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A. POWELL ET AL. V. CORNELIUS EGAN.

FILED NOVEMBER 7, 1894. No. 5643.

1. **When an appeal is taken from the action of a board authorized to pass upon applications for licenses** for the sale of liquors, the testimony taken before such board must be transmitted to the district court, where the appeal is heard on such testimony alone. The testimony so transmitted becomes a part of the record in the district court, and after hearing in that court no bill of exceptions is necessary in order to bring it before this court for review. The testimony so transmitted should, for such purpose, be certified by the clerk of the district court like other parts of the record.
2. **Members of a board whose duty it is to pass upon applications for liquor licenses** disqualify themselves from acting upon such applications by signing the petition on which the application is made, and if their votes be necessary to the granting of a license, no valid license can be issued.
3. **Their disqualification is founded upon the fact that by signing the application they have become interested in the issuing of the license,** or at least have prejudged the case, and their disqualification is, therefore, not removed by withdrawing the petition, erasing their signatures, obtaining others in their stead, and refiling the petition so changed.

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

N. C. Pratt and *C. E. Spear*, for plaintiffs in error.

F. S. Howell, contra.

IRVINE, C.

Cornelius Egan applied to the village board of St. Edwards, in Boone county, for a license to sell malt, spirituous, and vinous liquors. A remonstrance was filed by the plaintiffs in error. Upon the hearing the village board ordered the license to issue. The remonstrators took an

appeal to the district court, which sustained the action of the village board and dismissed the remonstrance. From this judgment the remonstrators prosecute error to this court.

The defendant in error has filed a motion to quash the bill of exceptions. This motion was submitted at the same time that the case was submitted upon its merits. The motion is not well taken, for the reason that there is no bill of exceptions to quash. The record does contain the evidence taken before the village board, and we understand the point the defendant in error makes to be that because the district court on appeal was acting upon this evidence it should have been settled and allowed as a bill of exceptions in the ordinary manner. This is a mistaken view of the proceedings. Section 4, chapter 50, Compiled Statutes, provides for appeals from the action of license boards. It provides that the testimony on the hearing before the board shall be reduced to writing and filed in the office of application; and if any party feels himself aggrieved by the decision, he may appeal therefrom to the district court, "and said testimony shall be transmitted to said district court, and such appeal shall be decided by the judge of such court upon said evidence alone." The statute therefore requires the certification of the evidence to the district court, and it becomes a part of the record in that court, as much so as the application, the remonstrance, or any other portion of the proceedings. The office of a bill of exceptions is merely to bring into the record matters which otherwise would not be entered of record. (*O'Donohue v. Hendrix*, 13 Neb., 255.) The testimony before the village board being a part of the record in the district court, was properly certified to this court by the clerk of the district court, and no bill of exceptions was necessary or proper to bring it into the record.

Of the errors assigned in the petition in error we shall consider only one. It appears that the application for the

license was first filed April 21, 1892, and bore the signature of each member of the board of trustees of the village. On May 4, before any action was taken upon such petition, it was withdrawn. The names of three of the five trustees were, in the language of a stipulation, "erased and withdrawn as signers to said application," and a number of additional signatures obtained. The same petition, so changed, was the next day refiled. It is argued by the plaintiffs in error that the trustees who signed this petition were disqualified from acting thereon. It has been repeatedly held by this court that a member of a village board who signs an application for a license thereby debars himself of the right to act on the petition; and that if his vote is necessary to the granting of a license no valid license can be issued. (*Vanderlip v. Derby*, 19 Neb., 165; *State v. Weber*, 20 Neb., 467; *State v. Kaso*, 25 Neb., 607; *Foster v. Frost*, 25 Neb., 731.) These cases are very pronounced and clearly decisive of the general question. The reason of the rule is that the village board acts judicially (*Hollembaek v. Drake*, 37 Neb., 680), and that by the petition for a license a signer declares, if not his interest in the issuing thereof, at least his conviction that a license should issue, and of the existence of facts warranting the issuing of the license. He cannot, therefore, sit in judgment upon these questions and occupy the position of a disinterested person. The general principle is conceded by the defendant in error, but he contends that when the petition was withdrawn and the names of three of the trustees "erased and withdrawn" from the application their disqualification was removed, and they were not forbidden to act upon the petition when refiled, it being then in effect a new application. To so hold would be a veritable "clinging to the bark." The disqualification of signers does not ultimately depend on the fact that their names appeared as petitioners. It is based upon the fact that they were interested parties, or at least parties who have prejudged the case, and of this

their signing the petition is conclusive evidence. The withdrawing of the petition and mechanical erasure of their names and the refiling of it with other names in their places did not alter the fact and did not avoid the principle upon which their disqualification is based. It follows that the whole village board was disqualified from acting on Egan's petition for a license for the municipal year of 1892, and that no valid license could be issued to him on the vote of that board. The district court erred in holding otherwise.

REVERSED AND REMANDED.

W. A. HEDRICK V. STRAUSS, UHLMAN & GUTHMAN.

FILED NOVEMBER 8, 1894. NO. 5243.

1. **Instructions** will not be reviewed where they are not pointed out in both the motion for a new trial and the petition in error.
2. **A purchase of property of an insolvent debtor,** with intent to aid in hindering, delaying, or defrauding his creditors, is void as to such creditors, though a full consideration is paid for the property.
3. **In order to constitute one an innocent purchaser of property sold for the purpose of defrauding the creditors of the vendor,** the whole consideration must be actually paid before the purchaser had notice of the fraudulent intent. If, after part of the consideration has been paid, the purchaser receives notice of the fraud, he will only be entitled to protection to the extent of the consideration paid, or parted with, before notice. As to the purchase price not paid, such vendee will not be regarded as an innocent purchaser of the property.
4. **Instructions.** *Held*, That defendants' third instruction was applicable to the evidence in the case, and that the trial court did not err in giving the same to the jury.

5. **Certain paragraphs of the charge** of the court not considered, since the alleged errors in their giving are not sufficiently assigned in either the motion for a new trial or the petition in error.

6. **In order to a review of instructions** by the appellate court, an exception must have been taken to each specific instruction claimed to be erroneous. A general exception to instructions given or refused is unavailing.

7. **Questions for Special Findings.** It is within the sound discretion of the trial judge to submit to, or withhold from, the jury questions for special findings, and his rulings in that regard will not be disturbed unless a clear case of abuse of discretion appears. Rule applied.

8. **Assignments of Error.** This court will not consider objections to the admission of testimony when the particular ruling is not pointed out in the petition in error.

9. **An assignment of error** not included in the points relied on for a reversal will be deemed waived.

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

The facts are stated in the opinion.

B. G. Burbank and *House & Blackledge*, for plaintiff in error.

C. C. Flansburg, for defendants in error:

A buyer who pays the consideration after notice of fraud is not entitled to protection as an innocent purchaser for value. (Wait, Fraudulent Conveyances, sec. 369; *Dougherty v. Cooper*, 77 Mo., 532; *Arnholt v. Hartwig*, 73 Mo., 485; *Bishop v. Schneider*, 46 Mo., 472; *Dixon v. Hill*, 5 Mich., 408; *Matson v. Melchor*, 42 Mich., 477; *Starin v. Kelly*, 88 N. Y., 421; *Bush v. Collins*, 35 Kan., 535; *Riddell v. Munro*, 52 N. W. Rep. [Minn.], 141; *Becker v. Dunham*, 27 Minn., 32.)

NORVAL, C. J.

This was an action in replevin brought by plaintiff in error against Thomas H. Britten, sheriff of Hitchcock county, to recover possession of a stock of general merchandise formerly owned by one E. O. Johnson. At the time the order of replevin was issued and served, the stock of goods in dispute was held by the sheriff by virtue of a writ of attachment sued out by the district court of said county by Strauss, Uhlman & Guthman against the said E. O. Johnson. On motion of said Strauss, Uhlman & Guthman, they were substituted, by order of the court, as defendants in the replevin suit, in lieu of the sheriff. Upon the trial of the latter case the jury returned a verdict finding that the defendants were entitled to the possession of the goods at the commencement of the action, and that the value of such possession is the sum of $878.09. Nominal damages were assessed for the detention of the property. A motion for a new trial was filed by the plaintiff, which was overruled, and judgment was entered by the court upon the verdict for the defendants.

It is undisputed that the property in controversy herein was, on and prior to the 28th day of April, 1890, owned by E. O. Johnson, who was engaged in the general retail merchandise business at Stratton, in Hitchcock county, and on which date his indebtedness to wholesale houses and others aggregated between $4,000 and $5,000. The amount which he owed the defendants was $850 and interest. On the date aforesaid Johnson transferred his entire stock of goods to the plaintiff, and a few days later the said attachment was levied thereon. The theory of the defendants is that said transfer to plaintiff was colorable merely, made for the purpose, and with the intent of hindering, delaying, and defrauding the defendants and other creditors of Johnson, and that plaintiff was a party to the fraud. On the other hand, the plaintiff insists that he purchased the

stock in good faith, for a valuable consideration, without notice.

Complaint is made by counsel in the brief of plaintiff of the giving of instructions 1, 2, 3, 4, and 5, asked by the defendants, which are as follows:

"1. The court instructs the jury that a conveyance or sale of property made with intent, on the part of the vendor, to delay, hinder, or defraud a particular creditor in the collection of his debt is void as against all creditors of the vendor, if the intent be known to, or participated in by, the vendee, although made for a good and valuable consideration.

"2. The jury are further instructed that if they find from the evidence that the plaintiff herein, W. A. Hedrick, knew at the time he purchased the stock of goods from E. O. Johnson that said Johnson had a fraudulent purpose for making the sale, and bought with that knowledge, then said Hedrick is not a purchaser in good faith; and if you find said sale was made by said Johnson for the purpose of hindering and delaying or defrauding his creditors, and that said Hedrick had knowledge of the facts and circumstances from which such fraudulent intent and purpose might reasonably and naturally be inferred by an ordinarily cautious person, then such transfer is fraudulent and void as against the rights of the creditors, and you will find for the defendants.

"3. The court instructs the jury that the intent to defraud is something distinct from mere intent to delay; and if the jury find from the evidence that said Johnson had no intent to defraud, but that he made the transfer as a shift merely to gain time in which to pay his debts, yet if the effect of said transfer would necessarily be to delay and hinder creditors in collecting their debts, and plaintiff knew or was in possession of facts which, upon inquiry, would have given him full knowledge of the effect of said transfer on the rights of creditors, then said sale to plaintiff was void as to creditors, and you will find for the defendants.

"4. The court instructs the jury that although they may find from the evidence that plaintiff gave to said Johnson the full value of the stock in trade and land, yet if they find from the evidence that a portion of said payment made by said Hedrick was two notes of said Hedrick for the sum of $1,500 each, and at the time of making the trade, and as a part of the consideration thereof, it was secretly agreed that the notes should not be transferred by said Johnson, but that he should hold them and receive his pay thereon out of the store, or in trade, as Hedrick becomes ready to pay, this, the court instructs you, being an advantage to the debtor, is denominated by the law a secret trust, and would render the sale void as to the creditors of said Johnson, and you will, if you so find, render your verdict for the defendants.

"5. The court instructs the jury that a purchaser of an entire stock of goods cannot close his eyes to the circumstances under which he purchases the stock, and the probable effect the means of payment will have upon the creditors of the seller, in hindering, delaying, or defrauding them of their claims; and if the effect of such sale will be to hinder and delay, if not to defraud, such creditors, he buys at his peril; and if you find that the plaintiff herein knew, or had reason to believe, that the effect of his alleged purchase would be to hinder and delay, if not to defraud, the creditors of E. O. Johnson, the seller, he is not a *bona fide* purchaser, and you will find for the defendants."

Objections to instructions cannot be raised for the first time in the supreme court, but, in order to have instructions reviewed, the attention of the trial court must have been challenged thereto in the motion for a new trial. The first and second instructions, therefore, will not be considered, since no complaint was made of either of them in the motion for a new trial, nor in the petition in error.

No claim is made in the brief filed that the third instruction given at the request of the defendants is incorrect

as an abstract legal proposition, but the contention here is that it is not based upon any evidence in the case and assumes that the plaintiff knew, or was in possession of facts which, if pursued, would have given him knowledge of Johnson's indebtedness. The criticism that this instruction assumes that the plaintiff was aware of the existence of any fact or state of facts which tended to impeach the *bona fides* of the sale is not merited. The language is certainly not susceptible of the construction placed upon it by counsel. It submitted to the jury for their determination, from the evidence, what the facts were upon the question of fraudulent intent, and then informed them, if a certain state of facts were found to exist, that the transfer was void as to the creditors of Johnson. It is urged that this instruction is not based upon the evidence, because there is no testimony in the record tending to establish that plaintiff knew of Johnson's indebtedness, or that the transfer was made with the intent to defraud, or that the plaintiff knew of such purpose. It is not seriously contended that the motive which induced Johnson to dispose of his stock was not to defraud his creditors. We think the jury were justified in inferring fraudulent intent from the fact that Johnson's indebtedness was so great that the transfer had the effect to hinder and delay his creditors in the collection of their claims against him, when taken in connection with the facts and circumstances surrounding the transaction disclosed by this record. An important inquiry is, did the plaintiff participate in the fraud, or did he purchase the property in good faith, for a valuable consideration, and without notice of the motive and purpose of Johnson in making the sale? The alleged consideration for the property was $6,600, which Mr. Hedrick testified on the trial was paid in the following manner: A quarter section of land in Rawlins county, Kansas, of the value of $2,000, was taken on the deal by Johnson at that sum, $300 in cash, a span of mules for $300, a $300 note against Schram

Bros., another note for $100 signed by W. C. McErvin, and three promissory notes executed by the plaintiff to Johnson, aggregating $3,000, two being for $750 each, due in one year from date, and one for $1,500, maturing in two years; that the remainder of the consideration, something over $500, was not evidenced by a note or other writing, but was left as an open account payable upon demand. The plaintiff further testified that it was mutually agreed between the parties at the time of the transfer that Johnson should not negotiate the said notes given by Hedrick, aggregating $3,000, but the same should be held by Johnson and payments were to be received thereon from time to time out of the store or in trade if the maker so desired; that he made inquiry of Johnson whether the property was incumbered, and was informed that there were no liens of any kind thereon, and that plaintiff did not know, prior to the sale, of Johnson's indebtedness. The testimony of E. O. Johnson as to the consideration of the sale is the same as given by Hedrick, excepting that the former contradicts the latter as to the number of notes which made up the $3,000. Johnson swears that there were but two notes made by Hedrick at the time of the sale, each for the sum of $1,500; that some time afterwards one of these was taken up by plaintiff, he executing instead thereof two notes, each for $750. It was shown that Hedrick and Johnson each had made statements out of court contradicting, in important particulars, their testimony given on the trial; that shortly after the sale, in a conversation with Charles H. Mehagan and C. C. Flansburg, plaintiff and Johnson each stated that the consideration for the property was between $5,500 and $6,000, consisting of $300 in cash, mules valued at $300, a quarter section of land worth $2,000, and promissory notes to the amount of $3,000, executed by plaintiff; that not a word was said about the $300 note of Schram Bros., or the $100 note on McErvin, or that $500 of the purchase price re-

mained in an open account. During the same conversation plaintiff, upon being interrogated by Mr. Mehagan regarding his knowledge of Johnson's indebtedness or financial condition at the time of the purchase, replied he "knew that there were no liens on the stock at the time he bought, and that was all he cared a damn for." This testimony, if true, shows that the rights of creditors did not concern plaintiff. Perhaps the evidence in the case heretofore alluded to is alone sufficient on which to base a conclusion, that prior to the transaction Hedrick was aware Johnson was insolvent, and that plaintiff had knowledge of the fraud. It certainly was ample for that purpose, when taken in connection with the undisputed fact that plaintiff paid Johnson the amount of the open account, besides some $1,500 or $1,600 on his three notes, after he was informed of Johnson's financial standing and knew his purpose in making the sale; hence, plaintiff, in no view of the case, is entitled to the protection which the law affords an innocent purchaser for value and without notice. To have constituted him such a purchaser, the whole consideration must have been paid prior to receiving notice of the fraud. If it be conceded that Hedrick, at the time the contract of purchase was made, had no notice of the fraudulent intent; still, having paid over more than $2,000 of the consideration after he had been apprised of the fraudulent character of the transaction, he would, at most, only be entitled to protection to the extent of the amount of the consideration paid, or parted with, before he received such notice. (*Dixon v. Hill*, 5 Mich., 408; *Bush v. Collins*, 35 Kan., 535, and cases cited in brief of defendants.) The Kansas case, in the principal facts, is quite similar to the one at bar. Chief Justice Horton, in delivering the opinion of the court, uses the following apt and appropriate language: "Where a valuable consideration is paid in good faith for a transfer from the vendor, who acts with fraudulent intent, the interest of the creditor is superseded. The in-

nocent purchaser, in such a case, having parted with value upon the faith of the vendor's possession and ownership of the property, acquires not only the legal title, but an equity which is paramount to that of the creditors of the failing and fraudulent debtor. So, in this case, if it be conceded that the transaction between Collins and McMillan was in good faith, so far as Collins is concerned, yet if there was no consideration, the interest of the creditors is paramount to any claim of Collins. More than this, the protection to which a *bona fide* purchaser without notice is entitled extends only to the money which has been actually paid, or to securities or property which have been actually appropriated by way of payment before notice, and notice before actual payment of all the purchase-money is binding as to the consideration not paid, in the same manner as notice had before the contract. In other words, to entitle a person to the character of a *bona fide* purchaser without notice, he must have acquired the legal title and have actually paid the purchase-money, or parted with something of value by way of payment before receiving notice. And even if notice is only after a payment of a part of the purchase-money, the purchaser is only entitled to reimbursement for the money paid." It is said that Hedrick paid the full value of the stock purchased by him. Conceding this to be true, yet that fact alone would not protect him, if Johnson was actuated by a fraudulent motive in making the sale, and plaintiff had notice thereof or knowledge of facts sufficient to put an ordinarily prudent man on inquiry. This court has held, and the proposition is abundantly sustained by decisions elsewhere, that a purchaser of property of an insolvent and failing debtor, with intent to aid in hindering, delaying, or defrauding his creditors, is invalid as to the creditors, though a full consideration is paid to such purchase. (*Tootle v. Dunn*, 6 Neb., 93; *Wake v. Griffin*, 9 Neb., 47.) The jury have passed upon the question of fraudulent intent in this case, and their finding, being based upon

the testimony, will not be disturbed. We are likewise fully persuaded that the third instruction given at the defendants' request was predicated upon the evidence, and that the same was not erroneous.

The fourth and fifth instructions, set out above, are claimed to be erroneous, because of a lack of evidence in the record whereon to base the same. Neither of these paragraphs of the instructions can be reviewed on account of the insufficiency of the assignment in both the motion for a new trial and petition in error, the assignment in each paper being in this language: "The court erred in giving the third, fourth, and fifth instructions asked for by defendants." Similar assignments this court has repeatedly held, since this cause was tried in the court below and briefed in this court, would be considered no further than to ascertain that any one of the instructions therein named was rightfully given. Inasmuch as we have reached the conclusion that no error was committed in giving the third instruction specified in the foregoing assignment, the fourth and fifth instructions will not be reviewed. There is another ground, equally as tenable, upon which we might place our refusal to consider said instructions, namely, no proper exception was taken to either of them in the court below. The record discloses that the plaintiff excepted in these words: "To the giving of said instructions 3, 4, and 5 asked by the defendants, and to each of said paragraphs, plaintiff there and then duly excepted." In at least three instances this court has decided such an exception too general to be availing; and further, that each paragraph of a charge must be specifically excepted to when read. (*McReady v. Rogers*, 1 Neb., 124; *Dodge v. People*, 4 Neb., 220; *Brooks v. Dutcher*, 22 Neb., 644.)

The refusal to give certain instructions requested by plaintiff is assigned for error. A general exception merely was entered by the plaintiff to the overruling of his re-

quests to charge, hence plaintiff is not in a position to have his instructions considered or reviewed by this court. Another point made is that the court below erred in refusing to submit to the jury five requests for special findings asked by the plaintiff. It is within the sound discretion of the trial judge to submit to, or withhold from, the jury questions for special findings, and his ruling in that regard will not be reviewed unless a clear abuse of discretion appears. (*Floaten v. Ferrell*, 24 Neb., 353; *Nebraska & Iowa Ins. Co. v. Christiensen*, 29 Neb., 581; *Atchison, T. & S. F. R. Co. v. Lawler*, 40 Neb., 356.) An examination of the record convinces us that plaintiff was not prejudiced by the failure of the court to give to the jury his requests for special findings. There certainly was no abuse of discretion.

It is finally argued in the brief that the court erred in permitting defendants to prove by the witness C. C. Flansburg certain statements of Johnson, the vendor, in derogation of plaintiff's title, made long after the purchase. From the bill of exceptions it appears that testimony of that character was permitted to be given by Mr. Flansburg, over the objection and exception of plaintiff. The ruling, however, cannot be reviewed, inasmuch as the decision upon the admission of such testimony is not assigned for error in the petition is error. The only complaint made in the petition in error relating to the admission of evidence upon the trial is the eighth assignment, wherein it is alleged that error was committed in admitting on cross-examination the testimony of Johnson as to the disposition he made of the money and property which he received from the plaintiff. It is obvious that this is insufficient to present for review the alleged error in admitting the testimony of Mr. Flansburg, and as the eighth assignment is not included in, or covered by, the points relied on by plaintiff in the brief, it will be deemed abandoned. We discover no error in the record, and the judgment is therefore

AFFIRMED.

ABRAM G. REED V. CHARLES S. WOOD ET AL.

FILED NOVEMBER 8, 1894. No. 5650.

1. Review: ASSIGNMENTS OF ERROR: WAIVER. An assignment in a petition in error will be disregarded by this court where the same is not relied upon in the briefs filed.
2. Instructions: REVIEW: ASSIGNMENTS OF ERROR. An assignment of error, which is directed generally by numbers merely, against three out of four instructions given at the request of the successful party is insufficient where none of said instructions are numbered, since it is too indefinite and uncertain as to the particular instructions intended.

ERROR from the district court of Pawnee county. Tried below before BUSH, J.

Story & Story, for plaintiff in error.

G. M. Humphrey, contra.

NORVAL, C. J.

Plaintiff in error was plaintiff in the court below. The petition upon which the case was tried alleges, in substance, that plaintiff was a commission merchant carrying on business in the city of New York; that the defendants shipped to plaintiff 215 cases of eggs to be sold on commission, the plaintiff to receive five per cent for making the sale, and all charges paid by him on the eggs; that at the time said shipment was made defendants drew a draft on the plaintiff for the sum of $900, which according to the custom of the trade was to be paid by plaintiff and the amount thereof to be deducted from the proceeds of the sale of the eggs; that said draft was presented to the plaintiff, and the same was accepted and paid by him before he received the eggs and without knowing their value; that plaintiff subsequently, after the receipt of the eggs, owing to the bad and unsalable condition of a large number thereof, was com-

pelled to, and did, sell the entire shipment for $881.15, which was the highest sum obtainable therefor; that plaintiff is entitled to a commission, for making the sale of $44.05; that he also paid the freight on the shipment, amounting to $134.91, and $6.45 cartage; that after deducting commission, freight, and cartage from the amount for which the eggs were sold there was a net balance of $695.74 applied by plaintiff on the $900 so advanced by him as aforesaid on said defendants' draft, and that they are indebted to plaintiff, by reason of the premises, in the sum of $204.26, for which amount judgment is prayed. The defendants for answer deny they are indebted to plaintiff in any sum whatever, and further answering the petition allege, in effect, that on the receipt of a telegram from plaintiff stating that the egg market in New York city was strong, stock scarce, and tendency upward, and that eggs were worth from twenty-two to twenty-two and three-fourths cents per dozen, defendants bought and shipped to plaintiff 215 cases, or 6,450 dozen fresh eggs, suitable for the market, to be sold on their arrival by the plaintiff for the defendants; that said eggs were worth in New York when they reached there the sum of $1,419; that plaintiff carelessly and willfully neglected to sell the eggs so consigned to him on their arrival, but carelessly and negligently kept the same for a long period without advising defendants of his intentions so to do, until the eggs became unsalable and unmarketable, before selling the same, and that by reason of the said negligence and carelessness of plaintiff said defendants have sustained damages in the sum of $378, for which they ask judgment against the plaintiff. The reply denies every allegation contained in the answer. On the issues thus formed the cause was tried to a jury, which resulted in a verdict and judgment for the defendants in the sum of $1.

The petition in error contains three assignments of error, as follows:

1. The court erred in giving the second, third, and fourth paragraphs of the instructions requested by the defendants.

2. The verdict was not sustained by sufficient evidence.

3. The court erred in overruling the motion for a new trial.

The second and third of the above assignments are not mentioned or referred to in the brief of counsel for plaintiff; hence, under the repeated utterances of this court, are regarded as waived, and will not be noticed by us. (*Gill v. Lydick*, 40 Neb., 508.) The first assignment is directed generally by numbers only against three instructions given at the request of the defendants. Turning to the transcript we find that the defendants asked four separate and distinct instructions, all of which were given by the court, and that none of these requests are numbered. The first assignment is, therefore, not sufficient to present any question for review, since it is left so indefinite and uncertain as to the particular instruction intended. Again, the assignment of error in the motion for a new trial, as well as the petition in error, is directed against the giving of a group of instructions *en masse*; hence, such assignment is insufficient, unless all the instructions in such a group are bad. Two of the four instructions asked by the defendant, and given by the court, read as follows:

"You are instructed that the law holds the consignee, in the conducting of the business of the consignor, to the same degree of care and diligence which a prudent man would exercise in the management of his own affairs.

"In determining the negligence, if any, on the part of the plaintiff to do and perform all that was required to be done in the matter of handling and selling the eggs for defendants, the jury should take into consideration all the circumstances that surround the transaction; any want of good faith on the part of the consignee, if it shall have been proved; the perishable nature of the article consigned, the deterioration of the same, and the consequent necessity

of selling the same at once; the keeping of the defendants in ignorance of the true condition of the eggs, if such facts shall have been proven, and the inconsistencies and absurdities which may appear from the testimony of the plaintiff, or his employes; or the failure of the plaintiff to perform any act which a reasonably prudent man would have done."

As to the instruction first above quoted it is sufficient to say that it is a literal copy of one of the instructions given on the trial in the district court in *Housel v. Thrall*, reported in 18 Neb., 484, and which was approved as good law by this court on the review of said case. No criticism was made in the brief to the giving of the defendants' request last above quoted. It is not believed to be faulty, but was based upon the evidence, and fairly submitted to the jury for their determination the disputed questions of fact in the case. Having reached this conclusion, the first assignment of error must be overruled without an examination of the other instructions. The judgment is

AFFIRMED.

STATE OF NEBRASKA, EX REL. SCHOOL DISTRICT NO. 1, SIOUX COUNTY, V. SCHOOL DISTRICT NO. 19, SIOUX COUNTY, ET AL.

FILED NOVEMBER 8, 1894. No. 4954.

1. **School Districts**: PRESUMPTION OF LEGAL ORGANIZATION: QUO WARRANTO. After a school district has exercised the franchises and privileges thereof for the period of one year, its legal organization will be conclusively presumed, whatever may have been the defects and irregularities in the formation or organization of such district.

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

Spargur & Fisher, for plaintiff in error, cited: *State v. Compton*, 28 Neb., 485; *Cowles v. School District*, 23 Neb., 655; *Dooley v. Meese*, 31 Neb., 424; *State v. Stein*, 13 Neb., 532; *State v. Hamilton*, 29 Neb., 198; *State v. Boyd*, 31 Neb., 682; *State v. School District*, 34 Kan., 237; *County of Piatte v. Goodell*, 97 Ill., 84; *People v. Town of Oran*, 121 Ill., 650.

W. H. Westover, contra.

NORVAL, C. J.

On November 13, 1888, the relator instituted in the court below proceedings in *quo warranto* against school district No. 19, Sioux county, and Daniel Kline, James T. Mason, and W. H. Johnson, claiming to be the officers of said district, for the purpose of determining the legality of the organization of the said respondent district, and ousting it from exercising the rights, franchises, and privileges of a school district. A general demurrer to the information was sustained, the action dismissed, and the relator prosecutes error to this court.

For a correct understanding of the question involved it will not be necessary to set out in this opinion a copy of the information. For our purpose it is sufficient to state that it appears that school district No. 1 was composed of eighteen sections of land, but that on the 4th day of October, 1887, the county superintendent of Sioux county, upon a petition presented to him for that purpose, divided said district No. 1 by taking therefrom eight sections of land, and erecting and forming out of the same said school district No. 19; that the petition for the division of the district was not signed by the requisite number of qualified petitioners; that no notice of the date of the presentation of the petition was ever posted; that no list of the legal voters of district No. 1 was filed with, or given to, the county superintendent at the time said petition was pre-

sented to him; that the respondent district has ever since the 4th day of October, 1887, exercised the rights, privileges, and franchises of a school district within and for the territory composed of the said eight sections of land. In order to give a county superintendent jurisdiction to divide or change the boundaries of a school district, a petition in writing, signed by at least one-third of the legal voters of the district affected, must be presented to him for that purpose, and notices of the proposed action and when the petition will be presented to the county superintendent must be given for the time and in the manner designated by section 4, subdivision 1, chapter 79, of the Compiled Statutes. (*Cowles v. School District*, 23 Neb., 655; *State v. Compton*, 28 Neb., 485; *Dooley v. Meese*, 31 Neb., 424; *School District v. Coleman*, 39 Neb., 391.) There is no room to doubt that there are defects and irregularities in the erection and organization of the respondent district. The petition for the change of boundaries of district No. 1 was not signed by a sufficient number of qualified voters, nor was any notice given of the presentation of the petition to the county superintendent. The question arises whether these defects and irregularities can now be taken advantage of by the relator.

Section 8, subdivision 3, of chapter 79 of the Compiled Statutes, provides: "Every school district shall, in all cases, be presumed to have been legally organized when it shall have exercised the franchises and privileges of a district for the term of one year." It is conceded that, under the foregoing provision, if there had been nothing at fault in the formation and organization of school district No. 19 but mere irregularities, its legal organization would be presumed. It is, however, contended that no such presumption exists where the jurisdictional steps prescribed by the statute for the erection of a school district have not been taken. In other words, where there has been a total disregard of the requirements of the statute in the formation of

a school district the organization is void on its face, and in such case the section quoted above does not apply. We are not willing to place so narrow or limited a construction upon the statute. Had the legislature intended that the section should apply alone to the districts where but mere formal defects or irregularities appear in their organizations or formations, it would have said so; but instead it has used language susceptible of but one construction, and that is, that the presumption of legal organization after the lapse of a specified period applies to "every school district" and "in all cases." The framers of the statute could, had they so desired, authorized a county superintendent to form two or more school districts out of an existing one, without any petition whatever of the voters of the district affected, or without any notice, and so it certainly had the power to provide where the statutory steps laid down for the division of a school district have not been taken, such as the presentation of a proper petition or the giving of notice that such defects in the formation and organization of the district shall be of no avail after the district has exercised the franchises and privileges thereof for one year.

The section of the school law we have been considering was construed by this court in *State v. School District*, 13 Neb., 78. Chief Justice LAKE, in delivering the opinion of the court, uses the following language: "This section is exceedingly comprehensive. Its terms are sweeping. It applies, as its language clearly imports, 'in all cases' wherein the doings of a district, as such, are called in question or in any way involved, as well to acts during the first year, and from which this presumption arises, as to those performed afterwards. So far, therefore, as concerns the capability of the district to take upon itself the obligation of a borrower of money, its complete organization at the time it assumed to do so must be indisputably presumed." In the case under consideration the defects in the formation of the respondent district cannot now be questioned, but

the legal organization of such district is conclusively presumed, since the record discloses that it had exercised the privileges, powers, and franchises of a school district for more than a year prior to the institution of this action. The information, therefore, failed to state facts sufficient to entitle the relator to the relief demanded, and the court below did not err in sustaining the demurrer and dismissing the action. The judgment is

AFFIRMED.

HARRY HILL V. STATE OF NEBRASKA.

FILED NOVEMBER 8, 1894. No. 6832.

1. Murder: INFORMATION: ELECTION AS TO COUNTS. In one count of the information for murder the accused was charged with having purposely, and of his deliberate and premeditated malice, killed the deceased, and in two other counts the killing is alleged to have been done in an attempt to rob the deceased. *Held*, To charge but one offense, and a motion to require the state to elect between the several counts of the information was properly overruled. (*Furst v. State*, 31 Neb., 403.)

2. ———. The law does not distinguish between principals of the first and second degree; hence, all persons who, being present, aid, assist, or abet in the commission of a felony may be prosecuted as principals.

3. ———: PRELIMINARY EXAMINATION: PLEA IN ABATEMENT. Objection by an accused on the ground that there has been no preliminary examination for the crime charged should be by a plea in abatement. (*Cowan v. State*, 22 Neb., 519.)

4. ———: SUFFICIENCY OF COMPLAINT. Complaint, upon which the accused was committed, examined, and *held* to state the crime charged in the information filed in the district court.

5. ———: RULINGS ON EVIDENCE: REVIEW. In reviewing the rulings of the trial court in receiving and rejecting evidence this court will confine its examination to the objections made at the trial. (*Schlencker v. State*, 9 Neb., 241.)

6. ———: JUROR: CHALLENGE: SCRUPLES AGAINST CAPITAL PUNISHMENT. The provision of the Criminal Code making conscientious scruples of a juror against capital punishment ground of challenge for cause in prosecutions for murder was not repealed by the amendment of 1893, conferring upon the jury discretion to fix the punishment, upon conviction for murder in the first degree, at imprisonment for life instead of the death penalty.

7. ———: AFFIDAVITS FOR NEW TRIAL: REVIEW. Affidavits after verdict, contradicting the answers of a juror on his *voir dire* examination for the purpose of proving disqualification on account of prejudice against the unsuccessful party, should be received with caution, and when contradicted, an order denying a new trial will not be reversed on appeal.

8. ———: PROOF OF INTOXICATION AS DEFENSE: INSANITY. Proof of voluntary intoxication is admissible in prosecutions for murder in the first degree, not to excuse the crime charged, but as a circumstance tending to show that the killing was not the deliberate and premeditated act of the prisoner. Where, however, continued drunkenness has produced such a condition of insanity or imbecility as would relieve from responsibility for criminal acts if produced by any other cause, such condition may be shown as a defense, and the fact that it was caused by voluntary drunkenness is immaterial.

9. ———: TRIAL: CROSS-EXAMINATION OF WITNESS. The limits within which cross-examination will be allowed respecting the past life of a witness other than the defendant in a criminal prosecution, for the purpose of affecting his credibility, rests in the discretion of the trial court. Accordingly, *held* not error to permit a witness for the defendant to be asked on cross-examination if he had been arrested for vagrancy, drunkenness, and other misdemeanors.

10. ———: ———: CHARGE: REVIEW. A judgment will not be reversed because the trial court in a prosecution for murder has, in charging the jury, assumed material facts as proved, where it is clearly shown by the record that they were admitted by the prisoner at the trial or treated by him as proved.

11. ———: ———: ———. The trial court should avoid the giving of undue prominence to a particular proposition by frequent repetitions thereof in charging the jury; but a violation of that rule in a criminal prosecution is not of itself reversible error, where it is apparent that there was no controversy respecting the proposition stated, and where it is clear that it did not have the

effect to exclude from the consideration of the jury other propositions stated by the court.

12. ——: ——: ——. Where in a criminal case the trial court has correctly charged upon all of the questions presented at the trial, the fact that a single proposition might have been stated with greater precision in a single paragraph is no ground for reversal, particularly where the instructions given are a substantial compliance with the requests presented by the prisoner.

13. **Robbery.** It is not essential to the crime of robbery that the property be taken from the body of the person robbed. It is sufficient if taken from his personal presence or personal protection.

14. **Trial:** IMPROPER REMARKS OF COUNSEL: EXCEPTIONS. Abuse of privilege by counsel in addressing the jury, to be available on appeal, must be excepted to at the time. (*McLain v. State*, 18 Neb., 154.)

15. ——: ——: ——. But that rule has no application to the trial court. It is the duty of the presiding judge, whether so requested or not, to protect the court by an enforcement of the rules essential to an orderly and impartial administration of the law; and should an attorney persist in attempting to influence the jury by reference to facts not in evidence, or appeals to prejudice unwarranted by the proofs, the court should not hesitate, on motion, to set aside a verdict in his favor, although no objection may have been interposed when the offense was committed.

16. **Murder:** SUFFICIENCY OF EVIDENCE TO SUPPORT CONVICTION. Evidence examined, and *held* to sustain the verdict of murder in the first degree and to warrant the extreme penalty imposed by the jury.

ERROR to the district court for Cass county. Tried below before CHAPMAN, J.

The facts are stated in the opinion.

Matthew Gering, for plaintiff in error:

The motion to quash the information upon which the prisoner was tried should have been sustained, being based upon the following grounds: (*a*) Because such information charges separate and distinct crimes punishable by different

penalties; (*b*) because no preliminary hearing upon the charge contained in the information was given the accused; (*c*) under the existing laws of this state no such crime as aiding and abetting in the commission of murder in the first degree is cognizable. (Consolidated Statutes, secs. 5577, 5579; *White v. State*, 28 Neb., 341; *State v. Maccuaig*, 8 Neb., 215; *Albertson v. State*, 9 Neb., 429; *Marion v. State*, 16 Neb., 350; Maxwell, Criminal Procedure, 498; *Hanoff v. State*, 37 O. St., 178; *Walrath v. State*, 8 Neb., 80.)

The statement of a juror that he is not in favor of capital punishment is not alone sufficient to justify an order sustaining a challenge for cause. (Wharton, Criminal Practice, secs. 664, 665; 1 Bishop, Criminal Procedure, secs. 852–918; Consolidated Statutes, secs. 5207, 6096; *Commonwealth v. Webster*, 5 Cush. [Mass.], 295; *Williams v. State*, 32 Miss., 389; *People v. Stewart*, 7 Cal., 140; *State v. Arnold*, 12 Ia., 479; *Commonwealth v. Buzzell*, 16 Pick. [Mass.], 153; *State v. Dooley*, 57 N. W. Rep. [Ia.], 415; *Spain v. State*, 59 Miss., 19; *Bradshaw v. State*, 17 Neb., 147.)

The examination of Harvey showed that he was qualified to act as a juror; and the challenge as to him for cause should have been overruled. (Constitution, sec. 7, art. 1; *Keener v. State*, 18 Ga., 194; *Graham v. State*, 13 S. W. Rep. [Tex.], 1011; *Hanks v. State*, 21 Tex., 526; *Henrie v. State*, 41 Tex., 573; *Sewell v. State*, 15 Tex. App., 56; *Chartz v. Territory*, 32 Pac. Rep. [Ariz.], 166; *People v. Plummer*, 9 Cal., 310; *State v. Burnside*, 37 Mo., 347; *Busick v. State*, 19 O., 198.)

An expression by a juror before trial that he believes the accused guilty, if unknown to defendant or counsel, constitutes a ground for a new trial. (*State v. Phillips*, 22 S. W. Rep. [Mo.], 1079; *State v. Burns*, 85 Mo., 47; *Washburn v. State*, 20 S. W. Rep. [Tex.], 715; *State v. Carter*, 25 W. L. B. [O.], 17; *State v. Cleary*, 19 Pac. Rep.

[Kan.], 780; *United States v. Christiensen*, 24 Pac. Rep. [Utah], 618.)

Opinions of neighbors and acquaintances of the prisoner, who form their opinion of the condition of his mind from seeing him frequently, are entitled to great weight. (Maxwell, Criminal Procedure, 230; *Schlencker v. State*, 9 Neb., 251; *Grant v. Thompson*, 4 Conn., 203; *Clark v. State*, 12 O., 483; *State v. Klinger*, 46 Mo., 224; *Choice v. State*, 31 Ga., 424; *Shults v. State*, 37 Neb., 498.)

It was error for the court to permit, over defendant's objection, an inquiry as to whether the witness had ever been arrested. (*Langhorne v. Commonwealth*, 76 Va., 1012; *People v. Brown*, 72 N. Y., 571; *Farley v. State*, 57 Ind., 331; *Hanoff v. State*, 37 O. St., 180; *People v. Crapo*, 76 N. Y., 288.)

It is error to overrule objections to hypothetical questions assuming the existence of necessary elements of conviction. (*Haish v. Payson*, 107 Ill., 370; *Bishop v. Spining*, 38 Ind., 144; Thompson, Trials, sec. 606; *Hathaway v. National Life Ins. Co.*, 48 Vt., 336; *Ballard v. State*, 19 Neb., 609.)

Inflammatory language used by the prosecuting attorney in his address to the jury is reversible error, and a new trial ought to be granted by the higher tribunal, even if no objection is made by the accused, since it is the duty of the trial court to either interfere at the time or give a charge upon the impropriety of such conduct. (1 Bishop, Criminal Procedure, sec. 975; *Ferguson v. State*, 49 Ind., 33; *State v. Underwood*, 77 N. Car., 502; *Hatch v. State*, 8 Tex. App., 416; *Schlencker v. State*, 9 Neb., 300; *Rakes v. People*, 2 Neb., 157; *Smith v. State*, 4 Neb., 290; *Walrath v. State*, 8 Neb., 80.)

An instruction which declares the existence of certain facts is erroneous, as invading the province of the jury. (*Helot v. State*, 20 Neb., 492; Bishop, Criminal Procedure, 979; *Smathers v. State*, 46 Ind., 447; *Bond v. People*, 39 Ill., 26; *Herges v. State*, 30 Ala., 45.)

If there is evidence that the accused was intoxicated when the crime was committed, the jury may consider the evidence of intoxication as a circumstance to show that the act was not premeditated and to rebut the idea that it was done in a cool and deliberate state of mind necessary to constitute murder in the first degree. (*Smith v. State*, 4 Neb., 278; *Schlencker v. State*, 9 Neb., 242; *Nichols v. State*, 8 O. St., 435; *Roberts v. People*, 19 Mich., 401; *People v. Harris*, 29 Cal., 678; Maxwell, Criminal Procedure, 227; *Wood v. State*, 34 Ark., 341.)

To refuse or fail to instruct upon one fact testified to even by the accused, which would mitigate or excuse the offense, is reversible error. (*McElvoy v. State*, 9 Neb., 157; *State v. Trivas*, 36 Am. Rep. [La.], 296; *O'Grady v. State*, 36 Neb., 320; *People v. Rogers*, 18 N. Y., 9; *Shannahan v. Commonwealth*, 8 Bush [Ky.], 463.)

The accused having offered some evidence to show the existence of dipsomania, the burden was on the state to prove sanity beyond a reasonable doubt. The failure to give the instructions upon that subject requested by defendant was error. (*Wright v. People*, 4 Neb., 409; *Ballard v. State*, 19 Neb., 610; *Beers v. State*, 24 Neb., 615; *Pigman v. State*, 14 O., 555; *State v. White*, 14 Kan., 538; *State v. Tatro*, 50 Vt., 483; *Cluck v. State*, 40 Ind., 263.)

If the jury occupied separate apartments it is ground for a new trial. (*Goersen v. Commonwealth*, 106 Pa. St., 477.)

George H. Hastings, Attorney General, and *H. D. Travis, County Attorney*, for the state:

The motion to quash the information was properly overruled. (*Cowan v. State*, 22 Neb., 519; *Glover v. State*, 109 Ind., 391; *Andrews v. People*, 117 Ill., 195; *Cox v. State*, 80 N. Y., 500; *Furst v. State*, 31 Neb., 403.)

An election is only required where separate and distinct offenses, not a part of the same transaction, are charged in the same information, and the prosecution in this case was

not obliged to elect upon which count it would rely. (*Hartshorn v. State*, 29 O. St., 635; *Alderman v. State*, 24 Neb., 97; *Stephens v. State*, 42 O. St., 150.)

Again, the objection to the whole information will not prevail if there be one good count, because an indictment which contains a sufficient allegation to charge an offense will not be impaired by other allegations which are immaterial or redundant. (*State v. Longley*, 10 Ind., 482; *State v. Noyes*, 30 N. H., 279; *Jillard v. Commonwealth*, 26 Pa. St., 169.)

It is a well settled rule that where there are two or more persons to be charged with an offense, the pleader may charge the act to have been done by said persons collectively. (*State v. Palmer*, 4 Mo., 454; *Bailey v. State*, 4 O. St., 440; *State v. Johnson*, 37 Minn., 493; *People v. Garcia*, 58 Cal., 102; *Commonwealth v. Andrews*, 132 Mass., 263; *State v. Rust*, 35 N. H., 438.)

The order sustaining the challenge to the juror on account of his conscientious scruples against capital punishment was proper. (*Caldwell v. State*, 41 Tex., 86; *People v. Tanner*, 2 Cal., 257; *State v. Melvin*, 11 La. Ann., 535; *Driskill v. State*, 7 Ind., 338; *Greenley v. State*, 60 Ind., 141; *St. Louis v. State*, 8 Neb., 405; *Bradshaw v. State*, 17 Neb., 147.)

The rulings in reference to the challenge and prejudice of juror Harvey were without error. (*Tomer v. Densmore*, 8 Neb., 384; *Palmer v. People*, 4 Neb., 75; *Clough v. State*, 7 Neb., 320; *Murphy v. State*, 15 Neb., 383; *Gandy v. State*, 27 Neb., 707.)

POST, J.

The plaintiff in error was at the December, 1893, term of the district court for Cass county convicted of murder in the first degree, the penalty fixed by the jury being death by execution, and which he now seeks to reverse by means of a petition in error addressed to this court. In the first

count of the information the plaintiff in error and one Benwell were jointly charged with killing the deceased, Mat. Akeson, purposely and of their deliberate and premeditated malice. In the second count the plaintiff in error is charged with murder while engaged with Benwell, his co-defendant, in an attempt to rob the deceased. And in a third count both defendants are charged with murder while attempting to rob the deceased. The plaintiff in error moved to quash the information, assigning as grounds therefor in his motion:

"First—That the information charges two distinct and separate causes under the laws of this state.

"Second—Because said information charges separate and distinct offenses under the laws of this state.

"Third—Because such information charges the defendant with the crime of aiding and abetting in the commission of a murder in the first degree, and that no such offense is known to the laws of this state, and that the defendant was not given a preliminary hearing upon the charge contained in the information.

"Fourth—That the information is not verified as required by law.

"Fifth—That the information charges different crimes than set out in the complaint."

The motion to quash having been overruled, an exception was taken by the plaintiff in error, and which is the ruling first complained of.

1. The first and second reasons assigned in the motion are substantially the same, and will be considered together. The offense charged in the several counts of the information is evidently the same, viz., the felonious killing of the deceased, Mat. Akeson. It is in such cases permissible for the state to charge the offense in different forms in order to anticipate any variance between the allegations and the proofs. That question was fully considered by this court in *Furst v. State*, 31 Neb., 403, and the conclusion therein reached must be regarded as decisive in this case.

2. To the third ground of objection to the information a sufficient answer is, that the plaintiff in error is not charged as an accessory. It is in each count alleged that he was present at the time of the assault and personally inflicted upon deceased a mortal wound from which he, deceased, "then and there died." Section 1 of our Criminal Code is declaratory merely of the common law rule by which an accessory before the fact is defined as one who aids, abets, procures, or commands another to commit a felony in his absence. (1 Russell, Crimes and Misdemeanors, 49*; Stephen, Criminal Digest, 24.) Those who, being present, aided and abetted in the commission of a felony were principals in the second degree. (*Walrath v. State*, 8 Neb., 80.) We cannot construe the information as charging the plaintiff in error with the mere aiding and abetting in the killing of Akeson; but, granting such to have been the intention of the pleader, the effect is the same, since the law does not distinguish between principals in the first and second degrees. (2 Bishop, Criminal Procedure, 3.)

3. The next ground relied upon is that the crime charged in the information is not the one named in the complaint, and for which the plaintiff in error was held to answer. That question, it was said in *Cowan v. State*, 22 Neb., 519, should be raised by a plea in abatement and not by motion to quash; but, in view of the gravity of the issues here presented, we have examined the record of the magistrate, and find that two complaints were lodged with him, in one of which both defendants are charged as principals, and in the other each is charged as principal with the other as present, aiding and assisting, and evidently referring to the crime charged in the information. It follows that no sufficient ground was alleged for the quashing of the information and that the court did not err in overruling the motion.

4. It is next claimed that the court erred in refusing to

require the state to elect between the several counts of the information. That claim is, however, without merit, since, as we have seen, there is but one crime charged. It is only when separate and distinct offenses, growing out of different transactions, are charged in the same indictment that the state will be required to elect. (*Furst v. State*, 31 Neb., 403; *Alderman v. State*, 24 Neb., 97; *Aiken v. State*, 41 Neb., 263.)

5. At the request of the plaintiff in error he was allowed a separate trial, during the course of which numerous exceptions were taken and which will be noticed in their order. George McReynolds, a member of the regular panel, being called as a juror was interrogated as follows: "Q. I will ask you to state if you now have any such opinion in your mind as would prevent you from finding the defendant guilty of murder if such would be proven upon the trial." To which he answered: "I am not in favor of capital punishment." He was thereupon challenged for cause by the state, which challenge was sustained, and is now assigned as error. It is argued by counsel for the accused that the juror's objection to capital punishment may have referred to the policy or expediency thereof, and did not necessarily imply any such conscientious scruples against the death penalty as would disqualify him to serve in this prosecution. But an examination of the record discloses the fact that the objection to the challenge rests upon entirely different grounds, viz., that death, under the Criminal Code as amended in 1893, is not the necessary penalty for murder in the first degree. Since the question argued is not presented by the objection, it is not deserving of further notice in this opinion.

6. It was not error to permit examination of jurors by the state touching their sentiments with respect to capital punishment. The amendment of 1893, conferring upon juries discretion to fix the punishment in case of conviction for murder in the first degree at imprisonment for life in-

stead of the death penalty, did not repeal the provision of the Criminal Code making conscientious scruples against capital punishment in certain cases ground of challenge for cause. The precise question was presented in *Caldwell v. State*, 41 Tex., 86, and *People v. Tanner*, 2 Cal., 257, and we are entirely satisfied with the views therein stated. (See, also, *State v. Melvin*, 11 La. Ann., 535; *Driskill v. People*, 7 Ind., 338; *Greenley v. State*, 60 Ind., 141). And the principle upon which the above decisions rest was recognized by this court also in *St. Louis v. State*, 8 Neb., 405, and *Bradshaw v. State*, 17 Neb., 147.

7. C. A. Harvey, who was accepted as a juror, testified upon his *voir dire* examination that he had no opinion with respect to the guilt or innocence of the accused, and was entirely free from bias or prejudice against him. Affidavits were subsequently filed tending to prove that the juror named had previously stated that the accused "ought to be hanged," that he was "in favor of hanging him," etc.; but unfortunately for the accused that showing was not made until after judgment and after the final adjournment of the term at which it was rendered; nor does it appear that the attention of the district court was ever directed to the affidavits mentioned, or a ruling asked upon the showing therein made. It is a settled rule of this court that alleged errors will be disregarded unless called to the attention of the trial court and a ruling had thereon. (See *Roode v. Dunbar*, 9 Neb., 95.) But counsel argue that in capital cases the appellate court should not refuse to interfere where the judgment appears to be unjust, on account of any negligence of the prisoner, since to permit him to waive a substantial right is contrary to the enlightened spirit of the law as well as the dictates of humanity. A consideration of that question is, however, unnecessary, since assuming, as we are asked to do, that objection, on account of the disqualification of the juror, was in due season presented to the district court and a ruling had thereon

adverse to the accused, there is still no sufficient reason suggested for interference on that ground. While it is the duty of the district court in a proper case to grant a new trial on account of the prejudice of a single juror discovered after verdict, evidence in support of such an objection should be received with great caution, for, as said by Judge Thompson (Thompson, Trials, 117), "otherwise, as soon as a verdict is rendered, another trial, to-wit, of the jurors, will begin." It follows, also, that such evidence should be carefully scrutinized, and when conflicting, the decision denying a new trial will not be disturbed on appeal. In *Spies v. People*, 122 Ill., 1, it is declared to be "a dangerous practice to allow verdicts to be set aside upon *ex parte* affidavits as to what jurors are claimed to have said before they were summoned to act as jurymen. The parties making such affidavits submit to no cross-examination, and the correctness of their statements is subject to no test whatever." (See, also, *Clem v. State*, 33 Ind., 418; *State v. Bancroft*, 22 Kan., 170; *Lamb v. State*, 40 Neb., 312; *Costly v. State*, 19 Ga., 614; *Lamb v. State*, 41 Neb., 356.) In this instance the juror named in an affidavit filed by the state testified that he had never expressed any such sentiments as attributed to him in the affidavits first mentioned, and explicitly denied the statements therein alleged, which brings the case clearly within the rule recognized in the authorities cited.

8. A witness for the accused, Isaac Frankenfield, testified by deposition to having served with the former in the United States army for nearly three years immediately preceding the month of November, 1891, and that he, accused, was, during the period of his service, constantly under the influence of liquor when able to procure it; that he was a confirmed drunkard, and had been dishonorably discharged after having served a term in the military prison at Leavenworth for an offense committed while intoxicated. At that point, on the objection of the state, the following questions

and answers were excluded as incompetent, irrelevant, and immaterial, and which ruling is assigned as error:

"When under the influence of liquor to such an extent as you have repeatedly seen him, what would you say, with your knowledge of his temperament, was his ability to rationally design, premeditate, and deliberate upon the usual affairs of life?

"In my opinion drinking seemed to take away his senses. I think he, when under the influence of liquor, did not have the ability to rationally design, premeditate, and deliberate upon anything.

"When under the influence of liquor, as you have repeatedly seen him, what would you say as to his ability to distinguish between right and wrong?

"I think when the man was drinking he was so far gone that he did not know right from wrong.

"When in this condition under the influence of whiskey or alcohol what would you say was the condition of his mind, sane or insane?

"My opinion is that the man was perfectly insane when he was drinking."

Much has been said and written upon the subject of drunkenness as a defense which tends to confuse rather than to elucidate the subject. Perhaps no more satisfactory statement of the rule is to be found than the charge of Stephen, J., in *Reg. v. Davis*, 14 Cox, Criminal Cases [Eng.], 564, viz.: "Drunkenness is one thing and the diseases to which drunkenness leads are different things; and if a man, by drunkenness, brings on a state of disease which causes such a degree of madness, even for a time, which would have relieved him from responsibility if it had been caused in any other way, then he would not be criminally responsible. In my opinion, in such a case, the man is a madman and is to be treated as such, although his madness is only temporary. If you think he was so insane that, if his insanity had been produced by other causes, he would not be re-

sponsible for his actions, then the mere fact that it was caused by drunkenness will not prevent it having the effect, which otherwise it would have had, of excusing him from punishment." And to the same effect see 1 Bishop, Criminal Law, sec. 406. It will be observed that the answers rejected do not prove that the mental faculties of the accused had been in any degree impaired by the use of liquor. They tend merely to prove what is an obvious fact of which all men will take notice without proof, viz., that the mind which is temporarily obscured or inflamed from the excessive use of intoxicants is incapable of reasoning rationally, the extent of the incapacity depending upon the degree of intoxication. The law recognizes a wide distinction between those cases where the mental derangement results from voluntary periodical intoxication, and the condition of insanity or imbecility produced by protracted overindulgence in the use of liquor. Drunkenness in the first class of cases is never, strictly speaking, a defense, although generally admissible as bearing upon the question of intention where the crime charged includes a specific intent. (See 1 Bishop, Criminal Law, 408 *et seq.*; *Schlencker v. State*, 9 Neb., 241; *Roberts v. People*, 19 Mich., 401; *People v. Cummins*, 47 Mich., 334; *Cluck v. State*, 40 Ind., 263; *Fisher v. State*, 64 Ind., 435; *Pigman v. State*, 14 O., 555; *Cline v. State*, 43 O. St., 332; *People v. Harris*, 29 Cal., 678.) But as the rulings upon that branch of the case must be considered under another assignment, they do not call for further notice in this connection. To summarize briefly, in the absence of evidence tending to show any degree or form of insanity as distinct from the effect of intoxication, which was, according to the testimony of the accused, voluntarily produced on the day of the homicide, the testimony above set out was properly excluded.

9. One Fair, a witness for the accused, testified to having known the latter intimately in Omaha and elsewhere, and that he drank to excess continuously from May 1 until

July 20 preceding the homicide, which occurred on the 1st day of November, 1893. On cross-examination the state was permitted, over the objection of the accused, to inquire if the witness had been arrested for vagrancy, drunkenness, and other misdemeanors. As respects the limits within which a witness other than the prisoner may be cross-examined for the purpose of testing his credibility the authorities are not harmonious; but the prevailing opinion is thus stated by Judge Thompson (Thompson, Trials, 458): "Except in cases where the witness is the prisoner on trial, the extent to which an inquiry will be allowed in his past life with a view of affecting his credibility rests in the discretion of the trial court." In *Real v. People*, 42 N. Y., 270, a well considered case, referring to questions of the character here involved, it is said: "Such inquiries do not relate to the issue directly upon trial, but relate only to the credibility of the witness. They are entirely collateral to the principal issue. As to the former, the same strictness is not required when the evidence is confined to the cross-examination of the witness introduced by the opposite party. In such examination the presumption is strong that the witness will protect his credibility as far, at least, as truth will warrant. All experience shows this to be so. It would be productive of great injustice often, if where a witness is produced, of whom the opposite party has before never heard, and who gives material testimony, and from some source, or from the manner and appearance of the witness, such party should learn that most of the life of the witness had been spent in jails and other prisons for crimes, if this fact could not be proved by the witness himself, but could only be shown by records existing in distant counties, and perhaps states, which, for the purposes of the trial, are wholly inaccessible. No danger to the party introducing the witness can result from this class of inquiries, while their exclusion might, in some cases, wholly defeat the ends of justice." And the rule as thus stated is recognized

in the following cases: *People v. Court of Oyer*, 83 N. Y., 436; *Wroe v. State*, 20 O. St., 460; *Bank of Cadiz v. Slemmons*, 34 O. St., 142; *State v. Carson*, 66 Me., 116; *People v. Arnold*, 40 Mich., 710; *State v. O'Brien*, 81 Ia., 93. It does not follow, however, that a witness will in every case be required to answer questions the tendency of which is to subject him to public disgrace or infamy; but that question is foreign to the present inquiry. It is sufficient for present purposes that the right to object, if such right exists, belongs to the witness whom it is sought to discredit, and not to the party calling him. (1 Greenleaf, Evidence, 459.)

10. Exception was taken, among others, to the eleventh paragraph of the instructions given by the court on its own motion as follows:

"No. 11. Gentlemen of the Jury: The evidence in this case shows, without conflict, that on the night of the 1st day of November, 1893, two persons entered the home of the deceased, Mattes Akeson, in Cass county, Nebraska, and without cause or provocation on the part of said deceased, or any of his family or servants there assembled, made a murderous assault upon the said deceased and the inmates of his home, shooting to death the said Mattes, also shooting at and striking his son Thomas, and shooting and wounding his hired men, Peter Simeon and Gus Burke, and beating, bruising, and wounding Rebecca Akeson, the wife of the deceased. That this assault was without provocation on the part of the deceased and the inmates of his home seems to be clear and undisputed from the evidence. The state contends that said crime was committed with premeditation and deliberation in an attempt to rob the deceased and the inmates of his home. The defendant Harry Hill, who stands charged before you in the information with the crime of murder, has entered a denial to said charge and pleads not guilty to the information. You are, therefore, charged that the burden of proof is upon the

part of the state to establish the guilt of this defendant upon this trial, by competent evidence and beyond any reasonable doubt. Therefore, in this case the prosecution must make out and prove to the satisfaction of the jury beyond all reasonable doubt every material allegation in the information, and unless that has been done the jury should find the defendant not guilty. In other words, in order to warrant a conviction in this case of the crime charged in the information, it is necessary for the state to satisfy you, gentlemen of the jury, that the defendant, together with one John Benwell, on or about the 1st day of November, 1893, within the county of Cass and state of Nebraska, made an assault upon the deceased in manner and form as charged in the information, with a revolver loaded with powder and ball, and that said Harry Hill or John Benwell, with malice aforethought, then and there shot the deceased, inflicting on him a mortal wound of which he then and there died, and that the other one of said defendants, either Harry Hill or John Benwell, was then present, aiding, abetting, and assisting in said assault and in said manner."

The objections to the above are: First, the assumption therein of the alleged homicide and accompanying assault on the deceased and other members of his family; second, that the reference therein to an assault upon the wife of the deceased is entirely unwarranted by the evidence. In *Heldt v. State*, 20 Neb., 492, it was held error to assume the existence of a fact in issue in a criminal prosecution, even where there is no conflict in the evidence, on the ground that it is for the jury to judge of the credibility of the witnesses. Mr. Bishop, in his work on Criminal Procedure (vol. 1, 979), after stating his views in substantially the language used in the case cited, concludes as follows: "The judge, therefore, should not assume a fact as proved unless the parties in the course of the trial have treated it so, and then he may." The facts assumed in this case, as will be

observed from a careful reading of the instruction, are that an unprovoked assault was made by two persons upon the deceased and his family, by means of which the former was killed. From an examination of the record the conclusion is irresistible that the defense was conducted on the theory that the accused had in fact assaulted and killed the deceased as charged and as proved by the state, but that he was at the time, in legal effect, insane from the excessive use of liquor. In the majority of the thirty-eight instructions asked by him the killing and the assault are assumed, while from none of them do those allegations appear to have been controverted. Again, we find in the brief of the accused filed in this court the following statement: "The commission of the crime was not denied, the only contention upon the part of the defense being an entire absence of any of the elements constituting homicide in the first degree; and further, that the defendant Hill had been in the habit of using liquor to such excess as to make him incapable of rationally designing the life of a fellow man and suffering from dipsomania." The court was, therefore, warranted in assuming the commission both of the assault and the homicide. Nor is the accused more fortunate in his second objection, as the record clearly proves that the wife of the deceased was struck with a chair by one of the assailants of her husband.

11. The criticism directed against the twelfth, thirteenth, and fourteenth instructions is twofold: First, that too much prominence is therein given to the proposition that drunkenness is no excuse for crime; and second, that they leave to the jury no discretion, but require them either to acquit the accused or find him guilty of murder in the first degree. Said instructions are here set out:

"No. 12. One of the defenses interposed in this case to the charge of murder contained in the information is that the defendant was under the influence of intoxicating liquor at the time of the killing, to such an extent as to be

unable to distinguish between right and wrong, and had been, for a considerable period of time immediately preceding the killing, intoxicated and under the influence of intoxicating drinks to such an extent as to be incapable of forming in his mind a design, deliberately and premeditately, to do the act charged in said information. This, you are instructed, is the defense of insanity caused by the excessive use of alcoholic stimulants, and when established by competent evidence, is an excuse for the commission of crime, for, if one committing a felony is found to be insane, from any cause, at the time he does the unlawful act, such insanity would be a complete defense if interposed in his behalf. You are, however, further instructed, touching the defense of drunkenness, that, as a rule of law, voluntary intoxication is no excuse for crime committed under its influence, and that to excuse the commission of a crime, or in a case like the one now on trial before you, where deliberation and premeditation are elements charged in the information, to be available as a defense or excuse, the evidence of drunkenness or intoxication at the time of the killing should be sufficient to raise in the minds of the jury a reasonable doubt as to whether the defendant or person charged with crime was capable of forming in his mind, before the killing, a willful, deliberate, and premeditated design to take the life of another, and that in cases where drunkenness is interposed as a defense, before the same can be considered there should be evidence in support of such defense sufficient to create a reasonable doubt in the minds of the jury of the accused's ability to distinguish between right and wrong at the time of the commission of the crime charged. So, in this case, you are instructed that if the evidence on this branch of the case is not strong enough, or is insufficient to create a reasonable doubt in your minds of the ability of the defendant Harry Hill to form the design and purpose to kill the deceased, such defense should be disregarded by the jury. In considering this branch of the

case you should take into consideration all of the testimony admitted before you tending to establish such insanity or drunkenness; the length of time the defendant was known in the neighborhood where the crime was committed, immediately preceding the homicide; his condition during that time as regards soberness and sanity or insanity, if any such be shown by the evidence; whether he was intoxicated or under the influence of intoxicating liquors during such time, if such fact appear from the evidence; his mental condition during that time, if such be shown from the evidence; his habits and life, so far as alcoholic stimulants are concerned, by his conduct; and it is from all such facts as they appear from the evidence, together with all other evidence tending to show his mental condition at and preceding the homicide, that you are to arrive at your verdict on this branch of the case. In this connection, however, you should bear in mind that under our law voluntary drunkenness, is no excuse for the perpetration of crime, and that where without intoxication the law would impute a criminal intent, mere proof of drunkenness will not avail to disapprove such intent, and that it is only in cases where the constant and excessive use of alcoholic stimulants have produced actual insanity, resulting in derangement of the mental and moral faculties to such an extent as to render the person so afflicted incapable of distinguishing right from wrong, that crime may be excused thereby.

"No. 13. Another rule of law which I now remind you of, in connection with this defense of insanity caused by drunkenness or excessive use of alcoholic stimulants, is that the law presumes every man who has reached the years of discretion to be of sound mind, and this presumption continues until arrested by evidence tending to establish insanity, which evidence should be sufficient, as I have hereinbefore instructed you, as to raise in the minds of the prudent, careful juror a reasonable doubt of the sanity of the accused. When, however, evidence of insanity has been

introduced, the burden of proof is upon the state to satisfy the jury, by competent evidence beyond any reasonable doubt, that the accused was possessed of a sound mind at the time he committed the act complained of. You should bear in mind, gentlemen, however, that the burden of proof in criminal cases is always upon the state, and never shifts from the state to the defendant; that is, the making out of a *prima facie* case against the defendant does not shift the burden of proof to the defendant; in such a case it is only necessary for the defendant to offer proof sufficient to create in the minds of the jury a reasonable doubt of his guilt. In this connection, however, you are further instructed that if a person voluntarily becomes intoxicated with a view of committing a crime, and while so intoxicated commits the crime, that total insanity, if the immediate result of such intoxication, would not excuse the criminal act committed while under the influence of such intoxication, for the law will not permit a person to so shield himself under the cloak of drunkenness for the purpose of violating the law of the land.

"No. 14. Further, you are instructed upon this branch of the case, in regard to the question of intoxication as a defense or as an excuse, partial or whole, for the crime, that if the person is sober enough and has mind enough to form a design to take the life of another, and in pursuance of such design does actually shoot and kill without any justification therefor, then the law presumes that such person is sober enough and of sufficient mind to form the specific intention to kill; and in such case, where he attempts to take life or does take life, he is criminally responsible for his acts; so, where there is evidence in such cases of insanity or loss of reason on account of the intoxication and drunkenness of the person committing the felony, the degree of intoxication and the fact itself is a question of fact for the jury to weigh with all other evidence in the case; hence, in this case, the question as to whether the ac-

cused was intoxicated at the time of the shooting and before, and to what extent, is a question of fact for you, gentlemen of the jury, to determine from all the evidence before you bearing upon that question; and if, after fully and impartially weighing and considering the same, you entertain a reasonable doubt of the guilt of the accused as defined by these instructions, it becomes your duty as jurors to give the defendant the benefit of such doubt, and acquit him of the crime charged in the information. If, on the other hand, after examining and weighing all the evidence bearing upon the question of the defendant's intoxication, together with all other evidence in the case, you are convinced beyond any reasonable doubt of the defendant's guilt as he stands charged in the information—that is, that the defendant Harry Hill, or John Benwell, with malice aforethought, shot the deceased, and thereby inflicted upon him a mortal wound of which he then and there died, in manner and form as charged in the information, and that said Hill, or said Benwell, as you may find from the evidence beyond any reasonable doubt, was present, aiding, abetting, and assisting in commission of said felony,—then you are instructed that it is your duty to return a verdict of guilty as said defendants stand charged in the information."

The repetition complained of presents no ground for reversal. It is, at most, an irregularity—a practice to be discouraged for obvious reasons; but it cannot in this instance be said to have excluded from the consideration of the jury other propositions of law stated by the court, since, as we have seen, there appears to have been no controversy at the trial with respect to the rule stated in the instructions. Murder in the first degree, murder in the second degree, and manslaughter were fully and accurately defined in other paragraphs of the charge. The jury were also advised that they were not required to return a verdict of murder in the first degree should they find that the accused

feloniously killed Mat. Akeson as charged, but that, if warranted by the evidence, they should return a verdict of murder in the second degree or manslaughter. We have seen that proof of drunkenness, although voluntary, is admissible as bearing upon the question of intention where a specific intent is an element of the crime charged. For instance, in prosecutions for murder in the first degree, which implies both malice and premeditation, the intoxication of the accused may be considered for the purpose of determining whether he was at the time in question capable of deliberation or of deciding between right and wrong and judging of his acts and their legitimate consequences; in short, for the purpose of showing the degree of the offense, if any, which has been committed. (*O'Grady v. State*, 36 Neb., 320.) Such, we understand, to be the doctrine of the instructions under consideration, and although the rule is not stated therein with the clearness and precision noticeable in the other paragraphs of the charge, we are unable to determine that the accused has been prejudiced thereby. We are confirmed in that view from the fact that the instructions above set out are, in substance, identical with those asked by the accused. Mere non-direction by the trial court is not sufficient ground for reversal on appeal, unless proper instructions have been asked and refused. That rule rests upon the soundest reasons and applies to criminal prosecutions as well as civil causes. (*Jones v. State*, 26 O. St., 208; *Sioux City & P. R. Co. v. Finlayson*, 16 Neb., 578; Thompson, Trials, 2339 *et seq.*)

12. Exception was taken also to the following instruction:

"No. 16. It being charged in the information that the deceased, Akeson, came to his death at the hands of the defendants Hill and Benwell while they, defendants, were engaged in the common purpose of committing a robbery upon the said deceased, you are instructed that, as a matter of law, robbery is the felonious taking of money, goods, or

other valuable things from the person of another by force or intimidation, and that under our statute the crime of robbery is a felony punishable by imprisonment in the penitentiary of the state; therefore, in this connection, you are further instructed that when an unlawful intentional killing of human being occurs or is committed by one or more persons while engaged in an attempt to rob the person so killed, that such killing would be murder in the first degree, and that all who are present, engaged in the common design of robbery, aiding and abetting therein, in furtherance of the common purpose of robbery, are equally guilty with the one who actually does the killing. You are therefore instructed in this case, if you believe from the evidence beyond any reasonable doubt that at the time of the alleged killing of Mattes Akeson, the defendant Harry Hill with John Benwell had entered his dwelling house, armed with a deadly weapon or weapons, for the purpose of intimidating the deceased for the furtherance of their purpose to steal, take, and carry away by force and violence the money or any article of personal property of the deceased's dwelling house, and that in the prosecution of that purpose and design the defendants, or either of them, shot the deceased and thereby caused his death, or that one of the defendants fired the fatal shot which caused the death of the deceased, and that the other defendant was there present, aiding, abetting, and assisting in the perpetration of the felony and in the commission of the act which caused the death of the deceased, then you are instructed, should you so find, that such killing would be murder in the first degree, for the law presumes when human life is taken under such circumstances, and in furtherance of the purpose to commit a robbery, that the person or persons committing such felony contemplate and intend such killing as a natural and probable result of their intent to rob."

There appears to have been an error or omission in the transcribing of the above instruction, wherein the court is

made to say that the accused might be convicted if he feloniously killed the deceased while engaged with his co-defendant in attempting forcibly to take, steal, or carry away "any article of personal property of the deceased's dwelling house." But the objection to the instruction is upon other grounds, viz., that it authorizes a conviction provided the jury should find that the defendant forcibly entered the house of the deceased for the purpose of committing a larceny. Robbery at common law was defined as larceny committed by violence from the person of one put in fear. (2 Bishop, Criminal Law, 1156.) By section 13 of our Criminal Code it is provided that "If any person shall forcibly and by violence, or by putting in fear, take from the person of another any money or personal property of any value whatever with the intent to rob or steal, every person so offending shall be deemed guilty of robbery, and upon conviction thereof shall be imprisoned in the penitentiary not more than fifteen nor less than three years." The taking, according to each definition, must be from the person, since the crime of robbery is an offense as well against the person as against property. It is, however, not essential to a conviction for the crime named that the property be taken from the body of the person wronged. It is sufficient if taken from his personal presence or personal protection. (2 Bishop, Criminal Law, 1177, 1178; *United States v. Jones*, 3 Wash. C. C., 209; *Clements v. State*, 84 Ga., 660; *State v. Calhoun*, 72 Ia., 432.) In the last named case, which was under a statute similar to ours, the prisoner was shown to have bound the prosecutrix and by putting her in fear extorted information respecting the place where her money and other personal property was kept. Leaving her bound he went to the place designated by her in another room of the same house and took the property named in the indictment. In the opinion the court, by Beck, J., uses this language: "The thought of the statute, as expressed in the language, is that the property

must be so in the possession or under the control of the individual robbed that violence or putting in fear was the means used by the robber to take it." And in *Clements v. State* the prisoner, by threats of violence, detained the prosecutor in an outhouse while a confederate entered his dwelling fifteen paces distant and took therefrom the property described, and the taking was held to be in the presence of the prosecutor within the meaning of the statute defining robbery. The taking of the property of the deceased from his dwelling under the circumstances indicated by the instruction would have been robbery. It would also have sustained a conviction for larceny. (*Brown v. State*, 33 Neb., 354.) The objection to the instruction is, therefore, without merit.

13. Among the reasons alleged for a new trial is that the jury, after a final submission of the cause, were conducted to a hotel and given separate apartments during the night; but the evidence relied upon to support that assignment was not filed until after judgment on the verdict and after the final adjournment of the term. That allegation, if true, will not avail the accused in this proceeding.

14. It is claimed that the prosecuting attorney, during the closing argument, made use of inflammatory language while referring to the accused, and which was entirely unwarranted by the evidence. It is, however, affirmatively shown by the record that no objection was made at the time, nor was the attention of the court in any manner called to the alleged abuse of privilege. It has been repeatedly held that questions of like character will not be reviewed by this court unless objection is made and exception taken in the district court. (See *Bradshaw v. State*, 17 Neb., 147; *McLain v. State*, 18 Neb., 154.) But although it is not clear that the attorney for the state was in this instance guilty of an abuse of privilege, we are constrained to call attention to what is believed to be a misconception of the rule recognized by this court. The proposition that

exception to statements used in argument must be taken at the time, refers to appellate proceedings and has no application to trials before the district court. It is the duty of the trial judge, with or without objection, to promptly interfere when counsel so far forget themselves as to attempt to mislead the jury or divert their minds from the issue before them. The judge is not a mere umpire without interest in the proceedings before him, but, on the contrary, it is his right and his duty to protect the court by an enforcement of the rules essential to an orderly and impartial administration of the law. As remarked in *Tucker v. Henniker*, 41 N. H., 317, "What a counsel does or says in the argument of a cause must be pertinent to the matter on trial before the jury, and he takes the hazard of its not being so;" and where counsel wantonly persist in attempting to influence the jury by reference to facts not in evidence, or appeals to prejudice, just or unjust, *de hors* record, the court should not hesitate, on motion, to set aside a verdict in his favor, unless fully satisfied of its correctness, although no objection may have been noted at the time of the offense. Referring to this subject the supreme court of Georgia, in *Berry v. State*, 10 Ga., 511, use the following pertinent language: "It is usually better to trust to the discrimination of the jury as to what is and what is not in evidence than for the opposite counsel to move in the matter, for what practitioner has not regretted his untoward interference when the counsel thus interrupted resumes, 'Yes, gentlemen, I have touched a tender spot. * * * You see where the shoe pinches.'" But in this, as in all matters pertaining to the trial, a large discretion is conceded to the trial judge, hence the rule requiring an objection to the abuse of privilege or privileges by counsel in order that it may be available upon review by the appellate court.

14. It is urged, finally, that the evidence is insufficient to warrant the extreme penalty, and that the judgment

should accordingly be modified by this court. We are, however, unable to so regard it in the light of the facts disclosed by the record, which, briefly stated, are as follows: Two days previous to the homicide the accused and his co-defendant met the son of the deceased in the town of Weeping Water and applied for work. The latter replied that he could furnish work for one but not for both of them, but finally consented to take both to his father's home, six miles and a half distant, where they were sheltered by the deceased until the next morning, when they were set to work husking corn. The morning following, the deceased, not wishing their services longer, paid and discharged them, saying he was going to haul hogs to market that day and would need his teams for that purpose. The defendants returned to Weeping Water, where they spent the day in the saloon drinking—probably to excess. In the evening of that day they left Weeping Water on foot, going direct to the house of deceased, where they arrived some time after dark. They first visited the stable and procured therefrom a pair of check lines, but for what purpose is a matter of inference only, as they were left at the door of the dwelling house. On entering the house, which they did immediately, and with handkerchiefs or masks of some description over their faces, the defendants commanded the deceased and his son to hold up their hands, when the latter both retreated to the kitchen followed by their assailants. About that time a scuffle ensued, during which the fatal shot was fired, but by which of the defendants does not clearly appear. It is further shown that the deceased's son and two hired men present at the time received pistol wounds at the hands of the defendants, and that deceased's wife was struck on the head with a chair by one of them; that the accused, with the other defendant, had deliberately planned to commit the crime of robbery is clear, and that they were guilty of murder in attempting

to execute their felonious purpose is established by the evidence beyond a doubt. The judgment is therefore

AFFIRMED.

Date of execution of sentence March 1, 1895.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY V. HENRY C. COCHRAN.

FILED NOVEMBER 8, 1894. No. 5448.

Contracts: ACTION FOR BREACH. One who refuses to perform the conditions imposed upon him by the terms of a contract cannot recover for a breach thereof by the other party.

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

T. M. Marquett and *J. W. Deweese*, for plaintiff in error, cited: *Delaney v. Linder*, 22 Neb., 280; *Mateer v. Missouri P. R. Co.*, 16 S. W. Rep. [Mo.], 839; *Hinkle v. Minneapolis & St. L. R. Co.*, 31 Minn., 434; *Gulliher v. Chicago, R. I. & P. R. Co.*, 13 N. W. Rep. [Ia.], 431; *Pennsylvania R. Co. v. Shay*, 82 Pa. St., 202; *Snider v. Adams Express Co.*, 63 Mo., 383; *Wallace v. Chicago, St. P., M. & O. R. Co.*, 25 N. W. Rep. [Ia.], 772; *Gould v. Cayuga County Nat. Bank*, 86 N. Y., 84; *Glenn v. Statler*, 42 Ia., 109; *Butman v. Hussey*, 30 Me., 263; *Moorman v. Collier*, 32 Ia., 138; *Belger v. Dinsmore*, 51 N. Y., 170; *Guldager v. Rockwell*, 24 Pac. Rep. [Col.], 556; *First Nat. Bank, Barnesville, O., v. Yocum*, 11 Neb., 332; *East Tennessee, V. & G. R. Co. v. Hayes*, 10 S. E. Rep. [Ga.], 351; *Doane v. Lockwood*, 115 Ill., 490; *Oswego Starch Factory v. Lendrum*, 57 Ia., 573; *Chapman v. Chicago & N. W. R.*

Co., 26 Wis., 303; *Chicago & G. E. R. Co. v. Dane*, 43 N. Y., 242; *Bolles v. Sachs*, 33 N. W. Rep. [Minn.], 864; *East Line & R. R. R. Co. v. Scott*, 10 S. W. Rep. [Tex.], 99; *Harper v. Hassard*, 113 Mass., 187; *Coffin v. Landis*, 46 Pa. St., 431; *Franklin Mining Co. v. Harris*, 24 Mich., 115; *Wilkinson v. Heavenrich*, 26 N. W. Rep. [Mich.], 140; *Stiles v. McClellan*, 6 Col., 89; *Warner v. Texas & P. R. Co.*, 54 Fed. Rep., 923.

W. S. Hamilton, contra, cited: *East Tennessee, V. & G. R. Co. v. Staub*, 7 B. J. Lea [Tenn.], 397; *Moore v. Chicago, B. & Q. R. Co.*, 65 Ia., 505; *Jessup v. Chicago & N. W. R. Co.*, 48 N. W. Rep. [Ia.], 77; *Wells v. Alexandre*, 15 L. R. A. [N. Y.], 218; *Smith v. Morse*, 20 La. Ann. 220; *Giles v. Bradley*, 2 Johns. Cas. [N. Y.], 253; *Seddon v. Rosenbaum*, 9 S. E. Rep. [Va.], 326; *Michie v. The Governor*, 4 Humph. [Tenn.], 486; *Howard v. Daly*, 19 Am. Rep. [N. Y.], 285; *Tarbox v. Hartenstein*, 4 Bax. [Tenn.], 78; *Ream v. Watkins*, 72 Am. Dec. [Mo.], 283; *Cake v. Pottsville Bank*, 2 Am. St. Rep. [Pa.], 600.

POST, J.

The plaintiff below (defendant in error) recovered in an action against the defendant below in the district court for Lancaster county, and which judgment is presented to this court for review by the petition in error of the defendant railroad company. In his petition the plaintiff below alleges that on the 11th day of May, 1888, while in the service of the defendant company, and by means of its negligence and default, he suffered serious personal injuries; that on the 3d day of September following he made a settlement with said defendant, whereby, in consideration of the sum of $100 in hand paid, and the promise of the latter to furnish him employment for the remainder of his life, or so long as he desired, with wages sufficient for the support of himself and family, he released and ac-

quitted the defendant from any and all claim for damage on account of its alleged negligence; that in pursuance of said agreement he served the defendant in the capacity of clerk in the yardmaster's office, and as locomotive fireman, until March 12, 1891, at which time, in consequence of a reduction in the hours of labor, his daily wages were reduced from $1.50 to $1.35 per day. He thereupon protested against such reduction, and was promised other employment, with wages adequate to the needs of his family, but which promise the defendant has wholly failed and neglected to fulfill. There is a further allegation in the following language: "And plaintiff says that said defendant, well knowing the premises and the validity of its aforesaid agreement, and recognizing the same and plaintiff's rights thereunder, yet wrongfully and unlawfully intending to cheat and defraud the plaintiff out of his just rights and to injure him, so conducted itself toward the plaintiff as to make his duties and labors burdensome and onerous and his remuneration insufficient, for the purpose of annoying the plaintiff and disgusting him with his employment, and for the purpose of thereby ridding itself of plaintiff and compelling him, by its aforesaid conduct, to leave defendant's service and to seek employment elsewhere; and that the defendant, pretending to carry out the agreement aforesaid, actually and in fact endeavored to freeze plaintiff out of its, said defendant's, service." The defendant by its answer admits that the plaintiff was injured while in its service as alleged, and that a settlement was had between the parties on the 3d day of September, 1888, but alleges that the $100 thereby paid to the plaintiff was in full of all demands arising out of his alleged injury. It admits that the plaintiff subsequently served it in the capacities named, but alleges that such employment was voluntary on its part and not in pursuance of any agreement, and alleges that the plaintiff left its service voluntarily and without cause. Accompanying

the answer is the written evidence of the alleged settlement, all of which, beginning with the word "received," except the amount, name, and residence of the plaintiff, as shown below, being on one of the defendant's printed forms.

"THE CHICAGO, BURLINGTON & QUINCY R. R. CO.,
"GRANTEE AND ASSIGNEE OF
"THE BURLINGTON & MISSOURI RIVER R. R. CO. IN NEBRASKA.

"To H. C. Cochran, Dr.,
"Address, Ravenna, Neb.

"1888. For personal injuries received while on duty as locomotive fireman at Ravenna, Neb., May 11, 1888..... $100

"Cochran in attempting to get on his engine missed the engine steps and slipped in such a way that right foot was caught and run over by trucks of engine tender, cutting toes so as to necessitate their amputation, and, later, amputation of foot back to instep.

"Casualty No. 2069.

"Approved: A. S. WIGGINS,
"*Ass't Auditor.*

"Approved: T. E. CALVERT.

"Received of the Chicago, Burlington & Quincy R. R. Company, grantee and assignee of the Burlington & Missouri River R. R. Co. in Nebraska, one hundred dollars, in full payment of the above account. In consideration of the payment of said sum of money, I, H. C. Cochran, of Ravenna, in the county of Buffalo and state of Nebraska, hereby remise, release, and forever discharge the said company of and from all manner of actions, causes of action, suits, debts, and sums of money, dues, claims, and demands whatsoever, in law or in equity, which I have ever had or now have against said company by reason of any matter, cause, or thing whatever, whether the same arose upon contract or upon tort.

"In witness whereof, I have hereunto set my hand this 3d day of September, 1888.

"$100. H. C. COCHRAN."

Numerous questions are presented touching the merits of the controversy, including the power of the superintendent to bind a company by an agreement such as alleged, and whether an agreement so indefinite can be made the foundation of an action at law; but since, in our judgment, there is an evident failure of proof of an essential allegation of the petition, it is unnecessary to further notice the questions above mentioned. It is shown by the testimony of the plaintiff that he remained in the service of the company until the 10th or 11th day of April, 1891, and that within a few days thereafter he called upon the superintendent, Mr. Calvert, and protested against the reduction of wages, and requested more lucrative employment. There was at that time some talk about the ability of the plaintiff to do clerical work, and he was requested by Mr. Calvert to submit a specimen of his penmanship, which he did, by a paper designated as a sample, bearing date of April 11th. On Saturday, April 25, Mr. Bignell, division superintendent, by direction of Mr. Calvert, addressed to the plaintiff a letter in the following words:

"LINCOLN, April 25, 1891.

"*Mr. H. C. Cochran, 843 N. 12th St., City*—DEAR SIR: You will please report to Mr. Scott, agent, Lincoln, at 7:30 Monday morning. I have requested him to give you a position, and to do this he has to dispense with the services of a good man who has been in the service some time. I shall expect you to fill the position equally well as your predecessor.

"Yours truly, E. BIGNELL."

The foregoing letter was for some reason not posted until Monday morning following, and delivered by carrier the next day, some twenty-seven hours after the time plaintiff was requested to report for duty. It is conceded that he

never reported for work or otherwise communicated with Mr. Scott, the agent named. It is also shown that he was at the date of said letter employed by the Lincoln Street Railway Company, in whose service he remained until the month of October following. There is no doubt of the good faith of Mr. Calvert and his desire to provide employment for the plaintiff, and no claim to the contrary is made in the brief of the latter. Mr. Scott, who testified for the defendant, fully corroborated Mr. Calvert, and testified that he had, in accordance with instructions from the superintendent, provided a position for the plaintiff as billing clerk in office of the witness at the same wages paid other employes therein, and which was reserved for him for a week or more. The law exacts good faith from both parties to a contract. The plaintiff was under no less obligation to render the service than the defendant was to provide employment for him. Assuming what is not proved, viz., that the purpose of the defendant company was to compel the plaintiff to abandon the service by continued acts of oppression and annoyance, that fact should not entitle him to recover for a breach of the contract unless he was himself ready and willing to discharge the obligations thereby imposed upon him. The fact that notice of his appointment was delayed one day will not justify his refusal to accept the proffered position. It was said by LAKE, J., in *Reynolds v. Burlington & M. R. R. Co.*, 11 Neb., 186, that a plaintiff who is himself in inexcusable default, and who shows no desire or willingness to perform his part of it, is in no position to complain or seek damage for its non-performance by the other; and the same principle is recognized in *Walter v. Reed*, 34 Neb., 544, and *Lexington Milling Co. v. Neuens*, 42 Neb., 649, decided at the present term.

The irresistible conclusion from the evidence is that the plaintiff below was guilty of the first breach of the contract, and that his default was without justification or

excuse. It follows that the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

HOME FIRE INSURANCE COMPANY v. MRS. R. J. BEAN.

FILED NOVEMBER 8, 1894. No. 5921.

1. **A demand, by an insurance company, for arbitration** in the manner provided in its policy, under which there has been a loss by fire, waives formal proofs of the loss.
2. **The petition** in this case *held* to contain a sufficient allegation of a demand for arbitration.
3. **Where real property is wholly destroyed by fire,** any provision of a policy of insurance covering such property which in any manner attempts to limit the amount of the loss to less than the sum written in the policy is in conflict with the statutory rule, invalid, and will not be enforced.
4. **"A provision in a policy** that no suit or action against the insurer 'shall be sustained in any court of law or chancery until after an award shall have been obtained' by arbitration, 'fixing the amount' due after loss, is void, the effect of such provision being to oust the courts of their legitimate jurisdiction." (See *German-American Ins. Co. v. Etherton*, 25 Neb., 505.)
5. **When a policy of insurance, as an exhibit, is made a part of a pleading** or petition, and is admitted by the answer, the facts stated therein become a part of the record in the case; and where some of the provisions of the policy are again pleaded in the answer as substantive matters of defense, and such provisions of the answer are demurred to by plaintiff, the action of the court in sustaining the demurrer is not prejudicial error.

ERROR from the district court of Thayer county. Tried below before HASTINGS, J.

The opinion contains a statement of the case.

Jacob Fawcett, for plaintiff in error:

The failure of the assured to furnish proper notice and proof of loss with certificate of magistrate prevents her from maintaining the action. (*Columbian Ins. Co. v. Lawrence*, 2 Pet. [U. S.], 25; *Leadbetter v. Etna Ins. Co.*, 13 Me., 265; *Inman v. Western Fire Ins. Co.*, 12 Wend. [N. Y.], 452; *Roumage v. Mechanics Fire Ins. Co.*, 1 Green [N. J.], 110; *Protection Ins. Co. v. Pherson*, 5 Ind., 417; *Noonan v. Hartford Fire Ins. Co.*, 21 Mo., 81; *Cornell v. Hope Ins. Co.*, 3 Martin [La.], 223.)

The requirement for a magistrate's certificate must be literally complied with, unless there has been a waiver. (*Kerr v. British America Assurance Co.*, 32 U. C. Q. B., 569; *Cayon v. Dwelling House Ins. Co.*, 32 N. W. Rep. [Wis.], 540; *Morrow v. Waterloo County Mutual Fire Ins. Co.*, 39 U. C. Q. B., 441; *Johnson v. Phœnix Ins. Co.*, 112 Mass., 49; *Williams v. Queen Ins. Co.*, 19 Ins. L. J. [Conn.], 26.)

S. W. Christy, contra:

When the company demanded arbitration, it thereby waived proof of loss. (*Jones v. Merchants Fire Ins. Co.*, 13 Am. Rep. [N. J.], 405; *Allemania Fire Ins. Co. v. Pitts Exposition Society*, 11 Atl. Rep. [Pa.], 572; *Snowden v. Kittanning Ins. Co.*, 16 Atl. Rep. [Pa.], 22; *Fisher v. Crescent Ins. Co.*, 33 Fed. Rep., 544; *Dwelling-House Ins. Co. v. Gould*, 19 Atl. Rep. [Pa.], 793; *State Ins. Co. v. Schreck*, 27 Neb., 527; *Rokes v. Amazon Ins. Co.*, 34 Am. Rep. [Md.], 323; *Loeb v. American Central Ins. Co.*, 12 S. W. Rep. [Mo.], 374; *St. Paul Fire & Marine Ins. Co. v. Gotthelf*, 35 Neb., 351.)

The insurance company cannot limit its liability under the valued policy act by a provision in the policy of insurance. (*Thompson v. St. Louis Ins. Co.*, 43 Wis., 459; *Seyk v. Millers National Ins. Co.*, 41 N. W. Rep. [Wis.], 443;

American Central Ins. Co. v. Haws, 20 W. N. C. [Pa.], 370; *Oshkosh Packing & Provision Co. v. Mercantile Ins. Co.*, 31 Fed. Rep., 200.)

HARRISON, J.

The petition filed in this case in the district court of Thayer county alleged for a cause of action against the Home Fire Insurance Company of Omaha that the plaintiff therein, Mrs. R. J. Bean, was, on the 6th day of April, 1891, the owner of a certain hotel building in the village of Davenport, in Thayer county, and procured on said day a policy of insurance, No. 51277, to be issued to her by the company, by which she was insured against loss or damage by fire to the hotel building in the sum of $1,200; that the building was afterwards damaged by fire, and the company paid the sum of $88.45 in full settlement of such damage on October 15, 1891, and was duly credited therefor on the policy, reducing the amount to the sum of $1,111.55, for which it remained in force from and after October 15, 1891; that on November 14, 1891, the building was totally destroyed by fire, of which the plaintiff (defendant in error) gave the company notice and proof and demanded payment of the loss, and has duly performed on her part all the conditions of the policy of insurance; that the company demanded, in writing, arbitration of the loss, and after arbitrators had been chosen, withdrew the name of its arbitrator, but continued negotiations for settlement, and subsequently demanded that a new board of arbitrators be appointed to fix the amount of the loss; that the building was, when burned, of the value of $1,700, and there was no other insurance thereon. The prayer of the petition was for judgment in the amount of $1,111.55 and interest at seven per cent per annum from November 16, 1891, and the allowance of a reasonable attorney's fee and other costs. To this petition there was filed for the company the following answer:

"1. The defendant admits that it is a corporation as alleged in the plaintiff's petition; admits that on the 6th day of April, 1891, it issued to the plaintiff its policy of insurance covering the property described in plaintiff's petition; admits that on the 15th day of October, 1891, it paid the plaintiff the sum of eighty-eight and $\frac{45}{100}$ dollars ($88.45) in full settlement for damage caused to the property covered by said policy by fire on October 9, 1891; admits that said payment reduced the amount of said policy to the sum of one thousand one hundred and eleven dollars and fifty-five cents ($1,111.55), and denies each and every other allegation in plaintiff's petition contained.

"2. As a further defense to the plaintiff's action the defendant alleges that the amount of the defendant's liability under and by virtue of said policy was, by the terms and conditions of said policy, limited to three-fourths the actual cash value of said property covered by said policy at the time of the fire; and this defendant alleges that the actual cash value of said property at the time of said fire did not exceed the sum of $1,000.

"3. Defendant further alleges that said policy of insurance contains the following conditions and agreements, namely: If differences of opinion arise between the parties hereto as to the amount of loss or damage, that question shall, at the written request of either party, be referred to two disinterested and competent men, each party to select one, who shall ascertain, estimate, and appraise the loss or damage; and in case of disagreement, the two so chosen to select a third, who shall act as an umpire on disputed points only, and their award in writing, duly sworn to, shall be binding on the parties hereto as to the amount of said loss or damage, but no appraisal or agreement for appraisal shall be construed as evidence of the validity of said policy or the company's liability therein; and each party to pay their own appraiser and one-half the umpire's fee.

"4. The defendant further alleges that in accordance

with said agreement and conditions contained in said policy the defendant, after said fire, in writing, notified and requested the plaintiff to submit the differences of opinion between the plaintiff and this defendant, in relation to the amount of loss or damage which the plaintiff had sustained, to two disinterested and competent men, in accordance with the terms of said policy, to ascertain an estimate and appraise the said loss or damage, and requested the plaintiff to notify this defendant of the person of whom the plaintiff had selected to act as appraiser in that behalf; that thereupon the plaintiff did select an appraiser and notified this defendant of said fact, whereupon this defendant selected one F. W. Hollingsworth, of Davenport, Nebraska, to act as its appraiser and notified the plaintiff of that fact; that within a few days thereafter, and before any step had been taken by the plaintiff or defendant, or by the appraisers so appointed, to make any appraisement of said loss or damage, this defendant was informed that the said Hollingsworth was not a disinterested appraiser, whereupon the defendant, at once, on the 11th day of January, 1892, notified the plaintiff in writing that this defendant withdrew the name of F. W. Hollingsworth to act as its arbitrator, and that it would within a reasonable time appoint another person to act as its arbitrator as aforesaid; that three days afterwards, to-wit, on the 14th day of January, 1892, this defendant notified the plaintiff that it had selected one Joseph Williams to act as its appraiser instead of said Hollingsworth; that two days later, to-wit, on the 16th day of January, 1892, this defendant appeared at Davenport, Nebraska, with the said appraiser and notified the plaintiff that it was ready and willing to proceed at once to said appraisement, but the plaintiff, in violation of the terms, conditions, and agreements contained in said policy, failed, neglected, and refused to proceed with the appraisement, or to enter into any agreement for any future day upon which to appraise said loss or damage, if any, to

said property; that subsequently thereto, to-wit, in the latter part of January, 1892, this defendant again demanded of the plaintiff an arbitration of said loss and damage to said property, but the plaintiff again refused to enter into said appraisal; and the plaintiff had at all times since the said date refused to enter into any appraisement or arbitration of the amount of loss or damage which the plaintiff may have sustained by reason of said fire, by means whereof the defendant has been unable to ascertain or determine the actual amount of said plaintiff's loss or damage by fire under said policy; but the defendant is informed and believes that the actual loss and damage sustained by the plaintiff under said policy does not exceed the sum of one thousand dollars ($1,000), and that by the terms of said policy the defendant would not in any event be liable for more than three-fourths of said amount, to-wit, the sum of seven hundred fifty dollars ($750), but the defendant alleges that by reason of the failure and refusal of the plaintiff to have the loss and damage by said fire a praised as required by said policy, prior to the commencement of this suit, said suit was at the time of its commencement premature.

"5. The defendant further alleges that the said policy of insurance contains the following agreements, restrictions, and limitations, to-wit: '18. No suit or action of any kind against this company for the recovery of a claim under this policy shall be sustained in any court of law or chancery until after an appraisement and award shall have been made, if requested, fixing the amount of such claim in the manner above provided.'

"6. The defendant further alleges that no appraisement or award has been made fixing the amount of plaintiff's claim under said policy, although the same has been requested in writing by the defendant as hereinbefore set forth. Wherefore the defendant prays that the plaintiff's action be dismissed and the defendant recover its costs."

There was then filed for Mrs. Bean what was styled "a reply," but which was in fact a general demurrer to the second, third, fourth, fifth, and sixth paragraphs of the answer. This was, on hearing, sustained, an exception to the ruling was taken by counsel for the company, and the company declined to plead further. A jury was waived and the case tried on its merits and submitted to the court, and at a subsequent date, during the same term, the court made a finding in favor of Mrs. Bean, and that there was due her from the company the sum of $1,162.75 and allowed the further amount of $60 as an attorney fee. Motion for new trial was filed on behalf of the company, which was overruled, and judgment was rendered in accordance with the findings. The company brings the case here for review.

It is argued by counsel for plaintiff in error that inasmuch as the company, in its answer, had denied that the loss was total, the defendant in error should not have been allowed to prove a waiver of the proofs of loss unless it was alleged in the petition or the reply, and that it was not alleged in either; that there was no evidence that proofs of loss were furnished, and hence the defendant in error was not entitled to recover, and the judgment should be reversed and a new trial awarded. The petition contained the following allegation: "That the defendant company demanded an arbitration of said loss, in writing, and after arbitrators had been chosen, said defendant withdrew the name of its arbitrator, but continued negotiations for settlement, and subsequently demanded a new board of arbitrators be appointed to fix amount of said loss." This was certainly a sufficient statement of a demand for arbitration and was followed by proof of the fact. This was a sufficient pleading of the waiver of the proofs of loss and amply supported by the evidence and relieves this branch of the case of the objections urged against it. Both pleadings and evidence showed a waiver of proofs of loss. Where

arbitration is demanded it is a waiver of the proofs of loss. (*Walker v. German Ins. Co. of Freeport*, 33 Pac. Rep. [Kan.], 597, and cases there cited.)

Another assignment is that it was error to sustain a demurrer to certain portions of the answer and thus strike them from the answer or exclude them from the issues. The petition pleaded the issuance of the policy, gave its number, and made it a part of the petition. The answer admitted the issuance of the policy and denied that the loss was total. Under this condition of the pleadings, if the company had proved that the loss was not a total one, it would have been entitled to the benefit of all the provisions of the policy as they were pleaded and admitted to exist. The issuance and existence of the policy in its entirety had been pleaded by one party and admitted by the other, and had thus become a part of the record without further proof. Referring to that portion of the answer in which the demand for arbitration is alleged, and the further complaint that by reason of fault on the part of defendant in error the arbitration was not made, and that this being a condition of the policy upon the fulfillment of the requirements of which the company was entitled to insist, hence the suit was prematurely brought, and the contention that it was error for the court to sustain a demurrer to the part of the answer in which this was pleaded, we think the action of the court was not erroneous, as this court has decided that such a provision in the policy was void. (See *German-American Ins. Co. v. Etherton*, 25 Neb., 505, and cases cited.)

It is next claimed that the court erred in finding for the defendant in error for the full amount for which the suit was brought. The policy upon which the action was based stated that "In consideration of forty-two dollars do insure Mrs. R. J. Bean against loss or damage by fire to the amount of twelve hundred dollars ($1200). * * * Other insurance permitted, not to exceed three-fourths of the actual

cash value of the property. In case the amount of insurance exceeds three-fourths of the actual cash value at the time of fire, this company shall be liable only for its *pro rata* share of three-fourths of the actual cash value of said property." It might be said here that probably the part of the policy in which the above statement appears limiting, under the condition set forth, the liability to a share of the cash value only, refers to a loss where there is other insurance on the property, but it is contended by the counsel for the company that it applies to all cases and to the case at bar in the adjustment of the loss between the insurer and insured. In this we cannot agree with counsel. Our statute (on this subject see Compiled Statutes, 1893, sections 43 and 44, chapter 43) not only states that where the property shall be wholly destroyed, that the amount written in the policy shall be taken conclusively to be the true value of the insured property, but that it shall also be the true amount of the loss and measure of damages. To give to the provision of the policy we have quoted the force and effect claimed for it would be in direct conflict with the provision of our statutes. This portion of the policy was invalid and could not be enforced. The judgment of the district court is

AFFIRMED.

GEORGE D. MATTISON, APPELLEE, v. CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, APPELLANT.

FILED NOVEMBER 8, 1894. No. 5729.

Parol evidence is incompetent to prove a contemporaneous oral agreement by which it is sought to change or alter the terms of a written contract and the result of which

would be to change the effect of the written contract in a material portion and to insert or read into it a condition or reservation not contained in it, or implied by its terms.

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

W. F. Evans and *C. S. Montgomery*, for appellant.

Beeson & Root, contra.

See opinion for citation of authorities.

HARRISON, J.

September 18, 1891, appellee filed a petition in the district court of Cass county, asking a decree compelling a specific performance by the appellant, the railway company, of an alleged verbal contract stated to have been made on or about the 1st of August, 1890, by the terms of which the petition alleges (we here insert what is conceded by the parties to be a substantially correct statement of the issues joined by the pleadings): "The plaintiff was to convey to the defendant a strip of land 150 feet wide, over and across said northeast quarter of said section 24, for right of way for said railway, and the defendant, in consideration of such conveyance, agreed to pay plaintiff therefor the sum of $500 in cash, and also to construct and maintain in good repair farm crossings across their said line of railway and right of way wherever plaintiff might designate upon said northeast quarter of said section 24." It was alleged in the petition that the plaintiff was the owner of said northeast quarter of said section 24, across which the defendant had located and constructed diagonally from near the northeast corner to near the southwest corner its line of railway, and it was after the location of said line of railway, but before and with reference to the construction thereof, that the contract in question was alleged to

have been made. It was further alleged that the plaintiff had performed the contract on his part; and that "the defendant had entered upon said land and constructed its line of railway across the same upon the land so as aforesaid conveyed to it by plaintiff." It was also alleged that the plaintiff had designated a point for a farm crossing over the said railway and right of way and that he had demanded that the same be constructed and maintained by the defendant, but that defendant had utterly refused "to put in or permit to be put in a crossing at the location designated by the plaintiff as aforesaid on said railway."

The defendant by its answer admitted its corporate capacity; that it was the owner of the railway in question; that the plaintiff was the owner of the lands described, except the portion upon which the railway was constructed, and which had been conveyed by the plaintiff to the defendant, but specifically denied "that it at any time ever promised to or agreed with the plaintiff that it would construct at any place on the road described in plaintiff's petition, or any part thereof, or at any other place, a crossing over said railroad." Further answering the defendant alleged "that during the year 1890 the defendant located its railway over and across the northeast quarter of section 24, township 12 north, of range 10 east, in Cass county, Nebraska; that thereafter, and on the 20th day of August, 1890, the plaintiff herein, George D. Mattison, and Laura Mattison, his wife, sold, in consideration of $500, and by deed of general warranty conveyed unto this defendant all that part of said northeast quarter, described as follows: [Then followed the description of a strip of land 150 feet wide, running through the said quarter section diagonally, as aforesaid, and upon which the railway was constructed, 50 feet lying north of the center of the railway and 100 feet south]; that thereafter the defendant entered upon said strip of land hereinbefore described and conveyed by said George D. Mattison, plaintiff, and his wife, Laura Mattison,

to the defendant as aforesaid and built and constructed its railroad thereon, and has at all times since, and is now operating the same thereover." The defendant further alleged "that thereafter, and on the 31st day of October, 1890, the plaintiff George D. Mattison and his wife, Laura Mattison, in consideration of the sum of $370.50, sold and by a deed of general warranty conveyed to the defendant" an additional strip of land 150 feet wide, adjoining and lying immediately north of the 150-foot strip, across the southwest quarter of the northeast quarter of said section of land, and that at the time defendant's answer was filed it was, and at all times since the conveyance of said strip of land had been, the absolute and unqualified owner of said strips of land. Copies of the said deeds of conveyance of said strips of land were attached to the answer and made a part thereof.

In reply the plaintiff denied "that the sum of $500 was the sole consideration moving to plaintiff for the execution of the deed described in said answer as 'Exhibit A,' but avers the fact to be that a crossing was to be granted to plaintiff as stated in his petition, in consideration of said conveyance, but that it was not set out in said instrument." "Exhibit A," referred to, is the deed of the first strip above mentioned and referred to in answer. Further replying the plaintiff denied that the defendant was "the absolute and unqualified owner of the strip of land described in its answer," but averred "the truth to be that by virtue of the contract between the parties to this suit, as described in the petition, this plaintiff has an easement of a farm crossing over and across said land and railway as set out in the petition."

Exhibit A, attached to the answer, which was one of the deeds executed by appellee and his wife and delivered to the company, reads as follows:

"Know all men by these presents, that we, George D. Mattison and Laura Mattison, husband and wife, of Cass

county and state of Nebraska, in consideration of the sum of five hundred dollars, in hand paid by the Chicago, Rock Island & Pacific Railway Company, a corporation, do hereby sell and convey unto the said railway company, its successors and assigns, the following described premises, situated in the county of Cass and state of Nebraska, to-wit: A strip of land one hundred and fifty feet wide, of which the center line of the route and line of the Chicago, Rock Island & Pacific Railway Company, as the same is now surveyed, staked, and located, is the center, being 50 feet on the north and 100 feet on south side of the center line of said route, over, across, and through the following described tracts of land, as said route and line of said railway passes through the same, to-wit: The northeast quarter of section 24, in township 12 north, of range 10 east, in Cass county, Nebraska; said strip of land is 150 feet wide, being 50 feet on the north and 100 feet wide on the south side of said center line of said railway, as now surveyed, staked, and located by the engineers of said railway company, over, across, and through said real estate, together with all such additional or extra ground out of the lands of the said grantor or grantors, adjoining such strip of land hereby conveyed, as said company may at any time require, to be paid for by said company at the price per acre paid for said strip. And said railway company may, through its agents, employes, servants, or contractors, encroach upon the adjoining lands outside of the limits above mentioned to which said grantor or grantors have title or possession for the purpose of building or constructing its road-bed and railroad and for completing and trimming its cuts and fills, and for all other purposes for the building, constructing, or maintaining its road-bed, or of maintaining its railroad. And said railway company, its successors or assigns, may, at any and all times between the first day of November and the fifteenth day of March of each year, erect and maintain snow fences on the lands now owned by said

grantor or grantors, not more than two hundred feet north or west of the center line of said railroad, and may remove such snow fences at pleasure; but shall only suffer them to remain on the lands of such grantor or grantors during the time herein limited. And we hereby covenant with said railway company that we hold said premises by good and perfect title; that we have good right and lawful authority to sell and convey the same; that they are free and clear of all liens and incumbrances whatsoever; and we covenant to warrant and defend the said premises against the lawful claims of all persons whomsoever. And the said Laura Mattison hereby relinquishes her right of dower in and to the above described premises.

"Signed this 20th day of August, A. D. 1890.

"GEO. D. MATTISON.

"LAURA MATTISON.

"In presence of

"WM. L. WELLS."

Exhibit B, the second deed, was in form the same as Exhibit A, and differed only in that it conveyed another and additional strip of land and recited a consideration of "three hundred and seventy-five and $\frac{50}{100}$," and was executed of a subsequent date.

Before entering into the trial of the case, counsel for appellant filed the following motion: "Comes now the defendant and moves this honorable court for judgment in said case in its favor, for a dismissal of said action at plaintiff's cost upon the pleadings, upon the grounds that it appears from the pleadings that the plaintiff is not entitled to recover in this action any judgment against the defendant." This motion was submitted and overruled, and the case was afterwards tried upon its merits to the court. As a result of the trial a judgment was entered in favor of appellee conforming to the findings of the court and decreeing a specific performance of the alleged oral contract to construct and maintain a crossing over defendant's line

of road, at a point indicated in the decree. From this decree the company has perfected an appeal to this court.

The main contention of appellant is that if such an oral contract existed between the parties as claimed by appellee and upon which this action and the decree accorded him therein were based, prior to the execution of the deed or deeds, it became merged in the deeds, that the final contracts are conclusive of all the prior agreements or conversations, and that evidence of the parol agreement was incompetent and could not be received or allowed to contradict, vary, or modify the contents of the written instruments,—in this case the deeds. The general rule on this subject is thus stated in 1 Greenleaf, Evidence, sec. 275: "Parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument;" and this court in the case of *Delaney v. Linder*, 22 Neb., 274, announced it as follows: "When a contract has been reduced to writing, as a general rule of law verbal evidence is not allowed to be given of what passed between the parties either before the written instrument was made or during the time of its preparation, so as to add to or subtract from or in any manner to vary or qualify the written contract." But general rules of law are, as are all general rules governing or pertaining to the conduct or transactions of men, subject to exceptions, and it is upon the belief that his position or situation, as disclosed in this case, brings him within a true and fair exception to the above rule, that the appellee relied in applying to the court for its aid in enforcing the alleged oral promise on the part of appellant, which he claims was a part of the consideration for the conveyance by him of the right of way over his land. We have been referred by counsel for appellee to the case of *Donisthorpe v. Fremont, E. & M. V. R. Co.*, 30 Neb., 142, as supporting his position in the case at bar. The rule stated in the case cited is that parol evidence is admissible to explain or show the purpose for which a deed

was given. The parol testimony was introduced to show what was intended or meant by the parties by the words of the grant of the right of way to the company by the Donisthorpes over their property. This is not what it is sought to do by the evidence in the case at bar, and we do not think the case cited can be said to be in point, except in so far as it establishes that exceptions to the general rule will be allowed. It has been announced by the courts in some cases that "parol evidence is admissible as to a distinct and collateral agreement, and not part of the contract embodied in the writing, but such evidence must relate to some matter distinct from that contained in the writing." (*Parcell v. Grosser*, 1 Atl. Rep. [Pa.], 909; *Thompson v. Libbey*, 26 N. W. Rep. [Minn.], 1; *Graffam v. Pierce*, 9 N. E. Rep. [Mass.], 819.) But, on the other hand, it is said that oral evidence cannot be received in the absence of fraud or mistake, to show that parties to a written contract stipulated, before the execution of the writing, for something contrary to what is there expressed, or to what is legally implied. (*Hopkins v. St. Louis & S. F. R. Co.*, 29 Kan., 544.) By the evidence of the parol agreement in the case at bar, it was not the object to show a separate, distinct contract from the one contained in the deed, but to show one by which the terms of the deed, as the contract of the parties would be changed by reading into it a reservation or condition by which the appellee would be given a right of a permanent crossing over the right of way of the appellant, not showing the purpose for which the deed was made, but changing the terms of the grant of the right of way, from a full and complete conveyance to one upon which was imposed the servitude of the appellee's right of crossing, thus varying and modifying it in a very material portion. This, we think, was clearly in direct violation of the rule, not only in its terms, but in the reasons upon which it is founded. The evidence was inadmissible and incompetent, and the contract resting, as it

did, in parol, could not be allowed to alter the terms and conditions of the deed. (See *Cornell v. St. Louis, K. & A. R. Co.*, 25 Kan., 613; *Tisloe v. Graeter*, 1 Blackf. [Ind.], 353; *Kellogg v. Richards*, 14 Wend. [N. Y.], 116; *Stull v. Thompson*, 25 Atl. Rep. [Pa.], 890; *Conant v. National State Bank*, 22 N. E. Rep. [Ind.], 250; *Shenandoah V. R. Co. v. Dunlop*, 10 S. E. Rep. [Va.], 239; *Mead v. Norfolk & W. R. Co.*, 15 S. E. Rep. [Va.], 497; *Kelley v. Palmer*, 42 Neb., 423, and authorities cited.) The judgment of the district court is reversed and a decree ordered in this court dismissing plaintiff's action.

REVERSED AND DISMISSED.

LIBERTY INSURANCE COMPANY OF NEW YORK V. LOUIS EHRLICH.

FILED NOVEMBER 8, 1894. NO. 5273.

Erroneous Instructions: REVIEW: HARMLESS ERROR. Where an erroneous instruction has been given, but an examination and consideration of the whole record of the proceedings at the trial of the case in the district court, and more especially the testimony, convinces that the jury were not misled by such instruction to the prejudice of the complaining party, the giving of the defective instruction will not be sufficient reason for reversing the judgment and granting a new trial.

ERROR from the district court of Seward county. Tried below before BATES, J.

Ed. P. Smith, for plaintiff in error.

Norval Bros. & Lowley, contra.

HARRISON, J.

It appears from the petition filed in this case that on March 20, 1890, the defendant in error applied to the agent

of plaintiff in error for and obtained insurance on his household furniture, goods, etc., then being used by him and his family in their home in Seward, and that on the 15th day of May, 1890, the property insured was damaged and a large portion of it destroyed by fire, in the sum of $507, that proof of loss was duly made, and that all conditions of the policy on his part were performed. The prayer of the petition was for judgment against the company in the sum of $507 and interest from September, 1890. The answer of the company admitted its corporate capacity and the issuance of the policy to defendant in error, covering property alleged in the petition, and denied each and every other allegation of the petition. For further answer to the petition it was stated that by the terms of the policy it was expressly provided that in case of fraud or false swearing by the insured touching any matter relating to the insurance or the subject thereof, before or after the loss, the policy should be void; that defendant in error had violated this provision of the policy by falsely and fraudulently claiming and representing to the company under oath that quantities of his household goods and wearing apparel of the value of over five hundred dollars were wholly and completely consumed or destroyed by the fire, when but a small portion of the goods were destroyed or damaged, and not to exceed fifty dollars in value; that defendant in error knew such representations to be false at the time he made oath to them, and they were made with the intent to cheat and defraud the company. The reply filed was, in substance, a denial of the allegations of fraud and false swearing contained in the answer. The issues were tried to the court and a jury, a verdict was returned for defendant in error in the sum of $312.13, for which, after overruling a motion for new trial, the court rendered judgment and the case has been removed to this court by petition in error on the part of the company.

The counsel for the company argues but one of the al-

leged errors in the petition in error and states that he relies upon it alone for a reversal of the judgment of the district court and the granting to the company a new trial, viz., that the trial court gave the following instruction on its own motion: "Under the issues made by defendant's answer and plaintiff's reply, the burden of proof is upon the defendant to prove all the material allegations in the second count of this answer by a preponderance of all the evidence; and if you believe from the evidence that the plaintiff included in his proofs of loss which he furnished to the company articles of property and household goods and wearing apparel of the value of over $500 wholly and completely consumed and destroyed by said alleged fire, when in truth and in fact but a small part only of said goods were destroyed, consumed, or damaged by said alleged fire, and that the damage was not to exceed fifty dollars, knowingly and with intent to defraud the company, knowing that he had no right to so do, and falsely swore to said articles and their value with intent to defraud the insurance company, this would avoid the policy and the plaintiff cannot recover in this suit." This instruction, counsel for the company claim, was erroneous, in that it not only informed the jury that if they believed from a preponderance of the evidence that the defendant in error had made false proofs of loss, claiming therein the destruction of more property than was actually destroyed or damaged, and this knowingly and with the intent to defraud or cheat the company, before the policy would be avoided and their verdict be for the company, that they must further find that the actual damages to the property did not exceed fifty dollars. That the meaning of this instruction was that although the jury might believe that the plaintiff falsely and knowingly made oath to the proofs of loss and with the fraudulent intent alleged, yet if the jury further believed that the damages exceeded fifty dollars, then the false swearing would not affect the

policy or his right to recover. This instruction was clearly open to the criticism urged against it and should not have been given.

We have closely and carefully examined and compared all the evidence in the case as detailed by the witnesses for the parties, and a full consideration of it convinces us that the jury were not misled or the rights of the plaintiff in error prejudiced by the giving of the fourth instruction, but that the verdict of the jury may be said to have responded fairly to the issues in the case and the testimony introduced bearing upon them. We do not think that the evidence established that the defendant in error made oath to proofs which were false, knowingly and with intent to defraud the company, or the fair inference to be drawn from the finding and verdict of the jury, in that it was less in amount than the sum claimed by defendant in error in the proofs or in his testimony, is that the oath to the proofs was false and made with fraudulent intent. The judgment of the district court is

AFFIRMED.

NORVAL, C. J., not sitting.

A. L. HALEY V. STATE OF NEBRASKA.

FILED NOVEMBER 8, 1894. No. 4609.

Intoxicating Liquors: ORIGINAL PACKAGES. Where bottles of intoxicating liquor were each enclosed in a paper wrapper or box, which was sealed with sealing wax, and a number of the paper boxes, each containing a flask of such liquor, were packed in a wooden box by a party in St. Louis, Missouri, and shipped to his agent at Republican City, Nebraska, and the agent opened the wooden box and took the paper boxes in which the flasks of liquor were contained therefrom and sold them separately, *held*, that the wooden box was the "original package" and not the

sealed paper box or wrapper, and bottle therein inclosed, and such a sale was a violation of the provisions of the law of this state regulating the license and sale of malt, spirituous, and vinous liquors.

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

W. S. Morlan, for plaintiff in error, cited: *Leisy v. Hardin*, 135 U. S., 100; *State v. Winters*, 44 Kan., 723; *State v. Coonan*, 48 N. W. Rep. [Ia.], 921; *State v. Fraser*, 48 N. W. Rep. [N. Dak.], 343.

George H. Hastings, Attorney General, for the state, cited: *State v. Chapman*, 47 N. W. Rep. [S. Dak.], 411; *Brown v. State of Maryland*, 12 Wheat. [U. S.], 419 *State v. Shapleigh*, 27 Mo., 344; *State v. North*, 27 Mo., 464; *In re Beine*, 42 Fed. Rep., 546; *In re Harman*, 43 Fed. Rep., 372.

HARRISON, J.

July 14, 1890, an information was filed in the district court of Harlan county, in one count of which the defendant (plaintiff in error) was charged with the unlawful sale of spirituous liquor to one Charles Hecht on the 4th day of July, 1890, in said county. From the record it further appears that on the 13th day of October, 1890, the plaintiff in error appeared in court accompanied by his attorney, and the state being represented by its attorneys, the case was called for trial, a jury was waived and the case submitted to the court on the following stipulated statement of facts:

"That said defendant A. L. Haley, on the 4th day of July, 1890, at Republican City, in Harlan county, Nebraska, did then and there sell to one Charles Hecht one-half pint of spirituous liquors, to-wit, one-half pint of whiskey, without obtaining a license, druggist's permit, or other authority therefor under the laws of the state of Nebraska.

"It is further stipulated that the liquor was sold by the said A. L. Haley, as agent for S. R. Cheadle, of St. Louis, Missouri, he having been appointed such agent by said S. R. Cheadle, as shown by Exhibit A, attached as a part of this stipulation; that the liquor was sold in a half-pint flask, packed in a paper box sealed with sealing wax, and was sold without said paper box being broken, and was shipped from St. Louis directly to Republican City, and in that package was sold directly to said Charles Hecht, and that a number of those paper packages were packed in a wooden box and so shipped in said wooden box, and that this said package was in such wooden box and said wooden box was opened to obtain said paper package therefrom."

Exhibit A is as follows:

"Know all men by these presents, that I, S. R. Cheadle, of the town of St. Joseph, in the state of Missouri, do hereby make, constitute, and appoint Anthony L. Haley, of the village of Republican City, in the state of Nebraska, my true, sufficient, and lawful agent for, and in my name, place, and stead, to sell and dispose of such beer, wine, brandy, whiskey, and other goods and merchandise as I may see fit to ship to him to be sold in said village of Republican City, it being provided and distinctly understood that all goods and merchandise so shipped and sold by said Anthony L. Haley shall be sold only in the original packages in which the same are shipped, and that the said Anthony L. Haley shall not, directly or indirectly, sell or otherwise dispose of any beer, wines, brandy, or whiskey for the period of one year from this date, except such as shall be shipped to him at said village of Republican City by me, and shall in no manner act as agent for any other person or persons, or engage in any other business than as agent for me for the period of one year from this date, dated this 3d day of July, 1890.

"S. R. CHEADLE.

"———, Witness."

From a consideration of the foregoing statement the court adjudged the plaintiff in error guilty as charged in the information, and sentenced him to pay a fine of $100 and costs of the action. Motion for a new trial was filed on behalf of plaintiff in error, which was overruled, and he has duly prosecuted a petition in error to this court. As will be gathered from the foregoing stipulated statement of facts, it is admitted that the sale of the liquor occurred, and that the plaintiff in error had no license or permit from the proper authorities to make such sale. The only question raised and argued by counsel for plaintiff in error is that the sale of the half-pint flask, inclosed in its paper box and the box sealed with wax, was a sale by him, as agent, in the original package in which it had been shipped to him by his principal from St. Louis, Missouri, to Republican City, in this state, and was a sale which was legal and allowable under the law regulating commerce between the states. The bottle of liquor sold was, it appears, packed with other bottles of liquor, similarly inclosed in sealed paper boxes, in a wooden box at St. Louis, the place of shipment, and in the wooden box shipped to and received by plaintiff in error at Republican City, the wooden box being opened and the paper box containing the half-pint of whiskey taken therefrom and sold. The case turns entirely upon the determination of which was the "original package," the wooden box in which the several bottles were packed for shipment, or the sealed paper box in which the half-pint flask of whiskey was enclosed.

In the year 1890 the supreme court of the United States rendered a decision in the case of *Leisy v. Hardin*, popularly referred to as the "Original Package Decision," in and by which the doctrine was promulgated and established that intoxicating liquors could be imported or shipped into any state from any other state, and the importer or shipper could, by himself or agent, so long as the liquors were in the unbroken original package in which they were ship-

ped, sell them, regardless of the provisions of the law of the state into which the liquors were shipped. The case of *Leisy v. Hardin* is reported in 135 U. S., 100, 10 Sup. Ct. Rep., 681, and was by a divided court, there being a dissenting opinion written by Mr. Justice Gray and concurred in by Mr. Justice Harlan and Mr. Justice Brewer. The decision of *Leisy v. Hardin* overruled and set aside what had been considered as the settled doctrine or rule upon the subject involved during a number of years prior to its announcement. The doctrine of the case was accepted by the state courts as authoritative, and followed, and was very quickly adopted, and advantage taken of the privilege it accorded, by parties manufacturers or sellers of liquors; and what, in popular parlance, were known as "original package houses" sprung into existence in many states where prohibitory laws or stringent license provisions had been enacted and were in force. There very soon followed an act of congress called the "Wilson Law" (see act of congress August 8, 1890, Pub. Laws, 51st Congress, First Session, ch. 728), which destroyed the force and effect of the decision in the case of *Leisy v. Hardin*. The act referred to was approved about three months after the announcement of the supreme court's decision. In the meantime quite a number of cases had arisen in the courts of the states where the business of selling in original packages had been established, and the controversies in them had been, by *habeas corpus* or other proceedings, in many instances, transferred to the federal courts, and one of the questions, very often a disputed one, and adjudicated in these cases, was the one by which a definition of what was an original package was sought and necessary to a decision of the particular case. In discussing what is meant by an original package, in the case of *Commonwealth v. Schollenberger*, 27 Atl. Rep. [Pa.], 33, the following language is used: "We have examined the decisions of the supreme court of the United States for a definition of the term 'original package.' It

does not seem, however, to have received, and perhaps at this time is not capable of a precise definition that may be applied to it in all cases. The idea for which it stands is, however, not difficult of apprehension or statement. The methods adopted by manufacturers and importers for packing and preparing goods for transportation by sea or land differ with the differences in the character, bulk, and material of the merchandise itself. The general purpose is to adopt that form and size of package best adapted to the safe and convenient transportation and delivery of the particular class of goods to be moved, because the convenience of the trade will be best subserved thereby. Such packages, put up with a view to the convenience and security of transportation and handling, in the regular course of trade, are the original packages of commerce. If we look at the meaning of the words 'employed,' we are brought to the same conclusion. 'Original' means pertaining to the beginning or origin; the first or primitive form of a thing. 'Package' means a bundle or parcel made up of several smaller parcels, combined or bound together in one bale, box, crate, or other form of package. An 'original package' is such form or size of package as is used by producers or shippers for the purpose of securing both convenience in handling and security in transportation of merchandise between dealers in the ordinary course of actual commerce. Such packages are not always made up by putting smaller packages or bundles together, but may include any form of receptacle that shall hold a fixed quantity; as a barrel of sugar or salt, a bag of coffee, a chest of tea, and the like. The package must not be divided or its unity destroyed. When it is received unbroken from the importer through the custom house, or from the manufacturer by the ordinary channels of transportation, it is within the protection of the interstate commerce doctrine, and the state may not subject it to vexatious delays, appraisement, taxation, or trade restriction. But it has never been held that the im-

porter might subdivide his package and dispose of its several parts in detail. On the contrary, in many cases the United States courts have held that upon such subdivision or breaking of bulk the original package ceased to be such, and the goods became mixed with and indistinguishable from the merchandise already within the state, and therefore subject to state laws. This assigns to each jurisdiction its proper powers. The general government protects the citizens of the several states in the movement of their commodities across state lines for the purpose of commerce. The state regulates the retail trade conducted within its own borders and forbids the sale of such articles to its citizens as it finds to be injurious to them."

In the case of *Keith v. State* and *Rion v. State*, 8 So. Rep., 353, decided by the supreme court of Alabama, it was held: "Where several bottles of liquor, each bottle separately wrapped in paper labeled 'Original Package,' and marked with the name of the importer, are placed in an open box, and shipped therein into the state, the box is the original package." In Rion's case it appeared that the bottles were each wrapped in paper marked "Original Package" and placed in an open box with hay between them, the box marked with the number of bottles it contained and their sizes, and thus packed, they were shipped. In determining which was the original package the court says in the text of the opinion: "Merely labeling each bottle 'Original Package' did not make it one, if it was not really an original package. The term 'to pack,' in its ordinary signification, especially when used in reference to carriage, means to place together and prepare for transportation, as to make up a bundle or bale, and package is a bundle or bale made up for transportation. It may consist of a single article; but when separate articles are placed together and prepared for transportation, in a bundle, or bale, or box, or other receptacle, they do not form as many separate and distinct packages as there are articles, though they may be wrapped

separately. The case, or box, or bale in which separate articles are placed together for transportation constitutes the 'original package' in the commercial sense."

In the case of *In re Harmon*, 43 Fed. Rep., 372, a case in which Harmon, as agent for one Jordan, a citizen of Tennessee, in Mississippi received from his principal by express boxes in which were packed bottles or flasks of whiskey, some holding a pint and others a quart each. The bottles were each inclosed in a paper wrapper or box, and the wrapper sealed with mucilage or sealing wax and were placed in pine boxes which were without covers, being furnished by the express company and to be returned to them when empty. The bottles of liquor were kept in the pine boxes until a customer was obtained, when his purchase of one or more bottles was removed therefrom and delivered. Harmon was informed against, arrested under the state law for making such sales of liquor, convicted, and sentenced to pay a fine and to imprisonment in the county jail, and upon being so imprisoned, appealed to the federal court for a writ of *habeas corpus*, and the court states its conclusion as to what constituted the original package, the pine box or the bottles, in the following language: "Where bottles of whiskey, each sealed up in a paper wrapper and closely packed together in uncovered wooden boxes furnished by an express company and marked 'to be returned,' are shipped from one state to another, the boxes, and not the bottles, constitute the 'original packages' within the meaning of the decisions of the supreme court upon the interstate commerce provision of the national constitution." To the same effect are *Harrison v. State*, 10 So. Rep. [Ala.], 30; *State v. Chapman*, 47 N. W. Rep. [S. Dak.], 411; *Commonwealth v. Swihart*, 138 Pa. St., 629, 21 Atl. Rep., 11; *Smith v. State*, 15 S. W. Rep. [Ark.], 882. To the contrary are the Iowa cases of *State v. Coonan*, 48 N. W. Rep. [Ia.], 921, and *State v. Miller*, 53 N. W. Rep. [Ia.], 330, in which the doctrine announced in *State v.*

Coonan was followed. The rule stated in these cases decided by the Iowa court, and the reasoning employed in them upon which the court bases its decisions, are not so satisfactory or conclusive as to induce us to follow them.

We think the cases herein quoted and cited from the federal and state courts which hold that the box or package in which the importer of the liquors ships them, be it large or small, containing only one bottle or more than one, is the "original package" that the shipper, by his act in making up the package for shipment, determined what it should be, state the correct rule. If he desired it to consist of only one bottle, he could so have constituted it by shipping, in the case at bar, one of the flasks covered as it was alone; if he placed a number of them in a pine box, because of his act, the package which was to be transported when received by his agent could be sold in its condition when shipped, but if opened, then its several parts, if removed from the box, or case, could no longer be considered or sold each as an original package. It follows that the decision of the district court was right and its judgment is

AFFIRMED.

F. H. GILCREST V. HENRY NANTKER.

FILED NOVEMBER 8, 1894. No. 5098.

Deceit: FALSE REPRESENTATIONS: PLEADING. A petition in which was alleged false representations of the kind and disposition of a horse which thereby plaintiff was induced to purchase at a certain price from the defendant was so defective because of an entire failure to aver that damages of any kind or amount had been sustained that, on error proceedings to this court, the judgment on a verdict in favor of the defendant is affirmed.

ERROR from the district court of Buffalo county. Tried below before HAMER, J.

R. A. Moore, for plaintiff in error, contending that the petition is sufficient, cited: *Holcomb v. Noble*, 37 N. W. Rep. [Mich.], 497; *Baughman v. Gould*, 45 Mich., 483; *Convers v. Blumrich*, 14 Mich., 108; *Webster v. Bailey*, 31 Mich., 36; *Busterud v. Farrington*, 31 N. W. Rep. [Minn.], 360; *Mohler v. Carder*, 35 N. W. Rep. [Ia.], 647; *Hawk v. Brownell*, 11 N. E. Rep. [Ill.], 416; *Long v. Clapp*, 15 Neb., 417; *Eldridge v. Hargreaves*, 30 Neb., 638.

Marston & Nevius, contra.

RYAN, C.

This action was tried in the district court of Buffalo county. There was a verdict and judgment in favor of the defendant. It was, in substance, alleged in the petition that the plaintiff claimed of the defendant the sum of $150; that in the summer of 1887 plaintiff purchased of the defendant a horse for the sum of $150; that said horse was purchased for a driving horse, for the use of plaintiff's wife and family, this intended use being well known to the defendant; that the defendant represented that the said horse was a gelding, quiet, gentle, sound, and all right for the use for which it was purchased; whereas in fact, as was well known to said defendant at that time, said horse was not as represented. There was a prayer for judgment in the sum of $150 and costs. There was no allegation that plaintiff had sustained damages, neither was there an averment as to the real value of the aforesaid horse, nor what its value would have been had the representations in regard to it been true. The allegations of the petition were only as above summarized, and a verdict, had it been in plaintiff's favor, would have lacked for its support the very essential averment that damage of any kind or to any amount

had been sustained by the plaintiff. It appears from the record that the district court ruled that plaintiff's motion for a new trial would be sustained, upon his application being made to amend the petition so as to allege a warranty by the vendor of the horse, to the effect that it was sound and all right in every respect, a breach of the warranty, and that the defendant knew the same to be false at the time he made it; provided that the costs of a preceding trial should be taxed to plaintiff. The plaintiff, as the record recites, "relies upon the sufficiency of the petition, declines to amend, and the motion for a new trial is overruled upon the ground that the petition contained only the substance of an action for deceit, upon which there was a conflict of the evidence sufficient to sustain the verdict of the jury for the defendant." Whether or not the reason given for overruling the motion for a new trial was sufficient need not be determined, for plaintiff declined the offer to allow him to amend his petition, because he relied upon its sufficiency. Under these circumstances a reversal of the judgment already rendered would imply that in the district court another trial shall be had upon the averments of the petition as it now stands, notwithstanding the existence of the radical defects already discussed. In the present status of this case our ruling as to the sufficiency of statements in the petition to constitute a cause of action should be the same as ought to have been the ruling of the district court had that petition been attacked by a general demurrer, which clearly must have been sustained. The judgment of the district court is, therefore,

AFFIRMED.

GEORGE W. STONE v. REBECCA S. NEELEY.

FILED NOVEMBER 8, 1894. No. 4427.

1. **Partnership:** PLEADING. An action may be maintained against H. L. S. and G. W. S., partners doing business as S. & S., or against either of them; but to render G. W. S. liable for the acts of H. L. S. there should be averments as well as evidence to establish between them the relation of partners.
2. **Trover and Conversion.** An action for failure to pay over money received by defendant as the agent of plaintiff cannot be maintained upon mere proof of negligence on the part of the defendant in making collection of the money with the detention of which he is sought to be charged in the petition.

ERROR from the district court of Buffalo county. Tried below before HAMER, J.

R. A. Moore, for plaintiff in error.

Greene & Hostetler, contra.

RYAN, C.

In the petition filed in the district court of Buffalo county this cause was entitled "Rebecca S. Neeley, plaintiff, v. H. L. Strong and George W. Stone, defendants." Nowhere in the petition were the defendants described otherwise than above, except in the written contract, which formed the basis of plaintiff's alleged cause of action. This contract was in the following language:

"KEARNEY, NEBRASKA, April 25, 1884.

"To whom it may concern: I hereby authorize Strong & Stone to sell lots 499 and 500, in the city of Kearney, for the sum of ($3,000) three thousand dollars, deducting therefrom such amounts as are necessary to satisfy the claims of Wiley Bros., Robinson Bros., R. L. Downing, and other legal liens that may be upon the property, the

remainder to be accounted for in cash, or satisfactory paper after deducting one hundred dollars for commission. A deed received by Strong & Stone for above property.

"R. S. NEELEY.
"STRONG & STONE."

After the petition had been filed, service of summons was had on defendant Strong, who died before service on Stone. After Strong's death, service by publication was attempted as to Stone, who had become a non-resident of this state. Whether or not jurisdiction was obtained is rendered an immaterial inquiry, by the fact that after a special appearance for the purpose of questioning the jurisdiction of the district court of his person, defendant Stone filed a motion for a more specific statement of plaintiff's cause of action, afterwards demurred, and finally filed an answer, under which he introduced evidence, and asked instructions with a view to defeat a recovery by plaintiff. (*White v. Merriam*, 16 Neb., 96; *Cropsey v. Wiggenhorn*, 3 Neb., 108.)

It is argued that even if the designation "Strong & Stone" should be held to imply the existence of a partnership relation between those individuals, yet that a several action could not be maintained against one or both of them. In *First Nat. Bank of Chicago v. Sloman*, 42 Neb., 350, an opinion prepared by Judge POST has been filed during this term, in which it was held that a petition wherein the defendants are described as M. H. S. and E. H. S., partners doing business as S. Bros., is not an action against the firm named, but will sustain a personal judgment against the defendants therein. It is nowhere in the petition made to appear, however, that Strong and Stone ever were partners. The transactions by reason of which Stone is sought to be held liable were between plaintiff and Strong. To connect Stone with them there should have been averments in the petition disclosing a reason for such liability, either as a partner or otherwise. In brief, the petition charged only the making of the written contract above quoted, that

defendants sold the lots described, and that "after the payment of the claims of Wiley Bros., Robinson Bros., R. L. Downing, and all other liens upon said property, and after deducting $100 for commission due the said defendants for the sale of said property, there remained due and unpaid to the said plaintiff from the said defendants, on account of said contract for the sale of said lots 499 and 500, the sum of $525, together with interest thereon from the first day of June, 1885." A demand for the payment of this sum of $525, with interest, and the refusal on the part of the defendants to comply, were then alleged, following which allegations was a prayer for judgment for said sum and interest thereon from June 1, 1884. There was filed an answer in which these averments of the petition were denied and in which it was alleged that no such firm as Strong & Stone existed when the written agreement was made, and that if there was any liability of the firm of Strong & Stone, said firm had never been sued, and that after the sale of the property to one Robertson and payment of all liens against it, and the commission of $100 and the judgment of the state of Nebraska, the balance was paid over to the plaintiff. Subsequently, by leave of the court, during the trial, there was filed an amendment to the answer, in which were contained the following averments: "That the judgment of the State of Nebraska v. Maria Brown for the sum of $502.88 was a *prima facie* lien on said lots 499 and 500, and that on or about July, 1884, there being a dispute as to the validity of said lien, it was mutually agreed by and between the purchaser of said land and the said plaintiff that the purchaser should retain the $525 in his hands until the validity of said judgment lien was adjudicated and settled in court; that pursuant to said agreement the said purchaser retained and held back the said sum; that the said plaintiff never had the said lien adjudicated and removed; that the said $525 never came into the hands of said Strong & Stone for the

reason above set forth; that the said sum is still retained by said purchaser, and that demand has never been made upon him for the payment of the same."

In the certificate of the clerk of the district court in this case there is reference made to a reply, but none is to be found. When leave was given to file the amendment to the answer first quoted no permission was asked to reply. We cannot, therefore, determine from the record what facts pleaded in the answer as amended were put in issue by reply. It seems, however, from the manner in which testimony was introduced without objection, and in which instructions were asked and given, that the reply was treated as applying to both the answer and the amendment thereto. The rule applicable where no reply is filed, "that each averment of the answer is to be taken as true," should not determine the effect to be given in answer, to which in fact there was a reply which had not been transcribed into the record brought to this court. The evidence of A. H. Connor, counsel for plaintiff in the district court, was that he waited on Mr. Strong in his lifetime and presented this claim; that Mr. Strong never contradicted this claim, but said that he had not yet got the money from Robertson; that the last time witness saw Strong he (Strong) asked witness to wait awhile, as Mr. Robertson had gone away, and that finally suit was brought. Mr. Strong gave plaintiff a memorandum in writing, which seems to have had reference to this transaction. This, however, was excluded when offered in evidence, on the ground that it was part of a transaction had between a person since deceased and plaintiff. In testimony Mr. Robertson stated that he paid to Mr. Strong $460.50, which included the cost of the abstract. This witness also testified that among the liens on the property there was one in favor of the state of Nebraska for $502.88; that, after paying over to Strong the $460.50, witness told Strong that until said judgment was closed up witness would not put any more money into the matter;

that some time after this Mrs. Neeley came and, as witness said, "We had a talk. They would not give a deed until the $500 was paid over to them. The agreement was that that money should be withheld until the judgment was removed, they claiming that it was only a cloud that could be removed at any time." This agreement, witness testified, was made with Mr. Strong, and he thought Mrs. Neeley was present, and that he never got a deed and did not dispose of this property until some time after he had left Kearney, when he sold it to Mr. Moore. In this connection it may be remarked that Mrs. Neeley admitted in her testimony that she thought that by letter she, at the request of Mr. Moore, instructed Mr. Strong to put on record the deed above referred to. She, however, denied any knowledge of the arrangement testified to by Mr. Robertson as to withholding payment until the lien of the aforesaid judgment was removed. She also testified that at the time the above judgment was rendered, Mrs. Brown, the judgment defendant, then owning the property in question, was the head of a family and occupied it as a homestead. The theory of the plaintiff seems to have been that as Strong & Stone were authorized to sell lots 499 and 500 on certain terms, a deed being given them at the same time to enable them to consummate such sale whenever they should secure a purchaser, they were bound to account for the amount fixed as her price whenever the sale was made and the deed delivered. The existence of a judgment against Mrs. Brown, a former owner of the property, seems to have created an impediment to finally closing the sale. There was then a conference between Mr. Robertson, the purchaser, and Mr. Strong, resulting in an agreement that the amount of this judgment should not then be paid, but the delivery of the deed meantime being withheld, this apparent lien should be removed, after which payment should be made of the amount withheld. Pursuant to this agreement Robertson

awaited this removal of the apparent lien. It appears that in a proceeding to foreclose a mortgage to Robertson Bros. by the First National Bank of Kearney, the holder by assignment thereof, R. A. Moore and Buffalo county were made defendants, and that upon issues joined between them the district court of said county decreed that the judgment in favor of the state of Nebraska was not a lien on the premises which Robertson contracted to purchase, because at the date said judgment was rendered said property was the homestead of the judgment defendant. This decree was of date December 21, 1885. There has been no demand of Robertson to pay the money he withheld until the removal of the aforesaid lien was consummated. His own evidence shows that in fact he has never paid it. If Strong & Stone are at all liable it must be for permitting this money to be withheld by Robertson, or perhaps for not collecting it from him. The petition does not present this issue, neither does it contain such averments as would, if proved, render Stone liable for the misfeasance, malfeasance, or nonfeasance of Strong in this regard. That this cause may be tried upon proper issues as to which the evidence may be relevant, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

C. B. BICKEL ET AL., APPELLEES, V. WARREN DUTCHER ET AL., APPELLEES, IMPLEADED WITH ELIZABETH GALLIGHER ET AL., APPELLANTS.

FILED NOVEMBER 8, 1894. No. 5188.

Review: SUFFICIENCY OF EVIDENCE: MECHANICS' LIENS: MORTGAGES. In this case there was presented on appeal no question save that of the sufficiency of the evidence to sustain

the findings of the district court. The proofs upon examination having been found fully to justify the conclusions questioned, the judgment of the district court is affirmed.

APPEAL from the district court of Douglas county. Heard below before WAKELEY, J.

David Van Etten, for appellants.

Howard B. Smith, George W. Covell, Rich, O'Neill & Sears, George F. Brown, J. L. Kaley, L. B. Copeland, and *Bartlett, Crane & Baldrige*, for appellees.

RYAN, C.

The appellees C. B. Bickel & Sons commenced this action in the district court of Douglas county for the foreclosure of a subcontractor's lien on a building erected by the principal contractor, Warren Dutcher, for the appellants Elizabeth and Theodore Galligher. The appellees the Lewis Investment Company and Jane E. Winchester were mortgagees; the other appellees, aside from Warren Dutcher, were subcontractors. The district court established as first liens between the above described parties the mortgage of the Lewis Investment Company and that of Jane E. Winchester. No serious contention is made as to this, and there should be none whatever, for each of these mortgages was filed for record before any right of contractor or subcontractor had its inception.

In the preliminary stages of the controversy in this court there was necessitated the settlement of the question whether or not this court on motion would require the appellees to supply as part of appellant's bill of exceptions the plans and specifications in accordance with which the aforesaid building should have been erected. This motion was overruled. (*Bickel v. Dutcher*, 35 Neb., 761.) There seems to have been referred to all through the trial these plans and specifications by witnesses for the purpose of il-

lustrating oral testimony given, though, as a matter of fact, it is nowhere discoverable when these plans and specifications were formally introduced in evidence. The absence of these plans and specifications is especially important to the appellants' claim for damages on account of the alleged departure therefrom and the therefore improper manner in which the contractor and subcontractors constructed the building, as against which they claim a lien. Notwithstanding this difficulty, a careful examination of the entire record as presented has been made, and all the testimony adduced has been read, with the result that on all points the findings of the district court have been found sustained by the proofs. As there is presented no question but that of the sufficiency of the evidence for this purpose the judgment of the district court is

AFFIRMED.

IRVINE, C., not sitting.

WILLIAM DARST V. WILLIAM G. PERFECT.

FILED NOVEMBER 8, 1894. No. 5620.

Contract: PLEADING. A petition which in ordinary and concise language described the contract upon which suit was brought, and in like language alleged compliance with its terms, is sufficient to sustain a judgment recovered upon the trial of issues framed without a question as to the sufficiency of the description of such contract, or of its performance.

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

Brome, Andrews & Sheean, for plaintiff in error.

Edgar H. Scott, contra, cited: *Farmer v. Gregory*, 78 Ky., 475; *Dutch v. Mead*, 36 N. Y. Super. Ct., 427; *Bacon v. Daniels*, 37 O. St., 279; *Bell v. Offutt*, 10 Bush [Ky.], 638; *Wharton v. Stoutenburgh*, 35 N. J. Eq., 266; *Blight v. Ashley*, 1 Pet. [U. S.], 15; *Brandon Mfg. Co. v. Morse*, 48 Vt., 322; *Costigan v. Mohawk & H. R. Co.*, 2 Denio [N. Y.], 609.

RYAN, C.

The defendant in error based his right of recovery in the district court of Douglas county upon a written memorandum which was set out at length in his petition. In form this writing was a contract whereby defendant in error was employed by plaintiff in error as general manager of a cigar department in Omaha for one year from December 1, 1890, for which compensation was to be made to him at the rate of $1,500 per year. This memorandum, however, was never signed by the plaintiff in error. The defendant in error alleged that this failure to sign was through mere oversight and neglect, and that, nevertheless, he entered upon the performance of his duties under such contract, and received payment of part of what he earned according to the terms above set out. Counsel for plaintiff in error, in their brief, say the only question presented arises upon the following allegations, which, in the original petition, were made just after the history of the transaction summarized as above: "That on or about the first day of April, 1891, the foregoing contract and agreement was, by mutual consent, modified and changed so that the same read in words and figures as aforesaid, with the exception that in place of reading 'the first day of December, 1890,' it read 'the first day of April, 1891,' and in the place of reading 'fifteen hundred dollars per year,' * * * it read 'twenty-five hundred dollars per year.'" Following the language quoted, there was sufficient averments of performance of the con-

tract, as amended, to entitle the defendant in error to payment of $790, the amount for which judgment was ultimately rendered in his favor.

The contention for the plaintiff in error is that this action was brought upon an alleged written agreement, and that to recover for the breach of a written contract it was necessary that proof should be made of the existence of such a contract. By section 92 of the Code of Civil Procedure it is required that the petition shall contain a statement of "the facts constituting the cause of action, in ordinary and concise language, and without repetition." This was done in the petition which we have under consideration, except perhaps that there was a failure to state whether the modification alleged was made orally or by a writing. It is provided by section 125 of the Code of Civil Procedure that "when the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment." There was no motion for a statement of the nature indicated whereby, if it was material, the uncertainty complained of could have been corrected pursuant to a ruling of the county court. Instead of filing such a motion the plaintiff in error answered, and upon a reply being filed, a trial was had, which resulted in a judgment in favor of the defendant in error. It was then too late, by petition in error to the district court, to challenge the insufficiency of the original petition, because therein there had been given no exact description of the contract which formed defendant in error's basis of recovery. The judgment of the district court affirming the judgment of the county court was proper and is, therefore,

AFFIRMED.

IRVINE, C., having presided at the hearing in the district court, took no part in the decision in this court.

OMAHA & REPUBLICAN VALLEY RAILWAY COMPANY v. MARY COOK.

FILED NOVEMBER 8, 1894. No. 5101.

1. **Railroad Companies:** TRESPASSER ON TRACK: PERSONAL INJURIES: NEGLIGENCE: INSTRUCTIONS. In an action against a railway company for personal injuries by it inflicted, the trial court very properly refused to give an instruction requested in which the right of plaintiff to recover was made dependent upon the absence on her part of a very slight want of ordinary care, when there had already been given instructions in which had been clearly explained the nature and effect of negligence on the part of each party to the suit.

2. ———: ———: DUTY OF ENGINEER. Where the plaintiff was injured by a locomotive of the defendant at a place on defendant's track where such plaintiff had no right to be, and where in fact she was a trespasser, the jury were properly instructed that the engineer was under obligations, as soon as he discovered that plaintiff was on the track, to use all possible means and efforts consistent with the safety of his train and any passenger or persons who might be thereon to avoid injuring the plaintiff, and failing so to do would render the company liable.*

3. **Infants:** CONTRIBUTORY NEGLIGENCE: INSTRUCTIONS. In a case wherein the evidence admitted of the application of the principle stated, the trial court properly instructed the jury that the rule of law as to the contributory negligence of a child is that it can only be expected and required to exercise that degree of care and discretion which a child of such age would ordinarily and naturally use and exercise under the circumstances shown in evidence and in the same situation, bearing in mind also the amount of intelligence or want of the same of the child, if any such had been shown by the evidence.

REHEARING of case reported in 37 Neb., 435.

See opinions for statement of facts.

J. M. Thurston, *W. R. Kelly*, and *E. P. Smith*, for plaintiff in error:

The contributory negligence of defendant in error should

*See supplemental opinion, *post*, p. 905.

prevent recovery. (*Baltimore & O. R. Co. v. Depew*, 40 O. St., 121; *Gunn v. Wisconsin & M. R. Co.*, 70 Wis., 203; *McAllister v. Burlington & N. W. R. Co.*, 20 N. W. Rep. [Ia.], 488; *Gaynor v. Old Colony & N. R. Co.*, 100 Mass., 208; *Spicer v. Chesapeake & O. R. Co.*, 12 S. E. Rep. [W. Va.], 556.)

The age of defendant in error does not excuse her negligence. (*Raden v. Georgia R. Co.*, 78 Ga., 47; *Masser v. Chicago, R. I. & P. R. Co.*, 68 Ia., 602; *Twist v. Winona & St. P. R. Co.*, 39 N. W. Rep. [Minn.], 403; *Daniels v. New York & N. E. R. Co.*, 28 N. E. Rep. [Mass.], 283; *Haas v. Chicago & N. W. R. Co.*, 41 Wis., 44; *Norfolk & W. R. Co. v. Stone*, 13 S. E. Rep. [Va.], 432; *Candelaria v. Atchison, T. & S. F. R. Co.*, 27 Pac. Rep. [N. M.], 497; *Messenger v. Dennie*, 5 N. E. Rep. [Mass.], 283; *Morrison v. Erie R. Co.*, 56 N. Y., 302; *Reynolds v. New York C. & H. R. R. Co.*, 58 N. Y., 249; *Wendell v. New York C. & H. R. R. Co.*, 91 N. Y., 420; *Tucker v. New York C. & H. R. R. Co.*, 26 N. E. Rep. [N. Y.], 916; *Miller v. Pennsylvania R. Co.*, 8 Atl. Rep. [Pa.], 209; *Deitrich v. Baltimore & H. S. R. Co.*, 58 Md., 347.)

The only duty the carrier owes to trespassers on its track is that they shall not be injured from the gross, willful, or wanton acts of employes in charge of trains. (*Terre Haute & I. R. Co. v. Graham*, 95 Ind., 286; *Pittsburgh, F. W. & C. R. Co. v. Collins*, 87 Pa. St., 405; *Mulherrin v. Delaware, L. & W. R. Co.*, 81 Pa. St., 367; *Burlington & M. R. R. Co. v. Wendt*, 12 Neb., 80; *City of Lincoln v. Gillilan*, 18 Neb., 117; *Union P. R. Co. v. Adams*, 33 Kan., 427; *Gibson v. City of Wyandotte*, 20 Kan., 158; *Mason v. Missouri P. R. Co.*, 27 Kan., 83; *Annas v. Milwaukee & N. R. Co.*, 67 Wis., 46; *Toomey v. Southern P. R. Co.*, 24 Pac. Rep. [Cal.], 1074.)

The law does not require the engineer or fireman to keep a special watch for trespassers on the track. (*Masser v. Chicago, R. I. & P. R. Co.*, 68 Ia., 602; *Louisville & N. R.*

Co. v. Black, 8 So. Rep. [Ala.], 246; *Omaha & R. V. R. Co. v. Martin*, 14 Neb., 295.)

Those in charge had a right to assume that the trespasser would hear the train and get out of danger. They were not required to check the speed of the train and should not be charged with negligence for failing to do so until they saw that defendant in error was unaware of danger and apparently would not step from the track in time to avoid injury. (*Rigler v. Charlotte & C. A. R. Co.*, 26 Am. & Eng. R. Cases [N. Car.], 392; *Louisville & N. R. Co. v. Black*, 8 So. Rep. [Ala.], 246; *Meyer v. Midland P. R. Co.*, 2 Neb., 319; *Frazer v. South & N. A. R. Co.*, 81 Ala., 185; *Tanner v. Louisville & N. R. Co.*, 60 Ala., 621; *High v. Carolina C. R. Co.*, 17 S. E. Rep. [N. Car.], 79; *Meredith v. Richmond & D. R. Co.*, 13 S. E. Rep. [N. Car.], 137; *Washington & G. R. Co. v. Harmon*, 147 U. S., 571; *Parker v. Wilmington & W. R. Co.*, 86 N. Car., 221; *Dailey v. Richmond & D. R. Co.*, 11 S. E. Rep. [N. Car.], 320; *Craddock v. Louisville & N. R. Co.*, 16 S. W. Rep. [Ky.], 125; *Boyd v. Wabash & W. R. Co.*, 16 S. W. Rep. [Mo.], 909.)

The fourteenth instruction given by the court was erroneous. (*Mobile & M. R. Co. v. Blakely*, 59 Ala., 471; *Bentley v. Georgia Pacific R. Co.*, 86 Ala., 484; *Georgia Pacific R. Co. v. Blanton*, 84 Ala., 154; *Columbus & W. R. Co. v. Wood*, 86 Ala., 164; *Alabama G. S. R. Co. v. McAlpine*, 75 Ala., 113; *Meyer v. Midland P. R. Co.*, 2 Neb., 319.)

A. A. Kendall, contra:

Less care and foresight are exacted of an inexperienced youth than of a person of more mature years. (*Dowling v. Allen*, 88 Mo., 293; 4 Am. & Eng. Ency. Law, p. 43, note 1.)

It was not necessary that the evidence should disclose wanton, willful, or malicious conduct on part of the employes to make the company liable. Want of ordinary

care was sufficient. (*Morris v. Chicago, B. & Q. R. Co.*, 45 Ia., 29; *Brown v. Hannibal & St. J. R. Co.*, 50 Mo., 461; *Burnett v. Burlington & M. R. R. Co.*, 16 Neb., 336; *Candelaria v. Atchison, T. & S. F. R. Co.*, 27 Pac. Rep. [N. M.], 500.)

The fourteenth instruction was a correct statement of the law. (*Keyser v. Chicago & G. T. R. Co.*, 56 Mich., 559; *Meeks v. Southern P. R. Co.*, 56 Cal., 513; *Morris v. Chicago, B. & Q. R. Co.*, 45 Ia., 29; *Brown v. Hannibal & St. J. R. Co.*, 50 Mo., 461; *Locke v. First Division St. P. & P. R. Co.*, 15 Minn, 350; *Burnett v. Burlington & M. R. R. Co.*, 16 Neb., 336; *Masser v. Chicago, R. I. & P. R. Co.*, 68 Ia., 602.)

C. V. Manatt, also for defendant in error.

RYAN, C.

An opinion already filed in this case may be found in 37 Nebraska on pages 435 *et seq.* A rehearing was afterwards granted upon the request of the writer of the first opinion, and upon further argument another submission was had for final judgment in this court. For all practicable purposes the history of the transactions which formed the basis of the action in the district court was fairly stated in the opinion just referred to. The special findings of the jury, each of which was sustained by sufficient evidence, were to the effect that the defendant in error, at the time of the injury, was about thirteen years of age, a girl of ordinary discretion, not deaf to any considerable extent; that just before the accident happened she had left her brother's house to return to that of her father, and went voluntarily upon the right of way of the plaintiff in error and was then and there trespassing, walking between the rails, in the same direction as was moving the train which afterwards struck her; that she did not step outside the rails after the engineer saw her and was in the act of jumping

from the track when the engine struck her; that the whistle sounded but once before she was struck; that the train men in response to the whistle applied the brakes; that the agents of plaintiff in error, by the appliances then and there at their command, after it became apparent that the defendant was walking between the rails unconscious of the fact of the coming train, could have stopped the train before it reached her. The above recapitulation of the facts found is made that the applicability of the instructions given and refused may appear without the necessity of reference to the opinion hereinbefore filed.

The plaintiff in error, by cumulative instructions asked, sought the recognition of various propositions of law. For our purpose a sample of each class will suffice. The twelfth instruction asked and refused was in the following language:

"12. The court instructs the jury that if they believe from the evidence that there was at the time of the happening of the injury upon the part of the plaintiff a very slight want of ordinary care, and that such slight want of ordinary care on her part contributed to the happening of the injury complained of, then you will find for the defendant."

In *Omaha Street R. Co. v. Craig*, 39 Neb., 601, it was said that such expressions as "slight negligence" and "slight want of ordinary care" should never be used in instructions to juries, as such expressions tend to obscure and confuse what should be stated in plain and concise language. On its own motion the court gave proper instructions as to negligence, avoiding the use of the words "slight negligence" and "slight want of ordinary care," a course which, in view of the holdings of this court, was eminently proper.

The fourth instruction asked by the plaintiff in error was in this language:

"4. The court further instructs the jury that it is no evidence of negligence on the part of the defendant that

the engineer or fireman, or any employe of the train, did not discover the plaintiff upon the tracks sooner than she was discovered, for the defendant is not bound, by its employes, to watch out for trespassers upon its tracks; it did not owe trespassers that kind of care."

During the pendency of this case in this court there have been filed two opinions which fully sustain the district court in its refusal to give the above requested instructions. (*Chicago, B. & Q. R. Co. v. Grablin*, 38 Neb., 90, and *Chicago, B. & Q. R. Co. v. Wymore*, 40 Neb., 645.) In connection with criticism of the refusal to give instruction 4 just quoted, complaint is made by plaintiff in error of the 14th instruction given by the court on its own motion. For the reason that the instruction last referred to embodies the view of this court heretofore expressed in the two cases just cited, and is within itself a clear, comprehensive, and accurate statement of the law on this branch of the case, it is quoted in this connection:

"14. You are instructed that the engineer in charge of and running the locomotive and train had a right to expect a clear track at the place where the accident happened, it being where there was no public crossing and where the company had the exclusive right to the use of the track, and not in any city, town, or village, or in a thickly settled portion of the country, or very near any house, and was under no obligations to anticipate that any person would make a foot path or a walk of the road-bed or track; but while the plaintiff had no right on the track, the engineer was under obligations as soon as he discovered that she was on the track to use all possible means and efforts consistent with safety to his train and any passenger or persons who might be thereon to avoid injuring the plaintiff, and failing so to do would render the company liable in this action."

As to the care required of the defendant in error the trial court properly gave the following instructions on its own motion:

"4. You are instructed that the plaintiff was bound to exercise only such care and prudence as might be reasonably expected of a girl or child of her age and capacity under similar circumstances, and that the same degree of care and prudence in avoiding danger is not required of a person of tender years and imperfect discretion as from a person of mature years; and if the jury believe from the evidence that the plaintiff was at the time of the accident of about thirteen years of age, that they must take that into consideration as bearing upon the question of carelessness or negligence on the part of the plaintiff, in connection with her intelligence or brightness, if any has been shown by the evidence in the case.

"5. You are instructed that the rule of law as to the contributory negligence of a child is that it can only be expected and required to exercise that degree of care and discretion which a child of such age would ordinarily and naturally use and exercise under the circumstances as shown in evidence and in the same situation, bearing in mind also the amount of intelligence or want of the same of the child, if any has been shown by the evidence."

This review of the instructions disposes of all the questions raised and not heretofore passed upon by this court, except as to the alleged excess in the amount of the verdict. This was, indeed, for a large sum, and yet it must be borne in mind that the injuries of the defendant in error were very painful in their nature, and from the evidence seem for all time to have rendered her a helpless, dependent cripple. The jury and the trial judge had presented for inspection the maimed foot of the defendant in error, and upon that inspection, and the evidence adduced in connection therewith as to the probability of its permanent character, they concurred in holding the damage not excessive in amount. This concurring estimate we shall not disturb, and the judgment of the district court is

AFFIRMED.

HARRISON, J., having presided on the trial of this case in the district court, took no part in its consideration in this court.

CHARLES N. DIETZ V. CITY NATIONAL BANK OF HASTINGS, NEBRASKA.

FILED NOVEMBER 8, 1894. No. 5400.

1. **Principal and Agent:** UNAUTHORIZED INDORSEMENT OF NOTE. Where it was known to the president of a bank that the indorsement of the name of the payee on a note by one assuming to make such indorsement as the payee's agent, was outside the scope of his powers, such indorsement is not binding on the alleged principal.
2. ———: ———: RATIFICATION. To the ratification of an unauthorized indorsement of his name, knowledge of the act to be ratified must be shown to have been had by the party sought to be charged by the alleged ratification.
3. **Pleading:** AMENDMENT AFTER VERDICT. It is error to permit after verdict an amendment of the petition so as to substantially change the claim made up to that time, especially when such change is not to conform such petition to the facts proved.

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

The facts are stated in the opinion.

Montgomery, Charlton & Hall, for plaintiff in error:

The plaintiff in error cannot be held to have authorized the indorsement sued on. (1 Daniels, Negotiable Instruments, secs. 292, 294; *Gulick v. Grover*, 97 Am. Dec. [N. J.], 728; *Davidson v. Stanley*, 2 Man. & G. [Eng.], 721; *Rossiter v. Rossiter*, 24 Am. Dec. [N. Y.], 62; *Wood v. McCain*, 42 Am. Dec. [Ala.], 612; *Breed v. First Nat. Bank, Central City*, 4 Col., 481; *Union Bank v. Mott*, 39 Barb. [N. Y.],

180; *Paige v. Stone*, 10 Met. [Mass.], 160; *Craighead v. Petterson*, 72 N. Y., 279; *Stamback v. Read*, 62 Am. Dec. [Va.], 648; *New York Iron Mine v. First Nat. Bank, Negaunee*, 39 Mich., 644; *Perkins v. Boothby*, 71 Me., 91; *Sewanee Mining Co. v. McCall*, 40 Tenn., 620; *Mordhurst v. Boies*, 24 Ia., 99; *Bickford v. Menier*, 107 N. Y., 490.)

The plaintiff in error had no knowledge of the note or indorsement. He did not, therefore, ratify the acts of Elsemore. (*Craighead v. Petterson*, 72 N. Y., 280; *Gulick v. Grover*, 97 Am. Dec. [N. J.], 728; *Bohart v. Oberne*, 36 Kan., 284; *Oberne v. Burke*, 30 Neb., 581; *Baldwin v. Burrows*, 47 N. Y., 199; *Roberts v. Rumley*, 58 Ia., 301; *Reynolds v. Ferree*, 86 Ill., 570.)

W. W. Morsman and *M. A. Hartigan, contra:*

A principal who retains the proceeds of a transaction after his attention has been challenged to the same cannot repudiate the agent's acts. He must return the proceeds if he wishes to disaffirm the action of the agent. (*Stewart v. Strawsburger*, 51 How. Pr. [N. Y.], 400; *Sherman v. Smith*, 42 How. Pr. [N. Y.], 199; *Ely v. James*, 123 Mass., 36; *Bacon v. Johnson*, 56 Mich., 182; *Hutchings v. Ladd*, 16 Mich., 493; *Mundorff v. Wickersham*, 63 Pa. St., 87; *Watterson v. Rogers*, 21 Kan., 529; *Ogden v. Machand*, 29 La. Ann., 61.)

The ruling of the court permitting amendment of the petition was without error. (*Griffith v. Short*, 14 Neb., 261; *O'Dea v. Washington County*, 3 Neb., 121; *Struthers v. McDowell*, 5 Neb., 493; *State v. Russell*, 17 Neb., 203; *Pomeroy v. White Lake Lumber Co.*, 33 Neb., 240; *Freeman v. Webb*, 21 Neb., 160; *Klosterman v. Olcott*, 25 Neb., 382.)

RYAN, C.

Charles N. Dietz was sued in the district court of Adams county as indorser on a note of Mary E. Swick and Peter Swick for $286.30, made on May 23, 1890, to C. N. Dietz.

The indorsement on the said note on which Dietz was sought to be held liable was in these words: "C. N. Dietz, per M. L. Elsemore." Dietz was served with summons in Douglas county; his co-defendants, served in Adams county, made default, upon which judgment was rendered against them. The question litigated was the liability of Dietz upon the indorsement set out: first, because of Elsemore's authority to use the name of Dietz in that way, and second, because of after-ratification by Dietz of Elsemore's act in making such indorsement. During all the transactions Mr. Dietz was a resident of Omaha. In the year 1885 he opened a branch lumber yard at Hastings and placed Mr. Elsemore in charge of it as his agent. The authority conferred upon this agent was to sell lumber and perform the duties which would naturally devolve upon him as manager of a branch lumber yard at Hastings. Mr. Bostwick at that time was president of the City National Bank at Hastings, the defendant in error. The testimony of Mr. Dietz as to his conversation with Mr. Bostwick at that time stands uncontradicted, and was in substance as follows: I advised Mr. Bostwick in regard to his [Mr. Elsemore's] authority here; that Elsemore's business was that of an agent in my branch business here, and in order to do the business easier I should need to have a bank account and that Elsemore would deposit the money in that bank and transmit to me and make checks for the purpose of transmitting funds to me and pay any local expenses here; that was merely done for convenience. In the fall of 1888 I told him, Mr. Bostwick, I would have no use of this bank at any time by the way of accommodation of money, and that my account must never be overdrawn. I never gave Mr. Elsemore any authority under any circumstances or in any manner to sign or indorse my name to a note. It is very clear from this evidence that Mr. Elsemore had no authority to indorse the name of Mr. Dietz and thereby render him liable as indorser.

2. As to the matter of ratification, Mr. Dietz testified that the first time he ever heard Elsemore had discounted paper in his name was when this suit was brought and the summons served; that he had never heard that the Swick note had been taken and discounted at the bank before this suit was commenced; that Mr. Elsemore had never given him any property, either directly or indirectly, at the time this suit was commenced; that the first knowledge witness had that Elsemore had ever signed his name to the note was obtained at the time he came down to Omaha, in August, 1890, and told him that he had so signed his name. Mr. Elsemore was sworn as a witness, and testified in relation to this part of the transaction that he told Mr. Dietz that there had been certain moneys of his used in connection with the Dry Pressed Brick Company's business and in other respects, and that at the solicitation of Mr. Bostwick, Mr. Elsemore had signed the name of Mr. Dietz to certain notes then in the City National Bank of Hastings, being guarantied by Mr. Bostwick that they should be taken care of. These notes were of the amount of about $11,000 or $12,000. In addition to the above, this witness testified that at the same interview with Mr. Dietz he told him that between $5,000 and $6,000 of Mr. Dietz's money had been collected and applied to the brick company's business, as well as the $11,000 or $12,000 just referred to. Mr. Elsemore proposed to protect Mr. Dietz so he would not lose any money on account of his (Elsemore's) dealings with Bostwick. For this purpose Elsemore testified that he made a bill of sale in blank of the brick company's property, which was in his name, and made a deed in blank of his own real estate, which was of the value of $10,000 to $12,000. He also transferred to Mr. Dietz certain insurance policies and stock. Afterwards, at the request of Mr. Bostwick, the name of C. H. Paul was inserted in the blanks in the deeds and all the instruments. Mr. Bostwick suggested the name of Paul for this purpose because Paul was a stockholder in the City

National Bank, and witness believed also that Mr. Bostwick said he was a director. Mr. Bostwick agreed to straighten the matter up and pay to the attorney of Mr. Dietz the amount Mr. Dietz's book showed was short. Witness had present a statement of this amount and Bostwick agreed to pay it. The brick company owed witness on the books something over $9,000 and Bostwick was a member of that company. The members of the brick company were Harrison Bostwick, C. H. Paul, Mr. Knowlton, and witness. In a conversation had with Mr. Bostwick the latter said he knew that witness had used moneys from the business of Mr. Dietz, and that he knew that the brick company owed Mr. Dietz about $6,000. In addition to the evidence just set out there was more of the same character which it is deemed unnecessary to quote. There is no evidence which tends to show that Mr. Dietz knowingly received anything of value on account of his indorsement on the note in question. In so far as we are able to discover from the testimony, the proceeds of the note were used in the business of the Pressed Brick Company, a corporation in which Mr. Bostwick was jointly associated with Mr. Elsemore, and in which Mr. Dietz had no interest, and concerning which, and its transactions, he was entirely ignorant. The proceeds of the note indorsed nominally went into the account of Mr. Dietz, but were withdrawn by his agent for his own use independently of the business with which he had been intrusted by Mr. Dietz. This was with the knowledge and acquiescence of Mr. Bostwick, the president of the City National Bank. To this bank must be imputed the knowledge possessed by its president that Mr. Elsemore was diverting the proceeds of sales as well of lumber as of notes belonging to Mr. Dietz to the transaction of business in which he had no interest. If Mr. Dietz had received the proceeds of this note after it had been discounted without his authority, and his acceptance of such proceeds had been with knowledge of the act of

his agent, there would have been such a ratification as perhaps would have bound him upon this indorsement, but the evidence shows nothing of the kind. The indorsement clearly was made for the purpose of enabling the agent to misappropriate the money of his principal, and the president of the bank with which the discount was made was fully cognizant of this fact and was a party to the agent's malfeasance. There has since been no ratification with knowledge by Mr. Dietz of this transaction or of the series of transactions of which this particular one was part. He has simply received whatever his quondam agent has been able to turn over to him on the indebtedness of $11,000 or $12,000, and the discount of notes of $5,000 or $6,000 in amount by way of payment or security. We know of no rule of law which would forbid a party receiving payment or security of indebtedness justly due him through the unfaithfulness of his agent, under pain of impliedly thereby being held to have ratified all his agent's misdeeds whether known to him or not. On this branch of the case there was no evidence to sustain the verdict because of a ratification on the part of Dietz.

3. About a month after the return of the verdict, but before the rendition of the judgment, leave was given the defendant in error to amend its petition so as to claim the amount of the Swick note from Mr. Dietz on account of moneys had and received to his use. This amendment was improperly allowed, for it changed substantially the nature of the claim made up to that time. As has already been stated, and perhaps reiterated, the proceeds of the discount of these notes were used in the business of the Pressed Brick Company. If any party was liable as for money had and received it was the Pressed Brick Company and not Mr. Dietz, for this money was not received or applied to his use. For the reason that there was no evidence upon which the verdict can be sustained, the judgment of the district court is

REVERSED.

HORACE C. METCALF v. ANNA S. BOCKOVEN.

FILED NOVEMBER 8, 1894. No. 5840.

Partnership: EVIDENCE OF EXISTENCE. The evidence in this case examined, and *held* to support the finding of the district court "that the partnership alleged to have been entered into between Horace C. Metcalf and Anna S. Bockoven, as set out in the amended petition, and denied by her answer, never existed."

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

Edgar H. Scott, for plaintiff in error, cited: *Shortel v. Young*, 23 Neb., 408; *Oberfelder v. Kavanaugh*, 29 Neb., 431; *Mewman v. Morris*, 52 Miss., 405; *Plumer v. Lord*, 5 Allen [Mass.], 460; *Preusser v. Henshaw*, 49 Ia., 41; *Scott v. Conway*, 58 N. Y., 619; *May v. May*, 9 Neb., 22; *Third Nat. Bank of Buffalo v. Guenther*, 123 N. Y., 568; *Rankin v. West*, 25 Mich., 195; *Guttman v. Scannell*, 7 Cal., 459; *Newan v. Morris*, 52 Miss., 405; *German Ins. Co. v. Hyman*, 34 Neb., 704; *Bitter v. Rathman*, 61 N. Y., 513; *Tillman v. Shackleton*, 15 Mich., 447; *Duprey v. Sheak*, 57 Ia., 361.

Abbott & Caldwell and *Breckenridge, Breckenridge & Crofoot, contra*, cited: *Wilson v. Loomis*, 55 Ill., 352; *Carter v. Martin*, 15 S. W. Rep. [Ky.], 663; *Payne v. Thompson*, 44 O. St., 192; *Bowker v. Bradford*, 140 Mass., 521; *Artman v. Ferguson*, 73 Mich., 146; *Wortman v. Price*, 47 Ill., 22; *Hyde v. Frey*, 28 Fed. Rep., 819; *Longdale Iron Co. v. Pomeroy Coal Co.*, 34 Fed. Rep., 448.

RAGAN, C.

Horace C. Metcalf brought this suit in equity in the district court of Douglas county against Anna S. Bockoven and Alfonso J. Metcalf. He alleged in his petition, in sub-

stance, that about the 1st of August, 1890, he and Mrs. Anna S. Bockoven entered into a copartnership under the name and style of Bockoven & Metcalf, for the purpose of engaging in the wholesale fruit business at Grand Island, Nebraska, and that shortly after the firm removed to Chicago, Illinois; that for the purpose of carrying on said business he loaned to the firm its entire capital stock, amounting to the sum of $3,000, for which it was agreed he should be reimbursed; that in addition to the capital so advanced he, at divers times, had loaned to the said firm other large amounts of money which the firm agreed to repay him with interest at ten per cent per annum; that in April, 1891, it was agreed between himself and Mrs. Bockoven that the partnership existing between them should be dissolved, and that Mrs. Bockoven and Alfonso J. Metcalf should continue the firm business under the same firm name; that in pursuance of this agreement the copartnership between him and Mrs. Bockoven was in fact dissolved, and Alfonso Metcalf and Mrs. Bockoven continued the business under the old firm name, agreeing to become jointly and severally liable to him for the amounts of money due him from the old copartnership. He prayed that an accounting might be had between himself and Mrs. Bockoven and Alfonso Metcalf, and that he might have judgment against them, and each of them, for the amount found due him. The answer of Mrs. Bockoven, so far as material here, was a general denial of all the allegations of Metcalf's petition. Preparatory to ordering an accounting in the case the district court tried the issue made by the pleadings as to the existence of the copartnership alleged to exist between Horace Metcalf and Mrs. Anna S. Bockoven, and between Mrs. Anna S. Bockoven and Alfonso J. Metcalf, and on these issues the court found: "That the partnership alleged to have been entered into between Horace C. Metcalf and Anna S. Bockoven, as set out in the amended petition, and denied by her answer, never existed. I do further find that

no copartnership ever existed between the defendant Anna S. Bockoven and her co-defendant, Alfonso J. Metcalf. I do further find that the plaintiff, by reason of the non-existence of such copartnership between himself and said Anna S. Bockoven, is not entitled to any accounting as prayed." And thereupon the district court rendered a judgment dismissing Horace C. Metcalf's action. To reverse this judgment the plaintiff prosecutes proceedings in error to this court.

The principal argument of the plaintiff in error is that the finding by the district court, that no copartnership existed between Horace Metcalf and Mrs. Bockoven, is not supported by, and is contrary to, the evidence. We shall not stop to quote this evidence, nor any considerable part of it, but we have not the slightest doubt that the findings made by the district court are the only ones that could have been correctly made under the evidence. There is no evidence in this record which even tends to show that Mrs. Bockoven and Alfonso Metcalf were ever copartners in any business whatever. The evidence does show that some time in September, 1890, Mrs. Bockoven's husband, C. A. Bockoven, entered into a copartnership with Horace Metcalf; that they were to be partners in carrying on a produce business, and the evidence shows that for some reason Mr. Bockoven did not wish his name used in this copartnership, and by the agreement between him and Metcalf, he, Bockoven, was to be Metcalf's partner and do business with him as a partner, but in the name of his, Bockoven's, wife; and that they did so conduct the partnership business. The articles of copartnership between Horace Metcalf and Mr. Bockoven recite that a copartnership had been entered into between Horace Metcalf and Mrs. Bockoven. These articles of copartnership are signed by Horace Metcalf in person and Anna S. Bockoven by her husband. At the time this article of copartnership was signed and entered into, Horace Metcalf had never seen Mrs. Bockoven. She never

put any money into this business nor expended any time towards its conduct. In fact she had nothing whatever to do with the business. It was not her business and she had no interest in it. It was the business and copartnership of her husband and Horace Metcalf, although her husband's part of the business was conducted in her name. That fact, however, did not make her the partner as between her and Horace Metcalf. Horace Metcalf and Mr. Bockoven might have agreed that their copartnership business should be conducted in the name of Lorenzo Crounse, and he might have known and consented to that arrangement, and yet as between him and Horace Metcalf and Mr. Bockoven he would not have been their partner. We are not called upon in this case to pass upon the question as to whether a married woman has the power to enter into a copartnership agreement with her husband or another person; nor are we called upon to determine whether Mrs. Bockoven, by permitting her name to be used as a partner in this copartnership between Horace Metcalf and her husband, thereby estopped herself from asserting that she was not a partner of Horace Metcalf as against the creditors of this firm. This question is not before us. She certainly is not estopped from showing the actual facts in the case as against Horace Metcalf. He never made any contract of copartnership with Mrs. Bockoven. He did not rely upon the property of Mrs. Bockoven or her especial fitness for conducting a produce business at the time he made this contract of partnership with her husband. He never loaned the firm any money on the faith and credit of Mrs. Bockoven's name or property. This entire arrangement between Horace Metcalf and C. A. Bockoven is apparently a very poorly disguised scheme by which C. A. Bockoven and Horace Metcalf attempted to enable the former to engage in business and shield the profits arising from such business from his creditors. But whatever money or property that at any time belonged to the firm of Metcalf & Bockoven, which

was not the property of Metcalf, was none the less the property of Mr. Bockoven. The judgment of the district court is

AFFIRMED.

IRVINE, C., not sitting.

E. W. JEFFRES V. E. F. CASHMAN ET AL.

FILED NOVEMBER 8, 1894. NO. 5532.

Review. Where the errors assigned and argued here are that the trial court erred in giving and refusing to give certain instructions, and it appears from the evidence that the verdict returned by the jury and the judgment pronounced thereon by the district court are the only ones that could have been rightfully returned and pronounced, this court will not examine the errors assigned. *Everett v. Hobleman*, 15 Neb., 376, reaffirmed.

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

J. C. Heald, *J. R. Swain*, and *G. C. Wright*, for plaintiff in error.

T. J. Doyle and *M. B. Gearon*, *contra*.

RAGAN, C.

This is an action of replevin for a span of mules, a wagon, and a set of double harness, brought in the district court of Greeley county by Elias W. Jeffres against E. F. Cashman. Cashman had a verdict and judgment, and Jeffres brings the case here for review.

The facts as disclosed by the bill of exceptions are: That Cashman bought this property from one Farrell and paid him for it, but he did not at once take the property from

Farrell's possession. A day or two after Cashman purchased the property one Gillespie, without the consent, knowledge, or permission of Cashman, obtained possession of this property, and mortgaged it to Jeffres to secure the payment of a promissory note which it appears Gillespie had given to Jeffres. Soon after this Cashman learned that Gillespie was in possession of the property and had mortgaged it to Jeffres, and he, Cashman, at once took the property from Gillespie, and thereupon Jeffres brought this action, claiming a special ownership of the property by reason of the chattel mortgage made by Gillespie.

The errors assigned and argued by counsel for plaintiff in error in their brief relate to instructions given and refused by the district court. We shall not consider these errors, nor any of them, because the verdict rendered by the jury and the judgment pronounced thereon by the district court are the only ones that could have been rightfully returned and rendered under the evidence in the case. The plaintiff in error could not possibly have been prejudiced by any instruction given or refused by the district court, and if the court erred in giving or refusing to give any instruction in the case, so far as the plaintiff in error is concerned, it was error without prejudice. Such error would offer no reason for reversing the judgment. (*Everett v. Hobleman*, 15 Neb., 376.) And a new trial will not be granted because the court erred in its instructions to the jury where the verdict returned and the judgment rendered are the only ones that could have been rightfully returned and rendered under the evidence. (*Mann v. Welton*, 21 Neb., 541.) Gillespie had neither title to, nor lien upon, this property, nor did he have any right to the possession of it, and hence he could convey no interest in this property or any lien thereon to Jeffres by the chattel mortgage. The judgment of the district court is

AFFIRMED.

HARRISON, J., not sitting.

WILLIAM R. WRIGHT ET AL., APPELLANTS, V. LAFAYETTE GRIMES, APPELLEE.

FILED NOVEMBER 8, 1894. No. 5095.

Action to Quiet Title: REVIEW OF JUDGMENT: SUFFICIENCY OF EVIDENCE. The evidence in this case examined, and found to support the finding of the district court, and the decree is affirmed.

APPEAL from the district court of Johnson county. Heard below before BROADY, J.

T. Appelget and *C. K. Chamberlain*, for appellants.

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

RAGAN, C.

On the 13th day of August, 1890, William R. Wright and Sytha Phillips brought this suit in the district court of Johnson county against Lafayette Grimes et al. In their petition Wright and Phillips set out that they were the owners of the following described real estate, situate in Johnson county, Nebraska, to-wit: The west half of the southwest quarter of section 25, and the southeast quarter of the southeast quarter of section 26, all in township 6 north and range 9 east of the 6th P. M.; that they were the owners of said land by inheritance from one Hiram J. Wright, to whom the lands were patented by the United States government in 1861; that the defendant Grimes claimed title to said lands under and by virtue of a tax deed dated November 24, 1874; they alleged that said tax deed was void for numerous reasons assigned in the petition; they prayed for an accounting of the rents, profits, taxes, and interest and improvements on said land, and offered to pay whatever the court might find to be due Grimes by reason thereof, and prayed that said tax title

might be canceled, and that the title to said lands might be confirmed and quieted in them, the said Wright and Phillips. Grimes, in his answer to this petition, alleged, in substance, that Wright and Phillips had brought against him, in the district court of Johnson county, a suit in all respects similar to the one at bar, on the 8th of December, 1888, and that on the 26th day of December, in said year, he had compromised and settled said case with them by paying them $410 in cash, and that they had then and there executed and delivered to him a quitclaim deed of all their interests in said lands; that said deed was duly witnessed, acknowledged, and recorded, and that at the same time the said Wright and Phillips had voluntarily dismissed the said action brought by them December 8, 1888, and he prayed that the title to said lands as against the said Wright and Phillips might be quieted and confirmed in him. To this answer Wright and Phillips replied, admitting the execution and delivery of the deed of December 26, 1888, the bringing of the suit December 8, 1888, and its dismissal by them, and the receipt from Grimes of the said sum of $410 as a consideration for the execution of said quitclaim deed; but they alleged that said dismissal of said action and the said quitclaim deed were procured by false and fraudulent representations made to them by Grimes, his agents and attorneys, and relied upon by them, the said Wright and Phillips, and but for which said false and fraudulent representations they would not have executed said deed and dismissed said suit. The district court found and decreed the issues in favor of Grimes, and Wright and Phillips bring the case here on appeal. The evidence on which the district court acted was very conflicting, but after a careful consideration of it we cannot say that the finding made by the district court is unsupported by the evidence, and for that reason the decree is

AFFIRMED.

PETER BURMOOD V. FARMERS UNION INSURANCE COMPANY.

FILED NOVEMBER 8, 1894. No. 6778.

1. **Mutual Insurance:** RECOVERY OF ASSESSMENTS: DEFENSE: AUDITOR'S CERTIFICATE. In a suit by a mutual insurance company organized under the laws of this state against one of its members for assessments levied against him to pay losses of the insurance company, the fact that the auditor of the state had refused the insurance company a certificate of authority to continue doing business in the state is not a defense, as the refusal of the auditor was only a prohibition upon the insurance company from taking new risks.

2. ———: ———: CONTRACTS WITH OTHER COMPANIES. Neither is it a defense to such an action that the directors of the mutual company had made a contract with another insurance company whereby it was agreed that the mutual company should use its influence with its members to induce them to insure their property in another insurance company, and agreed to surrender to its members, who should do so, their insurance and membership contract.

3. ———: ———: ———. Whether the directors of a mutual insurance company had any authority to make such contract, not decided.

4. **Cancellation of Mutual Insurance Contract Upon Request of Member of Company.** A membership and insurance contract between a mutual insurance company and one of its members provided that the insurance contract might be canceled at the request of a member by his paying all assessments against him to date of such request, together with a cancellation fee of $2, and surrendering to the insurance company the membership insurance contract. A member surrendered his insurance contract and paid the cancellation fee, but neglected to pay an assessment due from him at the date of surrendering his insurance contract. *Held*, That the insurance and membership contract remained in force.

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

See opinion for statement of the case.

W. H. Thompson, for plaintiff in error.

J. H. Randall, contra:

The refusal of the auditor of public accounts to issue to the company a certificate cannot be pleaded by a member as a defense to an action for an assessment. (*Wilmington & R. R. Co. v. Reid*, 13 Wall. [U. S.], 266; *Dartmouth College v. Woodward*, 4 Wheat. [U. S.], 642; 3 Parsons, Contracts [7th ed.], sec. 533; *Union P. R. Co. v. United States*, 99 U. S., 402; *Commonwealth v. Essex Co.*, 13 Gray [Mass.], 239; *Miller v. State*, 15 Wall. [U. S.], 498; *Shields v. Ohio*, 95 U. S., 324; *Green v. Biddle*, 8 Wheat. [U. S.], 84; *Sinking Fund Cases*, 99 U. S., 737; *Calder v. Bull*, 3 Dal. [U. S.], 388.)

The contract with the other company was no defense to the action. (*Hoyt v. Thompson*, 19 N. Y., 217; 1 Beach, Private Corporations, secs. 232, 237; *United States Bank v. Dandridge*, 12 Wheat. [U. S.], 112.)

The plaintiff in error could not require the company to cancel the policy without paying the amount due on the assessments. He is liable for the amount due. (*Sands v. Hill*, 42 Barb. [N. Y.], 651; *Neeley v. Onondaga County Mutual Ins. Co.*, 7 Hill [N. Y.], 51; May, Insurance [2d ed.], sec. 67; *Alliance Mutual Ins. Co. v. Swift*, 10 Cush. [Mass.], 434; *American Ins. Co. v. Woodruff*, 34 Mich., 6; *Farmers Union Ins. Co. v. Wilder*, 35 Neb., 572.)

RAGAN, C.

The Farmers Union Insurance Company (hereinafter called the "Insurance Company") was a mutual insurance company organized under chapter 43, Compiled Statutes, 1893. Peter Burmood became a member of said Insurance Company, and on his application therefor the Insurance Company issued to him a contract of insurance, in and

by which it agreed to insure his property in the sum of $2,250 against loss or damage by fire, lightning, etc., for a term of five years from the 3d day of January, 1889. In consideration of this contract of insurance Burmood agreed to pay to the Insurance Company the sum of $67.60 in twenty assessments, not more than four of such assessments to be payable in any one year, nor a greater amount than twenty-five per cent of the above named premium to be assessed in any one year. The contract of insurance also provided that it might be canceled at the request of Burmood by his paying all assessments up to the date of such request, together with $2 as a cancellation fee, and surrendering the insurance policy or certificate of membership. The Insurance Company brought this suit in the district court of Hall county against Burmood to recover the balance of the premium promised by him to be paid in consideration of his membership in the company and of the contract of insurance issued by the Insurance Company indemnifying him against loss or damage to his property. The Insurance Company had a verdict and judgment, and Burmood brings the case here on error.

All the errors assigned and relied upon here for a reversal of the judgment may be considered under three heads.

1. It appears that in February, 1892, the auditor of state refused the Insurance Company a certificate of authority for continuing the business of insurance in the state of Nebraska. The refusal of the auditor to permit the Insurance Company to do business in the state of Nebraska subsequent to the 1st of January, 1892, while it prohibited the Insurance Company from taking new risks, was not a prohibition on the Insurance Company's collecting assessments and premiums from its members for the purpose of paying losses that had or might thereafter occur on business already done, and consequently the action of the auditor of state is not a defense to Burmood in this action.

2. About the time that the auditor of the state refused the Insurance Company a certificate for taking risks and doing business in the state of Nebraska the directors of the Insurance Company entered into an agreement with the Continental Insurance Company. By the terms of this agreement it agreed to give the Continental Insurance Company a list of the agents in the employ of the Mutual Company in Nebraska, with their post-office addresses, and it agreed to use its influence in order to have its members insure their property in the Continental Insurance Company, that company agreeing to carry the insurance at three per cent, and in case any member of the Insurance Company should avail himself of the privilege of insuring his property with the Continental Insurance Company, then such member's premium and his contracts held by the Insurance Company were to be surrendered to him. We are not called upon in this case to decide whether the Insurance Company, or its board of directors, had any authority to enter into this contract with the Continental Insurance Company. Burmood did not avail himself of the opportunity of insuring his property in the Continental Insurance Company and then taking up his contract with the Insurance Company of which he was a member. Notwithstanding the contract made with the Continental Company the Farmers Union Insurance Company continued to exist. Its contracts with its members, and the agreements of the members with the company and with each other remained wholly unaffected by this agreement; and the making or the existence of the contract between the Insurance Company and the Continental Company cannot be pleaded by Burmood as a defense to this action.

3. On the 9th day of July, 1892, Burmood surrendered his policy to the Insurance Company, and paid to it a cancellation fee of $2, and he now insists that on that date he ceased to be a member of the company; that the contract between him and the company was then and there rescinded,

and that therefore he is not liable in this action. But this defense must also fail. Under the contract between the Insurance Company and Burmood, if Burmood wished to cancel such contract and be relieved from any liability thereon, it was only necessary for him to surrender the policy to the company and pay the Insurance Company a cancellation fee of $2; but he was also required by the policy to pay all assessments made against him up to date. At the time Burmood surrendered his policy to the Insurance Company there were assessments due against him and unpaid of $6.60, which assessments he has never paid. The contract of insurance, then, has never been canceled; and if a loss had occurred to the property of Burmood at any time prior to the date of the rendition of the judgment herein, January 5, 1894, the company would, so far as the existence or non-existence of the contract is concerned, have been liable for such loss. This contract is a mutual one; not one that can be rescinded at the whim of either party thereto, but can only be rescinded or canceled in the manner provided by its terms. Mr. Burmood having failed to pay the assessments due against him at the time he surrendered his policy and paid the cancellation fee, the policy was not canceled. There is no error in the record and the judgment of the district court is

AFFIRMED.

JOHN W. CONNOR ET AL. V. OMAHA NATIONAL BANK.

FILED NOVEMBER 8, 1894. No. 5801.

Foreign Voluntary Assignments: VALIDITY: ACTION TO RECOVER DEPOSIT: RIGHTS OF ASSIGNEES. One France, a citizen of Wyoming, made an assignment there for the benefit of his creditors. At the date of the assignment he had on deposit to his credit, and subject to his check, $—— in a bank of this state. The day after the assignment the bank applied the

money it held on deposit to the discharge of the unmatured notes of France held by it. The assignment law of Wyoming provided that an assignment for the benefit of creditors should be in writing, subscribed and acknowledged by the assignor, and before taking effect filed and recorded in the office of a probate judge; that within twenty days after making an assignment the assignor should make an inventory, verified by his affidavit, of his assets, liabilities, debtors, and creditors, and file the same with the probate judge; that "an assignment for the benefit of creditors is void against creditors of the assignor * * * unless it is recorded, and unless the inventory required is filed * * * within twenty days after the date of the assignment." The assignees of France sued the bank in a court of this state for the money he had on deposit therein at the date he made an assignment, and on the trial failed to prove that France, within twenty days after making such assignment, made and filed the inventory required by the Wyoming statute. *Held*, That the assignees were not entitled to recover, as the failure of the assignor to make and file, within twenty days, the inventory required by the law, rendered the assignment absolutely void.

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

John L. Webster, for plaintiffs in error.

Hall, McCulloch & English, contra.

RAGAN, C.

On the 16th day of March, 1888, one James France, of Carbon county, Wyoming, made there a general assignment for the benefit of his creditors, naming John W. Connor and William R. Brown, assignees. At the date of this assignment France had on deposit to his credit, and subject to check, in the Omaha National Bank the sum of $6,196.40. On the 17th day of March, 1888, the bank applied the money it held on deposit belonging to France to the payment and discharge of two notes held by it against France, which were not then due. On the 31st day of January, 1890, the assignees of France brought this suit in the district court of Douglas county against the

Omaha National Bank to recover the said sum of $6,196.40, which France had on deposit in said bank to his credit at the date he made said assignment for the benefit of his creditors. The case was tried without the intervention of a jury, and resulted in a finding and judgment in favor of the bank, and the assignees prosecute proceedings in error here.

In view of the conclusion we have reached, it becomes unnecessary to consider all the questions presented and argued by the able counsel in their briefs filed herein.

The assignment law of Wyoming was introduced in evidence on the trial of the case, and is in the record. Section 92 of this law provides that an insolvent debtor may, in good faith, execute an assignment of all his property to one or more assignees for the benefit of his creditors. By section 97 of said law it is provided that an assignment for the benefit of creditors must be in writing, subscribed by the assignor or by his agent thereto authorized by writing; must be acknowledged, or proved and certified, and before the same shall be in force, must be filed and recorded in the office of the probate judge of the proper county. Section 100 of the law is as follows: "Within twenty days after an assignment is made for the benefit of creditors, the assignor must make and file in the manner prescribed by section 102 a full and true inventory showing: (1) All the creditors of the assignor; (2) the place of residence of each creditor, if known to the assignor; if not known, the fact must be so stated; (3) the sum owing to each creditor, and the nature of each debt or liability, whether arising on written security, account or otherwise; (4) the true consideration of the liability in each case and the place where it arose; (5) every existing judgment, mortgage or other security for the payment of any debt or liability of the assignor; (6) all the property of the assignor at the date of the assignment, which is exempt by law from execution; and (7) all of the assignor's property at the date of the as-

signment, both real and personal, of every kind, not so exempt, and the incumbrances existing thereon, and all vouchers and securities relating thereto, and the value of such property, according to the best knowledge of the assignor." Section 101 of the law provides that the assignor shall make an affidavit, and file the same with the inventory required by section 100, in which affidavit he shall state that such inventory is just and true according to the best of his knowledge. Section 102 provides: "An assignment for the benefit of creditors must be recorded, and the inventory required by section 100 filed with the probate judge of the county in which the assignor resided at the date of the assignment, or if he did not then reside in this territory, with the probate judge of the county in which his principal place of business was then situated, or if he had not then a residence or place of business in this territory, with the probate judge of the county in which the principal part of the assigned property was then situated." Section 104 of the law is as follows: "An assignment for the benefit of creditors is void against creditors of the assignor, and against purchasers and incumbrancers in good faith and for value, unless it is recorded and unless the inventory required is filed pursuant to this chapter within twenty days after the date of the assignment."

Under the issues made by the pleadings in this case, in order for the assignees to recover therein it was necessary for them to prove that France made an assignment for the benefit of his creditors; that it was in writing and subscribed by him or his agent; that it was acknowledged or proved and certified, and filed and recorded in the office of the probate judge of said Carbon county; and it was also necessary for him to prove that within twenty days after France made the assignment, that he made and filed the inventory as required by section 100 of the act. The assignees proved on the trial that France had made an assignment to them for the benefit of his creditors; that

they, the assignees, had accepted the trust. The original deed of assignment was produced and read in evidence on the trial of the case. If France ever made the inventory required by section 100 of the assignment act quoted above, it was not offered on the trial. The only evidence upon the subject was that of a deputy county clerk of said Carbon county, and was as follows:

Q. Mr. Henderson, do you know of an inventory being prepared and filed at any time within twenty days after the 16th day of March, 1888?

A. I do.

Q. Do you know who wrote up that inventory?

A. I do.

Q. Who wrote it?

A. Myself and a gentleman by the name of Mr. Smith.

If it can be said that this evidence was sufficient to establish that an inventory was made and filed by France as required by section 100, it still falls far short of establishing that France, within twenty days from the date he made the assignment for the benefit of his creditors, made and filed the inventory required by section 100. The question then is whether the making and filing, within twenty days from the date of the assignment by France, of the inventory required by section 100 was essential to the validity of such assignment. We think it was. Section 104 of the assignment law of Wyoming expressly declares unless such inventory is made and filed within twenty days after the date of the assignment that the assignment shall be absolutely void. In *Mather v. McMillan*, 60 Wis., 546, it was held that the failure of an assignor to make and file a correct inventory and list of creditors within ten days after the execution by him of a voluntary assignment, rendered such assignment absolutely void under a statute which provided that "'a failure to make and file such inventory and list shall render such assignment void.'" But it is argued by counsel for the assignees that their assignor

was not required by the law to make and file the inventory by said section 100 until within twenty days after the date of the assignment, March 16; and that as the bank appropriated the money of France on the 17th of March and before his notes to it matured and nineteen days before the time expired in which France could file an inventory, the bank cannot now insist upon the failure of France to file an inventory as a defense to this action. We cannot agree to this argument. Whether the bank rightfully or wrongfully appropriated to its use the money which France had on deposit is not the question. These assignees could not recover the money without showing that France had made a legal and valid assignment; and since the making and filing of the inventory required by the law was necessary to the validity of the assignment, the assignees could not recover without proving the making and filing of such inventory. The evidence produced in the district court did not establish that France had made a valid assignment for the benefit of his creditors, and the burden of proving this was upon the assignees; and in the absence of evidence establishing the fact that France had made an assignment to these assignees for the benefit of his creditors, and that such assignment was valid under the laws of the state of Wyoming, the assignees were not entitled to recover. The judgment of the district court was right and is

AFFIRMED.

M. RANDALL V. CARL M. PERSONS.

FILED NOVEMBER 8, 1894. No. 5418.

1. **Replevin:** PLEADING AND PROOF. In replevin, as in all other actions, the evidence should correspond to the allegations in the pleadings; and where a plaintiff in replevin bases his right to

the possession of the property claimed by reason of a special ownership therein or lien thereupon, he should set out in his petition the facts with reference to such special ownership or lien. *Haggard v. Wallen*, 6 Neb., 271, reaffirmed.

2. **Allegata et Probata:** VARIANCE: REPLEVIN. A litigant cannot plead one thing and prove another. He cannot plead that he is the absolute owner of property and satisfy such plea by proving that he simply has a lien upon it; nor can he plead that he is entitled to the possession of property by virtue of a lien upon it and satisfy such plea by proving that he is the absolute owner of the property.

3. **Chattel Mortgages:** LIEN: TITLE TO PROPERTY. The legal title to property pledged by a chattel mortgage remains in the mortgagor until divested by foreclosure proceedings and sale in pursuance of law; and until the title of the mortgagor is thus divested the mortgagee has merely a lien upon the property. *Musser v. King*, 40 Neb., 892, reaffirmed.

4. **Replevin:** CHATTEL MORTGAGE AS EVIDENCE OF OWNERSHIP. A plaintiff in replevin pleaded that he was the absolute owner and entitled to the immediate possession of the property replevied. The defense was a general denial. To make his case plaintiff introduced in evidence a chattel mortgage executed to him on the property. *Held*, Irrelevant under the issues.

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

M. Randall and *Darnall & Kirkpatrick*, for plaintiff in error.

Charles G. Ryan, contra.

RAGAN, C.

This is an action of replevin brought in the district court of Hall county by Carl M. Persons against M. Randall. Persons alleged in his petition that he was the owner of and entitled to the immediate possession of the property replevied, the same being "an office chair." The answer of Randall was a general denial. Persons had a verdict and judgment, and Randall brings the case here for review.

The evidence in the bill of exceptions establishes, and tends to establish, the following facts: Persons sold the property and other property to one Meth, taking the latter's note for the purchase price of the property and a chattel mortgage thereon to secure the payment of the note. This mortgage, or a copy of it, was duly filed in the office of the county clerk of Hall county, where the property was situate. Persons afterwards sold and indorsed Meth's note to a bank in Grand Island, and the note not being paid at maturity, the bank sued Meth, and Persons as an indorser thereon, and obtained judgment against them for the amount of the note in suit. Persons then paid the amount of this judgment and interest to the bank, and he and Meth entered into an agreement, the substance of which was that the contract of sale of the property between Meth and Persons should be and was rescinded, the title to the property reinvested in Persons, and Meth was to pay Persons a small sum of money. The property, however, was not at this time removed from the place of business or office of Meth, where it was when the agreement between him and Persons was made. Soon after this time an execution was levied upon this property by one of Meth's judgment creditors, and the property in controversy, and other property, was, by the consent of Meth and the execution creditor, sold to Randall, he paying the agreed price thereof to the attorney of the execution creditor. We say that the evidence in the record establishes, and tends to establish, the foregoing facts, for the evidence as to nearly all of these facts was conflicting.

1. On the trial to the jury Persons, against the objection of Randall, was permitted to read in evidence to the jury the note and chattel mortgage executed by Meth to him upon the property in controversy, and this is the first error assigned here. It is to be remembered that Persons, in his petition, alleged in himself an absolute ownership of this property. The legal title to property pledged by a chattel

mortgage remains in the mortgagor until divested by foreclosure proceedings and sale in pursuance of law, and until the title of the mortgagor is thus divested, the mortgagee has merely a lien upon the property. In replevin, as in all other actions, the evidence should correspond to the allegations in the pleadings; and where a plaintiff in an action of replevin bases his right to the possession of the property claimed by reason of a special ownership therein or lien thereupon, he should set out in his petition the facts with reference to such special ownership or lien. (*Haggard v. Wallen*, 6 Neb., 271; *Musser v. King*, 40 Neb., 892.) The note and chattel mortgage, then, introduced in evidence in this case were irrelevant under the issues made by the pleadings, and did not tend to prove Persons' case.

Throughout the trial counsel for Persons laid great stress upon the fact of the existence of record of the chattel mortgage on this property made by Meth; and there is evidence in the record which tends to show that Randall had actual knowledge of the existence of this mortgage, but whether he had such actual knowledge, he was bound by the notice which the record imparted, and of course could not be an innocent purchaser of this property as against the holder of said chattel mortgage, if in force. There is no doubt but that the admission in evidence of the note and chattel mortgage was error. The difficulty in the case is to determine whether this error was prejudicial to Randall. There is evidence enough in the record, if believed by the jury, to sustain a finding that Persons was the absolute owner of this property at the time he brought this suit by virtue of the contract between him and Meth, by which the sale of the property to the latter was rescinded; but we cannot say certainly whether the verdict of the jury, that "at the time of bringing said action the said plaintiff was entitled to the possession of said property," was based upon their finding that the absolute title to the property was in Persons by reason of the said contract of rescission between him and

Meth, or whether the jury's verdict was predicated upon the note and chattel mortgage introduced in evidence. For that reason we think the admission in evidence of the note and chattel mortgage was prejudicial error. If Mr. Persons made the contract with Meth, which he alleges he did, rescinding the sale of the property previously made to Meth, then, of course, that operated as a satisfaction of the note and mortgage, as the note had been reduced to judgment, and was then owned by Persons; and if Mr. Persons based his title to this property upon its repurchase from Meth, it is difficult to understand why he insisted upon also claiming possession of the property by virtue of the note and chattel mortgage. The two theories were inconsistent. If he owned the property, as he pleaded he did, the chattel mortgage had nothing whatever to do with the case. If he did not own the property and claimed special ownership in it by virtue of the chattel mortgage, then he should have pleaded the facts, and apprised the defendant of just what his claims on the property were; and had he done so, then all his testimony as to his being the absolute owner of the property because of the said contract of rescission of its sale made between him and Meth would have been irrelevant under the issues. A litigant cannot plead one thing and prove another. He cannot plead that he is the absolute owner of property, and satisfy such plea by proof that he simply has a lien upon it; nor can he plead that he is entitled to the possession of property by virtue of a lien upon it and satisfy such plea by proof that he is the absolute owner of the property. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

HARRISON, J., not sitting.

L. LETITIA COCHRAN V. WARREN COCHRAN ET AL.

FILED NOVEMBER 8, 1894. NO. 5174.

1. **Alimony:** JURISDICTION OF COURTS. A court of equity will entertain an action brought for alimony alone, and will grant the same, although no divorce or other relief is sought, where the wife is separated from the husband without her fault.
2. **The district courts** of this state, being courts of general equity jurisdiction, are not limited in the exercise of such jurisdiction by statute.
3. **Husband and Wife:** ACTION FOR ALIMONY: PLEADING. A husband deserted his wife and minor children in the state of Wisconsin, where they resided, took up his abode in this state and became a citizen thereof, and procured a divorce from his wife on the grounds of desertion, obtaining service on her by publication. The wife had no knowledge of the divorce proceedings until after the date of the decree. Two years after the date of the divorce the wife brought suit in equity against the husband for alimony. *Held*, (1) That the action was not brought under, nor governed by, section 46, chapter 25, Compiled Statutes of 1893, nor by section 602 of the Code of Civil Procedure, but was a separate and independent action based on the legal obligation of the husband to support his wife and children; (2) that the petition stated a cause of action for alimony, although it contained no allegation that the wife and children were in destitute circumstances or in actual need of support.
4. **Our divorce laws** are liberal and should be liberally construed; but they are not designed for, and should not be used to enable designing husbands, without cause, to legally discard their wives whether domiciled in this or other states, or to escape the performance of their marriage contracts.
5. **Amount of Alimony.** There is no fixed rule for determining what portion of a husband's estate should be decreed to his wife for alimony. The amount should be just and equitable, due regard being had for the rights of each party, the ability of the husband, the estate of the wife, and the character and situation of the parties.
6. **In estimating the value of a husband's property for determining the amount of alimony** that should be

awarded the wife, the court should take the value of the husband's estate at the date of the rendition of the decree for alimony.

7. **The value of property acquired by a husband after obtaining a decree of divorce** from his wife by exchanging for it other property which he owned at the time of obtaining such divorce should be taken into consideration by the court in determining the amount of alimony to which the wife is entitled.

8. *Smith v. Smith*, 19 Neb., 706, *Earle v. Earle*, 27 Neb., 277, and *Smithson v. Smithson*, 37 Neb., 535, followed and reaffirmed.

APPEAL from the district court of Douglas county. Heard below before WAKELEY, J.

The facts are set forth in the opinion.

Bartlett, Crane & Baldrige and *Allen, Robinson & Reed*, for plaintiff:

The courts have general equity powers under the common law to set aside decrees on the ground of fraud, and parties are not limited to the remedy provided by the statutes. The action is not barred. (*District Township of Newton v. White*, 42 Ia., 613; *Bowen v. Troy Portable Mill Co.*, 31 Ia., 461; *Partridge v. Harrow*, 27 Ia., 97; *Whitcomb v. Whitcomb*, 46 Ia., 437; *Wisdom v. Wisdom*, 24 Neb., 551.)

It was not necessary to proceed in the same cause in which the fraudulent decree was obtained. (*Edson v. Edson*, 108 Mass., 590; *Harrison v. Harrison*, 19 Ala., 499; *McQuigg v. McQuigg*, 13 Ind., 234.)

Section 82 of the Code, providing for opening judgments rendered upon constructive service, has no application to actions for divorce. (*O'Connell v. O'Connell*, 10 Neb., 390; *Lewis v. Lewis*, 15 Kan., 181; *McJunkin v. McJunkin*, 3 Ind., 30; *Gilruth v. Gilruth*, 20 Ia., 225.)

A decree of divorce procured on service by publication, through fraud, may be set aside by a court of equity. (*Horn v. Queen*, 4 Neb., 108; *Roggencamp v. Dobbs*, 15 Neb.,

621; *Adams v. Adams*, 51 N. H., 588; *Weatherbee v. Weatherbee*, 20 Wis., 526; *Singer v. Singer*, 41 Barb. [N. Y.], 139; *Boyd's Appeal*, 38 Pa. St., 241; *Hardenburg v. Hardenburg*, 14 Cal., 656.)

An action to set aside and modify a decree of divorce to the extent of granting alimony may be maintained even after a divorce is granted. (*Earle v. Earle*, 27 Neb., 277; *Crugom v. Crugom*, 64 Wis., 253; *Cook v. Cook*, 56 Wis., 220; *Richardson v. Wilson*, 8 Yerg. [Tenn.], 67; *Cox v. Cox*, 19 O. St., 512; *M'Karracher v. M'Karracher*, 3 Yates [Pa.], 56.)

On the question of alimony we cite the following authorities: *Dickerson v. Dickerson*, 26 Neb., 322; *Smith v. Smith*, 19 Neb., 706.

W. J. Connell and *B. F. Cochran*, for defendants:

The decree is wrong in requiring payments of alimony to continue until the death of plaintiff. (1 Am. & Eng. Ency. Law, 483, 484.)

Where the wife acquiesces in the decree she should not be allowed alimony. (*Rouse v. Rouse*, 47 Ia., 422.)

Alimony cannot be allowed out of property acquired after divorce. (*Van Orsdal v. Van Orsdal*, 67 Ia., 35; *Kamp v. Kamp*, 59 N. Y., 212.)

Power to modify a judgment of divorce does not exist independent of statute. (*Mitchell v. Mitchell*, 20 Kan., 665.)

RAGAN, C.

On the 17th day of December, 1886, Mrs. L. Letitia Cochran (hereinafter called Mrs. Cochran) brought this suit in equity in the district court of Douglas county against Warren Cochran, Beriah Cochran and wife, Elmer G. Cochran and wife, and Katie Cochran. The substance of Mrs. Cochran's petition was as follows: That she was married to Warren Cochran in the state of Wisconsin on the 13th of March, 1867, and from that time until Novem-

ber, 1883, they had lived and cohabited together as husband and wife; that as the fruit of such marriage there were born to them two children, a boy and a girl, aged nineteen and seventeen years, respectively, at the time of the filing of said petition; that in November, 1883, and for several years continuously prior thereto, the residence and domicile of Mrs. Cochran, her husband, and said children was and had been the city of Oshkosh, in the state of Wisconsin, at which place Mrs. Cochran was in November, 1883, and had been since to the date of filing said petition, engaged in teaching school in the normal school of said state; that in 1883 Warren Cochran left his home in Oshkosh, Wisconsin, for the purpose of visiting the state of Nebraska and there investing some money in real estate speculations, and visiting his children (by a former wife), then residing in said last named state; that when Warren Cochran left Mrs. Cochran and her children in Oshkosh, in November, 1883, it was simply for a temporary purpose, and with the intention of returning as soon as he had completed his business and visit in the state of Nebraska; that at said time, November, 1883, Mrs. Cochran was under contract as a teacher in the state normal school in the state of Wisconsin, and could not accompany her husband to the state of Nebraska, and he did not solicit her or her children to accompany him, and did not express any desire that they should do so; that after Warren Cochran reached the state of Nebraska he formed the intention of procuring a divorce from Mrs. Cochran in the courts of Nebraska, secretly and fraudulently, and without notice to her; that in furtherance of said purpose Warren Cochran, on the 20th of May, 1884, brought a suit in the district court of Douglas county against Mrs. Cochran for a divorce, alleging as grounds therefor that Mrs. Cochran had willfully abandoned him, Warren Cochran, without just cause, for the period of two years immediately preceding said 20th day of May, 1884; that Warren Cochran brought said suit against Mrs. Cochran,

designating her by the name of "L. Letitia Cochran," and that she had never been known by that name; that she at all times had performed and discharged her duties to Warren Cochran as a dutiful, chaste, obedient, and faithful wife to the best of her ability, and that the allegation made by Warren Cochran in his petition for a divorce against her, namely, that she had willfully abandoned him without just cause, was wholly false, and known by Warren Cochran to be false; that such allegation in said petition was fraudulently made by said Warren Cochran to impose on the jurisdiction of the district court of Douglas county, and secretly and fraudulently to procure a decree of divorce from her, Mrs. Cochran, without affording her any opportunity to appear and defend the same; that in said petition for divorce Warren Cochran alleged that he was at that time, and for more than two years prior thereto had been, a *bona fide* resident of the state of Nebraska, and for more than six months immediately preceding the filing of said petition had been a resident of said Douglas county, in said state of Nebraska; that such allegations of Warren Cochran were false, and were made for the fraudulent purpose of conferring jurisdiction on the district court of Douglas county to hear and determine the said divorce suit brought by Warren Cochran against Mrs. Cochran; that at the time Warren Cochran brought said divorce suit, and for five years immediately prior thereto, he had been a *bona fide* resident of and domiciled in, the state of Wisconsin; that Warren Cochran filed in said divorce suit an affidavit setting forth that Mrs. Cochran was a non-resident of the state of Nebraska, and obtained service on her by publication; that such notice of the pendency of said divorce suit was published in the *Nebraska Watchman*, a paper then published in the city of Omaha, in said Douglas county, but of limited circulation; that Warren Cochran well knew at that time, and at all times, that Mrs. Cochran resided in the city of Oshkosh, Wisconsin; that such proceedings were had in

said divorce suit instituted by said Warren Cochran that the district court of Douglas county, on the 14th of July, 1884, entered a decree of divorce therein in favor of said Warran Cochran as prayed for by him in his said petition; that no personal service of summons in said suit was ever made on Mrs. Cochran, and she did not appear in said case in person or by attorney, for the reason that she had no notice of said suit; that by the said decree of divorce no alimony was awarded to Mrs. Cochran, nor any decree made respecting the custody of the two minor children; that at the date of said decree of divorce Warren Cochran was the owner of the following described real estate, situate in Douglas county, Nebraska, to-wit: Lot 27, being part of the southwest quarter of the southwest quarter of section 21, in township 15 north, and range 13 west of the 6th P. M., hereinafter called "tax lot 27;" the west half of the northeast quarter of the southwest quarter of section 4, in township 15 north, and range 13 west of the 6th P. M., hereinafter called the "twenty-acre tract;" and lots 3 and 4, in block 19, in the city of Crete, in Saline county, Nebraska, hereinafter called the "Crete property;" that said real estate was of great value; that for the purpose of cheating and defrauding said Mrs. Cochran out of her rights in said property Warren Cochran had caused said real estate to be conveyed to Beriah Cochran and Elmer G. Cochran, his sons by a former wife, and that said sons held said real estate in trust for the said Warren Cochran. The prayer of Mrs. Cochran's petition was that the said decree of divorce procured by Warren Cochran against her "be set aside and held fraudulent and void to the extent and to the end that the plaintiff may be restored to her rights of property in all of the estate of the said defendant Warren Cochran;" and she prayed for a judgment for $20,000 against Warren Cochran as alimony, and that the same might be made a lien upon the above described real estate, and that such real estate be decreed to belong to

Warren Cochran and held in trust by Beriah and Elmer G. Cochran for his use and benefit and in fraud of her rights. The answer of the defendants Warren Cochran, Beriah Cochran and wife, and Elmer G. Cochran and wife, so far as material here, admitted the marriage of Warren Cochran and Mrs. Cochran, the procuring of a divorce by Warren Cochran from Mrs. Cochran in the district court of Douglas county, July 14, 1884, and traversed all the other allegations of the petition. A default was rendered against Katie Cochran and she has no further connection with the case. The district court, on the 15th day of May, 1891, rendered a final decree in the case, in and by which it awarded Mrs. Cochran alimony as follows: $500 to be paid within three months, $500 within nine months, $500 within fifteen months, and $500 within twenty-one months from the date of the decree; and it awarded her a further sum of $250 per year, during her life, to be paid in semi-annual installments of $125 each on the first days of July and January of each year. The court further found and decreed that the real estate hereinbefore described as the twenty-acre tract was the property of Warren Cochran, and held in trust for him by the defendant Elmer G. Cochran; and that the real estate hereinbefore described as tax lot 27 was the property of Warren Cochran. From this decree all parties, except Katie Cochran, have appealed.

We will first dispose of the appeal of Warren Cochran. His counsel rely upon three arguments to reverse the decree rendered against him:

1. The first argument is, in effect, that an action for alimony or maintenance cannot be maintained in this state except as an incident to divorce proceedings, and that as Mrs. Cochran in her petition did not pray for a divorce the district court had no jurisdiction of the subject-matter of the suit. In other words, the argument is that the equity jurisdiction of the district courts of the state is limited by

statute; and that as no statute exists which expressly authorizes a suit for alimony or maintenance except as an incident to divorce proceedings, therefore the district court was without jurisdiction.

In *Cox v. Cox*, 19 O. St., 502, the facts were: A husband deserted his wife in Ohio, where both parties, up to the time of the desertion, were domiciled. The wife then brought suit for a divorce and alimony on the ground of the desertion. The husband appeared and answered, and set up as a defense to the wife's suit a decree of divorce obtained by him against her in another state. Of the pendency of this latter proceeding the wife had no actual notice, and the only jurisdiction the court had of her person was by constructive service. The court held that the domicile of the wife in Ohio remained unaffected by the desertion of her husband, and that the decree of divorce which he had procured in another state was no defense to her petition for alimony. White, J., in the opinion says: "The question therefore is whether the *ex parte* decree can be made available, not merely to effect a dissolution of the marriage, but to defeat the right of the petitioner to the alimony which the statute, upon the facts as they exist in regard to the husband's desertion, intended to provide for her? We think the decree ought not to have such effect. In arriving at this conclusion we make no distinction between a decree rendered, under the circumstances of this case, in a foreign and one rendered in a domestic forum. In either case, to give to a decree thus obtained the effect claimed for it would be to allow it to work a fraud upon the pecuniary rights of the wife. Such a result, in our opinion, is rendered necessary by no principle of comity or public policy."

Graves v. Graves, 36 Ia., 310, was an action by a wife domiciled in the state of New York against the husband residing in Iowa for alimony and maintenance. The wife in her petition alleged her marriage to the defendant in the state of New York, their removal soon after to the state of

Wisconsin, where they resided until May, 1869, and that she then, at her husband's request, had returned to the state of New York, where she had since remained; that the fruit of such marriage was a daughter, then aged about two years; that her husband had failed to support her and her child. To this petition the husband set up as a defense that in March, 1871, he had obtained from the plaintiff a divorce in the district court of Polk county, in the state of Iowa. The reply to this answer by the wife was that such decree of divorce was obtained by fraud; that the court had no jurisdiction of the parties, either by residence or notice. The district court rendered a judgment in favor of the wife for alimony, and the husband appealed, and the supreme court said: "A court of equity will entertain an action brought for alimony alone, and will grant the same, though no divorce or other relief is sought, where the wife is separated from the husband on account of conduct on his part justifying the separation." To the same effect see *Galland v. Galland*, 38 Cal., 265; *Whitcomb v. Whitcomb*, 46 Ia., 437; *Platner v. Platner*, 66 Ia., 378.

In *Earle v. Earle*, 27 Neb., 277, the wife brought suit in the district court of Douglas county against the husband for alimony and maintenance without a prayer for divorce. She alleged in her petition her marriage to the defendant; that the issue of said marriage was one child; that on or about the 1st day of January, 1879, her husband had sent her from him, and had since refused to permit her to return and refused to contribute anything to her support and maintenance. To this petition the husband demurred on the ground that the petition did not state facts sufficient to constitute a cause of action. The district court sustained the demurrer and dismissed the case, and the wife appealed. REESE, C. J., speaking for the court, said: "The question presented is whether or not an action for maintenance and support can be maintained in this state when not coupled with a petition for a divorce;" and the court held:

"Courts of general equity and common law jurisdiction are not necessarily limited in the exercise of such jurisdiction to the provisions of the statutes. The law of the land having made it the legal duty of a husband to support his wife and children, courts of equity within this state have the power, in a suit by the wife for alimony and support, to enforce the discharge of such duty without reference to whether the action is for a divorce or not."

This question was ably discussed by POST, J., in *Smithson v. Smithson*, 37 Neb., 535. The petition in that case alleged that the defendant therein, the plaintiff's husband, in the year 1878 procured a decree of divorce from the plaintiff by means of fraud and perjured testimony; that at that time plaintiff resided in the state of Pennsylvania; that the only service upon her was by publication in a local newspaper, and that she was not aware of the whereabouts of her husband, and had no knowledge of said action or decree until the time of bringing the action, about eleven years after. The prayer of the petition was to vacate and annul the decree of divorce procured by her husband against her and for a decree of divorce and alimony. The question discussed in the case was whether the right to vacate judgments and decrees was included within the general equity powers of the court, or whether the jurisdiction of the court in that respect was prescribed and limited by statute, and the court held: "It is not the object of the Code to abolish existing remedies in cases where no provision is made therein for the prosecution of actions. Cases involving substantial rights which are clearly outside the provision of the Code may be prosecuted in accordance with the practice previously recognized in courts of common law and equity." It was further held that the petition in the case stated a cause of action, and that the remedy by petition for a new trial under the provisions of the Code was inadequate.

These cases are decisive of the point under consideration.

We think they are sound law and good sense and we accordingly adhere to them.

2. Section 46, chapter 25, Compiled Statutes, 1893, provides: "No proceedings for reversing, vacating, or modifying any decree of divorce, except in so far as such proceedings shall affect only questions of alimony, property rights, custody of children, and other matters not affecting the marital relations of the parties, shall be commenced unless within six months after the rendition of such decree; or, in case the person entitled to such proceedings is an infant, a person of unsound mind, within six months, exclusive of the time of such disability." Section 602 of the Code of Civil Procedure provides: "A district court shall have power to vacate or modify its own judgments or orders, after the term at which such judgment or order was made: First—By granting a new trial of the cause, within the time and in the manner prescribed in section three hundred and eighteen. Second—By a new trial granted in proceedings against defendants constructively summoned, as provided in section seventy-seven. Third—For mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order. Fourth—For fraud practiced by the successful party in obtaining the judgment or order. Fifth—For erroneous proceedings against an infant, married woman, or person of unsound mind, where the condition of such defendant does not appear in the record, nor the error in the proceedings. Sixth—For the death of one of the parties before the judgment in the action. Seventh—For unavoidable casualty or misfortune, preventing the party from prosecuting or defending. Eighth—For errors in a judgment shown by an infant in twelve months after arriving at full age, as prescribed in section four hundred and forty-two. Ninth—For taking judgments upon warrants of attorney, for more than was due to the plaintiff, when the defendant was not summoned, or otherwise legally notified of the time and place of taking such judgment."

Counsel for Warren Cochran insist that as the decree of divorce in his favor was rendered on the 14th of July, 1884, and the present suit was not brought until the 17th of December, 1886, that the statute of limitations has run against Mrs. Cochran's cause of action. But this action was not brought under said section 46, quoted above, for the purpose of reversing, vacating, or modifying the decree of divorce obtained by Warren Cochran against his wife; and had the action been brought under said section for the purpose of modifying the decree in reference to alimony, the time for bringing it would not have been limited to six months from the date of the rendition of such decree, as said section only forbids an action to be brought for reversing, vacating, or modifying a decree of divorce, more than six months after its rendition, when such action affects the marital relations of the parties thereto; nor was this action brought under section 602 of the Civil Code. The petition filed in this case by Mrs. Cochran does not seek to set aside the decree of divorce rendered by the district court of Douglas county on the 14th of July, 1884. The prayer of the petition is that said decree of divorce may be held fraudulent and void to the extent and to the end that she may be restored to her rights of property.

This is a separate and independent action brought by Mrs. Cochran against her husband for maintenance or alimony. The basis of her action is the legal obligation of Warren Cochran to support her and the minor children, the fruit of their marriage. True, she has set out in her petition that Warren Cochran secretly, and for the purpose of defrauding her of her property rights, came to the state of Nebraska, and wrongfully procured from her a decree of divorce. This was simply stating the facts, and is, in effect, a statement by her that her husband had willfully abandoned and deserted her for more than two years before she brought this action. The case then stands as if Mrs. Cochran had set out in her petition her marriage to War-

ren Cochran, his desertion of and failure to support her, and prayed for alimony; and Warren Cochran, as a defense to such petition, had set up the decree of divorce rendered in his favor against his wife by the district court of Douglas county, and she had replied to such defense that she had no notice, other than constructive, of said divorce proceedings and the decree pronounced therein, and that the same was a fraud upon her rights.

3. The third argument is that the district court was wrong in awarding any alimony whatever to Mrs. Cochran. To sustain this argument it is first said that the petition does not allege, nor attempt to allege, that Mrs. Cochran or her children were in need of support. The petition does not allege that either Mrs. Cochran or her children are in destitute circumstances; but it does allege that she is the wife of Warren Cochran; that her two minor children living with her are the fruits of the marriage; and that she was at the time of bringing the action, and had been for years, engaged in teaching school for a living; and the petition does allege, in effect, that the defendant Warren Cochran had, more than two years before the bringing of the suit, abandoned his wife and minor children, and fraudulently and secretly procured from the plaintiff a divorce. We think this action should be regarded, and the rights of both Mr. and Mrs. Cochran should be determined therein, as if Mrs. Cochran had taken up her residence in the state of Nebraska, and had then brought a suit against Warren Cochran for a divorce on the grounds of desertion, with a general prayer for alimony, and we therefore think that the petition stated a cause of action.

Another argument under this head is that the evidence did not justify the district court in awarding alimony to Mrs. Cochran. It appears from the evidence in the record that on the 13th day of September, 1866, the first wife of Warren Cochran died, leaving five minor children. Six months after that date Warren Cochran was married, in

Wisconsin, to the plaintiff in this action. Mr. and Mrs. Cochran and the five children by the former's first wife then took up their abode in Wisconsin, where they lived as one family until about the year 1873. During all this time Warren Cochran divided his time between preaching, speculating, and farming; and Mrs. Cochran devoted a large part of her time to teaching school, the proceeds of the labor of both Mr. and Mrs. Cochran going to the support of the family, consisting of Mr. and Mrs. Cochran, the five children by Cochran's first wife, and the two children which had been born to Mr. and Mrs. Cochran. Some time in 1873 Mr. Cochran and the children by his first wife came to Nebraska. Mr. Cochran and said children, or some of them, began housekeeping on a farm which Mr. Cochran had purchased in Seward county, Nebraska. In the year 1874 Mrs. Cochran came on to Nebraska, and took up her residence with her husband on the Seward county farm, where she remained until 1876, when she returned to Wisconsin to attend the golden wedding of her father and mother. It appears that from that time until the autumn of 1878 Warren Cochran desired Mrs. Cochran to return to Nebraska, but she declined to do so. In the autumn of 1878 Warren Cochran instituted in the district court of Fillmore county, Nebraska, a suit against his wife for a divorce on the ground of desertion. This suit, however, was never prosecuted, but dismissed by Warren Cochran soon after he brought it; and he then returned to Wisconsin, and took up his residence and home with his wife and their two minor children, where he remained with them until the spring of 1883. During all this time Mr. Cochran continued preaching, and gardening or farming, and Mrs. Cochran continued teaching school. In the spring of 1883 Mr. Cochran came to Nebraska, and appears to have spent most of his time in visiting among his children by his first wife, residing here, but interested himself somewhat in preaching and in real estate specula-

tions. In November, 1883, he returned to Wisconsin and remained for some days. While there he lived with his family as usual. About the 1st of December, however, he returned to Nebraska. At the time of his leaving he did not request his wife and minor children to accompany him, and it is very doubtful if his wife and minor children knew or understood that he was leaving them permanently. Mr. Cochran took up his abode in Douglas county, Nebraska, about December 1, 1883. On March 6, 1884, he caused the following notice to be published in the Omaha *Bee*, a newspaper of general circulation in the state of Nebraska, printed and published in the city of Omaha: "Wanted—To correspond with a Christian lady of culture and refinement between the ages of 25 and 50, without children, who could unite with a genial husband to make his nice home in Omaha one of prosperity and happiness. This is in good faith, and deemed a proper method of introduction. Address under assumed name if preferred. (Signed) Otis Myrtle, Omaha, Neb." On the 20th day of May, 1884, Warren Cochran brought suit against Mrs. Cochran in the district court of Douglas county for a divorce, alleging as grounds therefor that Mrs. Cochran had willfully abandoned him without any just cause on the 17th day of May, 1882. He obtained service on his wife by publication in a newspaper, and on the 14th of July, 1884, obtained from Mrs. Cochran a decree of divorce. In the month of September, 1884, he was married to a third wife, from whom he was soon afterwards divorced, and at the time of the trial of this case was living with his fourth wife. When Mr. Cochran left his wife and children in Oshkosh, in December, 1883, whatever may have been his intention at that time with reference to making Nebraska his permanent home, there can be no doubt whatever that his object in settling in Douglas county was to procure a divorce from Mrs. Cochran in order to be free to marry again; and there can be no doubt

but that he studiously concealed from Mrs. Cochran that he intended to institute proceedings for divorce against her in Nebraska, and that he did conceal the pendency of said divorce proceedings. At the time Warren Cochran instituted divorce proceedings in Douglas county, at the time he filed an affidavit for service by publication upon his wife in that case, and at the time the decree of divorce was rendered, Warren Cochran absolutely knew that Mrs. Cochran had never abandoned him, and was then living with her children in Oshkosh, Wisconsin, where he had left them in December, 1883. The evidence in this record further shows that from the time that Warren Cochran married Mrs. Cochran, in 1867, until December, 1883, she behaved herself towards him as a chaste and faithful wife; she bore him during this time two children; and she devoted a large part of that time to teaching school, the proceeds of which went to the support of the family, consisting of the five children of Warren Cochran by his first wife, and Mr. and Mrs. Cochran and their two children. The evidence further shows that when Warren Cochran left Nebraska, in the autumn of 1878, and returned to Wisconsin to his wife and two children, he went there with the intention of permanently remaining and of making that the home of himself and Mrs. Cochran, and the two minor children; that the children by his first wife were then all about of age, and living in Nebraska; that after Warren Cochran left his wife and two children, in December, 1883, Mrs. Cochran continued to support herself and two children by teaching school; that at the time of the trial of this case she was possessed of small means, not exceeding perhaps $3,000 in value; that her health had become permanently impaired by reason of her labors in teaching school; and that she was at the time of the trial of this suit about sixty years of age and under medical treatment. The evidence further discloses that Mrs. Cochran had no knowledge or notice whatever of the pendency of the divorce

proceedings brought against her by Warren Cochran until some months after the decree of divorce had been rendered. We are of opinion that these facts establish that Warren Cochran willfully, and without any just cause whatever, deserted his wife and minor children in December, 1883, and show that Mrs. Cochran is entitled to alimony from the property of Warren Cochran. We are further of opinion that the divorce procured by Warren Cochran from his wife in the district court of Douglas county on the 14th of July, 1884, was procured by fraud and perjury, and we would not hesitate for one moment to set that decree aside if such were the prayer of Mrs. Cochran's petition. Our divorce laws are liberal and should be liberally construed, but they are not designed and must not be used for the purpose of enabling even preachers "to off with the old love and on with the new;" nor to discard faithful wives of whom they have become tired, because their freshness and bloom and health have departed, and thus leave them legally free to contract fresh marriages.

4. A further argument of Warren Cochran is that the amount of alimony awarded Mrs. Cochran is excessive. We do not think it is, for reasons that we shall state further on. The appeal of Warren Cochran is dismissed.

5. We next direct our attention to the appeals of Beriah Cochran and Elmer G. Cochran and their wives. Mrs. Cochran pleaded in her petition that for the purpose of cheating and defrauding her of her rights in the property of Warren Cochran the latter had purchased the property described in the petition and caused the same to be conveyed, without consideration, to Beriah C. and Elmer G. Cochran, his sons by his first wife. The evidence sustains this allegation of the petition, as it shows beyond dispute that the title to the Crete property is now held by Beriah Cochran, and the title to what is described herein as the twenty-acre tract is held by Elmer G. Cochran. Their appeals are, therefore, dismissed.

6. The next consideration is the appeal of Mrs. Cochran. Her sole ground of complaint is that the amount of alimony awarded her by the district court is too small. There is no fixed rule for determining what proportion of a husband's estate should be decreed to his wife as alimony. The amount is to be just and equitable, due regard being had to the rights of each party, the ability of the husband, the estate of the wife, and the character and situation of the parties. (*Smith v. Smith*, 19 Neb., 706.) The district court by its decree awarded Mrs. Cochran $2,000, to be paid in four equal installments, three, nine, fifteen, and twenty-one months after the 15th of May, 1891, the date of the decree, and the further sum of $250 per year, during her life, to be paid in two equal installments on the first days of July and January of each year. In July, 1882, Warren Cochran became the owner of the piece of land designated herein as tax lot 27, consisting of three and one-third acres. Warren Cochran owned this tract of land at the date he obtained a decree of divorce from Mrs. Cochran and at the date of the bringing of this suit. The value of this land at the date he obtained a decree of divorce from his wife, July 14, 1884, as shown by the evidence, was $3,333.33; but the undisputed evidence in the record also shows that the value of this tax lot 27 at the time of the trial was $22,983, taking the average value placed thereon by the four witnesses who testified thereto. The evidence also shows that at the time Warren Cochran obtained a decree of divorce from his wife he owned what is called in the record the "Beaver Crossing farm," in Seward county, in this state; and in 1885 he exchanged this farm for the tract of land herein designated as the twenty-acre tract, which tract he owned at the time of the bringing of this suit, although the title was held in the name of his son, Elmer G. Cochran. Averaging the values put upon this land by the three witnesses who testified as to its value, this twenty-acre tract was worth, at the time this suit was

tried, $53,320. The evidence further shows that the title of what is designated as the Crete property was in Beriah Cochran, though really owned by Warren Cochran, and that the value of this property at the time of trial was $560. The total value then of the property of Warren Cochran at the time of the trial, as shown by the evidence, was $76,953. The record discloses, however, that the title to the twenty-acre tract was in litigation, and it is impossible, in view of that fact, to say certainly what the value of Warren Cochran's interest is in that piece of land. We therefore deduct from the total value of Warren Cochran's property the value of the twenty-acre tract, and this leaves $23,633 as the value of the remainder of Warren Cochran's property. We do not think alimony should be awarded in installments during the life of a party as was done in this case. Mrs. Cochran's appeal should be sustained, we think, and the decree of the district court should be set aside as to the manner of the allowance of alimony and the amount allowed commuted to the gross sum of $6,000, payable in three equal annual installments of $2,000 each; the first installment to become due and payable January 1, 1895, another installment payable January 1, 1896, and another on January 1, 1897, each of said installments to draw interest at the rate of seven per cent per annum from this date and to be and become liens as other judgments upon the real estate of Warren Cochran.

Counsel for Warren Cochran call our attention to the rule announced in *Kamp v. Kamp*, 59 N. Y., 212, that alimony cannot be allowed out of the property acquired after the divorce. Assuming this rule to be correct, which we neither dispute nor admit, it is not applicable here. Warren owned the tract of land designated herein as tax lot 27 at the date he obtained a decree of divorce from his wife. Counsel contend that in estimating the amount of alimony to be awarded Mrs. Cochran in this suit the court should look only to the value of that tract of land at the

date of the decree of divorce, which, as already stated, was $3,333.33. We are not prepared to carry the rule announced in *Kamp v. Kamp, supra,* to this extent. Tax lot 27 is the same identical property now that it was when Warren Cochran obtained the decree of divorce from his wife, and in estimating its value for the purpose of determining what alimony should be awarded Mrs. Cochran, the court should consider its value at the time of entering the decree.

Another contention of counsel for Warren Cochran is that the court should not take into consideration the value of what is known as the twenty-acre tract, because Warren Cochran, or his son Elmer G. for him, did not obtain title to that piece of land until after the date of the divorce. We do not think this argument is sound. As already stated, Warren Cochran owned, at the time he instituted a suit for divorce against his wife, what is known in this record as the "Beaver Crossing farm," and after he obtained his decree of divorce he exchanged this farm for the twenty-acre tract. The court then should have taken into consideration the value of the twenty-acre tract at the date it rendered a decree for alimony in favor of Mrs. Cochran, for the purpose of determining the amount of such alimony. The decree of the district court as to the amount of alimony awarded Mrs. Cochran is set aside, and a decree will be entered in this court in favor of Mrs. Cochran against Warren Cochran for the sum of $6,000 alimony, as hereinbefore stated. In all other respects the decree of the district court is affirmed.

DECREE ACCORDINGLY.

IRVINE, C., not sitting.

W. T. SCOTT, APPELLEE, V. R. L. SPENCER ET AL., IMPLEADED WITH METCALF CRACKER COMPANY, APPELLANT.

FILED NOVEMBER 8, 1894. No. 5943.

1. **Bill of Exceptions:** AUTHORITY OF CLERK TO SIGN. To confer authority upon the clerk of a district court to sign and allow a bill of exceptions it must appear that the judge is dead, or that he is prevented by sickness or absence from his district from signing and allowing the bill, or the parties to the litigation, or their counsel, must agree upon the bill of exceptions and attach thereto their written stipulation to that effect. (Section 311, Code of Civil Procedure.)
2. ———: ———. The mere stipulation of counsel in a case that the clerk of the court may sign and allow a bill of exceptions is not sufficient to confer authority upon him to do so.
3. ———: REVIEW. Where it is sought to present to this court alleged errors occurring at the trial in a district court, a bill of exceptions settled and signed as required by law is indispensably necessary. *Edwards v. Kearney*, 14 Neb., 83, and *Reynolds v. Dietz*, 39 Neb., 180, reaffirmed.

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

Dryden & Main, for appellant.

Marston & Nevius, contra.

RAGAN, C.

This is an appeal from a decree in equity pronounced by the district court of Buffalo county. The bill of exceptions in the case was signed and allowed by the clerk of the district court. There is no showing in the record that the judge of the district court was dead, or that he was prevented by sickness, or absence from his district, from signing and allowing this bill of exceptions. Counsel for the

respective parties to the litigation made and filed in the case a stipulation in words and figures as follows: "It is hereby stipulated and agreed by and between the parties hereto that the bill of exceptions in the above entitled case may be settled by the clerk of the district court." Doubtless the clerk of the district court acted upon this stipulation as his authority for signing and allowing this bill of exceptions. Section 311 of the Code of Civil Procedure provides: "In case of the death of the judge, or when it is shown by affidavit that the judge is prevented by sickness, or absence from his district, as well as in cases where the parties interested shall agree upon the bill of exceptions, and shall have attached a written stipulation to that effect to the bill, it shall be the duty of the clerk to settle and sign the bill in the same manner as the judge is by this act required to do." To confer authority upon the clerk of a district court to sign and allow a bill of exceptions, then, it must appear that the judge of the district court is dead, or that he is prevented by sickness, or absence from his district, from signing and allowing the bill, or the parties to the litigation, or their counsel, must agree upon the bill of exceptions and attach thereto their written stipulation to that effect. Counsel for the parties to this litigation did agree and stipulate that the clerk might sign the bill of exceptions, but they did not agree by stipulation in writing attached to the bill that it was the correct bill of exceptions in the case. Where it is sought to present to this court alleged errors occurring at a trial in the district court, a bill of exceptions settled and signed as required by law is indispensably necessary. (*Reynolds v. Dietz*, 39 Neb., 180; *Edwards v. Kearney*, 14 Neb., 83.) We cannot, therefore, examine what purports to be the bill of exceptions in this case for the purpose of ascertaining whether the decree appealed from is the correct one under the evidence. In other words, the bill of exceptions cannot be used for any purpose. The only question left, then, in this case is

whether the pleadings support the judgment rendered; and as they do, it follows that the decree of the district court must be and is

AFFIRMED.

CHARLES GREENE, APPELLANT, V. RACHEL B. GREENE, APPELLEE.

FILED NOVEMBER 8, 1894. No. 5491.

1. **Husband and Wife:** ONE AS WITNESS AGAINST THE OTHER: SPECIFIC PERFORMANCE. In a suit by a husband against his wife to compel her to specifically perform a written contract she had made with him, in and by which she agreed to convey to him certain real estate, neither the husband nor the wife can testify one against the other in the case. *Niland v. Kalish*, 37 Neb., 47, reaffirmed.

2. ———: ———: REPEAL OF STATUTE. Section 331 of the Code of Civil Procedure was not repealed by the enactment of chapter 53, Compiled Statutes, 1893, entitled "Married Women." *Skinner v. Skinner*, 38 Neb., 756, reaffirmed.

3. **Specific Performance of Contract Between Husband and Wife:** UNDUE INFLUENCE. A husband brought suit against his wife to enforce the specific performance of a contract in writing made by her, in and by which she agreed to convey to her husband certain real estate. The wife defended on the ground that the contract sued on was procured from her by fraud and duress, and undue influence exercised over her by her husband. The evidence failed to establish that the contract was obtained from the wife by fraud or duress, but it did establish that the wife executed the contract because of a species of matrimonial coercion and undue influence exercised over her by her husband. *Held*, That the wife should be released from the performance of the contract.

4. ———: CONSIDERATION. To enable a husband to specifically enforce against his wife a contract by which she has agreed to convey to him certain real estate, it must appear that such contract had for its basis some consideration.

5. ———: ———: UNDUE INFLUENCE: BURDEN OF PROOF. In

such case, if the claim of the husband is that the consideration for the contract was her love and affection for him, or that because of the fact that he was her husband she intended by the contract to make a gift to him of the land described therein, then the burden is upon the husband to show that the wife made such contract freely and voluntarily, with full knowledge of all the facts with reference thereto, and without any fraud practiced upon her, and that she was not induced to make such contract by the coercion or undue influence of her husband.

APPEAL from the district court of York county. Heard below before MILLER, J.

George B. France and *N. V. Harlan*, for appellant.

John H. Ames and *Sedgwick & Power, contra.*

RAGAN, C.

Robert Blair died in the state of New Jersey about the year 1887 owning the legal title to the south half of the southeast quarter of section 31, in township 11 north and range 2 west of the 6th P. M., and lot 11, in block 58, in the city of York, in York county, Nebraska. Mr. Blair left a will, in and by which he devised an undivided one-half of this real estate to his daughter, Mrs. Rachel B. Greene, then and now the wife of Charles Greene, and an undivided one-half of said real estate to his two daughters, Mesdames Armstrong and Adams. Charles Greene and Rachel Greene, his wife, at this time resided in the city of York, Nebraska. About the month of May, 1888, Mrs. Greene instituted in the courts of New Jersey proceedings for contesting the will made by her father. The grounds of this contest were that she was the owner of said real estate; that her father had loaned her the money with which to purchase it, and that he held the title thereto in trust for her, the agreement being that the money which he had loaned her and which paid for the real estate was to be charged to her as an advancement made to her by her father

out of her share of his estate. About the same time her husband, Charles Greene, brought suit in the district court of York county against the executors of Robert Blair, his daughters, the Mesdames Armstrong and Adams, and his wife, Mrs. Rachel B. Greene. In this suit Charles Greene alleged that he was the owner of the above described real estate, and that Robert Blair, during his lifetime, held the title thereto, in trust for him, the said Charles Greene, and that Robert Blair had loaned him, Greene, the money with which to purchase this real estate, and that he held the title in his, Blair's, name, as security for the money so advanced. On the 24th day of July, 1888, a compromise and settlement of the will contest was had, and by the terms of this settlement Mesdames Armstrong and Adams and their husbands quitclaimed to Mrs. Greene all the interest in the above described real estate which had been devised to them by the will of their father, Robert Blair, and the said will was then admitted to probate. Charles Greene was present at this settlement and consented thereto, and one condition of the settlement made was that Charles Greene should dismiss the suit he had then pending claiming title to this property in York county, Nebraska, and relinquish all his claim of title to said property to his wife, Mrs. Rachel B. Greene. Charles Greene agreed to this settlement, and on the 27th day of July, 1888, he evidenced his agreement by a writing, duly signed, witnessed, and acknowledged by him, but dated the 24th of July, 1888, and in this writing he agreed to dismiss without delay the suit he had pending in York county and relinquish all his claim of title to the real estate in favor of his wife. On the same day that he executed this writing, to-wit, July 27, 1888, he and his wife, Rachel B. Greene, entered into another contract in writing, duly signed, witnessed, and acknowledged by both of them, in and by which contract Mrs. Greene agreed to convey to her husband the real estate above described, the consideration being that Charles Greene would dismiss the

suit brought by him and then pending in York county, Nebraska, against his said wife and the heirs and executors of Robert Blair, deceased. Mrs. Greene having refused to comply with this contract and convey the lands to her husband, he brought this suit for the specific performance of the agreement. The answer of Mrs. Greene to the suit, so far as material here, set out two defenses: (*a*) That said agreement was procured from her by fraud, duress, and by an undue influence exercised over her by her husband. (*b*) That Charles Greene was estopped from enforcing this contract by reason of his agreement made on the 24th day of July, 1888, and evidenced by him in writing on the 27th day of July, in settlement of the proceedings contesting the will of the said Robert Blair, deceased. The district court found and decreed the issues in favor of Mrs. Greene, and from this decree Mr. Greene appeals.

1. The first argument relied upon here for a reversal of this decree is the refusal of the district court to permit Charles Greene to testify on the trial of the case. Section 331 of the Code of Civil Procedure provides: "The husband can in no case be a witness against the wife, nor the wife against the husband, except in a criminal proceeding for a crime committed by the one against the other, but they may in all criminal prosecutions be witnesses for each other." This provision of our Code was under consideration by this court (RYAN, C., writing the opinion) in *Niland v. Kalish*, 37 Neb., 47. The action was brought by the creditors of Solomon Kalish to set aside certain conveyances made to his wife, Adalia Kalish. On the trial the creditors sought to have the husband testify in the case, and also sought to have the wife testify in the case. The district court, however, excluded the testimony, and the creditors appealed, and this court held that neither the husband nor the wife could testify in the case, as, from the nature of the action, the testimony of the husband would be against the interests of his wife and the testimony of the wife be

against that of her husband, and the judgment of the district court was affirmed. But it is argued that as by chapter 53, Compiled Statutes, 1893, entitled "Married Women," a married woman may bargain, sell, and convey her real estate and enter into contract with reference to the same with like effect as a married man may in relation to his real estate, and that a woman while married may sue and be sued, in the same manner as if she were unmarried, that therefore said chapter 53 repealed said section 331 of the Civil Code and thereby removed the common law disabilities of a married woman as to testifying. This precise question was before this court in *Skinner v. Skinner*, 38 Neb., 756, and it was there held: "But this act [chapter entitled 'Married Women'] has no reference to the right of married women to testify. It does not define nor attempt to define what shall be evidence nor who shall be competent witnesses in any case. It does not deal with the subject of either witnesses or evidence. At common law the contracts of a married woman were void, and the object, and the only object, of this statute [said chapter 53] was to remove her disability to contract and to permit her to contract with reference to her separate property, trade, or business.' (*Godfrey v. Megahan*, 38 Neb., 748, and cases there cited; *Niland v. Kalish*, 37 Neb., 47.) In *Lawson v. Gibson*, 18 Neb., 137, the rule as to the repeal of statutes by implication is thus stated: 'A statute will not be considered repealed by implication unless the repugnancy between the new provision and the former statute is plain and unavoidable.' Now, there is no repugnancy whatever between section 331 of the Code of Civil Procedure, defining the cases and circumstances in which a husband or wife becomes a competent witness against the other, and the so-called 'Married Woman's Act,' removing the common law disabilities of a married woman to make contracts and sue and be sued. At common law neither husband nor wife could testify one against the other in any case. The

rule still remains, except in so far as it has been changed by our statutes." The district court then did not err in refusing to permit Mr. Greene to testify in this case.

2. A second argument relied upon for a reversal of this decree is that it is not sustained by sufficient competent evidence. The evidence does not establish that the contract made the basis of this suit was obtained from Mrs. Greene by fraud. She was not misled by any false representations of her husband as to the actual facts in the case, as she knew at the time she made the contract that her husband had a suit pending in York county against her and the executors and heirs of Robert Blair, deceased, in which suit he claimed to be the owner of the property in controversy; nor does the evidence establish that Mrs. Greene was induced to make the contract sued upon because of fear of violence or injury to her person at the hands of her husband; but it does establish that Mr. Greene did obtain this contract from his wife by a species of matrimonial coercion, or the exercise of an undue influence over her, resulting from their marriage relations, and this is sufficient to release the wife from the performance of the contract. (*Witbeck v. Witbeck*, 25 Mich., 439; *Jenne v. Marble*, 37 Mich., 322.) The decree appealed from is right for another reason. Mr. Greene agreed with the executors and heirs of Robert Blair—his wife included among such heirs—to dismiss the suit he had brought in York county claiming this property, and to relinquish his rights and claims to said property to his wife, if they, the other heirs of Robert Blair, would convey their interest to his, Mr. Greene's, wife. Mrs. Greene thus became vested with the entire property instead of one-half of it, as provided by the terms of her father's will, and the contest over the will was thus settled and compromised, and Mr. Greene solemnly agreed, and evidenced the agreement in writing, to dismiss the York county suit and relinquish in favor of his wife all his claims to said property. It is clear that

if Mr. Greene had not dismissed his suit his agreement made in New Jersey in compromise of the will contest could have been successfully pleaded against him in bar of his further prosecution of the action. The compromise of the will contest was a sufficient consideration to support Mr. Greene's agreement to dismiss his York county suit and relinquish in favor of his wife all claims he had against the real estate involved therein. So far as the record discloses, this agreement was made by Mr. Greene freely and voluntarily, without any fraud practiced upon him and with a full knowledge of all the facts in the case, and was, therefore, as binding on Mr. Greene as were the agreements of the executors and heirs of Robert Blair, deceased, binding on them. (*Prichard v. Sharp*, 51 Mich., 432; *Husband v. Epling*, 81 Ill., 172.) The contract, then, sued on here has for its support no consideration whatever. True, it recites the pendency of the suit brought by Greene in York county, and that he will dismiss such suit in consideration that his wife would convey him the property described therein; but equity regards that done which a party is bound to do, and hence, as matter of law, the York county suit was dismissed at the very time Mr. Greene obtained the contract made the basis of this suit. Mr. Greene's action, then, is a suit against his wife for a specific performance of her contract to convey to him certain lands. The contract is not void because between husband and wife, as a married woman in this state may make valid contracts with her husband in reference to, or upon the faith and credit of, her separate estate. (*May v. May*, 9 Neb., 16; *Skinner v. Skinner*, 38 Neb., 756.) But to enable Mr. Greene to enforce the contract in suit the burden was upon him to show that the contract had for its support some consideration. As already stated, the evidence discloses that there was no consideration. If the claim of Mr. Greene was that because of her love and affection for him, or because of the fact that he was her husband, his

wife, by the contract, intended to make him a gift of this land, then the burden was upon Mr. Greene to show that his wife made such contract freely and voluntarily, with a full knowledge of all the facts in reference thereto, without any fraud practiced upon her, and that she did not make such contract by reason of the coercion or undue influence of her husband. (*Boyd v. De La Montagnie*, 73 N. Y., 498.) The evidence does not show these facts, and the decree of the district court was, therefore, right and is

AFFIRMED.

C. R. STEDMAN V. ROCHESTER LOAN & BANKING COMPANY.

FILED NOVEMBER 8, 1894. No. 4673.

1. **Negotiable Instruments:** ACTION BY INDORSEE OF NOTE: DEFENSE: FALSE REPRESENTATIONS. In a suit by an indorsee of a promissory note against the maker thereof the latter alleged as a defense that the note was given for certain stock in a milling corporation falsely represented by the original payee of the note to be solvent and earning annual dividends of thirty per cent. The undisputed evidence showed that the indorsee purchased the note before maturity, in the usual course of business, for a valuable consideration, and without any knowledge or notice of the defense pleaded by the maker. *Held*, That the court properly instructed the jury to return a verdict for the indorsee.

2. ———: ———: PROOF OF CONDITIONAL DELIVERY: PLEADING. In said suit the maker of the note offered to prove that the note was not intended to be delivered to the original payee thereof to become his property, except upon the condition that the stock of the milling corporation, for which the note was given, should yield a dividend of thirty per cent per annum; and that the original payee of said note agreed at the time of its execution and delivery to hold it in trust for him, the maker. The answer of the maker of the note did not allege an agreement on

the part of the original payee of the note that he would hold such note in trust for the maker. *Held*, That the evidence offered was irrelevant under the issues and properly excluded.

ERROR from the district court of Sherman county. Tried below before CHURCH, J.

Nightingale Bros., for plaintiff in error.

Long Bros. and *E. J. Hainer, contra.*

RAGAN, C.

On the 21st day of July, 1888, one C. R. Stedman made in writing of that date his promissory note for the sum of $534.75, payable to the order of the Sherman County Banking Company, a banking corporation organized and doing business at that time in Sherman county, Nebraska, April 1, after date, together with interest thereon at the rate of ten per cent per annum from maturity until paid. The Rochester Loan & Banking Company, a corporation created under the laws of the state of New Hampshire, brought this suit in the district court of Sherman county against said Stedman on said note, alleging that Stedman executed and delivered the note to the Sherman County Banking Company, and that it, the plaintiff, in the usual and ordinary course of business, for a valuable consideration and before the maturity of said note, purchased the same; that it was then the owner of said note, and that the same was wholly unpaid; and prayed judgment for the amount due thereon, with interest. The answer of Stedman, so far as material here, was an admission that he executed and delivered the note to the Sherman County Banking Company, but he denied that the Rochester Loan & Banking Company was an innocent purchaser of said note for a valuable consideration before maturity. Stedman also alleged that the note was made and delivered by him to the Sherman County Banking Company as part of the consideration for the

sale to him by said Sherman County Banking Company of ten shares of the capital stock of the Loup City Roller Mill Company; that the negotiation of said sale of stock was conducted on behalf of the Sherman County Banking Company by its president, one Whaley, who was also then president of said Roller Mill Company; that said note was procured from him by the Sherman County Banking Company by fraud and false representations, in this, that at the time of the sale of said stock Whaley stated to him, Stedman, that the stock was very profitable; that it was not for sale upon the market generally, but was reserved for the benefit of personal friends of the stockholders of said Roller Mill Company; and that he, Whaley, desired to confer a personal favor on Stedman; that said mill property was absolutely free from debt; that the mill had a capacity for making 125 barrels of flour per day, and was then, and had been for some time, producing that amount of flour per day, and that the profit on each barrel averaged $1.14; that said representations so made by Whaley were false, and known by him to be false; that they were made with the intent to deceive Stedman, and did deceive him; that, relying on these statements, and believing them to be true, he executed and delivered the note in suit. Stedman further alleged in his answer that at the time of the execution and delivery of said note and the purchase of said milling company's stock, that the said Sherman County Banking Company, by its president, Whaley, made an oral agreement with him, Stedman, that the sale of the milling company's stock should be rescinded and the notes given therefor canceled and surrendered to Stedman in case the profits and dividends declared upon the milling company's stock did not amount to thirty per cent per annum on the par value of the stock; that the original note given for said milling stock should be renewed at the expiration of six months until it should be ascertained what the profits of the milling company were,

and that the note sued on in this action was a renewal of the original note given for the purchase of said milling stock. Stedman further alleged that at the time of the renewal of the note Whaley stated that the earnings of the mill company had been put into a surplus fund for the purchase of wheat, and that no dividends on its stock had been declared by reason of this action by the milling company. The Rochester Loan & Banking Company had a verdict and judgment on the note, and Stedman prosecutes error proceedings here.

Only two points are argued in the brief of counsel for plaintiff in error.

1. The first argument is that the district court erred in instructing the jury to return a verdict for the Rochester Loan & Banking Company. The basis of this contention is that at the time the court so instructed there was evidence in the record which tended to show that the Rochester Loan & Banking Company had not purchased the note in suit in the ordinary course of business, for a valuable consideration before its maturity, without any notice of the defenses of Stedman thereto as against the original payee of the note. This contention cannot be sustained. We cannot take the time to quote the testimony, but the execution and delivery of the note by Stedman to the Sherman County Banking Company was admitted by him in his answer, and, as a part of its case in chief, the Rochester Loan & Banking Company proved that it purchased said note from the Sherman County Banking Company in the ordinary course of business before the maturity of the note; that it paid a valuable consideration for the note, something near the face of it; and that at the time it purchased it, it had no notice or knowledge whatever of any of the defenses which Stedman alleges against the note. The evidence given by Stedman not only did not disprove these facts, but it did not tend to disprove them or any of them.

2. The second argument assigned is that the district

court erred in excluding certain evidence offered by Stedman, which evidence, it is alleged, tended to prove that the note sued on was held in trust by the Sherman County Banking Company for Stedman and was negotiated in fraud of his rights. Stedman offered to prove that the note was not intended to be delivered to the Sherman County Banking Company to become its property, except upon the condition that the stock of the Roller Mill Company, for which the note was given, should yield a dividend of thirty per cent per annum. This is the offer of proof, the exclusion of which by the district court is here complained of. Stedman alleged in his answer that he assigned the milling company's stock to the Sherman County Banking Company as collateral security for the payment of the note in suit, and he also alleged that the sale of the stock to him was a conditional one, and that the title to such stock was not to vest in him unless the representations made as to the value of the stock and the earning capacity of the roller mill should prove to be true; but he did not allege in his answer any agreement on the part of the Sherman County Banking Company that it would hold such note in trust for him, Stedman. The offer of proof, then, made by Stedman was broader than his pleading, and, therefore, the district court did not err in excluding the evidence offered. The judgment of the district court is right and is

AFFIRMED.

CHARLES A. BURKE v. RICHARD CUNNINGHAM ET AL.

FILED NOVEMBER 8, 1894. No. 5364.

1. **Abandonment of Appeal by Filing Petition in Error.** When a case is in its nature appealable and a transcript is filed within the time allowed for appeal, but thereafter, and within

the time permitted for instituting proceedings in error, the appellant files and attaches to the transcript a petition in error, he will be held to have abandoned his appeal and elected to proceed in error.

2. **Partition**: DECREE: REVIEW. In an action for partition the court found on the trial of the issues that partition could not be made, and in the judgment confirming the interests of the parties ordered a sale of the land. The judgment was held to be irregular, but not without jurisdiction, and as it was not complained of because of this irregularity, either by a motion for a new trial or by assignment of error, *held*, that it could not be reversed.

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

Clark & Allen, for plaintiff in error.

Richard Cunningham, contra.

IRVINE, C.

A doubt arises as to whether this case is before us for review on appeal or on petition in error. The action was in form one for the partition of real estate. The transcript was filed within the six months allowed for an appeal, but the bill of exceptions containing the testimony was not filed until after the expiration of the six months. The transcript which was filed was sufficient to give the court jurisdiction on appeal. (*Schuyler v. Hanna*, 28 Neb., 601.) The day the bill of exceptions was filed Charles A. Burke filed a petition in error, in which he styles himself "plaintiff in error and appellant." The Code provides two methods of review, but it does not permit the same judgment to be reviewed both by appeal and on error, and it is evident that to permit a party to pursue both remedies would be intolerable. We must presume that Burke had some object in filing his petition in error; and if so, then that object must have been to abandon his appeal and to transform the proceedings into proceedings in error. The petition in error being filed within the statutory time, this was his privilege,

and we shall therefore treat the case as here on error and not as an appeal.

The first error assigned in the petition in error is directed to the overruling of a motion for a continuance. The affidavit on which this motion was based is not embodied in the bill of exceptions and this assignment cannot, therefore, be considered.

The next assignment is that the court erred "in admitting evidence over objections." There are two reasons why this assignment cannot be considered. The first is that there was no motion for a new trial in the district court. The other is that the assignment is too vague for consideration in any event.

The only two remaining assignments are that the judgment is contrary to the evidence and that it is not sustained by the evidence. The failure of the plaintiff in error to present these questions to the trial court by a motion for a new trial precludes us from their examination; but we ought not to pass them on that statement without a reference to the very peculiar condition of the record. As we have said, the action was in form one for the partition of land. The petition alleged that the plaintiff and defendants had purchased certain land under an agreement that each should pay an equal portion of the purchase money and should own equal and undivided interests in the land; that the plaintiff and defendant Edney paid the purchase money and that the defendant Burke had paid nothing. The prayer was for partition and general relief. The answer of Burke admitted the purchase of the land and the payment of the purchase money as alleged in the petition, but averred that Burke had devoted time and labor to the purchase of the property, for which he was entitled to credit in an accounting between the owners, and asked that the interests of the parties should be determined in an accounting between them as partners. The reply was practically a general denial. In the judgment the material

facts are found in favor of Cunningham. It is also found that the property cannot be divided without decreasing its value. The court then orders the land to be sold and from the proceeds of the sale the plaintiff and the defendant Edney reimbursed for their advances, and that any surplus after the repayment of said sum shall be divided equally among the three parties. It need hardly be said that these proceedings were very irregular. It is suggested in argument that the petition may be treated as one to quiet title, but it does not contain the necessary averments for that purpose and such a proceeding could not result in the decree rendered. Viewed as a case in partition, as it must be viewed, the court undoubtedly erred in ascertaining that partition could not be made and ordering a sale in the first instance. On the trial of the issues it was the duty of the court, in the first place, to enter judgment confirming the shares and interests of the parties and ordering partition. (Code of Civil Procedure, sec. 810.) Referees should then have been appointed to make partition, and if upon their reporting that partition could not be made without great prejudice, the court should be satisfied with such report, an order of sale should then be made. (Code of Civil Procedure, secs. 814, 815.) In other words, it is the duty of the referees, in the first instance, and not of the court, before the first judgment, to determine whether or not partition is practicable. The duty of the court in that regard arises on the report of the referees, and not until the coming in of that report; but it is within the jurisdiction of the court ultimately to determine that fact and to order a sale, and the decree cannot, therefore, be said to be *coram non judice*. No error is assigned upon the form of the judgment; and upon the assignment that the judgment is not sustained by the evidence, we are not warranted in reversing the decree because of the irregularity we have referred to. There having been no motion for a new trial in the district court, and no assignment of error proper to

raise the question of the irregularity of the judgment, except in connection with the evidence, we cannot interfere.

AFFIRMED.

LEXINGTON MILL & ELEVATOR COMPANY V. HENRY NEUENS.

FILED NOVEMBER 8, 1894. No. 5482.

Contracts: SALES: ADVANCEMENT OF MONEY: PART PERFORMANCE: RECOVERY OF PAYMENT. If a person has advanced money in part performance of a contract and then refuses to proceed, the other party being ready and willing to perform on his part all the stipulations of the agreement, the former will not be permitted to recover back what he has advanced. *Walter v. Reed*, 34 Neb., 544, followed.

ERROR from the district court of Dawson county. Tried below before HOLCOMB, J.

C. W. McNamar, for plaintiff in error, cited: *Barrow v. Arnaud*, 8 Q. B. [Eng.], 604; *Boswell v. Kilborn*, 15 Moores [Eng.], 309; *Allen v. Jarvis*, 20 Conn., 38; *Haines v. Tucker*, 50 N. H., 307; *McNaught v. Dodson*, 49 Ill., 446; *Chapman v. Ingram*, 30 Wis., 290; *Camp v. Hamlin*, 55 Ga., 259; *Bickell v. Colton*, 41 Miss., 368; *Boies v. Vincent*, 24 Ia., 387; *Rider v. Kelley*, 32 Vt., 268; *Ballentine v. Robinson*, 46 Pa. St., 117; *Denver, T. & G. R. Co. v. Hutchins*, 31 Neb., 572.

E. A. Cook, contra.

IRVINE, C.

The plaintiff in error sued the defendant in error to recover damages for the alleged failure by the defendant to

deliver 900 bushels of wheat contracted to be sold by the defendant to the plaintiff. The defendant, by answer, admitted the contract for the sale of the wheat, but alleged its terms to be somewhat different from those stated in the petition. He then averred that he offered to deliver the wheat and the plaintiff refused to accept the same, and asked damages on account of plaintiff's alleged breach of the contract. There was a trial to a jury and a verdict for the defendant without damages.

The court gave the following instruction: "If from the evidence you believe that the defendant was ready and willing and offered to deliver to the plaintiff the 900 bushels of wheat contracted for November 9, 1889, of like kind and quality as the sample shown plaintiff's agents, Jensen & Leflang, and that the plaintiff, by its agents, refused to accept the same, then plaintiff cannot recover. Your verdict should be for the defendant." The giving of this instruction is the first error assigned, the objection urged being that the instruction was not applicable to the evidence. The controversy on the trial turned upon the question whether the wheat tendered by the defendant was of the quality which he contracted to sell. The defendant received from the plaintiff $100 on the purchase money when the contract was made. We understand the point made by the plaintiff in regard to the instruction to be that it authorized a verdict for the defendant in case the jury should find that he offered to deliver the wheat according to contract, and disregarded the fact that the $100 had been paid; that is, the plaintiff claims that even though the jury should find that the defendant was ready to perform, and that the breach was by the plaintiff, still the plaintiff would be entitled to recover back the $100. In *Walter v. Reed*, 34 Neb., 544, it was said, in regard to a sale of personal property: "The rule is that if a person has advanced money in part performance of a contract and then refuses to proceed, the other party being ready and willing to per-

form on his part all the stipulations of the agreement, the former will not be permitted to recover back what he has advanced." In view of the frequency with which it might be supposed this question would arise, the authorities elsewhere are remarkably few and the cases wherein the principle has been involved are not harmonious. Had the case rested upon the defendant's counter-claim, in ascertaining his damages, the fact that he had already received the $100 might be one for consideration; but this instruction related to the plaintiff's cause of action and not to the counter-claim, and if, instead of alleging performance on its part, plaintiff had alleged in the petition that it paid the $100 and then refused to receive the grain, such a petition would have been demurrable. It would trace the right to recover through the plaintiff's own breach of contract. We are satisfied with the rule announced in *Walter v. Reed*, and the instruction given was correct, in view of that rule.

It is assigned that the verdict is not sustained by the evidence; but the brief, while referring to this assignment of error, simply characterizes the verdict as unjust and does not point out in what respect the evidence was insufficient. We have examined the evidence and find it conflicting as to the essential facts in dispute. The verdict cannot, therefore, be disturbed.

It is argued in the brief that the court erred in excluding certain evidence, but neither in the motion for a new trial nor in the petition in error is there any assignment sufficient to present the ruling complained of for review.

AFFIRMED.

ROBERT GUTHRIE ET AL. V. GEORGE BROWN.

FILED NOVEMBER 8, 1894. No. 5106.

1. **Bill of Exceptions:** ALLOWANCE BY CLERK. In order to authorize the clerk of the district court to settle a bill of exceptions it must appear that the conditions exist whereunder section 311 of the Code of Civil Procedure permits the clerk to exercise such authority. Therefore, although the parties may have agreed in advance of the preparation of the bill that the clerk might settle the same, he is not authorized to do so when the proposed bill, instead of being agreed upon, is returned with proposed amendments and those are not complied with.
2. **Trial:** GENERAL FINDING: PLEADING. When a defendant answers denying the allegations upon which plaintiff's claim is founded and at the same time pleading a counter-claim a general finding for the plaintiff is sufficient to dispose of the issues, both on the petition and on the counter-claim.
3. **Costs:** MECHANICS' LIENS: PERSONAL JUDGMENT. An action was brought to foreclose a mechanic's lien. There was a general finding for the plaintiff for a sum less than $200. A personal judgment was entered, but no decree establishing and foreclosing the lien. *Held*, That the general finding established the right to a lien and determined that the action was not one within the jurisdiction of a justice of the peace, and entitled the plaintiff to recover his costs. The fact that the court failed to enter judgment in accordance with the finding did not render a judgment for costs erroneous.

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

W. F. Buck, for plaintiffs in error:

The findings were erroneous in allowing the plaintiff below to recover costs. The amount sued for was within the jurisdiction of a justice of the peace. (*Ray v. Mason*, 6 Neb., 101; *Geere v. Sweet*, 2 Neb., 75; *Beach v. Cramer*, 5 Neb., 99; *Moore v. Darrow*, 11 Neb., 462; *Wilde v. Boldt*, 16 Neb., 539; *Goodman v. Pence*, 21 Neb., 459.)

S. A. Searle and *H. W. Short*, also for plaintiffs in error.

Edwin J. Murfin, *contra*, on the question of costs, cited: *Myer v. Gleisner*, 7 Wis., 55*; *Albers v. Eilers*, 18 Mo., 279; *Williamson v. Hendricks*, 10 Abb. Pr. [N. Y.], 98; *Lumbard v. Syracuse, B. & N. Y. R. Co.*, 62 N. Y., 290; *Dunning v. Clark*, 2 E. D. Smith [N. Y.], 535; *Huxford v. Bogardus*, 40 How. Pr. [N. Y.], 94.

C. J. McGrew, also for defendant in error.

IRVINE, C.

Brown brought an action in the district court of Nuckolls county to foreclose a mortgage on land alleged to belong to the Guthries. The Guthries filed answers presenting issues of fact, and Robert Guthrie, in addition thereto, interposed a counter-claim. An order was made referring the case to C. L. Trevitt "to take and report the proofs." Thereafter the referee's report was filed, and then it appears there was a trial to the court, a general finding for the plaintiff, and a personal judgment for the plaintiff for $198.60 and costs, but there was no decree foreclosing the mechanic's lien. The defendants seek to reverse this judgment principally because of errors alleged to have occurred on the trial, and questions relating to the sufficiency of the evidence. These questions we cannot consider. From what purports to be the bill of exceptions in the case it would seem that after the referee's report was filed the case came on for trial to the court and the parties offered in evidence the referee's report, upon which the court determined the case. If the parties agree upon that method of trial, it is probable that the proceedings would not be disturbed on that account, but such procedure was peculiar. Our Code of Procedure, sections 298 to 306, provides for trial by referees of all or any of the issues in actions under certain circumstances. The method of preserving the evi-

dence taken before a referee is by procuring a bill of exceptions to be settled and signed by the referee and not by judge. (*Light v. Kennard*, 10 Neb., 330; *Turner v. Turner*, 12 Neb., 161; *State v. Gaslin*, 30 Neb., 651.) In order to obtain a review by the court of the findings of the referee, exceptions should be taken to his report and a motion for a new trial made as in case of trials of fact to a jury. (*Murray v. School District*, 11 Neb., 438; *Simpson v. Gregg*, 5 Neb., 237.) In this case we have not any bill of exceptions settled by the referee, nor have we any motion for a new trial addressed to the district court. Indeed, the idea seems to have been to have the referee take the evidence only, and it does not appear that his report contained any findings. It seems to have been the theory of the parties to have the referee take the testimony and to offer a transcript thereof in evidence to the district court and rest the case on the court's review of this transcript; but treating this as a procedure which would be sustained if taken by the consent of the parties, still the record is not preserved to us in a manner authorizing us to review the evidence. There appears in the record a stipulation that the original report of the referee shall be embodied in the bill of exceptions, "and that the same shall be settled by the clerk of this [the district] court within the time allowed by law for the court to settle the same." This is not such a stipulation as is required by section 311 of the Code of Civil Procedure in order to authorize the clerk of the court to settle the bill. That stipulation must show that the parties have agreed upon the bill of exceptions which it is proposed that the clerk shall sign. Instead of such an agreement this record shows that the proposed bill of exceptions was returned by counsel for the defendant in error with amendments proposed, to-wit, that the referee's report should be signed and that certain exhibits should be attached to the bill. Instead of the bill of exceptions having been agreed upon it was, therefore, returned with objections, and an in-

spection of what purports to be the bill shows that the proposed amendments were not made. The certification of the bill by the clerk of the court was, therefore, unauthorized by law.

A few assignments of error arise outside of the evidence. The first is that the judgment was for more than was claimed by the plaintiff in his petition. The amount claimed was $162.50, with interest from November 1, 1887. The findings of the court were entered December 8, 1890. Interest for this period added to the $162.50 claimed would be more than the judgment, so this assignment is not well taken. Another assignment is that the plaintiff in error's counter-claim was disregarded by the district court. Whether this was so upon the evidence we cannot determine. The general finding for the plaintiff was sufficient on the record to dispose of the counter-claim. It was not necessary that there should be a separate finding on that branch of the case.

The only remaining assignment which we can notice is that the court erred in rendering judgment against the defendants for costs, because the amount recovered was within the jurisdiction of a justice of the peace. The action was to foreclose a mechanic's lien, and, therefore, not within the jurisdiction of a justice of the peace. The finding was generally for the plaintiff, and that finding entitled the plaintiff to a judgment foreclosing his mechanic's lien. Had such a judgment been rendered, complaint could not be made on the ground urged. The fact that the court rendered only a personal judgment, and failed to render a judgment foreclosing the lien, does not entitle the plaintiffs in error to complain because the costs were taxed against them. Had the court found the issues in such a way as to entitle the plaintiff to a personal judgment only and not a lien, the objection would be well taken, but having found generally for the plaintiff, the failure to enter judgment establishing and foreclosing the lien was error prejudicial

to the plaintiff. Its commission does not debar plaintiff of his right to enforce the judgment for costs.

JUDGMENT AFFIRMED.

J. P. CONNER V. JOHN G. SCHRICKER ET AL.

FILED NOVEMBER 8, 1894. No. 5297.

Landlord and Tenant: LEASE: CHANGE OF CONTRACT. A, the owner of land, demised the same to B, reserving as rent one-fourth of the crops; B sublet a portion of the premises to C for a money rent; C paid a portion of the rent to B and thereafter paid the remainder to B's administratrix. The administratrix paid the latter sum to A, who accepted the same. *Held*, That the payment to, and acceptance by, A of the money operated as a relinquishment of any interest he might have had in the crop raised on the land sublet to C, and evidenced a new contract between A and B's administratrix, whereby as to this land a money payment was to be received in lieu of rent in kind.

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

Charles Riley, for plaintiff in error.

N. C. Pratt and *F. S. Howell, contra.*

IRVINE, C.

Conner sued John G. Schricker, John Schricker, William Schricker, and Otto Schricker, alleging that Conner was the owner in fee of certain land in Boone county; that on December 20, 1889, he leased said land to one Ward, and that by the terms of the said lease Ward agreed to deliver as rent to Conner at Albion one-quarter of the crops to be raised on the premises during the year 1890; that thereafter Ward orally assigned his interest in a portion of

the premises to the defendants, they having notice of the lease from Conner to Ward and of its terms; that the defendants entered on said premises and raised thereon certain crops; that they have refused to deliver to the plaintiff any portion of said crops and have converted Conner's share thereof to their own use, wherefore Conner prayed judgment for the value of one quarter of the crop. John G. Schricker, John Schricker, and Otto Schricker answered by a general denial. William Schricker admitted Conner's ownership of the land, the lease to Ward, and its terms as alleged in the petition, and denied the other averments of the petition. He further answered that in April he subleased a portion of the premises from Ward until January 1, 1891, and agreed to pay Ward the sum of $1 per acre as rent; that prior to the commencement of the action he had paid Ward $28.75, and thereafter, and still prior to the action, had paid to the administratrix of Ward $28.25, the two sums constituting the full rent reserved in the lease from Ward. There was a reply to this answer in the nature of a general denial. At the conclusion of the evidence the court, at the request of the defendants, granted a peremptory instruction to find in their favor. The giving of this instruction and the refusal of instructions requested by the plaintiff submitting certain issues to the jury are the only errors presented by the briefs. As to all the defendants, except William Schricker, there can be no doubt of the correctness of the instruction, as there is no evidence tending to establish any connection between them and the acts complained of.

The case of William Schricker presents a different aspect. It was stipulated that William Schricker had leased fifty-seven acres of Conner's land from Ward, knowing of Ward's tenancy; that Conner had no knowledge of the lease between Ward and Schricker until the latter had raised a crop; that one-quarter of the value of the crop raised by Schricker would be $84.37; that Schricker paid

a portion of the rent agreed upon between himself and Ward to Ward, and that the remainder thereof, amounting to $28.25, Schricker paid to the administratrix of Ward, and the administratrix paid it to the plaintiff. The discussion in the briefs turns mainly upon the questions whether the contract with Schricker was an assignment or subletting, and whether Conner had a vested interest in the crop. We cannot regard either of these questions as necessary to a decision of the case. If the lease from Conner to Ward was not of such a character as to make the parties thereto tenants in common of the crop, then this action could not be maintained whether Schricker was assignee of a portion of the land or a subtenant. Unless such a co-tenany existed, Ward was not, until division, the owner of any portion of the crop and could not maintain trover against any one therefor. It would only be in case such a co-tenancy existed between Ward and Conner that the latter could maintain trover against either Ward or a stranger converting the crop. Let us assume then that by the lease between Conner and Ward the former did become the owner of a one-quarter interest in all the crops which might be raised on the land during Ward's term, and that such relation would continue between Conner and Schricker. In such case Conner might, if he saw fit, ignore any contract made between Ward and Schricker and enforce against Schricker his interest in the crop; but it was equally within Conner's power to ratify the contract between Ward and Schricker, which contemplated the payment of a cash rent instead of a rent in kind, and by a novation with Ward or his representative lose his interest in the crop and substitute therefor a money demand against Ward or his representative. This, we think, he did when he accepted from Ward's administratrix the money paid by Schricker to the administratrix. Just what the terms of this novation were and what rights were created thereby as between Conner and the administratrix we need not determine.

They are not involved in this case. It is plain, however, that a landlord in such case cannot accept from his tenant money in lieu of a rent in kind or undivided interest in a crop, and at the same time seek to establish such interest in the crop or his right to the rent in kind against either this tenant or another. We regard his acceptance of the money as an abandonment of his claim to the portion of the crop raised on Schricker's land and as evidencing a new contract for rent as to that portion of the land. It follows, then, that the plaintiff was not in any view entitled to recover from Schricker and that the judgment of the district court was right.

AFFIRMED.

HARRISON, J., not sitting.

NORWEGIAN PLOW COMPANY v. E. B. MOWER ET AL.

FILED NOVEMBER 9, 1894. No. 4817.

Review: FAILURE TO FILE BRIEFS: AFFIRMANCE. Where a judgment conforms to the pleadings and evidence in the case, and no briefs are filed by either party in this court, the judgment will not be disturbed. (*Damon v. City of Omaha*, 38 Neb., 583.)

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

Harwood, Ames & Kelly and *E. F. Pettis*, for plaintiff in error.

Davis & Hibner, contra.

NORVAL, C. J.

This was an action upon a promissory note executed and delivered by the defendants in error to the Norwegian Plow

Company for the sum of $103.42 and interest thereon. The petition is in the ordinary form. The defendants filed separate answers, each admitting the execution and delivery of the note, and setting up the defense of payment. The defendant Steiner further answered that he signed the note as surety for his co-defendant, E. B. Mower. The plaintiff replied by a general denial. There was a verdict for the defendants upon which judgment was rendered.

Upon a somewhat careful consideration of the record we are satisfied that the verdict and judgment conform to the pleadings and evidence, and neither party having filed briefs in the case, on the authority of *Phenix Ins. Co. of Brooklyn v. Reams*, 37 Neb., 423, and *Damon v. City of Omaha*, 38 Neb., 583, the judgment is

AFFIRMED.

COX & CORNELL V. PEORIA MANUFACTURING COMPANY.

FILED NOVEMBER 9, 1894. No. 5372.

1. **Waiver of Exception to Ruling on Demurrer:** PLEADING. The filing of an answer after a special demurrer to the petition is overruled is a waiver of an exception to the decision of the court on the demurrer.
2. ———: ———. Answering over after the overruling of a general demurrer to the petition is not a waiver of the defect that the petition fails to state a cause of action.
3. **Action Before Maturity of Debt:** ATTACHMENT. An action can only be maintained on a debt prior to the maturity thereof in the exceptional cases specified in section 237 of the Code.
4. **Attachment.** Such an action cannot be prosecuted to judgment, unless a writ of attachment has been allowed, and property seized thereunder.
5. **Affidavit for Attachment:** CLAIM NOT DUE. Where a cred-

itor brings an action on a claim before it is due, and sues out an attachment, it is not necessary that he should set up in the petition the fraudulent acts of the defendant which are relied upon as the basis for the granting of the attachment, but the same should be set forth in the attachment affidavit.

6. **Order of Attachment on Claim Not Due:** PRESUMPTION OF REGULARITY. Where a district judge allows an order of attachment on a debt not due, the presumption is, in the absence of a contrary showing, that the same was made while the court was in session, and especially so where the judge, at the time of the granting of the writ, was presiding at a regular term of the district court in which such action was brought.

7. **District Courts:** JUDGES. A district judge has the power to hold court in a district other than the one for which he was elected, and it will be presumed, in case he does so, that it was at the instance of the judge of the proper district.

8. **Attachment:** PARTNERSHIP PROPERTY: EXEMPTIONS: FRAUD. Where the members of an insolvent partnership divide between themselves all the firm assets, without regard to the interest or share of the respective partners therein, with the intention and for the sole purpose of enabling each to claim the portion so transferred to him as exempt against the creditors of the partnership, it is a sufficient ground for an attachment, since such transfer tends to hinder and delay the firm creditors in the collection of their claims.

ERROR from the district court of Saunders county. Tried below before BATES, J.

The opinion contains a statement of the case.

Simpson & Sornborger, for plaintiffs in error:

A judge has no authority to allow a writ of attachment outside of his own district, except upon a showing of absence of the judge of the district, or other disability. (*Ellis v. Karl*, 7 Neb., 381.)

Reference was made in the brief to the following cases on the question of fraud and the right of each partner to claim property as exempt after division of the firm assets: *O'Donnell v. Segar*, 25 Mich., 376; *Mortly v. Flannigan*,

38 O. St., 404; *Stewart v. Brown*, 37 N. Y., 350; *Russell v. Lennon*, 39 Wis., 570; *Worman v. Giddey*, 30 Mich., 151; *Blanchard v. Paschal*, 68 Ga., 32; *Skinner v. Shannon*, 44 Mich., 86; *O'Gorman v. Fink*, 57 Wis., 649; Thompson, Homesteads & Exemptions, sec. 211.

Atkinson & Doty, contra.

NORVAL, C. J.

On the 7th day of January, 1891, Cox & Cornell, a firm doing business at Wahoo, executed and delivered to the Peoria Manufacturing Company a promissory note in the sum of $743.90, with eight per cent interest from date, payable on the 1st day of May following. On the 30th day of March, 1891, this action was commenced by the defendant in error in the district court of Saunders county to recover the sum secured by said promissory note although the same was to become due thereafter. At the time of the commencing of the action an affidavit for an attachment was filed with the clerk of the said district court, and upon the same day the following order authorizing a writ of attachment to issue in said cause was entered upon the journal of said court, to-wit:

"Now, on this day, upon application of the plaintiff, the Peoria Manufacturing Company, and it appearing from the affidavit of C. A. Atkinson, an attorney of record of said plaintiff in said case, that the claim of the Peoria Manufacturing Company is just, and that there is cause for granting an attachment in the sum of $759.90, and $50 probable costs in the case, an attachment is therefore allowed to issue in this case, upon the plaintiff giving an undertaking for the sum of $1,500, with approved security, as required by law. WILLIAM MARSHALL,

"*Judge.*"

On March 31, 1891, the defendants filed a motion to dissolve the attachment on the following grounds:

1. That the judge allowing the writ of attachment was without jurisdiction to allow the same.

2. That the names of the defendants are not set forth in the affidavit for attachment, nor in the order of attachment, nor elsewhere in the record.

3. The facts stated in the affidavit are insufficient.

4. That the affidavit is untrue.

The motion was heard upon the affidavits of the defendants and the counter-affidavits submitted by the plaintiff, and on June 1, 1891, the court overruled said motion, to which ruling the defendants took exception.

On June 3, 1891, the defendants filed a demurrer to the petition, alleging:

1. That there is a defect of parties defendant.

2. That no defendant is named in the petition or proceedings.

3. That the petition does not state sufficient facts to constitute a cause of action.

This demurrer was on the same day overruled, and subsequently each of the defendants filed a separate answer alleging, in substance and effect, that the firm of Cox & Cornell had been dissolved, by mutual consent of all the members thereof, more than a month prior to the institution of this suit, and that notice of dissolution was given plaintiff within a week after the same occurred, and praying that the action be dismissed, or that the plaintiff be required to prosecute the same against the persons formerly composing said partnership, to-wit, Joseph M. Cox and George H. Cornell.

To each answer the plaintiff interposed a general demurrer, which was by the court sustained, and judgment was entered in favor of the plaintiff on January 25, 1892, for the sum of $808.99, and the sheriff was ordered to sell the attached property, and apply the proceeds arising therefrom in satisfaction of said sum, interest and costs.

We will first consider whether there was any error in the

overruling of the defendants' demurrer to the petition. As elsewhere stated, after the decision upon the demurrer, the defendants each filed a separate answer. They thereby waived the exception to the decision of the court in overruling such demurrer, except as to the third or last ground of the demurrer, namely, that the facts stated in the petition do not constitute a cause of action. The filing of an answer after the overruling of the demurrer is not a waiver of a defect in a petition, that the pleading fails to state a cause of action. (*Singer Mfg. Co. v. McAllister*, 22 Neb., 359; *O'Donohue v. Hendrix*, 13 Neb., 255; *Farrar v. Triplett*, 7 Neb., 237; *Burlington & M. R. R. Co. v. Kearney County*, 17 Neb., 511; *Renfrew v. Willis*, 33 Neb., 98.) Is the petition sufficient? It alleges the incorporation of the plaintiff, and that Cox & Cornell was a partnership doing business at Wahoo. The petition, after setting out a copy of the instrument sued on, avers the execution and delivery, by the defendants below to the plaintiff, of a promissory note for $743.90, bearing date January 7, 1891, and maturing May 1, following, drawing interest at the rate of eight per cent per annum from date; that no part of said note had been paid; that the same will be due on the 1st day of May, 1891, and that on said day there will be due and payable thereon from the defendants to the plaintiff the sum of $759.90. Counsel for the plaintiffs in error, in discussing the sufficiency of the pleading in the brief, say: "At first blush such a declaration must be held to be bad, because the first principle underlying a right of plaintiff to recover from the defendants is that something is due from one to the other; and an affirmative declaration that the something is not due, unexplained, negatives the right to recover." Ordinarily, an action cannot be brought on a debt prior to maturity thereof; but our statute has created an exception to the general rule. By section 237 of the Code of Civil Procedure it is provided: "A creditor may bring an action on a claim before it is due, and have an

attachment against the property of the debtor, in the following cases: First—Where a debtor has sold, conveyed, or otherwise disposed of his property, with the fraudulent intent to cheat or defraud his creditors, or to hinder or delay them in the collection of their debts. Second—Where he is about to make such sale, conveyance, or disposition of his property, with such fraudulent intent. Third—Where he is about to remove his property, or a material part thereof, with the intent or to the effect of cheating or defrauding his creditors, or of hindering and delaying them in the collection of their debts." It is plain from the reading of the foregoing provisions that when a debtor has committed any one of the fraudulent acts enumerated in the section quoted his creditor may maintain an action on the claim before the same is due, when aided by attachment, but that in all other cases an action cannot be properly commenced until the debt has matured. (*Seidentopf v. Annabil*, 6 Neb., 524; *Green v. Raymond*, 9 Neb., 295; *Caulfield v. Bittenger*, 37 Neb., 542.) Although writs of attachment are allowable for debts not due in the exceptional cases of fraudulent conduct on the part of the debtors above enumerated, yet it is expressly provided in section 242 of the Code that "The plaintiff in such action shall not have judgment on his claim before it becomes due." The original affidavit for an attachment in the case under review alleges the existence of the first and third grounds of fraud specified in said section 237, which was *prima facie* sufficient to entitle the plaintiff below to institute his action, on the note, even before the maturity thereof. It appears from this record that at the time the demurrer to the petition was filed, and the ruling was given thereon, the note, which is the basis of the suit, had matured, and this fact was disclosed by the face of the petition itself. The petition, therefore, at that time showed a present existing indebtedness of the defendants to the plaintiff, and a present right of action.

It is argued that the petition is defective in that it omitted to set forth the fraudulent conduct of the defendants. We are not aware of any provision of statute, or rule of practice, which requires that, in order to maintain an action upon a claim before due, the petition must set out the fraudulent acts of the defendant which are relied upon as the basis for the allowing of an attachment. All the statute requires, before an attachment shall be granted, or allowed, in an action on a demand before the same has matured, is that an affidavit be filed, stating the nature and amount of plaintiff's claim, that it is just, when the same will become due, and the existence of one of the grounds for attachment mentioned in section 237 of the Code. (See Code, sec. 238.) There is no necessity for setting forth the grounds for an attachment in the petition. Even should they be therein alleged, the action could not be prosecuted to judgment, unless an attachment has been granted and issued, and property seized thereunder. The right to prosecute an action on a debt before due depends upon the granting of an order of attachment; and the issuance of the writ in such a case is discretionary with the court or judge. (*Seidentopf v. Annabil, supra.*) If the order is refused, the action must be dismissed. (Code, sec. 239.) We are satisfied that the petition is not defective because of its failure to allege the fraudulent conduct or purpose of the defendants, and that there was no error in the decision of the trial court in overruling their demurrer.

We next consider the contention of the plaintiff in error, that the court erred in refusing to discharge the attachment. The second and third grounds contained in the motion to vacate the attachment not being now relied upon will be deemed waived, and hence the first and fourth grounds of the motion alone will be examined. Was the order of attachment granted without jurisdiction or authority? This court will take judicial notice of the fact that on and prior to the 30th day of March, 1891, the date on which the writ

of attachment was allowed, Saunders county was one of the counties comprising the fourth judicial district, and that the Hon. William Marshall was one of the judges of said district, and on the date aforesaid was holding a regular term of court in said county of Saunders. We know, too, that the governor on that day approved an act of the legislature, with an emergency clause, reapportioning the state into judicial districts, by which law Judge Marshall became one of the judges of the sixth district, and Saunders county became one of the counties comprising the fifth judicial district and that the Hon. Edward Bates was at the time the judge thereof. Counsel for plaintiff in error insist that this is a case of a judge of the sixth district assuming to allow an order of attachment for a debt before due in an action brought in a county of the fifth district, without a showing of absence, or other disability, of the judge of the latter district. The record does not bear out such contention. It is not disclosed that Judge Marshall was in the sixth district when the order was allowed, or that the same was made at chambers. In the absence of a showing to the contrary, it will be presumed that the order in question was made while the district court of Saunders county was in regular session, and especially so since Judge Marshall was presiding over the district court of said county on the day the attachment in question was granted. (*Bostwick v. Bryant*, 113 Ind., 448; *Carmody v. State*, 105 Ind., 546.) The constitution and statutes of this state authorize and empower district judges to interchange and hold courts for each other (*Drake v. State*, 14 Neb., 535); and, nothing to the contrary appearing on the face of the record under review, we must presume that Judge Marshall was holding the term of court in Saunders county at the request, or instance, of Judge Bates when the order of attachment was allowed. It is suggested that nowhere in the record is it disclosed that Judge Bates was absent from his district, or that he was sick, or unable to act. We reply that the va-

lidity of the order in no manner depends upon the existence of such fact. The statute places no limitation upon the power of a district judge to hold court for the judge of another district, and we have no right to do so. It logically follows from the views above expressed that there was no want of jurisdiction in granting the writ, but the same was as valid and binding as though it had been allowed by Judge Bates.

It remains to be considered whether the last ground contained in the motion to dissolve the attachment was well taken. There is absolutely no controversy as to the facts. It appears that the firm of Cox & Cornell was composed of Joseph M. Cox and George H. Cornell, and that the said firm continued in business up to about the 20th day of February, 1891, when by mutual consent the partnership was dissolved and the property of the firm, consisting chiefly of wagons and buggies, and for which the note sued on was given in part payment, was divided between the partners with the intention, and for the sole purpose, of enabling each, if possible, to claim the property as transferred to him as exempt under the exemption laws of the state, and thereby defeat the collection of plaintiff's claim. At the time of the division of the property as aforesaid the firm, and each member thereof, was insolvent. Subsequently, judgments were recovered against Cox & Cornell by two of their creditors, upon one of which an execution was issued and levied upon certain property which had been divided as aforesaid between the members of the firm; and the said Joseph M. Cox and George H. Cornell each filed an affidavit in the court from which the execution issued, claiming the property so levied upon as exempt. There is no evidence that the property was divided between the partners in proportion to the share or interest of each in the firm assets. The question for consideration is whether there was a disposition of the property of the partnership with fraudulent intent to cheat and defraud the

creditors of Cox & Cornell. Stated differently, have partners the right to divide between themselves the firm assets where such division is made with the avowed purpose of preventing, hindering, or delaying creditors from collecting their claims from the property of the partnership? We think the answer must be in the negative. Partnership effects are liable for the payment of the debts against the firm. The interest of each partner is his moiety or share of the assets remaining after the partnership debts are settled. In other words, each member of the firm holds his interest in the property of the partnership subject to a trust for the firm creditors. Neither partner, nor all of them together, can lawfully, on the dissolution of the firm, transfer or otherwise dispose of the assets, where the purpose in so doing is to place the same beyond the reach of the partnership creditors, or to hinder or delay them in the collection of their debts. In *Roop v. Herron*, 15 Neb., 73, a case similar in the controlling features to the one before us, the court says: "A partnership is a distinct entity, having its own property, debts, and credits. For the purposes for which it was created it is a person, and as such is recognized by law. And the credit being given to the firm—in effect to the partners jointly, it would seem but justice that the goods so purchased should not be diverted to the use of an individual partner, when such diversions will have the effect to defraud the creditors of the firm. It may be said the goods having been sold to the firm, the creditors thereby surrendered all control over them and trusted alone to the solvency of the debtor firm for payment; that the delivery being complete and without conditions, the debtor firm could make what disposition of the property it saw fit. In a sale to an individual upon credit, in addition to the agreement to pay the debt, there is an implied agreement that the debtor's property shall, if necessary, be applied for that purpose. Now, if the debtor attempts to divert his property from this purpose,—to place it beyond the reach of his cred-

itors,—the law at once authorizes its seizure by attachment to prevent the creditor from being defrauded. So with property held by a firm, there is an implied agreement that all its assets shall, if necessary, be applied to the payment of the firm debts; and any diversion of such assets of an insolvent firm is a fraud upon its creditors. In other words, the partnership property is a trust fund to the extent of the partnership liabilities, and to be applied in the satisfaction of the same. (*Egberts v. Wood*, 3 Paige Ch. [N. Y.], 517; *Innes v. Lansing*, 7 Paige Ch. [N. Y.], 583; *Whitewright v. Stimpson*, 2 Barb. [N. Y.], 379.) This being so, can the members of an insolvent firm, by simply assigning their interest in the property, defeat this trust and change the character of the property from partnership to that of an individual? If so, it affords an easy mode of defeating partnership creditors. The creditors might say, we gave the credit because the firm seemed to possess sufficient assets to pay its debts; and if in good faith they are applied to that purpose, they are sufficient. The right of the members of a firm, who as a firm have induced others to give them credit, to change the firm property to that of an individual member of the firm, without the consent of creditors, is very doubtful." We are satisfied that the dividing of the assets in the case at bar, in severalty between the partners for the purpose intended, amounted to such a fraudulent disposition of the property within the meaning of the statute as to lay the foundation for suing out the attachment. No one will dispute that, inasmuch as the statute of exemptions is lawful, it is not a fraud for a debtor to avail himself of its provisions by disposing of his unexempt property for the purpose of investing the proceeds arising therefrom in property which is exempt under the statute. But that is not the case before us, which must be plain to every one, since there has been no converting of the assets of the firm into other property. On the other hand all the effects have been

transferred to the individual partners, with the view of enabling each one to claim and hold as exempt the part which came into his hands; and this was done confessedly for the sole purpose of cheating and defrauding the firm creditors. We are of the opinion, therefore, that the charge of fraud set up in the attachment affidavit is fully sustained by the evidence, and that the court did not err in refusing to dissolve the attachment.

JUDGMENT AFFIRMED.

CITY OF SOUTH OMAHA ET AL. V. TAXPAYERS' LEAGUE ET AL.

FILED NOVEMBER 9, 1894. No. 7059.

1. **Statutes:** REPEAL: CONSTITUTIONAL LAW. Where it is sought by legislative enactment to amend and repeal a former act, or any section or sections thereof, there should be a compliance with requirements of the constitution in reference to amendment and repeal of laws.

2. ———: ———: ———. The act entitled "An act to amend sections one (1) and two (2) of an act entitled 'An act to incorporate cities of the first-class having less than twenty-five thousand and more than eight thousand inhabitants, and regulating their duties, powers, and government,' known as chapter 15 of the General Laws of 1889, and passed and approved March 14, 1889," (Laws of 1891, pp. 162, 163,) not having complied with the requirement of the constitution contained in secton 11 of article 3, wherein it is provided that "no law shall be amended unless the new act contains the section or sections so amended and the section or sections so amended shall be repealed," is void and without effect.

3. **Injunction:** MUNICIPAL CORPORATIONS: OFFICERS: ILLEGAL SALARIES. Where the acts of a municipal corporation are presumably without color of law, an action of injunction may be maintained by a party showing a sufficient interest and that irreparable injury will result to him through such acts, and this

notwithstanding a decision of the issues in the case may involve a decision of the particular class to which the municipal corporation belongs.

4. ———. Under the facts as developed in this case, *held*, that injunction was the proper remedy.

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

E. T. Farnsworth, for plaintiffs in error, cited: *Ryan v. State*, 5 Neb., 276; *Lancaster County v. Hoagland*, 8 Neb., 36; *Jamieson v. People*, 16 Ill., 257; *Fugate v. McManama*, 50 Mo. App., 41; *McClay v. City of Lincoln*, 32 Neb., 416; *People v. Maynard*, 15 Mich., 463; *Rumsey v. People*, 19 N. Y., 42; *Town of Geneva v. Cole*, 61 Ill., 397; *Mullikin v. City of Bloomington*, 72 Ind., 161; *City of St. Louis v. Shields*, 62 Mo., 247; *Louisville, N. A. & C. R. Co. v. Shires*, 108 Ill., 617; *Lincoln Building & Saving Association v. Graham*, 7 Neb., 173.

R. B. Montgomery, *H. G. Bell*, and *Edmund C. Lane*, *contra*, cited: *People v. McCallum*, 1 Neb., 182; *Willis v. St. Paul Sanitation Co.*, 50 N. W. Rep. [Minn.], 1110; *State v. Weston*, 4 Neb., 216; *Smails v. White*, 4 Neb., 356; *School District v. Paddock*, 36 Neb., 263.

HARRISON, J.

In this case the defendants in error filed a petition in the district court of Douglas county, alleging:

"1. The Taxpayers' League of South Omaha, Nebraska, is a corporation duly organized and existing under and by virtue of the laws of the state of Nebraska, and is located in the city of South Omaha, and is a taxpayer thereof, and is duly authorized to sue and be sued in its own behalf and in behalf of the taxpayers of said city in any action pertaining to the welfare of said city or its citizens.

"2. That the plaintiff Thomas J. O'Neill is an elector

of the city of South Omaha and has been for more than a year last past, and is a taxpayer in said city, having a large amount of property in said city, both real and personal, subject to taxation therein, and is and has been a heavy taxpayer in said city.

"3. That the said plaintiffs herein bring this action in their own behalf and in behalf of the citizens and taxpayers of the city of South Omaha.

"4. That the said defendant the city of South Omaha is a city of the second class having more than 5,000 and less than 10,000 inhabitants, according to the census taken and promulgated under and by the authority of the United States in the year 1890, being the last census taken and promulgated by the United States or the state of Nebraska.

"5. That the defendant Ed. Johnston was elected and is acting as mayor of the said city of South Omaha; that James Bulla, William M. Wood, Frank Koutskey, Henry Meis, Ed. Conley, John J. Ryan, W. M. Mullala, and John S. Walters are the acting city council of the said city of South Omaha; that Joseph J. Maly is the acting clerk of the said city of South Omaha; that Thomas Hoctor is the acting treasurer of the said city of South Omaha.

"6. That under the laws of the state of Nebraska governing cities of the second class, sections 2735 and 2736, Cobbey's Annotated Statutes of the state of Nebraska, provided that the salaries of all officers shall be fixed by ordinance, not exceeding the following sums, respectively: The city engineer, not exceeding five ($5) dollars per day for each day actually employed, and not exceeding five hundred ($500) dollars in any one year. The city clerk, five hundred ($500) dollars. The city attorney, five hundred ($500) dollars, etc.

"7. That contrary to said law and without authority said mayor and city council adopted, approved, and published the following ordinance, to-wit:

"'ORDINANCE NO. 568.

"'An ordinance fixing the salaries of the city attorney, city clerk, and city engineer of the city of South Omaha, Nebraska, and repealing all ordinances or parts of ordinances in conflict herewith.

"'*Be it ordained by the Mayor and City Council of the City of South Omaha, Nebraska:*

"'Section 1. That the salaries of the city attorney, city clerk, and city engineer of the city of South Omaha be and are hereby fixed as follows: City attorney, $1,200 per annum; city clerk, $1,000 per annum; city engineer, $1,000 per annum. Said salaries shall be payable in monthly installments by warrants drawn on the city treasurer in the usual form.

"'Sec. 2. All ordinances or parts of ordinances in conflict herewith are hereby repealed.

"'Sec. 3. This ordinance shall take effect and be in force from and after its passage.'

"8. That the defendants herein, without right or legal authority, intend and are about to pay the city attorney, one E. T. Farnsworth, city engineer, one —— Beal, and city clerk, one Joseph J. Maly, of said city the increased salaries allowed and provided for in said ordinance out of the money collected as taxes from the plaintiffs and other taxpayers of said city.

"9. The plaintiffs further represent that unless the defendants are restrained by injunction, they will proceed to audit, allow, and pay said illegal salaries to said officers out of the money collected as aforesaid, and that these plaintiffs and other taxpayers of said city will be greatly damaged and irreparably injured by said unlawful and illegal appropriation of said funds, and that the plaintiffs and taxpayers of said city will be without any adequate remedy at law. And praying an injunction against the auditing and allowing of any claim of the city attorney, city clerk, and city engineer against the city of South

Omaha for salaries in excess of the sums fixed as salaries for such officers in the charter governing cities of the second class and the ordering drawn, the drawing, signing, issuance, and payment of any warrant or warrants founded upon any such claim, and that the ordinance set forth in the petition fixing the salaries of the city attorney, city clerk, and city engineer be declared illegal and void."

To this petition the city filed to certain parts an answer and to other parts a demurrer, as follows:

"1. Defendants deny that South Omaha is a city of the second class, and in this connection allege that it is a city of the first class; deny the allegations contained in the first paragraph of said petition; deny the allegations contained in the last two lines of the third paragraph of said petition; deny all the allegations contained in the fourth paragraph of said petition; deny the allegations contained in the first line of the seventh paragraph of said petition; deny the allegations contained in the first line of the eighth paragraph of said petition; and deny each and every allegation contained in the last five lines of the ninth paragraph of said petition.

"2. As to the allegations contained in the second paragraph, the first two lines of the third paragraph, and all of the sixth paragraph, and the last two lines of the seventh paragraph, and last six lines of the eighth paragraph and first four lines of the ninth paragraph of said petition, the defendants, and each of them, demur, for the reasons that the allegations contained in said paragraphs do not state facts sufficient to constitute a cause of action against the defendants, and for the further reason that the plaintiffs have not the legal capacity to sue; that the court has no jurisdiction over the subject-matter of this action and these defendants object to the right of these plaintiffs herein, or either of them, to bring this action on their own behalf or to question the classification of defendant city in this action."

On the date the petition was filed a restraining order was issued and on June 14, 1894, the court rendered a decree in the cause as follows:

"Now on this day this cause came on to be heard on the petition of plaintiffs and the answer of defendants, and the stipulation and affidavits and exhibits of the parties, and the parties agreed that the hearing herein should be final. The court, being fully advised in the premises, finds, upon the issues joined and evidence produced, that the city of South Omaha is a city of the second class as alleged in plaintiffs' petition, and the court further finds in favor of the plaintiffs. It is therefore considered by the court that the injunction heretofore granted in this case may be made perpetual, and that the defendants, and each of them, be and the same are perpetually enjoined and restrained from paying salaries in excess of the following amounts, to-wit: City attorney, $500 per year; city clerk, $500 per year; city engineer, $5 per day, or not to exceed $500 per year. To all of which the defendants except."

A motion for a new trial was filed on behalf of the city, and on hearing overruled, and the city has removed the case to this court on petition in error.

The record discloses that South Omaha was organized as a city of the second class the proclamation of the governor of the state declaring it such a city being of date December 13, 1887; and was incorporated as a city of the first class, having a population of more than eight thousand and less than twenty-five thousand, by a proclamation of the governor of the state issued of date June 8, 1889. During the session of the legislature of 1891 there was passed an act which purported to amend the act under which South Omaha became a city of the first class, by which it was made necessary that the population of a city of the class therein named should be not less than ten thousand inhabitants, and it is claimed by the defendants in error, in argument, that by the census taken A. D. 1890 it was shown that

South Omaha had but 8,062 inhabitants and could no longer be a city of the first class, but was at once relegated to her position as a city of the second class. Attorney for plaintiff in error contends that for certain reasons stated in his brief the act of 1891 was unconstitutional and of no effect, and he further argues that this is an action in which the existence of the city of South Omaha as a city of the first class is to be determined, and that her existence as such city cannot be questioned in a collateral proceeding or suit, such as they claim is the present one. The act of 1891 was as follows:

"An act to amend sections one (1) and two (2) of an act entitled 'An act to incorporate cities of the first class having less than twenty-five thousand and more than eight thousand inhabitants, and regulating their duties, powers, and government,' known as chapter 15 of the General Laws of 1889, and passed and approved March 14, 1889.

"*Be it enacted by the Legislature of the State of Nebraska:*

"SECTION 1. That section one (1) of an act of the legislature entitled 'An act to incorporate cities of the first class having less than twenty-five and more than eight thousand inhabitants, and regulating their duties, powers, and government,' be amended so as to read as follows:

"Section 1. ('Cities of the First Class.') That all cities having less than twenty-five thousand (25,000) and more than ten thousand (10,000) inhabitants, as ascertained and officially promulgated by the census and enumeration taken by authority of the laws of the United States in the year 1890, shall be governed by the provisions of this act, and be known as cities of the first class having less than twenty-five thousand (25,000) inhabitants.

"SEC. 2. That section two (2) of said act be amended so as to read as follows:

"Section 2. Whenever any city of the second class shall

have attained a population of more than ten thousand (10,000) inhabitants, as ascertained and officially promulgated by the census return and enumeration taken under the authority of the United States, or under the authority of the state of Nebraska, the mayor of such city shall certify such fact to the governor, who shall by proclamation so declare, and thereafter such city shall be governed by the provisions of this act. And upon such proclamation being made by the governor each and every officer of such city shall within thirty (30) days thereafter qualify and give the bonds provided for by this act.

"SEC. 3. Whereas an emergency exists, this act shall take effect and be in force from and after its passage.

"Approved April 4, 1891."

It will be noticed by reading the above act that in its first section it limits the cities which shall be governed by the provisions of the act to such as have the required number of inhabitants as ascertained and officially promulgated by the census of 1890, and the act contains no repealing clause. As to how its validity is affected by the fact that it has no repealing clause cannot now be considered an open question. If it were, we might feel disposed, possibly, to take a different view of it than has been heretofore taken by this court; but the rule has been established and no good and sufficient season has been suggested showing any necessity for a change, and we think it should be adhered to. Under the doctrine announced in the cases of *Lancaster County v. Hoagland*, 8 Neb., 38, and *Ryan v. State*, 5 Neb., 276, the act of 1891 was void for non-compliance with constitutional requirements in regard to an amendatory act, and the act of 1889 continued in full force as it was originally enacted in so far at least as it was attempted to amend or change it by the act of 1891. In the case of *State v. Paddock*, 36 Neb., 263, cited by the counsel for defendants in error, the question regarding the constitutionality of the act of 1891 was not decided, hence the case is

not one in point in this case and is not in conflict with the conclusion herein reached on such question.

In another branch of the argument in this case it was insisted by attorney for the city that this suit involved the question of the existence of South Omaha as a municipal corporation, and being a collateral proceeding it must fail, and he cited, among others, the case of *State v. Whitney*, an opinion of this court filed June 27, 1894, reported in 41 Neb., 613, as directly in point and decisive of this case. In that opinion it is said by POST, J., in the text: "The rule is well settled upon authority that the existence of a municipal corporation cannot be questioned in collateral proceeding. In Dillon, Municipal Corporations [4th ed.], sec. 43*a*, it is said: 'Where a municipal corporation is acting under color of law, and its existence is not questioned by the state, it cannot be collaterally drawn in question by private parties.'" The facts in that case,—an application for *mandamus*,—as found by the referee, disclosed that the town of Alma, in Harlan county, had been incorporated for five years as a city of the second class having a population of 1,000 and not more than 10,000; that according to a census taken during the month of January preceding the election the population of the city was less than 1,000, and the contention of the respondents was that as soon as the census was completed and it appeared that there were not 1,000 inhabitants in the city, it ceased to be a city of the second class. The law was still in force, and any acts of the city as one of the second class would be at least under color of law and could not be made an issue in the action of *mandamus*. The facts in the case at bar differ from those in the case cited. The law under which the city of South Omaha had been incorporated and was acting as a city of the first class had been apparently superseded, and the city legislated out of existence as a city of the first class by an amendatory act which, presumably, was constitutional and valid, and which, unless repealed, must remain

in force and be given effect until pronounced invalid by some court of competent authority, and the acts which were sought to be enjoined could only be upheld by virtue of the portions of a law which had been apparently amended by the amendatory act of 1891, and such acts were then presumably without color of law for their authorization, and it was competent to attack them in the manner in which they were assailed in the case at bar, although in passing upon the validity of the act of 1891 it might involve the question of the class of cities to which South Omaha belonged. The decree of the district court is reversed and a decree ordered entered in this court dismissing the action.

JUDGMENT ACCORDINGLY.

WILLIAM T. SHACKELFORD V. WALTER HARGREAVES ET AL.

FILED NOVEMBER 9, 1894. No. 5005.

Replevin: BREACH OF CONTRACT. Where parties litigant had entered into a contract under which the possession of a stock of merchandise was transferred from plaintiff to defendants on a sufficient independent consideration, plaintiff could not found a superior right of possession, such as would entitle him to maintain replevin for said stock, upon an alleged breach of said contract by defendants as to retaining plaintiff in their employ at a certain rate of compensation thereby fixed.

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

A. H. Bowen, for plaintiff in error, cited: *Lichtenberger v. Johnson*, 32 Neb., 185; *Hull v. Godfrey*, 31 Neb., 204; *Newlean v. Olson*, 22 Neb., 717; *Ward v. Watson*, 24 Neb., 596; Jones, Chattel Mortgages, sec. 437; *Brashier v. Tolleth*, 31 Neb., 624.

Tibbets, Morey & Ferris, contra, cited: *Perkins v. Lougee,* 6 Neb., 220; *Kennedy v. Goodman,* 14 Neb., 585; *Keller v. Keller,* 18 Neb., 366; *Savage v. Aiken,* 21 Neb., 605.

RYAN, C.

This action of replevin was begun in the district court of Adams county by the plaintiff in error to recover possession of a stock of groceries and queensware, together with other property necessary for carrying on the retail business for the sale of a stock of the character named. A trial to the court resulted in judgment in favor of the defendants. Such facts as are essential—gleaned solely from the evidence of the plaintiff—are as follows: In the latter part of July, 1889, plaintiff was in the retail grocery business at Hastings. Mr. Low, the credit man for Hargreaves Bros., came into plaintiff's store about 8 o'clock in the evening of July 29, 1889, and stood around there until closing time, talking about different things, among others the indebtedness of plaintiff to defendants, and asking for security in respect thereof. Plaintiff said he had nothing on which to give security; whereupon Low asked if he could not give security on his stock and fixtures. This plaintiff declined to do at first, but afterwards consented to give a mortgage on the property which he subsequently replevied. The defendants, by Mr. Low, took possession of the mortgaged property on July 30, 1889, at about 10 o'clock A. M. Before possession was taken plaintiff had paid Mr. Low $649.73. On the evening of July 29 plaintiff and Mr. Low had a settlement of the matters between plaintiff and the defendants, and there was found due from the plaintiff the sum of $2,205. The notes secured by the mortgage made on July 29 were for the aggregate sum of $2,200, each note being for $300, except the last of the series, which was for $400. The first of these notes was due August 1, 1889, following which date a note fell due

every sixth day. The mortgage, by its terms, provided that in case of default made in the payment of the notes mentioned, or any part thereof, or if the mortgagor should not take proper care of the property, or if said mortgagees should at any time deem themselves insecure, or in case of the mortgagor attempting or permitting an attempt to injure, or dispose of or remove from the county of Adams the goods and chattels mortgaged, it should be lawful for the said mortgagees or assigns, in person or by agent, to take immediate possession of the mortgaged goods and chattels wherever found. On the 30th day of July, 1889, between 11 and 12 o'clock in the forenoon, the defendants, through Mr. Low, by virtue of their mortgage, took possession of the property therein described, and required plaintiff to discharge one of his clerks. Soon thereafter Mr. Low brought a Mr. Gardner into the store and gave to him one of the keys thereto. Between 3 and 4 o'clock in the afternoon of said day Mr. Low brought into the store a contract which plaintiff after some hesitation signed, which was in the following language:

"HASTINGS, NEB., July 30, 1889.

"This agreement, made this 30th day of July, 1889, by and between Hargreaves Bros., of Lincoln, Nebraska, and W. T. Shackelford of Hastings, Nebraska, witnesseth: Hargreaves Bros. are now mortgagees of the stock of goods of W. T. Shackelford, and are at the present time in possession of said goods and chattels described in said mortgage, and it is hereby agreed between and by W. T. Shackelford and Hargreaves Bros. that said Shackelford shall act as agent of said Hargreaves Bros. so long as said Hargreaves Bros. may desire his services, at the rate of $100 per month, but this contract may be terminated by either party upon one day's notice. Said Shackelford shall act only as the agent of Hargreaves Bros. and shall sell goods only for cash, accounting to Hargreaves Bros. accu-

rately for all moneys received, and shall in all matters act as directed by said Hargreaves Bros.

"HARGREAVES BROS.,
"By GEO. J. LOW.
"W. T. SHACKELFORD."

At the time this contract was signed Mr. Low was in possession of the store as agent for the defendants. About 9 o'clock A. M. of July 31, 1889, Mr. Low closed the store. On the following day plaintiff replevied the mortgaged property, but being unable to give bond as required by law, the action proceeded as one for the value of the property replevied. From this statement it is clear that the plaintiff voluntarily turned over to the agent of the defendants the possession of the property mortgaged, and that thereafter this possession was acquiesced in and was confirmed by the written contract made between the plaintiff and defendants. There is of course no attempt to reform this agreement in this form of action, nor is its validity in any way attacked, except on the ground that it was obtained by holding out to plaintiff the inducement, upon which he relied, that he was to have employment at the rate of $100 per month if he signed the contract; which employment has since been denied him. In his evidence the plaintiff admitted that he read the contract, and if this was true it should not have escaped his notice that by its terms he might be discharged upon one day's notice whenever the defendants chose to dispense with his services. If he had not the requisite notice, he could perhaps recover the compensation he was entitled to receive for one day's services, but under the terms of the contract he could recover no more. By accepting a position as agent of the defendants under the contract of employment to sell for defendants the stock of merchandise, plaintiff recognized the right of the defendants to hold possession of the property mortgaged. In an action of replevin there could not be litigated plaintiff's right to recover damages for a breach

of contract; the only question determinable in such an action was the right of possession of the plaintiff as against he defendants at the time of the commencement of the suit. (*Blue Valley Bank v. Bane*, 20 Neb., 294.) On the proofs the court could find this right only in defendants' favor, and its judgment so holding was right.

Another matter is urged for our consideration by the plaintiff, and that is the alleged disability of the trial judge set forth in the motion for a new trial. This disability, as alleged, consisted of the facts stated by the presiding judge during the trial, that on account of loss of sleep and fatigue, etc., he was unable properly to understand, weigh, and consider the evidence adduced. While there were affidavits filed showing the existence of the facts claimed, there were other affidavits adverse thereto. On consideration of this conflicting evidence the motion for a new trial was overruled, and we cannot now presume that the judgment of the district court in that respect was wrong. The judgment of the district court is

AFFIRMED.

JAMES EDMONDS V. STATE OF NEBRASKA.

FILED NOVEMBER 9, 1894. No. 6808.

Larceny: PROOF OF VALUE OF PROPERTY: WITNESSES. In a prosecution for larceny, proof of the value of the property stolen must be made by at least one witness affirmatively shown to possess knowledge of the value concerning which he is called upon to give evidence. Following *Brooks v. State*, 28 Neb., 389.

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

John A. Rooney, for plaintiff in error:

In a prosecution for larceny, witnesses called to testify to

the value of the property stolen must show that they possess knowledge of its value. (*Brooks v. State*, 28 Neb., 389; *Engster v. State*, 11 Neb., 539; Abbott, Trial Evidence, p. 307; Wharton, Criminal Evidence [8th ed.], sec. 416; 1 Wharton, Evidence, sec. 446; 2 Wharton, Evidence, sec. 1490; *State v. Doepke*, 68 Mo., 208; *Missouri P. R. Co. v. Coon*, 15 Neb., 232.)

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

Any evidence from which the jury may infer the value of the property alleged to be stolen is proper and competent, such as a description or inspection of the goods stolen. (*State v. Fenn*, 41 Conn., 590; *State v. Gerrish*, 78 Me., 20; *Commonwealth v. Lawless*, 103 Mass., 425; *Commonwealth v. Riggs*, 14 Gray [Mass.], 376; *Saddler v. State*, 20 Tex. App., 195; *Martinez v. State*, 16 Tex. App., 122; *Houston v. State*, 13 Ark., 66; *Wolverton v. Commonwealth*, 75 Va., 909.)

RYAN, C.

Plaintiff in error was convicted of larceny in the district court of Otoe county; his sentence was imprisonment in the penitentiary for the period of one year. There is but one question to which it is necessary that attention be given, and that pertains to the proof made of the value of the bicycle charged to have been stolen; that is, as to whether it was at least equal to $35. On this point there was no evidence except that of Roy Robinson, the owner of the aforesaid bicycle, who, over proper objections, testified as follows:

Q. What was the value of the wheel?
A. I know what its value was when I bought it.
Q. How long have you owned the bicycle?
A. Two months.
Q. What was its value when you bought it?
A. It was worth when it was new $150. * * *

Q. Do you know what the value of the wheel was when it was taken?

A. No, sir; I do not. * * *

Q. Is the bicycle in the same condition now as it was at the time it was stolen?

A. Yes, sir, with the exception of a brake that was on it then.

Q. A brake to stop the wheel?

A. Yes, sir. * * *

Q. I will ask you whether or not you have purchased bicycles before this last one which you purchased?

A. I have had two wheels.

Q. I will ask you to state what was the fair market value of the bicycle which was stolen by Edmonds at the time it was stolen?

A. I do not know any price.

Q. Have you an opinion what its fair market value was at the time it was stolen?

A. I do not know any price.

Q. Have you an opinion what its fair market value was at the time it was stolen?

A. I do not know whether it was worth five dollars or a hundred dollars.

Q. It was worth fifty dollars any way?

A. Yes, sir.

The above evidence was given partly when the witness was originally called and partly when he was recalled. On the latter occasion occurred the examination which began with the question as to whether or not the witness had purchased bicycles before the last one. In the interim between these examinations the bicycle itself was offered in evidence,—for what purpose is not disclosed by the record. We cannot assume that this offer was for the purpose of proving its value, for it was no more competent evidence of that fact than that in its make-up it corresponded to the proofs as to the description of the bicycle seen in

the possession of the accused. Under the statute it was essential that proof should be made that the value of the stolen article equaled or exceeded $35 in value to constitute grand larceny. In *Missouri P. R. Co. v. Coon*, 15 Neb., 232, it was held by this court that "Without a showing there is no presumption that a witness is competent to give a reliable estimate of the market value of land; and where one's competency is challenged, before he should be permitted to express an opinion it should be made to appear that he has in some way become qualified to do so." To the same effect was *Engster v. State*, 11 Neb., 539, and *Brooks v. State*, 28 Neb., 389. Tested by the rule above recognized, especially as applied in the case last cited, the testimony of Robinson as to the value of his bicycle was incompetent. The judgment of the district court is

REVERSED.

BENJAMIN A. SMITH V. FIRST NATIONAL BANK OF CRETE.

FILED NOVEMBER 9, 1894. No. 5475.

Action to Recover Penalty for Usury: LIMITATION. The limitation of two years within which an action under the provisions of section 5198, Revised Statutes of the United States, may be commenced for the recovery from a national bank of twice the amount of usury paid to it, dates from the actual payment of such interest, and not from the bank's reservation of it from the original loan by way of discount. Following *First Nat. Bank of Dorchester v. Smith*, 36 Neb., 199.

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

Abbott & Abbott, for plaintiff in error.

F. I. Foss, contra.

RYAN, C.

This action was brought on the 16th day of February, 1889, in the Saline county district court to recover twice the amount of usurious interest which plaintiff alleged he had paid defendant, a national bank. There was a trial of the issues to the court, which resulted in a judgment in favor of the plaintiff for the sum of $328.28 and costs. Complaining that this was too small an amount, the plaintiff has filed in this court his petition in error, accompanied by the proper record of the proceedings in the district court, and seeks a reversal of the aforesaid judgment.

The petition upon which trial was had contained seven causes of action. In the brief of plaintiff in error it is said that there are but two questions presented, and that these pertain to the first loan made by the bank to the plaintiff. One of these questions is as to whether the usurious rate complained of was fifteen or eighteen per cent per annum. The other is whether or not plaintiff's right of action as to this item was fully barred when this suit was begun; that is, whether two years had elapsed from the time the usurious transaction occurred. It is not essential that the first of these questions be decided at this particular time.

In the petition the first cause of action was stated in the following language: "First—The plaintiff alleges that he paid to the defendant the sum of $378 as and for interest on the sum of $3,600 from the 10th day of August, 1886, to the 10th day of March, 1887; said sum of $3,600 being so much money loaned by the defendant to the plaintiff on said 10th day of August, 1886, and by the plaintiff repaid to the said defendant with said interest on the said 10th day of March, 1887." As to the history of the transaction, L. H. Dennison, cashier of the defendant in error, was sworn and testified as follows:

On the 10th day of August, 1886, Benjamin Smith ap-

plied to us for a loan, saying it was to pay for feeding some cattle during the coming winter, and we asked him how much he wanted, and he said $3,600, and we agreed to loan him that amount of money, and we took a note dated the 10th of August, 1886, running six months, or until the 10th of February, 1887, for $3,600, and charged him for it, or reserved out of it the sum of $270, being interest at the rate of one and one-fourth per cent a month. The note came due on the 10th day of February, 1887, and was not paid at that time, but Mr. Smith said that his cattle were not quite ready yet and we allowed the note to run past the time a month and two days, or, I think I testified before, the payment was made after banking hours on the 11th day of March, and so appeared on the books on the 12th day of March, 1887, and at that time he reduced the note down to $1,730.78. He paid us as interest on the $3,600 from the time the note was due until he made the indorsement of the sum of $54.

Q. That makes a total for the seven months of how much?

A. Three hundred and twenty-four dollars. This transaction run on until the 3d day of June. On the 12th day of March, or on the 11th day of March after banking hours, and it appears on the banking books of the 12th, he paid us $54 interest on the balance unpaid of the original $3,600. It was finally paid on that date, and on that date, namely, the 2d day of June, 1887, he paid us $20.72 interest and took up the note, which was the end of that transaction.

This version of the matter does not agree with that given by the plaintiff in error in his evidence. As the judgment was in favor of the bank on this cause of action, the testimony most favorable to its theory has been set out at length, and from that statement it is evident that while this suit was brought on February 16, 1886, the first payment actually made of interest was on March 11, 1887, and that the balance of the note, principal and interest, was not

paid until June following. From these facts it is clear that if the reservation at the date of the note, August 10, 1886, is to be deemed the occurrence of the usurious transaction, then the first cause of action was barred when this suit was brought. If, however, the plaintiff's cause of action did not arise until he actually paid the interest, no part of his cause of action arose until the 11th of March, 1887, and in that view the statute had not run against his first cause of action when this suit was begun.

In *Duncan v. First Nat. Bank of Mt. Pleasant*, a case tried in the United States district court at Pittsburgh, Pennsylvania, reported in 1 Thompson, National Bank Cases, 360, Ketcham, J., instructed the jury as follows: "From the origin of the loan, from the retaining of the first discount through all the renewals up to the time of final payment of the principal, or up to the time of entering judgments, there is a *locus pœnitentiæ* for the party taking the excessive interest. Any time till then he may consider the excessive interest paid on account of the loan, and so apply it, and lessen the principal. Up to that time he may make this election. When payment is actually made or judgment is entered, the election is made; and if, as in these cases, judgment is entered for the face amount of the notes or full amount of the loan, or payment is taken in full without any reduction by taking out the excessive interest, the cause of action is complete. The original loans in these cases were more than two years before these actions were brought, but the payment of one of the Millinger notes was made, and the judgment on the other Millinger note and the judgments on all the Duncan & Brother notes were entered, near the time of bringing these suits, less than two years before. The payment and the judgment concluded the transaction and determined their character to be usurious. Till that time it was undetermined and the statute did not begin to run."

In the case of the *National Bank of Madison v. Davis*,

reported in 6 Central Law Journal, 106, is found the opinion of Gresham, J., in which he quoted the section of the "National Bank Act" with which we have to deal. That part of the section which is pertinent to our purpose is in the following language: "And the knowingly taking, receiving, reserving, or charging a rate of interest greater than aforesaid, shall be held and adjudged a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back in any action of debt twice the amount of the interest thus paid from the association taking or receiving the same; *Provided*, That such action is commenced within two years from the time the usurious transaction occurred." Having quoted this language, Judge Gresham commented on it as follows: "If a national bank discount a note at a usurious rate of interest, paying the borrower the proceeds less the interest, and suit be brought to recover the loan, and the borrower plead the usury, the bank will recover the face of the note less the entire interest taken out, received, reserved, and no more. It will thus collect the sum of money it actually paid out, being punished for receiving interest in excess of the legal rate by forfeiting all interest. But if the note thus discounted be renewed for the same amount, the borrower paying usurious interest out of his pocket in advance, and suit be brought on the renewed note, the defendent may recoup double the amount of the entire interest actually paid on renewal, or in an independent action of debt he may recover from the bank double the amount of the entire interest thus paid."

In *Higley v. First Nat. Bank of Beverly*, 26 O. St., McIlvaine, J., on pages 79 *et seq.*, made use of the following language in reference to that part of the section of the banking act above referred to: "By the first provision in that

part of the section above quoted, if the contract or promise to pay usurious interest be unexecuted, it cannot be enforced; and in such case the debtor is released from the payment, not only of the interest in excess of the lawful rate, but 'the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon,' must be held and adjudged to be forfeited. By the latter provision, if usurious interest 'has been paid,' twice the amount of interest paid may be recovered back from the association 'taking or receiving' it, provided the action therefor be commenced within two years from the time the usurious transaction occurred. And by construing the whole section together, we are inclined to believe that in case usurious interest has been 'reserved' at the time of the loan or discount, there is left to the bank a *locus pœnitentiæ*. In such case the bank may, upon receiving payment of the debt, discharge itself from all liability to the debtor by giving credit for the amount of interest reserved; otherwise the debtor may insist upon a reduction of his indebtedness to the amount actually loaned or advanced, or he may pay the whole claim, and afterwards, within two years, recover back twice the amount of interest paid."

The views above expressed find support in the case of *Shinkle v. First Nat. Bank of Ripley*, 22 O. St., 516. We do not concur in all the views expressed in the cases above cited, for some of them have been modified by later adjudications. In so far, however, as they hold that the right to a recovery of twice the amount paid shall be measured by the fact of payment in fact and not constructively, we concur in the principles above announced. Any other rule would recognize the right of the maker of a note to a national bank to recover from such bank twice an amount which he has not in fact paid, and perhaps may never be able to pay. Not only on principle, but by its own adjudications as well, this court is bound to give to the section hereinbefore referred to the construction which is above

held applicable specially to the statute of limitations, for in respect to it the following language was used by NORVAL, J., in *Hall v. First Nat. Bank of Fairfield*, 30 Neb., 103: "It is apparent that this section covers two classes of cases. The last clause provides that when illegal interest has been paid to a national bank, double the amount so paid may be recovered back, while under the first clause of the section, if usurious interest has been knowingly charged and not paid, a recovery can only be had for the amount borrowed; in other words, where illegal interest has been added into the note but not paid, it cannot be recovered in an action brought for that purpose. (*Brown v. Second Nat. Bank of Erie*, 72 Pa. St., 209.)" (See, also, *First Nat. Bank of Dorchester v. Smith*, 36 Neb., 199.) As the refusal of the district court to render judgment for the amount of the first cause of action pleaded was obviously founded upon a construction of the statute entirely at variance with that above given, it results that its judgment must be, and is,

REVERSED.

SABINA HEYN V. ALBERT F. OHMAN.

FILED NOVEMBER 9, 1894. No. 5932.

Covenants of Warranty: ACTION FOR BREACH: EVIDENCE. In an action for recovery of damages alleged to have resulted from breaches of defendant's covenants of warranty of title, and for quiet enjoyment, the plaintiff, to establish *prima facie* the breaches alleged, is required merely to prove that he has either been evicted or kept out of possession by one in actual possession claiming title paramount to his own. The presumption of title which then arises in favor of the party in possession must be overcome by proving title out of him, or both the aforesaid breaches may be deemed established by sufficient proof.

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

Cavanagh, Thomas & McGilton, for plaintiff in error, cited: *Real v. Hollister*, 20 Neb., 112; *Mills v. Rice*, 3 Neb., 85; Rawle, Covenants, 181, 308; *Sedgwick v. Hollenback*, 7 Johns. [N. Y.], 380; *Blanchard v. Hoxie*, 34 Me., 378; *Wait v. Maxwell*, 4 Pick. [Mass.], 87.

A. C. Wakeley, contra, cited: *West v. Pine*, 4 Wash. [U. S. C. C.], 691; *Ludlow v. McBride*, 3 O., 231; *Ward v. McIntosh*, 12 O. St., 240; *Robinoe v. Doe*, 6 Blackf. [Ind.], 85; *Hill v. Draper*, 10 Barb. [N. Y.], 454; *Jones v. Nunn*, 12 Ga., 469; *Nagel v. Macy*, 9 Cal., 426; *Shumway v. Phillips*, 22 Pa. St., 151; *Jones v. Bland*, 112 Pa. St., 176; *Brown v. Colson*, 41 Ga., 42; *Day v. Alverson*, 9 Wend. [N. Y.], 223; *Caldwell v. Kirkpatrick*, 6 Ala., 60; *Eakin v. Brewer*, 60 Ala., 579; *Douglas v. Ruffin*, 38 Kan., 530; *Spitznagle v. Vanhessch*, 13 Neb., 338.

RYAN, C.

The defendant in error recovered judgment against the plaintiff in error in the district court of Douglas county for the sum of $975 and costs, on account of breaches of covenants of warranty contained in a deed made in 1887 by plaintiff in error to defendant in error. The consideration recited in the aforesaid conveyance was the exact sum for which judgment was rendered. On the trial there was uncontradicted evidence that one Mary K. Lund, from the year 1885 up to the time of trial, had held undisputed possession of the premises described in the deed above referred to; that she had placed thereon a house and other improvements, and upon demand to that effect that she had refused to yield possession to the defendant in error.

An objection of the plaintiff in error was sustained to the introduction in evidence of a decree entered in the dis-

trict court of Douglas county and the pleadings whereon the same was entered in a certain action in said court formerly pending, wherein the said Mary K. Lund had been plaintiff and Richard C. Patterson, Pierce C. Himebaugh, A. F. Ohman, and A. W. Baldwin had been defendants. These parties named as defendants, including Ohman, the defendant in error in this case, were such persons as had held the title to the real property as to which this controversy has arisen, except that there was an omission of the plaintiff in error, who, therefore, previous to the institution of said action, had become substituted in her place with respect to such rights as she had formerly possessed. In such an action, which was one by Mrs. Lund to enforce specific performance of the contract to convey the premises, under which contract she had taken and still retained possession, the only parties necessary for plaintiff's purpose were such as were parties to the contract under which she claimed the right to specific performance, and the holder of the interests conflicting with and claimed to be paramount to her own at the time of action brought. These were all made defendants and with a view of showing that the defendant in error had actually been kept out of possession. This decree was competent evidence of the existence of a title paramount behind the possession adverse to the defendant in error. The error of excluding this decree is not, however, available to the plaintiff in error, for it was her objection which prevented its introduction in evidence. As has already been stated, there was shown an adverse possession dating from a time long anterior to the execution of the deed by plaintiff in error to defendant in error. By the latter party a demand of possession had been duly made and compliance with that demand has been persistently refused. There has been no showing of such title in the defendant in error as would justify the hope that a suit for possession, if instituted, could successfully be maintained against Mrs. Lund. In Tyler, Ejectment,

70, it is said: "It is a maxim of the law that the party in possession of lands is presumed to have a valid title thereto, and this presumption can be overcome only by proving title out of such party. Indeed, it has been said that possession of real estate is *prima facie* evidence of the highest estate in the property; that is, a seizin in fee." The views which have just been expressed find support in *Ware v. McIntosh*, 12 O. St., 231; *Robinoe v. Doe*, 6 Blackf. [Ind.], 85; *Shumway v. Phillips*, 22 Pa. St., 151; *Jones v. Bland*, 112 Pa. St., 176; *Brown v. Feagins*, 37 Neb., 256. The district court, therefore, properly held that an action of this character was maintainable, since the only question controverted was that above indicated. Its judgment is, therefore,

AFFIRMED.

HARLAN T. MOORE ET AL., APPELLEES, V. GEORGE C. VAUGHN ET AL., APPELLANTS.

FILED NOVEMBER 9, 1894. No. 5298.

1. **Mechanics' Liens:** LANDLORD AND TENANT: AGENCY. The mechanics' lien law of this state requires that a contract for material, labor, etc., for an improvement on real estate shall be made with the owner thereof or his agent; and a tenant of real estate, because of his tenancy, is not the agent of his landlord in such a sense as to render the latter or his real estate liable for materials furnished the tenant and used by him in erecting improvements on such real estate. *Waterman v. Stout*, 38 Neb., 396, reaffirmed.

2. ———: IMPROVEMENTS BY TENANT ON LEASED PREMISES: ORDER OF SALE. A landlord leased his premises to a tenant for one year with the privilege of releasing for another year at the end of the term. The tenant, during his lease, moved a dwelling house belonging to his landlord, and standing upon other land of his, upon the leased premises, and permanently affixed it to the land. He then made contracts with certain material-

men, in and by which they furnished him material which he used in repairing and building additions to the dwelling house moved upon the leased premises. In a suit brought by the material-men against him, in which they claimed liens upon the premises for the material furnished to, and used by, him in the erection of such improvements, the court decreed that the improvements on said real estate should be sold to pay and discharge the claims of the material-men against the tenant. *Held*, (1) That when the dwelling house was moved upon the leased premises and fixed to the land it became a part thereof, and that the court was without authority to order said dwelling house and additions severed and sold to pay the claims of the material-men; (2) that the material-men, by furnishing material to the tenant for the erection of improvements on the leased premises, acquired liens against the tenant's interest only in said premises.

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

R. L. Keester, for appellants.

C. C. Flansburg and *J. G. Thompson, contra.*

RAGAN, C.

The material facts in this case are: That on April 1, 1890, Sarah A. Vaughn was the owner in fee of the northeast quarter of section 17, township 4 north and range 17 west of the 6th P. M., and on said date leased said premises to one George C. Vaughn for a term of one year. By the terms of the lease Vaughn was to pay as rent for said premises $67.50, and had the privilege, at the expiration of the lease, to lease for another year on the same terms. During the year 1890 George C. Vaughn moved a small dwelling belonging to Sarah A. Vaughn to the leased premises and fixed it permanently to the land, and in said year 1890 Moore & Mudgett, Cross & Johnson, and E. L. Clark, in pursuance of contracts made by them with George C. Vaughn, furnished him certain material for the purpose of, and used by, George C. Vaughn in repairing the house he had moved of Sarah A. Vaughn's to the leased premises

and in building additions to said house. In November, 1890, George C. Vaughn and wife mortgaged all their interest in said leased premises to one Herman W. Vaughn to secure the payment of a note of $300 and interest held by said Herman W. Vaughn and executed by said George C. Vaughn. Moore & Mudgett brought this suit in the district court of Harlan county against the said George C. Vaughn and his wife, making Herman W. Vaughn, the said E. L. Clark, Sarah A. Vaughn, and said Cross & Johnson parties defendant to the action. In the petition of Moore & Mudgett they set out that in the year 1890 they made a verbal agreement with George C. Vaughn to furnish him certain hardware for the erection of a dwelling house on the above described real estate; that they furnished the hardware in pursuance of the agreement, and that the same was used in the construction of a dwelling house on said land; that within four months from the date of the furnishing of said hardware they made an account in writing of the items of such hardware, made oath thereto, and filed the same in the office of the recorder of deeds of Harlan county, claiming a mechanic's lien on the above described real estate and the buildings thereon. They also alleged that at the time of making said contract with George C. Vaughn and furnishing him the hardware; that he was in possession of and was the owner of the above described real estate; that there was due them the sum of $71.20, with seven per cent interest thereon from October 23, 1891, for said material so furnished; and they prayed for a judgment against said George C. Vaughn for said sum, and that said premises might be sold for the payment of the amount found due. Cross & Johnson filed an answer in the nature of a cross-petition, claiming a lien against the premises for the sum of $362.35, for material which they had furnished to the said George C. Vaughn in pursuance of a contract with him in the year 1890, towards the erection or reparation of the dwelling house on said

real estate. Sarah A. Vaughn filed an answer traversing all the allegations in the petition of Moore & Mudgett and cross-petition of Cross & Johnson, and alleging that during the year 1890, prior and subsequent thereto, she was the owner in fee-simple of said real estate; that George C. Vaughn was her tenant during the year 1890; that she had never made any contract with any of the parties to this suit to furnish any material for the erection of any improvement whatever on said real estate, nor had she authorized any person to make such contract. Herman W. Vaughn filed an answer in the nature of a cross-petition, setting up the mortgage executed to him by George C. Vaughn and wife in November, 1890, on their interest in said leased premises, and prayed for a foreclosure of the same. If the defendant E. L. Clark filed any pleading whatever in the case it does not appear in the record. The district court made the following findings: (*a*) That there was due Moore & Mudgett from George C. Vaughn $67.10; (*b*) that there was due Cross & Johnson from George C. Vaughn $385; (*c*) that there was due E. L. Clark from George C. Vaughn $30; (*d*) that there was due from George C. Vaughn to Sarah A. Vaughn $65; (*e*) that there was due from George C. Vaughn to Herman W. Vaughn $330. The court found that Sarah A. Vaughn had a first lien upon "said premises" to secure the sum found due her; that Herman W. Vaughn had a second lien upon "said premises" to secure the sum found due him; and that the liens of Moore & Mudgett, Cross & Johnson, and Clark should prorate one with the other, and be "a first lien on the interest of George C. Vaughn in the buildings and premises inferior only to the lien of Sarah A. Vaughn." And thereupon the court decreed that if George C. Vaughn should fail for twenty days to pay to the clerk of the court the amount found due the various parties as stated above, the sheriff of said county should proceed "to appraise, advertise, and sell the frame

dwelling house upon and the interest of George C. Vaughn in said premises as upon execution." From this decree Sarah A. Vaughn has appealed.

The decree must be reversed. The undisputed evidence in the record is that during the year 1890, and for some years prior, and at all times subsequent thereto, Sarah A. Vaughn was the owner in fee of the above described property, and that George C. Vaughn was her tenant in possession of said land during the year 1890. There was no authority of law whatever for the finding and decree of the court giving Sarah A. Vaughn a first lien upon her own real estate to secure the year's rent due to her from her tenant, George C. Vaughn. The house which George C. Vaughn moved to said premises was, when he moved it, the property of Sarah A. Vaughn. It did not cease to be her property because her tenant moved it from one of her farms and put it upon another. Said house, when moved upon said real estate, was by George C. Vaughn affixed to the land, and thereby became a permanent fixture and part of the real estate on which it stood. The additions and reparations which George C. Vaughn made to this house were permanent improvements, and they also became a part of the real estate; and the title to all such improvements, as soon as they were made, became vested in Sarah A. Vaughn. The lien, and the only lien, which Moore & Mudgett, Cross & Johnson, and Clark, or either or any of them, acquired against said real estate or the improvements thereon was simply a lien upon George C. Vaughn's leasehold interest in said real estate, and the district court was without authority to order the buildings on said real estate to be sold for the satisfaction of said mechanics' liens or any of them. All that the court could order sold to satisfy these liens was whatever interest George C. Vaughn had in the entire premises by reason of being a tenant thereof. There is no evidence in this record from which the court could find that Sarah A. Vaughn ever authorized George C. Vaughn to

contract with any one to furnish material for the erection of improvements on this real estate, or for repairing the buildings already thereon; and the fact that George C. Vaughn was the tenant of the owner of the land did not make him such owner's agent so as to bind the owner's property for material purchased by him and used in erecting improvements on the land. In *Waterman v. Stout*, 38 Neb., 396, this court, speaking through RYAN, C., said: "The mechanics' lien law requires that a contract for material, labor, etc., for the improvement of real property, shall be made with the owner thereof or his agent. A tenant, as such, has no power to contract for labor or material so as to affect with a mechanic's lien the real property leased to him." The court was also without authority to order the buildings on said real estate sold for the purpose of paying the amount found due from George C. Vaughn to Herman W. Vaughn. The latter's mortgage only purported to give him a lien on the leasehold interest of George C. Vaughn in the premises; and, as already stated, the house on these premises, moved there by George C. Vaughn, was real estate, and could not be made personal property and severed at the will of or by the contract of the tenant. The decree appealed from is reversed and the cause is remanded to the district court for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

CLARENCE K. CHAMBERLAIN ET AL., APPELLEES, V. LAFAYETTE F. GRIMES, APPELLANT.

FILED NOVEMBER 9, 1894. No. 4988.

1. **Vendor and Vendee: QUIETING TITLE: TRIAL: CHAMPERTY: TAX LIENS.** One Wright brought suit against one Grimes to cancel and be allowed to redeem from the lien of a void tax deed

held by Grimes against the land of Wright, and to have the title to said lands quieted in him. Wright employed one Chamberlain, an attorney at law, to institute and prosecute said action, and as compensation for his services in the premises duly executed to him a conveyance for an undivided one-half of the real estate in controversy. While the action was pending Grimes, with actual knowledge that Wright had already conveyed one-half the real estate to Chamberlain and that such conveyance was unrecorded, for a consideration paid to Wright, obtained from him a dismissal of said suit and a quitclaim deed to him, Grimes, for all the real estate involved therein. *Held*, (1) That the decree of the district court canceling the lien of the void tax deed, and canceling the deed obtained from Wright by Grimes as against an undivided one-half of said real estate, and permitting Chamberlain to redeem one-half of said real estate from the lien of said tax deed, and quieting the title to one-half of said premises in Chamberlain, was correct; (2) that if the contract between Wright and Chamberlain was champertous, it was not a defense of which Grimes could avail himself in this action.

2. **Trial**: REVIEW. If a defendant in a trial court omit to make a meritorious defense which he might have made, he will be bound by the record made there, and cannot interpose such defense for the first time in this court. *Courtnay v. Price*, 12 Neb., 188, reaffirmed.

APPEAL from the district court of Johnson county. Heard below before BROADY, J.

S. P. Davidson and *J. Hall Hitchcock*, for appellant.

C. K. Chamberlain and *T. Appelget, contra.*

RAGAN, C.

December 8, 1888, William R. Wright and Sytha Phillips brought this suit in the district court of Johnson county against Lafayette F. Grimes and others. Wright and Phillips, in their petition, claimed to be the owners of the following described real estate, situate in said Johnson county, to-wit: The west half of the southeast quarter of the southwest quarter of section 25, and the southeast quarter of the southeast quarter of section 26, all in township 6 north

and range 9 east of the 6th P. M. They alleged that Grimes was in possession of said lands by virtue of a tax deed bearing date November 24, 1874; that such tax deed was void, and they prayed for an accounting of the rents, profits, taxes and interest, and improvements, and offered to pay any balance that the court might find to be due Grimes, and prayed that the tax deed might be held void and set aside and that the title to the lands be quieted in them. Summons in this action was duly served on the defendant Grimes in Johnson county on the 19th day of December, 1888. Grimes then went to Missouri, where Wright and Phillips resided, and on the 26th day of December, 1888, procured from them a quitclaim deed for the land and a dismissal of the suit. This dismissal was subsequently filed and the suit dismissed, but afterwards, on motion of Clarence K. Chamberlain, who, as counsel and attorney for Wright and Phillips, brought the suit, it was reinstated on the docket and Chamberlain filed a petition therein as against Grimes, alleging, in substance, that on or before December 5, 1888, the said Wright and Phillips were the owners of said real estate; that said Lafayette Grimes held possession thereof by virtue of a tax deed bearing date November 24, 1874; that said deed was void for numerous reasons alleged in the petition; that on the 5th day of December, 1888, the said Wright and Phillips, by their deed of that date duly executed and delivered, conveyed to him, the said Chamberlain, an undivided one-half interest in and to all of said real estate; that the consideration for said deed was services rendered and to be rendered by him to them as counsel and attorney in and about the bringing this suit for quieting and confirming in them, Wright and Phillips, the title to said lands; that said deed of conveyance to him, the said Chamberlain, for an undivided one-half interest in and to said lands was not recorded at the time it was executed, nor for some months afterward; that on the 26th day of December, 1888, the

said Grimes, with full knowledge of the fact that said Wright and Phillips had conveyed to him, Chamberlain, an undivided one-half interest in and to said lands by their deed of December 5, 1888, and with full knowledge of the fact that he, Chamberlain, was in possession of said deed, but that the same had not been recorded in Johnson county, fraudulently procured the said Wright and Phillips to execute to him, the said Grimes, a quitclaim deed for all of said real estate, which deed the said Grimes caused to be recorded in the office of the recorder of deeds of Johnson county, Nebraska, on December 28, 1888. Chamberlain also alleged in his petition as another cause of action, although not so separately stated and numbered, that from the year 1887 he had been in the employ of Wright and Phillips as their counsel for the purpose of perfecting, quieting, and confirming in them the title to said lands; that since said date he had rendered for them various services and advanced for them various sums of money, in and about the premises, for which he had no other security than the deed aforesaid to the lands in question; and on the 25th day of March, 1889, he filed a lien for said services rendered to said Wright and Phillips in said cause, and he claimed a lien upon said premises for the services he had rendered for Wright and Phillips and for moneys paid out for them in the sum of $1,000. He then prayed that an accounting might be had between him and Chamberlain, of the rents, profits, taxes and interest, and improvements, and offered to pay whatever sum might be found due Grimes, and prayed that Grimes' deed dated December 26, 1888, might be canceled as against his deed of December 5, 1888, for an undivided one-half interest in the premises; that the title to an undivided one-half interest to said real estate might be quieted and confirmed in him; that the tax deed of Grimes, in so far as the same affected an undivided one-half of said real estate, might be declared void. He also prayed for a decree establishing a

lien against said premises for the sum of $1,000 for services he had rendered Wright and Phillips in the bringing of this action and in quieting and perfecting the title to said premises in them. The defense of Grimes, so far as the same is material here, was that he and his grantors had been in the open, notorious, and exclusive possession of said real estate, claiming title thereto for more than ten years prior to the bringing of this suit; that the deed made by Wright and Phillips on December 5, 1888, to Chamberlain for services rendered and to be rendered by him for them in and about the bringing and conducting of this suit and quieting and confirming the title to the premises described therein in said Wright and Phillips was champertous and void, because, by the contract between Chamberlain and Wright and Phillips, the former was to institute and carry on at his own cost and expense this litigation. He admitted obtaining the quitclaim deed for the land from Wright and Phillips on the 26th of December, 1888, and alleged that at that time he had no knowledge or notice whatever that Wright and Phillips had made the deed to Chamberlain on December 5, 1888, and generally traversed the other allegations of Chamberlain's cross-petition. The district court found and decreed that the tax deed dated November 24, 1874, and the quitclaim deed of Wright and Phillips, and each of them, be set aside and canceled and held for naught, in so far as they affected an undivided one-half interest in and to said real estate. The court also found and decreed that Chamberlain should pay to the defendant Grimes the sum of $500 within twenty days, and that thereupon the title to an undivided one-half interest in and to said lands should be quieted and confirmed in the said Grimes; and disallowed and dismissed Chamberlain's lien filed against said estate for attorney's fees. The case is now before us on appeal by Grimes. To reverse this appeal counsel for appellant make the following arguments:

1. The first point made is that Chamberlain, by his petition, claimed only an attorney's lien upon the real estate for services he had rendered Wright and Phillips, and that the court, in quieting and confirming the title to one-half of said real estate, misconstrued the issues made by the pleadings and awarded Chamberlain more than he asked. We think counsel for appellant misconstrue the petition of Chamberlain. This petition contains two causes of action, though not separately stated and numbered, and the prayer of Chamberlain's petition was that his title to an undivided one-half interest to the lands might be quieted and confirmed in him, and there was also a prayer that he might have judgment for $1,000 for attorney's fees, and that the same might be declared a lien upon the real estate.

2. The second argument is that Mr. Grimes procured his deed for this land from Wright and Phillips on the 26th day of December 1888, without any knowledge of the outstanding deed held by Chamberlain; and that while his, Grimes', deed was only a quit-claim, yet, nevertheless, Chamberlain is, and ought to be, estopped from asserting title to one-half of the premises as against him, Grimes, because it is said that in the original suit brought by Chamberlain for Wright and Phillips that Chamberlain signed this petition as counsel for Wright and Phillips and that he verified said petition; that he, Grimes, on the 25th day of December, 1888, procured a certified copy of this petition, and relying upon the allegations contained therein, that Wright and Phillips were the absolute owners of the land, went to the latter's home in Missouri, and procured them to make to him a quitclaim deed of December 26, 1888. If Grimes had read the original petition filed in this case, and had relied upon the statements therein contained, that at the time the petition was filed Wright and Phillips owned the real estate therein, and, relying upon this allegation in the petition, had purchased from Wright and Phillips the lands in controversy and taken

from them a conveyance thereof without any knowledge or notice that a portion of the land had already been conveyed by them to Chamberlain, there would be some force in appellant's argument; but we cannot believe that appellant's counsel make this argument seriously, as there can be no doubt in the mind of any reasonable man who has read this evidence but that Grimes, at and before the time he procured his quitclaim deed from Wright and Phillips for these lands, absolutely knew that Wright and Phillips had already conveyed an undivided one half interest in said lands to Chamberlain and that his deed had not been recorded. We shall not consume time by quoting this evidence. The district court found that Grimes, when he took his deed from Wright and Phillips, knew of the existence of the deed made by them to Chamberlain. That finding is supported by the evidence.

3. The third argument is that the contract between Chamberlain and Wright and Phillips was that Chamberlain should institute and carry on this litigation at his own cost and expense and receive therefor one-half of the fruits of the action, and that such contract was champertous and void. If we concede that counsel's contention is correct, viz., that the contract between Chamberlain and Wright and Phillips was champertous, that fact would not be a defense for Grimes in this action. That is a defense, if a defense, available only to Wright and Phillips in a suit against them by Chamberlain on his contract. (*Aultman v. Waddle*, 40 Kan., 195; *Courtright v. Burnes*, 13 Fed. Rep., 317.)

4. The final argument of appellant is that Wright and Phillips, at the time they made the conveyance to Chamberlain for one-half of the real estate, had no title thereto. The undisputed evidence in the record is that these lands were patented in July, 1861, by the United States government to one Hiram J. Wright; that he died on the 15th day of May, 1863, intestate, seized of these lands; that at

the time of his death he was unmarried and he left him surviving, as his only heir at law, a brother, one Henry R. Wright; that on the 15th of March, 1866, Henry R. Wright died intestate, leaving him surviving, his widow, the said Sytha Phillips, and the said William R. Wright, who was then an infant *in ventre sa mere*, and who was born on the 21st day of August, 1866; that said Henry R. Wright left no heirs, nor other next of kin, except his said widow and his unborn child. This argument, as to no title to the premises in Wright and Phillips at the time they made a deed thereof to Chamberlain, is based on an abstract introduced in evidence, from which counsel say it appears that on the 6th of February, 1869, one John D. Campbell, the administrator of Hiram J. Wright, made a contract for the sale of these lands to one Greenfield; that he took possession of the land and remained thereon until his death, and that his children conveyed the land to Grimes, and that Grimes holds title to these lands under these conveyances. Counsel say that these facts show that by the action of Hiram J. Wright's administrator the title of his heirs to the land was divested in 1869; that the presumption is that the estate of Hiram J. Wright received from Greenfield the purchase price of the land mentioned in the contract made by his administrator, and the further presumption is that the administrator made this contract of sale in pursuance of authority from a court of record as the law requires. There are two things to be said of this argument: First—It cannot be said that the abstract introduced in evidence, or any other evidence in the record, establishes the fact that Hiram J. Wright's administrator did make a contract for the sale of these lands to Greenfield, or that Greenfield took possession of the lands in pursuance of such a contract; nor does it appear that John D. Campbell was ever the administrator of the estate of Hiram J. Wright, deceased; but if the evidence showed that Hiram J. Wright's administrator made a contract for the sale of

these lands to Greenfield, and that he took possession of the lands under such contract, the court could not presume that the purchase price of the lands was received by the heirs of Hiram J. Wright; and it needs no argument nor citation of authorities to show that if the administrator made any such contract that it was not simply voidable, but absolutely void, and without any authority of law whatever. It remains to be said of this argument that no such defense as this was pleaded or proved in the court below, and if a defendant in a trial court omit a defense upon the merits which he might have made, he will in this court be bound by the pleadings and evidence as exhibited by the record. (*Courtnay v. Price*, 12 Neb., 188.) This defense then, of Grimes, whatever may be its merits, comes too late for the first time in this court. The decree of the district court was right and it is

AFFIRMED.

JOHN BLAINE V. JOHN A. POYER.

FILED NOVEMBER 9, 1894. No. 5569.

1. **Stipulation to Admit Affidavit for Continuance as Evidence of Absent Witness:** EXCLUDING TESTIMONY: REVIEW. Where a litigant files an application for a continuance on the ground of the absence of a material witness, and the adverse party stipulates in open court that if the application for a continuance be overruled, the affidavit made for a continuance may be read on the trial as the evidence of the absent witness, such stipulation is valid and binding, and every fact which it is alleged in the affidavit the absent witness would testify to which is competent, material, and relevant testimony under the issues the applicant for a continuance is entitled to read from the affidavit in evidence to the jury, and it is reversible error for the court to exclude such evidence.

2. **Evidence:** AFFIDAVIT FOR CONTINUANCE. And in such case

the facts which the affidavit alleged the absent witness would testify to are not incompetent, irrelevant, immaterial, or improper evidence, because such facts are stated in the form of a conclusion.

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

George R. Chaney, for plaintiff in error.

James McNeny, contra.

RAGAN, C.

On the 1st day of January, 1891, one John A. Poyer made and delivered his promissory note for $202 to one S. B. Smith, and to secure the payment of said note, on the 16th of March, 1891, made and delivered to said Smith a chattel mortgage upon certain personal property. Smith afterwards sold, indorsed, and delivered this note to John Blaine, who brought this action in replevin in the district court of Webster county against Poyer. Blaine set out in his petition that he had a special ownership in the property replevied, and was entitled to the immediate possession thereof by virtue of his ownership of the note and chattel mortgage given to secure its payment, executed by Poyer to Smith as aforesaid. He also alleged in his petition that he purchased said note in the usual and ordinary course of business, before the maturity thereof, for a valuable consideration. The defense of Poyer to the action was that the note was tainted with usury, and that Blaine was not an innocent purchaser of the note. When the term of court convened at which the action was tried Blaine filed an affidavit for a continuance of the case on account of the absence of Smith, the original payee of the note, and who, Blaine alleged, was a material witness for him, and without whose testimony he could not safely go to trial. He also alleged in this affidavit: "Said Smith will testify that plaintiff is an innocent purchaser of the note and mortgage mentioned

and described in plaintiff's affidavit of replevin in this case; that he purchased the same without notice of any defect therein, before due, and in the usual course of business; that said Poyer owes said note and has no offset or defense to the same whatever; that the debt secured by said mortgage is just and valid, and that said Poyer has never paid the same or any part thereof, and that he has no offset or counter-claim or any other defense against said note, even if it were now in his, Smith's, hands, instead of plaintiff's; that plaintiff paid a valuable consideration for said note to said Smith, who is the payee thereof." The record recites that it was agreed in open court as a condition to the overruling of Blaine's application for a continuance that the affidavit made by him to procure such continuance should be read in evidence on the trial as the evidence of Smith. The motion for the continuance was, therefore, overruled. When the case came up for trial to the jury, counsel for Blaine offered to read his affidavit made for a continuance in evidence to the jury. That part of his affidavit quoted above was objected to by counsel for Poyer, and the objection sustained. This evidence was competent, material, and relevant under the issues in the case. To procure this evidence Blaine had filed a motion for a continuance of his case, and in order that such motion might be overruled and the case come on for trial at once, counsel for Poyer had stipulated in open court that this affidavit of Blaine might be read in evidence on the trial. This was correct practice, and the stipulation was valid and binding on Poyer. By reason of this stipulation, every fact which Blaine alleged in his affidavit for a continuance that he expected to prove or could prove by Smith which was competent, material, and relevant testimony under the issues he was entitled to read to the jury from his affidavit as the evidence of Smith himself. This evidence was not incompetent, immaterial, irrelevant, or improper, under the stipulation and the circumstances of this case, because

Blaine stated the facts which he expected to, or could prove by Smith in the form of a conclusion. The learned judge of the district court erred in excluding the testimony offered. The judgment of the district court is reversed and the case remanded with instructions to set aside the verdict and judgment and grant the plaintiff in error a new trial.

REVERSED AND REMANDED.

HENRY MANNING ET AL. V. CITY OF ORLEANS.

FILED NOVEMBER 9, 1894. No. 5785.

1. **Judgment Non Obstante Veredicto.** Section 440 of the Code of Civil Procedure provides a remedy substantially like the motion for judgment *non obstante veredicto* of the common law. Such a judgment can only be rendered when the pleadings of the party in whose favor the verdict was rendered confess facts entitling the other party to judgment.
2. ———: MOTION FOR NEW TRIAL. In a case in which a party is entitled to a jury trial, and where the pleadings do not confess the right to a judgment, the court cannot disregard the verdict and enter such judgment as the evidence warrants. If the verdict is not sustained by the evidence, the remedy is by motion for a new trial on that ground.
3. ———: ———. Where the verdict is general and is unassailed by a motion for a new trial, judgment must, except in the cases stated in the first paragraph of this syllabus, be entered in conformity with the verdict.

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

The facts are stated by the commissioner.

Walter J. Lamb, L. H. Kent, and *C. C. Flansburg,* for plaintiffs in error:

If the verdict is wrong, the remedy was by motion for

a new trial. No application for a new trial having been made, the judgment should be rendered upon the verdict. (1 Black, Judgments, secs. 142, 161, 186; *Oades v. Oades*, 6 Neb., 304; *Bowers v. Rice*, 19 Neb., 576; *Nordyke v. Dickson*, 76 Ind., 188; *Reid v. Dunklin*, 5 Ala., 205; *Stevens v. Lee*, 70 Tex., 282.)

W. S. Morlan and *Case & McNeny, contra.*

IRVINE, C.

The city of Orleans sued the plaintiffs in error, alleging that the plaintiffs in error were, in 1885, the owners of certain property in the then village of Orleans; that they negligently made an excavation in the street adjoining their property and left the same without guards or protection for travelers; that one George S. Perry fell into said excavation and was injured, brought action against the defendant in error, recovered judgment, which was paid; that the defendant in error had informed plaintiffs in error of the pendency of such action, and that they had undertaken and conducted the defense thereof. The prayer was for a judgment indemnifying the city. The answer admitted the incorporation of the city and the ownership of the property as charged in the petition, and denied every other allegation. There was a trial to a jury, which found a verdict in favor of the city for $1,325. The city then moved the court "to enter up judgment notwithstanding the verdict, against the defendants, on the evidence, for the sum of $4,206.97, *non obstante veredicto.*" This motion the court sustained and entered judgment in the sum requested. The plaintiffs in error then filed a motion for a new trial, assigning numerous errors. This motion was overruled. The plaintiffs in error, on argument, abandon all assignments of error except those relating to the action of the court in sustaining the motion for judgment *non obstante veredicto.* The motion seems to have been made

and sustained upon the theory that the verdict, or the undisputed evidence, settled the city's right to recover, and that the evidence, without contradiction, showed the amount recoverable to be the sum for which judgment was rendered, and not the amount of the verdict. There is no bill of exceptions, and we have no means of determining whether or not this view of the evidence was correct. The question presented is whether the court, assuming such a state of the evidence, had authority to disregard the verdict and enter up judgment for the amount shown by the evidence.

At common law, judgment *non obstante veredicto* was entered where a plea was good in form though not in fact, as where it confessed the cause of action but did not sufficiently avoid it. In other words, where by defendant's own showing by plea the plaintiff was entitled to judgment. In such case, notwithstanding a verdict for defendant upon the immaterial issue joined, judgment would go for the plaintiff on the record. (1 Chitty, Pleading, 656; *Oades v. Oades*, 6 Neb., 304.) Our Code does not provide a remedy in such cases by the common law name, but the substance of the procedure is preserved by section 440, which provides: "Where, upon the statements in the pleadings, one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, though a verdict has been found against such party." Neither this section nor the common law procedure is applicable to this record. There was an answer amounting to a general denial, and, therefore, upon the pleadings the plaintiff was not entitled to judgment. It would require a verdict or finding in favor of the plaintiffs upon the issues so made in order to authorize judgment. On the other hand, section 438 applied. This section is as follows: "When a trial by jury has been had judgment must be rendered by the clerk in conformity to the verdict, unless it is special, or the court order the case to be reserved

for future argument or consideration." This was an action for the recovery of money in which a trial by jury is guarantied both by the constitution and by the statutes, and where it is the province of the jury to assess the amount of recovery. (Code, sec. 295; *Bowers v. Rice*, 19 Neb., 576; *Lamb v. Briggs*, 22 Neb., 138.) By the course taken the city was allowed to take advantage of the verdict in so far as the issues were by it determined in its favor but to disregard it as to the amount of recovery. The court undertook to do just what in the case last cited was held unauthorized, to ascertain the amount proper to be recovered and enter a judgment without a verdict to support it. In sustaining the motion for judgment the court undoubtedly erred. The city did not by motion for a new trial attack the verdict. It remains, therefore, unmodified and unassailed, and judgment should be entered in conformity thereto. The judgment entered is reversed and the cause remanded with instructions to enter judgment upon the verdict rendered by the jury.

REVERSED AND REMANDED.

PATRICK LAND COMPANY OF OMAHA V. EDWIN A. LEAVENWORTH ET AL.

FILED NOVEMBER 9, 1894. No. 4580.

1. **Mortgages:** MECHANICS' LIENS: PRIORITIES. *Hoagland v. Lowe*, 39 Neb., 397, followed and reaffirmed.
2. **Mechanics' Liens.** Where the vendor of land took by agreement a second mortgage to secure the unpaid portion of the purchase money and the cash payment was made from a loan secured by the mortgage which was made superior to the purchase money mortgage, with the knowledge of all parties but without previous agreement, it being the understanding that the

loan was being made for the purpose of erecting improvements on the premises and the owner contracting to erect such improvements, but there being no contract that the money obtained by the loan should be so used, and the loan company not undertaking to see to the application of the money, *held*, that by virtue of these facts the priority of the mortgages as against mechanics' liens for work begun and material furnished after the recording of the mortgages was not disturbed.

3. ———: ESTOPPEL. The loan company was not by estoppel or otherwise prevented from asserting the superiority of its mortgage as to the whole amount thereof because of the foregoing facts, or of the further fact that a mechanic, induced by representations of the owner, relied on payment out of the loan, a part of which was in fact appropriated to another purpose, it not appearing that the loan company had itself by contract or by conduct led the mechanic to rely upon its seeing to the application of the money.

4. **Orders:** ACTIONS. An action cannot be maintained by the payee against the drawee of an order upon a fund payable to the drawer where the drawee has refused to accept the order.

5. **Judgments:** PLEADING: CROSS-PETITION FILED AFTER ANSWER DAY: NOTICE TO CO-DEFENDANTS. One of several defendants demurred to a petition. The demurrer was sustained. His co-defendants, after answer day, filed cross-petitions seeking affirmative relief against him. No summons or notice was served upon him of the cross-petitions and he did not appear thereto. *Held*, That the court properly refused judgment against him on the cross-petitions. *Arnold v. Badger Lumber Co.*, 36 Neb., 841, followed.

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

Appearances of counsel were withdrawn.

IRVINE, C.

William Allen began this action to foreclose a mortgage made by the defendants George W. McIntire and wife to the Patrick Land Company, conveying lot 9, block 110, Dundee Place, an addition to the city of Omaha, and securing notes amounting to $1,000. This mortgage was

dated August 1, 1889, and was recorded August 15, 1889, at 4:30 P. M. It was alleged that Allen had become the owner of the notes secured by the mortgage. During the pendency of the action, the Patrick Land Company having become repossessed of the notes, was substituted for Allen as plaintiff. The Kimball-Champ Investment Company filed an answer setting up a mortgage on the property, dated August 1, 1889, and recorded August 13, 1889. The Kimball-Champ Investment Company asked to have this mortgage declared a first lien but did not seek a foreclosure. A. D. Paddock, by answer, set up a mortgage from McIntire and wife to the defendant Partridge and transferred to Paddock, and claimed that said mortgage was superior to all liens except that of the Kimball-Champ Investment Company. Partridge, Wahlstrom & Berglund and the Hussey & Day Company claimed mechanics' liens for work done and material furnished for erecting a building on the property after the mortgages were recorded. The decree of the district court established the investment company's mortgage as a first lien, the Paddock mortgage as a second, the Patrick Land Company's as a third, and the mechanics' liens as inferior to the three mortgages. From this decree the mechanics' lienors appeal, claiming that the court erred in subjecting their liens to the mortgages, and the Hussey & Day Company and Wahlstrom & Berglund also claim a right to a personal judgment against the defendant Leavenworth, which was denied by the district court. We shall first consider the question of priorities.

The pleadings and evidence disclose the following state of facts: An arrangement was made by the Patrick Land Company to sell the lot in question, together with nineteen others, to McIntire, Leavenworth in all things claiming to represent McIntire. Their true relations will be referred to on the other branch of the appeal. McIntire was to pay $5,000 in cash and give to the Patrick Land Company

notes and mortgages to secure the remainder of the purchase money. The mortgages to the land company it was agreed should be subject to a mortgage to be secured for the purpose of obtaining funds for building. Leavenworth made arrangements with Kimball, Champ & Ryan, acting as loan brokers, for a loan of $44,000, to be secured by mortgages of $2,200 upon each of the twenty lots. This loan having been negotiated from the investment company and all the instruments ready for delivery the secretary of the land company accompanied Leavenworth to the office of Kimball, Champ & Ryan, where Mr. Ryan paid $5,000 directly to the secretary of the land company, who then delivered to him the deeds for the lots. Delivery was then made of the other instruments. There is no evidence that there was any prearrangement between the land company and any one else that the $5,000 should be paid from this source. Indeed, the evidence is positive that the land company did not know in advance of the payment where the money was coming from. There can be no doubt, however, that when the transaction occurred the secretary did know that the $5,000 was a portion of the loan which was to be secured by the mortgage prior to the land company's. The mortgage to the investment company did not specify the purpose for which the loan was made. McIntire did, however, contemporaneously with the loan, contract with the investment company to erect within ninety days a two-story dwelling on each of the lots, the contract reciting that the lots were insufficient security for the loan and that the contract was made for the purpose of fully securing the investment company. In this contract it was agreed that the investment company should pay to McIntire the amount of his loan in two payments, one-half when the buildings were roofed, the other one-half upon their completion, reserving sufficient to protect the investment company from liens. As a matter of fact the investment company seems to have paid out a large portion of the loan on orders given

by Leavenworth to the various contractors, but there is nothing in the contracts of the investment company either requiring or empowering it to see that the loan was applied for the purpose of building. On this state of facts the appellants claim priority both as to the investment company and to the land company, urging the same arguments advanced by the appellants in the case of *Hoagland v. Lowe*, 39 Neb., 397. The facts of the two cases are so similar that every question presented in *Hoagland v. Lowe* is properly presented by this record. So far as the questions involved in the former case are concerned we shall not restate them or discuss them anew. Suffice it to say that the rules announced in that case are here adhered to. We can discover but two points on which differences could be suggested in the two cases. The first is that while in *Hoagland v. Lowe* Mrs. Lowe had no knowledge that the payment upon the lots made to her came out of the loan, there is no doubt that in this case the Patrick Land Company, although without a previous arrangement to that effect, did know when it received the payment that it was a portion of the loan. The second point of difference is that in *Hoagland v. Lowe* reliance was placed by the lender upon the lot alone as security. There was nothing more than a verbal promise to build. In this case there can be no doubt that the land company and the investment company both had contracts with McIntire requiring that houses should be built, and it was understood that the loan by the investment company was negotiated for the purpose of building, but there was no contract between any parties requiring the money to be so used. Do these distinctions render inapplicable the rule of priorities in *Hoagland v. Lowe?* We think not. The mere knowledge of the parties that the owner had in view the obtaining of funds to build when he negotiated the loan did not impose upon them the duty of seeing that the loan was applied to that purpose; nor did either mortgagee ever undertake any such duty. There

was no appropriation of the fund for that purpose by the contract, and if the mechanics obtained any right to have the fund distributed for that purpose it must have been by facts constituting an estoppel. It is very probable that if the investment company had led the mechanics to rely upon its seeing to the application of the loan for the purpose of their payment, and if the mechanics so relying had entered into their contracts or performed work thereunder and then the investment company had disbursed a portion of the loan for other purposes, it might be estopped from setting up its mortgage as against the mechanics to the extent of the funds so misappropriated. But such are not the facts of this case. It does not appear that either the Hussey & Day Company or Wahlstrom & Berglund, in making their contracts or doing their work, placed any reliance upon the fact that the loan had been secured. On the contrary, it does appear, as will be hereafter stated, that they advanced credit in reliance on other facts, or supposed facts. It does not appear that they even had any knowledge of the loan when their contracts were made or their work begun. Partridge did know of the loan, and undoubtedly did contract relying on being paid therefrom, but such reliance was due entirely to the statements of Leavenworth. The investment company by no act of its led him to rely upon the fund for his pay. It is true that he received from the investment company a portion of his compensation out of this fund and on orders from Leavenworth; but he had no dealings with the investment company until after he had made his contract and we cannot discover that any representation of the investment company, by act or word, justified Partridge in proceeding in reliance that the investment company would see him paid out of the loan. The investment company was free in the beginning to pay the money to the mortgagor without regard to its use by him, and it could not be deprived of that privilege nor have imposed upon it the duty of seeing the

money applied to any particular purpose, in the absence of some contract of the investment company to that effect, or of conduct on its part justifiably leading another to rely upon its doing so. This record discloses neither such contract nor such conduct.

Wahlstrom & Berglund claim a personal judgment against the investment company of $200, on the ground that Leavenworth gave them an order on the investment company for that amount. The evidence is uncontradicted that the investment company persistently refused to accept this order. Although it had funds in its hands payable on the loan, no duty was imposed upon it in favor at least of a stranger of accepting and paying to such stranger an order drawn upon the fund. The mortgagor may have a right of action against the investment company for refusing to accept this bill, but having refused to accept it, there was no contract between the investment company and the payee giving the latter a right of action thereon.

The Hussey & Day Company and Wahlstrom & Berglund both ask personal judgments against Leavenworth. It appeared beyond doubt that McIntire, the nominal purchaser of the property, was financially irresponsible; that he was an employe of Leavenworth; that he took title and made the contracts solely as a matter of convenience at the request of and for the benefit of Leavenworth; that he never had or expected to have any beneficial interest; that Leavenworth resorted to this scheme for the purpose of avoiding personal responsibility; that he represented to the Hussey & Day Company at least that McIntire was a man of means and amply responsible; that such representations were false, were known by Leavenworth to be false; that they were made for the purpose of deceiving the Hussey & Day Company; that the Hussey & Day Company relied thereon and were misled thereby. The Hussey & Day Company pleaded these facts and asked for judgment against Leavenworth and not against McIntire.

The plaintiff sought a deficiency judgment against Leavenworth for similar reasons. Leavenworth demurred to the petition on the ground of misjoinder of causes of action. This demurrer was sustained, and the plaintiff elected to proceed against the other parties. This ruling disposed of the plaintiff's claim in this action against Leavenworth.

The answers and cross-petitions of the Hussey & Day Company and Wahlstrom & Berglund were not filed until long after the answer day as fixed by the summons issued upon the petition. The record does not disclose that any summons or notice issued on either of the cross-petitions, or that Leavenworth ever appeared thereto, so that, without regard to the merits of these appellants' claims for personal relief against Leavenworth, the court had no jurisdiction to grant such relief. (*Arnold v. Badger Lumber Co*, 36 Neb., 841.) The decree of the district court is

AFFIRMED.

SANDWICH ENTERPRISE COMPANY V. A. L. WEST.

FILED NOVEMBER 20, 1894. NO. 5792.

1. **Review:** CONFLICTING EVIDENCE. A verdict rendered on conflicting evidence will not be disturbed.
2. **Trial:** SPECIAL FINDINGS: GENERAL VERDICT: JUDGMENT. Where the jury are directed to find specially in answer to certain material questions submitted to them for their consideration, and the jury returned a general verdict without answering such questions, it is error for the court to enter judgment on the general verdict against the objection of the unsuccessful party.

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

Moore & Hart, J. E. Cochran, and *Cobb & Harvey,* for plaintiff in error, cited: *Doom v. Walker,* 15 Neb., 339.

J. W. Cole, contra.

NORVAL, C. J.

Plaintiff in error was plaintiff in the court below. The petition sets up four causes of action. The first is upon an account for goods, wares, and merchandise amounting to $11.43, sold and delivered by the plaintiff to the defendant. The other three counts, or causes of action, set forth in the petition are based upon three promissory notes executed by the defendant, described as follows: One for $164.24, given on the 24th day of April, 1889, due April 1, 1890; one for $200, dated March 14, 1889, maturing July 1, 1890, and the other for $183.98, executed March 14, 1890, due May 15, 1890. All of said notes drew interest at the rate of ten per cent per annum from the date thereof. The defendant in his answer admits the execution and delivery of the notes declared on and the correctness of the account, and by way of set-off and counter claim alleges: (1) That the notes described in the petition have been in part paid by a promissory note executed by one L. A. Weakley to the defendant, and by the latter assigned to the plaintiff, amounting to $350, and ten per cent interest thereon, for which note plaintiff has not given defendant credit; (2) that defendant turned over to plaintiff a promissory note signed by one Fisher for the sum of $167 and interest, which should be applied on plaintiff's causes of action, while but $17 has been so credited; (3) that defendant and plaintiff entered into a contract whereby defendant was to have the exclusive right to sell the Enterprise windmills and other machinery in Hayes county; that most of the indebtedness sued on in this action was for windmills of said manufacture; that subsequent to the making of said contract, and prior to the bringing of this

suit, plaintiff violated said contract by itself and agents, against the wishes and consent of the defendant, selling and disposing of said windmills in said county, to the damage of the defendant in the sum of $500. All new matter pleaded in the answer is denied in a reply filed by the plaintiff. There was a trial to a jury, with verdict and judgment against the plaintiff for the sum of $14.85.

A number of errors are assigned in the petition in error, but the first one we shall notice, relates to the sufficiency of evidence to support the verdict and judgment. The defendant's answer admits the validity of plaintiff's demands; and at the time of the trial the four causes of action stated in the petition aggregated, including interest, $647.61. The contention of the plaintiff is that the total amount of defendant's set-offs and counter-claims established on the trial was considerably less than the sum admitted by the defendant to be due the plaintiff. It is undisputed that plaintiff received of and from the defendant the L. A. Weakley note mentioned in the answer, but there is a sharp conflict in the testimony as to the conditions upon which the same was received. The defendant's testimony goes to show that it was turned over as payment upon his indebtedness. A clear preponderance of the proof, however, is to the effect that it was left by defendant as collateral security to the claims held by plaintiff at the time the $200 and $183.98 notes were given by defendant. There being evidence to support the defendant's theory upon this point, and his right to set off the Weakley note being conceded by the plaintiff in the brief filed, the defendant will be credited with the amount due on said note at the date of the trial, the same being $359.72.

We will now consider the right of the defendant to set off in this action the Fisher note of $167. Upon this branch of the case the defendant testified on direct examination, in substance, that the plaintiff held his note for $151.28, and the Fisher note was delivered to the company

as collateral thereto; that plaintiff collected the Fisher note through the Hitchcock County Bank and credited defendant with $17 and some cents on the book account, but never returned to defendant his note for $151.28, although he has demanded the same of the company and its agent; that he does not know where the note is. Upon cross-examination the defendant stated that the agreement was that the proceeds of the Fisher note, when collected, should be applied on the defendant's note for $151, which was given in 1887, but at the trial was long past due; that after the Fisher note was collected defendant had a settlement of the matter with the company through Mr. Gregory, its agent, by the terms of which the money delivered for the payment of the Fisher note was applied in satisfaction of defendant's note of $151, and he was likewise credited with the sum of $17 by the company on book account; that the agreement at the time was that the $151 note was paid, that he did not receive said note, because Mr. Gregory did not then have the same with him. Upon the defendant's testimony alone, when considered apart from that introduced by the plaintiff, it is obvious that there is no merit in the claim made in the answer to have the Fisher note set off against plaintiff's causes of action.

We will next consider the claim of the defendant for $500 as damages for the violation by the plaintiff of its agency contract with the defendant for the sale of windmills in a certain territory. It is plain that a portion of said claim for damages was allowed by the jury, and the question is raised whether it should have been allowed under the evidence adduced on the trial. That defendant at one time was the agent of the plaintiff for the sale of their windmills in Hayes county is not denied, but it is insisted by plaintiff that no exclusive agency was ever given the defendant. The defendant testified, positively and unequivocally, that in 1886 he was appointed by the plaintiff agent for the sale of its windmills, cultivators, etc., which agency

continued for a period of four years; that he was given the sole or exclusive agency of Hayes county for the sale of plaintiff's goods, and he understood no one else had the right to sell its goods in said county; that during the continuance of defendant's agency, Coleman Bros., of McCook, who were plaintiff's agents for Hitchcock county, sold and erected in Hayes county thirty mills of plaintiff's manufacture; that there was a profit from $15 to $20 to the agent on each mill sold; that Coleman Bros.' agency did not include Hayes county; that he never informed plaintiff that they were selling mills in Hayes county, although he was aware of such fact when he executed the notes sued on, and that he never made any claim to the company for damages on account of such sales. The plaintiff introduced the testimony of two witnesses taken by deposition, which is to the effect that the defendant was appointed agent for the sale of windmills in Hayes county, but he was not given the exclusive right to sell plaintiff's machinery in said territory; that it did not establish any other agency, or authorize any one to sell windmills in Hayes county or vicinity during the time the defendant represented the company. The plaintiff also introduced in evidence a letter written by defendant on May 8, 1891, just prior to the bringing of this suit, in which he offered to convey certain lands in payment of his indebtedness to the plaintiff. While, perhaps, the preponderance of the testimony on this branch of the case is with the plaintiff, inasmuch as there is evidence in the bill of exceptions reasonably tending to support the claim of the defendant for damages, the finding of the jury in his favor on the question of breach of contract will not be disturbed as being against the evidence. It is evident that the verdict was the result of a compromise. The defendant was entitled at least to $450 on his counter-claim for damages, which added to the amount due on the Weakley note, namely, $359.72, makes $809.72. This last sum subtracted from the aggregate amount of

plaintiff's causes of action leaves $162.11, for which sum the defendant was entitled to a verdict, if for anything. The plaintiff, however, cannot complain of the smallness of the judgment returned against it.

There is but one other question that need be considered, which is one of practice. Upon the trial the court submitted to the jury seven requests for special findings of fact, five at the instance of the plaintiff and two at the defendant's request. Those submitted on motion of the defendant and three of the plaintiff's were answered by the jury; but the other two requested by the company, the fourth and fifth, were returned unanswered. Counsel for plaintiff at the proper time objected to the court receiving the general verdicts, on the ground that the jury had failed to answer all the interrogatories submitted to them by the court at plaintiff's request, which objection was overruled, and an exception was taken. This ruling of the court is assigned for error. In an unbroken line of decisions it has been held that it is within the sound discretion of the trial court to submit or refuse to give to the jury questions for special findings of fact. It does not follow, however, that it is discretionary with a jury to answer, or decline to do so, special interrogatories submitted to them by the court, and that it is not reversible error for the court, after having directed special findings to be returned, to receive a general verdict where all the questions propounded to the jury have not been answered by them. The precise point of practice presented by this record was discussed and passed upon in *Doom v. Walker*, 15 Neb., 339. We quote from the syllabus of the opinion as follows: "When, under the provisions of section 293 of the Code of Civil Procedure, the court shall have instructed the jury that if they render a general verdict to find upon particular questions of fact, stating the same in writing, and directing a written finding thereon, the jury shall fail to agree to a finding upon the whole or part of such questions but shall find a general verdict, it is

error on the part of said court, over the objection of the defendant, against whom is the said general verdict, to receive such verdict, and judgment thereon will be reversed." The failure of the jury to answer immaterial questions for special findings will not lead to a reversal of the case (*Missouri P. R. Co. v. Vandeventer*, 26 Neb., 222); but when a general verdict is returned, and the jury fail to answer special interrogatories, which are material under the pleadings and evidence, the verdict cannot be sustained. The interrogatories which were not answered by the jury were as follows:

"4. Did the plaintiff appoint any other agent in Hayes county, Nebraska, for the sale of Enterprise windmills during the alleged agency of the defendant?

"5. Do you find that the defendant assented to the sale of windmills by Coleman Bros. in Hayes county, during the time he claimed an agency therefor."

These questions were material. They were not covered by any of the interrogatories answered. It follows that the judgment rendered on the verdict is erroneous.

REVERSED AND REMANDED.

ELMER CARPENTER ET AL. V. MARY E. LINGENFELTER ET AL.

FILED NOVEMBER 20, 1894. No. 5655.

1. **Trial:** WITNESSES: EVIDENCE. When a party on cross-examination asks a witness an immaterial or irrelevant question, he is bound by the evidence so elicited, and cannot rebut it by other witnesses.

2. **Accession of Property:** TITLE: TRESPASS: TROVER AND CONVERSION. "The doctrine of accession of property applies

where one has willfully, as a trespasser, taken the property of another, and altered it in substance or form by his own labor. Where, however, the appropriation was through a mistake of fact, and labor has been expended upon it which converts it into something very different from the original article and greatly increases its value, and the value of the original article is insignificant in comparison with the new product, the title to the property in its converted form will pass to the person who has thus expended his labor, the original owner to recover the value of the original article." (*Baker v. Meisch*, 29 Neb., 227.)

3. Trover and Conversion: VALUE OF PROPERTY: RECOVERY: REPLEVIN. The owner of property which has been taken by another in good faith, believing he had a right to do so, may recover the value of the property at the time of the conversion, and not the value after the same has been improved by the other's labor and skill.

ERROR from the district court of Pierce county. Tried below before ALLEN, J.

The facts are stated in the opinion.

O. J. Frost, W. W. Quivey, and *Wigton & Whitham*, for plaintiffs in error:

The court erred in giving the sixth and seventh instructions on its own motion and in refusing the first instruction requested by plaintiffs. (Cobbey, Replevin, secs. 395, 396; *Baker v. Meisch*, 29 Neb., 227; *Hungerford v. Redford*, 29 Wis., 345; Wells, Replevin, secs. 85, 88; *Gillespie v. Sawyer*, 15 Neb., 536; *Fremont Ferry & Bridge Co. v. Dodge County*, 6 Neb., 25; *Roy v. McPherson*, 11 Neb., 200; *State v. Graham*, 21 Neb., 329.)

In replevin, where a recovery of the value of the property is sought, the measure of recovery is the value before the property was improved by defendants' labor and skill. (*Single v. Schneider*, 30 Wis., 570; *Hungerford v. Redford*, 29 Wis., 345.)

G. T. Kelley, J. B. Smith, and *Frick & Dolezal, contra.*

NORVAL, C. J.

This is an action in replevin by Elmer Carpenter, John Carpenter, and I. W. Peed against Mary E. Lingenfelter and D. C. Lingenfelter, to recover the possession of 157 tons of hay. The property was taken under the writ, and possession thereof delivered to the plaintiffs. The defendants recovered a verdict and judgment for the value of the hay in the sum of $350, and $5 damages for withholding possession. The plaintiffs prosecute a petition in error.

The testimony introduced by the plaintiffs tends to show that one Hugh Spencer, who was the owner of the southwest quarter of section 28, township 27, range 3, in Pierce county, by his authorized agent, R. J. Spencer, rented the same to the plaintiff, I. W. Peed, for the year 1889, at a rental of $25; that in April, 1890, R. J. Spencer had a conversation with Peed about renting him the land for that year, in which conversation the former told the latter that if he would pay the taxes on the quarter section he could have the use of the land for 1890, and Peed replied that he would take the land if he could keep the cattle off; that subsequently Peed made a contract with one Kidd, by which the latter agreed to keep the cattle off the land; that Peed also paid the taxes about October 1, the tax receipt being delivered to R. J. Spencer at his special request; that in June or July, 1890, Peed sublet the land to the Carpenters, they agreeing to cut the grass growing thereon, stack and bale the hay, and deliver to Peed one-half thereof on board the cars; that the Carpenters commenced cutting the grass and making the hay in controversy during the latter part of August, and had it all in stack by September 25th; that in November following, after they had baled a part of the hay, the defendants drove the plaintiffs off the land and took possession of the hay,—that which was baled, as well as the portion which was then in the stack. It further appears from the testimony that

R. J. Spencer rented the land upon which the hay was made, on or about the 21st day of August, 1890, to the defendant Mary E. Lingenfelter. There is likewise in the bill of exceptions evidence tending to establish that Peed refused to take the land for 1890, upon the terms proposed by Mr. Spencer, and that although the defendants knew the Carpenters were cutting the grass, and making the hay early in September, no claim to the hay was made by the defendants until after it had been all stacked.

The first assignment of error is based upon the ruling of the trial court in admitting the evidence of D. C. Lingenfelter, to the effect that upon the trial in the county court of Pierce county of the case of the State v. Lingenfelter, Elmer Carpenter, one of the plaintiffs herein, testified that he did not know who was the owner of the southwest quarter of section 28, township 27, range 3. This evidence was offered and admitted for the purpose of impeachment, by showing that Mr. Carpenter had testified differently in the county court from what his testimony was on the trial of this case concerning his knowledge of the ownership of the land upon which the hay in dispute was made. Whether Mr. Carpenter knew, or did not know, who owned the land was not relevant to any issue in the case, since it in no manner tended to prove who had the right of possession to the property in controversy at the commencement of the action. The Carpenters claim the right to the hay as sublessees from Mr. Peed, who it is insisted is the tenant of Spencer, the owner of the land. The defendant Mary E. Lingenfelter claims under a lease from Spencer. One of the main points in the case, and the one to which the testimony was largely directed, was whether Spencer had rented the land to Peed for the year 1890, and the testimony above referred to sheds no light whatever upon the subject. It is only as to matters relevant to some issue involved in a case that a witness can be contradicted for the purpose of impeachment. This rule is too well settled to

require the citation of authorities to sustain it. Another familiar rule of evidence is that when a party is permitted on cross-examination to ask a witness an immaterial question, he is bound by the evidence so elicited, and cannot rebut it. The statement made by the witness which it was sought to contradict by other witnesses was brought out by the defendants upon cross-examination. It follows that it was error to allow the defendants to introduce evidence to impeach Elmer Carpenter upon a matter collateral to the issue involved. For the reasons stated above it was likewise error to admit immaterial evidence offered by the defendants for the purpose of impeaching the witness John Carpenter.

Exceptions were taken to the giving of the sixth and seventh paragraphs of the court's charge to the jury, and in the refusing to give plaintiffs' instruction No. 1. For convenience these instructions will be considered by us at the same time. The sixth and seventh instructions given by the court on its own motion are as follows:

"6. To constitute a valid contract the parties thereto must have agreed upon the same thing, and in the same sense, and must not have left the matter open for future agreement. If you find from the evidence in this case that I. W. Peed and R. J. Spencer made and entered into a contract by the terms of which Peed became the lessee of the land described in the petition for the purpose of the hay and grass grown thereon in the year 1890, and thereafter Peed and the plaintiffs, John and Elmer Carpenter, made a contract by which the latter were to cut and bale the hay and grass growing on the said land for that year, and the parties to such agreement were to own the same jointly, and in pursuance to such last named contract the plaintiffs, John and Elmer Carpenter, did cut and bale said hay and grass, then the plaintiffs would be the owners of the hay and entitled to its possession, and you should so find by your verdict. If, however, Peed did not contract

for the land for the year 1890, or the hay and grass grown thereon that year, with R. J. Spencer, or any other person having authority to contract with reference thereto, then any agreement that Peed may have made with John and Elmer Carpenter with reference to the hay and grass grown on said land for that year would not confer upon the plaintiffs any title to, or right of possession of, the hay, and your verdict should be for the defendants.

"7. If you find from the evidence that R. J. Spencer, having authority to do so, leased the land described in the petition for the purpose of the hay and grass grown thereon in the year 1890, to the defendant Mary E. Lingenfelter, through her husband as her agent, and that no lease of said premises had been previously made for said year to I. W. Peed, your verdict should be for the defendants."

The following is the plaintiffs' request to charge, and which was refused by the court:

"1. If you shall find from the evidence that I. W. Peed claimed to be the owner of the grass which has been converted into the hay in controversy, and the plaintiffs, under the contract with said Peed, cut said grass and converted the same into hay in the stack or bales, and by the bestowal of such labor thereon greatly increased the value of the grass, and that such work was done in good faith, believing that Peed was the owner of said grass when they made said contract with him, and while performing said labor and manufacturing said hay, then your verdict will be for the plaintiffs."

The vice imputed to the court's charge quoted above is that plaintiffs' right to recover was by the rule announced by the court made to depend wholly upon whether Spencer leased to Peed for the year 1890 the premises upon which the hay in question was made. Plaintiffs' right to the possession of the hay was not based alone upon the fact that a contract of lease had been made between Peed and the owner of the land, but as well upon the fact established

by the evidence that they had entered upon the premises as the lessees of Peed, honestly believing that he had the right to make such lease, and in good faith cut the grass and made the same into hay, with the knowledge of the defendants and without any objection or protest on their part, until after the work was done. This feature of the case was entirely withdrawn from the consideration of the jury by the instructions given. An important inquiry, therefore, is whether the charge of the court was for that reason erroneous. Ordinarily, a change in the form of property, by a person other than the owner, will not have the effect to change the title, but the original owner may sustain replevin if the property is susceptible of identification, unless the change has been wrought in good faith by an innocent party, who, by his labor and skill bestowed thereon, has greatly increased its value. But where a chattel, taken by a willful trespasser, is enhanced by his labor and skill, the manufactured article belongs to the owner of the original material, and he may recover possession by replevin. The rule stated above is in conflict with some adjudications which may be found, but is supported by the weight of authority in this country and is in accordance with the principles of natural justice. The same doctrine was held and applied by this court in the case of *Baker v. Meisch*, 29 Neb., 227. That was an action for replevin to recover a quantity of brick manufactured by the defendant from clay belonging to the plaintiff. The defendant entered upon the land and manufactured the brick in good faith under a lease from one Palmer, who never owned the land, but who claimed to be such owner. There was judgment for the defendant in the trial court, which was affirmed by this court. We quote the third point in the syllabus: "The doctrine of accession of property applies where one has willfully, as a trespasser, taken the property of another, and altered it in substance or form by his own labor. Where, however, the appropriation was through a

mistake of fact, and labor has been expended upon it which converts it into something very different from the original article and greatly increases its value, and the value of the original article is insignificant in comparison with the new product, the title to the property in its converted form will pass to the person who has thus expended his labor, the original owner to recover the value of the original article." Mr. Cobbey, in his book on the Law of Replevin, at section 393, says: "If a person bestows his labor upon the property of another, thereby changing it into another species of article, the property is changed, and the owner of the original material cannot recover the article in its altered condition, but is only entitled to its value in the shape in which it was taken from him. It is not essential that it remain in its original form so long as it can be identified. But if the change has been wrought in good faith by an innocent party, and it has been materially increased in value, or has become incorporated with another thing, which is the principal and it is only a part, replevin would not be allowed." The author cites numerous cases which sustain the text. The same doctrine is laid down in Wells on Replevin, in section 216, and at section 217 Mr. Wells, in discussing the duty of the owner to reclaim his property before its value has been greatly enhanced by the labor of another, says: "The rule in Wisconsin seems to commend itself, as well for its plainness as for the manifest justice which it seems to deal out to all parties. It is there held that the owner of chattels does not lose his property by mere change of form at the hands of another, but he should reclaim it before the new possessor has greatly increased its value by the bestowal of his skill and labor; and, in event of his failure to do so, he should be restricted in his recovery to the amount of damages he has actually sustained, unless the taking was accompanied with some circumstances of malice or insult that might make it proper to inflict exemplary damages. This rule, while it

protects the owner fully, will be easy of application, and do justice to both parties, when such a result is attainable. In Michigan a somewhat similar doctrine prevails. When timber worth twenty-five dollars had, by one in the exercise of a supposed right, in good faith, been converted into hoops worth seven hundred dollars, it was held that the title passed to the party who had in good faith expended his labor, and the owner of the timber in such case could not sustain replevin for the hoops. In Pennsylvania, the plaintiff sought to recover, in trover, the value of coal dug out of his mine by mistake, and was allowed only the value of the coal before it was mined. The court says: 'It is apparent that any other rule would transfer to the plaintiff all the defendant's labor in mining the coal, and thus give her much more than compensation for the injury done.'" There is ample evidence in the record before us tending to establish that the Carpenters entered upon the land under claim of right, and in good faith cut the grass thereon, and made the same into hay, believing they had a right to do so, and that the defendants made no effort to stop them or to reclaim the hay before it was all made. In view of this evidence, we think it clear, under the authorities, that the instructions given by the court were erroneous and prejudicial to the rights of the plaintiff. Plaintiffs' request to charge was applicable to the evidence, and should have been given.

Upon the subject of the measure of damages the court instructed the jury substantially that inasmuch as the hay had been taken and delivered to the plaintiffs under the order of replevin and had since been sold and disposed of by them, the measure of the defendants' damage, in case a verdict should be returned in their favor, would be the highest market value of the hay which the evidence disclosed it possessed between the time it was replevied and the date of the trial. There is a conflict in the adjudicated cases as to the rule of damages where one's property has been

changed in form by another. There is one line of cases which holds that where the value of property has been increased by another the owner may recover the value of the property in its improved and more valuable form. There is another line of decisions which states the rule broadly that the measure of the recovery is the value of the article before the same was improved by the other's labor and skill, and this whether the value was increased by a willful wrong-doer or by a person acting in good faith. The last rule seems to us the better one. It gives the owner full compensation, and to the other party the increase of value for his labor bestowed on the property. (*Single v. Schneider*, 24 Wis., 299, 30 Wis., 570; *Hungerford v. Redford*, 29 Wis., 345; *Herdic v. Young*, 55 Pa. St., 176; Cobbey, Law of Replevin, sec. 913; *Wetherbee v. Green*, 22 Mich., 311.)

For the errors already pointed out the judgment is reversed and cause remanded.

REVERSED AND REMANDED.

ALFRED ECKLUND, APPELLEE, V. ELIJAH J. WILLIS, APPELLANT, ET AL.

FILED NOVEMBER 20, 1894. No. 5723.

1. **Review:** ALLEGATIONS OF ERROR. An alleged error not brought to the attention of the trial court will not be considered by this court on a review of the case by petition in error.
2. ———: CONFLICTING EVIDENCE. A finding based upon conflicting testimony will not be set aside unless found to be clearly wrong.
3. **Receivers.** *Held*, That the evidence was sufficient to authorize the appointment of a receiver to take charge of the mortgaged premises and to collect the rents and profits accruing therefrom.
4. **Mortgages:** FORECLOSURE: STAY: WAIVER OF ERRORS. The

taking of a stay of the order of sale under a decree of foreclosure is a waiver of all errors in the proceedings in the case prior to the obtaining of such stay.

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

B. F. Johnson and *T. F. Barnes*, for appellant.

Thos. C. Munger, contra.

NORVAL, C. J.

Plaintiff, and appellee, filed a petition in the district court to foreclose a mortgage upon real estate in North Lincoln, and in his petition he applied for the appointment of a receiver to collect the rents and profits, on the ground that the mortgaged premises are insufficient security for plaintiff's claim, and the insolvency of the defendants. Subsequently, at the September term, 1891, of said court, upon due notice to the defendants, Paul F. Clark was appointed receiver of the property to take charge of the same and collect the rents and profits accruing therefrom, who gave bond in the sum fixed by the court, and the plaintiff likewise executed a bond to the defendants, with approved sureties, in the sum of $1,000. At the February term, 1892, the defendant Elijah J. Willis filed a motion to vacate the order appointing a receiver, which motion was denied by the court, and he excepted to the ruling. At the same term a decree of foreclosure was rendered, and the defendants filed a request for a stay, in accordance with the provisions of the statute. The defendant Elijah J. Willis appeals from the overruling of his motion to vacate the order appointing a receiver.

The first point made in the brief of appellant is that the receiver did not give a bond in a large enough sum. A sufficient answer to this is that neither when the order appointing the receiver and fixing the amount of his bond

was made, nor in the motion to vacate such order, was any objection urged as to the size of the bond required. If appellant desired that question reviewed, he should have presented the same to the trial court in his motion to vacate, and obtained a ruling thereon. We have to do alone with the decision of the lower court in the motion to vacate its order appointing a receiver, and questions not raised therein cannot be urged as grounds for reversal. (*Hurford v. Baker*, 17 Neb., 443.)

It is lastly insisted that the appointment of a receiver was unnecessary in this case. Section 266 of the Code of Civil Procedure provides for the appointment of a receiver "in an action for the foreclosure of a mortgage when the mortgaged property is in danger of being lost, removed, or materially injured, or is probably insufficient to discharge the mortgage debt." The appointment was made on the ground that the mortgaged premises were inadequate to pay the plaintiff's claim. It appears from the record that there are mortgage liens upon the property prior in point of time to plaintiff's, amounting, including interest, to about $5,000. The amount of the decree in favor of the plaintiff, exclusive of costs, is $635.82. The motion to vacate the order appointing a receiver was heard upon affidavits, four on either side. The market value placed upon the property by plaintiff's witnesses ranged from $4,200 to $5,000, while the defendant's witnesses testified that it was worth from $9,950 to $14,200. There was sufficient testimony before the court, if plaintiff's witnesses were truthful, upon which to predicate a finding that the mortgaged property was inadequate to pay off the mortgage debt, after satisfying all prior liens. The testimony as to value was conflicting, and, following the rule universally adhered to by this court, the finding in the case at bar will not be disturbed.

There is another reason why the case should not be reversed. It appears from the transcript that after mak-

ing the order of which complaint is made, a decree of foreclosure was rendered in the action against the defendants, and that the appellant applied for, and obtained, a stay of the order of sale. This step is a waiver of the right to have reviewed any of the proceedings in the case prior to the taking of such stay. (Code, sec. 477*e*; *McCreary v. Pratt*, 9 Neb., 122; *Miller v. Hyers*, 11 Neb., 474; *Sullivan Savings Institution v. Clark*, 12 Neb., 578; *Banks v. Hitchcock*, 20 Neb., 315.)

AFFIRMED.

INGWERSEN BROS., APPELLEES, V. F. O. EDGECOMBE, RECEIVER OF THE FARMERS & DROVERS BANK OF BATTLE CREEK, APPELLANT, ET AL.

FILED NOVEMBER 20, 1894. NO. 5774.

Corporations: INSOLVENCY: DIRECTORS AND OFFICERS: ABUSE OF TRUST: DISTRIBUTION OF ASSETS. The relation of the directors and managing officers of an insolvent private corporation toward the property and assets thereof is that of trustees for all of the creditors. Such officers cannot take advantage of their position to secure a preference for themselves, but are required to share ratably with other creditors.

APPEAL from the district court of Madison county. Heard below before ALLEN, J.

The facts are stated in the opinion.

Robinson & Reed, for appellant:

The directors and officers of the corporation are trustees of the creditors and must manage the property and assets with strict regard to their interests; and if the directors and officers are also creditors, while the insolvent corporation is under their management, they cannot secure for

themselves any preference or advantage over other creditors. (*Haywood v. Lincoln Lumber Co.*, 26 N. W. Rep. [Wis.], 187; *Marr v. West Tennessee Bank*, 4 Cold. [Tenn.], 471; *Koehler v. Black River Iron Co.*, 2 Black [U. S.], 715; *Curran v. Arkansas*, 15 How. [U. S.], 306; *Richards v. New Hampshire Ins. Co.*, 43 N. H., 263; *Bradley v. Farwell*, 1 Holmes [U. S. C. C.], 433, *Drury v. Cross*, 7 Wall. [U. S.], 299; *Paine v. Lake Erie & L. R. Co.*, 31 Ind., 353; *Gas Light Co. v. Terrell*, L. R., 10 Eq. [Eng.], 168; *Hoyle v. Plattsburgh & M. R. Co.*, 54 N. Y., 315.)

Powers & Hays, contra.

POST, J.

On the 22d day of June, 1891, the Farmers & Drovers Bank of Battle Creek issued to John F. Teidgen a certificate of deposit in the usual form for $5,000, payable September 1, 1891, and bearing interest at eight per cent per annum. On the 9th day of July following said Teidgen, as vice president of said bank, for the purpose of securing the said certificate of deposit executed a mortgage whereby, in behalf of the bank, he conveyed to himself a lot in the village of Battle Creek, owned and occupied by said bank as a place of business, and in which B. Meyel, the cashier, also joined. On the 15th day of the same month the said bank was by this court adjudged to be insolvent and the defendant Edgecombe named as receiver to wind up its business under the direction of the court. On the 11th day of March, 1892, this proceeding was commenced by the plaintiffs, assignees of Teidgen, in the district court of Madison county, to foreclose the mortgage above mentioned. A decree having been allowed by the district court in accordance with the prayer of the petition, the cause was removed into this court upon the appeal of the receiver.

The numerous propositions discussed by counsel in the briefs submitted are included in the one inquiry, viz., is

the mortgage to Teidgen valid as against the receiver of the bank? It should in this connection be noted that the plaintiffs are not shown to be *bona fide* holders of the certificate of deposit, and do not in fact claim any equities superior to those of their assignor. In addition to the facts above stated it is disclosed by the record that the bank had been insolvent for some considerable time immediately preceding the date shown by the certificate of deposit, and was at no time thereafter able to pay its creditors in full. The capital stock of the bank was, during that time, held by R. H. Maxwell, who was president; John F. Teidgen, vice president; Ben. Meyel, cashier, and A. H. Hensel; said stockholders all being members of the board of directors thereof. The transactions which resulted in the execution of the mortgage are best understood from the testimony of the parties thereto. For instance, Teidgen, on his direct examination, testified for the plaintiffs as follows:

Q. State in full and in detail the circumstances under which you deposited the sum of $5,000 with said bank, and whether said bank ever gave you security for the payment of the same; and if so, the character of said security, and whether the amount due on said certificate has ever been paid.

A. At the time I deposited that money, Ben. Meyel, the cashier, came to me at my house while the president was not at home. The president was in Lincoln, Nebraska, and wanted me to advance the bank $5,000. I did not have the money, but drew a sight draft on Ingwersen Bros., and they paid it. The draft was for that sum. Ben. Meyel, the cashier, told me that the bank wanted $5,000 for a couple of months. * * * During that time they agreed to give me a mortgage on the building for $5,000 and have done it. It then run on and Ingwersen Bros. wanted their money, and I assigned the mortgage and certificate of deposit to them and told them to foreclose whenever they pleased. The cashier wrote the mortgage

and I signed it as vice president because the president was not there, he being in Lincoln, Nebraska. I don't know whether the cashier signed the mortgage or not. The mortgage covered the bank building. No part of the certificate of deposit has ever been paid to me. * * *

Q. State whether or not the cashier, or other officers of the bank, said anything about giving you a mortgage to cover said certificate of deposit at the time you deposited the $5,000 in the bank; and if so, what was said in regard to it and who said it?

A. The cashier did, if anything should go wrong.

Q. Did the cashier or other stockholder of the bank afterward say anything to you about giving a mortgage, and if so what?

A. I don't remember what they said, only I got the mortgage.

Meyel, the cashier, testified for the plaintiffs as follows:

Q. What was said by you to Teidgen in regard to giving security for this loan?

A. Why I told him at the time we would secure him with the bank building in case the bank should get tight or embarrassed so that they was going to close it up.

Q. Now, then, on this day when he advanced this loan, he was not to have security unless the bank should afterwards become embarrassed?

A. No; if the bank was in good sound condition we wouldn't give him the security and would not want to have it recorded.

Q. Your talk with John Teidgen was to depend upon whether, afterwards, there was danger of the bank going into the hands of a receiver?

A. The bank was in condition then to go into the receiver's hands. When I borrowed the money the understanding was he was to get security.

Q. But isn't it a fact if everything went right he was not to have security?

A. Yes.

The facts clearly established by the foregoing evidence are that the money represented by the certificate of deposit was voluntarily advanced by Teidgen for the purpose of relieving the immediate necessity of the bank without any definite agreement for security, and that the purpose of the mortgage was to give preference to his claim as a general creditor thereof. The question, therefore, of the authority of the bank to raise money by mortgage upon its real estate to meet its current obligations is not here presented. The vital question in this record is the character of the relation which the directors and managing officers of an insolvent corporation bears toward its creditors. That such officers are not trustees in the technical sense of the term is apparent, and yet it is well settled, both by authority and on principle, that they are within the rule which guards and regulates dealings between trustee and *cestui que trust*. But the application of that rule has resulted in a diversity of opinion. It is maintained by some courts that unless prevented by charter or the operation of statute in the nature of bankrupt laws, insolvent corporations possess the same power to make preference among their creditors as natural persons. But the view which may be said to rest upon the soundest reasons and is sanctioned by the decided weight of authority is that when a corporation becomes insolvent, its property and assets constitute a trust fund for the benefit of its creditors, and that the directors and officers in possession thereof, being trustees for all the creditors, cannot take advantage of their position to secure a preference for themselves, but must share ratably with the other creditors. (See *Haywood v. Lincoln Lumber Co.*, 64 Wis., 639; *Hopkins' Appeal*, 90 Pa. St., 69; *Sicardi v. Keystone Oil Co.*, 149 Pa. St., 139; *Olney v. Conamicut Land Co.*, 16 R. I., 597; *Rouse v. Merchants Nat. Bank*, 46 O. St., 493; *Hays v. Citizens Bank*, 51 Kan., 535; *Thompson v. Huron Lumber Co.*, 4 Wash. St., 600; *Corey v. Wadsworth*, 11 So. Rep. [Ala.], 350; *Adams v. Kehlor*

Milling Co., 35 Fed. Rep., 433; 2 Morawetz, Corporations, 787, 803; Beach, Private Corporations, 241 *et seq.*) In Wait, Insolvent Corporations, section 162, it is declared: "The practical working of the rule sustaining corporate preferences is monstrous. The unpreferred creditors have only a myth or shadow left to which resort can be had for payment of their claims, a soulless, fictitious, unsubstantial entity that can be neither seen nor found. The capital and assets of the corporation, the creditors' trust fund, may, under this rule, be carved out and apportioned among a chosen few, usually the family connections or immediate friends of the officers making the preference. This rule of law is entitled to take precedence among the many reckless absurdities to be met with in cases affecting corporations as being a manifest travesty upon natural justice." Nor is the fact that the advancement was in this instance for the accommodation of the bank material, since, as we have seen, the rights of Teidgen were those of a general creditor only. Transactions of the character here involved are voidable by the corporation, its stockholders or creditors (1 Beach, Private Corporations, 242); and the right of the bank to interpose the illegality of the mortgage as a defense passed to the receiver under the order of this court. It follows that the decree of the district court must be reversed and the cause remanded for further proceedings therein.

REVERSED AND REMANDED.

NEBRASKA MORTGAGE LOAN COMPANY, APPELLEE, V. J. H. VAN KLOSTER, IMPLEADED WITH GEORGE F. BLUST & COMPANY, APPELLANTS.

FILED NOVEMBER 20, 1894. No. 5523.

1. **Estoppel:** PLEADING. An estoppel, to be available as a cause of action or defense, must be specially pleaded.
2. **Lease:** CANCELLATION OF ASSIGNMENT: SUBROGATION: QUIETING TITLE. Evidence examined, and *held* to sustain the decree appealed from.

APPEAL from the district court of Douglas county. Heard below before DOANE, J.

A statement of the case appears in the opinion.

James B. Meikle and *Lyman O. Perley*, for appellants:

The assignment of the lease to Van Kloster was valid, and was recognized as such by the corporation and all other parties who had any connection with the transaction. (*Singer Mfg. Co. v. Doggett*, 16 Neb., 609; *Tootle v. Elgutter*, 14 Neb., 158; *Halliday v. Briggs*, 15 Neb., 223; *Roberts v. Beatty*, 2 Pen. & W. [Pa.], 63; *Dunbar v. Rawles*, 28 Ind., 225.) Van Kloster, by making payments on account of the company, became subrogated to its rights in the premises, at least to the extent of the amount paid. (*Aldrich v. Cooper*, 2 Lead. Cas. Eq. [Eng.], 230; Pomeroy, Equity Jurisprudence, sec. 1211.)

The appellee should not be allowed to deny that Van Kloster has a good and valid title to the leasehold, and that the assignment by him to George F. Blust transferred the title absolutely as security for the note given to the latter. (*Grant v. Cropsey*, 8 Neb., 205; *Knights v. Wiffen*, 5 L. R., Q. B. [Eng.], 660; *Henry v. Vliet*, 33 Neb., 130; *Markham v. O'Connor*, 52 Ga., 183.)

L. D. Holmes, contra:

Possession of property is notice to all the world not only of the possession itself, but of the right, title, and interest of the possessor. (*Shaw v. Spencer*, 100 Mass., 382; *Uhl v. May*, 5 Neb., 157; *McHugh v. Smiley*, 17 Neb., 630; *Parks v. Jackson*, 11 Wend. [N. Y.], 464.)

If the landlord accepts rent from the assignee, the latter becomes a tenant. (*Heeter v. Eckstein*, 50 How. Pr. [N. Y.], 445; *O'Keefe v. Kennedy*, 3 Cush. [Mass.], 325; *Shattuck v. Lovejoy*, 8 Gray [Mass.], 204; *Indianapolis Manufacturing & Carpenters Union v. Cleveland, C., C. & I. R. Co.*, 45 Ind., 281.)

Estoppel, to be available as a defense in an action, must be specially pleaded. (*McCormick v. Keith*, 8 Neb., 142; *Schribar v. Platt*, 19 Neb., 629; *Norwegian Plow Co. v. Hainer*, 21 Neb., 689.)

POST, J.

This is an appeal from a decree of the district court for Douglas county setting aside and canceling certain assignments of a leasehold interest in a lot or parcel of land in the city of Omaha, and quieting the title of the plaintiff thereto as against the defendants. The facts shown by the record are, in substance, as follows: On the 24th day of June, 1886, Elizabeth Kountz, the owner of said property, leased it to one Frederick Anderson, for the period of twenty years, and the latter thereafter erected the buildings in controversy upon the demised premises. On the 8th day of November, 1889, said Anderson, by a written assignment, transferred to the appellee, the Nebraska Mortgage Loan Company (hereafter called the "Loan Company"), all of his right, title, and interest under and by virtue of said lease for the expressed consideration of $2,500, and procured his brother, Nels Anderson, who appears to have had an interest therein, to execute to appellee

an instrument in the form of a bill of sale, whereby he released and transferred to the latter all of his interest under or by virtue of said lease. Afterward, on the 15th day of the same month, Frederick Anderson executed and delivered to the Loan Company a deed, whereby he conveyed to it all of his estate in the leased property. The conveyances aforesaid were all recorded and the Loan Company, by its agent, took possession on the day first named, and has remained in possession continuously since that date. On the 14th day of November, 1889, J. H. Van Kloster, who was then president of the Loan Company, procured Frederick Anderson to indorse on the lease first mentioned an assignment to himself. The title appears to have remained thereafter undisturbed until the 1st day of May, 1890, when Van Kloster executed an assignment of the lease to George F. Blust as collateral security for his individual pre-existing indebtedness, amounting in the aggregate to $1,840. On the 25th day of June following he executed a note for the amount of his indebtedness to Blust, and at the same time executed a further assignment of his rights under the lease, together with all buildings and improvements on the property in controversy. During all of the time, between November 8, 1889, and August 1, 1890, the stock of the Loan Company was owned by Van Kloster and one Johnson, the former, as we have seen, acting as president, while the latter was secretary and treasurer thereof. It is claimed by the plaintiff company that the assignment of November 14, 1889, was for its benefit, and that the subsequent assignment by Van Kloster to Blust, as security for the individual indebtedness of the former, was a fraud against it. The defendants George F. Blust & Co., who have succeeded to whatever interest was acquired by George F. Blust through the assignment to him, filed a cross-petition, in which they seek to have their rights determined, and for a decree of foreclosure, etc.

1. The first contention on this appeal is that the assign-

ment to Van Kloster was for his individual benefit, and was so recognized and treated by the Loan Company; but the finding of the district court was in favor of the Loan Company on that issue, and is, we think, fully warranted by the evidence, and will not now be disturbed.

2. It is next contended that Van Kloster advanced the consideration paid to Anderson, and that he became thereby subrogated to whatever rights the Loan Company might have acquired by an assignment of the lease. Upon that issue, also, the finding was in favor of the Loan Company, and with the finding we are entirely satisfied. It is clear from the testimony of Van Kloster that in the purchase of the lease he was acting for and in behalf of the Loan Company, and that the claim of personal ownership thereof is an afterthought; and if we assume that he did in fact advance the consideration, a proposition strongly controverted by the evidence, it does not follow that he could have asserted title to the lease as against the company, since by his own showing his relation to the latter was that of a trustee. (1 Beach, Private Corporations, 241.)

3. It is urged, finally, that the Loan Company is estopped to assert title as against Blust by reason of the statements of Van Kloster at the time of the assignment by him, to the effect that it, the company, had no interest in the lease; but the estoppel relied on, even if sufficient in law, is not available in this action, for the reason that it is not pleaded. (See *McCormick v. Keith*, 8 Neb., 142; *Schribar v. Platt*, 19 Neb., 629; *Norwegian Plow Co. v. Hainer*, 21 Neb., 689.) But the rule of estoppel can have no application to the facts of this case. Mr. Smith, the representative of Blust in the transaction which resulted in the assignment, testified as follows: "Well, during the course of the negotiation I remember asking him [Van Kloster] if Johnson had any interest in the lease. He said, 'No, sir; the lease is made out to me, isn't it?' I said, 'Yes, it is.' I just merely asked, that is all. I had

the utmost confidence in what Van Kloster told me. It was *prima facie* evidence to me that it belonged to him if made out in his name." Van Kloster, who was called by the defendants, testified positively that he was not asked if the Loan Company had an interest in the lease. The prior assignment to the Loan Company, it should be remembered, was then of record, and the company, by its tenants, in the undisputed possession of the property in controversy. The defendants were clearly chargeable with notice of the rights of the Loan Company at the time they took the assignment under which they claim. It follows that they cannot claim protection as *bona fide* purchasers. It follows, also, that the decree of the district court is right and must be

AFFIRMED.

EDWARD ZIELKE V. STATE OF NEBRASKA.

FILED NOVEMBER 20, 1894. No. 6814.

1. **Intoxicating Liquors: LICENSE: NOTICE OF APPLICATION.** Two weeks' notice of an application for liquor license is essential to confer jurisdiction upon the county, city, or village board to which it is addressed, and a license issued without the statutory notice will be *held* void even in a collateral proceeding.
2. **———: VALIDITY OF LICENSE ISSUED WITHOUT PAYMENT OF FEE.** The county, city, and village boards of this state have no authority to issue liquor license on credit, and a license issued without payment in full of the fee prescribed therefor is void.

ERROR to the district court for Wayne county. Tried below before JACKSON, J.

See opinion for statement of the case.

J. A. Berry and *Frank Fuller*, for plaintiff in error, cited: *State v. Bays*, 31 Neb., 514; 11 Am. & Eng. Ency.

Law, 638; *State v. Brandon*, 28 Ark., 410; Black, Intoxicating Liquors, pp. 158–221; *State v. Barton*, 27 Neb., 476.

George H. Hastings, Attorney General, A. A. Welch, and *W. L. Rose*, for the state:

The action taken by the village board before the expiration of the two weeks' notice of the application for license was void. The license was invalid and was no protection to plaintiff in error. (*Pelton v. Drummond*, 21 Neb., 492; *State v. Moore*, 1 Jones [N. Car.], 276; *Brown v. Lutz*, 36 Neb., 528; *Hollembaek v. Drake*, 37 Neb., 680.)

There is no authority to issue a license without appointing a time to hear the remonstrances on file. (*State v. Reynolds*, 18 Neb., 431; *Vanderlip v. Derby*, 19 Neb., 165; *State v. Hanlon*, 24 Neb., 608.)

If accused has not paid his fee, the license is void and he is liable to prosecution. (*Pleuler v. State*, 11 Neb., 576; *State v. Lydick*, 11 Neb., 366; *Houser v. State*, 18 Ind., 106; *Dudley v. State*, 91 Ind., 312; *Claus v. Hardy*, 31 Neb., 35; *State v. Fisher*, 33 Wis., 154.)

POST, J.

The plaintiff in error was by the district court for Wayne county convicted of selling and keeping for sale intoxicating liquors without license therefor, and brings the judgment into this court for review upon allegations of error. Inasmuch as the assignments all relate to the legality of the proceedings relied on by the plaintiff in error as a justification, it is deemed proper to set out in detail such parts of the record as bear upon that subject.

On the 18th day of May, 1893, the plaintiff in error filed with the clerk of the village of Carroll the following petition:

"CARROLL, NEB., May 18, 1893.

"*To the Board of Village Trustees:* I, the undersigned, apply for a license for the sale of malt, spirituous, and

vinous liquors to be carried on at Carroll, Wayne county, Nebraska, for a period of one year, beginning on the 30th day of June, 1893, and ending on the 1st day of May, 1894.

"EDWARD ZIELKE."

On the 30th day of the same month there was filed with the village clerk a remonstrance by twelve persons, described as "residents of the village of Carroll," against the allowance of a license to the petitioner, on the ground that the petition was defective in form and not signed by a majority of the resident freeholders of said village. It seems that no action was taken on the foregoing petition or remonstrance, but on the 13th day of June a second petition was filed, of which the following is a copy:

"*To the Board of Village Trustees of the Village of Carroll, Wayne County, State of Nebraska:* Your petitioners, whose names are hereto subscribed, respectfully represent that they all are resident freeholders of Carroll, Wayne county, Nebraska, in the county and state aforesaid; that Edward Zielke is desirous of obtaining a license for the sale of malt, spirituous and vinous liquors, to be carried on at Carroll, Wayne county, Nebraska, in said county and state; that the said Edward Zielke is a man of respectable character and standing, and is a resident of the state of Nebraska; wherefore your petitioners pray that a license to sell malt, spirituous, and vinous liquors, to be sold at the place above specified, be granted to said Edward Zielke for the period of one year, beginning on the 3d day of June, 1893, and ending on the 1st day of May, 1894, upon his compliance with the provisions of law requiring the payment of license money fees, and giving a bond in that behalf made; and your petitioners will ever pray.

"C. MAST.
"C. M. MATHEWS.
"R. BUCK.
"W. S. MYERS.
"MRS. MARGARET PETERS.

"Filed in my office January 13, 1892.

"C. M. ANDREWS,

"*Clerk.*"

There was filed a further remonstance in the following words:

"*To the Town Board of Trustees of the Town of Carroll, Wayne County, Nebraska:* We, the undersigned, residents and freeholders of the town of Carroll aforesaid, object, protest, and remonstrate against the issuing by your board of a license to Edward Zielke to sell malt, spirituous, and vinous liquors within said town, for the reasons stated in the remonstrance now on file with the town clerk. [Signed by Mrs. K. B. Northrop and nineteen others.]

"Filed in my office June 16th, 1893, at 5 o'clock.

"C. M. ANDREWS,

"*Clerk.*"

At a meeting of the village board held on the day last named the following proceedings were had, quoting from the record:

"Motion by J. P. Brenner and seconded by C. H. Wolf, that remonstrance filed July 16, 1893, shall not be considered. Carried. Ayes—C. H. Wolf, J. P. Brenner, T. W. Shirts. Nays—John Beach. To which action the remonstrators object.

"Motion made by J. P. Brenner and seconded by C. H. Wolf, that petition of Edward Zielke be considered. Carried. Ayes—Wolf, Brenner, and Shirts. Beach not voting.

"Motion made by J. P. Brenner and seconded by C. H. Wolf, that the second clause in remonstrance be not considered. Carried. Ayes—J. P. Brenner, C. H. Wolf, T. W. Shirts. Nays—John Beach.

"Remonstrators object to the board proceeding further in the matter, for the reason that the petition was not filed at the time the notice was published and not on file as stated in the notices published, and was not filed until the 13th day of June.

"The applicant now moves the board of trustees for a consideration of his application for final determination. To which the remonstrators object, and ask leave to introduce evidence in support of the remonstrators.

"Motion was made by C. H. Wolf and seconded by J. P. Brenner, that license be granted Edward Zielke. Carried. Ayes—C. H. Wolf, J. P. Brenner, T. W. Shirts. Nays—John Beach.

"Remonstrators appeal from the decision of the trustees and ask the clerk to immediately furnish a transcript of the records in this matter, and tender him the fees.

"It is therefore considered: First, That the applicant has complied with the law, and is entitled to a license for the sale of malt, spirituous, and vinous liquors during the present fiscal year, upon his filing a bond as required by law and complying with the ordinances of the village of Carroll in such cases made and provided. From which finding remonstrators appeal.

"Adjourned. C. M. ANDREWS.
"F. A. BERRY,
"*Chairman.*"

On the 19th day of the same month the remonstrators perfected their appeal by filing in the office of the clerk of the district court of Wayne county a transcript of the proceedings of the village board; and two days later the bond of the plaintiff in error was approved by three members of the board. On the 22d day of July the plaintiff in error paid to the village clerk $125 in cash and executed three notes in favor of the village trustee for $125 each, and the clerk thereupon issued to him a license for the remainder of the municipal year.

1. It was disclosed on the trial in the district court on the 5th day of October, 1893, that the notes above mentioned were still unpaid. We find in the record no reference to a notice of any kind except the mention thereof in the objection of the remonstrators, and it is apparent that the

notice essential to confer jurisdiction upon the board to act in the premises was not and could not have been given. The first petition was not even a decent pretense of compliance with the statutory condition, and it would be discrediting both the intelligence and honesty of the trustees of the village to presume that it had been seriously entertained by them. Jurisdiction is, by chapter 50, Compiled Statutes, conferred upon the various municipal bodies of the state to license the sale of intoxicating liquors upon the petition of the requisite number of resident freeholders thereof, and not otherwise; and while the petition of June 13 was probably insufficient because not signed by a majority of the resident freeholders, that fact was not disclosed by the paper itself, hence it was, we will assume, sufficient to confer upon the board authority to act; but the order allowing the license was made on June 16, or three days subsequent to the filing of that petition. It is obvious, therefore, as we have seen, that no attempt was made to comply with the requirement of section 2 of the liquor law for two weeks' notice of the application. The provision in question is neither doubtful nor ambiguous. "No action shall be taken upon said application until at least two weeks' notice of the filing of the same has been given by publication," etc. More imperative language could not have been used; nor is the question of the construction thereof a new one in this court. It was said in *Pelton v. Drummond*, 21 Neb., 492, that "the county (city or village) board has no authority to take any action thereon until the expiration of the time during which notice must be given. Any action taken by them before the expiration of the two weeks will be void;" and the same principle is distinctly recognized in *State v. Reynolds*, 18 Neb., 431; *Vanderly v. Derby*, 19 Neb., 165; *State v. Weber*, 20 Neb., 467; *State v. Hanlon*, 24 Neb., 608; *Brown v. Lutz*, 36 Neb., 528, and *Hollembaek v. Drake*, 37 Neb., 680. The subject here involved is not that of a mere

irregularity or informality in the proceedings before the board. The rules applicable to that class of cases are, therefore, foreign to the present inquiry. The notice, which is the jurisdictional process and which is essential to confer upon the village board authority to act in all such cases, was entirely wanting. It follows that the license was issued without authority, and the trial court rightly held that it was no protection to the accused in this prosecution.

2. The judgment is right for another reason. Assuming the proceedings of the board to have been in all respects regular, there was still no authority for the issuing of the license without payment in full of the license fee. The payment into the village treasury of the sum of $500 was just as essential to a valid license as the petition or notice. The proposition that the several municipal bodies can, under the provisions of our statute, license the sale of liquors on the credit of the license is not entitled to serious consideration, and a license so issued is not voidable merely, but void in a sense that it may be assailed even in a collateral proceeding.

3. It is observable from the record that the appeal was perfected within three days after the final order of the board, and that the license was not issued until more than a month thereafter. It does not appear that the appeal has been determined by the district court, and we assume that it is still undisposed of therein. We are asked on that record to declare the license, although prematurely issued, to be a sufficient protection pending the appeal, unless revoked by the village board voluntarily or in obedience to a writ of *mandamus*. The question of the effect to be given a license pending appeal where the action complained of is a mere irregularity or error of judgment by the board granting it is not presented; but it is clearly no protection to the license in a case like that before us. To hold otherwise would be to permit the board to accomplish by indirection

that which it is powerless to do directly. There is no error in the record and the judgment is

AFFIRMED.

JOHN LANHAM V. FIRST NATIONAL BANK OF CRETE.

FILED NOVEMBER 20, 1894. No. 5722.

Action to Recover Penalty for Taking Usurious Interest: LIMITATION. The limitation of two years within which an action under the provisions of section 5198, Revised Statutes, United States, may be commenced for the recovery from a national bank of twice the amount of usury paid to it dates from the actual payment of such interest, and not from the bank's reservation of it from the original loan by way of discount. Following *First Nat. Bank of Dorchester v. Smith*, 36 Neb., 199, and *Smith v. First Nat. Bank of Crete*, 42 Neb., 687.

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

Abbott & Abbott, for plaintiff in error.

F. I. Foss, contra.

HARRISON, J.

This action was instituted by plaintiff in error to recover of the First National Bank of Crete double the amount of interest which he alleged was paid to it by him pursuant to the terms of a "usurious transaction." The original petition contained three distinct counts or causes of action. The bank demurred to the first and second causes of action, and the court sustained the demurrer. The plaintiff then applied for leave to amend the third count, which was granted and the amendment made. The third count as amended was then demurred to by the bank, the

demurrer sustained, and the action dismissed at plaintiff's costs and brought to this court by plaintiff by petition in error. Since the hearing of the case in the district court the case of *First Nat. Bank of Dorchester v. Smith* has been decided by this court (36 Neb., 199), and the doctrine therein announced, it is conceded by plaintiff, sustains the ruling of the district court upon the demurrer to the first and second counts of the petition, and three-fourths of the amount which is declared upon as a cause of action in the third count thereof, and the only contention which he now makes is that as to the sum of $75 of the amount included in the third count of the petition the demurrer should not have been sustained. The demurrer was sustained, as we gather from an examination of the record, on the ground that the action was not commenced within two years after the occurrence of the alleged usurious transaction, and hence was barred by limitation. The third count of the petition as amended was as follows: "The plaintiff alleges that he paid the defendant the further sum of $300 as usurious interest, as follows: That on or about the 24th day of July, 1888, he borrowed from the defendant the sum of $2,500, and that it was then agreed between the parties that the said plaintiff should pay to the defendant interest on said sum at the rate of twelve per cent per annum, and that in pursuance of such agreement the defendant did, on the 24th day of July, 1888, deduct and retain from said sum of $2,500 the sum of $75, as and for interest thereon at the agreed rate for three months, and that at the date of the maturity of said note the same was renewed from time to time, once every three months, for a longer period of nine months, the last interest payment being April 24, 1889, and that at each and every renewal thereof interest at the agreed rate was paid to and received and retained by the said defendant, and that during said year this plaintiff paid to said defendant the said sum of $300, which usurious interest was by the defendant knowingly, willfully, and cor-

ruptly charged, reserved, and taken from the plaintiff in pursuance of said usurious agreement, and the plaintiff alleged that on the 24th day of July, 1889, he paid to the defendant the sum of $2,500, so as above borrowed in 1888, the same being in full of the amount due on said loan." Counsel for the defendant in error insists that where it is stated "the last interest payment being made April 24, 1889," should be construed to mean that this was the last payment of interest made on the loan, and it being more than two years from April 24, 1889, to July 22, 1891, the date the petition was filed, the cause of action was barred. With this we cannot agree. We think this count of the petition may be fairly said to set out that at the time the loan was effected $75 was deducted from the amount of it, $2,500, as the agreed amount of the interest for three months, and that this was paid when the whole $2,500 was paid, July 24, 1889, and that the statement above quoted referred to the interest payments at dates of renewals. If we are right, this brings the case as to the $75 within the rule that this being a retaining or reservation of this amount as a discount, the date from which the limitation of two years, within which the statutes of the United States governing such matters prescribes the action must be brought commenced to run, was not the date of so reserving the interest by way of discount, but the time of the actual payment of the interest, July 24, 1889. (See *First Nat. Bank of Dorchester v. Smith*, 36 Neb., 199; *Smith v. First Nat. Bank of Crete*, 42 Neb., 687.) It follows that the judgment of the district court must be reversed and the case remanded for further proceedings.

REVERSED AND REMANDED.

HOSMER H. HENDEE v. NAPOLEON B. HAYDEN.

FILED NOVEMBER 20, 1894. No. 6998.

Elections: CONTESTS: BALLOTS: EVIDENCE. The ballots cast at an election are the primary or controlling evidence of the result of the election, but the returns made by the canvassing board of any voting precinct or district to the county clerk are *prima facie* evidence of such result; and where in the trial of a contest the votes cast in a voting precinct were brought into the trial court, and there the package in which they were inclosed and sealed was opened and the ballots recounted, and during such recount a number of "spoiled" ballots, which had been irregularly, and contrary to the law governing elections and in reference to the disposition to be made of such ballots, but without any fraudulent intent, strung upon the same string as the cast ballots, but at an end thereof and in a separate bundle, with the string looped and tied around it, making a knot which divided the spoiled from the other ballots, were counted with the ones cast at the election and so mixed with them as to be indistinguishable, *held*, that such recount did not establish the result of the election as between the contestant and contestee, and that by the intermingling of the "spoiled" and other ballots they were rendered incompetent as evidence of the result of the election, but that as the will and choice of the voters expressed at such election, in the absence of fraud or illegality, should be ascertained if any authentic or satisfactory testimony existed by which the result might be proved, and the returns made to the county clerk, being *prima facie* evidence of such facts, were competent and should have been considered by the court; *and held further*, that it was not competent, under the circumstances above detailed, to apportion the "spoiled" ballots between the contestant and contestee and deduct from the vote of each one a share of such ballots, proportioned according to the whole number of votes cast for him.

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

Abbott & Abbott and *J. D. Pope*, for plaintiff in error, cited: *Albert v. Twohig*, 35 Neb., 563; *Martin v. Miles*, 40

Neb., 135; *People v. Cicott*, 16 Mich., 283; *Powers v. Reed*, 19 O. St., 189; McCrary, Elections, sec. 463; *State v. Marston*, 6 Kan., 524: *Russell v. State*, 11 Kan., 308; *Morris v. Valaningham*, 11 Kan., 269; *People v. Thacher*, 14 Am. Rep. [N. Y.], 312.

Hastings & McGintie and *A. S. Sands, contra*, cited: *Enewold v. Olsen*, 39 Neb., 59; *First Nat. Bank of Madison v. Carson*, 30 Neb., 104; *Bell v. Byerson*, 77 Am. Dec. [Ia.], 145; *Dunn v. State*, 35 Am. Dec. [Ark.], 61; *Convery v. Conger*, 22 Atl. Rep. [N. J.], 549.

HARRISON, J.

It appears from the record in this case that at the regular election held in this state November 7, 1893, there were in the county of Saline four candidates for the office of county judge, of whom Napoleon B. Hayden and Hosmer H. Hendee, two of the candidates, according to the canvass and returns made by the clerks and judges of the several election districts of the county and the further canvass of such returns by the county clerk and the duly authorized board of canvassers, received each the following number of votes: N. B. Hayden, 1,331 votes, and H. H. Hendee, 1,329 votes; the other two candidates, it further appears, receiving less than 600 votes each. In accordance with the result of the canvass, N. B. Hayden was declared duly elected to the office of county judge, and qualified and took possession of said office and assumed the performance of the duties thereof. On November 25, 1893, Hendee commenced proceedings to contest the election by filing a complaint in the district court of Saline county, in which was pleaded why there should be a recount of the ballots in the several precincts or voting districts of the county, or a change in the returns, etc. To this the respondent filed a motion to dismiss the petition. This being overruled, he filed an answer, in which the allegations of the complaint

in regard to irregularities and mistakes or frauds occurring during the election, and all facts pleaded in the complaint to show the necessity for a recount, are denied and affirmative statements made in regard to illegal votes cast for contestant during the election. The contestant filed a reply, in which the affirmative allegations of the answer are denied. There was a trial of the issues to the court, and the court, at the instance of contestant, made the following special findings:

"And the court proceeded at once to a recount of the ballots of the several voting districts of said county, without the introduction of preliminary proof. Contestee excepts. And the court finds from such recount of the ballots that the ballots cast at the election held in said county on November 7, 1893, for the respective parties hereto, for the office of county judge, to be as follows:

Crete, first precinct—
For contestant, 86; for respondent, 67
Crete, second district—
For contestant, 45; for respondent, 90
Crete, third district—
For contestant, 56; for respondent, 76
Dorchester, first district—
For contestant, 44; for respondent, 42
Dorchester, second district—
For contestant, 62; for respondent, 28
Lincoln precinct—
For contestant, 63; for respondent, 13
Friend, second district—
For contestant, 138; for respondent, 28
Friend, first district—
For contestant, 131; for respondent, 25
Turkey Creek precinct—
For contestant, 44; for respondent, 32
Monroe precinct—
For contestant, 45; for respondent, 34

Pleasant Hill precinct—
For contestant, 48; for respondent, 71
Big Blue precinct—
For contestant, 32; for respondent, 83

794 589

Wilber, first district—
For contestant, 55; for respondent, 151
Wilber, second district—
For contestant, 37; for respondent, 138
Brush Creek precinct—
For contestant, 19; for respondent, 77
North Fork precinct—
For contestant, 27; for respondent, 54
Atlanta precinct—
For contestant, 65; for respondent, 32
Olive precinct—
For contestant, 96; for respondent, 87
South Fork precinct—
For contestant, 86; for respondent, 70
Swan Creek precinct—
For contestant, 61; for respondent, 52
De Witt, first district—
For contestant, 73; for respondent, 68
De Witt, second district—
For contestant, 45; for respondent, 27

1,358 1,345

"Contestee excepts.

"That being a total of all the voting districts and precincts of the county; making of the ballots so recounted:

For contestant..... 1,358
For the respondent..... 1,345

Excess for the contestant over the respondent of.... 13

"The court further finds that upon the recount of the ballots of the first district of Friend precinct there were

found and recounted fourteen more ballots than there are names of voters in the poll books of that district, and that many more ballots than were canvassed by the election board of the district at that election; and the court further finds from the testimony of the election officers of said district of Friend, at that election, that there were fourteen ballots spoiled at that election, and returned to said officers as spoiled and were kept separate during the day; that none of them found their way into the ballot-box, or were canvassed by the board, but that said fourteen ballots were not put with the unused ballots and so returned to the county clerk, but were, at the close of the canvass, folded and strung on a string and the string looped around them and then the ballots that were cast and canvassed strung on the same string and were then sealed up and so returned to the county clerk. Contestee excepts. And the court further finds that upon opening and recounting said ballots all became so intermixed that it was impossible to separate the fourteen ballots from the others, and that the recount of the ballots of that district shows a gain of five votes for the contestant and one for the respondent, over the poll books and tally sheets of the district. The contestant then put in evidence all the poll books and tally sheets of all the respective voting districts of the county and all the ballots, except the ballots of the first district of Friend. The court further finds upon the evidence offered to show illegal voting, under the allegations of the respondents' answer, that two illegal votes were cast and counted at said election by John Hopkins and H. D. Eldred, and that they were for the contestant. Contestee excepts. The court further finds that inasmuch as the ballots of the first district of Friend precinct are not in evidence, and are the primary evidence, the court cannot consider the poll books and tally sheets of that district as evidence, and they are therefore excluded from consideration. The court therefore finds that of all the

ballots legally cast at said election for the office of county judge of said county, and so before the court as to be considered in this case, 1,319 were cast for the respondent Napoleon B. Hayden, and 1,225 were cast for the contestant Hosmer H. Hendee, and that the said respondent was duly and lawfully elected to said office and is entitled to the same. It is therefore considered and adjudged by me that the petition of the said Hosmer H. Hendee, contestant, be and the same is hereby dismissed; and that the respondent Napoleon B. Hayden recover of and from the said contestant his costs by him herein expended, and taxed to the sum of $——. To all of which the contestant excepts."

And these further findings and judgment:

"After examining the ballots voted at the general election held in each and all of the voting precincts in Saline county, Nebraska, on the 7th day of November, 1893, which said ballots were returned to the county clerk of said county, the court finds that said ballots from each and all of the precincts, together with the poll book, were properly sealed up and returned to the county clerk of said county in compliance with the requirements of the statutes, and that said ballots had in all respects been properly preserved by the said county clerk according to the statutory requirements.

"2. After counting all of said ballots so returned to the said county clerk from each and all the voting precincts in said county, the court finds that the contestant Hosmer H. Hendee received one thousand three hundred and fifty-eight (1,358) votes for the office of county judge, and that the incumbent Napoleon B. Hayden received one thousand three hundred and forty-five (1,345) votes for the office of county judge.

"3. In the counting of said ballots there was counted from the first district of Friend precinct in said county one hundred and ninety-eight (198) ballots, of which ballots

there were cast and counted for the contestant one hundred and thirty-one (131) votes, and for the incumbent twenty-six (26) votes and forty-one (41) miscellaneous. All of the ballots so counted by the court which were cast at said general election, excepting the one hundred and ninety-eight (198) ballots returned from the said first district of Friend, were introduced in evidence by the contestant. The said one hundred and ninety-eight (198) returned from said first district of Friend precinct not being introduced in evidence by either the contestant or the incumbent, the court finds from the ballot introduced in evidence that the contestant Hosmer H. Hendee received one thousand two hundred and twenty-seven (1,227) votes for the office of county judge, and that the incumbent Napoleon B. Hayden received one thousand three hundred and nineteen (1,319) votes for the office of county judge. Contestant excepts.

"4. The court finds that two of said votes which were cast and counted for contestant were cast by non-residents and illegal voters. Contestant excepts.

"5. It is therefore considered by the court that said Napoleon B. Hayden, the incumbent, was lawfully elected to the office of county judge. It is therefore considered by the court that said election be in all things confirmed, and that the complaint be dismissed at contestant's cost. Contestant excepts."

During the progress of the case the poll books and ballots were ordered brought into court for inspection and were accordingly produced, and the envelopes or packages in which were contained the ballots opened and the votes for the contestant and contestee recounted. When the first district of Friend precinct was reached in the recount it was developed that there were some fourteen more ballots on the string (the ballots had been run upon a string before they were placed in the envelope) than, as shown by the returns, there had been votes cast in the district. The testimony of some of the judges and clerks for this district,

of this election, who were called as witnesses and testified, shows that the fourteen apparently excessive ballots were some which had been spoiled and not used by the voters, that they were kept separate from the others, and when the canvass of the votes was completed the string was drawn through them and around them and a hitch or knot made in the string to divide and keep them separated from the ballots deposited by the voters, which were then run upon the same string, and they were then all inclosed in the package in which they were taken to the county clerk with nothing to designate or call attention to the fact that some were ballots which had been used and some unused ballots, except that the few at the lower end of the string were parted from the others by having the string tied around them. The parties who made the recount not having any knowledge that the fourteen ballots had not been cast, took them from the string and counted them with the others and, as stated by the judge in his findings, "that upon opening and recounting said ballots all became so intermixed that it was impossible to separate the fourteen ballots from the others." The second assignment of error is as follows: "The court erred in excluding from his consideration (as is shown by his special findings) the poll book of the first district of Friend, whereby that district was wholly disfranchised at that election and its entire vote excluded therefrom and the result of the election of county judge thereby changed;" and the third states: "The court erred in refusing to consider the poll book of the first district of Friend as the best evidence in the case, after it became apparent to him by the testimony of witnesses and his own knowledge obtained by the recount, that the ballots of said district had become worthless as evidence in the case, by reason of the intermixture of the spoiled ballots with those voted and canvassed, whereby the voters of said district were disfranchised and the result of the election changed." These two assignments may, we think, be said to raise the

same question, viz., whether the court erred in holding that the poll books and tally sheets of the first district of Friend could not be considered as evidence, and in excluding them from consideration on the ground that the ballots were the primary evidence. The record shows that at or near the close of the taking of testimony an action was taken on behalf of contestant, with reference to offering the ballots from the first district of Friend, which we find stated as follows: "The contestant now refuses to introduce or offer in evidence any of the ballots cast in and for the first precinct and voting district of Friend, in said Saline county, and states that such refusal to offer said ballots is made by said contestant, after mature deliberation and consultation of said contestant and his attorneys, and that the said ballots of the first district of Friend are not offered in evidence, and will not be offered, by the contestant in this case." This was after all the poll books and tally sheets for all precincts and voting districts had been introduced.

The counsel for contestee contends that the ballots are primary and controlling evidence, and they being in court and within the control of the contestant for the purpose of use as testimony, if he desired so to use them, his failure or refusal to offer or use them precluded the admission or consideration of what he terms secondary evidence, the poll books and tally sheets. That the ballots are the primary and controlling evidence of the expression by the voters of their selection of candidates for the various offices to be filled at an election we think is well settled by authority. The ballot, as deposited, bears upon its face the handiwork of the voter, is a record of his choice made by himself, and when received and preserved in the manner provided by law is certainly entitled to greater weight and to be preferred as evidence of what it contains than any record made from it by others, however skillfully they may be made or accurate they may be; but with this established as the rule, does it sustain the action of the court of which

complaint is made? Our law provides fully for the counting of the votes by the election boards of the voting precincts or districts, the making of tally lists, and the transmission to the county clerk of all ballots, poll books, and tally sheets after being sealed up carefully, and that such ballots as are the fourteen in this case "be made up in a sealed packet" and indorsed with the words, "unused and spoiled ballots," etc., and sent to the county clerk. After the lists, etc., reach the county clerk, he, with two disinterested electors, open the poll books and make abstracts of the votes cast as shown by such poll books, or, in other words, canvass the votes from the returns made to the county clerk from the various election boards, and any person who is shown by these returns to have received the highest number of the votes cast for any office to be filled at such election is declared elected and receives, as the law directs, a certificate that he has been so chosen, from the county clerk, if it is a county office, as in the case at bar. This canvassing board, the county clerk and two electors, cannot go behind the returns and examine the ballots. This has frequently been decided by this court. The ballots are to be disposed of as provided in section 47, chapter 26, page 459, Compiled Statutes, 1893: "Upon the completion of the canvass the poll books shall be again sealed up and, together with the sealed packages of ballots still unopened, securely bound in one package, shall be deposited in the office of the county clerk, where they shall be safely kept for twelve months, and the county clerk shall not allow the same to be inspected, unless in cases of contested elections, or the same become necessary to be used in evidence in the courts, and then only by the person and in the manner provided by law."

It will be gathered from the above statement in regard to the canvassing of the votes first by the election boards and their lists by the county clerk and his associates on the canvassing board that the ballots, after the election

boards have compiled the returns therefrom, are retired from the scene not to appear again unless there shall be a contest of the election instituted. The returns made to the county clerk are the evidence acted upon by the canvassing board which determines and declares who is elected, and in accordance with its conclusion the certificate of election issues. We think this constitutes the returns evidence of quite a strong character, testimony which, undoubtedly, is entitled to consideration if, for any reason, the primary evidence cannot be used. The authorities are quite uniform in holding that the returns are at least *prima facie* evidence of the results of the election. (*Albert v. Twohig*, 35 Neb., 569; *State v. Marston*, 6 Kan., 524; *Russell v. State*, 11 Kan., 308; *Hudson v. Solomon*, 19 Kan., 180; *Howard v. Shields*, 16 O. St., 184; *People v. Vail*, 20 Wend. [N. Y.], 12; *People v. Cicott*, 16 Mich., 283; *Keeler v. Robertson*, 27 Mich., 116.) The evidence in this case discloses nothing wrong with the election proceedings or canvass of the votes in the first district of Friend. The tally sheets and poll books are in no manner or degree discredited or shown to be incorrect. The voters cast their ballots as provided by law. They were duly canvassed and the result returned in proper manner and form to the officer entitled by law to receive them. That the fourteen "spoiled" ballots were strung upon the same string as the ballots cast, tied as they were, in a bundle to themselves, was at most an irregularity which could not and did not in any manner vitiate the votes cast or invalidate or in the least affect the returns, or the election in the district, but when the sealed envelopes or packages in which the ballots were contained were conveyed into court and there opened, the ballots taken therefrom and counted, and with them the fourteen ballots which had not been used, not cast by the voters, the result of such count was worthless, and of no avail, as it was in part composed of apparent votes which were never cast in the ballot-box by the voters, and there is no way by which

they can be eliminated and a true result obtained, nor can the ballots again be counted, for it is conceded that the fourteen ballots which were not voted have become so intermingled with the others that it is an impossibility to distinguish and separate them, and we do not think it is competent to count them as they now exist, nor do we think that there should be an apportionment of these votes and a deduction, applying the rule announced in *People v. Cicott*, 16 Mich., 283, cited by counsel for contestee. In that case the excessive ballots were in the box at the closing of the polls and the election officers had failed to perform their duty and draw them out as provided by law, and the court said that, so far as it could be accomplished, the provisions of the law should be fulfilled by a trial court during the trial of the case. We have not the same nor similar facts to deal with in the case at bar. Here there was no excess of ballots voted. The fourteen ballots were placed with the others after the canvass was completed and mixed with the true ballots after they were produced in court, and without the fault or wrong intent of any person, and we do not think it would be right or just to apportion them and deduct from the vote for each of these two candidates a share of them proportioned according to the whole number of votes cast in his favor. We believe it to be the rule that any person who receives the highest number of votes cast at an election for an office has a constitutional and legal right to be declared elected to and to hold such office, and if there is any satisfactory and authentic evidence from which the will and choice of the people as expressed in their ballots as deposited in the ballot-box can be shown, that it shall be ascertained and declared and not defeated, although for any reason the best evidence of the facts necessary may not be attainable. (*People v. Kilduff*, 15 Ill, 492; *Piatt v. People*, 29 Ill., 54; *Morris v. Valaningham*, 11 Kan., 270; *Jones v. Caldwell*, 21 Kan., 186; *Powers v. Reed*, 19 O. St., 189; *People v. Cicott, supra.*) We are

satisfied that the ballots from the first district of Friend were not competent and could not be used as evidence after the fourteen "spoiled" ballots had been mixed with the others, and were no longer the controlling evidence, and that the returns as embodied in the poll books and tally sheets or lists, being *prima facie* evidence of the result of the elections in the district, should have been considered, and that the court erred in excluding them from its consideration. It follows that the judgment must be reversed and the case remanded for a new trial.

REVERSED AND REMANDED.

IN RE THOMAS W. VAN SCIEVER.

FILED NOVEMBER 20, 1894. No. 7311.

1. **Extradition**: HABEAS CORPUS: REVIEW: EVIDENCE. Where a requisition is made upon the governor of one state by the governor of another state for the return of an alleged fugitive from justice, and the requisition is accompanied by a copy of the complaint filed in the court to which the party whose return is demanded was held to appear by the examining magistrate, and also a copy of the evidence adduced at the preliminary hearing before the magistrate, and on being arrested under a warrant issued by the governor in compliance with the request of such requisition the party sues out a writ of *habeas corpus* in the district court, or before a judge thereof, and to reverse the order of the district court or judge denying the relief prayed for brings the case to this court by petition in error, the evidence taken at the preliminary hearing will not be examined for the purpose of ascertaining whether it sustains a charge of the crime alleged in the information, nor to determine whether it supports the finding of the examining court that there was probable cause to believe the party had committed the crime with which he was charged.
2. ———: REQUISITION: COPY OF INDICTMENT: EVIDENCE OF CRIME: FOREIGN LAW. Where a requisition is accompanied

by a copy of an indictment found by a grand jury, the fact that an indictment has been found is at least *prima facie* evidence that the act charged is a crime and is so regarded in the state where the act was done; and where the policy of prosecution by information has been established by law, and it appears from the record accompanying the requisition that the party whose rendition is asked has been accorded a preliminary examination, as a result of which he was held to appear and answer to the charge in a higher court and has been duly charged with the crime in the higher court in an information filed therein, a copy of which is attached to the papers presented with the requisition to the governor, such information is of as high a grade as a criminal pleading as an indictment, and entitled to the same weight as evidence and will be so considered.

3. **Habeas Corpus**: REVIEW. The proceedings in a hearing on *habeas corpus* may be reviewed on error; but being in its nature a civil proceeding, such review must be by petition in error.

4. ———: ———. Section 902 of the Code, wherein it states: "Until the legislature shall otherwise provide, this Code shall not affect proceedings on *habeas corpus*," etc., *held*, to apply to the proceedings relating to the application for the writ of *habeas corpus* and its hearing, and not to the manner of their review or the removal of the case for such purpose.

5. ———: MOTION FOR NEW TRIAL: REVIEW. Where there is a trial in a *habeas corpus* case and it is sought to review alleged errors occurring during the trial, a motion for a new trial must be made embodying the errors of which complaint is made, and presented to the trial court or judge and a ruling obtained thereon, to entitle the complaining party to such review.

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

The opinion contains a statement of the case.

Pound & Burr, for plaintiff in error:

The testimony taken before the magistrate in California, upon which the information is based, certified to by the governor of California as authentic, and by him made a part of his requisition, shows upon its face that the plaintiff in error has committed no crime, and that the complaint

made can, at best, only be the subject of a civil suit. (*Van Etten v. State*, 24 Neb., 734; *Miller v. State*, 16 Neb., 180.)

The information upon which the requisition is founded, and which is certified to by the governor of California and made a part of his requisition, fails to charge the plaintiff in error with any crime.

Embezzlement is an offense not known to the common law, and is a purely statutory offense. (1 Wharton, Criminal Law [8th ed.], sec. 1009; 2 Bishop, Criminal Law [6th ed.], secs. 324–327; *Ex parte Hedley*, 31 Cal., 108.)

The courts of this state cannot take judicial notice of the statutes of California relating to criminal offenses. In the absence of proof, the presumption, if any, is that the statutes of that state relating to crimes are the same as those of this state. (*Lord v. State*, 17 Neb., 530; *Ruth v. Lowrey*, 10 Neb., 260; *People v. Brady*, 56 N. Y., 183.)

The information fails to allege to whom the check therein mentioned belonged, or that it was appropriated and converted without the assent of the employer or owner. These are fatal defects, and the information therefore charges no crime known to our laws or to the laws of California. (*Ex parte Eads*, 17 Neb., 145; *Smith v. State*, 21 Neb., 552.)

Whether or not the information charges a crime is a question of law open to judicial inquiry on an application for a discharge under a writ of *habeas corpus*. (*Ex parte Spears*, 88 Cal., 640; *Roberts v. Reilly*, 116 U. S., 95; *People v. Brady*, 56 N. Y., 182.)

Where the information charges no crime, the court will discharge the accused on writ of *habeas corpus*. (*Ex parte Eads*, 17 Neb., 145; *Smith v. State*, 21 Neb., 552, and cases cited; *Ex parte Pfitzer*, 28 Ind., 450; *People v. Brady*, 56 N. Y., 182; *Ex parte Spears*, 88 Cal., 640; *Ex parte Smith*, 3 McLean [U. S.], 121; *Roberts v. Reilly*, 116 U. S., 95.)

It will be found that the statutes of California, should they be consulted, require, to constitute embezzlement, that

the property appropriated be the property of another. They also require that indictments should state facts which, if true, will necessarily import that the crime imputed has been committed. (*People v. Williams*, 35 Cal., 671; *People v. Lewis*, 64 Cal., 402.)

Stearns & Strode, contra:

Before having the judgment of the district court reviewed the record must show that plaintiff in error filed a motion for a new trial and obtained a ruling thereon. (Code, secs. 316, 317; *Hull v. Miller*, 6 Neb., 128; *Gaughran v. Crosby*, 33 Neb., 33; *Carlow v. Aultman*, 28 Neb., 672; *Crosby v. Wiggenhorn*, 3 Neb., 108; Elliott, Appellate Procedure, sec. 290.)

The warrant issued in this case by the governor of Nebraska is conclusive, both as to the regularity of the requisition papers and the sufficiency of the information. (2 Spelling, Extraordinary Relief, sec. 1308; *State v. Buzine*, 4 Har. [Del.], 572; *In re Leary*, 10 Ben. [U. S.], 197; 3 Rice, Evidence, 920; *In re Romaine*, 23 Cal., 585; *Farmer v. Lewis*, 47 Am. Rep. [Ind.], 153; *Ex parte Reggel*, 114 U. S., 642; Church, Habeas Corpus [2d ed.], 472*b*; *Commonwealth of Kentucky v. Dennison*, 65 U. S., 66.)

The court should not consider on *habeas corpus* the question whether the original information filed in this case is sufficient to sustain a conviction. (*Pearce v. State*, 23 S. W. Rep. [Tex.], 15; *Ex parte Kitchen*, 18 Pac. Rep. [Nev.], 886; *State v. O'Connor*, 36 N. W. Rep. [Minn.], 462; *In re Davis*, 122 Mass., 324; *In re Brown*, 112 Mass., 409; *Ex parte Sheldon*, 34 O. St., 319; *In re Manchester*, 5 Cal., 237; *State v. O'Connor*, 38 Minn., 243; *In re Keller*, 36 Fed. Rep., 681; *In re Greenough*, 31 Vt., 279; *In re Voorhees*, 32 N. J. Law, 141; Church, Habeas Corpus [2d ed.], sec. 477; 7 Am. & Eng. Ency. Law, 613; *Ex parte Davis*, 17 Neb., 436.)

The information charges the crime of embezzlement

under the rules established by the supreme court of California. (*People v. Murray*, 10 Cal., 309; *People v. Martin*, 32 Cal., 91; *People v. White*, 34 Cal., 183; *People v. Potter*, 35 Cal., 110.)

HARRISON, J.

On October 20, 1894, H. H. Markham, governor of the state of California, issued a requisition, directed to the governor of this state, in which it was stated, in substance, that the plaintiff in error stands charged with the crime of embezzlement committed in the county of Los Angeles, state of California, and has fled from justice and taken refuge in the state of Nebraska, and requested and demanded that he be apprehended and delivered to a party named, to be conveyed to the state of California to be dealt with according to law. With the requisition were an affidavit, a copy of a complaint, or information, filed in the superior court of the county of Los Angeles, purporting to charge plaintiff in error with the crime of embezzlement, and copies of other papers, from which it appears that he had been arrested in the state of California and taken before a magistrate and given a preliminary examination, and in due course of the proceedings the information filed in the superior court, to which, upon arraignment, he had entered a plea of not guilty and pending trial been admitted to bail. His excellency, Governor Crounse, issued his warrant for the apprehension of plaintiff in error, who was arrested, after which he filed a petition in the district court of Lancaster county and sued out a writ of *habeas corpus*, under which he was produced before the court, or one of the judges thereof, and a hearing had, which resulted in a finding that he was not unlawfully detained or restrained of his liberty, and after an application to be admitted to bail, which was refused, error has been prosecuted in his behalf to this court.

The first point argued by counsel for plaintiff in error

in his behalf is that the testimony introduced in the preliminary examination in the magistrate's court in California is attached to the papers accompanying the requisition of the governor of that state, and that a consideration of the testimony will convince that the plaintiff in error has not committed the crime with which it is claimed he is charged in the information. We think it is without our province in this, a proceeding in error to review the action of the district court in the *habeas corpus* case, to enter into an examination of this evidence with a view to determining the question of whether the plaintiff in error should have been charged with a crime, the answer to such question to depend upon a decision of the sufficiency or insufficiency of the testimony to sustain the charge, and we cannot agree with counsel that inasmuch as this evidence is sent with and attached to the governor's requisition, it becomes our duty to examine it for the purpose of ascertaining whether the plaintiff in error stands charged with a crime. It would, in effect, be a review of the action of the justice of the peace in California, in holding from this testimony that a crime had been committed and there was probable cause for believing that plaintiff in error committed it. This would be passing back beyond the superior court in which information has been filed against him and reviewing the case as made upon the evidence in the court of the examining magistrate. We are convinced that this cannot be done.

Another, and the main point insisted upon by counsel for plaintiff in error, is that the information is insufficient, in that it does not state a crime, and as a portion of the argument on this point it is claimed that inasmuch as the law of California relating to embezzlement was not introduced in evidence on the hearing of the *habeas corpus*, and that in order to be considered it must have been proved as any other fact, or in the absence of such proof, the court must presume that the law of California in regard to the

crime charged is the same as the law of this state, and if the complaint is insufficient under the provisions of our Criminal Code in relation to embezzlement, the plaintiff in error is entitled to be discharged under the *habeas corpus*. In Hawley, Inter-State Extradition, 29, 30, is the following statement in reference to the rule that courts of one state do not take judicial notice of the laws of another state: "One of the difficulties which is found in determining whether or not the act charged is a crime in the demanding state and what evidence of this shall be deemed conclusive grows out of the rule that the courts of one state cannot take judicial knowledge of the laws of another state. They must be proved before them as matters of fact. It is not too much to say that it is a foolish rule, more honored in the breach than in the observance; and many cases can now be found in the books in which no pretense is made of observing it. But there are other cases in which the highest courts have obstinately shut their eyes to the most indubitable evidence of the law in another state." The law of California on the subject of embezzlement, it is claimed by counsel for defendant in error, was used or read during the hearing in the district court, and the attempt was made to incorporate it in the bill of exceptions as an amendment thereto, but it was refused by the judge who heard the case, and no doubt correctly; but which rule shall prevail in reference to our taking judicial notice of the law of the state of California or requiring it to be proved as a fact, we think can have no influence or weight in shaping our decision in this case. The record discloses that the plaintiff in error has been given a preliminary examination and held for appearance to answer in the higher court, that an information has been filed in such higher court, and that on being arraigned plaintiff in error entered a plea of not guilty and was admitted to bail pending trial. Prosecution by information in states by which it has been adopted is substituted for an inquiry by a grand jury

and its return of an indictment, and it is guarded by the requirement that every person prosecuted under an information must first have been allowed a preliminary examination and the further provision that the public prosecutor shall examine into the matter, and if he concludes that a further prosecution should be had, he shall prepare the information and file it. This, we think, constitutes the information filed in the higher court a criminal pleading of as high a grade and entitled to as much credence as an indictment. Having reached this conclusion then, the following rule of law as stated by the author in the work cited *supra* on page 30 thereof is applicable: "The fact that an indictment has been found is regarded as affording at least *prima facie* evidence that the act charged is a crime;" and the same author further says on pages 32, 33 of his work: "The distinction between an affidavit and an indictment in one case is stated as follows: 'If the charge is by way of affidavit against the alleged fugitive, and it appears clearly from the whole facts stated in the affidavit taken together that no crime had been committed, it might, with some show of reason, be claimed that the subject matter was not within the provisions of the constitution and act of congress, and, therefore, as to the jurisdiction of the executive to issue the warrant, the whole matter would be *non coram judice*. The case in 1 Park Cr. Cas. [N. Y.], 429, is of this character; but that is far from being this case. Here the charge against the alleged fugitive is by a bill of indictment found by a grand jury, and whether the bill charges an indictable offense under the statute of Illinois should be left to the determination of the courts of that state.' (*In re Greenough*, 31 Vt., 279.) While the rule seems to be that the making of an affidavit and the issuing of a warrant by a magistrate is not evidence that the act charged is a crime, all of the authorities agree that the finding of an indictment is at least *prima facie* evidence that the act

charged amounts to a crime" (*In re Briscoe*, 51 How Pr. [N. Y.], 422); and the supreme court of Maine, in an opinion given to the governor, said: "In our opinion it is the duty of the executive of this state to cause to be delivered over to the agent of another state, at the request of the executive thereof, a citizen of their state charged by indictment with the fraud before set forth, which, being indicted in such state, may be presumed to be there regarded as a crime. (6 Am. Jurist [Me.], 226;" Hurd, Habeas Corpus, 608–609, and cases cited and commented upon; *Pearce v. State*, 23 S. W. Rep. [Tex.], 15; *In re Brown*, 112 Mass., 409.) In 2 Moore, Extradition, p. 1030, sec. 638, it is stated: "It it believed that there is no case in which a court has on *habeas corpus* discharged a fugitive from custody on a rendition warrant on the ground that an indictment accompanying the requisition did not constitute or contain a sufficient charge of crime." That the technical sufficiency of the pleading will not be examined on *habeas corpus*, but will be left to be disposed of by the courts of the state making the demand for the return of the party accused, see *Tullis v. Fleming*, 69 Ind., 15; *Pearce v. State*, *supra*; *State v. O'Connor*, 36 N. W. Rep. [Minn.], 462; *In re Brown*, *supra*; *In re Roberts*, 24 Fed. Rep., 132; *In re Welch*, 57 Fed. Rep., 576; *Roberts v. Reilly*, 116 U. S., 80. We conclude that the information in this case must be considered *prima facie* evidence of a crime charged against the plaintiff in error under the laws of California.

It is argued by counsel for defendant in error in this case that no motion for new trial having been filed in the district court the plaintiff in error could not have the case reviewed in this court by petition in error. The authorities all state that it is the established rule of the English courts that a writ of error will not lie to the final order made on the hearing of a *habeas corpus*, and so it is held in a number of the states of our country, while several of them have provided by statute for reviewing the decision

on a *habeas corpus* by error or appeal. In our state the right to review by error proceedings exists. (See *Atwood v. Atwater*, 34 Neb., 405, and authorities cited, among which is *Ex parte Wames*, Nebraska Supreme Court, not reported. See, also, *In re White*, 33 Neb., 812.) But returning to the question of whether it was necessary to file a motion for a new trial in order to obtain a review of any alleged error occurring during the trial, section 375 of the Criminal Code,—the one by the provisions of which the plaintiff in error claims a right to proceed in this court,—states: "The proceedings upon any writ of *habeas corpus* shall be recorded by the clerks and judges respectively, and may be reviewed and writs of error and *certiorari* may issue as in other cases now provided by law." But writs of error and *certiorari* have been abolished in civil cases. In section 599 of the Code of Civil Procedure it is stated: "Writs of error and *certiorari* to reverse, vacate, or modify judgments or final orders in civil cases are abolished." The application for a writ of *habeas corpus*, we think, may be said to be sufficiently of the character of a civil proceeding to be governed by the provision of the section as quoted. In *Ex parte Collier*, 6 O. St., 60, a proceeding in the supreme court to reverse an order made by a judge of the court of common pleas in a *habeas corpus* case, the court stated: "We regard this in the nature of a civil proceeding." But in section 902 of our Civil Code we find the following: "Until the legislature shall otherwise provide, this Code shall not affect proceedings on *habeas corpus*," etc. It may be argued that by this portion of section 902 all the rights and remedies given in what is known as the "Habeas Corpus Act" are saved, and not within the operation of the section by which writs of error and *certiorari* were abolished. In considering this question under provisions of statute similarly worded and phrased, the supreme court of Ohio, in *Ex parte Collier*, *supra*, stated:

"Section 604 of the Code enacts 'that until the legislature shall otherwise provide, this Code shall not affect proceedings on *habeas corpus*,' etc. It may be claimed that this clause, by its peculiar phraseology, saves the *habeas corpus* act, and all of the remedies given by it, from the operations of the Code. The word 'proceedings' includes, we think, nothing more than the doings of the judge who allows the writ, and is limited to the hearing before him. The filing of a petition in error is a proceeding before another tribunal. It is new in its character and effects a review of the decision of the judge, without forming any part of the case before him. The allowance of the writ, the bringing forward of the petitioner before the judge, the inquiry into the cause of his caption and detention, the introduction of evidence, and the liberation or other disposal of the relator are all to be governed by the act relating thereto; and as to other questions, to be determined by some other tribunal, though arising out of the case made on the writ, the Code prescribes the form by which they are to be governed. We adopt this construction the more willingly as it secures uniformity of practice in cases of error in civil proceedings, which seems to be a prominent object of the Code." We think the views expressed and doctrine announced by the Ohio court, as above set forth, sound and correct, and hence we adopt them, and this not only wherein it refers to the application of the portion of the section quoted and limits it to the manner of procedure in the allowance of and hearing on the writ, but also in the further statement that "as to other questions to be determined by some other tribunal, though arising out of the case made on the writ, the Code prescribes the form by which they are to be governed." This court in *In re White, supra*, said in the opinion written by MAXWELL, C. J.: "There is an abundant provision for the granting of the writ, as it may be applied for to any county judge or judge of the district court, and the several rulings thereon of the

district court may be brought into this court for review on error. As a general rule, therefore, the proceeding should be instituted in the county where the alleged unlawful restraint is being exercised, and where, if it is necessary to call witnesses, the parties will not be subjected to unnecessary expense and inconvenience. The case may then be reviewed on error as in other cases." From the above statement we think it may be concluded that the court contemplated that proceedings in error in a *habeas corpus* case would be governed by the rules prevailing in other cases, and we are satisfied that where there is a trial in a *habeas corpus* case, and it is sought to have reviewed any error alleged to have occurred during such trial, the same rule applies in a *habeas corpus* case as in other cases, and it is necessary that a motion for a new trial should be made, embodying the errors of which the party complains, and presented to the trial court or judge and a ruling obtained thereon. In the case at bar there was no motion for a new trial, and if the rule requiring such motion had been enforced, we need not have examined some of the questions which have been considered; but counsel for plaintiff in error states in his reply brief as a reason why a motion for a new trial was not filed, that they did not have sufficient time allowed them to do so. Whether this was the reason or not does not in any manner appear from the record; but inasmuch as the final decision of the questions raised by the petition in error involved the right of the plaintiff in error to his personal liberty, for a time at least, the right to personal liberty being one than which we know no greater, we have thought it best to examine, consider, and decide them. From the views expressed it follows that the decision of the district court will be and is

AFFIRMED.

PHILIP ANDRES ET AL. v. W. H. KRIDLER.

FILED NOVEMBER 20, 1894. No. 6284.

1. **Error Proceedings:** PARTIES. Where only a part of several defendants, against all of whom a joint judgment has been rendered, file a petition in error for the purpose of procuring the vacation of such judgment, and the judgment defendants who have not joined in the petition in error are not made defendants in error, there exists such defect of parties that the judgment complained of cannot be reviewed.

2. ———: ———. Judgment defendants, who, within the time allowed by statute for the institution of error proceedings have not been made parties to such proceedings pending in this court, cannot become plaintiffs in error; they may, however, with their consent be made defendants in error to obviate a defect of parties.

MOTION to dismiss proceeding in error on the ground of defect of parties. *Motion overruled.*

John P. Breen, for the motion.

Charles W. Haller, contra.

RYAN, C.

On a trial had of a certain cause pending in the district court of Douglas county judgment was on November 7, 1892, rendered in favor of the plaintiff, W. H. Kridler, against the defendants, John Jenkins, Philip Andres, Thomas Falconer, Dennis J. Keleher, James H. Standover, Cornelius M. O'Donovan, and J. W. McDonald. On the 27th day of June, 1893, there was filed in this court a transcript of the record and the bill of exceptions in said cause. At the same time there was filed a petition in error, wherein Philip Andres, John Jenkins, Thomas Falconer, J. H. Standover, and J. W. McDonald were the only plaintiffs in error named. On the 14th day of October,

1894, there was filed a motion to dismiss the petition and proceedings in error for the reason that but five of the seven defendants, against whom a joint judgment had been rendered, by petition in error had asked for its reversal. On the 16th day of October, 1894, this motion was submitted. Contemporaneously with this submission plaintiffs in error were given leave to make a showing why the motion to dismiss should not be sustained. On the 20th day of the month last named there was filed a brief in resistance of the motion to dismiss, accompanied by written entries of appearance of Dennis J. Keleher, C. M. O'Donovan, and their written waivers of the fact that a summons in error had not issued or been served on each of them within the time fixed by statute.

In *Wolf v. Murphy*, 21 Neb., 472, it was held that all parties in a joint judgment were necessary parties to a petition by one of their number to reverse it and might be made so as plaintiffs or defendants. This rule as to the necessity of the parties was again announced and enforced in *Hendrickson v. Sullivan*, 28 Neb., 790. In *Consaul v. Sheldon*, 35 Neb., 247, it was held that by the submission of a cause on its merits without urging that there was a defect of parties, such defect was waived. This ruling was followed in *Curtin v. Atkinson*, 36 Neb., 110, wherein it was said that "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." From these cases the conclusions deducible seem to be that where a joint judgment has been rendered against more than one defendant all should by petition in error ask for a review of such judgment, yet that a defect of parties in error proceedings may be waived. The want of jurisdiction which is said to exist when all the judgment defendants have not presented a petition in error refers to parties rather than to subject-matter; otherwise it could not be waived by mere failure to urge it. Where such a defect of

parties exists the court nevertheless obtains jurisdiction of the subject-matter as between the existing parties to the error proceedings, but to an exercise of that jurisdiction it is necessary to bring in the parties omitted. In such cases, after the expiration of the time within which error proceedings may be instituted, the omitted parties may not file a petition in error, neither can they join as plaintiffs in one already filed. Their presence is only required to enable this court properly to exercise its jurisdiction to the extent that it has already attached. Under the provisions of sections 40, 41, and 42 of the Code of Civil Procedure these parties must be made defendants since they cannot join as plaintiffs. If any reason exists why they should not as defendants be made parties it is their right to urge it. In the case under consideration the judgment defendants who did not in due time join in the proceedings in error have voluntarily appeared and waived all objections to the failure sooner to make them parties. To a review of the errors assigned in due time the court has therefore jurisdiction of the subject-matter and there is now no defect of parties. The motion to dismiss is

OVERRULED.

AUGUSTINE A. RECORD V. ZERI M. BUTTERS.

FILED NOVEMBER 20, 1894. NO. 7087.

Error Proceedings: FAILURE TO FILE TRANSCRIPT: DISMISSAL. **A motion to dismiss an action brought to this court on error must be sustained when the transcript containing the final judgment sought to be vacated was filed in this court after the lapse of a year from the date of said judgment.**

MOTION to dismiss proceeding in error on the ground that the transcript was not filed within a year from the rendition of judgment. *Motion sustained.*

C. H. Bane, for the motion.

Allen G. Fisher, contra.

RYAN, C.

In this case there has been submitted a motion to dismiss for the reasons alleged, which are sustained by the record, that the verdict was returned in March, 1893, on which judgment was rendered on the 7th day of June immediately following, whereas the petition in error and transcript were not filed in this court until July 7, 1894. Plaintiff seeks to avoid the force of the facts just stated by showing that while judgment was rendered on the 7th day of June, it was at a term which did not end until July 14, 1893. By the provisions of section 592 of the Code it is required that proceedings in this court for the reversal of a judgment of the district court must be commenced within one year after the rendition of the judgment complained of. In *Bemis v. Rogers*, 8 Neb., 149, it was held that an action wherein personal service could be had was not to be deemed commenced until the issue of the summons, afterwards served. This same principle was enforced in *Baker v. Sloss*, 13 Neb., 130, and *Rogers v. Redick*, 10 Neb., 332. By section 586 of the Code of Civil Procedure the plaintiff in error is required to file with his petition a transcript containing the final judgment sought to be reversed. Under section 675 of the same Code it has been held by this court that on appeal the requirement that a transcript be filed in a time fixed was jurisdictional, and that filing after the time fixed could not be waived. (*Moore v. Waterman*, 40 Neb. 498; *Omaha Loan & Trust Co. v. Ayer*, 38 Neb., 891.) The failure to file anything in this court until after the lapse of one year from the rendition of the judgment complained of deprives this court of jurisdiction to review the judgment upon a transcript filed afterwards. It is sought to avoid this result by challenging attention to an

order made July 3, 1894, overruling a motion for a new trial made by the plaintiff in error. It appears that this motion was founded upon the statement therein that it appeared of record in this case of replevin that the right of possession of the defendant on the trial of this case was based upon a judgment recovered in another cause, wherein Luke S. Otis was plaintiff and Zeri M. Butters was defendant, which judgment has since its use as evidence been reversed. It was urged by plaintiff in this case that said judgment could not, after the last motion for a new trial was filed, be made use of as evidence, *ergo* it was improperly admitted; therefore, the motion for a new trial, overruled July 3, 1894, was filed to present this question. Within three days after the rendition of judgment, originally, there had been filed a motion for a new trial, which in due time was overruled, wherefore the district court properly overruled the last motion filed about a year or more afterward. The motion to dismiss plaintiff's action in this court should be sustained.

DISMISSED.

LYSANDER W. TULLEYS, APPELLANT, V. CHARLES B. KELLER ET AL., APPELLEES.

FILED NOVEMBER 20, 1894. No. 7240.

Supersedeas: APPEAL: ORDER TO REQUIRE ADDITIONAL BOND. Where it is shown that a supersedeas bond is entirely inadequate in amount, a sufficient bond may be required of the appellant as a condition necessary to the continuance of a stay of proceedings.

MOTION by appellees to require appellant to give additional supersedeas bond pending appeal from a decree of the district court for Douglas county. *Motion sustained.*

Charles B. Keller, for the motion.

Breckenridge & Breckenridge, contra.

RYAN, C.

Plaintiff Lysander W. Tulleys filed in the district court of Douglas county his petition which contained averments that plaintiff was then a resident of Iowa; that of the defendants, Keller and Weldon were residents of Nebraska; that the Anglo-American Mortgage & Trust Company, organized as an Iowa corporation, had subsequently become a domestic corporation in Nebraska; that the firm of Burnham, Tulleys & Co., of which plaintiff had been a member, had been engaged in placing loans on real estate, its outstanding loans aggregating on June 1, 1888, several million dollars in amount; that the mortgages securing loans made by Burnham, Tulleys & Co. were made to plaintiff as trustee; that the profits of this loan business were represented by mortgages made subject to those for the loan in each instance consummated; that about June 1, 1888, the Anglo-American Mortgage & Trust Company was organized in Iowa, succeeding to the business of Burnham, Tulleys & Co., which from thenceforward existed only for the purpose of settling up their business and collecting outstanding dues; that thereafter plaintiff, as trustee, was named in such mortgages as secured loans made by the Anglo-American Mortgage & Trust Company. There were other averments of the petition which it is not now deemed necessary to quote or describe. The prayer of the petition was that C. B. Keller, as attorney, be enjoined from interfering further in the management of the business which plaintiff claimed should be managed only by attorneys for Burnham, Tulleys & Co. The prayer was also that the Anglo-American Mortgage & Trust Company be restrained from the use of the name of plaintiff and from the use of the name of Burnham, Tulleys & Co.

in any manner or form. There was filed an answer by the Anglo-American Mortgage & Trust Company which contained a cross-petition, in which it was alleged that when said company was incorporated it purchased all the interests of Burnham, Tulleys & Co. above referred to, as well as the good-will of said business owned by Burnham, Tulleys & Co.; that plaintiff was acting persistently in his own interests and that of his associates wherever he was enabled to do so by reason of the aforesaid mortgages having been made to him as trustee, and by reason of the collection of the bonds secured as aforesaid having been entrusted to plaintiff and his associates in Iowa. There were also in said cross-petition averments that upon foreclosures of mortgages in Nebraska the title had been taken in the name of Tulleys as trustee, and that he, in each transaction above referred to, was acting solely as trustee for the Anglo-American Mortgage & Trust Company. There was a prayer for appropriate relief. After a reply filed there was a trial, which resulted in a finding that the averments of the above cross-petition were sustained by the evidence and a decree granting the Anglo-American Mortgage & Trust Company the relief it had prayed in its cross-petition. The amount of the supersedeas bond on appeal was fixed at $4,000, which bond was accordingly given. In this court the Anglo-American Mortgage & Trust Company by motion ask that plaintiff be required to give an additional supersedeas bond sufficient to protect said company against loss. In support of this motion there was filed the affidavit of Samuel S. Curtis, who states that he is the receiver of said Anglo-American Mortgage & Trust Company and as such, after the aforesaid decree was entered, wrote to plaintiff a letter in the following language:

"OMAHA, NEB., May 26, 1894.

"*Col. L. W. Tulleys*—DEAR SIR: Referring to the injunction against your collecting B., T. & Co. second mortgages in order that the same may not be tied up until de-

cision of the case in the supreme court, we are willing that you should collect and release the same, paying the money collected therefor over to this company, to be placed in the special trust fund created by the court for such purpose until a final decision is reached, and we hereby authorize and empower you to do so. We think it as well for all concerned that these mortgages should be collected when possible.

"Yours truly, SAMUEL S. CURTIS,
"*Receiver.*"

To the above letter the answer was in this language:

"COUNCIL BLUFFS, IOWA, May 29, 1894.

"*Samuel S. Curtis, Rec'r, Omaha*—DEAR SIR: Yours of 26th rec'd relative to collecting B., T. & Co. second mt'ge notes & releasing second mt'ges. I am advised by my Omaha att'ys that the effect of the supersedeas bond filed is to release these second notes & mt'ges from the effect of the injunction. My C. Bluffs att'ys advise the same thing.

"Yours truly, L. W. TULLEYS."

The receiver further showed by his affidavit that the position taken in said letter of Tulleys had since been reasserted and reaffirmed by his agents and attorneys, that the commission notes and mortgages of Burnham, Tulleys & Co. which said Tulleys proposed to collect because of having filed his supersedeas bond aforesaid amount to about the sum of $25,000; that the Anglo-American Mortgage & Trust Company claims a lien upon all the commission notes and mortgages remaining uncollected for its moneys and funds appropriated and used by L. W. Tulleys while its president, to the amount of nearly $160,000, and that if Tulleys is permitted to collect the remaining portion of the said $160,000 (represented by the $25,000 in notes and mortgages), affiant believes thereby will be defeated the claim of the Anglo-American Mortgage & Trust Company for the reimbursement of the funds so used, except to the extent of the amount of the supersedeas bond. This affiant

further stated that Tulleys was a non-resident of this state and financially irresponsible, and that a judgment against him would be uncollectible. No attempt was made to controvert the above showing, though due notice of its pendency was given the attorneys for Tulleys, and it must therefore be accepted as true. The decree against Tulleys was founded on averments of an abuse of trust reposed in him to the irreparable injury of his *cestui que trust*, the Anglo-American Mortgage & Trust Company. Since the decree was rendered it is shown that Tulleys, though a non-resident of this state and insolvent, is collecting a large amount of notes which his trust relation renders possible. His right now to do this he bases upon his supersedeas bond. It is not questioned that the aggregate amount of these notes equals $25,000. There is of course no attempt to fix the time which must elapse before this cause shall be determined. It was filed in this court September 27, 1894, and we are bound to assume that a considerable time must elapse before it can be decided. Meantime under the showing made it is fair to assume that $25,000 may be collected by the appellant and removed to another state. It is therefore but proper that a supersedeas bond commensurate in amount should be filed, and it is accordingly ordered that to continue in force the supersedeas now existing a new supersedeas bond in the penal sum of $25,000 be filed and approved in the office of the clerk of the district court of Douglas county on or before December 1, 1894.

JUDGMENT ACCORDINGLY.

MISSOURI PACIFIC RAILWAY COMPANY v. MARGARET E. BAXTER, ADMINISTRATRIX.

FILED NOVEMBER 20, 1894. No. 5484.

1. **Master and Servant.** A servant by his contract of employment assumes the ordinary risks and dangers incident thereto.
2. ———: DEFECTIVE MACHINERY AND TOOLS: CONTINUED USE BY SERVANT. If the machinery, tools, or appliances furnished the servant by his master are obviously defective and dangerous, and the servant, notwithstanding, continues in the service, he thereby assumes the risks of any injury which he may sustain by reason of such defective appliances, unless he is induced to continue in such service by the promise of the master to remedy such defect.
3. ———: DUTY OF MASTER TO FURNISH APPLIANCES. The law does not require that an employer should furnish his servants the newest or the safest tools, machinery, or appliances for the performance of the work for which they are hired. If the master furnishes such machinery, appliances, or tools to the servant as are reasonably safe and fit for the performance of the work in hand, and which the servant, in the execution of his work, by the exercise of ordinary care on his part, may use with reasonable safety to himself, the master has discharged his duty in that respect.
4. ———: NEGLIGENCE: ACTION FOR DAMAGES: PLEADING. A railroad brakeman, a part of whose duty it was to couple cars upon tracks known by him to be unblocked and dangerous, while so engaged caught his foot in an unblocked guard rail and was killed. His administratrix sued the railway company for damages, alleging that its failure to block the guard rails was negligence which caused her intestate's death. The petition did not allege that the deceased was inexperienced when he entered the employ of the railway company; that he was ignorant at the time he entered the service of the company; that the guard rails and rails of its main track were unblocked; that he did not know that the guard rail was unblocked, at which he was killed; that he remained in the service of the company, relying upon a promise made by it to block its guard rails; nor that guard rails blocked were less dangerous than unblocked. *Held*, That the petition did not contain averments of fact which negatived the

presumption of law that the injury received by the deceased was one of the risks which he assumed by virtue of his employment, and, therefore, did not state a cause of action.

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

The facts are stated by the commissioner.

W. H. Morris, *James W. Orr*, *D. Martin*, and *B. P. Waggener*, for plaintiff in error:

The petition does not state facts sufficient to constitute a cause of action when it merely alleges that the negligence consists in the failure at the time of construction to block the guard rails and switches. (*Missouri P. R. Co. v. Lewis*, 24 Neb., 848.)

By the pleadings, the admissions of the parties, and the evidence in the case it was clearly shown that the plaintiff's intestate continued in the service of the defendant company without protest or promise of a change or amendment, with the knowledge, or means of knowledge, that the guard rails of defendant company were unblocked; and he thereby waived the manner of construction, and thereby assumed the risks and dangers resulting from the operation of such tracks and guard rails, as one of the risks incident to his employment, and could not recover for any injuries resulting therefrom. (*Rush v. Missouri P. R. Co.*, 36 Kan., 129; *Smith v. St. Louis, K. C. & N. R. Co.*, 69 Mo., 32; *McGlynn v. Brodie*, 31 Cal., 376; *Richmond & D. R. Co. v. Risdon*, 12 S. E. Rep. [Va.], 786; *St. Louis, I. M. & S. R. Co. v. Davis*, 15 S. W. Rep. [Ark.], 895; *Sweeney v. Berlin & Jones Envelope Co.*, 101 N. Y., 520; *St. Louis, A. & T. R. Co. v. Lemon*, 18 S. W. Rep. [Tex.], 331; *Chicago, R. I. & P. R. Co. v. Lonergan*, 118 Ill., 41; *Wood v. Locke*, 147 Mass., 604; *Mayes v. Chicago, R. I. & P. R. Co.*, 63 Ia., 562; *Appel v. Buffalo, N. Y. & P. R. Co.*, 111 N. Y., 550; *Lovejoy v. Boston & L. R. Co.*, 125 Mass., 79;

Ladd v. New Bedford R. Co., 119 Mass., 412; *Tuttle v. Detroit, G. H. & M. R. Co.*, 122 U. S., 189; *Gibson v. Erie R. Co.*, 63 N. Y., 449; *Lake Shore & M. S. R. Co. v. McCormick*, 74 Ind., 440.)

Where a person of mature age and experience is engaged in a particular line of employment, and has the opportunity to know and see the manner of construction of a particular appliance, or of a part of a railroad, and continues in the employment of the company with such opportunities, the law presumes that he exercised ordinary care, and that he knew the manner of its construction and at least the obvious dangers attending the discharge of his employment, and that he continued in the discharge of such duties with such knowledge. (*Parigo v. Chicago, R. I. & P. R. Co.*, 52 Ia., 276; *St. Louis, A. & T. R. Co. v. Lemon*, 18 S. W. Rep. [Tex.], 332; *Hayden v. Smithville Mfg. Co.*, 29 Conn., 557; *Henderson v. Coons*, 31 Ill. App., 75; *Gleason v. New York & N. E. R. Co.*, 34 N. E. Rep. [Mass.], 79; *Way v. Illinois C. R. Co.*, 40 Ia., 341; *Wright v. New York C. R. Co.*, 25 N. Y., 566; *Muldowney v. Illinois C. R. Co.*, 39 Ia., 615; *Kitteringham v. Sioux City & P. R. Co.*, 62 Ia., 285; *Richmond & D. R. Co. v. Risdon*, 12 S. E. Rep. [Va.], 786; *Rush v. Missouri P. R. Co.*, 36 Kan., 129.)

A master is not bound to give notice of patent dangers discoverable by a reasonable and ordinary exercise of diligence on the part of the servant. (*Morse v. Minneapolis & St. Louis R. Co.*, 30 Minn., 466; *Fones v. Phillips*, 39 Ark., 17; *Atlas Engine Works v. Randall*, 100 Ind., 293; *Deane v. Caldwell*, 127 Mass., 243; *Chicago, R. I. & P. R. Co. v. Clark*, 15 Am. & Eng. R. Cas. [Ill.], 261; *Hughes v. Winona & St. Peter R. Co.*, 27 Minn., 137; *Walsh v. St. Paul & D. R. Co.*, 27 Minn., 367.)

If the defect is patent, open to observation, or such as the ordinary use of the machine in the business the servant is engaged would disclose to an ordinarily observant man, and the servant had ample opportunity by operating it be-

fore being injured to observe the defect, his opportunity to know would be held as knowledge whether in fact he knew of the defect or not. (*Porter v. Hannibal & St. J. R. Co.*, 71 Mo., 66; *Muldowney v. Illinois C. R. Co.*, 39 Ia., 615; Wharton, Negligence, sec. 244; *Gibson v. Erie R. Co.*, 63 N. Y., 449; *Chicago, R. I. & P. R. Co. v. Lonergan*, 118 Ill., 41.)

Whatever danger there was by reason of the guard rail not being blocked, was patent and open to the observation of plaintiff's intestate. (*Mayes v. Chicago, R. I. & P. R. Co.*, 63 Ia., 562; *Williams v. Central R. Co.*, 43 Ia., 396; *De Forrest v. Jewett*, 88 N. Y., 264; *Walsh v. St. Paul & D. R. Co.*, 27 Minn., 367; *Michigan C. R. Co. v. Austin*, 40 Mich., 247; *Indianapolis, B. & W. R. Co. v. Flanigan*, 77 Ill., 365; *Hathaway v. Michigan C. R. Co.*, 51 Mich., 253; *McCoy v. First Nat. Bank, Mt. Pleasant*, 50 Ia., 580.)

The servant is bound to make reasonable use of his senses to avoid danger and injury in the course of his employment. (*Walsh v. St. Paul & D. R. Co.*, 27 Minn., 367; *Hughes v. Winona & St. Peter R. Co.*, 27 Minn., 137; *De Forrest v. Jewett*, 88 N. Y., 264; *Tuttle v. Detroit, G. H. & M. R. Co.*, 122 U. S., 189.)

When a person offers himself for employment in a particular capacity, he thereby contracts that he has the requisite skill and experience to properly discharge the duties of the position sought and accepted by him, and that he knows at least the obvious dangers of the employment in which he is about to engage. (*McGinnis v. Canada Southern Bridge Co.*, 49 Mich., 466; *Smith v. St. Louis, K. C. & N. R. Co.*, 69 Mo., 32; *Rush v. Missouri P. R. Co.*, 36 Kan., 129; *Lake Shore & M. S. R. Co. v. McCormick*, 74 Ind., 440.)

The master is not bound to furnish the safest appliances, nor adopt every new invention, although the new device or invention may be safer than the one in use. (*Chicago,*

R. I. & P. R. Co. v. Lonergan, 118 Ill., 41; *Camp Point Mfg. Co. v. Ballou*, 71 Ill., 418; *McGinnis v. Canada Southern Bridge Co.*, 49 Mich., 466; *Smith v. St. Louis & C. & N. R. Co.*, 69 Mo., 32; *Lake Shore & M. S. R. Co. v. McCormick*, 74 Ind., 447; *Rush v. Missouri P. R. Co.*, 36 Kan., 129; *Simmons v. Chicago & T. R. Co.*, 110 Ill., 340)

F. I. Foss and *E. E. McGintie, contra.*

RAGAN, C.

Margaret E. Baxter, administratrix of the estate of George Edward Baxter, deceased, brought this suit in the district court of Saline county against the Missouri Pacific Railway Company (hereinafter called the "Railway Company") for damages, under chapter 21, Compiled Statutes, 1893, for the death of her intestate, her husband, alleged to have been caused by the negligence of the Railway Company. The administratrix had a verdict and judgment and the Railway Company brings the case here for review.

There are many errors assigned and argued in the brief of counsel for the plaintiff in error; but as we have reached the conclusion that the petition of the administratrix filed in the court below does not state facts sufficient to constitute a cause of action, and that the judgment of the district court must, therefore, be reversed, it becomes unnecessary to consider any question in the record except the sufficiency of such petition. The petition of the administratrix alleged the death of George Edward Baxter; her appointment as administratrix of his estate; that he was her husband, and at the time of his death left the administratrix, his widow, and two minor children him surviving. The petition further alleged:

"(4.) That the defendant had so negligently, carelessly, and unskillfully constructed its railroad track at Talmage,

both upon the main track, side tracks, and spur tracks, that any one who was an employe of said company, using due diligence, care, and skill in transacting the business of said company, was liable to be injured, hurt, and damaged on account of the negligent, careless, and unskillful manner in which the said track of the defendant was constructed at Talmage; that the said George Edward Baxter, while employed by the defendant at a reasonable salary as a compensation for his services, in the exercise of due care and skill upon his part in coupling the cars upon the side track of the defendant at Talmage, did, without any negligence upon his part, but on account of the negligence, carelessness, and unskillfulness of the defendant in the construction of its railroad bed, side tracks, and spur tracks, in not properly blocking and filling up the space between the outside rail and guard rail, have his left ankle caught just above the heel, between the guard rail and outside rail of said track, which threw him under the trucks of said cars, and he was thereby killed, which said killing was on account of the carelessness, negligence, and unskillfulness on the part of the defendant in the construction of their railroad, and while the said George Edward Baxter, the employe of the said Railway Company, was acting directly under the orders of the conductor of said train of which he was brakeman, and while he was using due care, diligence, and skill in the transaction of the business of said Railway Company."

The administratrix also alleged in her petition that her husband, at the time of his death, was thirty-three years old. At that time he was employed by the Railway Company as a brakeman on a train running between the stations of Crete and Talmage in Nebraska, "including the main line of road at Talmage, the side tracks, spurs, and other tracks necessary to be used and operated by said Railway Company at said place in connection with their business to and from Crete in Saline county, Nebraska."

A railroad brakeman, a part of whose duty it was to couple cars upon tracks known by him to be unblocked and dangerous, while so engaged caught his foot in a frog and was injured. Held, that he took upon himself the risk involved in the non-blocking of the frogs, and could not maintain an action against his employer for the injury sustained. (*Wood v. Locke*, 147 Mass., 604.)

In *Tuttle v. Detroit, G. H. & M. R. Co.*, 122 U. S., 189, it is said: "When a servant, in the execution of his master's business, receives an injury which befalls him from one of the risks incident to the business, he cannot hold the master responsible, but must bear the consequences himself."

A switchman employed in a railway company's yards, in helping to make up and distribute trains, while engaged in his employment "caught his foot in a frog" which connected two converging tracks and was used to effect the transfer of cars from one track to the other, and before he could release himself he was run over and killed. His administratrix sued the company for damages, alleging that it had been guilty of negligence in not "blocking its frogs." The switchman had been in the employ of the company for some years, and employed in and about the yard in which he was injured for quite a length of time prior thereto, and was acquainted with the frog and knew that it was not blocked. It was held that the switchman, in accepting and continuing in the employment, assumed the hazard of all known and obvious dangers, and that he was charged with notice of the difficulty of removing the foot when caught in the frog, and of the danger to be apprehended therefrom, and that, therefore, he could not recover. (*Appel v. Buffalo, N. Y. & P. R. Co.*, 111 N. Y., 550.)

In *Mayes v. Chicago, R. I. & P. R. Co.*, 63 Ia., 562, it was held: "Where defects in a railway are obvious to all employes, one who knows of such defects, or by the exercise of ordinary care might know of them, but, without

objection or promise of amendment, continues in the company's employment, thereby waives his right to recover for injuries received by reason of such defects."

In *Rush v. Missouri P. R. Co.*, 36 Kan., 129, the facts were: The railway company in the construction of its railway did not use any blocking or other protection between the main rails of its track and the guard rails. A servant of the railway company was employed as a switchman for about two and one-half months in one of the railway company's yards, and while in the discharge of his duty he stepped between the main rail and the guard rail of one of the tracks and was killed. His administratrix sued the railway company for damages. The court held "that the condition of the railway tracks and the danger must have been known to the employe, and, therefore, that he assumed the risk."

In *Sweeney v. Berlin & Jones Envelope Co.*, 101 N. Y., 520, it is said: "A servant accepts the service subject to the risks incident to it; and where, when he enters into the employment, the machinery and implements used in the master's business are of a certain kind or condition, and the servant knows it, he voluntarily takes the risk resulting from their use, and can make no claim upon the master to furnish other or different safeguards."

In *Chicago, R. I. & P. R. Co. v. Lonergan*, 118 Ill., 41, it was held: "A person who engages in the service of a railroad company in the running of its trains is presumed to do so with a knowledge of the dangers incident to such service, and he assumes the risks of its ordinary hazards. An employer is not bound to furnish for his workmen the safest machinery, nor to provide the best methods for its operation in order to save himself from responsibility for accidents resulting from its use. If the machinery be of an ordinary character, and such as can, with reasonable care, be used without danger to the employe, it is all that can be required from the employer."

In *McGinnis v. Canada Southern Bridge Co.*, 49 Mich., 466, it was held: "An employer is not bound to make use of the newest mechanical appliances for the purpose of insuring the safety of his employes, especially if it does not appear that on the whole it would be advantageous to them. So, a railway company is not bound to block its frogs, particularly if it does not appear that in doing so it would not entail greater dangers than it would avert."

In *Smith v. St. Louis, K. C. & N. R. Co.*, 69 Mo., 32, it is said: "Railroad companies are bound to use appliances which are not defective in construction; but as between them and their employes they are not bound to use such as are of the very best or most improved description. * * A brakeman who continues in the service of a railroad company with knowledge that the guard of a switch is made of T rail, cannot recover for injuries sustained in consequence of his foot being caught between the guard and the frog, notwithstanding it may appear that if the guard had been made of a different rail it would have been less dangerous."

In *Lake Shore & M. S. R. Co. v. McCormick*, 74 Ind., 440, it is held: "An employe, when he enters the service of an employer, impliedly agrees to assume all risks ordinarily and naturally incident to the particular service; and the employer impliedly agrees that he will not subject the employe, through fraud, negligence, or malice, to greater risks than those which fairly and properly belong to the particular service in which the employe is to be engaged. The employer's obligation is not to supply the employe with absolutely safe machinery, or with any particular kind of machinery, but to use ordinary and reasonable care not to subject the employe to extraordinary or unreasonable danger."

These authorities establish three general rules:

(1.) That a servant by his contract of service assumes the ordinary risks incident to such employment.

(2.) That if the machinery, tools, or appliances furnished him by the master are obviously defective and dangerous, and he nevertheless continues in the service of the master, he thereby assumes the risks of all injury which he may sustain by reason of such defective machinery or appliances, unless he continues in the service by reason of a promise of the master to remedy such defects.

(3.) That a master is not bound to adopt the newest or the safest machinery, tools, or appliances for the safety of his servants.

It will be observed that the only ground of negligence charged against the Railway Company in this case in the petition of the administratrix is the failure of the Railway Company to block the spaces between the guard rail and the rail of its main track. The petition does not allege, when Baxter entered the service of the Railway Company, that he was inexperienced when he entered its employ; how long he was in its service before he was killed; that he did not know at the time he entered the service of the Railway Company that the spaces between the guard rails and rails of its main track were unblocked; that he did not know the guard rail was unblocked at which he was injured; that the Railway Company promised him, in consideration of his remaining in its service, to block its guard rails; nor that guard rails blocked are less dangerous than unblocked. In other words, this petition does not contain averments of fact which negative the presumption that the injury received by Baxter was one of the risks which he assumed by virtue of his employment. We have no doubt but that the failure of the Railway Company to block its guard rails is an evidence of negligence on its part; and if this were a suit by a passenger of this Railway Company for injuries such passenger had sustained by reason of such default on the part of the Railway Company it might be liable. But this is not the case before us. If this were a suit by one not a passenger and not an employe of the company,

who had been injured by reason of the default of the Railway Company to block its guard rail, such failure of the Railway Company might be evidence of negligence on its part. But this is not the case before us. The question with which we have to deal is this: Assuming that the Railway Company was guilty of negligence in not blocking its guard rail, we must assume, because of the want of averments in the petition to the contrary, that Baxter actually knew at the time he entered the company's service, and while he was in its service, that the guard rails were unblocked; that he continued in the service of the Railway Company without any promise on its part to block these guard rails; that he was not inexperienced; that he was not unacquainted with the condition of the guard rail where he was injured; and that, therefore, he assumed, by continuing in the service of the railway company, the risk of being injured by reason of these guard rails being unblocked. An employer is not an insurer of the safety of his employes. In the very nature of things a railway company cannot guaranty that those who enter its service are to be engaged in undertakings which are safe. Common sense and observation teach all men that railroad operation is extremely hazardous. Danger lurks on every rail and tie, and death stands watch at every bridge and switch. One who enters the employment of a railway company as a brakeman knows this fact quite as well as his employer, and assumes this risk and hazard and danger when he enters upon the service. Nor does the law require that an employer should furnish his servants the newest or the safest tools, machinery, or appliances for the performance of the work for which they are hired. If the master furnishes such machinery, appliances, or tools to the servant as are reasonably safe and fit for the performance of the work in hand, and which the servant, in the execution of his work, by the exercise of ordinary care on his part, may use with reasonable safety to himself, the master has discharged his duty in that re-

spect. Doubtless employes of a railway company engaged in the operation of the road are exposed to less danger if the train be run at a speed of ten miles an hour instead of fifty, if in the construction of the road oak ties be used instead of cedar or pine, if eighty-five pound steel rails be used instead of fifty-six, if the road be constructed entirely without curves, and if the bridges and culverts be constructed of solid masonry instead of wood, and it is possible for a railway company to so construct and operate its road; but its failure to so construct and operate its road and trains, while possibly evidence of negligence, such evidence alone is not sufficient to support a verdict against it for damages for an injury received by one of its employes. The judgment of the district court is

REVERSED.

S. W. DUTTON ET AL. V. STATE OF NEBRASKA, EX REL. H. E. PANKONIN, ET AL.

FILED NOVEMBER 20, 1894. No. 7203.

1. **Bridges Across County Boundaries:** REPAIRS: MANDAMUS TO COUNTY COMMISSIONERS: PRECINCT BONDS. "Louisville precinct," a political subdivision of Cass county, voted its bonds to aid in the construction of a free wagon bridge across the Platte river. The county commissioners of Cass county issued the bonds voted, sold them and used the proceeds in constructing a free wagon bridge across the Platte river near the village of Louisville, in said county, and at a point where the river is the dividing line between the counties of Cass and Sarpy. The southern portion of the bridge became out of repair and unsafe for travel. The county commissioners of Cass county were notified thereof by three taxpayers and citizens of said county and requested to repair the same. The commissioners refused to make the repairs on the ground that it was not the duty of Cass county to keep such bridge in repair. To compel the commissioners to repair the bridge said taxpayers instituted

proceedings in *mandamus*. *Held*, (1) That as the statute makes the middle of the main channel of the Platte river the boundary line between the counties of Cass and Sarpy, the legal presumption is that the south half of such bridge is in Cass county, and that it is the duty of the authorities of said county to keep said portion of said bridge in repair, and that they would be compelled to do so by *mandamus* proceedings instituted and carried on by and in the name of said citizens and taxpayers; (2) that said bridge is not the property of said "Louisville precinct;" (3) that such bridge is the property of the public and a part of the public highways of the state.

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

H. D. Travis, for plaintiffs in error.

Beeson & Root, for defendant in error.

Byron Clark, for intervenors.

RAGAN, C.

H. E. Pankonin and others, taxpayers and citizens of Cass county, brought this action, a proceeding in *mandamus*, against S. W. Dutton and others, the county commissioners of Cass county, Nebraska, in the district court of said county to compel the respondents to repair the southern portion of a free wagon bridge over the Platte river near the village of Louisville, in said county. The district court rendered judgment, granting the peremptory writ of *mandamus* as prayed, and the county commissioners prosecute to this court proceedings in error. To reverse the judgment of the district court counsel for the plaintiffs in error makes the following arguments:

1. There is no evidence to prove that the bridge in question is in Cass county. The evidence in the record is that the bridge in question extends across the Platte river, and that at the place where the bridge is located, Cass county lies on the southern and Sarpy county on the northern side

of the Platte river. The statute makes the middle of the main channel of the Platte river the boundary lines between said counties of Sarpy and Cass. (Compiled Statutes, secs. 10, 68, ch. 17.)

2. The second argument is that there was at the time of the construction of this bridge no public road running to the approaches of the bridge in either Cass or Sarpy counties; and that the county authorities never laid out a road connecting the bridge with the public highways on either side of the river. It appears that the bridge was not constructed immediately upon a section line or a public road, but that soon after its construction parties interested in having the public use this bridge purchased the strips of land lying between the approaches of the bridge and the public highways, and that a road was opened across the strip of land lying between the public highway and the southern end of the bridge, and this road was, by the supervisors of the road district in which the southern end of the bridge is situate, opened and worked, and the public have taken possession of the road so laid out and used it as a means of reaching the bridge. It would seem, then, that the public had acquired by dedication a public road across the strip of land between the regularly laid out public road and the southern termination of this bridge. (*State v. Otoe County*, 6 Neb., 129.)

3. That the evidence is not conclusive that it would take more than one hundred dollars to repair the bridge, and that the evidence is not sufficient to show that Cass county has funds on hand with which to pay for the reparation of the bridge. These arguments are wholly without merit and will not be further considered.

4. The fourth argument is that the relators have an adequate remedy at law. When a public road or bridge in any county shall be out of repair or be unsafe for travel any three citizens or taxpayers of the state may give notice to the county commissioners in which such bridge or road

is situate that the same is out of repair or unsafe for travel, and thereupon it becomes the duty of the county commissioners of the county in which such road or bridge is situate, within twenty-four hours after the service of such notice, to commence to make suitable repairs on said highway or bridge and place the same in safe condition for travel. (Compiled Statutes, secs. 114–116, ch. 78.) In the case at bar we must presume that the south half or "the southern portion" of the bridge in controversy is in Cass county: The commissioners of that county were duly notified by three taxpayers and citizens of Cass county that the bridge in question was out of repair and unsafe for travel and requested to repair the same, or "the southern portion" thereof. The commissioners refused to comply with the request made, not on the ground that the bridge was not out of repair or not in need of repairs, and not because they had not the funds with which to repair it, but on the ground that it was not the duty of Cass county, or their duty as the officers of such county, to make such repairs. The act which the relators sought to have respondents perform was a public duty enjoined upon the latter by law, and one in which the people of the entire county were interested, and it was unnecessary for the relators, in order for them to maintain this action, to show that they had any interest in it other than that of mere private citizens interested in common with the public. (*Hall v. People*, 57 Ill., 307.)

5. The final contention of counsel for the plaintiffs in error is that the bridge in question is not, and never was, the property of Cass county, but that the bridge belongs to "Louisville precinct," a political subdivision of said county. It appears that in 1890 "Louisville precinct" voted $10,000 in bonds to aid in the construction of a free wagon bridge across the Platte river. The county authorities of Cass county issued these bonds, sold them, and with the proceeds constructed the bridge in question and accepted it from the contractors; that the bridge since that time has

been used by the traveling public, and though it was not constructed immediately upon a public highway then existing, that it was, as already stated, soon after its construction, connected with public highways on either side of the Platte river by certain citizens purchasing the strips of land lying between the approaches of the bridge and the public highways and laying out or dedicating to the public roads across such strips of land. This bridge is not the property of "Louisville precinct." The bridge is the property of the public. "Louisville precinct" simply donated its bonds to aid in the construction of this bridge, and the county authorities of Cass county built the bridge using the donation of the precinct in aid thereof, and in so doing we must presume that the county authorities of Cass county were acting for and on behalf of that county. They were not compellable by law to construct this bridge even though its construction was desired by "Louisville precinct," and it voted its bonds in aid thereof. We hold, therefore, that since the law makes the middle of the main channel of the Platte river the boundary line between the counties of Cass and Sarpy, that the presumption is that the south half of this bridge is in Cass county, and that it is the duty of the authorities of that county to at all times keep and maintain the south half of said bridge in a safe condition for travel. The judgment of the district court to that extent is

AFFIRMED.

FANNIE M. RANDALL ET AL., APPELLEES, V. NATIONAL BUILDING, LOAN & PROTECTIVE UNION OF MINNEAPOLIS, APPELLANT.

FILED NOVEMBER 20, 1894. No. 5736.

1. **Building and Loan Associations:** MORTGAGES: ACTION TO CANCEL: FORECLOSURE: ISSUE ON APPEAL. A member of a building and loan association, who was also a borrower, brought an action, before the maturity of the stock or loan, to redeem from the mortgage given to secure the loan on the ground of fraud in procuring it. She prayed that the mortgage be canceled on her payment of the amount found by the court to be due. The association brought its action to foreclose the mortgage because of delinquency in interest. The note provided that any such delinquency rendered the whole debt due. The court consolidated the two cases and made a general finding for the plaintiff in the first suit, but ascertained the amount due on the mortgage and decreed a foreclosure and sale. The association appealed. *Held*, That inasmuch as both parties sought the same relief and the appellant obtained all the relief it sought except as to the amount found due, the other issues were immaterial to the appeal.

2. ———: FORFEITURE: ACCOUNTING: PAYMENTS ON STOCK. The plan of a building association was that its members should make certain payments periodically upon the stock and for other purposes, that the stock should mature at a fixed time. Its loans also matured at a fixed time. A member made a number of payments upon the stock and also certain payments of interest and premium. She then ceased to pay, the association declared her stock forfeited and instituted an action to foreclose the mortgage securing the loan. *Held*, That the payments upon the stock should in an accounting of the amount due on the mortgage be treated as payments *pro tanto* on the loan.

3. ———: ———: CONTRACT OF MEMBERSHIP: PAYMENTS ON STOCK. The fact that the contract of membership provided strictly for the forfeiture of stock in case any payment was not made when due did not change the above rule. In an action to enforce the mortgage a court of equity will, under such circumstances, relieve against such forfeiture to the extent of treating the payments made upon the stock as payments upon the loan.

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

The facts are stated by the commissioner.

W. A. Prince and *George D. Emery*, for appellant:

The appellee Fannie M. Randall has no right to recover, either directly or as a credit upon her indebtedness on the mortgage, the premiums or stock dues paid before default, and which have been duly forfeited and so declared. (*Fowler v. Woodward*, 26 Minn., 349; *Northwestern Mutual Life Ins. Co. v. Allis*, 23 Minn., 337; *Smith v. Mariner*, 5 Wis., 551; *Ludlow v. Dutch Rhenish R. Co.*, 21 Beav. [Eng.], 43; *Naylor v. South Devon R. Co.*, 1 De G. & Sm. [Eng.], 32; *Pendergast v. Turton*, 1 Younge & Coll. [Eng.], 98; *Sparks v. Liverpool Water-Works Co.*, 13 Ves. Jr. [Eng.], 433; *Germantown P. R. Co. v. Fitler*, 60 Pa. St., 124; *Small v. Herkimer Mfg. Co.*, 2 N. Y., 335; *Marvin v. Universal Life Ins. Co.*, 39 Am. Rep. [N. Y.], 657; *Roehmer v. Knickerbocker Life Ins. Co.*, 63 N. Y., 160; *Freeman v. Ottawa Building Homestead & Savings Association*, 114 Ill., 182; *Beadle v. Chenango County Mutual Ins. Co.*, 3 Hill [N. Y.], 161; *Attorney General v. North American Life Ins. Co.*, 82 N. Y., 172; *Born v. Schrenkeisen*, 110 N. Y., 59; *Attorney General v. Continental Life Ins. Co.*, 68 N. Y., 443; *How v. Union Mutual Life Ins. Co.*, 80 N. Y., 43; *Klein v. New York Life Ins. Co.*, 104 U. S., 88; *New York Life Ins. Co. v. Statham*, 93 U. S., 24; *Wheeler v. Connecticut Mutual Life Ins. Co.*, 82 N. Y., 543; *Kellner v. Mutual Life Ins. Co. of New York*, 43 Fed. Rep., 623; *Ewald v. Northwestern Mutual Life Ins. Co.*, 60 Wis., 431; *Heim v. Metropolitan Life Ins. Co.*, 7 Daly [N. Y.], 536; *Lantz v. Vermont Life Ins. Co.*, 21 Atl. Rep. [Pa.], 80; *Bosworth v. Western Mutual Aid Society*, 75 Ia., 582; *Ashbrook v. Phœnix Mutual Life Ins. Co.*, 94 Mo., 72; *Pendleton v. Knicker-*

bocker Life Ins. Co., 5 Fed. Rep., 238; *Milligan v. Goddard*, 1 How. Pr., n. s. [N. Y.], 377; *Lyon v. Supreme Assembly Royal Society of Good Fellows*, 26 N. E. Rep. [Mass.], 236; *Alabama Gold Life Ins. Co. v. Thomas*, 74 Ala., 582; *Standley v. Northwestern Mutual Life Ins. Co.*, 95 Ind., 254; *Continental Life Ins. Co. v. Houser*, 89 Ind., 258; *Scheufler v. Grand Lodge A. O. U. W.*, 47 N. W. Rep. [Minn.], 799; *Reeve v. Ladies' Building Association*, 19 S. W. Rep. [Ark.], 917.)

M. Randall, contra.

IRVINE, C.

The defendant was a Minnesota corporation in the nature of a building and loan association. The plaintiff became a member of the association and procured a loan therefrom, executing her note and mortgage, the latter on property in Grand Island, to secure the loan. This was in September, 1889. In 1891 she brought her suit, her husband joining therein, in the district court of Hall county, charging that she was induced by fraud to procure the loan, pleading a tender to the association of all remaining due on the mortgage, asking an accounting of the amount justly due, and that the mortgage be canceled upon her payment into court of the amount so found. Soon after the defendant commenced suit in the same court to foreclose the mortgage. The two actions were consolidated. The court found generally for the plaintiffs in the first action, ascertaining the amount due on the mortgage as $703.06, and ordered that unless this amount should be paid in a time fixed the mortgaged premises be sold to satisfy the debt. The defendant appeals.

A portion of the argument related to the propriety of the court's finding for the plaintiffs, and the petition and proofs are attacked as insufficient to authorize the relief prayed. We cannot see how these questions are material

in the present condition of the case. The plaintiffs asked that they be permitted to pay the amount due. The defendant asked that they be required to pay the amount due. While the decree finds generally for the plaintiffs, it orders a sale of the property if the amount due it is not paid within a time certain. The defendant, therefore, obtained all the relief it sought, unless the court erred in ascertaining the amount of recovery. We think this question is the only one for determination under this condition of the record. The contract of membership in the association required the member to make certain periodical payments as assessments on the stock subscribed, certain payments to the expense fund, and certain other payments, or rather somewhat uncertain payments, to be made as called for, for the purpose of satisfying the stock of its deceased members. The contract of loan required the borrower to pay, in monthly installments, interest on the loan at the rate of five per cent per annum and a "premium" of five per cent per annum. In ascertaining the amount due on the mortgage the court applied the payments made upon the stock of the plaintiff as partial payments of the principal debt. The defendant claims that this was erroneous; that the loan and the membership were by virtue of separate contracts; that they must be treated as distinct; that under the rules of the association the stock payments had become forfeited by delinquency in subsequent payments and that the defendant was entitled to recover the face of the loan, together with all unpaid premiums and interest. It must be here remarked that the court allowed no interest from the commencement of the action to the rendition of the decree. This was correct, provided the court properly assessed the amount of recovery, because the amount so found was less than the tender made before action brought, which was refused by the association.

In order to determine the principal question it will be necessary to state more particularly some of the features

of this particular association. In the first place its plan was that its stock and loans should both mature at a time certain. There was no general provision for a surrender and withdrawal from membership, but the right to withdraw before the maturity of the stock was confined to the representatives of deceased members, who might at their option remain in the association or withdraw. To meet payments on account of such withdrawals the withdrawal assessments before mentioned were made. The contract of membership provided in different places very rigidly that in case any member failed to pay by the time it was due any of the various assessments, his membership should be forfeited and all sums theretofore paid should be forfeited to the association without right to recovery or accounting therefor. The note and mortgage provided that any failure to pay any installment of the interest or premium when due should mature the whole debt. Mrs. Randall subscribed for thirteen shares of stock in September, 1889. Her note and mortgage were dated October 1, 1889, and are for $1,000. The stock was planned to mature in five years. The note was payable fifty-nine months after date. An initiation fee with certain other charges and all assessments, interest, and premium were paid until and including February, 1891, when Mrs. Randall ceased to pay and soon after brought suit. In July, 1891, and before the suit to foreclose was commenced the association passed a resolution declaring Mrs. Randall's stock and the payments thereon forfeited. Under these circumstances is Mrs. Randall entitled to have her stock payments credited upon the loan? In the first place it must be remembered that this association is a foreign corporation and is not entitled to the protection which our statutes (Compiled Statutes, ch. 16, sec. 145 *et seq.*) afford or attempt to afford to such corporations in this state. The events were prior to the amendment of the law referred to in 1891, and the association has not attempted to comply with the provisions of the

amendatory law in regard to foreign corporations. The validity or nature of that legislation is not therefore presented for consideration in this case. The cases are very numerous relating to the respective rights of such associations and their members. A review of them would be tedious and not very useful. A very clear statement of the result of the cases may be found in the note to *Robertson v. Homestead Association*, 69 Am. Dec. [Md.], 145. The law is there stated, with abundant citations, that when a member of an association becomes a borrower the transaction has been considered as so much in the nature of a loan that subsequent payments made by the member upon his stock are partial payments upon his debt, but other cases (and we think the greater weight of the modern cases) is that payment of dues are not *ipso facto* payments upon the mortgage debt and do not operate of themselves to extinguish it *pro tanto*. Still the borrower has a right to so apply them and the association may, in case of default, make such application. A proper regard for the nature of the contract we think leads to the conclusion that during the currency of the debt and membership the accounts arising out of each should be kept separate and that stock payments do not as they are made operate as payments on the debt; but it must not be forgotten that the object of the stock payments is ultimately to satisfy the stock and that in the case of a borrower such payments operate ultimately to satisfy the debt. While a borrower may, if the association works successfully, become entitled to other returns upon his stock, until the debt is satisfied all payments made by him are finally applied to that purpose. We are aware that there always seems to be an effort made to obscure this relationship and to give the transaction a different form, but whatever may be the devices of actuaries to make it appear that payments are investments simply in a profitable stock and that the loan in some mysterious manner pays itself, the fact is that it is

paid from the stock assessments, and that in the contemplation of both parties the stock assessments are to be applied sooner or later to that purpose. The right of either party to so apply them in an organization of this character during the currency of both loan and membership is not here to be decided, but the association has terminated Mrs. Randall's membership by its resolution of forfeiture and has matured the loan by its election to foreclose. This proceeding is, therefore, not one to determine the rights of a continuing membership, but this is a proceeding after membership determined and the loan matured to adjust the correlative rights and duties of the parties. In such case we think it very clear that the stock payments must be applied to the purpose for which they were principally intended, to-wit, as payments on the debt. In case of associations whose shares have an uncertain maturity, elaborate calculations have sometimes to be made in order to determine the present value of the shares, but in this case, where the maturity is certain and the plaintiff renounces all claims to profits, the face of the payments may indicate the proper credits. To avoid this application of the payments the defendant urges the forfeiture clauses of its contract. We agree with the defendant that equity will not ordinarily relieve against such forfeitures, and this rule probably extends so far that if Mrs. Randall had not been a borrower and her stock had been forfeited for delinquency in assessments she might not have the affirmative aid of a court to recover for past payments, but this principle does not extend so far as to induce a court to lend its affirmative aid to enable a lender to recover the face of the debt where payments have been made under an agreement that on certain conditions they may be forfeited. It is more than probable that the effect of this forfeiture would be to deprive Mrs. Randall of the right to participate in any profits which might have arisen on her stock, and when given this effect we think the contract of the parties has been enforced. If A lend

B $1,000, payable in installments of $10 each, B agreeing that if he fail to pay any installment when it comes due, all payments shall be forfeited, and B pay ninety-nine of such installments and fail to pay the one-hundredth, would any court in Christendom permit A to recover the $1,000? It is just such penalties that courts of equity have always relieved against. The treatment of penal bonds, as well as the whole doctrine of mortgages, is based upon a principle of relieving against such forfeitures, or rather refusing to assist them, and the principle which has thus prevailed in such cases for centuries is precisely applicable here. We think, therefore, that the district court proceeded properly in making the computation. In *Lincoln Building & Saving Association v. Graham*, 7 Neb., 173, it is evident this court adopted a similar view in making the computation.

The plaintiffs state in their brief that they took a cross-appeal. Aside from this statement the record bears no evidence of such fact. This is not very material, however, because the plaintiffs state that their cross-appeal is based upon the failure of the district court to find in their favor on their plea of usury. We cannot find on a close examination of the record that the plaintiffs anywhere plead usury in the transaction. The decree of the district court is, therefore, in all things

AFFIRMED

HARRISON, J., not sitting.

HARRISON W. STEARNS ET AL., APPELLEES, V. NATIONAL BUILDING, LOAN & PROTECTIVE UNION OF MINNEAPOLIS, APPELLANT.

FILED NOVEMBER 20, 1894. No. 5737.

Building and Loan Associations: FORFEITURE: CANCELLATION OF MORTGAGES: FORECLOSURE: ACCOUNTING: PAYMENTS ON STOCK. For syllabus see *Randall v. National Building, Loan & Protective Union* 42 Neb., 809.

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

W. A. Prince and *George D. Emery*, for appellant.

M. Randall, contra.

IRVINE, C.

This case is similar in all respects to that of *Randall v. National Building, Loan & Protective Union*, 42 Neb., 809, and the decree is for the same reasons

AFFIRMED.

HARRISON, J., not sitting.

CLARENCE A. LUCE ET AL. V. BLANCHE L. FOSTER ET AL.

FILED NOVEMBER 20, 1894. No. 5234.

1. **Attorneys**: LIABILITY AS BONDSMEN: ESTOPPEL. Under our statute an attorney at law should not become a surety upon a bond in a legal proceeding in the district in which he lives, and if he sign such a bond the clerk should not approve it, but if it be approved, the surety is nevertheless bound thereby. *Tessier v. Crowley*, 17 Neb., 207, followed.

2. **Allegata et Probata.** Under the Code of Procedure, as well as at common law, the *allegata et probata* must agree. A party will not be permitted to plead one cause of action and upon the trial rely upon proof establishing a different cause.

3. **Attorney and Client**: INDEMNITY BOND TO SHERIFF: AUTHORITY OF ATTORNEY TO EXECUTE. An attorney at law, by virtue merely of his employment as such to prosecute an action, has no authority to execute on behalf of his client a bond to indemnify the sheriff from the consequences of levying upon property claimed by a stranger, the client residing and being at the place where the events took place and there being full opportunity for prompt communication between client and attorney.

4. ———: ———: PROCEEDS OF SHERIFF'S SALE. An attorney in such a case has no authority to bind his client by an agreement that the proceeds of execution shall be by the sheriff paid to the surety on the indemnity bond, to be held as security against liability thereon.

5. **Indemnity Bonds**: EXECUTION BY ATTORNEY: LIABILITY OF SURETIES. The bond on its face showing that the client's name was signed by the attorney and not by the client, both the surety and the officer were bound to know that it was done without authority, and under such circumstances the surety must be held to have executed the undertaking absolutely and is not released merely because there was no authorized signature by the principal.

6. **Bonds**: PRIVATE SEALS: CONTRACTS. Our statute having abolished private seals it abolished at the same time their incidents, and an instrument in the form of a bond must be now deemed a simple contract not conclusively importing a consideration.

7. ——: CONSIDERATION: PROOF. Want of consideration for such a bond or the illegality thereof may be shown by parol.

8. **Proceeds of Sheriff's Sale:** DUTY OF SHERIFF. It is the duty of a sheriff under an ordinary writ of execution to pay the proceeds directly to the parties entitled and not return the money into court.

9. ——: AGREEMENT TO PAY THIRD PERSON: SHERIFF: PUBLIC POLICY. Therefore, it is not illegal nor against public policy for the sheriff, by the authority and with the consent of the plaintiff to the writ, to agree to pay the proceeds to a third person, but in order that such agreement shall be lawful it must be made with the consent or by the authority of the person entitled to receive the money.

10. **Contracts:** CONSIDERATION. Where an indivisible promise is founded upon two considerations, one of which is legal and the other illegal, the promise cannot be enforced.

11. **Principal and Surety:** INDEMNITY BOND TO SHERIFF. Therefore, where a surety executes an indemnity bond to a sheriff, the sheriff agreeing to pay the proceeds of the execution to the surety, to be held as security against liability on the bond, neither the principal nor any one authorized by him signing such instrument, *held*, that the surety was not liable on the bond.

12. **Instructions:** CONFLICT: REVIEW. A judgment will not be reversed because of conflicting instructions when that instruction least favorable to the party complaining was more favorable than the law warrants. In such case the conflict in the instructions and the error therein are not prejudicial.

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

See opinion for statement of the case.

C. C. Flansburg, for plaintiffs in error:

The plaintiffs contend that an attorney by signing a bond as surety is bound as such when the bond is approved. (*Tessier v. Crowley*, 17 Neb., 209.)

L. B. McManus was a joint trespasser with the sheriff. (*Sprague v. Kneeland*, 12 Wend. [N. Y.], 161; *Shaw v.*

Rowland, 32 Kan., 154; *Peterson v. Foli*, 67 Ia., 402; *Walker v. Wonderlick*, 33 Neb., 504.)

By giving the bond the defendants became responsible for the continuance of the wrongful possession and for the sale, transfer, and conversion of the goods, and are liable for all damages plaintiffs sustained. (*Lovejoy v. Murray*, 3 Wall. [U. S.], 1; *Lewis v. Johns*, 34 Cal., 629; *Davis v. Newkirk*, 5 Denio [N. Y.], 92; *Ford v. Williams*, 13 N. Y., 584; *Ball v. Loomis*, 29 N. Y., 412.)

The rights of plaintiffs to proceed upon the bond should be determined in the same manner as though the action was brought by Peter Roth. (*Dillon v. Schofield*, 11 Neb., 423; *Richards v. Yoder*, 10 Neb., 431; *Wilson v. Burney*, 8 Neb., 43; *Eaton v. Hasty*, 6 Neb., 425; *Burr v. Boyer*, 2 Neb., 268.)

The attorney of the execution creditor had power under his original retainer to authorize the sheriff to depart from the regular and orderly course of execution; and when the attorney gave the sheriff specific directions as to his course of procedure, the latter became the agent of the party for whom the attorney acted. (*Sheldon v. Risedorph*, 23 Minn., 519; *Schoregge v. Gordon*, 29 Minn., 367; *Gorham v. Gale*, 7 Cow. [N. Y.], 740.)

The continued employment of the attorney after judgment may be regarded as vesting in him authority to collect the judgment by the usual modes, and to use the usual expedients, hostile or otherwise, for this purpose; and promises by the attorney bind the creditor, though not assented to by the latter at the time. (Wharton, Agency, sec. 589; *Jenney v. Delesdernier*, 20 Me., 183; *Read v. French*, 28 N. Y., 285; *Erwin v. Blake*, 8 Pet. [U. S.], 18; *Scott v. Seiler*, 5 Watts [Pa.], 235; *Lynch v. Commonwealth*, 16 S. & R. [Pa.], 388; *Nelson v. Cook*, 19 Ill., 440; *Corning v. Southland*, 3 Hill [N. Y.], 552; *Hyams v. Michel*, 3 Rich. [S. Car.], 303; *Hopkins v. Willard*, 14 Vt., 474; *Willard v. Goodrich*, 31 Vt., 597; *Gorham v. Gale*, 7 Cow. [N. Y.],

739; *Day v. Wells*, 31 Conn., 334; *Steward v. Biddlecum*, 2 N. Y., 103; *Silvis v. Ely*, 3 Watts & S. [Pa.], 420.)

The obligors signing the bond are liable thereon though the bond was not signed by the principal, the officer having sold the goods and applied the proceeds on the execution, and judgment was subsequently recovered against him for the value of the goods. (*Bollman v. Pasewalk*, 22 Neb., 761; *State v. Bowman*, 10 O., 445.)

The defendant McManus cannot now question the genuineness or the authority of the signature of Blanche L. Foster to the bond. (*Lombard v. Mayberry*, 24 Neb., 684; *Bigelow v. Comegys*, 5 O. St., 256; *United States v. Linn*, 15 Pet. [U. S.], 290; *Parker v. Bradley*, 2 Hill [N. Y.], 584; *Artcher v. Douglas*, 5 Denio [N. Y.], 509.)

Sureties are bound by recitals. (*Martin v. Bolenbaugh*, 42 O. St., 508.)

W. S. Morlan, contra:

It is admitted that Blanche L. Foster is bound by the acts of her attorneys within the scope of their authority; and as such attorneys they might, in her name, execute an appeal bond and various other bonds, but had no authority to execute an indemnity bond. (1 Am. & Eng. Ency. Law, 957; *Snow v. Hix*, 54 Vt., 478; *Averill v. Williams*, 4 Denio [N. Y.], 295; *Welsh v. Cochran*, 63 N. Y., 181; *Schoregge v. Gordon*, 29 Minn., 367; *Clark v. Randall*, 9 Wis., 135*.)

Some authorities hold that an attorney may execute an indemnity bond when his client is at a distance and cannot be consulted; but no case is cited and none has been found holding that where the client can be consulted that the attorney has, without his client's consent, authority to direct a levy on property claimed by another. (*Sheldon v. Risedorph*, 23 Minn., 519; *Gorham v. Gale*, 7 Cow. [N. Y.], 740.)

A bond executed by the sureties only, and not by the

person named as principal, does not bind the sureties. (1 Am. & Eng. Ency. Law, 457; *Wood v. Washburn*, 2 Pick. [Mass.], 24; *Bean v. Parker*, 17 Mass., 591; *People v. Hartley*, 82 Am. Dec. [Cal.], 758.)

There can be no action maintained on the bond because the sheriff failed to perform the contract to turn the proceeds of the sale over to McManus. (*Babcock v. Deford*, 14 Kan., 408; *Bradley v. Washington, Alexandria & Georgetown Steam-Packet Co.*, 13 Pet. [U. S.], 89; *Lapham v. Whipple*, 8 Met. [Mass.], 59; *Lewis v. Gray*, 1 Mass., 297; *Weeks v. Medler*, 20 Kan., 57.)

The agreement that the amount realized from the sale of the property levied upon should be turned over to McManus during the litigation is surely not against public policy, for the reason that the attorneys had a right to receive the money realized from the sale and therefore the right to control it.

IRVINE, C.

The plaintiffs in error were the plaintiffs in the district court and in their petition they allege that one Charles H. Brown had for a certain term been sheriff of Harlan county; that plaintiffs were sureties on his official bond; that while Brown was sheriff the defendant Blanche L. Foster caused an execution to be issued on a judgment in her favor against certain persons named; that in consideration of Brown's proceeding to sell certain property levied upon under such execution and claimed by Peter Roth, a stranger to the writ, the said Blanche L. Foster, together with the defendants John Dawson and L. B. McManus, executed to Brown a bond of indemnity conditioned to pay him the penal sum thereof if the property so levied upon was not the property of the judgment debtors or either of them; that in consideration of said bond Brown sold the property; that Roth began an action against him in replevin and recovered judgment; that Brown was insolvent

and unable to pay said judgment and Roth brought suit against the plaintiffs and recovered a judgment, which they were compelled to pay; that Brown had assigned the indemnity bond to the plaintiffs and that the defendants had been notified of the pendency of the proceedings alleged, and required to defend the same, and to hold Brown harmless; but they had failed so to do. The record shows neither service upon nor appearance by the defendants other than McManus. He filed an answer, and the questions litigated were those raised between him and the plaintiffs. His answer set up several defenses or facts alleged to constitute defenses. The assignments of error and the argument in this court relate to only two of these and they alone will be considered. One of these was that the indemnity bond sued upon was never signed by Blanche L. Foster, the principal, and that her attorneys had no authority to sign the same, a fact alleged not to have been known to McManus when he signed. The other defense involving questions presented here was that Brown agreed with McManus, with the consent of Blanche L. Foster's attorneys, that in consideration of McManus signing the bond the proceeds of the sale of all the property levied upon should be paid to McManus, to be by him held until the end of all litigation in regard to the ownership of the property, and if anything should be recovered on the bond, if sued upon, McManus should use the money so received to discharge such liability; that Brown had sold the property for $1,347, had wrongfully paid to the attorneys for Mrs. Foster $940 thereof, and had converted the remainder to his own use, and had never paid any of the proceeds of the sale to McManus. It may be here remarked that the answer also alleged that the indemnity bond was invalid, for that McManus' co-surety, Dawson, was an attorney at law and, therefore, not a proper surety under section 14, chapter 10, Compiled Statutes, providing that no practicing attorney shall be taken as surety on any bond in any

legal proceedings in the district in which he may reside. We do not understand that this defense is now insisted upon, but it may be safe to remark that it is not well taken. A practicing attorney should not sign a bond in a legal proceeding as surety; if he sign such a bond, the clerk should refuse to approve it; but if he do sign the bond, and if it be approved, he is estopped from alleging its invalidity, and it may be enforced both against him and the other parties thereto. (*Tessier v. Crowley*, 17 Neb., 207.)

There was a verdict and judgment in favor of McManus, to reverse which plaintiffs assign seven errors. A consideration of the assignment that the verdict was not sustained by the evidence necessarily involves a determination of all the questions arising under the special assignments. A consideration of the sufficiency of the evidence therefore disposes of all questions presented and the special assignments will not be noticed by themselves. There is one assignment relating to the admission of evidence which would not fall within the foregoing remark, but it is not discussed in the briefs and will, therefore, be deemed to be waived. The evidence is somewhat conflicting upon the minor points, but not upon the principal facts. It shows, or tends to show, that Brown having as sheriff received an execution on a judgment in favor of Blanche L. Foster against certain persons, he was about to levy on property found in the possession of the judgment debtors. He was informed that the property belonged to Peter Roth. He took an inventory thereof, but did not complete his levy and refused to proceed unless indemnified. The attorneys of Mrs. Foster were John Dawson and T. Judson Ferguson. Mr. Dawson asked McManus to sign the bond, and McManus offered to do so if the proceeds of sale were turned over to him to hold as security until the litigation was ended. They then went to Mr. Brown and the same statements were made. An understanding was reached that such disposition should be made of the money. The bond

was then signed as follows: "Blanche L. Foster, by T. Judson Ferguson, her att'y, John Dawson, L. B. McManus." The sheriff completed his levy and was proceeding to sell the property when Roth commenced the replevin suit. He failed to give bond and the action proceeded as one for damages, resulting in a judgment against Brown in favor of Roth. In the meantime Brown had sold the property under the execution, Ferguson and Dawson bidding in a portion thereof, paying no cash therefor, with the purpose of their bids being credited upon the judgment. The remainder of the money was paid to Dawson and deposited in the bank of which McManus was president. It is uncertain in what manner this payment was made, but the deposit was certainly to the credit of Dawson, the money was checked out by him and it was not paid to McManus or placed in anywise under his control. Roth being unable to realize on his judgment in the replevin suit, sued the plaintiffs on the sheriff's official bond and recovered judgment which the plaintiffs paid. It very clearly appears that Mrs. Foster, at the time the bond was given, lived in Alma, where the events took place; that Mr. Ferguson also lived there and could have consulted her in regard to the bond or any other matter; that he did not do so, and that she was for a long time after all the events complained of, ignorant of the fact that the bond had been given and of all the circumstances connected with the levy and the sale. On this state of the case McManus contends that Ferguson had no authority to execute the bond on behalf of his client, and that there being no authorized execution by the principal he, as surety, is not bound. Further, that if Ferguson had authority to execute the bond, Dawson as co-attorney had authority to make the collateral agreement whereby the proceeds of the sale were to be deposited with McManus as security, and that this agreement being made with the sheriff as well as the judgment creditor, was binding and not against public policy, and the failure to perform dis-

charged McManus' liability. On the other hand, the plaintiffs contend that Mrs. Foster's attorney, by virtue of that relationship, had authority to execute the bond on her behalf. If he had not, it would still be binding on the sureties; but beyond this there was no authority to bind her by the agreement that the sheriff should pay the proceeds of the sale to McManus, and in any event parol evidence would be inadmissible to establish such an agreement. The plaintiffs also contend that McManus, by signing the indemnity bond, became an actor and a participant in the unlawful proceedings of the sheriff, and that there arose from such act a liability *ex delicto* in favor of Roth against McManus; that by the payment of the judgment procured against plaintiffs by Roth, plaintiffs became subrogated to Roth's right of action against McManus. We need not inquire as to the soundness of this theory of subrogation because the plaintiffs have not based their action on any such claim. They have sued upon the bond of indemnity and traced their rights thereunder and not through Roth's. Under the Code, as well as at common law, the *allegata et probata* must agree. (*Traver v. Shaefle*, 33 Neb., 531; *Imhoff v. House*, 36 Neb., 28.) The petition counting upon the bond of indemnity and the liability accruing thereunder, the plaintiffs could not be permitted to introduce evidence and recover upon a liability *ex delicto*, the advantages of which accrued to them, if at all, from an entirely different source.

With these incidental questions disposed of, the first question essential to the determination of the case is whether or not Ferguson, as Mrs. Foster's attorney, had authority to execute the indemnity bond on her behalf. It is not pretended that any special authority existed, and if any authority existed it was by virtue of the general employment of Ferguson for the purpose of prosecuting the action resulting in the judgment on which the execution was issued. It must be assumed that Ferguson's general

authority did not cease with the procurement of the judgment. If there be any doubt as to the continuance of an attorney's employment in this state after judgment, it does not arise in this case, for the evidence shows that Mrs. Foster did contemplate the collection of the judgment by Dawson and Ferguson, and she ratified their action by receiving a portion of the proceeds of the execution. This was not, however, a ratification of Ferguson's act in executing the indemnity bond, because the evidence shows that when she received the money she was not aware that any such bond had been made or that there was an adverse claim to the property levied upon. The inquiry, therefore, limits itself to the question whether an attorney authorized to collect a judgment has implied authority to sign his client's name to a bond of indemnity running to the sheriff to protect him against adverse claims to the property levied upon. The general authority of an attorney by virtue of his employment has been well stated as including the doing on behalf of his client of all acts in or out of court necessary or incidental to the prosecution or management of the suit and which affect the remedy only and not the cause of action. (*Moulton v. Bowker*, 115 Mass., 40.) Substantially similar language has been used by many courts in defining the general authority of attorneys. The authority is usually plenary on all matters affecting the remedy, but does not at all exist in regard to matters affecting the substantial rights of the client to enforce which the attorney is employed. This distinction may readily be illustrated. An attorney employed to make collections has no authority to release a surety on a note (*Stoll v. Sheldon*, 13 Neb., 207); nor to compromise a valid judgment (*Hamrick v. Combs*, 14 Neb., 381); nor may he compromise his client's cause of action even under the cloak of an award which was pre-arranged (*Holker v. Parker*, 7 Cranch [U. S.], 436). The foregoing acts affect the cause of action; but with respect to procedure and matters affecting the remedy alone

the client is presumed to confer on the attorney authority to do all things which the latter, by virtue of his superior legal knowledge, deems necessary or proper. (*Foster v. Wiley*, 27 Mich., 244.) Thus, the attorney may consent to selling attached property of a perishable nature. (*Nelson v. Cook*, 19 Ill., 440.) He may agree that if a foreclosure sale is had pending an appeal the proceeds shall be deposited in court subject to the final determination of the case. (*Halliday v. Stuart*, 151 U. S., 229.) So it has been held that he may release an attachment. (*Moulton v. Bowker*, 115 Mass., 36; *Jenney v. Delesdenier*, 20 Me., 183.) We have stated and illustrated the general rule because it goes far towards reconciling the many cases apparently conflicting with one another which have been cited as affording analogies to the case at bar. It must be remembered, however, that the rule is but general and does not supply an absolute test. Thus, an attorney cannot authorize an execution to issue against his client when a proper supersedeas is on file. (*State Bank of Nebraska v. Green*, 8 Neb., 297.) The exception in the application of the rule seems to be that in a matter affecting the remedy the attorney cannot, without special authority, perform acts which sacrifice his client's substantial rights or involve him in new liabilities to third persons. It is probable that this distinction may account for the fact that the New York courts have held that an attorney may conduct proceedings in aid of execution to reach the judgment debtor's choses in action (*Steward v. Biddleman*, 2 N. Y., 103); but may not direct a levy upon particular property (*Averill v. Williams*, 4 Denio [N. Y.], 295; *Welsh v. Cochran*, 63 N. Y., 181). So, in the absence of a statute authorizing it, it is not a professional duty to provide security for appeal (*Winborn v. Byrd*, 92 N. Car., 7; *Churchill v. Brooklyn Life Ins. Co.*, 92 N. Car., 485); and, therefore, he may not sign on behalf of his client an appeal bond (*Ex parte Holbrook*, 5 Cow. [N. Y.], 35; *Clark v.*

Courser, 29 N. H., 170). In the latter case the decision rested partly on the ground that authority to execute a sealed instrument must be created by instrument under seal. Our statute (Compiled Statutes, ch. 7, sec. 7) gives to an attorney power to execute in the name of his client a bond for an appeal, *certiorari*, writ of error, or any other paper necessary and proper for the prosecution of a suit already commenced. This statute clearly extends the authority of an attorney so far as to authorize him to bind his client by any bond or undertaking which the law requires or authorizes in the direct prosecution of an action; but the general term must be construed with reference to the particular terms preceding, and we cannot regard the statute as extending the attorney's power to the execution of bonds not judicial or statutory, but voluntary and collateral to the main purpose of the action. It has been held that where the client resides at a distance an attorney employed to collect debts has implied authority to indemnify the officer. (*Clarke v. Randall*, 9 Wis., 135*; *Schoregge v. Gordon*, 29 Minn., 367.) In each case emphasis was placed upon the fact of the client's absence, from which it must have been contemplated that exigencies were likely to occur requiring, for the client's protection, prompt action before communications could be had and specific instructions obtained, and the authority is implied from that feature of the situation. The absence of the client as extending the attorney's authority is also referred to and the same reasons advanced in *Scott v. Seiler*, 5 Watts [Pa.], 235, and *Hopkins v. Willard*, 14 Vt., 474. In this case the client was a neighbor of the attorney and could have been readily consulted, a fact known to both surety and sheriff.

From this review of the authorities we conclude that the implied authority of an attorney to bind his client in matters affecting the remedy does not generally exist where the act performed is such as to devolve upon the client new liabilities to third persons; that this exception prevents an

attorney from directing a levy upon property claimed by a stranger and executing on behalf of his client a bond to indemnify the sheriff from the consequences of such levy; that while such authority may be implied in case of an absent client, it is then implied from the impossibility of obtaining special instructions in such case and the intention presumed therefrom of committing to the attorney a wider discretion. Such authority will not be presumed merely from the relationship of attorney and client where it is practicable for the attorney to consult the client and obtain special directions. If Ferguson had no authority to sign Mrs. Foster's name to the bond, it follows, *a fortiori*, that Dawson had no authority to bind Mrs. Foster by the collateral agreement that the proceeds of the sale should be paid to McManus in consideration of his signing the bond as surety. Ferguson being without authority to execute the bond on behalf of Mrs. Foster, the question then arises as to the effect of that want of authority on the liability of McManus. It was held in *Bollman v. Pasewalk*, 22 Neb., 761, that such a bond, voluntarily given, bound the surety although the principal did not sign it; and in *Lombard v. Mayberry*, 24 Neb., 674, it was said that the surety who signs an obligation after the names of others admits without warranty the genuineness of those signatures, and if such names be forged without his knowledge and without complicity of the holder, it is no defense to the surety that he believed such signatures were genuine. This case is somewhat peculiar, in that on one hand it does not present a case of incomplete execution, and on the other hand that it does not present a case such as suggested in the last case cited of a forgery unknown to the surety as well as to the obligee. Here it must be held that as a matter of law both McManus and Brown were bound to know that the signature of Mrs. Foster's name by Ferguson was unauthorized. We think here there is greater reason for holding the sureties than in *Bollman v. Pasewalk*, where execution by the

principal may have been contemplated. McManus and Brown both being aware that the signature of Mrs. Foster was unauthorized, we think McManus must be held to have executed the obligation voluntarily and absolutely, and that the want of execution by Mrs. Foster is in itself no defense for McManus. The inquiry, therefore, as to Ferguson's authority would be in a measure irrelevant but for the manner in which it affects the validity of the agreement in regard to the disposition of the proceeds of sale.

We are now brought to a consideration of the questions arising upon the agreement referred to. It is urged by the plaintiffs that McManus will not be permitted to show any such agreement because it would contradict and vary the terms of the bond. In support of this contention we are cited to *Bigelow v. Comegys*, 5 O. St., 256, and *Martin v. Bolenbaugh*, 42 O. St., 508. Neither of these cases is in point. *Bigelow v. Comegys* simply held that the obligor of a bond could not avoid his liability by showing that his signature was obtained by fraud of one of his co-obligors without participation of the obligee; while *Martin v. Bolenbaugh* held that the obligors in an indemnity bond were estopped to deny the recital that the goods in controversy were claimed by other persons than the defendant in the action. On the other hand, it has been held in this state, following the general rule, that evidence can be received of a contemporaneous distinct oral agreement upon the performance of which the written contract was to depend. (*Norman v. Waite*, 30 Neb., 302; *Barnett v. Pratt*, 37 Neb., 349.) Furthermore, parol evidence is always admissible in the case of simple written contracts to prove that there was no consideration or that the consideration was illegal. (1 Greenleaf, Evidence, 304; *Rawson v. Walker*, 1 Stark. [Eng.], 361; *Folsom v. Mussey*, 8 Greenl. [Me.], 400; *Barker v. Prentiss*, 6 Mass., 430.) The reason of such cases as hold the contrary in regard to bonds is that a bond being under seal it imports a consideration, but our

statutes having abolished the use of seals we must treat this instrument as a simple contract. The incidents of the seal fell with the seal itself. It was, therefore, proper to admit the evidence of the parol agreement. Was this a valid agreement? It is upon this question that the want of authority of Mrs. Foster's attorneys to act for her becomes important. There can be no doubt that our Code contemplates that the sheriff shall himself disburse the money received on execution, and that he is not under an ordinary execution required to pay it into court for disbursement there. There is no direct provision in that behalf, but by section 513 the sheriff is subject to amercement for refusing or neglecting to pay over to the plaintiff, his agent or his attorney of record, all moneys by him collected or received for the use of such party. By section 507 the sheriff is required, if the sale realizes more than is sufficient to satisfy the writ, to pay the balance to the defendant, and by section 517 the sheriff to whom an execution has been issued from another county is authorized, at the instance of the plaintiff, to return the money by mail. The sheriff was then authorized to pay the proceeds of the execution directly to the plaintiff, and it follows that he might have paid them to a third person at the plaintiff's instance and would be guilty of no breach of duty in so doing. If, therefore, it had appeared that the acts of Ferguson and Dawson, in procuring the execution of the indemnity bond and in agreeing that the proceeds of the sale should be paid to McManus, had been authorized by Mrs. Foster, the sheriff would have then been justified in agreeing to so dispose of the money; but we have held that neither the signing of the bond, nor the making of the collateral agreement, was within the authority of the attorneys, and this being so the sheriff had no right to pay the money realized on execution to any one but Mrs. Foster, her agent or attorneys of record; nor had he any right to agree to so do. The making of the bond by McManus was in consideration, first, that Brown would

proceed to sell the goods, and second, that he would pay the proceeds to McManus instead of the plaintiff or her attorneys of record. The latter consideration was illegal. When any portion of the consideration is illegal the promise cannot be enforced unless there are several promises, and that which relates to the bad consideration can be distinguished and separated from the others. In other cases the promise is unenforceable. All the text-writers so state the rule. (See, for instance, Wharton, Contracts, 339; Anson, Contracts, 191; Pollock, Contracts, 338.) The rule is so well settled that a reference to the adjudications is unnecessary. It may be well to remark, however, that it has been recognized in *McCann v. McLennan*, 3 Neb., 25, and that the earliest case usually cited in support of the rule is very similar to that we are considering. (*Featherston v. Hutchinson*, 1 Cro. Eliz. [Eng.], 199.) It follows from the foregoing discussion that the evidence sustains the verdict, and, as we have already said in examining this question, we have incidentally determined all others presented.

The plaintiffs complain that certain instructions were conflicting. This is true. In one instruction the jury was told, in effect, that McManus would not be liable provided the sheriff failed to comply with the agreement in regard to disposing of the money realized. By another instruction the jury was told that the failure to so dispose of the money would not affect McManus' liability. In the view we take of the law McManus' freedom from liability did not depend upon the breach of the agreement but upon the fact that the agreement was illegal and so defeated the promise founded thereon. Of the conflicting instructions, therefore, that least favorable to the plaintiffs was still more favorable to them than the law warranted, and the giving of these instructions was, therefore, not prejudicial. Judgment

AFFIRMED.

THOMAS C. LAIRD v. CHARLES J. LEAP.

FILED NOVEMBER 21, 1894. No. 5873.

Jurisdiction of County Court of Contest of Election of School District Officer. The jurisdiction conferred upon county courts in section 71, chapter 26, Compiled Statutes of 1893, to hear and determine contests of election of certain officers therein stated, does not include an action to contest the election of a school district officer.

ERROR from the district court of Nuckolls county. Tried below before BUSH, J.

S. W. Christy, for plaintiff in error, cited: *Foxworthy v. Lincoln & F. R. Co.*, 13 Neb., 398; Wells, Jurisdiction, secs. 40, 43, 44, 66; 1 Black, Judgments, secs. 216–218.

S. A. Searle, also for plaintiff in error.

R. D. Sutherland, contra.

HARRISON, J.

The defendant in error instituted an action in the county court of Nuckolls county to contest the election of plaintiff in error to the office of director of school district No. 7 of said county. It appears from the record that an answer was filed by the plaintiff in error, in which he alleged as one of the defenses the following:

"2. That the facts stated in said complaint do not state a cause of action or cause of contest over which this court has jurisdiction to hear, try, and determine the rights of the parties to the said office in controversy."

It is stated in one of the briefs filed that there was a trial in the county court, but there is no bill of exceptions in the record and the evidence does not seem to have been preserved. There was a judgment rendered in the county

court ousting the plaintiff in error and declaring the defendant in error entitled to the office, and ordering all books, etc., belonging to the office to be turned over to him. The plaintiff in error removed the case to the district court for review, where the judgment of the county court was affirmed, and he has further prosecuted the error proceedings to this court.

The only question argued by the counsel for the parties in the briefs filed is the right of the county court to entertain and try a contest of an election of school director, or its lack or want of jurisdiction over such a proceeding. Section 70, chapter 26, Compiled Statutes, 1893, confers jurisdiction upon district courts to hear and determine certain contests of election as follows: "The district courts of the respective counties shall hear and determine contests of the election of county judge and in regard to the removal of county seats, and in regard to any other subject which may by law be submitted to the vote of the people of the county, and the proceedings therein shall be conducted as near as may be hereinafter provided for contesting the election of county officers." Section 71, immediately following, states: "The county courts shall hear and determine contests of all other county, township, and precinct officers, and officers of cities and incorporated villages within the county." It will be noted that in section 70 district courts are given the jurisdiction to hear cases in which the election of a county judge is contested, and in section 71 the county court, contests of all other county, "township, and precinct officers," etc. If the county court had any jurisdiction of this case, it must have been acquired under section 71 above quoted, as it is not conferred in any other portion of our statutes, and in order that the county court have jurisdiction in such a case it must be given by statute. Says COBB, J., in *Foxworthy v. Lincoln & F. R. Co.*, 13 Neb., 399: "County courts are courts of limited jurisdiction. Says the constitution, 'County courts shall be courts of record, and

shall have original jurisdiction in all matters of probate, settlement of estates of deceased persons, appointment of guardians and the settlement of their accounts, in all matters relating to apprentices, and such other jurisdiction as may be given by general law.' The jurisdiction claimed for such courts in this case, then, not being a matter of probate, nor relating to the settlement of estates of deceased persons, appointment of guardians or the settlement of their accounts, nor a matter relating to apprentices, to be sustained, must be found expressed in a general statute." We do not think a school director can be said to be within the meaning of section 71, "other county" officers evidently referring to the sheriff and clerk, etc., who are county officers proper as distinguished from state or officers of the divisions of the county or municipal officers. In the case of *Frans v. Young*, 30 Neb., 363, which was a case tried on an information in the nature of a *quo warranto* to determine the right of the respondent to the office of moderator of a school district, it was argued that one of the parties to the cause was not properly qualified as such officer because he had never taken the oath of office. NORVAL, J., in deciding this point, says: "It is conceded by the respondent that the school law contains no provision requiring a person elected to the office of moderator of a school district to take an oath of office. But it is claimed that section 1 of chapter 10 of the Compiled Statutes requires school district officers to take the usual oath of office. That section provides that 'all state, district, county, precinct, township, municipal, and especially appointed officers, except those mentioned in section 1, article 14, of the constitution, shall, before entering upon their respective duties, take and subscribe the following oath, which will be indorsed upon their respective bonds,' etc. The word 'district,' as used in this section, refers solely to judicial district officers, and unless school district officers are municipal officers, it is apparent that they are not controlled by the

provisions of said section." We think it clear that school district officers are not county officers; neither are they precinct or township officers. Each of these designations has reference to a particular set of officers, of a well defined division of the county, and no other officers are mentioned in section 71 except those of cities and incorporated villages or municipal officers. We are well satisfied that our statutes do not give the county courts jurisdiction in cases of contests of election of school district officers, hence the county court was without jurisdiction in the case at bar and should have dismissed it. It follows that the district court erred in affirming the decision of the county court, and its judgment is therefore reversed and the case remanded to the district court for further proceedings in accordance with the views herein expressed.

REVERSED AND REMANDED.

A. S. SANDS ET AL. V. FRONTIER COUNTY.

FILED NOVEMBER 21, 1894. No. 5566.

1. **County Attorney:** ASSISTANT COUNSEL: EMPLOYMENT: PROOF. Where attorneys claim compensation on account of services rendered as assistants of the county attorney in the trial of a criminal cause, they must make proper proof that their employment by the county attorney was under the direction of the district court of the proper county.

2. ———: ———: TRIAL ON CHANGE OF VENUE: COMPENSATION. Attorneys duly employed by the county attorney of one county to assist in the trial of a cause therein pending are not required or authorized, even on the request of such county attorney, to follow said cause on change of venue to another county; and if, notwithstanding this fact, they do so, they will not thereby entitle themselves to compensation for such unauthorized assistance as thereafter they may render.

ERROR from the district court of Frontier county. Tried below before WELTY, J.

Frank Selby, E. E. McGintie, and *A. S. Sands,* for plaintiffs in error.

L. M. Graham, contra.

RYAN, C.

By appeal from the county commissioners of Frontier county this cause was brought up to the district court of said county, wherein a trial was had resulting in a verdict and judgment in favor of plaintiffs in error for the sum of $101. They prosecute error to this court because, as they claim, the verdict was for too small an amount. Their verified statement of claim, as filed with the clerk of the aforesaid county, was in the following words and figures:

"Claim bill 280. STOCKWELL, NEB., Dec. 6, 1891.

"FRONTIER COUNTY,

"To J. R. PATRICK AND A. S. SANDS, DR.

1891.

Nov. 30. Two days' services, assistant prosecuting attys., State v. W. H. Adams...$100 00

Dec. 4. Two days' services, assistant prosecuting attys., State v. W. H. Adams... 100 00

$200 00"

This claim was allowed only to the extent of $100. In the petition in the district court there was set out the following order, which plaintiffs claim justified them in rendering the services described in their bill, to-wit:

"STATE OF NEBRASKA, } ss. District Court.
FRONTIER COUNTY, }

"On the application of the county att'y of said county it is by the court found expedient and necessary that he have some att'y to assist him in the prosecution of the case

of the State of Nebraska v. J. W. & W. H. Adams. It is therefore ordered that the county att'y of this county is authorized and directed to employ Patrick & Sands as atty's to assist the said county att'y in the prosecution of the said action in the court. J. E. COCHRAN,

"Dated Nov. 17, 1891. *Judge of the District Court.*"

In the answer there was a denial of the averment that the district judge appointed plaintiffs to assist in the prosecutions aforesaid. On the trial there was offered in evidence no written instrument signed by the aforesaid judge which would justify the employment of the plaintiffs in error for the rendition of the services by them for which they now claim compensation. There was testimony that the county attorney of Frontier county requested plaintiffs to assist in the trial of the state case in Gosper county after it had been removed to that county for trial. As the board of county commissioners of Frontier county allowed the portion of the claim which referred to the services rendered in that county, we have now for consideration presented only the question whether or not plaintiffs in error are entitled to compensation for services rendered in Gosper county upon the trial of the state case therein had. In support of their claim plaintiffs cite section 20, chapter 7, Compiled Statutes, which provides: "The county attorney may appoint one or more deputies, who shall act without any compensation from the county, to assist him in the discharge of his duties; *Provided,* That the county attorney of any county may, under the direction of the district court, procure such assistance in the trial of any person charged with the crime of felony as he may deem necessary for the trial thereof, and such assistant or assistants shall be allowed such compensation as the county board shall determine for his services, to be paid by order on the county treasurer upon presenting to said board the certificate of the district judge before whom

said cause was tried certifying to the services rendered by such assistant or assistants." In this case it was not denied that a certificate was made by Judge Cochran conforming to the above requirement with respect to both items of the account presented by plaintiffs. That a certificate of this character could have no other or greater force than evidence was held in *County of Boone v. Armstrong*, 23 Neb., 764. In *Fuller v. Madison County*, 33 Neb., 422, this language was used by Judge NORVAL, who delivered the opinion of this court: "That it is the duty of the county attorney to represent the state in all criminal prosecutions in the district court of his county, is too plain to admit of a doubt. The duty and obligation thus imposed applies to criminal causes removed to the county upon a change of venue from an adjoining county. This was expressly ruled in *Gandy v. State*, 27 Neb., 707." As it was the duty of the county attorney of Gosper county to prosecute this case when by change of venue it came into that county, there devolved upon the county attorney of Frontier county no duty to follow it. Authorized by the provision of section 20 above quoted, the county attorney, under the direction of the district court, might procure assistance in the trial of any felony, but we cannot understand how he could procure assistance to do that which he himself was not required to do; that was, in this instance, to follow a criminal case into another county. If, therefore, he could employ no assistance for that purpose, no compensation could be recovered; for, in such case the service rendered would be without authority of law. As has already been noted, there was no relevant proof made on the trial as to directions having been made by the district court for the procurement by the county attorney of assistance, and, even if there had been, such assistance could not lawfully by him be procured to render services in a county other than that for which he was attorney. The verdict could not properly have been for more than it was in any event. We are therefore re-

lieved of the necessity of examining other questions presented. The judgment of the district court is

AFFIRMED.

ISAAC WHITMAN V. STATE OF NEBRASKA.

FILED NOVEMBER 21, 1894. No. 6916.

1. **Criminal Law:** WEIGHT OF EVIDENCE: REVIEW. The jury must determine the weight of evidence adduced, and its estimate thereof will not be interfered with, unless it is clearly wrong.
2. **Burglary:** EVIDENCE: INSTRUCTIONS. An instruction *held* proper which, in effect, left it to the jury to determine what weight and effect should be given the circumstance that the accused, soon after the burglary charged, was in possession of goods which had been taken from the store where the burglary had been committed.

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

J. C. Johnston, for plaintiff in error.

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

RYAN, C.

Plaintiff in error was convicted of the crime of burglary in the district court of Lancaster county, and was sentenced to an imprisonment of eighteen months' duration, and to pay the costs of prosecution. On the hearing of the motion for a new trial there appears to have been used certain affidavits which are identified by a mere certificate of the clerk of the aforesaid district court. This did not cure the failure, by bill of exceptions, to render certain the claim now made that they were used as evidence. (*Zimmer-*

man v. Klingeman, 31 Neb., 495; *Fitzgerald v. Benadom*, 35 Neb., 317; *Maggard v. Van Duyn*, 36 Neb., 862; *Berneker v. State*, 40 Neb., 810.) There was no question that during the night following the 22d day of November, 1893, a burglary was committed by the breaking and entering of a store in Malcolm as charged. The contested point was whether or not plaintiff in error was a party to it. There was evidence that shortly before the crime referred to was committed plaintiff in error had boasted that he and others were going to make some money; that when asked if they intended to "make it crooked," plaintiff in error answered, "it didn't make any difference, but they were going to make it—going to haul the whole damn thing away." The object of the burglars was larceny, and the evidence showed that groceries, dry goods, clothing, handkerchiefs, etc., were removed from the store building broken into; that a wagon had been placed near the back door thereof to receive the stolen property; that this wagon was traced directly to the city of Lincoln on the morning of November 23, the "wabbling" of one of the wheels in the frost rendering this an easy matter; that between the hours of 7 and 9 o'clock in the forenoon of the day last named plaintiff in error offered for sale and actually sold to one John L. Cox, in the northern part of the city of Lincoln, a portion of the goods which had been removed from the plundered store at Malcolm. The fact of the sale of these goods rests almost entirely upon the evidence of the purchaser, who, in giving testimony, admitted that when he bought the goods he suspected they had been stolen, and hinted as much to the plaintiff in error, who, by a knowing smile, gave him to understand that his surmise was correct. This witness at the time of this trial had pleaded guilty to the charge of receiving stolen property, knowing it to be such. He also was shown to have made contradictory statements as to the manner of his coming into possession of the stolen property, when by means of

search warrant said property was found scattered about in his dwelling house. In addition to this, it was testified by one witness, the officer who assisted in making said search, that the general reputation of John L. Cox for truth and veracity in the neighborhood in which he lived was bad. Only one person saw any one at the house of Cox on the morning when he claimed to have bought the property of plaintiff in error, and that person was his wife. She was not able to state, however, that plaintiff in error was the individual whom she saw. She could only say that the moustache of each resembled that of the other. Plaintiff in error testified that during the whole night of November 22, 1893, he was at the house of William Ringer in the southern part of the city of Lincoln; that up till between 12 and 1 o'clock of that night he was playing cards and drinking whiskey with Mr. Washburn, Mr. Barrett, and Mr. Ringer, in the house of Mr. Ringer. The wife of the person last named, as well as Mr. Barrett and Mr. Washburn, corroborated the statement of the plaintiff in error as to playing cards until almost 1 o'clock of November 23. William Sexton also testified that he met plaintiff in error in the southwestern part of the city of Lincoln about 8 or 9 o'clock of the forenoon of the day last named. As an original question upon the record we should probably say that an *alibi* had been quite successfully established by the plaintiff in error. We are not at liberty, however, to ignore the verdict of the jury, sanctioned as it has been by the refusal of the presiding judge to grant a new trial because of the alleged want of sufficient evidence to sustain it. In *Palmer v. People*, 4 Neb., 68, the following apt language is used: "But if the evidence is conflicting, and the case has been fairly submitted to the jury, the verdict will not be disturbed. So much depends on the manner and appearance of the witness while giving his testimony, that the question of his credibility must be left to the jury, and a reviewing court will not in such a case say, from an examination of the testimony, that the verdict

is erroneous. That the crime charged in this case was committed at the time and place charged in the indictment we think is clearly shown, and there is testimony connecting the plaintiff in error with the commission of the offense as strong as is often found in this class of cases." Again, in *Monroe v. State*, 10 Neb., 448, there was sustained by the citation of several authorities the following language: "The rule is well established in this court that where a verdict is clearly wrong it will be set aside; but where there is only doubt of its correctness, it will not be disturbed." In its later history this court has adhered to the same doctrine. (*Sloman v. Spellman*, 42 Neb., 165; *Johnson v. Guss*, 41 Neb., 19; *Quigley v. McEvony*, 41 Neb., 73.) Without referring to further decisions in support of this proposition, it is sufficient to say that it has uniformly been recognized as well established, and that governed by it we cannot reverse this judgment because of what, as an original question on the record presented, might seem to be a preponderance of the evidence in favor of the contention now made by the plaintiff in error.

But one question remains, and that arises on the 10th instruction given by the court in the following language:

"10. If you believe from the evidence, beyond a reasonable doubt, that soon after the burglary of the store-house of L. C. Meyer and the larceny of the goods therefrom a portion of the goods of said Meyer so stolen was in the exclusive possession of the defendant Isaac Whitman, you are instructed that this circumstance, if so found, is presumptive, but not conclusive, evidence of the defendant's guilt of larceny, and you should consider this circumstance, if so proven to your satisfaction, along with other evidence in the case in arriving at your verdict, giving it such weight and effect as you think it entitled to, and giving the defendant the benefit of any reasonable doubt of guilt."

The criticism of this instruction made by counsel for plaintiff in error is that under it the possession of recently

stolen goods justified a presumption of the burglary with which the accused was charged. We do not so understand it. The instruction confined the presumption which might be entertained to larceny of the goods themselves. As a distinct proposition the jury were told that if proven this circumstance (that is, the proof of larceny), along with other evidence in the case, should be considered in arriving at a verdict, the weight and effect to be attached to this circumstance being left to the jury. No repetition of the evidence is necessary to illustrate the significance of the possession of goods stolen from the store within twelve hours preceding such possession, the burglary charged having taken place within the space of time indicated. This possession, under the circumstances, might logically be considered sufficient to connect the possessor with the recent burglary by means of which the goods were taken from the possession of their rightful owner. It would probably have been better to have made no reference whatever to the presumption of larceny arising from the possession of recently stolen goods; though this reference was not wholly foreign to the facts disclosed by the evidence. In effect, however, the instruction was that as to the act of burglary the possession of the goods soon afterwards was a circumstance which the jury might properly take into consideration in determining whether or not plaintiff in error was connected therewith. The judgment of the district court is

AFFIRMED.

THOMAS P. STEPHENS v. EPHRAIM SMITH.

FILED NOVEMBER 21, 1894. No. 5957.

Sufficiency of Evidence to Sustain Verdict: REVIEW. The evidence examined, and *held* sufficient to sustain the verdict.

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

N. C. Pratt, for plaintiff in error.

James S. Armstrong and *F. S. Howell, contra.*

IRVINE, C.

The only assignment of error in this case which is presented in the briefs is that the verdict is not sustained by sufficient evidence. No question of law is involved, and a statement or discussion of the facts would, therefore, be useless. An examination of the record persuades us that while the evidence on behalf of the defendant in error was neither conclusive nor very convincing, it was sufficient to sustain the verdict, and the judgment is, therefore,

AFFIRMED.

HARRISON, J., having presided in court below took no part in the decision.

JOSEPH GARNEAU, JR., v. OMAHA PRINTING COMPANY.

FILED DECEMBER 4, 1894. No. 6798.

1. **Error Proceedings:** FAILURE TO FILE TRANSCRIPT: JURISDICTION. A transcript of the proceedings containing the final judgment sought to be reviewed must be filed with the petition in error, and prior to the issuing of the summons in error, in order to confer jurisdiction upon the supreme court.
2. **Dismissal:** JURISDICTION. Where this court has not acquired jurisdiction of a cause, the only judgment which can be rendered is one dismissing the proceeding.

MOTION to dismiss from the supreme court a proceeding in error from the district court of Douglas county, affirm the judgments alleged to be erroneous, and, under section 596 of the Code, assess against the plaintiff in error five per cent of the amount due from him. The grounds of the motion were that the plaintiff in error brought the case to the supreme court for the purpose of delay, and failed to file transcript and briefs. *Proceeding in error dismissed.*

Chas. Offutt and *Charles S. Lobingier*, for the motion:

This proceeding presents no question of law or fact upon which this court could pass, and hence the petition in error should be dismissed (*Upton v. Cady*, 38 Neb., 209), and an affirmance of the judgment below should follow as of course (*Dunterman v. Storey*, 40 Neb., 448).

In dismissing the attempted proceeding in error the court should also assess the five per cent damages provided for by section 596 of the Code of Civil Procedure, (1) because the facts clearly show that the proceeding was a dilatory one, since plaintiff in error took but the one step which was necessary to stay the judgment, and made no effort to have the cause reviewed on its merits; (2) because section 596 of the

Code is a wise and beneficial statute, the advantages of whose provisions belong to litigants who have been unwarrantably deprived of the fruits of litigation; and (3) because this court, as a matter of self-protection, should enforce the provisions of the statute in order to discourage dilatory proceedings and the flooding of its docket with appeals having no merit.

In *Moore v. Herron*, 17 Neb., 703, this court did not decide that section 596 was unconstitutional. It merely refused in that particular case to enforce the provisions of the statute, and the general question as to its validity is expressly left open. Moreover, the reason given for failing to enforce the statute in that case was unsound. Section 596 does not deny or interfere with the right of appeal. It rather promotes it by restricting it to its legitimate scope as a proceeding to have cases reviewed upon their merits rather than one for the delay of litigation. The statute is much more in harmony with section 13 of the bill of rights than it could possibly be contrary to section 24 of the same.

The statute is not peculiar to Nebraska, but is enforced in other states having similar constitutional provisions. (*Citizens Bank v. Crouch*, 53 N. W. Rep. [S. Dak.], 862.)

J. W. West, contra.

NORVAL, C. J.

On the 5th day of March, 1894, the plaintiff in error filed in this court a petition in error to obtain a reversal of two judgments recovered against him in the court below by the defendant in error on the 24th day of March, 1894. The cause is submitted upon the motion of the defendant in error to dismiss this proceeding and affirm the cases and render a judgment against the plaintiff in error for five per cent upon the amount of the judgments as provided by section 596 of the Code of Civil Procedure. The grounds

of the motion are two: (1.) Plaintiff in error has failed to perfect the appeal or to file any briefs herein. (2.) The causes were brought to this court solely for delay. The plaintiff in error caused to be filed with the clerk of this court a petition in error, upon which a summons in error was issued and service thereof has been accepted. He has taken no other or further step in the case. No transcript of the judgments and proceedings sought to be reviewed has ever been filed in this court.

Section 586 of the Code of Civil Procedure provides: "The plaintiff in error shall file with his petition a transcript of the proceedings containing the final judgment or order sought to be reversed, vacated, or modified." It is clear, under the foregoing provision, that a cause cannot be docketed in this court either on appeal or error until a transcript of the proceedings in the trial court is filed. The transcript of the record is the foundation of the proceeding here, and until the same is filed this court acquires no jurisdiction to hear and determine the cause. Until then there is no case to review. The statute requires that it shall be filed with the petition in error. This was distinctly held in *City of Brownville v. Middleton*, 1 Neb., 10. In *Ward v. Urmson*, 40 Neb., 695, the petition in error was dismissed on the ground that the transcript filed did not contain the final decree rendered in the district court, although it contained the notes or minutes entered by the trial judge upon his docket for the guidance of the clerk in preparing the decree. The case under consideration is much stronger than the precedent cited, since neither the pleading nor the judgments are before us. For want of jurisdiction the petition in error must be dismissed. (See *Baker v. Kloster*, 41 Neb., 890.)

By section 596 of the Code of Civil Procedure it is provided: "When a judgment or final order shall be affirmed in the supreme court, the said court shall also render judgment against the plaintiff in error for five per cent upon

the amount due from him to the defendant in error, unless the court shall enter upon its minutes that there was reasonable ground for the proceedings in error." In *Moore v. Herron*, 17 Neb., 703, the section quoted was held unconstitutional. We are asked to consider the question anew, and overrule our former decision. This we cannot now do; nor can we enter upon a discussion of the subject, since the supreme court has no jurisdiction to pronounce any judgment in this cause other than one of dismissal. The petition in error is

DISMISSED.

HENRY B. SHIELDS V. WILLIAM O. GAMBLE.

FILED DECEMBER 4, 1894. NO. 5668.

1. **Recovery for Commission Due Real Estate Agent:** SUFFICIENCY OF EVIDENCE. Evidence examined, and *held* to sustain the verdict.
2. **Costs:** JUDGMENT IN DISTRICT COURT: AMOUNT. In an action brought in the district court the plaintiff obtained judgment for $200. *Held*, That he was not entitled to recover costs, but that each party is required to pay his own costs.
3. ———: REVIEW: MOTION TO RETAX. In order to review the question of the taxation of costs a motion to retax must be filed in the trial court and a ruling obtained thereon.

ERROR from the district court of Wayne county. Tried below before ALLEN, J.

H. H. Moses and *Barnes & Tyler*, for plaintiff in error.

A. A. Welch and *Frank M. Northrop, contra.*

NORVAL, C. J.

This suit was brought in the district court by William O. Gamble to recover the sum of $365 for commissions

alleged to be due him for services rendered Henry B. Shields in procuring a purchaser, or effecting the exchange, of certain real estate owned by the latter. The defendant answered the petition by a general denial. Upon the issues joined the cause was tried to a jury, with a verdict for the plaintiff in the sum of $200. A motion for a new trial was filed by the defendant, which was overruled, and the court ordered that the costs be taxed one-half to each party, and a judgment was entered upon the verdict. The defendant prosecutes error to this court.

The first ground urged in the brief for a reversal of the judgment is that the court erred in allowing the plaintiff below to testify, over the objections of the defendant, that the usual and customary commission charged by real estate agents for finding a purchaser for real estate was five per cent upon the first $1,000, and two and a half per cent thereafter. This objection is not well taken for two reasons: First—No complaint as to the admission of the testimony is made in the petition in error. This was necessary in order to have the ruling of the court thereon reviewed. In the next place the plaintiff sought to recover upon a *quantum meruit*, and he was permitted to testify, without objection, that $365 was a reasonable compensation for his services in finding a purchaser or bringing about an exchange of the property. The defendant offered no testimony upon that branch of the case. Besides the witness J. S. French, without any objection being made at the time, gave precisely the same testimony as did the plaintiff as to the customary and ordinary percentage charged by real estate dealers in making sales and effecting the exchange of real property. The defendant, therefore, was not prejudiced by the admission of the testimony of which complaint is here made. Upon the cross-examination of the plaintiff below he was asked this question: "Well, you don't know, then, that he had been entering into negotiations with other real estate agents to find him a place for his Sioux City

property in exchange, do you?" The question was objected to by plaintiff's counsel as incompetent, irrelevant, immaterial, and not proper cross-examination, which objection was sustained. This ruling it is insisted is erroneous. Although the point is sufficiently raised in the motion for a new trial under the assignment of "Errors of law occurring at the trial," yet the court cannot review the decision, inasmuch as the same is not covered by any of the assignments in the petition in error; and for the same reason we will not notice the sustaining of objections by the court to questions propounded to the witness Clark on cross-examination, found on pages 17 and 20 of the bill of exceptions.

It is argued in the brief of counsel that the court erred in excluding the answer to interrogatories 12 and 13 of the deposition of the plaintiff in error, in excluding the answers made by the witness A. M. Jackson in his deposition to direct interrogatories 42, 51, 54, 56, 59, 60, 61, 62, 63, and 64, in granting plaintiff leave to withdraw cross-interrogatory 3 and the answer thereto of said deposition, also in allowing plaintiff to withdraw from the deposition of said Jackson, and from the consideration of the jury, certain letters, telegrams, and correspondence between the defendant and the firm of A. M. Jackson & Co., which plaintiff had introduced in evidence upon cross-examination of said witness Jackson. The several rulings of the district court to which reference has just been had are not sufficiently raised by the petition in error to require consideration at our hands. The only assignment therein relating to the subject is the first, which is in the following language: "The court erred in excluding evidence offered on the trial of said cause by the defendant." This assignment was entirely too indefinite, in that it did not specify the particular part of the evidence that was excluded from the jury. We desire to emphasize the doctrine so often held by this court, namely, that in order to review, a peti-

tion in error must assign alleged errors with such certainty as to enable the court to determine the precise ruling intended. Criticisms are made in the brief of other rulings upon the introduction of testimony, but they will not be considered for the reasons stated above.

On the trial of the cause the defendant below requested the court to charge the jury as follows:

"4. If you find, from the evidence, that the plaintiff was employed by the defendant to make an exchange of the defendant's farm for the Sioux City property, and that plaintiff, in pursuance of such employment, procured the man Clark, who was willing to make the exchange with the defendant, and that the plaintiff brought the defendant and Clark together, yet if he did not negotiate the exchange, but that said negotiation of exchange was made by A. M. Jackson & Co. as defendant's agents, the plaintiff would not be entitled to recover for commission on a complete sale. In such case the plaintiff would be entitled to recover only for the value of the services he rendered after he was actually employed by the defendant."

The foregoing request to charge, the plaintiff in error insists the court refused to give. The record, however, discloses that it was given. Besides the refusal of this instruction is not complained of in a motion for a new trial, hence it cannot be reviewed.

The defendant's fifth request to charge, which was refused, was fully covered by instruction No. 4 given at his request, and by the instructions of the court on its own motion, and the error in such refusal was thereby cured.

The defendant below also asked this instruction, which was refused:

"6. The plaintiff claims that the letters which passed between the plaintiff and the defendant, and which are attached to the defendant's deposition, constitute an agreement between the parties, whereby the plaintiff became the agent of the defendant, authorized and empowered to ne-

gotiate an exchange of the farm, and entitling him to the ordinary commission for selling. But I instruct you in law these letters do not constitute an agreement between the parties which gives the plaintiff the exclusive right to sell or exchange the farm with Clark or any one else, but notwithstanding the letters, the defendant retains the right to sell the property or exchange it by himself or agent. (*Stensgaard v. Smith*, 44 N. W. Rep. [Minn.], 669; *Stillman v. Fitzgerald*, 33 N. W. Rep. [Minn.], 564.)"

This instruction was rightly refused on account of the citation of authorities attached thereto. The authorities cited do not sustain the proposition stated in the instruction refused. The adding of the citations of authorities to instructions is not good practice, and while a cause might not be reversed for the giving of such instruction, where no prejudice is shown, it is discretionary with the trial court to give or refuse an instruction containing a list of authorities relied upon in support thereof.

The giving of the fourth paragraph of the instructions by the court on its own motion is urged in the brief as ground for reversal. This instruction was not excepted to when given, and for that reason alone it will not be considered by us. Moreover, the giving thereof is not assigned for error in either the motion for a new trial or in the petition in error. The seventh assignment in the motion for a new trial is: "The court erred in its instructions to the jury;" and the fourth assignment in the petition in error is as follows: "The court erred in giving the instructions to the jury given upon its own motion, excepted to by the defendant." These are the only assignments which could possibly be claimed to cover the instruction of which complaint is made, and they are too indefinite and general to be considered, unless the entire charge is bad, and this is not claimed. The citation of the decisions of this court sustaining this view is needless.

For the reason last above stated the second instruction

given at the request of the plaintiff below will not be considered by this court.

It is further insisted that the verdict is without evidence to sustain it. There is practically no conflict in the testimony. It appears that plaintiff in error, in 1890, was a resident of the state of Ohio, and owned a ranch situate in Wayne county, which contained about 680 acres. The defendant in error is engaged in the real estate business in said county. Early in September, 1890, one A. B. Clark, a resident of Sioux City, Iowa, and who owned some real estate therein, while in Wayne county met Mr. Gamble, the plaintiff below, and during the conversation had between them Mr. Clark mentioned the fact that he had been figuring with a Mr. Howser of said county for the exchange of Mr. Clark's Sioux City property for a farm owned by Mr. Howser, but stated he did not think a deal could be made with him, and inquired of Mr. Gamble if he had any property near town to sell or trade. To this the latter replied in the negative, but subsequently, after a moment's reflection, he informed Mr. Clark that Mr. Shields wanted to dispose of his property, describing its location, and stated that he would write and ascertain the facts, which he immediately did as promised. Upon receiving a reply to the letter, he wrote to Mr. Clark making inquiry as to what he wanted for his property and the condition upon which he would trade, and on receiving Mr. Clark's reply, Mr. Gamble again addressed a letter to Mr. Shields. Not long after this Mr. Clark came to Wayne county, called upon the defendant in error and informed him that he had heard from Mr. Shields and wished to examine his land. Thereupon Mr. Gamble procured a team and went out with Mr. Clark and showed him the ranch. Not very long afterwards the defendant in error, through A. M. Jackson & Co., of Sioux City, effected an exchange of his farm for Mr. Clark's property. We have stated all that Mr. Gamble did towards bringing about the exchange

or trade. It is insisted by the plaintiff in error that he never employed or authorized Mr. Gamble to act for him in the transaction, but on the other hand that A. M. Jackson & Co. were his agents, and he made the deal through them, paying them for their services. The letters which passed between the plaintiff and defendant constitute the contract of agency between the parties, if such an agency ever existed. The following are copies of the entire correspondence:

"WAYNE, NEB., Sept. 11, 1890.

"*Henry Shields*—DEAR SIR: I write you to ask if you desire to sell your ranch here, and if so would you take some desirable Sioux City property in trade? I think I could make such a trade for you; also could sell your Short-Horns, as the party's object is to start a Short-Horn herd near Wayne, and he is a fine cattleman. This would be a fine chance to close out your stock if you desire. Please advise me early.

"Truly yours, W. O. GAMBLE."

"GIRARD, OHIO, Sept. 16, 1890.

"*W. O. Gamble, Wayne, Nebraska*—DEAR SIR: Your favor of the 11th inst. addressed to me at Youngstown is duly received. Answering your questions concerning the sale of the ranch, together with the cattle that are upon it, I would want to know what amount the purchaser is willing to pay in cash, and where in Sioux City the property that he proposes to exchange is located, and whether it is improved or unimproved. Let me have a full description of the Sioux City property, and the value he places upon it.

"Yours truly, HENRY B. SHIELDS."

"WAYNE, NEB., Sept. 29, 1890.

"*Henry B. Shields*, DEAR SIR: Mr. Clark, who desires to trade Sioux City lots, has 150 feet business lots near stock yards; fine. Values at $150 per foot; value $15,000. Would take your land and Short-Horns and all your

feed and pay difference in cash. He is in love with the farm and stock, and if his valuations on his lots are not too high, think you can trade; but you must mark your prices up to meet him. I know his lots. They are very desirable, I should think, but cannot say as to their value. A. B. Clark, Sioux City. Write him if you desire to trade, or to me here.

"Truly, W. O. GAMBLE."

"GIRARD, OHIO, Oct. 2, 1890.

"*W. O. Gamble, Esq., Wayne, Nebraska*—DEAR SIR: I have your favor of the 29th ult., and note contents. I will have the Sioux City property examined and report to you as soon as possible. Permit me to inquire of you what, in your opinion, my farm is worth. I do not care to write Mr. Clark, preferring to make the deal through you, providing one is made.

"Truly yours, HENRY B. SHIELDS."

"WAYNE, NEBRASKA, Oct. 6, 1890.

"*H. B. Shields*—DEAR SIR: Yours of the 2d is before me. Your land is worth about $25 per acre. Land that distance well improved is selling for that. I sold 160 four miles out for $22; good improvements. The Hunter farm, three miles out, the finest in the neighborhood, sold for $23.25 recently. I told Mr. Clark you would want $27 to $30 per acre; therefore he will likely ask a stiff price for his Sioux City property. Set your price high enough. People trading always put on a big price, I discover. I do not think you could sell for at $25, but prices are getting very close, and I could sell 80-acre tract joining you on the east, the north half of southwest quarter (S. W. ¼) of section thirty-one (31). 27, 4, very good, for $20 per acre; thirty acres broke and balance fine grass land. Mr. Clark is very anxious to locate near Wayne, and is a fine cattleman. I think you can get a good trade out of him. Parties here are desirous of trading with him, but their land don't lay near enough to the city. He will not buy any-

thing more than three miles out. I am very busy attending my cattle. My men are away for a few days and I attend 160 head myself. Pardon this.

"Truly yours, W. O. GAMBLE."

It is upon the foregoing letters alone that the jury found an agency contract existed. At the first reading of the correspondence the writer was of the opinion that it failed to establish any employment or appointment of Mr. Gamble as agent, but upon reflection we are persuaded that the interpretation placed upon the letters by the jury is not untenable. In the letter of September 11 the defendant in error made the direct offer to Mr. Shields to act for him in trading his property. The letter stated, "I think I could make such a trade for you," and asked for an early reply. Mr. Shields answers this letter by making inquiry as to the description, location, and value of the property which is proposed in exchange for his ranch and as to the terms upon which an exchange could be effected, to which Mr. Gamble returned a reply under date of September 29, giving the desired information, together with the name and address of the proposed purchaser, and suggesting therein that Mr. Shields write either to Mr. Clark or to Mr. Gamble if he desired to trade. In the answer to this letter Mr. Shields asked the advice of the defendant in error as to the value of his farm, and closed with the statement, "I do not care to write Mr. Clark, preferring to make the deal through you, providing one is made." There is no claim that the defendant in error was acting for Mr. Clark in the transaction. On the contrary, a fair construction of the entire correspondence above set out shows that the proposition or offer of the plaintiff below in his first letter to act as Mr. Shields' agent was accepted by the latter. It was after such acceptance that Mr. Clark was shown the ranch by Mr. Gamble and the trade was made. It is true that the latter did not negotiate the exchange, but he was instrumental in bringing the plaintiff below and Mr. Clark together, and an ex-

change of properties was effected. This was sufficient to entitle plaintiff below to recover the value of the services rendered by him. The undisputed evidence shows that a reasonable and fair commission for the completed deal is $450, and the jury allowed the plaintiff but $200. This finding is justified by the evidence.

Complaint is made of the taxing to the defendant one-half of the costs in the case. The amount of recovery was within the jurisdiction of a justice of the peace, and the action having been brought in the district court, the plaintiff was not entitled to recover any costs. Each party is required to pay his own costs. (*Geere v. Sweet*, 2 Neb., 76; *Beach v. Cramer*, 5 Neb., 98; *Ray v. Mason*, 6 Neb., 101; *Miller v. Roby*, 9 Neb., 471; *Goodman v. Pence*, 21 Neb., 459.)

A motion to retax the costs was filed by the plaintiff in error in the trial court, but the amended transcript filed in this court does not show that this motion has ever been passed upon; hence the judgment as to costs cannot be reviewed. (*Wilkinson v. Carter*, 22 Neb., 186.) Again, it appears from the record that the defendant in error filed in the lower court a remittitur of all costs taxed to the defendant. This cured the error in the taxation of costs. The judgment is

AFFIRMED.

GEORGE E. SALLADIN, ASSIGNEE, APPELLANT, V. J. B. MITCHELL ET AL., APPELLEES.

FILED DECEMBER 4, 1894. No. 4840.

1. **Voluntary Assignments: LIENS AGAINST ASSIGNOR.** The assignee of an insolvent corporation under an assignment for the benefit of creditors takes the property subject to whatever equities existed against the assignor.

2. **Action to Recover Money Due Insolvent Bank: SET-OFF.** The defendant, in an action by the assignee to recover money due to an insolvent banking corporation, may set off against the amount owing by him to the bank an indebtedness of the latter to him.

3. **Voluntary Assignments: MORTGAGE FORECLOSURE: SET-OFF.** In a proceeding by an assignee to foreclose a mortgage, the property of an insolvent bank, the purchaser from the mortgagor, who is made a defendant therein, may set off against the claim of the assignee an indebtedness due to him from the bank.

4. **Set-Off: CERTIFICATE OF DEPOSIT: INSOLVENT BANKS.** The right of set-off exists in favor of one who has acquired the title to money due from an insolvent bank on a certificate of deposit issued to a third person without a formal assignment by the latter.

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

The opinion contains a statement of the case.

Norval Bros. & Lowley, for appellant:

A depositor in an insolvent bank, who also owes it for borrowed money, cannot set off his deposit against such debt, although the deposit consists of the borrowed money. (*Hannon v. Williams*, 34 N. J. Eq., 255; *Bunnell v. Collinsville Savings Society*, 38 Conn., 203; *Hillier v. Allegheny Mutual Ins. Co.*, 3 Pa. St., 470; *Lawrence v. Nelson*, 21 N. Y., 158; *Stockton v. Mechanics and Laborers Savings Bank*, 32 N. J. Eq., 163.)

The property and assets of a banking corporation, organized under the laws of this state, after it has ceased to carry on a banking business, are a trust fund for the payments of its debts. (*State v. Commercial State Bank*, 28 Neb., 677; Perry, Trusts, sec. 242; *Upton v. Tribilcock*, 91 U. S., 45; *Goodin v. Cincinnati & Whitewater Canal Co.*, 18 O. St., 182; *Taylor v. Miami Exporting Co.*, 5 O., 165; *Sanger v. Upton*, 91 U. S., 56.)

Ed. P. Smith, contra:

The assignee succeeds only to the rights of the assignor and is affected by all the equities against the latter. (*Housel v. Cremer*, 13 Neb., 300; *Hade v. McVay*, 31 O. St., 231; Burrell, Assignments, sec. 391; *Chace v. Chapin*, 130 Mass., 128; *Roberts v. Austin*, 26 Ia., 315; *Hodgson v. Barrett*, 33 O. St., 63; *In re Van Allen*, 37 Barb. [N. Y.], 225; *Martin v. Kunzmuller*, 37 N. Y., 396; *New Amsterdam Savings Bank v. Tartter*, 4 Abb. New Cases [N. Y.], 215.)

In an action to foreclose a mortgage any defendant who is personally liable, or whose land is bound for the debt, may introduce a set-off to reduce or extinguish the debt. (Jones, Mortgages, sec. 1496; *National Fire Ins. Co. v. McKay*, 21 N. Y., 191; *Hunt v. Chapman*, 51 N. Y., 555; *Chapman v. Robertson*, 6 Paige Ch. [N. Y.], 627; *Hess v. Final*, 32 Mich., 515.)

POST, J.

This was a foreclosure proceeding in the district court for Seward county by the appellant as assignee for the benefit of the creditors of the Northwestern Banking Company of Milford. The mortgage in controversy was executed by the defendant Mitchell and wife and covered certain lands in Seward county. The defendants filed separate answers, from which it appears that shortly before the failure and assignment of the banking company in the month of January, 1889, Mitchell sold the mortgaged premises to his co-defendant, Borchers, the latter by written agreement undertaking to pay therefor as follows: $1,000 by March 1, 1889, and $100 on or before December 1, 1890, and also to assume and satisfy prior liens thereon to the amount of $900. Borchers, on the 19th day of December, 1888, deposited for Mitchell the sum of $700 with the banking company. The latter paid therefrom certain taxes and

matured interest due from Mitchell in accordance with instructions, amounting in the aggregate to $310.31, and issued a certificate of deposit in his favor for the balance, $389.69. Said amount was still due from the banking company to Mitchell at the time of the assignment, and which he now seeks to have set off against the amount due on the mortgage above described. A few days preceding the assignment of the banking company Borchers deposited therewith the further sum of $257.70 on his own account, taking a certificate of deposit therefor, which he still holds and which he asks to have set off against the claim of the assignee; and on the day last named Edward Borchers, son of the defendant herein, deposited with the banking company the sum of $200, taking a certificate of deposit therefor in his own name, which the defendant now claims to own and which he prays may also be set off against the claim of the assignee. There was a finding for the defendants on all of the issues; and as the amount of the several certificates of deposit exceeded the balance due on the mortgage it was adjudged to be fully paid and satisfied and the petition of the assignee accordingly dismissed, and from which the latter has prosecuted an appeal to this court.

The only controversy presented by the answer of Mitchell is whether he is entitled to have the amount of his credit with the banking company at the date of the assignment applied in satisfaction of his indebtedness to the latter. The question is an important one, and has frequently been suggested in this court, although never before directly presented for decision. The right of set-off has been made the subject of statutory regulations in this state. The language of section 106 of the Civil Code is: "When cross-demands have existed between persons under such circumstances that if one had brought an action against the other a counter-claim or set-off could have been set up, neither can be deprived of the benefit thereof by the assignment

or death of the other, but the two demands must be deemed compensated so far as they equal each other." It is not clear whether the term "assignment" therein means an ordinary transfer of a claim or cause of action by the party in whose favor it exists, or whether it is used in the sense in which it is employed in proceedings in bankruptcy and insolvency. It appears, however, to have been given the latter interpretation in Ohio (see *Hade v. McVay*, 31 O. St., 231), although we do not rest our conclusion on that ground, but upon the proposition that the right of set-off existed according to well established equitable principles before the adoption of the Code, and that the assignee succeeded to the rights of the insolvent banking company as they existed at the date of the assignment, and no other or greater rights. The authorities bearing upon the proposition are not, it is conceded, altogether harmonious, but the rule as above stated has the support of a decided majority of the courts as well as text-writers, and rests upon the more satisfactory reasons. The following among the many cases in point are cited as sustaining the view above stated: *Hade v. McVay*, *supra*; *Hodgson v. Barrett*, 33 O. St., 63; *American Bank v. Wall*, 56 Me., 167; *Miller v. Receiver of Franklin Bank*, 1 Paige Ch. [N. Y.], 444; *Chace v. Chapin*, 130 Mass., 130; *Roberts v. Austin*, 26 Ia., 315; *Cook v. Cole*, 55 Ia., 70; *Farmers Deposit Nat. Bank v. Penn Bank*, 123 Pa. St., 283; *Chase v. Petroleum Bank*, 66 Pa. St., 169; *Van Wagoner v. Patterson Gas Light Co.*, 23 N. J. Law, 283; *Clarke v. Hawkins*, 5 R. I., 219; *Cox v. Volkert*, 86 Mo., 505; *McCagg v. Woodman*, 28 Ill., 84; *Chance v. Isaacs*, 5 Paige Ch. [N. Y.], 592; *Smith v. Felton*, 43 N. Y., 419; *Rothschild v. Mack*, 115 N. Y., 1; *Nashville Trust Co. v. Fourth Nat. Bank*, 91 Tenn., 336; *Merwin v. Austin*, 58 Conn., 22; *St. Paul & M. Trust Co. v. Leck*, 58 N. W. Rep. [Minn.], 826; *Schuler v. Israel*, 120 U. S., 506; *Carr v. Hamilton*, 129 U. S., 252; Pomeroy, Remedies, secs. 163, 169; Burrell, Associations, sec.

349; Waterman, Set-Off, pp. 118, 119. The leading cases asserting the opposing view, *Eastern Bank v. Capron*, 22 Conn., 639, and *Haxtun v. Bishop*, 3 Wend. [N. Y.], 13, are obviously in conflict with the more recent opinions of the courts of those states, which are cited above. It follows that Mitchell was entitled to the offset pleaded, and the decree in his favor is right.

2. We come now to a consideration of the questions raised by the answer of Borchers. While there is made no claim to a personal judgment against the defendant named, it will be remembered that he is owner of the land which is the subject of the controversy, and which it is sought by the foreclosure proceeding to sell for the satisfaction of the alleged balance on the mortgage. He was made a defendant for the single purpose of having determined his rights as against the plaintiff; and it is not only his privilege, but his duty as well, to set up whatever equities may exist in his favor against the mortgage. That an offset for money due from the plaintiff is available, and as effective for that purpose as payment or accord and satisfaction, we have no doubt either upon reason or authority. (See *Bathgate v. Haskin*, 59 N. Y., 533; *Hess v. Final*, 32 Mich., 515; *Chapman v. Robertson*, 6 Paige Ch. [N. Y.], 627; Jones, Mortgages, sec. 1496.)

3. The remaining inquiry relates to the certificate of deposit issued to Edward Borchers. According to the testimony of the defendant he borrowed the money represented thereby from the payee, his son, for the purpose of completing his payment for the land in controversy, and executed his note therefor, payable twelve months after date, although the certificate was not indorsed by the payee. The finding on that issue was for the defendant and is not seriously assailed at this time. Under a system like ours, which not only permits but requires every action to be prosecuted in the name of the real party interested, there seems to be no doubt that the right of set-off applies to any claim to which

the party asserting it possesses the beneficial interest. Assuming, as was found by the district court, that Edward Borchers did in fact sell to the defendant his claim against the banking company, there is no doubt that the latter could have maintained an action therefor in his own name. Indeed, leaving out of consideration any exceptional rights which might have existed in favor of the holder by reason of the negotiable character of the paper, the defendant is the necessary party and the only person who could have maintained an action or defense thereon. It follows that the claim under consideration was properly allowed as an offset. We find in the brief of the plaintiff a further contention, which is, in effect, that Borchers is now estopped to claim an offset on account of the $200 certificate of deposit, by reason of having procured his son, in whose favor in was drawn, to present it to the county judge for allowance against the estate of the banking company, and the receipt by the latter of a small dividend paid by the assignee. A sufficient answer to that contention is that no such issue is presented by the pleadings, the reply being a general denial of the allegations of the answer. It is the settled rule in this state that an estoppel, to be available as a cause of action or defense, must be specially pleaded. (*Nebraska Mortgage Loan Co. v. Van Kloster*, 42 Neb., 746, and cases cited.) The decree of the district court is right and is accordingly

AFFIRMED.

NORVAL, C. J., not sitting.

JAMES MCCORMICK V. STATE OF NEBRASKA.

FILED DECEMBER 4, 1894. No. 7209.

1. **Larceny**: VALUE OF PROPERTY: VERDICT. The provision of section 488 of the Criminal Code that the jury on a conviction for larceny "shall ascertain and declare in their verdict the value of the property stolen," etc., requires a definite finding, and a conviction for grand larceny cannot be sustained upon mere estimate by the jury of the value of the property stolen.
2. ———: ———: ———. A verdict in the following form: "We, the jury in the above entitled cause, duly impaneled and sworn, do find the defendant James McCormick guilty as he stands charged. Amount, estimated, of stolen property, $95. I. A. Baker, Foreman," *held*, an estimate only, and not an ascertainment of the value of the property within the meaning of the statute.

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

George B. France, for plaintiff in error.

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

POST, J.

At the November, 1893, term of the district court for York county an information was filed by the county attorney in which the plaintiff in error was, in two counts, charged with larceny and the knowingly receiving of stolen property. At the February, 1894, term a trial was had, resulting in the following verdict:

"THE STATE OF NEBRASKA / v. / JAMES MCCORMICK. } February term, 1894, to-wit, February 20, 1894.

"We, the jury in the above entitled cause, duly impaneled and sworn, do find the defendant James McCormick guilty as he stands charged in the first count of the infor-

mation and not guilty as to the second count. Amount, estimated, of stolen property, $95. I. A. BAKER,

"Foreman."

A motion for a new trial and in arrest of judgment was overruled and the accused sentenced to a term in the penitentiary, which judgment he seeks to reverse by means of this petition in error.

The only assignment of error which we are called upon to notice is that which relates to the form of the verdict. It is contended that the finding therein with respect to the value of the property stolen is indefinite and insufficient to sustain the conviction for grand larceny. The provision of statute which bears upon the subject is found in section 488 of the Criminal Code, and reads as follows: "When the indictment charges an offense against the property of another by larceny, embezzlement, or obtaining property under false pretenses, the jury on conviction shall ascertain and declare in their verdict the value of the property stolen, embezzled, or falsely obtained." It is a fundamental principle of our criminal jurisprudence that, in order to warrant a conviction for a felony, the state must establish all of the essential elements thereof by proof beyond a reasonable doubt. In this state the stealing of property of the value of $35 or upwards is a felony, and punishable by imprisonment in the penitentiary, while the stealing of property of a less value than $35 is a misdemeanor and punishable by a fine not exceeding $100, or imprisonment in the county jail not exceeding thirty days. (Sections 114, 119, Criminal Code.) The stealing of property of any value is a larceny, but stealing property of a specified value is declared to be grand larceny, which is a felony. (Criminal Code, sec. 247.) In short, the latter is the exception to the rule, and in the absence of a finding in substantial compliance with the provision above quoted, the accused cannot be adjudged guilty of grand larceny. It is conceded that the value which is required to determine

the degree of the offense is an essential element of grand larceny. But the jury in prosecutions for larceny are required not to estimate but to determine the value of the property. The verb "determine" is thus defined: "To fix the boundaries of; to mark off and separate. 2. To set bounds to; to fix the determination of; to limit; to bound; to bring to an end; to finish. 3. To fix the form or character of; to shape; to prescribe imperatively; to regulate; to settle. * * * 5. To ascertain definitely. * * * 6. To bring to a conclusion, as a question or controversy; to settle by authoritative or judicial sentence; to decide." (*Vide* Webster's International Dictionary.) According to the same authority, "to estimate" is "To judge and form an opinion of the value, from imperfect data, * * * to fix the worth of roughly or in a general way. * * * 2. To form an opinion of, as to amount, number, etc., from imperfect data, comparison, or experience; to make an estimate of; to calculate roughly; to rate." While the noun "estimate" is defined as "A valuing or rating by the mind, without actually measuring, weighing, or the like; rough or approximate calculation." It seems clear from the foregoing definitions that the jury's estimate will not answer the requirements of the statute to ascertain and declare the value of the property, and that the judgment which rests thereon cannot be sustained. It is admitted that a judgment in a civil action may be sustained upon a finding no more formal or complete than that now before us. But we have been referred to no case, and believe none can be cited, in which such a one has been held a compliance with a statute in terms or substance like ours. There are on the other hand adjudications which strongly support the conclusion here announced. For instance, the Texas Criminal Code requires all verdicts to be in writing, and when the plea is not guilty the jury shall find the defendant guilty or not guilty. It was held in *Shaw v. State*, 2 Tex. App., 487, that a verdict which omits the word find is fatally

defective and will not sustain a verdict based thereon. It follows from what has been said that the sentence imposed was unwarranted by the verdict and that the judgment must be reversed and the cause remanded for further proceedings in the district court. The other assignments all refer to exceptions taken at the trial, not affecting the merits of the case, and do not therefore require to be noticed in this opinion.

REVERSED.

CHARLES H. WATTS, APPELLEE, V. W. E. GANTT ET AL., APPELLANTS.

FILED DECEMBER 4, 1894. No. 5727.

1. **Corporations**: RIGHT TO HOLD REAL ESTATE: COLLATERAL ATTACK. The right of a corporation to hold title to real estate, or to purchase and hold a lien thereon, cannot be questioned collaterally, but can only be attacked in a direct proceeding instituted for the purpose. Such purchase and holding are not void but are voidable, and none but the sovereign can object. *Missouri Valley Land Co. v. Bushnell*, 11 Neb., 192, followed.

2. **Husband and Wife**: MORTGAGE BY WIFE: CONSIDERATION. A married woman may in this state mortgage her separate estate or property to secure the payment of the individual debt of her husband. A loan of the money to the husband creating the debt so secured is a sufficient consideration for her executing and delivering the mortgage.

3. ———: ———: ———: SURETYSHIP. A married woman who executes and delivers a mortgage on her separate property to secure the debt of her husband occupies the position of surety of her husband to the extent of the property mortgaged.

4. **Principal and Surety**: EXTENSION OF TIME. An extension of time for the payment of a debt will not discharge a surety unless it is for a definite time and on a sufficient consideration.

5. **Counter-Claims**: LIBEL: MORTGAGE FORECLOSURE. Certain alleged counter-claims pleaded in the answer of one of the defendants, *held*, not to arise out of the transaction upon which the

plaintiff's cause of action was based and not connected with the subject of the plaintiff's action, and hence not competent as counter-claims in this action.

The opinion contains a statement of the case.

J. J. McCarthy, W. E. Gantt, and *W. P. Briggs,* for appellants:

A wife executing a mortgage on her separate property to secure the individual debt of her husband occupies the position of a surety. (*Hubbard v. Ogden,* 22 Kan., 363; *Bank of Albion v. Burns,* 46 N. Y., 170; *Smith v. Townsend,* 25 N. Y. 479; *Barrett v. Davis,* 15 S. W. Rep. [Mo.], 1010; *Nelson v. Bevins,* 14 Neb., 153.)

A valid extension of the time of payment of the note was made without the knowledge and consent of the surety and she is therefore released. (*Blazer v. Bundy,* 15 O. St., 57; *Wood v. Newkirk,* 15 O. St., 295; *Fawcett v. Freshwater,* 31 O. St., 637; *Jones v. Brown,* 11 O. St., 609; *Chute v. Pattee,* 37 Me., 102; *Long v. Rankin,* 12 S. E. Rep. [N. Car.], 987; *Scott v. Scruggs,* 11 So. Rep. [Ala.], 215; *Reynolds v. Barnard,* 36 Ill. App., 218.)

The agreement to extend the time has been fully executed and the time contracted for has actually been given. The surety is therefore discharged regardless of whether the original consideration for the extension was valid. (*Bever v. Butler,* Wright [Ohio], 367; *Munroe v. Perkins,* 9 Pick. [Mass.], 298; *Robertson v. Gardner,* 11 Pick. [Mass.], 150; *Ratcliff v. Pemberton,* 1 Esp. [Eng.], 35.)

The following cases are cited to sustain the right to the counter-claim: *Fox v. Abbott,* 12 Neb., 331; *Burlingim v. Cooper,* 36 Neb., 73; Maxwell, Pleading & Practice [4th ed.], p. 151.

Wigton & Witham, contra:

The surety is not released. (*Jenness v. Cutler,* 12 Kan., 500; *Pierce v. Goldsberry,* 31 Ind., 52; *McComb v. Kit-*

tridge, 14 O., 348; *Bailey v. Adams*, 10 N. H., 162; *McLemore v. Powell*, 12 Wheat. [U. S.], 553; *Crossman v. Wohlleben*, 90 Ill., 537; *Waters v. Simpson*, 2 Gilman [Ill.], 570; *Woolford v. Dow*, 34 Ill., 424; *Reynolds v. Ward*, 5 Wend. [N. Y.], 501; *Fulton v. Matthews*, 15 Johns. [N. Y.], 433; *Halliday v. Hart*, 30 N. Y., 474; *Harter v. Moore*, 5 Blackf. [Ind.], 367; *Abel v. Alexander*, 45 Ind., 523; *Byers v. Harris*, 25 N. W. Rep. [Ia.], 879; *Hunt v. Postlewait*, 28 Ia., 427; *Michigan State Ins. Co. v. Soule*, 16 N. W. Rep. [Mich.], 662; *Burr v. Boyer*, 2 Neb., 265; *Dillon v. Russell*, 5 Neb., 484.)

The alleged counter-claim for libel must fail for the reason (1) that it accrued after the commencement of this action (Code, sec. 101; *Simpson v. Jennings*, 15 Neb., 671; *Tessier v. Englehardt*, 18 Neb., 167; *Wescott v. Archer*, 12 Neb., 346); (2) that the publications complained of were made in the progress of the suit in manner and substance as authorized by statute, and are absolutely privileged (13 Am. & Eng. Ency. Law, 406–410, and cases cited); (3) that even if the publications were not privileged, the charge of insolvency is not actionable *per se* unless it is made of a merchant or trader, or of one engaged in a business that is usually carried on by means of credit (*Hirshfield v. Ft. Worth Nat. Bank*, 18 S. W. Rep. [Tex.], 744; *Newell v. How*, 17 N. W. Rep. [Minn.], 383; Cooley, Torts, 202).

HARRISON, J.

On the 7th day of April, 1884, W. E. Gantt executed and delivered to Charles H. Watts a promissory note in the sum of $800, due April 7, 1889, and bearing interest at eight per cent per annum, and a mortgage to secure the payment of the note was executed by W. E. Gantt and his wife, Carrie E. Gantt, covering certain lots in Ponca, Nebraska, the title to which was of record in the name of the wife, Carrie E. Gantt, and which were her separate property. July 8, 1891, this action was instituted in the

district court of Dixon county to foreclose the mortgage, and a portion of the relief prayed for in the petition filed was the appointment of a receiver to take charge of the property and collect the rents and profits thereof and apply them on the indebtedness. The statement in the petition, to show the necessity for the appointment of a receiver, was as follows: "That since the execution of said note and mortgage, said lots have greatly depreciated in value on account of the decline in real estate values in said city of Ponca, and that said lots are entirely inadequate for the payment of said mortgage indebtedness and tax lien, and an insufficient security for plaintiff's debt, the actual cash values of said lots at this date being not more than $900, and the aggregate amount of said mortgage indebtedness and tax lien amounting at this date to the sum of $1,380; that W. E. Gantt, the maker of said note, is insolvent and has no property out of which said indebtedness or any part thereof can be made, and that the rental value of said lots does not exceed the sum of $180 per annum." The petition also contained the following allegation: "That the defendants Carrie E. Gantt and W. E. Gantt have wholly failed to pay the taxes on said lots for the years 1887 to 1890 inclusive, and that said lots were on the 11th day of November, 1890, sold for taxes to the defendant the Farmers Loan & Trust Company of Sioux City, Iowa, and that said defendant has a tax lien on said lots, on account of said purchase, in the sum of $400." With the petition there was an affidavit filed for service by publication of the summons and also the notice of application for a receiver. Publication of the two notices was commenced on the following day and continued to completion. The date at which defendants were required to answer was August 7, 1891, and the time set for hearing the application for the appointment of a receiver, August 15, 1891. The notice of the hearing in the receiver matter was as follows: "You are hereby notified that on the 15th day of August, A. D.

1891, at 10 o'clock A. M. or as soon thereafter as I can be heard, I will apply to the Hon. W. F. Norris, judge of district court, Dixon county, at chambers in Ponca, Nebraska, for the appointment of a receiver to collect the rents and profits of lots 7 and 8, block 99, Ponca, Nebraska, and report the same to said district court, upon the ground that said premises being the property of defendants Carrie E. Gantt and W. E. Gantt and mortgaged by them to the plaintiff to secure the payment of a promissory note executed by defendant W. E. Gantt to the plaintiff April 17, 1884, for $800, defendant Farmers Loan & Trust Company has a tax lien on said lots, and that said lots are insufficient security for the payment of plaintiff's debt, and that W. E. Gantt, the maker of said note, is insolvent, and has no other property out of which said debt can be made," etc. This notice was published in the Ponca *Gazette* on July 9, 16, 23, 30, and August 6, 1891. With reference to the hearing on this branch of the case there appears the following admission in the fifth paragraph of a stipulation admitting certain facts: "It is admitted that no hearing has ever been had on the motion for the appointment of a receiver; that at the time set for said hearing, to-wit, on the fifteenth day of October, 1891, an objection was made by defendants W. E. Gantt and C. E. Gantt to Judge Norris exercising jurisdiction, on the ground that he would be a material witness in the case, and for said reason said judge refused to act on the same, and the same for said reason has never been passed upon."

The answers of the principal defendants, the Gantts, were not filed on or before the answer day, August 7, but were filed out of time. The answer of Carrie Gantt was first directed to the sixth paragraph of the petition and denied the existence of any lien against the premises arising from the purchase of the property for delinquent taxes, and averred that the Farmers Loan & Trust Company was a foreign corporation, organized and existing under the laws

of the state of Iowa, and had never been a corporation of the state of Nebraska, and was not entitled to do business in this state, and that its pretended purchase of the premises for taxes was void; that the articles of incorporation, or charter of the company, did not empower it to purchase lands for delinquent taxes at tax sales or to hold such liens, hence the purchase of this property by it was unauthorized and void and gave it no right of lien. This was followed by a denial of each and every allegation of the seventh paragraph of the petition, and the remaining portions of this answer were devoted to setting forth that the premises mortgaged were the sole and separate property of Mrs. Gantt, and the debt evidenced by the note that of the husband alone, and that no benefit from the loan made to the husband when the note and mortgage were given, or its proceeds, was ever received by her, nor was any of the money loaned in any manner used upon or for the benefit of her separate estate or property and that no consideration passed to her for executing the mortgage; that her liability created by signing the mortgage was that of a surety, and that she was discharged from liability as such surety by reason of extensions of time for payment of the note, granted to her husband after its maturity, each for a definite time and valuable consideration, and without notice to her, or knowlege on her part, of such extensions. W. E. Gantt in his answer denies that the Farmers Loan & Trust Company have any lien against the premises described in the petition by reason of its pretended purchase for delinquent taxes; also denies the statement of the seventh paragraph of the petition, and for further answer sets up five of what in the answer are denominated counter-claims, the first of which is as follows: "That on the 9th day of July, 1891, at Ponca, Dixon county, Nebraska, the plaintiff falsely, wickedly, and maliciously composed and published of and concerning the defendant, in a newspaper called the Ponca *Gazette*, the false and defamatory matter following,

to-wit [then followed the notice of application for receiver, as heretofore copied]; that at the time of publication of said notice the said plaintiff had filed in the office of the clerk of the district court in and for Dixon county the petition, but had not at said time taken the steps necessary to commence an action by causing the issue of a summons therein, and that at the time of the publication of said notice no action had been commenced or was pending in said court by reason of which said plaintiff could apply for the appointment of a receiver, and plaintiff well knew that neither the district court nor the judge thereof had jurisdiction to hear said application on the day named and set in said application at said time, or at any other time under said notice, and plaintiff well knew that the charge of insolvency made by him in said notice was false and that he could not prove said charge. (2.) That by reason of said false and defamatory publication the defendant was injured in his reputation and business to his damage in the sum of $5,000." The other four are pleaded in substantially the same language, except that the damages claimed in each of them is $2,500 instead of $5,000, as claimed in the one quoted.

The reply filed to the answer of Carrie E. Gantt was a general denial, and to that of W. E. Gantt was an admission of the publication of the notice of application for the appointment of a receiver, and a general denial of each and every other allegation of such answer.

During the January term of the court in Dixon county there seems to have been an application for a change of venue, and an order was made transferring the case to Wayne county for trial, where it was finally tried before the Hon. Wm. V. Allen, judge, on the 13th day of April, 1892. On the 4th day of April, 1892, the Farmers Loan & Trust Company filed a special appearance, objecting to the jurisdiction of the court to entertain or hear the matters alleged in the answers of the Gantts, in so far as it related

to the trust company or involved its rights, and asked affirmative relief as against it, for the reason that it had not been served with any notice of the filing of such answers; and on April 9, without any leave obtained, filed an answer to the portion of the pleading filed by Mrs. Gantt, which alleged matter upon which was based a prayer for affirmative relief against the trust company. The trial resulted in a decree in favor of plaintiff for the amount due on the note and foreclosure of the mortgage, and the defendants W. E. and Carrie E. Gantt have appealed to this court.

We will first dispose of the question which is raised by the portion of the answer of Mrs. Gantt, in which the authority of the trust company to acquire a lien on the real estate by purchase at tax sale is assailed because not allowed by its charter, and for the further reason that it was not authorized to do business in Nebraska. If there had been no appearance on the part of the trust company, then no affirmative relief could have been granted against it on the answers, as they were filed out of time and no notice of their filing was served on the trust company. Service of such notice was necessary to entitle the parties to affirmative relief (see *Cockle Separator Mfg. Co. v. Clark*, 23 Neb., 702); but if the trust company made a general appearance when it filed what was intended for a special appearance, or when it filed its answer without leave obtained of the court, no decree could be rendered affecting it or its rights in the premises, for, under the rule announced by this court in *Missouri Valley Land Co. v. Bushnell*, 11 Neb., 192, its right to purchase and hold the lien on the real estate could not be assailed in this action, but if attacked, it must be in a direct proceeding instituted for that purpose and the objection must come from the sovereign or state. (See, also, *Carlow v. Aultman*, 28 Neb., 672; *Meyers v. McGavock*, 39 Neb., 843; *Hanlon v. Union P. R. Co.*, 40 Neb., 52.)

On the other point made by Mrs. Gantt in her answer, that the mortgage was made to secure her husband's individual debt and not in any manner or measure for the benefit of her or her separate estate, and that she received no consideration for executing the mortgage, the making of the loan to her husband was sufficient consideration for her execution and delivery of the mortgage. (See 1 Jones, Mortgages, sec. 113; *Buffalo County Nat. Bank v. Sharpe*, 40 Neb., 123, and cases cited; *Smith v. Spaulding*, 40 Neb., 339.) It is further contended in her behalf that there were extensions of time for payment of the note, granted to her husband for a valuable consideration and without her knowledge, and that her property was thereby released from any further liability for the payment of the debt. It was held in *Buffalo County Nat. Bank v. Sharpe, supra*, that by giving a mortgage on her separate property, to secure the payment of her husband's debt, the wife became bound to the extent of the property mortgaged; that to the extent that she thus binds herself, she occupies the position of a surety. (See *Stevenson v. Craig*, 12 Neb., 464.) It appears that the debt in the case at bar was allowed to run for two years and some months after its maturity. It was due April 7, 1889, and suit was commenced July 8, 1891. The interest was paid to April 7, 1890, one year after maturity, but there is no evidence of any consideration for any extension of time, more than the note and any interest which might accrue thereon according to its terms as a contract between the parties at any and all times during its existence; nor does the evidence show that there was an agreement to extend its payment for any definite time, or to any fixed date, so that it could not have been claimed to be due, and action instituted thereon by the owner, or payment made by the Gantts at any time after its maturity. In order to discharge a surety there must be more than a forbearance without consideration; nor will an extension of time of payment release a surety unless a

definite time is agreed upon. (*Dillon v. Russell*, 5 Neb., 484.) The evidence in this case does not show any extension or agreement for extension of time of payment of the note such as effects a discharge of a surety.

We will now turn our attention to the alleged counter-claims of W. E. Gantt. In section 101 of the Code it is stated: "The counter-claim mentioned in the last section must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition, as the foundation of the plaintiff's claim, or connected with the subject of the action." If it be conceded that there exist causes of action against the plaintiff in favor of W. E. Gantt, by reason of the matters contained in the portions of the answer under the head of counter-claims, which we do not now decide, then did they arise out of the contract or transaction set forth in the petition, or are they connected with the subject of the action? The transaction upon which the plaintiff's cause of action is founded is the loan of the money to W. E. Gantt, and delivery to plaintiff by Gantt and his wife of the note and mortgage, and their default in the payment of the debt. The alleged counter-claims grow out of a publication made months afterward, in which it is claimed there were libelous and defamatory statements of and concerning the defendant, to his injury in reputation and business. The action of the plaintiff and counter-claims of defendant rest on entirely different grounds, the plaintiff's cause of action on the contract as embodied in the note and mortgage, and the defendant's counter-claim upon the publication of the notice of application for a receiver. The loan was made and the note and mortgage given and default occurred months prior to the publication. We think it very clear that they do not arise out of the same transaction; the one arises out of the contract and the other out of the alleged wrong committed several

months afterward, each an entire, distinct, and separate transaction in and of itself. Neither do we think that the counter-claims can be said to be connected with the subject of the action. They are radically and irreconcilably different. The subject of one is a contract, and the other a tort; no connection between the two exists. It is true that the notice published was a notice in the case in which the mortgage was being foreclosed, but this fact cannot connect the facts which are combined to compose the alleged counter-claims with the facts entering into and forming the plaintiff's cause of action. They were widely separated as to the time of their occurrence and entirely different and distinct in their facts, and although one is caused by the publication of a notice in a suit pending in regard to the other, in their subject-matter there is no possible connection between them. In the case of *Rothschild v. Whitman*, 30 N. E. Rep. [N. Y.], 858, we find the following statement: "Where a seller of goods on credit causes the arrest of the buyer for inducing the sale by deceit, and the buyer, after discharge, sues for malicious prosecution, a claim by the seller for damages for the deceit is not a valid counter-claim, since it does not arise out of the same transaction, and is not connected with the subject-matter of the action as required by Code of Civil Procedure, section 501." And in the text of the opinion it is said: "There is no necessary or legal connection between the two. It is not like an action for converting wood and a counter-claim for waste in cutting the same wood (*Carpenter v. Manhattan Life Ins. Co.*, 93 N. Y., 552); or where certain goods are the subject of the action and a claim is made for the value of the same goods (*Thompson v. Kessel*, 30 N. Y., 383); or where a mutual claim is made to a trade mark. (*Glen & Hall Mfg. Co. v. Hall*, 61 N. Y., 226.) On the contrary, the effort is here made to set up one tort committed in January against another committed in September; the one being for an injury to property, and the other for an injury to

the person. The circumstance that the deceit which constituted the former was the pretext or excuse for perpetrating the latter, establishes no such connection as to satisfy the statute, any more than if A slanders B on the 4th of July, and B thrashes him for it at Christmas." (See, also, *Merritt Milling Co. v. Finlay*, 15 S. E. Rep. [N. Car.], 4; *Byerly v. Humphrey*, 95 N. Car., 151.) We are satisfied that these counter-claims, if they existed as causes of action in favor of the defendant, were not competent as counter-claims in the present action. The decree of the district court is

AFFIRMED.

UNION STOCK YARDS STATE BANK, OF SIOUX CITY, IOWA, V. J. L. BAKER.

FILED DECEMBER 4, 1894. No. 5868.

Mechanics' Liens: EFFECT OF TAKING COLLATERAL SECURITY: WAIVER. The right to a mechanic's lien, or to enforce it by the proper action, if filed, is not lost nor waived by the acceptance of collateral security for the payment of the account for material furnished or labor performed, unless such was the intention of the parties in the giving and taking of such security.

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

Kean & Sherman, for plaintiff in error.

T. M. Franse, contra.

HARRISON, J.

The defendant in error commenced this action in the district court of Cuming county to foreclose a mechanic's lien on the northwest quarter of section 24, township 24,

range 5 east in said county. The lien, it appears, was based upon an account for lumber furnished to one Courtland Abrams, who was, at the time the lumber was furnished, the owner of the land, but, after the lien upon which this action is predicated was filed, transferred the property to the plaintiff in error. Abrams was made a party defendant to the action, but did not enter an appearance nor make any defense. The bank (plaintiff in error) filed an answer, in which it admitted the ownership of the land and denied all other allegations of the petition; pleading further that defendant in error had waived his right to enforce his lien by taking as other security for its payment certain notes, or such balance of the proceeds thereof as might remain after the payment therefrom of an indebtedness of the principal defendant, Abrams, to the Nebraska State Bank of West Point, for the payment of which the notes in question were in the hands of such bank as security; and that the defendant in error waived his right to foreclose his lien by certain representations made during the progress of the negotiations which resulted in the acquirement of the title by plaintiff in error to the land affected by this lien. A trial to the court resulted in a decree in favor of defendant in error, foreclosing his lien for the sum of $177. Motion for a new trial was filed on behalf of the bank, overruled on hearing, and the case brought to this court by petition in error.

The only petition in error filed is one entitled "petition on appeal." The trial and determination of this case in the district court was of date May 12, 1892, and the transcript was filed in this court December 12, 1892, more than six months after the rendition of decree by the trial court, too late to perfect an appeal, and hence, if considered in this court, it must be as an error proceeding.

The first point argued by counsel for plaintiff in error is that the evidence shows that there was a payment of $20.92 made to defendant in error, to apply on the lien in

suit, for which no credit was given either before or after the suit, and the amount of the decree is for $20.92 more than it should be, and for this reason erroneous. This was not included in the motion for new trial, nor any part of the petition in error, and, following the established rule of this court, cannot be considered; but if properly before us, it was not prejudicial to the rights of the bank, as the trial court made a finding, and which was according to the evidence, that there was due the defendant in error the sum of $177, with interest at seven per cent per annum from December 13, 1889, but rendered judgment for $177 without interest. If the interest had been computed and the credit of $20.92 allowed, the judgment would have been for a larger sum in favor of defendant in error than it now is.

It is further claimed that inasmuch as the notes belonging to Abrams, which were in the Nebraska State Bank of West Point as security for the payment of his indebtedness to the bank, were also pledged to defendant in error to the extent of any balance of them which should remain after extinguishing the debt to the bank, and accepted by him as collateral security for the payment of the amount of the lien, he thereby waived his right to enforce the lien. The acceptance of this security could not, and did not, in any manner affect the lien, unless it was the intention at the time it was taken that the lien was to be waived or the acceptance was to work such a waiver, and we are satisfied from the evidence that no such intention was proved. (See *Hoagland v. Lusk*, 33 Neb., 376.)

Another contention of plaintiff in error is that the defendant in error made representations to third parties at the time the land was conveyed to plaintiff in error and which were communicated to plaintiff in error, by which the lien was waived, or the defendant in error estopped to assert it. It does not anywhere appear that defendant in error at any time declared any intention of waiving the rights acquired by filing his lien, or either expressed him-

self in such terms or acted in such a manner as to estop him from resorting to a foreclosure of the lien to obtain payment of the account. It is true that he was to receive the balance of the proceeds of the notes in possession of the bank, if any remained after its claim was paid, but this agreement was made with no intention, so far as the evidence discloses, of relinquishing any rights under the lien. The judgment of the district court is

AFFIRMED.

WILLIAM B. HAMILTON V. HOME FIRE INSURANCE COMPANY.

FILED DECEMBER 4, 1894. No. 5734.

Estoppel: INSURANCE: NOTICE: WAIVER. Knowledge of the existence of a right or defense and the intention to relinquish it must concur in order to estop a party by waiver. Following *Henry & Coatsworth Co. v. Fisherdick*, 37 Neb., 209.

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

John P. Breen, for plaintiff in error.

A. S. Churchill and *Fawcett & Sturdevant, contra.*

RYAN, C.

This action was brought in the district court of Douglas county for the recovery of the sum of $500, the conceded value of the building insured which was afterward destroyed by fire. The policy was issued to cover the interim between November 1, 1887 and November 1, 1890, subject to certain conditions, which were in effect that the policy should lapse by the failure of the insured to pay

any portion of the premium when it fell due; and further, that during default in making such payment the policy should not be in force. At the time the insurance was effected plaintiff gave his note to the defendant for the sum of $10, of which sum $5 represented the premuim on the policy sued upon. This note was due January 1, 1888. On September 7, 1889, the insured building was burned. No proof of loss was made, neither was any notice of this fire given until the 11th day of October, 1889. The premium note was on October 19, 1888, left with Daniel O'Connell, a justice of the peace, for collection, and was with others taken out of his hands October 4, 1889, and entrusted to Mr. Thompson, an attorney at law. He, without special instruction, brought suit for the collection of the premium note very soon after, and judgment was thereon rendered October 11, 1889. On the day last named there was paid to John S. Morrison, the justice of the peace by whom the judgment had been rendered, the principal, $10, and $2 interest on the note aforesaid, and $2.55 costs of suit. The amount of the note was at once paid over to Mr. Thompson, and notice and proof of loss was served upon defendant at its general office in Omaha in the afternoon of the same day. This was the first notice or knowledge which the insurance company had that there had been a loss. At once its secretary notified Mr. Thompson of the condition of affairs, by whom the next day the sum of $14.55 was repaid the insured in accordance with directions of the officer above named. After all the evidence had been introduced on the trial, the jury were instructed to find for the defendant, which was accordingly done. From the judgment rendered for costs on this verdict plaintiff prosecutes error to this court. Several questions have been discussed, but it is deemed necessary to consider but one, and that is whether or not there was a waiver by the company of the conditions contained in its policy. In argument it is said that the district judge gave the instruction

to find for the defendant upon a misconstruction of language used in the case of *Phenix Ins. Co. v. Bachelder*, 32 Neb., 490. This misconstruction alleged was in assuming that payment of a note given for the premium on a policy containing conditions such as are above described operated only to revive the policy from and after the time of payment. If this was the theory on which the instruction complained of was given, it is possible that the language referred to was misunderstood, for the contingency herein involved was not in that case, as will readily be seen by a careful examination of the original opinion, as well as that filed on rehearing reported in 39 Neb., 95. What may have influenced the court to instruct the jury to find for the defendant does not now so much concern us as does the proposition whether or not the direction was proper. A careful examination of all the evidence introduced has convinced us that there was no proof that the defendant, with knowledge that a loss had been sustained, enforced payment of the note for the premium. By the terms of the policy it was the duty of plaintiff, if he claimed on the policy, to give notice to the company of a loss within a reasonable time after it was sustained. We do not mean by this to say what would be the effect of a failure to give this notice, but rather to point out that the company had a right to suppose that if no notice of loss had been given, none had probably been sustained. The term for which the insurance was effected had not expired when the note was collected by suit, so that its collection afforded no ground of inference that the company intended to deny its liability, and at the same time collect the premium as though it was liable. The collection of the note was in entire harmony with the rights of the company if no loss had been sustained, and that was the condition of affairs which its officers supposed existed when the note was collected. As soon as knowledge was obtained that a loss had previously been sustained the payment which the company had received

was at once refunded. If this had not been done there would have been some ground for the assumption that the company ratified the collection made with all its incidental consequences. It could not, however, be held to have ratified the waiver of its defenses in respect to an existing loss when the fact of such loss was at the time unknown to it. Knowledge of the existence of a right or defense and the intention to relinquish it must concur in order to estop a party by waiver. (*Henry & Coatsworth Co. v. Fisherdick*, 37 Neb., 209.) On the theory that there was no evidence from which the jury could properly find that the insurance company had waived its right to insist that when the loss occurred the policy was not in force, the instruction to find for the defendant was proper. The judgment of the district court is, therefore,

AFFIRMED.

DANIEL MCALEESE V. STATE OF NEBRASKA.

FILED DECEMBER 4, 1894. No. 6276.

1. **Contempt:** COUNTY CLERK: FAILURE TO OBEY ORDER TO PLACE NAME ON BALLOT. When by an order of a district judge a county clerk has been required to place upon official and sample ballots the name of a candidate and to make due return of his compliance at a time fixed, a failure to comply may be punished as being in contempt of the authority of such judge.
2. ———: JUDGMENT: REVIEW. Whether or not such failure has been satisfactorily explained is a question of fact determinable in the district court wherein the proceedings for the punishment for the alleged contempt was had, and the judgment of that court on this question will not be reversed unless it was clearly wrong.
3. ———: AFFIDAVIT: OATH ADMINISTERED BY NOTARY. Proceedings for the punishment of contempt of the character above indicated may be had upon an affidavit, sworn to before any officer by law authorized to administer an oath.

ERROR to the district court for Cheyenne county. Tried below before NEVILLE, J.

The facts are stated by the commissioner.

George W. Heist and *Henry St. Rayner*, for plaintiff in error:

An information must be sworn to before a judicial officer authorized to administer the oath, and not before a notary public. (*Richards v. State*, 22 Neb., 150; *Davis v. State*, 31 Neb., 252.)

The mandate commanding the county clerk to perform an act contrary to the express provisions of the statute was unauthorized and void. A statute which requires that certificates of nomination shall be filed with the county clerk not less than twelve days before the day of election is mandatory, and imperatively requires that twelve full days shall intervene, exclusive of the day of filing and the day of election. (*Howes v. Turner*, 1 C. P. D. [Eng.], 670; *Zouch v. Empsey*, 4 B. & Ald. [Eng.], 522; *Dousman v. O'Malley*, 1 Doug. [Mich.], 450; *Sallee v. Ireland*, 9 Mich., 154; *Robinson v. Foster*, 12 Ia., 186; *Arnold v. Nye*, 23 Mich., 293; Wigmore, Australian Ballot System, 187; *Small v. Edrick*, 5 Wend. [N. Y.], 137; *Columbia Turnpike Road v. Haywood*, 10 Wend. [N. Y.], 423; *Owen v. Slatter*, 26 Ala., 546; Sedgwick, Constitutional Limitations [2d ed.], 357.)

An order made by a court or judge in a proceeding in excess of the jurisdiction conferred upon such tribunal or judge, or commanding the performance of an illegal act, is not a lawful mandate, and failure to comply therewith cannot be punished as a contempt. (3 Am. & Eng. Ency. Law, 788, and cases cited; *Haines v. Haines*, 35 Mich., 143.)

To sustain a charge of contempt under subdivision 3 of section 5234, Consolidated Statutes, it must appear that the disobedience alleged was willful and, within the terms of

the statutes, a distinct and clear disobedience of a lawful process or order of the court. (3 Am. & Eng. Ency. Law, sec. 788, and cases; *Sherwin v. People*, 100 N. Y., 351; *Worden v. Searls*, 121 U. S., 14.)

George H. Hastings, Attorney General, and *H. D. Rhea*, for the state:

The power to punish for contempt is inherent in every court having common law jurisdiction, without regard to statute. (3 Am. & Eng. Ency. Law, 870, and cases cited; *Ex parte Robinson*, 1 Cent. L. J. [Ark.], 280.)

The court has power, outside of common law and statutory doctrine of contempt, to punish the clerk of the district court for willfully refusing to obey an order or to make return to a peremptory writ of *mandamus*. (*Briggs, Ex parte*, 64 N. Car., 202; *In re Wooley*, 11 Bush [Ky.], 95; *Stuart v. People*, 4 Ill., 395; *People v. Wilson*, 64 Ill., 195; *People v. Smith*, 3 Caines' Cas. [N. Y.], 221; *Commonwealth v. Newton*, 1 Grant [Pa.], 453.)

The following authorities were also referred to by the state: *Tolman v. Jones*, 114 Ill., 147; *Crosby's Case*, 3 Wils. [Eng.], 188; *Gist v. Bowman*, 2 Bay [S. Car.], 182; *Cossart v. State*, 14 Ark., 538; *Yates v. People*, 6 Johns. [N. Y.], 337; *Anderson v. Dunn*, 6 Wheat. [U. S.], 204; *McLaughlin v. District Court*, 5 W. & S. [Pa.], 272; *Ex parte Kearney*, 7 Wheat. [U. S.], 38.

RYAN, C.

The official ballot of Cheyenne county for the year 1892 contained the name of but one candidate for the office of county attorney, "W. P. Miles, of Sidney." The election was held on the 8th day of November. During that year plaintiff in error was county clerk. On October 27 there was presented to him for the purpose of being filed a certificate signed by seventy-three persons, whereby was nominated Leroy Martin as a candidate for county attorney, to

be voted for at the election above referred to. Each signer certified that he was a legal resident and qualified voter of said county and opposite his signature placed his address, as well as a description of his business and the place where it was carried on. On the certificate thus presented plaintiff in error made this indorsement:

"Leroy Martin, county att'y. Certificate presented October 27, 1892, at three o'clock P. M. and forty-eight minutes, and on account of the failure, on the part of the candidate named herein, to file the same in accordance with section 1753, Nebraska Statutes for 1891, the same is not received for filing. D. MCALEESE, *Co. Clerk.*

"JAMES MCMULLEN, *Deputy.*"

On the 28th day of October, 1892, there was filed with the county clerk of the aforesaid county the following document:

"W. P. MILES, COUNTY ATTORNEY CHEYENNE COUNTY,

"SIDNEY, NEB., October 28, 1892.

"*To Daniel McAleese, County Clerk Cheyenne County, Nebraska:* You are hereby notified that I object to the filing of the certificate of nomination of Leroy Martin as a candidate for county attorney for Cheyenne county, for the following reasons, to-wit: Said certificate of nomination was not presented for filing within the time required by law. W. P. MILES,

"*One of the Electors of Cheyenne County, Neb.*"

There was also filed with said clerk, in respect to said certificate, written objections, though the date whereon these were filed does not appear in the record. They were, however, sworn to by John Williams, October 29, 1892. These objections were to the certificate of nomination "on file" in the clerk's office. As the certificate referred to was marked filed only once, which was on November 2, 1892, the date whereon the objections of Williams were filed is still further rendered uncertain by these considerations.

These objections were because, as Williams alleged, twenty-five names attached to the certificate of nomination were illegible, and because, among other signers, three were minors, in addition to which three there were ten other signers who were not electors. There was no attempt to designate the illegible names, neither was there any attempt to name the signers who were alleged not to be electors. On the 29th day of October, 1892, there was presented to Hon. William Neville, judge of the thirteenth judicial district of the state, authorized by section 16, chapter 24, acts 1891, an information on the relation of Leroy Martin, wherein was fully set forth the presentation of the certificate of nomination, hereinbefore described, to the respondent on October 27, and his refusal to file the same, from which it was charged would inevitably result the omission from the official ballot of the name of the relator. The prayer was that a peremptory writ of *mandamus* might issue commanding the defendant forthwith to receive and file said certificate of nomination and cause to be printed the name of Martin on all the ballots to be used at the ensuing election. On the day on which the above information was presented to him, Judge Neville made an order in which, after a recitation of the facts, was the following mandate:

"Now, therefore, you are commanded to file said certificate of nomination as required by law and cause said nomination of said candidate to be printed upon the official and sample ballots to be used at the said next general election, or that you will appear before me in my office at North Platte, Nebraska, on next Tuesday, the 1st day of November, 1892, to show cause why you refused so to do."

This order was served on plaintiff in error on October 31, by the sheriff of Cheyenne county. No showing was made as required by it to be done by November 1. There was, however, filed on that day with Judge Neville the following answer, entitled as had been the information for a *mandamus*.

"Now comes Daniel McAleese, the respondent herein, and for answer, and for an excuse for not complying with the mandate of the court, denies the right of the relator herein to the relief sought.

"DANIEL MCALEESE,
"By W. P. MILES,
"*His Attorney.*"

On the 2d day of November the certificate of nomination was indorsed in this language: "Filed November 2, 1892, D. McAleese, clerk Cheyenne county, by James McMullen, deputy clerk, in accordance with the ruling of the judge." On the day last described there was mailed to the party therein addressed the following notice:

"*To Leroy Martin, Sidney Neb.:* You are hereby notified that objections to your certificate of nomination as a candidate for county attorney of Cheyenne county, Nebraska, and to the printing of your name on either the sample or official ballots, as such candidate, have been filed in this office. The objections thereto have been sustained by me.

D. MCALEESE,
"*Co. Clerk,*
"JAMES MCMULLEN,
"*Deputy.*"

On the day following that on which the above communication was mailed to Leroy Martin there was presented to Judge Neville an information against Daniel McAleese, in which was recited the former order and the refusal of the respondent to comply therewith, and an order prayed requiring the respondent to correct the official ballots and distribute them in such manner that the name of Leroy Martin should thereon appear as a candidate for county attorney. The same day an order was made as prayed, and in addition requiring the plaintiff in error McAleese to make return to Judge Neville at his office of the compliance and doings by plaintiff in error thereon indorsed, on or before November 7, 1892, at 3 o'clock P. M. This

order was served on November 4. There was compliance with this order, neither in the way of printing the ballots, nor in making return by plaintiff in error of his doings. On the 19th day of December, 1892, an affidavit sworn to by James B. Ragan before B. A. Jones, a notary public, was filed in the district court of Cheyenne county in which was recited the facts hereinbefore stated. Together with Daniel McAleese, William P. Miles, county attorney, was charged with willful disregard of the orders of Judge Neville. In regard to William P. Miles it was alleged that at the time of his misconduct he was, and at the time of complaint made continued to be, county attorney of Cheyenne county. Following these averments was the following language, to-wit:

"That by reason thereof it was the duty of said William P. Miles, as a sworn officer of this court, to advise the said McAleese to obey the process, order, and mandate of the judge so heretofore made, but that notwithstanding the facts aforesaid, then and there being in the county of Cheyenne, and state of Nebraska, did then and there counsel and advise with the defendant McAleese to refuse to obey the orders of the judge, with intent to hinder and obstruct the due administration of justice in the proceeding hereinbefore named, then pending before said judge on the dates of service aforesaid, and that they counseled and advised with each other and together for the purpose of obstructing the laws of the state, and the orders and mandates herein made by William Neville, judge of the thirteenth judicial district of Nebraska, made at chambers, North Platte. Your informant further deposes and says that the said William P. Miles was a candidate for county attorney of Cheyenne county, Nebraska, to be voted for at the general election therein on the 8th day of November, 1892, and was interested in the result of said election, and that he advised and counseled the defendant McAleese not to print and to publish his name upon the sample and official bal-

lots, with intent and design to obtain an undue advantage, and unlawfully advised the defendant to refuse to file the petition and certificate of nomination of said Leroy Martin for county attorney, with intent thereby to deprive the citizens of the county aforesaid of the right to vote for the man of their choice for said office, and the said Miles corruptly advised the said McAleese to refuse to correct the sample and official ballots, and the said Miles corruptly advised the said Daniel McAleese to refuse to print unofficial ballots, and the said Miles corruptly advised the defendant McAleese to refuse to make return as respondent to the last order hereinbefore named, with intent to hinder and obstruct the administration of justice, and the said Miles failed to prosecute the defendant McAleese for the violation aforesaid, and advised with the defendant McAleese and his counsel, and assisted him with intent to hinder the due administration of justice in contempt of court, and contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the state of Nebraska."

The defendants McAleese and Miles declined to plead and their requests for separate hearing were granted, for which reason the subsequent proceedings in this case concern only McAleese. It is insisted in his behalf that the proceedings for the punishment of contempt cannot be prosecuted upon an affidavit sworn to before a notary public. In *Gandy v. State*, 13 Neb., 445, it was held that no jury was allowed in proceedings of this kind, as the question involved affects the administration of justice and may require the prompt action of the court or judge to prevent an obstruction of the law or a failure of justice. In the case under consideration McAleese, the county clerk, was *ex officio* clerk of the district court of Cheyenne county. It could scarcely be required that of necessity the oath of the informant must be administered by this officer. Ordinarily, it would be well that proceedings of this kind

should be begun by the county attorney, but in this case this officer was likewise guilty of the contempt to be charged. It might be that the accusation against the county attorney would be malicious and unfounded. We cannot believe this true in this case. There is found in the evidence ample proof that Miles, to the extent of his ability, assisted in preventing the name of Martin from appearing upon the ballots to be used at the election at which he himself was a candidate for the same office. He was effectually able to do this, because he was then an incumbent of the same office and did not hesitate to use his official position to further his own candidacy. If these proceedings had been against McAleese alone, it is inconceivable that any one would be so stupid as to ask County Attorney Miles to act as prosecutor, for, without scruple or shame, he had been a selfish participant throughout the entire series of transactions to be investigated. Since, in these proceedings, the question involved affects the administration of justice, it would be manifestly absurd to require that they should be commenced before a justice of the peace, or other examining magistrate, as provided by section 585 of the Criminal Code, when, as in this case, the administration of justice interfered with was in the district court. By section 671 of the Code of Civil Procedure it is provided that persons punished for contempt in cases of the nature of that under our present consideration shall nevertheless be liable to indictment, if such contempt shall amount to an indictable offense. It is very clear that there was no error in entertaining jurisdiction upon proper affidavit, and it would be intolerable that the validity of the whole proceeding should be made to depend upon the particular class of officers empowered to administer oaths in which the officer who administered the oath belonged.

It is argued that the plaintiff in error was justified, under the provisions of section 8, chapter 24, Laws, 1891, in his refusal to file the certificate of nomination of Leroy

Martin, for the reason that it was presented for that purpose on October 27, whereas the election took place on November 8 following. Whether or not this was in due time we do not feel called upon to determine, for the interference by plaintiff in error with the due administration of justice does not depend upon his correct construction of the requirement that in this particular class of cases certificates should be filed not less than twelve days before election. When he was required to appear before Judge Neville at North Platte on November 1, it was his duty to do so, and if there existed reasons for refusal to file the certificate of nomination which he deemed important, he should have presented them, and doubtless a proper order would then have been made. Instead of doing this he caused to be filed an answer on the 1st day of November, in which he only set up an alleged excuse for not complying with the mandate theretofore issued, and that excuse was simply a denial of the right of the relator to the relief sought. When afterwards it had been made known to Judge Neville that plaintiff in error had refused to comply with the requirement that the name of Leroy Martin should be printed on the ballots, and an order had issued requiring performance as well as a return of his doings by the afternoon of November 7, plaintiff in error neither obeyed nor explained the cause of his disobedience. Even when in the district court proceedings were begun against him for the disregard of the orders of Judge Neville, he refused to plead, and it was only to be gathered from the evidence why he claimed justification of his conduct. On the trial plaintiff in error explained that he did not read that portion of the copy of the order which required him to make return, and supposed the return would be made by the sheriff. The probability of this explanation being true was one of the questions of fact which the district court must by its judgment have settled adversely to the plaintiff in error, and its estimate of this explanation will not now be reviewed. Unexplained,

the refusal of the plaintiff in error to comply with the orders made by Judge Neville justified a finding that he was guilty of willful disobedience. Whether the explanation offered served to relieve the conduct of plaintiff in error of its apparent contumaciousness was a question of fact, the determination of which this court will not review unless the judgment of the trial court was clearly wrong—a condition not found to exist in this case. The punishment inflicted was certainly not excessive, for the offense was against the political rights of the people of Cheyenne county. An officer entrusted with the performance of a duty upon which depends the right of voters to express their choice of officers should not so far forget his responsibility as to refuse to make a full and fair showing of all the facts required of him by proper judicial authority. If in this regard he willfully disobeys in the interest of a particular candidate, or political party, he does so at his peril, and a punishment even greater than that inflicted in this case would probably be held not disproportionate to the offense. The judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA V. STATE BANK OF WAHOO.

FILED DECEMBER 4, 1894. No. 5962.

Insolvent State Banks: RELATION OF BANKER AND DEPOSITOR: FRAUD OF CASHIER: PREFERRED CLAIMS: CERTIFICATE OF DEPOSIT: TRUST FUNDS: PRACTICE. Kingsley loaned Baum $2,000, secured by a mortgage on real estate. Ladenburger had sold the real estate to Baum and he borrowed this money to pay for it. The cashier of the Bank of Wahoo negotiated the loan for Baum, and by agreement between Baum, Ladenburger, and the cashier, the latter was to receive from Kingsley the proceeds of the loan and pay the same over to Ladenburger. About No-

vember 1, 1892, the cashier received the draft and collected it, but on Ladenburger's demanding the money, falsely alleged there was a defect in the title to the real estate, and claimed the right to hold the money until such defect should be cured. Ladenburger consented to this. December 31, 1892, the cashier mailed to Ladenburger a certificate of deposit, reciting that the latter had deposited in the bank the Kingsley money payable to the order of himself "in person," and on return of the certificate indorsed "when the land title to Baum is straightened out." January 23, 1893, the bank was found to be insolvent, and at the suit of the attorney general placed in the hands of a receiver. Ladenburger demanded of the receiver the payment of his claim in full as a preferred claim. *Held*, (1) That the controlling, the test question in the case is, was Ladenburger a voluntary creditor of the bank? Was the relation subsisting between them that of ordinary depositor and banker? (2) That the agreement of the parties that the cashier should negotiate the loan and receive the proceeds thereof for Ladenburger did not make the latter a voluntary creditor or depositor of the bank; (3) that one may involuntarily become the creditor of another, but from the very nature of things the relation of banker and depositor can be created only by consent of both parties; (4) that if A, without the knowledge of B, deposits a sum of money in a bank to the latter's credit, then, until B shall be informed thereof, and expressly or by implication recognize the deposit as such, the bank will hold such money in trust for B, and not as his banker; (5) that the false representation of the cashier, that there was a defect in the title to the real estate, and that he was holding Ladenburger's money until such defect should be cured, was a fraud on the latter, and his conduct in permitting the cashier to retain the money for the purpose alleged should not be construed into an intention or a consent on his part to become a depositor of the bank; (6) that the certificate of deposit was, under the circumstances, nothing more than an acknowledgment in writing that the bank held the proceeds of the Kingsley loan for Ladenburger and would pay the same to him when the title to the real estate should be perfected, and the mere holding of this certificate of deposit by Ladenburger was not of itself sufficient evidence to establish that he thereby recognized himself as a depositor of the bank; (7) that to make one a depositor of a bank, and in case of its insolvency to limit such person's rights against the assets thereof to those of an ordinary creditor, it must appear that such person became a depositor of such bank voluntarily; (8) that the title to the money received by the bank from Kingsley for Ladenburger was held in trust by the bank for him,

and the title to such money did not pass to the receiver; (9) that when a fund is once impressed with the character of a trust, such trust character continues until changed by the consent of the beneficiary; (10) that Ladenburger was entitled to have his claim paid as a preferred claim.

ORIGINAL action to wind up the affairs of the State Bank of Wahoo, Nebraska, under the banking law of 1889. Upon demand of Moriz Ladenburger for payment of his claim in full from the assets of the bank the receiver petitioned the court for instructions. *Claim preferred and payment ordered.*

Good & Good, for claimant.

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

RAGAN, C.

About October 1, 1892, Moriz Ladenberger sold some real estate, situate in Saunders county, Nebraska, to John Ladenburger and Fritz Baum (hereinafter called "the purchasers"). In order to make payment in full for the real estate the purchasers applied to W. H. Dickinson, the proprietor and cashier of the State Bank of Wahoo, a banking institution situate in said county, to procure for them a loan of $2,000, to be secured by a mortgage on said real estate. Dickinson undertook to procure one Kingsley to make the loan. The purchasers executed the proper mortgage, which was duly recorded, and by agreement between them and Dickinson and Moriz Ladenburger, the $2,000, when advanced by Kingsley on the mortgage, Dickinson was to turn over to Moriz Ladenburger in payment of the balance due him from the purchasers of his real estate. About November 1, 1892, Dickinson received from Kingsley a draft for $2,000, being the loan made by the latter to the purchasers. Dickinson appears to have collected the money on this draft, or cashed it, about the time he re-

ceived it. Moriz Ladenburger, soon after the receipt of the draft by Dickinson, demanded of him the money which Kingsley had loaned the purchasers, but Dickinson refused to pay over the money, alleging as a ground therefor that there was some defect in the title of the real estate mortgaged to Kingsley, and claimed the right to hold said money until such defect should be cured, and for such alleged purpose did retain said money, Moriz Ladenburger, it would seem, consenting thereto. It does not appear, however, that Moriz Ladenburger knew at this time that the money which Kingsley had furnished the purchasers was sent to Dickinson in a draft; and, as a matter of fact, there was no defect in the title to the real estate. Moriz Ladenburger, during the month of November, 1892, frequently demanded of Dickinson this money. Dickinson refused to pay it over, still alleging that the title to the real estate had not been perfected. On December 31, 1892, Dickinson wrote and mailed to Moriz Ladenburger a letter as follows:

"WAHOO, NEB., Dec. 31, 1892.

"*Moriz Ladenburger, Morse Bluff, Neb.*—DEAR SIR: We went up to the court house this afternoon to pay the taxes on your land, but the treasurer's deputy was so busy that they would not get out the receipts to-day and said it possibly would be a week or two before they could do so. That being the case, we thought that you would not want to be out of the interest on your money any longer, so now inclose you certificate of deposit for $1,900, drawing eight per cent interest, which you will please hold until the matter is closed up. We have retained $100 to pay the taxes and other expenses with. Whatever balance there may be after these are paid we will turn over to you in cash when all is settled. Hoping that this will be satisfactory to you for the present, we remain yours truly,

"W. H. DICKINSON, *Cash.*"

The certificate of deposit alluded to in the letter and

which accompanied the same was in words and figures as follows:

"$1900. STATE BANK OF WAHOO,
"WAHOO, NEB., Dec. 31, 1892.

"Moriz Ladenburger has deposited in this bank nineteen hundred and no 100 dollars, payable to the order of himself in person on the return of this certificate properly indorsed when the land title to Ladenburger & Baum is straightened out. With eight per cent interest from date.

"No. 2372. W. H. DICKINSON, JR., *Cash.*"

It appears that on January 3, 1893, Dickinson charged to Moriz Ladenburger on the books of the bank $10 for abstract of title to the land mortgaged; on the 7th of January, 1893, $42.20, for taxes paid on the land; and as the so-called certificate of deposit was for only $1,900, $47.80 remain unaccounted for. This sum Dickinson probably charged Ladenburger for the privilege of robbing him. On the 23d of January, 1893, the Bank of Wahoo was discovered to be insolvent, and at the suit of the attorney general brought in this court was placed in the hands of a receiver. Dickinson never paid any part of the money to Moriz Ladenburger received for him from Kingsley, and Moriz Ladenburger demanded of the receiver the payment of said sum of money in full as a preferred claim out of the assets in his hands, and the receiver has petitioned this court for instructions in the premises.

The controlling, the test question in the case is, was Moriz Ladenburger a voluntary creditor of this bank? Was the relation subsisting between them that of an ordinary depositor and banker? When the $2,000 draft was received from Kingsley by Dickinson, the cashier, the bank had and held it as agent and in trust for Moriz Ladenburger. It had received the draft for the express purpose of turning it over to him. When the bank collected the money on the draft it held such money as agent and in trust for Moriz Ladenburger. The agreement of the parties that

the cashier should negotiate the loan and receive the proceeds thereof for Moriz Ladenburger by no means made the latter a voluntary creditor or depositor of this bank. One may involuntarily become the creditor of another, but from the very nature of things the relation of banker and depositor can be created only by consent of both parties. If A, without the knowledge or consent of B, deposits a sum of money in a bank to the latter's credit, then, until B shall be informed thereof and expressly or by implication recognize the deposit as such, the bank will hold such money in trust for B, and not as his banker. The representations made to Moriz Ladenburger by the cashier that he was holding the money received from Kingsley until the title to the land should be perfected was false and a fraud on Moriz Ladenburger, and the latter's conduct in permitting the cashier to retain the money for the purpose and on the grounds alleged should not be construed into an intention or a consent on his part to become a depositor of this bank, nor did the issuance by Dickinson of the certificate of deposit and its delivery to Moriz Ladenburger modify the relations existing between Ladenburger and the bank. True, the certificate of deposit recites that Moriz Ladenburger had deposited $1,900 in the bank, but this was not true. Dickinson, if any one, had done this, and that without the knowledge or consent of Moriz Ladenburger. It was not within the power of this cashier to make Moriz Ladenburger a depositor, as such, in this bank without his consent. But Moriz Ladenburger held this certificate of deposit some twenty days before the failure of the bank; and it is argued here that he thereby became an ordinary creditor or depositor thereof. Under the circumstances this certificate of deposit was nothing more than an acknowledgment in writing that the bank held the money, the proceeds of the Kingsley loan. The certificate of deposit recites that the money will be paid to Moriz Ladenburger in person when the title to the land has been perfected. This was simply

putting in writing the reasons and purposes Dickinson alleged for retaining this money, and in which, as already stated, Moriz Ladenburger was induced to acquiesce by the false representations of the cashier. The letter in which the certificate of deposit was sent to Moriz Ladenburger informed him that it would be a week or two before they could straighten up the title to the land. It does not appear that Moriz Ladenburger, prior to the receipt of this certificate of deposit, was a depositor or customer of this bank; nor does it appear that he did or said anything after the receipt of the certificate of deposit from which it can be inferred that he recognized himself as a depositor. He held the certificate of deposit—evidence to him that his agent, the bank, had collected the money coming to him from Kingsley, had possession of this money, and would pay it over when the title to the land should be cleared up. Moriz Ladenburger by this was not consenting nor intending that his money should be mingled with that of the bank and that it should become his debtor therefor. It takes more than this to create the relation of banker and depositor. In *Anheuser-Busch Brewing Association v. Morris*, 36 Neb., 31, this court held: "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." In *McLeod v. Evans*, 66 Wis., 401, it was held that a banker who accepts for collection a draft and in fact collects the money thereon, holds the same as trustee of the owner; and, after his assignment for the benefit of creditors, the trust character still adheres to the fund in the hands of the assignee, irrespective of other creditors. These cases were decided upon the correct principle that to make one a depositor as such of a bank, and, in case of its insolvency, to limit his rights against

the assets thereof to those of an ordinary creditor, it must appear that such person became a depositor of such bank voluntarily. (See, also, *Wilson v. Coburn*, 35 Neb., 530.) In the case at bar the title to the money received by the bank of Wahoo from Kingsley for Moriz Ladenburger did not pass to the receiver. It was Moriz Ladenburger's money held by the bank in trust for him; and when a fund is once impressed with the character of a trust, such trust character continues until changed by the consent of the beneficiary. It cannot be said that the evidence in this record is sufficient to establish that Moriz Ladenburger ever consented that the bank should hold the Kingsley draft or the proceeds thereof otherwise than as his agent and in trust for him. The receiver is instructed to pay the claim of Moriz Ladenburger as a preferred claim, to-wit, $1,946.78, with interest thereon at the rate of seven per cent per annum from November 1, 1892.

JUDGMENT ACCORDINGLY.

A. P. PILGER ET AL., APPELLEES, V. VICTOR K. TORRENCE ET AL., APPELLANTS.

FILED DECEMBER 4, 1894. No. 5869.

Judgments: ACTION TO SET ASIDE: PLEADING AND PROOF. When one against whom a judgment has been rendered seeks the affirmative aid of a court of equity to relieve him from that judgment, he must aver and prove that he had a meritorious defense to the action in which judgment was rendered. This is true even though the judgment be void, provided at least its invalidity does not appear on the face of the record.

APPEAL from the district court of Madison county. Heard below before ALLEN, J.

Griggs & Rinaker and *J. A. Smith*, for appellants.

Barnes & Tyler, contra.

IRVINE, C.

A judgment was rendered in the district court of Pierce county in favor of Torrence and against the plaintiffs in this case. A transcript of this judgment was filed in Madison county, and this action was brought against Torrence and the sheriff of Madison county to enjoin the enforcement of the judgment, it being claimed that the judgment had been entered without jurisdiction. An injunction was granted, and the defendants appeal.

It is not necessary to consider the questions raised as to the validity of the judgment. The plaintiffs do not in their petition allege that they had any meritorious defense to the action. When one against whom a judgment has been rendered seeks the affirmative aid of a court of equity to relieve him from that judgment, he must aver and prove that he had a meritorious defense to the action in which judgment was rendered. This is true even though the judgment be void, provided at least its invalidity does not appear on the face of the record. (*Osborn v. Gehr*, 29 Neb., 661; *Janes v. Howell*, 37 Neb., 320; *Langley v. Ashe*, 38 Neb., 53; *Gould v. Loughran*, 19 Neb., 392; *Proctor v. Pettitt*, 25 Neb., 96; *Winters v. Means*, 25 Neb., 242; *Lininger v. Glenn*, 33 Neb., 187; *Petalka v. Fitle*, 33 Neb., 756; *Wilson v. Shipman*, 34 Neb., 573.)

REVERSED AND CAUSE DISMISSED.

OMAHA & REPUBLICAN VALLEY RAILWAY COMPANY v. MARY COOK.

FILED FEBRUARY 19, 1895. No. 5101.

1. **Railroad Companies:** DUTY TO TRESPASSERS ON TRACK: NEGLIGENCE. The engineer in charge of a railroad train may presume that a trespasser discovered on the track is in possession of his senses, that he will appreciate the danger and act with discretion. He is therefore under no obligation to stop his train or even lessen the speed thereof before discovering that such trespasser is in iminent danger of personal injury.

2. ——— : ———. Such presumption has no application to persons incapable of caring for themselves, such as the very young and the helpless.

SUPPLEMENTAL motion for a rehearing of the case as reported in 42 Neb., 577.

POST, J.

We are by means of a supplemental motion for a rehearing asked to modify the proposition stated in the second paragraph of the syllabus of the opinion filed herein November 8, 1894. (See *ante*, page 577.) It is said that the rule therein asserted is oppressive and calculated to greatly interfere with the running of trains, and embarrass railroad companies in the transaction of their business as common carriers; and, as said in the brief accompanying the motion: "If such be the rule, trespassers are in control—if they choose to be—of the tracks and premises of railroad companies, and the operation of trains may depend entirely upon the whim or caprice of evil disposed persons." But counsel evidently misconceive the scope and effect of the decision complained of. What was there in fact decided is that since the peril of the plaintiff below was discovered by the engineer in charge of the train in time to have averted the injury, the giving of the instruc-

tion referred to in the syllabus is at most error without prejudice. Among the special findings by the jury was the following:

Q. Could the defendant's agents by the appliances then at their command, after it became apparent that plaintiff was walking between the rails unaware of the coming of the train, have stopped the train before it reached her?

A. Yes.

We certainly do not wish to be understood as intimating that it is in every case the duty of the engineer to stop his train or even lessen the speed thereof on the discovery of a trespasser upon the track, or that the rule of the instruction would be a safe direction in every action against a railroad company for injuries to trespassers. The rule is correctly stated in Wharton, Negligence, 389*a*, thus: "An engineer who sees before him on the track a person apparently capable of taking care of himself has a right to presume that such person on due notice will leave the track if there be opportunity to do so; and the engineer will not in such cases be chargeable with negligence if, in consequence of such person not leaving the track, the train cannot be checked in time to avoid the striking. But it is otherwise with persons apparently not capable of taking care of themselves, such as very young children and persons lying helpless on the track." In Beach, Contributory Negligence, 203, the rule is thus summarized: "Nor is the company liable for a failure on the part of its employes to stop the train, on seeing a person walking on the track, even though there was time enough to do so, provided the proper signals of warning were given. The company may presume that the trespasser is in full possession of his senses, and that he will appreciate his danger and act with discretion. But an engineer who sees a helpless person incapable of moving, on the track, is guilty of negligence if he fails to make all prudent efforts to avoid the collision, and this without reference to the causes of the person's dis-

ability." The doctrine as thus stated is fully supported by the numerous cases cited in the note to the text, and is in accord with previous decisions of this court. (See *Omaha Horse R. Co. v. Doolittle*, 7 Neb., 481; *Chicago, B. & Q. R. Co. v. Grablin*, 38 Neb., 90; *Union P. R. Co. v. Mertes*, 39 Neb., 448; *Chicago, B. & Q. R. Co. v. Wymore*, 40 Neb., 645.) But for the reason that the giving of the instruction could not have prejudiced the rights of the plaintiff in error the motion for a rehearing is denied.

MOTION OVERRULED.

HARRISON, J. not sitting.

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Accession.

1. Where one willfully, as a trespasser, takes the property of another and alters it in substance or form by his own labor, the manufactured article belongs to the owner of the original material. *Carpenter v. Lingenfelter*..... 728
2. Where one appropriates property through a mistake of fact, and by his labor transforms it so as to greatly increase its value, the title to the manufactured product will pass to him,—the former owner to recover the value of the original material. *Id.*

Accounting. See BUILDING AND LOAN ASSOCIATIONS. PARTNERSHIP, 3.

Actions. See CREDITOR'S BILL. EMINENT DOMAIN, 5, 6. HUSBAND AND WIFE, 4. INJUNCTION, 1, 3. INSURANCE, 8. INTERPLEADER. MECHANICS' LIENS, 10, 11. ORDERS. PARTNERSHIP, 5. QUIETING TITLE, 2. VENUE.

1. An action can only be maintained on a debt not due, in the exceptional cases specified in sec. 237 of the Code. *Cox v. Peoria Mfg. Co*..... 660
2. An action on a debt not due cannot be prosecuted to judgment, unless a writ of attachment has been allowed, and property seized thereunder. *Id.*
3. The proceeding for contesting an election provided by ch. 26, Comp. Stats., is neither an action at law nor in equity, and cannot be maintained by any person unless authority therefor is found in the statute. *Thomas v. Franklin*..... 310

Additional Burdens. See EMINENT DOMAIN, 5, 6.

Ad Quod Damnum. See MILLS AND MILL-DAMS.

Adverse User. See HIGHWAYS, 3.

Affidavits. See NEW TRIAL, 3.

Agency. See INSURANCE, 2.

Alimony. See DIVORCE, 6, 7.

Allegata et Probata.

1. The evidence should correspond to the pleadings. *Randall v. Person*..... 608
2. Under the Code, as well as at common law, the *allegata et probata* must agree. *Luce v. Foster*..... 818

Amendments. See PLEADING, 4.

Animals. See ARBITRATION.

Appeal. See COUNTY COURTS, 2. INTOXICATING LIQUORS, 4. MECHANICS' LIENS, 3. REVIEW. SUPERSEDEAS.

1. Either party may appeal from a judgment rendered by a justice of the peace on an award of arbitrators under art. 3, ch. 2, Comp. Stats. *Holub v. Mitchell*..... 389
2. A party who appeals from a judgment of a justice of the peace is entitled to a trial *de novo* in the appellate court. *Id.*
3. A party who dockets an appeal in the supreme court will be *held* to have abandoned it where he subsequently files a petition in error within a year from judgment below. *Burke v. Cunningham*..... 646

Appearance.

A party was held to have entered a general appearance in the district court where he prosecuted error thereto, cross-examined a witness whose evidence was being taken by deposition, consented to a trial on the merits of the case and waived a jury. *Ward v. Western Horse & Cattle Ins. Co*..... 374

Appraisement. See EMINENT DOMAIN, 4.

Arbitration. See INSURANCE, 5, 6, 8.

Secs. 991–995 of the Code, providing for arbitration, judgment, and appeal, do not apply to awards and judgments for damages by animals, under art. 3, ch. 2, Comp. Stats. *Holub v. Mitchell*..... 389

Argument. See REVIEW, 14. TRIAL, 5.

Assessments. See MUNICIPAL CORPORATIONS, 3–9.

Assignment. See BANKS AND BANKING, 1. BILL OF LADING.

1. An assignment by a contractor of a contract to transfer freight for a railway company was *held* not merely an assignment of the moneys to be earned, but an assignment of the whole contract, binding the assignee, who accepted benefits under the contract, to discharge the obligations thereof. *Union P. R. Co. v. Douglas County Bank*..... 469

Assignment—*concluded.*

2. Under such circumstances the equity of employes to a fund created by their labor in moving freight, and held by the company, is superior to that of the assignee. *Id.*

Assignments for Benefit of Creditors. See VOLUNTARY ASSIGNMENTS.

Assignments of Error. See REVIEW, 15, 34, 35.

Attachment. See ACTIONS, 1, 2. FRAUDULENT CONVEYANCES, 6, 7. INTERPLEADER.

1. As soon as a petition is filed in the proper court and summons issued thereon, with a *bona fide* intention of having it served, the plaintiff may have a writ of attachment upon filing the necessary affidavit. *Hoagland v. Wilcox* ... 138
2. A plaintiff who makes attachment and garnishment proceedings part of a suit to recover money, and serves notice on the garnishees in the county in which the action is brought, is not thereby entitled to have a summons directed to another county and served on the defendant there. *Id.*
3. Where the allegations of an affidavit for attachment are put in issue by a motion to dissolve, plaintiff is required to establish, to the satisfaction of the court, the truth of the facts alleged. *Citizens State Bank v. Baird* 219
4. A creditor in suing on a claim not due and attaching the debtor's goods need not set out in his petition the ground of attachment, but may state it in his affidavit. *Cox v. Peoria Mfg. Co.* 660
5. It is a sufficient ground for attachment that members of an insolvent partnership divide between themselves the firm assets for the purpose of enabling each to claim the portion transferred to him as exempt against the partnership creditors. *Id.* 661
6. Where a district judge has allowed an attachment on a debt not due, the presumption is that he made the order during a session of court. *Id.*

Attorney and Client. See QUIETING TITLE, 2.

1. Where a bond in a legal proceeding is signed by an attorney and approved, he is liable thereon, though he should not have signed it. *Luce v. Foster* 818
2. An attorney, with opportunity for prompt communication with his client, cannot, by virtue of his employment to prosecute a case, execute on behalf of the client a bond to indemnify a sheriff for levying on property claimed by a stranger. *Id.*

Attorney and Client—*concluded.*

3. In such a case the attorney has no authority to bind his client by an agreement to pay the proceeds of the execution to the surety on the indemnity bond. *Id.*

Attorneys. See COUNTY ATTORNEYS. CRIMINAL LAW, 12, 13.

Attorney's Fee. See TAXATION, 1, 12, 13.

The taxation of attorney's fees by federal courts cannot be impeached in the state courts as being contrary to public policy. *Mead v. Weaver* 150

Award. See APPEAL, 1.

Bail.

1. The right of defendant to give bail pending error proceedings in the supreme court, after conviction for a felony, is not absolute, but rests in the discretion of that court. *Ford v. State* 418
2. Bail will be allowed in the supreme court upon a showing of probable error calling for a reversal of the judgment. *Id.*

Ballots. See CONTEMPT. ELECTIONS.

Banks and Banking. See CORPORATIONS, 2. VOLUNTARY ASSIGNMENTS, 1.

1. The right of set-off exists in favor of one who has acquired the title to money due from an insolvent bank on a certificate of deposit issued to a third person, without a formal assignment by the latter. *Salladin v. Mitchell* 860
2. The relation of banker and depositor can be created only by consent of both. *State v. State Bank of Wahoo* 896
3. To make one a depositor of a bank, and, in case of insolvency, to limit his rights against the assets to those of ordinary creditors, it must appear that he became a depositor voluntarily. *Id.*
4. One does not recognize the relation of depositor by merely holding a certificate for trust money, where the bank refused to pay it on demand, and the cashier falsely claimed the right to retain it. *Id.*
5. Where a bank receives purchase money for land, under an agreement to pay it to the vendor, and, upon demand for it, the cashier falsely states there is a defect in the title, claiming the right to hold the funds until the defect is cured, and subsequently sends the vendor a certificate of deposit, payable when the title is straightened out, and the bank soon becomes insolvent, the title to the money does not pass to the receiver, and the holder of the certificate should be paid as a preferred claimant. *Id.*

Bill of Exceptions.

1. After a bill of exceptions has been quashed by the supreme court it will not be considered for any purpose. *Jones v. Wolfe* 272
2. Where the bill shows upon its face that important and material testimony has been omitted therefrom, a certificate of the trial judge, reciting that the bill contains all the evidence, will not control. *Nelson v. Jenkins* 133
3. A bill of exceptions will not be considered in supreme court where the referee before whom the case was tried failed to certify that all the evidence adduced had been preserved. *McClain v. Morse* 52
4. A clerk of the district court has no authority to sign and allow a bill of exceptions under conditions other than those specified in sec. 311 of the Code. *Scott v. Spencer* ... 632
   Guthrie v. Brown 652
5. The mere stipulation of counsel that the clerk may sign and allow a bill of exceptions is not sufficient to confer authority upon him to do so. *Id.*
6. The testimony taken at the hearing of an application for a liquor license, and transmitted to the district court, becomes a part of the record, and no bill of exceptions is necessary to bring it before the supreme court for review. *Powell v. Egan* 482

Bill of Lading.

A bill of lading, though not negotiable, is assignable. *Gates v. Chicago, B. & Q. R. Co.* 380

Bonds. See SUPERSEDEAS.

1. The statute having abolished private seals, an instrument in the form of a bond must be deemed a simple contract, not conclusively importing a consideration. *Luce v. Foster*, 818
2. Want of consideration for a bond, or the illegality therof, may be shown by parol. *Id.* 819

Breach of Covenant. See COVENANTS.

Bridges.

Where a county builds a bridge with money realized from precinct bonds, the precinct is not the owner of the bridge in such a sense as to relieve the county from a liability to keep it in repair. *Dutton v. State* 804

Briefs. See REVIEW, 5.

Brokers. See REAL ESTATE AGENTS.

Building and Loan Associations.

Payments by a member upon stock should, in an accounting of the amount due on a mortgage against him, be treated as payments on the loan. The fact that the company declared the stock forfeited according to the terms of the contract does not change the rule. *Randall v. National Building, Loan & Protective Union*..... 809
Stearns v. National Building, Loan & Protective Union..... 817

Burden of Proof. See ATTACHMENT, 3. SPECIFIC PERFORMANCE, 4. TAXATION, 15.

Burglary.

An instruction was proper which left it to the jury to determine what weight and effect should be given the circumstance that the accused, soon after the burglary charged, was in possession of goods which had been taken from the store where the burglary was committed. *Whitman v. State*..... 841

Calendars. See COUNTY COURTS, 1, 2.

Capital Punishment. See JURY.

Carriers.

1. It is the duty of carriers to deliver goods to the consignee within a reasonable time. *Gates v. Chicago, B. & Q. R. Co.*.... 379
2. The delivery of goods to the consignee is made at the peril of the carrier, unless when made the consignee surrenders the bill of lading either made or indorsed to himself. *Id.*
3. Where a carrier receives goods consigned to the owner's agent, and, at the direction of the latter, delivers them to another before the bill of lading has been surrendered, the delivery is, in effect, a delivery to the consignee, and the carrier is not liable to the owner upon failure of the person who received the goods to pay for them, it not appearing that the bill of lading had been assigned or indorsed to any one. *Id.*

Cemetery Associations. See CORPORATIONS, 1.

Certificates of Deposit. See BANKS AND BANKING, 1.

Cestui Que Trust. See TRUSTS.

Challenges. See JURY.

Champerty.

Right of defendant to plead that a contract between plaintiff and his attorney was champertous. *Chamberlain v. Grimes*, 702

Chattel Mortgages.

The mortgagee under a chattel mortgage acquires a lien only upon the property conveyed. *Bedford v. Van Cott*..... 229
Randall v. Persons..... 608

Churches. See RELIGIOUS SOCIETIES.

Cities. See MUNICIPAL CORPORATIONS.

Code. See TABLE, *ante*, p. li.

Collateral Attack. See CORPORATIONS, 3. INTOXICATING LIQUORS, 7.

Collateral Security. See ASSIGNMENT.

Commission Merchants.

A commission merchant is held to the same degree of care and diligence a prudent man would exercise in the management of his own affairs. *Reed v. Wood*..... 498

Commissions. See MORTGAGES, 3. REAL ESTATE AGENTS.

Common Carriers. See CARRIERS.

Condemnation Proceedings. See EMINENT DOMAIN.

Consideration. See BONDS, 2. HUSBAND AND WIFE, 2. SPECIFIC PERFORMANCE, 4.

Constitutional Law. See STATUTES, 2.

1. Sec. 15, art. 3, of the constitution, providing that the legislature shall not pass local or special laws granting special or exclusive privileges, is not a restriction upon its power over that subject, but a limitation with respect to the exercise thereof. *Smiley v. MacDonald*..... 5
2. The provision of sec. 9, art. 1, of the constitution, that all persons shall be bailable by sufficient sureties, has reference to bail as understood at common law, and in accordance with the practice before the constitution was adopted. *Ford v. State*..... 418

Contempt.

1. A county clerk may be punished for a failure to place upon ballots the name of a candidate, under an order of the district judge. *McAleese v. State*..... 886
2. Contempt proceedings in such a case may be had upon an affidavit, sworn to before any officer authorized to administer an oath. *Id.*

Contests. See COUNTY COURTS, 4. ELECTIONS.

Continuance. See EVIDENCE, 3.

Contracts. See ASSIGNMENT, 1. EQUITY. EVIDENCE, 5, 6. INSURANCE. LANDLORD AND TENANT, 1. MECHANICS' LIENS, 6, 7. MILLS AND MILL-DAMS, 2. REAL ESTATE AGENTS, 1. REPLEVIN, 4. SPECIFIC PERFORMANCE. VENDOR AND VENDEE.

1. A metropolitan city may, pursuant to ordinance, enter into a contract for the removal of garbage. Such a contract will not be held void by reason of a stipulation therein that the privilege thereby conferred upon the contractor is exclusive. *Smiley v. MacDonald* 6
2. Where a written contract of dissolution of partnership requires a partner to pay certain liabilities not itemized, parol evidence may be admitted to show the items intended. *Peaks v. Lord* 15
3. A petition describing in ordinary and concise language the contract sued on and alleging compliance therewith is sufficient after trial of issues framed without question as to the sufficiency of the description. *Darst v. Perfect*..... 574
4. One who refuses to perform the conditions imposed upon him by the terms of a contract cannot recover for a breach thereof by the other party. *Chicago, B. & Q. R. Co. v. Cochran*..... 531
5. A person who advances money in part performance of a contract and refuses to proceed cannot recover back his payment where the other party is without fault and willing to perform. *Lexington Mill & Elevator Co. v. Neuens*, 649
6. An indivisible promise founded upon two considerations, one of which is legal and the other illegal, cannot be enforced. *Luce v. Foster*..... 819

Conversations. See WITNESSES, 2.

Conversion. See TROVER AND CONVERSION.

Conveyances. See VENDOR AND VENDEE.

Corporations. See BUILDING AND LOAN ASSOCIATIONS SCHOOLS AND SCHOOL DISTRICTS.

1. A cemetery association organized under sec. 45, ch. 16, Comp. Stats., is a private corporation. *Pokrok Zapadu Publishing Co. v. Zizkovsky*..... 65
2. Directors and managing officers of an insolvent private corporation cannot take advantage of their position to secure a preference for themselves, but are required to share ratably with other creditors. *Ingwersen v. Edgecombe*..... 740
3. The right of a corporation to hold title to real estate or a lien thereon can only be attacked in a direct proceeding by the state. *Watts v. Gantt*..... 869

Costs. See ATTORNEY'S FEES. TAXATION, 1, 12, 13.

1. In order to review the taxation of costs a motion to retax must be filed in the trial court and a ruling obtained thereon. *Shields v. Gamble* 850
2. Where one brings a suit in the district court and recovers judgment for two hundred dollars he is not entitled to recover costs. *Id.*
3. Where an action within the jurisdiction of a justice of the peace is instituted in the district court, the plaintiff is not entitled to recover costs. *Pickens v. Polk* 268
   Guthrie v. Brown 655
4. A general finding for plaintiff, though for a sum less than two hundred dollars, establishes his right to recover costs in the district court in an action to foreclose a mechanic's lien. *Guthrie v. Brown* 652

Co-Sureties. See NEGOTIABLE INSTRUMENTS, 3.

Counties. See BRIDGES. MUNICIPAL CORPORATIONS, TAXATION.

County Attorneys.

1. Counsel who sue for compensation for assisting the county attorney in a criminal case must prove their employment was under the direction of the court. *Sands v. Frontier County* 837
2. Counsel employed to assist the county attorney in a criminal case are not required to follow it on change of venue to another county, and connot recover fees for unauthorized services rendered after the removal of the cause. *Id.*

County Boards. See HIGHWAYS, 1, 2.

County Clerks. See CONTEMPT, 1.

County Courts. See JUDGMENTS, 3, 4.

1. It is the duty of the county judge, on the first day of each term, to prepare a calendar for all the causes for trial thereat. *Bond v. Wycoff* 214
2. It will be presumed upon appeal, in absence of a showing to the contrary, that the county judge prepared his calendar according to sec. 15, ch. 20, Comp. Stats. *Id.*
3. The jurisdiction of county courts depends upon sec. 16, art. 6, of the constitution and the legislative acts in pursuance thereof. *Glade v. White* 336
4. An action to contest the election of a school district officer is not within the jurisdiction of a county court. *Laird v. Leap* 834

County Seat. See ELECTIONS, 1.

Courts. See ACTIONS, 3. COSTS, 3. COUNTY COURTS. DISTRICT COURTS. EVIDENCE, 1. JUDGMENTS, 2. JUSTICE OF THE PEACE.

Covenants.

Breach of covenant of warranty of title to land and for quiet enjoyment may be established *prima facie* by proof that the covenantee has been evicted or kept out of possession by one in actual possession claiming paramount title. *Heyn v. Ohman*..... 693

Creditors' Bill. See FRAUDULENT CONVEYANCES, 4, 5.

An action in the nature of a creditor's bill may be maintained upon a judgment of the United States circuit court for the district of Nebraska. *First Nat. Bank of Chicago v. Sloman*..... 350

Criminal Law. See BAIL. INDICTMENT AND INFORMATION, 2. LARCENY. LIBEL. MUNICIPAL CORPORATIONS, 1.

1. Where a plea in bar is insufficient in form, or shows that the facts alleged are not in law a bar to the prosecution, the state may demur; otherwise it should join issue by means of a replication. *Smith v. State*..... 356
2. By demurring to a plea in bar the state will be held to have admitted all of the facts well pleaded by accused. *Id.*
3. The state cannot deprive the accused of his right to a trial upon a plea in bar by introducing evidence tending to controvert the facts therein alleged in connection with a demurrer to the plea. *Id.*
4. A transcript of the reporter's notes, although accompanied by a formal certificate, is not admissible as independent evidence. *Id.*
5. All persons who, being present, aid, assist, or abet in the commission of a felony may be prosecuted as principals. *Hill v. State*..... 503
6. Objection by an accused on the ground that there has been no preliminary examination should be by a plea in abatement. *Id.*
7. In reviewing the rulings of the trial court in receiving and rejecting evidence, the supreme court will confine its examination to the objections made at the trial. *Id.*
8. The extent of cross-examination respecting the past life of a witness, for the purpose of affecting his credibility, rests in the discretion of the trial court. *Id.*..... 504

Criminal Law—*concluded.*

9. A judgment will not be reversed because the trial court in a murder case assumed in his charge material facts as proved, where it is clearly shown by the record that they were admitted by the prisoner at the trial. *Id.*

10. The giving of undue prominence to a proposition by repeating it in the charge to the jury in a criminal case is not of itself reversible error, where it is apparent that there was no controversy respecting the proposition stated, and where it is clear that it did not have the effect to exclude other propositions from the jury. *Id.*

11. Where the jury has been correctly charged upon all questions, the fact that a single proposition might have been stated with greater precision in a single paragraph is not ground for reversal. *Id.* 505

12. Abuse of privilege by counsel in addressing the jury, to be available on error, must be excepted to at the time. *Id.*

13. Where an attorney persists in an attempt to influence the jury by reference to facts not in evidence, and by appeals to prejudice, the court should not hesitate, on motion, to set aside a verdict in his favor, although his conduct may not have been objected to at the time. *Id.*

14. The jury must determine the weight of evidence adduced, and its estimate thereof will not be interfered with, unless it is clearly wrong. *Whitman v. State* 841

Crops. See TROVER AND CONVERSION, 2.

Damages. See EMINENT DOMAIN, 1, 3-6. MUNICIPAL CORPORATIONS, 10, 11. NEGLIGENCE. RAILROAD COMPANIES, 1. REPLEVIN, 3. TROVER AND CONVERSION, 2. WATER AND WATER-COURSES, 2.

1. In a suit predicated upon the publication of a statement which is libelous *per se*, the plaintiff need neither aver nor prove special damages. *Pokrok Zapadu Publishing Co. v. Zizkovsky* 64

2. Where a purchaser ratifies a contract made through fraudulent representations of vendor as to the location of lots, he may recover the difference between the value of the land and what it would have been worth if located as represented. *Hoock v. Bowman* 83

3. Discussion of instructions in an action to recover damages for injuries caused by negligence of defendant in constructing and maintaining a barbed wire fence on a highway. *Young v. Sage* 41

Damages—*concluded.*

4. Where the plaintiff sells land of defendant under execution upon a judgment which the latter has paid, the measure of damages defendant may recover is the fair market value of his interest in the land at the time it was sold by the sheriff. *Pope v. Benster*..... 304

5. A petition to recover damages from a railroad company for negligently causing the death of a brakeman by using defective appliances should contain averments of fact which negative the presumption that the injury was a risk of employment. *Missouri P. R. Co. v. Baxter*..... 793

Deceit. See FRAUDULENT REPRESENTATIONS. VENDOR AND VENDEE, 1–3.

A petition in an action to recover for false representations in selling a horse is defective where it fails to allege that the purchaser sustained damage. *Gilcrest v. Nantker*..... 564

Deeds. See EQUITY. VENDOR AND VENDEE.

Default. See JUDGMENTS, 3, 4. JUSTICE OF THE PEACE.

Defect of Parties. See REVIEW, 25, 26.

Depositors. See BANKS AND BANKING.

Directing Verdict. See NEGOTIABLE INSTRUMENTS, 1. TRIAL, 2.

Dismissal. See REVIEW, 8, 10, 30.

District Courts.

1. The district courts, being courts of general equity jurisdiction, are not limited in the exercise of such jurisdiction by statute. *Cochran v. Cochran*..... 612

2. A district judge has the power to hold court in a district other than the one for which he was elected, and it will be presumed, in case he does so, that it was at the instance of the judge of the proper district. *Cox v. Peoria Mfg. Co.*, 661

Divorce.

1. Divorce laws should be liberally construed, but should not be used to enable designing husbands to escape the performance of their marriage contract. *Cochran v. Cochran*, 612

2. A wife whose husband fraudulently obtained a divorce may recover alimony in an independent case without praying for a divorce or the cancellation of the fraudulent decree. *Id.*

3. In estimating the value of property to determine the amount of alimony that should be awarded the wife, the court should consider the value of the husband's estate at the date of the decree for alimony. *Id.*

Divorce—*concluded.*

4. The value of property acquired by a husband after divorce by exchanging for it other property which he owned at the time of obtaining the decree should be taken into consideration in determining the amount of alimony to which the wife is entitled. *Id.* 613
5. Alimony should not be awarded in installments during the life of a party. *Id.* 630
6. A court in rendering a decree of divorce should not order the sale of specific real estate for the payment of alimony. *Nygren v. Nygren* 408
7. A decree for alimony is a lien upon real estate, the same as a judgment at law. *Id.*

Drunkenness. See MURDER, 3, 4.

Duress. See EQUITY.

Easement. See MILLS AND MILL-DAMS, 2.

Elections.

1. Ch. 26, Comp. Stats., confers no authority upon an elector of a county to contest in his own name an election for the relocation of the county seat, and such a proceeding should be dismissed. *Thomas v. Franklin* 310, 313
2. Ballots cast are the primary evidence of the result of the election. *Hendee v. Hayden* 760
3. The returns made by the canvassing board to the county clerk are *prima facie* evidence of the result of the election. *Id.*
4. In the trial of a contest the ballots cast, when indistinguishably mingled with spoiled ballots, are not competent evidence of the result of the election. *Id.*
5. In determining the result of an election, spoiled ballots, when mingled with those cast, cannot be apportioned between the contestant and contestee according to the vote of each. *Id.*

Eminent Domain.

1. Municipal or other corporations, before taking private property, must ascertain the compensation and make payment. *Livingston v. Board of County Commissioners* 277
2. Where a city opens a street through private property, and, to pay the award for damages, assesses against that portion of the land not taken an amount in excess of the benefits conferred by the improvement, the assessment is illegal. *Cain v. City of Omaha* 120

Eminent Domain—*concluded.*

3. In an action against a railway company for constructing and maintaining its track in the street in front of the house and lot of an abutting owner, the measure of damages is the depreciation in the market value of the property thus damaged. *Chicago, B. & Q. R. Co. v. O'Connor*... 90

4. The depreciation in value of the property of an abutting owner by reason of the construction of a railway track or coal house in the street in front of his property is the difference in the market value of his lot immediately before and after the constructions by the company. Elements to be considered in determining depreciation in value are set out in the opinion. *Id.*

5. The construction of a side track in a street, after condemnation proceedings and erection of the railway, does not constitute an additional burden to the property of an abutting owner, and cannot be made the basis of an independent action for damages. *Id.*

6. The construction of a coal house and hoisting apparatus by a railway company in the street in front of the lot of an abutting owner constitutes an additional burden to his property and may be the subject of an action for damages. *Id.*

Equity. See BUILDING AND LOAN ASSOCIATIONS. FRAUDULENT REPRESENTATIONS. INJUNCTION.

Where coercion is not sufficient to amount to duress, but a social or domestic force is exerted on a party which controls the free action of the will, and prevents voluntary action in the making of a contract or execution of a deed for real estate, equity may relieve against the same on the ground of undue influence. *Hartnett v. Hartnett*..... 23

Error Proceedings. See APPEAL. REVIEW.

Estoppel. See BANKS AND BANKING, 4. LACHES. MECHANICS' LIENS, 7.

1. *Jameson v. Kent*..... 416
Patrick Land Co. v. Leavenworth..... 716

2. An estoppel, to be available as a cause of action or defense, must be specially pleaded. *Nebraska Mortgage Loan Co. v. Van Kloster*..... 746
Salladin v. Mitchell..... 865

3. Knowledge of the existence of a right or defense and the intention to relinquish it must concur in order to estop a party by waiver. *Hamilton v. Home Fire Ins. Co*..... 883

Estoppel—*concluded.*

4. A judgment creditor who sells land of defendant on execution after the latter paid the judgment is estopped, in an action by the land owner to recover damages, from asserting that the sheriff's sale was void. *Pope v. Benster*... 305
5. An attorney who procured from his client a deed for the undivided one-half interest in land for services to be rendered in quieting title thereto, failed to record his conveyance, brought suit in the name of his client and verified the petition which alleged ownership in plaintiff, is not estopped from claiming title as against the defendant who obtained from plaintiff a quitclaim deed and dismissal of the action with notice of the attorney's conveyance. *Chamberlain v. Grimes* 706

Evidence. See BONDS, 2. BURGLARY. COVENANTS. CRIMINAL LAW, 4. ELECTIONS, 2–5. FRAUDULENT CONVEYANCES, 4, 5. INDICTMENT AND INFORMATION, 2. MECHANICS' LIENS, 7. MURDER, 3, 4. NEGOTIABLE INSTRUMENTS, 1, 2. NEW TRIAL, 2. PARTNERSHIP, 4. REPLEVIN, 1. TAXATION, 16, 17. TRIAL, 3. WITNESSES, 2.

1. Upon trial of a person for the violation of a city ordinance the police court may take notice of the ordinance; and upon trial *de novo* of an appeal from a judgment of conviction the district court may take notice of whatever facts the lower court could have noticed judicially. *Foley v. State*..... 233
2. Before the testimony of a witness at a former trial can be admitted in evidence it must be shown that he is absent from the state, or without the jurisdiction of the court, or beyond the reach of process. *Young v. Sage*..... 38
3. An affidavit in support of a motion for a continuance may be read to the jury as the testimony of an absent witness, where the adverse party so stipulated in order to procure the overruling of the motion, notwithstanding the facts were stated in the affidavit in the form of a conclusion. *Blaine v. Poyer*..... 709
4. The law of a sister state may be the proper subject of expert testimony. *Barber v. Hildebrand*..... 401
5. Parol evidence may be introduced to establish the contract between a real estate agent and his principal, though it may contradict or vary the terms of a written contract between the latter and the purchaser. *Id.*
6. Parol evidence is inadmissible to contradict or vary material terms of a valid written contract. *Mattison v. Chicago, R. I. & P. R. Co.*..... 545

Evidence—*concluded.*

7. A party cannot testify to his opinion of the amount of his damage, but the facts upon which the court or jury can make such estimate are to be given. *Jameson v. Kent*, 412

8. In a civil action, when a fact may be fairly and reasonably inferred from other and all the facts and circumstances proved, it may be taken as established. *Chicago, B. & Q. R. Co. v. Hildebrand*..... 33

Exceptions. See BILL OF EXCEPTIONS.

Executions. See ATTORNEY AND CLIENT, 2. JUDICIAL SALES. SHERIFFS AND CONSTABLES, 2.

1. It is the duty of a sheriff under an ordinary writ of execution to pay the proceeds directly to the party entitled thereto and not return the money into court. *Luce v. Foster* 819

2. A sheriff with the consent of plaintiff may lawfully agree to pay the proceeds of an execution sale to a third person. *Id.*

3. Where a debtor pays a judgment and the creditor fails to satisfy the lien, but subsequently causes the former's land to be sold on execution, the owner of the land may treat the sale as void, or sue the judgment creditor for the value of the land. *Pope v. Benster*..... 304

Exemption.

One may lawfully sell unexempt property for the purpose of investing the proceeds in property which is exempt under the statute. *Cox v. Peoria Mfg. Co*..... 670

Extradition.

1. Authority of court in *habeas corpus* proceedings by a fugitive arrested on a warrant issued under a requisition from another state, to consider the evidence taken at the preliminary hearing to ascertain its sufficiency to sustain the charge in the information or support the finding of the examining magistrate. *In re Van Sceiver*..... 772

2. In such a case the fact that an indictment was found, or information filed, is *prima facie* evidence that the act charged is a crime in the state where the offense was committed. *Id.*

Factors and Brokers. See REAL ESTATE AGENTS.

False Representations. See DECEIT. VENDOR AND VENDEE, 1–3.

Fees. See COUNTY ATTORNEYS, 2. INTOXICATING LIQUORS, 8. LICENSE. SHERIFFS AND CONSTABLES. TAXATION, 12, 13.

Fences. See RAILROAD COMPANIES, 1.

Findings. See TRIAL, 7.

Fire Insurance. See INSURANCE.

Fires. See NEGLIGENCE.

Forcible Entry and Detainer.

1. The only finding of fact that can be made in a forcible detainer case is whether or not the defendant is guilty of forcibly detaining the premises. *Stover v. Hazelbaker*..... 393
2. The only judgment that can be pronounced in a forcible detainer case is that plaintiff have restitution of the premises, or that the action be dismissed. *Id.*

Foreclosure. See MECHANICS' LIENS.

Foreign Laws. See EVIDENCE, 4. VOLUNTARY ASSIGNMENTS, 1.

Forfeiture. See BUILDING AND LOAN ASSOCIATIONS.

Franchises. See CONTRACTS, 1.

Fraud. See INSURANCE, 3. JUDICIAL SALES. SALES, 1. VENDOR AND VENDEE, 1–3.

Fraudulent Conveyances. See ATTACHMENT, 5.

1. *Bedford v. Van Cott*..... 229
2. An intention to defraud should not be inferred from the mere fact that by pledging his personal property and mortgaging his real estate a debtor has given a preference to one or more creditors. *Robinson v. Foot*..... 156
3. Discussion of evidence tending to show that property was conveyed to, and held by, the wife in fraud of the rights of her husband's creditors. *First Nat. Bank of Chicago v. Sloman*..... 355
4. Evidence that a wife, twenty years prior to the trial, had furnished part of the purchase money for land sold to her husband, was *held* insufficient to establish in her favor a lien upon or interest in the land in an action by his judgment creditors to subject it to the payment of their claims, the land having been conveyed to the debtor's wife. *Brownell v. Stoddard*..... 178
5. In such a case to establish an equity in favor of the wife it must appear that she furnished the money as claimed. There must be evidence to overcome the presumption of an advancement and the presumption of bad faith in the transfer to her. *Id.*
6. A purchase of property of an insolvent debtor, with intent to aid in hindering, delaying, or defrauding his cred-

Fraudulent Conveyances—*concluded.*

itors, is void as to such creditors, though a full consideration was paid for the property. *Hedrick v. Strauss* 485

7. To constitute one an innocent purchaser of property sold for the purpose of defrauding the creditors of the vendor, the whole consideration must be paid before the purchaser had notice of the fraudulent intent. *Id.*

Fraudulent Representations.

Where a party intentionally misrepresents a material fact or produces a false impression with the purpose of obtain- an undue advantage of another, it amounts to a fraud, to remove the effects of which equity affords a remedy. *Galloway v. Merchants Bank of Neligh* 259

Garbage. See MUNICIPAL CORPORATIONS, 2.

Garnishment. See ATTACHMENT, 2. INTERPLEADER.

Habeas Corpus. See EXTRADITION.

1. *Habeas corpus* proceedings can only be reviewed in the supreme court by petition in error. *In re Van Sciever* 773
2. A motion for new trial and a ruling thereon are necessary to a review of *habeas corpus* proceedings. *Id.*
3. Sec. 902 of the Code, reciting that until the legislature shall otherwise provide, the Code shall not affect proceedings on *habeas corpus*, applies to procedure on application for the writ, and not to the manner of review. *Id.*

Harmless Error. See REVIEW, 32.

Herd Law. See ARBITRATION.

Highways. See BRIDGES.

1. A petition is not essential to confer jurisdiction upon the county board to open section line roads. *Rose v. Washington County* 1
2. The only limitation upon the discretion of the county board in opening section line roads is the compensation for taking or damaging private property. *Id.*
3. Where the travel upon a highway has remained substantially unchanged it is sufficient to establish adverse user, even though at times, to avoid obstructions, there may have been a slight deviation from the common way. *Nelson v. Jenkins* 133

Homestead. See SPECIFIC PERFORMANCE, 2.

Defendants who fail to assert their homestead right before sale of the premises on execution will be deemed to have waived it. *Brownell v. Stoddard* 178

Homicide. See MURDER.

Husband and Wife. See FRAUDULENT CONVEYANCES, 3-5. WITNESSES, 1.

1. A wife's contract to convey land to her husband cannot be enforced where it was made without consideration. *Greene v. Greene*..... 634
2. A married woman may mortgage her separate estate to secure the individual debt of her husband, and a loan to him is a sufficient consideration. *Watts v. Gantt*..... 869
3. A married woman who mortgages her separate estate to secure a debt of her husband is a surety for him to the extent of the property mortgaged. *Id.*
4. A court of equity will entertain an action brought for alimony alone, though no divorce or other relief is sought, where the wife is separated from the husband without her fault. *Cochran v. Cochran*..... 612
5. A wife whose husband deserted her and obtained a divorce without her knowledge may recover alimony in an independent action without alleging that she or her children are in actual need of support. *Id.*

Indemnity Bonds. See PRINCIPAL AND SURETY, 2, 3.

Indictment and Information. See CRIMINAL LAW, 1. MURDER, 1, 2.

1. An information in police court for the violation of a city ordinance need not set out the ordinance. *Foley v. State*, 233
2. Where prosecution by information has been established by law, an information as evidence is entitled to the same weight as an indictment. *In re Van Sciever*..... 773

Infancy. See RAILROAD COMPANIES, 5, 6.

The rule of law as to the contributory negligence of a child is that it can only be expected and required to exercise that degree of care and discretion which a child of its age would ordinarily and naturally use and exercise under similar circumstances. *Omaha & R. V. R. Co. v. Cook*..... 577

Information. See INDICTMENT AND INFORMATION.

Injunction.

1. Injunction should not be granted where complainant fails to show that he is liable to suffer irreparable injury, or that he is without a full and adequate remedy at law. *Eidemiller Ice Co. v. Guthrie*..... 239
2. Irreparable injury defined. *Id.*
3. A taxpayer may maintain an action to restrain city officers from paying illegal salaries, notwithstanding the issues

Injunction—*concluded.*

in the case may involve a decision of the particular class to which the city belongs. *City of South Omaha v. Taxpayer's League*..... 671

Insanity. See MURDER, 3, 4.

Insolvency. See BANKS AND BANKING, 5. TRUSTS, 1. VOLUNTARY ASSIGNMENTS.

Instructions. See CRIMINAL LAW, 10, 11. RAILROAD COMPANIES, 3, 4. REVIEW, 14-18.

1. Objections to instructions should be pointed out in a motion for a new trial. A failure in that regard prevents review. *Peaks v. Lord*..... 15
2. It is not error to refuse an instruction, the substance of which has already been given. *Young v. Sage*..... 37
3. Where the facts of a case call for the application of a limitation of a general rule of law, an instruction simply stating the general rule is not erroneous if other instructions correctly state the limitation. *Omaha Fair & Exposition Association v. Missouri P. R. Co*..... 105
4. It is not error to refuse an instruction which states to the jury an inference of fact, to be drawn from the evidence, and no rule of law. *Id.*
5. A party cannot complain because the court submitted to the jury the issue he requested. *Id.*
6. Instructions to the jury must be considered together, and if then they state the law applicable to the facts and the issues made by the pleadings, it is sufficient. *Nelson v. Jenkins*..... 133
7. A party who complains that an instruction does not fully state the issues must request one which is complete. *Barr v. City of Omaha*..... 341
8. Objections to instructions should be presented by motion for a new trial. *Id.*
9. Instructions will not be reviewed unless excepted to when given. *Id.*
10. Instructions will not be reviewed where they are not pointed out in the motion for a new trial and petition in error. *Hedrick v. Strauss*..... 485
11. A judgment will not be reversed because of conflicting instructions when the instruction least favorable to the party complaining was more favorable than the law warrants. *Luce v. Foster*..... 819

Instructions—*concluded.*

12. It is discretionary with the trial court to give or refuse an instruction containing a list of authorities. *Shields v. Gamble*..... 854

Insurance.

1. A condition in a policy fixing the location of the property insured may be waived by the company, but such waiver must be pleaded. *Burlington Ins. Co. v. Campbell*..... 209
2. Where a policy provides that the company shall not be liable after the removal of insured personalty and requires any waiver of the terms to be indorsed on the contract, oral consent to removal by one who issued the policy, but who was not an agent when he consented, does not bind the company, and removal of the goods without written consent avoids the contract. *Id.*..... 208
3. Under a policy which declares that fraud by false swearing shall cause a forfeiture, an insured who, after loss, procures copies of invoices, raises the amounts of purchases, verifies the invoices by affidavit and presents them to the company, cannot recover, where the value of the goods is less than the insurance. *Home Ins. Co. v. Winn*... 331
4. Effect of falsely representing to insurer the value of goods destroyed by fire. *Liberty Ins. Co. v. Ehrlich*..... 555
5. After loss a demand by the company for an arbitration under the provisions of the policy is a waiver of formal proof of loss. *Home Fire Ins. Co. v. Bean*..... 537
6. The petition discussed in the opinion *held* to contain a sufficient demand for arbitration. *Id.*
7. Where realty has been wholly destroyed, any provision of the policy limiting the loss to less than the amount of insurance written, is void as being in conflict with the valued policy act. (Sec. 43, ch. 43, Comp. Stats.) *Id.*
8. A provision in a policy that no action for a loss shall be maintained until arbitrators have made an award fixing the amount due insured, is void. *Id.*
9. Where a policy is made a part of the petition and is admitted by the answer, the facts stated therein become a part of the record. *Id.*
10. In an action by a mutual insurance company to recover assessments, a member cannot maintain as a defense the refusal of the auditor of state to issue the company a certificate of authority to continue business. *Burmood v. Farmers Union Ins. Co*..... 598

Insurance—*concluded.*

11. It is no defense in a suit to recover assessments that the company contracted to use its influence to induce its members to insure in another company. *Id.*

12. A mutual insurance contract providing for cancellation thereof by payment of all assessments and a fee, cannot be annulled by a member who pays the fee and surrenders the contract but fails to pay assessments due. *Id.*

Interest. See TAXATION, 1.

Interpleader

Where a railway company files a bill of interpleader, all parties interested yielding to the proceeding and asserting their claims, the funds involved, when created by employes of one who contracted to transfer freight for the company, and afterwards assigned the contract, should be distributed as if the employes had been permitted to secure their wages by garnishment. *Union P. R. Co. v. Douglas County Bank*..... 469

Interstate Commerce. See INTOXICATING LIQUORS, 6.

Intoxicating Liquors.

1. In an action on the bond of a saloon-keeper the fact essential to be shown is the disqualification to support those entitled thereto, caused or contributed to by sales of intoxicating liquors to one upon whom legally devolves the duty of furnishing such support. *Chmelir v. Sawyer*..... 362

2. In such a case the disqualification to furnish plaintiffs support may be either partial in effect or limited in duration by reason of physical disability, or it may become complete, as by death. *Id.*

3. Whether or not the disqualification alleged as partial, limited, or complete was contributed to by any or all of the defendants is a question of fact to be determined by the jury upon consideration of all the evidence adduced. *Id.*

4. An appeal from the decision of a village board on an application for a license must be heard upon the testimony taken before the board and transmitted to the district court. *Powell v. Egan*..... 482

5. Members of a village board who sign a petition for a liquor license are disqualified from acting on the application, and their disqualification is not removed by erasing their signatures. *Id.*

6. Where bottles of intoxicating liquors are separately put up in paper boxes, sealed, placed in a wooden box and shipped

Intoxicating Liquors—*concluded.*

by the owner from Missouri to his agent in Nebraska, the wooden box is the original package; and sales of the sealed packages, separately, without a license, are violations of law. *Haley v. State*..... 556

7. A license issued without the two-weeks statutory notice will be *held* void even in a collateral proceeding. *Zielke v. State*..... 750

8. A license issued without payment in full of the fee prescribed therefor is void. *Id.*

Intoxication. See MURDER, 3, 4.

Jeopardy.

If, after the jury has been sworn and the jeopardy thus begun, the court without sufficient cause discharges it without a verdict, this in law is equivalent to an acquittal. *Smith v. State*..... 358

Judges. See DISTRICT COURTS.

Judgments. See DIVORCE, 6. EXECUTIONS, 3. FRAUDULENT CONVEYANCES, 4, 5. JUSTICE OF THE PEACE. MECHANICS' LIENS, 10, 16. PLEADING, 8. REVIEW, 28.

1. A party who consents to the entry of a judgment cannot allege error in the proceedings. *Weander v. Johnson*..... 117

2. The judgments of United States courts for Nebraska may be treated, for many purposes, as domestic judgments. *First Nat. Bank of Chicago v. Sloman*..... 350

3. In the county court, in a case not within the jurisdiction of justice courts, plaintiff is entitled to have default of defendant entered where the answer is not on file the first day of the term. *Bond v. Wycoff*..... 215

4. A motion to set aside a judgment by default must be accompanied by an answer showing a meritorious defense. *Id.*

5. A defendant who asks the affirmative aid of a court of equity to relieve him from a judgment must aver and prove a meritorious defense to the action in which it was rendered. *Pilger v. Torrence*..... 903

6. A judgment *non obstante veredicto*, under sec. 440 of the Code, can only be rendered when the pleadings of the party who recovered the verdict confess facts entitling the other party to judgment. *Manning v. City of Orleans*..... 712

7. Where the verdict is not sustained by the evidence, the remedy is by motion for a new trial, and not by motion for judgment *non obstante veredicto*. *Id.*

Judgments—*concluded.*

8. There being no motion for a new trial in a case where sec. 440 of the Code does not apply, judgment should be rendered on a general verdict. *Id.*

Judicial Notice. See EVIDENCE, 1.

Judicial Sales. See DAMAGES, 4.

A purchaser of realty at a valid sale takes a title which cannot be assailed because of fraud in a prior transfer of the decree. *Robinson v. Foot* 156

Jurisdiction. See ATTACHMENT, 2. COUNTY COURTS, 3, 4. REVIEW, 9.

Jury. See REVIEW, 37.

The provision of the Criminal Code making conscientious scruples against capital punishment a ground of challenge in murder cases was not repealed by the amendment of 1893, giving the jury discretion to fix punishment. *Hill v. State* 504

Justice of the Peace.

1. A judgment rendered against defendant in his absence should be set aside by the justice when the former has complied with sec. 1001 of the Code. *Smith v. Riverside Park Association* 372

2. On motion to open a judgment by default, the justice must fix the time and place of hearing before defendant can be held to a compliance with the provision of sec. 1001 of the Code requiring notice to plaintiff. *Id.*

Laborers' Liens. See ASSIGNMENT.

Laches.

A vendor cannot shield himself from the consequences of falsely representing the character, quality, or location of property, by interposing against the vendee the plea of laches. *Hoock v. Bowman* 81

Landlord and Tenant. See MECHANICS' LIENS, 15–17.

1. Where land is leased for a portion of the crops, the landlord relinquishes his share thereof by accepting from his tenant the rent in money. *Connor v. Shricker* 656

2. Acceptance of rent which falls due after the landlord declares a forfeiture of the lease for non-payment, operates as a waiver of his right to insist upon a forfeiture because of the tenant's default. *Stover v. Hazelbaker* 393

3. Without an express contract a landlord is neither bound to repair leased premises nor pay for repairs made by his tenant. *Turner v. Townsend* 376

Landlord and Tenant—*concluded.*

4. A tenant cannot recover from the landlord the expense of restoring a window destroyed by a storm where the lease provides that the premises shall be surrendered in as good condition as when entered upon by the tenant, loss by fire or inevitable accident excepted. *Id.*

Larceny.

1. Proof of the value of the property stolen must be made by at least one witness shown to possess knowledge of the value concerning which he is called upon to testify. *Edmonds v. State* 684
2. A conviction cannot be sustained upon a mere estimate by the jury of the value of the stolen property. There must be a definite finding. *McCormick v. State* 866

Lease. See LANDLORD AND TENANT. TRUSTS, 2.

Libel. See SET-OFF AND COUNTER-CLAIM, 2.

1. Any written or printed statement which falsely and maliciously charges another with the commission of an indictable, criminal offense is libelous *per se*. *Pokrok Zapadu Publishing Co. v. Zizkovsky* 64
2. In determining whether the words of a publication are libelous the courts will construe the language used in its ordinary and popular sense. *Id.*
3. To make the truth of the statement a defense it must appear that the publication alleged to be libelous was made with good motives and for justifiable ends. *Id.* 65
4. A communication is privileged when made in good faith, in answer to one having an interest in the information sought. *Id.*
5. A communication is privileged when volunteered to a person interested, where it was the reasonable duty of the informant to make the statement. *Id.*
6. The secretary of an incorporated cemetery association is not a public officer in such a sense as to justify a person, on the ground of privileged communication, in publishing a statement charging the secretary with embezzling the funds of the association. *Id.*
7. Where the publication charges the plaintiff with the commission of a crime, the law presumes that he is innocent, and the presumption becomes conclusive where the defendant does not plead the truth of the charge. *Id.*
8. Whether a publication was maliciously made, and whether it was an injury to the plaintiff, are questions of fact for the jury. *Id.*

Libel—*concluded.*

9. In absence of evidence the law presumes that a publication charging a crime was maliciously made. *Id.*
10. It is no defense that the publisher believed the charges made by him were true. *Id.*
11. It is no defense that the writing was a repetition of previous oral publications and that the defendant was induced to make it by acts of the person defamed. *Vallery v. State,* 123
12. A school-district meeting called for the purpose of receiving charges against teachers is not an occasion of absolute privilege, and the defendant is liable for the publication therein of a libel against a teacher, at least on proof of express malice. *Id.* 124
13. Sentence imposing fine of five hundred dollars and imprisonment for six months *held* not excessive. *Id.* 128

License. See INTOXICATING LIQUORS. MILLS AND MILL-DAMS, 2.

1. An ordinance, within the power of the city, to regulate the production and sale of milk, will be upheld when intended as a police regulation, and the revenue derived therefrom is not disproportionate to the cost of issuing the license and the regulation of the business. *Littlefield v. State* 223
2. While the courts have power to inquire into the reasonableness of the fee exacted in the exercise of the power to regulate a business, considerable latitude will be allowed for the exercise of legislative discretion. *Id.*

Liens. See ASSIGNMENT. DIVORCE, 7. FRAUDULENT CONVEYANCES, 4, 5. MORTGAGES. TAXATION. VOLUNTARY ASSIGNMENTS, 2.

Limitation of Actions.

1. An action against a railway company for damages for constructing its tracks in the street in front of plaintiff's dwelling is barred after four years from the time the company occupied the street. *Chicago, B. & Q. R. Co. v. O'Connor* 90
2. Right of action of an abutting owner against a railway company for damages caused by the erection of a coal house and hoisting apparatus in the street in front of his property is barred in four years from the construction thereof. Id..... 91
3. The limitation of two years for recovery, under sec. 5198, Rev. Stats. U. S., of the penalty for taking usurious interest, dates from the actual payment of the usury and not

Limitation of Actions—*concluded.*
from the bank's reservation of it from an original loan by way of discount. *Smith v. First Nat. Bank of Crete*..... 687
Lanham v. First Nat. Bank of Crete..... 757

Malice. See LIBEL, 8, 12.

Mandamus. See MUNICIPAL CORPORATIONS, 7.
1. Proceedings to punish respondent for disobedience of order. *McAleese v. State*..... 886
2. Citizens and taxpayers may maintain an action to compel the county commissioners to repair a bridge built by the county with proceeds of the bonds of a precinct. *Dutton v. State*..... 804

Marriage and Divorce. See DIVORCE.

Married Women. See WITNESSES, 1.

Master and Servant.
1. A servant by his contract of employment assumes the ordinary risks and dangers incident thereto. *Missouri P. R. Co. v. Baxter*..... 793
2. The law does not require an employer to furnish the newest or safest tools, machinery, or appliances for the safety of servants. *Id.*
3. Where a servant continues to use appliances which are obviously defective, he thereby assumes the risk, unless he is induced to continue by the master's promise to remedy the defect. *Id.*

Maxims.
"*Caveat emptor*" applies to purchaser at tax sales. *Adams v. Osgood*..... 451

Mechanics' Liens. See COSTS, 4.
1. A copy of a contract by a subcontractor is not a necessary part of his sworn statement and claim for a lien. It is unnecessary to set forth in the statement the ownership of the property. *Garlichs v. Donnelly*..... 57
2. Where the itemized account filed with the sworn statement and claim for a lien shows when the furnishing of labor or material began and ended, it is not essential that those facts should be restated. *Id.*
3. In a foreclosure suit where the owner fails to answer the cross-petition of a co-defendant who claims a lien, the former cannot, upon appeal, object to the correctness of the decree in favor of the cross-petitioner, except as to the amount of the finding. *Barnacle v. Henderson*..... 169

Mechanics' Liens—*continued.*

4. When a person entitled to a lien takes the note of the owner for the amount due, there is no conclusive presumption that it was given or accepted in payment of the debt; neither does the law presume that the payee of the note thereby intended to waive his right to a lien. *Barnacle v. Henderson* 169
Union Stock Yards State Bank v. Baker 880

5. Whether a note for the amount due for labor or material was accepted in payment of the debt, and whether the payee intended to waive his right to a lien, are questions of fact to be determined from the evidence. *Barnacle v. Henderson* 169

6. Where the contract for the erection of an improvement is in writing it, or a copy, must be filed with the account of items. *Id.*

7. Under an oral contract for the erection of an improvement a mistake in alleging in the affidavit filed with the account of items that the contract was in writing does not estop the plaintiff in a suit to foreclose the lien from alleging and proving that the contract was verbal, nor render the account incompetent as evidence. *Id.*

8. One who purchases real estate during the life of a lien thereon is a necessary party in an action to foreclose the lien. *Pickens v. Polk* 267

9. An owner who sells the premises after contracting for improvements for which a lien has been filed is not a necessary party to a foreclosure suit. *Id.*

10. A personal judgment, under proper pleadings, service, and proof, in a foreclosure suit, may be entered against a former owner who contracted for improvements and subsequently sold the property. *Id.*

11. Where the owner sells the premises to a non-resident after a lien attaches, the first publication of notice to the latter of foreclosure proceedings must be made within two years from the time the lien was filed. *Id.*

12. Service of summons upon a former owner who contracted for improvements and subsequently sold the premises to a non-resident after a lien attached is not a commencement of a foreclosure suit, although the petition naming both as defendants was filed and summons issued before the lien expired. *Id.*

13. A subcontractor may, without prejudice to his rights, postpone the filing of his lien until toward the end of the

Mechanics' Liens—*concluded.*
time limited for that purpose. *Bohn Sash & Door Co. v. Case*..... 281
14. Under an entire contract for the erection of buildings on lots not contiguous to each other, one claim may attach to both improved properties where the claimant has contributed material or labor to both. *Id.*
15. A lien cannot attach by virtue of a contract with a mere tenant of the premises. *Moore v. Vaughn*..... 696
16. Where a tenant moves, upon leased premises, a house belonging to his landlord and contracts for the erection of additions thereto, material-men who make the improvements and file a lien are not entitled to a decree to sever the buildings and sell the additions. *Id.*
17. In such a case a lien can only attach to the tenant's interest in the premises. *Id.*
18. Priority of purchase money mortgages and mortgages given to secure loans for making improvements as against mechanics' liens. *Patrick Land Co. v. Leavenworth*..... 715

Metropolitan Cities. See MUNICIPAL CORPORATIONS.

Mills and Mill-Dams. See WATER AND WATER-COURSES.
1. Issues and procedure in an *ad quod damnum* proceeding under ch. 57, Comp. Stats., and conclusiveness of inquest. *Newcomb v. Royce*..... 323
2. Where one owning land traversed by a stream sells a portion of it to another and gives him by parol the right to overflow the remainder by erecting a dam on the land conveyed, and the vendee, relying on the parol agreement, erects and maintains a dam and mill, operated by water, the parol agreement becomes enforceable. Viewed as a license the acts of the purchaser render the license irrevocable; viewed as an easement they take the grant out of the statute of frauds. *Id.*

Misconduct of Attorney. See CRIMINAL LAW, 12, 13.

Misconduct of Jury. See REVIEW, 37.

Mortgages. See BUILDING AND LOAN ASSOCIATIONS. FRAUDULENT CONVEYANCES, 2. HUSBAND AND WIFE, 2. SUBROGATION, 1. VOLUNTARY ASSIGNMENTS, 3.
1. Priority of purchase money mortgages and mortgages given to secure loans for making improvements as against mechanics' liens. *Patrick Land Co. v. Leavenworth*..... 715
2. The taking of a stay of the order of sale under a decree of foreclosure is a waiver of all error in previous proceedings. *Ecklund v. Willis*..... 737

Mortgages—*concluded.*

3. A court of equity will cancel commission notes and mortgage procured by fraud and misrepresentation of material facts. *Galloway v. Merchants Bank of Neligh*..... 259
4. The lien of a mortgage on land in different counties may be entirely satisfied by a release which describes the land in only one county, where there is a recital that the debt has been paid in full. *Gadsden v. Latey*..... 128

Municipal Corporations. See EMINENT DOMAIN, 1. INJUNCTION, 3.

1. Municipal courts should take notice of city ordinances. *Foley v. State*..... 233
2. Sec. 15, art. 3, of the constitution, providing that the legislature shall not pass local or special laws, granting special or exclusive privileges, does not prohibit a metropolitan city from contracting for the removal of garbage. *Smiley v. MacDonald*..... 5
3. A municipal corporation possesses only such powers as are expressly conferred upon it by the statute, or are necessary to carry into effect some enumerated power. *State v. Irey*, 186
4. The power to levy and collect special taxes under sec. 69, ch. 12*a*, Comp. Stats., does not alone carry with it authority to sell land for non-payment of the assessments. *Id.*
5. The mode designated by sec. 69, ch. 12*a*, Comp. Stats., for the collection of special taxes by distress or sale of personal property, is not the exclusive method for enforcing payment. *Id.*
6. The term "all municipal taxes," employed in sec. 83, ch. 12*a*, Comp. Stats., does not include or cover special taxes levied against real estate by the city for the improvement of streets and alleys. *Id.*
7. Sec. 91, ch. 12*a*, Comp. Stats., confers authority upon the county treasurer to sell real estate for the non-payment of special paving assessments, legally levied thereon by a metropolitan city, although there are no delinquent state, county, or general municipal taxes of any kind against the property, and *mandamus* may issue to require such sale to be made. *Id.*
8. A local assessment in excess of the benefit conferred by the improvement is a taking of private property for public use without compensation, and is illegal. *Cain v. City of Omaha*..... 120
9. In metropolitan cities, where an improvement extends through an unsubdivided tract, the tract is not subject to

Municipal Corporations—*concluded.*
local assessments to a greater distance from the improvement than the average distance to which assessments on subdivided lots are levied. *Id.*
10. Special benefits which may be properly set off against damages sustained by an abutting property owner by reason of street improvements. *Barr v. City of Omaha*..... 342
11. Verdict in favor of city sustained where the evidence was conflicting, in an action by a property owner to recover damages on account of changing the grade of a street. *Id.*
12. Where authority is conferred upon a municipal body to license and regulate a business or occupation as a sanitary measure, such power must be exercised as a means of regulation only, and not as a means of producing revenue. *Littlefield v. State*..... 223
13. Authority is conferred upon the city of Omaha, by its charter, to license and regulate the production and sale of milk within its limits, and it may exact a reasonable license fee from all persons engaged in such business. *Id.*
14. Where an ordinance to regulate the production and sale of milk is clearly within the general powers of the city, it is presumed to be reasonable and will not be declared void unless shown to be unreasonable. *Id.*

Murder. See JURY.
1. An information charging murder in one count, and in two counts alleging that the killing was done in an attempt to rob the deceased, charges but one offense, and the state will not be required to elect as to counts. *Hill v. State*.... 503
2. The complaint upon which the accused was committed sufficiently stated the crime charged in the information. *Id.*
3. Proof of voluntary intoxication is admissible in prosecutions for murder in the first degree, not to excuse the crime charged, but as a circumstance tending to show that the killing was not the deliberate and premeditated act of the prisoner. *Id.*..... 504
4. Where continued drunkenness has produced such a condition of insanity as would relieve accused from responsibility for criminal acts if produced by any other cause, such condition may be shown as a defense, and the fact that it was caused by voluntary drunkenness is immaterial. *Id.*
5. Evidence examined, and *held* to sustain the verdict of murder in the first degree and to warrant the extreme penalty imposed by the jury. *Id*..... 505

Mutual Insurance. See INSURANCE, 10-12.

Negligence. See MASTER AND SERVANT. RAILROAD COMPANIES. VENDOR AND VENDEE, 2.

The failure of an adjacent property owner to take unusual precautions against fires negligently set out by a railroad company cannot be urged as a defense to an action to recover for the loss. *Omaha Fair & Exposition Association v. Missouri P. R. Co.* 105

Negotiable Instruments. See MECHANICS' LIENS, 4. MORTGAGES, 3. PRINCIPAL AND AGENT, 2, 3. SET-OFF AND COUNTER-CLAIM, 3. VOLUNTARY ASSIGNMENTS, 1.

1. In a suit by an indorsee of a note where the undisputed evidence shows he was a *bona fide* purchaser, without notice of the maker's defense that the note was procured by false representations, the court may direct a verdict for plaintiff. *Stedman v. Rochester Loan & Banking Co* 641
2. In such a case evidence that the note was delivered conditionally to the original payee is irrelevant, where the answer does not allege an agreement on his part to hold the note in trust for the maker. *Id.*
3. Where two makers of a note are shown to be sureties for a third person they will be presumed to be co-sureties until the contrary is proved. *Eisley v. Horr* 3

New Trial. See HABEAS CORPUS, 1, 2. INSTRUCTIONS, 1. JUDGMENTS, 7, 8. REVIEW, 7, 24, 38.

1. A verdict should not be set aside because a witness has been seen in conversation with a juror, where it is made to appear that there was no communication with reference to the case. *Omaha Fair & Exposition Association v. Missouri P. R. Co* 105
2. An affidavit for a new trial, based on hearsay evidence of the result of a *post mortem* examination, was *held* insufficient. *Chmelir v. Sawyer* 362
3. After verdict an affidavit to show disqualification of a juror, on account of prejudice, and contradict his answers on *voir dire* examination, should be received with caution, and when the statements of the affidavit are denied an order overruling a motion for a new trial will not be reversed upon review. *Hill v. State* 504

Novation. See LANDLORD AND TENANT, 1.

Oath. See CONTEMPT, 2.

Occupation Taxes. See MUNICIPAL CORPORATIONS, 12-14.

Office and Officers. See LIBEL, 6.

Opening and Closing. See TRIAL, 5.

Orders.

An action cannot be maintained by the payee against the drawee of an order upon a fund payable to the drawer where the drawee has refused to accept the order. *Patrick Land Co. v. Leavenworth* 716

Ordinances. See EVIDENCE, 1.

Original Packages. See INTOXICATING LIQUORS, 6.

Parties. See MECHANICS' LIENS, 8–12. PLEADING, 5. REVIEW, 25, 26.

Partition.

Where the court finds on the trial of the issues that partition cannot be made, and in confirming the interests of the parties orders a sale of the land, the judgment is erroneous, but will not be reversed on error in absence of a complaint by motion for a new trial and petition in error that the proceeding was irregular. *Burke v. Cunningham*..... 646

Partnership. See ATTACHMENT, 5. PLEADING, 5.

1. Evidence discussed in opinion *held* sufficient to show that no partnership existed as alleged in the petition. *Metcalf v. Bockoven* 590
2. To render one partner liable for the acts of another partner there should, in an action against the partnership, be averments and evidence to establish between them the relation of partners. *Stone v. Neeley*..... 567
3. In settling the business of a partnership the court will be governed by the articles of agreement of dissolution as far as applicable. *Leighton v. Clarke*..... 427
4. Under a written agreement of dissolution requiring a partner to pay certain accounts not itemized, parol evidence is admissible to show the items intended. *Peaks v. Lord*..... 15
5. After a partnership has been dissolved, a partner who owns the accounts of the firm under a settlement may maintain an action at law against the other partner to recover money collected by the latter and wrongfully withheld. *Glade v. White*..... 336

Pleading. See ATTACHMENT, 4. CONTRACTS, 3. CRIMINAL LAW, 1–3. DAMAGES, 1, 5. DECEIT. ESTOPPEL, 2. HOMESTEAD. INJUNCTION, 1. INSURANCE, 1, 6, 9. JUDGMENTS, 5. MECHANICS' LIENS, 7. NEGOTIABLE INSTRUMENTS, 2. PARTNERSHIP, 2. TRIAL, 7.

Pleading—*concluded.*

1. *Allegata et probata* must agree. *Luce v. Foster*..... 818
2. Where the allegations of the answer amount to no more than a denial of plaintiff's cause of action a reply is unnecessary. *Peaks v. Lord*..... 15
3. After verdict it is error to permit an amendment of the petition so as to change the claim. *Dietz v. City Nat. Bank of Hastings*..... 584
4. Permitting a pleading to be amended so as to conform to the evidence is largely within the discretion of the trial court. *Barr v. City of Omaha*..... 341
5. A petition describing the defendants as M. H. S. and E. H. S., doing business as S. Bros., will sustain a personal judgment against the individuals. *First Nat. Bank of Chicago v. Sloman*..... 350
6. The filing of an answer after a special demurrer to the petition is overruled is a waiver of an exception to the decision of the court on the demurrer. *Cox v. Peoria Mfg. Co*..... 660
7. Answering over after the overruling of a general demurrer to the petition is not a waiver of the defect that the petition fails to state a cause of action. *Id.*
8. Where a defendant, after answer day, files a cross-petition seeking relief as against a co-defendant, judgment should not be entered against the latter unless he had notice or appeared to the cross-petition. *Patrick Land Co. v. Leavenworth*..... 716

Pledges. See FRAUDULENT CONVEYANCES, 2.

Police Courts. See EVIDENCE, 1.

Police Powers. See MUNICIPAL CORPORATIONS, 12-14.

The legislature cannot, under the guise of police regulations, arbitrarily invade private property or personal rights. The test when such regulations are called in question is whether they have some relation to the public health or public welfare, and whether such is, in fact, the end sought to be attained. *Smiley v. MacDonald*..... 6

Practice. See CRIMINAL LAW, 6-13. EVIDENCE, 3. INDICTMENT AND INFORMATION, 1. JUDGMENTS. REVIEW. TRIAL, 9.

Appeal and error cannot be prosecuted from the same judgment at the same time. *Burke v. Cunningham*..... 645

Preferred Claims. See BANKS AND BANKING.

Preliminary Examination. See CRIMINAL LAW, 6.

Presumption. See LIBEL, 7, 9. MECHANICS' LIENS, 4.

Principal and Agent. See CARRIERS, 3. REAL ESTATE AGENTS. TROVER AND CONVERSION, 1.

1. A tenant, because of his tenancy, is not the agent of his landlord in such a sense as to make the latter liable for improvements under a contract made by the tenant. *Moore v. Vaughn*..... 696
2. The payee of a note is not bound by an indorsement known by the indorsee to have been made by an agent while acting outside his powers. *Dietz v. City Nat. Bank of Hastings*..... 584
3. To constitute ratification of the unauthorized act of an agent in indorsing the name of his principal on a note, it must be shown that the latter had knowledge of the act. *Id.*

Principal and Surety. See HUSBAND AND WIFE, 3. NEGOTIABLE INSTRUMENTS, 3.

1. An extension of time for the payment of a debt will not discharge a surety unless it is for a definite time and on a sufficient consideration. *Watts v. Gantt*..... 869
2. A surety who signs an indemnity bond, knowing that the name of the principal was written thereon by an attorney without authority, will not be released merely because there was no authorized signature by the principal. *Luce v. Foster*..... 818
3. Where a surety executes an indemnity bond to a sheriff, the latter agreeing to pay the proceeds of execution to the surety as security against liability on the bond, neither the principal nor any one authorized by him signing it, the surety is not liable. *Id.*..... 819

Privileged Communications. See LIBEL.

Privileged Publications. See LIBEL.

Proceedings in Error. See REVIEW.

Promises. See CONTRACTS.

Prosecuting Attorney. See COUNTY ATTORNEYS, 1.

Public Policy. See ATTORNEYS' FEES. EXECUTIONS, 2.

Publications. See LIBEL.

Questions of Fact. See MECHANICS' LIENS, 5.

Quieting Title.

1. Decree will be affirmed when supported by sufficient evidence. *Wright v. Grimes*..... 596

Quieting Title—*concluded.*

2. Where defendant in an action to quiet title obtains from plaintiff a quitclaim deed to the land and a dismissal of the action, with notice that before the suit was brought plaintiff deeded to his attorney, for services to be rendered, an undivided one-half interest in the real estate, the attorney may have the cause re-instated, and the court may grant him, as to his interest, the relief sought before dismissal, though he began the original action in his client's name, verified the petition, and failed to record his deed. *Chamberlain v. Grimes*..... 701

Quo Warranto. See SCHOOLS AND SCHOOL DISTRICTS.

Railroad Companies. See ASSIGNMENT. CARRIERS. EMINENT DOMAIN. LIMITATION OF ACTIONS, 1, 2. MASTER AND SERVANT.

1. The evidence discussed in the opinion *held* sufficient to sustain a finding that plaintiff's horse was killed through the negligence of the company, the horse having been found under a trestle, near a place where the company failed to maintain fences and cattle guards. *Chicago, B. & Q. R. Co. v. Hildebrand*..... 33
2. The obvious hazard of fires from engines is a fact which an adjacent property owner cannot disregard. He is bound to take such precautions against fire as a person of ordinary prudence would take for the protection of his property. *Omaha Fair & Exposition Association v. Missouri P. R. Co*..... 105
3. Refusal of trial court in an action for personal injuries to give an instruction making the right of plaintiff to recover dependent upon the absence on her part of slight want of ordinary care. *Omaha & R. V. R. Co. v. Cook*..... 577
4. In an action to recover for injuries inflicted while plaintiff was trespassing on defendant's track the jury was properly instructed that the engineer was under obligations, as soon as he discovered that plaintiff was on the track, to use all possible means and efforts, consistent with the safety of the train and passengers, to avoid injury. *Id.*
5. An engineer may presume that a trespasser on the track is in possession of his senses, will appreciate danger and act with discretion. The engineer is under no obligation to slacken the speed of his train before discovering that a trespasser is in imminent danger of personal injury. *Id.*... 905
6. Such presumption has no application to persons incapable of caring for themselves, such as the very young and helpless. *Id.*

Ratification. See DAMAGES, 2. PRINCIPAL AND AGENT, 2, 3.

Real Estate Agents. See TROVER AND CONVERSION, 1.

1. Sufficiency of correspondence to establish contract of agency. *Shields v. Gamble* 855
2. The rule that a broker is entitled to his commission when he has procured a purchaser, willing and able to buy on the terms proposed by the seller, does not apply where the broker and principal have agreed on other terms *Barber v. Hildebrand* 400
3. Where the right of an agent to compensation depends upon an actual exchange of land, he cannot recover commission for negotiating a conditional exchange, which subsequently failed because the proposed purchaser, in violation of his contract of purchase, did not furnish an abstract showing that he had perfect title to the land to be conveyed by him. *Id.*

Realty.

Where a tenant moves upon leased premises a house belonging to his landlord, and fixes it to the land, it becomes a part of the real estate. *Moore v. Vaughn*..... 697

Receivers. See BANKS AND BANKING, 5.

In a suit to foreclose a mortgage, the evidence was *held* sufficient to justify the appointment of a receiver to collect the rents and profits, on the grounds that defendants were insolvent and the security insufficient. *Ecklund v. Willis*... 737

Records.

Stenographers' notes are not public records. *Smith v. State*... 361

Referees. See BILL OF EXCEPTIONS, 3.

Registration. See QUIETING TITLE, 2.

Release. See MORTGAGES, 4.

Religious Societies.

There is no presumption that seceders from a church forfeited their membership by withdrawal where they organized another society of the same church and afterwards returned to the original one. *Peterson v. Samuelson*..... 161

Repeal. See STATUTES, 2.

Replevin. See ACCESSION.

1. Evidence that plaintiff has a chattel mortgage on the property replevied is irrelevant under an allegation that he is absolute owner, where the defense is a general denial. *Randall v. Persons*..... 607

Replevin—*concluded.*

2. Where the right of possession is found to be in defendant and the property cannot be returned, he is entitled to judgment for the value of such possession with damages for withholding the property; but a failure to find the value of the possession or render judgment therefor is not error of which plaintiff can complain. *Jameson v. Kent*... 412

3. In an action of replevin for a building, injury to property therein occasioned by the removal of the building cannot be recovered by the defendant as an element of damage. *Id.*

4. Where parties litigant had entered into a contract under which the possession of a stock of merchandise was transferred from plaintiff to defendants on a sufficient independent consideration, plaintiff could not found a superior right of possession, such as would entitle him to maintain replevin for said stock, upon an alleged breach of said contract by defendants as to retaining plaintiff in their employ at a certain rate of compensation thereby fixed. *Shackelford v. Hargreaves*..... 680

Reply. See PLEADING, 2.

Reporters' Notes. See CRIMINAL LAW, 4.

Requisitions. See EXTRADITION.

Rescission. See SALES, 1. VENDOR AND VENDEE.

Residence. See SUMMONS.

Revenue. See LICENSE. TAXATION.

Review. See BAIL. BILL OF EXCEPTIONS. CONTRACTS, 3. COSTS, 1, 2. COUNTY COURTS, 2. CRIMINAL LAW. HABEAS CORPUS. INSTRUCTIONS. MECHANICS' LIENS, 3. PARTITION. REPLEVIN, 2. SUMMONS. TRIAL, 4-6.

1. Where there is no question of law involved and the finding below is supported by sufficient evidence or the testimony is conflicting, the judgment will be affirmed.
Peaks v. Lord..... 15
Sloman v. Spellman..... 165
Svanson v. City of Omaha..... 303
Stanwood v. City of Omaha..... 303
Barr v. City of Omaha..... 342
Nygren v. Nygren..... 408
Leighton v. Clarke..... 427
Howell v. Schlotfeldt..... 448
Bickel v. Dutcher..... 572
Wright v. Grimes..... 596
Ecklund v. Willis..... 737
Stephens v. Smith..... 846

Review—*continued.*

2. The action of the trial court during the selection of jurors presents no ground for reversal in absence of abuse of discretion. *Foley v. State* 237
3. Exclusion of evidence of a fact fully established by other competent and uncontradicted evidence is not reversible error. *Barr v. City of Omaha* 342
4. Defendant cannot make a defense for the first time in the supreme court. *Chamberlain v. Grimes* 702
   Randall v. National Building, Loan & Protective Union 816
5. Where the pleadings support the decree and appellant fails to file briefs the judgment will be affirmed. *Peaks v. Lord* 15
   Obert v. Wentz 104
   Norwegian Plow Co. v. Mower 659
6. Transcript for review imports verity. It cannot be corrected in the supreme court. *Weander v. Johnson* 117
7. A record which shows that a motion for a new trial was filed and overruled, but fails to disclose the grounds of the motion, is insufficient. *Koehler v. Summers* 330
8. An error proceeding may be dismissed where the plaintiff in error fails to file a transcript for review within a year from judgment. *Record v. Butters* 786
9. The transcript of the proceedings below must be filed with the petition in error before issuance of summons. *Garneau v. Omaha Printing Co* 847
10. Where the appellate court has not acquired jurisdiction of a case, the only judgment it can render is one dismissing the proceeding. *Id.*
11. Findings of a referee will not be reviewed where his certificate to the bill of exceptions fails to show that the bill contains all evidence adduced. *McClain v. Morse* 52
12. A verdict will not be set aside as contrary to the evidence where the bill of exceptions shows upon its face that important and material testimony has been omitted therefrom. *Nelson v. Jenkins* 133
13. Alleged errors occurring at the trial below will not be reviewed in the supreme court when the plaintiff in error or appellant fails to file a proper bill of exceptions. *Scott v. Spencer* 633
14. The court may refuse to consider instructions on review where, in argument, those alleged to be erroneous are grouped with others of which no complaint is made. *Mead v. Weaver* 155

Review—*continued.*

15. An assignment of error directed generally by numbers against instructions, is insufficient where the instructions are not numbered. *Reed v. Wood* 496
16. Where a complete instruction was not requested, an objection to an instruction that did not fully state the issues will be disregarded. *Barr v. City of Omaha*..... 341
17. An instruction will not be reviewed unless the record shows it was excepted to when given. *Id.*
18. Objections to giving and refusing instructions will not be considered unless presented below by a motion for a new trial. *Id.*
19. Alleged errors in the charge to the jury will be disregarded unless specifically pointed out in the motion for a new trial and petition in error. *Hedrick v. Strauss*..... 486
20. A general exception to instructions is insufficient. There must be an exception to each instruction claimed to be erroneous. *Id.*
21. The giving of an erroneous instruction which does not prejudice the party complaining is not sufficient ground for reversing a judgment. *Liberty Ins. Co. v. Ehrlich*..... 553
22. Where the judgment is the only one that could be rendered, assignments of error as to certain instructions will not be examined. *Jeffres v. Cashman*..... 594
23. The supreme court on error will not consider an allegation of error not presented below. *Ecklund v. Willis*..... 737
24. Allegations of error will be disregarded upon review by petition in error where they were not called to the attention of the trial court by a motion for a new trial. *Farmers Loan & Trust Co. v. Davis*..... 46
Koehler v. Summers..... 330
Ward v. Western Horse & Cattle Ins. Co..... 374
25. A judgment will not be reviewed on error where part of the judgment defendants are not parties in the supreme court. *Andres v. Kridler*..... 784
26. A judgment defendant who was not made a party to error proceedings within a year from judgment, may, by his consent, become a defendant in error and obviate a defect of parties. *Id.*
27. A ruling on a request for special findings will not be disturbed unless there has been a clear abuse of discretion of the trial court. *Hedrick v. Strauss*..... 486
28. Where the facts admitted by the pleadings and established by the special findings of the trial court are at variance

Review—*continued.*

with its final judgment, such judgment in an error proceeding must be reversed. *Lewis v. Scotia Building & Loan Association*..... 439

29. The supreme court on error or appeal may on its own motion look into the record to determine whether the petition below states a cause of action. *Thomas v. Franklin*, 310

30. In a special proceeding an appellate court may, on its own motion, examine the record and determine whether such proceeding is authorized by statute, and whether the plaintiff is authorized to prosecute the case. *Id.*

31. A judgment on verdict for defendant may be affirmed where the record shows the petition failed to state a cause of action and that plaintiff refused to amend when given permission by the trial court. *Gilcrest v. Nantker*..... 564

32. A judgment will not be reversed because of the admission of incompetent evidence where no prejudice resulted. *Rightmire v. Hunteman*..... 119

33. An order sustaining an objection to a question put by a party to his own witness will not be reviewed where the party failed to make an offer indicating what he expected to prove. *Barr v. City of Omaha*..... 342

34. An assignment in a petition in error will be disregarded where it is not relied upon in the brief. *Hedrick v. Strauss*..... 486
Reed v. Wood..... 496

35. The supreme court will not consider objections to the admission of testimony when the particular ruling is not pointed out in the petition in error. *Hedrick v. Strauss*... 486

36. In contempt proceedings, whether a failure to comply with an order has been satisfactorily explained is a question of fact for the trial court, and its judgment will not be reversed unless clearly wrong. *McAleese v. State*..... 886

37. A finding of the trial court, sustaining a verdict which has been attacked on the ground of misconduct of a juror or party, will not be disturbed unless the evidence of misconduct is clear and convincing. *Omaha Fair & Exposition Association v. Missouri P. R. Co*..... 105

38. Where different plaintiffs in cases presenting different facts try the causes together by agreement and join in a motion for a new trial and petition in error, the judgment must be affirmed as to all if free from error as to one. *Id.*..... 106

39. Where the appellant obtained all the relief asked except

Review—*concluded.*

as to the amount found due, the other issues are immaterial on appeal. *Randall v. National Building, Loan & Protective Union* 809
Stearns v. National Building, Loan & Protective Union 817

40. A ruling permitting a party to amend a pleading so as to conform to the evidence will not be disturbed unless there was an abuse of discretion in allowing the amendment. *Barr v. City of Omaha* 341

41. Appeal and error cannot be prosecuted from the same judgment at the same time. *Burke v. Cunningham* 645

42. A party who consents to the entry of a judgment cannot allege error in the proceedings. *Weander v. Johnson* 117

43. The district court should take notice of a city ordinance upon trial *de novo* of an appeal from a judgment for violation of the ordinance. *Foley v. State* 233

Riparian Rights. See WATER AND WATER-COURSES.

Roads. See HIGHWAYS.

Robbery.

It is not essential to the crime of robbery that the property be taken from the body of the person robbed. It is sufficient if taken from his personal presence or protection. *Hill v. State* 505

Sales. See DAMAGES, 4. TAXATION.

1. Where goods are sold upon credit induced by fraudulent representations of purchaser as to his financial ability, the consignor may rescind and replevy upon discovery of the fraud. *Tootle v. First Nat. Bank of Chadron* 237

2. Where the seller is without fault and the purchaser refuses to proceed under his contract to purchase, the latter cannot recover back what he has advanced. *Lexington Mill & Elevator Co. v. Neuens* 649

Satisfaction. See MORTGAGES, 4.

Schools and School Districts. See COUNTY COURTS, 4.

After a school district has exercised the franchises and privileges thereof for the period of one year, its legal organization will be conclusively presumed. *State v. School District* 499

Seals. See BONDS, 1. TAXATION, 5.

Set-Off and Counter-Claim.

1. *Sandwich Enterprise Co. v. West* 722

2. Damage by libel published in a notice of application for

Set-Off and Counter-Claim—*concluded.*

a receiver of mortgaged premises is not a valid counter-claim in an action to foreclose the mortgage. *Watts v. Gantt* 878

3. The defendant, in an action by an assignee to recover money due to an insolvent banking corporation, may set off against the amount owing by him to the bank an indebtedness of the latter to him. *Salladin v. Mitchell*..... 860

Sheriffs and Constables. See ATTORNEY AND CLIENT, 2, 3.

1. A sheriff is entitled to mileage at the rate of five cents per mile for conveying insane patients to the hospital. *Porter v. Merrick County*..... 397
2. Where the check of a purchaser at sheriff's sale of realty has been received and used by the sheriff with the assent of all parties concerned, he will not be denied his commission on the ground that no money was received or disbursed by him. *Kent v. Shickle*..... 274

Sheriffs' Sales. See EXECUTIONS.

Special Assessments. See MUNICIPAL CORPORATIONS, 3–9.

Special Benefits.

Barr v. City of Omaha 342

Special Findings. See TRIAL, 8, 9.

Special Proceedings. See ACTIONS, 3.

Specific Performance.

1. *Mattison v. Chicago, R. I. & P. R. Co.*..... 545
2. Under the pleadings and evidence referred to in opinion it was *held* that specific performance of an executory contract to convey real estate should not be denied on the ground of homestead rights, and that both husband and wife should have joined in the contract. *Hyde v. McConnell*..... 50
3. In an action by a husband against the wife for the specific performance of a contract to convey land she should be released where the evidence shows that she executed the contract because of matrimonial coercion and undue influence. *Greene v. Greene*..... 634
4. Where the husband claims that the consideration for a contract with his wife to convey land to him was her love and affection, or an intention to make him a gift, the burden is on him to show that she made the contract voluntarily, with knowledge of all the facts, and without any fraud, coercion, or undue influence on his part. *Id*..... 635

Statute of Frauds. See EVIDENCE, 5. MILLS AND MILL-DAMS, 2.

A parol promise of the grantor of real estate to warrant and defend the title of his grantee is within the provisions of the statute of frauds and is, therefore, void. *Kelley v. Palmer*..... 423

Statute of Limitations. See LIMITATION OF ACTIONS.

Statutes. See ACTIONS, 3. CONSTITUTIONAL LAW, 1. HABEAS CORPUS, 3. LICENSE. MUNICIPAL CORPORATIONS, 7. TABLE, *ante*, p. xlix.

1. Sec. 331 of the Code, prohibiting husband and wife from testifying against each other, was not repealed by ch. 53, Comp. Stats. *Greene v. Greene*..... 634
2. Ch. 9, Laws, 1891, amending secs. 1 and 2 of ch. 15, Laws, 1889, incorporating cities of a certain class, is void as being in conflict with sec. 11, art. 3, of the constitution, which provides that no law shall be amended unless the new act contains the sections amended, and the sections amended shall be repealed. *City of South Omaha v. Taxpayers' League*, 671

Stay. See MORTGAGES, 2.

Stenographers' Notes. See CRIMINAL LAW, 4.

Subrogation.

1. The fact that the proceeds of a mortgage were used in discharging the lien of a prior mortgage affords no grounds for subrogation. *Bohn Sash & Door Co. v. Case*..... 281
2. The purchaser at an invalid tax sale of land becomes subrogated to all the rights of the public to the liens for the taxes paid by him on account of his purchase. *Adams v. Osgood*..... 451
3. Case in which a wife who paid incumbrances upon land conveyed, through a third person, to her by her husband, was subrogated to the rights of those whose claims she paid where the land was subjected to the payment of the judgments of other creditors. *Brownell v. Stoddard*..... 178

Summons. See ATTACHMENT, 2. MECHANICS' LIENS, 11, 12. PLEADING, 8.

A finding as to place of residence of a defendant served with summons by leaving a copy at his alleged usual place of residence will not be disturbed where the evidence was conflicting. *Heaton v. Thayer*..... 47

Supersedeas.

Where it is shown that a supersedeas bond is inadequate in amount, a sufficient bond may be required by the appel-

Supersedeas—*concluded.*

late court as a condition of staying execution. *Tulleys v. Keller*..... 788

Suretyship. See PRINCIPAL AND SURETY.

Tax Liens. See QUIETING TITLE, 2.

Taxation. See EMINENT DOMAIN, 2. MUNICIPAL CORPORATIONS, 3–9.

1. A purchaser at an invalid tax sale, by payment of his bid, is subrogated to the rights of the county for the enforcement of payment of the amount due with interest at ten per cent; but is not entitled to have an attorney's fee taxed as part of the costs. *Stegeman v. Faulkner*..... 53
Brownell v. Stoddard..... 185
2. Sec. 123 of the revenue act (ch. 77, Comp. Stats.) construed. *Thompson v. Dickey*..... 314
3. Contents of notice to redeem, time of service, and persons upon whom service should be made. *Id.*
4. Duty of holders of tax sale certificates. *Id.*
5. The statutes do not provide for a county treasurer's official seal, and valid tax deeds cannot, therefore, be executed under the present revenue law. *Id*..... 322
6. A county treasurer cannot make a valid tax sale of land unless he includes in the sale all delinquent taxes against the land with interest and costs. *Adams v. Osgood*..... 450
7. The rule *caveat emptor* applies to purchasers of land at tax sales. *Id*..... 451
8. A sale of land for one year's taxes does not discharge taxes assessed against it for previous years. *Id.*
9. A valid tax on land can only be discharged by payment of the tax, unless the land be sold therefor and the holder of the tax lien fails to bring a foreclosure suit for five years after the expiration of the time to redeem. *Id.*
10. The tax sales and liens mentioned in sections 119 and 181 of the revenue law of 1879 have reference to valid tax sales and valid liens arising therefrom. *Id.*
11. A county treasurer has no authority to sell land at private sale for taxes until he has made return to the county clerk of a public sale pursuant to sec. 109, ch. 77, Comp. Stats. *Id.*
12. Where a tax sale is invalid, the holder of the certificate thereunder, who becomes subrogated to the rights of the public to the lien for the taxes, is not entitled to recover as costs, upon foreclosure of the lien, an attorney's fee of ten per cent of the amount of the decree in his favor. *Id.*, 452

Taxation—*concluded.*

13. Where the sale on which a tax lien is based is valid, the holder of the lien, upon foreclosure, is entitled to an attorney's fee. *Id.*

14. Where the owner of land in an action to cancel an invalid tax sale certificate makes a tender in payment of taxes for certain years, he thereby admits that the taxes for those years were legally assessed. *Id.*

15. In such a case the burden of showing that certain taxes paid by the holder of the certificate had not been assessed, or were for any cause illegal, or were not liens upon the land, is on plaintiff. *Id.*

16. Proof necessary to entitle the holder of a tax sale certificate to a decree foreclosing his lien. *Id.*

17. Admissibility of tax sale certificate and tax receipts in establishing a lien in favor of the holder. *Id.*

18. Rate of interest to be paid holder of invalid tax sale certificate. *Id.* 451

Tender. See TAXATION, 14.

Torts. See INTOXICATING LIQUORS, 1–3. SET-OFF AND COUNTER-CLAIM, 2.

Transcripts. See REVIEW, 6–9.

Treasurers. See MUNICIPAL CORPORATIONS, 7.

Treasurer's Seal. See TAXATION, 5.

Trespass.

In order to maintain trespass to land the plaintiff must be the owner, or in posession thereof, when the acts complained of were committed. *Nelson v. Jenkins* 133

Trial. See APPEAL, 2. CRIMINAL LAW. EVIDENCE, 3. INSTRUCTIONS. REVIEW, 2–4.

1. All communications during a trial between jurors and persons connected with the case should be avoided. *Omaha Fair & Exposition Association v. Missouri P. R. Co.* 105

2. Where there is evidence which should be submitted to the jury an instruction withdrawing the case from it should not be given. *Chicago, B. & Q. R. Co. v. Hildebrand* 33

3. Where a party on cross-examination asks a witness an immaterial or irrelevant question, he is bound by the evidence so elicited. *Carpenter v. Lingenfelter* 728

4. Error cannot be successfully assigned upon the admission of evidence which the trial court subsequently strikes

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from the record and withdraws from the jury. *Nelson v. Jenkins*..... 133

5. In a trial to the court without a jury it is not reversible error to deny the party holding the affirmative leave to open and close where it is apparent from the record that he has not been prejudiced. *Citizens State Bank v. Baird*, 219

6. An answer of a witness which should have been stricken out as not responsive is not prejudicial where it is not calculated to mislead the jury and is not harmful to the rights of the party who moved to strike it out. *Peaks v. Lord*... 15

7. Where defendant answers by general denial and pleads a counter-claim, a general finding for plaintiff disposes of the issues. *Guthrie v. Brown*..... 652

8. It is within the discretion of the trial judge to submit or withhold questions for special findings of the jury. *Hedrick v. Strauss*..... 486

9. Where a jury disregards a direction for special findings in answer to material questions, and returns a general verdict, it is error to enter judgment thereon over the objection of the party aggrieved. *Sandwich Enterprise Co. v. West*..... 722

Trover and Conversion.

1. An action for failure to pay over money received by defendant as the agent of plaintiff cannot be maintained upon mere proof of negligence on the part of the defendant in making collection of the money with the detention of which he is sought to be charged. *Stone v. Neeley*..... 567

2. The owner of property taken by another in good faith may recover its value at the time of the conversion, but not the value after it has been improved by the other's labor and skill. *Carpenter v. Lingenfelter*..... 729

Trusts. See FRAUDULENT CONVEYANCES, 4, 5.

1. The relation of the directors and managing officers of an insolvent private corporation toward the property and assets thereof is that of trustees for all of the creditors. *Ingwersen v. Edgecombe*..... 740

2. Question whether the president of a loan company who claimed to have advanced money to purchase a leasehold interest in land acted for himself or for the benefit of the company. *Nebraska Mortgage Loan Co. v. Van Kloster*..... 746

3. Where a fund is once impressed with the character of a trust, the trust character continues until changed by the consent of the beneficiary. *State v. State Bank of Wahoo*, 902

Undue Influence. See EQUITY.

User. See HIGHWAYS, 3.

Usury. See LIMITATION OF ACTIONS, 3.

A renewal note which includes interest on the amount of the loan at a usurious rate for the time of the extension is tainted with usury. *McDonald v. Beer*..... 437

Variance. See ALLEGATA ET PROBATA. REVIEW, 28.

Vendor and Vendee. See MECHANICS' LIENS, 8–12. REAL ESTATE AGENTS. STATUTE OF FRAUDS.

1. Case where one had entered into a contract to purchase two lots and was entitled to rescind on the ground that the vendor's agent in showing the property falsely represented that one of the lots was a corner lot. *Hoock v. Bowman*..... 80
2. A purchaser of real estate has a right to believe and rely upon representations made to him by his vendor as to the character, quality, and location of the property, when the facts concerning which the representations are made are unknown to the former. *Id.*
3. A vendee who is unacquainted with the facts, and relies on false representations of the vendor as to character, quality and location of property, may rescind, notwithstanding an examination of a public record would have disclosed a material misrepresentation by the vendor. *Id*..... 85
4. Where one receives a conveyance to land after a contract by his vendor to sell it to another had been duly made, acknowledged and recorded, he takes the property subject to the rights of the vendee in said contract. *Id*..... 87
5. A vendee is not entitled to rescind a contract to buy land because his vendor subsequently made a conveyance of it to a third person. *Id.*
6. Evidence that the grantee under a quitclaim deed had notice of a prior unrecorded deed for an undivided one-half interest in the premises. *Chamberlain v. Grimes*..... 701

Venue.

A suit for the recovery of money must be brought in the county where the defendant resides or where he temporarily is. *Hoagland v. Wilcox*..... 138

Verdict. See JUDGMENTS, 6–8. LARCENY, 2. TRIAL, 9.

Village Boards. See INTOXICATING LIQUORS, 5.

Voluntary Assignments.

1. A foreign assignee cannot recover assets in an action in

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this state where he fails to show the validity of the assignment under the laws of the state in which it was made. *Connor v. Omaha Nat. Bank*..... 602

2. The assignee of an insolvent corporation takes the property subject to whatever equities existed against the assignor. *Salladin v. Mitchell*..... 859

3. In a proceeding by an assignee to foreclose a mortgage, the property of an insolvent bank, the purchaser from the mortgagor, who is made a defendant therein, may set off against the claim of the assignee an indebtedness due to him from the bank. *Id.*..... 860

Waiver. See ESTOPPEL, 3. HOMESTEAD. INSURANCE, 1, 2, 5. LANDLORD AND TENANT, 2. MECHANICS' LIENS, 4. MORTGAGES, 2. PLEADING, 6, 7.

Warranty. See COVENANTS. STATUTE OF FRAUDS.

Water and Water-Courses.

1. The owner of a mill upon a non-navigable stream with the right to maintain a pond is entitled to have the ice on it remain there when removal would interfere with his motive power; but the riparian owner may make any use of the ice he desires where he does not infringe upon the rights of the owner of the mill. *Eidemiller Ice Co. v. Guthrie*..... 238

2. The owner of a mill and dam is liable in damages where he willfully and unnecessarily lowers the water in the pond and destroys or injures the ice belonging to the riparian owner. *Id.*..... 239

Witnesses. See CRIMINAL LAW, 8. EVIDENCE, 2. LARCENY, 1. TRIAL, 6.

1. In a suit by a husband against his wife for specific performance of a contract, neither can testify against the other. *Greene v. Greene*..... 634

2. After the death of one of two plaintiffs and the entry of an order to proceed in the cause in the name of the survivor, a conversation between deceased and an interested party is not provable by the latter's testimony. *Mead v. Weaver*..... 149

Words and Phrases.

1. "All municipal taxes." *State v. Irey*..... 187
2. "Assessments." *Id*..... 202
3. "Common benefits." *Barr v. City of Omaha*..... 342
4. "Irreparable injury." *Eidemiller Ice Co. v. Guthrie*..... 239

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5. "Notice to redeem." *Thomsen v. Dickey*..... 314
6. "Original packages." *Haley v. State*..... 556
7. "Reasonable doubt." *Foley v. State*..... 237
8. "Special benefits." *Barr v. City of Omaha*..... 342

Writs. See SUMMONS.