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ROSS GAMBLE V. A. STAUBER MANUFACTURING COMPANY.

FILED JANUARY 19, 1897. No. 7024.

Custom and Usage: KNOWLEDGE: CONTRACTS. The business usage of a particular individual is not admissible to interpret a contract between that individual and another in the absence of proof of knowledge by the other of such usage. *Union Stock Yards Co. v. Westcott*, 47 Neb., 300, followed.

ERROR from the district court of Buffalo county. Tried below before HOLCOMB, J. *Reversed.*

Calkins & Pratt, for plaintiff in error.

Marston & Nevius, contra.

IRVINE, C.

This was an action in replevin by the A. Stauber Manufacturing Company against Ross Gamble to recover goods described as "200 pairs of men's and boys' pants." The plaintiff had judgment for a portion of the goods, and the defendant brings the case here by proceedings in error.

It appears that one A. Sands was, in 1891, in business in Kearney. On the 13th of October in that year he wrote the plaintiff as follows:

"*A. Stauber Mfg. Co.*—GENTS: Yours of the 12th to hand. You can send a sample line of your cashmere pants, price $2 to $4, and if prices and goods are satisfactory I will send you order.

"Yours resp., A. SANDS."

Thereupon a quantity of the articles which the parties see fit to designate "pants" was shipped by the plaintiff to Sands, and on October 16 the plaintiff mailed to Sands an invoice headed as follows:

"A. STAUBER MFG. CO.,
"Manufacturer of Warranted Pants, 1004, 1006, 1008 Fourth Street,
"CLINTON, IOWA, Oct. 16, 1891.
"Sold to Mr. A. Sands, Kearney, Neb.
"Payable in Chicago or New York exchange.
"Dec. 1, 6-10. 5-30."

Below this was a list of the goods shipped with prices, and across the face was printed the following: "If this bill is not correct in all respects, please notify us at once, as no allowance will be made at time of settlement." This was followed October 21 by a written order from Sands for a quantity of goods of the same character. These goods were shipped October 24, and invoiced in precisely the same form as the first shipment. The goods, in some way not disclosed, found their way into the possession of Mr. Gamble, from whom the plaintiff undertook to replevy both orders. The court instructed the jury that the second transaction was a sale to Sands and that as to the goods embraced in the second order the plaintiff could not recover.

The sole issue presented to the jury was whether the first transaction was a shipment of samples for inspection and return by Mr. Sands, or whether it was a sale. The plaintiff's letter of October 12, referred to in Sands' letter of the 13th, was not produced and there is no evidence as to its character. It will be at once observed that according to circumstances the first transaction may have been either a shipment of samples for inspection or a sale. Mr. Sands' letter of October 13 apparently contemplates a shipment to him of samples for inspection, but, if instead of complying with the directions of that letter the plaintiff shipped goods under such circumstances as to imply an intention to make an absolute sale and Sands received the goods and detained them, there can be no doubt that the plaintiff might have recovered as for a sale on a *quantum meruit*. Therefore it would be a sale and replevin would not lie. No document in evidence constitutes a complete written contract. The letter as

remarked plainly implies an order of samples for inspection. The invoice, on the other hand, as strongly implies a sale. Only one witness was called—the secretary of the plaintiff company. He was permitted to testify, over the objections of the plaintiff, as follows:

Q. When such an order as this of the 13th of October, 1891, which has been introduced in evidence here, is received by this house asking for samples, what is the rule of the house, or your practice, with reference to those orders?

A. It is customary to send such goods out on memorandum, as nearly all houses do.

This was followed by an explanation that by memorandum was meant such a bill as accompanied these goods. In admitting this evidence we think the court erred. It was not sought to show a custom, or even a trade usage, either general or local, in its character. The evidence was merely as to the usage of one business concern, the plaintiff in the case. It was not shown that Sands had any notice of such usage, nor was any offer made to show that fact. Even in the case of a local custom, such knowledge must be brought home to the individual sought to be charged in order to render the custom available. (*Milwaukee & Wyoming Investment Co. v. Johnston*, 35 Neb., 554; *Union Stock Yards Co. v. Westcott*, 47 Neb., 300.) With regard to customs they may be so well established and so general that the parties are presumed to contract with reference thereto, but with regard to the usage of an individual, actual knowledge must be proved. (*Union Stock Yards Co. v. Westcott*, *supra*.) There was very little evidence in the case beyond what has already been detailed,—none in fact throwing any important light on the transaction. The documents from their terms leaving the transaction uncertain, the evidence referred to probably had serious weight with the jury. Its admission was certainly prejudicial, and its effect was not controlled in any way by the instructions.

REVERSED AND REMANDED.

PATRICK MULLEN V. LOUISA KINSEY.

FILED FEBRUARY 3, 1897. No. 7018.

1. **Vendor and Vendee: FRAUD.** A purchaser of real estate has a right to rely upon the representations of his vendor touching the quality and location of the property, and the character of the improvements thereon, whenever the facts concerning which such representations are made are not within the knowledge of the purchaser.
2. ———: ———. Evidence examined, and *held* to sustain the judgment for damage on account of fraudulent representations by the vendor touching the character and value of improvements upon the lands conveyed.

ERROR from the district court of Douglas county. Tried below before HOPEWELL, J. *Affirmed.*

Charles B. Keller, for plaintiff in error.

Warren Switzler, contra.

POST, C. J.

This was an action below in the district court for Douglas county by the defendant in error, Louisa Kinsey, against the plaintiff in error, Patrick Mullen, to recover damage on account of certain alleged false and fraudulent representations of the latter as an inducement to the purchase by the former of a certain quarter section of land in Holt county. The fraud charged consists in the false statement relied upon by the plaintiff below, that there were situated upon the Holt county land a frame dwelling house 20 by 40 feet, with a stone foundation, of the value of $600, and a barn 20 by 30 feet, of the value of $200; a frame granary 10 by 20 feet, of the value of $200, together with good fences, outhouses, etc.; also that 65 acres of said land was under cultivation, in addition to which there was, as represented, situated thereon an orchard of 5 acres. The material allegations of the petition were all put in issue by the answer

and a trial had resulted in a verdict for the plaintiff below in the sum of $250, upon which judgment was subsequently entered and which it is sought to reverse by means of this proceeding.

The question to which our attention is especially directed by counsel for the plaintiff in error is that of the sufficiency of the evidence to sustain the judgment. In this connection it is contended that the defendant in error did not rely upon the alleged representations respecting the land in question, but upon an independent investigation made under her direction; and in support of that proposition we are referred to the fact that one Green, defendant in error's agent, pending the negotiation which resulted in the contract, at the instance of the latter, wrote to Holt county for information respecting said land. But the inquiry made appears to have been confined to the character of the land only, and a reason was given, satisfactory to the jury, for the reliance by the defendant in error upon the representations of the adverse party touching the value of the land and the improvements thereon. It is also argued that the representations, as proved, related to the value of the property only and that they are accordingly not actionable, even conceding them to have been false; but there is evidence clearly tending to prove the plaintiff's charges and which for the purpose of this investigation is quite sufficient to sustain the judgment complained of. A purchaser of real estate has a right to rely upon the representations of his vendor touching the quality and location of the property and the character of the improvements thereon whenever the facts concerning which such representations are made are not within the knowledge of the vendee. (*Hoock v. Bowman*, 42 Neb., 80, and authorities cited.)

Exception was taken to the admission in evidence of a sworn statement or application for a loan made by one Price, plaintiff in error's grantor, in which the representations respecting improvements correspond to the alle-

gations of the petition below. We think a sufficient foundation had been laid for the introduction of the evidence complained of. The negotiations which resulted in the conveyance by the plaintiff in error of the Holt county land in exchange for certain property in the city of Omaha were conducted on the part of the latter by one Spencer, and who, as an inducement to such exchange, submitted to defendant in error the statement aforesaid as evidence of the character and value of the improvements upon the premises of his principal. It is evident from the record that Spencer, in the transaction mentioned, was acting within the scope of his authority as plaintiff in error's agent in effecting the desired exchange of property and that the ruling assigned is free from error.

It is next assigned that the district court erred in permitting one Saunders, a witness for defendant in error, to testify to the value of the Holt county property and also the improvements thereon at the time of the transaction here involved, to-wit, in the month of July, 1889. The objection that no foundation had been laid for such testimony is clearly without merit. The witness had, according to his own statement, bought and sold real estate in Holt county, and was acquainted with the market value of lands in that vicinity at the time in question.

Error is also alleged in the giving and refusing of instructions. But the questions thus presented, so far as they are material to the controversy, have been noticed in connection with the other assignments.

There is no error in the record and the judgment will be

AFFIRMED.

H. WALLACHS & SONS ET AL. V. ROBINSON & STOKES COMPANY ET AL.

FILED FEBRUARY 3, 1897. No. 7039.

1. **Insolvent Corporations**: PREFERRING CREDITORS. An insolvent corporation may, in the absence of actual fraud, prefer one or more of its creditors to the exclusion of others.
2. ———: FRAUDULENT CONVEYANCES. Whether or not a conveyance by an insolvent corporation is fraudulent as to creditors cannot be determined as a question of law, but is a question of fact, to be determined from a consideration of the evidence in each particular case. (*Shaw v. Robinson*, 50 Neb., 403.)

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

Rich, O'Neill & Sears, for plaintiffs in error.

Montgomery & Hall, contra.

POST, C. J.

This is a petition in error by H. Wallachs & Sons, Barnheimer & Walker, Converse, Stanton & Cullen, Rothchilds & Co., James Talcott, and Robinson & Shackleton, who were intervenors in the district court for Douglas county in an action in which the Robinson & Stokes Company was plaintiff, and the Commercial National Bank, Anastatia Burnette, and George A. Bennett, sheriff, were defendants. The controlling question presented is that of the right of an insolvent corporation, in the absence of actual fraud, to prefer one or more of its creditors to the exclusion of others, and which was, by the order sustaining the demurrer of the Commercial National Bank to the petition of intervention, resolved in the affirmative. The precise question here involved was considered in *Shaw v. Robinson*, 50 Neb., 403, in which it was held that the question of fraud is in all such cases one of fact to be determined from a consideration of all of the evidence

adduced. We are satisfied with the reasoning of Mr. Commissioner RYAN in the case cited, as well as the conclusion there reached. It follows that the judgment of the district court is right and must be

AFFIRMED.

NORVAL, J.

I concur on the ground that the question was settled in the case cited in the opinion.

CHARLES W. BRANCH, APPELLEE, V. UNITED STATES NATIONAL BANK OF OMAHA, APPELLANT, ET AL.

FILED FEBRUARY 3, 1897. No. 6939.

1. **Commercial Paper:** INDORSEMENT: TITLE. The legal title of commercial paper indorsed "for collection" passes to the indorsee only so far as to enable him to demand and enforce payment thereof.
2. ———: ———: ———: BANKS AND BANKING. The owner of paper so indorsed may control the same until paid in full, and may intercept the proceeds thereof in the hands of an intermediate agent.
3. **Banks and Banking:** COLLECTIONS. The mere crediting of the account of the remitting bank by a correspondent employed by it to make collections does not create in favor of the latter such an equity as can be interposed in defense of an action by the owner of the paper so collected for the proceeds thereof.
4. ———: ———: PROCEEDS. Evidence examined, and *held* insufficient to prove that the position of appellant, a sub-agent for the collection of commercial paper, has been altered to its damage through the placing of the proceeds of such paper to the credit of the bank from which it was received.

APPEAL from the district court of Lancaster county. Heard below before STRODE, J. *Affirmed.*

Cowin & McHugh, for appellant.

John S. Bishop, contra.

POST, C. J.

This was an equitable proceeding in the district court for Lancaster county, whereby the appellee, Charles W. Branch, seeks to recover the sum of $941.34 and interest, being the proceeds of a check drawn to his order by the Hamilton Brown Shoe Company upon the Continental National Bank of St. Louis, under date of January 11, 1893. A final decree was by the district court rendered against the appellant, the United States National Bank of Omaha, in accordance with the prayer of the petition, and dismissing the action as against the defendant Hayden, receiver of the Capital National Bank. The issues presented by the pleading are fairly indicated by the findings of the district court, viz.:

"That on the 13th day of January, 1893, at Lincoln, Nebraska, the plaintiff indorsed said check and delivered it to the defendant, the Capital National Bank of Lincoln, for collection, and that the said Capital National Bank received the same for collection as the agent of the plaintiff, without paying any consideration therefor, and stamped its collection number 15227 on the face of said check, and entered the same on its collection register as the collection of plaintiff; that on the 14th day of January, 1893, the defendant, the Capital National Bank, indorsed said check to the order of M. T. Barlow, cashier of the United States National Bank of Omaha, Nebraska, for collection, and forwarded the same by mail to the said United States National Bank at Omaha, Nebraska, as the property and collection of this plaintiff; that the defendant, the United States National Bank, received said check for collection, without paying any consideration therefor, on the 16th day of January, 1893, and that said United States National Bank had notice, by the collection number of the Capital National Bank thereon and the letter of the said Capital National Bank forwarding the same, that the Capital National Bank was not the owner of the said check, but was agent of the plaintiff for

the collection thereof; that on the 20th day of January, 1893, the defendant, the United States National Bank, collected the full amount of said check, to-wit, the sum of nine hundred forty-one and 34-100ths dollars, and that the said defendant, the United States National Bank, has not paid the amount it received on said check, but still has the same in its possession.

"The court further finds that the defendant, the Capital National Bank, acted as the agent of the plaintiff in making this collection and in forwarding the same to the defendant, the United States National Bank, and that said defendant, the Capital National Bank, never received the proceeds of said check.

"The court further finds that the defendant Kent K. Hayden, as the receiver of the said Capital National Bank, never received the proceeds of said check.

"The court further finds that the plaintiff, before the commencement of this action, demanded from the defendant, the United States National Bank, payment of the amount received by it as the proceeds of said check, and that said demand was refused.

"The court further finds that the plaintiff is not indebted to the defendant, the Capital National Bank, and was not a depositor therein, and that on January 20, 1893, said Capital National Bank was insolvent and that its doors were closed on January 21, 1893, and that on the morning of January 23, 1893, said bank passed into the hands of an United States bank examiner and afterwards into the hands of a receiver."

In addition to the facts as above found it appears that the check in question was by the plaintiff indorsed in blank at the time of its delivery to the Capital National Bank for collection; that said check when received by the United States National Bank bore upon its face the following indorsement: "Report by this No. 15227. Capital National Bank," and was indorsed on its back as follows: "Collect for account of Capital National Bank, Lincoln, Nebraska." Accompanying the check was the following letter:

"LINCOLN, Jan. 14, 1893.

"*U. S. National Bank, Omaha, Neb.:* We enclose for collection and cr' number 15227 St. Louis, Mo. No Protest $941.34. Please report by our number. Do not carry collections past maturity. R. C. OUTCALT,

"*Cashier.*"

The foregoing was by the correspondent bank acknowledged as follows:

"OMAHA, 1-20-93.

"*Cap. Nat. Bank, Lincoln:* Your favor of the — inst. is received, with stated enclosures. We credit * * * No. 15227, $941.34. We credit out of town items subject to payment. M. T. BARLOW,

"*Cashier.*"

The Capital National Bank was on January 20, and for a considerable time previous thereto, insolvent, and at the close of business on January 21 was placed in the hands of a bank examiner by order of the comptroller of currency. There had been, for several years previous to the transaction here involved, continuous dealings between said banks. As a matter of convenience, and in accordance with the usage of corresponding banks, the proceeds of commercial paper transmitted by the Capital National Bank for collection were by the United States National credited to the account of the former, and paid on its order or transferred to other banks, as the condition of the account might demand. The books of the United States National show an overdraft by the Capital National on January 16, when the check in controversy was received from the latter, of $18,230.43. At the opening of business on January 20 the account of the Capital National was overdrawn to the amount of $2,325.93, and during said day there was paid upon its orders by the United States National the sum of $11,454.02, and on said day it was credited with the sum of $11,800.97, including the proceeds of the check in controversy, leaving an overdraft, as shown by the books of the latter at the close of

business, of $1,978.98, and which at the close of business on the 21st had been reduced to $291.85. The letter of advice above set out under date of January 20 was received by the examiner in charge of the Capital National subsequent to the impounding thereof, and the credit in said letter mentioned does not appear upon the books of said bank in the hands of the receiver.

The first inquiry suggested by the record and arguments is the effect of the indorsement by the Capital National Bank of the check in question. It is true that the indorsement in blank by the plaintiff invested the indorsee, the Capital National Bank, with apparent general ownership of said instrument. The subsequent qualified indorsement by that bank, however, to the United States National Bank raises no presumption of ownership by the latter. Such a form of indorsement is not intended to give currency to commercial paper, but, on the contrary, operates to prevent further circulation, and passes to the indorsee such a title only as will enable him to demand payment and enforce collection of paper thus transferred. And the owner may in such case control the collection of his paper and may intercept the proceeds thereof in the hands of an intermediate agent. (*Dickerson v. Wason*, 47 N. Y., 439; *Freeman's Nat. Bank v. National Tube Works Co.*, 151 Mass., 413; *Boykin v. Bank of Fayetteville*, 24 S. E. Rep. [N. Car.], 357; *Clafflin v. Wilson*, 51 Ia., 15; *Commercial Bank v. Armstrong*, 148 U. S., 50; *Evansville Bank v. German-American Bank*, 155 U. S., 556.)

This conclusion leads to the subject of discussion to which most prominence is given in the arguments of counsel, viz., whether the crediting to the Capital National by the United States National on January 20 of the proceeds of the check in question amounts to a payment thereof which can be successfully interposed as a defense to this action. It is contended by appellant that the decisive question is not that of its title under the restricted indorsement, but whether, in view of the plaintiff's unrestricted indorsement of the check, it was authorized to

treat the Capital National Bank as the owner thereof. It is, in effect, contended that the plaintiff, in forwarding the check for collection through the Capital National Bank, by implication consented to the agencies usually employed for that purpose, and that he should, in view of the custom of banks in making collections, be held to have authorized the mingling of the proceeds of this check with the funds of the collecting bank, and settlement therefor by crediting the account of the bank to which the money should otherwise have been remitted. The soundness of that proposition as a general statement of the rule may, for the purpose of this case, be conceded, although it can, for reasons hereafter stated, have no application to the facts of the case before us. No mere book-keeping between a bank and its sub-agent for the collection of money can change the actual status of the parties, or destroy rights which arise out of the real facts of the transaction. (*Commercial Bank v. Armstrong, supra.*) In no case cited, and in none examined by us, has the mere crediting of the remitting bank by a correspondent employed by it to make collections been held to create in favor of the latter such an equity as can be successfully interposed as a defense to an action by the owner for the proceeds thereof. The transaction must in such case, as all agree, in order to work an estoppel, amount to a payment in good faith to the transmitting bank of money realized upon collections by the means usually employed by banks in effecting exchange.

The statement renders necessary a brief reference to the evidence in the record. We have seen that the United States National Bank received the proceeds of the plaintiff's check on January 20, that it paid out on said day, upon orders of the Capital National Bank, $11,454.02, and credited the account of the latter $10,859.63 in addition to the $941.34 now in controversy. The cashier of the United States National, Mr. Barlow, testifies that the sum of $11,454.02, above mentioned, was advanced by him as such cashier, in reliance upon the cash items, in-

cluding the money in controversy, on that day received from, and on account of, the Capital National. But the condition of the account at the time of the receipt of the plaintiff's money and the amount subsequently paid out on that day upon orders of the Capital National, as compared with the remittances of the latter, do not appear, while the cash items received by the appellant bank on the 21st exceed the amount paid out on that day on the orders of the Capital National by $1,687.13. It cannot, therefore, we think, be said that the position of the appellant has been altered to its damage through the crediting of the Capital National of the money received in payment of plaintiff's check. The defense here relied upon is essentially an equitable one, as to which the burden is upon the appellant, and we are, upon the whole record, satisfied that the finding of the district court is right and that its decree should be

AFFIRMED.

BEN B. WOOD V. MAX L. ROEDER.

FILED FEBRUARY 3, 1897. NO. 6867.

1. **Fraud in Misrepresenting Foreign Law.** As a general rule, a misrepresentation which embodies matter of law is one upon which a party cannot rely, as all parties are presumed or bound to know the law; but where it is as to the law of another state, or its effect, it is not within the rule and may be fraudulent; and ignorance of the law may be pleaded by the one to whom the misrepresentation is made.

2. ———: SALE OF COUNTY WARRANTS. Where a warrant issued by a county of one state is purchased in another state in reliance upon a misrepresentation in respect to the statute of limitations as applicable to the warrant, and on presentation and demand payment of the warrant is refused on the ground that it is not a claim which can be enforced, there arises a cause of action in favor of the purchaser and against the party who sold the warrant and made the misrepresentation.

3. ———: ———. The evidence *held* sufficient to sustain the verdict rendered.

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

George E. Pritchett, for plaintiff in error.

Winfield S. Strawn, contra.

HARRISON, J.

The defendant in error instituted this action in the district court of Douglas county to recover of plaintiff in error, alleging in substance in his petition that in the course of certain business transactions had with the plaintiff on or about October 6, 1887, he purchased a county warrant, or order, purported to have been issued by the proper officers of Lake county, Colorado, in the express sum of $454.01 and interest thereon at ten per centum per annum from August 18, 1880, the date of its presentation for payment to the county treasurer, and its nonpayment for want of funds; that the defendant in error gave for the warrant its face value at the time of his purchase, viz., $778.80; that to induce the purchase of said warrant the plaintiff in error "falsely and fraudulently represented to the plaintiff that said warrant was the existing legal and binding obligation of the said Lake county, in the state of Colorado; and, referring to the value of the said warrant, also verbally stated that the said warrant was good and would certainly be paid in full by the county issuing the same, only that said county was a little slow; that as plaintiff was necessarily making some investments, the said warrant would be a good and safe investment for the plaintiff.

"(3.) That having no other knowledge of said warrant than that derived from defendant's said representations, and confiding in and wholly relying on the correctness thereof and believing the same to be true, plaintiff took the said warrant of said defendant and gave as consideration therefor the sum of $778.80, which then and there passed from plaintiff to defendant.

"(4.) That said warrant was not a legal existing and binding obligation of the said Lake county; that the said warrant was not good and would not then, or for a long time prior thereto, be paid by the said county, and was not a safe investment; but was then and for a long time prior thereto had been fully barred by the statute of limitations of the state of Colorado, and the obligation of said county to pay the same repudiated on that account, and that payment of the said warrant had been refused —all of which the defendant at the time of making such false representations well knew."

In the answer the plaintiff in error admitted the ownership of the warrant as stated in the petition, and alleged that the defendant in error, as agent for a life insurance company, solicited the plaintiff in error to insure his life with such company, which plaintiff in error did on condition that the company would accept the said county warrant as a part of the consideration for the insurance, and that the company, by its agent, the defendant in error, acceded to the condition and received the warrant and $190.94 in cash, and issued to plaintiff in error a policy of life insurance; and further:

"That some time after said bargain or trade had been consummated and executed, the plaintiff tendered back to this defendant said warrant and demanded the face value thereof and interest of this defendant, in cash, with which demand this defendant refused to comply, but proposed to the plaintiff that if said company, his principal, or himself, was dissatisfied with the trade, said warrant and money should be returned to him, and he would deliver up said policy of insurance, and that such proposition was rejected by the plaintiff.

"And further answering said substituted petition this defendant denies the same and each and every allegation thereof, except as hereinbefore admitted."

In the reply it was admitted that the warrant was received by the defendant in error as a portion of the premium on a policy of insurance issued to plaintiff in error

by the National Insurance Company of Montpelier, Vermont, and that the balance of the premium was paid in cash, and it was alleged that the company had nothing to do with the part of the transaction which involved the warrant, that being a matter of trade between plaintiff and defendant in error personally, and known to plaintiff in error to be so; that there was a refusal to accept a return of the policy and to give up the warrant and cash therefor received, for the reason that at the date of the offer the policy had been in force two years, of which plaintiff in error had received the benefit. After the trial the defendant in error, on leave granted so to do, amended the second paragraph of the petition to conform to the proof, by adding thereto the following: "And verbally guaranteed that said warrant was good, and would be paid by the county issuing it, and that defendant agreed he would make it good." There was a trial of the issues to a jury and verdict and judgment for defendant in error. The case is presented here for review.

It is insisted that the evidence was insufficient to sustain the verdict. The evidence establishes that at the time of the transactions between the parties out of which the cause of action arose, any action on the warrant for the recovery of its amount was barred by the statute of limitations of Colorado, where it was executed. The evidence, although conflicting, was sufficient to support findings that such representations were made as were alleged in the petition and for the purpose therein stated, that the defendant in error relied on them, and that he, and not the insurance company, purchased the warrant. As a general rule, a misrepresentation which involves a statement of matters of law is one upon which a party cannot rely, as all parties are bound to know the law. (*Burt v. Bowles*, 69 Ind., 1; *Upton v. Tribilcock*, 91 U. S., 45.) But this is not a universal rule and has its exceptions. (Bigelow, Fraud, p. 9.) A misrepresentation which includes the opinion of a law of another state is without the rule, and may be fraudulent; and ignorance of the law may be

pleaded by the party to whom the misrepresentations were made. (*King v. Doolittle*, 1 Head [Tenn.], 77.) The statement made by plaintiff in error was one of fact and law. It embraced the element of the operation of the law of Colorado in regard to the limitation of actions on the remedy for nonpayment of the warrant, the subject-matter of the contract between the parties; and whether or not he was possessed of knowledge, the effect was the same. It was not necessary to either plead or prove *scienter*. It was proven that the defendant in error, after he became possessed of the warrant, presented or caused it to be presented for payment, which was refused. This, being true, gave him a right of action to recover what he had paid for the warrant. It had proved to be without value,—was worthless. It was not an existing binding obligation of Lake county, Colorado, at the time of the sale to defendant in error, but was then barred by the statute of limitations; hence the right to this action accrued. (*Brown v. Rice*, 26 Gratt. [Va.], 467.) There was sufficient evidence to support findings of all the elements of an action such as this and which must be present to warrant a verdict, hence the verdict must be allowed to stand.

The points raised and presented by exceptions to certain designated instructions did not differ materially from those we have hereinbefore noticed and discussed, and what has been said is equally forcible to these as to the ones discussed, from which it follows that the objections to the instructions must be overruled. The judgment of the district court is

AFFIRMED.

IN RE WILLIAM MCVEY.

FILED FEBRUARY 3, 1897. No. 8999.

1. **Burglary:** TIME COMMITTED. That the act be committed in the night-time is an essential element of the crime of burglary.
2. ———: INFORMATION: HOUSEBREAKING. Under an information against a person for the crime of burglary, he cannot be convicted of the statutory offense of breaking and entering buildings in the daytime described in section 53 of the Criminal Code.
3. **Criminal Law:** SENTENCE. Jurisdiction to pronounce a particular sentence imposed is as essential as jurisdiction of the person and subject-matter. If the first does not exist the sentence is void.

ORIGINAL application for writ of *habeas corpus*. *Petitioner discharged.*

W. S. Shoemaker, for petitioner.

HARRISON, J.

In this, an application for a writ of *habeas corpus* on behalf of William McVey, who, it is pleaded in the petition, is unlawfully imprisoned and restrained of his liberty by John McDonald, sheriff of Douglas county, it appears that the applicant was arrested, informed against, and tried in the district court of Douglas county on a charge of the crime of burglary. The jury returned the following verdict: "We, the jury duly impaneled and sworn to try the case of the state of Nebraska against William McVey, do find the said defendant not guilty of the crime of burglary as charged, but do find him guilty of the crime of breaking and entering in the daytime with intent to steal property of value." Counsel for defendant moved his discharge, but this was overruled and the prisoner sentenced to imprisonment in the penitentiary for a term of two years and six months.

It is claimed that the crime of burglary and that of breaking and entering in the daytime are distinct offenses and that a conviction of the latter cannot be had

under a charge of the former; that inasmuch as the jury adjudged the prisoner not guilty of the former, he was entitled to be discharged; that the court had no jurisdiction to sentence him; hence its judgment was void and the prisoner should be released. Burglary is defined in our statutes as follows: "If any person shall, in the night season, willfully, maliciously and forcibly break and enter into any dwelling house, * * * with intent to kill, rob, commit a rape, or with intent to steal property of any value, or commit any felony, every person so offending shall be deemed guilty of burglary, and shall be imprisoned in the penitentiary not more than ten nor less than one year" (Criminal Code, sec. 48); and the crime of breaking and entering buildings in the daytime is stated as follows: "If any person shall wilfully and maliciously, in the day time, break and enter any dwelling house, * * * with intent to steal, or commit any felony, every person so offending shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding $500 and imprisonment in the jail of the county not exceeding six months at the discretion of the court." (Criminal Code, sec. 53.) "Burglary is a felony at common law, and a burglar is defined by Lord Coke as 'he that in the night-time breaketh and entereth into a mansion house of another of intent to kill some reasonable creature or to commit some other felony within the same, whether his felonious intent be executed or not.'" (2 Am. & Eng. Ency. of Law, p. 659, note 1.) "Inasmuch as, at common law, burglary could be committed in the night-time only, and as the circumstance of the nocturnal entrance was vital to the offense, the allegation of night-time in the indictment was essential and the indictment was insufficient without it." (3 Ency. Pl. & Pr., p. 741.) That the breaking and entering be in the night-time is, by our statutes, made one of the essential elements of the crime of burglary and must be both pleaded and proved. The crime of burglary as set forth in the Criminal Code differs from that of breaking and

entering buildings in the daytime as described in section 53 of the same Code. A man may not be informed against for one crime and convicted of another and different one. He is entitled to know the nature and cause of the accusation (see Constitution, art. 1, sec. 11), so that he may be enabled to prepare and make his defense, if any he has. The statement of the time as to the crime of burglary is an averment of a material element thereof and must be specifically proved as laid. The crime of breaking and entering buildings in the daytime is not included in a charge of burglary, and a prisoner cannot be convicted of the former under a charge of the latter, or burglary. (*Bromley v. People*, 37 N. E. Rep. [Ill.], 209; *Guynes v. State*, 8 S. W. Rep. [Tex.], 667; *State v. Behee*, 17 Kan., 402; *State v. Adams*, 20 Kan., 329; *Mace v. State*, 9 Tex. App., 110; *Bravo v. State*, 20 Tex. App., 188; *Waters v. State*, 53 Ga., 567; *Williams v. State*, 46 Ga., 212; *State v. Alexander*, 56 Mo., 131.) This being true, the verdict herein did not warrant the court in sentencing the prisoner, as it announced him not guilty of the burglary as charged.

The only further question presented is whether the sentence of the court was merely erroneous or whether it was illegal in such a sense as to be void. It may be said that the modern doctrine or idea is that a court must possess jurisdiction not only of the person and subject-matter, but to impose the sentence which is adjudged. If the latter is lacking the sentence is not merely voidable but void. (Black, Judgments, sec. 258; citing, among others, *Ex parte Lange*, 18 Wall. [U. S.], 63; *Ex parte Milligan*, 4 Wall. [U. S.], 131; *Ex parte Wilson*, 114 U. S., 417; *Ex parte Kearny*, 55 Cal., 212; *In re Petty*, 22 Kan., 477. See, also, *Ex parte Cox*, 32 Pac. Rep. [Ida.], 197; *Ex parte Yarbrough*, 110 U. S., 651.) In the case at bar, the jury having, by its verdict, determined the prisoner not guilty as charged, although it further adjudged him guilty of another crime, the trial court had no jurisdiction to sentence him; hence its attempt in that direction was ille-

gal in such sense that it was void, and *habeas corpus* the appropriate remedy. (*In re Betts*, 36 Neb., 282; *In re Havlik*, 45 Neb., 747.) It follows that the prisoner must be discharged.

PRISONER DISCHARGED.

NATIONAL BANK OF COMMERCE, APPELLEE, V. PAULINE CHAPMAN ET AL., APPELLANTS.

FILED FEBRUARY 3, 1897. No. 7047.

1. **Fraudulent Conveyances: INSOLVENCY: RELATIVES.** A debtor in failing or insolvent circumstances may prefer one creditor notwithstanding the fact it may be to the exclusion of others, and this rule may include relatives of the debtor who are his creditors.
2. ———: ———: ———: **BURDEN OF PROOF.** If such transfers between relatives be attacked as fraudulent, the burden is upon the parties thereto to show the good-faith character of the transactions.
3. ———: ———: ———. A son may convey property to his mother in payment of a pre-existing debt to her if such a conveyance is honestly made or without fraudulent intent to the knowledge of the mother, or participated in by her.
4. ———: ———: ———. Findings and judgment *held* contrary to the conclusions established by the evidence.

APPEAL from the district court of Douglas county. Heard below before WALTON, J. *Reversed and action dismissed.*

W. W. Slabaugh, Isaac Adams, and *Webster, Rose & Fisherdick,* for appellants.

B. N. Robertson, contra.

HARRISON, J.

April 29, 1893, the appellee herein filed in the district court of Douglas county a petition or creditor's bill, in

which it was alleged that at the September, 1892, term of court in Douglas county, appellee recovered judgment against Pauline and Eugene B. Chapman in the sum of $1,126.78, which remained unpaid and on which execution issued April 13, 1893, and was returned April 29 unsatisfied; that the Chapmans were insolvent. It was further pleaded that on July 16, 1891, Eugene B. Chapman and Pauline Chapman conveyed to Eliza A. Hammond certain real estate specifically described, and on February 18, 1892, conveyed to the same person certain other described real estate, and that on April 8, 1893, Eugene B. Chapman, being the owner of a certain lot, lot 2, block 4, Briggs Place addition, the title of record being in E. A. Benson, caused the lot to be conveyed to Eliza A. Hammond;" that the said Eliza A. Hammond paid no consideration for the said lot and that all the said consideration therefor was paid by the said defendant Eugene B. Chapman; that all the said several conveyances herein set forth, by the said Chapman to the said Hammond, were made without consideration and for the purpose of preventing the plaintiff from collecting its said judgment, as the said defendant Eliza A. Hammond well knew; that the title to said premises now stands in the name of the said defendant Eliza A. Hammond, but that the said Eugene B. Chapman is the actual owner of the same." The relief sought was to subject the real estate to the payment of appellee's judgment. The defendants' answer admitted the conveyances of the real estate, but denied "that said conveyances were made by said grantors, or received by said grantee, with any intention to defraud plaintiff in the collection of its judgment, or to hinder or delay said plaintiff in such collection, or to hinder, delay, or defraud any other creditor of said grantors or either of them;" and further pleaded as follows: "Defendants allege that at the time of said conveyances, and long prior thereto, defendant Eugene B. Chapman was indebted to defendant Eliza A. Hammond in a large amount, and that said convey-

ances were made for the purpose of liquidating, in part, said indebtedness, and that said Eliza A. Hammond paid full value for the real estate so conveyed to her. Defendants deny the allegations of said petition respecting the transfer to said Eliza A. Hammond of lot two (2) in block four (4), in Briggs Place addition." The reply was a general denial. There was a trial of the issues, and a decree for appellee in which appeared a finding that the several conveyances were made with the intent on the part of the grantors, the Chapmans, to defraud, hinder, and delay the plaintiff (appellee), of which intent the grantee, Eliza A. Hammond, had full knowledge at the time. From the decree this appeal has been perfected.

It was admitted at the trial that Pauline and Eugene B. Chapman executed and delivered to appellee a promissory note of date February 3, 1891; that action was commenced thereon and judgment obtained during the September, 1892, term of the district court in Douglas county in the amount of $1,126.78; that execution had issued and been returned of date and indorsed as stated in the petition; that the Chapmans were insolvent and possessed no property liable to execution; also, that the conveyances of real estate by Chapman and wife to Eliza A. Hammond were made of the dates set forth in the petition and the titles thereto stood of record in the name of Eugene B. Chapman on the date of the execution of the note to appellee, to-wit, February 3, 1891. It was also admitted that Eliza A. Hammond was the mother of Eugene B. Chapman. There was no admission in regard to the conveyance of the title of a lot by E. A. Benson to Mrs. Hammond.

It appears from the evidence that Mr. Hammond, the second husband of Eliza A. Hammond, died during the year 1882, having at that time insurance on his life amounting to the sum of $11,000, and of which Eliza A. Hammond was the beneficiary and from which she received very nearly the whole amount, some $200 or $300 less than the face of its policy being paid by one of the

companies or associations. That in September, 1882, Eugene B. Chapman, her son by a first husband, engaged in the wholesale grocery business in the city of Omaha and soon afterwards purchased, with money furnished him by his mother, and for her, lots 15 and 16, in block 7, Reed's first addition to the city of Omaha, taking the title thereto in his own name. Mrs. Hammond, whose home was in St. Louis, removed to Omaha, April, 1883, and soon after, probably during the next month (May), the title to the two lots last described was conveyed to her and she took possession of the property and occupied and used it. January 2, 1885, Mrs. Hammond conveyed to Pauline Hax, who three days later became the wife of Eugene B. Chapman, lot 16 in Reed's first addition to Omaha, receiving as a consideration therefor the promissory note of Chapman in the sum of $6,000. On March 13, 1888, Mrs. Hammond deeded to Mrs. Chapman the lot 15 in the addition last mentioned, the consideration being $10,000, evidenced by a promissory note for the whole sum, signed by the Chapmans and the payment thereof secured by mortgage on the property. We will state here that it clearly appears that the property had increased in value and was fully worth the prices which Chapman agreed to pay his mother for it. On March 11, 1890, Chapman desired to procure a loan on the property, and at his request his mother released the $10,000 mortgage. She then had the one note for $6,000 and also the $10,000 note without any security for the payment of the total amount of the indebtedness evidenced thereby. During the year 1887 Chapman discontinued the grocery business and acquired some property and interests in mines in the Black Hills in Dakota, and was buying and accumulating real estate, or interests therein, in Omaha and South Omaha. In January, 1891, Mrs. Hammond gained the knowledge that her son had lost and was losing money in his business ventures and she asked for security or settlement of some nature, and later in the year, or in July, the first deed of which complaint is

made in the petition was executed to her by Chapman and wife, the consideration being the cancellation of the debt evidenced by the $10,000 note, on which there had been paid prior to this time $1,000, so that the debt was, in round numbers, $9,000. On February 18, 1892, there was conveyed to her, by her son and his wife, certain property in payment of the amount due on the $6,000 note. This was also one of the conveyances attacked by the creditor's bill in this case. We will say here that we are satisfied from a consideration of the evidence in regard to the conveyance of lot 2, block 4, Briggs Place addition, from E. A. Benson to Mrs. Hammond, the validity of which was also drawn in question by the petition, and in issue in this case, was made pursuant to an exchange of lots between Benson and Mrs. Hammond. It is true the son, Chapman, conducted the negotiations, but it is quite clear that it was for his mother and not himself.

We must conclude, after a careful examination of the evidence, that it disclosed a valid indebtedness of the son to the mother, existing and due her at the time the transfers herein assailed were made to her. The son received the mother's money and invested it in property for her, conveyed it to her, and afterwards became its purchaser, and thereby her debtor in the amount of the consideration; that this debt was still in existence, valid and subsisting at the dates of the conveyances of property to her in payment of it. It clearly appears that Mrs. Hammond had full knowledge of and accepted the transfers of the property to her and for the purpose for which they were made. She dealt with some of the property as hers after the transfers. That the Chapmans were in failing circumstances financially, or insolvent, at the times of the conveyances to Mrs. Hammond, constituted at most a fact tending to prove fraud in the transfers. It is the settled rule that a failing or insolvent debtor may prefer one creditor to the exclusion of others, and may pay a *bona fide* demand of one creditor

in preference to those of others. (*Elwood v. May*, 24 Neb., 373; *Lininger v. Raymond*, 12 Neb., 19; *Bank of Commerce v. Schlotfeldt*, 40 Neb., 212; *Meyer v. Union Bay & Paper Co.*, 41 Neb., 67.) And relations are included within the rules just announced. (*Melick v. Varney*, 41 Neb., 105.) See, also, *Ward v. Parlin*, 30 Neb., 376, wherein it was stated: "We have read and scrutinized the evidence in this record with care and it appears to us that the defendant's testimony is consistent and reasonable. We are convinced that Mrs. Ward acted in perfect good faith. True, she knew that her husband was being pressed by his creditors and asked him to secure her. She had a perfect right to make good her claim notwithstanding she knew she was being preferred to other creditors of her husband, if the security was accepted in good faith and without any fraudulent purpose on her part. (*Hill v. Bowman*, 35 Mich., 191; *Jordan v. White*, 38 Mich., 253; *Dice v. Irvin*, 11 N. E. Rep. [Ind.], 488; *Rockford Boot & Shoe Mfg. Co. v. Mastin*, 39 N. W. Rep. [Ia.], 219; *Miller v. Krueger*, 13 Pac. Rep. [Kan.], 641; *Chapman v. Summerfield*, 14 Pac. Rep. [Kan.], 235; *Cornell v. Gibson*, 16 N. E. Rep. [Ind.], 130.)" But in this state, if the good faith of the transaction is attacked, the burden is cast upon them to establish its fairness or good faith character. (*Carson v. Stevens*, 40 Neb., 112; *Melick v. Varney*, *supra*.) There was evidence sufficient to sustain a finding that Chapman had an intent to defraud his creditors, especially appellee, but it is well settled that this, if it existed, would not affect or destroy the right of any of the creditors, including Mrs. Hammond, to secure a preference if not possessed of knowledge of such fraudulent intent. (*Smith v. Schmitz*, 10 Neb., 600; *Edwards v. Reid*, 39 Neb., 645.) The evidence did not show that Mrs. Hammond had any knowledge of any intent on the part of her son to defraud his creditors, or connect her therewith in any manner, but we think established her good faith throughout the transactions prior to and including the conveyances herein sought to be set aside. This being true, it

follows that the decree of the district court must be reversed and the petition of appellee dismissed.

JUDGMENT ACCORDINGLY.

WALTER KNAPP V. ELLIS O. JONES ET AL.

FILED FEBRUARY 3, 1897. No. 6936.

1. Damages: CONTRIBUTORY NEGLIGENCE. In an action for damages alleged to have been produced by the negligence of the defendant in the action, if it appears that the plaintiff's failure to exercise ordinary care under the existing conditions was the cause of the injuries, he cannot recover.
2. Trial: DIRECTING VERDICT. If from the undisputed facts different minds might not honestly reach different conclusions or draw different inferences without reasoning irrationally, it is not error on the part of the trial court to withdraw the case from the consideration of the jury and order a verdict consistent with the facts.

ERROR from the district court of Douglas county. Tried below before SCOTT, J. *Affirmed.*

Connell & Ives, for plaintiff in error.

Breckenridge & Breckenridge, contra.

HARRISON, J.

The plaintiff, by his next friend, instituted this action in the district court of Douglas county to recover of the defendants damages which he alleged were caused by injuries to him as the result of negligence on the part of the defendants. The amount claimed was $15,000. It was stated in the petition that the defendants were the owners and managers of a five-story building in the city of Omaha, the rooms of which, above the ground floor, were occupied and in use as offices by various tenants; that there was a passenger elevator maintained and op-

erated by defendants between the ground floor and upper stories of the building, for the use of tenants and persons having business to transact therein. "The said plaintiff further says that it became and was the duty of the said defendants to use at all times proper and suitable safeguards, appliances, care and skill in the maintenance, repairing, and operation of their said elevator, but that the said defendants, contrary to their said duty, were guilty of such negligence as to the use of proper and suitable appliances and safeguards, and as to the use of care and skill in the maintenance, repairing, and operation of the said elevator, that the plaintiff, by reason thereof, on or about the 14th day of January, 1893, then and there being lawfully in the vicinity of said elevator, suffered great and permanent injuries." Paragraph 4 of the petition contained a specific description of the injuries to plaintiff, and their effect. The answer of the defendants admitted the ownership of the building and its use and occupancy as alleged in the petition and the running of the passenger elevator, and that the plaintiff had been injured in or about the elevator shaft in the building. It was averred that it was not a duty owed by defendants to plaintiff to protect him from injury, and specifically denied that they had been guilty of any negligence in the particulars stated in the petition. It was further pleaded that the negligence, if any other than that of plaintiff caused the injury, was by one Stevenson, who was under contract with defendants doing certain work at the time in and upon the premises. It was further pleaded that the plaintiff's injuries were resultant from his own negligence. A reply was filed and of the issues joined there was a trial before the court and a jury. At the close of the introduction of the evidence, counsel for defendants moved the court to give the jury a peremptory instruction to return a verdict for defendants. This motion was sustained and the jury was charged as follows: "The jury are instructed by the court that under the law and the evidence in this case you will return a verdict for de-

fendants." From a judgment subsequently rendered for defendants, error proceedings have been prosecuted to this court on behalf of plaintiff. The error assigned and urged is the action of the trial court in giving the instruction we have quoted.

There is no conflict in the evidence as to the injuries to plaintiff, or the conditions, facts, and circumstances under which they occurred. The evidence disclosed that there was a stairway by which persons could go to or come from any of the floors of the building, and which was contiguous to the elevator shaft, as was stated by plaintiff in his testimony:

Q. How near was the stairway to the elevator?

A. Runs right around the elevator, close to it.

Q. Is that the way it goes from the ground floor clear up?

A. Yes, sir.

On and above the third, and extending to the fourth floor, this being the portion directly involved herein, separating the stairway space from that of the elevator shaft, was a wainscoting, or board partition, which, from the floor of the third story, was forty-five inches high; from the top of the first step of the stairway, going to the story above, or fourth, was thirty-eight and one-half inches high, and from the top of the second step, and all intervening ones between the second step and the landing above, was thirty-six inches in height. In the further portion of the space between the stairway and the elevator shaft, and above the partition we have just described, between the third and fourth floors, there generally appeared a diamond-shaped wire screen, which, on the day the plaintiff was injured, had been removed to be painted, there being a man there at work under a contract to clean and paint or varnish the elevator shaft, stairway, etc. The plaintiff was, and had been for some three months, in the employ of a physician whose office was situate on the third floor of the building, and had very frequently used the elevator in going up to the office or down to the lower

floor. He knew of the wire screens, had noticed them, and saw the workman remove them from the position they occupied in the shaft, including the one between the third and fourth floor. He testified as to what was done with them when they were taken down, as follows:

Q. When the wire screens were taken out, as you have told that day, what was done with them?

A. They were put at the right of the stairway as you go up at the left hand side.

In regard to the weights attached to the elevator he stated:

Q. Now tell the jury just where they come down and how many of them there are.

A. There was a piece up here, a plank on each side and there the iron weights slid up and down. There was eight of these big iron weights.

Q. And when they came down how close to the rail of the stairs did they run?

A. Came about a couple of inches.

He further stated that at the time of the injury he did not know of the elevator weights.

The plaintiff was, at the time he was injured, between sixteen and seventeen years of age and was, it was stated by one of the doctors who was testifying in respect to plaintiff's condition and appearance before the injury, "a remarkably bright, clean, healthy, active, energetic, genial, pleasant young fellow." But this is immaterial. No question has been raised as to youthfulness and consequent lack of discretion on the part of plaintiff. A few minutes before the noon hour of the 13th of January, 1893, the plaintiff was in the office of the physician, his employer, on the third floor of defendants' building. The doctor was out of the office and building and the plaintiff was evidently expectant of his return. However this may have been, the plaintiff left the office rooms through a door which was, relatively to the elevator, immediately across the hallway, stepped over to the elevator shaft, passed the wire screen, which, as we have before seen,

had been removed from its place and was then upon the floor near the stairway, went up to the second step of the stairs and reaching or leaning over the thirty-six inch high board partition or barrier, put his head and the upper portion of his body into the elevator shaft, as he states it, to look at the elevator which was below to see and ascertain whether the doctor was therein, and coming to the office. The elevator was coming up and the weights down. The plaintiff was struck or caught by the weights in their descent and the injuries to him, the basis of this action, resulted.

As we view the proper final disposition of this action, we need not now consider and settle the questions of the duty of landlords to tenants and their employes, or whether proper care would have required that the elevator in defendant's building, during the time of the painting of the shaft, should have been stopped, and not operated while the screens were out of place and until replaced, for we feel forced to the determination that the evidence discloses such want of ordinary care on the part of plaintiff, under the facts, circumstances, and conditions existent and known to him at the time of his injuries, as constituted his acts contributory negligence and without which the injuries would not have been sustained. This was sufficient to bar his recovery. The defendant knew that the elevator was being operated, he had been riding in it that day, and his direct purpose in looking into the shaft was to see the elevator during its trip upward, and whether the doctor was a passenger. He knew of the wire screens which usually formed a part of the enclosure of the elevator shaft, and had seen them removed but a very short time before, temporarily, to be painted, and had watched the progress of the work. He knew the use for which the elevator shaft was prepared and intended, and he was making a use of it for which it was never intended and to which he possessed no right or privilege, and which was dangerous, against which it was usually guarded in all parts by the screens. In order

to effect his purpose he went up to the second step of the stairs and then leaned over the partition three feet high. These, with other facts in evidence, disclosed conclusively such want of ordinary care as to preclude his recovery of damages. The plaintiff's want of ordinary care and prudence were the cause of the injury, hence he could not recover damages (Whitaker's Smith, Negligence, 226; *Pierce v. Whitcomb*, 48 Vt., 127; *Mau v. Morse*, 33 Pac. Rep. [Colo.], 283); and though both plaintiff and defendant might have been negligent in the premises, the plaintiff could not recover if, by the exercise of ordinary care, he could have avoided the injury. (*Omaha Horse R. Co. v. Doolittle*, 7 Neb., 481; Thompson, Negligence, 1104.)

It is urged that the question of whether or not there was contributory negligence on the part of plaintiff should have been submitted to the jury. The undisputed facts were such, we think, that different minds might not reach different conclusions or draw different inferences from them in regard to the plaintiff's want of ordinary care and prudence, and the court did not err in not submitting the question to the jury and, on motion of counsel for defendants, charging that body to return a verdict favorable to defendants. In the opinion in the case of *Slayton v. Fremont, E. & M. V. R. Co.*, 40 Neb., 840, appears the following quotation from section 2267, Thompson on Trials, in reference to an instruction such as was given in the case at bar: "'The demurrer to evidence used in the ancient common-law practice seems to have passed, for the most part, out of use in American jurisdictions. In the place of it the defendant moves for a nonsuit, or requests the court to give a peremptory instruction to the jury to return a verdict for the defendant. In either case the effect is substantially the same as a demurrer to the evidence under the ancient practice. An order of nonsuit, or a peremptory instruction given in compliance with such a motion, does not undertake to decide any question of fact, but simply pronounces the law arising upon the evidence, admitting the same to be true. In

this way the court pronounces upon the legal effect of the facts which the evidence may, in the opinion of the jury, prove. If there is no evidence tending to support the allegations of the plaintiff's declaration, petition, or complaint, it is, under all theories of procedure, the duty of the court to instruct the jury that he cannot recover.'" And it is said in the opinion in relation to the rights or duty of the trial judge to give a peremptory instruction as applicable in that particular case and generally: "The instruction was properly given requiring a verdict for defendant. It could have subserved no useful purpose to either litigant to trust that the jury, upon the submission of the entire case to them, would exercise the same discretion as could reasonably be expected of the trial court. There was no evidence on which the verdict could be sustained, and the trial judge did but his duty in so informing the jury. Often the responsibility of determining questions which should be met by the trial judge is devolved in the last instance upon this court. This is sometimes scarcely fair to litigants, for it frequently happens that the question to be determined is surrounded with difficulties in this court from which the trial court has comparative freedom. When the trial judge approves the jury's estimate of the weight of the evidence adduced, there arises a presumption in favor of its correctness, because both the judge and the jury have had opportunities of observing the deportment of the witnesses and their apparent candor, which are denied this court. When the trial judge is satisfied there is no evidence to sustain a verdict it is his duty to so instruct the jury, for in such a case the merits are presented in this court untrammeled by adverse presumptions." This is quite pertinent and forcible in the case at bar, for had the cause been submitted to the jury and a verdict for plaintiff ensued, it would not have been sustained by the evidence. In support of the same proposition see, also, *Dewey v. Chicago & N. W. R. Co.*, 31 Ia., 373; *Davis v. Hilbourn*, 41 Neb., 35; *Central City Bank v. Rice*, 44 Neb., 594.

There were some other matters argued in the briefs of counsel, but we do not deem a discussion or decision of them necessary at this time. The judgment of the district court must be

AFFIRMED.

GEORGE J. WOODS, APPELLEE, V CLEMENT L. HART, APPELLANT.

FILED FEBRUARY 3, 1897. No. 6974.

1. **Conflicting Evidence:** REVIEW. A finding on conflicting evidence will not be disturbed unless manifestly wrong.
2. **Specific Performance:** EVIDENCE. Evidence *held* to sustain findings in an action for the specific enforcement of a contract for the exchange of property.
3. **Fraud:** BURDEN OF PROOF. The burden of proving fraud or misrepresentation in the making of a contract is upon the party alleging it.
4. **Contracts:** EXCLUSIVE AGENCY. A stipulation in a contract giving a person the exclusive agency for the sale of the principal's property for an indefinite period does not render such contract void as being against public policy.
5. **Principal and Agent:** REVOCATION OF CONTRACT. The principal could, at any time before sale, revoke the agent's authority, even though the instrument expressly stipulated that the agent's power to sell should be exclusive.
6. **Exchange of Property:** DESCRIPTION. A contract for the exchange of property is not void for indefiniteness of description where the description is such as, by the aid of evidence *aliunde*, to enable the property to be identified.
7. **Conveyances:** CONFLICTING DESCRIPTIONS OF PROPERTY. Where a contract contains two descriptions of the property to be conveyed, one correct and the other false in fact, the latter should be rejected as surplusage.

APPEAL from the district court of Douglas county. Heard below before WALTON, J. *Modified and affirmed.*

F. W. Fitch, for appellant:

Where a contract gives the benefit entirely to one person, with the exclusive sale, barter, trade, or handling thereof, it is against public policy. (*Moses v. Scott*, 4 So. Rep. [Ala.], 742; *Baggott v. Sawyer*, 25 S. Car., 405; *Boyle v. Adams*, 52 N. W. Rep. [Minn.], 860.)

A contract formed to establish and maintain a uniform rate of charge and prevent competition in the sale of an article or property, where the entire benefit inures to one of the parties only, is illegal and void as being in restraint of trade. (*More v. Bennett*, 29 N. E. Rep. [Ill.], 888; *Strait v. National Harrow Co.*, 18 N. Y. Supp., 224; *Tode v. Gross*, 127 N. Y., 480; *Chaplin v. Brown*, 48 N. W. Rep. [Ia.], 1074; *Western Wooden Ware Ass'n v. Starkey*, 84 Mich., 76.)

F. H. Woods, contra.

NORVAL, J.

This was an action by George J. Woods to enforce the specific performance of an alleged contract for the exchange of real estate for live stock, of which the following is a copy:

"Article of agreement between George J. Woods, of the first part, and Dr. C. L. Hart, of the second part:

"Said Woods and Hart do this day make the following trade, subject, however, to title: Said Woods agrees to give said Hart lots eight (8), nine (9), ten (10), eleven (11), twelve (12), thirteen (13), and fourteen (14), all in block seven (7) of Battle Creek Addition to College View, Lancaster county, Nebraska; said lots to be transferred to said Hart by good and sufficient warranty deed, and clear of all incumbrances of any nature. (Said lots being the ones shown Hart by me.) In consideration of the above described lots, said Hart is to give said Woods the following described cattle:

Eight head of registered Holstein bulls at $50	$400
Four head of registered Holstein cows at $75	300
Twenty head of grade Holstein cows and heifers at $40	800
	$1,500

Being the same cattle picked out by said Woods on June 27, '93; said Hart agreeing to keep said cattle, and in as good condition, for two months from date. He is also to furnish transfers on all registered animals as the Holstein Herd Book demands. He is also to give said Woods a difference of fourteen hundred, to be secured on the above described lots, and to draw seven per cent interest, and to be payable on or before two years from date. Another express consideration of this agreement is that said Woods is to have the exclusive agency for the sale of the lots. This trade is this day made and agreed to by both parties as herein written, all papers to be transferred on or before two weeks from date.

"GEORGE J. WOODS.
"C. L. HART.

"Witness:
"A. R. BOYD.
"Signed this 27th day of Jan., A. D. 1893.'

The plaintiff alleges in his petition the execution of the contract by himself and the defendant, the failure of the latter to comply with the terms thereof on his part, and that the former has been ready to carry out and fulfill each and all the conditions therein on his part to be kept. He also brought into court his warranty deed and abstract of the lots described in the contract, and tenders the same to the defendant, upon his executing a mortgage on the premises for the security of the $1,500 and the delivery to the plaintiff of the cattle mentioned in said contract. The defendant, for answer, denies that he ever made, entered into, or signed the contract declared on,

and pleads other defenses which will not now be stated. The court found generally for the plaintiff, and a decree was entered that defendant should perform specifically the contract within twenty days, and that in default thereof plaintiff have judgment against Hart for the sum of $1,500, with interest thereon at seven per cent from January 27, 1893. Defendant appeals.

The findings and decree are assailed as not being sustained by the evidence. Attention will first be given to the question, was there a contract between the parties? Stated in a different form, did the defendant sign the alleged agreement which it is sought to have enforced in this case? The record discloses that plaintiff, George J. Woods, resided in the city of Lincoln, and that the defendant, Clement L. Hart, was a physician residing in the city of Omaha, and owned a farm in Hall county, near Cairo, stocked with cattle; that on the 25th day of January, 1893, Hart went to Lincoln to employ Colonel Woods, plaintiff's father, to sell some cattle for defendant; that the colonel not being at home, Hart explained his business to George J. Woods, informing him of the kind and number of cattle he had for sale, and during the conversation the latter made a proposition to exchange real estate for the former's cattle. The parties do not agree in what was said, but they both unite in saying that the subject of trading real estate for cattle was discussed; that the defendant went with plaintiff to College View, a suburb of the city of Lincoln, and looked at some lots in that vicinity which Woods claimed to own and proffered to exchange. That the same day Hart took the train for Grand Island, where he remained over night, going out to Cairo in the forenoon of January 26. On the same day Woods went to Cairo to look at defendant's cattle, arriving so late that, on account of darkness, no satisfactory examination could be had, although an attempt to do so was made. The next morning both parties went to see the cattle, when those involved in this litigation were selected and picked out of defendant's herd. Mr. Hart

testified that, owing to his physical condition at that time, he has no distinct recollection of the conversation which occurred between them on the morning of January 27, and further, that he never signed the paper alleged to be the contract in question, and never saw the same or knew the contents thereof until this suit was instituted. Lewis Schwalerberg and other witnesses called by the defendant, and who were familiar with his handwriting and signature, testified on the trial that Hart's signature to the contract was not genuine. The testimony of the plaintiff is to the effect that in pursuance of an appointment made with the defendant, he went to Mr. Hart's farm near Cairo on January 26 to look over the cattle and to agree upon terms of exchange; that on arriving at Cairo, Woods employed one A. R. Boyd, a liveryman, to drive him to defendant's place; that on reaching the farm plaintiff and defendant, in the presence of Boyd, Eli Hart, a brother of defendant, and another person, looked over the cattle and agreed upon prices; that plaintiff, on his return to Cairo, was to prepare the contract in duplicate and return the next morning, when it was to be executed and the cattle sorted out; that plaintiff, as requested, drew up the agreement, and returned the next morning with Mr. Boyd, when the cattle were selected and driven into a corral, and that after this was done plaintiff and defendant went into the barn of the latter, where both signed the contract with a lead pencil, in the presence of Mr. Boyd. The testimony of plaintiff relating to the selection of the cattle and to the signing of the contract is in every essential part corroborated by the deposition of Mr. Hart, which is set forth in the bill of exceptions. It was also shown that a few days after January 27 the defendant wrote and sent to the plaintiff the following letter:

"CAIRO, HALL CO., NEBR., 7, 93.

"*George J. Woods, Esq., Lincoln, Nebr.*—DEAR SIR: I am giving all my time to the cattle, fixing up the sheds, etc. Shall do all in my power to keep the cattle in good condi-

tion as the severity of the weather, and neglect of the cattle before I came, will allow.

"I do not want a deed of lots, only land contract for reasons I will give you when I see you. I shall not be able to get there in two weeks with (?) leaving the stock to the tender mercies of that boy, which I dare not do. I have rented the farm to what seems to be a good man, and expect him on between now and Mch. 1st. When he comes I shall not have to depend upon such a boy.

"When I come through Lincoln, I will call upon you.

"Truly yours, C. L. HART."

The foregoing letter is unexplainable upon any other hypothesis than that some sort of a contract or agreement existed between Woods and Hart relating to the exchange of lots for cattle, and in view of this letter, and the evidence adduced on behalf of the plaintiff already mentioned, it is not surprising that the trial court found the contract set forth in the petition was entered into by the defendant as alleged. Certainly such finding is not only sustained by the evidence, but by the clear preponderance thereof.

Another defense interposed is that the contract was entered into through the fraud and misrepresentation of the plaintiff as to the location of the lots; hence a court of equity will not decree specific performance. This defense is inconsistent with the one just noticed, and must be regarded as an admission that the defendant executed the contract. Woods and Hart are the sole persons who have any knowledge whether the lots described in the contract were the ones shown by the former to the latter on January 25, the day the negotiations for the exchange of properties first commenced, and their testimony on the subject fails to harmonize. The defendant testified that he never saw the lots mentioned in the contract before the trade was made; that they are not situated in College View proper, but in Battle Creek Addition thereto, and located a considerable distance east of the college buildings; that the lots, seven in number, which Woods showed

him on that occasion, and offered to trade for the cattle, were situated in College View proper, about a quarter of a mile west or northwest of the college buildings, and about on a level therewith. We reproduce from the bill of exceptions the following from the testimony of George J. Woods, the plaintiff:

Q. What property was it you showed Dr. Hart?

A. Lots 8, 9, 10, 11, 12, 13, and 14, in block 7, Battle Creek Addition to College View, Lancaster county, Nebraska.

Q. State what, if any, other property besides that mentioned in the contract you showed Hart at the time he was in Lincoln, if any at all.

A. I did not show him any.

Q. Did you offer to trade him any other property?

A. No, sir.

The burden was upon the defendant to establish by the preponderance of the testimony his charge of misrepresentation and fraud as regards the location of the property which was to be exchanged for the cattle. In our view, he did not establish this defense, but the court was fully warranted in giving credence to the direct and positive testimony of the plaintiff above quoted, especially in view of the fact that the defendant under oath denied his own signature to the contract which is made the foundation of this suit.

Another reason urged for refusing the enforcement of the contract is the inadequacy of consideration. It will be observed that in the trade the lots were put in at $2,900. The testimony bearing upon the question of the value of the lots at the time of the making of the contract was given by real estate agents, and, as might have been expected, was of the most conflicting character. The values placed upon the lots by the defendant's witnesses are as follows: F. W. Brown, $50 each; A. E. Moeller, $200 a lot; A. N. Wycoff, $100 apiece; F. L. Dunn, from $200 per lot to $3,000 for the seven. The average valuation placed on the lots by plaintiff's wit-

nesses was over $400 apiece. The consideration for the contract to be furnished by Woods was not unjust or inadequate, but, on the contrary, if the testimony of his witnesses is to be given credence, the defendant obtained an advantage over plaintiff in the bargain as made. It is a well recognized rule that the finding of the trial court, when based upon conflicting evidence, will not be disturbed by the reviewing court, and the doctrine will be adhered to and applied in the case under consideration.

It is argued that specific performance should be refused, because the defendant did not make a sale of the lots in ninety days from the date of the trade. The contract declared on contains no such stipulation or guaranty. It is true a verbal agreement having such a provision is pleaded by the defendant in his answer, and his testimony tended to support the averment; but the trial court found against the existence of such a contract, and such finding is not without support in the testimony; hence, plaintiff was not required to effect a sale of the lots in order to entitle him to a specific enforcement of the contract against Dr. Hart. Moreover, it does not appear that the latter ever advised the plaintiff of the terms upon which the lots were to be sold.

The next contention is that the contract is void as being against public policy, in that it provided that "Woods should have the exclusive agency for the sale of the lots." Such provision did not, in the least, operate against the interests of the public, nor yet against those of the defendant, since the appointment as agent was not for a fixed or definite period. The power or right of revocation of the agency remained in Hart, and he could have exercised the same at any time, or sold the property himself. (*Chamber v. Seary*, 73 Ala., 372.) Not one of the cases cited by appellant supports the doctrine that the clause under consideration renders the contract void. Suffice it to say that they merely held that contracts in restraint of trade, or those made for the purpose of preventing competition at auction and other public sales, are contrary to public policy, and therefore void.

Complaint is made that the cattle which the decree requires the defendant to deliver are not the same as designated in the contract. In the decree they are described as "four (4) head of registered Holstein bulls, five (5) head of registered Holstein cows, and twenty-five (25) head of grade Holstein cows and heifers," which states the number of each class differently from that given in the contract; and hence it is claimed that the decree has made a new and different contract for the parties. This objection would be unanswerable if the number and class constituted the only description of the cattle contained in the contract. But such is not the case. The stock intended to be exchanged is expressly designated in the written agreement as "being the same cattle picked out by said Woods on January 27, 1893." This description alone would have been sufficient, for the particular cattle to which the contract was intended to apply could be established by the aid of extrinsic testimony. There was no uncertainty in the description, for that is certain which is capable of being made so by evidence *aliunde*. The authorities agree that parol evidence is admissible to identify the subject of a written contract. (Bishop, Contracts, sec. 376, and cases cited in notes.) The undisputed testimony is to the effect that on January 27, 1893, the parties to the contract selected from the defendant's herd nine registered Holsteins, four being bulls and five heifers, and also twenty-five graded Holstein cows and heifers, and that the entire thirty-four head were put into an adjacent pen or corral, and set apart as the cattle to be exchanged for the lots. So that the cattle mentioned in the decree were the ones actually picked out and selected, and therefore not different from those covered by the contract. That part of the description of the cattle in the contract which gave the number of each kind or class was false, and under the rule laid down in *Hubermann v. Evans*, 46 Neb., 784, should be rejected, since the remainder of the description is sufficient to enable the cattle to be identified.

The only substantial error in the record is the finding that the plaintiff should have judgment for $1,500, with interest thereon from January 27, 1893, in case defendant failed to deliver the cattle within the time mentioned in the decree. The cattle were to be retained by Hart for sixty days from the making of the contract. It was unjust to allow interest from the date of the contract. It should have been computed from March 27, 1893, the period fixed for delivery. The decree is accordingly modified, and as thus modified is affirmed.

DECREE MODIFIED.

RAYMOND BROTHERS & COMPANY V. THEODORE H. MILLER ET AL.

FILED FEBRUARY 3, 1897. No. 7004.

Trover and Conversion: MORTGAGED CHATTELS: PLEADING. In an action by a mortgagee of chattels against a stranger for the conversion of the mortgaged property, the petition must set out the facts constituting plaintiff's special ownership. A mere allegation that he has a special ownership, right, title, and lien upon and to the property, by virtue of a chattel mortgage given to him thereon by a designated person, is not alone sufficient.

ERROR from the district court of Saline county. Tried below before HASTINGS, J. *Reversed.*

G. M. Lambertson and *F. M. Hall*, for plaintiffs in error.

F. I. Foss, Hastings & McGintie, and *W. R. Matson, contra.*

NORVAL, J.

This is an action of conversion. There was a judgment for plaintiffs below, and defendants prosecute error.

Of the numerous errors assigned and argued by counsel, we do not deem it necessary to discuss more than one,

namely, that the petition fails to state sufficient facts to constitute a cause of action, which was duly raised at the outset of the trial in the court below by objections to the admission of testimony on that ground, and again after verdict by the motion for a new trial, as well as by proper assignment in the petition in error filed herein. The allegations of the petition, so far as they are necessary to a determination of the question to be decided, are: "That on the 25th day of July, 1888, the plaintiffs were entitled to the immediate possession of the following described goods and chattels, and had a special interest and ownership in the said goods and chattels to the amount of $2,009.43, with interest at the rate of ten per cent from July 25, 1888, to-wit, the entire stock of groceries, dry goods, clothing, queensware, wooden and willow ware, boots and shoes, hats, caps, and notions, glassware, tobacco, cigars, furniture, fixtures, scales, tanks, etc., including all of the stock of furniture and chattels, of every name and nature whatever, which are contained in a certain brick building and cellar used by Pronger & Clarey in their mercantile business in Crete, Saline county, Nebraska, of the value of $6,500." It is alleged that they have special ownership, right, title, and lien upon and to the above described goods by virtue of a chattel mortgage given to them upon the same by the said Pronger & Clarey, dated July 25, 1888, and duly recorded in the clerk's office of Saline county, Nebraska, a copy of which mortgage is attached, marked "Exhibit A." It is also alleged, in substance, that defendants took possession of the property under and by virtue of a chattel mortgage against Pronger & Clarey, and converted the same to defendants' own use. It will be observed that there is no averment in the petition to the effect that plaintiffs are the general owners of the chattels in controversy, but that they predicate their right to recover damages for the alleged conversion merely upon a claim of special interest or ownership in the property arising by virtue of a chattel mortgage. The terms and condi-

tion of the mortgage are not pleaded, nor any facts averred which disclose that any of the stipulations therein contained have been broken, or that anything is due plaintiffs upon the mortgage. It is true the petition states that a copy of the mortgage is hereto attached as an exhibit, but an examination of such exhibit reveals that it is a copy of a mortgage given by Pronger & Clarey to the defendants, Raymond Bros. & Co., and it is not averred that it has been assigned to the plaintiffs below, or that they are the owners thereof or of the debt secured thereby; hence, instead of its showing a lien or interest in the property in them, it clearly negatives any such idea. Plaintiffs, in order to set forth a cause of action, were required to plead in their petition the facts constituting their special interest in the property, as well as the facts relied upon to entitle them to maintain an action for conversion against the defendants. This they have not done. It has been repeatedly asserted by this court that a petition in replevin, by a mortgagee of chattels against the mortgagor or a stranger, must set out the facts creating his lien or special ownership and the facts entitling him to the possession, and if the pleading fails to do so it is fatally defective. (*Musser v. King*, 40 Neb., 892; *Randall v. Persons*, 42 Neb., 607; *Sharp v. Johnson*, 44 Neb., 165; *Camp v. Pollock*, 45 Neb., 771; *Strahle v. First Nat. Bank of Stanton*, 47 Neb., 319; *Garber v. Palmer*, 47 Neb., 704.) The same rule of pleading applies to actions for conversion by mortgagee. The conclusion is irresistible that the petition, for the reason stated, fails to state a cause of action. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

FRED DREXEL ET AL. V. JAMES RICHARDS, IMPLEADED WITH ROLLIN L. DOWNING ET AL., APPELLANTS, AND KENNARD GLASS & PAINT COMPANY ET AL., APPELLEES.

FILED FEBRUARY 3, 1897. No. 6708.

1. **Mechanics' Liens:** STATEMENT: DESCRIPTION. The sworn statement of a subcontractor for a mechanic's lien must contain a description of the premises on which the improvement was erected.
2. ———: ———: ———. Such a description is not insufficient if it renders the location of the property susceptible of ready ascertainment by the aid of extrinsic evidence.
3. ———: ———: ———. The account of the items for the materials furnished and labor performed by a contractor or subcontractor, and for which a lien is claimed, and the affidavit thereto attached should be construed together, and if when thus construed they substantially comply with the statute it is sufficient.
4. ———: ———: ———. A description of property in a statement for a mechanic's lien as the "Bartlett & Downing Block, Kearney, Buffalo county, Neb.," is a sufficient description of the premises, especially when there are no rights of third parties to be affected by the lien.

REHEARING of case reported in 48 Neb., 732. *Decree below affirmed.*

Calkins & Pratt, for appellants.

B. G. Burbank, Kennedy & Learned, and *Marston & Nevius, contra.*

NORVAL, J.

This is a rehearing of the case reported in 48 Neb., 732. From a decree foreclosing certain mechanics' liens the defendants Bartlett & Downing appealed. On the former hearing the decree, in so far as it awarded the Kennard Glass & Paint Company a lien, was reversed because of an insufficient description of the premises, and in all other respects the decree of the trial court was

affirmed. The following propositions were laid down in the opinion heretofore filed:

1. A sworn statement for a mechanic's lien by a subcontractor must describe the land on which the materials furnished by him have been used in making the improvement.

2. Such description, to be sufficient, must be such as, aided by extrinsic evidence suggested by the description itself, would charge a party dealing with real estate with notice of such claim for lien. In other words, the description of the premises must be sufficiently accurate and definite to render their location susceptible of ready ascertainment.

3. The description of the property in the mechanic's lien account of the Kennard Glass & Paint Company is so defective as to render the lien void.

We are content with the doctrine announced in the first proposition above stated. The statute requires the affidavit, or sworn statement, of the subcontractor for a mechanic's lien to give a description of the premises upon which the labor was performed, or materials were used, as much as it does a statement of the amount due him. No other reasonable construction can be placed upon section 2 of our mechanics' lien law. The description need not be inserted in the affidavit proper. It is sufficient if it is set forth in the itemized account or bill which is made a part of the lienor's affidavit. The account of the items attached and referred to in the affidavit, or made a part thereof, and the affidavit proper are to be considered together, and when thus construed, if they meet the substantial requirements of the statute, it is sufficient. (*Henry & Coatsworth Co. v. Fisherdick*, 37 Neb., 207; *Noll v. Kennealy*, 37 Neb., 880.)

Upon a careful review of the authorities we adhere to the views announced in the former opinion as embraced in the second proposition stated above. The object of the statute in requiring the description of the property in the sworn statement of a mechanic's lien of a subcon-

tractor is to advise the owner of the property, as well as the public, of the claim of such subcontractor, by the examination of the records of the county. The legislature has not undertaken to define the manner in which the property shall be described in the claim for lien. A description of the property is indispensable to the validity of the lien. It is obvious, therefore, that any description will suffice which will carry out the purpose of the law, whether it be by metes and bounds, by lot and block numbers, by governmental subdivisions, or by such general description of the property as will enable a person acquainted with the locality to identify it. Any description of the premises in a mechanic's lien will suffice which renders the location susceptible of ready and easy ascertainment, and apprises the owner and third parties of the claim of the lienor. A description of the property in a statement for a mechanic's lien as "The Lincoln Hotel, in the city of Lincoln, Nebraska," or the "Burr Block" in said city, most assuredly would not be void for indefiniteness of description, since either is amply sufficient for the identification of the premises intended to be described. The rule laid down in the adjudicated cases is that a description sufficient to sustain a mechanic's lien is one which enables a party familiar with the locality to identify the property with reasonable certainty upon which the lien is claimed. In addition to the authorities cited in the former opinion, see *Kezartee v. Marks*, 15 Ore., 529; *Tredinnick v. Red Cloud Consolidated Mining Co.*, 72 Cal., 78; *Harrisburg Lumber Co. v. Washburn*, 44 Pac. Rep. [Ore.], 390; *Springer v. Kroeschell*, 161 Ill., 358; *Rockwell v. O'Brien-Green Co.*, 62 Ill. App., 293; *O'Brien v. Krockinski*, 50 Ill. App., 456; *Buchannan v. Cole*, 57 Mo. App., 11; *Bambrick v. King*, 59 Mo. App., 284; *National Lumber Co. v. Bowman*, 42 N. W. Rep. [Ia.], 557; *Myers v. Maverick*, 27 S. W. Rep. [Tex.], 950, 1083; *Scholes v. Goodall*, 77 Tex., 482; Phillip, Mechanics' Liens, secs. 379, 381. It will be observed that in the statement of the account for a lien in this case, and to which the affidavit of the lienor was attached, the premises are described as the

"Bartlett & Downing Block, Kearney, Buffalo county, Nebraska." They are repeatedly designated in the testimony by the witnesses as the "Bartlett & Downing Block." Applying thereto the rule announced in the former opinion, as well as the definition given herein of a sufficient description of property in a claim of lien, the description under consideration is sufficient, since there are no rights of third parties to be affected by the lien. The owners of the premises could not have been misled by the description, much less does the evidence show that they were in any manner deceived thereby.

It is argued that the description in a mechanic's lien must be a numerical one, else the lien cannot be entered on the numerical indexes kept in the recorder's office. The statute contemplates that mechanics' liens shall be entered upon such indexes. (Compiled Statutes, ch. 18, art. 1, sec. 85.) But the failure to do so would not defeat the lien if the claim for a lien has in all other respects been properly recorded. (*Lincoln Building & Savings Association v. Hass*, 10 Neb., 581.) It therefore logically follows that a numerical description is not indispensable to the validity of a mechanic's lien.

It is finally argued that the lien is invalidated by the insertion in the affidavit for lien by the recorder of Buffalo county, after it was sworn to, the numerical description of the property. It was thus inserted by the express direction of the person who made the affidavit. Moreover, the other description of the property was ample to support the lien; hence the added description was an immaterial alteration of the affidavit. The affiant had a right to change it at any time before it was filed for record, subject, however, to being disregarded as to the amendments made after the affidavit was sworn to. The judgment of this court on the former hearing reversing the decree of the court below in favor of the Kennard Glass & Paint Company and dismissing its cross-petition is vacated, and the decree of the district court is in all respects

AFFIRMED.

FIRST NATIONAL BANK OF DUBUQUE, IOWA, v. H. C. MCKIBBEN.

FILED FEBRUARY 3, 1897. No. 6985.

1. **Negotiable Instruments: ACTION BY INDORSEE: BURDEN OF PROOF.** In an action by an indorsee of a negotiable promissory note against the maker, its mere production by the plaintiff, duly indorsed, raises a presumption of law that it was transferred before maturity and for value, and the burden is on the defendant to show that plaintiff is not an innocent holder.

2. ———: ———: **DEFENSE.** *Held*, That the answer fails to state a defense.

3. ———: ———: **EVIDENCE.** Evidence examined, and *held* not to sustain the verdict.

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

G. W. Fox, for plaintiff in error.

E. A. Cook, contra.

NORVAL, J.

This is an action brought by the plaintiff as indorsee of two promissory notes executed by the defendant for $100 each, payable to the order of Chamberlain Plow Company, bearing date June 21, 1887, and maturing November 1, 1887, and January 1, 1888, respectively. Defendant, in his answer, admits the execution and delivery of the notes, denies that they were indorsed to plaintiff before maturity, and sets up the following facts as a defense: "That after the maturity of the second note this defendant indorsed and transferred to the said Chamberlain Plow Company, at its request, one certain promissory note for $300, signed by one J. L. Dougherty and payable to this defendant, to secure the payment of the notes sued on in this action; that the maker of said note at the time of delivering the same to the said Chamberlain Plow

Company, and at the time that said note became due, was solvent and able to pay the same; that afterwards, on the 6th day of August, 1889, the said Chamberlain Plow Company obtained a judgment on said promissory note against the said J. L. Dougherty for the sum of $335.92; that said promissory note was only transferred to the said Chamberlain Plow Company to secure the note sued on and in payment of the same and for no other purpose; that said Chamberlain Plow Company holds said judgment at this time; that said judgment cannot now be collected; that said note of said Dougherty could have been collected at its maturity if the said Chamberlain Plow Company had used the diligence in its collection that said company agreed to use; that this defendant had been greatly damaged by the neglect of the said Chamberlain Plow Company in its failure to carry out its said contract and agreement in the collection of said promissory note to an amount greater than the notes sued on; that the promissory notes sued on were in the hands of, and owned by, said plow company at the time of their maturity. This defendant also delivered to said plow company, to secure said notes, other notes signed by Ira Barnes, C. Davis, J. W. Ervin, and —— Baker." The reply consisted of a general denial. There was a jury trial which resulted in a verdict for the defendant in the sum of $1, which amount the defendant remitted, and thereupon the court overruled plaintiff's motion for a new trial, and rendered a judgment of dismissal. Plaintiff is here on a petition in error.

The verdict and judgment cannot stand, for two reasons, viz.: (1.) They are not sustained by the evidence. (2.) The answer does not state a defense.

The defendant having admitted the execution and delivery of the notes, the burden of proof that the bank was a *bona fide* holder for value before maturity was not cast on it, but the burden was on the maker to disprove this fact. (*Cottage Organ Co. v. Boyle*, 10 Neb., 409; *Coakley v. Christie*, 20 Neb., 509; *Violet v. Rose*, 39 Neb., 660; *Mc-*

Donald v. Aufdengarten, 4 Neb., 40; *Kelman v. Calhoun*, 43 Neb., 157.) An examination of the evidence contained in the bill of exceptions not only fails to show that the bank did not purchase these notes in good faith before due, but on the contrary it establishes that the bank bought them a few days after their date in the usual course of business without notice of any defense, and at the time paid therefor the sum of $200. The fact that plaintiff failed to notify defendant it owned the notes, or to bring suit thereon, until long after their maturity, is insufficient to overcome the direct and positive evidence of Guernesey, the cashier of the bank, as to the time and manner of the purchase of the notes from the payee. The mere production of the notes, duly indorsed, raised a presumption of law that they were transferred before maturity and for value, and this *prima facie* case was not overthrown by the evidence adduced on the trial.

The answer filed by the defendant is faulty, in that it omits to plead that the notes in controversy were the property of the payee, the Chamberlain Plow Company, when the collateral notes were turned over to them. The allegation is "that the promissory notes sued on were in the hands of and owned by said plow company at the time of their maturity," and that the collateral notes were indorsed and delivered after the maturity of the second note. Again, the answer charges, in general terms, that defendant was damaged by the failure of the payee to carry out its contract and agreement in the collection of the collateral, but no contract or agreement on the subject is pleaded. In these respects the answer was defective. Under the evidence the court should have directed a verdict for the bank. The judgment is reversed, and the cause remanded for a new trial.

REVERSED AND REMANDED.

CITY OF FLORENCE V. MARY A. WHITE.

FILED FEBRUARY 3, 1897. No. 7066.

Adverse Possession. One who has been in the open, notorious, exclusive adverse possession of real property for ten years becomes vested with a valid title to the same.

ERROR from the district court of Douglas county. Tried below before SCOTT, J. *Affirmed.*

McCoy & Olmsted, for plaintiff in error.

Slabaugh & Rush, contra.

RYAN, C.

This was an action of ejectment brought in the district court of Douglas county January 1, 1893. The subject-matter of the litigation was known as "South Market Square," in the city of Florence. The plaintiff in the district court, Mary A. White, alleged that she had a legal and equitable estate and was entitled to the possession of said square, and that ever since November, 1888, the defendant, the city of Florence, had unlawfully kept her out of possession. There was a prayer for possession and for damages which she alleged she had sustained by reason of the aforesaid wrongful dispossession. Issues having been duly joined, there was a verdict in favor of Mrs. White, in which her damages were assessed at the sum of five cents, and to reverse the judgment rendered upon this verdict there has been prosecuted these error proceedings by the city of Florence.

There was a special finding, upon sufficient evidence, that Mrs. White first took possession of the square in dispute and placed a fence around it in March, 1868. There was evidence to justify the conclusion that this possession of Mrs. White was open, adverse, and continuous until some time in the year 1881, from which time

until suit brought there is a serious conflict as to who was in possession until the year 1888. There was, therefore, sufficient evidence to sustain the general verdict, from which it must be implied that before the year 1881 Mrs. White had acquired title by virtue of her actual, continuous, and notorious adverse possession. (*Gatling v. Lane*, 17 Neb., 77, 80; *Haywood v. Thomas*, 17 Neb., 240; *Horbach v. Miller*, 4 Neb., 47; *Pettit v. Black*, 13 Neb., 142; *Stettnische v. Lamb*, 18 Neb., 626; *Parker v. Starr*, 21 Neb., 680; *Gue v. Jones*, 25 Neb., 634; *Lantry v. Parker*, 37 Neb., 353.)

It is insisted that there was no evidence of declarations of Mrs. White as to her intention in taking and maintaining the possession upon which she founded her title. There was evidence, however, that she took possession, fenced, and year by year leased the property to a tenant who cultivated it, or herself planted corn on it, during the period above indicated of more than ten years, with intention of holding it as a homestead. There was no necessity that she should give notice of her intentions otherwise than as she did; that is, by fencing the property and using it as her own, independently of all the world.

There was an offer of evidence by the plaintiff in error to show that it was customary, during the period intervening between 1868 and 1881, for residents of Florence to take possession of streets and other property of the city with the purpose of using them temporarily, without making claim of title founded on such possession, and that the city authorities acquiesced in such possession. This was not claimed to be such an established, recognized custom, by reason of its universality, that it was presumable that Mrs. White was acting with reference to it and should be governed by it. The proffered evidence was, therefore, properly excluded.

There is no special argument directed to instructions, either given or refused; indeed, there was no assignment of error in the motion for a new trial which would permit of consideration, except as to an instruction of the plaint-

iff in error which was refused, but as the essential substance of this was given in another instruction by the court on its own motion, there is no ground for complaint because of the refusal to instruct as requested. The judgment of the district court is

AFFIRMED.

TECUMSEH NATIONAL BANK V. CHARLES BEST.

FILED FEBRUARY 3, 1897. No. 7030.

1. **Successor to Bank:** ASSUMPTION OF LIABILITY: PLEADING. A petition of a creditor of a banking association which discloses that another bank, as successor of said association, had assumed the liabilities upon a sufficient consideration moving from said association, and that the claim of plaintiff was one of said liabilities remaining unpaid, states sufficient facts to entitle to relief as against the bank which assumed the aforesaid liabilities.
2. **Bill of Exceptions:** REVIEW. A bill of exceptions must contain all the evidence upon which questions of fact are to be determined, a reference in such bill to evidence to be found by reference to another bill, filed in an independent case, not being sufficient.

ERROR from the district court of Johnson county. Tried below before BABCOCK, J. *Affirmed.*

John H. Ames, C. Gillespie, and *S. P. Davidson,* for plaintiff in error.

T. Appelget, J. Hall Hitchcock, and *L. C. Chapman, contra.*

RYAN, C.

In this case there was a judgment against the Tecumseh National Bank as prayed by the plaintiff in the district court of Johnson county. The bank seeks a reversal of this judgment on two grounds, of which the first is that the petition failed to state a cause of action. The second is that the finding against the bank was not sustained by the evidence.

The averments of the petition, in substance, are that about May 1, 1889, James D. Russell, Charles A. Holmes, Warren Holmes, and James Bennett, as an association under the name of Russell & Holmes, were doing a general banking business in the city of Tecumseh under and by virtue of the laws of this state; that of this association James D. Russell was president, Charles A. Holmes was vice president, Warren Holmes was cashier, and James Bennett was assistant cashier; that on or about August 14, 1890, the said association resolved to become a national banking association under the name of the Tecumseh National Bank, and pursuant to said resolution made the organization certificate required by the comptroller of the currency of the United States; that said national banking association duly filed its articles and certificate of incorporation, and, as a body corporate, proceeded to do a banking business in the building in which the banking business of Russell & Holmes had previously been transacted; that of this national bank Charles A. Holmes was president, Warren Holmes was cashier, and James Bennett was assistant cashier, and that the Tecumseh National Bank is a thing continuous of the banking association of Russell & Holmes, the name alone being changed. In this connection the petition contained the following language: "This plaintiff further avers the fact that the real property, consisting of a banking building (which was the bank of Russell & Holmes, and where they had for many years transacted business), furniture, cash, bills receivable, and the assumption and the agreeing to pay debts owing and obligations to become due of the said banking firm of Russell & Holmes, when the Tecumseh National Bank was formed as aforesaid, was vested in and became the property, rights, and liabilities of the said Tecumseh National Bank." Immediately following the above description of the officers of the Tecumseh National Bank in the petition there were the following allegations: "That each of the persons last above named became the owner of a large amount of

shares or certificates of stock of the said Tecumseh National Bank at the time it was organized, and that the said certificates or shares of stock were given to said persons for the real property, cash, bills receivable, good will, rights, and choses in action, and the assumption of and agreeing to perform all debts, contracts, and obligations outstanding which was to be done or performed by the banking association of Russell & Holmes." In the language quoted there are allegations of assumption by the Tecumseh National Bank of the liabilities and obligations of its predecessor, founded upon an adequate consideration, sufficiently described. By the further averments of the petition that the claim sued upon was one of the liabilities assumed by the Tecumseh National Bank, and within the rule laid down in *Shamp v. Meyer*, 20 Neb., 223, an action is maintainable by the beneficiary against the bank. This rule has received the approval of this court in numerous cases considered subsequently to that above cited. (*Keedle v. Flack*, 27 Neb., 836; *Fonner v. Smith*, 31 Neb., 107; *Kaufman v. United States Nat. Bank*, 31 Neb., 661; *Hale v. Ripp*, 32 Neb., 259; *Sample v. Hale*, 34 Neb., 220; *Barnett v. Pratt*, 37 Neb., 349; *Doll v. Crume*, 41 Neb., 655; *Chicago, B. & Q. R. Co. v. Bell*, 44 Neb., 44; *Hare v. Murphy*, 45 Neb., 809.) The petition must be held, therefore, to have stated a cause of action in favor of the plaintiff therein named.

Whether or not there was sufficient evidence to sustain the averments of the petition, denied, as they were, by the answer, we cannot determine, for the bill of exceptions in this case does not purport to contain all the evidence on which the case was tried. For a part of this evidence we are therein referred to the bill of exceptions in the case of Saunders v. Tecumseh National Bank. We cannot look into another case than this for the purpose of ascertaining what evidence should be considered in the case before us. (*Lowe v. Riley*, 41 Neb., 812; *State Ins. Co. v. Buckstaff*, 47 Neb., 1. The judgment of the district court in this case is

AFFIRMED.

TECUMSEH NATIONAL BANK v. ANNA B. SAUNDERS.

FILED FEBRUARY 3, 1897. No. 7028.

Successor to Bank: ASSUMPTION OF LIABILITY: ACTION BY CREDITOR: VERDICT FOR PLAINTIFF: EVIDENCE. The evidence in this case examined, and *held* not sufficient to sustain the judgment of the district court. NORVAL, J., dissents.

ERROR from the district court of Johnson county. Tried below before BABCOCK, J. *Reversed.*

John H. Ames, C. Gillespie, and *S. P. Davidson,* for plaintiff in error.

T. Appelget, J. Hall Hitchcock, and *L. C. Chapman, contra.*

RYAN, C.

There was a judgment in favor of Anna B. Saunders in the district court of Johnson county, of which the judgment defendant seeks a reversal in this court. With this there were submitted eight other cases, in each of which the Tecumseh National Bank was the plaintiff in error, the defendants in error being, respectively, Andrew Head, Ann Smith, Sarah A. Brown, Allora Hull, Elias Young, Alice Kershaw, Jane Turner, and Luke Corson. On behalf of all parties, it was earnestly requested on the argument that the evidence should be considered with reference to its sufficiency to sustain a verdict, and, if there was not sufficient for that purpose, that this court should so indicate, thereby enabling the parties litigant in all the cases to avoid further costs, for it was conceded by each party that in any further trial of either case the evidence must necessarily be the same as is contained in the bill of exceptions herein submitted for our examination. We have, therefore, given the careful examination to the evidence which the interests involved demand, and shall, without separate discussions, direct in each case such

future action to be taken as we shall find to be proper from our consideration of this evidence.

The original petition in this case was filed August 19, 1893, against the Tecumseh National Bank, as successor of the Banking Association of Russell & Holmes, for the collection of a certain indebtedness of Russell & Holmes, as to which, it was alleged, the Tecumseh National Bank was liable. As requested, we have undertaken to determine as to this liability upon consideration of the evidence and shall, therefore, forbear a review of the pleadings.

There is no question made that the corporation known by the name of Russell & Holmes was indebted to Anna B. Saunders as claimed, upon two certificates of deposit, one of which was for $150, dated June 11, 1889, the other for $250, dated July 26, 1889. Neither of these was for a fixed time but by each it was provided that if the money was left on deposit for six months it should draw interest at the rate of five per cent per annum. The transfer by Russell & Holmes to the Tecumseh National Bank, which was April 12, 1890, was without the knowledge, much less the assent, of Anna B. Saunders. When she first learned of the existence of the Tecumseh National Bank it was doing a banking business in the same room and under the management of officers who had managed the banking business of Russell & Holmes. It was shown that by its own procurement the Tecumseh National Bank was advertised from May 30, 1890, until December 3, 1892, in a newspaper published at Tecumseh, as a successor of the bank of Russell & Holmes. As was pointed out in *Austin v. Tecumseh Nat. Bank*, 49 Neb., 412, the inference to be drawn from the successorship of one bank to another is controlled by the circumstances of such transfer. As has already been indicated, the defendant in error was not a party to this transfer and in no way sanctioned it, so that her rights are to be entirely governed by the inferences proper to be drawn from the circumstances attendant upon and constituting the transfer

between these two banking institutions. Before this transfer there had been deposited with Russell & Holmes the sum of $25,000 to be used in buying bonds as a basis of issue for the proposed national bank and to defray its other necessary expenses. When the transfer took place this amount was transferred to the credit of the Tecumseh National Bank, and of the $28,740 cash held by Russell & Holmes, $14,225.33 was likewise transferred. The association of Russell & Holmes, just previous to the transfer, had loans, discounts, warrants, and orders to the amount of $139,825.15, of which there was turned over to the Tecumseh National Bank when it began business on April 14, 1890, $48,155.53 in amount, leaving in the possession of Russell & Holmes bills receivable represented by the difference between the above items. Of individual deposits owing by Russell & Holmes, the Tecumseh National Bank assumed payment of $59,763.12. The difference between the amount assumed by the Tecumseh National Bank, $59,763.12, and the cash and bills receivable turned over was $3,717.74, as to which there was such evidence as to show that it was provided for, but not evidence of a sufficiently exact nature to enable us to state with precision how this was done.

The capital stock of the Tecumseh National Bank was $50,000, of which $20,000 in par value was issued to Charles A. Holmes and James D. Russell. This was paid for out of funds and property of the bank of Russell & Holmes. At the organization of the Tecumseh National Bank Charles A. Holmes and James D. Russell paid in cash fifty per cent of their subscriptions. The balance was paid afterward, as needed, largely by the conversion of personal and real property. Of the latter class of property, subsequently, the bank building of Russell & Holmes was turned in to the Tecumseh National Bank at a valuation of $8,500. How these individuals became the owners of this building there was no question made either by the pleadings or the evidence. There was no objection that this valuation was unfair and, for our

present purpose, it must be assumed to be just. Of the $20,000 worth of stock subscribed for by James D. Russell and Charles A. Holmes there was, therefor, paid in cash $10,000 at the time of the organization of the bank, and afterwards, $8,500 in real property. This accounts for within fifteen hundred dollars of their subscriptions, and as the association of Russell & Holmes had retained bills receivable to the amount in par value of over $91,000, it is not difficult to believe that this balance might have been paid as required. In a general way it was shown by the testimony of Charles A. Holmes that Russell & Holmes transferred to the Tecumseh National Bank, notes, other than those above referred to, after the last named bank had commenced business, but it was also shown by other evidence that these notes in each instance were paid for at the times when they were discounted. There was also testimony that real property of Russell & Holmes had been to the amount in value of $25,000 turned over to the Tecumseh National Bank as security for debts owing said national bank by Russell & Holmes, not earlier than the month of September, 1891. Of the stock of Charles A. Holmes and James D. Russell in the Tecumseh National Bank, $1,000 in par value was very soon transferred to Warren H. Holmes. In September, 1891, the holders of this $20,000 of stock pledged it as collateral security for a loan made them by the First National Bank of Lincoln. Subsequently the bank last named purchased this stock and has since continued to hold it. Of the other $30,000 stock of the Tecumseh National Bank, some was paid for in cash and some in certificates of deposit which had been issued by Russell & Holmes. The amount of each of these certificates, however, was paid to the National Bank by Russell & Holmes.

From a consideration of all the evidence upon which this case was tried, we are led to the conclusion that there was no proof of an undertaking, express or implied, that the Tecumseh National Bank would pay the indebtedness

of Russell & Holmes. The association last named, when it was succeeded in business, had a good financial reputation, and, with assets which it retained, continued to pay its indebtedness as presented for more than a year after that time. This transfer was April 14, 1890, and there were paid on the certificate of deposit first herein described, $9 on June 14, 1890, $56.75 March 28, 1891, June 13, 1891, $9, being interest to June 11, 1892. On the other certificate of deposit there were the following payments: $15, interest to July 26, 1890; $15, interest to July 25, 1891; $15, interest to July 18, 1892. It is claimed that these, or some of these, payments were made by the Tecumseh National Bank, and that, therefore, it should be held liable as to the balance. It was shown, however, that in almost every instance the payments were made by Russell & Holmes; that that association was winding up its business in the banking room of the Tecumseh National Bank, and when payments were made by that bank for Russell & Holmes, it was because the amount was small and no member of that association was present, and that the amount advanced was speedily replaced by Russell & Holmes in every instance. For more than a year after the Tecumseh National Bank had become its successor the association of Russell & Holmes was regarded as being perfectly solvent, and by the defendant in error was so dealt with. After the lapse of more than three years from the time the Tecumseh National Bank began business it was, by this suit, sought to hold it liable for the debt of its predecessor. While the corporation is the same that began business, the stockholders in the meantime have changed, so that the delay noted will operate to their injury if this action is maintainable. Under such circumstances it devolved upon the plaintiff in error to show that she was entitled to the relief prayed, and in this we think she has entirely failed. The judgment of the district court is therefore

REVERSED.

NORVAL, J.

I dissent. The petition in the court below, in every essential particular, is identical with that in the case of *Eans v. Exchange Bank of Jefferson City*, 79 Mo., 182, which the supreme court of Missouri held, and, I believe, rightly, stated a cause of action. The facts in the record before us, some of which are stated in the majority opinion, fully sustain every material averment contained in the petition, and establish the liability of the defendant bank for plaintiff's demand. The judgment should therefore be affirmed.

STATE OF NEBRASKA, EX REL. E. J. CAREY, V. JOHN F. CORNELL, AUDITOR OF PUBLIC ACCOUNTS.

FILED FEBRUARY 3, 1897. No. 8997.

1. **Statutes:** AMENDMENTS: CONSTITUTIONAL LAW. An act complete in itself is not inimical to the constitutional requirement that no law shall be amended unless the new act contains the section or sections so amended, although such complete act may be repugnant to, or in conflict with, a prior law, not referred to nor in express terms repealed by the later act.

2. ———: ———: STENOGRAPHERS: COMPENSATION. The act entitled "An act to amend chapter 13 of the Revised Statutes of 1866, entitled 'Courts,'" approved February 27, 1879 (Session Laws, p. 82), was an act complete in itself, and the provisions therein made for stenographic reporters and their compensation were germane to its purposes.

3. ———: ———: ———: ———. The conclusion reached in *Morgan v. State*, 48 Neb., 798, disapproved, and said case overruled.

ORIGINAL application for *mandamus* to compel the auditor of public accounts to issue a warrant for the salary of relator as stenographer of the seventh judicial district. *Writ allowed.*

N. Z. Snell and *J. E. Frick*, for relator.

C. J. Smyth, Attorney General, and *Ed P. Smith, Deputy Attorney General, contra.*

RYAN, C.

This is an original action by the stenographic reporter of the seventh judicial district of this state to compel the auditor of public accounts to issue a warrant in the sum of $375, for one quarter's salary, under the provisions of an act entitled "An act to amend chapter 13 of the Revised Statutes of 1866, entitled 'Courts'" (Session Laws, 1879, p. 82), approved February 27, 1879. It is insisted by the respondent that section 46 of the act just referred to is unconstitutional, because the said act is amendatory of an act approved February 19, 1877, said last named act not being mentioned in the title of the amendatory act, and that, therefore, the provisions of said act of 1877, which fixed the relator's salary at $250 per quarter, must govern, rather than section 46 of the amendatory act, which fixes it at $375 per quarter, as claimed by the relator. The respondent is willing to issue a warrant for $250, but refuses to issue one for $375, hence this controversy.

Chapter 13, Revised Statutes of 1866, entitled "Courts," made general provisions for a supreme court and for district courts in this state. The jurisdiction of the district courts was defined. Provisions were made for clerks and for terms to be held, for records, proceedings, and other like matters. There was, however, no mention of a stenographic reporter. This officer was first provided for in 1875. By the provisions of section 6 of the act approved February 19, 1877, the yearly compensation of this reporter was fixed at $1,000. By the act entitled "An act to amend chapter 13 of the Revised Statutes of 1866, entitled 'Courts,'" approved February 27, 1879, there was enacted a complete statute providing for district courts, and, among other things, for necessary officers, among whom was a stenographic reporter, to receive an annual salary of $1,500.

It is contended by the respondent that the case of *Morgan v. State*, 48 Neb., 798, is decisive of the questions now urged by the relator, and, therefore, that the writ of *mandamus* to compel the auditor to issue the warrant for $375 should be denied. In *Morgan v. State, supra*, there was under consideration section 49 of the act above referred to as having been approved February 27, 1879, and it was held that this section was unconstitutional and void, because it was amendatory of section 5 of an existing act approved February 19, 1877; the title of the amendatory act in no way referring to or recognizing the existence of the act of 1877. In this case there is urged the fact that the act of 1879 was a complete act providing for and governing courts, and that, therefore, it was not necessary that in its title there should be mention of acts incidentally affected, as was the act of 1877. In *State v. Moore*, 48 Neb., 870, there was under consideration the applicability of section 11, article 3, of the constitution of this state, which declares that "No law shall be amended unless the new act contain the section or sections so amended, and the section or sections so amended shall be repealed." In respect to the constitutional provision just quoted it was said: "This constitutional provision has been frequently before this court for consideration, and it is a rule, well settled, that where an act of the legislature is not complete in itself, but is amendatory of a former law, to which it does not refer, it is within the constitutional inhibition quoted above. In other words, the fundamental law of the state requires all the parts of an amended law to be incorporated in the act, and the old law so amended to be repealed. If said constitutional provision is disregarded or not complied with in the amendment of a prior act the new law is void. (*Smails v. White*, 4 Neb., 353; *Ryan v. State*, 5 Neb., 276; *Lancaster County v. Hoagland*, 8 Neb., 38; *Sovereign v. State*, 7 Neb., 409; *In re House Roll 284*, 31 Neb., 505; *Stricklett v. State*, 31 Neb., 674; *City of South Omaha v. Taxpayers' League*, 42 Neb., 671.) It is also firmly established in this state, by

a long line of decisions, that an act complete in itself is not inimical to said constitutional provision, although such act may be repugnant to, or in conflict with, a prior law, which is not referred to nor in express terms repealed by the later act. In such case the earlier statute will be construed to be repealed by implication. (*Smails v. White*, 4 Neb., 353; *Jones v. Davis*, 6 Neb., 33; *State v. Maccuaig*, 8 Neb., 215; *State v. Whittemore*, 12 Neb., 252; *State v. Page*, 12 Neb., 386; *State v. Ream*, 16 Neb., 681; *Ballou v. Black*, 17 Neb., 389; *Herold v. State*, 21 Neb., 50; *State v. Arnold*, 31 Neb., 75; *Brome v. Cuming County*, 31 Neb., 362; *State v. Benton*, 33 Neb., 825; *State v. Bemis*, 45 Neb., 724.)" In *Omaha Real Estate & Trust Co. v. Kragscow*, 47 Neb., 592, a repeal by implication by reason of inconsistent statutory provisions was held to have resulted between irreconcilable sections of the same statute. In *State v. City of Kearney*, 49 Neb., 325, it was pointed out that in several cases this court had held that the constitutional provision under consideration was applicable to amended subdivisions of a section equally with an entire section. In *Henry v. Ward*, 49 Neb., 392, the principle last above enunciated received a practical application to a condition of legislation very similar to that involved in the present case. To demonstrate this resemblance in point of fact, the following language from the case just cited is quoted: "Section 46, chapter 78, Compiled Statutes, being a portion of the road law of 1879 (Session Laws, 1879, p. 120), provides as follows: 'The section lines are hereby declared to be public roads in each county in this state, and the county board of such county may, whenever the public good requires it, open such roads without any preliminary survey and cause them to be worked in the same manner as other public roads.' * * * In 1867 there was passed an act (Session Laws, 1867, p. 45) providing, among other things, that all roads located in compliance with the laws of this state are declared open roads. * * * The act of 1873 provided that 'section lines be, and are hereby de-

clared to be, public roads and highways' in certain counties named. * * By an act of 1875 (Session Laws, 1875, p. 114, sec. 1) 'all roads, or parts of roads, located and established in this state, except such as are located on section lines, that shall not be worked or traveled for a period of six years from the location [of] said road or roads, the same shall be, and are hereby, declared vacated.' In 1879 there was passed (Session Laws, 1879, p. 120) 'An act to amend chapter 47 of the Revised Statutes of 1866, entitled "Roads."' This is our present road law and contains section 46 above quoted. The argument on behalf of the defendant is that this act did not operate to repeal the acts of 1873 and 1875, and did not vacate any roads established under the act of 1873, notwithstanding section 3 of this act, which provides that 'all roads within the state which have been laid out in pursuance of any law of this state or of the territory of Nebraska, and which have not been vacated in pursuance of the law, are hereby declared to be public roads; provided, that all roads that have not been used within five years shall be deemed vacated.' The evidence is undisputed that this road was not used prior to 1884. * * * We think this earlier legislation (of 1867, 1873), whatever may have been its effect, was superseded by the act of 1879. It is true that the act of 1879 was, in form and in title, an act to amend chapter 47 of the Revised Statutes of 1866, and did not contain or repeal the acts of 1867 or of 1873. Nor did it in terms repeal the act of 1875, which vacated all roads except section line roads for non-user. But chapter 47 of the Revised Statutes of 1866 was a general statute, covering the whole subject of roads and embracing all the legislation then existing. Under the title of an act to amend that chapter it was, therefore, competent for the legislature to include any subject germane to the provisions of the act amended; that is, relating to the general subject of location, opening, maintenance, and vacation of highways within the state. The act of 1879 repeated in the same terms a large portion of chapter 47,

Revised Statutes; and it formed a complete law by itself on the subject of highways." From this line of reasoning it is clear that it was within the constitutional power of the legislature to amend chapter 13 of the Revised Statutes of 1866, entitled "Courts," by substitution therefor of an act on the same subject, complete within itself, and that, therefore, the said act of 1879 was valid.

The only questions remaining to be determined are whether or not the incorporation into the substituted statute of a provision for stenographic reporters, and for the compensation to be allowed such reporters, was germane to the subject-matter of such legislation. In *Martin v. Tyler*, 60 N. W. Rep., 392, the supreme court of North Dakota had under consideration an act entitled "An act to provide for establishing, constructing, and maintaining drains in this state." It was contended that the provisions of this act violated that part of the constitution of that state which provided that "No bill shall embrace more than one subject, which shall be expressed in its title." The provisions of the statute called in question were for the creation of a special drainage commission, and vesting it with powers to act; the levying of special assessments to pay the costs of constructing drains; the providing for the issuance of bonds and of a sinking fund to pay the same, and the repealing of certain sections of existing statutes. In respect to the objections noted that court said: "The title to the act in question is very broad; 'An act to provide for the establishing, constructing, and maintaining drains in this state.' It covers the entire subject. Whatever means and instrumentalities are necessary or usual and proper for effectuating the purposes of the act may be provided in the act. The objections go only to the means and instrumentalities. * * * It (the question here) is not what power passes by implication, but what power may be expressly granted under a title authorizing internal improvements. We think authority to pay for such improvements in some manner other than the ordinary taxation, particularly when, as

in this case, the limit of ordinary taxation might be totally inadequate to meet the expense, is entirely germane to the title, and the issuance of bonds is, perhaps, the most common means known to the law for meeting such expenses." It might be that this court would not care to extend the principle under consideration as far as above indicated, but this is not necessary for our present purpose, which is simply to illustrate the rule of construction applicable to the facts of the case at bar. In *Simon v. Northup*, 40 Pac. Rep., 560, the supreme court of Oregon was considering an act of which the subject, or general object, as expressed in the title, was the acquisition, control, and management of certain specified bridges and ferries across the Willamette river at Portland, and the details by which these purposes were to be accomplished. Section 20, article 4, of the constitution of Oregon declares: "Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title." In the consideration of the objects above indicated it was said: "But it is clearly stated in the title that one of the purposes of the act is to require the county court of Multnomah county 'to assume the management, control, and supervision of such bridges and ferries,' and this is certainly broad enough to sustain a provision requiring the county to provide the funds with which to pay the expenses of such management, control, and supervision, and such provision is germane to, and properly connected with, the subject expressed in the title, and valid." In *Town of Abingdon v. Cabeen*, 106 Ill., 200, it was held that the powers conferred upon townships by the act to subscribe for the capital of, or make donations to, a railroad company; to provide for election; to decide whether such subscriptions or donations should be made; for taxation for the payment of the same if voted, and for the issue of bonds, were sufficiently indicated by the title, which was "An act to incorporate the Dickson & Quincy R. R. Company," to comply with the constitutional provision that "No pri-

vate or local law which may be passed by the general assembly shall include more than one subject, and that shall be embraced in the title." In the delivery of the opinion of the court by Justice Dickey he said: "The title adopted being sufficient to apprise the legislators, fairly, of the general subject-matter of the act, all provisions therein fairly related to that general subject, and designed to conduce to the building of the road named, must, in the light of previous decisions of this court, be held to be fairly embraced in the title adopted." There were cited and analyzed several cases previously decided by the supreme court of Illinois upon substantially the same state of facts as that above considered, and the result in each instance supported the conclusion announced by Justice Dickey. The case just cited was followed by the same court in *Hutchinson v. Self*, 39 N. E. Rep. [Ill.], 27. The first paragraph of the syllabus of *Commonwealth v. Lloyd*, 35 Atl. Rep., 816, which correctly reflects the holding of the supreme court of Pennsylvania, is in this language: "Act March 16, 1872, entitled 'An act relating to the county commissioners of Cambria county,' provides (section 1) that the commissioners shall assemble at a certain date in each year for the purpose of organization, and that at said meeting each member shall produce his certificate of election. Section 2 fixes the salary of each commissioner at $400 per annum. Section 3 empowers said commissioners to employ a competent clerk, whose compensation shall not exceed $600 per annum. *Held*, That said act does not violate the constitutional provision that no bill shall be passed containing more than one subject, which shall be clearly expressed in its title." The supreme court in express terms approved the opinion which had been filed by the superior court, from which the case had come for review. In this opinion we find this language: "The second section gives the commissioners, each, compensation as a right to which they are entitled for services rendered the county in the discharge of their duties, and their compensation

is fixed at $400 per annum. We have said that the title clearly indicates any provision in the body of the act touching the rights, duties, and powers of the commissioners; and there is no right more thoroughly understood by all the people, as inevitably incident to an office, than the right to receive fair compensation for the performance of the duties thereof. By the third section the commissioners are empowered to employ a clerk for their assistance, and to pay him a salary, within certain limits, for his services. From the very nature of the duties to be performed by the county commissioners, a clerk to keep a correct record of their proceedings and the books pertaining to the office is a necessary incident thereto, and from the first organization of counties in this commonwealth to the present time persons peculiarly qualified have been employed and paid as commissioners' clerks; and it requires no stretch of the imagination on the part of any citizen or taxpayer to understand and take notice that the title of an act relative to county commissioners might and would include the right of such commissioners to employ and fix the salary of a clerk. We repeat that the title of this act is all-sufficient to give notice of any legislation properly pertaining to the rights, duties, and powers of the county commissioners of Cambria county, and there is nothing in the body of the act that does not pertain to such rights, duties, and powers; and instead of being misleading, the title is germane to every subject mentioned in the body of the act, and the entire act pertains to but one subject."

It is hardly requisite that we should enter into a detailed analysis of the above cases to illustrate what from them appears clear to us, and that is that the title, "An act to amend chapter 13 of the Revised Statutes of 1866, entitled 'Courts' (Session Laws, 1879, p. 82), was broad enough to admit of provision being made in the act for a stenographic reporter for each district court, and to provide for his compensation. The act just referred to, as we have already stated, was an act complete in itself

upon the subject of courts, and the provision for the appointment of a stenographic reporter was just as germane as was the requirement that there should be elected a clerk or appointed a bailiff, and, as shown by the above cases, it was proper that the compensation of such reporter should be fixed by the provisions of the act providing for his appointment. It has already been noted that the effect of the enactment of the general statute in question, in 1879, was to repeal the special provisions of the act of 1877, entitled "An act to provide stenographic reporters for the district courts, and to repeal an act entitled 'An act to provide for short-hand reporters in the district courts,' approved February 9, 1875." In the case of *Morgan v. State*, 48 Neb., 798, the opinion was prepared upon the line of argument pursued by the attorney general, in the absence of an argument in reply thereto. Now, for the first time, there are presented the considerations which we have just discussed, leading us to the conclusions already indicated. The result reached in *Morgan v. State, supra*, was unavoidable on the line which was followed; and said case, holding that section 49 of an act to amend chapter 13, Revised Statutes of 1866, entitled "Courts," passed and approved February 27, 1879, is unconstitutional and void, is overruled. The writ will issue as prayed.

WRIT ALLOWED.

DOUGLAS COUNTY V. J. H. TAYLOR.

FILED FEBRUARY 3, 1897. No. 7045.

1. **Eminent Domain:** PORTION OF STREET OUTSIDE OF CITY: GRADE: DAMAGES: CLAIMS: LIABILITY OF COUNTY. Taylor owned a tract of land lying within the limits of the city of Omaha, in Douglas county. On the north side of his land was a public thoroughfare. The south half of this thoroughfare in front of Taylor's land was in the limits of the city of Omaha. The north half of the thoroughfare in front of Taylor's land was without the limits of the

city of Omaha, but within Douglas county. The county made a cut and constructed a fill in the thoroughfare north of Taylor's land the entire width of the street. Taylor sued the county for damages, alleging that by the construction of the improvement in the street in front of his property the latter had been depreciated in value; that in constructing said improvement the county had dug and carried away portions of his land lying outside the limits of said street; had torn down his fences and cut down his trees and used the same in the construction of said improvement; and had appropriated a portion of his land lying outside the limits of said thoroughfare by constructing thereon the base of said fill. *Held*, (1) Construing sections 1, 33, and 1*a*, chapter 78, Compiled Statutes, that it was the duty of the county to work and maintain the north half, and the duty of the city of Omaha to work and maintain the south half of said street in front of plaintiff's property, but that the county and city had concurrent jurisdiction or authority to construct the cut and fill in the street in front of Taylor's property, and that, therefore, the acts of the county in the premises were not *ultra vires;* (2) that it was immaterial what technical name might be given to Taylor's action; for whether his petition stated a cause of action *ex delicto* or *ex contractu*, the averments thereof, if true, established the fact that his property had been taken and damaged for public use, and that by virtue of section 21 of the bill of rights (Constitution, art. 1, sec. 21) he was entitled to compensation therefor; (3) that no legislative enactment was necessary to enable Taylor to maintain his action; (4) that the district court had original jurisdiction to try the claim of Taylor against the county; that it was not a claim required by section 37, article 1, chapter 18, Compiled Statutes, to be filed with the county clerk of said Douglas county and passed upon by its board of commissioners; (4) the word "claims" in said section 37 has reference only to claims originating in contract, express or implied, between the claimant and the county.

2. ———: STREETS: DAMAGES: VERDICT FOR PLAINTIFF. Evidence examined, and *held* to sustain the finding of the district court.

ERROR from the district court of Douglas county. Tried below before HOPEWELL, J. *Affirmed.*

The facts are stated by the commissioner.

J. L. Kaley and *A. C. Troup*, for plaintiff in error:

The action is one sounding in tort for which a county is not liable unless made so by express provision of statute. (*Russell v. Men of Devon*, 2 T. R. [Eng.], 671; *Wehm v. Gage County*, 5 Neb., 494; *Woods v. Colfax County*, 10 Neb.,

552; *Hamilton County v. Mighels*, 7 O. St., 109; *Crowell v. Sonoma County*, 25 Cal., 313; *Schuyler County v. Mercer County*, 4 Gilm. [Ill.], 20; *County of Rock Island v. Steele*, 31 Ill., 543; *Granger v. Pulaski County*, 26 Ark., 37; *Monroe County v. Flint*, 6 S. E. Rep. [Ga.], 173; *Ward v. Appling County*, 6 S. E. Rep. [Ga.], 914; *White Star Line Steamboat Co. v. Gordon County*, 7 S. E. Rep. [Ga.], 231; Dillon, Municipal Corporations, secs. 963, 999; 4 Am. & Eng. Ency. of Law, 364.)

If plaintiff had any legal claim against the county it was his duty to file the same with the county board before bringing suit. (Compiled Statutes, ch. 18, sec. 37; *Dixon County v. Barnes*, 13 Neb., 295; *Brown v. Otoe County*, 6 Neb., 111; *State v. Buffalo County*, 6 Neb., 454; *Yavapai County v. O'Neill*, 29 Pac. Rep. [Ore.], 432; *Luzerne County v. Day*, 23 Pa. St., 141; *Lawrence County v. City of Brookhaven*, 51 Miss., 68; *Alden v. Alameda County*, 43 Cal., 272; *Shepard v. Commissioners of Darke County*, 8 O. St., 354; *State v. Commissioners of Hamilton County*, 26 O. St., 369; *Richardson County v. Hull*, 24 Neb., 536; *Fuller v. Colfax County*, 33 Neb., 716; *Marsh v. Benton County*, 39 N. W. Rep. [Ia.], 713; *Maddox v. County of Randolph*, 65 Ga., 216; *Powder River Cattle Co. v. Custer County*, 22 Pac. Rep. [Mon.], 383; *Barbour County v. Horn*, 41 Ala., 114; *Norwood v. Gonzales*, 14 S. W. Rep. [Tex.], 1057; *McCann v. Sierra County*, 7 Cal., 121; *Hohman v. County of Comal*, 34 Tex., 36.)

If the allegations of the petition are true, the acts complained of were without the jurisdiction of the county commissioners, and therefore void; and ratification by the county would be impossible. (*Zottman v. City and County of San Francisco*, 20 Cal., 97; *Board of Supervisors of Jefferson County v. Arrighi*, 54 Miss., 668; *Newberry v. Fox*, 33 N. W. Rep. [Minn.], 333; *Lancaster County v. Fulton*, 18 Atl. Rep. [Pa.], 384; Dillon, Municipal Corporations [3d ed.], sec. 465.)

County commissioners have only such powers as are expressly granted by statute, or are essential to the due ex-

ercise of such powers. (*Hamlin v. Meadville*, 6 Neb., 227; *Walsh v. Rogers*, 15 Neb., 311; *State v. Lincoln County*, 18 Neb., 283; *Browning v. Owen County*, 44 Ind., 11; *Wheeler v. Wayne County*, 24 N. E. Rep. [Ill.], 625; *Daley v. City and County of San Francisco*, 13 Pac. Rep. [Cal.], 321; *Rowland v. City of Gallatin*, 75 Mo., 134.)

A county cannot be bound by any acts of its commissioners not regularly enacted by the board. (*Phelan v. San Francisco*, 6 Cal., 532; *Merrick County v. Batty*, 10 Neb., 176.)

A county can be bound by its board upon a contract, only by an affirmative act within the scope of its authority, evidenced by an entry on its minutes. (*Bridges v. Clay County*, 58 Miss., 817; *Crump v. Colfax County*, 52 Miss., 107; *Dennison v. County of St. Louis*, 33 Mo., 168; *Mitchell v. St. Louis County*, 24 Minn., 459; *Murphy v. Napa County*, 20 Cal., 498.)

A contract made by county commissioners, to be binding upon the county, must be made by the board at a regular session. (*Potts v. Henderson*, 2 Ind., 327; *Campbell v. Brackenridge*, 8 Blackf. [Ind.], 471; *County of Eldorado v. Reed*, 11 Cal., 130; *County of La Salle v. Simmons*, 10 Ill., 513; *Gardner v. Dakota County*, 21 Minn., 33; *Linden v. Case*, 46 Cal., 172.)

A county is not chargeable with knowledge possessed by an individual member of a county board. (*Commissioners of Leavenworth County v. Hamlin*, 31 Kan., 105; *Bouton v. Supervisors of McDonough County*, 84 Ill., 384; *Merrill v. Inhabitants of Berkshire*, 11 Pick. [Mass.], 269; *Treichler v. Berks County*, 2 Gr. [Pa.], 445; *Madison County v. Burford*, 93 Ind., 383; *Crawford County v. Clerc*, 4 Chand. [Wis.], 56; *Smith v. Barron County*, 44 Wis., 686; *Stamp v. County of Cass*, 47 Mich., 330; *Dennison v. County of St. Louis*, 33 Mo., 168; *Rice v. Plymouth County*, 43 Ia., 136.)

C. A. Baldwin, *G. W. Doane*, and *Robert W. Patrick*, *contra.*

RAGAN, C.

Joseph H. Taylor brought this suit in the district court of Douglas county against said county, the individuals composing its board of commissioners, and the city of Omaha, to recover damages which he alleged his real estate had sustained by reason of the grading of a street or highway in front thereof. At the close of the evidence the district court directed a verdict returned in favor of the gentlemen composing the board of commissioners and the city of Omaha, which was done and a judgment entered dismissing them out of the action. The case proceeded to trial against Douglas county and resulted in a verdict and judgment in favor of Taylor, and the county brings the same here for review on error.

1. The first argument is that the petition does not state facts sufficient to constitute a cause of action against Douglas county. The petition alleges, in substance, that in the year 1890 plaintiff was the owner of a small tract of land lying in the western part of the then corporate limits of the city of Omaha, in said Douglas county; that running east and west on the north side of plaintiff's land was a public highway; that prior to 1887 this highway on the north side of plaintiff's land was one of the public roads or highways of Douglas county; that at that time the part of said highway east of plaintiff's land was known as Leavenworth street, in said city of Omaha; that in the year 1887 the western boundary of said city was so changed as to put plaintiff's property and the south half of said highway or street in front thereof within the limits of said city of Omaha, and leave the north half of said street in front of plaintiff's property outside the limits of said city of Omaha, but within the county of Douglas; that in the autumn of 1890 the gentlemen constituting the board of commissioners of said county, "while pretending to act in their official capacity, with a strong hand unlawfully, wrongfully, forcibly, and without any authority of law entered upon plaintiff's land

with horses, mules, men, and machinery," and made a cut and fill in said street in front of plaintiff's property; that said cut began on the eastern boundary of plaintiff's land and extended west 250 feet, was constructed the full width of the street, and was from eight to twelve feet in depth; that the fill began at the west end of the cut made and extended to the western boundary of plaintiff's land, a distance of 600 feet, was constructed the width of the entire street, and from twelve to twenty feet in height; that the said cut and fill so constructed depreciated in value and damaged plaintiff's land; that in the prosecution of said work said workmen dug and carried away a portion of plaintiff's land lying outside the limits of said street, and used and appropriated said earth so dug and carried away towards the construction of said fill; that in making said fill said workmen so constructed it that several feet of the south line of the base thereof rested on the north end of plaintiff's land, lying outside the limits of said street; that in the prosecution of said work said workmen entered upon plaintiff's land, tore down his fences, cut down his trees, and used and appropriated said trees and fences towards the construction of said cut and fill, to the plaintiff's damage.

(*a.*) The first contention is that since Taylor's land and the south half of the street or highway north thereof were in the limits of the city of Omaha, that it, and it alone, had jurisdiction and authority to work and repair the south half of said street in front of plaintiff's property; that the county had no jurisdiction or authority to work or repair the south half of said street in front of plaintiff's property, and that the act of its commissioners in constructing the grade and cut in the south half of said street was *ultra vires*, was void, and that the county is not bound by their action. The property of Taylor and the south half of the street in front thereof was in the city of Omaha, and because of that fact the city had jurisdiction and control over the south half of said street in front of Taylor's property, and it was the city's duty to work,

grade, and maintain in proper repair and condition for travel said part of said street. (Compiled Statutes, ch. 78, sec. 33.) The north half of said street in front of Taylor's property was outside the limits of the city of Omaha, but in Douglas county. The county, then, had jurisdiction and control over the north half of said street, and it was its duty to work and maintain in proper condition for travel said north half of said street. (Compiled Statutes, ch. 78, sec. 1.) Such were the duties of the county and city, respectively, as to such street in front of plaintiff's property; but section 1*a*, chapter 78, Compiled Statutes, passed and approved March 30, 1889, provides that the county board of any county in which any city of the metropolitan class is situate is authorized and empowered to aid in the grading, paving, or otherwise improving of any street leading into said city, and within the corporate limits thereof, by providing for the payment of a certain portion of the cost of such labor. A city of the metropolitan class, namely, the city of Omaha, at the time this grading was done was situate in Douglas county. The street in front of plaintiff's property led into said city, and the street, or at least a part of it, was within the corporate limits of said city. As we read this statute, then, Douglas county was authorized to aid in grading this street in front of plaintiff's property, and we do not think that the county is by the statute limited to paying to the city the proportion of the cost of such grading as the county may assume, but that it had authority to use its own agents and machinery in doing such part of the grading as it was authorized by law to pay the cost of. The act of the county, then, in putting the cut and fill in the south half of this street in front of plaintiff's property was not an act outside its jurisdiction. It was an act authorized by law. While the law made it the duty of the county to work and maintain the north half of the street, and made it the duty of the city to work and maintain the south half of the street, it conferred on the county and city a concurrent jurisdiction or authority

to grade or pave a street such as the one in front of plaintiff's property.

(*b.*) A second argument under the contention that the petition does not state a cause of action is that the petitioner seeks to recover damages from the county by reason of a tort committed by it, and that an action of tort will not lie against a county in the absence of an express statute authorizing it, and that no such statute exists. To sustain this contention we are cited to *Wehn v. Commissioners of Gage County*, 5 Neb., 494. In that case Gage county had constructed a jail near the residence of Wehn, and he claimed that criminals and drunken men were permitted "to be loose and go at large around said premises, whereby * * * offensive and frightful noises, wild and terrible yells, shrieks, and ravings, vile, profane, obscene, and indecent language and words, noxious and offensive swills and stenches were permitted therein, * * * entered the dwelling house and premises of plaintiff nightly and daily and rendered the same unwholesome and uninhabitable, and incommoded and exposed to insult and injury the plaintiff and his family, to his great damage." In other words, it was a suit of Wehn against the county for damages because the latter was maintaining a nuisance, and the court held that the action would not lie. We are also cited by counsel for the county to *Woods v. Commissioners of Colfax County*, 10 Neb., 552. It was held in that case that a county was not liable, in the absence of an express statute, for injuries one had received by the breaking down of a public bridge negligently constructed by authority of the county. But these cases are not in point here, and *Woods v. Commissioners of Colfax County*, at least, is no longer in force since the enactment of section 4, chapter 7, Session Laws of 1889, which made counties liable for damages sustained by any person resulting from a defective highway or bridge. (See, also, *Hollingsworth v. Saunders County*, 36 Neb., 141.) Section 21 of the bill of rights (Constitution, art. 1, sec. 21) provides that the property of no person

shall be taken or damaged for public use without just compensation therefor. Taylor in his petition avers that a part of his property was taken by the county for a public purpose, and that the part of his property not taken was damaged by the construction by the county of the public improvement in front thereof. It is immaterial, then, what technical name may be given to this action. By force of the constitutional provision just quoted the averments of the petition, if true, establish a cause of action in favor of Taylor and against the county. To give effect to this section of the bill of rights no legislative enactment was or is necessary.

(*c.*) A third argument in support of the contention that the petition does not state a cause of action is that Taylor does not aver therein that he filed his claim for damages with the county clerk of Douglas county, and that it had been passed upon by the county commissioners thereof. To sustain this contention counsel cite us numerous authorities, among which is *Brown v. Commissioners of Otoe County*, 6 Neb., 111. Brown's claim against the county in that case was for publishing the delinquent tax list of the county, and it was held that the jurisdiction of the district court over Brown's cause of action against the county was appellate only; that his claim should have been filed with the county clerk of Otoe county and passed upon by the commissioners thereof in order to invest the district court with jurisdiction. Another case cited is *Board of Commissioners of Dixon County v. Barnes*, 13 Neb., 294. The claim of Barnes against the county was for services which he claimed he had rendered for the county as an attorney in a litigation in which the county was interested, and it was held that such claim must be filed with the county clerk of said Dixon county and passed upon by the commissioners of said county in order to invest the district court with jurisdiction to hear it. *Richardson County v. Hull*, 24 Neb., 536, was an action brought originally in the district court of Richardson county by Hull against the county to recover a sum of money he had

paid into the county treasury as taxes upon certain land which was not subject to taxation, and it was held that the district court had no original jurisdiction. Such, also, is *Fuller v. Colfax County*, 33 Neb., 716. It is to be observed that in the cases cited the claims considered originated in contracts, express or implied, between the claimants and the counties; or, in other words, they were claims which arose *ex contractu*. *Nance v. City of Falls City*, 16 Neb., 85, was an action brought by an administrator against the city for damages for negligently causing the death of his intestate. At that time section 80, chapter 14, Compiled Statutes, 1885, was in force, and it provided that all claims against a city of the class to which Falls City belonged must be presented in writing to the city council, with a full account of the items, verified by the oath of the claimant or his agent, and that no costs should be recovered against such city in any action brought against it for an unliquidated claim unless such claim had been first so presented to the city council. The administrator did not file his claim for damages with the city council and the district court held that he was liable for the costs of the action. On error proceedings to this court this judgment was reversed, the court holding that the word "claims" used in the statute just quoted referred only to claims *ex contractu*, and not to claims *ex delicto*. To the same effect see the decision in *Village of Ponca v. Crawford*, 18 Neb., 551. In *Hollingsworth v. Saunders County*, 36 Neb., 141, Hollingsworth sued the county for injuries he had received by the falling of a public bridge in said county, and which damages, he alleged, were the result of the negligence of the county in constructing such bridge or in not maintaining it. The county interposed a general demurrer to the petition, and one of the points made was that the petition did not state a cause of action, because Hollingsworth did not aver that he had filed his claim for damages with the county clerk of said Saunders county and had it passed upon by the county authorities of that county, as provided by

section 37, article 1, chapter 18, Compiled Statutes. The district court sustained the demurrer and dismissed the petition. On error proceedings to this court this judgment of the district court was reversed, the court holding that the said section 37 only required claims *ex contractu* to be filed with the county clerk and passed upon by the county commissioners of the county in order to invest the district courts with jurisdiction to try such claims. *Dayton v. City of Lincoln*, 39 Neb., 74, was an action brought by Dayton against the city for damages which he alleged his property had sustained by the change of grade of certain streets on which his property abutted. The city of Lincoln at that time was a city of the first class having more than twenty-five and less than one hundred thousand inhabitants, and governed by chapter 13*a*, Compiled Statutes. Section 36, article 1, of this chapter provided that all claims against a city must be presented in writing to the city council. It was insisted by the city that the county court, to which the action was originally brought, was without jurisdiction to try the case, because Dayton had not first presented his claim for damages to the city council; but on a proceeding in error to this court the contention of the city in this respect was overruled, the court holding that the section of the statute just quoted did not contemplate the filing of claims for unliquidated damages with the city council. Section 37, article 1, chapter 18, Compiled Statutes, is to the effect that all claims against a county must be filed by the county clerk and presented to and passed upon by the board of county commissioners. We think that the word "claims" in that section refers only to claims originating in contract, express or implied, between the claimant and the county, and that a claim against a county for damages caused to the claimant's property by the county's taking it for public use, or damaging it by the construction of a public improvement, is not such a claim as need be first filed with the county clerk and passed upon by the county authorities; but an action on such a claim may be

brought, in the first instance, in any court having jurisdiction of the subject-matter. (*City of Chadron v. Glover*, 43 Neb., 732.)

2. It is insisted that the district court erred in giving instructions numbered from 1 to 10, both inclusive, and in refusing to give instructions asked by the county numbered 1 to 7, both inclusive. We have examined the instructions given and refused, and ascertained that the court did not err in giving all the instructions given nor in refusing all the instructions refused; and since the assignment is that it erred in giving all and refusing all the instructions, it will not be further considered.

3. Complaint is made of the action of the trial court in admitting certain evidence on the trial. We have scrutinized the action of the court in this respect and find it without error, and it would serve no useful purpose to give these assignments further attention here.

4. A final argument is that the verdict is not supported by sufficient evidence. We think it is. The contention of Taylor was, and the evidence in his behalf tends to support it, that he had been damaged several thousand dollars by the action of the county in grading the street in front of his property. The contention of the county was, and the evidence in its behalf tended to support it, that Taylor's property had been enhanced in value by the construction in front thereof of a cut sixty-six feet wide, eight to ten feet deep, and two hundred and fifty feet long, and a fill six hundred feet long, sixty-six feet wide, and twelve feet high. The jury weighed this evidence and reached the conclusion that Taylor had been damaged in the sum of $500. This conclusion is abundantly supported by the evidence. The judgment of the district court is

AFFIRMED.

W. Q. BELL, ADMINISTRATOR, v. ANNA RICE ET AL.

FILED FEBRUARY 3, 1897. No. 7071.

1. **Parent and Child:** SERVICES: EVIDENCE. Generally where a child renders services for a parent, the family relation existing at the time, the law presumes, by reason of the kinship of the parties and such family relation, that such services were gratuitously rendered.

2. ———: ———: ———. Such presumption is not a conclusive one, and the child may recover the value of the services rendered if the evidence shows that they were rendered under such circumstances as to justify the inference of a contract on the part of the parent to pay for them.

3. ———: ———: ———. Whether the evidence warrants such a conclusion is a question for the jury.

4. ———: CARE OF IMBECILE: COMPENSATION: NECESSARIES. A stepfather residing in the state of Illinois became an imbecile. No conservator was appointed for him. At the request of those who had charge of his property and business his stepdaughter caused him to be brought to the home of herself and husband in the state of Nebraska, where he remained until his death, some ninety weeks afterwards. During this time the stepdaughter furnished him boarding, lodging, medicine and medical attendance, and such care as his demented condition required. For these services she filed a claim against his estate. *Held*, That the services rendered to the stepfather were necessaries for which his estate was liable.

5. **Statute of Limitations:** REVIEW. The defense of the statute of limitations is a meritorious one, but one that may be waived; and if it is not insisted upon in some manner in the trial court it will not be considered here for the first time.

6. **Gift of Money to Father From Child:** SETTLEMENT OF ESTATE: INTEREST. A brother gave to his sister his note for $1,000. The brother died and the note was filed and allowed as a claim against his estate, and his administratrix, on settling the estate, paid said claim in full to the father of her intestate's sister. The daughter was at the time living with her father, and the money was paid to and retained by him with her knowledge and consent, without any agreement on his part to pay interest for the use of said money or to repay it at any particular time. After the father's death the daughter filed a claim against his estate for this money. *Held*, (1) That the evidence warranted the conclusion that the money was not a gift by the daughter to the father; (2) that it was not money which the father was entitled to appropriate to himself by reason of the relation existing between himself and daughter;

(3) that the transaction was in the nature of a gratuitous loan to the father; (4) that the money was payable to the daughter on demand; (5) that her father's estate was liable to her for the claim, but as she made no demand for its payment during the lifetime of her father, her claim should only draw interest from the date she filed it against the estate.

ERROR from the district court of Lancaster county. Tried below before STRODE, J. *Modified.*

Abbott, Selleck & Lane, for plaintiff in error:

The estate of a parent is not chargeable for either services rendered by, or for money received from, a child or stepchild, unless it is shown that there was an express promise made by the parent to pay for such services or to refund such money. (*Woods v. Land*, 30 Mo. App., 176; *Barhite's Appeal*, 126 Pa. St., 404; *Havens v. Havens*, 3 N. Y. Supp., 219; *Wright v. Senn's Estate*, 48 N. W. Rep. [Mich.], 545; *Harris v. Currier*, 44 Vt., 468; *Allen v. Allen*, 60 Mich., 635; *O'Kelley v. Faulkner*, 17 S. E. Rep. [Ga.], 847; *Puterbaugh v. Puterbaugh*, 34 N. E. Rep. [Ind.], 611; *Ellis v. Cary*, 42 N. W. Rep. [Wis.], 252; *Smith v. Rogers*, 24 Kan., 140; *Wells v. Perkins*, 43 Wis., 164; *Keegan v. Malone*, 17 N. W. Rep. [Ia.], 461; *Tyler v. Burrington*, 39 Wis., 376; *James v. Gillen*, 30 N. E. Rep. [Ind.], 7.)

W. E. Stewart and *Tibbets Bros., Morey & Ferris, contra.*

References: *Smith v. Meyers*, 19 Mo., 433; *Hall v. Hall*, 44 N. H., 293; *Adams v. Adams*, 23 Ind., 50.

RAGAN, C.

In the county court of Lancaster county, sitting as a court of probate, Sophia Mills and Anna Rice each filed a claim against the estate of Thomas H. Rice, deceased. From the judgment of the county court allowing these claims the administrator of the estate refused to appeal, whereupon certain heirs of the estate, in pursuance of the provisions of the statute, appealed from the judgments of the county court to the district court. The two claims

were there tried without pleadings. They were tried together to the court without a jury. The district court allowed the claims of Sophia Mills and Anna Rice against the said estate, and said heirs have filed here a petition in error to review the action of the district court.

1. We will first direct our attention to the claim of Sophia Mills. She claimed that the estate was indebted to her in the sum of $1,350 for boarding, lodging, and caring for the deceased for the ninety weeks immediately preceding his death, on which claim she admitted that she had been paid $862.91, leaving a balance due her of $867.19. By the judgment of the district court she was awarded $311.95. The evidence shows that Mrs. Mills in 1887 resided with her husband in Waverly, Nebraska; that she was the stepdaughter of the deceased, who at that time resided in Monmouth, Illinois; that in September, 1887, the deceased became an imbecile. The management of his affairs and estate was taken charge of by certain of his friends in Illinois, though no conservator or guardian was appointed for him. About this time, at the suggestion of those having charge of the estate and the affairs of the deceased, Mrs. Mills caused him to be brought to her house in Nebraska, where he remained until he died, some ninety weeks afterwards. During this time Mrs. Mills boarded, lodged, and cared for him, and furnished him medicine and medical attendance. It was necessary, owing to his lack of the use of his mental faculties, to keep a constant watch upon him to prevent his straying away. He had lost power to control and direct the functions of his body and had to be waited upon like an infant; and the evidence shows that the services of Mrs. Mills in the premises were reasonably worth from $10 to $30 per week. It is urged against the judgment of the district court that its finding is unsupported by sufficient evidence. It is first said that the evidence does not warrant the amount awarded Mrs. Mills. Adding the amount of money received by her from the estate of the deceased during his lifetime to the amount awarded

her by the court, we have a total of $1,174, which Mrs. Mills has received for her services in the premises. This amount the evidence justifies. But it is said that the evidence does not disclose an express promise on the part of the deceased to pay Mrs. Mills for her services, since she was his stepdaughter and the deceased lived with her in her family; that a family relation existed between them, and that the presumption is that the services rendered by Mrs. Mills were gratuitously rendered because of the relation existing between herself and the deceased. But this evidence does not bring Mrs. Mills' case within the rule that where services are rendered by a child for a parent, the presumption is such services were rendered gratuitously because of the relation existing between the parties. The deceased was not a visitor at the house of Mrs. Mills, nor was he at her house because he had been invited by her to come there and make it his home. If because of the relationship of Mrs. Mills to the deceased the law presumes that the services rendered by her were gratuitously rendered, still this was not a conclusive presumption; and we think that the services of Mrs. Mills were rendered under such circumstances as to overthrow this presumption and justify the application to this case of the general rule that where services are rendered by one party for another, and knowingly accepted by him, the law will imply a promise on his part to pay what such services are reasonably worth. (*Smith v. Myers*, 19 Mo., 433.) In *Koch v. Hebel*, 32 Mo. App., 103, a daughter filed a claim against her father's estate for services rendered by her for him in his lifetime. The evidence showed that while the daughter was away from home working for herself her mother was taken ill; that the daughter then returned to the home of her parents, but whether at their request did not appear, and remained with and cared for them until the death of the survivor, and that her father had on certain occasions spoken of compensating her for these services. The court held that because of the family relationship

existing between the claimant and the deceased the law presumed that the daughter had rendered the services she did gratuitously, but nevertheless, it was for the jury to say from this evidence whether the services were in fact rendered gratuitously by the daughter, or under such circumstances as to justify the inference of an actual contract of hiring the daughter by the deceased. To the same effect see *James v. Gillen*, 30 N. E. Rep. [Ind.], 7. In *Davidson v. Westchester Gas Light Co.*, 2 N. E. Rep. [N. Y.], 892, it was held that an implied promise to pay for services would be held to exist where the services were rendered under such circumstances as justified the party rendering them in entertaining reasonable expectation of their payment by the party soliciting the performance. In *Adams v. Adams*, 23 Ind., 50, it was held that where a child continues with a parent after being of age the presumption is that no wages are to be paid; but a contract to pay a reasonable compensation might be inferred from circumstances tending to rebut such presumption. In *O'Kelly v. Faulkner*, 17 S. E. Rep. [Ga.], 847, it was held that in order to authorize a recovery by a son against the estate of his deceased father for services in the nature of care and attention to the latter while old and infirm, it must affirmatively appear either that the services were rendered under an express contract that the son was to be paid for them, or, the surrounding circumstances must plainly indicate that it was the intention of both parties that compensation should be made and negative the presumption of law that by reason of the family relation the services were gratuitously rendered. In *Byers v. Thompson*, 66 Ill., 421, a son placed a house on his father's land in the lifetime of the latter. After the father's death the son filed a claim against his estate to recover the value of the house. The court held that the son's right to recover depended upon whether he expected to be paid therefor at the time he placed the house on the farm, and the father expected to pay him, and that this must be determined from all the evidence in the case;

and the court expressly held that it was not necessary to enable the son to recover that the proofs should show an express contract with his father to pay for the house. We conclude, therefore: (1) That where a child renders services for a parent, the family relation existing at the time, the law presumes by reason of the kinship of the parties and such family relation that such services were gratuitously rendered; (2) that such presumption is not conclusive, and that the child may recover the value of the services rendered if the evidence shows that they were rendered under such circumstances as to justify the inference of a contract on the part of the parent to pay for them; (3) and whether the evidence warrants such conclusion is for the jury. (*Hill v. Hill*, 23 N. E. Rep. [Ind.], 87.) In the case at bar the deceased was incapable of caring for himself. The services rendered for him by Mrs. Mills, the boarding, lodging, medicine, medical attendance, and clothing furnished to him by her were necessaries; and though there was no express contract on his part to pay for these necessaries, and, if the evidence was insufficient to justify the inference of a presumption on the part of the deceased to pay for the services rendered, still the judgment of the district court was right. (*Reando v. Mosplay*, 2 S. W. Rep. [Mo.], 405.) The judgment of the district court in favor of Mrs. Mills is affirmed.

2. The district court by its judgment awarded Anna Rice a claim against the estate in the sum of $1,686.50. Her contention seems to have been that the estate was indebted to her for various sums of money which she had loaned the deceased in his lifetime, or which had come into his hands for her use, and it was for these sums of money and interest thereon that she based her claim. It is evident that the award made by the district court consists of an item of $500 and an item of $555.33, and interest on those items. No evidence was given or offered on the trial of any other items embraced in the claim of Anna Rice, and our consideration of the case

will be directed entirely to the question whether the district court was right in allowing the amount of these two items and interest thereon. It is first insisted that the judgment is erroneous because not supported by sufficient evidence. The evidence is somewhat unsatisfactory, and, as is usual in this class of cases, very meager, but we think it sustains the finding of the court that the estate of the deceased was indebted to Miss Rice in the sum of the two items of $500 and $555.33, and interest thereon. This evidence tends to show that Anna Rice was the daughter of the deceased, and in March, 1883, had a brother living, named William A. Rice. On the 26th of this month William executed his promissory note, payable to the order of Anna, for $1,000, due one year after date. Early in the year 1884 William died intestate in the state of Missouri and his widow was appointed his administratrix. At the time of William's death the note to Anna remained unpaid, as also certain other notes which William owed his father. The notes belonging to Anna's father and the note belonging to herself were sent to Missouri by a messenger, with instructions to file them against the estate of William Rice. The notes were so filed against the estate of William Rice, but by mistake were all filed and allowed as notes of Anna's father. When the administratrix of William Rice was ready to settle she discovered this fact, and then caused Anna to indorse her own note to her father. The amount of Anna's note allowed against her brother's estate was $1,055.33, and on the 3d of October, 1884, $500 of this money was by William's administratrix placed to the credit of Anna's father in a bank at Monmouth, Illinois, with which he did business; and on the 10th of February, 1885, $555.33, being the remainder of Anna's note, was placed to her father's credit in the Monmouth bank, with her knowledge and consent. Anna and her father at that time resided in the state of Illinois and he was then transacting business. About September, 1887, Anna's father lost the use of his mental faculties and he was brought to

the state of Nebraska and cared for by his stepdaughter until his death in 1889. It seems, also, that Anna came with him to the state of Nebraska and remained here until his death. Anna made no request of her father during his life to repay her the money put into his account by the administratrix of his deceased son, William. No express agreement existed between them that he should repay this money, nor that he should pay interest upon it. No attempt was made by the estate to show that this money, or any part of it, had ever been repaid to Anna. It is inferable from the evidence that the $1,000 note given to Anna by her brother was money that his father had put in his hands or loaned to him, and which was intended for Anna as a share or a part of her father's estate. This evidence then shows that Anna possessed in her own right $1,055.33 of money; that this money, with her knowledge and consent, went into the hands of her father; but we do not think that the money of Anna went into her father's possession under such circumstances as to warrant the conclusion that it was a gift by Anna to her father. It was not money that she had earned when a minor, and to which by reason thereof he might have been entitled; nor was it money which she had given him to be used for the support of himself and the family. Technically speaking, the father did not hold this money as bailee, and perhaps he was not a trustee of an express trust. The placing of this money in the father's possession by Anna was in the nature of a gratuitous loan to him; a "*commodatum*," as it is sometimes called.

3. A second argument is that the claim of Anna for this money was barred by the statute of limitations. We will not consider this point, because not made in the court below. Contestants in the district court, neither by demurrer nor answer, raised any question as to the statute of limitations, nor did they object to the introduction of evidence in support of claims upon that ground. The statute of limitations is a meritorious de-

fense, but it is one that may be waived, and if it is not insisted upon in some manner in the trial court it will not be considered here for the first time. (*Scroggin v. National Lumber Co.*, 41 Neb., 195, and cases there cited.)

4. A final contention is that the amount of recovery permitted by the court is too large. We think this contention correct. The court allowed the two items mentioned above, with interest on the same from the date that the money went into the hands of the decedent. We think this was wrong. This money being in the hands of Anna's father with her knowledge and consent, she having loaned it to him gratuitously,—that is, without any agreement upon his part to pay interest for the use of it,—it was payable to her only on demand. The first and only demand she ever made for this money was when she filed her claim against the estate for it on the 12th day of March, 1890, and from that date, we think, the interest should have been computed. (*Duncan v. Magette*, 25 Tex., 245; *Morse v. Rice*, 36 Neb., 212.) The judgment is accordingly $385.02 too large. Miss Rice will have permission to remit that amount from the judgment within thirty days, and if she does so the judgment of the district court in her favor for $1,301.48 will be affirmed; the costs of this proceeding in this court to be taxed to Anna Rice.

JUDGMENT ACCORDINGLY.

UNION PACIFIC RAILROAD COMPANY V. PATRICK DOYLE.

FILED FEBRUARY 3, 1897. No. 7070.

1. **Master and Servant**: VICE-PRINCIPAL: RAILROAD COMPANIES: INJURY TO EMPLOYE. The defendant in error was a section hand in the employ of the railway company. He and others were hired by one Cochran, a section boss in the employ of the railway company, and they were under his control and direction while working on their section of the railway, and Cochran had authority to discharge the men hired by him. Cochran and his section men were

put to work on a gravel train of the railway company. This gravel train, the crew thereof, and all the men working thereon, including Cochran and his section men, while at work with the gravel train, were under the control, direction, and subject to the orders of a foreman named Forrest. Forrest was not invested with authority to hire or discharge the defendant in error. The defendant in error, while working on this gravel train, was injured, as he alleged, through the negligence of an order given by Forrest, and sued the railway company for damages. *Held*, That as to the defendant in error, Forrest was not a fellow-servant, but a vice-principal.

2. ———: ———. Whether one of several employes of the same master is a vice-principal as to his co-employes, or whether all are fellow-servants, is not always a question of fact, nor always a question of law. Generally it is a mixed question of law and fact, and to be determined in any case by the particular facts and circumstances in evidence in the case in which it is presented.

3. ———: ———. The fact that one employe is vested with authority to hire and discharge a co-employe is not conclusive evidence that as to such co-employe he is a vice-principal; nor does it follow that one employe is not a vice-principal as to his co-employes because not vested with the authority to hire and discharge them.

4. ———: ———: EVIDENCE. The most satisfactory evidence that one is, as to his co-employes, a vice-principal is that his co-employes are under his supervision, his control, and subject to his orders and directions.

5. ———: ———: ———. Evidence examined, and *held* (1) to sustain the finding of the jury that the negligence of the defendant in error was not the proximate cause of his injury; (2) not to sustain the finding of the jury that the negligence of the railway company was the proximate cause of the defendant in error's injury.

ERROR from the district court of Deuel county. Tried below before HOLCOMB, J. *Reversed.*

See opinion for references to cases.

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

John R. Brotherton and *McClanahan & Halligan, contra.*

RAGAN, C.

Patrick Doyle brought this suit in the district court of Deuel county against the Union Pacific Railway Com-

pany (hereinafter called the "railway company") for damages which he alleged he had sustained by reason of the negligence of the railway company. Doyle had a verdict and judgment and the railway company brings the same here for review on error.

1. We have carefully examined the complaints made by the railway company as to the action of the district court in permitting certain questions to be propounded to and answered by its witnesses on their cross-examination, and have reached the conclusion that the court did not err in that respect. It would subserve no useful purpose to set out these questions in this opinion.

2. At the time the accident sued for herein occurred, and before that time, Doyle was a section hand in the employ of the railway company. He and a number of other men were employed by one Cochran, who was what is called a section foreman or boss in the employ of the railway company. All these men were hired by Cochran, the section boss, were subject to discharge by him, and were under his direction and control while engaged in working upon their section of the railway. At this time the railway company had a gravel or work train on its road hauling earth and gravel and placing them on the track. Cochran and his gang of men were put at work on this train, and the train crew and some other laborers of the railway company on the train, and Cochran and all his men, while working on the gravel train were under the control, direction, and supervision of a foreman named Forrest, but the latter had no authority to hire Doyle nor to discharge him. The railway company complains because the district court refused to instruct the jury to the effect that the facts above narrated made Forrest and Doyle fellow-servants. Whether one of several employes of the same master is a vice-principal as to his co-employes, or whether all are fellow-servants, is not always a question of law nor always a question of fact. Generally it is a mixed question of law and fact, and, as was said in *Union P. R. Co. v. Erickson*, 41 Neb., 1,

we are not prepared to lay down any set rule as a test for determining when two or more employes are fellow-servants or one of them a vice-principal. The relationship existing between the employes of a common master is to be determined by the particular facts and circumstances in evidence in the case in which it is presented.

In *Chicago, St. P., M. & O. R. Co. v. Lundstrom*, 16 Neb., 254, Lundstrom was a day laborer in the employ of the railroad company and was one of a number of men employed on and about a construction train. This train and its crew were engaged in the business of clearing snow from the railway track. The train crew and all the men, including Lundstrom, engaged in working with the construction train were under the direction and subject to the control and orders of the conductor of that train. Lundstrom was injured by obeying an order of the conductor, the giving of which, he alleged, was negligence, and this court held that the relation existing between Lundstrom and the conductor of the train was not that of fellow-servants of a common master, but that as to Lundstrom the conductor was a vice-principal. The court said that the conductor represented the railway company, with all its authority and power.

In *Burlington & M. R. R. Co. v. Crockett*, 19 Neb., 138, the husband of the administratrix was boss or foreman of a gang of trackmen in the employ of the railroad company, and with his men was put to work on a gravel train hauling gravel and earth for repairing and strengthening the railway track. The gravel train and the section foreman and his men were all under the control and direction of the conductor of the gravel train. Crockett was killed by obeying an order of the conductor, which, it was alleged, was negligently given, and the court held that the conductor of the train and Crockett, the boss of the section gang, were not fellow-servants, but that as to Crockett the conductor of the train was a vice-principal.

In *Sioux City & P. R. Co. v. Smith*, 22 Neb., 775, Smith

was an employe of the railway company and engaged in the business of repairing bridges, water tanks, and telegraph lines. He and a number of other men were under the charge of a foreman named King. King and his men had possession of a hand car, which they used to ride on from their boarding place to the work, and after the day's work to ride back on to their boarding house. One evening after their work was finished King and his men got aboard this hand car for the purpose of going to their boarding house, and by the direction of King the car was pushed up to the rear of the caboose of a freight train and some of the men held to the rear car of the freight train, and thus the hand car was carried forward on the track as rapidly as the freight train proceeded. The freight train ran on a curve and King gave an order to his men to let go the freight train, but Smith did not hear this order and held on to the way car in front. King then applied the brake to the hand car, which caused it to instantaneously stop, and Smith was thrown off the hand car and injured. He sued the railway company for damages, alleging that the act of King in applying the brake to the hand car caused his injury, and that such act was negligence. The railway company insisted that Smith and King were fellow-servants, but the court held that King was a vice-principal.

In *Chicago, B. & Q. R. Co. v. Sullivan*, 27 Neb., 673, a man named McCarty was a car repairer for the railroad company. He gave notice to the company that he intended to quit at a day named in the future, and thereupon the company employed Sullivan to take his place and put Sullivan to work under McCarty's orders and directions, so that he might learn the duties of a car repairer before McCarty's time expired. Sullivan went in between or under some cars standing on a track at Falls City to make some repairs at the direction of McCarty, and while there at work a train backed up against the cars under which Sullivan was at work and injured him. He sued the company for damages, alleging that his in-

jury was the result of obeying a direction of McCarty's, and that such direction was negligently given. This court reversed the judgment because of an instruction given by the trial court, but said that the evidence quoted above constituted McCarty a vice-principal as to Sullivan.

It is to be observed that in each of these cases the employe was held to be a vice-principal because of the fact that he had the control, supervision, and direction of the man injured; and the latter was subject to and bound to obey the orders of the party held to be a vice-principal. These cases control the question under consideration. Doyle was under the control and direction and subject to the orders of Forrest; it was his duty to obey whatever order or direction Forrest might give; Forrest and Doyle were, therefore, not fellow-servants.

Palmer v. Michigan C. R. Co., 53 N. W. Rep. [Mich.], 397, is strikingly like the case at bar. In that case Palmer was a section hand on the Michigan Central railroad; had been employed by one Cavanaugh, who was a section foreman on said road. Cavanaugh and his men, including Palmer, were put to work loading steel rails on a moving train of flat cars owned by the railroad company. This train of cars, its crew, and Cavanaugh and his men, while engaged in loading these rails, were all under the direction of the assistant roadmaster. Palmer was injured, as he alleged, through the negligence of the assistant roadmaster, and the railway company contended that Palmer and the roadmaster were fellow-servants; but the court held that the assistant roadmaster was a vice-principal as to Palmer. The court said: "It is too clear to admit of argument that the assistant roadmaster had the exclusive, unconditional control of all the men engaged upon this work at the time of the accident. He had charge of and directed the method of its performance, and while it does not appear that he personally had anything to do with employing plaintiff in the first instance, yet his authority was so great that at least while engaged in this particular work he even had control

and direction over the section foreman." To the same effect see *Bloyd v. St. Louis & S. F. R. Co.*, 58 Ark., 66.

In *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S., 377, the supreme court of the United States held that a conductor of a railroad train, who has the right to command the movements of the train and to control the persons employed upon it, represents the company while performing those duties and does not bear the relation of fellow-servant to the engineer and other employes of the corporation on the train. The court said: The conductor of a railway train, who commands its movements, directs when it shall start, at what stations it shall stop, at what speed it shall run, and has the general management of it and control over the persons employed upon it, represents the company, and, therefore, that for injuries resulting from his negligent acts the company is responsible. If such a conductor does not represent the company, then the train is operated without any representative of its owner.

It is insisted in argument here that because Forrest was not invested with authority to hire and to discharge Doyle, that, therefore, he cannot be considered a vice-principal as to Doyle. It is to be observed that in none of the cases cited was an employe held a vice-principal as to his co-employes because of the fact that he had authority to hire or discharge such employes. All the cases cited make the employe a vice-principal because of his power of direction and control over his co-employes. If an employe be vested with authority to hire and discharge, that is evidence which tends pretty strongly to show that as to such employe he is a vice-principal, but we do not think it would be conclusive evidence that such relation existed; nor does it follow that one employe is not a vice-principal as to his co-employes because he is not vested with authority to hire and discharge them. The most satisfactory evidence that one is, as to his co-employes, a vice-principal, is that his co-employes are

under his supervision, his control, subject to his orders and direction.

But it is insisted that the supreme court of the United States has overruled *Chicago, M. & St. P. R. Co. v. Ross, supra*, and that, therefore, that case should no longer be followed. We have not been able to find any case in which the supreme court of the United States has expressly said that it overruled, or intended to overrule, the Ross case. In *Baltimore & O. R. Co. v. Baugh*, 149 U. S., 368, an engineer and fireman were running on a locomotive not attached to any train and not in charge of any other employe of the road. A rule of the company provided that when an engine was running without a conductor that the engineer should be regarded as conductor and acted accordingly. The fireman was injured through the negligence of the engineer and sued the company for damages; but the court held, distinguishing the Ross case, that the engineer and fireman were fellow-servants; that the engineer was not as to his fireman a vice-principal. It seems to us that the decisions in the Ross case and the Baugh case cannot be reconciled.

In *Northern P. R. Co. v. Peterson*, 51 Fed. Rep., 182, 16 Sup. Ct. Rep., 843, Peterson was a section hand in the employ of the railroad company and was at a station called Old Superior, on the railroad. Work became scarce and he applied to the roadmaster for employment. The latter gave him a pass to a station on the road named Poplar in order that he might go there and obtain work on the road. At that station was a number of men under a foreman named Holverson. These men were called an "extra gang," and their duty was to go over some two or three sections of the road and assist the regular section gang in keeping the track in repair. Holverson employed Peterson in his "extra gang." All the men under Holverson were hired by him, were subject to his orders, and he had authority to discharge them. While Peterson was at work on the track with other section men, all under the control and direction of Holverson,

he was injured, as he alleged, through Holverson's negligence. He sued the railroad company for damages; it defended on the ground that Holverson and Peterson were fellow-servants. But the court of appeals held that Holverson as to Peterson was a vice-principal. The supreme court of the United States reversed this judgment and held that Holverson and Peterson were fellow-servants. Mr. Chief Justice Fuller and Justices Field and Harlan dissented, and it is to be regretted that they did not file dissenting opinions. The court based its decision upon the ground that Holverson was not a "chief" of a separate and distinct department or branch of the business of the railroad company. This decision in effect not only overrules the Ross case but practically destroys the doctrine of vice-principal in railroad cases. The logical effect of this decision is that all section men, track repairers, section bosses, bridge repairers and their bosses, construction trains, work trains, and their conductors and foremen, are fellow-servants; and the road-master, and he only, as to them is a vice-principal, because he is the "chief in charge of that branch or department of the railroad company's business," namely, the care and repair of the track. We do not assume to criticise this opinion but we are at liberty to point out the result which must flow from it if it shall stand. The opinion attempts a classification for the operation of a railroad that no general manager would countenance for a moment. The managers of railroad corporations have not made the trackmen and the section men, the foremen of gravel and construction trains and the crews thereof, fellow-servants. They have divided their roads into sections, and on each section they have placed a number of men to repair and care for the track, and over these men they have placed a superintendent, a boss, or foreman, with authority to hire and to discharge these men, with supervision and control over them. This boss is not required to labor and is paid a higher wage than a common laborer; and to the road-

master, and to him alone, is this boss responsible. They have placed upon their roads certain construction and gravel trains. On these trains there is a conductor, an engineer, a fireman, a brakeman, and with these trains go a number of laborers, each gang under immediate charge of one or more bosses, and all these men, including the train crew, the bosses, and the common laborers, are placed in charge of a foreman who superintends, manages, controls, and directs when, how, and where the work shall be done, and this foreman is not made by the rules of the railroad company a fellow-servant with the men under his direction, but he is responsible for his conduct to the roadmaster.

We repeat that we have not examined these opinions of the supreme court of the United States for the purpose of criticism. For our part we are satisfied to follow the Ross case. The decisions of our own court in the 16, 19, 22, and 27 Neb. are all based upon the principles which control the Ross case, and whether it be considered as distinguished or overruled by the tribunal which rendered it, we still think it is law; and we are not prepared to adopt the doctrine that an employe, to become a vice-principal as to his co-employe, must be the "chief of a separate and distinct department or branch of the business of his employer." The court did not err in refusing to instruct the jury that Forrest and Doyle were fellow-servants.

3. Another argument is that the finding of the jury that Doyle's injury was not the result of his own contributory negligence is not sustained by sufficient evidence. The evidence shows that this gravel train consisted of an engine and tender next to which was a tool car. These were equipped with an air brake. Following the tool car were twelve flat cars and an ordinary caboose, connected together by means of links and pins, the space, or slack, between any two cars being about two feet. The train was standing upon the track. Forrest, the foreman in charge, was standing on the ground north of the

train and north of a ditch on the north side of the track. The men had finished shoveling the dirt from the car next to the caboose, to the ground. Forrest then said to Doyle: "Come down and shovel this earth between the rails." Doyle prepared to obey the order by stepping from the flat car to the platform of the caboose; at that moment Doyle heard Forrest call to the engineer to pull up a car length. The bell rung, the whistle sounded, the train moved, Doyle standing on the platform either intending to alight from the car while in motion or to alight after it stopped. The train moved at a rate of speed not to exceed a mile and a half an hour. Without warning to Doyle, Forrest gave a signal to the engineer for an instantaneous stop of the engine. The order was obeyed. The engine stopped instantaneously. The caboose on which Doyle was standing struck against the car in front of it and Doyle was thrown against the brake and injured. The jury, by its verdict, has said that Doyle was not guilty of contributory negligence in standing upon the platform of the caboose as he did while the train was moving, and we think the evidence sustains that finding. It may have been evidence of negligence for Doyle to stand there. When the engine stopped Doyle may have heard the clashing together of the cars in time to have braced himself to prevent a fall. He may have taken such precaution to brace himself as he thought necessary to his protection. Under the circumstances we do not think his not going into the caboose and taking a seat was conclusive evidence of negligence on his part. But whether Doyle's conduct, under the circumstances, was negligence upon his part was for the jury, and we cannot say that they reached a wrong conclusion in finding that he was in the exercise of ordinary care. In *Jeffrey v. Keokuk & D. R. Co.*, 9 N. W. Rep. [Ia.], 884, Jeffrey was employed as a shoveler upon a construction train. This train was equipped very much like the one in the case at bar. It had an engine, a number of flat cars, and a caboose. In the caboose the men

kept their dinner pails and coats. It was the custom of the men, when the work was finished and the train started in to the station, while the train was in motion, to put their tools into a tool box on a car on the train and to get their coats and dinner pails and be ready to leave the train immediately on its reaching the station. The construction train started to the station. The conductor was on the platform of the caboose and Jeffrey on the rear of the flat car in front thereof. As the train neared the station Jeffrey, having deposited his tools in the tool box, started back to the caboose to get his coat, and as he reached the rear end of the car next the caboose, and while standing there, he saw the conductor pull the pin which coupled the caboose to the train and give the engineer a signal. The train started forward with an accelerated speed. Jeffrey was thrown from the end of the car where he was standing, to the track, and run over by the caboose. The jury found that Jeffrey was in the exercise of ordinary care when he was injured and the supreme court of Iowa, reviewing the evidence, held that Jeffrey had the right to assume that the speed of the train would continue the same afterwards as before the caboose was uncoupled, and that he was not bound to suppose because he had seen the signal given to the engineer and seen the caboose uncoupled, that the car on which he was standing would be pulled forward with an "unusual jerk." In that case five seconds only intervened between the time when Jeffrey saw the signal and the occurrence of the jerk which threw him from the car on which he was standing.

4. But is there any evidence here to show that Doyle's injury resulted from the negligence of this railway company, or any one connected with it? Doyle knew that the train was in motion. He knew that it was being moved up about a car's length so that he and others might get off and shovel the earth between the rails, and he was charged with notice that when the car on which he stood had moved up about a car's length that it would

stop. The evidence that Forrest called out to the engineer to pull up a car's length does not justify a conclusion of negligence. The fact that the train moved at a mile and a half an hour does not justify a conclusion of negligence. The fact that the train stopped instantaneously does not justify a conclusion of negligence. Had Doyle and his co-laborers been at work shoveling earth from this train and Forrest had given a signal to start it without any warning thereof that would have been evidence of negligence. Had the train been in motion and these men shoveling the earth from the train and Forrest had given a signal to stop the train without any warning, that would have been evidence of negligence; but these are not the facts in this case. The work had been done. The order had been openly and notoriously given and heard by Doyle for the train to pull up about a car's length. The whistle had been sounded and the bell rung and Doyle knew not only that the train was moving but he knew that it was to move about a car's length, and when it had gone about that distance he knew that it was to stop. The negligence charged to the railway company here is not the starting of this train; not the speed at which it was moving, but its being stopped instantaneously without warning to Doyle. He knew when he first reached the platform of the car, and while he was standing there he knew that the train was being pulled up to a particular place and was likely to stop the moment it reached it. It is not for us to say whether Doyle was guilty of contributory negligence in standing on the platform as he did while the train was in motion. It is not for us to say that he was guilty of negligence in not watching and bracing himself and preparing for the stopping of the train. All that was for the jury and they have said that he was not guilty of contributory negligence under the circumstances, and we have no disposition to interfere with that. But the fact remains that if he was injured such injury was not the result of any negligent act or omission of this railway

company or any of its servants. Doyle's theory is that the train was moving very rapidly and that it was stopped instantaneously without notice to him, which threw him against the brake and hurt him. With all due respect to the jury, one of two things is not true. Either that train was not moving rapidly or it was not stopped instantaneously. A heavy locomotive engine, if moving rapidly, cannot be stopped instantaneously by an air break or any other appliance known. If it was not stopped instantaneously then there was no violent jamming of the caboose against the car in front of it, and to sanction the verdict of the jury finding both ways on that proposition is to judicially determine that the laws of nature which control the universe have no application in Nebraska. The judgment of the district court is reversed.

REVERSED AND REMANDED.

CHARLES O. LOBECK V. ELBERT T. DUKE.

FILED FEBRUARY 3, 1897. No. 7020.

1. **Guaranty**: SALE OF STOCK IN CORPORATION: TERMS: CONSTRUCTION. L. sold stock in a corporation to D., guarantying that it could be sold for $3,000 within one year, D. agreeing not to sell within a year without L.'s consent for less than $3,000, and that in case of sale without such consent D. should lose the difference between $3,000 and the amount of the sale, D. agreeing to use due diligence in procuring a larger price. The stock was not sold within a year and was thereafter sold for much less than $3,000. *Held*, (1) There having been evidence tending to show exchanges of property for other stock in the same corporation during the year, it was proper to instruct the jury that the agreement contemplated a sale for money, and that D. was not required to make any efforts to exchange it for other property; (2) whether or not D. had been negligent in failing to make a sale within the year was a question of fact, and it was, therefore, not erroneous to refuse to instruct the jury that a failure to make certain specified efforts constituted negligence; (3) that D. was not required by the terms of the contract to submit to L. for acceptance or rejection all offers received by D. during the year.

2. Action on Guaranty: RECOVERY BY PLAINTIFF. Evidence *held* to sustain the verdict, and instructions not to be conflicting or prejudicial to defendant.

ERROR from the district court of Douglas county. Tried below before HOPEWELL, J. *Affirmed.*

James W. Carr, for plaintiff in error.

E. Wakeley and *A. C. Wakeley, contra.*

IRVINE, C.

On the 5th of May, 1891, Lobeck, in exchange for a stock of hardware, transferred to Duke, as part of the consideration, stock in a corporation known as the Omaha Hardware Company, of the par value of $5,000. At the same time Lobeck executed to Duke the following instrument:

"For value received, I hereby guarantee that the shares of stock this day assigned to Elbert T. Duke, known and designated as numbers 78, 79, 80, 81, and 82 (ten shares each), inclusive, of the Omaha Hardware Company, can be sold at and for the sum of $3,000 within one year from the date hereof. The said E. T. Duke binding himself not to sell the same within said year without my consent, in writing, for less than $3,000, and in the event of such sale without such written consent he shall lose the difference between the amount of such sale and the said $3,000, and in the event of a failure to sell the same for at least $3,000 by the end of said year, I hereby agree to make good any difference arising from the sale thereof, the said Duke hereby agreeing to use due diligence in procuring a larger price for the same.

"Omaha, May 5, 1891. C. O. LOBECK.

"Witness:

"JAS. W. CARR."

Duke not having sold the stock within a year, proceeded, after the expiration of that time, to offer it at public auction, and thereby sold it for $750. He then

brought this action against Lobeck on the written guaranty for the difference between $3,000 and the amount realized on the sale of the stock. It is claimed that the sale was not *bona fide*, but under the instruction as to the measure of damages and the finding of the jury this issue becomes immaterial. Duke had judgment and Lobeck prosecutes error.

At the request of the plaintiff the court instructed the jury that "the agreement between the parties had reference to a sale of the stock for money, and Mr. Duke was not required to use due diligence or make any efforts to exchange the stock for property, and he would have no right to make any trade of that character without making some new arrangement with Lobeck." It is claimed that this instruction is erroneous, as conflicting with other instructions given, whereby the case was submitted to the jury on the theory that the plaintiff, in order to recover, was bound to prove that he had used due diligence within the year to effect a sale. For the purpose of ascertaining the value of the stock and the practicability of making a sale during the year, considerable testimony had been introduced as to actual transactions between other parties, and there was evidence tending to show that some stock had been transferred within the year at an agreed valuation sufficient to meet the terms of this guaranty, but that such transactions were in the way of exchanges for real estate and other property, and were not cash sales. It is a well known fact that in exchanging one species of property for another the parties to the exchange are not unlikely to place a valuation upon their respective holdings beyond their cash value, and beyond what the parties themselves consider to be their value. We think, therefore, this instruction, in view of the evidence, was a proper caution to the jury, and in nowise conflicted with the other instructions requiring due diligence to procure an actual sale.

The court also, at plaintiff's request, instructed that "due diligence in trying to dispose of the stock did not

require Duke to make efforts for that purpose beyond such as in the judgment of reasonable men of experience in such matters would have been adopted to that end." It is claimed that this instruction contradicts and renders nugatory an instruction given at the request of the defendant, to the effect that due diligence means that the plaintiff must be active in his endeavors to dispose of the stock, and must use all means at his command and which a reasonably prudent business man would use. We are unable to perceive the conflict. The two instructions together amount to this: that the plaintiff must be active in his endeavors and must use all means which a reasonably prudent business man would use, but is not required to make any effort which would not be made by a reasonable man of experience in such matters. If the court in the instruction complained of had said "reasonably prudent business man," instead of "reasonable man of experience in such matters," the instructions would be alike in their effect, one being positive and the other negative. The only qualification peculiar to the instruction complained of is its requiring such efforts to be made as would be made by a person experienced in such matters. This rather added strictness to the rule laid down, and thereby operated more favorably to the defendant than the instruction requested by him standing alone.

The court refused an instruction requested by the defendant to the effect that if the plaintiff failed to list his stock in the hands of those agencies which made it a business to deal for others in such matters, or to properly advertise the same in the usual mediums therefor, such failure would be negligence on his part. This instruction was properly refused. The court had correctly defined the rule of diligence and what that rule required, and whether or not the plaintiff had satisfied it were questions of fact under the circumstances of this particular case. They were not questions of law. Therefore the court properly refused to enter upon the domain of the jury.

The court also refused to instruct that it was the plaint-

iff's duty to submit any offers he might receive to the defendant for his approval. It is somewhat doubtful whether the evidence would permit a finding that any *bona fide* offer was made to the plaintiff during the year. But, however that may be, we do not think the contract placed any such burden on the plaintiff. It provided that if he sold at less than $3,000 during the year without defendant's consent he must bear the loss; but it did not require him to make any sale for less, nor did it give to the defendant any option to require any particular sale to be made. The stock was the plaintiff's, for sale according to his own judgment, with the sole restriction that the guaranty could not be enforced in case a sale was made without Lobeck's consent at less than $3,000 during the year.

Finally, it is claimed that the evidence does not sustain the verdict. It would be useless to review the evidence. We are satisfied that it was sufficient.

AFFIRMED.

JOHN STEEN, APPELLEE, V. THOMAS STRETCH ET AL., APPELLANTS.

FILED FEBRUARY 3, 1897. No. 7043.

1. **Usury.** A was indebted to B in a certain sum and to C in a further sum. The contract with C was usurious. A obtained a larger loan from B and from its proceeds discharged both debts. C acted as the agent of B in examining the title and drawing the instruments, and in paying the money; but C's debt was entirely separate from B's, and B was not aware that the additional money borrowed from him was to be used in satisfying C's usurious loan. *Held*, That the last transaction was not tainted by the usury inherent in the debt to C.

2. ———: BANK DISCOUNT. Under our statute any rate of interest agreed upon not exceeding ten per cent per annum is valid, and interest, if the parties so agree, may be taken yearly or for any shorter period, or in advance. *Held*, That under this statute it is not usurious to compute the interest according to the process known as "bank discount;" that is, to deduct interest at the rate

of ten per cent, if that rate be agreed upon, calculated on the face of the note or other evidence of indebtedness, and to pay the borrower the difference.

3. Mortgages: CONSIDERATION. A mortgage given to secure the guarantor of the mortgagor's note is not void for want of consideration, although given after the debt accrued without new consideration, and given before the surety paid the debt.

4. ———: ———: CONSTRUCTIVE NOTICE. A mortgage was executed to A for the purpose of indemnifying him against loss on a note of the mortgagor, the payment of which he had guarantied. The mortgage on its face was conditioned absolutely to pay the note referred to, and did not disclose the relation of the parties as principal and surety. *Held*, That a subsequent incumbrancer was charged with notice by the record of A's mortgage, and was not entitled to priority because it did not truly state its conditions.

APPEAL from the district court of Saunders county. Heard below before WHEELER, J. *Reversed in part.*

M. B. Reese, for appellant Sanford.

Simpson & Sornborger, for appellants May and Stretch.

E. F. Gray and *D. B. Carey*, for appellee Steen.

O. C. Tarpenning and *Guttery & Silver*, for other appellees.

IRVINE, C.

Steen instituted this action for the purpose of foreclosing a mortgage executed by Thomas Stretch and wife on land in Saunders county. A number of persons were made defendants and a decree was rendered establishing the several amounts and relative priority of the various liens and awarding foreclosure. There is no controversy as to some of these liens and it is unnecessary, therefore, to state their nature or the facts relating thereto. Of the contested liens priority was awarded that of Whitfield Sanford. He claimed under a mortgage to secure a note of $3,800 executed by Stretch. Stretch urged in defense that the transaction was usurious. The court so found and awarded Sanford merely the amount by

him advanced, without interest. From this part of the decree Sanford appeals. The next lien was awarded the plaintiff Steen, on the mortgage first referred to. The following was awarded James C. May on a later mortgage. Stretch defended against Steen's mortgage on the ground that it was without consideration. Stretch appeals from that part of the decree awarding Steen a lien. May also appeals from this part of the decree, claiming that the court erred in giving the Steen mortgage priority over his. We shall treat these three appeals in their order.

There is no substantial conflict in the evidence. The facts surrounding the Sanford claim are, in brief, as follows: Sanford held two notes of Stretch, one for $1,500, the other for $1,100. Both notes bore interest at the rate of ten per cent per annum. The interest on the $1,100 note was made payable in advance and was represented by coupons. Stretch was also indebted to C. W. Sanford, the son of Whitfield Sanford, on two notes, one for $313 the other for $418. Both of these notes were usurious. C. W. Sanford in many matters acted as agent for Whitfield Sanford, his father, but the evidence is uncontradicted that with regard to Stretch their transactions were entirely separate, although a portion of Stretch's business with Whitfield Sanford was transacted through C. W. Sanford's agency. Stretch applied for a further loan. Whitfield Sanford inspected the property, and finding it in his opinion to afford sufficient security, agreed to make a loan of $3,800 thereon, the two notes which he already held to be paid from the loan. He directed C. W. Sanford to make the necessary examination and draw the papers. Accordingly the $3,800 note and mortgage were drawn by C. W. Sanford and executed by Stretch. The note was made for five years, bearing ten per cent interest per annum. One year's interest was deducted at the time of making the note, and four coupon notes were executed payable in one, two, three, and four years respectively, each for $380, and each providing that

if not paid at maturity it should itself draw interest at ten per cent from maturity. At that time there was due on the two notes already held by Whitfield Sanford, $2,763.40. C. W. Sanford made a charge against Stretch of $6 for making and examining an abstract of title and drawing the instruments. He surrendered the two Whitfield Sanford notes which were in his possession for collection and applied the remainder of the $3,800 by agreement with Stretch upon the notes held by C. W. Sanford. The account was made up as follows:

Due Whitfield Sanford on his two notes.....	$2,763 40
One year's interest thereon.....	380 00
Paid C. W. Sanford for abstract, etc.....	6 00
Paid C. W. Sanford on $313.00 note.....	352 80
Paid C. W. Sanford on $418.00 note.....	297 80
Total	$3,800 00

There is evidence tending to show that in the computation of the sum due on the $1,100 note interest was computed on delinquent interest, and, as already stated, the coupons attached to the $3,800 note on their face provide for the payment of interest after maturity. This transaction Stretch claims, and the district court held, was usurious. It would seem at first that this claim would be best supported by the fact that interest had been reserved on delinquent interest already computed at the highest rate permitted by law. It seems to be the doctrine of this court that interest may not be reserved upon delinquent interest where the amount would thereby be greater than simple interest at the highest legal rate. But while the court will not allow such compounding of interest, it does not render the transaction usurious. (*Hager v. Blake*, 16 Neb., 12; *Mathews v. Toogood*, 23 Neb., 536, 25 Neb., 99; *Richardson v. Campbell*, 27 Neb., 644, 34 Neb., 181; *Rose v. Munford*, 36 Neb., 148.) Indeed, we understand counsel for Stretch to concede this point. They state in their brief that they do not contend, first, that an agreement to take ten per cent annu-

ally in advance is usurious; or, second, an agreement to pay interest on overdue interest; or, third, to pay the lender reasonably for abstracting and drawing papers; or, fourth, an agreement to pay interest on interest after maturity.

The brief abounds in mathematics and subtle reasoning; but we gather that Stretch's contention is twofold: First, that C. W. Sanford being the agent of Whitfield Sanford, the $3,800 note was in effect a renewal of the two notes of C. W. Sanford, and that these being usurious, the whole transaction was tainted; and, second, that while the statute permits taking interest in advance, such interest must be computed on the amount actually paid over to the borrower and not by making a note which by deducting from its face one year's interest on the face thereof, yields the borrower, presently, the amount desired.

As to the first argument we do not think it is borne out by the record. While C. W. Sanford, in many matters, and to a certain extent in this, acted as the agent of his father, Whitfield Sanford, it still appears, by the undisputed evidence, that the two notes to C. W. Sanford, which are conceded to have been usurious, were his own property. They represented a debt from Stretch to him and not to his father. They were paid and discharged out of the proceeds of the loan, the elder Sanford not even knowing how the surplus after discharging his own notes was used. It is inferable from the testimony that no money was actually paid to Stretch; that C. W. Sanford kept a separate bank account embracing his transactions with his father, and drew checks thereon; that he kept a running account of transactions between his father and himself, and that the payment to him was by way of an exchange of credits on this account. The fact remains, however, that Stretch obtained the benefit of this money; that Whitfield Sanford became in no manner a party to the usurious loans, and that the transaction was not essentially different from what it would

have been had Whitfield Sanford or a stranger lent Stretch money, paying it over to him and taking his note, and Stretch had, with that money, paid outstanding notes usurious in their character. Such a transaction would not taint the new loan with usury.

The second argument resolves itself to this: Where interest is reserved at ten per cent, is it lawful to compute that interest on the amount to be paid at maturity, deduct the interest so computed from that amount, and pay the borrower the difference? In other words, does our statute forbid what is known as "bank discount?" The statute is as follows: "Any rate of interest which may be agreed upon, not exceeding ten dollars per year upon one hundred dollars, shall be valid upon any loan or forbearance of money, goods, or things in action; which rate of interest so agreed upon, may be taken yearly or for any shorter period, or in advance, if so expressly agreed. (Compiled Statutes, ch. 44, sec. 1.) This statute was adopted in 1879. By the established custom of bankers existing when the statute was adopted, and emphatically impressed on the mind of every schoolboy in his arithmetic under the title of "bank discount," a loan of $100 for one year meant the making of a note payable in one year without interest, the deducting of one year's interest at the rate agreed from $100, and the payment of the difference to the borrower. The statute was passed undoubtedly with a view to that custom, and we think that the provision permitting the taking of interest in advance had reference thereto. The statute, therefore, did not invalidate such a transaction as we have before us. We can find no evidence, therefore, tending to support the plea of usury in the Sanford mortgage, and the decree must in that respect be reversed.

We next direct our attention to the appeal of Stretch against the decree on behalf of Steen. The pleadings allege, and the evidence shows, that Stretch had executed a note to Steen for $1,005, due in January, 1889. Soon after the execution of this note Steen sold it to

Lyle & Collins, guarantying payment. It was not paid at maturity, and thereafter Stretch and wife executed a mortgage to Steen to secure the note, on Steen's agreement, as averred in his cross-petition, to forbear proceedings for six months, and, as disclosed by the evidence, to forbear "until next fall." Thereafter judgment was recovered on the note against both Stretch and Steen. Steen paid the judgment and thereafter brought this action. Stretch contends that the mortgage so executed was without consideration, chiefly on the ground that Steen had no power to prevent proceedings against the maker, and that his agreement to extend the time of payment "until fall" was too indefinite for enforcement. We need not inquire very closely into these questions. While Steen was not at the time the mortgage was executed the holder of the note, he was obligated for its payment. As between him and the maker, he occupied the position of a surety. We have never heard that a mortgage executed for the indemnification of a surety was without consideration; nor do we think that a new consideration is necessary to support a conveyance made to secure the payment of an existing debt. Questions may arise, and have arisen, as to the effect of such conveyances, between the grantee and other creditors or holders of intervening equities; but these are questions which do not go to the validity of the transaction as between the parties. Every assignment for the benefit of creditors is a conveyance of this character. A large proportion of the mortgages in fact executed have been executed solely to secure pre-existing debts. We are cited in support of this appeal to the case of *Kansas Mfg. Co. v. Gandy*, 11 Neb., 448. In that case it was held that a mortgage executed by a married woman on her separate estate to secure the pre-existing debt of her husband, was without consideration. While the language of the opinion is somewhat general, it is quite clear that the fact that the mortgage was by a stranger to the debt was the controlling consideration, and this seems to have been the interpretation placed on

the case in *Barnes v. Van Keuren*, 31 Neb., 165. On the other hand, our reports are so full of cases supporting mortgages whose sole purpose was the securing of a pre-existing debt, that it would be tedious and supererogatory to cite them.

The appellant May contends that even if the Steen mortgage be good as between the parties, it should be subordinated to his mortgage, which is later in time. In addition to the arguments against the Steen mortgage advanced by Stretch, May argues that the consideration of this mortgage was not truly expressed, and that for that reason its record did not charge him with notice of its nature. The condition of the Steen mortgage, as expressed, is the payment of the note for $1,005. The mortgage does not recite that the note had been transferred and that Steen's obligation was then that of a guarantor only. But the distinction is not substantial. The true condition was the indemnification of Steen. The liability could not be greater than that expressed in the mortgage. It turned out to be the same. It might have been less; but this would have operated in May's favor. There was no misrecital in the mortgage which made it appear as a less formidable incumbrance than it really was, and May could not have been misled to his disadvantage. Indeed, he does not claim that he was so misled in fact. No estoppel *in pais* was either pleaded or proved. There was no estoppel by deed in favor of May, and to hold the record of an instrument not in all respect accurately describing the real contract of the parties to be invalid and not to charge subsequent purchasers with notice, would be as disastrous in its consequences as it is unfounded in reason. It would displace all deeds where the exact consideration is not recited. It would displace every absolute deed by way of mortgage.

The decree is reversed as to Sanford and the cause remanded with instructions to take an account of the amount due him on the basis of a legal contract, not al-

lowing, however, interest on delinquent interest installments. In other respects the decree is affirmed.

JUDGMENT ACCORDINGLY.

OMAHA FIRE INSURANCE COMPANY V. PETER F. THOMPSON ET AL.

FILED FEBRUARY 3, 1897. No. 8137.

1. **Equity:** TRIAL OF ISSUE OF FACT: JURY. The power of a court of equity to obtain the verdict of a jury on any issue or issues is preserved by the Code, and in actions equitable in their nature the trial court may, in its discretion, impanel a jury and submit to its determination such issues of fact as it deems expedient.

2. ———: ———: VERDICT: JUDGMENT. When such a course is taken the verdict is at most a determination of the issues of fact submitted. The judgment need not strictly conform thereto, but the court may, on determining the other issues, enter such judgment as the whole case demands.

3. **Insurance:** MECHANIC'S LIEN. The filing of a claim for a mechanic's lien does not in itself establish such lien, even *prima facie*. It is merely the performance of a condition essential to consummate the lien.

4. ———: ———: EVIDENCE. Therefore, in an action on a policy of insurance, one of the defenses being that the insured had permitted the property to become incumbered, contrary to a provision in the policy, it was not error to exclude from evidence the record of a claim for a mechanic's lien, no facts being offered to establish the substantive facts creating such lien.

5. ———: CHATTEL MORTGAGES. A policy of insurance contained the following: "It is agreed that if any false statements are made in said application this policy shall be void; * * * or if the property be sold or transferred or incumbered, or upon the commencement of foreclosure proceedings; or in case any change shall take place in the title, possession, or interest of the assured in the above mentioned property; or if the assured shall not be the sole and unconditional owner in fee of said property; * * * then in each and every one of the above cases this policy shall be null and void." It did not appear that any application had been made or required, or that any representations had been made with regard to the title. *Held*, That the existence of a chattel mortgage on a

part of the property at the time the policy was written did not, under the clause quoted, avoid the policy.

6. **Chattel Mortgages.** A chattel mortgage in this state creates merely a lien, and does not pass title to the mortgagee. *Musser v. King*, 40 Neb., 892, followed.

7. **Insurance:** BILL OF SALE: CHANGE OF POSSESSION. The voluntary execution by the insured of a bill of sale of a portion of the property, without consideration, without delivery to the vendee, without the vendee's knowledge, without any prior contract, and without change in possession, does not create such a change in interest as to avoid the policy.

8. ———: ACCORD AND SATISFACTION. To an action on a policy of insurance the defendant pleaded that after the loss it had made a settlement with the insured, whereby it agreed to pay a certain sum in sixty days, and that, relying on such settlement, it had accepted orders of the insured in favor of third persons for a portion of the amount, and had admitted indebtedness in garnishment proceedings which resulted in a judgment against it for another portion, the aggregate amount assumed being less than the amount of the settlement. It was not alleged that these obligations had been paid. *Held*, That this neither operated as an accord and satisfaction, nor did it estop the plaintiff from rescinding the agreement on the ground of fraud.

9. ———: ———: BURDEN OF PROOF. To such answer the plaintiff replied denying the settlement pleaded, and then affirmatively alleging that he had agreed to accept the sum of money named on condition that it be paid in four days. *Held*, That under these pleadings the burden was on the defendant to establish the settlement as it alleged it to be.

10. **Damages:** PREJUDICE OF JURY. The mere fact that a verdict for $2,865.30 was $105 in excess of the amount recoverable is not sufficient to show that the jury was influenced by passion or prejudice.

11. **Insurance:** ATTORNEY'S FEE. Under Compiled Statutes, chapter 43, section 45, the court may, in an action on a policy covering both real and personal property, allow a reasonable attorney's fee, based on the amount recovered on account of the real property.

ERROR from the district court of Holt county. Tried below before KINKAID, J. *Affirmed.*

W. D. Oldham and *J. M. Easterling*, for plaintiff in error.

H. E. Murphy, *M. F. Harrington*, and *R. R. Dickson*, *contra.*

IRVINE, C.

This action was begun by Thompson against the Omaha Fire Insurance Company to recover on a policy of insurance covering certain buildings and also personal property, it being alleged that all of said property had been totally destroyed by fire. The insurance company answered admitting the issuing of the policy and alleging affirmative matters which may be grouped as stating, or attempting to state, three defenses: First, that, contrary to the provisions of the policy and while it was in force, the plaintiff permitted a mechanic's lien to accrue against the real estate, and that thereafter the plaintiff had executed and delivered to his wife a bill of sale of all the personal property. In short, these are allegations of a transfer and incumbrance of the property while the policy was in force. Second, that prior to the issuance of the policy the plaintiff had executed a chattel mortgage on a portion thereof. Third, that after the fire the loss had been settled and adjusted between the parties for $1,717, which the defendant agreed to pay within sixty days, and that, relying on such adjustment, the defendant had accepted two orders drawn by the plaintiff against the company for portions of the money, one for $825, the other for $292, and that still later, relying on the adjustment, the defendant having been summoned in garnishment, had admitted an indebtedness of $600 to the plaintiff and was adjudged to pay into court the sum of $129.80. This defense, if it be one, is, in short, either a plea of an adjustment or a plea of accord and partial satisfaction, by becoming obligated to third persons in reliance on the accord. The reply, after a general denial, and a special denial of the settlement pleaded, proceeded to aver that plaintiff had made an agreement with the defendant to settle the loss for $1,717, but upon condition that said sum of money should be paid immediately upon the return of the adjuster to Omaha, and within four days from the date of the agreement, and that the defendant

had failed to pay any portion thereof within the time fixed. Further, that plaintiff had been induced to enter into such agreement by certain representations, which were false. E. H. Hubbard intervened, and by way of cross-petition alleged an indebtedness from the plaintiff to himself of $825, the making of an order by the plaintiff upon the defendant for said sum, and its acceptance by the defendant. He prayed for judgment against the defendant for that sum. O. O. Snyder & Co. also intervened, alleging an indebtedness of $292 and an order and acceptance similar to that of Hubbard. The Sharpless Company intervened and pleaded a judgment against plaintiff, and a garnishment of the defendant and judgment in the garnishment proceedings for $129.80. The insurance company then filed an application whereby it asked that, because of the multiplicity of interests in dispute, the cause be determined by the court in the exercise of its equity jurisdiction. Instead, however, of proceeding in accordance with this application, a jury was impaneled and the court submitted to the determination of the jury the issues made between the plaintiff and the insurance company, reserving for its own determination the issues presented by the pleadings of the intervenors. The jury trial resulted in a verdict for the plaintiff for $2,865.30. The plaintiff remitted $105 from the verdict. The cause then coming on for hearing upon the untried issues, the court found in favor of the three intervenors, and accordingly entered judgment in favor of Hubbard for $825, in favor of Snyder & Co. for $292, in favor of the Sharpless Company for $129, and in favor of the plaintiff for the remainder of the verdict, after deducting the amount remitted. The insurance company brings the case here by petition in error.

The first question raised relates to the refusal of the court to try the cause without the intervention of a jury. This was not error. Assuming that by the several petitions of intervention, and by the nature of the answer of the insurance company, a case was finally presented

which, under the old procedure, would properly be brought in equity, still the trial of any or all the issues to a jury was a matter within the discretion of the trial court. While it has become elementary, it seems that it is impossible to too often remind the bar that by virtue of the Code the distinctions formerly existing between proceedings at law and in equity have been abolished. The constitutional guaranty of trial by jury (Constitution, art. 1, sec. 6) is that "The right of trial by jury shall remain inviolate." That is, the right was not extended by the constitution; it was merely preserved. On the other hand, it was not curtailed. By section 280 of the Code it is provided that "issues of fact arising in actions for the recovery of money or of specific real or personal property shall be tried by a jury, unless a jury trial is waived or a reference be ordered as hereinafter provided." Section 281 provides: "All other issues of fact shall be tried by the court, subject to its power to order any issue or issues to be tried by a jury or referred as provided in this Code." These sections were plainly intended to be preservative of the right of trial by jury as it had formerly existed, and are in effect nothing more than a declaration of the former law as to the mode of trial. Under the old procedure the chancellor might obtain the verdict of a jury by permitting an action at law to be instituted, by a feigned issue, or by directing an issue. (2 Daniell, Chancery Pleading & Practice, 1070 *et seq.*) The verdict so reached was merely for the information of the chancellor. Our Code preserves the same right to obtain verdicts on issues in proceedings equitable in their nature, but under the reformed procedure the method is merely by impaneling a jury in the original action and submitting to its determination the issues desired. In an equity case the court may, but is not bound to, so give a jury trial. (*Roggencamp v. Converse*, 15 Neb., 105.) The course taken in this case was perfectly appropriate. As the case was begun, it was in its nature one in which under the constitution either party had a right to demand

a jury. It was simply a proceeding *ex contractu* to recover money. It became complicated by petitions of intervention by parties claiming assignments or liens upon portions of the fund in dispute. The court very properly preserved the original right to a jury trial by trying the direct issues in that way, and with equal propriety avoided complications by reserving the case, so far as it was in its nature equitable, for determination by the court alone.

Under three assignments of error the insurance company argues questions relating to the defenses based on alleged incumbrances and conveyances of the property. The insurance company offered in evidence a claim or statement for a mechanic's lien recorded in the county clerk's office. On objection by the plaintiff this was excluded. The object was to show that in violation of a provision of the policy the property had been incumbered after the policy was issued. The record offered did not establish such a defense. No offer was made to prove any of the substantive facts which under our law give rise to a mechanic's lien. The claim of lien alone is not evidence of the existence of the lien, even as between the parties thereto. The statement does not establish a lien, but the claimant must, in addition thereto, prove the performance of labor or the furnishing of material for the erection, reparation, or removal of a house or other building, and other facts necessary to constitute a lien. The introduction of the statement in evidence merely proves the performance of a condition essential to consummate the lien. It is an instrument prepared and filed by the claimant, to which the owner is not a party, and by which he is not bound in the absence of the substantive facts creating the lien.

The defendant also offered in evidence a chattel mortgage executed by Thompson on certain live stock covered by the policy. This was excluded. It was executed before the policy was written. It was in force at that time, but we are unable to find any provision of the policy

whereby it was avoided for that reason. Without quoting provisions manifestly inapplicable, we quote the following as being the only portions of the policy upon which the defendant can possibly base its contention: "It is agreed that if any false statements are made in said application, this policy shall be void; * * * or if the property be sold or transferred or incumbered, or upon the commencement of foreclosure proceedings; or in case any change shall take place in the title, possession, or interest of the assured in the above mentioned property; or if the assured shall not be the sole and unconditional owner in fee of said property; * * * then in each and every one of the above cases this policy shall be null and void." It is not averred in the answer that in the application the plaintiff misrepresented or concealed the fact of the incumbrance. Nor is there any proof to that effect. Indeed, it does not appear, except by a recital in the policy, that any formal application was made. None was introduced in evidence. So that the mortgage did not tend to prove any defense under the first clause quoted. The following clause manifestly refers to a future sale, transfer, incumbrance, or change of interest, and not to an incumbrance existing at the time the policy was written. This appears generally by the language and particularly by that clause whereby the commencement of foreclosure proceedings avoids the policy. This clearly indicates that existing incumbrances were within the contemplation of the parties, and that the policy was not to be avoided unless foreclosure proceedings should be begun upon them. Finally, notwithstanding the mortgage, the assured was the sole and unconditional owner in fee of the property, as a chattel mortgage does not pass title. (*Musser v. King*, 40 Neb., 892; *Bedford v. Van Cott*, 42 Neb., 229; *Murray v. Loushman*, 47 Neb., 256; *Randall v. Persons*, 42 Neb., 607; *Sharp v. Johnson*, 44 Neb., 165; *Camp v. Pollock*, 45 Neb., 771; *Strahle v. First Nat. Bank*, 47 Neb., 319.) The proof of the mortgage, therefore, did not tend to establish any defense and was properly excluded.

Complaint is made of the sixth instruction. It is too long for profitable quotation in the opinion. It was, however, to the effect that the burden of proof was on the insurance company to establish its defense relating to the transfer of the personal property by the plaintiff to his wife, and that in order to establish such defense it was essential to prove not only the making of the bill of sale pleaded, but, in addition thereto, its delivery to Mrs. Thompson, or her knowledge of its existence and acquiescence therein. It goes without saying that a transfer of personal property may be proved without a bill of sale, either made or executed. But the defendant, both by its pleadings and proof, relied solely on the bill of sale as establishing the transfer. It was not claimed that there had been any change of possession, actual or constructive. There was evidence tending to prove that Thompson had voluntarily executed a bill of sale to his wife and had caused it to be recorded; but that this was without the knowledge of his wife, that it was not in pursuance of any contract made with her, that it was without consideration, and that she obtained no knowledge thereof until the time of the adjustment, or attempted adjustment, of the loss. Certainly the court construed the law as favorably as possible to the insurance company when it adopted the view that the making and delivery of a bill of sale, or the making of one and Mrs. Thompson's acquiescence therein without delivery, were without other circumstances sufficient to prove a transfer or change of interest. We think the burden was upon the company to establish these facts, if not more. We are aware that the delivery of an instrument for record has sometimes been held a constructive delivery to the vendee; but we know of no provision requiring or authorizing the recording of an absolute and unconditional bill of sale of chattels, and its delivery for record can no more be taken as constituting a delivery to the vendee than its delivery to any third person for the purpose of having a copy made.

An assignment of error upon which considerable stress

is laid in the argument relates to the modification of instruction No. 2 given at the request of the plaintiff. The language complained of does not appear in that instruction, but does appear in instruction No. 3. It does not, however, appear that this language was introduced by way of a modification of the instruction; nor does it appear that any exception was taken either to the instruction or to its modification. The assignment, therefore, cannot be considered.

Complaint is made of the seventh instruction. This instruction is very long and relates to the issues tendered by what we have styled the third defense. Its effect is that the burden of proof was upon the insurance company to establish the settlement pleaded, the inference being that the burden was not upon the plaintiff to establish the condition upon which the settlement was based as pleaded in the reply. Further, the instruction proceeds to charge the jury that if the settlement was made, the plaintiff was not bound provided it was procured by the false representations pleaded in the reply, and because of plaintiff's reliance on such representations. It was admitted that the representations, if made, were false. The insurance company now contends that this instruction is erroneous in the first place for casting the burden upon the defendant to establish the agreement, it being urged that the plaintiff in the reply admits this fact. We do not think so. The defendant pleaded an agreement to settle the loss at $1,717, to be paid in sixty days. The plaintiff denied this, and pleaded an agreement to settle at $1,717, on condition that it should be paid immediately upon the adjuster's return to Omaha, and within four days. The reply in this respect is, in substance, similar to the special traverse of the common law. The denial of the contract alleged was in itself sufficient to cast upon the defendant the burden of proving it. The affirmative pleading of a different contract was merely an argumentative denial, the inducement of the special traverse at common law, and not

itself traversable. The case is in this respect similar to *McEroy v. Swayze*, 34 Neb., 315, where under a similar state of the issues it was held that the burden was upon the party claiming under the contract to prove it as he alleged it to be. It is further contended that the instruction under consideration was erroneous because it disregarded facts operating as an estoppel against the plaintiff. On this point the theory of the insurance company is that the insurance company, having accepted the orders in favor of Hubbard and Snyder, and having answered as garnishee in the Sharpless case, admitting an indebtedness to the plaintiff, and all in reliance on the settlement, the plaintiff was thereby estopped to rescind the same. But in these facts we see none of the elements of an estoppel. The so-called settlement, if it were enforceable, would not discharge the insurance company without satisfaction by payment of the sum agreed upon. It would still owe that sum, which was greater than the aggregate of the liabilities charged upon it by the orders and garnishment. Had the jury by its verdict found that the plaintiff was entitled to recover less than this aggregate, then the company might well urge that it had changed its possession to its disadvantage in reliance on the settlement. But an accord without satisfaction is not a defense, and the assumption of obligations to third persons of a portion of the amount agreed upon without the payment of such obligations was not a satisfaction. The company was in nowise prejudiced by assuming the obligations, whether or not the settlement was fairly reached.

It is contended that the verdict was the result of passion and prejudice. In support of this counsel refer simply to the verdict itself. This was for a sum less than the face of the policy, with interest. For some reason, not disclosed on the face of the record, the plaintiff felt bound to remit $105. It may, therefore, be assumed that the verdict was to that extent excessive, but this is insufficient in itself to disclose passion or prejudice.

It is urged that the court erred in allowing an attor-

ney's fee for $120. By what is known as the "Valued Policy Law" (Compiled Statutes, ch. 43, sec. 45), it is provided "that the court, upon rendering judgment against an insurance company upon such policy of insurance, shall allow the plaintiff a reasonable sum as an attorney's fee, to be taxed as part of the costs." In *Hanover Fire Ins. Co. v. Gustin*, 40 Neb., 828, it was held that the term "such policy" in the statute refers to policies written upon real property, which is the subject of the preceding sections, and we think this construction is correct. But we cannot concede the argument of plaintiff in error that where a policy covers both real estate and personal property the section is inapplicable. This was a policy written to insure real property, although it also includes personalty. It is probable that in such a case the court should fix the fee with regard to the loss on the real property alone. But judged by that standard, the allowance was in this case reasonable. The total insurance on the buildings was $1,310. The loss was total, so that the sum insured fixed the amount of recovery on account of the buildings. We cannot say that there was an abuse of discretion in allowing an attorney's fee of $120 on a recovery of $1,310 in a case as sharply contested as this seems to have been.

Finally it is urged that the finding and judgment are conflicting and not in accordance with the verdict. In support of this contention it is argued that the jury by their verdict having found that there had been no valid settlement, the court gave effect to such settlement by awarding judgments in favor of the intervenors and did not enter judgment in conformity with the verdict. In discussing the seventh instruction we indicated our view that there was no essential connection between the so-called settlement and the claims of the intervenors. The validity of the settlement in nowise depended upon the validity of those claims, nor did the validity of the claims depend upon that of the settlement. Therefore, by allowing the claims of the intervenors, the court did not

disregard the verdict, and, treating the action as one in equity, as the plaintiff in error contends it was, the court was not bound to enter judgment in conformity with the verdict. So treated, the verdict was taken simply to inform the conscience of the court upon the issues submitted to the jury, and operated at most as a determination of those issues. It was not decisive of the general result of the case. Payments were computed and judgment rendered on the basis of the verdict, with entire regard to the facts found by the jury and the damages by it assessed.

AFFIRMED.

SELDEN K. EMERSON V. MICHAEL KILROY.

FILED FEBRUARY 3, 1897. No. 7060.

Review. No question of law is presented in this case. Evidence *held* sufficient to sustain the verdict.

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

Clark & Allen, for plaintiff in error.

Thomas Darnall and *John S. Kirkpatrick, contra.*

IRVINE, C.

Kilroy brought this action against Emerson to recover rent for a farm and also to recover for a small quantity of rye sold and delivered. Emerson filed a counter-claim asking damages against Kilroy for failure to perform a covenant to furnish a well on the farm, and also for the breach of an alleged contract to sell and deliver to the defendant 120 acres of corn-stalks. On the undisputed evidence, the plaintiff was entitled to recover on both counts of his petition. The jury allowed the defendant

damages on the counter-claim relating to the well, but evidently found against the defendant as to the corn-stalks. The only question presented by the briefs is the sufficiency of the evidence to sustain the verdict in this last particular. No question of law is involved, and it would be useless to set out the evidence. We think it is sufficient to sustain the verdict.

AFFIRMED.

FREMONT, ELKHORN & MISSOURI VALLEY RAILROAD COMPANY V. JOHN WATERS.

FILED FEBRUARY 16, 1897. No. 6999.

1. **Carriers:** FREIGHT: CONNECTING LINES. It is the duty of a railroad company in this state, subject to such reasonable rules as may be adopted in the transaction of its business as a common carrier, to receive and transport goods offered for shipment to the terminus of its line, and in case such goods are consigned to a point beyond its line, to safely deliver them to a connecting carrier.
2. ———: LIABILITY BEYOND LINE OF CARRIER. A railroad company receiving for shipment goods consigned to a point on the line of a connecting carrier, under an agreement to transport them to the terminus of its own road, is neither at common law nor by statute of this state answerable therefor after their safe delivery to the connecting line named in the bill of lading or contract of shipment.
3. ———: BILL OF LADING. Bill of lading examined, and construed as an agreement for the carriage of goods over the defendant's line of road only.
4. **Instructions.** An instruction unwarranted by the evidence, although an accurate statement of the law, is ground for reversal, provided it has a tendency to mislead the jury.

ERROR from the district court of Seward county. Tried below before WHEELER, J. *Reversed.*

William B. Sterling, B. T. White, and *D. C. McKillip,* for plaintiff in error:

A common carrier of goods may by special contract confine its liability to its own line, though the goods are

consigned to a place on a connecting line. (*Myrick v. Michigan C. R. Co.*, 107 U. S., 102; *Ogdensburg & L. C. R. Co. v. Pratt*, 22 Wall. [U. S.], 123; *McCarn v. International & G. N. R. Co.*, 19 S. W. Rep. [Tex.], 547; *Wichita V. R. Co. v. Swenson*, 25 S. W. Rep. [Tex.], 47; *Mulligan v. Illinois C. R. Co.*, 36 Ia., 181; *Detroit & M. R. Co. v. Farmers & Millers Bank of Milwaukee*, 20 Wis., 130; *Pendergast v. Adams Express Co.*, 101 Mass., 120; *Berg v. Atchison, T. & S. F. R. Co.*, 30 Kan., 561; *American Express Co. v. Second Nat. Bank of Titusville*, 69 Pa. St., 394; *Taylor, Cleveland & Co. v. Little Rock, M. R. & T. R. Co.*, 32 Ark., 399; *Central R. Co. v. Avant*, 5 S. E. Rep. [Ga.], 78; *Savannah, F. & W. R. Co. v. Harris*, 7 So. Rep. [Fla.], 544; *Goodman v. Oregon R. & N. Co.*, 49 Am. & Eng. R. Cas. [Ore.], 87; *Nines v. St. Louis, I. M. & S. R. Co.*, 18 S. W. Rep. [Mo.], 26.)

Norval Bros. and *George W. Lowley, contra:*

A carrier must furnish suitable vehicles for transportation, and if it furnishes unfit or unsafe vehicles it is not exempt from responsibility because the shipper knew of the defects. (*Ogdensburg & L. C. R. Co. v. Pratt*, 22 Wall. [U. S.], 123; *Gulf, C. & S. F. R. Co. v. Trawick*, 15 S. W. Rep. [Tex.], 568; *Hunt v. Nutt*, 27 S. W. Rep. [Tex.], 1031; *Welsh v. Pittsburg, F. W. & C. R. Co.*, 10 O. St., 65; 19 Central Law Journal, 164, 165; 27 Central Law Journal, 80.)

Where the damage to goods was caused by negligence in furnishing an unsuitable car, the fact that damage actually occurred on another line is immaterial. (*Hunt v. Nutt*, 27 S. W. Rep. [Tex.], 1031; *Alabama & V. R. Co. v. Searles*, 16 So. Rep. [Miss.], 255.)

Instructions must be construed together, and if when considered as a whole they properly state the law, it is all that is required. (*Sioux City & P. R. Co. v. Finlayson*, 16 Neb., 578; *Gray v. Farmer*, 19 Neb., 69; *Bartling v. Behrends*, 20 Neb., 211; *City of Lincoln v. Smith*, 28 Neb., 762; *Barton v. McKay*, 36 Neb., 633.)

A station agent of a railroad company can bind it by a verbal contract to furnish cars at a given time for the

shipment of freight, unless the shipper knows that the agent has no such authority. Inability of a carrier to furnish cars contracted for, owing to unusually heavy traffic at the time, is no defense to an action for failure to furnish such cars. (*Gulf, C. & S. F. R. Co. v. Hume*, 27 S. W. Rep. [Tex.], 110; *Gulf, C. & S. F. R. Co. v. Hodge*, 30 S. W. Rep. [Tex.], 829.)

Defendant below is liable in case at bar. (*Union P. R. Co. v. Marston*, 30 Neb., 248; *Missouri P. R. Co. v. Twiss*, 35 Neb., 267.)

POST, C. J.

This was an action below in the district court for Seward county, wherein the defendant in error, John Waters, recovered judgment against the plaintiff in error, the Fremont, Elkhorn & Missouri Valley Railroad Company (hereafter called the "railroad company"), and from which the latter prosecutes proceedings in error to this court.

The cause of action alleged in the petition below is (1) that the defendant company neglected and refused, upon the plaintiff's demand, to furnish him, the said plaintiff, cars for the transportation of corn from Goehner station, in this state, to Chicago, between November 12 and 28, 1891, although notified in advance that he would require twelve cars for the shipment of his grain, amounting to 5,000 bushels and over, then on hand, which was, as the defendant well knew, worth in the Chicago market, if delivered during the month of November, eighty cents per bushel, but which was when subsequently delivered worth forty-five cents, or less, per bushel; (2) that on and after November 28, 1891, plaintiff delivered to the defendant company, in good condition, eight car loads of shelled corn, which the latter undertook to transport from the station above named to Chicago, but that through the negligence of the defendant, sixty bushels of said corn, of the value of eighty cents per bushel, was lost, and 5,014 bushels thereof was, on account of the bad condi-

tion of the cars furnished by the defendant, damaged in transit to the amount of twenty cents per bushel. The answer admits the receipt by the defendant company of eight cars of corn, which it undertook to transport from Goehner station to its terminal point at Missouri Valley, in the state of Iowa, where said corn was, by agreement with the plaintiff, delivered in as good condition as when received, to the Chicago & Northwestern Railroad Company, a connecting carrier, and was by the last named company in like condition delivered to the plaintiff's consignee in the city of Chicago. It is in the answer further alleged that there was during the period mentioned in the petition, an unusual and extraordinary demand for cars to be used in the shipment of corn to the Chicago market, and that the defendant company made a just and equitable distribution of cars among its patrons, including the plaintiff. Accompanying the foregoing statements of the answer is a denial which puts in issue the other allegations of the petition. The reply is a general denial.

The assignment of the petition in error to which especial prominence is given by the argument of counsel for the railroad company relates to the giving of the seventh instruction, as follows: "You are instructed, as a matter of law, that where two or more carriers by agreement unite to complete a line of transportation, the freight to be divided between them in definite proportions, and one of them receives goods for one freight for the whole line, and gives a through bill of lading, then each carrier is the agent of the other, and each is liable for damages done to the goods, or any unreasonable delay in transporting the same, on whatever part of the line the same may occur; and, in this case, you are further instructed that the bills of lading introduced in evidence recite that the cars of corn therein mentioned were received by the defendant corporation at Goehner to be carried to Missouri Valley, and thence to Chicago over the Chicago & Northwestern railway, and, if you believe from the evidence that the defendant corporation, at the time the corn was received,

had an arrangement or agreement with the Chicago & Northwestern railway, by which they were each to unite and form a complete line of transportation between Goehner and Chicago, and each of the connecting companies to have an agreement or definite part of the freight, as between themselves, then the defendant would be liable for any damage or loss happening to the corn on any part of the entire route." This instruction is, it is contended, erroneous, for the reason that it assumes the existence of facts as to which there is an entire failure of proof; a criticism in our judgment altogether warranted by the record. There is in the bill of exceptions no evidence tending to prove that the defendant undertook to transport the corn beyond the terminus of its own line, or an agreement between the said defendant and the Chicago & Northwestern Company with respect to through traffic over their respective lines, while by the contract of shipment, as evidenced by the several bills of lading, it was expressly stipulated that the liability of the defendant company should cease upon the delivery at its depot at Missouri Valley of the property which is the subject of this controversy, in as good condition as when received, to the Chicago & Northwestern Company as a connecting carrier. We insert here so much of the contract mentioned as relates to the subject under discussion:

"READ THIS CONTRACT.

"*Receipt for Freight Received at Goehner, Neb., Dec. 5, 1891.*

"Received from John Waters in apparent good order by the Fremont, Elkhorn & Missouri Valley Railroad Co., the following described packages marked and numbered as per margin, subject to the conditions and regulations of the published tariff of said company, to be transported over the line of this railway to Mo. Valley, Ia., and delivered, after payment of freight, in like good order to C. & N. W. Ry., a connecting or carrier (if the same are to be forwarded beyond the lines of the company's road) to

be carried to the place of destination, it being expressly agreed that the responsibility of this company shall cease at this company's depot, at which the same are to be delivered by such carrier, but this company guarantees that the rate of freight for the transportation of said packages from the place of shipment to Chicago shall not exceed tariff per cwt. and charges advanced by this company subject to the following conditions:

* * * * * * *

"Marks and Consignee.	Description of Articles.
"Order of H. T. Jones. "Notify Bartlett, Frazier & Co., Ch'go. "Car initial, F., E. & M. V. "Car No. 3026.	Bulk Corn, 40,000 lb.

"J. M. MCFADDEN,
"Agent."

McFadden, the defendant's station agent at Goehner, testifies on his cross-examination as follows:

Q. Is that (the C. & N. W. Company) a part of the Elkhorn?

A. It is under a different management.

Q. It is the same system?

A. I guess it is.

There was also introduced in evidence by the plaintiff below a map, upon the upper margin of which appears in bold type the words: "Chicago & North-Western System. The Elkhorn Valley Line. Fremont, Elkhorn & Mo. Valley R. R., and Connections," and in another place, in smaller type, the following: "The North-Western Line, F., E. & M. V., and S. C. & P. R. R." There appears also upon said map, in different colors, the lines of the Chicago & Northwestern, the Fremont, Elkhorn & Missouri Valley, the Sioux City & Pacific, and the Chicago, St. Paul, Minneapolis & Omaha Railroad Companies. This evidence was, it may be assumed, admissible as tending to prove the relationship to each other, in some manner or for some purpose, of the several railroad companies above

named. But the character of such relation, whether that of a common management, a common ownership, or the not unusual agreement for the interchange of business, is not indicated by the words "system" as there employed, and such evidence, with the inferences deducible therefrom, is certainly insufficient to overcome the positive agreement contained in the bills of lading.

As to the common-law liability of the initial carrier upon a through bill of lading on account of loss or damage to goods by a connecting line to which they have been delivered for transportation, the authorities are not harmonious. The question of the carrier's liability in such case has, in this state, been made the subject of both constitutional and statutory regulation. Section 4, article 11, constitution of 1875, provides: "The liability of railroad corporations as common carriers shall never be limited." Section 111, chapter 16, Compiled Statutes, entitled "Railroads," declares that "any railroad company receiving freight for transportation shall be entitled to the same rights and be subject to the same liabilities as common carriers;" and by section 5 of article 1, chapter 72, Compiled Statutes, entitled "Railroads," it is provided that "No notice, either express or implied, shall be held to limit the liabilities of any railroad company as common carriers, unless it shall make it appear that such limitation was actually brought to the knowledge of the opposite party and assented to by him or them, in express terms before such limitation shall take effect." These restrictions were examined in *St. Joseph & G. I. R. Co. v. Palmer*, 38 Neb., 463, and held applicable to contracts made in this state for the transportation of goods beyond the carrier's own line. IRVINE, C., in the case cited, after a review of the earlier decisions of this court, says: "The contract of the shipper was with the carrier first receiving the goods, and if such carrier undertook to deliver the goods at their destination, even though it contemplated doing so through intermediate carriers, it assumed a liability of such character for every part

of the route." But the rule thus stated can have no application to the facts of the case at bar, since the limitation here involved relates to the obligation of the defendant company to accept the corn in question for transportation beyond the terminus of its own road, and not to its liability as a carrier under the contract as actually made. It was the duty of the defendant company, subject to such reasonable rules as may have been adopted in the transaction of its business as a common carrier, to receive the plaintiff's corn and transport the same from the point of shipment to the terminus of its line at Missouri Valley, and there safely deliver it to a connecting carrier. But upon the delivery of goods in such case to the connecting carrier designated in the bill of lading, or contract of shipment, the common-law liability of the initial carrier ceases, and any duty on its part respecting the transportation of such goods over connecting lines results from contract obligations. It was accordingly competent for the defendant company to contract for the transportation of plaintiff's corn from Goehner station to Missouri Valley, and to stipulate that its responsibility therefor should cease upon the delivery of said corn to the Chicago & Northwestern Company. It is possible that the contract of shipment might, notwithstanding the language of the bills of lading, have been shown by extrinsic evidence to contemplate the through carriage of the corn. That question is, however, not presented by the record or the arguments of counsel and will not be further noticed in this connection. It is sufficient that the contract, unexplained, is for the transportation of the corn to Missouri Valley only; that said contract is in no proper sense a limitation of the liability of the defendant company as a common carrier, and that there is no competent evidence of an agreement between the defendant and the Northwestern Company for the issuing of through bills of lading or for the "division in definite proportions," or otherwise, of freight charges for grain forwarded by the former. The instruction above set out being unwar-

ranted by the evidence, is, as has often been held, erroneous. (*Newton Wagon Co. v. Diers*, 10 Neb., 284; *Esterly v. Van Slyke*, 21 Neb., 611; *Esterly Harvesting Machine Co. v. Frolkey*, 34 Neb., 110.)

It is, however, contended that the transaction between the plaintiff and McFadden, the station agent, at the time the cars in question were "ordered," amounted to a contract by the latter in behalf of the defendant company which could, under the statute quoted, be modified only upon proof of actual notice to the plaintiff and his assent in express terms thereto. It is not doubted that a railroad company is *prima facie* liable for the failure to furnish cars in accordance with the verbal agreement of a station agent acting within the scope of his authority. (*Gulf, C. & S. F. R. Co. v. Hume*, 87 Tex., 211; *Gulf, C. & S. F. R. Co. v. Hodge*, 30 S. W. Rep. [Tex.], 829.) And the same principle was recognized by the court in *Union P. R. Co. v. Marston*, 30 Neb., 241. But the claim with respect to a verbal contract for the transportation of the corn is unsupported by the record. The plaintiff, according to his own testimony on November 12 and 16, notified McFadden that he would require cars for the shipment of his corn to Chicago, whereupon the latter promised to provide cars but without naming a definite number or time for their delivery at Goehner. There was, so far as the evidence discloses, nothing said respecting the defendant's undertaking, whether for the transportation to Chicago or to the terminus of its own line, nor are there any facts from which we can infer an agreement on that occasion for a through shipment of the plaintiff's grain. The transaction in question certainly lacks the element of certainty which is essential to all valid contracts.

There are other propositions discussed by counsel, but which are mainly incidental to the question here decided, and will not be noticed in this opinion.

For reasons above stated the judgment is reversed and the cause remanded.

REVERSED.

NIELS SEIEROE, APPELLEE, V. WILLIAM R. HOMAN, IMPLEADED WITH CENTRAL LOAN & TRUST COMPANY ET AL., APPELLANTS.

FILED FEBRUARY 16, 1897. No. 7014.

1. **Subrogation**: PAYMENT OF SUPERIOR MORTGAGE: MISTAKE. The right of subrogation exists in favor of a creditor who has paid the amount of a mortgage or other incumbrance in order to protect his own subordinate lien, or when as the holder of such subordinate lien he has, through mistake or inadvertence, satisfied a prior lien upon the property covered thereby.

2. ———: EXISTENCE OF RIGHT. The right of subrogation must in every case rest upon some recognized principle of equity jurisprudence, such as a mistake of fact, an agreement or understanding that the money advanced was for the express purpose designated, or the like. (*Bohn Sash & Door Co. v. Case*, 42 Neb., 281.)

3. ———: ———. Evidence examined, and *held* to sustain the findings of the referee and the decree based thereon.

APPEAL from the district court of Douglas county. Heard below before FERGUSON, J. *Affirmed.*

The opinion contains a statement of the case.

Wharton & Baird, for appellants:

The court erred in applying to the case at bar the doctrine announced in *Bohn Mfg. Co. v. Kountz*, 30 Neb., 719. (*Henry & Coatsworth Co. v. Fisherdick*, 37 Neb., 207; *Holmes v. Hutchins*, 38 Neb., 601; *Pickens v. Plattsmouth Investment Co.*, 37 Neb., 272; *Hoagland v. Lowe*, 39 Neb., 397.)

References as to right of subrogation: *Johnson v. Barrett*, 117 Ind., 551; *Gilbert v. Gilbert*, 39 Ia., 657; *Fears v. Albea*, 69 Tex., 437; *Walker v. King*, 44 Vt., 601; *Wheeler v. Willard*, 44 Vt., 640; *Robinson v. Erquhart*, 12 N. J. Eq., 524; *Tradesmen's Building, etc., Ass'n v. Thompson*, 32 N. J. Eq., 133; *Guthrie v. Ray*, 36 Neb., 612; *Blodgett v. Hitt*, 29 Wis., 169; *Valle's Heirs v. Fleming's Heirs*, 29 Mo., 152; *Lery v. Martin*, 48 Wis., 198; *Wilton v. Mayberry*, 75 Wis., 191; *Payne v. Hathaway*, 3 Vt., 212; *Bruse v. Nelson*, 35 Ia., 157.

B. G. Burbank, V. O. Strickler, W. H. De France, Kennedy & Learned, J. W. West, B. N. Robertson, E. W. Simeral, Lysle I. Abbott, Montgomery, Charlton & Hall, Elmer E. Thomas, Parke Godwin, Tiffany & Vinsonhaler, and *B. F. Thomas, contra.*

POST, C. J.

Suit was commenced in the district court for Douglas county by Niels Seieroe against William R. Homan for the foreclosure of a mechanic's lien upon lot 1, in block 362, in the city of Omaha, the facts alleged as the plaintiff's cause of action being substantially as follows: On the 1st day of April, 1890, the plaintiff entered into a contract with Homan, as owner of the premises above described, whereby he agreed to furnish certain material and perform certain labor in the erection of six three-story brick and frame apartment houses upon said premises for the sum of $10,221, payable upon estimates of the architect. It was further provided in said contract that for all extra brickwork plaintiff should receive $9.50 per thousand, wall measure, for extra work in excavating 20 cents per cubic yard, and for extra concrete work $5 per cubic yard; that plaintiff, prior to March 30, 1891, furnished all of the material and performed all of the labor provided for in said contract, and in accordance with the terms and conditions thereof, and that he furnished extra material and performed extra labor under said contract, upon the demand of the owner and the architect, amounting to $1,672.50, making a total charge of $11,893.50, which is reduced by payments credited $9,602.50, leaving a balance of $2,291, for which decree was sought. It was further alleged that the plaintiff, on the 28th day of July, 1891, and within four months after the furnishing of such material and labor, made an account in writing of the items of the labor and material so furnished under said contract, and, after making oath thereto as required by law, filed the same in the office of

the register of deeds for Douglas county, claiming a lien upon the property above described. To said petition Clarence A. Starr, the Central Loan & Trust Company, the Home Investment Company, the Insurance Company of North America, William D. Windsor, James D. Windsor, James Morton & Son, John J. Hannighen, John A. Lindquist, Charles Hill, W. H. Bell, John Upton, Edward Ericksen, J. A. Fuller & Co., and Milton Rodgers & Sons were also made defendants.

The pleadings subsequently to the petition are exceedingly voluminous, covering more than one hundred and thirty printed pages, hence a statement of their contents must be confined to a bare outline of the issues presented. Homan, the owner, answered admitting the plaintiff's claim in part, but alleging defective workmanship and a failure to complete the buildings within the specified time, and praying judgment in the sum of $2,400, but since he has failed to appeal from the decree in plaintiff's favor, it is unnecessary to notice the issues tendered by him. The Central Loan & Trust Company, which will hereafter be referred to as the "trust company," filed answer, in which, after a denial of the essential allegations of the petition, it alleges that Homan and wife, on the 1st day of April, 1890, executed in its favor two mortgages upon the property in controversy, to-wit, one for $30,000, to secure the bond of the said William R. Homan, payable June 1, 1897, with interest from date at the rate of six per cent, and one for $2,100, to secure the note of the said William R. Homan, payable in fourteen semi-annual installments of $150 each, without interest, and which said mortgages were filed for record April 21, 1890; that on the 11th day of June, 1890, the plaintiff executed the following waiver:

"We, the undersigned, taking full notice of the fact that the Central Loan & Trust Company, of Des Moines, Iowa, are making a loan of $32,100 to Wm. R. Homan, secured by mortgage on the following described property, to-wit, lot 1, block 362, city of Omaha, and a strip

twenty feet wide adjoining on east, do hereby consent and agree that any right we now have, or which may accrue up to 6 o'clock P. M. of November 1, 1890, to file a mechanic's lien against said property shall be, and the same is hereby, junior and subject to the lien of the mortgages to said Central Loan & Trust Company. Expecting to receive a part of the proceeds of said loan, we make the above agreement in order to enable said Wm. R. Homan to proceed with the negotiations with said company. It being understood and agreed that this agreement in no manner divests us of our rights to file mechanic's liens against said property, except as above stated.

"Dated at Omaha, Neb., this 11th day of June, 1890.

"N. SEIEROE,
"*Brick Contractor.*"

It is further alleged by the said trust company that on December 1, 1890, it loaned to Homan the further sum of $3,000, and canceled and acknowledged satisfaction of the two mortgages above described, taking in lieu thereof three first mortgages upon several equal portions of the premises in controversy for $10,000, $11,000, and $12,000, respectively, also second mortgages upon said several tracts for $700, $770, and $840, respectively, and which mortgages were all filed for record December 9, 1890, that the release of the mortgages first above described was an act of inadvertence on the part of the said trust company, and that plaintiff and all persons furnishing labor and material for the erection of said buildings had notice that the mortgage debts were not in fact paid. Accompanying said answer is a prayer for an accounting and decree of foreclosure in favor of the said trust company as trustee for its co-defendant, the Insurance Company of North America, of the $10,000 mortgage above described, an accounting and decree of foreclosure in its favor, as trustee for defendant James D. Windsor, of the $11,000 mortgage above described, and an accounting and decree of foreclosure in its favor, as trustee for de-

fendant William D. Windsor, of the aforesaid $12,000 mortgage; also for an accounting and decree of foreclosure in its own right of the three second or commission mortgages above described, and for the additional sum of $247.27, being taxes paid by it upon the mortgaged property. There is also a further prayer for a decree adjudging the $30,000 mortgage above described to be a valid first lien in favor of said trust company as trustee of the Insurance Company of North America, James D. Windsor, and William D. Windsor, and that the aforesaid $2,100 mortgage be declared to be a valid second lien in its favor in its own right.

To this answer and cross-bill the plaintiff replied admitting the execution of the two mortgages by Homan and wife for $30,000 and $2,100, respectively, and alleging that said mortgages were paid in full on or prior to January 17, 1891, on which day they were by the trust company canceled and satisfied of record; that the plaintiff's signature to the written waiver above set out was procured by means of false representations of the said trust company to the effect that it, the said company, was about to advance to Homan the sum of $30,000 to be used in the construction of the buildings herein described, and that plaintiff would be paid therefrom the full amount due by virtue of said contract, including extras, whereas the sum of $10,000 and more of said amount was by said company and Homan diverted from said use and expended for purposes entirely foreign to the improvements contemplated in said waiver; that on the date of the execution of said waiver, to-wit, June 11, 1890, there was due plaintiff, under his contract with Homan, the sum of $7,250, and that if the full sum of $30,000 had been expended in the construction of said buildings it would have satisfied the lawful claims of contractors and laborers, including the plaintiff. It is also, in effect, alleged that the waiver in question applied to mortgage liens, aggregating $32,100, upon the lot as an entirety, and that the plaintiff has never been willing that his claim

should be subordinated to mortgage liens aggregating $35,350 upon fractional parts thereof.

The Windsors and the Insurance Company of North America filed answers, each alleging the purchase of one of the three notes executed by Homan to the trust company, December 1, 1890; that by agreement with the said company the latter was, in its capacity as trustee, authorized in their behalf to prosecute any action or actions for the foreclosure of the mortgages given to secure said notes. They also allege that the prior mortgages were canceled and discharged of record through inadvertence of the trust company, and ask that the said mortgages may be foreclosed in accordance with the prayer of the said trustee. The other defendants, with the exception of Starr, to whom reference will hereafter be made, answered alleging liens superior to the several mortgages herein described, but as the vital question of the controversy appears from the issues made by the plaintiff and the defendants claiming under the mortgages, it will not be necessary to prolong this statement by further reference to the pleadings.

Upon the completion of the issues, the cause was, by agreement, submitted to Hon. D. D. Gregory, upon whose report and finding a decree was entered for the plaintiff, and also for defendants Lindquist, Ericksen, Fuller & Co., Morton & Son, and Hannighen, who were adjudged entitled to first liens and to prorate with each other, and from which the said trust company, in its own right and as trustee for the Windsors and the insurance company, have prosecuted an appeal to this court.

The referee's report, so far as it is material to the questions discussed on this appeal, is here set out:

"Your referee finds in regard to the issues raised upon the cross-petition of the Central Loan & Trust Company praying the foreclosure of its several mortgages, that the testimony establishes the following facts:

"First—That at the instance of the defendant Homan, the Central Loan & Trust Company loaned the sum of

$30,000 and took a mortgage bond and mortgage upon said premises to secure said amount of the date of April 1, 1890, and additional mortgage to secure the sum of $2,100 which was designated as for commissions due the Central Loan & Trust Company in the negotiation of said loan and represented the difference between six and seven per cent interest for the life of the first mortgage, seven per cent per annum being the amount for which the original loan was contracted. That these two mortgages were duly recorded in the recorder's office of Douglas county, Nebraska, on April 21, 1890.

"Second—That upon the 11th day of June, 1890, Seieroe, the plaintiff, waived his right of priority to any mechanic's lien which might accrue prior to November 1, 1890, in favor of the Central Loan & Trust Company for $32,000. The consideration expressed for the waiver was the expecting to receive a portion of the proceeds of said loan.

"Third—In like manner, upon the 28th day of August, 1890, J. J. Hannighen made waiver of the priority of lien to said Central Loan & Trust Company under the same terms and conditions.

"Fourth—The testimony further shows that the defendant Homan desiring additional money, and the Central Loan & Trust Company preferring that the mortgage of $30,000 be divided into separate mortgages of smaller sums, did, at the date of December 1, 1890, obtain three additional mortgages from said Homan to secure the three several amounts, one for $12,000, one for $10,000, and one for $11,000. The said several mortgages were given upon three several sections of forty-four (44) feet front each of the premises in controversy, and at the time there was also made three commission mortgages, one for $840, one of $700, and one of $770, which mortgages were severally given to secure the sums named for the difference between six and seven per cent, the original loan being made at seven per cent per annum, and the three several mortgages were severally placed upon the

divisions named, and that all of said mortgages were duly recorded upon the 9th day of December, 1891, and that in consideration of the execution and delivery of these mortgages the Central Loan & Trust Company duly canceled of record the $30,000 mortgage and the $2,100 mortgage, and treated the loan of $30,000 and the commission mortgage pertaining to it, as paid and discharged.

"Fifth—It is further shown from the evidence that at the time of the execution of the first mortgage of $32,100 there was a prior mortgage upon said premises amounting to $10,181, held and controlled by Bates, Smith & Co., and that the first moneys out of the said loan of $30,000 was taken and used in the discharge of such mortgage as a prior incumbrance. It further appears in evidence that the Central Loan & Trust Company paid over the money directly to Homan without assuming any direction as to its application or use, or possessing any accurate knowledge as to the state of the account between Homan and his contractors, basing their priority of lien upon the waiver of the principal contractors engaged in the erection of said buildings, and that the three mortgages were taken in place of and represented the money of the first mortgage of $30,000, save and except as to the $3,000 additional advances.

"The Central Loan & Trust Company, for itself and in behalf of the assignees of said mortgages, William D. Windsor, the Insurance Company of North America, and James D. Windsor, ask that their interest be subrogated to that of the first mortgage of $30,000.

"First—Your referee finds as a matter of law that subrogation will be allowed to a creditor when he has paid off a prior lien to protect an existing junior lien, or when as a creditor he has discharged a lien through inadvertence or mistake, in that a court of equity could say in conscience and good morals that he should be subrogated to the right of the holder of such prior lien. But subrogation is not allowed to volunteers nor to strangers, and

never to intermeddlers; nor is it the province of a court of equity to relieve parties from their mistake of judgment, carelessness, or mistake of law in entering into a contract.

"Second—The Central Loan & Trust Company is charged in law with the full knowledge of every fact that existed at the time of this exchange of mortgages, and for the purpose of its own accommodation voluntarily entered into a new contract with the defendant Homan, and in consideration of the additional loan of $3,000 Homan was induced to make six several mortgages, as before stated, upon the cancellation of the two mortgages that had been executed prior thereto. No inadvertence or mistake of fact is shown by which the Central Loan & Trust Company was misled or deceived as to any existing fact. Consulting its own convenience and deeming it to its own advantage to hold six several mortgages instead of two, it accepted the same as executed by Homan for and in discharge of the pre-existing mortgages. Your referee therefore finds no equities in favor of the Central Loan & Trust Company upon which this claim for subrogation in law can rest, and recommends that the prayer of the Central Loan & Trust Company, in so far as it asks to be subrogated to the right of mortgagee the first named, be denied.

* * * * * * *

"Your referee further finds that the Central Loan & Trust Company has paid taxes upon the property in question from time to time, amounting in all, principal and interest, up to the first day of this term of court, to the sum of $631. But your referee further finds that Clarence A. Starr, acting as trustee of the said property and in interest of the Central Loan & Trust Company, received the sum of $5,000 as rentals therefrom, and in good conscience the duty rested upon said trustee to have first paid the said taxes out of said rentals, and that the lien for taxes should be subordinate of claims of all other lien-holders, but that the course of conduct having been

acquiesced in by William R. Homan, the Central Loan & Trust Company as to him would be entitled to a lien upon said premises for the amount and foreclosure therefor, and as well as to the respective sums in the six mortgages hereinbefore set forth."

We will first notice the argument of appellants which is directed to the alleged waiver by the plaintiff. Several propositions are discussed in this connection, all of which depend upon the effect to be given the release by the trust company of the prior mortgages. Appellants, in their discussion of the question above indicated, invoke with seeming confidence the doctrine of subrogation, and insist upon priority over the liens for labor and material, on the ground that the proceeds of the prior mortgages were, with the knowledge of appellees, expended in the construction of the building mentioned, thus by the amount thereof increasing the security of the latter; but to that proposition we are unable to give our assent. On the contrary, it is clear from the findings above quoted that there are in this case no facts upon which to base the right of subrogation. There must, as was held in the recent case of *Bohn Sash & Door Co. v. Case*, 42 Neb., 281, as a condition to the right of subrogation, in addition to the inherent justice of the case, concur therewith some established principle of equity jurisprudence as recognized and enforced by courts of chancery. Indeed, the conclusion of the learned referee in passing upon that question is a treatise of itself, and has abundant support in the decisions of other courts. (*Shinn v. Budd*, 14 N. J. Eq., 234; *Receivers of New Jersey M. R. Co. v. Wortendyke*, 27 N. J. Eq., 660; *Unger v. Leiter*, 32 O. St., 210; *Banta v. Garmo*, 1 Sandf. Ch. [N. Y.], 383; *Sandford v. McLean*, 3 Paige [N. Y.], 122; *Marvin v. Vedder*, 5 Cow. [N. Y.], 671.) To review at length in this connection the cases cited by appellants would prove a profitless task. It is sufficient that they in nowise conflict with the conclusion of the referee or the views expressed by us in *Bohn Sash & Door Co. v. Case, supra.* The record, so far as it sheds any light

upon the execution of the six mortgages bearing date of December 1, 1890, and the satisfaction of the two prior mortgages, lends no support to the contention of appellants. There is not alone a failure of proof to sustain the allegations that the prior mortgages were discharged through inadvertence or mistake, but the irresistible inference from the evidence is that the arrangement in question was deliberately made by the trust company as mortgagee, and for its own accommodation, and to enforce the canceled mortgages at this time for its protection would be to violate the plainest principles of equity.

There is a further contention to the effect that plaintiff's lien was not filed within the statutory period after the furnishing of the material and labor which is the basis of this claim. The referee has found specifically that the lien was filed within four months from and after the completion of the contract, and an examination of the record has satisfied us that that finding is in accord with the decided weight of the evidence. The lien, as we have shown, was filed July 28, 1891, and the last work, being the construction of certain brick piers and area walls called for by the plans and specifications, was completed April 7 of the same year.

What is said above applies with equal force to the claims of other defendants whose liens were by the decree given priority over the mortgages of appellants. No sufficient reason has been suggested for interference with the decree of the district court, which is accordingly

AFFIRMED.

NIELS SEIEROE ET AL. V. FIRST NATIONAL BANK OF KEARNEY.

FILED FEBRUARY 16, 1897. No. 7085.

1. **Negotiable Instruments:** CONTEMPORANEOUS CONTRACTS: EVIDENCE. In an action on a promissory note, or other written agreement, a contemporaneous contract in writing, connected therewith by direct reference or by necessary implication, is admissible as part of the transactions involved.

2. ———: ———: MORTGAGES. In a promissory note otherwise in the usual form it was recited that "this note is secured by a real estate mortgage of date herewith and governed by the conditions thereof." The mortgage referred to, after authorizing foreclosure in case of non-payment of interest or taxes, contained the following clause: "But no general execution shall issue herein against the maker or indorser of said note, but the mortgagee, or his assigns, shall be entitled to immediate possession of the premises, and shall take the same in full satisfaction of his debt." *Held*, To exempt the makers and indorsers of the note from personal liability thereon, and to restrict the remedy of the holder of the mortgage security.

ERROR from the district court of Buffalo county. Tried below before BATES, J. *Reversed.*

H. C. Burnett, V. O. Strickler, and *R. A. Moore*, for plaintiffs in error.

E. C. Calkins and *Warren Pratt, contra.*

POST, C. J.

This cause originated before a justice of the peace for Buffalo county, from whence it was taken by appeal to the district court for said county, where a trial was had, resulting in a verdict for the plaintiff therein under the direction of the court, upon which judgment was subsequently entered and from which the defendants Moore and Seieroe prosecute error to this court. The cause of action alleged is the following promissory note of Moore and Shipman:

KEARNEY, NEB., March 10, 1891.

"Twelve months after date we promise to pay Niels Seieroe, or order, ($150) one hundred and fifty dollars, with ten per cent interest from date, interest payable semi-annually. And it is further agreed that this note is secured by a real estate mortgage of even date herewith and governed by the conditions thereof; and in case an action is commenced to foreclose said mortgage, a reasonable sum shall be allowed as attorney's fees and made a part of the judgment hereon. R. A. MOORE.

"J. E. SHIPMAN."

The mortgage to which reference is made in the note was executed by Shipman and wife and contains the following, among other provisions: "It is distinctly understood that the legal holder or holders hereof may immediately cause this mortgage to be foreclosed; but no general execution shall issue herein against the maker or indorser of said note, but the mortgagee, or his assigns, shall be entitled to immediate possession of the premises and the rents, issues, and profits thereof, and shall take the same in full satisfaction of said debt." The makers of the note and Seieroe, the payee, whom it is sought to charge as an indorser, answered separately, each alleging as a defense the condition of the note and mortgage above set out which, as they claim, exempts them from personal liability and restricts the remedy of the payee and his assigns to the mortgage security.

The first contention of plaintiff in error is that the two instruments are, for the purpose of determining the question of their liability in this action, to be construed as a single contract. That proposition is obviously sound and rests upon a principle distinctly recognized by this court in *Polo Mfg. Co. v. Parr*, 8 Neb., 379, and *Grimison v. Russell*, 14 Neb., 521. See, also, 1 Randolph, Commercial Paper, sec. 198, and cases cited.

The next and only remaining question is that of the construction of the note and mortgage when read together. *Kennion v. Kelsey*, 10 Ia., 443, was an action on

a promissory note, to which the defendants answered setting out a mortgage executed by them contemporaneously with the note sued on, as a part of the same contract and containing the following recital: "But it is agreed general execution shall not issue herein." In reviewing an order sustaining a demurrer to the answer on the ground that it failed to state a defense, the court, by Lowe, C. J., say: "This covenant was incorporated in the mortgage for some purpose. What was that purpose? It seems to us that there can be but one answer given to that question. It is that the mortgagee should look to the land mortgaged alone for the satisfaction of his debt in case he resorted to any remedial process to enforce his claim. Under this contract he can never have a general execution and, therefore, as a matter of legal propriety, he is not entitled to a general judgment, but is limited in his remedy to a special proceeding against the mortgaged premises." The reasoning there employed appears to be unanswerable and applies with even greater force to the case at bar, since it is here expressly stipulated that no general execution shall issue against the makers or indorsers of the note, but that "the mortgagee, or his assigns, * * * shall take the same [the mortgaged premises] in full satisfaction of said debt."

Counsel for defendant in error argue that the construction contended for would nullify the promise to pay, which is the principal incident of the note, an interpretation, it is claimed, alike destructive of the contract and opening the doors to fraud and deceit. But to that argument we answer that an agreement such as is here involved is simply an acknowledgment by the mortgagee or pledgee that he relies upon the security exacted and not upon the personal credit of the promisor. Again, counsel overlook the fact that the note is but a part of the contract, and that the true character of the transaction is to be ascertained from the terms of each instrument as modified or limited by the conditions contained in the other. The agreement in this case, when thus

viewed, is susceptible of but one construction, viz., a pledge of the property described in the mortgage as security for the debt, limited by an undertaking on the part of the mortgagee to look to the property pledged for the satisfaction of his debt and exempting the makers and indorsers of the note from personal liability thereon.

JUDGMENT REVERSED.

MERCHANTS SAVINGS BANK OF PROVIDENCE, APPELLEE, V. HATTIE A. NOLL ET AL., IMPLEADED WITH W. F. THOMAS, ASSIGNEE, APPELLANT.

FILED FEBRUARY 16, 1897. No. 7023.

1. **Appearance:** WAIVER OF NOTICE. A defendant by a general appearance in an action thereby waives the issuance and service of summons therein.
2. **Review:** HARMLESS ERROR. A decree will not be reversed by this court on account of error unless prejudicial to the complaining party.
3. **Transcript for Review.** The record of the trial court, for the purpose of an appellate proceeding, when certified as required by law, imports absolute verity. (*Worley v. Shong*, 35 Neb., 311.)
4. ———: CORRECTIONS. In such case, if the record is incorrect or incomplete, the remedy is by appropriate proceeding to secure a correction thereof in the lower court. (*Omaha Loan & Trust Co. v. Hogeboom*, 47 Neb., 9.)

APPEAL from the district court of Dawes county. Heard below before BARTOW, J. *Affirmed.*

Allen G. Fisher, for appellant.

Albert W. Crites, contra.

POST, C. J.

This was a proceeding by the appellee, the Merchants Savings Bank of Providence, Rhode Island, in the district

court for Dawes county to foreclose a certain mortgage executed by defendants Hattie A. Noll and John Noll to the Western Farm Mortgage Company. The appellant, Thomas, as assignee of the Sioux City Dry Goods Company, was made a party defendant and answered setting up a judgment against one O'Connor, to whom the mortgaged premises had been conveyed by the Nolls. There was a decree adjudging the plaintiff's mortgage to be a first lien upon the premises therein described, and awarding to the appellant a third lien thereon. Subsequently, and after the decree had been entered at large upon the record of the court, the appellant moved to strike from the records the last clause in the recorded decree, for the reasons: (1.) There is not of record, nor was there ever made by the court, any order for a decree of foreclosure. (2.) There is no warrant of law, nor any statute giving any authority, for the court to enter the order giving the plaintiff possession of the premises in controversy. (3.) There has not been filed in this case any evidence upon which the decree could be founded. (4.) Plaintiff has not filed any note or mortgage as required by statute for the foundation of the decree." From an order overruling said motion, as well as from the original decree, an appeal is prosecuted to this court.

The first proposition stated in the brief of appellant is that the decree is erroneous, for the reason that there was no service upon defendant Hattie A. Noll. It is a sufficient answer to that contention that the defendant named entered her voluntary appearance, thereby waiving the issuing and service of summons.

It is next argued that the district court erred in awarding to the plaintiff possession of the premises in controversy pending the sale thereof under the decree, or until payment of the amount adjudged due upon the mortgage. But appellant is not shown to be entitled to the possession of the mortgaged property, nor does he, so far as we can discover, claim any interest in the rents thereof. The decree is, therefore, at most as to him error without prejudice.

It is contended that the decree is not supported by sufficient proof, the notes and mortgage described in the petition not having been produced or filed with the clerk. But in the absence of a bill of exceptions containing the evidence before the district court, this assignment may be dismissed without further notice.

It is further contended that the decree has, without leave of the district court, been materially altered since its entry of record. Upon a suggestion by counsel for appellant assailing the transcript as filed herein, an order was made requiring the clerk of the district court to send up a true and certified copy of the decree appealed from, and which sustains the claim of the appellee in every particular. The record of the trial court, for the purpose of proceedings by petition in error or appeal, when properly certified, imports absolute verity. (*Worley v. Shong*, 35 Neb., 311; *Sullivan v. Benedict*, 36 Neb., 409.) If such record is incomplete or incorrect, the remedy is by appropriate proceeding to secure a correction thereof in the lower court. (*Omaha Loan & Trust Co. v. Hogeboom*, 47 Neb., 9.)

DECREE AFFIRMED.

HOWARD WHITNEY, SHERIFF, V. CYRUS K. SPEARMAN.

FILED FEBRUARY 16, 1897. No. 7040.

1. **Parol Evidence:** COMMERCIAL PAPER: INDORSEMENTS. A general indorsement of commercial paper may, except as against a *bona fide* holder, be explained and the precise terms of the agreement shown by parol evidence. (*Corbet v. Fetzer*, 47 Neb., 269.)

2. **Final Order:** INTERVENTION. An order striking a petition of intervention on the ground that it was not filed within the time allowed therefor is not such a final order as will be reviewed upon petition in error to this court.

ERROR from the district court of Sarpy county. Tried below before BLAIR, J. *Affirmed.*

Rich, O'Neill & Sears, for plaintiff in error.

H. C. Lefler, Kennedy, Gilbert & Anderson, and *W. W. Morsman, contra.*

POST, C. J.

On the 7th day of July, 1893, Hamilton M. Hinkle and Ethan H. Hinkle, doing business in Sarpy county in the firm name of Hinkle & Son, conveyed to the defendant, Cyrus K. Spearman, by chattel mortgage a stock of merchandise to secure the sum of $3,870, evidenced by three promissory notes of the mortgagors, to-wit, one for $1,200, maturing June 19, 1893, one for $1,200, maturing June 19, 1894, and one for $1,487, maturing August 18, 1894. On the 20th day of July plaintiff in error, Whitney, as sheriff of Sarpy county, seized the property aforesaid in the possession of the mortgagee named to satisfy four certain orders of attachment issued in as many separate actions in the district court for said county, by Kirkendall, Jones & Co., McCord, Brady & Co., Gilmore & Rhul, and the Gate City Hat Company, as plaintiffs, against the said Hinkle & Son. Afterward this action of replevin was brought by the defendant in error against the sheriff and prosecuted to judgment in favor of the former, and from which the latter prosecutes error to this court.

The Sarpy County Bank and the Kilpatrick-Koch Dry Goods Company, hereafter called the "dry goods company," claiming to be interested in the property in controversy by virtue of mortgages from Hinkle & Son under date of July 17 and 18, respectively, sought to intervene in the replevin suit in order to assert their rights in that action to the property in controversy, but the petition of the former was stricken from the files on the motion of the court, and the cause proceeded to judgment in favor of the dry goods company against the plaintiff in the sum of $1,559.11, and from which the bank prosecutes error, assigning as ground for the reversal of the judg-

ment the order of the district court striking its petition of intervention.

Practically the only contention by plaintiff in error Whitney at this time is that the district court erred in permitting Spearman, the plaintiff below, to prove that he was the owner of the $1,487 note above described, then held by J. D. Spearman & Co., bankers, under an unrestricted indorsement. Said note was at the date of the mortgage, as shown by the testimony of both Spearman, the payee, and the cashier, held by the bank above named as collateral security for advancements to said Spearman appearing upon the books of the bank as an overdraft. The district court found as a matter of fact that said note "was so held as collateral security for an indebtedness of said Cyrus K. Spearman to said bank; that said bank never looked to said Hinkle & Son for any of the interest on said note, nor for the principal thereof, but always looked to Cyrus K. Spearman to make good to it the sum received by said Cyrus K. Spearman at the time of transferring of said note to the bank." This finding is unquestionably supported by the evidence, and is, we think, material to the issues actually tried. The testimony was not, it should be remembered, received for the purpose of verifying the terms of the unrestricted indorsement as against one claiming to be a *bona fide* holder of the note. Between the parties to such an indorsement the precise terms of the contract is always a subject of inquiry and may be shown by parol evidence. (*Cortelyou v. Hiatt*, 36 Neb., 584; *Holmes v. First Nat. Bank of Lincoln*, 38 Neb., 326; *True v. Bullard*, 45 Neb., 409; *Corbet v. Fetzer*, 47 Neb., 269.) And the rule thus recognized applies with equal force to a case like that before us, where the objection is interposed by one who is an entire stranger to the transaction. It is probable, although the question is not presented for decision, that the security mentioned will in equity inure to the benefit of the legal holder of the paper. There is, however, in such a transaction no inherent vice, nor is there in the evidence adduced the

slightest ground for imputing to the contracting parties, or either of them, a purpose to defraud the creditors of the mortgagors. There is no error in the record so far as it relates to the principal controversy, and the judgment in favor of defendant in error Spearman is accordingly affirmed.

Turning to the petition in error of the Sarpy County Bank, we observe, first, that no exception was taken to the order striking the petition of intervention; second, there was interposed by said bank no motion for a new trial; third, there is no final judgment to which said bank is a party. Upon this record comment is unnecessary. It follows that the petition in error must be dismissed.

Petition in error of Sarpy County Bank dismissed. Judgment in favor of defendant in error Spearman

AFFIRMED.

WILLIAM J. BRYAN ET AL., APPELLEES, V. CITY OF LINCOLN ET AL., IMPLEADED WITH ELMER B. STEPHENSON, APPELLANT.

FILED FEBRUARY 16, 1897. No. 8671.

1. **Municipal Bonds: VOTE OF PEOPLE.** The clause, "When the same shall have been authorized by a vote of the people," contained in section 67, subdivision 21, article 1, chapter 13*a*, Compiled Statutes, under heading "Cities of the First Class," means authorized by a majority of the voters of the city.

2. ———: ———. A proposition to authorize the issuance of funding bonds was submitted to the electors of a city, pursuant to the provisions of such section of the statutes, at the same time and place as the general city election. *Held*, Under the facts shown, to be but one election; that the presumption is that all the electors voted at such election, and the proposition, to work its adoption, must have received a majority of all the votes cast at such election.

APPEAL from the district court of Lancaster county. Heard below before HOLMES, J. *Affirmed.*

Lambertson & Hall, for appellant.

Boehmer & Rummons, contra:

A proposition submitted to the voters of a municipality at a general election must receive a majority of the votes cast at such election in its favor, in order to be carried. As the bond proposition failed to receive a majority of the votes cast at the election, it did not carry and hence all subsequent acts of the council relative thereto are void. (*State v. Anderson*, 26 Neb., 517; *State v. Bechel*, 22 Neb., 158; *State v. Benton*, 29 Neb., 469; *Douglas County v. Keller*, 43 Neb., 644.)

A. S. Tibbets, also for appellees.

HARRISON, J.

The appellees herein, in their character as residents and taxpayers of the city of Lincoln, instituted this action in the district court of Lancaster county to restrain or enjoin the execution and delivery by the city, the mayor and city council thereof, of certain funding bonds in the aggregate sum of $534,500 to Elmer B. Stephenson, the alleged purchaser of such bonds. Pleadings were filed and issues joined of which there was a trial, which resulted in a judgment by which the execution and delivery of the bonds were perpetually enjoined. Elmer B. Stephenson of defendants in the trial court has appealed to this court.

The proposition of the issuance of the bonds was submitted to a vote of the people, and of the questions at issue in the district court was the one, Did the bond proposition receive the requisite number of votes to effect its adoption? That it did not was asserted by appellees and is urged in the briefs filed in this court; and on oral argument counsel for appellees especially directed attention to this branch of the case. The proposition of the issuance was, pursuant to the provisions of

the law, submitted to a vote of the electors of the city. Section 67, subdivision 21, chapter 13*a*, article 1 of the Compiled Statutes, 1895, page 208, in which is embodied the grant of power to the officers of a municipality of the class to which the city of Lincoln belonged to issue funding bonds, reads as follows: "To provide for issuing bonds for the purpose of funding any and all indebtedness now existing or hereafter created of the city, now due or to become due, when the same shall have been authorized by a vote of the people; *Provided*, That the mayor and council shall not fund any bonded debt at a higher rate. Such bonds shall be redeemable after ten years, at the option of the city." The phrase "when the same shall have been authorized by a vote of the people" is the portion of the section with which we have here more particularly to deal. Authorized by the vote, in this connection, can but mean by a majority, as there are but two answers to be made to the question submitted, an affirmative and a negative; and to be authorized, the matter of the proposition must receive the greater number or majority of the votes. It could not be a plurality, as might be when there are more than two candidates for office, and the one receiving the highest number of votes is elected, but may not have received a majority of the votes. The word "people," as used here, must mean electors or voters. It can have no other signification, and the section in which it occurs have intelligible, reasonable, and sensible force. It was stated in an act that towns and cities might submit a proposition to the vote of the "inhabitants." The word "inhabitants" was held to mean voters. (6 Am. & Eng. Ency. of Law. p. 445; *Walnut v. Wade*, 103 U. S., 683.) The phrase under consideration in the case at bar must necessarily be held, from the act and connection in which it appears, to refer to the vote of the people of the city of the class to which the act is applicable. A fair reading, then, of the phrase would be "authorized by a majority of the vote of the electors or voters of the city." It appears that an ordinance was

passed by the city council in which provision was made for the submission of the proposition of the issuance of the funding bonds to a vote of the electors of the city,—and we will here digress to say that the council probably indicated its construction of the law with reference to the vote necessary to carry the subject of the submission in the ordinance, as did also the mayor in the notice or proclamation published of the election, for it was stated in each that if the majority of the votes cast at the election were favorable to the proposition, the mayor and council should have power to issue the bonds. But returning again to the question proper, it appears that though in some portions of the ordinance the election therein provided was denominated a "special election," it was fixed to be held on Tuesday, the 3d day of April, 1894, which was the day of the general election for city officers, and the vote on the bond proposition was to be presided over by the same judges and clerks of election as the vote on officers at the general city election. The vote was taken at the same polling places in the city, the same registration lists were used, the same voting booths. Indeed, no measures were used which would mark the vote on the bond proposition as a separate election, except separate ballot boxes were used and probably separate poll lists. This last does not very clearly appear from an inspection of the evidence. This constituted but the one election when considered for the purpose of determining how many persons presented themselves and participated as voters in an election at that time and place. (*State v. Bechel*, 22 Neb., 158.)

The next question which presents itself for consideration and adjudication is whether, under the provision we have quoted in regard to an election on the proposition to issue funding bonds held at the same time and place as the general election of the officers of the city, and practically as a part of that election, to affirmatively indorse the proposition, it required but a majority of the votes cast for or against it, or did it require a majority of the votes

cast at the election? No inherent right or power existed in the city to issue these or any other bonds. To exist it must be conferred by statute. (*State v. Babcock*, 21 Neb., 187.) If issued, they created a debt which is in effect a lien upon the taxable property of the citizens of the municipality. (*Fullerton v. School District*, 41 Neb., 601.) It is but right and just that the provisions of the law regulating the procedure in the preliminaries or precedent conditions to be fulfilled in the authorization of their issuance, should be the subjects of fairly strict construction, and if a doubt arises or is entertained in any particular it should be resolved in the interest of regularity and fullness of compliance with such requirements. An application of this rule in the present instance leads us to the conclusion that to work the adoption of the proposition submitted it was necessary that a majority of all the votes cast at the election be favorable to it, and not only a majority of the ballots cast for or against the proposition. It required, as we have seen by giving to the portion of the section of the statute in reference to the vote its evident, ordinary, and plain import, a majority of the votes of the electors of the city to authorize the proper officers to issue bonds, and it is but fair and reasonable to take the highest number of voters voting at the election on the selection of a person to fill any office for the filling of which the election was being held or for or against any proposition regularly submitted and voted upon, as constituting the body of the electors of the city. The registration lists would not furnish a perfect total of the number, as the body of the voters necessarily changes with the passing of the days, some who have registered probably moving away from the city and new ones coming in who are unregistered, and there would also be many others who do not register, and probably as fair a test of the number of the electors of the city for the purpose for which it is desired in the determination of the question now under consideration is to fix it at the highest number who voted on the selection of any one

office or matter on which an expression of the voters was taken at the then election. It must be presumed that the framers of the section of the statute, by virtue of which this matter of the bond issue was submitted, had it in contemplation that all the electors would vote (as indeed, if possible, they all should), and that a majority of those voting should settle the question. (*Slingerland v. Norton*, 61 N. W. Rep. [Minn.], 322.) To adopt any other construction would cast it within the realm of doubt and uncertainty and involve inquiries whether there were electors who for any reason had not appeared at the polls and voted, would in fact lead to divers, many, and endless questions, invite contests in elections, and, in fact, would seriously cripple or impede, if not entirely destroy, any intended operation of the law. (*People v. Warfield*, 20 Ill., 160.)

In the case of *People v. Wiant*, 48 Ill., 263, the question to be decided was whether a vote taken on the proposition had authorized a removal of the county seat from one town to another. In the law under the provisions of which the submission was made it was stated that if it should appear from a canvass of the votes that a majority of the legal voters of the county had voted for the removal to Wheaton, then that place should be the county seat of the county. The election was held at the same time as the election for circuit judge. A majority of the votes cast on the question of the removal of the county seat was favorable thereto, but not a majority of the whole number cast at the election, as appeared from the poll on the election of the circuit judge. It was held: "Where an election on the question of the removal of a county seat happens to be held at the same time there is another election as for a circuit judge, the vote cast on the single question of removal will not alone govern as to whether a majority of all the legal votes of the county were given in favor of removal, but it must appear that a majority of all the votes cast at that election were so given." And it was further said in the body of the opin-

ion: "In this case it appears that the majority of the votes cast at the election on the question were for removal, but the clerk's certificate does not show that those voting in its favor are a majority of the votes cast at that election. * * * In this case, however, there was, at the same time, an election held for circuit judge, which was a regular election. We therefore have, in this case, additional means of ascertaining the whole number of voters of the county. If the return of the various poll books of the county showed a larger number of votes cast for circuit judge, or other officer, than were cast for and against removal of the county seat, then that should be taken as the number of voters of the county; and it should appear that a majority of the voters at that election had cast their votes in favor of removal before the county seat could be changed. It is not the vote cast upon that single question that is to govern where it occurs at any other election held at the same time, but it must appear that a majority of all the votes cast at that election are in favor of removal." (*State v. Winkelmeier*, 35 Mo., 103; *State v. Benton*, 29 Neb., 460; *Stebbins v. Judge of Superior Court of Grand Rapids*, 66 N. W. Rep. [Mich.], 594.)

In the decision in the case of *People v. Brown*, 11 Ill., 478, in considering a section of the constitution of the state of Illinois wherein it was stated: "'The general assembly shall provide by a general law for a township organization, under which any county may organize whenever the majority of the voters of such county, at any general election, shall so determine,'" it was observed: "At the ensuing general election in the county of Woodford one hundred and fifty-three votes were given for and one hundred and seven votes against township organization, while more than six hundred votes were cast in the county. The question arises on this state of case whether the township organization was legally adopted by the people of that county. The section of the constitution before recited is free from all doubt or uncertainty. The language is clear and explicit, and ad-

mits of but one meaning. It does not mean a majority of those voting on the question to be submitted, but a majority of all the legal voters of the county. The right of a county to organize under a law to be passed in pursuance of this provision of the constitution is made expressly to depend upon an affirmative vote of a majority of all the citizens of the county entitled to vote on the question."

We are fully aware that there is a line of decisions which announce a doctrine differing radically from the general rule which we follow in the present case, but some of such decisions have been considered by this court and the doctrine disapproved and a refusal to follow it expressed (*State v. Commissioners of Lancaster County*, 6 Neb., 474; *State v. Babcock*, 17 Neb., 188), and we now indorse what was then stated in this regard.

In our own state, in the case of *State v. Commissioners of Lancaster County, supra*, it appeared that the proposition of township organization had been submitted to the voters of Lancaster county at a general election, and that a majority of the votes cast on the proposition were favorable thereto, but not a majority of all the votes cast at the election. The decision involved a construction of section 5, article 10, of the constitution, under which the proposition was submitted, which read as follows: " 'The legislature shall provide by general law for township organization, under which any county may organize whenever a majority of the legal voters of such county, voting at any general election, shall so determine;' " and it was then said by GANTT, J., who wrote the opinion: "I think that section 5, article 10, of the constitution must be construed according to the plain meaning of the words used, and that the language employed therein is mandatory; and therefore, as the affirmative vote on the question submitted was less than a majority of all the legal voters voting at the general election, the proposition to adopt township organization was defeated."

In the case of *State v. Babcock, supra*, there was under

consideration section 1 of article 15 of the constitution, which provides for the submission of amendments to the constitution proposed by the legislature to a vote of the electors of the state, and for publication of the proposed amendments for a prescribed time "immediately preceding the next election of senators and representatives, at which election the same shall be submitted to the electors for approval or rejection, and if a majority of the electors voting at such election adopt such amendments, the same shall become part of this constitution." In the opinion written by MAXWELL, J., appears the following statement in regard to the facts: "It is agreed by the parties that the whole number of votes cast at the election in November, 1884, was 134,000 for governor and other state officers, and 132,000 for senators and representatives; and in favor of the proposed amendment 51,959, and 17,766 against the same." It was held that the proposed amendment, to be adopted, must have received a majority of the whole number of votes cast at the election, and as it had not, it was not adopted. For a decision in regard to a similar provision of the constitution of the state of Ohio, on the same subject, see *State v. Foraker*, 23 N. E. Rep., 491.

In the case of *State v. Bechel, supra*, the question was of the vote necessary to give consent to a street railway company to construct and maintain a street railway on the streets of Omaha. The proposition was submitted and voted upon at the same time and place as the general city election. The proposition received a majority of the votes cast on that particular question, but not a majority of the largest number of votes cast at the election on any one office or matter submitted, and hence it was held by the court not carried. The submission was made under the following provisions: Section 2 of the article of the constitution entitled "Miscellaneous Corporations," in which it was stated that the legislature should pass no general law "granting the right to construct and operate a street railroad within any city * * * without first

requiring the consent of a majority of the electors thereof," and section 5 of article 8 (now 7), chapter 72, Compiled Statutes, in which the requirement in regard to the vote necessary to carry the question was: "And if a majority of the votes cast at such election shall be in favor of," etc.

In the case of *State v. Anderson*, 26 Neb., 517, the language of section 30, part 1, chapter 18, Compiled Statutes, wherein it states, "'If it appears that two-thirds of the votes cast are in favor of the proposition,'" was held to require for the adoption of a proposition to which the section had reference a number of votes equal to two-thirds of the votes cast upon any one question, or for all the candidates for any one office, at the election at which the proposition was submitted. (See, for approval of general principle, *Douglas County v. Keller*, 43 Neb., 635; and for approval of the doctrine of *State v. Anderson*, *supra*, in regard to the section of the statute therein considered, see *Stenberg v. State*, 50 Neb., 127.)

In the case of *State v. Benton*, 29 Neb., 460, in which the facts in respect to the submission of the question of the issuance of bonds by the school district of the city of Omaha, a metropolitan city constituting one school district, and the manner of conducting the election, etc., were very similar to the circumstances, in the like connection, of the case at bar, there were two provisions of the law applicable to and governing the vote necessary to be cast to carry the proposition under consideration, worded as follows: "'A majority of the ballots polled at such an election shall be for issuing bonds,'" and "'The electors shall sanction the issuing of said bonds in the manner aforesaid.'" The submission was at the same time and place as a regular city election, and the question received a majority of the votes cast as to it, but failed to receive a majority of all the votes polled for some of the offices to be filled at the regular city election, and it was held "not sanctioned by the vote given."

The case of *State v. Roper*, 47 Neb., 417, involved the

consideration of a special election on the proposition of removal of a county seat. It was an election held specially for the purpose of determining the one question, and there was no voting for any person or anything more than the proposition of removal. The decision of this court finally hinged on the determination of the point of whether certain ballots should be counted as votes cast or not. The opinion in the Roper case has no bearing on the question now under consideration, except to the extent that it approves the general rule that when a proposition of the nature of the one out of the vote upon which the controversy in the case arose is submitted at a general election, the highest number of votes cast on any proposition or for any candidate is assumed to be the total number, of which the requisite majority must be obtained.

We have thus referred to the foregoing decisions of this court for the purpose of calling attention to the fact that through and in each and every one of them there is the element or principle that if a proposition is submitted at a general state or municipal election, under a law which requires for the adoption of the proposition a majority of all the votes cast, it must receive more than one-half of the total number of votes polled at such election on any matter or the filling of any office on which a vote is taken. The proposition to issue the bonds is shown to have received a majority of the votes cast for and against it, but not a majority of the votes cast at the election at which it was submitted, hence was not adopted. The power of the officers of the city to issue the bonds depended on the authorization of such action by "the vote of the people," and not on any declaration of the result of the election by the officers, or any of them, or any other person or persons; and the authority not having been granted by the vote taken, they could not issue them. (*Douglas County v. Keller*, 43 Neb., 635; *Stenberg v. State*, 50 Neb., 127.)

It appears that the bonds had been prepared and con-

tained a clause that they should be "payable in United States gold coin, government standard of present weight and fineness, or its equivalent," or were, as prepared, what are commonly known as "gold bonds," and the question is presented here whether under a general authorization for the issuance of the bonds, if conferred, would the bonds as prepared be valid? Since the decision of the question we have heretofore discussed disposes of the case, and a determination of this one would not change the result, we deem it unnecessary at this time to consider and decide the further query. It follows that the judgment of the district court is

AFFIRMED.

SIDNEY S. STEWART V. HENRY C. SMITH.

FILED FEBRUARY 16, 1897. No. 7117.

1. **Review:** SUFFICIENCY OF EVIDENCE. A case will not be reversed on the ground of the insufficiency of the evidence to sustain the verdict where there is not such a lack of evidence in its support as to lead to the conclusion that it is manifestly wrong.
2. **Action for Commission on Sale of Land:** VERDICT FOR DEFENDANT. Evidence in this case *held* sufficient to sustain the verdict rendered.
3. **Real Estate Agents:** COMMISSION. A real estate broker who is employed to sell or dispose of property has no claim for a commission until he has furnished a purchaser for the property, willing and able to buy it upon such terms and at the price prescribed by the vendor.
4. **Instructions:** REQUEST. If further and more specific instructions are desired on a point covered by the charge given, they must be prepared and presented on behalf of the party in whose interest it is contended they were necessary.
5. ———: REVIEW. Certain instructions attacked as erroneous *held* applicable to the evidence, and, when read and construed in connection with other branches of the charge, not to be erroneous or prejudicial to the rights of the complaining party.

ERROR from the district court of Johnson county. Tried below before BUSH, J. *Affirmed.*

L. C. Chapman and *W. E. Stewart*, for plaintiff in error.

E. W. Thomas and *J. Hall Hitchcock, contra.*

HARRISON, J.

In this action the plaintiff sought to recover a sum alleged to be his due from defendant as commission on sale of real estate alleged to have been effected by him for defendant. The material portions of the petition filed, after allegations of defendant's ownership of the real estate, were as follows:

"That this plaintiff and defendant, on or about the 3d day of September, 1892, entered into an agreement in which it was stipulated that this plaintiff was to find for and furnish to this defendant a purchaser for the real property aforesaid.

"3. That the terms named in the said agreement on which this plaintiff was to furnish to this defendant a purchaser was as follows: $4,500, $2,500 in cash, purchaser to assume a mortgage then on the land of $2,000, as a part of the purchase price to be paid.

"4. That in accordance with the agreement aforesaid this plaintiff did, on or about the 6th day of October, 1892, furnish to this defendant a purchaser for the said real property aforesaid; that the said purchaser agreed to and with this defendant to purchase the said land upon the terms aforesaid; that at the time of the said agreement between this defendant and the purchaser of the said land the said purchaser was in a financial way able to comply with his part of the contract; that the said purchaser was a *bona fide* purchaser.

"5. That the said service rendered by this plaintiff to this defendant is reasonably worth the sum of $137.50."

The answer contained an admission of the ownership of the property described in the petition and a general denial of each and every other allegation of the petition. A trial of the issues in the district court of Johnson county, where the suit was instituted, resulted in a ver-

dict and judgment favorable to defendant, from which this error proceeding on behalf of plaintiff has been prosecuted to this court.

One assignment of error presents the question of the sufficiency of the evidence to support the verdict rendered. The sale of the land, on the negotiation of which this action is predicated, was never completed by any payment of the purchase price or any portion thereof, or by any transfer or agreement therefor. Indeed the evidence, although conflicting, warranted a finding that no definite or settled arrangement had been reached as to the terms of a contemplated sale. Of the conflicting evidence there was also sufficient to sustain a finding that plaintiff had never been employed by defendant to sell the land, and possibly that the relation of principal and agent in regard to such sale had never, directly or indirectly, by stated contract or by acts of one accepted by the other, been given an existence; and further, that the party, the prospective purchaser furnished by plaintiff, was not at the time ready and able to complete the purchase according to the proposed terms of sale. These are all essential elements without the appearance of which, in an action of this character, the plaintiff was not entitled to recover, and the contrary finding, based on sufficient evidence, will not be disturbed. "A new trial will not be granted by the supreme court on the ground of a want of sufficient evidence to support the verdict, unless the want is so great as to show that the verdict is manifestly wrong." (*Potvin v. Curran*, 13 Neb., 302.)

It is of the assignments that the trial court erred in giving the first instruction requested for defendant. The alleged error in this instruction was that it informed the jury that the evidence, to entitle the plaintiff to a recovery, must show that the relation of principal and agent, in respect to the proposed sale of the land, existed between the plaintiff and defendant; also, that it was not applicable to the evidence. With reference to the latter, suffice it to say that it was applicable to the evidence, and in

regard to the former, when the instruction was viewed as it should be, in connection with further instructions, prepared and given at the instance of counsel for plaintiff, the jury could only understand it must appear that the relation of employe and employer existed; that plaintiff represented and did any acts alleged to have been performed by him in and about the negotiations for a sale of the land, for and in behalf of defendant, and thereby became entitled to compensation.

It is complained that it was error to give an instruction asked for defendant, that the plaintiff must establish the procurement of a purchaser ready and willing and of the financial ability to complete the purchase for the price and on the terms and conditions originally required by the owner of the land. Counsel say: "That the proposed purchaser must be able, as well as willing, to perform, we do not deny; but we contend that ability to perform is presumed, in absence of evidence to the contrary, and if inability is a defense, it must be pleaded and proven by the defendant. This instruction changed the burden of proof, which is error on the part of the court;" citing, with others, the case of *Grosse v. Cooley*, 45 N. W. Rep. [Minn.], 15, wherein it was held: "Where a real estate broker has procured a purchaser for the property of his principal, the solvency and ability of such purchaser to perform the obligations of his contract will be presumed until the contrary is proven." This is but saying that when the proof shows that a purchaser was procured who entered into a contract for the purchase of the property, a *prima facie* case has been made by the plaintiff; that the presumption will prevail that the party is able to perform. This, if the rule in this state, which we need not now decide, does not and did not conflict with what was stated in the instruction the subject of this attack. Unquestionably the plaintiff must both plead and prove the ability to perform,—must establish a *prima facie* case. What facts proven and their necessarily attendant presumptions might suffice as a performance of such task,

if a matter demanding further instruction, devolved the duty on counsel for plaintiff, of the preparation and presentation for giving of such an instruction. This they failed to do, and the complaint, if it could have prevailed, is without force.

Error is specifically assigned of the giving, in the charge to the jury, of each of the instructions, third, fifth, and sixth, requested for the defendant. These instructions were applicable to the evidence, and when read and construed in connection with the other portions of the charge, especially those given at the request of counsel for plaintiff, were not erroneous or prejudicial to the rights of plaintiff, hence the objections to them must be overruled. No available errors have been assigned and presented, and it follows that the judgment will be

AFFIRMED.

JAMES TALCOTT, APPELLANT, V. JAMES R. C. FIELD ET AL., APPELLEES.

FILED FEBRUARY 16, 1897. No. 7106.

Bill of Exceptions: AUTHENTICATION. A bill of exceptions must be authenticated by the clerk of the district court to entitle its contents to consideration in an appeal to this court.

APPEAL from the district court of Gage county. Heard below before BUSH, J. *Affirmed.*

J. E. Cobbey, for appellant.

HARRISON, J.

The result of the trial of the issues in the district court of Gage county in this, an action instituted by appellant to subject certain property described in the petition filed to the payment of a judgment in favor of appellant against the appellees herein, was a finding and judgment

for appellees of dismissal of appellant's action, from which an appeal has been perfected to this court.

The questions presented on appeal require an examination and consideration of the evidence adduced on the trial, or a portion thereof. What purports to be a bill of exceptions is attached to the record, but it lacks identification by the certificate of the clerk of the district court; hence the matters therein contained will not be investigated. Since the evidence is not properly before us, and without it we cannot determine the force of appellant's attack on the judgment of the trial court, such judgment must be

AFFIRMED.

EDWIN W. MOSHER V. OLIVER P. COLE ET AL.

FILED FEBRUARY 16, 1897. No. 7095.

Landlord and Tenant: ACTION FOR RENT: ATTORNMENT. In an action for rent the defendants answered that the lessor had falsely represented that he was the owner of and entitled to control the demised premises, and thereby induced the lessees to enter into the lease, when in fact the lessor did not own the premises and was not entitled to the control thereof or to lease them, and that subsequently the defendants had attorned to and received a lease of the property from the owner, and paid the rent during the time for which it was claimed in the action to the later lessor. *Held*, That inasmuch as the lessee took possession of the premises under the lease by virtue of which the plaintiffs asserted their claim for rent due, and it not being shown that defendants had surrendered their rights under the first lease or been kept out of possession, or that there had been an eviction or its equivalent by the holder of the paramount title, there was no sufficient defense.

ERROR from the district court of York county. Tried below before BATES, J. *Reversed.*

Gilbert Bros., for plaintiff in error.

References: *Mattis v. Robinson*, 1 Neb., 3; 1 Washburn, Real Property, 361; 2 Herman, Estoppel & Res Judicata,

sec. 868; *McAusland v. Pundt*, 1 Neb., 249; *Parker v. Nanson*, 12 Neb., 419; *Denniss v. Twitchell*, 10 Met. [Mass.], 180; *Boyd v. State*, 19 Neb., 128; *Rector v. Gibbon*, 111 U. S., 276.

F. C. Power, contra.

References: *Anderson v. Smith*, 63 Ill., 129; *Mattis v. Robinson*, 1 Neb., 3; *Carter v. Marshall*, 72 Ill., 609; *Berridge v. Glassey*, 7 Atl. Rep. [Pa.], 749.

HARRISON, J.

In this case it was alleged for cause of action in plaintiff's petition that on May 9, 1892, Charles Green was lawfully possessed of certain described property in the city of York, this state, which he then leased to the defendants for the term of one year, they to pay therefor the sum of $15 per month in advance for each and every month during the term of the lease; that on July 2, 1892, the plaintiff became the owner of the lease and entitled to the benefits thereof by virtue of an assignment executed by the lessor named in the lease; that defendants were notified of said assignment and gave their assent thereto, and promised in writing, indorsed on said lease, to make payments due thereunder to plaintiff; that defendants had defaulted in five payments due under the terms of the lease, commencing with the payment due September 10, 1892. Defendant's answer was to the effect that Charles Green was not, at the time of the execution of the lease under which the claim in this action accrued, the owner or entitled to the possession or control of the premises leased, and that he had not been since the 31st day of December, 1891, at which date the title and right of possession of said property had been decreed by the district court of York county to be in one Rachel B. Green, to the exclusion of all persons, and especially Charles Green, named as lessor in the contract of lease with defendants; that defendants were induced to enter into said contract by the false representations of Charles

Green that he was the owner and in possession of the property to be affected thereby, and entitled to the control thereof; that long subsequent to the execution of the lease the defendants became informed of the facts in regard to the title and right to possession and control of the property occupied by them by virtue of the lease, and were notified by the agents of Rachel B. Green of her claimed rights in the premises and demand made that defendants vacate the property, and that they would be evicted unless they would attorn to Rachel B. Green and pay to her all moneys due for the use and occupation of the premises; that defendants afterward recognized and acknowledged the rights of Rachel B. Green in the premises and made such payments to her, including the amounts due for the months for which the payments are demanded in the present action. For plaintiff, in reply, there was a denial of all allegations of the answer in relation to false representations made by Charles Green, at the time of leasing, of and concerning the title to the property and the rights of possession and control thereof. There was an affirmative statement that the case was one on an appeal from the judgment of a justice of the peace, and that in the inferior court no such defense had been made of the issues tried and adjudicated. The reply also contained an admission of the rendering of the decree December 31, 1891, pleaded in the answer, but alleged the appeal thereof to the supreme court, and the approval and filing of a supersedeas bond; and further, that when the decree was rendered Charles Green was in the possession of the property; that Rachel B. Green had moved the court for a writ of possession of said premises after the rendition of the decree set forth in the answer and her motion had been overruled. A jury was impaneled and a trial of the issues had. At the close of the introduction of the evidence the presiding judge instructed the jury to return a verdict for defendants, which instruction was obeyed by that body, and in the regular course of the proceedings judgment was rendered in accordance

with the verdict. The case has been removed to this court by error proceedings on behalf of the plaintiff.

It is a general rule that a tenant cannot deny his landlord's title in an action to recover the rent moneys accrued under the terms of the lease. (Washburn, Real Property, 357*.) In the case of *Nissen v. Turner*, 50 Neb., 272, wherein an action for rent moneys due was attempted to be defended on the ground of want of title in the lessor and title in another, and false representations of lessor in regard to the title, which induced the lessee to execute the contract of lease, it was held: "To an action for rent the defendant pleaded that he had been induced to enter into the lease by the plaintiff's falsely and fraudulently representing to him that he was the owner of the demised premises, whereas in fact he was not the owner and had no authority to lease the same; that thereafter the defendant had accepted a lease from and paid rent to the true owner. Held not to state a defense, there being no averment that the lessee had not entered into possession, or that he had been kept out of possession or evicted by the holder of the paramount title, or that he had surrendered the lease." (See, also, *Parker v. Nanson*, 12 Neb., 419; *McAusland v. Pundt*, 1 Neb., 249.) The facts of the case at bar bring it directly within the rule announced in *Nissen v. Turner;* hence it must be governed thereby.

Counsel for defendant cite and rely upon the decision in the case of *Mattis v. Robinson*, 1 Neb., 3, to sustain their position in this case, and it is stated in the brief of counsel for plaintiff that it was claimed in the trial court to announce the doctrine "that a tenant can yield to a paramount title simply by notifying the landlord, without an actual surrender of possession." What was, in fact, announced in *Mattis v. Robinson, supra*, was the following: "Wherever there is a paramount title in a third person, who has a right thereby to the possession, and it can be done without any collusion or bad faith to the lessor, the tenant, in order to prevent being expelled by the holder of

that title, to whom, otherwise, he would be rendering himself liable as a trespasser, may yield the possession and attorn to or take from such holder of the title a new lease, or he may abandon the possession. In neither case will he be liable to the first lessor for rent. In the former case he may resist his first lessor's claim to the possession by the new right thereby acquired. In all cases he should notify his landlord of his action." From these statements and the discussion in the body of the opinion it is clear that what is meant is that an eviction, or what is equivalent thereto, by the holder of the paramount title must occur to warrant an attornment by the tenant to such party, and this must be coupled with notice to the landlord or original lessor. The circumstances of the case at bar, as developed by the evidence, were not of a character to bring it within the doctrine of the decision in *Mattis v. Robinson*, *supra*, or, indeed, within any of the restrictions or limitations of the general rule. It follows that the charge of the trial court to the jury to return a verdict for defendants was erroneous, and the judgment based on the resultant verdict must be reversed and the case remanded.

REVERSED AND REMANDED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY v. JAMES LYON.

FILED FEBRUARY 16, 1897. No. 7128.

1. **Railroad Companies: RIGHT OF WAY: FENCES.** Section 18, article 2, chapter 2, Compiled Statutes, in which a lawful fence is defined, has no reference to the fencing of the line or right of way of a railway. The latter subject is covered or governed by the provisions of section 1, article 1, chapter 72, of the Compiled Statutes.

2. ———: ———: EXPENSE OF FENCES: LIABILITY OF COMPANY. A party who has given to a railway company the notice to build a fence between its right of way and his adjoining land prescribed in the proviso to section 1, article 1, chapter 72, Compiled Statutes,

must, to be entitled to recover in an action for the reasonable expense of the erection of the fence after failure of the company so to do, show that the fence built by him along the right of way complies with the requirements of said section.

ERROR from the district court of Perkins county. Tried below before NEVILLE, J. *Reversed.*

W. S. Morlan and *J. W. Deweese*, for plaintiff in error.

References: *Missouri P. R. Co. v. Youngstrom*, 27 Pac. Rep. [Kan.], 982; *Lake Erie & W. R. Co. v. Lanert*, 27 N. E. Rep. [Ind.], 324; *Pennsylvania R. Co. v. Riblet*, 66 Pa. St., 164; *Welles v. Northern C. R. Co.*, 25 Atl. Rep. [Pa.], 51.

Parsons & Logan, contra.

HARRISON, J.

The defendant in error brought action in the district court of Perkins county to recover the alleged value of a fence built by him along the company's line of road, or right of way, and between the land owned and occupied by him and the right of way, alleging, *inter alia*, that the company's line of road, including a portion thereof which was on the land of the defendant in error, had been constructed, open for and in use for more than six months prior to December 16, 1892; that said land was not within the limits of any city, town, or village, nor were there public road crossings or highways within or on the right of way over and across the land of defendant in error; that on the date mentioned the defendant in error served on the company a notice of the intention by him entertained to build a fence and thereby inclose his land, and requesting the company to construct a fence along its right of way on and adjoining said land; that after the lapse of more than six months immediately succeeding the service of the notice, the company having failed to build the fence along its right of way as demanded in the notice, the defendant in error procured the necessary material and erected said fence, whereby the company be-

came indebted to him in the sum of $74.27. The answer of the company was in the following words:

"1. Denies each and every allegation in said petition contained, except the matters and facts hereinafter specifically admitted.

"2. The plaintiff has not inclosed the land mentioned in plaintiff's petition, or any part thereof, with a lawful fence, and at no time before the commencement of this action did the plaintiff intend to build around the land in plaintiff's petition described, and up to the right of way of the line of railroad operated by this defendant, a lawful fence."

To this answer there was a reply, a general denial. A jury was waived and a trial of the issues had to the court. The following stipulation of facts was filed: "It is hereby stipulated and agreed between the plaintiff and the defendant in this action, and for the purpose of this trial it is to be considered as evidence by the court, that the defendant is a corporation and the owner and operator of the railroad described in plaintiff's petition; that the plaintiff, on the 16th day of December, was the owner of the southeast quarter of section 18, township 10 north of range 39 west, in Perkins county, Nebraska, adjoining the right of way of said railroad; that said railroad crosses the above described land in a direction nearly east and west, leaving about fifty acres north of said track and the balance on the south side; that said land is not within the limits of any city, town, or village, and that there is no crossing of public roads or highways on the right of way across the said lands; that on the 16th day of December, 1892, the plaintiff served notice upon the defendant that he desired and intended to inclose his land on the adjoining right of way of the defendant on the south of the railroad with a fence, and requested the defendant to construct a fence along the right of way, as provided by section 555, page 192, of the Consolidated Statutes of Nebraska. The plaintiff constructed a fence around his land up to the right of way of the defendant,

consisting of two wires attached to the posts set two rods apart; that this was the very same kind of fence he intended and the only kind of fence he intended to build at the time he served the notice; that he constructed along the line between the railroad and the land above described a fence composed of posts and four wires; wires attached to posts sixteen feet apart, with stays midway between, the top wire being four and one-half feet from the ground and the bottom wire one and one-half feet from the ground, and two other wires equal distance between the top wire and the bottom wire. The fence so constructed along the right of way of the railroad is not a fence suitable and amply sufficient to prevent hogs from getting on the railroad. That the prices of the material used and the labor performed in constructing the fence along the railroad by the plaintiff set forth in the petition are the reasonable prices and value thereof, and that no part of the amount claimed has been paid; that more than six months elapsed from the 16th day of December, 1892, the date of the service of the notice, and the defendant failed to erect said fence as required by said notice, and that after the six months elapsed the plaintiff built the fence above described."

Of the oral evidence we will quote the following portion:

Q. I will ask you to state, if you know, if the fence built by you along the right of way of the railroad crossing your land, as mentioned in this stipulation, was like other fences built by the railroad company crossing other lands in this county and vicinity.

A. It was; more than the posts that I got wasn't as large as other posts. The posts were the same distance apart, same number of wires, and the wires the same distance apart.

The action was instituted under the provisions of section 1, article 1, chapter 72, Compiled Statutes, 1895, which took effect as a law June, 1867, and a proviso thereto, passed during the legislative session of 1883.

The section and proviso read as follows: "That every railroad corporation whose lines of road or any part thereof is open for use shall, within six months after the passage of this act, and every railroad company formed or to be formed, but whose lines are not now open for use, shall, within six months after the lines of such railroad or any part thereof are open, erect and thereafter maintain fences on the sides of their said railroad or the part thereof so open for use, suitably and amply sufficient to prevent cattle, horses, sheep, and hogs from getting on the said railroad, except at the crossings of public roads and highways, and within the limits of towns, cities, and villages, with opens, or gates, or bars at all the farm crossings of such railroads for the use of the proprietors of the lands adjoining such railroad, and shall also construct, where the same has not already been done, and hereafter maintain at all road crossings, now existing or hereafter established, cattle guards suitable and sufficient to prevent cattle, horses, sheep, and hogs from getting onto such railroad, and so long as such fences and cattle guards shall be made after the time hereinbefore prescribed for making the same shall have elapsed, and when such fences and guards, or any part thereof, is not in sufficiently good repair to accomplish the objects for which the same is herein prescribed, is intended, such railroad corporation and its agents shall be liable for any and all damages which shall be done by the agents, engines, or trains of any such corporation, or by the locomotives, engines, or trains of any other corporations permitted and running over or upon their said railroad, to any cattle, horses, sheep, or hogs thereon; and when such fences and guards have been fully and duly made, and shall be kept in good and sufficient repair, such railroad corporation shall not be liable for any such damages, unless negligently or willfully done; *Provided, however*, That any person, company, or corporation owning land adjoining the right of way of any railroad company in this state, and not within the limits of any town,

village, or city, and intending to inclose his or their land, or any part thereof, that adjoins such right of way or railroad, with a fence, such person or the secretary of such company or corporation, by direction thereof, may notify in writing such railroad company of such intention and request such railroad company to build a lawful fence as described in this section, on the line between their railroad and the land intended to be inclosed. Such notice shall definitely specify two points on such line between which points such fence is requested to be erected, and describe the field intended to be inclosed. The railroad company shall, within six months after receiving such notice, cause to be erected the fence required by such notice, and in case of a failure so to do the party so giving notice as aforesaid may cause such fence to be erected, at a reasonable cost, and collect the amount thereof from the railroad company so neglecting to erect the fence."

There was some discussion in the briefs as to the kind of a fence to be erected to fulfill the requirements of the section of the statute we have just quoted, and it was urged in behalf of the company that the erection of such a fence as is described in section 18, article 2, chapter 2, Compiled Statutes, as a lawful fence, is what is demanded by the provisions of section 1, article 1, chapter 72; but this is not necessarily true, and that the fence prescribed and described in section 18, article 2, chapter 2, is what may be denominated a lawful fence when made for the mere inclosure of land does not authorize the conclusion that it is the fence meant and required in section 1 of chapter 72. It could not be so unless it was according to the terms of the last mentioned section, as a structure "suitably and amply sufficient to prevent cattle, horses, sheep, and hogs from getting on the said railroad," or, expressed in other words, to bar or inclose such animals. This question was considered and decided by this court in the case of *Chicago, B. & Q. R. Co. v. James*, in an opinion written by MAXWELL, J., reported in 26 Neb., 188. It was

announced: "The provisions of section 18, chapter 2, Compiled Statutes, defining a lawful fence, apply alone to the inclosing of lands, and do not apply to the fencing of a railway. That matter is governed by section 1, article 1, chapter 72, Compiled Statutes." It is true that the material to be used and the form and manner of construction of the fence are not set out in terms, or even indicated, in section 1 of chapter 72, but doubtless a fence could be devised and erected, if the desire existed so to do, which would be reasonably ample and sufficient to inclose either or all of the specified animals, or bar the progress of either in any particular direction.

One contention on the part of the company is that the fence built by the defendant in error, the expense thereby incurred being the amount sought to be recovered herein, and for which he was given judgment, was not such a fence as is exacted by the section of the statutes under which the claim is asserted, and that this is disclosed by the stipulated statement of the facts, wherein it was said: "The fence so constructed along the right of way of the railroad is not a fence suitable and amply sufficient to prevent hogs from getting on the railroad;" that in order to entitle the defendant in error to be paid for making the fence it must have been such a structure as was required by the law under which the claim is presented. The statute prescribed that the fence must be suitably and amply sufficient to prevent certain designated animals, including hogs, from getting on the railroad, and also that the person, owner of and intending to inclose land through or over which the company's road extended, might give the company written notice of such intention and request it to build a "lawful fence as described in this section on the line between the railroad and the land intended to be inclosed," and if the company failed to comply with the request of the notice within six months after its service the party might cause such a fence to be erected, at a reasonable cost, and collect the amount of such cost from the company, from all of which

it is clear that the fence erected by the party claiming to collect the amount of its cost from the company, by reason of the company's neglect to build the fence within the statutory time after such notification, must be such a fence as meets the requirements of the statute under which the claim is made. And it further appears that the fence, on the erection of which this suit is predicated, was not such an one, for the reason that it would not turn or inclose or prevent hogs from getting on the railroad; hence no cause of action accrued and the judgment rendered was erroneous.

It is urged in this connection, in behalf of defendant in error, that the fence which he built was similar to the fences erected by the company along the line of its right of way, to meet the demands of the statute and of parties in statutory notices served in regard to such fences; that inasmuch as in building the fence, the cost of which he seeks to recover herein, he followed the pattern set by the company, it should be sufficient, although not so in contemplation of the statute. If the company has erected, or caused to be erected, fences which were lacking in the particular in which it is stipulated the one built by defendant in error was deficient, then it has, in so doing, not complied with the statute, and in each instance could not successfully allege its action as a compliance with the law; but its failure can furnish no reason for allowing to the defendant in error a recovery on an incomplete performance of the statutory requirements in regard to the kind of a fence to be erected. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

ABRAHAM RACHMAN ET AL. V. J. F. CLAPP ET AL.

FILED FEBRUARY 16, 1897. No. 7022.

1. **Sales:** PAYMENT OF ANTECEDENT DEBT. A bill of sale received in payment of an antecedent debt protects the vendee to the same extent as had there been a new consideration, if taken in good faith and without an intention to defraud the other creditors of the vendor.

2. **Attachment:** SERVICE OF PROCESS. Jurisdiction over attached property is not lost by failure to serve process in the main case so long as the action remains pending. (*Darnell v. Mack*, 46 Neb., 740.)

ERROR from the district court of Douglas county. Tried below before SCOTT, J. *Reversed.*

Kennedy, Gilbert & Anderson, and *C. P. Halligan*, for plaintiffs in error.

B. N. Robertson, Martin Langdon, Cavanagh & Thomas, Rich, O'Neill & Sears, and *McClanahan & Halligan, contra.*

NORVAL, J.

This was a suit in replevin to recover a stock of groceries, store fixtures, and other personal property. A separate verdict was returned in favor of each defendant covering different portions of the chattels, and from the judgments rendered thereon, plaintiffs have prosecuted error proceedings to this court.

Plaintiffs claim to be the absolute owners of the property in controversy, while the defendants seized the same under certain writs of attachment issued against H. S. Rachman, plaintiffs' son, who at one time was the owner of the chattels, and the defendants insist that he had not parted with his title thereto at the time the levies in question were made. The disputed question of fact in the case was: Did the plaintiffs, or their son, own the property? It is undisputed that one Milford E. James

was the owner of a grocery stock and fixtures located at 1921 Sherman avenue, in the city of Omaha, which on the 1st day of September he sold and conveyed by bill of sale to B. Rachman, one of the plaintiffs, and on the same day the latter, by bill of sale, conveyed the same property to her son, the said H. S. Rachman, who immediately took possession and carried on the business, until January 27, 1893, replenishing the stock from time to time by purchases. On the date last aforesaid, the son conveyed to the plaintiffs, by bill of sale, the stock then on hand, the fixtures and some other chattels, the same being the property now involved in this suit, in payment of an indebtedness of something less than $1,400, the larger portion of which represented the amount due from H. S. Rachman to his mother for the original purchase price of the goods. Just preceding the last transfer the stock was inventoried by the father, his son, and two clerks of the latter, consuming in doing so one day and a part of one night. The bill of sale was filed for record in the office of the county clerk, and possession of the property taken by the plaintiffs. Subsequently, the several writs of attachment were issued and levied thereon. The son was insolvent at the time. The defendants introduced testimony tending to show that one of the plaintiffs, Abraham Rachman, at the time the levies were made, stated that he had always owned the stock of goods and that the son was conducting the business for the father; also, that he, Abraham, told the defendant Clark that the son owned the horses levied upon. The latter alleged statement is denied by Abraham, but the other stands uncontradicted. The record discloses that immediately prior to the making of the last bill of sale McCord, Brady & Co. sold on time and delivered to H. S. Rachman twenty sacks of flour, which have never been paid for. Upon this feature of the case the court gave the following instruction to the jury, which is assigned as error:

"If you find from the evidence that the twenty sacks of flour were purchased a short time before the date

when the plaintiff claims to have bought the property back from his son, * * * and you further find that the defendant has shown by a preponderance of the evidence that the twenty sacks of flour were the property of the intervenors, McCord, Brady & Co., and that the same has not been paid for and the value thereof, then your verdict should be for the intervenors, McCord, Brady & Co., upon their petition of intervention as to the twenty sacks of flour. And you are further instructed that if when this flour was purchased by H. S. Rachman, whether he was the actual owner of the store or not, if he was in failing circumstances, unable to meet his obligations, and you further find that the plaintiffs knew that fact, or had reason to know the fact; that is, if a reasonably cautious and prudent man would have known the fact that H. S. Rachman purchased the grocery, including the flour, if you find he did purchase it back, that H. S. Rachman was indebted, and unable to pay his debts, or, if you further find that at the time of the alleged purchase by Abraham Rachman he took it back, took the store back for an antecedent debt, knowing, or having reason to know, if he did know or have reason to know that H. S. Rachman was in failing circumstances and unable to pay his debts, such transaction on the part of Abraham Rachman would not give him the right of possession of this flour as against McCord, Brady & Co., if they have established the facts as I have stated they are required to."

This instruction was erroneous and prejudicial. There was no evidence to show that McCord, Brady & Co. owned the flour in controversy; hence it was error to assume that there was evidence before the jury from which they could find the existence of such ownership. It was a fact that the flour was sold to young Rachman recently before the transfer to plaintiffs and payment therefor had not been made, but such fact alone did not authorize said firm to obtain possession of the property, or constitute it the owner thereof. Nor is it the law that the plaintiffs were

not entitled to the possession of the flour because H. S. Rachman was in failing circumstances; that plaintiffs had notice thereof or of facts sufficient to put them upon inquiry and that they took the stock, including the flour, in satisfaction of debt then due them from their son. It is a well recognized principle of law in this state, that a pre-existing debt is a good consideration for a conveyance of property, and if it was taken in good faith and without any fraudulent purpose it will be upheld even though the consideration therefor was an antecedent debt. (*Ward v. Parlin*, 30 Neb., 376; *Chaffee v. Atlas Lumber Co.*, 43 Neb., 224; *State Bank of Lushton v. Kelley Co.*, 49 Neb., 242; *Steen v. Stretch*, 50 Neb., 572.) There was ample evidence to authorize a finding that the bill of sale to plaintiffs was executed in good faith, without any intention on their part to defraud the other creditors of the grantor, and we cannot say that the jury would not have so found had it not been for the above portion of the charge of the court.

Counsel for plaintiffs assail the fifth instruction, which reads as follows:

"5. You are further instructed that if you find from the evidence that there was a bill of sale executed by Henry S. Rachman to his mother for this property, or any portion of it, involved in these proceedings, and such bill of sale was never recorded, and you further find that these parties who gave credit to Henry S. Rachman had no actual knowledge of the existence of such bill of sale, and gave credit to Henry S. Rachman not knowing such instrument to be in existence, such instrument is a fraud, and would be a fraud upon the creditors who in good faith gave Henry S. Rachman credit on the belief that no such instrument in fact existed. It is admitted that exhibit number '4' was never recorded, and that is the instrument alluded to in this instruction."

The foregoing was erroneous for the reason, among others, plaintiffs did not predicate title upon the bill of sale dated September 1, 1890,—the one alluded to in the

charge,—but upon the one executed January 27, 1893; hence the creditors of Henry S. Rachman were not prejudiced by the existence of the bill of sale of the date first aforesaid.

Lastly, it is urged that the attachment proceedings were invalid because no service of summons was ever obtained upon the defendant in the main actions in which the attachments were sued out. We have held the opposite to be true in *Darnell v. Mack*, 46 Neb., 740, which decision was right, and is adhered to. Judgment reversed, and cause remanded for a new trial.

REVERSED AND REMANDED.

GEORGE M. MONTGOMERY ET AL. V. ALBION NATIONAL BANK.

FILED FEBRUARY 16, 1897. No. 6929.

1. **Usury:** PAYMENT: SET-OFF. Money paid to a national bank as usurious interest on a loan of money cannot be set off in a suit brought by it to recover the principal debt more than two years after such payment was made. *Norfolk Nat. Bank v. Schwenk*, 46 Neb., 381, and *Lanham v. First Nat. Bank of Crete*, 46 Neb., 663, followed.
2. **Review:** ASSIGNMENTS OF ERROR. The question as to whether there was error in the assessment of the amount of recovery will not be considered unless raised by a proper assignment of error.
3. ———: CONFLICTING EVIDENCE. Questions of fact determined upon conflicting evidence will not be reviewed in this court.
4. **Usury:** COSTS: ATTACHMENT. Where, in an action on a promissory note, the defense of usury is established, the defendant is entitled to recover his costs, and such recovery applies to costs incurred in the suing out of an attachment in the case.

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

F. S. Howell and *Montgomery & Hall*, for plaintiffs in error.

J. A. Price, contra.

NORVAL, J.

This was an action upon a promissory note for $2,700 executed by the defendants below under the firm name of Montgomery & Jaycox, and delivered to the Albion National Bank. The defense was usury, thirteen payments of illegal and usurious interest of $16.50 each being set up in the answer in as many counts thereof. The bank filed a general demurrer to the several counts of the answer, which was overruled as to the first three defenses and sustained as to the others. From a judgment against the defendants they prosecute error.

It is argued that there was reversible error in sustaining the demurrer to the last ten grounds of defense contained in the answer. The defendants sought to have applied, by way of set-off against the note, the several payments of illegal or usurious interest actually paid the bank on the loan. The district court ruled they were not entitled to do so, which is in accord with the doctrine recognized and applied in *Norfolk Nat. Bank v. Schwenk*, 46 Neb., 381, and *Lanham v. First Nat. Bank of Crete*, 46 Neb., 663. In the opinion in the last case it was said "that usurious interest paid a national bank on a note cannot be set off in an action upon such note, and that the federal statute alone determines the penalties that shall be visited upon such banking institutions for exacting and receiving illegal interest; that is, if illegal interest has been contracted for and not paid, the bank forfeits all interest; but if illegal interest has been paid to a national bank, the borrower may recover double the amount thereof, providing his action is commenced within two years from the time the usurious transaction occurred; further, that the borrower may not set off in an action on

the note either the amount of usurious interest paid thereon, or double the sum so paid, more than two years before the action was instituted." The answer shows that all the payments of usurious interest, excepting the first three, were made more than two years prior to the bringing of this suit; and furthermore, that an action has been instituted by the defendants against the bank under the Revised Statutes of the United States to recover double the amount of usurious payments, and said suit is still pending and undetermined. In view of these facts, there was no error in sustaining the demurrer.

The note in controversy was taken in renewal of two other notes given by the defendants for $1,500 and $1,200 respectively. The one for the larger sum was tainted with the vice of usury, while as to the other no usury is claimed. It is insisted that the merging of those two notes into the one under consideration affected the latter with the usurious taint, and prevents the recovery of interest on any portion of the principal sum; therefore, the court below erred in allowing interest on $1,200 of the debt. Whether this is true or not we refrain from deciding, since no complaint has been made in the petition in error that the assessment of the amount of the recovery was excessive. (*Beavers v. Missouri P. R. Co.*, 47 Neb., 761; *Barmby v. Wolfe*, 44 Neb., 77.)

Another contention is that there was error in overruling the motion to discharge the attachment, which was based upon two grounds—the insufficiency of the affidavit on which the attachment was issued, and that the statements therein contained are untrue. The latter ground alone is relied upon in this court. The motion to dissolve was heard upon conflicting affidavits, and the decision being supported by evidence tending to show that at least one of the statutory grounds for an attachment existed, the ruling will not be molested.

Finally, it is argued that the court erred in rendering judgment in favor of the bank for the costs made on the attachment. All other costs were taxed to it. The note

for $1,500, already mentioned, was executed and delivered by the defendant to Thompson & Barker, who, after the receipt of three payments of illegal interest, indorsed the note to the Albion National Bank. The latter was a purchaser with notice of the usurious contract. Section 5, chapter 44, Compiled Statutes, declares: "If a greater rate of interest than is hereinbefore allowed shall be contracted for or received or reserved, the contract shall not, therefore, be void, but if in any action on such contract proof be made that illegal interest has been directly or indirectly contracted for, or taken, or reserved, the plaintiff shall only recover the principal, without interest, and the defendant shall recover costs." By virtue of the foregoing provision, when the defense of usury is established, in any action, the defendant is entitled to recover his costs, even though the plaintiff obtains judgment. The statute has made no exception as to costs made in an ancillary proceeding before judgment, as in case of attachment, and the court can make none. It is said that this bank is a creature of the law of the general government and is liable alone to penalties imposed by the federal statute relating to usurious contracts. As a general proposition that could be safely conceded as to usurious contracts made with national banks, and in this case such rule has been applied as to all usurious interest contracted for and received by the bank on the $1,500 note. But the question of costs in the case at bar is controlled by the state statute above quoted, since the note is tainted with the vice of usury in its inception, and was not delivered to the bank originally, but it subsequently became the owner thereof by purchase, with notice of the usurious transaction. The fact that the costs grew out of the attachment proceedings, and were not made in proving or disproving the charge of usury, is immaterial. (*Cattle v. Haddox*, 17 Neb., 307; *Rodgers v. Graham*, 36 Neb., 730.)

The judgment, in so far as it awarded the bank the costs which accrued in the attachment, is reversed and a

judgment for defendants below will be entered for the amount of their costs in the attachment. In all other respects the judgment of the district court is affirmed.

JUDGMENT ACCORDINGLY.

HARRISON, J., not sitting.

D. E. HOLMES, APPELLEE, V. ELSIE E. HULL, APPELLANT, ET AL.

FILED FEBRUARY 16, 1897. No. 7003.

1. **Mortgages:** ACKNOWLEDGMENT: WITNESSES. A mortgage upon real estate, other than the homestead, executed and delivered by the mortgagors is valid between the parties and those having knowledge of its existence, although not lawfully acknowledged or witnessed.
2. **Married Women:** MORTGAGES. A married woman may, by a mortgage duly executed and delivered, bind her separate property for the payment of a loan of money made to her husband, to the extent of the property covered by such mortgage.
3. ———: ———: CONSIDERATION. The loan to the husband is a sufficient consideration for the execution of the mortgage.

APPEAL from the district court of Kearney county. Heard below before BEALL, J. *Affirmed.*

J. L. McPheely, G. L. Godfrey, and *J. M. Stewart,* for appellant.

Ed L. Adams, contra.

NORVAL, J.

The defendants are wife and husband. The defendant husband borrowed of plaintiff, through his agent, J. A. Cline, the sum of $2,500, which loan was evidenced by promissory notes signed by both husband and wife, and the payment thereof was secured by a real estate mort-

gage given by them upon the separate property of the wife. Plaintiff's agent had full knowledge of the ownership of the mortgaged property at the time the loan was negotiated, and the money was paid over to the husband. No portion of the $2,500 ever came into the hands of the wife, nor was any part thereof used or expended in any way whatever for the benefit or improvement of her separate estate, trade, or business. From a decree foreclosing said mortgage the wife appeals.

It is urged that the mortgage is invalid, because the execution thereof was not witnessed by a competent person, and that the notary who certified to the acknowledgment was disqualified to act by reason of his being the agent of the lender. The sole witness to the execution of the instrument was the said J. A. Cline, and he was likewise the officer who took the acknowledgment. Whether the fact that Mr. Cline was the agent of the mortgagee in making the loan is sufficient to render him incompetent to either witness the mortgage or take the acknowledgment it is unnecessary to decide, although it would seem that the decisions of this court would justify the conclusion that Mr. Cline did not possess such an interest in the subject of the instrument as to disqualify him from signing as a witness or taking the acknowledgment of the mortgagors. (See *Child v. Baker*, 24 Neb., 188; *Horbach v. Tyrrell*, 48 Neb., 514; *Havemeyer v. Dahn*, 48 Neb., 536.) It is neither alleged nor proved that the mortgaged premises were at the time occupied by the defendants as a homestead. The evidence shows the opposite to be the fact; therefore the acknowledgment of the mortgage by them before an officer empowered by law so to do was not essential to the validity of the instrument. It was valid as between the parties though it had never been witnessed or acknowledged. This doctrine has been too frequently asserted by this court to require more than the citation of the cases in which it has been announced. (*Burbank v. Ellis*, 7 Neb., 156; *Kittle v. St. John*, 10 Neb., 605; *Green v. Gross*, 12 Neb., 123; *Harrison v.*

McWhirter, 12 Neb., 152; *Missouri Valley Land Co. v. Bushnell*, 11 Neb., 192; *Keeling v. Hoyt*, 31 Neb., 453; *Connell v. Galligher*, 39 Neb., 793; *Pearson v. Davis*, 41 Neb., 608.) The evidence is clear and undisputed that Elsie E. Hull signed the notes and mortgage, but whether she executed them with her free and voluntary act the witnesses do not agree. Each of the defendants testified that she signed them under protest, while Mr. Cline's testimony is quite emphatic that the execution of the papers on her part was entirely free and voluntary, and without any compulsion or coercion on the part of any one. The finding of the court as to the execution and delivery of the mortgage being sustained by sufficient evidence, it will not be disturbed.

It remains to be considered whether the plea of coverture is a good defense against this mortgage. Stated differently, is a wife's separate estate liable for the payment of a mortgage executed by her to secure the payment of a loan obtained by her husband for his own use and benefit, when no part of the money thus procured was expended in and about her separate estate, trade, or business? The statute of this state relative to married women has been frequently before this court for consideration, but it is unnecessary for us to review the decisions on the subject at this time. Appellee strenuously insists that the statute does not confer upon a married woman an unrestricted power to enter into contracts, but the right to do so is confined to those made with reference to and upon the faith and credit of her separate property, trade, or business. Counsel for appellant do not controvert the soundness of the rule just stated, but they insist that a contract is not made in reference to a married woman's separate estate, trade, or business unless such contract related to or concerned the same, and that the consideration passed to her for the benefit of her separate property, trade, or business. If the question was an open one in this state the writer would be inclined to adopt that as the proper construction of the statute, but the

point has been set at rest by judicial construction of so long standing as to bar our investigating the subject anew. It has been decided that a married woman may, by mortgage duly executed and delivered, bind her individual property for the payment of another's debt, to the extent of the property covered by such mortgage. (*Stevenson v. Craig*, 12 Neb., 464; *Nelson v. Bevins*, 19 Neb., 715; *Buffalo County Nat. Bank v. Sharpe*, 40 Neb., 123; *Watts v. Gantt*, 42 Neb., 869.) The loan to the husband was a sufficient consideration for the mortgage, and it having been made upon the faith and credit of Mrs. Hull's individual property, the same is liable for its payment. The decree will be

AFFIRMED.

CARPENTER PAPER COMPANY, APPELLEE, V. J. C. WILCOX ET AL., APPELLANTS.

FILED FEBRUARY 16, 1897. No. 7051.

1. **Mortgages: DESCRIPTION: MISTAKE: REFORMATION.** A mutual mistake in the description of property mortgaged is sufficient to justify the reformation of the instrument by a court of equity, not only as against the mortgagors, but also as against purchasers under them chargeable with notice of such mistake.
2. **Bona Fide Purchasers.** A *bona fide* purchaser of land is one who purchases for a valuable consideration, paid or parted with, without notice of any suspicious circumstances to put him upon inquiry.
3. **Mortgages: ERRONEOUS DESCRIPTION.** A mortgage of real estate will not be invalidated by reason of an error in the description of the property in case the remainder of the description, after rejecting the erroneous portion, is sufficiently definite to enable the land to be located. (*Hubermann v. Evans*, 46 Neb., 784.)
4. ———: **REFORMATION: EVIDENCE.** Evidence examined, and *held* sufficient to justify the reformation of a mortgage on the ground of a mutual mistake in describing the property intended to be incumbered.

APPEAL from the district court of Douglas county. Heard below before AMBROSE, J. *Affirmed.*

David Van Etten and *Sherman Wilcox*, for appellants.

L. D. Holmes and *Byron G. Burbank, contra.*

NORVAL, J.

This was an action in equity to reform a mortgage on the ground of an alleged mutual mistake in said mortgage, and for a decree of foreclosure thereon as reformed. A decree was entered in favor of plaintiff, from which defendants appeal. A reformation of the instrument was asked for on the ground of an alleged mistake of the scrivener in describing the property intended to be incumbered. The decree is assailed on the ground that it is unsupported by the evidence. The proofs submitted on the trial tend strongly to establish the following facts: Jeremiah C. Wilcox, one of the defendants, on the 20th day of October, 1891, executed and delivered to plaintiff his promissory note for $5,966.28, due in eight months thereafter, with interest at ten per cent, and the payment thereof was to be secured by a real estate mortgage. At that time said Wilcox was the owner of the following described real estate situate in Douglas county, to-wit: "Commencing at a point 852 feet north and 425 feet east of the quarter-section corner, on the west line of section 34, township 15 north, range 13 east, being on the south side of Green street, thence south 134½ feet; thence east 175 feet; thence north 134½ feet; thence west 175 feet to the beginning, being a tract on the east side of Twenty-third street and the south side of Green street. Also a piece of land described as follows: Commencing at a point 247½ feet south of the northwest corner of the tract last above described, thence south 130 feet; thence east 175 feet; thence north 130 feet; thence west 175 feet to the beginning, being a tract of land fronting on Boulevard street." Pursuant to said agreement, on the same date the said Wilcox and Perlia J. Wilcox, his wife, by her attorney in

fact, the said Jeremiah C. Wilcox, executed a mortgage to secure the payment of said promissory note, the premises being described in said mortgage as above set forth, with the exception that the number of the section was designated as "3" instead of "34." The mortgage was prepared by L. D. Holmes, plaintiff's attorney, and it is insisted that he inadvertently described the premises as lying in section 3 when in lieu thereof section 34 should have been written in the mortgage. There is no pretense that Mr. Wilcox owned any land in section 3 of the town and range mentioned in the mortgage, and he testified that he did not own any real estate therein, while he was then the owner of the property here in dispute, situate in the said section 34. No disinterested person can read the testimony contained in the bill of exceptions without reaching the conclusion that there was a mutual mistake in describing the premises in the mortgage. It would be a reflection upon the integrity of Mr. Wilcox to hold that he intentionally mortgaged property he did not own,—an imputation not warranted by the evidence before us. The record discloses that Mr. Wilcox furnished plaintiff, prior to the drafting of the mortgage, an abstract of the title of the property upon which security for the payment of the note was to be given, and to which abstract was attached a plat of the premises, showing their location as described in the mortgage with the single exception that the number of the section was stated on the plat to be "34" instead of "3." This abstract and plat were produced by the plaintiff on the trial and introduced in evidence, and they have been preserved by the bill of exceptions. Mr. Wilcox, although examined as a witness, did not deny in his testimony that an error was made in the description by the draftsman of the mortgage. That the mistake as contended was made we entertain no doubt. That the description of the premises in a mortgage may be reformed by a court of equity on the ground of mutual mistake of the parties is firmly established by the adjudications of

this court. (*Palmer v. Windrom*, 12 Neb., 494; *Parker v. Starr*, 21 Neb., 680.) It is unnecessary to cite the decisions of the courts of our sister states affirming the same doctrine.

It is urged that the decree as to Perlia J. Wilcox should be reversed—First, because she never authorized her husband to affix her name to the mortgage in controversy; and second, that, she not having been present when the instrument was executed, the error in the description was not a mistake with which she is chargeable. Neither of the contentions is well founded. It is undisputed that Mr. Wilcox, at the time the mortgage was given, held a general power of attorney from his wife, duly executed by her, authorizing him, among other things: "To incumber, by mortgage or otherwise, all or any part of any real estate, or any interest therein, I have or ought to have in the state of Nebraska." This conferred ample authority upon Jeremiah C. Wilcox to execute a mortgage in the name of Mrs. Wilcox, upon any part of her real estate in this state, or in which she had any interest. If she had no interest whatever in the property in controversy, as insisted in the brief, clearly she is not prejudiced by the decree. It is unimportant that Mrs. Wilcox was not present when the mortgage was given. The mistake of her attorney in fact is, in law, her own. The error in the description as between the parties to the mortgage should be reformed.

There remains to be considered the question whether the mortgage can be corrected as against the defendants, the South Side Real Estate & Building Company, a corporation, and Sherman Wilcox. The latter is a son of the said Jeremiah C. and Perlia J. Wilcox. The answer admits that the three Wilcoxes were the exclusive stockholders in the said company. Subsequent to the execution, delivery, and recording of the mortgage under consideration, the said Jeremiah C. Wilcox and his wife conveyed to the said South Side Real Estate & Building Company, subject to existing incumbrances of record, the

real estate intended to be covered by said mortgage. While a mutual mistake will not be corrected in equity as against innocent third parties, it is the settled law that a mistake in the description of the premises in a mortgage or deed will be reformed not only as against the parties to the instrument but also as against subsequent purchasers chargeable with notice of such mistake. (*Gouverneur v. Titus*, 6 Paige Ch. [N. Y.], 347; *Whitehead v. Brown*, 18 Ala., 682; *Wall v. Arrington*, 13 Ga., 88; *White v. Wilson*, 6 Blackf. [Ind.], 448; *Simmons v. North*, 3 S. & M. [Miss.], 67; *Strang v. Beach*, 11 O. St., 283.) Applying the foregoing rule to the facts in the case it is obvious that the mortgage can be reformed as against the South Side Real Estate & Building Company; since it was not a purchaser of the real estate for value without notice of the imperfection in the description in the mortgage. It was established on the trial beyond dispute that one of the tracts intended to be mortgaged to plaintiff is bounded on the north by a public highway known as "Green street," and on the west by a public thoroughfare known as "Twenty-third street;" that the other piece is also bounded on the west by said Twenty-third street, and on the south by Boulevard street; that both Green and Boulevard streets have been for many years, and were, at the time the mortgage was given, used by the traveling public as highways, and recognized as streets. Rejecting entirely the portion of the description contained in the mortgage which was untrue, namely, the number of the section, and the remainder of the description therein contained was sufficiently definite to render the point of commencement and the location of the premises susceptible of ready ascertainment by any one acquainted with the locality, or by a competent surveyor, and to have charged any purchaser of the property with notice which the record of this mortgage afforded. The description as written in the mortgage, after rejecting the erroneous portion thereof, as we must, under the rule laid down in *Hubermann v. Evans*, 46 Neb., 784, and *Woods v. Hart*, 50

Neb., 497, clearly shows that the starting point for the location of the first tract mentioned in the mortgage is the east intersection of Twenty-third street with the south line of Green street, and that said tract extended thence east 175 feet along the south side of said street, and also extended from said initial point south 134½ feet along the east side of said Twenty-third street. There is no difficulty in locating the second piece, from the description as written in the mortgage, since it is described by courses and distances as "commencing at a point 247½ feet south of the northwest corner of the tract last above described, * * * being a tract of land fronting on Boulevard street." The mortgage contained a sufficient description of the property to prevent the South Side Real Estate & Building Company from becoming an innocent purchaser of the property. Besides, it was put upon inquiry by the clause in the deed: "Subject to all existing incumbrances of record." Moreover, the record fails absolutely to show that the company ever paid or promised to pay a dollar for the land; therefore it is not entitled to the protection which the law throws around a *bona fide* purchaser for value. (*Veith v. McMurtry*, 26 Neb., 341; *Savage v. Hazard*, 11 Neb., 323.)

As to the defendant Sherman Wilcox, it is sufficient to say that he is not a purchaser of any portion of the property in controversy, inasmuch as he is merely a stockholder in the South Side Real Estate & Building Company, and whether he paid value for his stock is not important to the question before us. The decree is right and is accordingly

AFFIRMED.

PETER ROCCO ET AL. V. B. FRAPOLI ET AL.

FILED FEBRUARY 16, 1897. NO. 7075.

1. **Contracts**: PUBLIC POLICY. Courts will refuse to enforce contracts which are manifestly contrary to public policy or sound morals. Following *Wilde v. Wilde*, 37 Neb., 891.
2. **Unlawful Sale of Liquor**: CONTRACTS. A contract for commission sales of intoxicating liquors in this state by one as agent of another, neither of whom has been licensed as required by the statutes of this state, is void as against public policy, and a breach of such contract cannot be made to serve as the basis for a judgment between such parties.

ERROR from the district court of Douglas county. Tried below before SCOTT, J. *Reversed.*

G. W. Shields, for plaintiffs in error:

The court will not enforce an illegal contract, either by specific performance or by allowing damages for its breach. (*Gould v. Kendall*, 15 Neb., 549; *Hobbie v. Zaepffel*, 17 Neb., 536; *Gipps Brewing Co. v. De France*, 58 N. W. Rep. [Ia.], 1087; *Kraut v. State*, 47 Ind., 519; *Shaw v. State*, 56 Ind., 188; *Pickens v. State*, 20 Ind., 116.)

McCabe, Wood, Newman & Elmer, contra:

Where two parties enter into a contract to do a thing prohibited by law, not inherently wrong, but *malum prohibitum*, that party to the contract who is more guilty cannot, after availing himself of the proceeds realized under the contract, assert its illegality against the other party, who is less in the wrong, seeking relief under the contract. (*Bateman v. Robinson*, 12 Neb., 509; *Lowell v. Boston & L. R. Co.*, 23 Pick. [Mass.], 24; *Atlas Bank v. Nahant Bank*, 3 Met. [Mass.], 581; *White v. Franklin Bank*, 22 Pick. [Mass.], 181; *Schermerhorn v. Talman*, 14 N. Y., 93; *Carkins v. Anderson*, 21 Neb., 364; *McBlair v. Gibbes*, 17 How. [U. S.], 237; *Brooks v. Martin*, 2 Wall. [U. S.], 70;

Wann v. Kelley, 2 McCrary [U. S.], 628; *Planters Bank v. Union Bank*, 16 Wall. [U. S.], 483.)

An agent who has received money from or in behalf of his principal cannot defeat an action, brought by the principal to recover it, upon the ground that the contract under which the money was paid, or the transaction from which it was realized, or the purpose to which it was to be devoted, was illegal. (*United Protestant Church v. Stegner*, 21 O. St., 488; *Manhattan Ins. Co. v. Ellis*, 32 O. St., 388; *Snells v. Pells*, 113 Ill., 145; *Kiewert v. Rindskopf*, 46 Wis., 481; *Baldwin v. Potter*, 46 Vt., 402; *Evans v. City of Trenton*, 24 N. J. Law, 764.)

RYAN, C.

There was a judgment in this case in the district court of Douglas county in favor of the defendants in error for the sum of $400. It was averred in the petition in said court that the defendants in error, in the month of October, 1890, had consigned from California to the plaintiffs in error, who were commission merchants in Omaha, a car load of wines and brandy; that by the terms of the agreement between the parties to such shipment the defendants in error were to pay the plaintiffs in error ten per cent commission on the amount sold by the plaintiffs in error; that the wines and brandy had either been sold or the plaintiffs in error had negligently neglected to sell the same, and, therefore, should be held to account to the defendants in error for the value of such consignment; that there had been paid but $470.15, and that the reasonable value of the liquors unaccounted for was $1,350.71, for which judgment was prayed. Among the defenses pleaded by the plaintiffs in error was that in the following language: "For further answer to said petition these defendants allege that all of the said goods described in said petition and consigned by plaintiffs to these defendants were spirituous and vinous liquors; that by the terms of said contract said goods were to be sold in the city of Omaha, Nebraska, by these defendants

as agents for the plaintiffs, and the defendants allege that neither the said plaintiffs nor said defendants ever had or obtained a license from the state of Nebraska, the county of Douglas, or the city of Omaha, nor any of the officers thereof, to sell said liquors, and that the said goods were delivered by the said plaintiff in accordance with the said contract to the said defendants in the city of Omaha, Nebraska, and that the said contract between the said plaintiffs and defendants was illegal and void." This was denied by the reply, but there was direct, positive testimony which established beyond question the fact that neither of the parties to this action had ever been licensed to sell malt, spirituous, or vinous liquors in the city of Omaha, as required by the laws of this state. It was also proven that the other averments of the answer above quoted were true. This case, therefore, falls within the rule laid down in *Wilde v. Wilde*, 37 Neb., 891, in principle, and upon a transaction of much the same character as that at bar it has practically been settled in advance by *Storz v. Finklestein*, 46 Neb., 577. The judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

IOWA LOAN & TRUST COMPANY, APPELLEE, V. ALBERT A. WALKER ET AL., IMPLEADED WITH J. C. STANDLEY, APPELLANT.

FILED FEBRUARY 16, 1897. No. 7044.

Review: DEFECTIVE RECORD. Questions of fact cannot be considered on appeal from a confirmation of a judicial sale where there is presented no proper evidence that the alleged facts ever existed.

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

J. M. Easterling, *J. J. Whittier*, and *M. O. Cornett*, for appellant.

Fred A. Nye, contra.

RYAN, C.

There was a decree of foreclosure in favor of appellant in this case in the district court of Buffalo county, on April 30, 1892. Subsequently an order for the sale of the real property described in said decree was duly issued to the sheriff of the aforesaid county, by whom all of said land was duly advertised and at the proper time offered for sale in lots of 160 acres each. There was no bidder except for the northwest quarter of section 34, township 12, range 13, which was bidden on by appellant for more than two-thirds of the appraised value of this tract. On motion this sale was duly confirmed, and from such confirmation this appeal is prosecuted. The questions argued are as to the right of the judgment defendant to have all the land sold before resort to the above 160-acre tract, which he alleged was his homestead, and his right to have declared effective an alleged redemption before confirmation.

There is found in the transcript no answer to the original petition for a foreclosure; neither is there a bill of exceptions. The alleged homestead character of the property sold has not, therefore, been made to appear; neither is there presented any evidence of the payment into the district court of the amount necessary to redeem, as required by section 497*a* of the Code of Civil Procedure. The order of confirmation is therefore

AFFIRMED.

JOHN T. CLARKE ET AL. V. NEBRASKA SAVINGS & EXCHANGE BANK.

FILED FEBRUARY 16, 1897. No. 7097.

Review: ASSIGNMENTS OF ERROR. In error proceedings no point will be considered which is not presented by the petition in error, even though argued in the brief of counsel.

ERROR from the district court of Douglas county. Tried below before BLAIR, J. *Affirmed.*

James W. Carr, for plaintiffs in error.

Silas Cobb and *Tiffany & Vinsonhaler, contra.*

RYAN, C.

There was a judgment in this case in the district court of Douglas county against the maker and indorser of a promissory note. There is discussed in the brief of counsel but one question, and that is the right of the holder of a note to maintain suit upon it by virtue of a provision that the failure to pay within the time limited would cause the whole sum to become due at the election of the holder, it having been alleged in the answer that after the time limited for the payment of such interest there had been made a tender of such payment. This proposition was not suggested by the petition in error, hence it cannot be considered.

The only question presented upon the record is whether or not interest in excess of that provided by the note was allowed in the judgment. This assignment was not argued, and by computation we have not discovered any error in the respect indicated. The judgment of the district court is therefore

AFFIRMED.

JOSEPH S. WELLS V. HENRY STECKLEBERG.*

FILED FEBRUARY 16, 1897. No. 7113.

1. **Guardian and Ward**: FAILURE OF GUARDIAN TO QUALIFY: VOID SALES. One assuming to act as the guardian of the estate of a minor, who, in fact, has never qualified as such, has no standing to apply for authority to sell such minor's real estate, and an order made upon such application is an absolute nullity, as is also a sale thereunder, especially without service thereof as required by section 49, chapter 23, Compiled Statutes.

2. ———: ———: ———. The provisions of section 64, chapter 23, Compiled Statutes, apply to mere irregularities in respect to guardians' sales. They do not and cannot operate to confer jurisdiction otherwise entirely without existence.

ERROR from the district court of Stanton county. Tried below before NORRIS, J. *Reversed.*

The facts are stated in the opinion.

George G. Bowman, Albert & Reeder, and *John A. Ehrhardt,* for plaintiff in error:

The notice did not conform to the statutory requirement and amounted to no notice at all. The order of sale was therefore void. (*Mickel v. Hicks,* 19 Kan., 578; *Valle v. Fleming,* 19 Mo., 454; *Sibley v. Waffle,* 16 N. Y., 180; *Blodgett v. Hitt,* 29 Wis., 169; *Tunis v. Withrow,* 10 Ia., 305; *Newcomb v. Dewey,* 27 Ia., 381; *McAllister v. Moye,* 30 Miss., 258; *Lyon v. Vanatta,* 35 Ia., 521; *Spragins v. Taylor,* 48 Ala., 520; *Frazier v. Miles,* 10 Neb., 109; *Pardon v. Dwire,* 23 Ill., 572.)

John B. Wells never having been appointed guardian, the district court was without jurisdiction and its judgment, the sale, and other proceedings are void. (*Thatcher v. Powell,* 6 Wheat. [U. S.], 119; *Galpin v. Page,* 18 Wall. [U. S.], 350; *Morse v. Presby,* 25 N. H., 299; *Carleton v.*

*Rehearing allowed.

Washington Ins. Co., 35 N. H., 162; *Gunn v. Howell*, 27 Ala., 663; *Foster v. Glazener*, 27 Ala., 391; *Barry v. Patterson*, 3 Humph. [Tenn.], 313; *Cooper v. Sunderland*, 3 Ia., 114; *Wight v. Warner*, 1 Doug. [Mich.], 384; *Northcut v. Lemery*, 8 Ore., 317; *Fergeson v. Jones*, 20 Pac. Rep. [Ore.], 848; *Crawford v. Howard*, 30 Me., 422; *Walbridge v. Hall*, 3 Vt., 114; *Smith v. Rice*, 11 Mass., 513; *Henry v. Estes*, 127 Mass., 474; *Hall v. Howd*, 10 Conn., 514; *Gray v. McNeal*, 12 Ga., 424; *Rutherford v. Crawford*, 53 Ga., 138; *Horan v. Wharenberger*, 9 Tex., 313; *State v. Metzger*, 26 Mo., 65; *Chandler v. Nash*, 5 Mich., 409; *Grier's Appeal*, 101 Pa. St., 412; *Maxsom v. Sawyer*, 12 O., 195; *Perry v. Brainard*, 11 O., 442; *Pryor v. Downey*, 50 Cal., 388; *Whitesides v. Barber*, 24 S. Car., 373.)

W. W. Young and *Allen, Robinson & Reed, contra:*

Jurisdiction attached when the guardian filed his petition for the sale of the property. (*Grignon v. Astor*, 2 How. [U. S.], 319; *Mohr v. Manierre*, 101 U. S., 417; *Beauregard v. City of New Orleans*, 18 How. [U. S.], 502; *Comstock v. Crawford*, 3 Wall. [U. S.], 396; *George v. Watson*, 19 Tex., 354; *McPherson v. Cunliff*, 11 S. & R. [Pa.], 422; *Alexander v. Maverick*, 18 Tex., 179; *Meyers v. McGavock*, 39 Neb., 843; *Morrow v. Weed*, 4 Ia., 77; *Davenport v. Schmidt*, 15 Ia., 213; *Frazier v. Steenrod*, 7 Ia., 339; *Meyer v. McDougal*, 47 Ill., 278; *Moore v. Neil*, 39 Ill., 256; *Morris v. Hogle*, 37 Ill., 150; *Hawkins v. Hawkins*, 28 Ind., 66; *Stow v. Kimball*, 28 Ill., 108; *Doe v. Anderson*, 5 Ind., 33.)

The court having jurisdiction, the purchaser is not bound to look beyond the decree; and his title is good. Irregularities in the proceedings would not invalidate the sale. (*Darrah v. Watson*, 36 Ia., 116; *De Tar v. Boone County*, 34 Ia., 490; *Cooper v. Sunderland*, 3 Ia., 133; *United States v. Arredondo*, 6 Pet. [U. S.], 729; *Elliott v. Piersol*, 1 Pet. [U. S.], 340; Compiled Statutes, ch. 23, sec. 64; *Thaw v. Ritchie*, 136 U. S., 548; *Thompson v. Tolmie*, 27 U. S., 157; *McNitt v. Turner*, 83 U. S., 352.)

RYAN, C.

This was an action of ejectment brought by Joseph S. Wells against Henry Steckleberg in the district court of Stanton county. The petition was in the ordinary form and was filed September 18, 1891. The answer was a general denial. Upon the trial of the issues to the court there was a judgment in favor of the defendant.

Joseph S. Wells inherited an interest in certain real estate of his mother at her death, in 1872. He was then two years of age. By partition proceedings in 1880, he was vested with the title to the property which is the subject-matter of this action. There was an application for the sale of this land by John B. Wells, in which the applicant described himself as the "Guardian of Joseph S. Wells duly appointed by the probate court in said Platte county." This application was granted, and by virtue of the authority thus conferred upon him, and no other, John B. Wells, at a public sale, sold said real property to Henry Steckleberg and afterwards, as guardian, accordingly executed a deed of the property, the sale meantime having been confirmed. On the trial of this action there was left, by the evidence, no room for doubt that John B. Wells had never been appointed guardian of his son, Joseph S. Wells. Indeed, his own testimony was that he assumed to act in making the sale and executing the deed, solely as the natural guardian of his son. Before he attained his majority, Joseph S. Wells notified Mr. Steckleberg that he repudiated the entire transaction by virtue of which Steckleberg now claims title, and he has since acted consistently with this his declared purpose, so that there is presented no element of estoppel in this case. It is quite clear, from an examination of section 6 of chapter 34 of the Compiled Statutes of 1883, that the father was the natural guardian of his minor child and was entitled to the care and custody of the minor's person. For him, or any one else, to dispose of the property of such minor it was, and still is, necessary

that he should be appointed by the probate court and qualify, as required by law, as guardian of the minor's estate. (Compiled Statutes, 1895, ch. 34.) An application to sell the property of a minor by one who did not claim to act as guardian would be an absolute nullity, and could confer no jurisdiction to make such sale or a conveyance thereunder, and, on principle, we cannot see that this is the less the case when the applicant falsely describes himself as guardian and thus perpetrates a fraud upon the court. • In this case there was no copy of the order of the sale served upon the next of kin of the minor as required by section 49, chapter 23, Compiled Statutes; indeed the order had been fraudulently procured by the very person upon whom, ordinarily, this order should have been served, and to whom the minor ought to be able, confidently, to look for the protection of his interests. There was a publication of the order required to be made in a newspaper, but that did not purport to dispense with the statutory service of the order above noted. There was, therefore, neither jurisdiction of the subject-matter nor of the person of the minor.

Notwithstanding the want of jurisdiction pointed out, it is insisted by the defendant that these matters are unavailable because of the provisions of section 64, chapter 23, Compiled Statutes, which are as follows:

"Sec. 64. In case of an action relating to any estate sold by a guardian, under the provisions of this subdivision, in which the ward or any person claiming under him shall contest the validity of the sale, the same shall not be avoided on account of any irregularity in the proceedings, provided it shall appear: First—That the guardian was licensed to make the sale by a district court of competent jurisdiction. Second—That he gave a bond, which was approved by the judge of the district court in case any bond was required by the court, upon granting the license. Third—That he took the oath prescribed in this subdivision. Fourth—That he gave notice of the time and place of the sale as prescribed by law. Fifth—

That the premises were sold accordingly, at public auction, and are held by one who purchased in good faith."

The question involved is not one of mere irregularity. It is a question of jurisdiction, that is to say, of power to make any order of sale whatever; and hence, these provisions cannot be invoked. But even if by this section it had been attempted to declare the proceedings conclusively binding as to jurisdiction, no more power would have been assumed than was in section 130, chapter 77, article 1, Compiled Statutes, as to the conclusiveness of a tax deed, and yet this court has said that the creation of this conclusive presumption is not within the power of legislature. (*Larson v. Dickey*, 39 Neb., 463.) In view of the fact that the court was without jurisdiction to order the sale of the property of the minor, the deed executed by John B. Wells, as guardian, to Henry Steckleberg was a mere nullity. The judgment of the district court based upon this deed as evidence was therefore erroneous and, accordingly, it is reversed and this cause is remanded for further proceedings not inconsistent with the views above expressed.

REVERSED AND REMANDED.

POST, C. J., not sitting.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY V. PETER H. SODERBERG.

FILED FEBRUARY 16, 1897. No. 7104.

1. **Master and Servant:** RISKS OF EMPLOYMENT. A servant by his contract of employment assumes the ordinary risks and dangers incident thereto.

2. **Negligence:** EVIDENCE. To sustain a verdict for negligence it must have the support of competent positive evidence that the injury complained of was caused by the negligence of the defendant, or such negligence must be fairly and reasonably inferable from proved or conceded facts.

3. ———: ———. Evidence examined, and *held* not sufficient to sustain a finding of negligence.

ERROR from the district court of Kearney county. Tried below before BEALL, J. *Reversed.*

The opinion contains a statement of the case.

J. W. Deweese, for plaintiff in error:

The requirement of the statute in reference to signals at public crossings imposes an obligation upon the company toward people who are crossing or are about to cross the railroad track on the public highway, and no one else can claim the enforcement of these signals. (*Bohan v. Milwaukee, L. S. & W. R. Co.*, 61 Wis., 394; *Spicer v. Chesapeake & O. R. Co.*, 12 S. E. Rep. [W. Va.], 553; *Christy v. Chesapeake & O. R. Co.*, 12 S. E. Rep. [W. Va.], 1111; *Rawlston v. East Tennessee, V. & G. R. Co.*, 20 S. E. Rep. [Ga.], 123; *East Tennessee, V. & G. R. Co. v. Smith*, 20 S. E. Rep. [Ga.], 127; *Lundquist v. Duluth Street R. Co.*, 67 N. W. Rep. [Minn.], 1007.)

Plaintiff below assumed the risk and danger from passing trains. There was no evidence of any rule or custom requiring the foreman to warn trackmen of the approach of a train. The company is not chargeable with the alleged negligence of the foreman in failing to give warning of danger. The foreman and the men in the gang were fellow-servants. (*Jackson v. Missouri P. R. Co.*, 104 Mo., 456; *Thomas v. Missouri P. R. Co.*, 18 S. W. Rep. [Mo.], 980; *Shepard v. Boston & M. R. Co.*, 33 N. E. Rep. [Mass.], 508; *Cooney v. Great N. R. Co.*, 37 Pac. Rep. [Wash.], 440; *Sullivan v. Fitchburg R. Co.*, 36 N. E. Rep. [Mass.], 751; *Ell v. Northern P. R. Co.*, 48 N. W. Rep. [N. Dak.], 223; *Elliott v. Chicago, M. & St. P. R. Co.*, 150 U. S., 245; *Baltimore & O. R. Co. v. Baugh*, 54 Am. & Eng. R. Cas. [U. S.], 340; *Northern P. R. Co. v. Hambly*, 154 U. S., 356; *Northern P. R. Co. v. Charless*, 162 U. S., 359; *Northern P. R. Co. v. Peterson*, 162 U. S., 346; *Walker v. Kinnare*, 76 Fed. Rep., 101; *Railway Co. v. Leech*, 41 O. St., 389; *Ring v. Missouri P. R. Co.*,

20 S. W. Rep. [Mo.], 436; *Jolly v. Detroit, L. & N. R. Co.*, 53 N. W. Rep. [Mich.], 526; *Olson v. St. Paul, M. & M. R. Co.*, 33 Am. & Eng. R. Cas. [Minn.], 386; *Nelling v. Chicago, St. P. & K. C. R. Co.*, 63 N. W. Rep. [Ia.], 568.)

W. S. Morlan and *J. L. McPheely*, also for plaintiff in error.

Ed L. Adams, contra.

References: *Schlereth v. Missouri P. R. Co.*, 19 S. W. Rep. [Mo.], 1134; *Sioux City & P. R. Co. v. Smith*, 22 Neb., 775; *Chicago, B. & Q. R. Co. v. Sullivan*, 27 Neb., 673; *Chicago, St. P. & M. R. Co. v. Lundstrom*, 16 Neb., 258; *Little M. R. R. Co. v. Lewton*, 20 O. St., 401; *Lake Shore & M. S. R. Co. v. Lavelley*, 36 O. St., 221; *Burlington & M. R. R. Co. v. Crockett*, 19 Neb., 138; *Union P. R. Co. v. Billeter*, 28 Neb., 422; *Gulf Coast & S. F. R. Co. v. Wells*, 16 S. W. Rep. [Tex.], 1025; *Missouri P. R. Co. v. Williams*, 12 S. W. Rep. [Tex.], 835; *Louisville, N. A. & C. R. Co. v. Graham*, 24 N. E. Rep. [Ind.], 668; *Sherrin v. St. Joseph & S. L. R. Co.*, 15 S. W. Rep. [Mo.], 442; *Davis v. New York, N. H. & H. R. Co.*, 159 Mass., 532; *Texas & P. R. Co. v. Lewis*, 26 S. W. Rep. [Tex.], 873.

RYAN, C.

Plaintiff in error in this case seeks a reversal of a judgment in the sum of $5,000 which was rendered by the district court of Kearney county upon the verdict of a jury. The defendant in error, whom we shall hereafter refer to as the plaintiff, because he was plaintiff in the district court, alleged, in substance, that on May 22, 1893, he was a section hand in the employ of the railroad company; that in the forenoon of that day, while the wind was blowing very hard and rain was falling, he, under the direction of a foreman, was working on the railroad at a point about fifty-seven rods east of a highway crossing, and that about twenty-three rods east of where he was at work there was a post, at which post the employes in

charge of trains of the railroad company were required to ring a bell and sound a whistle until the aforesaid highway should be reached; that the point where he was working was near the foot of a grade descending from the east; that trains coming down said grade usually made but little noise, other than by the escape of steam, which on said morning could not be heard. The negligence charged was the failure to sound the whistle and ring the bell as it was above indicated should have been done, and the failure of the foreman of the section gang to give notice of the approaching train before it struck the plaintiff.

The following facts appear without contradiction from the evidence adduced: The section gang, in the forenoon of May 22, 1893, was required by the unfinished condition of the work to surface up a portion of the track at a point about three and one-half miles east of Minden, the station nearest where the work was to be done. The day began with considerable wind, which grew stronger, and at about 9 o'clock, when the accident happened, was blowing very hard. There were occasional showers of rain, accompanied with sleet. The foreman was Henry Hamelius, and the gang was composed of five men, J. H. Showers, Albert Holstein, Oscar Holstein, Albert Thigh, and the plaintiff, Peter H. Soderberg. The whistling post was at the west end of a cut, and west of this post was a bridge, 540 feet distant. This post, as stated in the petition, was eighty rods east of a highway crossing. The foreman distributed his men along a high grade approaching this bridge, Soderberg being placed about ninety feet east of the bridge and directed to throw earth from the south side of the embankment upon the ties, and there so to dispose of it that the water would run each way from the center of the track. The two Holsteins were between twenty and thirty feet east of Soderberg, and Showers was ninety feet east of him on the north side of the track. No one described the position of Thigh. The foreman, after he had disposed of his men

as above indicated, noticed that one side of the bridge seemed a little low, and thereupon he went under it to see if there was anything wrong. When he had finished his inspection the foreman came up on the track at the east end of the bridge, and looking eastward he saw, at a distance of about a quarter of a mile, a freight train approaching, and immediately called to his men notifying them of that fact. At this time Soderberg was on the embankment outside the south end of the ties, and was stooped over throwing earth upon the ties between the rails. Albert Holstein testified on behalf of plaintiff that, though fifteen feet away, he could not by calling to him three or four times make plaintiff aware of the approach of the train. Oscar Holstein, though he was within fifteen or twenty feet of his brother, Albert, was not able to understand what he was calling out. He saw that he was calling out something, and, looking in the direction he was pointing, discovered the approaching train. He further testified that it was a dreadful windy and stormy day. Peter Soderberg testified, but his testimony threw no light on the subject. The above was all the evidence given as to the surroundings and employment of Soderberg when struck by the train. It was a regular train and was on its schedule time. The foreman was not shown to be outside the line of his duty in making an inspection of what appeared to be a dangerous condition of the bridge. There was evidence that tended to show that this foreman had said to his men that in the yards and while moving over the track in a hand car he would look out for trains, and that the men need not trouble themselves to be also looking. There was no evidence that when his section men were surfacing the track the foreman, by reason of any promise, rule, or custom, was required to warn them of the approach of trains. They had the same means of knowing of this fact that he did. The track from where Soderberg was ran in a northeasterly direction, and a high wind was blowing from the north, so that, without doubt, he was

unaware of the impending danger, and, though no one testified just how it happened, it is doubtless true that in a stooped position he was standing close enough to the track to be struck by the engine when it reached him. He was, however, bound to know that trains were likely to be moving along this track, and there is undisputed evidence that if he had looked eastward he could have seen this train almost a half a mile distant. It was held by this court in *Dehning v. Detroit Bridge & Iron Works*, 46 Neb., 556, that it will be presumed that an employe contracts with reference to the risks ordinarily appertaining to his particular employment, and that he has notice of all the risks which are open and obvious, or ought to have been to a person of his experience and understanding. In *Missouri P. R. Co. v. Baxter*, 42 Neb., 793, this rule was stated in the first paragraph of the syllabus in this language: "A servant by his contract of employment assumes the ordinary risks and dangers incident thereto." The rule being as we have just stated, it was not a duty devolved upon the railroad company to require of its section foreman that he should exercise the only diligence necessary to prevent section men being struck by trains moving along the railroad undergoing repairs. These views are in accord with those expressed in *Ring v. Missouri P. R. Co.*, 20 S. W. Rep. [Mo.], 436, and *Nelling v. Chicago, St. P. & K. C. R. Co.*, 63 N. W. Rep. [Ia.], 568.

It is, however, insisted that it was shown that there was negligence in failing to ring the bell and sound the whistle for the crossing from the time the engine passed by the whistling post until it reached such highway crossing. The engineer testified in the most positive terms that the bell was arranged to ring automatically, and that on account of the high wind and the storm it was kept ringing from the time the engine left Hastings until it reached Minden. He also testified that he sounded the whistle from the time he left the whistling post until he reached the highway crossing. The fireman testified that he was so accustomed to the sound of the bell and whistle

that he did not notice either. The foreman's testimony was that if there had been no wind or storm he could have heard the whistle and bell, but with both wind and storm prevailing as it did, he did not know whether he could have heard them or not. As it was, he did not hear the bell or whistle. The effect of the testimony of the other witnesses was that they did not hear the bell or whistle, but whether they could have heard the sound if either had been used, notwithstanding the wind and the storm, they did not undertake, nor were they required, to state. The burden of showing negligence rested upon the plaintiff. (*Spears v. Chicago, B. & Q. R. Co.*, 43 Neb., 720.) As was said in *Kilpatrick v. Richardson*, 40 Neb., 478: "For that verdict to stand it must have for support competent, positive evidence that the injury was caused through the negligence of the plaintiffs in error, or such negligence must be fairly and reasonably inferable from proved or conceded facts in evidence." (See, also, *Kearney Canal & Water Supply Co. v. Akeyson*, 45 Neb., 636.) The evidence as to the failure to ring the bell or sound the whistle was scarcely strong enough to raise a mere conjecture, most certainly it could do no more. The plaintiff was outside the rails, and even beyond the ties, and there is no claim that the engineer failed or neglected to do his duty upon seeing plaintiff in a dangerous place; indeed, no one seems to have known beforehand that plaintiff was in dangerous proximity to the track, or even how it happened that he was struck, more definitely than that before the engine reached him he was outside the track, and by the time it reached him he was close enough to the track to come in contact with some part of the locomotive. He may have been that near the track for some little time, or he may have moved nearer just before he was struck; no one could describe how it was. We are of the opinion that there was not sufficient evidence to justify a finding that any employe of the railroad company was guilty of negligence, and the judgment of the district court is therefore reversed and the case is re-

manded for further proceeding consistent with the views above expressed.

REVERSED AND REMANDED.

THOMAS M. ROBERTS V. JESSIE M. HOPPER ET AL.

FILED FEBRUARY 16, 1897. No. 7092.

Assignments of Error: EVIDENCE OF DAMAGE. Under an assignment of error that the damages awarded by the jury are excessive, this court will not review the action of the trial court in admitting in evidence items of damage.

ERROR from the district court of Burt county. Tried below before AMBROSE, J. *Affirmed.*

H. E. Carter, for plaintiff in error.

H. Wade Gillis, contra.

RAGAN, C.

Jessie M. Hopper brought this suit in the district court of Burt county in behalf of herself and two minor children against Thomas M. Roberts, a licensed dealer in intoxicating liquors, to recover damages for loss of support to herself and children by reason of the drunkenness of her husband caused by intoxicating liquors sold to him by Roberts. She had a verdict and judgment and Roberts brings the case here for review.

The only argument made in the brief is that the damages awarded by the jury are excessive. The verdict was for a much smaller sum than that claimed by the plaintiff below in her petition and not in excess of the amount warranted by the evidence. Under an assignment that the damages awarded are excessive we cannot review the action of the district court in admitting in evidence certain items of damage. Our consideration of the case

must be confined solely to the assignment of error argued in the brief. The judgment of the district court is

AFFIRMED.

JACKSON BRADLEY V. A. B. SLATER.

FILED FEBRUARY 16, 1897. No. 7101.

1. **Landlord and Tenant:** CONTINUATION OF TENANCY. When a tenant with the consent of his landlord, express or implied, holds over his term, the law presumes a continuation of the original tenancy for another like term and upon the same conditions.
2. ———: ———: EVIDENCE. But this presumption is not a conclusive one, and may be overthrown by evidence that the tenant's holding over was in pursuance of an agreement with his landlord that he might so hold over and pay rent only for the time he occupied.
3. ———: ———: ———. In a suit against a tenant who had held over two months, to recover rent for a term equal to the prior one and at the same rent, the evidence disclosed that before the expiration of his term the tenant notified his landlord that he would not occupy the leased premises after the expiration of his term; that he had purchased other premises, into which he intended removing, but that they would not be ready for occupancy when his lease expired; that the tenant held over without any express agreement with his landlord that he might do so, but with his knowledge and without his protest. *Held*, That this evidence was not sufficient to overthrow the legal presumption that the tenant was in for another term of the same length as the prior one and on the same conditions.
4. ———: ———: ———. When the lease of a tenant expires by its terms and he does not vacate, the landlord may, at his option, treat him as a trespasser or as a tenant; and if he continues to occupy without protest or objection from his landlord, the law, by the presumption, supplies the *prima facie* evidence, binding upon both landlord and tenant, that such a relation exists between them, and that the tenant is in for the same length of term and on the same conditions as his first term.

ERROR from the district court of Douglas county. Tried below before OGDEN, J. *Reversed.*

Warren Switzler, for plaintiff in error.

Joseph R. Clarkson, contra.

RAGAN, C.

Premises were demised by written lease for one year in consideration of a stated rent. The tenant held over his term two months. The landlord then sued to recover rent for the premises for one year after the expiration of the first term upon the theory that the tenant, by holding over, became liable for the rent of the leased premises for a year at the same rent fixed in the first lease. The tenant had a verdict and judgment and the landlord prosecutes error.

The defense of the tenant, so far as material here, was that he held over in pursuance of an agreement with the landlord that he might do so, paying rent for the time he occupied at the same rate per month as he paid under the first lease. The evidence shows that in November, 1889, one Jacob R. Hendrix owned the premises and on said date demised it by a written lease to Augustus B. Slater for one year, or until the 15th of November, 1890, in consideration of a rent of $750 paid and agreed to be paid by Slater; that after taking possession of the leased premises Slater purchased a lot in the city of Omaha, where the leased premises were situate, and began the erection thereon of a dwelling. Before the lease expired Slater notified Hendrix that he had purchased a lot and was building a house but that it would not be ready for occupancy until about January, 1891; that he intended to move into it as soon as it was ready for occupancy, and that he would not renew the lease or remain in possession of the leased premises for another year. Hendrix endeavored to release the premises to Slater for another year, but this was refused by the latter. Hendrix then sought to release the premises to Slater for six months after the expiration of his lease, but this was declined by Slater. The record contains no evidence that Hendrix expressly agreed that Slater might hold over on any terms whatever; nor does it show that he protested or objected to Slater holding over the time he did. Slater

paid the rent in full for the premises for the year ending November 15, 1890. About the 13th of January, 1891, Slater abandoned the leased premises and at that time returned the keys of the building to Hendrix and paid him $125, being two months' rent of the premises at $62.50 per month. Hendrix, when he accepted the keys and the rent, notified Slater that he did so under protest and that he would make reasonable efforts to find a tenant for the premises for the year ending November 15, 1891, and that if he did not receive as much rent for them as Slater paid for the year ending November 15, 1890, he would look to Slater to make up the difference. On the 14th or 15th of January, 1891, Hendrix sold and conveyed the premises by warranty deed to plaintiff in error Bradly, who brought this suit. It is quite clear that the evidence does not sustain the defense interposed to this action by Slater, namely, that he held over in pursuance of an express contract with his landlord. When a tenant, with the consent of the landlord, express or implied, holds over his term, the law presumes a continuation of the original tenancy upon the same terms and conditions. (See the rule stated and the authorities collated in 12 Am. & Eng. Ency. of Law, p. 758*g*. See, also, *Yates v. Kinney*, 19 Neb., 275, and *Schuyler v. Smith*, 51 N. Y., 309.) The last case cited was strikingly like the one at bar. In that case the premises were leased for one year, and before the expiration of the lease the tenant notified the landlord that they would not occupy the premises after their term expired; that they had hired other premises to which they intended removing on the expiration of their lease. The tenants, nevertheless, held over twenty-one days. The landlord then sued them for a year's rent of the premises at the same rate fixed by the lease of the previous year. The court said: "The plaintiff claims that because the defendants held over and continued in the occupancy of the premises for three weeks after the expiration of the lease he had the right to hold them as tenants for the whole year. This they deny, because they

gave him notice before the expiration of the term that they did not intend to occupy the premises for another year and made arrangements, with his knowledge, to occupy another wharf. I am of opinion that the plaintiff's claim is well founded. The law is too well settled to be disputed that where a tenant holds over after the expiration of his term the law will imply an agreement to hold for a year upon the terms of the prior lease. * * * But the defendants claim that this implication of law may be rebutted and that the tenants may show by proof that they did not intend to hold upon the same terms as the prior lease, and they claim that the notice which they gave in this case was sufficient to overthrow this implication. * * * In this case the defendants hold over wrongfully. It cannot be disputed that they were trespassers; and their notice did not deprive their act of holding over of its tortious character. The law should not give them the option to determine whether they should be treated as trespassers or as tenants. This option should be accorded to the innocent holder of the property. The law regards the possession of real estate as a great advantage in any dispute in reference to it, and hence a tenant who has obtained possession of real estate cannot dispute the title of his landlord; and having obtained possession from his landlord he should not be permitted to hold over, deny his tenancy, and convert himself into a wrong-doer." Applying these authorities to the facts of the case at bar, it follows that Slater being a tenant for a year and having held over after the expiration of his term without an agreement with his landlord, but with his assent, the presumption is that he held the premises for another year upon the same terms that he held them the first year. But this was a presumption only, and it was perfectly competent for Slater to show in this case that his holding over was in pursuance of an agreement with his landlord that he might hold over, might pay rent for the time which he did hold over, and for that time only. The evidence introduced by Slater was not suffi-

cient to overthrow the presumption that he was holding for another year on the same terms that he held the first year. The evidence, and all the evidence, introduced by Slater to sustain his defense of holding over under an express agreement was that he had notified his landlord before the expiration of the term that he would not occupy the premises for a second term, and that he held over, if not with the consent, at least without any protest from his landlord and with his knowledge. This was not sufficient evidence to justify a finding that the tenant held over in pursuance of an express agreement with his landlord that he should pay rent only for the time which he held over; nor was it sufficient to overthrow the presumption of law that his holding over was for a year and on the terms and conditions of his first lease, and the legal presumption remained in force and controlled the case. When the lease of a tenant expires by its terms and the tenant does not vacate, the landlord may, at his option, treat him as a trespasser or as a tenant; and if the tenant continues to hold over without protest or objection from his landlord and without demand for the possession of the premises, the law raises the presumption, binding upon both landlord and tenant, that the relation of landlord and tenant exists between the parties and that the latter is in for the same length of term and on the same conditions as the first term; but this is a presumption only and may be overthrown by proof that the tenant is holding over in pursuance of an agreement to pay rent for the premises for the time which he holds over. (*Montgomery v. Willis*, 45 Neb., 434.) The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

JOHN J. BERGER ET AL., APPELLANTS, V. LINCOLN COUNTY ET AL., APPELLEES.

FILED FEBRUARY 16, 1897. No. 7125.

Review: UNAUTHENTICATED BILL OF EXCEPTIONS: AFFIRMANCE. Where, in a case brought to this court on appeal, the bill of exceptions is uncertified by the clerk, and the pleadings support the decree rendered, it will be affirmed.

APPEAL from the district court of Lincoln county. Heard below before NEVILLE, J. *Affirmed.*

J. S. Hoagland, for appellants.

J. G. Beeler and *H. D. Rhea, contra.*

RAGAN, C.

This is an appeal in equity from the district court of Lincoln county. We cannot review the evidence, because the bill of exceptions is not certified by the clerk to be either the original bill or a certified copy thereof. The pleadings support the decree rendered, and it is accordingly

AFFIRMED.

CLARKE DRUG COMPANY ET AL., APPELLANTS, V. GEORGE M. BOARDMAN ET AL., APPELLEES.

FILED FEBRUARY 16, 1897. No. 7084.

1. **Insolvency:** PREFERRING CREDITORS. A creditor may take such lawful steps as he deems best to secure the payment of a debt owing to him; and if the creditor's only motive be the honest one of securing his debt, he will not be guilty of fraud because the effect of securing or paying his debt is to leave some other creditor's debt partly or wholly unpaid.

2. ———: ———: RELATIVES: CONFESSION OF JUDGMENT: CREDITORS' BILL. For the purpose of enabling him to buy a drug store and

engage in business, a mother loaned her son, who had no property, $1,500. For this loan he gave her his note due in one year. He purchased the store for $2,000, paid thereon the cash borrowed of his mother, and gave his note for $500 for the balance. While he was in business he represented to wholesale dealers that his only indebtedness was the $500 owing on the purchase of the store, and concealed the fact of his indebtedness to his mother. The wholesale dealers sold the son goods and extended him credit, ignorant of the fact that he was indebted to his mother and relying upon his statement that his total indebtedness was the $500. After the mother's note matured she ascertained that her son was financially embarrassed; induced him to confess a judgment in her favor for the amount due her on her note; and caused the drug store to be seized and sold on execution. Thereupon the wholesale dealers sought, by a suit in equity, to have their judgments against the son paid out of the proceeds of such sale before the payment of the mother's judgment. *Held*, (1) Whether the money furnished to the son by the mother was a loan, a gift, or an advancement, whether or not the mother was actuated by a sinister motive in furnishing the money to her son at the time and under the circumstances that she did, in doing nothing to notify the public of such fact, in inducing her son to prefer her to his other creditors at a time when he was financially embarrassed and in resorting to the confession of judgment for that purpose, were, one and all, questions of fact; (2) that the evidence would not support any other finding than the one made by the district court, that the money furnished by the mother was a loan, and that her entire conduct in the premises was inspired by an honest purpose and that in nothing that she did was she influenced by a motive to defraud any one.

3. ———: ———: ———: ESTOPPEL: PROCEEDS OF EXECUTION. *Held*, That the mother was not estopped from claiming the proceeds of the execution sale as against her son's other creditors because he had no property when she made him the loan; nor because to her knowledge the son borrowed the money to purchase the drug store; nor because to her knowledge the son embarked and continued in business, his only capital being the money she had loaned him; nor because she did not give any notice of the fact that the capital on which her son was doing business was loaned to him by her, and unpaid; nor because she did not take and file a chattel mortgage on the drug store to secure the loan when it was made; nor because the son concealed from the wholesale dealers the fact that he was indebted to his mother and thereby induced them to extend him credit; nor because the effect of the son's preferring her debt was to leave the debts of his other creditors partly or wholly unpaid; nor because she resorted to a confession of judgment to secure such preference and expedite its payment.

4. ———: ———: ———: BURDEN OF PROOF. An insolvent son may

prefer his mother to his other creditors by securing or paying her debt; but when such preference is called in question by the other creditors the law places the burden on the mother of showing by a preponderance of the evidence that such preference was accepted by her in good faith for her protection, and not for the purpose of defrauding any one.

APPEAL from the district court of Hamilton county. Heard below before WHEELER, J. *Affirmed.*

A. W. Agee, Howard M. Kellogg, and *Whitmore & Carr,* for appellants.

Cases cited by counsel for appellants are referred to in the opinion.

Hainer & Smith and *Howell & Spear, contra.*

RAGAN, C.

In the district court of Hamilton county George M. Boardman confessed a judgment in favor of his mother, Mary T. Boardman, on a promissory note. An execution was issued upon this judgment and levied upon a stock of drugs belonging to George M. Boardman, the stock sold, and thereupon a number of his other creditors, who had obtained judgments against him and whose executions had been returned "No property found," brought this action to enjoin the sheriff from paying the proceeds of the sale of said stock of goods to George M. Boardman's mother. The trial resulted in a decree dismissing the action of the creditors, and they have appealed.

1. Briefly, the facts are as follows: In June, 1891, Frank Chambers owned a drug store and stock of drugs at Hampton, Nebraska. At that time Mary T. Boardman and her husband resided at Albion, Nebraska, and she had considerable property of her own. Her son, George M. Boardman, was then a married man and had been for some years employed as a drug clerk, but was without any property, and desired to embark in the drug

business. Chambers advertised his Hampton store for sale. This advertisement was seen by George M. Boardman, and he and his father then went to Hampton and looked over the drug stock of Chambers. Negotiations followed which resulted in Chambers selling his drug stock to George M. Boardman for $2,000. Fifteen hundred dollars of this money was loaned to George M. Boardman by his mother, and for this he executed a promissory note, due in one year. The remainder of the purchase price of the stock was evidenced by some promissory notes executed by Boardman to Chambers. George M. Boardman continued the operation of the drug store for about a year, during which time he became indebted to several wholesale houses, hereinafter called "commercial creditors." While he was in business he made certain statements to commercial agencies that his only indebtedness was the $500 owing to Chambers as the balance of the purchase price of the drug stock, and concealed the fact that he was indebted to his mother. After George M. Boardman had been in business about a year, and after the note given to his mother had matured, his mother ascertained that he had been using intoxicants to excess, and that his financial affairs were in an embarrassed condition; and at her request he confessed a judgment in her favor upon the note which he had given her for the money borrowed. It also appears from the evidence that the commercial creditors, relying upon the statements made by George M. Boardman to the commercial agencies that his only indebtedness was that of $500 to Chambers, sold him goods and extended him credit. It does not appear that the commercial creditors, or any of them, knew that George M. Boardman was indebted to his mother, nor does it appear that Mrs. Boardman knew until the trial of this case that her son had represented his only indebtedness to be the $500 owing Chambers, and had concealed from the commercial creditors the fact of his indebtedness to her.

The commercial creditors seek to restrain the sheriff

from paying to Mrs. Boardman the proceeds of the execution sale of the drug store upon two grounds, as we gather from the petition filed by them in the court below. The first of these is that the entire transaction between Mrs. Boardman and her son was fraudulent; that it was a scheme devised to delay and defraud them; and second, that by reason of the facts already stated Mrs. Boardman is estopped as against them to claim the proceeds of the sale of the drug stock. The district court has found that there was no fraud on the part of either Mrs. Boardman or her son in any of the transactions between them, and this is the only finding on that issue that the evidence would support. Some attempt was made at the trial to show that the $1,500 furnished by Mrs. Boardman to her son was in the nature of an advancement to him, but this attempt was a failure. The evidence leaves no room for doubt that it was an ordinary loan.

It seems also to have been insisted in the trial court that the confession of the judgment by young Boardman in favor of his mother was fraudulent, as its effect was to enable him to prefer his mother as a creditor. It may be true that young Boardman desired to prefer his mother, and it may be true that she desired to be preferred; and it is probably true that she realized that by her inducing her son to confess a judgment in her favor she would be more likely to secure the payment of her debt; but if she knew these facts, and if her knowledge of the embarrassed financial circumstances of her son prompted her to induce him to confess a judgment in her favor, still all this would not be conclusive evidence of a fraudulent intent on her part. A debtor has the right to prefer one creditor to another if the preference is made and accepted in good faith. And while the evidence shows that young Boardman was willing to prefer his mother, and she was anxious to secure the payment of her debt, and took the step she did for that purpose, still the evidence would not warrant the conclusion that she

accepted this confession of judgment for the purpose of hindering, delaying, or defrauding the other creditors of her son. It is not a fraud, nor evidence of fraud, for a creditor to be vigilant in the collection or securing of a debt due to him from a debtor. A creditor may take such lawful steps as he deems best to secure the payment of a debt due him from a debtor, though the latter be in failing circumstances and largely indebted to others; and if his motive be the honest one of securing his own debt, he will not be guilty of fraud because the effect of securing or paying his debt is to leave some other creditor's debt partly or wholly unpaid. No rule of law or equity forbids a creditor to exercise diligence for his own protection. If the motive which prompts his conduct in collecting or securing the debt is the honest one of self-preservation the law will protect him, no matter what may be the effect on other creditors. So long as his conduct is not prompted by a sinister motive to hinder, delay, or defraud other creditors, he is entitled to all the advantage which his diligence, knowledge, and vigilance give him; and since in the case at bar the confession of judgment was brought about without any intention upon the part of Mrs. Boardman to hinder, delay, or defraud the other creditors of her son, they cannot be heard to charge fraud because the effect of the confession of judgment was to give Mrs. Boardman a first lien upon the property of their common debtor.

2. It is insisted by the commercial creditors that because Mrs. Boardman loaned to her son the capital which he invested in the drug business, she thereby enabled him to hold himself out to the world as the owner of the drug stock, and to contract debts on the strength of his being the owner thereof; and that, therefore, she is estopped from now claiming the proceeds of the execution sale. If this contention be correct, it must be because Mrs. Boardman has done, or omitted to do, something which she was under a legal or equitable obligation to do or omit to do, and that by reason of her conduct the com-

mercial creditors have changed their status, to their injury. What has she done? She loaned her son the capital which he invested in business, and when his debt to her matured she took steps to secure its payment. Certainly she violated no rule of morals or law in doing either of these things if the motives which prompted her to these actions were honest, and if she was innocent,—and we have seen that she was,—of any intention to defraud these commercial creditors. What has she omitted to do? She did not advise the world that she had loaned her son money to buy this drug stock; nor was she under any legal or moral obligation to do so. She did not take a mortgage upon this stock and file it, and thus give notice to the world of her claim; nor was it her duty so to do. No mortgage was offered her and she requested none. She kept silent in regard to the debt which her son owed her, but under circumstances when it was not her duty to speak; and her silence was not a concealment of her claim against her son, either for the purpose of assisting him or injuring others. When her debt matured she did not notify her son's other creditors that she was about to take steps to secure its payment, and we know of no rule of law or morals that made it her duty to give such notice. It is true that the commercial creditors furnished the son goods and extended credit to him, believing his only indebtedness to be the $500 that he owed Chambers, and by so doing they have changed their status to their injury. But the proximate cause of their action and their injury was not the loan made by Mrs. Boardman to her son, but the false statements made by the son to them. Mrs. Boardman at no time had any interest in or control over this stock of drugs. The son was not her agent. He was her debtor, and she is not bound or estopped by any representation that he made, as she neither induced him to make such statements nor knew they had been made. Suppose that wholesale dealer A had sold young Boardman $5,000 worth of goods on credit and he had put them into his stock, and while

these goods were on hand another wholesale dealer, B, had inquired of young Boardman if he owned these goods and if he was in debt, and he had replied that he owned the goods and that they were paid for, and upon the strength of that representation B had sold more goods to young Boardman and extended him credit therefor. Is there any rule of law or equity that would postpone A's debt to B's? And yet the principle which controls the point under consideration is precisely the principle that would control a contest between A and B if B were claiming that by reason of A's conduct his claim against young Boardman should be postponed.

Counsel for the appellants, to sustain their contention that Mrs. Boardman is estopped as against these commercial creditors to claim the fund in question, have cited us to several authorities, which we will now briefly review.

The first case cited is *Webb v. Armistead*, 26 Fed. Rep., 70. In that case Armistead's relatives loaned him the capital with which he embarked in business. He afterwards failed and made an assignment for the benefit of his creditors, preferring his relatives who had loaned him the money with which he started in business, and the court held that the deed of assignment was void on its face because of the extraordinary powers and discretion which it conferred upon the assignee named therein. Counsel for the appellants here insist that the court also decided that the preference given to his relatives by Armistead was void as against his commercial creditors, because this preference was in fact the only capital which Armistead put into his business. We do not think the decision of the case turned upon that point, and if it did, we are not prepared to follow it. In that case, as in the case at bar, it was shown that the debtor had made statements to the commercal agencies as to his indebtedness and concealed the fact that he was indebted to his relatives; that the commercial creditors relied upon these statements and sold him goods and extended him credit upon the faith of them. But there is in the case no refer-

ence whatever to the fact that the commercial creditors changed their status, not by reason of the fact that Armistead's relatives had loaned him capital, but because they relied upon his false statements.

Smith v. Sipperly, 34 Pac. Rep. [Utah], 54, is another case cited by counsel for appellants. But this case follows the holding of the federal court in the *Armistead Case*, and adopts its opinion without discussion or examination.

Another case cited is *Krippendorf v. Hyde*, 28 Fed. Rep., 788. The court said: "If a creditor of a commercial firm whose insolvency is known to him, but not to the public, helps the firm to keep going and to extend largely the scope of its business and credit, under a promise of preference over other creditors in case of disaster, which under the circumstances is clearly probable, and the firm, having obtained large quantities of goods on credit, turns them over to this creditor in payment of his demands, keeping nothing for other creditors, the transfer of the goods will be deemed fraudulent." The opinion in the case was written by Woods, J., and the preference seems to have been held fraudulent because of a secret promise therefor made by the commercial firm at the time the creditor loaned it money. The case is not in point here and the learned judge cites no authority to support the conclusion reached by him; and in addition to this the same judge, in *Smith v. Craft*, 17 Fed Rep., 705, in an able opinion in which the authorities are examined, held that a preference given by a failing debtor in pursuance of a promise made when he obtained the loan, to make such a preference in case of his failure would not be set aside as fraudulent at the instance of other creditors unless a fraud was intended. And again in *Lippincott v. Shaw Carriage Co.*, 25 Fed. Rep., 590, the same judge made the same ruling that he did in *Smith v. Craft, supra.* In view of these contradictory decisions of the *nisi prius* federal courts, we do not feel bound to follow the rule announced in the *Armistead Case.*

Another case cited by counsel for appellants is *White v. Heimerdinger*, 17 N. Y. Supp., 888. In that case a mother gave to her son a letter addressed "To Whom It Might Concern," stating that she had loaned him $10,000, "to be paid back at his option, and leave same to him at the risk of his business for five years." This letter was shown to commercial agencies and through them to a commercial creditor, who sold the son a large amount of goods on credit on the faith of this letter. In less than a year after the date of the letter the son became insolvent, and confessed judgment in his mother's favor for the amount of the loan made by her to him; and the court held,—and correctly, we think,—that the commercial creditor's claim took precedence of the mother's; but that case is not in point here. As said by Lawrence, J., in the opinion, it is perfectly clear that it was the mother's intention to lead commercial creditors who might see and rely upon her letter to believe that the $10,000 which she had loaned to her son was to be at the risk of the business, and subject to all its hazards. The very object that the mother had in writing the letter was to give notice to the world that the $10,000 which she had loaned her son to invest in business was, for at least a period of five years, to be considered and regarded by persons dealing with him as his.

Another case cited by appellants is *Roy v. McPherson*, 11 Neb., 197. In that case Mrs. Roy put into the hands of her brother a sum of money with which to purchase land for her. The brother purchased the land, but took the title in the name of Mrs. Roy's husband. This was in 1864. Mrs. Roy knew that the title to the land had been placed in her husband's name at the time it was done. She acquiesced in this for thirteen years. During this time her husband engaged in mercantile business and contracted debts upon the faith of his being the owner of this land. The husband failed and a contest arose between his creditors and Mrs. Roy as to the title to this land, and we held that Mrs. Roy had estopped herself to

claim this land as against her husband's creditors. But that case is not an authority for the contention under consideration. Mrs. Roy owned the equitable title to this land. Her husband held it in trust for her and she kept the trust a secret. It was her duty to speak and she kept silent, and her silence caused her husband's creditors to change their status to their injury, and she was rightly held estopped as against them from claiming the land. But Mrs. Boardman did not own the drug stock or any interest in it. Her son did not hold this drug stock in trust for her. She is not here claiming to be the owner of this drug stock or any interest in it. Her attitude here is that of a creditor. She did not keep silent at any time when it was her duty to speak, and no creditor of her son was induced to change his status because of Mrs. Boardman's silence.

Other cases cited by appellants are *Early v. Wilson*, 31 Neb., 458, and *Swartz v. McClelland*, 31 Neb., 646. These cases follow the rule announced in *Roy v. McPherson*, and, for reasons already stated, are not in point here.

The transactions out of which this suit grew occurred between parent and child, and if the decree of the district court shall be affirmed its result will probably be to deprive the other creditors of young Boardman of their debts; and because of these facts, the law has placed on this mother the burden of showing by a preponderance of the evidence that her conduct in the premises and the motives which inspired it were honest; that the entire transaction was in good faith, and that in nothing that she did was there any intention to defraud the son's other creditors. (*Plummer v. Rummel*, 26 Neb., 142; *Ward v. Parlin*, 30 Neb., 376; *Peregoy v. Krantz*, 31 Neb., 58; *Carson v. Stevens*, 40 Neb., 112; *Melick v. Varney*, 41 Neb., 105; *Glass v. Zutavern*, 43 Neb., 334; *Steinkraus v. Korth*, 44 Neb., 777.) But this is merely a rule of evidence and owes its origin to the fact that the relationship existing between members of the same family is not only an inducement for them to protect one another, but affords

opportunities for the perpetration of frauds. But business transactions between relatives are not forbidden by law, and, subject to the rule of evidence just stated, such transactions between them are governed, and the rights and liabilities of the parties thereto are determined, in the same manner as if they were strangers; and the preference made by young Boardman to his mother was neither fraudulent, illegal, nor inequitable, because of the fact that the loan represented by the preference was the only capital with which young Boardman embarked in business. (*Laird v. Davidson*, 25 N. E. Rep. [Ind.], 7; *Hegeler v. First Nat. Bank of Peru*, 21 N. E. Rep. [Ill.], 812; *Buhl v. Peck*, 37 N. W. Rep. [Mich.], 876; *Tomlinson v. Matthews*, 98 Ill., 178; *City Bank v. Wright*, 26 N. W. Rep. [Ia.], 35.) Mrs. Boardman has shown beyond all question that her conduct in lending her son money to embark in business and inducing him to confess a judgment in her favor was actuated with honest motives and free from any sinister purpose to defraud her son's other creditors; that she has done nothing nor omitted to do anything which caused his creditors to change their status, and she is therefore entitled to have the amount of her judgment paid in full from the proceeds of the execution sale. The decree of the district court is accordingly

AFFIRMED.

FREMONT, ELKHORN & MISSOURI VALLEY RAILROAD COMPANY V. CHARLES HARLIN.

FILED FEBRUARY 16, 1897. No. 7108.

1. **Railroad Companies:** NEGLIGENCE IN CONSTRUCTING DITCHES: PLEADING. A plaintiff alleged in his petition that the defendant, a railroad company, carelessly and negligently constructed its ditches along its track through the lands of plaintiff, in such a manner as to cause the surface waters to collect in said ditches and be precipitated on plaintiff's land, whereby certain of his crops were destroyed, certain of his trees growing on said land

were destroyed, and his land was depreciated in value by the deposit thereon of clay and sand. *Held*, (1) That because of the general allegation of the railroad company's negligence in constructing its ditches, the petition was open to a motion to make more definite and certain; (2) but that the general allegation of negligence was good as against a demurrer, and, therefore, the petition stated a cause of action.

2. **Eminent Domain**: CONVEYANCE TO RAILROAD COMPANY: RELEASE OF DAMAGES: CONSTRUCTION OF DITCHES: NEGLIGENCE: MEASURE OF DAMAGES. A land owner conveyed to a railroad company a right of way across his land. The conveyance contained the following release: "For the consideration aforesaid do hereby release and discharge the said party of the second part, its successors and assigns, from all costs and damages which the said party of the first part has now sustained, or shall at any time hereafter sustain, in any way by reason of the construction, building, or use of the said railroad." The railroad company afterwards built its road on the right of way purchased, and in so doing constructed thereon certain ditches for the purpose of draining its road-bed. Subsequently the land owner conveyed his land to the defendant in error and he sued the railroad company for damages, alleging that said ditches were negligently constructed, and by reason thereof they conducted the surface waters collected therein on his land, destroyed certain of his crops, certain of his trees, and injured his land by depositing sand and clay thereon. The railroad company pleaded the release in the right of way deed in bar of the action. *Held*, (1) That if the release would estop the original owner had he retained the land and brought this action, it would likewise estop the defendant in error; (2) that the true construction of the release is that by it the land owner acknowledged satisfaction for the value of all the land appropriated by the railroad company for its right of way, and released and discharged it from all damages which the remainder of his land had sustained, or would sustain, by reason of the non-negligent construction, maintenance, and operation of its road across the lands for all time; (3) that the release should be given the same effect as if it were a judgment rendered in a condemnation proceeding instituted by the railroad company for right of way over the land; (4) that in such a judgment, and therefore in the release, were not included damages for injuries that might afterwards arise as the results of a negligent construction, maintenance, or operation of the road; (5) that it was not within the contemplation of the parties to the right of way deed, at the time it was executed, that the railroad company would negligently construct, maintain, or operate its road; (6) that had the right of way been obtained by condemnation the land owner in that proceeding could not have been awarded damages upon the theory that he might in the future sustain injury by reason of the railroad company's negligently constructing, maintaining, or operating

its road; (7) that the defendant in error's cause of action arose when the injury sued for occurred, and not when the ditches were completed; (8) that whether the ditches were properly and skillfully constructed for railroad purposes was not the material issue in the case; (9) and if so constructed, that of itself did not afford the railroad company a complete defense to the action, as the material issue in the case was whether the railroad company had so constructed its ditches as to unnecessarily and negligently injure the defendant in error; (10) that the measure of the defendant in error's damages was the value of his crops destroyed, the value of his trees destroyed, and the difference in the value of his land immediately before and after the depositing of the sand and clay thereon.

3. **Railroad Companies:** DRAINAGE: NEGLIGENCE: DAMAGES: INSTRUCTIONS. In addition to a general denial that the defendant in error had sustained any damages and that it had been guilty of any negligence in constructing its ditches the railroad company interposed the defense that the damages claimed resulted from a rain storm so unprecedented as to amount to the act of God. The district court instructed the jury that if the railroad company had failed to establish by a preponderance of evidence the defense interposed they should find for the defendant in error. *Held*, That the giving of the instruction was reversible error.

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

See opinion for references to cases.

William B. Sterling and *J. E. Frick*, for plaintiff in error.

C. Hollenbeck, contra.

RAGAN, C.

Charles Harlin brought this suit in the district court of Saunders county against the Fremont, Elkhorn & Missouri Valley Railroad Company, hereinafter called the railroad company, to recover damages which he alleged he had sustained by reason of the destruction of certain of his crops, certain trees growing upon his land, and by reason of the deposit on his land of quantities of debris, all caused by the negligence of said railroad company in constructing certain ditches on its right of way in such a manner as to cause the waste and surface waters to be

collected in said ditches and precipitated on his land. Harlin had a verdict and judgment and the railroad company prosecutes here a petition in error.

1. The first point argued in the brief is that the petition does not state facts sufficient to constitute a cause of action. The petition, so far as material here, is as follows: "That the defendant * * carelessly and negligently constructed its ditches along * * * said railroad track * * * through the lands of plaintiff * * * in such a manner as to cause the waste and surface waters to collect along and adjoining the said railroad track, and to lead and precipitate the same directly on and over the adjoining lands of plaintiff; that during the years 1889 and 1890 the water so precipitated and turned from its natural course over upon said lands of plaintiff totally destroyed large portions of crops of corn and potatoes then growing upon said land and the property of plaintiff; and during the year 1891, by reason of the said careless and negligent construction of said ditches, large quantities of clay and sand were carried by the water from said ditches over and upon the lands of said plaintiff, totally destroying the crops of potatoes and corn then standing and the property of said plaintiff; and by reason of the depositing of said sand and clay on said land a large number of trees standing and growing thereon were totally destroyed, and a large quantity of said land was greatly and permanently damaged, so as to be unfit for the production of crops." The averments of this petition do not disclose the particular acts or omissions of the railroad company in constructing its ditches which the pleader alleges were negligent. It is not averred that the railroad company was guilty of negligence because it constructed ditches, or in constructing them where it did; nor that they were too narrow or too shallow. The allegation of negligence is a general one, and had a motion been made to require the pleader to specifically state in what the negligence of the railroad company consisted it would doubtless have been sustained. But a general

allegation of negligence is good against a demurrer; and under such an allegation evidence of any fact which contributed to the injury sued for is competent and relevant. (*Omaha & R. V. R. Co. v. Wright*, 47 Neb., 886.) We think, therefore, that the petition states a cause of action.

2. At the time the railroad company constructed its road over the lands of plaintiff they were owned by a man named Shannon, the plaintiff's grantor. Before the construction of the road over the lands Shannon, for a valuable consideration, conveyed to the railroad company a right of way over his lands. In this conveyance occurs the following: "For the consideration aforesaid do hereby release and discharge the said party of the second part [the railroad company], its successors and assigns, from all costs and damages which the said party of the first part has now sustained or shall at any time hereafter sustain in any way by reason of the construction, building, or use of the said railroad." On the trial of this case the railroad company offered in evidence, under proper pleadings, this right of way deed. It was excluded and this action of the district court, it is now insisted, was erroneous. The contention is that this was a release to the railroad company by Shannon of all damages which he had or might afterwards sustain by reason of the construction and operation of this road over his lands; that the release would bar this action were it brought by Shannon, and that the release is likewise binding upon his grantee. We agree with counsel for the railroad company that if this release would bar Shannon from maintaining this action, it likewise precludes his grantee, as the latter took the land burdened with the railroad company's easement, and he cannot maintain any action against the railroad company for damages growing out of the construction, operation, or maintenance of this road that his grantor could not maintain had he continued the owner of the land. The question, therefore, is whether the release in the right of way deed would bar this action had it been brought by Shannon.

The question is an important one, and to sustain his theory counsel for the railroad company have cited us to the following authorities:

Hoeffditz v. Southern P. R. Co., 18 Atl. Rep. [Pa.], 125. In this case Hoeffditz, for a valuable consideration, released and discharged a railroad company and its successors from all suits, claims, demands, and damages whatever by reason of its entry upon his land and appropriating a part thereof towards the construction of its railroad and works connected therewith. At the time of executing the release the railroad company had erected on the land acquired from Hoeffditz an embankment, in which was a culvert. Subsequently Hoeffditz sued the railway company for damages caused by the water which passed through this culvert; and the court held that the release was a bar to the action.

Updegrove v. Pennsylvania S. V. R. Co., 19 Atl. Rep. [Pa.], 283, is very much like the case at bar. Updegrove, for a consideration, deeded the railway company the right of way over his land, and released it from all claims for damages by reason of the taking and using of the lands for its railroad, or by reason of the construction and maintenance of its road over said land. The release appears to have been executed before the road was built, and the court held that this release barred Updegrove's action against the railroad company for damages caused by an overflow of water which resulted from the construction of a ditch and culvert on the right of way. The court based its decision upon the proposition that the damages sued for were in contemplation of the parties at the time of the execution of the right of way deed. In other words, that the damages sued for entered into and formed a part of the consideration paid by the railroad company for the right of way.

In *Radke v. Minneapolis & St. L. R. Co.*, 43 N. W. Rep. [Minn.], 6, Radke sued the railroad company for damages to his land caused, as he alleged, by the negligent construction of its railroad over or near his land. The neg-

ligence complained of was that the railroad company neglected to put a culvert in an embankment. After the embankment was constructed Radke, for a consideration, conveyed to the railroad company a right of way over his land. But the right of way deed contained no release of damages. The court, however, held that the absence of this release from the right of way deed was unimportant, and said: "When he conveyed the premises to the defendant he knew that there was no culvert through the embankment * * where he now claims it should be placed in order to carry the water off his land, and he knew that the railroad embankment had already stopped the flow of water. It cannot affect the case that he may not then have apprehended the full extent of the injury which would result from this in future." To the same effect are *McCarty v. St. Paul, M. & M. R. Co.*, 17 N. W. Rep. [Minn.], 616; *Milwaukee & N. R. Co. v. Strange*, 23 N. W. Rep. [Wis.], 432.

In *Chicago, R. I. & P. R. Co. v. Smith*, 111 Ill., 363, the owner of certain land conveyed to the railroad company a right of way across the same. The deed recited, "For the purpose of constructing a railroad, and for all purposes connected with the construction and use of said railroad," and the court held that the right of way deed was a bar to an action by the owner's grantee against the railroad company for damages caused to his property by its engines throwing smoke, cinders, ashes, and sparks of fire thereon, and by the shaking of the house on said premises. But it is to be observed that the damages claimed resulted from the usual and ordinary operation of the road. Smith did not claim that the damages resulted from the negligent operation of the road; and the case rests upon the principle that when anything is granted, all the means to attain it and all the fruits and effects of it are granted also; and the court correctly held that the shaking of the house and the smoke, cinders, and ashes thrown by passing engines were necessarily incident to and inseparable from the operation of the

railroad, and were conclusively presumed to have been adjusted and settled by the consideration paid by the railroad company to the original owner at the time he executed the right of way deed. The case is not an authority for the contention of the railroad company in the case at bar. To the same effect are *Chicago & E. I. R. Co. v. Loeb*, 8 N. E. Rep. [Ill.], 460; *Chicago & E. I. R. Co. v. McAuley*, 11 N. E. Rep. [Ill.], 67.

In *St. Louis, V. & T. H. R. Co. v. Hurst*, 14 Ill. App., 419, it seems that the railroad company constructed its road over the land of Hurst. At or before this time, for a consideration, Hurst conveyed to the railroad company a right of way deed over his lands, and in this deed he released and relinquished all claims for damages by reason of the location, completion, and construction of the road. Years after the road had been completed and in operation the railroad opened a ditch by the side of its track, and Hurst claimed that the construction of this ditch changed the natural channel and flow of water and caused the same to flow upon his land, to his damage, for which he brought suit. On the trial the railroad company offered the right of way deed in evidence. The trial court excluded it and on appeal its action in this respect was reversed. The court seems to have placed its ruling upon the ground that the railroad company was entitled to have the jury say as a matter of fact whether the construction of the ditch complained of was a necessary act in the proper maintenance of the road, and held that if the construction of the ditch was necessary to the maintenance and operation of the road, that the release was a bar to the action; and said that before Hurst could recover damages he must make it appear that the acts of the railroad company amounted to a departure from or were not embraced within the purposes for which the release was made. This case is an authority so far as it goes against the contention in support of which it is cited.

Of these authorities the cases from Pennsylvania and Minnesota only, we think, can be said to sustain the

proposition contended for by counsel for the railroad company here. But our construction of this right of way deed is that by it Shannon acknowledged satisfaction for the value of all the land appropriated of his by the railroad company for its right of way, and released and discharged the railroad company from all damages which the remainder of his land had sustained or would sustain by reason of the non-negligent construction, maintenance, and operation of the road across his lands for all time. This right of way deed must be read, construed, and given the same effect that we would give to a judgment rendered in a condemnation proceeding instituted by the railroad company for right of way over Shannon's land; and had the railroad company pleaded and offered in evidence such a judgment instead of this right of way deed, the question would have been whether the damages sought to be recovered in this action were embraced in the condemnation judgment. It was not within the contemplation of the parties to this right of way deed that the railroad company would negligently construct, maintain, or operate its road; and if in the trial of the condemnation proceedings Shannon had sought to recover damages from the road upon that theory he could not have done so.

In *Delaware, L. & W. R. Co. v. Salmon*, 39 N. J. Law, 299, it was held: "A conveyance of land for railroad purposes or an assessment of the value of lands taken and damages under proceedings to condemn only bars the recovery of such damages as naturally and necessarily arise from the use of the premises for the authorized purpose; and will not bar the recovery of damages for injuries arising from an unskillful or improper construction or negligence in operating the road. For such damages the remedy by action remains notwithstanding the conveyance or condemnation."

In *King v. Iowa M. R. Co.*, 34 Ia., 458, it was held that in a proceeding to appropriate land for a right of way of a railroad already constructed, evidence of damages result-

ing from defective construction or the like is not admissible. While such damages may furnish cause of action to recover the same in an action therefor, they are not to be considered in assessing the compensation to be allowed the owner for the right of way appropriated.

In *Stodghill v. Chicago, B. & Q. R. Co.*, 43 Ia., 26, Stodghill sued the railroad company for damages for diverting a stream of water from its natural course, thus preventing it from flowing upon his land and depriving him of the use of the stream. The railroad company interposed as a defense that before it built its road over Stodghill's land it acquired from him, for a valuable consideration, the right of way; that its right of way passed over a creek, and that when it constructed its road it built a bridge over this creek; that some eight years afterward, on account of an increase of business and for the safety of travel, it took out the bridge and built a fill across the creek. The supreme court said: "As it is not claimed by appellant that greater rights were acquired by the plaintiff's deed than would have been acquired by proceedings in condemnation, we shall assume for the purposes of this opinion that they were the same. The question, then, which we are called upon to decide is this: Are the damages resulting to the land owner from the diversion of a natural stream of water, where such diversion is required by good railroading and a reasonably prudent construction of the road-bed, to be regarded as having entered into and been covered by the condemnation and appraisal?" and held that the right of way deed was not a bar to the action.

Hunt v. Iowa C. R. Co., 52 N. W. Rep. [Ia.], 668, is a case almost identical with the one at bar. Hunt sued the railroad company for damages sustained by him, as he alleged, by reason of its negligently constructing a ditch on its right of way, whereby surface waters destroyed his crops and deposited debris upon certain of his land and depreciated its value. The ditch complained of was constructed at the time the road was built across Hunt's

land, and at this time another party owned the land. It does not appear whether the railroad acquired its right of way over the land by condemnation proceedings or by conveyance from the owner; but the case was tried and finally considered by the supreme court upon the theory that the railroad company at the time it built its road and constructed the ditch complained of did so in pursuance of a right of way granted to it for that purpose by the then owner of the land. The railroad company insisted that the damages sued for were such as the law conclusively presumes were included in the amount paid by the railroad company originally for its right of way. But the supreme court said: "From these facts we think it is clear that the damage sued for herein cannot be said to have been considered and settled for in condemnation proceedings." The court then cited *Drake v. Chicago, R. I. & P. R. Co.*, 63 Ia., 308, and *Sullens v. Railroad Co.*, 74 Ia., 659, and continued: "It is well settled that in assessing damages to the land owner for right of way taken, regard is had only to the immediate consequences of the appropriation. The owner is not, in such proceedings, compensated for damages which may thereafter result from negligent acts of the company committed after it makes the appropriation;" and after citing *Fleming v. Chicago, D. & M. R. Co.*, 34 Ia., 353, *King v. Iowa M. R. Co.*, 34 Ia., 458, *Miller v. Keokuk & D. M. R. Co.*, 63 Ia., 680, continued: "The plaintiff's grantor had a right to presume, when he conveyed the land to the company that built the road, that the work of constructing the road would be properly done; that sufficient culverts for the passage of surface water, at proper places, would be put in and maintained. * * * By neglect and carelessness on part of the defendant, surface water from several hundred acres of land * * * was gathered in the ditches of defendant, carried along, and finally discharged upon her [the plaintiff's] land. Damages arising from such an act have never been held to be included in the price paid for right of way." This has long been the doctrine of this court.

In *Burlington & M. R. R. Co. v. Schluntz*, 14 Neb., 421, it was held: "An award of damages under the statute for right of way for a railroad embraces only those damages which may reasonably be anticipated upon the assumption that the road will be built and operated with due care and skill, and with no unnecessary injury to property outside of the right of way." To the same effect see *Omaha Southern R. Co. v. Todd*, 39 Neb., 818, and *Chicago, B. & Q. R. Co. v. O'Connor*, 42 Neb., 90.

The district court did not err in excluding the right of way deed from the jury.

3. The next argument is that the court erred in refusing to give to the jury an instruction, at the request of the railroad company, to the effect that though they found that the ditches of the railroad company were negligently constructed, and that by reason thereof Harlin had sustained injury as claimed by him, still, if they further found that the ditches were constructed and completed more than four years immediately preceding the commencement of this action, they should find for the defendant. In other words, the instruction was a request to the court to hold that Harlin's action was barred by the statute of limitations, as the evidence is undisputed that the ditches were constructed and completed more than four years before this suit was brought. The contention of counsel for the railroad company is that the cause of action made the subject of this suit was the negligent construction by the railroad company of its ditches, and that that cause of action arose when the ditches were completed. To sustain this contention we are cited, among others, to the following authorities:

City of North Vernon v. Voegler, 2 N. E. Rep. [Ind.], 821. In that case the city, by improving or grading one of its streets, changed the flow of the surface water so as to gather it into a channel and pour it upon Voegler's lots. For this he sued the city for damages, alleging that its negligent grading of the street had injured and depreciated his real estate. He recovered a judgment. Sub-

sequently another overflow occurred and he again sued the city, but the court held that the judgment in the first action was a bar to the second, as all damages which Voegler has sustained to his real estate, both past and prospective, could have been recovered in the first action. The court treated the case as though both the actions brought by Voegler were for the permanent depreciation in value of his real estate by reason of the manner in which the city had improved its street. It is needless to remark that that is not this case.

Another case cited in support of the contention under consideration is *Baldwin v. Oskaloosa Gas Light Co.*, 10 N. W. Rep. [Ia.], 317. There Baldwin sued the gas light company for damages for maintaining its gas works in the immediate vicinity of his premises. The jury found that the gas works were permanent and the court held that this was equivalent to a finding that the injury was permanent, and that, therefore, Baldwin's cause of action accrued when the gas works were first located and that consequently his action was barred by the statute of limitations. To the same effect is *Stodghill v. Chicago, B. & Q. R. Co.*, 5 N. W. Rep. [Ia.], 495.

Another case cited by counsel is *Chicago & A. R. Co. v. Maher*, 91 Ill., 312. In that case the railroad company placed a protection to a drawbridge in a river and thus permanently depreciated the value of an adjoining lot. The owner of the lot subsequently conveyed it to Maher and she sued the railroad company for damages which the real estate had sustained by reason of the improvement which the railroad company had made adjoining her lot. But the court held that the injury caused to the real estate was permanent in its character, and the cause of action sued for arose when the improvement was first constructed. In other words, that the plaintiff's cause of action was the amount that her lot had been depreciated in value by reason of the improvement placed in the river adjoining it by the railroad company, and that this depreciation took place, this injury and this damage

accrued, at the time the improvement was erected. And this seems to be the principle upon which all the cases cited by counsel for the railroad company to support the contention under consideration rest; and such is the doctrine of this court, as announced in *Chicago, B. & Q. R. Co. v. O'Connor*, 42 Neb., 90. And the principle that controls the case just cited is the same principle that controls the case at bar, namely, that the right of action accrued when the injury happened. (See *Omaha & R. V. R. Co. v. Standen*, 22 Neb., 343; *Cedar Lake Hotel Co. v. Cedar Lake Hydraulic Co.*, 48 N. W. Rep. [Wis.], 371.)

One of the defenses interposed in *Hunt v. Iowa C. R. Co.*, *supra*, was the statute of limitations. It will be remembered, in that case Hunt claimed damages because of the negligent construction by the railroad company of certain ditches on its right of way, whereby the surface water overflowed his land and destroyed his crops. The ditches were constructed more than five years before the action was brought. The court said: "It is clear that plaintiff herein could not have maintained an action until some actual injury was caused to her by diversion of the water by defendant. There is here no claim of any such injury until 1888—less than two years prior to the commencement of this action. True, the evidence shows various overflows of plaintiff's land prior to that, but if they caused any injury, no damage is claimed for it."

In *St. Louis, I. M. & S. R. Co. v. Biggs*, 12 S. W. Rep. [Ark.], 331, the court held that where a railroad company constructs its road-bed so that at times it causes overflow to adjoining lands, there may be as many recoveries as there are successive injuries, and the statute of limitations begins to run on the happening of the injury complained of, and not from the construction of the railway.

In *Austin & N. W. R. Co. v. Anderson*, 15 S. W. Rep. [Tex.], 484, it was said that in an action against a railroad company for damages caused by occasional overflows of surface water, which has been diverted from its natural channel by the construction of its road, the statute

of limitations does not begin to run from the construction of the road, but from the occurrence of each overflow, since each overflow constitutes a separate cause of action.

The court did not err in refusing to give the instruction requested.

4. The next argument is that the court refused to instruct the jury, on behalf of the railroad company, to the effect that if the jury found that the ditches were properly constructed with reference to the use of the same for railway purposes, that they should find for the railroad company. Of this instruction we remark, first, that the railway company was not prejudiced by the court's refusal to give it, as the court had already, at the request of the railroad company, instructed the jury to the effect that the railroad company could not be held liable if the ditches as constructed were properly constructed for railway purposes. Certainly the railroad company was not entitled to this instruction. The material issue on trial was not whether the ditches were sufficient and proper for the draining of the railroad company's right of way and road-bed, but the material issue was whether the railroad company had so constructed its ditches as to unnecessarily and negligently injure the property of its neighbor. The instruction under consideration refused by the court, if given, would have made the case turn on an immaterial issue. A railroad company might construct a bridge, an embankment, a culvert, or a ditch sufficient for the maintenance and operation of its road, and one entirely proper for that purpose, and yet the improvement made might be of such a character as to unnecessarily and negligently injure the property of an adjoining proprietor. A lot owner might construct a conduit across his lot in such a manner as to gather all the rains and melting snows and carry them off. This conduit might be properly constructed for the purpose for which it was intended; the highest degree of care and skill may have been exercised by the lot owner in its building, and it may have subserved in the most satisfac-

tory manner the ends for which it was built, and yet the operation of this conduit might injure the property of the lot owner's neighbor, and if it did the lot owner, when called upon by his neighbor for damages, could not successfully defend by saying: "The conduit is properly constructed for the purpose for which I intended it." This is not a suit in which the plaintiff claims damages because the railroad company did not properly construct its ditches for railroad purposes, but the principle upon which this action rests is that the railroad company, in the lawful possession and use of its property, so used and managed it as to unnecessarily and negligently inflict an injury upon its neighbor.

In *McCleneghan v. Omaha & R. V. R. Co.*, 25 Neb., 523, this court said: "A railroad company must construct its road not only with reference to the safety of the traveling public, but also with reference to the rights of adjacent land owners." The following cases rest on the same principle: *Anheuser-Busch Brewing Association v. Peterson*, 41 Neb., 897; *Lincoln & B. H. R. Co. v. Sutherland*, 44 Neb., 526; *Fremont, E. & M. V. R. Co. v. Marley*, 25 Neb., 138; *Jacobson v. Van Boening*, 48 Neb., 80.

But it is said in support of the contention under consideration that this court has ruled, in *Morrissey v. Chicago, B. & Q. R. Co.*, 38 Neb., 406, that if an improvement made by a railway company in the construction, operation, or maintenance of its road is properly made for railroad purposes, then if another sustain damages by reason of such improvement or the manner in which it is constructed or maintained he is without remedy. Once more we disclaim having ever consciously so held, and once more call attention to the fact that we do not so understand the *Morrissey Case*. As we said in *Jacobson v. Van Boening, supra*, an examination of the *Morrissey Case* discloses that we had in view the fact that there was neither pleading nor proof that the railroad embankment which caused the injury sued for in that action had been unnecessarily or negligently constructed; that is, the evidence did not

show that the embankment complained of was negligently constructed for railroad purposes; nor that the railroad company, by constructing the embankment that it did, in the manner that it did, unnecessarily and negligently caused the injury sued for. The embankment was properly constructed for railroad purposes, and the manner of its construction was not a negligent one with reference to Morrissey.

5. As already stated, in the action at bar Harlin claimed damages for the destruction of certain of his crops, for the destruction of certain trees growing upon his land, and for damages to certain portions of his land caused by the deposit of sand and clay thereon. With reference to the measure of Harlin's damages, the court instructed the jury that he was entitled to recover the value of the crops destroyed, the value of the trees killed; and that the measure of his recovery for the damage to his land was the difference between its value immediately before and immediately after the debris was deposited thereon. It is now insisted that the court adopted an improper measure of damages. The instruction was correct. (See *Fremont, E. & M. V. R. Co. v. Crum*, 30 Neb., 76; *Kansas City & O. R. Co. v. Rogers*, 48 Neb., 653.)

6. In addition to a general denial that Harlin had sustained any damages, and that it had been guilty of any negligence in constructing its ditches, the railroad company interposed the defense that if Harlin had sustained damages, as he claimed, that they resulted from a rain storm so unprecedented as to amount to the act of God. The district court, upon its own motion, instructed the jury that the burden of proof was upon the railroad company to establish this defense by a preponderance of evidence, and "if the defendant has failed to prove the above material allegation by a preponderance of the evidence, or the evidence is evenly balanced thereon, then you should find for the plaintiff." This instruction was excepted to and its giving is assigned as error. It is needless to say that the instruction was erroneous. The bur-

den was upon the railroad company to establish this defense by a preponderance of the evidence; but even if the railroad company failed to establish the defense interposed by it, it did not follow that Harlin was entitled to recover. A careful examination of the entire charge of the court constrains us to the conclusion not only that the instruction was erroneous, but that its giving was prejudicial to the railroad company, and for the giving of this instruction the judgment of the district court must be reversed.

REVERSED AND REMANDED.

IRVINE, C., dissenting as to measure of damages as to trees destroyed.

TJEDE M. EHMEN, APPELLANT, V. VILLAGE OF GOTHENBURG, APPELLEE.

FILED FEBRUARY 16, 1897. No. 7119.

1. **Dedication of Public Park:** REGISTRATION OF PLAT. The statute provides for the acknowledgment and recording of plats subdividing tracts of land, and that the acknowledgment and recording of such a plat is equivalent to a deed in fee-simple of such portion of the premises platted as is on such plat set apart for streets and other public use. *Held*, That under this statute a plat, properly acknowledged and recorded, showing the subdivision of land into blocks and lots with streets traversing the same, with a block in the center thereof not subdivided into lots and with no alley traversing the same as was the case with other blocks, said block being designated "Ehmen's Park" (Ehmen being the owner of the land subdivided), operated as a statutory dedication of that block for a public park.
2. **Park:** DEFINITION. The term "park," as used in this country, means a tract of land within or near a town or city devoted to purposes of amusement, pleasure, or exercise; and while there are private parks, in this sense the term generally means one open to the public.
3. **Municipal Corporations:** PARK: DEDICATION. In view of the frequent use of the donor's name to designate a public park by him granted, the use of the term "Ehmen's Park" cannot be taken to imply the reservation of the land for Ehmen's private use.

APPEAL from the district court of Dawson county. Heard below before HOLCOMB, J. *Affirmed.*

Warrington & Stewart, for appellant.

W. D. Giffen and *W. J. Trotter, contra.*

IRVINE, C.

This was an action by Tjede M. Ehmen, on her own behalf and on behalf of her minor children, against the village of Gothenburg to quiet title to certain land claimed by the village as a public park. In 1885 William Ehmen, being the owner of the east half of the southwest quarter of section 10, township 11 north of range 25 west, caused a portion thereof to be surveyed and platted. He then duly acknowledged said plat in accordance with the statute and caused the same to be recorded. The land so platted is within the village of Gothenburg. The plat shows a subdivision of the land into blocks and lots, with continuous strips of land separating said blocks, evidently intended for streets and alleys, although not so designated on the plat. One of these blocks, in the center of the plat, is numbered 11, in accordance with the general course of numbering adopted. It is not, however, subdivided into lots, nor is there an alley through it, as is the case with the other blocks, and in addition to the number 11 it bears on the plat the words "Ehmen's Park." The plaintiffs are the widow and children of Ehmen, who died intestate in 1890. The sole question involved is whether there was a dedication of this block which operated to convey it to the village as public grounds. The statute then and still in force provides for the platting of subdivisions, the acknowledgment of the plat and its recording, and further, that "The acknowledgment and recording of such plat is equivalent to a deed in fee-simple of such portion of the premises platted as is on such plat set apart for streets or other public use, or as is thereon dedicated to charitable, religious, or educa-

tional purposes." (Compiled Statutes, ch. 14, art. 1, sec. 106.) A former statute, repealed when this was passed, contained this language in a similar connection: "Thereupon such plat shall be equivalent to a deed in fee-simple from the proprietor or proprietors of all streets, avenues, alleys, public squares, parks, and commons, and such portion of the land as is therein set apart for public or city use, or is dedicated to charitable, religious, or educational purposes." (Session Laws, 1871, p. 2.)

It is contended in the first place that this change in the statute, omitting the specific words "avenues, alleys, public squares, parks, and commons," operated as a restriction, and that the mere designation of lands by such terms on the plat does not, under the present law, operate as a dedication, unless there exist elsewhere apt words clearly indicating the *animus dedicendi.* We do not think that the change in the phraseology of the statute was intended to accomplish any such purpose. On the other hand, we believe the object was to supply the place of the specific words by a more general term, which would cover, perhaps, other dedications than would fall within the old statute. The word "alley" is omitted, but it was certainly not intended that the mere designation on the plat of a strip of land as a street should operate as a dedication, while a like designation of another strip as an alley should not. The term "other public use," used in connection with "street," is sufficient to include a public square or park. It is true, greater uncertainty is likely to arise as to the purpose of the grantor in the case of such public grounds than in the case of streets, the necessity of the existence of which leaves the purpose of the grantor seldom in doubt. Still, where the designation on the plat is such as to clearly manifest the grantor's intent to dedicate land thereon for public use as a park, we think the statute is ample to constitute the acknowledging and recording of such plat a conveyance of the land for that purpose.

The appellants contend that the designation "Ehmen's

Park" is insufficient to imply an intention to dedicate it as public land, and we are referred in this connection to the common-law definition of the term "park," as well as to certain cases, such as *City of Logansport v. Dunn*, 8 Ind., 378, and *City of Pella v. Scholte*, 24 Ia., 283, where the word "square," or some similar word, has been held in itself ambiguous and not to operate on a plat as a dedication in the absence of evidence *aliunde* establishing the grantor's intent in using the word. Without questioning the correctness of the cases referred to under their peculiar facts, we think they have no application here. In the United States we have no parks within the meaning of the forestry laws of England. The term has never in this country been used in that sense. Indeed, such signification is not now in England exclusive. To demonstrate this, we need only refer to "Hyde Park," in London. The universal meaning of the term in this country is a tract of land in or near a city or town, and devoted to purposes of amusement, pleasure, or exercise. There may be private parks, but the use of the term to designate private property is the exception, and public use is implied by the term in the absence of language or surrounding facts implying the contrary. In *Price v. Inhabitants of the City of Plainfield*, 40 N. J. Law, 608, it was said: "A park in a city means to the sense of every person a place open to every one." In *People v. Green*, 52 How. Pr. [N. Y.], 440, the term "park" is defined as "a piece of ground adapted and set apart for purposes of ornament, exercise, and amusement." This is the sense in which it is several times used in our statutes, as, for instance, the former statute on the subject of village plats already referred to, and the so-called charter of metropolitan cities (Compiled Statutes, ch. 12*a*, sec. 108), whereby a board of park commissioners is established to control such parks.

But it is insisted that if the word "park" alone would indicate a dedication to public purposes, the term "Ehmen's Park" implies private ownership. We do not

think so. The dedication of land by proprietors for public purposes is now quite frequent, prompted sometimes by pure motives of philanthropy, at others by a desire to thereby enhance the value of surrounding property, and sometimes, no doubt, by both motives. In such cases the name of the grantor is quite frequently attached to the park by the public by way of grateful recognition of the gift, or by the grantor himself, through a not unnatural ambition to so perpetuate the memory of his gift. We think this custom, together with the almost universal use of the word "park" to designate public grounds, fully warranted the trial court in finding that the term was here so used.

There was a complete statutory dedication of the land in controversy, and we need not consider the questions raised as to a common-law dedication, title by estoppel, or questions relating to the evidence on those points.

AFFIRMED.

J. GRIFFITH, APPELLEE, V. JAMES JENKINS, APPELLANT.

FILED FEBRUARY 16, 1897. No. 7083.

1. **Judicial Sales: RAISING BID: CONFIRMATION: REVIEW.** An order confirming a judicial sale disclosed that the purchaser in open court raised his bid, but did not disclose why he did so or that his action in so doing was in performance of any condition imposed by the court as essential to the confirmation of the sale. *Held*, That the confirmation of the sale at the higher price was without prejudice to the former owner, provided the sale as reported was regular.

2. ———: ———: ———: ———. The record examined, and *held* not to disclose any irregularity which would have justified the trial court in setting aside the sale as reported.

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

F. G. Hamer, for appellant.

Warren Pratt and *E. C. Calkins, contra.*

IRVINE, C.

This is an appeal by the vendee from an order confirming a sale of land made under a decree foreclosing a contract for the sale thereof for default of payment. The sole ground urged for reversing the order of the district court is that the order of confirmation was conditioned upon the purchaser's raising his bid from $1,956 to $2,500.

It is contended that the court may not impose conditions changing the terms of the sale, and confirm the sale upon compliance with those conditions; and that the court cannot open up the sale and then accept bids after the officer has made his return. Generally speaking, there is no doubt that these contentions are correct, but the record hardly discloses a basis for their application in this case. The sheriff who made the sale reported the land sold to Griffith for $1,956, which was slightly more than two-thirds the appraised value of Jenkins' interest. A motion was filed to set aside the sale, and thereafter appears an entry as follows: "Now on this 6th day of January, 1894, this cause being called, plaintiff in open court raises his bid made herein to $2,500; thereupon the court doth order that the surplus over and above the amount of the decree in controversy be and the same is hereby directed to be applied on the matured installments of the contract sued on, but not included in the decree. This cause now coming on for further hearing upon the motion of the plaintiff for a confirmation of the sale made herein, and it appearing to the court that the sheriff had made due return to the order of sale issued herein, after carefully examining the same, together with his report of the proceedings had therein, finding them regular and according to law in all respects, the court doth hereby approve the same." Then

followed an order of confirmation. We find nowhere in the record any reason disclosed for the purchaser's raising his bid after the sale was reported. It does not appear that the court required such action as a condition for confirming the sale. On the other hand, the court expressly finds that the sale was regular and according to law in all respects. It may be true that the purchaser would not raise his bid without some reason therefor, but the record wholly failing to disclose such reason, we cannot infer that it was to meet a condition imposed, and not evidenced by the record, upon the performance of which only the sale would be confirmed. If the sale was in fact regular and the purchaser entitled to its confirmation at the price reported, the action of the court in accepting an increase of the bid was not prejudicial to the defendant. If the sale was irregular and the defendant was, therefore, entitled to have it set aside, then it is clear that the court could not cure the error by accepting an increased bid. It would in such case be the right of the parties to have a new sale, with open bidding, at a proper place and after proper advertising. As already stated, the defendant complains only of what he calls the condition attached to the order of confirmation, and we might be justified in concluding from that, as well as from the express finding of the court that the sale was regular, that the order of confirmation was proper under the original bid. In the reply brief, however, it is suggested that there were such irregularities as would have justified the court in setting aside the sale, and that the order of confirmation was, therefore, prejudicial to the defendant. The first reason suggested is that the appraisement was so low as to justify an inference of fraud. Among the forty and more reasons set out in the motion to set aside the sale in the district court it is alleged that the appraisement is too low, but it is not alleged that it was fraudulent. In the absence of fraud an appraisement can be attacked on the ground that it is too low only by motion filed before the sale. (*Vought*

v. Foxworthy, 38 Neb., 790.) Such a motion does not appear in the record, and the assignment in the motion to set aside the sale for the first time that the appraisement was too low presented no question for the district court to act on and did not suggest fraud. Moreover, the proof is insufficient to establish fraud. While there is considerable evidence tending to show that the appraisement was too low, there is much evidence to sustain the action of the appraisers; and, indeed, the proof as to value varies less than we usually find the case in such records.

The land is not described in the same terms in the decree and in the order, notice, and report of sale, and it is claimed this variance was a cause for setting the sale aside. In the decree the land is described as "Lots numbered 405 and 406 and west half of lot numbered four hundred and four, less five feet on the left side thereof, according to the recorded plat of School Section Addition to the city of Kearney, Nebraska." In the petition, in the contract attached thereto, in the order of sale, in the published notice, and in the report the description is "Lots numbered 406 and 405 and the west half of lot numbered 404, less five (5) feet on the east side of the west half, in School Section Addition to the city of Kearney." The latter description seems reasonably clear. The description in the decree refers to the recorded plat of the addition. If that plat as recorded is arranged as is usual, with the north at the top of the page, then it would seem that the land described in the decree is not exactly the tract sold. If, however, the plat as recorded be inverted, then the five feet on the left side of the west half of lot 404 is also the five feet on the east side of the west half of that lot, and the variance is not material. There is no evidence on this subject preserved by the record. The defendant does not now complain of this variance as a substantive ground for setting aside the sale, but only as disclosing prejudice in confirming it at the higher price. The court found the proceedings regular, and if there was in fact a variance between the decree

and the land actually sold, this was such a manifest error that the court certainly could not have considered a raising of the bid sufficient to cure it. We do not think that error in this respect affirmatively appears.

We have examined the other reasons alleged for setting aside the sale, and we find that they receive no support from the record.

AFFIRMED.

ROSALIE FARLEY V. WILLIAM E. PEEBLES ET AL.

FILED FEBRUARY 16, 1897. No. 6996.

1. **Witnesses**: PRIVILEGED COMMUNICATIONS: ATTORNEYS. Generally, in order to bring communications made to a lawyer within the privilege accorded by the common law and declared by the statute, it must be shown that the relationship of attorney and client existed at the time the communications were made. While this rule has its exception in the fact that communications properly made in negotiating for the employment of an attorney are likewise privileged, still neither the rule nor the exception, neither the letter nor the spirit of the common law or of the statute, extends the privilege to communications voluntarily made to a lawyer after he has informed the person making them that he will not and cannot accept the employment to which the communications relate.

2. **Conspiracy**: EVIDENCE: OVERT ACTS. A conspiracy, like other facts, may be proved by circumstantial evidence, and one means of proof is by showing overt acts of the individuals charged with conspiring. From the fact that different persons at different times by their acts pursue the same object, the jury may, in connection with other facts, infer the existence of a conspiracy to effect that object.

3. ———: ———: ADMISSIONS. In order to justify the admission in evidence, for the purpose of establishing the conspiracy, of such acts of individuals it is not necessary to first prove by other evidence the existence of the conspiracy.

4. ———: ———: DECLARATIONS. Declarations made in pursuance of the object are likewise admissible, but to be so they must not be merely narrative of past occurrences or statements of future purposes; they must tend so directly toward the accomplishment

of the alleged common object as to constitute a part of the *res gestæ*.

5. ———: ———: ———. Evidence of such acts or declarations may have a twofold purpose: First, the proof of the existence of the conspiracy; second, the conspiracy having been proved, to charge each member thereof with the consequence of such acts or declarations. For the first purpose the evidence is admissible generally as against all. For the second purpose it cannot be considered against those not participating in the acts or declarations, unless from all the evidence the existence of the conspiracy has been proved.

ERROR from the district court of Cuming county. Tried below before NORRIS, J. *Reversed.*

The facts and issues are stated by the commissioner.

Breckenridge & Breckenridge and *C. C. McNish*, for plaintiff in error:

It was error to exclude proof not only of acts and declarations resulting in plaintiff's damage, but of facts tending to show the unlawful combination itself, as against any and all defendants not shown to be present and directly connected with the particular declaration or fact. (*Nudd v. Burrows*, 91 U. S., 426; *Spies v. People*, 122 Ill., 1; *United States v. Gooding*, 12 Wheat. [U. S.], 469; *Ochs v. People*, 124 Ill., 399; *St. Paul Distilling Co. v. Pratt*, 45 Minn., 215; *Regina v. Duffield*, 5 Cox C. C. [Eng.], 404; *Mapstrick v. Ramge*, 9 Neb., 390.)

The testimony of the witness Sloan was not properly excluded as privileged communications. (*Home Fire Ins. Co. v. Berg*, 46 Neb., 600; *Henry v. Nubert*, 35 S. W. Rep. [Tenn.], 444; *In re Turner*, 31 Atl. Rep. [Pa.], 867; *Romberg v. Hughes*, 18 Neb., 579; *Clay v. Tyson*, 19 Neb., 530; *George v. Silva*, 68 Cal., 272; *Thiesen v. Dayton*, 82 Ia., 74; *Plano Mfg. Co. v. Frawley*, 68 Wis., 577.)

Guy T. Graves and *Jay & Beck, contra.*

References: *Lawson v. State*, 32 Ark., 220; *Nelson v. Becker*, 32 Neb., 99; *People v. Barker*, 27 N. W. Rep.

[Mich.], 539; *Clay v. Tyson*, 19 Neb., 530; *Hapgood Plow Co. v. Martin*, 16 Neb., 27; *Rupert v. Penner*, 35 Neb., 587; *Omaha S. R. Co. v. Beeson*, 36 Neb., 361; *United States v. Cole*, 5 McL. [U. S.], 513.

IRVINE, C.

Rosalie Farley brought this action against William E. Peebles, A. C. Abbott, D. N. Wheeler, George F. Chittenden, and Harry F. Swanson, alleging in her petition that she is a member of the Omaha tribe of Indians; that there was made to her by said tribe, on the 1st of May, 1892, a lease of 21,632.18 acres of the unallotted tribal lands of said Omaha Indians for a period of five years, or until the allotment of the lands leased; that said lease was made for grazing purposes, rent being reserved at twenty-five cents per acre per year; that said lease was duly approved by the commissioner of Indian affairs and the secretary of the interior; and that plaintiff took possession under said lease of the lands therein described; that the lands were of great value to her for grazing purposes, and that she derived large profits therefrom; that in 1892 the defendants conspired together to interfere with her rights and to destroy her business of grazing and pasturing cattle upon said lands, and of renting said lands to owners of cattle for grazing purposes; and pursuant to said conspiracy the defendants caused to be printed and circulated among the customers of plaintiff a notice purporting to be signed by the members of the council of the Omaha tribe, which notice was to the effect that plaintiff's lease had expired, and that any cattle or stock found on said lands after May 1, 1893, would be taken up for trespass and held for damages. She further alleged that said notice was not in fact issued by the Omaha tribe; that many of the council knew nothing thereof and never signed or authorized the signing thereof, all to the defendants' knowledge; that the sole purpose of issuing said notice was to prevent plaintiff from securing cattle to graze on said lands; that in fur-

ther pursuance of said conspiracy the defendants caused said notice, with comment, to be published in a newspaper in Thurston county, which newspaper was published by the defendant Swanson; and that said newspaper circulated largely among plaintiff's patrons. The plaintiff further averred that in pursuance of said conspiracy, and for the purpose of ruining plaintiff's business, the defendants procured the institution in the circuit court of the United States of an action in equity in the name of certain members of the council of the Omaha tribe, appearing for themselves and other members of the tribe, the object whereof was to obtain a decree, contrary to the facts, adjudging the plaintiff's lease to be canceled, and that said action was begun for the purpose of slandering plaintiff's title; that when said tribe learned of the commencement of said action it repudiated the same; that several of the ostensible plaintiffs to said action did not authorize the suit to be brought and did not sign or swear to the bill, although said bill had attached the jurat of one of the defendants, a notary public for Thurston county, indicating that all said plaintiffs had made oath thereto. Plaintiff further alleged that by reason of such acts certain persons who had executory contracts with the plaintiff for the pasturing of cattle had been induced to cancel the same, and that other persons had been prevented from entering into contracts with her, all to her damage in the sum of $8,000. The answer, while admitting certain allegations of minor importance, denied most of the allegations contained in the petition, including all charges of conspiracy and wrongful acts. A trial to a jury resulted in a verdict, followed by judgment, for defendants. The plaintiff prosecutes error.

In addition to the foregoing statement, it may be well to say that the Omahas are a tribe of Indians having their residence chiefly in Thurston county. They were formerly in possession of a reservation, but by virtue of certain treaties and acts of congress a portion of their

land was sold for their benefit, and a large portion of the remainder was allotted in severalty to members of the tribe. There remained unallotted a considerable body of land, subject to lease for grazing purposes under certain supervision by the Indian bureau, for the benefit of the tribe. While the members of the tribe have adopted the habits of civilized life, a council composed of twelve members is retained and exercises a certain control over property still enjoyed by the members of the tribe in common. It is to this communal property that this suit relates. These last facts are stated partly from the evidence, and partly as derived from the treaties and acts of congress and as matters of public notoriety, of which the court can properly take notice.

In view of these facts it cannot be questioned that the plaintiff stated a cause of action. She alleged, more in detail than we have stated, a valid lease to herself of a large tract of land, the equitable ownership of which, if not the legal title, rests in the tribe of which she is a member; a conspiracy among persons outside the tribe to deprive her of the beneficial enjoyment of that lease; this conspiracy carried into effect by the publication of a false warning purporting to be, but not, in fact, signed by those having control of the tribal affairs, whereby strangers would be induced to avoid contracting with plaintiff on the faith of her lease; the institution of an action in the name of the Indians, but without their authority, to cancel her lease; and damages as the result of such acts.

There are many assignments of error, but we address our attention to only two groups, which present, as we think, the two questions of most importance developed by the trial. The other assignments relate either to matters of minor importance, to matters probably accidental to the first trial and not likely to recur, or to questions not properly preserved by exceptions or in the motion for a new trial.

Thomas L. Sloan was called as a witness for the plaint-

iff. Mr. Sloan is a member of the bar of the state, practicing in Thurston county, and is himself an Omaha Indian. It was sought to show by Sloan that Chittenden, one of the defendants, had approached him, seeking to retain him as an attorney in business against Mrs. Farley; that Sloan had informed him that he was generally retained on behalf of Mrs. Farley, and that he therefore could not accept a retainer against her; that thereafter Chittenden had made certain statements to him to the effect that Wheeler & Chittenden, who were partners in the real estate business, desired to secure Sloan's services to assist them in obtaining control of the land in controversy as against Mrs. Farley, and to use his influence with the tribe for the same purpose. Still further, that at a later time, and after information as to Sloan's retainer on behalf of Mrs. Farley, the defendant Peebles had joined the defendants Wheeler & Chittenden in a further effort and further statements to the same effect, and that an offer had been made Sloan of a large retainer if he would accept such employment, and also an offer to indemnify him against any damages which Mrs. Farley might recover on account of the breach of his contract with her. The court's rulings on this matter were not very consistent. The offers were made a number of times. A portion of the evidence was admitted. Other portions were excluded, but the result of it all was an order striking the whole of Sloan's testimony from the record. It is probable that some portions were incompetent and should have been excluded, but there can be no doubt that a considerable portion of that excluded or stricken out should have been admitted. The objection was on the ground that it was sought to elicit from the witness privileged communications made to the witness as an attorney at law. Our statute provides (Code of Civil Procedure, sec. 333): "No practicing attorney, counsellor, * * * shall be allowed, in giving testimony, to disclose any confidential communication properly entrusted to him in his professional capacity, and necessary

and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline." So far as we have quoted, the statute is merely declaratory of the common law. The portion not quoted relates merely to communications made to physicians, surgeons, priests, and ministers of the gospel. There is no doubt that generally, in order to surround such a communication with the protection of either the common law or the statute, the relationship of attorney and client must exist at the time the communication is made. (*Romberg v. Hughes*, 18 Neb., 579.) Nor do we have any doubt, on the other hand, that to enforce the spirit of the statute it is necessary and proper to hold that the protection extends also to communications made to an attorney in negotiating to employ him as such. (*Nelson v. Becker*, 32 Neb., 99.) But the offer here made was not of that character. It was to show communications made after the defendants had been informed that no employment would or could be accepted. Such communications are neither within the letter nor the spirit of the statute or of the common law, and are not privileged. (*Clay v. Tyson*, 19 Neb., 530; *Setzar v. Wilson*, 4 Ired. [N. Car.], 501.) Such portions, at least, of the evidence sought to be elicited from Sloan as were not incompetent under the foregoing statement should have been admitted, or should not have been stricken out.

The other subject which we deem it proper to consider is presented by numerous rulings upon the evidence, and by at least nine assignments of error. These we shall not consider in detail, although a detailed consideration might disclose that under the particular questions asked and offers of proof made some of the rulings may have been correct. Still, we are convinced that most of them were wrong, and that the court proceeded on an erroneous view of the law. The plaintiff, without first establishing by direct or by circumstantial evidence of a general character the existence of the conspiracy complained of, sought to show various acts of one or another

of the defendants, mostly by way of conversations with members of the council of the Omaha tribe. In a general way, it may be said that these were communications seeking to ascertain the views of the Indians with regard to the Farley lease; seeking to induce individual members of the tribe to exert themselves to have the land allotted in severalty; seeking to induce them to institute an action for the purpose of annulling the lease; also communications with reference to the issuing of the notice or circular complained of in the petition, and facts with regard to the institution of the action in the federal court. It was not offered to show, in any instance, that all the defendants took part or were present at the time of the acts sought to be proved. In each instance the court admitted the evidence only as against the defendants present at the time, and at the close of the trial the court instructed the jury that before it could consider any admission, declaration, or act of any of the defendants as to the alleged conspiracy, it must first find that there was a conspiracy unlawfully entered into by the defendants to injure Rosalie Farley. As an abstract statement of law, when properly understood, this instruction would be free from error; but coming, as it did, after a multitude of rulings on the evidence, excluding evidence of all acts or declarations as against those not present, it served to impress upon the jury as a rule of law that the conspiracy must be established otherwise than by acts or declarations of any portion of the defendants, and that such acts could not be considered for any purpose without preliminary evidence of another character as to the existence of the conspiracy. This, we think, was wrong. A text-writer on evidence, whose work has attained such a standing that it is in itself almost authoritative, says on this subject: "The evidence in proof of a conspiracy will generally, from the nature of the case, be circumstantial. Though the common design is the essence of the charge, it is not necessary to prove that the defendants came together and actually agreed in terms to have

that design, and to pursue it by common means. If it be proved that the defendants pursued by their acts the same object, often by the same means, one performing one part and another another part of the same, so as to complete it, with a view to the attainment of that same object, the jury will be justified in the conclusion that they were engaged in a conspiracy to effect that object." (3 Greenleaf, Evidence, sec. 93.) So, also, another writer has said: "A conspiracy is proved either expressly or by the proof of facts from which the jury may infer it. It is seldom proved expressly; nor can a case easily be imagined in which that is likely to occur, unless where one of the persons implicated in the conspiracy consents to be examined as a witness for the prosecution. In nearly all cases, therefore, the conspiracy is proved by circumstantial evidence, namely, by proof of facts from which the jury may fairly imply it. It is usual to begin by showing that the defendants all knew each other, and that a certain degree of intimacy existed between them, so as to show that their conspiring together is not improbable; and if to this can be added evidence of any consultations or private meetings between them, there is then a strong foundation for the evidence to be subsequently given, namely, of the overt acts of each of the defendants in furtherance of the common design. But although the proof above mentioned is desirable, because it satisfies the jury as you proceed and they are better able to apply the evidence of the overt acts when it is afterwards given, yet it is not essentially necessary, as the jury may imply the conspiracy of all from the overt acts of each. * * * Perhaps the safer rule to lay down upon the subject would be that, wherever the writings or words of any of the parties charged with or implicated in a conspiracy can be considered in the nature of an act done in furtherance of the common design, it is admissible in evidence, not only as against the party himself, but as proof of an act from which (*inter alia*) the jury may infer the conspiracy itself." (Archbold, Crimi-

nal Practice & Pleading, 619*, 621*.) These views are in accordance with numerous adjudicated cases, among them *Regina v. Murphy*, 8 C. & P. [Eng.], 297; *Clune v. United States*, 159 U. S., 590; *United States v. Cole*, 5 McL. [U. S. C. C.], 513; *United States v. Doyle*, 6 Sawyer [U. S. C. C.], 612; *Spies v. People*, 122 Ill., 1; *Ochs v. People*, 124 Ill., 399; *Jones v. Baker*, 7 Cow. [N. Y.], 445. The last cited case has been referred to with approval by this court in *Mapstrick v. Ramge*, 9 Neb., 390. We think, upon reflection, one must be convinced that such evidence should be admitted in the absence of a positive rule of law to the contrary. The ordinary rules of evidence require it. As stated in almost every case upon the subject it is impossible from the very nature of the case to obtain direct credible evidence of an actual meeting together of the conspirators and an express agreement among them to pursue the common object. The fact that there exists among them a concert of minds must in nearly all cases be established by circumstances, and among such circumstances there can be none of more logically convincing force than the fact that one person at one time, another person at another time, and a third person at a third time have been working along the same lines and by the same general methods to effect the same object. In admitting such evidence the court should not, and it was not in this case asked to, infringe against the rule excluding hearsay testimony, or the rule restricting the effect of admissions to the parties making them. In the language of the supreme court of the United States, acts or declarations are in such cases admissible only "in reference to the common object and forming a part of the *res gestæ*." (*American Fur Co. v. United States*, 2 Pet. [U. S.], 358.) What is merely narrative of a past occurrence, or what is merely expressive of a future purpose, would not generally be so admissible; but an act performed, a declaration made, a writing made or delivered, as a part of the matter in dispute, that is, in itself tending to advance the common purpose or object of the alleged conspiracy, is

neither hearsay nor merely the admission of one of the parties. It is an overt act in pursuance of the object. From such overt acts of each of the alleged conspirators the jury may, together with other evidence, infer the existence of the conspiracy itself. We are aware that it is the established rule that the acts or declarations of one of the alleged conspirators are not admissible as against the others unless the conspiracy itself be established, in which case the act or declaration of one becomes that of all; and we are aware, also, that it has sometimes been stated that such acts or declarations are not admissible in evidence until the conspiracy itself is first *prima facie* established. It has always been said, however, in connection with this, as in other cases, that the order of proof must rest within the discretion of the trial court. If an act or declaration is of such a character as to tend to establish the existence of the conspiracy, then it should not be excluded merely because it is also of such a character as to bind all the conspirators by its consequences in the event of the establishment of the conspiracy. In short, we conceive the rule to be that a conspiracy may be established by circumstantial evidence, including overt acts in pursuance thereof by individual conspirators, the others not being present or participating in such acts; but that such individual acts are not admissible when of the character of subsequent admissions, and they should not ordinarily be admitted when not so directly tending to the accomplishment of the common purpose, as also to tend by that fact toward proving the existence of the conspiracy, unless the existence of such conspiracy be first *prima facie* proved. It is, of course, proper in instructing the jury, when such a method of proof has been resorted to, to make it clear that the proof of such acts or declarations has a twofold purpose: In the first place, to establish the existence of the conspiracy, and in the second place, when such conspiracy has been established, to charge each person proved to be a party to it with all the consequences of

such acts or declarations. For the purpose of inquiring whether a conspiracy has been proved, such acts or declarations should be considered in connection with all the defendants; but unless by evidence connecting a particular defendant directly with the conspiracy he has been proved a party thereto, such acts or declarations are not to be considered for the purpose of charging him with their consequences.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. GERMAN SAVINGS BANK, APPELLANT.

FILED FEBRUARY 16, 1897. No. 9000.

1. **Banks and Banking:** INSOLVENCY: AUTHORITY OF RECEIVER: PARTIES. In a proceeding under chapter 8, Compiled Statutes, to wind up an insolvent banking corporation, the corporation, even after consenting to the appointment of a receiver, remains an interested party and may be heard to resist an application for an order conferring authority upon the receiver not within the original order appointing him.

2. **Order on Receiver to Sue Stockholders:** REVIEW. An order was made *ex parte* directing a receiver to sue stockholders for their unpaid subscriptions. The defendant corporation moved to discharge the order. The motion was overruled and the corporation excepted. *Held*, That it might appeal from this order.

3. **Banking Corporations:** INSOLVENCY: LIABILITY OF STOCKHOLDERS: ENFORCEMENT OF CLAIMS. The constitution provides: "In all cases of claims against corporations and joint stock associations, the exact amount justly due shall be first ascertained, and after the corporate property shall have been exhausted, the original subscribers thereof shall be individually liable to the extent of their unpaid subscriptions." (Constitution, art. 11, sec. 4.) The banking act (Compiled Statutes, ch. 8, sec. 35) provides: "Whenever any receiver or any incorporated bank shall file a report with the court or judge thereof, setting forth the fact that in the opinion of such receiver, the assets of such bank are not sufficient to pay the liabilities of such bank within a reasonable time, the court or judge may order such receiver to proceed at once to collect from the several stockholders of such bank, who are liable therefor, any or

all such liabilities as shall be necessary for the payment of all the liabilities of such bank." *Held*, (1) That this statute refers to liabilities of stockholders upon their stock; (2) that the constitution makes the liability of subscribers for unpaid subscriptions for the purpose of paying debts of the corporation a secondary liability, to be enforced only after the amount of the debts has been judicially ascertained and other corporate property has been exhausted; (3) that a proceeding by the receiver of an insolvent bank to collect unpaid subscriptions to its capital stock is on behalf of creditors of the corporation and is a "case of claims" against the corporation within the meaning of the constitution; (4) that the statute quoted, in so far as it attempts to authorize actions to recover unpaid stock subscriptions before the corporate debts have been judicially ascertained and the corporate property exhausted, is in conflict with the constitution and void.

APPEAL from the district court of Douglas county. Heard below before KEYSOR, J. *Reversed.*

Joel W. West, for appellant.

Ralph W. Breckenridge, contra.

IRVINE, C.

The attorney general, acting under authority of chapter 8 of the Compiled Statutes, entitled "Banks," applied, in the name of the state, for the appointment of a receiver of the German Savings Bank, a corporation conducting a banking business in Omaha. A receiver was appointed, without objection by the defendant, to take possession of the books, records, assets, and property of said bank, together with all debts and evidence of debts due thereto, and empowered to collect all such debts, dues, and claims and reduce all assets as speedily as possible to money; to sell and dispose of all property belonging to the bank; to compound any and all bad or doubtful debts on such terms as should be thereafter ordered; and, in general, to do all acts essential and necessary to a speedy closing up and winding up the affairs of said bank. On the 25th of November, 1896, the receiver made a report to the court of the assets, together with his estimate of their value, and he further reported that in his opinion such assets

were not sufficient to pay the liabilities of the bank within a reasonable time, whereupon the court entered an order, apparently *ex parte*, reciting that only $100,000 of the $500,000 subscribed capital stock had been paid in, and directing that an assessment be levied on the subscribers of eighty per cent of their respective subscriptions, and that the receiver institute actions against all stockholders in default of payment of said assessment to collect the amounts so assessed. On the 6th of January, 1897, the bank filed a motion to vacate the order because it was made without notice to the defendant, because it was made contrary to the provisions of section 4, article 11, of the constitution, entitled "Miscellaneous Corporations," and because it was prematurely and improvidently made. This motion was overruled and the bank appeals.

Two questions suggested in the briefs, but not much insisted upon in oral argument, relate to the right of the corporation to resist the order complained of and to the appealability of such order. The theory of the appellee seems to be that from the time the receiver is appointed the corporation as such is without standing in court to object to or resist such applications as the one in this case made. But we think this contention without merit. The action is against the corporation. It has for its object as a provisional and immediate remedy the appointment of a receiver to take charge of the assets of the corporation, to liquidate such assets and to apply them, all under the direction of the court, to the satisfaction of the corporate debts. If the assets prove more than sufficient to discharge the debts, the surplus, both by direction of the statute and by general principles of equity, is to be returned to the persons entitled thereto, to-wit, the officers of the corporation. The proceeding is not one merely *ex parte* whereby the court, as a sort of administrator, winds up the estate, but it is in its nature an adversary proceeding. The fact that the corporation consented or acquiesced in the appointment of the receiver and in the general directions given him by the first order, might properly

estop the bank from afterwards asserting that such order was improvidently made. But the corporation remains the defendant in the case. It has rights which it is entitled to protect. The corporation as such is interested in an economical and prudent management of its affairs, and, as the defendant in the case, and the only defendant, it has the right to be heard in subsequent proceedings. Its consent to the first order does not imply an entire abandonment of its corporate functions or estop it from resisting applications for further orders, at least when such further orders are not clearly for the purpose merely, of carrying out the order to which it did consent. While its property has been taken from its possession by the order appointing the receiver, the corporation is not by such order dissolved, and there remains in the corporation at least a contingent residuary interest in such property which makes it not only nominally but actually an interested party in the further proceedings, entitled to protect itself against improvident or unauthorized dealings with such property. The statute, by express terms, makes such orders appealable, section 275 of the Code of Civil Procedure providing that "All orders appointing receivers, giving them further directions and disposing of the property, may be appealed to the supreme court in the same manner as final orders and decrees." Nor can any objection to the appeal be urged on the ground that no exception was taken to the original order. That order having been made *ex parte* and a motion to vacate it having been made and an exception taken to the order overruling such motion, the right to appeal was preserved. (*Clarke v. Nebraska Nat. Bank*, 49 Neb., 800.)

We are thus brought to a consideration of the propriety of the order itself. The statute (Compiled Statutes, ch. 8, sec. 35) provides: "Whenever any receiver of any incorporated bank shall file a report with the court or judge thereof, setting forth the fact that in the opinion of such receiver, the assets of such bank are not sufficient to pay the liabilities of such bank within a reasonable time, the

court or judge may order such receiver to proceed at once to collect from the several stockholders of such bank, who are liable therefor, any or all such liabilities as shall be necessary for the payment of all the liabilities of such bank." This provision manifestly applies to the liabilities of stockholders as such, because the mere fact that a person otherwise indebted to a bank was a stockholder would not prevent the receiver under general authority conferred upon him in pursuance of the statute from enforcing such liability. The order was, therefore, strictly in conformity with the statute and made on the showing required by the statute to justify such order, and the precise question, therefore, presented is whether the statute, so far as we have quoted it, is a constitutional enactment. Article 11 of the constitution of 1875 deals with corporations. It is subdivided into three parts, one relating to railroad corporations, one to municipal corporations, the third to miscellaneous corporations. Section 4 of the last subdivision is as follows: "In all cases of claims against corporations and joint stock associations, the exact amount justly due shall be first ascertained, and after the corporate property shall have been exhausted the original subscribers thereof shall be individually liable to the extent of their unpaid subscriptions, and the liability for the unpaid subscription shall follow the stock." Another provision not essentially connected with this, but which is so similar in character that one should never be considered without reference to the other, is section 7 of the same subdivision, which reads as follows: "Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors over and above the amount of stock by him held to an amount equal to his respective stock or shares so held, for all its liabilities accruing while he remains such stockholder; and all banking corporations shall publish quarterly statements under oath of their assets and liabilities." It will be observed at once that the general effect of these two provisions is to establish a liability, free from inter-

ference by the legislature, on stockholders of all corporations, subject to certain conditions, for their unpaid subscriptions; and in the case of banking corporations, an additional liability for a further amount equal to the amount of stock held by any person for the purpose of paying debts incurred while such person is a stockholder. The conditions attached to the enforcement of the first liability are that its enforcement must be in cases of claims against corporations; that the amount of such claims shall be first ascertained, and that the corporate property shall have been exhausted.

Does the banking act, in so far as it attempts to confer authority upon the court to authorize the receiver of a bank, merely upon a report that in his opinion the assets of the bank are insufficient to pay its liabilities within a reasonable time, to collect this unpaid subscription, conflict with section 4 as we have quoted it? We have been assisted in the examination of this question by very able arguments and briefs advanced by counsel on either side. Counsel agree that our constitutional provisions on the subject are unique, and an examination of the briefs convinces us that the cases in other states have not been directed to a consideration of similar language, either in constitutions or in statutes. A large portion of the argument in support of the statute has been addressed to three points: In the first place, a consideration of the policy of the statute, which is manifestly to afford a speedy and somewhat summary remedy for creditors of insolvent banks, and to enable the receiver, for their benefit, to promptly enforce all liabilities of stockholders. Secondly, the justness of this policy, the danger attending upon any process requiring securities to be immediately sold, often on a falling market and at a sacrifice, or, if that danger be avoided, the still greater danger of delaying resort to proceedings against stockholders until such a time that by their death or insolvency the remedies become ineffectual. Thirdly, an appeal to the general principle that the corporation, while it was a going

concern, had the right to make calls for unpaid subscriptions regardless of the sufficiency of its assets to pay existing liabilities, and that this right passed to the receiver, so that the receiver, in collecting unpaid subscriptions, is acting merely as he does in collecting other assets. We freely grant the correctness of the last statement as the statement of a general principle of law, and we further concede the correctness of the contention of the appellee as to the policy of the statute. We may further, for the purposes of this case, acquiesce in the position of counsel that for the effective winding up of insolvent banks and the protection of depositors a remedy against stockholders should be permitted in some cases, before, by a slow process of liquidation, other assets shall have been exhausted. But all these are matters not particularly pertinent to the question under consideration. We are not free to declare the law as we believe it ought to be. In a doubtful case of construction it may be proper to throw the balance in favor of that side where we conceive the natural justice and policy to lie; but this only for the reason that in such doubtful cases it is rather to be presumed that the intention of the law-makers was on the side of manifest justice and policy. Where, after resort to established canons of construction, no doubt is left, we must construe the law as written, and not in accordance merely with our own notions of abstract or substantial justice. Furthermore, in interpreting the written law the prevailing doctrine of other jurisdictions is of assistance only for the purpose of ascertaining upon what information the law-makers acted in adopting their language, and such general doctrine cannot be permitted to prevail as against a written constitution or statute plainly implying an intention to change the rule. In order to a proper comprehension of the constitutional provisions, some regard must be paid to the state of the law at the time the constitution was adopted. At that time a much-mooted question was whether, in case of insolvency, the liability for unpaid

subscriptions to stock rested solely on the original subscriber, or whether it passed to his transferee, and, in the latter case, whether the transferee's liability was sole or whether the original subscriber also remained liable. We conceive that one object of the adoption of section 4 already quoted was to remove this doubt, although the decisions had not then advanced so far, perhaps, as to enable a statement of the purpose to be made so clear as to entirely effectuate that object. There had also appeared at that time the so-called American or trust-fund theory with reference to corporate assets, especially capital stock. The controversy on this point had not then reached its present state of clear definition, but it had advanced so far that the framers of the constitution evidently intended, so far as their prescience extended, to remove doubt on that subject. Therefore, they provided that a liability to creditors should exist, but only after other assets should be exhausted and the amount of the claims ascertained. A motive undoubtedly prompting this solution of the problem was the fact that this was a new state, sparsely settled, its resources almost entirely undeveloped, and with very little home capital, and still less concentrated wealth in individuals, available for the purpose of developing such resources. It was, therefore, the policy adopted to encourage the investment and, to a certain extent, the concentration of capital for the purpose of developing the resources of the state; and, in view of the legal controversy then existing elsewhere, it can hardly be doubted that it was deemed in consonance with good policy to relieve persons engaging here in productive enterprises, so far as practicable, from unnecessary burdens and liabilities, and one method of doing so was by requiring the exhaustion of the assets of a corporation before calling upon subscribers for unpaid subscriptions to the capital stock. Whether this is now good policy, whether this provision should still be retained, are questions foreign to the issue. The constitution must be interpreted according to the facts which its framers and

the people in adopting it had then in mind. Even without resort to these extraneous circumstances, the language of section 4, in its general scope, cannot be open to much doubt. With them in view, its meaning is absolutely clear. The general purpose is to require, prior to the enforcement of liability for the unpaid subscriptions, the ascertainment of the debts of the corporation, and also the exhaustion of the corporate property other than such unpaid subscriptions; that is, the constitution contemplates, as a general thing, a resort to such other property of a corporation in the first instance to pay its debts, and a resort to unpaid subscriptions only for the purpose of supplying the deficiency after a judicial ascertainment of the amount of such deficiency, and only to that extent. The necessity of a prior judicial ascertainment of the corporate debts has been frequently asserted by this court. (*Commercial Nat. Bank of Omaha v. Gibson*, 37 Neb., 750; *Globe Publishing Co. v. State Bank of Nebraska*, 41 Neb., 175; *Farmers Loan & Trust Co. v. Funk*, 49 Neb., 353.) The other requirement, that the corporate property must first be exhausted, is no less mandatory and is implied and, indeed, expressed in the cases referred to. It is true that the language of these cases implies that the ascertainment of the debts must be by way of judgment against the corporation, and that the exhaustion of the assets must be evidenced by a return of *nulla bona* on execution upon such judgment. Whence it is argued that when proceedings in insolvency are instituted and the assets of the corporation impounded by means of a receivership, that method becomes impracticable or useless, and that, therefore, a resort thereto not being available, the constitutional requirement does not apply to such a case as this. But the court was in those cases considering the distinction between proceeding as general creditors against stockholders and proceeding as judgment creditors against stockholders of a corporation whose property could not be reached by execution. When a receiver has been appointed for the express purpose of

winding up an insolvent corporation, of ascertaining its debts, of liquidating its assets and applying the same to the satisfaction of those debts, a different question is presented. The allowance through regular procedure of a claim by the receiver may in such case take the place of a judgment. His report disclosing an exhaustion of the assets may take the place of the return of execution *nulla bona*. These questions are not now presented to us. We merely suggest them for the purpose of showing that the language used in the cases cited in regard to the necessity of a judgment and execution, while perfectly proper in the connection then used, is not necessarily controlling in a proceeding of this character. We are entirely clear that the general purpose of the constitutional provision was as already indicated, and that it was the deliberate intention of the framers of the constitution to render the liability for unpaid stock subscriptions, in one sense at least, secondary, to be enforced only after a consummation of the conditions precedent mentioned, and it is no answer to this conclusion to assert that the corporation itself, while it was a going concern, might by call, if necessary, followed by suit, have enforced that liability as primary. The conditions are different. The corporation in making calls acts for the stockholders. Directors or other officers authorized to make the call are representatives of the stockholders, by them selected for that and other purposes, and the object in making the call is to provide the corporation with means of proceeding with the business for which it was created. When, however, the corporation suspends its functions as a going concern, the only purpose of resorting to the capital is to discharge debts. It was perfectly competent for the constitution to provide that upon this contingency a liability which might theretofore have been enforced unconditionally by the representatives of the corporation should thereafter be enforced only as a secondary liability and so far as necessary to accomplish its purpose. This the constitution did, and in such clear terms as to be almost unmistakable.

It remains, therefore, to be considered only whether the present case is one of "claims against corporations" within the meaning of the constitutional provision. On the one hand, it is argued that the constitution refers only to direct actions by creditors against the stockholders. On the other, that the present proceeding is one on behalf of all creditors and, therefore, within the terms of the constitution. We think the latter view is correct. The receivership in this case was based solely upon allegations that the capital of the bank had become impaired, that the bank was insolvent, that it was conducting its business in an unsafe manner, and was jeopardizing the interest of its depositors. There were no allegations justifying the interference of a court of equity, except for the sole purpose of protecting the creditors of the bank. By the appointment of the receiver, the bank's assets passed into his possession for the purpose of paying creditors. By the statute, after that single object is accomplished, the remainder of the assets must be returned to the proper officers and the functions of the receiver and of the court cease. The ordinary remedies of the creditors were suspended by this action. The receiver, as an officer of the court, became entitled to pursue all remedies and collect the assets which were before that within reach of the creditors. In *Farmers Loan & Trust Co. v. Funk, supra*, we held that the receiver might pursue the stockholders on their liability for the benefit of creditors. We do not doubt the correctness of that decision, and it is here reaffirmed. Indeed, the liability of the stockholders in case of insolvency existing only for the purpose of paying the corporate debts, it is solely for the benefit of creditors and to satisfy their claims that proceedings to enforce that liability could be brought. If the actions ordered by the district court are not cases of claims against the corporation, they do not lie at all, because it is only to pay claims against the corporation that the liability exists.

It is suggested that the statute relates only to the remedy and for that reason it is not in conflict with the

constitution which relates to the liability and not the remedy. But this argument is founded on a misconstruction of the constitution. The constitution, in fixing the liability at the amount of the unpaid subscriptions, is only declaratory of the common law and of the contract of the subscribers. The new feature was affixing terms and conditions upon which, and upon which only, the liability could be enforced, and it was beyond the power of the legislature to provide a remedy whereby such liability could be enforced in violation of the terms impressed by the constitution.

We conclude that the portion of the banking act under which the order complained of was made is in conflict with section 4 of article 11 of the constitution relating to miscellaneous corporations, and is void. The report of the receiver showing affirmatively that the corporate property had not been exhausted, but only that it was in his opinion probably insufficient within a reasonable time to pay the liabilities of the bank, the court had no authority at that time to direct actions to be brought for the unpaid subscriptions.

REVERSED AND ORDER DISCHARGED.

CHARLES S. ROBERTS, APPELLANT, V. FRANK E. SAMSON ET AL., APPELLEES.

FILED MARCH 3, 1897. No. 7118.

1. **Pleading**: DEMURRER. An objection in the nature of a general demurrer will not lie to a pleading sufficient in substance but wanting in form or completeness.

2. ———: ———. It is not a sufficient objection to a pleading when assailed by a general demurrer that it lacks definiteness of expression, or that the facts are therein stated in an argumentative form; but it will be *held* to charge what can by reasonable and fair intendment be implied from the statements thereof.

3. Mortgages: PAYMENT: PLEADING. Answer examined, and *held* to charge a satisfaction of the mortgage debt, which, not being put in issue by the reply, must be taken as true.

APPEAL from the district court of Cuming county. Heard below before NORRIS, J. *Affirmed.*

Tiffany & Vinsonhaler, Ferry & Small, and *Dawes, Coffroth & Cunningham,* for appellant.

T. M. Franse, contra.

POST, C. J.

This was an action by Charles S. Roberts in the district court of Cuming county by which he sought to foreclose a certain real estate mortgage executed by Frank E. Samson and wife to the Lombard Investment Company for the principal sum of $1,700 and interest from date, to-wit, February 28, 1890, at the rate of six and one-fourth per cent per annum, as evidenced by the bond and coupon notes of the said Frank E. Samson, and to which action the Valley Loan & Trust Company and Waldo E. Whitcomb were also joined as parties defendant. To the petition, which is in the usual form, Whitcomb answered, admitting the execution of the aforesaid bond and coupon by Samson, and alleging that J. T. Meyers, before whom, as county clerk of Cuming county, the said mortgage purports to have been acknowledged, was not in fact at the date of the certificate thereto, to-wit, March 1, 1890, the clerk of said county, and that said pretended acknowledgment is without authority and void, and that the said mortgage was accordingly not entitled to record in Cuming county. Another allegation of the answer to which especial prominence is given in the briefs of counsel is the following: "The defendant, for answer to paragraph eight of the petition, says: He admits that no proceedings at law have been had for the recovery of said debt, and denies that said debt has not been paid and denies each allegation of said paragraph except as specially admitted,

and avers the fact to be that heretofore, to-wit, on the 20th day of August, 1891, said negotiable real estate mortgage bond described in paragraph one of plaintiff's petition was fully paid and cancelled by the execution and delivery by the defendants Frank E. Samson and Harriet E. Samson to the Valley Loan & Trust Company of a quitclaim deed of the premises described in plaintiff's petition on condition and in consideration that said mortgage bond be cancelled and that the mortgage hereinafter declared upon be assumed and paid by the grantee named in said deed, which deed was duly recorded in the clerk's office of Cuming county, Nebraska, in book X of deeds on page 46, and was duly indexed and said grantee named in said deed went into immediate possession of said premises and have been, and are now, in the possession of said premises under said deed, and rent said premises and receive the rents and profits thereof and have neglected and refuse to pay the defendants' note and mortgage described in the following cross-petition:" Accompanying the foregoing answer is a cross-bill, in which is alleged the execution by the Samsons to Jacob Brememan, under date of March 1, 1890, of a mortgage upon the premises in controversy to secure the four notes of the mortgagors named in the sum of $421.67 each, and the purchase in good faith by the answering defendant of said notes and mortgage without actual notice of the rights of the Lombard Investment Company, or its assigns, under and by virtue of the mortgage herein first described, with a prayer for foreclosure and for a decree adjudging said mortgage to have priority over the lien of the plaintiff's mortgage. There was also interposed a reply, in which it is first alleged that the officer who certified to the acknowledgment of the plaintiff's mortgage was, at the date in question, clerk of Thurston county, and that such certificate was in all respects in due and legal form to entitle the said mortgage to record in Cuming county; second, that Whitcomb, the answering defendant, should not be heard to allege any irregularity in the acknowledg-

ment of the plaintiff's mortgage for the reason that the mortgage to Brememan is, by its terms, made subject and subordinate to the lien in favor of the plaintiff's assignor, the Lombard Investment Company, and for the further reason that the rights of the said defendant were acquired subsequent to the commencement of this action and after the filing of a *lis pendens* notice of the plaintiff's claim in the premises. There is, however, in the reply, no allusion to the paragraph of the answer above set out, either by way of denial or avoidance. Upon the issues thus joined a hearing was had before the district court, resulting in a decree substantially as proved by the defendant Bigelow, adjudging his mortgage to be a first lien upon the premises in controversy, and from which an appeal has by the former been prosecuted to this court.

The first inquiry suggested by the argument is the sufficiency of the foregoing allegation as a plea of payment or accord and satisfaction. The answer is, it must be confessed, lacking in that degree of precision essential to a model pleading even under our liberal code system. But is it so deficient in substance as to be vulnerable when tested by means of a general demurrer? We think not. It is not enough, when a pleading is thus assailed, that the facts are imperfectly stated, that it lacks definiteness of expression or that the facts are argumentatively averred, but it will be held to charge what can be implied upon the statements therein by reasonable and fair intendment. (*Marie v. Garrison*, 83 N. Y., 14; *Rothburn v. Burlington & M. R. R. Co.*, 16 Neb., 441; *Tessier v. Reed*, 17 Neb., 105; *Forbes v. Petty*, 37 Neb., 899.) "Contrary to the common law rule," as said by Dixon, C. J., in *Morse v. Gilman*, 16 Wis., 504*, "Every reasonable intendment and presumption is to be made in favor of the pleading, and it will not be set aside on demurrer unless it be so fatally defective that, taking all the facts to be admitted, the court can say they furnished no cause of action whatever." While it is not in terms alleged that the contract relied upon was made with the holder of the first mort-

gage, or through the Valley Loan & Trust Company as the authorized agent of such holder, it is expressly charged that the mortgage bond was fully paid and canceled in consideration of the conveyance by the Samsons of the mortgaged premises to said loan and trust company. The reasonable and necessary inference from that statement of the answer is that the consideration for the conveyance by the mortgagors was the promise of the holder of the bond and coupons instead of a stranger thereto. The paragraph quoted from the answer accordingly states a defense to the cause of action alleged, and which, not being put in issue by the reply, must be taken as true. It follows that the decree of the district court is right and must be

AFFIRMED.

EDWARD A. SMITH, APPELLEE, V. JOSIAH T. LONG ET AL., IMPLEADED WITH GEORGE W. E. DORSEY, APPELLANT.

FILED MARCH 3, 1897. No. 7129.

Mortgages: ASSIGNMENT: FRAUDULENT RELEASE: MORTGAGEE'S LIABILITY. The fraudulent release of a mortgage by the mortgagee after the indorsement without recourse of the bond and coupons, thereby secured, in favor of a third party having notice of the rights of the holder, does not of itself render the former liable in an action *ex contractu* for the amount of such debt.

APPEAL from the district court of Cuming county. Heard below before NORRIS, J. *Reversed.*

E. F. Gray and *D. B. Carey*, for appellant.

H. C. Brome and *Charles Offutt, contra.*

POST, C. J.

This was an action by the appellee, Smith, in the district court for Cuming county, to foreclose a certain real

estate mortgage executed by C. H. Toncray and wife to George W. E. Dorsey, to which the Toncrays, Dorsey, the mortgagee, Josiah T. Long, Peter Nelson, Adrian Stevenson, Otto Baumann, as guardian for Adrian Stevenson, an infant, and R. C. Peters were made defendants. The petition recites the execution of the mortgage by Toncray and wife, covering 382 acres of land in Cuming county, to secure the bond of the former in the sum of $3,500, bearing date of April 1, 1887, and maturing April 1, 1892, with interest at seven per cent, payable semi-annually, according to the tenor of ten coupon notes attached thereto for $122.50 each; also the filing for record of said mortgage in Cuming county on the 30th day of April, 1887, and concluding as follows: "That on the 2d day of May, 1887, said defendant George W. E. Dorsey indorsed said bond as follows: 'Pay to the order of * * without recourse, George W. E. Dorsey,' and at the same time, by like words, indorsed each of said coupons, and thereupon sold and delivered the same, and all thereof, to this plaintiff, together with the said original mortgage. * * * That lately heretofore, to-wit, on the 11th day of October, 1890, and again on the 22d day of November, 1890, the said defendants George W. E. Dorsey and C. H. Toncray, unlawfully and fraudulently conspiring together to cheat and defraud this plaintiff and their co-defendants, Josiah T. Long, Peter Nelson, Otto Baumann, guardian of Adrian Stevenson, Adrian Stevenson, and R. C. Peters, did undertake to release the said mortgage and lien so as aforesaid acquired and held by this plaintiff, in manner and form as follows, to-wit, that is to say: That on October 11, 1890, the said George W. E. Dorsey, unlawfully, falsely, and fraudulently pretending that he, the said Dorsey, was still the owner of said mortgage, for the alleged consideration of $1,000 did undertake to execute to his co-defendant, C. H. Toncray, and his wife, Emma R. Toncray, a release of the said mortgage held by this plaintiff, on the * * * and in like manner did, on November 22, 1890, illegally, falsely, and fraudu-

lently pretending that he was the owner of said mortgage, for the purported consideration of $500, undertake to release to his co-defendant and his wife, Emma R. Toncray, the said mortgage then owned and held by this plaintiff on the * * * but the same, and both thereof, were fraudulent, null, and void, for inasmuch as at that time this plaintiff, for valuable consideration, as the said Dorsey and Toncray well knew, was the owner and holder of the said mortgage so as aforesaid executed by the said Toncray to said Dorsey on April 1, 1887, for $3,500, and the said Dorsey, as he then well knew, had no interest in or right or title to said mortgage, or any part thereof, and his, the said Dorsey's, pretense that he had the right to release the same was, as he, the said Dorsey, well knew, a fraud upon his co-defendants, the said Josiah T. Long, Peter Nelson, Otto Baumann, guardian of Adrian Stevenson, Adrian Stevenson, and R. C. Peters, and the said alleged release of October 11, 1890, for the recited consideration of $1,000, was illegal, null, and void, for inasmuch as the same, even though the said Dorsey had had the right to execute it, was not acknowledged in manner and form as required by law, nor duly witnessed, the said C. H. Toncray himself, the grantee, and no other person, being the notary public before whom the same purported to be executed, and the said release of November 22, 1890, for the purported consideration of $500, was not executed by the said Dorsey in the presence of a disinterested notary public, and was not attested or certified as required by law, and neither of said releases were entitled to be recorded. And further, this plaintiff says that the said defendants, Josiah T. Long, Peter Nelson, Otto Baumann, guardian of Adrian Stevenson, Adrian Stevenson, and R. C. Peters, and each and all of them, acquired their interest, if any they had, in said premises negligently and carelessly, and without any regard for the rights of this plaintiff, and well knowing that this plaintiff's said mortgage was not due, still of record, unreleased, and unpaid." The prayer is for a decree of

foreclosure, that the plaintiff's mortgage may be adjudged to be a first lien upon the premises therein described, and for a deficiency judgment against the aforesaid maker and indorser of the mortgage bond. To said petition Dorsey interposed a general demurrer, which was overruled, and the cause proceeded to decree adjudging the releases above mentioned to be in all respects valid, and to operate as a discharge of so much of the mortgaged property as is therein described. The court also apportioned the mortgage debt between the property thus released and the portion thereof which, according to said decree, is still subject to the lien, and rendered personal judgment against Dorsey in the sum of $2,033.49, from which the latter alone appeals.

Practically the only proposition argued at this time is that the petition fails to state a cause of action against Dorsey, the appellant, for the reasons, as alleged therein, that the bond and coupons were indorsed without recourse, and that the rights of the other defendants, if any, were acquired with knowledge that the plaintiff's said mortgage was still of record, unmatured, unreleased, and unsatisfied. The only purpose of the plaintiff in joining Dorsey as a party defendant was, as we have seen, to secure against him a deficiency judgment, or, in other words, to charge him with the amount of the mortgage debt. It is to be regretted that the plaintiff has failed to submit a brief upon this appeal, or to indicate the ground of Dorsey's alleged liability for the mortgage debt. If the plaintiff's security has been destroyed or impaired through the fraudulent act of the mortgagee named, the latter would, as a matter of course, be liable for damage in an action *ex delicto*, or possibly upon an accounting therefor in this proceeding. The petition is, however, not silent merely respecting the damage, if any, resulting from the attempted release by Dorsey of portions of the mortgaged property, but it appears affirmatively therefrom that the plaintiff's security is in nowise affected, since, as expressly charged, the other defend-

ants, whether as purchasers or mortgagees, were fully advised of his (plaintiff's) rights in the premises, and their interests therein, of whatever nature, are in law subordinate to the lien of his mortgage. Nor can the petition be said to state a cause of action for nominal damage, since, as appears therefrom, the purpose of the action is not to recover such damages as result directly from the tort alleged, but to charge the appellant as a party to the mortgage debt. The decree is reversed and the cause remanded, with instructions to sustain the appellant's demurrer, and for further action not inconsistent with this opinion.

REVERSED.

COUNCIL BLUFFS SAVINGS BANK v. HENRY W. GRISWOLD, TRUSTEE, ET AL.

FILED MARCH 3, 1897. No. 7021.

1. **Parties:** NON-JOINDER. It is in case of joint obligations only that all persons liable thereon must be joined as parties defendant. An action may be prosecuted to judgment against any one or more of several persons jointly and severally bound without joining others liable for the same indebtedness.

2. **Abatement:** PENDING SUIT: EVIDENCE. A plea of another suit pending is not sustained by proof of an order dismissing, without prejudice, a former suit on the same cause of action, and the filing by the plaintiff of a motion for a new trial upon which, so far as the record discloses, no action has been taken by the trial court.

3. **Courts:** LAWS AND PROCEDURE IN OTHER STATES. The laws of sister states will, as a rule, in the absence of proof, be presumed to be the same as our own. There are, however, to that rule recognized exceptions, among which is that courts of general jurisdiction of other states will, unless there is proof to the contrary, be presumed to possess the authority they assume to exercise, and that the methods of procedure pursued by them, although differing from the established practice of this state, are authorized by the laws of the state in which they act.

4. **Judgments:** JOINT AND SEVERAL OBLIGATIONS: APPEARANCE. Where to an action upon a joint and several obligation all parties liable thereon are made defendants, the fact that the judgment

therein rendered is void as to one of such defendants, the voluntary appearance in his name being unauthorized, does not render said judgment void as to all.

5. **Judgments: LIEN UPON PARTICULAR PROPERTY: RELEASE OF LIEN.** A judgment defendant cannot, as a matter of right, unaffected by equitable considerations, insist upon the preservation of the judgment lien upon particular property of his co-defendants, nor will the release by the plaintiff of specific property of one of several judgment defendants from the lien of the judgment, of itself, operate to discharge the other defendants from liability therefor.

ERROR from the district court of Douglas county. Tried below before HOPEWELL, J. *Reversed.*

McCabe, Wood & Elmer and *Cavanagh, Thomas & McGilton*, for plaintiff in error.

Edgar H. Scott, Schomp & Corson, A. S. Churchill, and *C. E. Herring, contra.*

POST, C. J.

This was an action in the district court for Douglas county upon a decree of the district court within and for Pottawattamie county and state of Iowa, which resulted in a final judgment in favor of the defendants below, and from which the plaintiff prosecutes error to this court.

The action in the Iowa court was by the plaintiff herein against Henry W. Griswold, as trustee and in his own right, also against Julius C. Iler, Claus J. Schmidt, H. E. Gales, Mary E. Fried, O. P. McKesson, H. P. Stoddart, and M. F. Williams, for the foreclosure of a certain mortgage executed by Griswold as trustee, and resulting in a decree awarding to I. S. Wright, who had intervened therein, a first lien upon the mortgaged property for $2,325, and in favor of the plaintiff a second lien thereon, for a like amount. There was a further finding, to the effect that the several defendants above named were personally liable for the amounts thus adjudged due, accompanied by an order for the sale of the mortgaged premises upon special execution, and for a general exe-

cution against said defendants for any balance thereon remaining unsatisfied by the proceeds of such sale. Said property was thereafter sold as provided by the decree, and the proceeds thereof, to-wit, $2,465.64, applied in satisfaction of the first lien and costs, leaving nothing to apply on the plaintiff's judgment. We shall in our discussion of the questions presented adopt the admirable arrangement thereof in separate brief of counsel for the defendant Gates.

It is first argued that there is a defect of parties, since Henry W. Griswold, against whom, in his own right, judgment was rendered by the Iowa court, was not joined herein as a defendant. It is doubtful, indeed, if that objection is presented by the record, but assuming the omission of the party named to have been properly pleaded, the alleged defect will not avail the defendants in this action, since by statute of Iowa all persons bound by a judgment or decree rendered in that state are both jointly and severally liable thereon. Section 2550, Annotated Code of that state, which was introduced in evidence, reads as follows: "Where two or more persons are bound by contract or by judgment, decree, or statute, whether jointly only or jointly and severally, or severally only, and including the parties to negotiable paper, common orders, and checks, and sureties on the same, or separate instruments, or by any liability growing out of the same, the action thereon may, at the plaintiff's option, be brought against any or all of them. When any of those so bound are dead, the action may be brought against any or all of the survivors, with any or all of the representatives of the decedents, or against any or all such representatives. An action or judgment against any one or more of several persons jointly bound shall not be a bar to proceedings against the others." The evident purpose of the statute above quoted is to abolish the joint liability of persons bound by contract, judgment, or statute, and to authorize the prosecution of actions against any or all of the parties so liable, at the election of the

plaintiff. (*Ryerson v. Hendrie*, 22 Ia., 481; *Hosmer v. Burke*, 26 Ia., 356; *Allen v. Maddox*, 40 Ia., 125.) Griswold was accordingly not a necessary party, and the contention of the defendants, so far as it relates to this branch of the case, is without merit.

2. It is alleged in the separate answer of Gates, and perhaps others of the defendants, that there is another suit pending between the parties hereto upon the same cause of action. The foundation for that contention is the fact that the plaintiff herein, in the year 1889, commenced an action in the district court for Douglas county upon the judgment here involved, which was, upon a trial to the court without the assistance of a jury, determined in favor of Mary A. Fried, one of the defendants therein, on the ground that the appearance in her name in the Iowa court was unauthorized, and that the judgment was as to her void for want of jurisdiction. There was also a final order dismissing said cause as to the other defendants, without prejudice to another action. To the order last mentioned the plaintiff excepted and in due time filed a motion for a new trial, which has, so far as this record discloses, never been submitted to the court for its determination. The motion for a new trial did not of itself operate to suspend the judgment or in any way impair its force or conclusiveness as a determination of the issues involved. Execution will in such case be awarded upon the demand of the successful party for his costs, and in case of an equitable proceeding an appeal may be prosecuted therefrom to this court. (*Parr v. Van Horne*, 40 Ill., 122; *Church v. Goodin*, 22 Kan., 527; *People, ex rel., v. Loucks*, 28 Cal., 68.) The former action is not, therefore, in a legal sense, now pending, and the objection on that ground may be dismissed without further consideration.

3. It is next contended that the plaintiff's remedy is by means of a supplemental proceeding for a deficiency judgment in the Iowa court. This contention is based upon the statutes and recognized practice in the courts

of this state. The laws of Iowa are, it is argued, the record being silent upon the subject, presumed to be the same as our own; hence, as counsel conclude, the court was without authority in the first instance to enter personal judgment against the defendants. It is undoubtedly true, as a general proposition, that the laws of a sister state will, in the absence of proof, be presumed to be the same as those in force in this state; but to that rule there are recognized exceptions, of which the facts of this case afford an excellent illustration. It will, upon reason and authority, be presumed, in the absence of proof to the contrary, that courts of general jurisdiction of other states possess the authority they assume to exercise, and that the methods of procedure pursued by them, although differing from the established practice in this state, are authorized by the laws of the states in which they act. (*Dodge v. Coffin*, 15 Kan., 277; *Ward v. Baker*, 16 Kan., 31; *Sanford v. Sanford*, 28 Conn., 6; Black, Judgments, sec. 889; Freeman, Judgments [4th ed.], sec. 565.) But it is unnecessary to indulge in presumptions in order to sustain the adjudication of the Iowa court, since it is clear that an action would in this state lie upon the record introduced in evidence as a domestic judgment. (*Stover v. Tompkins*, 34 Neb., 465; *Eldredge v. Aultman, Miller & Co.*, 35 Neb., 884.)

4. It is claimed that the judgment which is the basis of this action, having been determined in the former suit to be void for want of jurisdiction so far as it concerns Mary A. Fried, one of the defendants named therein, is void as to all of the defendants. That claim rests upon the assumption to which we have already alluded, viz., that the judgment in question is the joint obligation only of the several defendants. But the mortgage debt was, as we have seen, the joint and several obligation of the parties thereto, and that the plaintiff might, at its election, have pursued its remedy by means of personal judgment against any or all of such parties. Had Mrs. Fried not been made a party to the foreclosure proceedings

and the cause prosecuted to judgment against these defendants, the latter would, in view of the statute quoted, have had no ground of complaint. Again, had the appearance in Mrs. Fried's name been authorized, and the judgment against her in all respects regular and binding, an action would lie thereon against her alone, or against one or all of the other defendants in her absence. And since it was the plaintiff's privilege to proceed against any or all persons liable for the mortgage debt, the unauthorized appearance for one party named as a defendant cannot on principle be said to render the judgment void as to others regularly served with process, or who voluntarily submitted themselves to the jurisdiction of the court.

5. Finally, it is alleged by the defendants Gates and Schmidt, and urged by way of argument, that the effect of the release by plaintiff from the operation of the judgment of certain property in Pottawattamie county was to satisfy said judgment and discharge said defendants from liability therefor. The facts relied upon to support that claim, briefly stated, are as follows: The plaintiff, by its cashier, executed certain written orders, directed to the clerk of the district court, substantially similar in form, one of which is here set out:

COUNCIL BLUFFS, IA., February 27, 1890.

"*H. J. Chambers, Dist. Court, Potta. Co., Ia.*—DEAR SIR: Please release lots 5, 6, and 7, block 17, Mill Addition to Council Bluffs, from lien of a judgment of $2,442.25 in favor of the Council Bluffs Savings Bank, as appear in judgment docket 7, page 172.

"By order of COUNCIL BLUFFS SAVINGS BANK,

"By A. W. REIKMAN, *Cashier.*"

These orders, it is conceded, refer to the judgment involved in this action, and in obedience thereto formal entries were made by the clerk releasing the property therein described from the judgment lien. There is, it should be observed, no pretense that the property thus

released was included in the mortgage, or that the plaintiff had any specific lien thereon as security for the indebtedness which is the foundation of the judgment. It does not appear that the plaintiff received any consideration whatever for the releases alleged, nor is it shown by pleadings or proof that the property described was at the time of its release owned by the non-complaining defendants, who are by counsel referred to as "the Council Bluffs parties," or that said defendants, or any of them, are insolvent or unable to contribute their just proportion of the judgment indebtedness. The question is not, therefore, that of an alleged payment, relied upon as a defense in full or *pro tanto*, or the power of courts of equity to control the enforcement of judgments in order to administer equity between the several parties liable therefor, but whether one defendant may, as a matter of right, unaffected by equitable considerations, insist upon the preservation of the judgment lien upon particular property of his co-defendants. The contention of defendants must fail for the obvious reason that the law will not require resort to particular property for the satisfaction of a judgment. Indeed, courts of law have, as a rule, nothing to do with the way in which their judgments are enforced or the funds from which they are satisfied; they merely pronounce the sentence of the law upon the facts before them, to which, as an incident thereof, a lien attaches by virtue of statute. (Black, Judgments, sec. 402.) But it is needless to cite authority in support of a proposition which may be demonstrated by an illustration. The plaintiff in this case might, without prejudice to a subsequent proceeding for its enforcement, have suffered the judgment to become dormant, thereby discharging the lien as to all property owned by Council Bluffs defendants, and we are unwilling to hold that it was unable to do directly that which it could, as all admit, accomplish by indirection.

The reasons which controlled the district court in its findings and judgment for the defendants do not clearly

appear, but since the record presents questions of law only, which as we have seen, must be resolved in favor of the plaintiff, it follows that the judgment must be reversed and the cause remanded for trial *de novo*.

REVERSED.

FRANK B. GILMORE V. G. H. WHITEMAN ET AL.

FILED MARCH 3, 1897. No. 7049.

Res Judicata: ACTION ON ONE OF A SERIES OF NOTES. Where to an action upon the first of a series of notes given for the same consideration the defendant alleges fraud and breach of warranty for the purpose of avoiding the contract in question, a verdict and judgment for the plaintiff may be pleaded as a bar to the same defense when interposed to an action upon a second note of the same series.

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

E. A. Cook, for plaintiff in error.

Warrington & Stewart, contra.

POST, C. J.

This was an action below in the district court for Dawson county upon a note for $650 executed by the defendants in error to W. J. Simmons and J. M. McIntosh, bearing date of October 22, 1888, payable thirty months after date, with interest at eight per cent, payable semi-annually. Defendants answered admitting the execution of the note sued on, but alleging that the same was given in part payment for a certain stallion purchased of the said Simmons and McIntosh upon the following written warranty:

"OVERTON, NEBRASKA, October 22, 1888.

"For and in consideration of the sum of thirteen hundred dollars, paid by one note of $650, due eighteen months after date, and one of equal amount due thirty months after date, at eight per cent interest, we bargain, sell, and deliver, and have sold and delivered one registered, finely bred English shire horse called 'Mistake' to Lot G. Carr, G. H. Whiteman, and Abbie P. Lincoln, equal owners, of Overton, Nebraska, and we warrant said horse to be a foal-getter if properly cared for.

"W. J. SIMMONS.
"J. M. MCINTOSH."

It was further alleged that the said Simmons and McIntosh, in order to induce defendants to purchase the said stallion and execute the said note, exhibited to them a false and fictitious pedigree by which said stallion was represented to be a purely bred English shire horse, and that the defendants being inexperienced in like matters purchased the said stallion and executed the said note, relying upon said statements and warranties; whereas in truth and in fact said stallion was not a purely bred English shire horse; that he "was not a registered and pedigreed animal," and was not a foal-getter, but was, as the said Simmons and McIntosh well knew, of no value whatever. To the foregoing answer the plaintiff replied as follows: "That the plaintiff, on the 4th day of March, 1892, filed his petition in the district court (said cause before that having been appealed from the county court of Dawson county) against the defendants, who were the same defendants as in this action, said suit being upon said promissory note for six hundred fifty dollars ($650) so given at the time the note in suit was given and which matured eighteen (18) months after its date. In said action the plaintiff herein was plaintiff and the defendants herein were defendants; that to said petition the defendants herein filed their amended answer on the 4th day of March, 1892, in which said answer the defendants in said action, they being the same defendants as in this action,

set up and pleaded the same defense to said promissory note as is set up by said defendants in paragraphs 4, 5, and 6 of the amended answer in this case; that on the issue joined in said first action a trial was had to the court and jury at the October, 1892, term of the district court within and for Dawson county; that the jury in said cause returned a verdict therein and said court, at the January sitting thereof, having overruled the motions for a new trial, judgment was by said court entered on said verdict in favor of the plaintiff herein against the defendants herein, said parties herein being plaintiff and defendants in said action, for the sum of three hundred fifty-eight dollars ($358) and costs of suit; that said judgment is in full force and unreversed; that the defense set up in said cause wherein said judgment was so rendered in favor of this plaintiff and against the defendants herein is the same defense and grows out of the same transaction and is between the same parties as is the defense set up in the amended answer in this case," etc. Upon the trial of the issues thus joined the plaintiff offered in evidence the petition, answer, and reply in the suit upon the companion note, the defense interposed therein being identical with that alleged in this action, as to the record of the trial of said cause showing a verdict and judgment therein in plaintiff's favor in the sum of $358, but which were, upon the objection of the defendants, excluded, and which is the ruling relied upon for a reversal of the judgment in this cause.

The objection to the evidence offered was based upon the following grounds: (1.) No such issue was presented in the county court where the cause originated and from whence it was appealed to the district court. (2.) Said evidence is irrelevant and immaterial. (3.) The issues in this cause are not identical with those tried in the former suit. (4.) The judgment mentioned in the record offered in evidence was, by means of a petition in error, removed to this court and is still pending and undetermined herein. There is, so far as we can discover from the record and

briefs of counsel, no foundation whatever for the first and fourth grounds of objection. Our examination will, accordingly, be confined to the single proposition stated in the second and third grounds thereof, viz., that the issues tried in the former suit are not identical with those tendered by the answer in this action, and that the judgment therein cannot be here interposed as an estoppel. Or, to state the same proposition in the form of an interrogatory, are the allegations of the reply sufficient as an avoidance of the new matter alleged in the answer? It is an elementary rule often recognized in this state that a judgment of a court of competent jurisdiction upon a question directly involved in one suit is conclusive as to that question in a subsequent action between the same parties and others in privity with them. (*Wilch v. Phelps*, 16 Neb., 515; *Nelson v. Bevins*, 19 Neb., 715; *Knorr v. Peerless Reaper Co.*, 23 Neb., 636; *Gayer v. Parker*, 24 Neb., 643.) The reply must, when tested by that rule, be held sufficient, and the judgment therein alleged conclusive of the question raised by the answer. There can, upon the record before us be no doubt of the identity of the defense here interposed with that alleged in the former action and which was in part sustained by the judgment therein. That action was, as we have seen, upon a note executed at the same time as the one here involved, and as part consideration for the stallion described in the answer. The contract of warranty and the fraud there interposed as a defense are the same as those relied upon in this action. By the judgment pleaded two facts are conclusively established: First, that the stallion purchased by the defendants was not as represented by Simmons and McIntosh, a sure foal-getter; second, that the defendants' damage on account of such misrepresentations, whether resulting from a breach of the contract of warranty, or for actionable fraud, did not exceed the sum of $500, being the difference between the face value of the note there involved and the amount of the verdict and judgment for the plaintiff. If authority were necessary to prove that

the judgment pleaded is, in view of the facts alleged, a complete bar to the same defense when interposed in this action, it is found in *Knorr v. Peerless Reaper Co.*, *supra*, a case in point. (See, also, 2 Black, Judgments, sec. 754, and cases cited.) It follows that the rejection of the evidence offered was error, for which the judgment in favor of defendants must be reversed and the cause remanded for further proceedings in the district court.

REVERSED.

GEORGE OBERNE ET AL. V. GEORGE BURKE ET AL.

FILED MARCH 3, 1897. No. 7134.

1. **Principal and Agent:** RATIFICATION: EVIDENCE. A ratification by a principal of the unauthorized act of his agent may be inferred from the conduct of the former inconsistent with any intention other than a purpose to adopt such act as his own.
2. ———: ———: ———. *Held*, From an examination of the evidence, (1) that the contract sued on, pledging defendants' credit, is within the scope of the authority of their agent by whom it was executed; (2) granting such contract to have been unauthorized and void when executed, the jury were warranted in finding that it has been subsequently ratified by the defendants.

ERROR from the district court of Douglas county. Tried below before HOPEWELL, J. *Affirmed.*

Montgomery, Charlton & Hall, for plaintiffs in error.

Hall, McCulloch & Clarkson, contra.

POST, C. J.

This is a proceeding prosecuted by the plaintiffs in error, hereafter called the defendants, to reverse a judgment of the district court for Douglas county based upon the following instrument:

"SOUTH OMAHA, NEB., April 26, 1897.

"*M. Burke & Sons, U. S. Yards, Neb.*—DEAR SIRS: We will guaranty the payment by R. Kunath in thirty days the sum of seven hundred ninety-one and 28-100 dollars for seventeen head of cattle.

"OBERNE, HOSICK & CO.,
"Per HARMON."

By the answer interposed below every allegation of the petition is put in issue; however, the only substantial controversy relates to the authority of Harmon, who signed the foregoing agreement, to bind the defendants by contracts of like nature executed in their name. A former judgment in favor of the plaintiffs below was reversed by this court on the ground that the contract sued on was not shown to be within the scope of the authority of the agent by whom it was executed, or that it had been subsequently ratified by the defendants. (See *Oberne v. Burke*, 30 Neb., 581.) In addition to the facts stated in the opinion cited there was, on the second trial, evidence tending to prove that one Bush, who had the general charge and supervision of the defendants' business at Omaha, was absent from the state for the period of a month or more immediately preceding May 1, 1887, and that the said Harmon was, with the knowledge and approval of defendants, left in charge of their said business during his absence. There is, it is true, a suggestion to the effect that Harmon was a mere subagent of Bush, and that, granting the power of the latter to bind defendants by contracts like that here involved, such authority implies the exercise of a personal judgment and discretion which cannot, without the consent of the principal, be delegated to another. But there was evidence which warranted the jury in finding that Harmon was not a mere subagent; that he was, on the contrary, the accredited representative of the defendants, and clothed with whatever authority was possessed by Bush in the conduct and management of the business at Omaha. It was also shown by the testimony of Bush that he returned to Omaha about May 1, or five

days subsequent of the agreement above set out; and Mr. Hosick, one of the defendants, being asked when his firm first learned of said agreement, answered, "Mr. Bush wrote us about it on his return home." It does not appear that notice was given by defendants of the repudiation of the agreement in their name until maturity of the debt thereby assumed, while one of the plaintiffs, George Burke, testified that no communication whatever was received from defendants relating to said agreement until after default by Kunath, and dishonor of the draft drawn upon defendants in accordance with the terms of their guaranty; and the same witness, referring to the course of dealing with defendants, testified, in substance, that previous to the refusal of payment in this instance Bush's authority to pledge the credit of defendants' firm under like circumstances, although frequently exercised, had never been disputed. It may also be said to have been the practice of Bush, in the management of defendants' business, and in their name, to guaranty payment in favor of commission men for cattle sold to butchers with whom said firm had dealings, the purpose of such accommodations being to enlarge the firm's business in Omaha and vicinity. The evidence shows also that all previous guaranties were kept good, and in closing up several of such transactions drafts were drawn upon the defendants in their firm name and which were paid by the firm's checks. It was customary for one of defendants to visit Omaha as often as once in six months and on such occasions to examine into the condition of the firm's business, by ascertaining the amount of cash on hand, and in bank, and inspecting checks drawn against its bank account. The canceled checks drawn in payment of bills thus guarantied by Bush were, it is fair to presume, submitted to the scrutiny of the defendants and were sufficient of themselves to put the latter upon inquiry touching the course of dealings in their name. The evidence is, we think, quite sufficient to sustain the finding that defendants were advised of Bush's practice to

guaranty payment in behalf of patrons of the firm in Omaha and vicinity, and that such practice was within the scope of the authority of said Bush as the defendants' managing agent.

We are also of the opinion that a ratification of Harmon's act in pledging defendants' credit may be implied from the facts and circumstances in evidence. In addition to the failure, above commented on, to give notice of the repudiation of the alleged unauthorized agreement until after default by Kunath, the party primarily liable to plaintiffs, it is conclusively shown that defendants at the time in question held a chattel mortgage upon his, Kunath's, butcher shop, tools, and fixtures for $1,500, of which amount $1,075 represented an indebtedness previously assumed by defendants for the mortgagor, and the balance, $425, was to secure future advancements of money or cattle by defendants. It is also established beyond controversy that Bush, upon being notified of the guaranty by Harmon in defendants' name, and before maturity of the debt which was the subject of that contract, induced Kunath to surrender to him the property covered by said mortgage, and which was by agreement disposed of at private sale on defendants' account. Kunath, who was called as a witness for plaintiffs, testified, in referring to the foreclosure of the mortgage, as follows:

Q. When you turned over all the property under that mortgage, did the amount you owed him at that time, and for which the mortgage was taken, include the $791 for these cattle? [Referring to the indebtedness mentioned in the contract of guaranty.]

A. Yes, sir. * * *

Q. At the time Oberne, Hosick & Co. took your property under this mortgage, about what amount were you owing them outside of this $791?

A. In the neighborhood of $400.

The foregoing statement, so far as it relates to the application to be made of the proceeds of the mortgaged property, is not expressly contradicted by Bush, who tes-

tified in behalf of defendants. It is not seriously contended that the act of Bush in accepting the mortgage here mentioned, or the subsequent foreclosure thereof in the name of the defendants, was in excess of his authority as managing agent of the latter. A review of the authorities bearing upon the proposition here involved would be a profitless task. It is sufficient that a ratification will be implied from the conduct of the person in whose behalf another has assumed to act, clearly inconsistent with any intention other than a purpose to adopt such act as his own. (Mechem, Agency, sec. 146 *et seq.*; 1 Am. & Eng. Ency. of Law [2d ed.], 1195; *Johnston v. Milwaukee & Wyoming Investment Co.*, 49 Neb., 68; *Farmers & Merchants Bank of Elk Creek v. Farmers & Merchants Nat. Bank of Auburn*, 49 Neb., 378.) Granting, therefore, that the contract sued on was in the first instance unauthorized and void, the jury were warranted in finding that it has been subsequently ratified by the defendants, such being the reasonable and logical, if not, indeed, the necessary, inference from defendants' conduct as shown by the evidence above cited.

There are other assignments presented by the arguments of counsel, but which, in view of the conclusion above stated, do not call for notice at this time. There being no error in the record, the judgment is

AFFIRMED.

HENRY N. TOWN V. MISSOURI PACIFIC RAILWAY COMPANY.

FILED MARCH 3, 1897. No. 7054.

1. **Water-Courses: SIZE OF STREAM.** To constitute a water-course the size of the stream is not material. It must, however, be a stream in fact, as distinguished from mere surface drainage occasioned by freshets or other extraordinary causes, but the flow of water need not be continuous. *Pyle v. Richards*, 17 Neb., 180, approved and followed.

2. Surface Water: RIGHTS OF LAND OWNER. The doctrine of the common law in regard to surface waters is as a general rule in force and controls in this state. Surface waters may be controlled by the owner of the land on which they fall or originate or over which they flow. He may appropriate to his own use all that falls or comes on his land and refuse to receive any that falls or originates or flows on or over adjoining property.

3. ———: ———. The right under the general rule to control surface waters must be so exercised by any person as not to unnecessarily or negligently cause injury to the rights and property of others.

4. ———: ———: EMBANKMENTS. Surface waters may have such an accustomed flow as to have formed at a certain place a channel or course, cut in the soil by the action of the water, with well-defined banks, and having many of the distinctive attributes of a watercourse; and though there are no exceptions to the general rule except from necessity, this may constitute an exception, and if the flow is stopped by the erection of an embankment across and in the channel, some provision may be necessary for the allowance of the regular flow of the surface waters.

5. ———: ———: ———: NEGLIGENCE. Whether such embankment has been negligently constructed with reference to the obstruction of the flow of the surface waters, and whether such negligence, if any, is the proximate cause of an alleged injury, are generally questions to be submitted to the jury.

6. ———: OBSTRUCTION: NEGLIGENCE. *Held*, That a finding that the damages in this case were not the result of negligence on the part of defendant was sustained by the evidence.

7. Instructions: ASSIGNMENTS OF ERROR. If instructions are grouped in an assignment of error the determination that the action of the trial court, the subject of complaint, was proper as to one of such instructions suffices to dispose of the entire assignment.

8. Special Findings: FAILURE TO REQUEST: REVIEW. Where a jury is directed to find upon particular questions of fact, if any further than those submitted are desired by a party to the action, a request must be made for the submission of the further questions. If no request is made, error cannot be predicated upon the failure of the court to include such questions in the list of those directed to be answered.

9. ———: IMMATERIAL ANSWERS: GENERAL VERDICT: JUDGMENT. Where questions for special findings are submitted to a jury the answers to which would be immaterial to the issues as presented by the pleadings and evidence, and in view of the other findings of the jury, and the jury fails to answer one or more of such questions, it is not prejudicial error for the court to render a judgment over the objection of a party, on the general verdict returned.

10. Verdicts. The general and special verdicts held not inconsistent.

ERROR from the district court of Lancaster county. Tried below before STRODE, J. *Affirmed.*

Samuel J. Tuttle, for plaintiff in error.

A. R. Talbot, contra.

HARRISON, J.

This is an action by the plaintiff in error, also plaintiff in the lower court, to recover of the defendant railway company the damages alleged to have been caused by the obstruction of a water-course by the careless and negligent construction and maintenance of an embankment by the railway company on its right of way and the consequent flooding of the plaintiff's premises or place of business in the city of Lincoln, and injury to the articles which he kept therein for sale. The defendant company, in its answer, denies any negligence on its part in the particulars complained of in the petition, and alleged that the damages, if any, suffered by the plaintiff were the result of his own negligence, and further pleaded as follows: "Defendant further answering says that the drainage provided for under the road-bed and embankment complained of in plaintiff's petition was, and has been at all times, sufficient to successfully and completely drain the country and property tributary thereto, and that if any damage or injury accrued to the plaintiff's property, as set forth in his petition, it was due to unusual and unprecedented heavy rains and to surface water and by reason of the physical condition of the property and ground not owned or controlled by the defendant on the north side of said embankment and railway track, which prevented said water from escaping, and that the outlet and sewer provided for the escape of such surface water by the city of Lincoln on said north side was insufficient and out of order and practically destroyed so that the said surface water could not escape; that over which said sewer and drain and conditions and

outlet the defendant railway company had no control or authority whatever, and that the backing up of the water complained of in the plaintiff's petition was due to the carelessness and negligence of the city of Lincoln, if any, and not to the defendant company. Defendant further answering says that the embankment complained of in plaintiff's petition does not cross a natural stream or water course." A reply,—a general denial of the new matter contained in the answer,—was filed, and on trial to the court and a jury the defendant was successful and secured a verdict, on and in accordance with which judgment was subsequently rendered, and the plaintiff presents the case here for review.

It appears that on and prior to the 10th of June, and during some considerable time subsequent thereto, the plaintiff was conducting mainly what is commonly known as a "feed store" in a building on the corner of Twenty-seventh and W streets in the city of Lincoln, in which, on the said 10th of June, he had a stock or supply consisting of bran, shorts, hay, corn, oats, chopped feed, etc. He also had for sale some flour and corn meal. A body of land, the plaintiff says about a section (640 acres), one witness says a half section, and others fix it at two or three hundred acres, within the corporate limits of the city of Lincoln, including some of the improved portions of the city, and all platted or laid out in lots and blocks, etc., on a lot on which was the plaintiff's place of business, has such a surface conformation or is sloped so that, in time of rains or melting snows, any running waters caused thereby flow toward and come together in a body at a place in what witnesses called a "draw," others a "depression in the prairie," and others a "channel" or "water way," having its course near the store of plaintiff, and in, or directly across which, an embankment was made by or for the railway company, and which stopped the flowage of waters in the channel. The company made a culvert by placing at the base of the embankment, in the course which the surface waters had

apparently taken in their flow, a tile of the required length, and of an internal diameter of twenty-four inches. On the date stated in plaintiff's petition there was a very heavy rainfall, and the consequent flow of the surface waters draining from the body of land or portion of the city we have hereinbefore indicated came in what plaintiff contends was their regular and natural channel or well-defined course, and, when they reached the embankment were, he asserts, by reason of the construction of such embankment, and the lack of a proper culvert or opening in the embankment for the waters to run in their natural and usual direction, and pass through in sufficient volume or quantity, thrown back and into the plaintiff's store.

The jury, pursuant to directions given it before retirement to consider of a verdict, made special findings of which we desire to direct attention to the following:

"1. Was the water alleged to have been backed up and occasioned the damage, because of the building of defendant's embankment in a natural or general water-course?

"A. In freshets; yes.

"2. Was the water alleged to have caused the injury in this case surface water caused by heavy rains?

"A. Yes.

"3. Did the depression in the land complained of have a water-course or natural channel with banks and clearly defined water-course?

"A. Yes.

"9. Was the water complained of by plaintiff surface water?

"A. Yes.

"10. Was there a natural water-course crossed by the embankment complained of?

"A. In freshets; yes."

These established that the jury believed from the evidence that there was at the place where the embankment was built a well-defined channel or course for drainage of deposits or accumulations of rains or melting snows, of

surface waters, and none others. There was sufficient evidence in the record to support these findings, though there was much testimony tending to lead to a contrary conclusion in regard to the appearance there of any channel or other than a mere depression of the prairie, it being of the evidence that the grass and weeds grew on the whole surface of the ground at this particular place, and that the land in the depression was cultivated, and grains or grass sown or planted there. It is contended the findings of the jury fully determined that this was not the course of a stream of water having a spring as its source, continuous in its flow, or of any permanency, but was the way in and through which naturally flowed streams of water having no permanancy or regularity as to time of flow, and dependent upon transient causes alone for their origin or source. It was not within the definition of a "water-course" as defined in the opinion in the case of *Pyle v. Richards*, 17 Neb., 180, wherein it was said: "To constitute a water-course the size of the stream is not material. It must, however, be a stream in fact, as distinguished from mere surface drainage occasioned by freshets or other extraordinary causes, but the flow of water need not be continuous." In *Hoyt v. City of Hudson*, 27 Wis., 656, it was said of a water-course: "There must be a stream usually flowing in a particular direction, though it need not flow continually. It may sometimes be dry. It must flow in a definite channel, having a bed, sides or banks, and usually discharge itself into some other stream or body of water. It must be something more than a mere surface drainage over the entire face of the tract of land, occasioned by unusual freshets or other extraordinary causes. It does not include the waters flowing in hollows or ravines in land, which is the mere surface water from rain or melting snow, and is discharged through them from a higher to a lower level, but which at other times are destitute of water."

According to the third finding of the jury the outlet for water drawn into question in this case, had some of the

essential distinctive attributes of a water-course, but lacked others,—among them a frequent flow of water, or a flow which had any definite, and other than an occasional, source. It was confined to drainage of surface water. The doctrine of the common law in regard to surface water is in force and prevails in this state as a general rule. Under this rule such water may be controlled by the owner of the land on which it falls or over which it flows. He may appropriate to his own use all that falls or comes on his land and refuse to receive any that falls upon or comes on his neighbor's land. "The doctrine of this court is the rule of the common law,—that surface water is a common enemy, and that an owner may defend his premises against it by dyke or embankment, and if damages result to adjoining proprietors by reason of such defense, he is not liable therefor." (*Lincoln & B. H. R. Co. v. Sutherland*, 44 Neb., 526.) The general rule has been applied and enforced by this court in several instances,—notably in the case of *Morrissey v. Chicago, B. & Q. R. Co.*, 38 Neb., 406; also in *Bunderson v. Burlington & M. R. R. Co.*, 43 Neb., 545, in which the rule announced in *Fremont, E. & M. V. R. Co. v. Marley*, 25 Neb., 138, was followed. A modification of the general rule, or rather its application in connection with the time-honored and just maxim that each one must so use his property as not to injure the rights of another, has been recognized in the opinion in the case of *Anheuser-Busch Brewing Association v. Peterson*, 41 Neb., 897, wherein it was stated: "Every proprietor may lawfully improve his property by doing what is reasonably necessary for that purpose, and unless guilty of some act of negligence in the manner of its execution, will not be answerable to an adjoining proprietor, although he may thereby cause the surface water to flow onto the premises of the latter to his damage. But if in the execution of such enterprise he is guilty of negligence, which is the natural and proximate cause of injury to his neighbor, he is accountable therefor." This was followed in *Lincoln & B. H. R. Co. v. Sutherland*, 44 Neb., 526. (See,

also, *Jacobson v. Van Boening*, 48 Neb., 80.) The flow of surface waters is governed, and certain distinctive characteristics given it, by the natural conditions of the surfaces of lands over which it takes its way. If the land is hilly and full of sharp irregularities, the water may be forced rapidly toward a common point of final drainage, through a gorge or ravine originally formed by the action of the waters, or there may be a gradual or uniform slope from all directions of a large body of land to one place of common drainage, and a resultant, well-defined, final avenue of escape for the surface waters made by the large quantities which have from time to time run through it. This last may be said to be the condition, as ascertained and fixed by the jury in the findings, existent at the place drawn into controversy in the present case. On the other hand, there may be a flow of diffused waters over the surface of lands, which passes across the country in such condition, and nowhere gathers in large or restricted volume, or in any stream confined within banks or in a channel. This last may be said to be true surface drainage, as to which the general rule of law is applicable in its full force. This flow, if deflected from its course, would be but the turning of a dispersed flow, at no point great, and not liable to cause damage. There are and should be no exceptions to the general rule unless demanded by necessity. In the case at bar the jury determined that the surface waters had flown from this body of land in a channel with banks and clearly-defined water-course. They had made for themselves a channel, through which, during certain months when there were heavy rains, they flowed regularly. This channel must be said to have possessed the characteristics of a water-course, and that there was the necessity for some provision to be made at the time the embankment was built for the uninterrupted flow of the waters in the same direction and in the channel. By making the necessary culvert or passage way under its embankment, the company could not be charged with having collected the surface waters in a body, and

thrown them in unwonted quantities upon the premises of its adjoining property owner. It would be receiving the waters as naturally collected, and allowing them to flow as had been their wont theretofore, and would be using its property with as little injury to that of others as might be, or the necessities demanded. It would thus bring itself within all the rules or fair exceptions thereto.

The facts in the case of *Lincoln & B. H. R. Co. v. Sutherland, supra,* constituted it one very similar in its leading elements to the case at bar. A summary of some of the main facts, as given in the syllabus to the opinion, is as follows: "A draw some seven miles in length crossed the premises of a farmer. The surface waters produced by rains and melting snows were wont to run into this draw from the surrounding territory and thence find their way to the Platte river. A railroad company constructed its road-bed across the premises and built an embankment, without culvert or opening over the draw." In a suit by the owner of the land against the company for damages for negligently constructing the embankment without an opening, whereby the surface waters were stopped and overflowed the land, and destroyed the crops thereon, it was held to call for the application of the rule against the railroad company, that a proprietor must so use his property as not to unnecessarily and negligently injure his neighbor, and the question of negligence was one to be determined by the jury. As we view the case at bar it was one for the application of the same rule; of necessity presented an exception to the general doctrine in regard to surface waters; and the question of the negligence of the company in the construction of its embankment was for the jury to settle. It was submitted to them, and though not the subject of a special finding, we must conclude that it was embodied as one of the conclusions on which the jury passed by its general verdict. A finding that there was no negligence shown which was the natural and proximate cause of the injury to plaintiff's property was amply supported by the evidence. We must conclude

that the verdict of the jury was sustained by the evidence, and not contrary to the rules of law applicable to the facts.

It is urged that the court erred in refusing to give certain instructions prepared and tendered on behalf of the plaintiff. The assignment in relation to this alleged error in both the motion for new trial and petition in error was in gross as to the seven instructions included. Of these, the one numbered 5 was erroneous, in that it ignored the question of negligence on the part of defendants as an element of the plaintiff's right to recover. This being determined we need not further examine the assignment.

One assignment of error is based upon the proposition that it was the duty of the trial court, in submitting special questions to the jury, to have included one to which an answer would have disclosed what the jury estimated to be the amount of the damages caused to the property of plaintiff by the waters, so that if it became necessary to render judgment on the special findings for plaintiff, as is the contention should now be done, it would be possible to do so intelligently and in full. Sections 292 and 293 of the Code of Civil Procedure, upon the subject of special verdicts, are as follows:

"Sec. 292. A special verdict is that by which the jury finds the facts only. It must present the facts as established by the evidence, and not the evidence to prove them; and they must be so presented as that nothing remains to the court but to draw from them conclusions of law.

"Sec. 293. In every action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases the court may direct the jury to find a special verdict, in writing, upon all or any of the issues; and in all cases may instruct them if they render a general verdict, to find upon particular questions of fact to be stated in writing, and may direct a written finding thereon. The special verdict or finding must be filed with the clerk and entered on the journal."

Under these it would seem that the court may direct special findings on any one or all of the issues of fact, but, however this may be, it appears from the record that counsel for plaintiff excepted to the submission to the jury of any of the list of questions calling for special findings or verdict. If any other or different from those submitted were desired, they should have been prepared and submitted to the court by counsel, or at least there should have been a request for the submission of such further queries as were desired, and if refused, an exception noted. This not having been done, the assignment must be overruled. (*Everson v. Graves*, 26 Neb., 262; *First Nat. Bank of North Bend v. Miltonberger*, 33 Neb., 847.)

Error is also assigned of the action of the court in receiving the special verdict with one of the questions therein unanswered. Query numbered 8, was as follows:

"Was the grade of Twenty-seventh street in front of the store building of plaintiff which contained the goods said to have been damaged established prior to the building of said store by the plaintiff?

"A. Don't know."

It is urged that this was not an answer to the question, and that it was error to receive the special verdict with this answer in the form in which it appeared; and the case of *Doom v. Walker*, 15 Neb., 339, is cited in which it was held: "Where, 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 a part of such questions, but shall find a general verdict, it is error upon 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." (See, on the same subject, *Sandwich Enterprise Co. v. West*, 42 Neb., 722.) While the foregoing is the rule, it is also true that where a question is submitted for spe-

cial finding which is immaterial under the pleadings and evidence in the cause on trial and the jury fails to answer the question, it will furnish no ground for reversal of a judgment rendered on a general verdict returned by the jury. (*Missouri P. R. Co. v. Vandeventer*, 26 Neb., 222.) In the case at bar the question submitted which the jury did not answer was immaterial under the pleadings and evidence and in view of the findings of the jury on the other questions which it considered and answered; hence, if any error in the action of the court in the rendition of a judgment on the general verdict, over the objection of the plaintiff, it was error which was not prejudicial to his rights, from which it follows that this assignment is unavailing and must be overruled.

It is also argued that the general and special verdicts were inconsistent; that under such a condition it was error for the trial court to render judgment in accordance with the general verdict. The rule invoked is correct, but not applicable in this case. The verdicts were not inconsistent, but in harmony.

It follows from the foregoing discussion that the judgment of the district court will be

AFFIRMED.

HIRAM W. OLCOTT, APPELLEE, V. JOHN A. BOLTON, APPELLANT.

FILED MARCH 3, 1897. No. 7026.

1. **Action to Rescind Contract of Sale of Bank Stock: FALSE REPRESENTATIONS: DECREE FOR PLAINTIFF.** Evidence *held* sufficient to sustain the findings and judgment of the trial court.

2. **Sales: FALSE REPRESENTATIONS: RESCISSION.** If to induce a party to purchase capital stock of a corporation representations are made of material facts which, if true, would enhance the value of the stock, but which are false, to the knowledge of the vendor, or, if without knowledge the statements are made by him as representations of positive to him known facts, if believed to be true

and relied and acted upon by the vendee in making the purchase, and to his injury, an action of damages or for rescission of the sale accrues in favor of the vendee.

3. ———: ———: ———. If representations consist of direct statements or asserted facts, and to ascertain their truth or falsity would necessitate an examination or investigation, the party to whom they are made may place reliance on them.

4. ———: ———: ———. That the complainant obtained information on the same subject other than that contained in the representations, but from which he did not learn their falsity, will not deprive him of his right of action.

5. ———: ———: ———: RETURN OF PROPERTY. Where the evidence sustains a finding that as soon as plaintiff in an action for the rescission of a sale alleged to have been induced by false representations of the vendor discovered the falsity of the representations he tendered a return of the property and demanded a rescission of the sale, it is sufficient as to the point in regard to the time rescission was demanded.

APPEAL from the district court of Lancaster county. Heard below before STRODE, J. *Affirmed.*

The opinion contains a statement of the case.

Mockett, Rainbolt & Polk and *J. R. Webster*, for appellant:

On plaintiff's own evidence the representations were not in the nature of warranty, but at most a mere expression of opinion, which the evidence shows beyond doubt, and the court affirmatively finds, were stated in good faith. Upon the proofs and findings, in any event, a decree should have been entered in favor of this appellant. (Adams, Equity [7th ed.], p. 178; *Spence v. Duren*, 3 Ala., 251; *Pasley v. Freeman*, 3 T. R. [Eng.], 51; *Freeman v. Baker*, 5 B. & Ad. [Eng.], 797; *Ormrod v. Huth*, 14 M. & W. [Eng.], 651; *Parmelee v. Adolph*, 28 O. St., 10; *Lord v. Goddard*, 13 How. [U. S.], 198; *Russell v. Clarke*, 7 Cranch [U. S.], 93; *Tryon v. Whitmarsh*, 1 Met. [Mass.], 1; *Meyer v. Amidon*, 45 N. Y., 169; *Cowley v. Smyth*, 46 N. J. Law, 380; *Stone v. Demy*, 4 Met. [Mass.], 151; *Young v. Covell*, 8 Johns. [N. Y.], 25; *Hopper v. Sisk*, Smith [Ind.], 102; *Fooks v. Waples*, 1 Har. [Del.], 131; *Boyd v. Browne*,

6 Pa. St., 316; *Weeks v. Burton*, 7 Vt., 67; *Wells v. Jewett*, 11 How. Pr. [N. Y.], 242; *Ashlin v. White*, 1 Holt [Eng.], 387; *Shrewsbury v. Blount*, 2 Man. & G. [Eng.], 475.)

If the means of knowledge are at hand, and equally available to both parties, and the subject-matter is open to the inspection of both alike, and there are no fiduciary or confidential relations, and no warranty of the facts, the injured party must show that he has availed himself of the means of information existing at the time of the transaction before he will be heard to say that he was deceived by the misrepresentation of the other party. (*Rudd v. Robinson*, 126 N. Y., 113; *Champion v. Woods*, 12 Am. St. Rep. [Cal.], 126; *Leggett v. New Jersey Mfg. Co.*, 23 Am. Dec. [N. J. Eq.], 728; *Wakeman v. Dalley*, 51 N. Y., 27; *Swentzel v. Pennsylvania Bank*, 147 Pa. St., 140; *Maisch v. Seamen's Saving Fund*, 5 Phila. [Pa.], 30; *Briggs v. Spaulding*, 141 U. S., 132; *In re Forest*, 10 Ch. Div. [Eng.], 450; *Spering's Appeal*, 10 Am. Rep. [Pa.], 684; *Ackerman v. Halsey*, 37 N. J. Eq., 363; *Hun v. Cary*, 82 N. Y., 65; *In re Denham*, 25 L. R., Ch. Div. [Eng.], 752; *Watt's Appeal*, 78 Pa. St., 391.)

To entitle a party to rescind a contract for the sale of chattels on the ground of fraud, he must offer to return the property received by him and demand a rescission within a reasonable time after discovery of the fraud. (*Brown v. Waters*, 7 Neb., 428; *Kingsley v. Wallis*, 14 Me., 57.)

R. D. Stearns and *E. C. Strode, contra:*

If the representations of appellant in regard to the stock and condition of the bank were in fact false, appellee is entitled to a rescission, though appellant believed his statements were true when made. (Kerr, Fraud & Mistake, p. 53; 1 Story, Equity Jurisprudence, sec. 193; Adams, Equity, p. 177; 2 Pomeroy, Equity, sec. 885; Bigelow, Law of Fraud, p. 413; *Martin v. Hill*, 43 N. W. Rep. [Minn.], 337; *Mitchell v. Zimmerman*, 4 Tex., 75; *Stimson v. Helps*, 9 Colo., 33; *Allen v. Hart*, 72 Ill., 104;

Booth v. Smith, 117 Ill., 370; *Bowen v. Schuler*, 41 Ill., 192; *Miner v. Medbury*, 6 Wis., 294; *Holcomb v. Noble*, 37 N. W. Rep. [Mich.], 497; *Parmelee v. Adolph*, 28 O. St., 10; *Chatham Furnace Co. v. Moffatt*, 18 N. E. Rep. [Mass.], 168; *Gray v. Robbins*, 11 Atl. Rep. [N. J.], 680; *Kennedy v. McKay*, 43 N. J. Law, 288; *Rimer v. Dugan*, 39 Miss., 477; *Shackelford v. Handley*, 10 Am. Dec. [Ky.], 753; *East v. Matheny*, 10 Am. Dec. [Ky.], 721; *Yeater v. Hines*, 24 Mo. App., 619; *Linhart v. Foreman*, 77 Va., 540; *Lowe v. Trumble*, 78 Va., 65; *Nelson v. Wood*, 62 Ala., 175; *Bridge v. Penniman*, 12 N. E. Rep. [N. Y.], 19; *Leavitt v. Sizer*, 35 Neb., 80; *Phillips v. Jones*, 12 Neb., 215.)

Appellant, as a director of the Nebraska Savings Bank, is conclusively presumed to know the financial condition of the bank. As such director he is conclusively presumed to know the falsity of his statements to appellee in regard to the prosperous condition of the bank. (*Speck v. Riggin*, 40 Mo., 405; *Hun v. Cary*, 37 Am. Rep. [N. Y.], 546; *German Savings Bank v. Wulfekuhler*, 19 Kan., 60; *Merchants Bank v. Rudolph*, 5 Neb., 527; *McDowell v. Arkansas M. & A. Co.*, 38 Ark., 17; *Seale v. Baker*, 7 S. W. Rep. [Tex.], 742; *Prewett v. Trimble*, 17 S. W. Rep. [Ky.], 356; *Tyler v. Savage*, 143 U. S., 79; *Martin v. Webb*, 110 U. S., 7; *Foley v. Holtry*, 43 Neb., 137.)

HARRISON, J.

In this, an action instituted in the district court of Lancaster county, the appellee sought and was accorded a decree by which was effected a rescission of a contract of sale to him by appellant of a number of shares of the stock of the Nebraska Savings Bank. The grounds for rescission were the alleged false representations of the appellant, by which, it was claimed, the appellee was induced to purchase the stock. The sale was made on or about January 7, 1893, and this suit was brought June 22 of the same year. Defendant's answer contained a denial of any false representations on his part, and contained affirmative allegations that the statements made

by him to appellee in the course of the contract of sale were true, and were made in good faith; also denial that appellee relied in the purchase of the stock on statements of appellant, and further stated that appellee made inquiries elsewhere, and of other persons, and thus obtained the information on which he relied in making the purchase; and further, that with full knowledge of all the facts in relation to the stock and its value, as affected by the condition of the bank financially, the appellee held and controlled the stock for a number of months.

The appellant argues: "First, the evidence is insufficient to sustain a judgment against him; second, that upon the findings of the court and proof, judgment should have been in favor of appellant." The trial judge, in compliance with a request of appellant's counsel, made written findings of facts, among which was one in regard to the representations made, from which we gather clearly that they were not only such as might be regarded as opinions with reference to the value of the stock, as the counsel for appellant contend, but were in relation to the then existing condition of the bank; and they were material, for, if true, the value of the stock would be much enhanced, and if false, correspondingly decreased. There was also a finding that the representations made by appellant were untrue, and further, that the appellee relied upon them as true in the purchase of the stock. There was a further finding that the appellant did not know that what purported to be the facts of his statement were false or different than he asserted. We will here say that at the time of the negotiations between the parties, which culminated in the sale of which the rescission is herein sought, the appellant stated the fact that he was then, and had been for some considerable time, a director of the bank, the stock of which was the subject of sale. It was also of the findings that appellee, as soon as he ascertained that the representations made by appellant at the time of the sale were untrue, tendered a return of the stock and demanded a rescission, which was refused.

In respect to the contention that the judgment is not sustained by the evidence, we have carefully examined the evidence, and while it is conflicting as to many points in issue, the findings of the court upon which the judgment is based are sufficiently supported by the evidence and will not be disturbed. We do not deem a discussion of the evidence in detail necessary here, hence omit it. The rules of law applicable to the facts, reduced to conclusions as embodied in the findings of the trial court, may be said to be well established. As was stated in an opinion of this court, written by IRVINE, C., in the case of *Foley v. Holtry*, 43 Neb., 137, in which the rescission of a sale of shares of the capital stock of a corporation was in issue: "The elements necessary to sustain such an action have been recently summarized by this court as follows: (1) It must be alleged and proved what representation was made; (2) that it was false; (3) that plaintiff believed the representation to be true; (4) relied on and acted upon it; (5) and was thereby injured. (*Stetson v. Riggs*, 37 Neb., 797.)". But in this case we have another fact; *i. e.*, the party who made the representations was without knowledge as to their truth or falsity, and believed them to be true. In the opinion in *Foley v. Holtry, supra*, it was observed on this point: "To these requirements the courts formerly added another, to-wit, that defendant must have known that the representations were false. A more accurate statement, in view of the later decisions, would be that the defendant must either know that the representations were false, or else they must be made, without knowledge, as positive statements of known fact. The rule as thus formulated practically charges the defendant with notice of the truth in all cases where he makes positive representations of existing facts." It is claimed that the appellee might have made such an examination of the affairs of the bank and of its condition financially as would have afforded him full information in regard thereto, and that it devolved upon him so to do. With this view we cannot agree.

The statements of appellant were what purported to be facts known to him, and were positive in their character, and the appellee could not have ascertained their truth or falsity without an investigation. Under such conditions he was warranted in relying upon the representations as made. (*Foley v. Holtry, supra.*)

It is also urged that the appellee made inquiries of other persons in regard to the capital stock of the bank and its value, and also the other matters that were subjects of the representations made by appellant; that having done so and thus obtained information thereupon, he must be presumed to have relied upon such information, and not upon the representations of appellant. It was shown that appellee had a conversation with at least one other person besides appellant in regard to the stock of the bank, its value, and other points bearing on such value; but it does not appear that by so doing he discovered, to any extent or in any particular, the falsity of the representations made by appellant, nor does it appear that he relied in any degree upon the information thus obtained; hence the fact that he had such conversation did not impair his right to this action against the appellee.

The judgment of the district court was sufficiently sustained by the evidence, and in accordance with the rules of law applicable to the facts, and will be

AFFIRMED.

MCKINLEY-LANNING LOAN & TRUST COMPANY, APPELLANT, V. EDWARD C. ALDRICH ET AL., APPELLEES.

FILED MARCH 3, 1897. No. 7137.

Usury. To constitute a plea of usury facts must be stated which disclose a contract between the parties thereto by which there is received or reserved a rate of interest in excess of the maximum allowed by law.

APPEAL from the district court of Frontier county. Heard below before WELTY, J. *Reversed.*

Tibbets, Morey & Ferris, for appellant.

J. H. Broady, contra.

HARRISON, J.

The plaintiff commenced this action in the district court of Frontier county to foreclose real estate mortgages. At a trial of the issues joined the trial court entered a decree of foreclosure, by which the amount of plaintiff's alleged claim was reduced by the favorable finding on the allegation in the answer that the loan transaction evidenced by the notes and mortgage in suit was usurious. The plaintiff has appealed to this court. Subsequent to the appearance of the record here a motion was made to quash the bill of exceptions, which, on hearing, was sustained; hence the evidence adduced on the trial is not before us, and the sole question for determination is, will the pleadings support the judgment rendered? and is to be settled by an examination of the answer, to ascertain whether, to the extent there was attempted in it to set up the usurious character of the transaction of the mortgage loan, it was, as a plea thereof, sufficient. The portion of the answer we have referred to was as follows, after admitting the execution and delivery of the notes and mortgages alleged in the petition: "That the notes and mortgages described in plaintiff's petition were given for a loan of $800, running for five years, at ten per cent interest per annum from date, payable semi-annually; that the notes of $12 each described in count 1 of plaintiff's petition had no other consideration than that of being for a part of the interest on the said loan of $800, and admits the matters alleged in count 2 of said petition to be true. Alleges that said transaction and loan of $800 as above set forth and the notes and mortgages given in connection with said trans-

action are usurious in this, that in the making thereof the payees, W. H. Lanning and W. H. Lichty, in addition to the contract by said defendant to pay them ten per cent per annum, the full amount allowed by law, received and reserved $100 as illegal interest and bonus on said loan; that of said loan of $800 defendants only received the sum of $700, as follows: $350 at the time said loan was made, and $350 sixty days thereafter; that the rate of interest on said loan amounted to more than ten per cent per annum, and that the above transaction was between W. H. Lanning and W. H. Lichty and said defendants."

In the decision of the case of *Leonard v. Cox*, 10 Neb., 541, which was an appeal by the plaintiff in the case from a decree of foreclosure of a mortgage in which he had been adjudged to receive a less sum than claimed, by reason of the favorable consideration in the trial court of the defendant's plea of usury, it was held in the opinion, written by MAXWELL, C. J.: "To constitute usury there must be a contract between the lender and the borrower, by which the lender receives or reserves a greater rate of interest than the maximum allowed by law;" citing *Richards v. Kountze*, 4 Neb., 205. And in the case of *New England Mortgage Security Co. v. Sandford*, 16 Neb., 689, wherein the sufficiency of an answer or plea of usury in the foreclosure of a mortgage loan was under consideration, the plea in that case being very similar to the one in the case at bar, in practical effect the same, it was said in the opinion, written by MAXWELL, J.: "The proof cannot make a stronger defense than the answer in the case. It is therefore essential, in pleading usury, to state with whom the usurious agreement was made, its nature, and the amount of usurious interest agreed upon or received. (*Manning v. Tyler*, 21 N. Y., 567; Maxwell, Pl. [3d ed.], 105.) The court will not presume that the parties intended to evade the law, but there must be an allegation to that effect."

In the case of *Rose v. Munford*, 36 Neb., 148, in which,

inter alia, the sufficiency of a plea of usury in an answer was considered, it was stated: "We agree with appellee that the answer does not allege sufficient facts to constitute the defense of usury. To make a contract usurious there must be an agreement between the borrower and lender by which the latter receives or reserves a greater rate of interest than the law allows. There must be an intent on the part of the borrower to give and of the lender to receive interest in excess of the legal limit. (*Leonard v. Cox*, 10 Neb., 541; *New England Co. v. Sandford*, 16 Neb., 689.) Testing the answer by the above rule, the pleading is clearly insufficient. The facts alleged therein do not show that the contract was usurious; nor can it be inferred from the facts stated that there was an intent to evade the law on the subject of usury. It fails to aver the rate of interest agreed upon. True, the answer sets up the amount of money received by Munford on the loan, but it does not state that the difference between the amount so received and the face of the note was intentionally retained by Sandford as interest, nor can any such a conclusion be properly drawn from the facts alleged." (See, also, *Anglo-American Land Mortgage & Agency Co. v. Brohman*, 33 Neb., 409; *Rainbolt v. Strang*, 39 Neb., 339; *Bell v. Stowe*, 44 Neb., 210.) Tested by the established rule in this state, set forth in the cases to which we have referred, the plea of usury in the answer in the case at bar is insufficient. It fails to show the intent with which the amount alleged to have been reserved was so retained, or that it was pursuant to any contract or agreement between the parties as interest on the principal sum. The answer was insufficient and the judgment must be reversed and the cause remanded to the district court for further proceedings.

REVERSED AND REMANDED.

H. M. HOPEWELL V. M. S. MCGREW, ASSIGNEE.

FILED MARCH 3, 1897. NO. 7147.

1. **Pleading:** WAIVER OF DEFECT. That the party answers over after his general demurrer to a petition is overruled is not a waiver of the defect that the petition fails to state a cause of action. (*Cox v. Peoria Mfg. Co.*, 42 Neb., 660.)
2. **Principal and Surety.** The liability of a surety is measured by, and will not be extended beyond, the strict terms of his contract.
3. **Attachment Bond:** SURETIES. The obligation of a surety in an undertaking in attachment is to pay the obligees thereof the damages sustained by reason of the attachment, "if the order be wrongfully obtained."
4. **Action on Attachment Bond:** PLEADING. The petition disclosed that the action was brought by the assignee of a party, a stranger to those described in the attachment bond, and was one for damages which he claimed to have sustained by reason of the seizure under the writ of attachment of property of which he was in possession as such assignee. *Held*, Not to state a cause of action on the bond.

ERROR from the district court of Burt county. Tried below before AMBROSE, J. *Reversed.*

E. W. Peterson, for plaintiff in error.

Charles T. Dickinson, contra.

HARRISON, J.

This, an action on an undertaking in attachment proceedings, was instituted in the district court of Burt county November 27, 1891. A trial of the issues presented by the pleadings as settled and filed in accordance with the rulings of the court resulted in a judgment in plaintiff's favor, and the case has been removed to this court by error proceedings on the part of defendant.

The plaintiff in error was surety upon the attachment bond in suit and the action was against him alone, his principal not being joined. By one of the assignments of error the point is raised, were there sufficient facts

stated in the petition to constitute a cause of action? The petition we will now give in part as it appears in the record, and of other portions the substance, as follows:

"Comes now the above named plaintiff and for cause of action against said defendant complains and says, that heretofore, to-wit, on the 7th day of October, 1889, Charles Erickson, a merchant doing business at Oakland, Nebraska, executed and delivered to F. F. Parker, sheriff of Burt county, Nebraska, a deed of assignment of all his property, for the benefit of his creditors; that within twenty-four hours after the execution and delivery of said deed to the said Parker, the said Parker caused the same to be recorded in the office of the clerk of Burt county, Nebraska, and immediately took possession of all the property of said Charles Erickson; that afterwards, to-wit, on the 14th day of June, 1890, one James R. Foree was duly elected by the creditors of said Erickson as assignee, due and legal notice of the time and place of said election having been given by the county judge of said county, as required by law. Immediately after said election the said Foree gave the bond required and entered upon the discharge of his duties as assignee of said estate.

"Plaintiff further represents that the term of office of said F. F. Parker expired in January, 1890, and the plaintiff herein is the duly elected, qualified, and acting successor in office of the said Parker as sheriff as aforesaid.

"On the 9th day of September, 1891, upon the application of the J. T. Robinson Notion Company, Sweet, Dempster & Co., and other creditors of said Charles Erickson, the county court made an order removing said James R. Foree from the further execution of said trust, and restored the plaintiff herein, as the sheriff of said county, to the execution of said trust, from which order no appeal has been taken, and the same remains unreversed and in full force and effect.

"Plaintiff further represents that on the 12th day of October, 1891, Henry W. King & Co., of Chicago, Illinois,

commenced in the district court of Burt county, Nebraska, an action by attachment against the firm of Anderson & Erickson, and F. F. Parker as assignee, for the recovery of money from said firm, alleging in the affidavit for said attachment and as a ground for said attachment, 'That said Anderson & Erickson has assigned, removed, and disposed of a part of the said firm property with the intent to defraud their creditors, and the creditors of said firm, and that said Anderson & Erickson are about to dispose of the balance of their property with the intent to defraud their creditors, and the creditors of the firm; that the said Anderson & Erickson are about to convert their partnership property into money for the purpose of placing it beyond the reach of their creditors.'

"That said Anderson & Erickson have turned over all their firm property to F. F. Parker, sheriff of Burt county, Nebraska, upon a pretended assignment for the benefit of the creditors of Charley Erickson, but that said pretended assignment was fraudulently made and for the purpose of defrauding the creditors of the firm, and is illegal and void."

At the same time said Henry W. King & Co., and the defendant herein, H. M. Hopewell, executed and delivered to the clerk of said court the following undertaking:

"In the District Court of Burt County, Nebraska.

"HENRY W. KING, WILLIAM C. BROWNING, and EDWARD W. DEWEY, partners doing business under the name and style of Henry W. King & Co., Plaintiff,

v.

ANDERSON & ERICKSON, a firm doing business in Nebraska and not incorporated, and F. F. PARKER, Sheriff of Burt County, Nebraska, as assignee, Defendants.

"Whereas said Henry W. King, William C. Browning,

and Edward W. Dewey, doing business under the name and style of Henry W. King & Co., have commenced an action in the district court of Burt county against said Anderson & Erickson to recover the sum of $1,306.50 and have filed the necessary affidavit to obtain an order of attachment against said Anderson & Erickson: Now therefore we, Henry W. King & Co., of Chicago, and H. M. Hopewell, of Burt county, do hereby undertake to said Anderson & Erickson, defendants, in the penal sum of $3,000, that the plaintiff shall pay the defendants all damage not exceeding the above amount which said defendant may sustain by reason of the attachment in this action if the order therefor be wrongfully obtained.

"HENRY W. KING & CO.,
"By E. W. PETERSON,
"Their Attorney.
"H. M. HOPEWELL.

"I do hereby approve the above undertaking and the sureties thereon. F. E. WARD,
"Clerk of Dist. Court."

It was further stated that a writ of attachment was issued and "Which order was levied upon the following goods and chattels of the said Charles Erickson: all of the stock of dry goods, clothing, gents' furnishing goods, hats, caps, notions, boots and shoes, being all of the goods and store fixtures of the said Charles Erickson, also all the books of account belonging to said Erickson, all of said stock, fixtures, and accounts and books of account formerly belonging to the firm of Anderson & Erickson, but at the time of the levy of said order of attachment, and for some time prior thereto, had been transferred over to the said Charles Erickson by said firm, and by the said Erickson transferred over to the said F. F. Parker, as sheriff of said county as temporary assignee, under said deed of assignment, and at the time of said levy the firm of Anderson & Erickson had no interest in said goods; that all of said goods above described were taken into the care and custody of the coroner of said county, the sheriff

being a party to such action, and detained by said coroner for the period of —— days." There were further allegations, from which it appeared that the attachment was, on motion, dissolved and the attachment proceedings dismissed, from which adjudication there had been prosecuted no proceedings for its reversal, and after some further statements in regard to damages, which need no particular notice at this time, the petition closed with a prayer for judgment. To this petition was interposed the following demurrer:

"The defendant demurs to the petition of the plaintiff for the following causes, which appear on the face of the petition:

"1. The plaintiff has not legal capacity to sue.

"2. There is a defect of parties defendant.

"3. There is a defect of parties plaintiff.

"4. The petition does not state facts sufficient to constitute a cause of action."

Which was overruled and an answer which was in effect a general denial was filed for plaintiff in error. At the inception of the introduction of the evidence, objection was made to further proceeding in that direction on the ground that no cause of action was stated in the petition. The objection was overruled and evidence received. The plaintiff in error, notwithstanding he answered after the overruling of his general demurrer, may now be heard to insist on his objection that the petition did not state facts sufficient to constitute a cause of action. (*Cox v. Peoria Mfg. Co.*, 42 Neb., 660; *Farrar v. Triplet*, 7 Neb., 237; *O'Donohue v. Hendrix*, 13 Neb., 255; *Burlington & M. R. R. Co. v. Kearney Co.*, 17 Neb., 511; *Singer Mfg. Co. v. McAllister*, 22 Neb., 359; *Renfrew v. Willis*, 33 Neb., 98; 6 Ency. Pl. & Pr., 365.) What we have just stated being the rule, the question then is presented in this case, was there a cause of action against plaintiff in error and against defendant in error, stated in the petition?

The basis of the action, as pleaded in the petition, was the undertaking in attachment, which, by its terms, was

for the benefit and security of Anderson & Erickson, and not of defendant in error. It is not disclosed in the petition that the Charles Erickson, of whom the defendant in error was the assignee, was the Erickson who figured as one of the partners of the firm of Anderson & Erickson, or that he was other than a stranger to said firm; hence he must here be considered as a third person and as not being connected with the partnership. It is true that defendant in error, as assignee of Charles Erickson, was made a party defendant in the suit in which the attachment was issued and in the attachment proceedings. It is further true that as assignee of Erickson the defendant in error was in possession of the goods upon which the levy of writ of attachment was made. Why the defendant in error was made a party in the attachment case is not disclosed in the petition in this action, but presumably it was that his rights in and to the attached property might be litigated in that suit. It is a well-established general rule that the liability of a surety is governed by and will not be extended beyond the precise terms of the contract. (*Curtin v. Atkinson*, 36 Neb., 110; *Crane v. Specht*, 39 Neb., 123.) The bond on which this suit was predicated, signed by plaintiff in error as surety, was in terms for the benefit of Anderson & Erickson, the partnership, to secure it against damages if the writ was wrongfully obtained, and could not inure to the defendant in error as the assignee of the individual personal property of Charles Erickson, though it was the same property attached as belonging to the partnership. The assignee was not a party to the bond, and his rights, if any, in the property, were not covered by the bond. The assignee occupied no better position than would a third person not a party to the suit, whose property might have been attached or who might have claimed the property attached, as a purchaser from Erickson, and such third person clearly could claim no rights under the bond. (*Edwards v. Turner*, 6 Rob. [La.], 382; *Davis v. Commonwealth*, 13 Gratt. [Va.], 139; 1 Shinn, Attachment & Garnishment,

sec. 185; *Mason v. Rice*, 23 N. W. Rep. [Ia.], 384.) The undertaking of the surety in attachment is to pay such damages as the obligees may sustain by reason of the attachment, "if the order be wrongfully obtained." If the officer, by virtue of the writ, seizes the property of a person other than the one whose property the writ commands him to take, the damages, if any, occasioned by the levy do not arise from the wrongful suing out of the writ, but are the result of its wrongful levy. (*Mason v. Rice, supra.*) In the case at bar the damages, if any, suffered by the assignee were not by reason of the writ of attachment having been wrongfully obtained, but because of its wrongful levy. The bond was not made for his protection and was not intended to and did not cover or was not security against a wrongful levy on or seizure of property in his possession and to which he had the right; hence no action on the facts as stated in the petition arose in his favor. It follows from the views expressed that the petition did not state a cause of action in favor of defendant in error, therefore the judgment of the trial court in his favor must be reversed and the cause remanded.

REVERSED AND REMANDED.

THOMAS ROBINSON ET AL. V. KILPATRICK-KOCH DRY GOODS COMPANY.

FILED MARCH 3, 1897. No. 7182.

1. **Chattel Mortgages:** TITLE. A chattel mortgage creates a lien on the property described therein but does not pass the legal title thereto.

2. **Petition in Error:** AMENDMENT. A party will be allowed to amend his petition in error to cover a point which, so far as the record discloses, was presented in the trial court.

8. **Replevin**: PLEADING: CHATTEL MORTGAGES: EVIDENCE. The introduction in evidence of a chattel mortgage, in which is described property the subject of an allegation of general ownership and right of possession in the plaintiff in an affidavit and petition in a replevin action, is not proof of such allegation.

ERROR from the district court of Buffalo county. Tried below before BATES, J. *Reversed.*

Greene & Hostetler, Dryden & Main, and *George E. Evans,* for plaintiffs in error.

Calkins & Pratt, contra.

HARRISON, J.

It appears herein that some time prior to and during the year 1890 W. L. Randall was engaged in mercantile business in the village of Gibbon, Buffalo county, this state. In the course of such business he became indebted to a number of wholesale dealers for goods and merchandise, including the Kilpatrick-Koch Dry Goods Company, defendant in error in this cause. November 20, 1890, the defendant in error obtained from Randall a chattel mortgage on his stock of merchandise to secure the payment of his indebtedness to the company, and on the same date other chattel mortgages, in favor of other parties and firms, were executed by Randall, a number of which were subsequently, together with the accounts or notes the payment of which they were given to secure, assigned to defendant in error. The company took possession of the stock of goods under its mortgage, and other parties instituted actions and attachment proceedings. In some of the actions judgments were obtained and executions issued. After service of the writs of execution and attachment on the stock of merchandise by the plaintiffs in error, one of them the sheriff of Buffalo county and the other a constable, the defendants in error commenced this, an action of replevin, against the officers to recover the possession of the merchandise. A trial of

the issues in the case resulted in a verdict and judgment favorable to the company. The unsuccessful parties have prosecuted error proceedings to this court.

The counsel for plaintiffs in error made application, by motion, for leave to amend the petition in error to include an assignment that the evidence was insufficient to support the verdict, which has been granted. It is disclosed by the record presented here that one of the grounds of the motion for new trial in the district court was the insufficiency of the evidence to sustain the verdict rendered. From this it must be concluded that the question was raised in the trial court, hence the amendment was proper and allowable. The averments in regard to the defendant in error's ownership of the merchandise in controversy were identical in the petition and the replevin affidavit, being in each an allegation of general ownership and in the following terms: "That the plaintiff is the owner and entitled to the immediate possession of the following described goods and chattels, to-wit:" The verdict was: "That the plaintiff, at the commencement of the action, was the owner and entitled to the possession of the goods described in plaintiff's petition." The evidence introduced to show ownership in the defendant in error was the chattel mortgage executed and delivered to the company by Randall, and the other chattel mortgages on the stock of goods of which it had received assignments. These did not prove the defendant in error to be the owner of the title to the goods; did not prove him to be the "owner" as alleged in the petition and as determined in the verdict. The title to mortgaged chattels remains in the mortgagor until divested by foreclosure of the mortgage. The mortgagee of chattels acquires by the execution and delivery of the mortgage a lien on the property described therein, but does not take the legal title. (*Musser v. King*, 40 Neb., 892; *Randall v. Persons*, 42 Neb., 607; *Sharp v. Johnson*, 44 Neb., 165; *Camp v. Pollock*, 45 Neb., 771; *Murray v. Loushman*, 47 Neb., 256; *Garber v. Palmer*, 47 Neb., 704;

Griffing v. Curtis, 50 Neb., 334; *Strahle v. First Nat. Bank of Stanton*, 47 Neb., 321.) In the decision in the last mentioned case it was said in the syllabus: "An allegation of general ownership in a petition and affidavit in replevin is not supported by the introduction of the chattel mortgage under which the plaintiff claims the right of possession of the property replevied." And further on the same point, in the body of the opinion: "There was likewise error in the ruling of the court in directing a verdict for the bank, for the obvious reason there was no evidence to show that the plaintiff was the owner of the property. At most, it had but a special interest therein by virtue of the mortgages. The *allegata et probata* did not agree; hence the plaintiff failed to make out its cause of action." It follows that the evidence in the case at bar was insufficient to warrant or sustain the verdict. A discussion of the other assignments of error is not deemed necessary. The judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

CITY OF SOUTH OMAHA V. JAMES POWELL.

FILED MARCH 3, 1897. NO. 7058.

1. **Instructions**: EXCEPTIONS. An exception to all of the instructions is unavailing if any one of them is correct.
2. ———: ———. Where several distinct requests to charge are denied, an exception to the refusal of all of them is insufficient, unless it appears that each should have been given.
3. ———: ASSIGNMENTS OF ERROR. An assignment in a motion for a new trial that a group of instructions is erroneous is bad if any one of them was properly given.
4. ———: REPETITIONS. A refusal of an instruction already substantially given is not error.
5. **Municipal Corporations**: STREETS: NEGLIGENCE. A city is required to exercise reasonable care and diligence in keeping a street in

a safe condition for travel, even though the street may not be one frequently used by the public.

6. ———: UNSAFE BRIDGE: DAMAGES: JUDGMENT FOR $2,500. Evidence examined, and *held* that the judgment is not excessive.

ERROR from the district court of Douglas county. Tried below before OGDEN, J. *Affirmed.*

James H. Van Dusen and *E. T. Farnsworth*, for plaintiff in error.

James Hassett and *E. M. Bartlett, contra.*

NORVAL, J.

In September, 1891, while the defendant below, James Powell, was crossing a bridge on F street, in the city of South Omaha, with a team and loaded wagon, the bridge collapsed, throwing him, the horses, and wagon into the creek, thereby injuring plaintiff and his team, and breaking the wagon. This action was instituted against the city to recover the damages sustained. The trial resulted in a verdict for the plaintiff in the sum of $5,000, and he having filed a remittitur for $2,500, a judgment was rendered in his favor for a like amount. The city has removed the record into this court for review.

The first thirteen assignments contained in the petition in error relate exclusively to the giving of certain instructions, and to the refusing of the requests to charge submitted by the city. Exception was taken in the trial court to the instructions *en masse*, those refused and also those given; therefore error cannot be predicated upon the instructions unless the entire charge was bad, or each of the requests should have been given. (*Union P. R. Co. v. Montgomery*, 49 Neb., 429, and cases there cited.) There is no claim that all the instructions given are erroneous, and where they are not, such an exception is insufficient. Again, the instructions were improperly assigned in the motion for a new trial, they being grouped in the assignments of error therein as follows:

"1. The court erred in giving on its own motion instructions Nos. 1, 2, 3, 4, 5, 6, 7, 8, and 9.

"2. The court erred in refusing to give instructions Nos. 1, 2, 6, 7, 8, 9, and 10 offered by the defendant.

"3. The court erred in giving instructions 3, 4, and 5 offered by the plaintiff."

Similar assignments in motions for new trials have been held insufficient repeatedly, and that they would be considered by the appellate court to the extent alone of ascertaining if any one of the instructions was correct in each group given, and that at least one of those refused was properly denied. Counsel for the city do not claim that all the instructions given by the court on its own motion were erroneous. They offer no criticism whatever upon the first and second paragraphs of the charge, and the ninth in the same group is not contained in the record before us; therefore the first assignment must be overruled. There is no pretense that all the instructions embraced within the third assignment were erroneous, and clearly the fifth instruction given at the suggestion of the plaintiff was free from fault, which told the jury that the reasonable care and caution required of the plaintiff was that degree of care and caution which might be reasonably expected from an ordinarily prudent person under the circumstances surrounding the plaintiff at the time of the alleged injury. One, if not more, of the instructions of the defendant which was refused was in every essential particular covered by the charge of the court, hence it was not reversible error to decline to repeat the same proposition to the jury. It follows that since each assignment in the motion for a new trial is not well taken as to all the instructions referred to therein, it requires no further consideration at our hands. (*Union P. R. Co. v. Montgomery, supra.*)

The court excluded testimony offered by the city for the purpose of showing that the bridge where the accident happened was located on a street in an unfrequented and remote part of the city, over which

the travel was not so great as on other streets of the city. This ruling is now assailed. The testimony was not material. It was the duty of the defendant to keep all its streets and bridges in a reasonably safe condition for travel, whether located in one part of the city or another, and its care and diligence in respect of them are not controlled or affected by the fact that the bridge or street is less frequently used than some others within the municipality. (*City of Lincoln v. Smith*, 28 Neb., 762; *City of Ord v. Nash*, 50 Neb., 335.)

We do not see how any prejudice could have resulted from the oral remarks of the judge during the progress of the trial, or that he in the least invaded the power of the jury, and the assignment directed to that point is without merit.

Finally, it is urged that the damages are excessive. The amount found by the jury, $5,000, was regarded by the trial judge as too large, and a remittitur of $2,500 was ordered and filed. A perusal of the evidence satisfies us that the jury could have based a finding thereon that the plaintiff received a permanent injury; hence judgment for $2,500 is not so excessive as to call for a reversal.

AFFIRMED.

WESTERN WHITE BRONZE COMPANY V. JOSEPH PORTREY ET AL.

FILED MARCH 3, 1897. No. 7093.

1. **Principal and Agent: SET-OFF.** A collecting agent cannot extinguish a debt due his principal, by setting off against it his own debt, unless authorized to do so by his principal. (*McCormick v. Keith*, 8 Neb., 142.)

2. **Novation.** There can be no novation of a debt in the absence of an unqualified discharge of the original debtor by the creditor.

ERROR from the district court of Richardson county. Tried below before BUSH, J. *Reversed.*

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

Edwin Falloon and *C. Gillespie, contra.*

NORVAL, J.

Plaintiff is engaged in the manufacture and sale of bronze monuments at Des Moines, Iowa. In June, 1890, plaintiff, through one Anson Rising, its soliciting agent, obtained a written order from the defendants for a monument, and afterwards, in pursuance thereof, the monument was manufactured and shipped to and received by defendants. This is a suit to recover the contract price, the defenses being payment and novation. Plaintiff was unsuccessful in the court below, and it has brought the record here for review.

The facts relied upon to establish the defense of payment are these: At the time the order for the monument was given, the said Rising, plaintiff's agent, was indebted to the defendant Portrey for rent in a sum exceeding the contract price of the monument. Subsequently, Rising, without the knowledge and consent of plaintiff, settled the account for the monument by setting off against it his debt to Portrey for rent and receipting him in full for the sum due the plaintiff. This did not amount in law to an extinguishment of the debt in controversy. The order for the monument contained this clause: "Agents are not authorized to make collections, or extend term of payments, without written orders from the company." No written authority was given Rising to settle with the defendants, or to collect the claim. Moreover, plaintiff, on the day the monument was shipped from Des Moines, notified the defendants in writing, through the mails, to "bear in mind that payment for this work must be made direct to the company, as no agent is authorized to make

collections for us, and no payment made to an agent will be recognized by the company, unless such agent can produce our special written authority." It is true there is some evidence in the record tending to prove that Rising had frequently made collections for plaintiff on orders taken by him for monuments; but this did not authorize Rising to extinguish the amount due from the defendants to plaintiff, by setting off against it his own debt to Portrey. (*McCormick v. Keith*, 8 Neb., 142.)

The defendants were no more successful in their attempt to establish a novation of the debt. Mr. Rising testified that he went to Des Moines subsequent to the delivery of the monument, and while there he saw one Johnson, plaintiff's secretary and manager, and "requested him to charge that monument to me, and he agreed to do so, and stop writing to Mr. Portrey." Mr. Johnson, by deposition, gives the following version of the same conversation: "Mr. Rising called and stated that Mr. Portrey wanted to settle with him, and requested that I give him a written order directing the defendants to pay Rising for the monument. This I declined to do, stating to him positively that the company did its own collecting and preferred to continue, our method being to collect through banks and attorneys exclusively, and paying agents by check as fast as the commissions were due them. Rising said then that he didn't want us to press Mr. Portrey for collection for he was an influential man in the community in which he lived and he wanted to use him to assist him in getting three other orders, and he said when he returned home he would remit us the money himself or make some arrangements to get it and pay us the amount due on the Portrey monument, and then asked us if we would send him a written order directing Mr. Portrey to pay the money to him, and I replied that it made no difference to us who paid us the money, and on receipt of the money we would be perfectly willing, and would send him such an order, but we would not do it before we got our money. Mr. Rising never sent us the

money, and hence we never sent the order." It will be observed that there is a conflict in the evidence as to whether plaintiff ever agreed to charge Mr. Rising the price of the monument. But conceding that Rising's testimony is true, nevertheless it is insufficient to establish a novation. He does not pretend to say that Mr. Johnson, for and on behalf of his company, agreed to release or discharge the defendants from their obligation to pay for the monument, or to the substitution of Rising in the place of the original debtors. There can be no novation in the absence of an unqualified discharge of the original debtor by the creditor. (*Pimental v. Marques*, 109 Cal., 406; *Aldritt v. Panton*, 17 Mont., 187.)

The evidence fails to sustain the verdict. The judgment is reversed, and the cause remanded for a new trial.

REVERSED AND REMANDED.

CITY OF OMAHA V. FANNIE E. RICHARDS, ADMINISTRATRIX.

FILED MARCH 3, 1897. No. 6581.

Municipal Corporations: PONDS: DEATH OF CHILD: LIABILITY OF CITY. The former decision in this case (49 Neb., 244, 68 N. W. Rep., 528) adhered to.

REHEARING of case reported in 49 Neb., 244. *Affirmed.*

W. J. Connell and *E. J. Cornish*, for plaintiff in error.

Breckenridge & Breckenridge and *L. F. Crofoot, contra.*

NORVAL, J.

An opinion was handed down in this case at the last term affirming the judgment below (49 Neb., 244, 68 N.

W. Rep., 528). On application of the city a rehearing was granted, and the cause has been argued and submitted to us for determination.

It is contended that the facts developed by the undisputed testimony are different from what they were assumed or stated to be in the opinion already filed. That the direction of South Twenty-fifth street, in the city of Omaha, was incorrectly given in that opinion when filed, is conceded; but it was an immaterial error, which did not in the least degree control the conclusion reached,—an error which has been corrected in the official report of the case. We will briefly notice the alleged inaccuracies in the statement of facts in the former opinion.

The city attorney insists that plaintiff's intestate was drowned on private property, and that this court was in error when it stated there was a conflict in the evidence as to whether the drowning occurred in the street or upon premises adjacent thereto. The record reveals that some of the witnesses testified that young Weston lost his life in the water on Mr. Connell's lot, while Lewis Peterson states it as his opinion the boy was drowned in the water on the street. It escaped the attention of the writer that the further examination of the witness Peterson developed the fact that he was not in a position to have seen the accident, which point was not urged on the former hearing, else the court would not have been led to suppose the evidence was conflicting as to the exact place where Weston went down, when the witnesses competent to speak upon the subject agree that the accident happened on Mr. Connell's property, near the street. But this misconception of the evidence did not lead to the affirmance of the judgment, because the case was tried by both parties upon the theory that it made no difference whether the drowning occurred in the street or upon private property, and the city attorney requested the trial judge to so instruct the jury and the request was given. Again, it was distinctly stated in the opinion filed that "it is quite immaterial whether

he [the boy Weston] was drowned in the water in the street or on the adjacent premises, in close proximity to the street, since the negligence of the city caused the accumulation of the water, consisting of a single body extending nearly one-fourth the distance across the street to the abutting properties, and farther, that the raft containing the deceased floated from the street upon the properties abutting thereon. * * * It would have been different if the pond had been entirely upon private property, and not in close proximity to a street. In such case there would be no liability upon the city, since it would have been guilty of no breach of duty. It is undisputed that this pond of water extended into the street, and the city cannot escape liability merely because the drowning occurred upon the adjacent premises." The language just quoted shows that the conclusion then reached was in no manner influenced by the assumption that there was competent evidence to establish that the place where the boy was drowned was not on private property, but in the street.

It is also urged that the proofs were insufficient to justify the conclusion of the court on the former hearing, that the accumulation of water was occasioned by the negligence of the city in grading the street in question and constructing the storm sewer therein; but, on the contrary, that the pond was created by Connell and Clarke making a fill in the draw on their premises, thereby damming up the water. It is true that those parties filled in a portion of their lots with earth in such a manner as to constitute a dam across the draw or ravine in question a short distance below where it is crossed by South Twenty-fifth street, which caused the water coming into the ravine to back up across said street, and formed the pond in which Weston was drowned. It is likewise undisputed that the city raised the grade of the street for a portion of its width at the point where it intersects said ravine, and that the manhole connected with the storm sewer was located west

of this embankment and near the west line of the street, and was constructed to such a height above the natural surface of the ground as to prevent the drainage of the water from the pond into the sewer. Had the manhole been properly put in, and another one, or a catch basin, had been provided near the east line of the street, connected with a drain leading into the sewer, no water would have accumulated in the street, and the sidewalk which was used by the boys as a raft would not have become detached and floated upon the water, and in all probability Weston would not have lost his life. The negligence of the city in the respect indicated contributed to the accident. It cannot escape responsibility on the ground that the embankment or dam constructed by private parties upon their own properties caused the surface water coming down the ravine to back up over the street in question. Even though the city may have had no right to go upon the lots of Connell and Clarke to remove the dam, or to drain the pond thereby formed, it could, at least, have made proper provision for the draining of the water from the street. Having failed so to do, it was guilty of negligence.

The former opinion is criticised because the only reference therein to the authorities cited by the city was the mere statement that they were not based upon similar facts to those in the case at bar. To emphasize what was then said, a brief reference to some of the cases will be made, although a review of all will not be attempted.

In *Omaha & R. V. R. Co. v. Martin*, 14 Neb., 295, the railroad company in grading its road-bed had made a deep excavation within its right of way. In the night-time, Martin, with a heavily loaded wagon, left the main traveled highway and followed some tracks in which the public had traveled, but which had not been used for several months, and in so doing drove his team into said excavation and was injured. This court held the company was not liable, inasmuch as it had been guilty of no breach of legal duty.

In *Murphy v. City of Brooklyn*, 118 N. Y., 575, a boy was drowned in an excavation on private property, about sixty feet from the street, caused by the pressure of sewerage from an adjoining sewer. The excavation was separated from the street by an embankment, faced with a wall, upon which was a fence. It was ruled that there could be no recovery against the city.

Charlebois v. Gogebic & M. R. R. Co., 91 Mich., 59, was an action to recover damages for the death of plaintiff's intestate, a boy eight years old, caused by drowning in a pond of water on defendant's right of way. The judgment of the trial court for the company was affirmed on appeal. To the same effect are *Overholt v. Veiths*, 6 S. W. Rep. [Mo.], 74; *Moran v. Pullman Palace Car Co.*, 36 S. W. Rep. [Mo.], 659. Those decisions are the same as the case of *Richards v. Connell*, 45 Neb., 467.

The syllabus of *Goeltz v. Town of Ashland*, 44 N. W. Rep. [Wis.], 770, is as follows: "In an action against a town for the death of a boy, caused by an alleged defective highway, it appeared that the town authorities had built a wagon road or bridge, twenty feet wide, guarded on both sides by a substantial railing, across a ravine, and that twenty feet north of the wagon road they had built a sidewalk, also properly guarded by rails. Between the sidewalk and the road, and from four to six feet below, there was an open space not used for travel, in which someone, without authority from the town, had dug a hole four feet deep that had become filled with water. While attempting to fill a rubber ball, and to get a drink at the hole, the boy fell into the water and was drowned. Held, that as the town had prepared a sufficiently safe track for the public travel, both for teams and footmen, it was not guilty of any negligence, and a verdict was properly directed for defendant."

The facts in *Witte v. Stifel*, 28 S. W. Rep. [Mo.], 891, are reflected by the syllabus in the following language: "Plaintiff's son, seven years old, went up to one of the cellar windows of a building in the process of construc-

tion, in a large city, which was about three feet from the street line, and tried to draw himself up by taking hold of a stone placed across the top of the window frame. The stone, not being fastened, fell and killed him. It was not shown that the owners of the building and the contractors knew of the dangerous position of the stone, or that children were in the habit of playing around the building. Held, that plaintiffs cannot recover, deceased having been a trespasser." This case would be in point if this suit was against Connell, instead of the city.

After much reflection and reinvestigation of the authorities, we are constrained to adhere to the views announced on the first hearing upon the questions of law then presented. A further discussion of them would be superfluous. Under the undisputed facts in the case the plaintiff was entitled to recover. The opinion heretofore filed is not in conflict with the decision in *Richards v. Connell*, 45 Neb., 467. The principles distinguishing the two cases are too marked to require mention here.

Attention is called to the tenth and fifteenth requests of the city to charge, which were refused, and which were not considered upon the former hearing. They are as follows:

"10. If you find from the evidence that the pond was caused by surface water accumulating on the streets and property adjacent thereto by reason of banks of earth deposited on the private property of Mr. Connell and Mr. Clarke, which prevented the free and natural flow of the surface water in that locality, then and in that case you are instructed that the defendant was not guilty of negligence in allowing said pond to accumulate, and your verdict will be for the defendant.

"15. You are instructed that the burden of proof is upon the plaintiff to prove, by a preponderance of the evidence, either that the defendant knew of the condition of the street in question, or that the said street had been in such condition on prior occasions, so as to have be-

come of such general notoriety that the defendant is presumed to have known its condition as to becoming flooded after rain."

The first of these requests was erroneous, inasmuch as it made the case turn upon the fact whether the surface water accumulated in the street and upon the vacant property resulted from the fill of earth made by Connell and Clarke on their lots, rather than from the negligence, or the want thereof, of the city in not providing suitable drainage of the water from the street. There was no dispute that the dam caused the water to back up on the street, and had such request been given, the jury, had they followed its command, could not have escaped returning a verdict for the city. As to the other request, it was sufficiently covered by the charge of the court. The former decision is adhered to.

AFFIRMED.

JOHN D. CREIGHTON ET AL., APPELLEES, V. M. C. KEITH ET AL., IMPLEADED WITH THADDEUS J. FOLEY, APPELLANT.

FILED MARCH 3, 1897. No. 7078.

1. **Review:** SUPERSEDEAS. While a supersedeas bond is not essential to obtain a review of a decree in an equity cause, such bond is indispensable to a stay of the enforcement of such decree pending the review.

2. **Res Judicata.** A judgment or decree in full force is binding upon the parties thereto, and their privies, as to the issues adjudicated.

APPEAL from the district court of Lincoln county. Heard below before HOLCOMB, J. *Reversed.*

E. J. Hainer and *T. Fulton Gantt*, for appellant.

E. C. Calkins, J. B. Strode, and *George E. French, contra.*

NORVAL, J.

In July, 1888, William M. Holtry and several others formed a corporation known as the North Platte Milling & Elevator Company, having its principal place of business at North Platte, and the purposes of its organization being, among others, the buying, selling, and storing of grain and the manufacture of mill products. The articles of corporation contained this provision: "The capital stock of the company shall be seventy-five thousand (75,000) dollars, divided into shares of one hundred (100) dollars each, forty per cent of which shall be paid in on or before the 10th day of July, 1888, and the residue when called for as provided in the by-laws of the company; provided that no assessment on capital stock shall be made unless there are dividends due and unpaid on capital stock sufficient to meet such assessment, and no assessment shall be made unless authorized by a vote of three-fourths of the capital stock." Forty per cent of the amount of the entire capital stock subscribed was paid down, but no other or further payments thereon have been made. After the corporation commenced business it became indebted to John C. Creighton and others, plaintiffs herein, and to secure which it executed mortgages upon its real estate, which were foreclosed on June 15, 1891. The property was sold under decree, and deficiency judgments were rendered against the corporation, upon which executions were issued and returned wholly unsatisfied. Thereupon this suit was instituted against the original stockholders and their assignees, Thaddeus J. Foley and others, claiming that the defendants were indebted to the corporation for sixty per cent of the amount of stock subscribed, praying a decree that the defendants be required to satisfy plaintiffs' judgments. From a decree for plaintiffs the defendant Foley alone appeals.

The petition, for cause of action against Foley, alleges that on the 24th day of February, 1890, he purchased of

his co-defendant Holtry 200 shares of the capital stock of the corporation, at which time only forty per cent of the amount of said stock had been paid, and that Foley assumed and agreed to pay the remaining sixty per cent thereof. To this charge in the petition Foley, in his answer, avers that Holtry, by fraudulent and false representations, did sell, convey, and transfer to Foley the amount of stock as stated in the petition; alleges that said sale was void, and pleads a decree of the district court of Lincoln county, rendered December 29, 1891, which vacated, set aside, and annulled said transfer of stock, in an action wherein said Foley was plaintiff and said Holtry was defendant. For reply to this portion of the answer, plaintiffs allege that they were not parties to the suit wherein said decree (which is set out in full in the answer) was rendered, and "that said decree has not become final, but that the case wherein the same was rendered is now pending on appeal in the supreme court of the state of Nebraska." A demurrer to this portion of the reply was overruled.

But one of the numerous questions argued in the briefs of counsel will be noticed, and that is whether the said decree in the case of Foley v. Holtry is a bar to this action. It fully appears from the pleadings herein that in said suit, and prior to the bringing of this action, Foley obtained a decree against Holtry adjudging that the former, by the false representations of the latter, was induced to purchase said shares of stock, and that the court rescinded the transfer on that ground. For a report of the decision of this court affirming said decree see *Foley v. Holtry*, 43 Neb., 133. If the decree of rescission was in force at the time of the trial in the court below, and it is binding upon plaintiffs, it is a complete defense to this action, since, in contemplation of law, Foley was not a stockholder in the corporation, and, therefore, not liable for its debts. Section 675 of the Code of Civil Procedure authorizes appeals from the district court to the supreme court from final orders and decrees in all

actions in equity, if effected within six months from the rendition thereof. Section 677 declares: "No appeal in any case in equity now pending and undetermined, or which shall hereafter be brought, shall operate as a supersedeas, unless the appellant, or appellants, shall, within twenty days next after the rendition of such judgment, or decree, or the making of such final order, execute to the adverse party a bond with one or more sureties as follows:" etc. The giving of a supersedeas bond is not essential to the prosecution of an appeal in an equity cause, but is indispensable to a stay of proceedings pending a review in the appellate court. Such is the plain meaning and effect of the section above quoted, and this court has so held. (*McAusland v. Pundt*, 1 Neb., 211; *Parker v. Courtney*, 28 Neb., 605; *State v. Ramsey*, 50 Neb., 166.) In the second case, in construing section 677, it was said: "It is evident that where no supersedeas bond is filed the decree remains in full force, and that when a third party purchases property at a judicial sale, or in reliance upon the decree then in force, his rights cannot be divested by a subsequent reversal of the decree." (See Elliott, Appellate Procedure, secs. 544, 546; *Ryan v. Newcomb*, 45 Ill. App., 527, 147 Ill., 368.) The answer pleads the rendition of the decree, and the reply admits it to be true. While the reply avers that the case in which the decree was entered is pending on appeal in this court, it is not alleged that any supersedeas bond was ever given. "An appeal does not operate as a supersedeas, except as provided by statute, and upon the terms imposed by statute." (*Home Fire Ins. Co. v. Dutcher*, 48 Neb., 755; *State v. Ramsey*, 50 Neb., 166.) The reply, therefore, did not state sufficient facts to avoid the defense interposed by the answer, and the demurrer to the reply should have been sustained. The trial court found a bond was filed to stay the execution of the decree, but as such matter was not made an issue by the pleadings, the finding must be disregarded.

The appeal by Holtry in the case brought against him

by Foley did not have the effect to vacate and set aside the decree rendered therein. "If the judgment had not been appealed from it would, upon a familiar elementary principle, have so completely terminated and adjudicated all the questions embraced within the issues as to conclude the parties. The appeal does not take from the judgment its chief and much valued characteristic,—that of terminating the litigation by a final and conclusive adjudication; on the contrary, the judgment retains that characteristic and possesses that effect until reversed." (Elliott, Appellate Procedure, sec. 544.) A decree is affected by an appeal no further than that proceedings are stayed pending the review, where there has been filed a proper bond, and perhaps the decree is not admissible as evidence. In addition to the authorities already cited, see *Burton v. Burton*, 28 Ind., 342; *Burton v. Reeds*, 20 Ind., 87; *Randles v. Randles*, 67 Ind., 434; 1 Freeman, Judgments, sec. 328; *Day v. De Yonge*, 33 N. W. Rep. [Mich.], 527; *Woodbury v. Bowman*, 13 Cal., 635; *Burgess v. Hitt*, 21 Mo. App., 313; *People v. Rickert*, 159 Ill., 496; *Semple v. Eubanks*, 35 S. W. Rep. [Tex., Civ. App.], 509; *Tilley v. Washburn*, 91 Wis., 105. An appeal duly perfected, and where bond is given, strictly speaking, does not absolutely vacate the decree or judgment. If such were the case, all the appellant need do to escape the force of the judgment or decree against him would be to dismiss his appeal in the appellate court. Such dismissal does not reinstate the judgment, it merely releases the suspension of its enforcement which resulted from the appeal. We are aware that in *Minneapolis Harvester Works v. Hedges*, 11 Neb., 48, and *O'Leary v. Iskey*, 12 Neb., 137, it was said that an appeal from a justice judgment has the effect to vacate such judgment. The statement is mere *obiter*. It has been held that an appeal from a justice of the peace does not affect a lien created by the filing of the transcript of the judgment in the proper office prior to the perfecting of such appeal, except to stay the enforcement thereof. (*Dawson v. Cunning*, 50 Ill.

App., 286.) It is a familiar principle that a judgment or decree in full force is binding upon the parties thereto and their privies as to the issues adjudicated. (*Fuller v. Brownell*, 48 Neb., 145; *Gapen v. Bretternitz*, 31 Neb., 302; *Spear v. Tidball*, 40 Neb., 107; *Brigham v. McDowell*, 19 Neb., 407.) Applying this doctrine to the case before us, the decree in the suit of Foley v. Holtry was a complete bar to this action. They were both parties to the litigation wherein it was adjudicated that Foley was induced to purchase the stock in the corporation through the false and fraudulent representation of Holtry, and the sale was rescinded. This decree left the parties in the same situation as if the stock had never been transferred to Foley. Since privies, as well as parties, are bound by a decree, plaintiffs cannot maintain the present action against Foley. The creditors of the corporation predicate their right to recover against him upon the fact that Holtry transferred to him certain shares of the capital stock which had not been paid up. They are in privity with Holtry, and he being bound by the decree, they are likewise equally concluded. (1 Greenleaf, Evidence, sec. 523; 19 Am. & Eng. Ency. of Law, 156; Winfield, Adjudged Words & Phrases, 487.) The decree herein against Foley is reversed, and as to him the action is dismissed.

REVERSED AND DISMISSED.

I. M. RAYMOND ET AL., APPELLEES, V. W. H. LEINBERGER & COMPANY, APPELLEE, AND WILLIAM GLOVER, APPELLANT.

FILED MARCH 3, 1897. No. 7100.

Fraudulent Conveyances: RESALE: RIGHTS OF CREDITORS. One who has taken the title of an insolvent partnership firm to real property for the purpose of disposing of such real property and paying to a creditor of said insolvent firm a part of the proceeds of the

sale and to the firm itself the balance of such proceeds, may properly be held, in an equitable proceeding instituted against said firm and said trustee by one of its creditors, bound to pay such balance to such creditor.

APPEAL from the district court of Lancaster county. Heard below before STRODE, J. *Affirmed.*

Hainer & Smith, for appellant.

G. M. Lambertson, H. J. Whitmore, and *Darnall & Kirkpatrick, contra.*

RYAN, C.

This is an appeal of William Glover from a judgment in favor of I. M. Raymond and others, rendered against him by the district court of Lancaster county. Originally, W. H. Leinberger & Co. became indebted to the partnership firm of Raymond Bros. & Co., for merchandise purchased, in the sum of $731.90, and for this amount a judgment was rendered, on which an execution was returned *nulla bona.* This judgment formed the basis of this action against William Glover, who, it was charged in the petition in this case, with full knowledge of the insolvency of the firm of W. H. Leinberger & Co. and with the intention of defrauding the creditors of W. H. Leinberger & Co., had received a fraudulent transfer of all the real and personal property of said last named firm. The district court specially found that as to the personal property the transfer was made and received in good faith, and, as there is no appeal with respect to this finding, it must stand unquestioned. The real estate transfer was a few days subsequent to that of the personal property. With respect to this transaction the finding of the district court was as follows: "The court further finds that the said W. H. Leinberger and E. Erb [who composed the firm of W. H. Leinberger & Co.] sold their interest in a certain contract for the purchase of real estate, a house and lot in the town of Bromfield, to the defendant William Glover, and

that as the consideration therefor he agreed to pay the claim of Mrs. Garrett against the firm of W. H. Leinberger & Co., amounting to the sum of $735, and when he [Glover] sold said real estate he was to pay an excess over and above the said claim of $735 of Mrs. Garrett to said firm of W. H. Leinberger & Co. The court finds that the defendant [Glover] has paid the claim of Mrs. Garrett amounting to $735; that he has sold real estate for the agreed price of $1,500; that for the excess of $765 over and above the claim of Mrs. Garrett, the defendant is liable for and that he has not paid or accounted for the same." The judgment was for the sum last named as hereinbefore described. It is urged that there should have been no judgment for the reason that a garnishment proceeding was adequate to reach this money, hence that a resort to equitable proceedings should not have been tolerated. It is a sufficient answer to this to say that neither in the pleading nor throughout the entire trial in the district court was this question raised. It is too late to raise it now. (*Sherwin v. Gaghagen*, 39 Neb., 238.)

It is further urged in argument that the firm of W. H. Leinberger & Co. had transferred its right to the payment of this fund to W. V. Morse & Co., and that, therefore, the appellant Glover may be compelled to pay it twice, once under this assignment and once under the judgment in this case. As the firm of W. V. Morse & Co. is not a party to this action, and as this transfer was not pleaded in bar of plaintiffs' right of action, we cannot consider this question upon the issues joined.

It is furthermore urged that the judgment is not responsive to the prayer of the petition. In this we think counsel are mistaken, for the petition was framed upon the theory that Glover in his own wrong had obtained title to certain property, which properly should have been subject to the debts owing by W. H. Leinberger & Co., and there was a prayer that the defendant Glover accordingly should be held liable to plaintiff as creditors of W. H. Leinberger & Co. The finding of the district court upon

sufficient evidence was that Glover had sold the property for $1,500. As he was required to pay only the difference between that amount and the claim of Mrs. Garrett, he certainly had no cause to complain of the amount of the recovery. As he has disposed of the property so that it cannot be used for the payment of the debt due from W. H. Leinberger & Co. to plaintiffs, he cannot be heard to assert that thereby plaintiffs have been deprived of every remedy. Since Glover, as a mere trustee, has thus disposed of this property, he should be held accountable as such trustee. The finding of the district court was sustained by sufficient evidence, and, as the judgment was justified by the pleadings, it is

AFFIRMED.

FARMERS & MERCHANTS INSURANCE COMPANY V. DELILAH R. GRAHAM.

FILED MARCH 3, 1897. No. 7139.

1. Insurance: AGENTS: AGREEMENT TO PROCURE POLICY. A mere agreement of a soliciting agent to procure to be issued a policy of insurance does not create a present liability against the insurance company, his principal.
2. ———: AUTHORITY OF AGENT. Proof that an insurance agent has solicited and forwarded risks and collected premiums is not such evidence as will justify an inference, against positive uncontradicted evidence, that the powers of such agent were in excess of those above indicated.
3. ———: ———: PLEADING: EVIDENCE. The petition examined, and *held* not to state a cause of action. The evidence considered and found insufficient to sustain an action even if a good cause of action had been stated in the petition.

ERROR from the district court of Lancaster county. Tried below before STRODE, J. *Reversed.*

The opinion contains a statement of the case.

Charles E. Magoon, for plaintiff in error:

Richards did not have authority to bind the company. (1 May, Insurance [3d ed.], secs. 120, 138; *Insurance Co. v. Wilkinson*, 13 Wall. [U. S.], 222; *Eames v. Home Ins. Co.*, 94 U. S., 621; *Morse v. St. Paul Fire & Marine Ins. Co.*, 21 Minn., 407; *Armstrong v. State Ins. Co.*, 61 Ia., 212; *Insurance Co. v. Johnson*, 23 Pa. St., 72; *Constant v. Insurance Co.*, 3 Wall. [U. S. C. C.], 313; *Hackney v. Alleghany County Mutual Ins. Co.*, 4 Barr [Pa.], 185; *Dickinson County v. Mississippi Valley Ins. Co.*, 41 Ia., 286; *Critchett v. American Ins. Co.*, 53 Ia., 404; *Ayers v. Hartford Fire Ins. Co.*, 17 Ia., 176; *Security Ins. Co. v. Fay*, 22 Mich., 467; *Reynolds v. Continental Ins. Co.*, 36 Mich., 131; *Lanborn v. Fireman's Ins. Co.*, 16 Gray [Mass.], 448; *Lohnes v. Insurance Co. of North America*, 121 Mass., 439; *Bush v. Westchester Fire Ins. Co.*, 63 N. Y., 531; *Ayers v. Home Ins. Co.*, 21 Ia., 185.)

The proof fails to establish the existence of a contract of insurance. (1 Wood, Fire Insurance [2d ed.], secs. 5, 6, 15; *McCann v. Ætna Ins. Co. of Hartford*, 3 Neb., 198; *Strohn v. Hartford Fire Ins. Co.*, 37 Wis., 625; *Hartford Fire Ins. Co. v. Wilcox*, 57 Ill., 180.)

John S. Bishop and *Pound & Burr, contra:*

The insurer is bound by all acts of an agent within the apparent scope of his authority. (2 Wood, Fire Insurance [2d ed.], sec. 408; *Johnson v. Milwaukee & Wyoming Investment Co.*, 49 Neb., 68; *Thompson v. Shelton*, 49 Neb., 644.)

A mere technical objection should not defeat a recovery for loss of property insured. The contract of insurance should be sustained if possible. (*Phœnix Ins. Co. v. Barnd*, 16 Neb., 90; *Springfield Fire & Marine Ins. Co. v. McLimans*, 28 Neb., 846; *Nebraska & Iowa Ins. Co. v. Christiensen*, 29 Neb., 572; *State Ins. Co. v. Schreck*, 27 Neb., 527; *Nebraska & Iowa Ins. Co. v. Silvers*, 27 Neb., 541.)

The scope of the agent's power is, under proper instructions, a question to be determined by the jury. (*Ganser v. Fireman's Fund Ins. Co.*, 38 Minn., 74; *Rivara v. Queen's*

Ins. Co., 62 Miss., 721; *Murphy v. Southern Life Ins. Co.*, 59 Tenn., 440; *Dickinson County v. Mississippi Valley Ins. Co.*, 41 Ia., 286.)

As to third parties, in absence of notice to the contrary, the agent of an insurance company must be held to possess all the powers which his occupation and dealings fairly import to the public. (*Day v. Mechanics & Traders' Ins. Co.*, 88 Mo., 325; *Phœnix Ins. Co. v. Spiers*, 87 Ky., 286; *Farnum v. Phœnix Ins. Co.*, 83 Cal., 246; *Harron v. City of London Fire Ins. Co.*, 88 Cal., 16; *California Ins. Co. v. Gracey*, 15 Colo., 70; *Zell v. Herman Farmers Mutual Ins. Co.*, 75 Wis., 521.)

A local agent having ostensible general authority to solicit applications and make contracts for insurance, and to receive first premiums, binds his principal by any acts or contracts within the general scope of his apparent authority. (*Union Mutual Ins. Co. of Maine v. Wilkinson*, 13 Wall. [U. S.], 222; *Rivara v. Queen's Ins. Co.*, 62 Miss., 721; *Mississippi Valley Life Ins. Co. v. Neyland*, 9 Bush [Ky.], 430; *Western Home Ins. Co. v. Hogue*, 21 Pac. Rep. [Kan.], 641.)

RYAN, C.

In the district court of Lancaster county there was a judgment against the Farmers & Merchants Insurance Company, for the review of which these error proceedings are prosecuted. It was alleged in the petition in the district court that on November 30, 1891, plaintiff was the owner of certain household furniture in use in a house on North Thirteenth street, in the city of Lincoln; that on December 2, 1891, the defendant, the aforesaid insurance company, executed a policy of insurance on said furniture, whereby it was insured in the sum of $1,000 against loss, from November 30, 1891, till November 30, 1894, for which insurance the plaintiff paid the required premium of $14 to Burt W. Richards, the agent of the defendant. It was further averred in said petition that on or about June 14, 1892, the plaintiff made arrangements to pack

her household goods and move them from her dwelling on North Thirteenth street to a certain warehouse on Fourteenth and G streets, excepting the piano, which was to be removed to the residence of the above named Burt Richards, on K street, and that at said time there was an unearned premium on said policy amounting to more than $8.40. The transaction which was claimed sufficient to create a contract to insure, and which, therefore, should, as the plaintiff claims, be held to be in effect an insurance, was in the fifth paragraph of the petition described as follows: "That on the said 14th day of June, 1892, said Richards, at request of plaintiff, came to plaintiff's house, at said number 228 North Thirteenth street, and as agent of said defendant agreed with this plaintiff to have said policy of insurance on said goods canceled, and to have made out and delivered by defendant to plaintiff another policy of insurance that would insure plaintiff against loss or damage by fire on said goods, in the sum of $1,000, for a period of ninety days from noon on said 14th day of June, 1892, and said insurance should be seven hundred (700) dollars on all goods, excepting the piano, while stored in said storage warehouse at Twenty-fourth and G streets, and three hundred dollars ($300) on said piano while kept at said number 1817 K street, all in said city of Lincoln, and it was further agreed that said unearned premium on said first policy of insurance should be applied on and pay the premium of said new policy to be issued to plaintiff by the defendant, and if the amount of said unearned premium was more than the amount of said premium on said new policy, the difference was to be paid to plaintiff by defendant, and if it was less, plaintiff was to pay to defendant such difference, and plaintiff then and there offered to pay same." The furniture was stored at the warehouse above indicated on June 14, 1892, and on the following day it was destroyed by fire. The judgment was for value of the said furniture.

This judgment we think should be reversed, for various

reasons, which we shall now proceed to state as briefly as possible. Burt W. Richards was the soliciting agent of the insurance company. There was no evidence introduced by the plaintiff which showed facts inconsistent with the limitation of his agency, shown by the company to be confined to soliciting insurance, taking and forwarding applications; and possibly premiums may, in some instances, have been paid to him. In the transaction under consideration, however, there was no premium paid. Indeed, the requirement of payment is apparently sought to be obviated by allegations of an agreement to cancel an existing policy and use the unearned premium thereon for a payment. But this cancellation of the policy, the above averments show, was not assumed to be within the scope of the powers of Mr. Richards. In this respect the averment was that Mr. Richards agreed to have the old policy canceled, thereby implying that this must be done by some other representative of the insurance company than Mr. Richards. As to the issuance of a new policy, the allegations of the petition were, in effect, that Richards, as agent of the company, agreed to have made out and delivered by defendant, the insurance company, to plaintiff another policy of the insurance company, which would insure plaintiff against loss or damage by fire on said goods. In *Wallingford v. Burr*, 15 Neb., 204, it was held that a contract of sale was not complete because, though while all the terms had been agreed on, there had not been made, according to the requirement of the agreement between the vendor and the vendee, a bill of sale evidencing the fact of such sale. By the very terms of the contract as pleaded in the petition a policy was required to issue to complete the contract of insurance. This requirement was never met; hence, on plaintiff's own statement of the basis of his cause of action, there was no executed contract of insurance. The reason for the rule enforced in *Wallingford v. Burr* applied to the executory contract to insure, and such a contract was not sufficient

to render the company liable for a loss before the condition precedent was performed; that is, before a new policy had issued. In our opinion the petition failed to state a cause of action against the insurance company, and the proofs fell far short of sustaining one, even if it had been stated. The judgment of the district court is

REVERSED.

AMBROSE P. S. STUART ET AL., APPELLEES, V. HENRY BURCHAM ET AL., APPELLANTS.

FILED MARCH 3, 1897. No. 7138.

Bill of Exceptions: REVIEW: TRANSCRIPT. In the absence of a bill of exceptions, issues of fact cannot be considered in this court on appeal, even though the transcript of the pleadings and proceedings recites that the cause was originally determined on an agreed statement of facts copied in such transcript. Following *State Ins. Co. of Des Moines v. Buckstaff Bros. Mfg. Co.*, 47 Neb., 1.

APPEAL from the district court of Lancaster county. Heard below before TIBBETS, J. *Affirmed.*

Stevens & Cochran, for appellants.

S. L. Geisthardt, contra.

RYAN, C.

The district court of Lancaster county adjudged that certain of the purchase price of lands sold by Henry Burcham should be paid by the purchaser to Ambrose P. S. Stuart and Charles Holland, as creditors of said Burcham. The wife of Henry Burcham, who unsuccessfully claimed by her cross-petition that this balance should be paid to her as a creditor of her husband, brings this case into this court for review upon appeal. The petition has been examined and found to state a cause of ac-

tion, and a proper prayer for such relief as was decreed by the district court. The record recites that the case was determined upon an agreed statement of facts, but there is in the record no bill of exceptions; hence we are without proper evidence of the contents of the alleged statement of facts, and cannot consider issues of that nature presented by the pleadings. (*State Ins. Co. v. Buckstaff Bros. Mfg. Co.*, 47 Neb., 1, and authorities therein cited.) The judgment of the district court is

AFFIRMED.

GUNTHER KOOPMAN V. THOMAS CARROLL ET AL.

FILED MARCH 3, 1897. No. 7122.

1. **Ejectment:** SUFFICIENCY OF ANSWER. The averments of an answer attacked by general demurrer considered and *held* sufficient to show the existence and probate of a will through which defendant claimed title.
2. **Executors and Administrators:** POWERS: SALES OF LAND. The holding of this court with reference to the power of an administrator, with the will annexed, to convey real property in accordance with powers given by such will, stated in *Schroeder v. Wilcox*, 39 Neb., 136, adhered to.

ERROR from the district court of Adams county. Tried below before BEALL, J. *Affirmed.*

The facts are stated by the commissioner.

Harwood, Ames & Pettis and *John A. Casto*, for plaintiff in error:

If the alleged will is not a will, either because it contains no apt words of bequest, or because it is not executed in the manner provided by our statute, the foreign probate does not supply or dispense with those requisites. (*Lynch v. Miller*, 54 Ia., 516; *Loving v. Pairo*, 10 Ia., 282;

Bailey v. Bailey, 8 O., 239; *Meese v. Keefe*, 10 O., 362; *Jones v. Robinson*, 17 O. St., 171; *Nelson v. Potter*, 50 N. J. Law, 324.)

The proceedings cannot be sustained unless the record affirmatively shows the jurisdictional facts, and in the absence of such showing the proceedings may be collaterally attacked. (*Gibbs v. Shaw*, 17 Wis., 197; *Dakin v. Hudson*, 6 Cow. [N. Y.], 221.)

The statutory provision that the administrator with the will annexed shall have and exercise all the power, authority, trusts, and obligations of the executor does not confer upon the administrator the power to sell real estate, even when that power is contained in the will, and conferred upon an executor by that instrument. (*Bennett v. Chapin*, 77 Mich., 526; *Conklin v. Egerton*, 21 Wend. [N. Y.], 430; *Tainter v. Clark*, 13 Met. [Mass.], 220; *Patton v. Randall*, 1 J. & W. [Eng.], 189; *Drayton v. Drayton*, 1 Desau's Eq. [S. Car.], 557; *Bentham v. Wiltshire*, 4 Mad. [Eng.], 44; *Houck v. Houck*, 5 Pa. St., 273; *Tippett v. Mize*, 30 Tex., 364; *In re Estate of Durham*, 49 Cal., 490; *Bell's Appeal*, 66 Pa. St., 498.)

Tibbets, Morey & Ferris, contra:

A will proved in a foreign country will be presumed to have been executed according to the laws thereof. The only question our courts could try would be whether such will was proved according to the laws of such foreign state. (*Goldtree v. McAllister*, 24 Pac. Rep. [Cal.], 801.)

The will, if executed according to the laws of the domicile of the testator and place where executed, will, after having been probated in this state, have the same force and effect as though executed according to the laws of this state. (*Bowen v. Johnson*, 73 Am. Dec. [R. I.], 53; *Succession of Gaines*, 14 So. Rep. [La.], 233; *Babcock v. Collins*, 61 N. W. Rep. [Minn.], 1020.)

References to question of jurisdiction: *Clow v. Plummer*, 48 N. W. Rep. [Mich.], 795; *Culbertson v. Witbeck*, 127 U. S., 327.

The judgment of a probate court, where it has jurisdiction, finding a will valid and admitting it to probate is final and conclusive, unless reversed or modified in some of the modes prescribed by law. (*Kirk v. Bowling*, 20 Neb., 263; *Brown v. Burdick*, 25 O. St., 260; *Schell v. Husenstine*, 15 Neb., 9; *Yeatman v. Yeatman*, 35 Neb., 422.)

The will, under the statutes, gives the administrator with the will annexed power to sell real estate. (*Schroeder v. Wilcox*, 39 Neb., 136.)

M. A. Hartigan, also for defendants in error.

RYAN, C.

Plaintiff in error began this action of ejectment in the district court of Adams county. The defendants in error answered specially pleading title through *mesne* conveyances from August Ludwig Koopman, who had purchased at an auction sale made by William Steinhaus, administrator with the will annexed of the estate of Julius Koopman, through which testator both parties claim title. It was alleged in the answer that on February 16, 1879, the said Julius Koopman departed this life, leaving several heirs named; that at the time of his death, which occurred in Germany, he was seized in fee-simple of the land in controversy, situated in Adams county. The third paragraph of the answer was in this language: "That the said Julius Koopman left a last will and testament; that the same was duly probated in the proper court of Germany, and on the 6th day of October, 1879, the said last will was probated in the county court of Adams county, state of Nebraska; that William Steinhaus was appointed administrator with the will annexed of said estate, and gave bond in the penal sum of two thousand dollars ($2,000) as such administrator. The following is a copy of the said will and proceeding relative to the probating of the same, and the bond of said administrator," etc. Following the above averments of the answer, there was set out a copy of what

appears to be the minutes of a court in Germany, showing the deposit therein of the will of Julius Koopman, and certain proceedings afterward had. One of these minutes, under date of July 5, 1876, was as follows: "Of his free will appeared the proprietor, Julius Koopman, from U. S. of A., now at Donnerschuer, and asked leave to deposit his last will in writing. As there appeared nothing against, it was granted. After which the applicant declared: 'As my heirs I proclaim,'" etc. In this instrument there were four sections, of which all the language was in the first person, singular. It was signed by Julius Koopman and by two other parties, as well as by the clerk of the court. On the 5th day of July, 1879, the minutes of the same court recite that the widow of Julius Koopman appeared and asked for publication of the last will and testament of her deceased husband, and that her request was granted. It is then recited that "the last will on record in this court under No. 103, A. D. 1876, taken from the document safe, read before the above named widow Koopman, and published at the same time. The applicant asked for a copy, the reading of which was waived." Following the above quoted language there were the minutes made when the will was deposited and the instrument above described as having been signed by Julius Koopman, followed by a certificate of translation. By the copy of what we take to be the will, for reasons hereinafter stated, it was provided that all the personal and real property of the testator in the United States should be sold at public auction after his death. As already indicated, the answer showed the defendants' title to have been derived through such a sale. There was a general demurrer to the answer, which was overruled, and plaintiff excepted. This was followed by a judgment in favor of the defendants.

It is contended that the language of the German court record shows that the testator did not file a written will, but that he made some oral declarations only, as indicated by the use of the word "declared." The demurrer

admitted the truth of each averment of the answer, and one of these was that the will was duly probated in Germany. The word "declared" we take to mean "exhibited" or "published," and this we are strongly influenced to assume, not only because Webster gives these as equivalents of the word, but because there follows immediately what appears to be a written instrument in the first person, singular, signed by Julius Koopman and two other persons, presumably as witnesses. As the answer alleged that the will was probated in the county court of Adams county, that fact must be accepted as true, and we do not feel called upon to make the assumption that this act of the court having jurisdiction was irregular or defective.

The effect which should be accorded the execution of the power to sell land by an administrator with the will annexed was discussed in *Schroeder v. Wilcox*, 39 Neb., 136, and need not be repeated. The judgment of the district court is

AFFIRMED.

HENRY OLIVER, APPELLEE, V. JAMES F. LANSING ET AL., APPELLANTS.

FILED MARCH 3, 1897. No. 7094.

1. **Partition.** Where a cause is fairly within the law authorizing a partition, the right to partition is imperative and absolutely binding upon courts of equity. In such a case the right of partition is a matter of right and not of mere grace.

2. ———: DISTRIBUTION. The mere fact that inconvenience or difficulty of making distribution, or even probable loss, is involved in making partition, in nowise affects the absolute right to have partition.

3. ———: RIGHTS OF LESSEE. Where real property leased for a term of years is owned by several persons as tenants in common, both of the rents and the reversion, partition upon the petition of one of the tenants in common may be had, and, in case of a sale being thereby rendered necessary, the lessee will become a tenant of the purchaser of the rents and reversion.

APPEAL from the district court of Lancaster county. Heard below before STRODE, J. *Affirmed.*

Cases cited by counsel are referred to in the opinion.

Pound & Burr, J. W. Deweese, and *F. M. Hall,* for appellants.

Webster, Rose & Fisherdick, contra.

RYAN, C.

In his petition, filed in the district court of Lancaster county, Henry Oliver alleged his ownership of an undivided one-half of certain described lots in the city of Lincoln, and that the defendant, James F. Lansing, was the owner of the other half. There was described an incumbrance on the property and the plaintiff alleged that the defendant had collected certain rents and profits of the real estate which he should account for, and there was a prayer for partition, and, as an incident of such partition, for an accounting as to said rents and profits. In his answer the defendant alleged that he had fully accounted for and paid all rents and profits by him collected. Further answering, the defendant alleged that plaintiff and said defendant had built the "Lansing Opera House" on the lots described in the petition, and that prior to entering upon said enterprise the said litigants had entered into a contract with one Ed A. Church, by the terms of which they had leased to Church the said opera house for the term of five years. A copy of the contract referred to was attached to the answer, and, as it becomes necessary, will be hereinafter described. The defendant concluded his answer with the following averments: "This defendant further alleges the fact to be that the agreement between the plaintiff and this defendant was that their joint ownership and control of the building known as the 'Lansing Theater,' and their copartnership in the building, managing, and operating the

same, was to continue for a period of five years. This defendant further alleges the fact to be that neither the plaintiff nor this defendant are entitled to the possession of the opera house proper of said building until the expiration of said lease. And defendant further alleges the fact to be that the plaintiff is not entitled to a partition of said property until the expiration of the lease with the said Ed A. Church for a period of five years. The defendant further alleges the fact to be that the said Ed A. Church is now in possession of said property and occupying the same under and by virtue of the terms of his said lease, and is a proper party defendant to this action, and defendant therefore asks that said Ed A. Church be brought in and made a defendant in this suit, and that upon the final hearing of this action the said partition suit may be dismissed at the plaintiff's cost, and for such other and further relief as this defendant is in equity entitled to receive." There was a supplemental answer filed, by which there were merely amplifications of the above matters urged as defenses; that is to say, it was alleged that but for the consideration that the relationship established with Church was to exist for five years, the construction of the opera house would not have been contributed to, or entered upon, by the defendant. In addition to the allegations of this nature there were averments of sums expended in the common enterprise and a prayer for an accounting in respect thereto. The affirmative matters appearing in the answer were denied by plaintiff's reply. There was a decree in favor of the plaintiff that a partition should be made as prayed, and, in conformity with a finding upon an accounting, there was a judgment in plaintiff's favor in the sum of $330.05. In the decree it was specially found, upon sufficient evidence to sustain the finding, that there was no copartnership agreement between Lansing and Oliver as to the real property partitioned, and that there was no agreement restrictive of the right of either party to a partition. By the terms of the decree it was provided that

the rights of Ed A. Church should be preserved to him, and the partition was subject to his rights under his contract with plaintiff and defendant.

The questions presented by the appeal of the defendant shall receive consideration as outlined by his answers. The contract between the parties to this action and Ed A. Church was made before the building of the opera house. Its provisions affecting this controversy were, in effect, that Church was to have the exclusive management and control of the opera house for a period of five years from the time when it would be ready for public use, during which period he was to determine for what purpose the opera house was to be used and the kind of entertainments therein to be given. The relations of Lansing and Oliver as party of the first part, and Church as party of the second part, to the agreement between said parties was defined in the following language: "Second—For his services in managing said opera house, said party of the second part shall receive five (5) per cent of the gross receipts and income of said opera house of all entertainments and performances therein, after deducting from said receipts the amount paid to the attractions showing at said house. Third—The party of the second part shall receive all income arising from said opera house, and on the day or morning next succeeding the day or night during which said opera house shall have been used or occupied for any purpose the said party of the second part shall render to the party of the first part a true account of the gross proceeds arising from the use of said opera house for the preceding day or night, and after deducting from the said sum the amount to be paid the performing company, and five per cent of the remainder thereof, he shall immediately pay the balance to the party of the first part. Fourth—All expense of stationery, correspondence, postage, telegraphing, and telephoning for the purpose of securing entertainments and performances in said opera house shall be paid by the party of the second part, and said party of the first part shall

keep said opera house in good condition and repair. Sixth—At the expiration of the period hereby limited the party of the first part shall pay to the party of the second part the actual expense to which the party of the second part may have been in securing performances and entertainments in the future, such expense to be limited to correspondence, stationery, postage, telegraphing, and telephoning."

The appellant insists that the appellee was not entitled to maintain an action for partition: First, on account of the relations between the plaintiff and the defendant in relation to the property; and second, on account of the relation, on the one hand, of the parties to this suit and Mr. Church, on the other hand, with respect to the subject-matter thereof. Under the first head it was urged, and probably with truth, that Mr. Lansing would never have entered into an agreement for the construction of the opera house if he had expected that inside of five years Mr. Oliver would apply to the courts for partition. It is probably true that if Mr. Oliver could have anticipated the outcome he would not have embarked in the joint enterprise. The case is one where parties with perhaps the best of intentions toward each other find that they cannot act in harmony. The question presented under such circumstances is whether, notwithstanding this unforeseen disagreement, both tenants in common must remain such for the period in contemplation when that relation was assumed between them. In support of the contention of the appellant there were cited several adjudicated cases, the aptness of which we shall now consider.

From the opinion in *Eberts v. Fisher*, 54 Mich., 294, appellant quoted these sentences: "A party may enter into such agreements with his co-tenant as to estop him from enforcing the right of partition." "And in view of the relation of the parties to the fee and reversion it was as plainly implied that such relations should not be interfered with by partition without mutual consent." These

independent sentences state a principle which might be utilized by appellant if the facts under consideration in the case in which they were used did not so radically differ from those involved in this case. Eberts was the owner of a vacant lot, which he leased for a term of twenty years. For the first ten years the rent was fixed at $1,050; for the remainder of the term at $1,200. It was provided in the lease that within the last year of the lease appraisers should be chosen, by whom the value of the lot should be appraised separate from the improvements (which improvements the lessee was bound, meantime, to place upon the lot), and thereupon the lessor might, at her option, have the improvements on payment of the appraised value at the termination of the lease. The right to exercise this option was dependent upon sixty days' notice to that effect, to be given before the termination of the lease. If no notice should be given the lease was to continue for another ten years. There was no notice given by the lessor of the option, though within the time allowed for that purpose appraisers were appointed and duly acted as such in making the appraisement. It was under this condition of affairs that the lessor sought by partition to become the owner of the improvements. The sentences quoted were used in the discussion of this attempt to violate the express provisions of the lease, and in that case were very proper, but they are not applicable to the facts of this case.

In *Avery v. Payne*, 12 Mich., 540, Payne, the owner of certain real property, entered into an agreement with Avery, his attorney, whereby Avery undertook to dispose of said property for their common benefit, subject to Payne's approval of the sales in each instance. In pursuance of this agreement Payne conveyed to Avery an undivided half interest in the real property which was the subject-matter of the contract. Avery, instead of disposing of this property, began an action for its partition, and it was held that under the circumstances partition had been improperly made by the inferior court.

In *Peck v. Cardwell*, 2 Beav. [Eng.], 137, four persons purchased land under an agreement that it should be laid out in streets and sold in lots, according to a specified plan. All the parties died. The purchase money had all been advanced by two of the four persons indicated, in whose favor mortgages had been made by the other two on their respective interests. One of these mortgagors made the two mortgagees and another person his executors and trustees, giving them power to sell, but not to make purchases. It was held that as between the representatives of the deceased persons there could be no partition, because the parties were not mere tenants in common of land as to portions of which some were entitled partly as trustees and partly for their own benefit.

In *Coleman v. Coleman*, 19 Pa. St., 100, land containing iron ore was held in common by two persons, and the heirs of another, a former owner. By the said two persons and the guardian of the minors who were owners of an interest it was agreed in writing, under seal, that certain persons named should make partition of a part of the property, but that the ore banks should remain as an undivided tenancy in common, and that none of the parties should interfere with or interrupt the others at any mine hole by them opened and occupied for the purpose of raising iron ore. In amicable actions of partition the furnaces and forges were allotted, but as to the iron ore banks and hills it was recommended that they should still remain undivided. The report containing this recommendation was duly confirmed by the court in 1787, and each party took possession of the parcel assigned him and himself, or those claiming under him, continued to hold the same until 1851, when suit was brought for the partition of the land on which was situated the ore bed. It was held that the agreement was a defense, not only on account of the judgment by which it had been ratified, but because the covenant ran with the land, if not for the purpose of enabling an heir or assignee to sue, at least for that of rebutting a suit brought in derogation

of the restraint which it imposed. The partition was held not permissible, because the partition previously had, had been in effect of profits of the mine hills, for the soil was of no value. The ore was the object to be secured, and the partition of this was impracticable, for no one could say how it was distributed. For the reason that the value of the several parts of an ore bed was not ascertainable, it was held in *Conant v. Smith*, 1 Aikin [Vt.], 67, that it was not apportionable, and that under such circumstances resort should be had to a court of chancery for a decree which would authorize its sale as an entirety and the apportionment of the proceeds.

Just how far the case of *Haughton v. Callahan*, 3 Wash., 158, falls short of justifying appellant's contention is illustrated by the first paragraph of the syllabus, which is in the following language: "Where, by agreement between plaintiff and the defendant, certain land upon which plaintiff held an option was to be purchased and paid for by the defendant and deeded to the latter in his own name, the profits of the transaction, after refunding purchase money and interest, to be equally divided between them, the defendant is entitled to hold the land until it has all been sold to third parties, and the plaintiff has not such an interest in the land as to entitle her to a partition thereof, but can claim only an equal share of the profits from its sale."

In *Baldwin v. Humphrey*, 44 N. Y., 609, certain persons as trustees received a conveyance of real property, and it was held that no partition of it could be had, for a division of the property necessarily involved a breach of trust.

In *Anderson School Township v. Milroy Lodge*, 130 Ind., 108, partition was sought of a house of which the three different stories were owned by distinct individuals, and it was held that the relief prayed must be denied, for it necessitated the cutting off of the means of access to the two stories above the ground; moreover, it was held as consistent with the same theory that the house was as

completely partitioned as in its nature it was possible to make partition of it.

Appeal of H. B. Latshaw, 122 Pa. St., 142, involved the same principle as was involved in *Baldwin v. Humphrey*, *supra*, and this principle is thus stated in the syllabus: "Ordinarily when a deed is made to trustees for a church or other charity the fee vests at once in the association, for, the trust being raised only for the purpose of taking and passing title, it is immediately executed; but not so where the trust is active and continuing, as where it is created for the support of a special use."

In *Story v. Palmer*, 46 N. J. Eq., 1, the reason why partition would not lie was indicated by the language of the syllabus: "A court of equity will not decree a partition urged by one *cestui que trust*, and resisted by another, where its effect will be to override and put an end to an active trust and thus defeat the testator's intention, if the trustees stand ready to execute the trust in good faith." It was said, furthermore, that if the trustees refused to perform they could be compelled to do so by a court of equity.

In *Brown v. Lutheran Church*, 23 Pa. St., 495, trustees of real estate for educational and religious purposes, it was held, could not create a new use or convey the estate for purposes inconsistent with those for which they held it. A burying ground being a part of the property held in trust for the use of two societies, it was held, should not be partitioned, for it could not properly be divided by lines, and to sell it to be used for ordinary purposes would be repugnant to every sense of decent propriety.

The case of *Hill v. Reno*, 112 Ill., 154, was cited by appellant, and in its syllabus we find the rules laid down as follows: "Where a case is fairly brought within the law authorizing a partition, the right to partition is imperative and absolutely binding upon courts of equity. They are not clothed with such discretion as that, under a given state of facts, they may grant the relief or refuse it and yet commit no error. To invoke this equitable

remedy is a matter of right, and not of mere grace." In the fifth paragraph of the same syllabus it is said: "In the event that a partition could be effected only through the instrumentality of a sale of the premises and a distribution of the proceeds of such sale among the several parties in interest, the mere fact that difficulties may arise in the adjustment of the distribution, or inconvenience, or even possible losses, result from the change of the relation of the parties to the estate by reason of the sale, will in no way affect the absolute right to have partition." The consensus of most of the cases cited by appellant cannot be better stated than was done in this case, and, therefore, assuming that appellant's counsel have cited it because of that fact, we shall quote therefrom this language: "Notwithstanding the rule as stated [in effect as in the above quotation from the syllabus] is almost universally conceded, nevertheless, there are certain well recognized modifications of it. For instance, if an estate should be devised or conveyed, to two or more, upon the express condition that it should not be subject to partition, or if several tenants in common, or joint tenants, should covenant between themselves that the estate should be held and enjoyed in common only, equity would not, in the absence of special equities, award a partition at the suit of some of the parties, against the objections of the others; and where the title of the complainant is doubtful, or, in other words, where he does not show a clear right to partition, it will not be awarded. So where several persons have purchased land with a view of selling it out into lots for building ground, according to a certain plan, and it was agreed among them that neither of them should dispose of his share, except in a certain manner, it was held, in a suit by the representatives of one of the parties against the survivors, that the agreement barred the right to partition. (*Peck v. Cardwell*, 2 Beav. [Eng.], 137. See, also, in this connection, *Cubbage v. Franklin*, 62 Mo., 364; *Selden v. Vermilya*, 2 Sandf. [N. Y.], 568.) The principle which seems to underlie all

these cases is that equity will not award a partition at the suit of one in violation of his own agreement, or in violation of a condition or restriction imposed upon the estate by one through whom he claims. The objection to partition in such cases is in the nature of an estoppel." This quotation leaves out of consideration the class of cases wherein partition has been denied of ore beds, but as there is nothing of this nature in this case, the omission is of little practical consequence. There has been neither pleaded nor shown an express condition of limitation by contract. There is just as complete a failure to disclose any trust which would be violated by awarding partition. It was said in the case of *Hill v. Reno, supra*, that mere hardship would not be sufficient to prevent resort to partition, for partition is a matter of right, and these propositions are abundantly sustained by the books. (Freeman, Cotenancy & Partition, sec. 433; *Smith v. Smith*, 10 Paige Ch. [N. Y.], 470; *Howey v. Goings*, 13 Ill., 95; *Parker v. Gerard*, 1 Amb. [Eng.], 236; *Holmes v. Holmes*, 2 Jones Eq. [N. Car.], 334; *Stedman v. Weeks*, 2 Strob. Eq. [S. Car.], 145; *Wiseley v. Findley*, 3 Randolph [Va.], 261.)

It seems, however, that the appellant, to some extent, bases his opposition to the right of appellee to partition upon the assumption that there was a partnership between plaintiff and defendant in respect to the building and management of the opera house. There is not found in the record any evidence of a partnership relation, and the district court found specially that no such relation existed. If there had been a partnership, that fact alone would not have been sufficient reason for denying partition. (*Collins v. Dickinson*, Hayw. 2d ed. [N. Car.], 275; *Hughes v. Devlin*, 23 Cal., 502.) We conclude from a full consideration of the citations made on behalf of both litigants, and from such independent research as we have been able to make with reference to this proposition, that the relations of the plaintiff and defendant to the opera house, and between themselves, were not such as would serve to modify the generally accepted rule that

partition between tenants in common is the absolute right of either tenant.

We shall now consider the relations of the appellant and appellee towards the opera house property as affected by their contract with Mr. Church. By the appellant it is insisted that his contract was one of lease, therefore that the right of possession during the term is solely in Mr. Church, from which consideration it is claimed necessarily to result that no partition can be had between Mr. Oliver and Mr. Lansing, because neither of them is in possession. It may, for the purposes of this investigation, be conceded that Mr. Church, for the term of five years, has the right of exclusive possession of the opera house. This being thus conceded, let us consider the citations of appellant directed to the deduction that therefore partition cannot be maintained. The first case cited is that of *Hunnewell v. Taylor*, 6 Cush. [Mass.], 472, but this is of little value, for the court was governed by a provision of the statutes of Massachusetts that a petition for partition "may be maintained by any person who has an estate in possession, but not by one who has only a reversion or a remainder." In *Tabler v. Wiseman*, 2 O. St., 207, it was held as long as there was in existence the widow's dower right, the heirs could not partition their interests, because no right of present possession existed in their favor. These cases are all that tend to sustain the contention of the appellant,—the latter quite directly so. As opposed to this contention we shall now review other cases which seem quite in point.

In Illinois the statute provides for partition on the petition of any one or more of the persons interested; and that the petition shall set forth the rights and titles of the parties in interest, including tenants for years, for life, by courtesy, or in dower, and of persons entitled to the remainder or reversion. It was held that as this statute contained nothing requiring that the applicant should have an estate entitling him to be in possession, and as it clearly contemplated bringing before the court

the owner of the life estate, it must be construed as authorizing a reversioner or remainder-man to maintain a suit for partition against the owner of the remaining undivided interest in reversion or remainder, although the whole premises were subject to an unexpired life estate. (*Scoville v. Hilliard*, 48 Ill., 453; *Hilliard v. Scoville*, 52 Ill., 449.)

A like construction was given a similar statute in Minnesota in a case where the possession was held by a lessee. (*Cook v. Webb*, 19 Minn., 167.)

In New Jersey partition may be had among remainder-men. (*Smith v. Gaines*, 38 N. J. Eq., 65.)

In *Phillips v. Johnson*, 14 B. Mon. [Ky.], 172, the real property had been subject to the life estate of Mrs. Standeford. Partition between the heirs, after her death, was resisted by one who claimed possession under a lease from her and insisted that no partition could be had until his possession had been legally terminated. Referring to the rights of the heirs, Marshall, J., used this language: "To say that the chancellor is ousted of his ordinary jurisdiction to make partition between the parties thus entitled, and must send them to a court of law to establish their title and get possession because the tenant in possession, though by his own showing he holds under their title, and is bound to surrender to it, says the land is his, that he claims and holds adversely, and that he cannot be ousted but by the verdict of a jury, would be to subject an important and beneficial jurisdiction to the mere ignorance or perversity of the tenant in possession, and to allow the substantial ends of justice to be defeated by a shadow of technicality."

In *Hunt v. Hazelton*, 5 N. H., 216, on a petition for partition, where the petitioner alleged that he was seized in fee as a tenant in common with the respondents, it was held that a plea alleging that one of the respondents had a lease of the interest of the petitioner for a term of years, which had not expired, was no answer to the petition.

In *Woodworth v. Campbell*, 5 Paige Ch. [N. Y.], 518, the syllabus was as follows: "Where lands leased for a term of years are owned by several persons as tenants in common, both of rents and of the reversion, a bill for partition may be sustained; but a sale of the lands under the decree in partition must be made, subject to the rights of the lessees, who by the sale will become the tenants to the purchaser of the rents and reversion."

It is probable that the requirements of the rule as to possession to sustain partition is stated as favorably as possible to appellant in section 446 of Freeman, Cotenancy & Partition, as follows: "It is a general rule, prevailing in England without exception, and also throughout the majority of the United States, that no person has the right to demand any court to enforce a compulsory partition unless he has an estate in possession—one by virtue of which he is entitled to enjoy the present rents or possession of the property as one of the cotenants thereof."

Section 802 of the Code of Civil Procedure is in the following language: "When the object of the action is to effect the partition of real property among several joint owners, the petition must describe the property, and the respective interests and estates of the several owners thereof, if known. All tenants in common or joint tenants of any estates in land may be compelled to make or suffer partition of such estate or estates in the manner hereafter prescribed."

The conclusion reached by the courts, respectively, in *Scoville v. Hilliard, supra*, and *Cook v. Webb, supra*, was in each instance influenced by a statute much resembling our own, and it is our conclusion therefrom, and from the other cases above cited, on general principles, independent of statute, that there was properly a partition awarded between appellant and appellee notwithstanding their contract with Ed A. Church.

The finding of the court as to the condition of the accounts between the appellant and appellee, in view of the

great number of items and of the interest which might properly be allowed, was as nearly correct as could be expected. We have examined these items sufficiently to be satisfied that no injury had been done Mr. Lansing, and we do not feel called upon to make a more critical analysis, merely to be able to state this fact with mathematical exactness. The judgment of the district court is in all things

AFFIRMED.

CITY OF HASTINGS V. ARTIE L. MILLS.

FILED MARCH 3, 1897. No. 7163.

1. Costs: ACTION AGAINST CITY: DAMAGES. Mills sued the city in the district court claiming $5,000 damages which he alleged he had sustained by falling into an excavation in one of its streets negligently left unguarded. He recovered a verdict for $200. *Held*, (1) That, assuming the excavation was a nuisance within the meaning of section 621 of the Code of Civil Procedure, a justice of the peace had jurisdiction to render judgment for the amount of the verdict and therefore Mills was not entitled to recover costs; (2) that the amount claimed by Mills in his petition deprived a justice of the peace of jurisdiction to try the case but the amount recovered determined his right to recover costs.

2. ———. The right of a litigant to recover costs is a statutory, not a common-law, right.

ERROR from the district court of Adams county. Tried below before BEALL, J. *Reversed.*

A. H. Bowen, for plaintiff in error.

C. H. Tanner, contra.

RAGAN, C.

In the district court of Adams county Artie L. Mills, by his next friend, sued the city of Hastings for damages for an injury which he alleged he had sustained by falling

into an excavation in one of the streets of said city, negligently permitted by it to remain unguarded. He had a verdict and judgment for $200. Thereupon the city moved the court for an order to tax it with only its costs, and not with the costs made by Mills. This motion the district court overruled and permitted Mills to recover from the city the costs expended by him in the action. To reverse this order the city prosecutes here a petition in error.

Section 621 of the Code of Civil Procedure is as follows: "If it shall appear that a justice of the peace has jurisdiction of an action, and the same has been brought in any other court, the plaintiff shall not recover costs; and in all actions for libel, slander, malicious prosecution, assault, assault and battery, false imprisonment, criminal conversation, seduction and actions for nuisance, or against a justice of the peace for misconduct in office, if the damages assessed be under five dollars the plaintiff shall not recover any costs." The contention of the city is that a justice of the peace had jurisdiction of this action, and, therefore, it is not liable for the costs expended by Mills in prosecuting the action. The contention of Mills is that his is an "action for nuisance," within the meaning of said section of the Code, and that a justice of the peace had not jurisdiction thereof, and that if he had recovered only $5 he would have been entitled to recover costs. We assume, for the purposes of this case only, that the unguarded excavation left in its street by the city was a nuisance, and that the action at bar is an "action for nuisance,"—that is, an action arising out of and caused by such nuisance,—and proceed to the inquiry as to whether a justice of the peace has jurisdiction of such action. Section 18, article 6, of the constitution provides: "Justices of the peace * * * shall * * * have and exercise such jurisdiction as may be provided by law; *Provided*, That no justice of the peace shall have jurisdiction of any civil case where the amount in controversy shall exceed two hundred dollars, nor in a criminal

case where the punishment may exceed three months' imprisonment or a fine of over one hundred dollars, or in any manner wherein the title or boundaries of land may be in dispute." It will thus be seen that, subject to the limitations named in said section, the constitution has left it to the legislature to say over what subjects and actions a justice of the peace shall have jurisdiction. Section 905 of the Code of Civil Procedure, adopted in 1866, enumerates ten subjects within the jurisdiction of justices of the peace; and section 906 of the Code adopted in 1881 gave justices of the peace jurisdiction in actions for trespass to real estate where the damages demanded did not exceed $200; and section 1103 of the Code adopted in 1881 provided: "Justices of the peace shall have jurisdiction in all cases where the sum in question does not exceed $200, except in cases limited in this title." The limitations alluded to are found in section 907 of the Code, which provides that a justice of the peace shall not have jurisdiction to recover damages for an assault, an assault and battery, malicious prosecution, actions against justices of the peace or other officers for misconduct in office, for slander, verbal or written, on contracts for real estate, nor in actions in which the title to real estate is sought to be recovered or may be drawn in question.

Reading the constitution and the sections of the Code just quoted together, it appears that justices of the peace have jurisdiction of the subject-matter of all civil cases where the sum in question does not exceed $200, except in actions the subject-matter of which are expressly named in section 907 of the Code; and we conclude, therefore, that a justice of the peace has jurisdiction of an action brought by one to recover damages which he alleges he has sustained as the result of a city maintaining or permitting to exist in its streets a nuisance, where the amount of damages claimed does not exceed $200. The amount claimed by the plaintiff in his petition determines, in the first instance, whether a justice of the peace has jurisdiction of the action; and if a plaintiff claims more

than $200 he cannot bring his action before a justice of the peace; but jurisdiction must not be confounded with right to recover costs. Jurisdiction is the authority to hear and decide. The right of a litigant to recover costs is not a common-law right, but a statutory one, and while the amount claimed determines what court has jurisdiction, the amount recovered determines the plaintiff's right to costs. The meaning of section 621 of the Code is not that if a plaintiff claims more than $200 he may thereby oust the justice of the peace of jurisdiction of the case and still recover his costs in some other court, if his recovery be within the jurisdiction of the justice. He may claim in his petition what he pleases and thereby oust the justice of the peace of jurisdiction to try the case, but if his recovery is within the jurisdiction of the justice the statute does not award him costs. (See *Geere v. Sweet*, 2 Neb., 78; *Beach v. Cramer*, 5 Neb., 98; *Ray v. Mason*, 6 Neb., 101; *Martin v. Grover*, 9 Neb., 263; *Miller v. Roby*, 9 Neb., 471; *Moore v. Darrow*, 11 Neb., 462; *Wilde v. Boldt*, 16 Neb., 539; *Goodman v. Pence*, 21 Neb., 459.)

We must not be understood as deciding whether or not a justice of the peace has the jurisdiction to abate a nuisance. This is not such an action. The provisions of section 1103 of the Civil Code are very broad, and it may be that a justice of the peace has now jurisdiction in civil actions for false imprisonment, criminal conversation, seduction, and actions for nuisance where the amount of damages claimed does not exceed $200. But whether a justice has such jurisdiction is not presented by this record and not decided. The order of the district court is reversed and the cause remanded with instructions to tax the costs made by Mills to him.

REVERSED AND REMANDED.

FRANK W. KETTENBACH, ADMINISTRATOR, V. OMAHA LIFE ASSOCIATION ET AL.

FILED MARCH 3, 1897. No. 6956.

Life Insurance: WARRANTIES: REPRESENTATIONS: CONSTRUCTION.

MOTION for rehearing of case reported in 49 Neb., 842. *Motion overruled.*

Byron G. Burbank, for the motion.

RAGAN, C.

The defense of the insurance company to this action proceeded upon two theories: (1) That the statements made by the assured in his application were warranties; and (2) that if the statements made were representations they were false. In the opinion filed in the case we held that the statements of the assured in the application were representations, and not warranties, and that in order for the falsity of the representations made by the assured to constitute a defense to the action it was incumbent upon the insurance company to plead and prove that the statements and answers alleged to have been made by the assured in his application were actually made by him as therein written; that these statements were false; that they were false in some particular material to the insurance risk; and that the insurance company relied and acted upon such statements.

After a re-examination of the case we adhere to all the propositions of law already announced. But the insurance company claims that it is entitled to a rehearing, for the reason that there was no question of fact which the district court should have submitted to the jury. For the purposes of this motion, and this motion only, we assume that the assured made the statements and answers written in his application; that some of these state-

ments were false; that they were false in some particular material to the insurance risk; and proceed to inquire whether the undisputed evidence in the record discloses that the insurance company relied and acted upon such representations. The insurance company, in its answer filed in the district court, alleges: "That if said William F. Kettenbach had informed this defendant * * * that he was afflicted with or had symptoms of exophthalmic goiter or impotency, and was subject to jaundice, bleeding piles, or other diseases, this defendant * * * would not have entered into said contract of insurance." This is not an affirmative plea, on the part of the insurance company, that the assured made a representation that he was not afflicted with any of the diseases named, and that such representation was false, and that the insurance company believed the representation made to be true and in consequence thereof issued the policy in suit. Assuming, however, that the plea is sufficient, does the uncontradicted evidence support it? It appears from the record that one Esmond was secretary, one Bechtel president, and one Dr. Knode was the medical director of this insurance company at the time the policy in suit was issued; that these three gentlemen constituted the executive board, or the examining board. Mr. Esmond testified that he examined the application of the assured and relied upon it. Mr. Bechtel testified that he examined the application and relied upon it. It also appears that the insurance company caused the assured to be examined by a Dr. Kelley, who was an agent or employe of this insurance company for that purpose. Dr. Kelley made his examination of the assured, and it appears in full as a part of the assured's written application and bears date the day after that application was signed. In this application Dr. Kelley certified that he had made a personal private examination of the assured, and he gave his opinion that the assured would survive the term of his expectancy of life; that he had discovered nothing in the assured which affected the risk; that he believed

him to be safely insurable, and that, after reviewing the assured's state of health, he considered the risk first class. This report of Dr. Kelley is very full and very minute. It sets out the color of the hair, eyes, and skin of the assured; gives his complexion; describes his figure; states that he had a sanguine temperament; gives the rate of his pulse per minute, standing and sitting; the volume of his pulse; states that it is regular; gives the number of his respirations per minute; gives the circumference of his chest during a forced expiration, tranquil respiration, and forced inspiration; describes the action of his heart as being uniform, free, and steady; states the appearance of his tongue, and states other facts concerning the organs of the assured and their functions and the condition of the assured's health that he could not have given had he not made, as he stated, a careful and private examination of him. Mr. Esmond and Mr. Bechtel both testified that while they relied upon the application of the assured, they also examined this report of Dr. Kelley, and that they as implicitly relied upon that as they did upon the application of the assured. But this is not all. Mr. Bechtel testified for the insurance company that if the application of the assured had disclosed that he had been afflicted with piles or impotency, that the insurance would not have been refused necessarily for that reason if it appeared that he had recovered; or in any event, that the company would have been governed in the premises by the advice of Dr. Knode, its medical adviser. The evidence does not show that this examination board, as such, ever examined or passed upon the application made by the assured; nor does it show that the medical examiner of this company ever saw this application or this report of Dr. Kelley; he was not called as a witness. We conclude, therefore, that if it be assumed that the assured made false representations in his application, and if it be assumed that the insurance company has, by its pleading, put the making and reliance upon these false representations in issue,

still the district court had no right to decide the question at issue, whether the insurance company relied upon these representations, and because of its reliance thereon issued the policy in suit. That was a question for the jury to determine, and the district court invaded the province of the jury when it took that question from it. The motion for rehearing is overruled.

REHEARING DENIED.

GEORGE W. SCOTT v. JOHANNA C. WRIGHT ET AL.

FILED MARCH 3, 1897. No. 7107

1. Judgment: PROCEEDING TO VACATE. A judgment suffered because of the negligence of counsel employed is not the result of unavoidable casualty or misfortune within the meaning of subdivision 7, section 602, of the Code of Civil Procedure.
2. ———: ———. In a suit in ejectment against a married woman and her husband, judgment was rendered for the plaintiff. After the adjournment of the term at which judgment was rendered the wife filed a petition to vacate it, alleging that she depended entirely upon her husband to conduct the defense of the ejectment suit; that at the time of the rendition of the judgment he was sick and unable to be in attendance in court, and the judgment was rendered in his absence and in the absence of all persons interested in the defense; that her husband willfully betrayed her and deprived her of an opportunity to appear and make a defense to the ejectment suit. *Held*, (1) That the averments of the petition did not show that the wife had been prevented from defending the ejectment suit by an unavoidable casualty or misfortune within the meaning of said section 602 of the Code; (2) that the facts averred in the petition were not sufficient to authorize the district court in the exercise of its general equity jurisdiction to set aside the judgment in the ejectment case.

ERROR from the district court of Douglas county. Tried below before SCOTT, J. *Reversed.*

Saunders & Macfarland, for plaintiff in error.

Andrew Bevins, contra.

RAGAN, C.

In the district court of Douglas county, George W. Scott brought a suit in ejectment against Johanna C. Wright and Luther R. Wright. The parties made defendants appeared and answered and judgment was rendered against them. After the adjournment of the term at which such judgment was rendered, Johanna C. Wright filed a petition against Scott to vacate the judgment rendered against her in the ejectment suit. To this petition Scott interposed a general demurrer, which was overruled and the judgment vacated, and from this order Scott has prosecuted an error proceeding.

The petition of Mrs. Wright sets forth facts which constitute a meritorious defense to the action of ejectment. In her petition she also avers that at the time of the rendition of such judgment she was a married woman, the wife of her co-defendant in the ejectment suit, Luther R. Wright; that she depended entirely upon him to manage and conduct the defense of the ejectment suit, and to inform her whenever any proceedings were to be had or her presence or evidence were required in the action; that at the time of the rendition of the judgment her husband "was sick and unable to be in attendance in court or present at such trial, and said judgment was rendered in his absence and in the absence of all persons interested in the defense to said action;" that she did not know that a trial had been had and a judgment rendered in the ejectment suit until after the adjournment of the term in which such judgment was rendered; that after the rendition of such judgment, and after the recovery of said Luther R. Wright from such sickness, he willfully and wrongfully withheld from his wife all knowledge that any proceedings had been had in such action, until too late to file a motion to set such judgment aside.

Do the facts averred in this petition show that Mrs. Wright was prevented from defending the ejectment suit by unavoidable casualty or misfortune, within the mean-

ing of the seventh subdivision of section 602 of the Code? The district court seems to have been of opinion that the sickness of Mrs. Wright's husband on the day of the trial of the ejectment suit was an unavoidable casualty or misfortune within the meaning of the Code. The failure of counsel employed to be present at the trial of a case on account of sickness has sometimes been held such an unavoidable casualty or misfortune as entitles the party suffering the judgment to have it vacated. Such is *Bristor v. Galvin*, 62 Ind., 352. In *Town of Omro v. Ward*, 19 Wis., 249, the case was set for trial on the 22d of December. On the 21st of that month the attorney employed took the train for the place of trial and in time to reach there in the evening of the 21st; but by reason of a wreck or accident upon the road the counsel did not reach the court room until after the judgment had been rendered, on the 22d. The court held that this was such an unavoidable casualty or misfortune as entitled the party suffering the judgment to have it vacated. But in the case at bar the petition of Mrs. Wright does not allege when her husband and attorney first became sick, nor the nature of his sickness,—whether it was of such a character as to affect his mind and deprive him of the power to give directions concerning the pending ejectment suit, nor does she allege how long his sickness continued,—whether he recovered in time to have filed a motion to vacate the judgment during the term at which it was rendered; nor does the petition allege when the term of court at which the ejectment judgment was rendered finally adjourned.

If it be conceded that the sickness of counsel on the day of trial is an unavoidable casualty or misfortune within the meaning of the statute, the facts averred in the petition do not disclose that the judgment in ejectment against Mrs. Wright was the result of such casualty or misfortune; nor do they show that, by reason of the sickness of her husband on the day of trial, she was deprived of an opportunity to file a motion to vacate the

judgment in ejectment during the term at which it was rendered. Though the husband may have been sick on the day of trial and unable to be present in court, still, from anything that appears in the petition, this sickness may have begun long before the trial. The sickness of her counsel was known to Mrs. Wright, and she may have had opportunity to employ other counsel; and from anything that appears in the petition her husband recovered from his illness during the term at which the judgment was rendered, and in sufficient time to have filed a motion to set it aside; and it does not appear from the petition that during all his sickness he was unable to communicate with her in reference to the pending suit or judgment and afford her an opportunity to employ other counsel to look after it; nor does it appear from the petition that the sickness of the husband was of such a character as to require the wife's attendance upon him at the day of the trial. A careful analysis of this petition discloses that this ejectment judgment against Mrs. Wright was the result of the negligence of her husband. A client who employs counsel to defend a suit is responsible for his negligence or other acts, which do not amount to a fraud, and a judgment suffered because of the negligence of counsel employed is not the result of unavoidable casualty or misfortune within the meaning of the statute. (*Ganzer v. Schiffbauer*, 40 Neb., 633.) The facts averred in the petition do not bring the plaintiff within the provisions of section 602 of the Code of Civil Procedure. The district courts of the state, by virtue of their general equity jurisdiction, may vacate a judgment after the term at which it was rendered for causes not specified in section 602 of the Code. But the facts averred in the petition in the case at bar are not sufficient to authorize the district court, in the exercise of its general equity jurisdiction, to set aside the judgment in the ejectment suit. It is true that Mrs. Wright, in the petition, avers that her husband willfully betrayed her and deprived her of an opportunity to appear and

make a defense to the ejectment suit, but this is a mere conclusion. No facts are stated. The decree appealed from is reversed and the cause remanded, with instructions to the district court to sustain the demurrer of the appellant.

REVERSED AND REMANDED.

NORTH PLATTE WATER-WORKS COMPANY V. CITY OF NORTH PLATTE.

FILED MARCH 3, 1897. NO. 7470.

1. **Review:** PRINTED ABSTRACT: TRANSCRIPT. The supreme court cannot for any purpose look into the record certified here by the clerk of the district court when the case under review has been submitted on a printed abstract in pursuance of its rules.
2. **Municipal Corporations:** WATER-WORKS: CONTRACTS. The city council of the city of North Platte, in July, 1887, by virtue of subdivision 15, section 69, chapter 14, Compiled Statutes, 1887, was authorized to contract with a corporation to erect and maintain within the limits of said city a system of water-works and supply said city and its inhabitants with water; and to levy annually, on all the taxable property of said city, a tax of seven mills on the dollar to pay for the water furnished said city under such contract.
3. ———: ACTION FOR WATER RENTS: PLEADING. In a suit against said city to recover water rents alleged to be due upon such a contract it is not necessary for the plaintiff to plead such statute.
4. ———: WATER RENTS: TAXATION. If the revenue derived in any one year from a seven-mill levy should prove insufficient to pay the water rental accruing in said year under such a contract, whether the city would be liable for such deficiency not decided.
5. ———: ———: PLEADING. *Held*, That the petition in the case at bar states a cause of action.

ERROR from the district court of Lincoln county. Tried below before NEVILLE, J. *Reversed.*

Wilcox & Halligan and *Marston & Marston*, for plaintiff in error.

French & Baldwin, contra.

RAGAN, C.

The North Platte Water-Works Company, hereinafter called the "water company," in the district court of Lincoln county, sued the city of North Platte to recover a sum of money which it alleged was due it from the city for hydrant rentals. To the petition of the water company the city interposed a general demurrer, which was by the court sustained and the petition of the water company dismissed. To reverse this judgment of the district court the water company has prosecuted here a petition in error.

1. The case has been advanced under rule 2 of this court and submitted to us on a printed abstract of the record. The sole question presented is whether the petition of the water company states a cause of action. The petition quoted in the abstract alleges: "That the water company is a private corporation and the city a municipal corporation of the state; that on the 14th day of July, 1887, the city and the water company entered into a contract in and by which the water company was to construct in said city a system of water-works and operate the same, and to rent to the city forty-five hydrants for twenty years, for which the city was to pay an annual rental of $65, payable in January and July of each year; that the water company constructed its water-works and the city accepted the same, and that the water company had since maintained and operated its works in accordance with the terms of its contract with the city; that in the year 1889, at the request of the city, the water company extended its mains and placed thereon six additional fire hydrants, for which the city agreed to pay an annual rental of $40 each, payable semi-annually on the first days of January and July of each year; that there is due the plaintiff from the defendant, and unpaid, under the terms of said contract, the sum of $4,235.43, with interest from July 1, 1893, at seven per cent; that the assessed valuation of the taxable prop-

erty of said city in 1886 was $410,548.69, and a levy of 5 mills produced $2,052.74; in 1887 was $454,612.74, and a levy of 5 mills produced $2,273.06; in 1888 was $479,580, and a levy of 5 mills produced $2,397.90; in 1889 was $398,560, and a levy of 5 mills produced $1,992; in 1890 was $438,067, and a levy of 5 mills produced $2,190.33; in 1891 was $419,482, and a levy of 5 mills produced $2,097.41; in 1892 was $438,086, and a levy of 5 mills produced $2,190.43; in 1893 was $478,826, and a levy of 7 mills produced $3,351.78; that all of said levies were made by the proper authorities, and were made for the sole purpose of paying the amounts due the plaintiff for said water rental, and amounted in the aggregate to the sum of $18,545.65, and that had it been applied to the payment of said rental nothing would have been due the plaintiff; that the plaintiff has at all times complied with the terms of its contract, and prays judgment for $4,235.43, with interest from July 1, 1893, and costs." Exhibit B, made part of the petition, shows that the hydrant rental earned by the plaintiff from November 3, 1888, to July 1, 1893, was $14,490. "That the amount paid by the defendant of such earnings from time to time was $10,674.80; that the balance due July 1, 1893, of principal was $3,815.20, with interest on deferred payments amounting to $420.43, making the amount due plaintiff from defendant July 1, 1893, $4,235.63."

2. Counsel for the city say that the petition does not state a cause of action, because the petition shows that the contract sued upon was one made between the city and the American Water-Works Company, and the petition does not show that the water company has succeeded, by assignment or otherwise, to the rights of the American Water-Works Company. We have not opened the record certified here by the clerk of the district court of Lincoln county, nor can we do so for any purpose whatever in this case. This action is submitted to us, as already stated, upon a printed abstract, under rule 2 of this court, and in such a case we must look, and look

only, to the printed abstract. The petition of the water company quoted in this abstract alleges that the contract sued upon was made between it and the city, and nowhere in the abstract is any reference made to the American Water-Works Company. For the purposes of this opinion, therefore, we must conclusively presume that the contract sued upon was entered into between the city and the water company. (*Closson v. Rohman*, 50 Neb., 323.)

3. Another contention of counsel for the city in support of the judgment of the district court is that the facts averred in the petition do not show that the city had authority to make the contract with the water company sued upon in this action. At the time the contract in suit was executed the city of North Platte was governed by chapter 14, Compiled Statutes, 1887. Subdivision 15 of section 69 of that chapter in express terms authorized the city council of the city to make contracts with and authorize any person, company, or corporation to erect and maintain a system of water-works and water supply; to give such contractors the exclusive privilege for a term not exceeding twenty-five years, of using the streets and alleys of the city for water mains and supply pipes; and to furnish water to such city and the residents thereof, under such regulations as to supply and price as the city council might prescribe by ordinance. Said section further authorized in express terms the city council of said city to levy and collect a general tax, not exceeding seven mills on the dollar in any one year, on all the taxable property within the city, to pay for water furnished the city under such a contract. This was a general statute, of which the courts of the state are bound to take judicial notice, and it was not necessary for the water company to plead the statute in its petition herein.

4. Another contention of counsel for the city is to the effect that the petition does not state a cause of action, because it shows that for the year 1889, and since to the

bringing of this suit—October, 1893—the annual water rental fixed by the contract amounts to $3,165, and that a seven-mill levy upon all taxable property of the city for the year 1889, and each year since, would yield a less sum than the water rental fixed by the contract. It may be that if a seven-mill levy upon all the taxable property in the city for any year would not produce sufficient revenue to discharge the water rental of that year, that the city would not be liable for the deficiency; but that question is not presented by this record. The petition of the water company here declares for a balance due it on water rents from November 3, 1888, to July 1, 1893; and it is apparent from the petition that a levy of seven mills upon the taxable property of the city for the years 1888, 1889, 1890, 1891, and 1892 would yield a revenue of $15,226.42; and the petition avers that for those years the water rentals accruing to it were only $14,490; or that the water rentals were less than the revenue that could have been raised by a levy of seven mills upon the taxable property for the time. The petition further alleges that there have been paid to it on the water rental for said time $10,674.80. Deducting this from the revenue that would have accrued from a seven-mill levy, the petition alleges, in effect, that there was at the time the suit was brought $4,552.62 in the treasury applicable to the payment of the water rents. The petition, therefore, states a cause of action. The court erred in sustaining the demurrer. Its judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

EMANUEL G. BURKLAND V. CHARLES A. JOHNSON.

FILED MARCH 3, 1897. No. 7143.

1. **Arbitration and Award:** MISTAKE: CORRECTION. Whether an award made in pursuance of title 28, Code of Civil Procedure, may be set aside or modified, on motion, because of a mistake in computation or allowance of interest by the arbitrators,—such mistake not appearing upon the face of the award,—not decided.

2. ———: ———: ———. If such an award may be set aside or modified on motion for such reason it can only be done when it appears that such a mistake was that of all the arbitrators whose concurrence was necessary to the making of the award.

3. ———: DUTY OF ARBITRATORS: CONCLUSIONS OF FACT AND OF LAW. It is the duty of arbitrators chosen and acting in pursuance of the provisions of title 28, Code of Civil Procedure, to make and state separately the conclusions of fact and conclusions of law reached by them, unless the parties to such arbitration have by their agreement of submission waived such requirement.

4. ———: ———: ———: WAIVER. An award made by such arbitrators without a statement of any conclusions of fact or conclusions of law found by them, such requirements not having been waived, is erroneous and a judgment confirming such award may be reversed in a direct proceeding instituted for that purpose.

5. ———: ———: ———: CONFIRMATION. The failure of such arbitrators to make and state the conclusions of fact and law found by them is an irregularity merely, and one that does not render their award void nor oust the district court of jurisdiction to confirm it.

6. ———: WAIVER OF IRREGULARITIES. It is competent for parties to such an arbitration to waive any irregularity in the proceeding which does not go to the jurisdiction of the arbitrators to act, or the jurisdiction of the district court to confirm the award made.

7. **Submission of Controversy:** ACKNOWLEDGMENT. Parties who submit their differences to arbitration in pursuance of the provisions of title 28 of the Code of Civil Procedure, must acknowledge their agreement of submission before a justice of the peace, and failure to do so will deprive the district court of jurisdiction to confirm the award made or render judgment thereon on motion of the successful party.

8. ———: ———: CONFIRMATION. The failure to acknowledge before a justice of the peace the agreement of submission is not an irregularity that the parties to the arbitration may waive; and their

ratification of an award made under such defective submission will not invest the district court with jurisdiction to confirm such award.

9. **Jurisdiction:** Jurisdiction of the subject-matter of an action cannot be conferred upon a court even by consent.

10. **Arbitration.** The method provided by title 28 of the Code of Civil Procedure for settling differences existing between parties by arbitration is not exclusive. That right existed at common law and has not been taken away by the statute.

11. ———: AWARD: ESTOPPEL. *Held*, In the case at bar, that the plaintiff in error had estopped himself from assailing the award made, either because of the failure of the arbitrators to state the conclusions of fact and conclusions of law found by them, or because of a mistake in computation and allowance of interest alleged to have been made by the arbitrators.

ERROR from the district court of Saunders county. Tried below before WHEELER, J. *Reversed.*

V. L. Hawthorne and *Pound & Burr*, for plaintiff in error.

George I. Wright and *Good & Good, contra.*

RAGAN, C.

On the 27th of March, 1894, Emanuel G. Burkland and Charles A. Johnson submitted certain differences existing between them to arbitrators. The submission was in writing, duly signed by the parties, and acknowledged by them before a notary public. The arbitrators selected convened and, after a somewhat protracted investigation, made in writing their award as required by the agreement between Burkland and Johnson. The award, so far as material here, is as follows:

"First—We award that E. G. Burkland shall, on or before the 1st day of May, 1894, pay and discharge the judgment and costs in the case of the Saunders County National Bank v. E. G. Burkland and C. A. Johnson, now pending in the district court of said county, and not further prosecute said case.

"Second—We award that C. A. Johnson shall file a dismissal of the suit wherein he is plaintiff and said Burk-

land is defendant at the costs of said Johnson, said suit being for the specific performance of a real estate contract; and the said Johnson shall sign said dismissal and pay the costs in said suit on or before the 1st of May, 1894.

"Third—We award that said E. G. Burkland and C. A. Johnson shall file a dismissal and settlement, at the costs of said C. A. Johnson, in each of the suits for rent which are now pending in the courts of said county, and that C. A. Johnson shall pay the costs therein on or before May 1, 1894.

"Fourth—We award that E. G. Burkland and wife shall make and deliver to said C. A. Johnson, on or before May 1, 1894, a quitclaim to lot one (1), block one hundred and forty-eight (148), in the County Addition to the city of Wahoo, aforesaid.

"Fifth—We award that C. A. Johnson and wife shall make and deliver to E. G. Burkland, on or before May 1, 1894, a quitclaim deed to lots three and four (3 and 4), block one hundred and forty-nine (149), in the County Addition to Wahoo, aforesaid.

"Sixth—We award that said E. G. Burkland shall, on or before the 1st day of May, 1894, pay or secure by good bankable paper to the said C. A. Johnson the sum of three thousand and eighty-nine ($3,089.50) dollars and fifty cents.

"Seventh—We award that upon the compliance with the foregoing awards by the parties, the said E. G. Burkland shall execute and deliver to said C. A. Johnson a release of all actions and causes of action or demands, of whatsoever nature, which existed between them at the time of the execution of the contract and bonds for arbitration, and that the said C. A. Johnson shall execute and deliver to said E. G. Burkland a similar release at same time.

"Eighth—We award that each party pay one-half of the costs of this arbitration."

This award was filed in the office of the clerk of the

district court of Saunders county on the 1st day of May, 1894, and Johnson thereupon moved the court to confirm it. The court caused a notice of this motion to be served upon Burkland, who appeared and moved the court to set aside the award, on grounds that will be hereinafter stated. A large number of affidavits were read to the court in support of the motions filed by the respective parties, which are incorporated into the bill of exceptions and made a part of the record here. The district court found specially that Johnson had in all things ratified and confirmed said award and performed all requirements thereof; that Burkland had accepted said award and the terms and provisions thereof, and had in all things ratified the same and performed all the requirements of said award, except the requirement contained in the sixth item of said award; and thereupon the court sustained the motion of Johnson to confirm said award, confirmed it, and, upon the motion of Johnson, rendered judgment in his favor and against Burkland for the amount awarded the former against the latter by the arbitrators in the sixth item of their award. To reverse this judgment Burkland has prosecuted here a petition in error.

1. One of the grounds of Burkland's motion to set aside the award of the arbitrators was that they had made a mistake in the computation of the amount awarded Johnson in the sixth item of their award, and that this mistake consisted in allowing Johnson certain interest. And the argument is made here that the judgment of the district court confirming the award should be reversed because of this alleged mistake of the arbitrators in the amount awarded Johnson from Burkland. The mistake in computation, if there was one, does not appear upon the face of the award, and whether one party to an arbitration proceeding may, on motion, assail the award made on such ground we do not decide. If an award may be assailed by motion to set it aside because of a mistake in computation made by arbitrators, the relief asked for by

the motion can only be granted; that is, the award can only be set aside or modified for such reason when it appears that such a mistake was made, and that it was the mistake of all the arbitrators. (*Pulliam v. Pensoneau*, 33 Ill., 375.) In the case at bar all the arbitrators do not concur in saying that the amount awarded Johnson was the result of a mistake made by them in computation or in allowing him interest. Indeed, the evidence leaves no doubt in our minds that the award made by the arbitrators was the one they all intended to make, and we therefore conclude that the district court found that no mistake as to computation or allowance of interest had been made by the arbitrators, and the evidence certainly sustains that conclusion. By the agreement of submission entered into between the parties five arbitrators were selected, and the award made by any three of them was to be binding upon the parties to the arbitration proceeding. The award made by these arbitrators is the judgment of the tribunal selected by the parties themselves, and, like any other judgment, it is conclusive and binding upon the parties to the arbitration proceeding, both as to the law and the facts; and the sixth item of the award is the deliberate judgment of three of these arbitrators at least, and it is final and conclusive as against the parties to this proceeding.

2. This arbitration proceeding took place in pursuance of title 28, being sections 862 to 879, both inclusive, of the Code of Civil Procedure. Section 867 of this Code provides that all the rules prescribed by law in cases of referees are applicable to arbitrators, except as herein otherwise expressed, or except as otherwise agreed upon by the parties; and section 300, Code of Civil Procedure, among other things, provides that referees must make a statement of the conclusions of fact and law found by them, and make such statements separately. Another ground of the motion made by Burkland in the district court for setting aside this award, and insisted upon here, is, in effect, that the award made by the arbitrators is

not supported by any findings or conclusions of fact, and that, therefore, the award and the judgment pronounced thereon are erroneous. It is quite clear that the arbitrators in their report stated no conclusions of fact and no conclusions of law. They simply made an award. In other words, the award is a judgment without any findings of fact or conclusions of law on which to rest. Such an award or such a judgment is not void, but voidable and erroneous at most, and a judgment confirming such award may be reversed in a direct proceeding instituted for that purpose. (*Doty v. Sumner*, 12 Neb., 378; *Connelly v. Edgerton*, 22 Neb., 82.) It is also true that it was made the duty of the arbitrators in the case at bar, by the sections of the Code just referred to, to separately state the conclusions of fact and conclusions of law reached by them, as well as to make their award, the parties not having, in their agreement of submission, waived this requirement of the Code. (*Murry v. Mills*, 1 Neb., 456; *Graves v. Scoville*, 17 Neb., 593; *Westover v. Armstrong*, 24 Neb., 391.) The failure of the arbitrators to make and state the conclusions of fact and law found by them was an irregularity merely, but one that did not render their award void nor oust the district court of jurisdiction to confirm it; and these irregularities were of such a nature as the parties to the arbitration proceeding might waive, and notwithstanding their existence the parties to the arbitration might ratify the award made. The district court found specially—and the evidence sustains the finding—that Johnson had accepted and ratified the award made, and had on his part performed everything required of him; that Burkland had ratified the award; had accepted it and performed all things required by the award of him except the sixth item thereof. This award was an entirety, and Burkland having accepted the part thereof that was beneficial to him, is now estopped from assailing the award made for any irregularity in the proceedings of the arbitrators. It was competent for him to waive any irregularity in the arbitration proceeding which did

not go to the jurisdiction of the arbitrators' act or the jurisdiction of the district court to confirm the award made; and by his conduct he has waived the failure of the arbitrators to state the conclusions of fact and law found by them. (*Thornton v. McCormick*, 39 N. W. Rep. [Ia.], 502; *Miller v. Brumbaugh*, 7 Kan., 343; *Phillips v. Couch*, 66 Mo., 219; *Culver v. Askley*, 36 Mass., 300; *Cogswell v. Cameron*, 136 Mass., 518; *Fudickar v. Guardian Mutual Life Ins. Co.*, 62 N. Y., 392; *Hays v. Hays*, 23 Wend. [N. Y.], 363; *Jones v. Phœnix Bank*, 8 N. Y., 228; *Hazen v. Addis*, 14 N. J. Law, 333; *State v. Gurnee*, 14 Kan., 111.)

3. Section 863 of the Civil Code provides that parties who are about to submit matters of difference between them to arbitration must sign a written agreement of submission. Section 864 of the Code provides that the parties must then appear before some justice of the peace of the county and acknowledge the instrument of submission signed by them to be their free act and deed. The parties to the arbitration proceeding here complied with this statute in all respects, except that they acknowledged their written agreement of submission before a notary public of the county instead of a justice of the peace. It was insisted by Burkland in the court below, and is insisted here, that the district court was without jurisdiction to confirm the award made and render a judgment thereon on motion, because the agreement of submission to arbitration was not acknowledged before a justice of the peace. The authorities are uniform, so far as we have been able to examine them, in support of this contention of the plaintiff in error.

The statute of arbitrations and awards of the state of Illinois provides that parties might submit differences existing between them to arbitration by an instrument in writing, signed by them and attested by at least one witness. In *Moody v. Nelson*, 60 Ill., 229, the parties submitted their differences to arbitration by an instrument in writing, but it was not witnessed, and the supreme court held that the circuit court was without jurisdiction to

render a judgment upon the award made. The court said: "It is indispensable to the jurisdiction of courts to render judgment upon an award of arbitrators that the submission be executed with the formalities of and contain in substance what is required by the statute." To the same effect see *Low v. Nolte*, 15 Ill., 368.

The Code of Iowa provided that the agreement of parties to submit their difference to arbitration should be acknowledged; and in *Fink v. Fink*, 8 Ia., 313, it was held that an award made in pursuance of an unacknowledged agreement therefor conferred no jurisdiction upon the district court to render a judgment upon the award.

The statute of Massachusetts required an agreement for arbitration to be acknowledged before a justice of the peace. Such an agreement was signed by both parties, but acknowledged by only one of them; and the supreme court of Massachusetts held that the *nisi prius* court had no jurisdiction to render a judgment upon the award made. (See *Abbott v. Dexter*, 6 Cush. [Mass.], 108.)

The statute of Minnesota provides that an agreement for arbitration must be acknowledged before a justice of the peace; and in *Barney v. Flower*, 7 N. W. Rep. [Minn.], 823, the supreme court held: "In a submission to arbitration under the statute the agreement to submit must be acknowledged before a justice of the peace; an acknowledgment before any other officer will not do. The proper acknowledgment cannot be afterwards waived by the parties, even though that objection is not made on the application to confirm the award and for judgment on it."

In *Gibson v. Burrows*, 3 N. W. Rep. [Mich.], 200, it was held: "No rule of arbitration can be enforced by a judgment thereon unless it in all respects conforms to the statutory provisions." To the same effect see *Holdridge v. Stowell*, 40 N. W. Rep. [Minn.], 259; *Heath v. Tenney*, 3 Gray [Mass.], 380; *Burghardt v. Owen*, 13 Gray [Mass.], 300; *Franklin Mining Co. v. Pratt*, 101 Mass., 359; *Darling v. Darling*, 16 Wis., 675; *Steel v. Steel*, 1 Nev., 27.

The failure of the parties to the arbitration proceeding to acknowledge their written submission before a justice of the peace was one which went to the jurisdiction of the district court to pronounce a judgment upon the award finally made. In other words, the parties to an arbitration proceeding, in order to make it such a proceeding as the statute contemplated, and as would authorize the district court, on the coming in of the award, to confirm it and render a judgment to carry it into effect, must have complied with the statute. The fact that the parties to the arbitration proceeding accepted the award made and performed the requirements thereof amounted to a ratification of the proceedings of the arbitrators and waived any irregularities on their part, but did not confer jurisdiction on the district court to confirm the award or to render judgment thereon. Jurisdiction of the subject-matter of an action cannot be conferred upon a court even by consent.

We conclude, therefore, (1) that the finding and judgment of the district court to the effect that the sixth item of the award was not the result of a mistake made by the arbitrators in computation or allowing interest were and are correct; (2) that the plaintiff in error, by his conduct, has ratified the award made and is estopped from now assailing it because of the failure of the arbitrators to state the conclusions of fact and conclusions of law found by them; (3) that because of the failure of the parties to acknowledge the agreement of submission before a justice of the peace, the district court was without jurisdiction to confirm the award on motion and without jurisdiction to render a judgment upon the award made. The decree of the district court is

REVERSED.

JAMES GOLDER v. JOHN LUND.

FILED MARCH 3, 1897. No. 7110.

1. **Personal Injuries:** MEDICAL TREATMENT: EXPENSE: EVIDENCE. In an action for personal injuries it is proper to admit evidence of the actual expense incurred by plaintiff in procuring medical treatment, the rule being that he may recover the reasonable value of such services, not to exceed the actual expense incurred.
2. ———: ———: ———: ———. In order to recover in such an action for expenses of medical treatment it is not necessary to prove by the record that the physician rendering the services was licensed to practice under the statute. Proof that he practiced as a physician raises the presumption in actions between third parties that he was licensed to do so.
3. **Assault and Battery:** DAMAGES: EVIDENCE OF DISPOSITION. In an action for assault and battery, self-defense being pleaded as a defense to the action, proof that plaintiff was of a quarrelsome disposition and ungovernable temper must be made by proof of general reputation and not by opinions of witnesses based on their individual observation.
4. **Trial:** MISCONDUCT OF ATTORNEY: REVIEW. Generally a judgment will not be reversed because of improper remarks by counsel in argument when, on objection made the court interposes, the jury is directed to disregard the statement, and the improper remarks are not repeated.
5. ———: ———: ADMONITION. In such case an admonition addressed by counsel making the remark to the jury is equivalent to one addressed by the court.
6. ———: ———: EXCEPTIONS: REVIEW. In order to preserve for review error in permitting improper remarks by counsel, objection must be made at the time, a ruling obtained and exception taken.

ERROR from the district court of Dodge county. Tried below before MARSHALL, J. *Affirmed.*

Frick & Dolezal, for plaintiff in error.

J. C. Crawford and *A. H. Briggs, contra.*

IRVINE, C.

Lund sued Golder for assault and battery. The defenses interposed were a denial of the assault, self-

defense, and certain averments by way of mitigation of damages. There was a verdict and judgment for the plaintiff for $1,500, which the defendant seeks to reverse.

Certain assignments of error are waived in the brief. Of those insisted upon, two relate to the admission of evidence with regard to the expenses of medical attendance in the treatment of plaintiff for the injuries alleged to have been inflicted upon him. The plaintiff, after narrating the circumstances and consequences of the alleged beating, testified that he called Dr. Bartlett to treat his wounds; that he was confined to bed for six weeks and required constant nursing. He was then asked this question: "What amount of money did you expend in employing physicians, or physician and medicine together?" This was objected to, the objection overruled, and an exception taken. Aside from other grounds of objection, which apply to another assignment of error and which will be noticed later, it is urged that this question permitted a recovery for any sum the plaintiff might have seen fit to expend. It is true that the measure of recovery for such expenses is not the sum actually expended, but is confined to the reasonable expense. (*Hewitt v. Eisenbart*, 36 Neb., 794; *City of Friend v. Ingersoll*, 39 Neb., 717.) In the cases cited, however, the evidence of actual expenses was not coupled with evidence that such expenses were reasonably incurred, and verdicts based solely on the evidence of actual expenditure were held bad for that reason. The rule whereby such expenditures are recovered is based upon the doctrine of avoidable consequences. It is the duty of the person injured to exercise reasonable precautions in order to render the injury as slight as possible. Failing to perform that duty, he cannot recover for consequences which might thereby have been avoided; therefore he is entitled to to recover the expenses reasonably by him incurred by reason of such precautions. As held in the cases cited, he may not recover his actual expense, regardless of its reasonableness. On the other hand, he cannot speculate

on this item of damages and recover what would be a reasonable expense unless he has in fact incurred it, either by payment or by becoming liable therefor. In cases of personal injuries, in order to recover for medical attendance and similar items, it is necessary, therefore, for the plaintiff to show two facts: First, what expense he actually incurred; and secondly, that it was reasonably incurred. It is not the reasonable charge for medical services which he may recover, but the expense to him of such services, not to exceed their reasonable value. It was, therefore, proper for the plaintiff to show what expense he had actually incurred, and in this case this evidence was followed by proof of what was reasonably incurred, so the case does not fall within the rule of either of the cases above referred to.

Dr. Bartlett, after testifying that he was a practicing physician in Dodge county, and had been such for three years, and that he had rendered professional services to the plaintiff in the treatment of his injuries, was asked: "What are your charges for attending the plaintiff during that sickness?" This was objected to as incompetent, irrelevant, and immaterial, and because no proper foundation had been laid for the question. The objection was overruled. In support of this objection it is urged that there was no evidence that Dr. Bartlett had complied with the provisions of chapter 55, Compiled Statutes, with regard to the practice of medicine; that he was, therefore, not shown to be qualified to testify as an expert in regard to the value of his services, and further, that section 15 of that chapter providing that no person who has not complied with the provisions of that act may recover for medical services, and the plaintiff not having at the time of the trial paid the bill, it was not shown that any expense had been incurred for which the plaintiff was legally liable. The first part of the argument does not meet the question, which does not relate to the value of the services, but to the actual charge therefor. The objection would apply, however, to the

following question, which related to the reasonableness of the charge, and which was also properly objected to. A consideration of the second reason, however, argumentatively disposes of this question, although we do not wish to be understood as holding that in order to qualify a person learned in the profession to testify as an expert he must necessarily be qualified under the act to practice medicine in this state. It is true that the act in section 15 does in express terms prohibit a recovery for medical services rendered by a person not licensed to practice under the act. (*Maxwell v. Swigart*, 48 Neb., 789.) But it does not follow that in all proceedings the burden is upon the party asserting the professional character of the physician to prove by the record his license to practice. It has been said that "The general rule is that when a person is required to do a certain act, the omission of which would make him guilty of a culpable neglect of duty, it ought to be intended that he has duly performed it unless the contrary is shown. * * * But in civil or criminal prosecutions for a penalty for doing acts which the statutes prohibit, excepting by those who are licensed therefor, no such presumption arises; and where the subject-matter of the negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true unless disproved by the other party." (*State v. Crowell*, 25 Me., 171; *Brown v. Young*, 2 B. Mon. [Ky.], 26.) The authorities are generally to the effect that in a prosecution for carrying on a trade or profession without a license the burden is on the defendant to prove the license, but only because it is a fact peculiarly within his own knowledge, and one susceptible of very ready proof by him, while the contrary might require voluminous or difficult proof by the prosecution. In some cases this rule has been extended to actions for services performed by some person exercising a calling requiring a license. (See, among other cases, *Adams v. Stewart*, 5 Harr. [Del.], 144; *Dow v. Haley*, 30 N. J. Law, 354.) On the other hand, there are many cases distinguishing between prose-

cutions and actions for penalties on the one hand, and suits to recover for services on the other, holding that in cases of the latter class the presumption is in favor of a license. (*Brown v. Young, supra; Haskill v. Commonwealth*, 3 B. Mon. [Ky.], 342; *McPherson v. Cheadell*, 24 Wend. [N. Y.], 15; *Thompson v. Sayre*, 1 Den. [N. Y.], 175; *Williams v. People*, 20 Ill. App., 92.) We are not called upon to here determine what would be the rule in an action for services by the physician. The cases holding that in such actions a license is presumed distinguish such actions from prosecutions, or penal actions for proceeding without a license, on the ground that in the former class the issue is collateral. Whether or not this reason is sound when applied to an action for services, it is certainly sound when applied to an action between third parties, such as the case before us. To practice medicine without a license is, by section 16 of the act, made a misdemeanor, so that to require the license in this case to be affirmatively proved would be to presume a stranger to the action guilty of a crime. The reason for indulging apparently a similar presumption in prosecutions or penal actions has been already stated, to-wit, the fact that the evidence lies peculiarly within the power of the defendant. This reason does not apply when the qualifications of the physician are involved in a proceeding to which he is not a party. We think, therefore, whatever may be the rule in an action by or against the physician, that in an action to which he is not a party proof that he practiced as a physician raises the presumption that he was qualified to do so. A case directly in point and sustaining this view is *City of Chicago v. Wood*, 24 Ill. App., 40.

A witness was asked the following question, referring to the plaintiff: "Were you acquainted with his disposition and character as to being peaceable or quarrelsome?" This was on objection excluded, and the defendant then offered to prove that the witness knew the disposition and character of the plaintiff, and that he

was quarrelsome, easily aroused, and had an ungovernable temper. This evidence was offered in support of the plea of self-defense. We can certainly see no reason why it is not proper, in support of such a defense, to make proof of the plaintiff's character in a civil action for assault and battery as much as in a prosecution for homicide; but in such cases the proof must be of the plaintiff's general reputation, and not by the opinion of witnesses as to his general character. (*Carleton v. State*, 43 Neb., 373.) Neither the question nor the offer promised the production of evidence of reputation, but merely of the witness' opinion, and the case last cited is on this point directly applicable.

Several assignments relate to alleged misconduct of counsel in argument. The showing made was by affidavits in support of a motion for a new trial. There is very little conflict in the evidence as to what occurred. The trial judge having overruled the motion for a new trial, we should properly consider this evidence in the light most favorable to the plaintiff, but there being so little conflict, we accept the statement of defendant's witnesses to the effect that during the closing argument one of the counsel for plaintiff said that he had known the defendant for a number of years; that they had always been good friends, and that later he said: "I tell you, Golder is a fighter, and he is the bully of that whole country up there when he gets his Irish up." Thereupon the defendant excepted to the statement of counsel that Golder was a fighter and a bully; and the court said that the statement was improper and such statements should not be made. Counsel for plaintiff then said that the jury should not pay any attention to it, and the defendant still insisted on his exception. It does not appear that the language was repeated, or that any similar remark was thereafter made. It is urged that the mere remark of the court that the statement was improper was not sufficient without an admonition to the jury to disregard the statement, but the defendant's proof shows that counsel

for the plaintiff himself gave the jury that admonition. There may be cases so flagrant,—such abuses of the privilege of counsel,—that a remark, once made, would be so prejudicial that no admonition by the court would cure the error, but we do not think that the remark here complained of was of that character. It was only by inference from a former statement that it could be taken as a statement of fact within counsel's knowledge, rather than an inference from the testimony. Generally an admonition by the court, when the improper language is not persisted in, is sufficient to cure the error. (*Atkins v. Gladwish*, 27 Neb., 841; *Mehagan v. McManus*, 35 Neb., 633.)

Counsel also, in argument, commenting on the testimony of the physician as to the time which it would take for the wound to heal, said: "I have had a good deal of experience with wounds myself, and I have never known a wound to heal up in as short a time as Dr. Inches said it would." Objection was made to this language, but no ruling obtained from the court, and counsel desisted from stating his own experience. In order to render available an assignment of error based on improper language used by counsel in argument, not only must objection be made at the time, but a ruling obtained and an exception taken. (*Gran v. Houston*, 45 Neb., 813.) No ruling having been obtained on this objection, and counsel having yielded to the suggestion and desisted from further statements of that character, the language, if improper, which we do not decide, was not ground for reversal.

AFFIRMED.

STATE OF NEBRASKA, EX REL. WOODRUFF-DUNLAP PRINTING COMPANY, V. J. S. BARTLEY ET AL.

FILED MARCH 3, 1897. No. 8948.

1. **Mandamus.** A writ of *mandamus* will only be allowed when the relator clearly establishes his right. Nothing essential to that right will be taken by intendment.
2. ———: STATE PRINTING BOARD: AWARDING CONTRACTS. The statute providing that no bid for state printing shall be considered unless accompanied by a bond conditioned to give bond for the performance of the contract should it be awarded, a bidder, though otherwise entitled to the contract, cannot have the aid of a writ of *mandamus* to compel the awarding of the contract to him when he does not show that his bid was accompanied by the bond so required.

ORIGINAL application for *mandamus* to require the state printing board to award to the relator the contract to print and bind the reports of state officers, and other reports. *Writ denied.*

J. H. Broady, for relator.

C. J. Smyth, Attorney General, and *Ed P. Smith, Deputy Attorney General*, for respondents.

IRVINE, C.

An act of 1883, Session Laws, chapter 61, Compiled Statutes, chapter 68, provides for printing for the state. The auditor of public accounts, treasurer, and secretary of state are constituted a state printing board and given general supervision over the matter of state printing, in the manner provided by the act. The act provides that the board shall advertise at certain times, and in a certain manner, for proposals for the different classes of printing provided for. It is required that the advertisement shall state that the board reserves the right to reject any and all bids (sec. 4); that the proposal or bid for any of the contracts shall not be considered unless

the same shall be accompanied by a bond in the sum of $5,000, with two or more sureties, conditioned that in case the party proposing shall be awarded the contract he will, within five days after the award, enter into bonds for the faithful performance thereof (sec. 7). It is then provided that it shall be the duty of the secretary of state to give immediate notice to the successful bidder of the acceptance of his proposal, and that he shall in five days thereafter enter into bonds in the sum of not less than twice the amount of the contract price, conditioned for the faithful performance of the contract, and if he fail to give bond within the time allowed, then "the contract shall be given to the next lowest bidder, who will give bond as aforesaid, or the board may, in their discretion, advertise anew and relet the contract in the manner hereinbefore provided." (Sec. 8.) Further provision is made for actions upon the preliminary bond for failure to give the final bond. (Sec. 10.) Section 2 of the act is as follows: "The printing of all bills for the legislature, with such matters as may be ordered by either house thereof to be printed in bill form, shall be let in one contract. The printing and binding of the senate and house journals shall be let in another contract. The printing and binding of reports of state officers authorized by law to be printed, and all other reports and documents ordered by the legislature, except such as enter into and form a part of the journals, shall be let in another contract. The printing and binding of the laws, joint resolutions, and memorials enacted by the legislature shall be let in another contract. And the printing and binding of all blanks, blank books, and circulars required to be furnished by the officers of the executive department of the state shall be let in another contract."

The relator, a corporation formed for the purpose of conducting a printing business, instituted this action against the then members of the state printing board, praying for a writ of *mandamus* to require the respondents to award and let to the relator a contract for the

printing and binding of the reports of state officers and all other reports and documents ordered by the legislature, except such as enter into and form a part of the journals. The terms of office of the original respondents having expired, an amendment was made praying for similar relief against their successors. The attorney general, on behalf of the respondents, demurred generally to the relation.

Omitting formal and unessential matters, the relation avers that the state printing board duly advertised for bids as provided by the act, designating as class 1 the printing of bills for the legislature, with such matters as may be ordered by either house; as class 3, the reports of state officers and other reports and documents ordered by the legislature not forming a part of the journals, and undertook to reserve under class 3 the right to award contracts in whole or in part, as the board should elect; that the relator filed its bid for the work designated as class 3; that this bid was considered; that it was the lowest and best bid therefor in the aggregate; that, considered by items, its bid was the lowest for certain reports, but the bids of two others were lower than the bid of the relator for certain other reports; that the relator then tendered to the printing board its bond, as required by law, for the performance of the contract for printing all the reports, but the board refused to award to the relator the contract for the whole of the work, solely because it deemed proper to sever the contract and award to the relator the printing only of such reports for which it was the lowest bidder, and undertook to award to the two other competitors referred to the contracts for printing those reports for which they were, respectively, the lowest bidders. The relator contends that under section 2 of the law, already quoted, the printing of all reports must be awarded in a single contract, and that the board had no power under the law to sever the contract. The respondents, in support of their demurrer, contend against this construction of the statute, and also insist

that the relator has, for other reasons, failed to show a right in itself to the contract, among such being that the relator does not aver that it tendered the preliminary bond required by section 7 of the statute. This defect is fatal to relator's case, and renders a decision of other questions unnecessary. The positive mandate of the law in section 7 is that a proposal shall not be considered unless it be accompanied by a bond conditioned for the giving of bond for the performing of the contract in case it shall be awarded. This provision is not idle and the giving of the preliminary bond is not a bare formality. If a bidder is successful and fails to give the proper bond for the performance of his contract, the board may either relet the contract to the next lowest bidder who will give bond or it may readvertise and receive new bids. In either event the state sustains a loss, and the requiring of preliminary bonds is for the purpose of protecting the state against that loss. While the relator alleges that it tendered the final bond for the performance of the contract, it does not allege that it tendered the preliminary bond with the bid. If that bond was not tendered, it was not only the right, but the duty of the board to disregard the bid. In order to obtain a writ of *mandamus* the right of the relator must be clear, and nothing essential to that right will be taken by intendment. (*State v. School District*, 8 Neb., 92; *State v. Mayor and Council of Omaha*, 14 Neb., 265; *State v. Nelson*, 21 Neb., 572; *State v. Babcock*, 25 Neb., 500; *State v. Sabin*, 39 Neb., 570; *State v. Cook*, 43 Neb., 318; *State v. Home Street R. Co.*, 43 Neb., 830; *State v. Bowman*, 45 Neb., 752.) While the relation alleges that the board based its refusal solely upon its claim of power to sever the contracts, still the writ should not be granted unless it be made to appear that the relator was, aside from that contention, entitled to the award.

WRIT DENIED.

EUGENE F. SEAVER ET AL. V. JOHN HALL.

FILED MARCH 3, 1897. No. 7124.

1. **Vendor and Vendee:** BREACH OF CONTRACT: DAMAGES. When two or more persons have contracted to convey land to a third person, the vendors cannot, by contract or conveyance among themselves, release any of them from the obligation to respond to the vendee for damages arising from a breach of the contract.
2. ———: FAILURE TO MAKE TITLE: REMEDY OF VENDEE. Where a vendor of land cannot make title, the vendee may at his election recover payments of purchase money with interest, or damages for the loss of his bargain.
3. ———: ———: SPECIFIC PERFORMANCE. Where time is not of the essence of the contract, a vendor who is unable to make title at the time he should convey, may have specific performance by tendering good title at any time before decree, provided he has acted in good faith and specific performance can be enforced without injustice to the vendee.
4. ———: ———: ———: RENTS AND COSTS. In such case an awarding of rents to the vendee together with costs, in the absence of special circumstances adjusts the equities.
5. **Record for Review:** DATE OF FINDINGS. The record as to the time a finding was made prevails as against an objection based on the hypothesis that the finding was earlier made, in the absence of some showing of record in support of the objection.

ERROR from the district court of Douglas county. Tried below before BLAIR, J. *Reversed.*

Wharton & Baird, Bartlett, Baldrige & De Bord, and *Breckenridge & Breckenridge,* for plaintiffs in error.

George W. and *W. G. Doane, contra.*

IRVINE, C.

This action was begun by Hall against Eugene F. Seaver, George N. Hicks, James M. Swetnam, George W. Loomis, Amelia Burroughs, and Ella E. Latson to recover moneys paid to the defendants under a contract for the purchase of land. From a judgment for the plaintiff

the defendants prosecute error. The questions raised are for the most part questions of law of general application. The case was tried to the court, a jury having been waived, and the facts may perhaps be best stated by an abstract of the special findings, which, except in one particular, are admitted to be in accordance with the evidence.

On June 8, 1887, Hall entered into a contract with the defendants whereby defendants agreed to sell plaintiff lot 7, block 4, West Lawn Addition, to which the defendant then had a valid fee-simple title. The price was $425. The time for payment was extended, but final payment made June 14, 1893, and a deed demanded, which defendants were unable to make, because the defendant Seaver "had, through inadvertence and mistake, conveyed the same to one Ames, and so had put it beyond his power to convey the same to plaintiff, and defendants at that time had no title thereto." April 27, 1888, the defendants, who prior thereto had owned in common the tract of land known as West Lawn, including the lot in question, divided their respective holdings, lot 7, block 4, falling to the defendant Seaver. The other defendants executed to him a quitclaim deed and assigned to him their interest in the contract with plaintiff. All payments made thereafter were made to Seaver, "as they had been before that time," but plaintiff had no notice until he had fully completed his payments that the title did not remain in the defendants, as it was when the contract was made. When final payment was made Seaver promised to deliver a warranty deed, "but prior to that time the said Seaver had, as hereinbefore stated, through inadvertence and mistake, but without any intention whatever to commit any fraud upon plaintiff, conveyed (with forty-nine other lots) the said lot 7, block 4, West Lawn, to one George W. Ames, and learned such mistake on said June 14, 1893, and immediately upon ascertaining such fact entered upon negotiations with said Ames to procure a reconveyance of said lot from Ames to said Seaver, in

order that the said Seaver might make the conveyance of said lot to said Hall, but said negotiations failed because of the inability of Seaver to pay the price asked for said lot." July 18, 1893, plaintiff served notice upon the defendants of his intention to rescind the contract. Between June 14 and July 19 (when the suit was brought) Seaver endeavored to procure title, but failed to do so until March 15, 1894. After the negotiations between Seaver and Ames failed, defendant Loomis continued same, with the result that on March 15, 1894, Ames and wife reconveyed to Seaver. March 21, Seaver and wife made and tendered to plaintiff their warranty deed, which plaintiff refused. The title was then clear. Judgment was rendered for the amount which had been paid by Hall, with interest.

The first question presented relates to the measure of damages. It is contended that if the case be viewed as an action for money had and received, the judgment should have been against Seaver alone for moneys paid after the partition among the defendants, and, viewed as an action for damages for breach of contract, the measure would be the value of the lot at the time conveyance should have been made, and not the purchase price. There are no forms of action under the Code except where specially provided. The question is, does the petition state any cause of action, and if so, one calling for the relief granted? We do not think that the partition of the property among the defendants released any of them from liability to Hall. The contract was with all the defendants, and while they might by agreement among themselves partite the property and change their mutual rights and obligations, they could not by such action affect their obligations to Hall or discharge any of them from any of such obligations. While as among the defendants Seaver became entitled to receive the purchase money to his own use, Hall could still hold them all responsible for the performance of their contract and look to all for damages resulting from its breach, no matter

how those damages accrued. It is claimed that that part of the findings to the effect that plaintiff had no notice of the conveyance to Seaver is not sustained by the evidence. We think, however, it is. As to the measure of damages, it has been several times held that the vendee who has paid the purchase money may, on failure of title, recover it back, and this although the vendee was himself in default. (*Eaton v. Redick*, 1 Neb., 305; *Reed v. Beardsley*, 6 Neb., 493; *McPherson v. Wiswell*, 19 Neb., 117.) And this doctrine receives much support elsewhere. (See, for instance, *Stickter v. Guldin*, 30 Pa. St., 114; *Bassett v. Bassett*, 55 Me., 127; *Hurd v. Denny*, 16 Ill., 492.) There are other cases in this court holding that the vendee is entitled to the benefit of his bargain, and assimilating the rule of damages to that in cases of personal property. (*Wasson v. Palmer*, 13 Neb., 376; *Carver v. Taylor*, 35 Neb., 429; *Violet v. Rose*, 39 Neb., 660.) It would appear that this court has thereby placed itself on both sides of the much disputed question as to whether, when the vendor cannot make title, only nominal damages can be recovered, or whether the vendee is entitled to the benefit of his bargain. Some cases hold that the former rule applies where the vendor acted in good faith (*Conger v. Weaver*, 20 N. Y., 140), and that the latter applies when the vendor was guilty of fraud (*Pumpelly v. Phelps*, 40 N. Y., 59). If this distinction is to be observed, and it receives support in many states other than New York, the present case would, under the findings, be brought within the rule of nominal damages; that is, the damages would be nominal for the breach, but the vendee would be entitled to recover his payments, a result which would sustain this judgment. It may well be doubted, however, whether, in a state where exemplary damages are not permitted, the measure of recovery should depend on the good faith of the vendor. The object of the law is to afford compensation, and not to punish, in civil cases, and the actual damage is the same regardless of the motive of the vendor. We think, however, that the cases can be

reconciled on a more logical basis. The vendor should not be permitted to speculate on his contract. If either rule of damages should be enforced, to the exclusion of the other, he would be permitted to do so. If the rule of nominal damages alone prevails, then if the land rises in value the vendor may obtain the benefit of the increase by breaking his own contract, as by putting it out of his power to fulfill it. If the rule of substantial damages alone applies, the vendor, when the property has fallen in value, may keep the purchase money and the lot by repaying only the decreased value of the lot. The law will not permit a party to so speculate and reap a profit by violating his contract. We think the true rule to be that the law reposes in the innocent vendee an election either to treat the contract as rescinded and recover back what he has paid, or to ask damages for the breach. In this case he relied on rescission, pleaded the payments made, and asked judgment therefor, thus exercising that election.

The defendants next invoke the doctrine that where time is not of the essence of the contract, and the vendor is not able to make a good title at the time the contract ought to be performed, nevertheless a court of equity will afford him relief if he subsequently perfect his title and tender a good conveyance before decree. The general principle has been several times recognized by this court. (*Filley v. Duncan*, 1 Neb., 134; *King v. Gsantner*, 23 Neb., 797.) This proposition is met in the present case by substantially two arguments. The first is that this is an action by the vendee after rescission, and not a suit for specific performance; the second, that specific performance will not be decreed unless the party seeking it has been ready, prompt, and eager in the performance of his part. As to the first argument, it is sufficient to say that the Code recognizes no distinction between proceedings at law and in equity. The defendant may interpose an equitable defense. In this case the defendants set up the facts in their answer and prayed that the plaintiff

might be required to accept a conveyance. If in an action by the vendor, who failed at the proper time to tender good title, the vendee will be required to accept it when subsequently tendered, there is no reason under our system of practice why the present ability to furnish a good title, and tender thereof, cannot be presented as a defense to the vendee's action for damages. As to the second argument, the rule that a party to enforce specific performance must be ready and prompt on his part yields to the general doctrine that time is not of the essence of the contract, and does not prevail in such cases as this, where the vendor becomes able within a reasonable time to perform, where his contract was not speculative, but entered into in good faith, and when the situation of the other party has not been altered so as to render specific performance unjust to him. One text-writer states the rule as follows: "It is accordingly held that if a substantial ownership exists, though the title be not fully cleared on the appointed day, specific performance may be decreed; and the court may rectify the incidental delay by giving the intermediate rents to the purchaser, and interest on the purchase money to the vendor." (Adams, Equity, 88.) Another says: "Courts of equity will also relieve the party vendor by decreeing a specific performance where he has been unable to comply with his contract according to the terms of it, from the state of his title at the time, if he comes within a reasonable time, and the defect is cured. So if there has been no unnecessary delay courts of equity will sometimes decree a specific performance in favor of the vendor, although he is unable to make a good title at the time when the bill is brought, if he is in a condition to make such a title at or before the time of the decree." (Story, Equity Jurisprudence, 777.) Under the rule as first stated the vendees might in this case fail because they did not show a substantial ownership at the time they should have performed. Under the rule stated by Story this is immaterial. While most of the cases are where there was a

technical defect of title, the rule is usually stated in the language of Story, and *Hepburn v. Dunlop*, 1 Wheat. [U. S.], 179, seems to have been a case where the defect was not simply a defect in the technical legal title. (See *Hepburn v. Auld*, 5 Cranch [U. S.], 262, and *Dresel v. Jordan*, 104 Mass., 407.) However this may be, we think the case of *King v. Gsantner*, *supra*, controls us here. One of the defects in the vendor's title in that case arose from the fact that before plaintiff's grantor had recorded his deed, his grantor had, through inadvertence and mistake, made a deed to a stranger. It was held that a tender of title several months thereafter was sufficient. The point discussed in nearly all the cases is not the character of the defect in the vendor's title, but his good faith and the practicability of awarding specific performance without injustice to the vendee. The findings are that Seaver, immediately on ascertaining that the lot had been conveyed to Ames, entered upon negotiations to reinvest himself with the title, and that before decree he had done so and tendered a conveyance. This seems to be sufficient. (Story, Equity Jurisprudence, *supra; Hepburn v. Dunlop, supra; McKinney v. Jones*, 55 Wis., 39; *Mussleman's Appeal*, 65 Pa. St., 480; *Leavitt v. Morrow*, 6 O. St., 71; *Brown v. Haff*, 5 Paige Ch. [N. Y.], 235.) It would seem, therefore, that the vendors brought themselves within the rule.

It is urged that the contract was for a warranty deed from all the defendants; that the other defendants conveyed to Seaver by deed of quitclaim; and that only Seaver's warranty was tendered. The bill of exceptions discloses that on the 13th of June, 1894, the defendants moved to reopen the case and for leave to introduce additional testimony. Such leave was granted and the defendants tendered a warranty deed to Seaver from the other defendants, duly recorded. A general objection to this deed as incompetent, immaterial, and irrelevant was sustained. It is asserted that this tender was not made until after the court had announced its findings. The transcript shows that the findings were made June 26,

and while the plaintiff objected to reopening the case on the ground that the findings had already been announced, the record does not disclose anything in support of the objection, and we must accept the evidence of the record rather than the inference from this objection not supported by the record.

There is nothing to show that there had been any change in the situation of the parties rendering it unjust to Hall to require him to accept performance, except what can be corrected by allowing him the rental value of the land pending the delay, and awarding costs against the defendants. This, we think, should be the course taken. The judgment of the district court is reversed and the cause is remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

T. R. NORCROSS v. G. P. BALDWIN.

FILED MARCH 17, 1897. No. 7177.

Replevin: LIEN: PLEADING. A plaintiff in replevin who claims a special ownership by virtue of a chattel mortgage must, in his petition, allege facts showing his interest in the property in controversy, and also facts which entitle him to the immediate possession thereof.

ERROR from the district court of Gage county. Tried below before BUSH, J. *Affirmed.*

E. O. Kretsinger, for plaintiff in error.

A. D. McCandless and *S. J. Tuttle, contra.*

POST, C. J.

This was an action of replevin by the plaintiff in error against the defendant in error in the district court for

Gage county. There was a verdict below finding that the right of property and right of possession of the property in controversy was in the defendant, and assessing damage against the plaintiff for the wrongful detention thereof, upon which judgment was entered, and from which the latter prosecutes error.

It is in the petition below alleged that the plaintiff therein is entitled to the immediate possession of the property described, by reason of a special ownership or interest therein through a chattel mortgage executed by one Baldwin, but without the statement of any facts entitling him to such possession. It was held in *Camp v. Pollock*, 45 Neb., 771, as the natural and necessary result of the decision in *Musser v. King*, 40 Neb., 892, overruling *Adams v. Nebraska City Nat. Bank*, 4 Neb., 370, that a plaintiff in replevin who relies upon a special ownership by means of a chattel mortgage must allege not only the facts with respect to such ownership, but also facts which entitle him to the possession of the mortgaged property. The authorities cited by IRVINE, C., in *Camp v. Pollock*, *supra*, without doubt support the proposition that where, by the terms of a mortgage, the mortgagor is entitled to possession of the property conveyed, the mortgagee cannot maintain a possessory action therefor against an officer who has levied upon the same as the property of the former. The reasoning there employed is quite as applicable to the case at bar. It follows that the petition fails to state a cause of action, and that the judgment must be

AFFIRMED.

THOMAS W. SHRYOCK ET AL. V. CELIA V. SHRYOCK ET AL.

FILED MARCH 17, 1897. No. 7073.

Insurance: MUTUAL BENEFIT ASSOCIATIONS: BENEFICIARIES. A mutual benefit association whose declared object is "to give moral and material aid to its members by assisting them in business," etc.,

and "to establish a benefit fund, from which not exceeding $3,000 shall be paid at the death of a member to whomsoever he shall designate, or if a legatee be not mentioned, then to the heirs at law of the deceased," in the year 1881 issued a certificate of membership to one S. Said certificate is in form similar to those in common use by associations of like character, with the exception of the beneficiary clause, viz.: "It is my will that the benefit fund named in this certificate be paid to —— legal heirs, subject to revocation or assignment at pleasure on presentation of this certificate to the supreme secretary," etc. The insured, about ten years previous to his death, which occurred in the year 1892, intending to make provision for his parents, indorsed said certificate as follows: "Two thousand dollars of this policy to be paid to my father and mother if living at the time of my death. (Signed) W. B. S." In a proceeding by the widow and daughter of the insured against his father and mother to determine the rights of the parties with respect to the fund realized upon said certificate, *held:* (1.) The act of the insured in directing payment to his father and mother was an original designation, and not a change of beneficiaries within the meaning of the certificate and laws of the association. (*Hanson v. Minnesota Scandinavian Relief Ass'n*, 59 Minn., 123.) (2.) Viewing said transactions as a change of beneficiaries, it sufficiently answers the requirements of the certificate and by-laws in that regard. (3.) If it was necessary to present the certificate to the supreme secretary as a condition precedent to the rights of the insured to designate his parents as beneficiaries thereunder, such presentation will be presumed from the designation actually made, accompanied by an intention to provide for the beneficiaries named and the subsequent payment by the insured during his lifetime of assessments for their benefit.

ERROR from the district court of Cass county. Tried below before CHAPMAN, J. *Reversed.*

The opinion contains a statement of the case.

Beeson & Root, for plaintiffs in error:

The Equitable Aid Union is a mutual insurance company, and the rules applicable to old-line companies do not apply. (*Masonic Mutual Benefit Society v. Burkhart*, 10 N. E. Rep. [Ind.], 79.)

All a beneficiary has during the lifetime of a member who holds the certificate is a mere expectancy which gives no vested rights, but is subject to the will of the person taking out the insurance. Whenever the will of

the assured is satisfactorily manifested that he desires a change, or has made a change of the beneficiary, no matter in what manner, or by what method, the expectancy of the first designated beneficiary is destroyed, and the money should be paid as directed by the deceased. (*Marsh v. American Legion of Honor*, 21 N. E. Rep. [Mass.], 1070; *In re Breitung's Estate*, 46 N. W. Rep. [Wis.], 891; *Anthony v. Massachusetts Benefit Association*, 33 N. E. Rep. [Mass.], 577; *Chandler's Appeal*, 34 Wis., 505; *Brown v. Mansus*, 5 Atl. Rep. [N. H.], 768; *Chapman v. McIlwrath*, 77 Mo., 38; *Griswold v. Sawyer*, 4 Am. R. & C. Cas. [N. Y.], 98; *Grand Lodge v. Noll*, 51 N. W. Rep. [Mich.], 268; *Schmidt v. Knights of Pythias Ins. Association*, 47 N. W. Rep. [Ia.], 1032.)

A. N. Sullivan, contra.

References to question as to change of beneficiary: *Harley v. Heist*, 86 Ind., 196; *Presbyterian Mutual Assurance Fund v. Allen*, 106 Ind., 593; *Duvall v. Goodson*, 79 Ky., 224; *Continental Life Ins. Co. v. Palmer*, 42 Conn., 64; *Union Mutual Aid Association v. Montgomery*, 38 N. W. Rep. [Mich.], 588; *McKinney v. Stewart*, 5 Kan., 392; *Weisner v. Zann*, 39 Wis., 200; *State v. Engle*, 21 N. J. Law, 367; *Bailey v. Bailey*, 25 Mich., 188; *Richards v. Miller*, 62 Ill., 424.

The mention of one method of change of beneficiary excludes all others. (*Holland v. Taylor*, 111 Ind., 127; *Stephenson v. Stephenson*, 64 Ia., 534; *National Mutual Aid Society v. Lupold*, 101 Pa., 111; *Gentry v. Knights of Honor*, 23 Fed. Rep., 718; *Ireland v. Ireland*, 42 Hun [N. Y.], 212; *Knights of Honor v. Nairn*, 60 Mich., 44; *Highland v. Highland*, 109 Ill., 366; *Greeno v. Greeno*, 23 Hun [N. Y.], 478; *Manning v. Supreme Lodge*, 5 S. W. Rep. [Ky.], 385; *Olmsted v. Masonic Mutual Benefit Society*, 37 Kan., 93; *Daniels v. Pratt*, 143 Mass., 216; *Hotel Men's Benefit Association v. Brown*, 33 Fed. Rep., 11; *Coleman v. Knights of Honor*, 18 Mo. App., 189.)

POST, C. J.

This is a petition in error to review a judgment of the district court for Cass county reversing an order of the county court in the settlement of the estate of William B. Shryock, deceased. The primary question of the controversy relates to the disposition of the sum of $2,805, the proceeds of a certificate of membership held by deceased in the Equitable Aid Union, a benevolent fraternal society issuing insurance to members thereof upon the so-called asssessment plan. The object of the order named, according to its constitution, which was introduced in evidence, is " * * * 4. To give all moral and material aid in its power to members, by assisting each other in business, in obtaining employment, and in sickness. 5. To establish a benefit fund, from which not exceeding $3,000 shall be paid at the death of a member to whomsoever the member shall designate, or if a legatee be not mentioned, then to the heirs at law of the deceased." The certificate in question bears date of February 26, 1881, and is in form substantially similar to those in common use by fraternal and mutual benefit associations, with the exception of the beneficiary clause, which reads as follows:

"*To the Officers and Members of the Supreme Union, E. A. U.:* It is my will that the benefit fund named in this certificate be paid to —— legal heirs, subject to revocation or assignment at pleasure on presentation of this certificate to the supreme secretary of the Equitable Aid Union. WILLIAM SHRYOCK."

The deceased, who was at the date of said certificate a single man, subsequently married the defendant in error, Celia V. Shryock, and from which union was born the latter's co-defendant, her infant daughter, Lillian J. Shryock. Deceased, previous to his marriage, and ten years or more before his death, over his own signature indorsed said certificate as follows:

"Two thousand dollars of this policy to be paid to my father and mother if living at the time of my death.

"WM. B. SHRYOCK."

It does not appear affirmatively that the certificate was presented to the supreme secretary upon the execution of the foregoing direction, and the presumption arising from the facts stated will be considered in another connection. The deceased left a will, executed a short time before his death, containing this, among other provisions: "After paying my debts, I wish the following disposition to be made of my property and life insurance: One thousand dollars to be paid to my mother and one thousand dollars to be paid to my father." Said will having been proved as provided by law, the said Celia V. Shryock, Thomas W. Shryock, and Frank E. White in due form qualified as executors, and who, as such executors, subsequently received from the Equitable Aid Union the benefit fund in controversy. The issues below were presented by the separate petitions of the said Celia V. Shryock, in her own right and as guardian of her infant daughter, Lillian J. Shryock, as heirs at law of the deceased, praying to be declared the beneficiaries under and by virtue of the certificate of insurance above mentioned, and for a decree confirming their title in equal shares to the proceeds thereof in the hands of the executors. The plaintiffs in error, Thomas W. Shryock and Rachel A. Shryock, who are the father and mother of the deceased, filed answers, each asserting a claim to $1,000 of the fund in controversy as beneficiaries under said certificate by virtue of the written direction thereon above set out, and also by reason of the foregoing provision of the last will of the deceased. They alleged, also, certain facts by reason of which, it is argued, defendants in error are now estopped to claim any part of the fund in question, although that contention, in view of the conclusion we are constrained to adopt respecting the other questions stated, will not be noticed further. There was also a proceeding instituted by defendants in error for the removal of the said

Celia V. Shryock as executrix, on account of the alleged contumacy of the latter in refusing to join with the said Thomas W. Shryock and Frank E. White in signing checks in payment of claims allowed against the estate. The county court found upon all of the issues thus joined for the plaintiffs in error, adjudging them to be entitled to the sum of $1,000 each out of said fund, and entered an order removing the said Celia V. Shryock from her trust as executrix, etc. On appeal from said orders to the district court, the several proceedings having been consolidated by agreement of parties, a trial was had upon the issues herein stated, which, as we have seen, resulted in a finding and judgment for the defendants in error upon all of such issues, and from which the said Thomas W. Shryock and Rachel A. Shryock prosecute error.

In determining the rights of the respective claimants to the fund in question we may dismiss from our consideration the provision made for plaintiffs in error by last will of the deceased. It is clearly established by the evidence that the latter had, at the time of the execution of his said will, $7,000 or upwards of life insurance, subject to testamentary disposition, beside other property, real and personal, of considerable value, so that it cannot by any permissible construction of said provision be held to convey an interest in this particular policy or certificate of insurance to the exclusion of others. This observation leads to the second and most important subject of inquiry, viz., the effect of the deceased's attempt to designate his father and mother as beneficiaries under the certificate of insurance. That his intention was to so designate them to the extent of $1,000 each is apparent from the written indorsement and attending circumstances, as to which there is no dispute. Counsel for defendants in error frankly admits that the rules governing life insurance companies proper have no application to mutual benefit associations in respect to the change of beneficiaries. But the right to make such a change,

it is contended, rests upon contract, and can be exercised only upon the conditions and in the manner prescribed by the certificate of membership and laws of the association. There are, it must be conceded, authorities which appear to support that contention, while others, equal in point of number and respectability, hold that conditions of the character indicated are imposed for the protection of the association, and when it chooses to waive the prescribed formalities a third party will not be heard to complain. We are, however, spared the necessity of reviewing at this time the decisions upon the subject, or of choosing between the conflicting and apparently irreconcilable views therein expressed, first, because the act of deceased in directing payment to plaintiffs in error was not, in our judgment, a change of beneficiaries, but an original designation thereof; second, assuming that it was necessary to present the certificate to the supreme secretary before the rights of plaintiffs in error would attach as beneficiaries thereunder, such presentation will be presumed, in the absence of evidence to the contrary, from the period of ten years and more which elapsed between the date of such designation and the death of the said William B. Shryock. In *Hanson v. Minnesota Scandinavian Relief Association*, 59 Minn., 123, which was a proceeding in the nature of a bill of interpleader, the law of the association provided for payment of benefits to "such person or persons as the deceased may have designated to receive the same, as the same shall appear upon the books of the association," and * * * "if no designation has been made, then the benefit shall be paid to the legal heirs or devisees of such deceased member." It was also provided that every applicant should designate in his application the person or persons to whom, in case of his death, the benefit should be paid, and that any member in good standing might change his beneficiary by sending to the secretary a written application therefor, duly acknowledged before a notary public, and paying a fee of $1.00. It was further

provided that in case such change was approved by the board of managers, a new certificate should be issued to such member, and that no change of beneficiaries should be made in any other manner than as therein provided. One H., in the month of March, 1882, applied to become a member of the association, and upon being accepted as such received a certificate of membership, without having designated a beneficiary. Some time in the year 1883 or 1884 the insured called in person at the office of the association and verbally notified the general manager that he had designated his four children as his beneficiaries, to whom payment should be made, in case of his death, of the fund realized upon his certificate, of which an entry was made in the books of the association. H. died in the year 1890, leaving surviving him, in addition to the children designated by him as beneficiaries under his certificate of insurance, a widow and daughter. The question therein was, as in this case, the effect of the attempted designation by the deceased of the children, who claimed as his beneficiaries, and the court, by Mitchell, J., referring to that subject, say: "By the 'designation' of a beneficiary, the by-laws evidently refer to the express act of the member specifying and naming some particular person, and by 'changing' beneficiaries they refer to the act of naming and specifying some other person or persons in place of those previously designated. According to this construction of the by-laws, the act of Hanson was an original designation, and not a change of beneficiaries." With the conclusion reached in that case, which is, it must be conceded, directly in point, we are entirely satisfied, and accordingly hold that the provision by the deceased for the plaintiffs in error, his parents, was in no sense a change of beneficiaries, but an original designation thereof within the meaning of the certificate and constitution of the Equitable Aid Union. But viewing the transaction in question as a change of beneficiaries, it sufficiently answers the requirements of the certificate and laws of the association, which, unlike

any other to which our attention has been called, prescribe no conditions to the exercise by the insured of his right in that regard, except the presentation of his certificate to the supreme secretary. Granting such presentation to have been a condition precedent to the right of deceased to designate plaintiffs in error as beneficiaries, it should, we think, be presumed from the designation in fact made, accompanied by the intention to provide for them and the subsequent payment of assessments for their benefit during the lifetime of the deceased. (2 Wharton, Evidence, sec. 1320; Lawson, Presumptive Evidence, p. 67 *et seq.*; 1 Jones, Evidence, sec. 51.)

As regards the order removing Mrs. Shryock from her trust as executrix, we quite agree with counsel that the judgment of the district court is right and should be affirmed. There is, so far as we can discover, no pretense whatever of misconduct on her part, aside from her refusal to dissipate the fund she was in good faith claiming in her own right, and in behalf of her infant daughter, until advised touching her duty in the premises by order of the court. It requires no argument to prove that such fact does not amount to a breach of her trust for which she was removable on the motion of the county court or the complaint of her co-executors. The judgment is, however, reversed so far as it relates to the disposition of the fund in controversy, and the cause remanded to the district court for further proceedings therein not inconsistent with this opinion.

REVERSED.

HENRY OTTO ET AL. V. ISAAC BURCH ET AL.

FILED MARCH 17, 1897. No. 7072.

Replevin: JUDGMENT: APPEAL: DAMAGES. B. and K., as agents for G., took possession of personal property by virtue of a mortgage executed by O. In an action of replevin by the latter for the

recovery of said property, before a justice of the peace, judgment was entered for the return thereof or the value of defendant's possession, being the amount of the mortgage debt. From said judgment O., upon the giving of an undertaking in due form, prosecuted an appeal to the district court, where defendants also recovered judgment for the return of the property or the value of their possession. Afterward, O. having failed to return the property, G. recovered the same by means of an action of replevin in his own name, under and by virtue of his mortgage, upon which, after foreclosure in the manner therein provided, the proceeds of said property was applied. In a subsequent action by B. and K. upon the appeal undertaking given by O., *held*, (1) that the judgment in the original action was, in consequence of the privity between the defendants therein and G., their principal, satisfied except as to damages and unpaid costs by the delivery to the latter in the subsequent action of the mortgaged property, and the disposition thereof by him in accordance with the terms of his mortgage; (2) a defendant to whom in an action of replevin has been awarded a return of the property or its value, or the value of his posssession, is not himself required to resort to an action of replevin in order to reap the fruits of the judgment in his favor. But if, instead of pursuing his remedy upon the bond given for his protection, he recovers the property by reason of his original title, he will be held to have waived his right to the alternative relief.

ERROR from the district court of Gage county. Tried below before BABCOCK, J. *Reversed.*

A. Hardy, for plaintiffs in error.

Griggs, Rinaker & Bibb, contra.

POST, C. J.

This was an action upon an appeal undertaking executed by Henry Otto as principal and the other defendants, Bartling and Kees, as sureties, which resulted in a judgment for the plaintiff in the district court for Gage county, and from which the defendants therein prosecute error.

The facts essential to an understanding of the decisive question of the controversy are as follows: Otto, the principal defendant, in the month of April, 1889, executed in favor of James W. Graham his two promissory

notes for $80 each, payable July 1 and December 1, after date, secured by a mortgage upon a certain span of mules. Subsequently, the note maturing July 1 being due and wholly unpaid, the defendants in error, as agents for Graham, took possession of said mules by virtue of the mortgage, which they were proceeding to foreclose by means of notice and sale, when said property was taken from them under a writ of replevin issued by a justice of the peace in a suit by Otto, the mortgagor. A trial before the justice resulted in a judgment for the defendant therein for a return of the property, or in case return thereof could not be had, for $165.98 damage, the value of the defendant's possession, and which was, upon the execution of the undertaking here involved, removed by appeal into the district court. Upon the perfecting of said appeal a trial was had in the district court, which also resulted in a judgment for the defendants for a return of the property, or in case return thereof could not be had, for the value of the defendants' possession, assessed at $84.10. Thereafter, to-wit, in the month of August, 1891, said property not having been returned in accordance with the order of the district court, and execution upon said judgment having been returned unsatisfied, Graham, in his own name, commenced an action of replevin against Otto, alleging that he was entitled to the possession of said property by virtue of the mortgage above described. The suit last mentioned was prosecuted to final judgment in favor of the plaintiff therein, to whom the mortgaged property had in the meantime been delivered under the writ of replevin, and who thereafter proceeded to foreclose his said mortgage by notice and sale of the property therein described. It appears from admissions in the record that the proceeds of said sale, after deducting costs and expenses, did not exceed the amount of the note maturing December 1, 1889, upon which it was by the mortgagee applied, leaving the defendants below liable, as here claimed, upon their appeal undertaking for the amount of the note first maturing,

with costs of suit. In that view the district court concurred, judging from instructions given and refused, apparently upon the theory that the judgment in the first mentioned suit is conclusive in so far only as it relates to the note maturing previous to commencement thereof. It is, on the other hand, contended that the right of defendants in error to a return of the property, or for the value of their possession, was inseverable and exhausted by the final judgment in their favor, although no provision was made for declaring the entire debt due upon the mortgagor's failure to pay the first note at maturity. It is further contended that said judgment was, in consequence of the privity between the defendant in error and Graham, satisfied, except as to damages, assessed at $4.10, and unpaid costs, by the delivery to the latter of the mortgaged property in the subsequent suit and the disposition thereof by him in accordance with the terms of his mortgage. There is, it seems to us, much force in that contention. Graham, the party in interest, has had the benefit of the mortgage security, the proceeds thereof have been applied by him upon Otto's indebtedness in conformity with the terms of the contract, and we are aware of no principle which can be invoked to sustain a judgment in addition thereto upon the appeal undertaking of the latter for the amount of such indebtedness. That an action will lie on the appeal undertaking of the plaintiff in replevin, to whom the property has been delivered, upon his refusal to return the same after final judgment for the defendant, upon which execution has been returned unsatisfied, is not doubted. The party to whom has been awarded a return of the property, or its value, or the value of his possession, as the case may be, provided a return thereof cannot be had, is not required to resort to an action of replevin in order to reap the fruits of the judgment in his favor. But where, as in this instance, instead of pursuing his remedy upon the appeal undertaking, he recovers the property by means of an action of replevin by reason of his original title

or right of possession, he will be held to have waived his right to the alternative relief. The fact that it was Graham, the mortgagee in the case at bar, instead of the defendants in error, as his agents, who resorted to the process of the court in order to recover the property cannot be regarded as material. It is sufficient, as already intimated, that he, Graham, recovered such property while the judgment for his benefit was in force, and disposed of it in this manner and for the purpose contemplated by the mortgage. Although we have been referred to no case arising out of a state of facts precisely similar to those here involved, the principle which must govern in the determination of the question presented was distinctly recognized in *Rinker v. Lee*, 29 Neb., 783. In the case cited, which was a suit below upon a replevin bond executed by Rinker as plaintiff in favor of Lee as defendant, it was shown that the property in controversy was, subsequent to the delivery thereof to the former, taken from his possession and delivered to Lee by means of a writ of replevin in an action wherein one Bentley was plaintiff and the said Rinker was defendant. The court, by NORVAL, J., in commenting upon the foregoing facts when urged as a defense by Rinker in the action upon his undertaking, said: "The condition of the replevin undertaking is 'that the said Avalon R. Rinker, plaintiff, shall duly prosecute his action, and pay all the costs and damages which may be awarded against him, and shall return said property to said defendant in case judgment for the return thereof shall be rendered.' The damages and costs recovered in the replevin suit have been paid. When the property came again into the possession of Lee, the condition of the replevin bond to return the property was fulfilled. The mules having been taken from the possession of Rinker and delivered to the plaintiff, makes it impossible for the defendants to literally comply with the judgment for their return. It appearing that during the pendency of the replevin suit the property came into the possession of Lee, in as good condition and

as valuable as when replevied, he cannot afterward maintain an action for its value." In addition to the cases cited in support of the conclusion there reached, our attention is directed to *Harrow v. Ryan*, 31 Ia., 156, in which it was held that where property replevied is restored to the possession of the defendant before the determination of his rights with respect thereto, such fact will defeat his claim for the value of the property in an action on the replevin bond, whether the restoration be through the act of the plaintiff or by means of legal process.

The recovery by Graham of the property under the mortgage, and the disposition thereof by him, amounted, as we have seen, to a satisfaction of the judgment in the replevin suit, except as to unpaid costs and damages. It follows that the district court erred in permitting the defendants in error to recover upon the replevin bond for the value of their possession as determined in the replevin suit, for which the judgment must be reversed and the cause remanded to that court.

REVERSED.

GEORGE W. DOUGLAS, APPELLANT, V. WILLIAM T. SMITH, APPELLEE.

FILED MARCH 17, 1897. No. 7176.

Review: QUESTIONS OF FACT: BILL OF EXCEPTIONS. One desiring to secure a review in this court of a ruling upon a question of fact is required to preserve the evidence by means of a bill of exceptions, allowed in the manner provided by law.

APPEAL from the district court of Webster county. Heard below before BEALL, J. *Affirmed.*

A. M. Walters, for appellant.

J. S. Gilham, contra.

POST, C. J.

This was a proceeding by the plaintiff, George W. Douglas, in the district court for Webster county to foreclose a certain real estate mortgage executed by Smith, the defendant. An answer was filed admitting the execution of the note and mortgage, and alleging as a defense thereto usury and payment in full, and which allegations were put in issue by the reply. A final decree was entered upon a finding in substantial accord with the allegations of the answer, and from which the plaintiff appeals.

No claim is made at this time that the decree is unsupported by the pleadings, the sole ground upon which a reversal is sought being the alleged insufficiency of the evidence. A paper purporting to be a bill of exceptions was at a previous term stricken from the files, on the ground that it was not allowed within the time or by any person authorized by law. The record accordingly presents for determination no question of law or fact, and the decree will therefore be affirmed. It is a rule settled by an unbroken line of decisions in this state that the unsuccessful party must preserve the evidence by means of a bill of exceptions in order to secure a review in this court of rulings upon questions of fact.

AFFIRMED.

J. L. MOORE, APPELLEE, V. MONTGOMERY POLLOCK ET AL., APPELLANTS.

FILED MARCH 17, 1897. No. 7109.

1. **Agency: COLLECTIONS: PAYMENT.** An agent employed to make collection of commercial paper is, as the result of that relation, authorized to receive in payment thereof such coin or currency only as is by law declared to be a legal tender, or which is by common consent treated as money, and, in commercial transactions, passes as such at par.

2. ———: ———: ———. The defendant, desiring to pay and satisfy a note and mortgage for $1,000 then about maturing, executed in favor of a local investment company a note and mortgage for $1,500, and received from T., the manager of said company, the sum of $465, the latter agreeing to pay off the first mentioned note and mortgage, then held by the plaintiff in the state of Massachusetts. He also, without the knowledge or consent of the plaintiff, charged the local company upon its books, with the amount of said note, to-wit, $1,035, and entered a corresponding credit in favor of a Massachusetts corporation authorized to receive payment thereof. No money passed by the transaction, except as above stated, and the local company subsequently passed into the hands of a receiver, after having negotiated the $1,500 note and without having paid or accounted for the balance of the proceeds thereof. *Held* not to sustain the plea of payment.

APPEAL from the district court of Dodge county. Heard below before MARSHALL, J. *Affirmed.*

Frick & Dolezal, for appellants.

Munger & Courtright and *G. G. Martin, contra.*

POST, C. J.

On the 8th day of October, 1885, Montgomery Pollock and wife borrowed the sum of $1,000 through one Toncray, acting as agent for the Dakota Mortgage Loan Corporation, hereafter called the "Dakota Company," and on said day executed and delivered to Toncray their negotiable note or bond in the principal sum above named, payable to the order of said Dakota Company October 1, 1890. Accompanying said note or bond were coupons, also executed by the Pollocks, for the semi-annual interest upon the principal debt, all payable at the office of the said corporation in Boston, Massachusetts. The Pollocks, in order to secure said bond and coupons, on the day first mentioned executed in favor of the payee therein named a mortgage upon the southeast quarter of section 10, township 17, range 9 east, in Dodge county. On the 17th day of November, 1885, the Dakota Company duly sold and transferred said bond and coupons to Fanny C. Palmer, who thereafter indorsed the same to Moore, the

plaintiff herein, as trustee, and who prosecutes this action for her benefit. Subsequent to the transactions above noted the Globe Investment Company succeeded to all the rights of the Dakota Company, the principal office and place of business of said corporations being the same, to-wit, Boston, Massachusetts, with a branch office at Kansas City, Missouri. Some time after the execution of the mortgage which is the subject of this controversy the Nebraska Mortgage & Investment Company, hereafter called the "Nebraska Company," was organized and succeeded to the business of Toncray, who thereafter acted as the managing officer of said company. Said last named company, as claimed by appellants, became, upon its organization, the agent of the Globe Investment Company for the purpose of making collections of principal and interest of loans negotiated by Toncray, including the loan in controversy for the Dakota Company, and also for the said Globe Investment Company. It is shown that both Toncray and the Nebraska Company made frequent collections for the Globe Investment Company, and that the accruing interest on the loan in question, as the same became due and payable, was collected by one or the other of said parties at their place of business, in Fremont, and remitted to the said Globe Investment Company at Boston, or to the latter's branch office at Kansas City. On the maturity of the principal debt, in the month of October, 1890, the Pollocks arranged to pay and discharge the same by means of a new loan, to be negotiated by Toncray. Pursuant to that arrangement, the Pollocks executed in favor of the Nebraska Company a bond and mortgage for $1,500, payable October 1, 1895, with interest from date at the rate of six per cent per annum. On the delivery of the last mentioned securities to Toncray the latter paid to the mortgagors named the sum of $465, but whether by means of his personal check or the check of the Nebraska Company does not clearly appear. He also credited the Globe Investment Company with the sum of $1,035 on the books of the Nebraska

Company, under date of October 4, 1890, and at the same time entered a corresponding charge against the last named corporation. The money was, however, never remitted by the Nebraska Company, which, subsequent to the transaction last mentioned, passed into the hands of a receiver, and is now insolvent. In the month of July, 1891, the second note and mortgage were by the Nebraska Company sold and transferred to Frances E. Walker, who is made a party to this action, and who has filed herein a cross-bill praying for a foreclosure of her said mortgage. Upon proof of facts substantially as above stated the district court for Dodge county found the issues in favor of the plaintiff, and entered a decree of foreclosure in accordance with the prayers of the petition and cross-bill, from which, so far as it relates to the plaintiff's cause of action, the Pollocks appeal.

It may, we think, be fairly assumed from the foregoing statement that the relation between the plaintiff and the Nebraska Company was that of principal and agent with respect to the interest coupons. It may also be conceded, for the purpose of the present inquiry, that said company was, when the principal debt matured, authorized to receive payment thereof in behalf of the plaintiff in the usual course of business, even in the absence of the evidence of such indebtedness; but does it follow therefrom that said company could bind the plaintiff by accepting in satisfaction of the said claim a note and mortgage payable to its own order five years thereafter, and which would require the advancement by him or his *cestui que trust* of fifty per cent of the face value of his security? To that question the books furnish a ready answer in the proposition that an agent employed to make collection of commercial paper is not, as the result of such relation alone, authorized to receive in payment thereof anything but money, which, however, as said in *State v. Hill*, 47 Neb., 456, includes not only legal tender coin and currency, but any other circulating medium, instruments, or tokens in general use in the commercial world as the rep-

resentative of value. A reference in this connection to a few of the many cases in point will serve to illustrate the foregoing proposition.

Scott v. Gilkey, 153 Ill., 168, was a case in which a bank holding notes for collection accepted therefor other notes of the maker, payable to its own order at a future date, and surrendered the first mentioned notes, marked paid. At the same time it credited the payee's account with the amount of his notes, although no money passed in the transaction. It was held not to amount to a payment and the payee was permitted to recover.

In the recent English case of *Hine v. Steamship Insurance Syndicate*, 11 The Reports [Eng.], 777, it was held that an agent authorized to demand payment on behalf of his principal can receive money only, and payment by means of a bill of exchange drawn by the agent and accepted by a debtor of the principal, payable three months after date, was held not within the authority of the former and not binding upon the principal, although said bill was immediately discounted and honored at maturity.

Ward v. Smith, 7 Wall. [U. S.], 447, was a case in which a bank holding for collection certain securities payable at its office accepted in satisfaction thereof depreciated bank notes, but the court, referring to the foregoing facts when relied upon as a defense to an action on such securities, said: "That the power of a collecting agent, by the general law, is limited to the receiving for the debt of his principal that which the law declares to be a legal tender, or which is by common consent considered and treated as money and passes as such at par, is established by all the authorities." (See, also, *Lochenmeyer v. Fogarty*, 112 Ill., 572; *Merchants Nat. Bank of Philadelphia v. Goodwin*, 109 Pa. St., 422; *Graydon v. Patterson*, 13 Ia., 256; *Aultman v. Lee*, 43 Ia., 404; *Scully v. Dodge*, 40 Kan., 395; *Robinson v. Anderson*, 106 Ind., 152; Mechem, Agency, sec. 375, and cases cited.)

Counsel for appellants, however, remind us of our duty

to look at the substance rather than the form of the transaction in order to determine whether the act of Toncray, as manager of the Nebraska Company, was *ultra vires*, or within the scope of the authority of such corporation as the plaintiff's agent, and in the course of the argument make use of this forcible illustration: "Suppose that Pollock, instead of receiving from Toncray $465 only, had received a check for the full sum of $1,500, which he immediately cashed, and after handing to the latter the amount of plaintiff's mortgage, $1,035, retained the balance of $465. No one would claim that the transaction was not a full and complete payment. Did, then, the fact that Mr. Pollock made a new loan, from the proceeds of which the note in question was to be paid, under the circumstances of the case, alter the character of the transaction and render it any the less a payment?" If we accept as true the premises from which counsel argue, we must be prepared to accept their conclusion; but the fallacy of that reasoning lies in the assumption, wholly unwarranted by the record, that there was, aside from the $465 above mentioned, any money passed or any credit transferred by means of the transaction involved, either from Pollock to the Nebraska Company or from said parties, or either of them, to the plaintiff. Toncray, it is true, credited plaintiff's agent, the Globe Investment Company, with the amount of Pollock's note on the books of the company of which he was manager; but the making of such entry was altogether gratuitous on his part, and if within the scope of his authority as agent for that corporation, it was certainly ineffective for the purpose of binding the plaintiff or the beneficial owner of the note. Mere book-keeping alone between the Globe Investment Company and the Nebraska corporation will not change the actual status of the parties or destroy rights which arise out of the real facts of the transaction. Indeed, the transaction in controversy, when tested by a final analysis, proves no more than that the Nebraska Company, as Pollock's agent, was by the latter entrusted with the sec-

end note for the purpose of negotiating the same, and with the understanding that it would from the proceeds thereof pay and discharge his prior note and mortgage. And the wrong to him of which mention is made by counsel, however much to be deplored, results from the negligence or fraud of his chosen agent, with which the plaintiff is in no sense chargeable. It follows that the decree is right and must be

AFFIRMED.

EAST OMAHA STREET RAILWAY COMPANY v. LEWIS N. GODOLA.

FILED MARCH 17, 1897. No. 7126.

1. **Street Railways:** PERSONAL INJURY: CONTRIBUTORY NEGLIGENCE. It is not such negligence for a passenger to stand upon the platform of a crowded street car while in motion as will *per se* defeat a recovery for injuries received in consequence of the negligence of the persons in charge thereof. (*Pray v. Omaha Street R. Co.*, 44 Neb., 167.)

2. ———: CARE AND SKILL. Street railway companies are, in this state, common carriers, and as such are required to exercise more than ordinary skill and precaution in order to insure the safety of passengers upon their trains. (*Spellman v. Lincoln Rapid Transit Co.*, 36 Neb., 890.)

3. ———: COMMON CARRIERS. A street railway company, by undertaking the transportation of passengers for hire, assumes toward its patrons the relation of a common carrier, without regard to the character of the easement possessed by it in its right of way.

4. **Foreign Laws:** PRESUMPTIONS. As a general rule the laws of sister states are, in the absence of proof upon the subject, presumed to be the same as our own.

5. **Street Railways:** NEGLIGENCE: PERSONAL INJURY: DAMAGES: JUDGMENT AGAINST CARRIER. Evidence examined, and *held* to sustain the verdict and judgment complained of.

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

V. O. Strickler, for plaintiff in error.

William F. Gurley and *Frank T. Ransom, contra.*

POST, C. J.

The East Omaha Street Railway Company, hereafter called the defendant, is engaged in operating a suburban railway by means of electricity, the initial point of its line of road being Sherman avenue, near the eastern boundary of the city of Omaha, and its terminus at Courtland Beach, between four and five miles distant. From Sherman avenue the course of the defendant's track is due east, along what is described as Locust street, to a point about midway between the city and the Missouri river, from whence it extends north to Courtland Beach. On the 6th day of August, 1893, as alleged by the defendant in error, hereafter called the plaintiff, he took passage upon one of the defendant's trains at Courtland Beach for Omaha, and that the said defendant, in consideration of the usual fare therefor, undertook to safely carry him to his aforesaid destination; that the train upon which the plaintiff had taken passage was greatly crowded, as the defendant's servants well knew, yet notwithstanding such fact, and in disregard of their duty to the plaintiff and the other passengers thereon, the conductor and motorman in charge of said train negligently and carelessly caused the same to be run into and upon the curve of the defendant's said track at Locust street at an unusual and dangerous rate of speed, whereby the plaintiff was thrown from said train, in consequence of which he suffered personal injury, to his damage, etc. The plaintiff recovered in the district court upon the cause of action stated, and the defendant prosecutes error.

The allegations of the answer will sufficiently appear from our discussion of the questions presented by the brief and argument by counsel for the defendant.

It is first insisted that there is a failure of proof to sustain the allegation of negligence, and that the speed of

defendant's train at the time of the injury was both reasonable and necessary, in view of the circumstances of the case. But, as said by counsel for plaintiff, men in human affairs judge largely by results; and when, as is clearly shown by the record herein, a motor train, crowded inside and out with passengers, is run into a curve with such force as to toss persons seated within to the opposite side of the car, and to throw others from the platforms of the motor and trailer to the ground while striving to maintain their positions thereon, a finding of negligence fails to strike the judicial mind as either unreasonable or unwarranted.

In this connection a brief reference to evidence may not be out of place. Sergeant Whalen, a police officer of the city of Omaha, testified that he lost his hold upon the front platform of the trailer and was thrown off when the train struck the curve. Arthur Creighton, who was sitting upon the dash-board of the trailer and holding with his right hand to the hood of the car, was, as he testified, thrown over the head of a friend and lit upon the ground ten or fifteen feet distant. Dr. Carpenter testified that as the train struck the curve he saw several men flying through the air and was being thrown off himself. John W. Parr, when asked about what occurred when the train reached the curve at Thirteenth and Locust streets, answered: "I don't know what street it is, but where they throwed everybody off." Philip McLarnen was asked, "What occurred when you got to that point?" meaning the curve in question, replied: "They went around that curve at a pretty good hickory. There were several of them took a tumble; they rolled off like pumpkins." Mr. Lloyd, who with his wife and son was seated inside the motor, testified that he was thrown to the opposite side of the car, and that the passengers were in a state of commotion. There was evidence tending to prove that the speed of the train when it struck the curve was from twelve to fifteen miles an hour. Mr. Gray, the conductor in charge, testified that he was running from

seven to ten miles an hour, and admitted that it was unsafe to go around the curve in question at a rate of speed exceeding five miles an hour. It is true the foregoing statements are in part contradicted by the witnesses for the defendant, but the evidence, under the well established rule of this court, is, to say the least, quite sufficient to sustain the verdict upon the issue of negligence in the operation of the train. The plaintiff was not, as a matter of law, guilty of contributory negligence in riding upon the platform of the motor. (*Germantown P. R. Co. v. Walling*, 97 Pa. St., 55; *Nolan v. Brooklyn City & N. R. Co.*, 87 N. Y., 63; *Topeka City R. Co. v. Higgs*, 38 Kan., 379; *Matz v. St. Paul City R. Co.*, 52 Minn., 159; *Geitz v. Milwaukee City R. Co.*, 72 Wis., 307; *City R. Co. v. Lee*, 50 N. J. Law, 438; *Upham v. Detroit City R. Co.*, 85 Mich., 12.) It is, on the other hand, as said in *Pray v. Omaha Street R. Co.*, 44 Neb., 167, evidence of negligence on the part of a street railway company to carry passengers greatly in excess of the seating capacity of its trains, and permitting them to stand upon the platforms and steps of its cars. Again, street railway companies are, as was held in *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb., 890, and *Pray v. Omaha Street R. Co., supra*, common carriers, and, as such, are bound to exercise more than ordinary skill and precaution in order to insure the safety of passengers upon their trains. The question of the plaintiff's alleged contributory negligence was fairly submitted to the jury, and the finding upon that issue will not be disturbed in this proceeding. This case is, upon the evidence adduced, clearly within the rule recognized in the authorities above cited. The plaintiff's witnesses agree that the train in question was crowded to its utmost capacity, not only the space inside the cars, but the platforms of the motor and trailer. It is further shown that the defendant was in the habit of permitting passengers to stand in the aisles and upon the platforms of its cars, and that Mr. Lazarus, who at the date named was acting in the capacity of assistant superintendent, or train

dispatcher, was present and personally gave orders for the starting of the overcrowded train. True, there was evidence tending to prove the presence of a printed card notifying passengers not to stand upon the platforms, but there was, on the other hand, evidence that the card above mentioned was not posted until after the accident which resulted in the injury complained of. It is also claimed that the conductor protested against the appropriation of the platform by passengers; but upon that point, also, the evidence is conflicting, and, as we have said, sufficient to sustain the verdict.

Complaint is made of the exclusion of evidence to prove that the defendant's line of road is constructed upon private property. The purpose of the evidence offered was, if we understand the position of counsel, to prove that the defendant company is not liable as a common carrier; but that proposition is not, it seems to us, entitled to serious consideration. The defendant, by undertaking to transport passengers for hire between Courtland Beach and the city of Omaha, assumed the relation toward its patrons of a common carrier, and the character of the easement in the right of way is wholly immaterial. (*Vide* Bouvier, Law Dictionary, title "Commercial Carrier;" Lawrence & Rapalje, Law Dictionary.)

The defendant offered to prove that the point where the accident occurred is within the state of Iowa, and which evidence was, upon the objection of the plaintiff, rejected. It does not appear from pleading or proof that the laws of Iowa recognize a different rule of liability from that which governs in this state, and in the absence of proof to the contrary the laws of that state are presumed to be the same as our own. (*Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 41 Neb., 374.)

Exception was taken to the exclusion of a written report of the accident by the witness Gray, as conductor, made shortly thereafter, and which was, it is claimed, admissible for the purpose of impeachment, the execution thereof having been admitted by the witness upon his

cross-examination. Our impression at the argument was that the statement was admissible for the purpose offered, and that its exclusion was prejudicial error, but after carefully examining it in connection with the testimony given by the witness named, we are unable to perceive any substantial conflict therein, and conclude that the defendant has no just ground of complaint on account of the ruling assigned.

There are further assignments which relate to the giving and refusing of instructions, but since the questions therein presented have been noticed in the discussion of other assignments, they do not require extended notice in this connection. There is no error in the record and the judgment is

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2. In a civil action for assault and battery, it is unnecessary to specially allege such damages as are the necessary and usual consequence of the act complained of. *Id.*

3. A petition charging the defendant with unlawfully beating and wounding the plaintiff on the head with a pitchfork whereby he, plaintiff, "was wounded and is, and for a long time will be, sick, and has suffered, and will suffer, great bodily pain and discomfort," states a cause of action for such physical and mental suffering as is the natural and proximate result of the wrong so alleged. *Id.*

Damages. Evidence.

4. Evidence *held* sufficient to sustain a judgment for plaintiff in an action for damages for assault and battery, where defendant used excessive force in ejecting plaintiff from the former's premises. *Id.*

5. In a suit for damages for assault and battery, self-defense being pleaded by defendant, evidence that plaintiff was of a quarrelsome disposition and ungovernable temper must be made by proof of general reputation and not by opinions of witnesses. *Golder v. Lund*..... 867

Assessments. See TAXATION.

Assignments. See MORTGAGES, 4, 5. NEGOTIABLE INSTRUMENTS, 5. PLEDGES.

Assignments of Error. See NEW TRIAL, 2. REVIEW, 3-8.

Attachment. See JUSTICE OF THE PEACE, 1. NEGOTIABLE INSTRUMENTS, 1. USURY, 5.

Leave of Court.

1. Though a sheriff in possession of personalty for safe keeping, pending application for a receiver, be deemed a receiver, the levy of an attachment on a portion of the property without leave of court is not void in absence of any objection by the sheriff as custodian, or by the receiver, on that ground. *Ackerman v. Ackerman*..... 54

Bonds. Actions.

2. Petition *held* not to state a cause of action on an attachment bond. *Hopewell v. McCrew*..... 789

3. The obligation of a surety in an undertaking in attachment is

Attachment—*concluded.*

to pay the obligees thereof the damages sustained by reason of the attachment, "if the order be wrongfully obtained." *Id.*

4. An attachment bond is valid without the signature of the attaching plaintiff, and where he does not sign the bond he is not liable thereon to defendant in attachment. *Storz v. Finklestein* 177
5. In an action on an attachment bond, where the answer is a general denial of the averments of the petition, the burden is upon the plaintiff to show that the attachment was wrongfully issued. *Id.*
6. In an action on an attachment bond where the answer was a general denial, an instruction which permitted the jury to return a verdict for plaintiff upon finding that the attachment was merely dissolved, *held* erroneous. *Id.*

Lien.

7. A creditor who attaches a chose in action acquires only a lien upon the interest which the defendant in the attachment suit had therein at the time the chose in action was seized. *Hartford Life & Annuity Ins. Co. v. Cummings* 242

Affidavits.

8. A statement in an affidavit for attachment that the action is one "upon an account for goods sold and delivered by plaintiff to defendant at his request," *held* sufficient to show that the action was one in which an attachment might issue, and to give the court jurisdiction of the attachment suit. *Grotte v. Nagle* 363
9. Where the claim appears from the statements of the affidavit to be one for which an attachment is authorized, but its nature is not fully set forth, reference may be had to the petition. *Id.*
10. An attachment affidavit must contain a statement of the nature of plaintiff's claim. *Id.*
11. *Held,* That the court did not err in overruling a motion to discharge the attachment on the ground that the affidavit did not state the nature of plaintiff's claim as contained in the amended petition. *Id.* 364
12. It is not ground for the discharge of an attachment that some portion of the sum stated in the affidavit is not due. *Id.*
13. A slight variance between the amount stated in the affidavit and that actually due, *held* immaterial. *Id.*

Evidence.

14. Proof in attachment suit *held* sufficient to support the finding of the court sustaining the attachment. *Id.*
15. Evidence *held* sufficient to sustain findings and judgment for plaintiff. *Id.* 365

Jurisdiction.

16. Jurisdiction over attached property is not lost by failure to serve process in the main case so long as the action remains pending. *Rachman v. Clapp* 648

Attorney and Client. See EVIDENCE, 10-12. JUDGMENTS, 2.

Attorneys. See TRIAL, 3, 4.

Review of proceeding whereby defendant was disbarred. *Blodgett v. State* 121

Attorneys' Fees. See INSURANCE, 12. WILLS, 4.

Attorneys' Liens. See INTERVENTION.

An attorney's lien cannot be enforced where there is nothing to which it can attach. *Yeiser v. Lowe* 310

Attornment. See LANDLORD AND TENANT, 1, 2.

Auditor of Public Accounts. See STATE.

Australian Ballot Law. See ELECTIONS.

Banks and Banking. See CHECKS. TRUSTS. USURY.

Collections.

1. A bank which undertakes the collection of a customer's check is guilty of negligence in sending it for payment direct to the drawee bank, provided there is in the same town another bank in good standing. *Western Wheeled Scraper Co. v. Sadilek* 105
2. The legal title of commercial paper indorsed "for collection" passes to the indorsee only so far as to enable him to demand and enforce payment thereof. *Branch v. United States Nat. Bank of Omaha* 470
3. The owner of paper indorsed "for collection" may control the same until paid in full, and may intercept the proceeds thereof in the hands of an intermediate agent. *Id.*
4. The mere crediting of the account of the remitting bank by a correspondent employed by it to make collections does not create in favor of the latter such an equity as can be interposed in defense of an action by the owner of the paper so collected for the proceeds thereof. *Id.*
5. Evidence *held* insufficient to prove that the position of appellant, a sub-agent for the collection of commercial paper, has been altered to its damage through the placing of the proceeds of such paper to the credit of the bank from which it was received. *Id.*

Insolvency. Right of Bank.

6. In a proceeding under ch. 8, Comp. Stats., to wind up an insolvent bank, the corporation remains an interested party and may resist an application for an order conferring upon the receiver authority not within the original order appointing him. *State v. German Savings Bank* 734
7. A proceeding by the receiver of an insolvent bank to collect unpaid subscriptions to its capital stock is one on behalf of creditors of the corporation, and is a "case of claims" against it within the meaning of sec. 4, art. 11, of the constitution, under miscellaneous corporations. *Id* 735

Reorganization. Liability of Successor.

8. The petition of a creditor of a banking association, which

Banks and Banking—*concluded.*

disclosed that another bank, as successor, assumed the liabilities of its predecessor, and that plaintiff's claim was one of the unpaid liabilities, *held* to state sufficient facts to entitle plaintiff to relief as against such successor. *Tecumseh Nat. Bank v. Best*..... 518

9. Evidence *held* insufficient to show that a national bank, succeeding a banking association, assumed the debts of the association. *Tecumseh Nat. Bank v. Saunders*..... 521

Sale of Stock.

10. Evidence *held* sufficient to sustain a decree in favor of a purchaser of bank stock in an action by him to rescind the contract on the ground that he was induced to buy the stock through the seller's false representations as to its value. *Olcott v. Bolton*..... 779

Liability of Stockholders.

11. Sec. 35, ch. 8, Comp. Stats., conferring upon district courts power to order the receiver of an insolvent bank to enforce the liabilities of stockholders, refers to liabilities upon their stock. *State v. German Savings Bank*..... 734

12. Sec. 4, art. 11, of the constitution, under miscellaneous corporations, makes the liability of subscribers for unpaid subscriptions a secondary liability to be enforced only after the amount of the debts has been judicially ascertained and the corporate property exhausted. *Id*..... 735

13. Sec. 35, ch. 8, Comp. Stats., in so far as it attempts to authorize actions to recover unpaid stock subscriptions before the corporate debts have been judicially ascertained and the corporate property exhausted, is unconstitutional and void. *Id.*

Bastardy.

In a bastardy action it is prejudicial error to admit in evidence, over proper objections, an offer of marriage by the putative father to the mother of the bastard child, made with a view to the settlement of such proceeding about to be commenced. *Lisy v. State*..... 226

Bathing Resorts.

1. In a suit against a bath-house company the court erred in directing a verdict for the company, where it failed to search for a missing bather when notified of his disappearance in time to rescue him. *Brotherton v. Manhattan Beach Improvement Co*..... 214

2. A company maintaining a bathing resort and letting out its privileges to the public for hire is bound to take such precautions for the safety of bathers as a person of ordinary prudence would take under the circumstances. *Id.*

Beet-Sugar Bounties. See BOUNTIES.

Beneficiaries. See INSURANCE, 16-18.

Bill of Exceptions. See INSTRUCTIONS, 1. REVIEW, 9-20.

Examination and Amendment.

1. A motion to quash a bill of exceptions, on the ground that it

Bill of Exceptions—*continued.*

was not presented to the adverse party, or to his attorney, for examination and amendment within the statutory period, should be made within a reasonable time after the bill is filed in the appellate court. *Nash v. Costello*..... 325

2. Where objection to a bill, on the ground that it was not presented to the adverse party within the statutory time, is not made for eighteen months after the filing of the transcript and briefs, the objection will be considered waived. *Id.*
3. Objection to a bill of exceptions that it was not presented for examination and amendment within the statutory period, not made before the bill was signed and allowed by the trial judge but raised for the first time in the supreme court, will not be considered. *Thompson v. Missouri P. R. Co*..... 329
4. Where a bill is served upon the adverse party after the time therefor had expired, and the parties stipulated in writing that the trial judge should sign and allow the bill, it is a waiver of the objection that the bill was not presented within the time fixed by law or the order of the court. *Id.*
5. A bill presented for amendment after expiration of the time limited by statute may be quashed where objection to its allowance on that ground was made before the trial judge and promptly renewed by motion in the appellate court before briefs were filed on the merits of the case. *Trumble v. Trumble* 332

Allowance.

6. The statute by which the clerk of the district court is allowed to settle and sign a bill of exceptions must be strictly construed. *Scott v. Overall*..... 144
7. In allowing a bill of exceptions, a statement by the clerk in his certificate, that he has knowledge of the absence of the judge, will not take the place of an affidavit required by statute. *Id.*
8. A stipulation, "It is hereby agreed that the clerk of the district court sign this bill of exceptions, instead of the judge who presided at the trial of this case," *held* sufficient to authorize the clerk to sign and settle the bill. *Behrends v. Beyschlag* 305

Authentication.

9. A bill may be considered upon satisfactory proof of its proper authentication, though the authentication has been lost. *Winters v. Means*..... 209
10. The clerk's certificate of authentication should identify the document as the bill of exceptions. *Behrends v. Beyschlag*.... 305
11. The words, "this bill of exceptions," in a stipulation, *held* equivalent to an agreement that the document to which the stipulation was attached was a true bill of exceptions. *Id.*

Contents.

12. A bill of exceptions must contain all the evidence upon which questions of fact are to be determined, a reference in the bill

Bill of Exceptions—*concluded.*

to evidence preserved in another bill, in an independent case, not being sufficient. *Tecumseh Nat. Bank v. Best*..... 518

Motion to Quash. Laches.

13. A motion to quash a bill of exceptions which has been duly allowed by the trial judge and properly authenticated, the motion having been made more than a year after the filing of the bill and the transcript in the supreme court, and after the service of briefs in the case, comes too late. *Thompson v. Missouri P. R. Co*..... 330

Bill of Lading. See CARRIERS, 4.

Bill of Sale. See INSURANCE, 15. SALES, 1.

Bills and Notes. See BANKS AND BANKING, 2-5. CHECKS. NEGOTIABLE INSTRUMENTS.

Board of Transportation. See RAILROAD COMPANIES, 1.

Bonds. See ATTACHMENT, 3-6. MUNICIPAL CORPORATIONS, 12.

Bounties.

Chapter 1, Session Laws, 1895, providing for sugar bounties, carries no appropriation for payment thereof, and there being no appropriation for that purpose elsewhere, the auditor has no authority to issue warrants in payment of such bounties. *State v. Moore*..... 88

Bridges. See DAMAGES, 4.

Briefs. See REVIEW, 21.

Brokers.

1. A real estate broker employed to make a sale has no claim for commissions until he furnishes a purchaser willing and able to buy the property upon the terms fixed by his principal. *Stewart v. Smith*..... 631
2. Verdict for defendant in a suit by a real estate broker for commissions *held* sustained by the evidence. *Id.*

Burden of Proof. See ATTACHMENT, 5. CONTRACTS, 5. FRAUD, 2. FRAUDULENT CONVEYANCES, 1. INSURANCE, 26. LIBEL AND SLANDER, 2. NEGOTIABLE INSTRUMENTS, 7.

Burglary.

1. Commission of the act in the night-time is an essential element of the crime of burglary. *In re McVey*..... 481
2. Under an information against a person for the crime of burglary, he cannot be convicted of the statutory offense of breaking and entering buildings in the daytime. *Id.*

Carriers.

1. An action against a carrier for failure to deliver goods cannot be maintained by the consignor in the absence of averments that he was the owner of the goods, that he was liable for their loss, or that he had sustained special damage. *Union P. R. Co. v. Metcalf*..... 452

Carriers—*concluded.*

2. It is the duty of a railroad company to receive and transport to the terminus of its line, and to safely deliver to a connecting carrier, goods offered for shipment and consigned to a place beyond its line. *Fremont, E. & M. V. R. Co. v. Waters*.. 592
3. A company receiving for shipment goods consigned to a place on the line of a connecting carrier, under an agreement to transport them to the terminus of its own road, is not answerable therefor after their safe delivery to the connecting carrier named in the contract of shipment. *Id.*
4. Bill of lading examined, and construed as an agreement for the carriage of goods over the defendant's line of road only. *Id.*

Chattel Mortgages. See FRAUDULENT CONVEYANCES, 3. REPLEVIN, 4. TROVER AND CONVERSION.

1. Completed agreement not to file mortgage until financial difficulty of mortgagor made registration necessary to protect interests of mortgagee, the former to notify him of such difficulty, *held* to render the conveyance void as to mortgagor's creditors. *Ackerman v. Ackerman*..... 54
2. A chattel mortgage creates merely a lien and does not pass title to mortgagee. *Robinson v. Kilpatrick*..... 795
Omaha Fire Ins. Co. v. Thompson..... 581

Checks.

1. A customer's bank check is not intended for circulation as a medium of exchange, and should be presented for payment with the dispatch consistent with the circumstances of the case and the transaction of other commercial business. *Western Wheeled Scraper Co. v. Sadilek*..... 105
2. A bank receiving for collection a customer's check is required to pay the same upon the receipt thereof during business hours, or to promptly give notice of its dishonor in order to charge the drawer and indorsers thereof. *Id.*
3. *Held*, From the evidence, that prejudice to drawer of a check would be presumed, where he did not receive prompt notice of its dishonor. *Id.*

Claims. See COUNTIES, 6.

Clerk of District Court. See BILL OF EXCEPTIONS, 8.

Collateral Attack. See COUNTY TREASURERS.

Collections. See BANKS AND BANKING, 2-5.

Commercial Paper. See BANKS AND BANKING, 2-5.

Common Carriers. See CARRIERS. STREET RAILWAYS.

Conflict of Laws.

1. As a general rule the law of another state, in absence of proof, is presumed to be the same as that of the state of the forum. *East Omaha Street R. Co. v. Godola*..... 906
2. There are exceptions to the rule that the laws of another

Conflict of Laws—*concluded.*

state, in absence of evidence to the contrary, are presumed to be the same as the laws of the forum. *Council Bluffs Savings Bank v. Griswold* 753

In absence of evidence to the contrary, it will be presumed that courts of general jurisdiction of another state possess the authority they assumed to exercise, and that the methods of procedure pursued by them are authorized by the laws of that state, though differing from the practice of the forum. *Id.*

Consideration. See HUSBAND AND WIFE, 5. MORTGAGES, 1. SALES, 1.

Conspiracy.

1. A conspiracy may be proved by circumstantial evidence. *Farley v. Peebles* 723
2. One means of proof is by showing overt acts of the individuals charged with the conspiracy. *Id.*
3. Declarations tending so directly toward the accomplishment of the alleged common object as to constitute a part of the *res gestæ*, are admissible in evidence. *Id.*
4. From the fact that different persons at different times by their acts pursue the same object, the jury may, in connection with other facts, infer the existence of a conspiracy to effect that object. *Id.*
5. In order to justify the admission in evidence of overt acts of individuals it is not necessary to first prove by other evidence the existence of the conspiracy. *Id.*
6. Purposes of evidence of overt acts and of declarations of conspirators. *Id.* 724

Constitutional Law. See BANKS AND BANKING, 13. RAILROAD COMPANIES, 1. STATUTES.

To authorize the expenditure of public funds the constitution requires a specific appropriation made by law. *State v. Moore,* 88

Construction. See CONTRACTS, 1, 2

Contempt.

A finding without a judgment in a summary prosecution for contempt of court will not be reviewed by means of a proceeding in error. *Blodgett v. State* 121

Contests. See WILLS, 1-3.

Continuance.

1. Affidavits for continuance, to be available on review, must be embodied in the bill of exceptions. *Hans v. State* 150
2. In a criminal case, a motion by accused for a continuance on the ground that a witness is absent, may be overruled where the state admits that the witness, if present, would testify as stated in the affidavit in support of the motion. *Fanton v. State* 351
3. A party who obtained one adjournment in a suit before a

Continuance—*concluded.*

justice of the peace cannot procure another adjournment extending more than thirty days from the return day, on a general affidavit in the language of sec. 960 of the Code, it being necessary for that purpose to comply with sec. 961 of the Code. *Moran v. McCullum*..... 449

Contracts. See CARRIERS, 3. CORPORATIONS, 2. CUSTOM AND USAGE. LANDLORD AND TENANT. MUNICIPAL CORPORATIONS, 14. NEGOTIABLE INSTRUMENTS. SALES. SCHOOLS AND SCHOOL DISTRICTS, 2-4. STATE, 5. VENDOR AND VENDEE.

Construction.

Where a written contract is to be construed with reference to its terms alone, it is the duty of the court to interpret it. *Rosenthal v. Ogden*..... 218

2. Where the construction or application of a written contract depends upon extrinsic facts, it should be submitted with the questions of fact, under proper instructions, to the jury. *Id.*. 219

Reformation.

3. To justify the reformation of a written contract for mistake, the mistake must be mutual and established by clear, convincing, and satisfactory proof. *Home Fire Ins. Co. v. Wood*.. 381

Agency.

4. *Held*, That a principal who gave a person the exclusive agency for the sale of the former's property for an indefinite period, could revoke the agent's authority any time before sale. *Woods v. Hart*..... 497

Deceit.

5. The burden of proving fraud or misrepresentation in the making of a contract is upon the party alleging it. *Id.*

Public Policy.

6. A stipulation in a contract giving a person the exclusive agency for the sale of the principal's property for an indefinite period does not render such contract void as against public policy. *Id.*

7. A contract for commission sales of intoxicating liquors by one as agent of another, neither of whom has been licensed, is void as against public policy. *Rocco v. Frapoli*..... 665

8. Courts will refuse to enforce contracts which are manifestly contrary to public policy or sound morals. *Id.*

Conversion. See REPLEVIN, 1.

Corporations. See BANKS AND BANKING. GUARANTY.

Stock.

1. One claiming stock by purchase from a cashier who wrongfully used the funds of his bank to buy the stock, *held*, under evidence set out in opinion, not an innocent purchaser for value. *Tecumseh Nat. Bank v. Russell*..... 277

2. *Held*, That a corporation which issued a new certificate to a

Corporations—*concluded.*

pledgee of original stock, waived its right to rescind the contract with the original holder and cancel the stock on the ground of fraud in its procurement. *Id.*

3. Evidence *held* sufficient to sustain a decree in favor of a purchaser of bank stock in an action by him to rescind the contract on the ground that he was induced to buy the stock through the seller's false representations as to its value. *Olcott v. Bolton*..... 779

Preferences.

4. A corporation may not prefer a debt owing to its own directors, or a debt for which such directors are sureties. *Campbell Printing Press & Mfg. Co. v. Marder*..... 289
5. There is no inflexible rule in existence which, under all conditions, prevents an insolvent corporation from transferring or incumbering its property in good faith and for proper purposes. *Shaw v. Robinson*..... 403
6. An insolvent corporation may, in the absence of actual fraud, prefer one or more of its creditors to the exclusion of others. *Wallachs v. Robinson*..... 469

Service of Process.

7. Where attempt is made to serve a summons upon a corporation, and the persons served are not at the time officers of, or connected with, the corporation, the case is one of total absence of service. *Campbell Printing Press & Mfg. Co. v. Marder*, 283

Enforcement of Claims.

8. One corporation having acquired all the stock of another, and then, through its officers, having procured that other to execute to it a bill of sale of all its assets to secure an existing indebtedness, and there remaining as a consequence of such acts no officers or place of business or tangible assets of such second corporation, *semble*, that another creditor of the second corporation need not procure judgment against it preliminary to an action against the first for the purpose of enforcing its claim against the second. *Id.*

Costs. See INSURANCE, 12. USURY, 5. VENDOR AND VENDEE, 8.

1. Taxation and collection by a justice of the peace of $1 for a second day's attendance upon the hearing of a motion to dissolve an attachment *held* not illegal. *Gibson v. Sidney*..... 12
2. The right of a litigant to recover costs is a statutory one. *City of Hastings v. Mills*..... 842
3. A plaintiff who recovered a verdict for $200, only, in the district court in a suit by him against a city for an injury sustained by falling into an unguarded excavation in a street, *held* not entitled to recover costs. *Id.*

Counties. See TAXATION.

Sale of Public Lands.

1. The determination of whether or not the proposition to sell the public grounds of a county received the required number

Counties—*concluded.*

of votes to work its adoption, *held* not a matter for the official determination of the county board. *Stenberg v. State*..... 127
Douglas County v. Keller..... 139

2. Sec. 30, art. 1, ch. 18, Comp. Stats., requiring an affirmative vote of two-thirds of the electors voting to carry a proposition, applies to a proposition to sell the public grounds of a county. *Id.*
3. The authority to sell public lands of the county *held* to depend upon it appearing from the abstract made during the official canvass of the election returns filed with the county clerk, that the requisite number of votes have been cast in favor of the proposition. *Id.*
4. A county board, in attempting to sell public lands, not being required to make findings as to the result of the election on the proposition for a sale, the action of a subsequent board in passing upon claims of the purchasers for repayment of the purchase money on the ground that there was no authority to make the sale, *held* not to involve a review or a reversal of the finding of the former board. *Id.*

Claims.

5. Question of title and of validity of conveyance by commissioners *held* not to deprive the county board of jurisdiction to determine the validity of a sale in passing upon claims for repayment of purchase money. *Id.*
6. The word "claim," as used in sec. 37, art. 1, ch. 18, Comp. Stats., requiring persons having claims against the county to file them with the county clerk, has reference only to claims originating in contract, express of implied. *Douglas County v. Taylor*..... 536
7. One owning city lots abutting on a street, only one-half of which is in the city of Omaha, may recover from Douglas county damages resulting from its action in grading the street in front of the lots, though plaintiff did not file his claim with the county clerk. *Id.*

County Board. See COUNTIES.

County Treasurers.

The authority of a county treasurer to deposit for safe keeping in bank the funds entrusted to his care cannot be questioned in a strictly collateral proceeding. *Western Wheeled Scraper Co. v. Sadilek*..... 106

Courts. See CONFLICT OF LAWS, 2, 3. NEW TRIAL, 1.

1. The original jurisdiction of the supreme court is confined to cases relating to the revenue, civil cases where the state is a party, *mandamus*, *quo warranto*, and *habeas corpus*. *State v. Piper*..... 25
2. Jurisdiction of the subject-matter of an action cannot be conferred upon a court by consent. *Burkland v. Johnson*..... 859

Covenants. See LIMITATION OF ACTIONS, 1.

Creditors' Bill. See FRAUDULENT CONVEYANCES, 7. HUSBAND AND WIFE, 2.

1. Order subjecting property, conveyed by son to mother, to payment of a claim in favor of a judgment creditor of the son, *held* not sustained by the evidence. *Nat. Bank of Commerce v. Chapman*..... 484
2. A druggist failed in business and confessed judgment on a note in favor of his mother who loaned him money to buy his drug store, and in a contest between her and other creditors seeking to subject to the payment of their claims the proceeds of a sale under execution on the judgment thus confessed, it was *held* that the preference in favor of the mother was not fraudulent. *Clarke Drug Co. v. Boardman*..... 687

Criminal Law. See INDICTMENT AND INFORMATION. INSTRUCTIONS, 1-6. NEW TRIAL, 1.

1. Refusal, before trial, to require the state to elect as to which count of the information it would reply upon, *held* reviewable without being assigned as error in the motion for a new trial. *Hans v. State*..... 150
2. An order in a criminal case permitting the state to withdraw its rest, for the purpose of introducing further testimony, will not be disturbed where an abuse of discretion on the part of the trial court has not been shown. *Id*..... 151
3. In a prosecution for a misdemeanor it is not essential that the state should prove the commission of the offense on the precise date laid in the information, it being sufficient to establish that the crime was committed within the statute of limitations. *Id.*
4. Where the intention of the accused is a material fact, and he takes the stand on his own behalf, he may be asked directly what was his intention with regard to the act complained of. *Cummings v. State*..... 274
5. A motion by accused for a continuance on the ground that a witness is absent, may be overruled where the state admits that the witness, if present, would testify as stated in the affidavit in support of the motion. *Fanton v. State*..... 351
6. Jurisdiction to pronounce a particular sentence is as essential as jurisdiction of the person and subject-matter. *In re McVey* 481

Criminal Libel. See LIBEL AND SLANDER.

Crops. See DAMAGES, 3.

Custom and Usage.

1. The business usage of a particular individual is not admissible to interpret a contract between that individual and another in the absence of proof of knowledge by the latter of such usage. *Gamble v. Stauber Mfg. Co*..... 463
2. Evidence showing that it was customary for residents of a city to take possession of streets with the purpose of using

Custom and Usage—*concluded.*

them temporarily without claiming title, and that the city acquiesced in such possession, *held* properly excluded. *City of Florence v. White*..... 516

Damages. See ASSAULT AND BATTERY. BATHING RESORTS. NEGLIGENCE, 12. PRINCIPAL AND AGENT, 1. REPLEVIN, 1. SALES, 10. SCHOOLS AND SCHOOL DISTRICTS, 2-4. VENDOR AND VENDEE, 2, 6. WATERS, 9.

Grade of Street.

1. Evidence *held* sufficient to sustain a judgment for plaintiff for $500 in a suit against a county for damages resulting from the action of the county in grading a street in front of plaintiff's lots. *Douglas County v. Taylor*..... 546

Excessive Judgment.

2. The mere fact that a verdict for $2,865.30 was $105 in excess of the amount recoverable is not sufficient to show that the jury was influenced by passion or prejudice. *Omaha Fire Ins. Co. v. Thompson*..... 581

Surface Water.

3. In a suit by a land owner against a railway company, the measure of damages resulting from the negligent construction of a ditch through which surface water was discharged on plaintiff's land, was *held* to be the value of crops destroyed, the value of trees destroyed, and the difference in the value of the land immediately before and after the injury. *Fremont, E. & M. V. R. Co. v. Harlin*..... 700

Defective Bridge.

4. Where a bridge in a city collapsed, throwing plaintiff and his horses and loaded wagon into a creek, injuring him and the team and breaking the wagon, a judgment against the city for $2,500 *held* not excessive. *City of South Omaha v. Powell*.. 793

Personal Injuries.

5. In an action for personal injuries, plaintiff may recover the reasonable value of medical services rendered, not to exceed the expense incurred therefor. *Golder v. Lund*..... 867

6. In a suit for personal injuries, it is not necessary, in order to recover for expenses of medical treatment, to prove by the record that the attending physician was licensed to practice. *Id.*

7. Evidence *held* sufficient to sustain a judgment for plaintiff in a suit against a street railway company for personal injuries resulting from its negligence. *East Omaha Street R. Co. v. Godola*..... 906

Death by Wrongful Act. See MUNICIPAL CORPORATIONS, 2.

Deceit. See SALES, 4, 8-10. VENDOR AND VENDEE,

Declarations. See CONSPIRACY, 3. WILLS, 1-3.

Dedication.

1. Under sec. 106, art. 1, ch. 14, Comp. Stats., an acknowledged

Dedication—*concluded.*

and recorded plat designating a block within a village as a park, operated as a dedication of that block for a public park. *Ehmen v. Village of Gothenburg* 715

2. Where Ehmen acknowledged and recorded a plat designating a block as "Ehmen's Park," it was *held* that such designation did not imply the reservation of the land for the donor's private use. *Id.*

Deeds. See COUNTIES, 5. EMINENT DOMAIN, 3.

The condition in a deed upon which title of lands conveyed for church purposes shall revert to the grantor cannot be invoked by one faction of the grantee to the prejudice of another. *Moseman v. Heitshusen* 420

Default. See JUDGMENTS, 1.

Depositories. See COUNTY TREASURERS.

Description. See EXECUTIONS, 6. MECHANICS' LIENS, 1-4. MORTGAGES, 7-9. SALES, 5. VENDOR AND VENDEE, 1.

Diminution of Record. See REVIEW, 60.

Disbarment.

Review of proceeding whereby defendant was disbarred. *Blodgett v. State* 121

Dismissal. See INTERVENTION. REVIEW, 43.

Upon rendering judgment in favor of plaintiff, it was *held* proper to dismiss, without prejudice, the suit as to one item not due which was separately numbered in the petition. *Grotte v. Nagle* 364

Divorce. See WILLS, 6.

Alimony.

1. The sum allowable to a wife for expenses and counsel fees *pendente lite*, the conditions of payment, and time of making the order, are within the discretion of the district court. *Brasch v. Brasch* 73
2. Allowances made by a district court for the temporary support of the wife for expenses and attorney's fees will not be disturbed unless it appears that the court abused its discretion. *Id.*
3. Within the meaning of sec. 12, ch. 25, Comp. Stats., providing for payment of alimony *pendente lite* and costs, an action is pending from its commencement until its final determination on appeal or error, or until the statutory time for review has expired. *Id.*

Attorney's Fees.

4. Under sec. 12, ch. 25, Comp. Stats., the allowance of attorney's fees to counsel of the wife is ancillary to the action for divorce, and a separate suit cannot be maintained against the husband by such attorney to recover for professional services rendered to the wife in the action for divorce. *Yeiser v. Lowe* 310

Drainage. See DAMAGES, 3.

Easements.

To acquire an easement or way on another's land there must be a use of the way for the length of time which will bar an action for the recovery of title to land, and which is under claim of right, or adverse. *Engle v. Hunt*..... 358

Ejectment. See JUDGMENTS, 1.

Averments of an answer attacked by general demurrer *held* sufficient to show the existence and probate of a will through which defendant claimed title. *Koopman v. Carroll*..... 824

Elections. See COUNTIES, 2, 3. MUNICIPAL CORPORATIONS, 12.

Nominations. Secretary of State.

1. Where rival factions of a political party in good faith nominate candidates at conventions called and held in accordance with the usages of the party, and certify such nominations to the secretary of state, he will certify to the several county clerks the names of the candidates nominated by each faction. *State v. Piper*.....26, 39
2. It is neither the province of the secretary of state nor of the court to determine which of two rival state conventions of the same party is entitled to recognition as the regular convention. *Id.*
3. The findings of facts made by the secretary of state in passing upon objections filed against certificates of nomination are *prima facie* right. *Id*.....25, 39
4. The secretary of state in passing upon objections to certificates of nomination may determine from extrinsic evidence whether the candidates therein named were in fact nominated by a convention called and held according to party usages and claiming in good faith to represent a political party which cast the requisite number of votes at the last election. *Id*.....26, 39
5. The statutory provisions (Comp. Stats., sec. 136, ch. 26), requiring objections to certificates of nomination for office to be filed within three days after the filing of the certificates, are mandatory, and must be strictly followed, or objections will be deemed waived. *Id*..... 40
6. The secretary of state in passing upon objections to a certificate of nomination has power to decide from extrinsic evidence whether the candidate named therein was in fact nominated by a convention called and held in accordance with precedents and usages of a party which cast one per cent of the votes at the last state election, or by a faction claiming to represent a party casting one per cent of such vote. *Id*..... 42

Eminent Domain. See RAILROAD COMPANIES. STREET RAILWAYS, 2.

1. One owning city lots abutting on a street, only one-half of which is in the city of Omaha, may recover from Douglas

Eminent Domain—*concluded.*

county damages resulting from its action in grading the street in front of the lots. *Douglas County v. Taylor*..... 536

2. Release of damages resulting from a railroad company's exercise of the right of eminent domain, *held* not to include damages caused by the negligent construction, maintenance, or operation of the railroad. *Fremont, E. & M. V. R. Co. v. Harlin* 698

Construction of a conveyance granting a railroad company a right of way and releasing the company from liability for damages. *Id*..... 699

Equalization. See TAXATION, 1.

Equity. See FRAUDULENT CONVEYANCES, 7. JUDGMENTS, 1. MORTGAGES, 4, 7, 8. TRUSTS.

Where issues have been submitted to a jury, the judgment need not strictly conform to the verdict, but the court may, on determining other issues, enter such judgment as the whole case demands. *Omaha Fire Ins. Co. v. Thompson*..... 580

Error. See REVIEW.

Estoppel. See ARBITRATION AND AWARD, 9. INSURANCE, 27.

1. Where an insolvent, by confession of judgment, made a preference in favor of his mother who loaned him money, it was *held* that she was not estopped, as against creditors who sold the son goods, from claiming the proceeds of an execution sale under the judgment thus confessed. *Clarke Drug Co. v. Boardman*..... 687
2. A release sufficient to estop the land owner from claiming damages resulting from an exercise of the right of eminent domain would also estop one claiming under him. *Fremont, E. & M. V. R. Co. v. Harlin*..... 698
3. The consent of a bank to the appointment of a receiver *held* not to estop the bank from assailing an order requiring the receiver to sue the stockholders. *State v. German Savings Bank* 736
4. A judgment binds parties and privies. *Otto v. Burch*..... 894

Evidence. See BASTARDY. CONSPIRACY. CONTINUANCE, 2. CONTRACTS, 2. CRIMINAL LAW, 4. CUSTOM AND USAGE, 2. DAMAGES, 2. ELECTIONS, 4, 6. HIGHWAYS, 1, 2. INSURANCE, 13, 16. INTOXICATING LIQUORS, 4. MUNICIPAL CORPORATIONS, 1. NEGOTIABLE INSTRUMENTS, 10. PARTNERSHIP, 3. PRINCIPAL AND AGENT, 7. RAILROAD COMPANIES, 2. REPLEVIN, 3. REVIEW, 22-29. SUMMONS, 2. WILLS, 1-3.

Assault.

1. In defending, on the ground of self-defense, a civil suit for assault and battery, evidence of plaintiff's quarrelsome disposition must be made by proof of general reputation. *Golder v. Lund* 867

Evidence—*continued.*

Deed.

2. In a suit against a railroad company for negligently constructing a ditch through which surface water was discharged on plaintiff's land, a right-of-way deed from plaintiff to defendant, containing a release of damages, was *held* inadmissible. *Fremont, E. & M. V. R. Co. v. Harlin*..... 699

Experiments.

3. Some discretion is conferred upon the trial court in receiving evidence of experiments for the purpose of contradicting or corroborating witnesses. *City of Ord v. Nash*..... 336

Foreign Laws.

4. As a general rule the law of another state, in absence of proof, is presumed to be the same as that of the state of the forum. *Council Bluffs Savings Bank v. Griswold*..... 753
East Omaha Street R. Co. v. Godola..... 906

Judgment.

5. Where the attempted service of a summons was void, the judgment of a justice of the peace, against defendant in the case, *held* inadmissible in evidence. *Campbell Printing Press & Mfg. Co. v. Marder*..... 287

Parol Evidence.

6. Where, by omission in an insurance policy, the time when the instrument becomes operative is left in doubt, parol evidence is admissible for the purpose of supplying such omission. *Modern Woodmen Accident Ass'n v. Kline*..... 345

7. A general indorsement of commercial paper may, except as against a *bona fide* holder, be explained by parol evidence. *Whitney v. Spearman*..... 617

Physicians.

8. In an action for personal injuries it is proper to admit evidence of the actual expense incurred by plaintiff in procuring medical treatment. *Golder v. Lund*..... 867

9. Proof that one practiced as a physician raises the presumption, in actions between third parties, that he was licensed to do so. *Id.*

Privileged Communications.

10. Communications properly made in negotiating for the employment of an attorney are privileged. *Farley v. Peebles*.... 723

11. Privileged communications to a lawyer are generally confined to communications made when the relationship of attorney and client existed. *Id.*

12. Communications voluntarily made to a lawyer after he has informed the communicator that he will not accept the employment to which they relate are not privileged. *Id.*

Witnesses.

13. Where a witness is shown to be absent from the state, his testimony given at a former trial of the same cause is admissible if otherwise unobjectionable. *City of Ord v. Nash*..... 336

Evidence—*concluded.*

14. Where a witness is absent from the state, the fact that he testified at a second trial of the cause *held* not to render inadmissible, at the third trial, evidence given by him during the first trial. *Id.*

Exceptions. See BILL OF EXCEPTIONS. INSTRUCTIONS, 11, 12. REVIEW, 45. TRIAL, 1.

Exchange. See VENDOR AND VENDEE, 1.

Executions. See CREDITORS' BILL, 2. NEGOTIABLE INSTRUMENTS, 1, 2.

Appraisement.

1. The fact that the certificates of incumbrances were dated subsequent to the advertisement of sale, *held* insufficient to establish the falsity of portions of the record showing by the date of the appraisement and of the copy, by the clerk's filing mark, and by the sheriff's return, that the appraisement was made and filed before the sale was advertised. *Nebraska Loan & Trust Co. v. Barnes*..... 324

2. In absence of fraud an appraisement can be attacked, on the ground that it is too low, only by motion filed before sale. *Griffith v. Jenkins*..... 721

Bid.

3. Where a purchaser at a judicial sale raised his bid in open court, it was *held* that confirmation at the higher price was without prejudice to the former owner. *Id*..... 719

Confirmation.

4. The rule that the appellate court will not disturb the finding of a trial court made upon conflicting testimony applies to orders confirming judicial sales. *Creighton University v. Riley*, 341

5. Record for review *held* not to disclose any irregularity which would have justified the trial court in setting aside a judicial sale. *Griffith v. Jenkins*..... 719

Description of Property.

6. Variance between the description in the decree and the description in the order, notice and report of judicial sale, *held* not ground for setting aside the sale. *Id*..... 722

Replevin.

7. When property has been levied upon on writ of execution and has been delivered to a third person, plaintiff in a replevin suit against the officer making the levy, such property cannot be again seized by the officer under another writ against the same person while the replevin suit is pending. *Beagle v. Smith*..... 446

Executors and Administrators. See PARENT AND CHILD, 5. WILLS.

Under a will directing the sale of realty, the sale may be made by an administrator *cum testamento annexo*, the executor named having failed to qualify, and the will indicating no special confidence in him. *Koopman v. Carroll*..... 824

Experiments. See EVIDENCE, 3.

Expert Evidence. See EVIDENCE, 3.

Factors. See BROKERS.

False Representations. See INSURANCE, 21-25. SALES, 2, 3, 8-10. VENDOR AND VENDEE, 2.

Fees. See COSTS.

Fees and Salaries. See STATUTES, 5.

Fences.

Sec. 18, art. 2, ch. 2, Comp. Stats., defining a lawful fence, does not apply to a fence inclosing the right of way of a railroad company. *Chicago, B. & Q. R. Co. v. Lyon*..... 640

Final Orders. See REVIEW, 30-35.

Findings. See JUDGMENTS, 4. REPLEVIN, 1.

Fines. See SCHOOLS AND SCHOOL DISTRICTS, 1.

Foreign Laws. See CONFLICT OF LAWS, 2, 3. SALES, 2, 3.

Fraud. See CONTRACTS, 5. INSURANCE, 27. MORTGAGES, 5. SALES, 2-4, 8-10. STATUTE OF FRAUDS. VENDOR AND VENDEE, 2.

1. Where the only motive of a creditor is to secure a debt, he will not be *held* guilty of fraud because the effect of securing his debt is to leave the claims of other creditors unpaid. *Clarke Drug Co. v. Boardman*..... 687
2. Where an insolvent, by confession of judgment, makes a preference in favor of his mother who loaned him money, the burden is on her, in a contest with other creditors, to show by a preponderance of the evidence that the preference was accepted by her in good faith for her protection, and not for the purpose of defrauding any one. *Id.*

Fraudulent Conveyances. See SALES, 1.

Burden of Proof.

1. Where a transfer between relatives is attacked as fraudulent, the burden is upon the parties thereto to show the good-faith character of the transaction. *Nat. Bank of Commerce v. Chapman*..... 484

Chattel Mortgages. Registration.

2. Completed agreement not to file mortgage until financial difficulty of mortgagor made registration necessary to protect interests of mortgagee, the former to notify him of such difficulty, *held* to render the conveyance void as to mortgagor's creditors. *Ackerman v. Ackerman*..... 54
3. In a proceeding to avoid a sale of personalty as having been made in fraud of the rights of creditors of a firm, the fact that part of the consideration was the cancellation of a debt by one partner, incurred before the partnership was formed,

Fraudulent Conveyances—*concluded.*

and secured by an unrecorded chattel mortgage on the property before the firm became its owner, was not one which would have justified an instruction that the sale was void. *Wilson v. Gamble*..... 426

Preferences.

4. A son may convey property to his mother in payment of a pre-existing debt. *Nat. Bank of Commerce v. Chapman*..... 484
5. The rule that an insolvent debtor may prefer certain creditors to the exclusion of others applies to relatives of the debtor where they are creditors. *Id.*

Question of Fact.

6. Whether or not a conveyance by an insolvent corporation is frauduient as to creditors cannot be determined as a question of law, but is a question of fact, to be determined from a consideration of the evidence in each particular case. *Shaw v. Robinson* 403
Wallachs v. Robinson..... 469

Trusts.

7. One taking title to realty of an insolvent firm for the purpose of selling the property and of paying part of the proceeds to a creditor of the firm and the balance to the firm, may be *held* liable to pay such balance to another creditor in a suit in equity brought by the latter against the firm and the trustee. *Raymond v. Leinberger*..... 815

Garnishment. See INTERPLEADER.

Gifts.

Evidence *held* to warrant the conclusion that the proceeds of notes payable to a daughter were not gifts to the father to whom payment was made. *Bell v. Rice*..... 547

Guaranty. See MORTGAGES, 1. PRINCIPAL AND AGENT, 3.

1. One who purchased stock in a corporation under a guaranty that it could be resold for $3,000 within a year, *held* not required to submit to the guarantor for acceptance or rejection all offers received during that time. *Lobeck v. Duke*..... 568
2. A guaranty by the seller of stock in a corporation that the purchaser could resell it for $3,000 within a year, *held* to contemplate a resale for money, the guarantee not being required to make an effort to exchange the stock for other property. *Id.*
3. Where the seller of stock in a corporation guarantied that it could be resold for $3,000 within a year, whether the guarantee had been negligent in failing to make a resale, was *held* a question of fact for the jury. *Id.*
4. In an action on a guaranty that the purchaser of stock could resell it for $3,000 within a year, it was *held* proper to refuse an instruction that a failure to make certain specified efforts to resell the stock constituted negligence. *Id.*

Guardian and Ward.

1. The provisions of sec. 64, ch. 23, Comp. Stats., apply to irregularities in respect to guardians' sales, and cannot operate to confer jurisdiction otherwise without existence. *Wells v. Steckleberg* 670
2. An order to sell land of a minor on application of one assuming to act as guardian, but who never qualified as such, and the sale pursuant to the order, *held* void. *Id.*

Habeas Corpus.

One sentenced for the statutory offense of housebreaking under an information charging him with burglary may be discharged from custody. *In re McVey*..... 481

Harmless Error. See REVIEW, 46-48.

Highways.

Prescription.

1. To establish a highway by prescription there must be a user by the general public under a claim of right, and which is adverse to the occupancy of the owner of the land, of some particular or defined way or track, uninterruptedly, without substantial change, for a period of time necessary to bar an action to recover the land. *Engle v. Hunt*..... 358

User.

2. The existence of a highway over the premises of a private person may be shown by user alone, but the user must have been with the knowledge of the owner and have continued the length of time necessary to bar an action to recover the title to land, but this rule does not apply when the user is of wild, unenclosed prairie land. *Id.*

Improvements.

3. The acts of Douglas county in making an improvement extending across a highway, one-half of which was in the city of Omaha, *held* not *ultra vires*, though it was the duty of the city to improve the part of the street within its jurisdiction. *Douglas County v. Taylor*..... 536

Housebreaking. See BURGLARY, 2.

Husband and Wife.

Property Rights.

1. Prior to the taking effect of the married woman's act, June 1, 1871, the wife's chattels became those of the husband, and her choses in action became his when reduced to possession. *Eggleston v. Slusher*..... 83

Insurance. Creditors' Bill.

2. The proceeds of a fire insurance policy taken out by a husband on property bought in his name with his wife's money prior to June 1, 1871, *held* properly subjected to payment of claims of his creditors in a contest between them and the wife, to whom the husband had assigned the policy. *Id.*

Divorce. Attorneys' Fees.

3. Professional services of an attorney rendered to a wife in a

Husband and Wife—*concluded.*

suit for divorce are not "necessaries" for which the husband is liable in a separate suit brought against him by the wife's attorney after dismissal of the action for divorce. *Yeiser v. Lowe* 312

Pledges. Agency.

4. One taking from the husband as his pledge a note which had been assigned to the wife, *held* not justified in assuming that the husband was the wife's agent. *Norfolk Nat. Bank v. Nenow* 429

Mortgages.

5. A loan to a husband is a sufficient consideration for a mortgage by his wife securing the loan. *Holmes v. Hull*..... 656
6. A married woman may, by a mortgage duly executed and delivered, bind her separate property for the payment of a loan to her husband, to the extent of the property covered by the mortgage. *Id.*

Improvements. See LANDLORD AND TENANT, 8, 9, 11.

Indictment and Information. See BURGLARY, 2. INTOXICATING LIQUORS, 2, 3.

Objections.

1. The remedy of the accused in an indictment or information is by plea, and not by motion to strike out unnecessary and immaterial allegations. *Blodgett v. State*..... 121
2. A motion or objection directed to an indictment or information as a whole will be overruled unless applicable to each count thereof. *Id.*

Validity.

3. The test by which to determine the sufficiency of an indictment is whether enough remains after rejecting all unnecessary averments thereof to satisfy the requirements of the statute. *Id.*

Joinder.

4. A charge of malpractice against an attorney and counselor at law may be joined with a prosecution for a contempt of court where both charges involve a single transaction. *Id.*

Election as to Counts.

5. Refusal, before trial, to require the state to elect as to which count it would rely upon, *held* reviewable without being assigned as error in the motion for a new trial. *Hans v. State*.. 150

Injunction. See JUDGMENTS, 6. RELIGIOUS SOCIETIES.

Garnishment.

1. Right of an insurance company which is a garnishee in possession of the proceeds of a policy, to an order enjoining the garnisher from prosecuting a *scire facias* against it after it had been sued in another court by an assignee of the beneficiary. *Hartford Life & Annuity Ins. Co. v. Cummings*..... 236

Obstruction of Alley.

2. Evidence, though conflicting, *held* sufficient to sustain a decree enjoining defendant from obstructing an alley. *Ryley v. Sandean* 111

Injunction—*concluded.*

Remedy.

3. As a preventive remedy *mandamus* cannot take the place of injunction. *State v. Piper*.....25, 39

Taxes.

4. Injunction was denied in a suit to enjoin the collection of taxes, where plaintiff claimed that an error proceeding from an order of the board of equalization would be inadequate and failed to plead and prove the facts upon which his claim was based. *Webster v. City of Lincoln*..... 1

Trespass.

5. Evidence *held* sufficient to sustain a finding for plaintiff in an action to restrain defendant from using a portion of plaintiff's land for a highway. *Engle v. Hunt*..... 358

Insanity. See PARENT AND CHILD, 4.

Insolvency. See BANKS AND BANKING, 6-8. CORPORATIONS, 5, 6. FRAUDULENT CONVEYANCES, 1, 5-7.

A druggist failed in business and confessed judgment on a note in favor of his mother who loaned him money to buy his drug store, and the preference was *held* not fraudulent as to other creditors who sold goods to the son. *Clarke Drug Co. v. Boardman* 687

Instructions. See ATTACHMENT, 6. MUNICIPAL CORPORATIONS, 6, 7. NEGLIGENCE, 4, 5. REVIEW, 3.

Criminal Law.

1. Where there may have been a possible state of facts which would warrant the refusal of an instruction omitted from the charge, an assignment of error assailing the ruling may be overruled in absence of a bill of exceptions. *Lauder v. State* 140
2. A charge which, construed as a whole, plainly states the law applicable to the case is without error. *Hans v. State*..... 151
3. Instruction *held* not to assume the possible existence of a single fact, but merely told the jury what were the material averments of the information. *Id.*
4. A material misstatement of the issues in an instruction in a criminal case is error which will not be cured by a correct statement in another instruction. *Raker v. State*..... 202
5. Argumentative instructions should not be given. *Id*..... 208
6. An instruction in a criminal prosecution that if the jury should find the facts essential to establish guilt they should acquit, but if such facts had not been proven they should convict, is erroneous and ground for reversal, though it may be apparent to the appellate court that the trial court unintentionally transposed the words "convict" and "acquit." *Cummings v. State*..... 274

Evidence.

7. An instruction directing what weight should be given to certain facts, was properly refused. *Wilson v. Gamble*..... 426

Instructions—*concluded.*

8. An instruction unwarranted by the evidence, although an accurate statement of the law, is ground for reversal, provided it has a tendency to mislead the jury. *Fremont, E. & M. V. R. Co. v. Waters* 592
9. Instructions *held* applicable to the evidence in a suit by a broker for commissions on sale of realty. *Stewart v. Smith* .. 631
10. An instruction requiring defendant to establish a defense by a preponderance of evidence *held* erroneous. *Fremont, E. & M. V. R. Co. v. Harlin* 700

Exceptions.

11. An exception to all of the instructions is unavailing if any one of them is correct. *Id.*
12. Where several distinct requests to charge are denied, an exception to the refusal of all of them is insufficient, unless it appears that each should have been given. *Id.*

Repetitions.

13. An instruction like one already given may be refused. *Reuther v. Zimbleman* 165
City of South Omaha v. Powell 798
14. The court may refuse an instruction containing propositions already given to the jury. *Jamison v. Kent* 247
Behrends v. Beyschlag 305

Requests.

15. A party desiring an instruction more specific than those given should prepare one and present it. *Stewart v. Smith* .. 631

Insurance. See HUSBAND AND WIFE, 2. INTERPLEADER.

Additional Insurance.

1. Where an insurance company issues a policy with knowledge of other insurance on the same property, it cannot escape liability on the ground that no memorandum of the prior insurance was indorsed on the policy. *Home Fire Ins. Co. v. Wood* 381
2. A statement by the insured to the agent of the insurer that the former intends to procure additional insurance on the property is not notice of the existence of such additional insurance when obtained. *Id.*
3. Where insured violated a provision that the policy should be void if other insurance was subsequently obtained without the consent of the company, it was *held* that he could not recover on the first policy. *Id.*

Agents.

4. An agent who, upon learning that his agency is soon to be revoked, abuses his trust by wrongfully canceling policies of his principal and by transferring the risks to other companies, is liable to the company which issued the policies canceled for the premiums thereon. *Northern Assurance Co. v. Hamilton* 248

Insurance—*continued.*

5. A mere agreement of the soliciting agent to procure a policy does not create a present liability against the company. *Farmers & Merchants Ins. Co. v. Graham*..... 818
6. Evidence *held* insufficient to show that an agent had authority to create a present liability binding upon his principal. *Id.*

Ambiguity. Parol Evidence.

7. Where, by omission in a written policy, the time when the instrument becomes operative is left in doubt, parol evidence is admissible for the purpose of supplying such omission. *Modern Woodmen Accident Ass'n v. Kline*..... 345
8. *Held*, From the evidence, that the receipt of payment by insurer, subsequent to injury for which claim was made, applied to future indemnity only, and was not a waiver of payment in full as condition to the taking effect of the policy. *Id.*

Assessments.

9. The parties to an insurance contract may stipulate that it shall not become operative as an indemnity until payment is made in full by the insured of all charges and assessments required by the constitution, rules, and regulations of the insurer. *Id.*

Attorneys' Fees.

10. In an action on a policy, an indorsement on the summons that plaintiff will take judgment for attorneys' fees, *held* not a notice of the claim of plaintiff's attorney for a lien for fees, and service of the summons so indorsed did not convey to the company notice of such claim. *Cobbey v. Dorland*..... 373
11. Denial of application of plaintiff's attorney for leave to intervene and prosecute his claim against insurer for fees in an action on a policy, *held* proper, where plaintiff's case was settled and the action dismissed, without notice to insurer of a claim for an attorney's lien. *Id.*
12. Under sec. 45, ch. 43, Comp. Stats., the court may, in a suit on a policy covering both realty and personalty, allow a reasonable attorney's fee, based on the amount recovered on account of the realty. *Omaha Fire Ins. Co. v. Thompson*..... 581

Incumbrances.

13. Where one of the defenses to a suit on a policy was that insured incumbered the property in violation of a provision of the policy, it was *held* not error to exclude from evidence the record of a claim for a mechanic's lien. *Id*..... 580
14. Existence of a chattel mortgage on a portion of the property at the time the risk was taken, *held* not to avoid the policy as being a breach of the provision relating to title. *Id.*
15. The voluntary execution by insured of a bill of sale of a portion of the property, without consideration, without delivery, without vendee's knowledge, without any prior contract, and without change in possession, does not create such a change in interest as to avoid the policy. *Id*..... 581

Insurance—*continued.*

Mutual Benefit Insurance. Beneficiaries.

16. Where it is necessary to present a benefit certificate to the supreme secretary as a condition precedent to the right of the assured to designate his parents as beneficiaries, such presentation may be presumed from the designation actually made, accompanied by an intention to provide for the beneficiaries named and the subsequent payment by the assured during his lifetime of assessments for their benefit. *Shryock v. Shryock* 886
17. Change of beneficiaries under a certificate issued by a mutual benefit association *held* a sufficient compliance with the certificate and by-laws. *Id.*
18. Under a certificate issued by a mutual benefit association, the act of assured in directing payment to his father and mother *held* an original designation, and not a change of beneficiaries. *Id.*

Pleading.

19. Petition *held* not to state a cause of action for a loss. *Farmers & Merchants Ins. Co. v. Graham*..... 818

Reformation of Policy.

20. Evidence examined, and *held* insufficient to authorize the reformation of the policy in suit. *Home Fire Ins. Co. v. Wood*.. 381

Representations of Insured.

21. Evidence *held* sufficient to sustain a finding that there was no representation in a written application for insurance that the insured goods were in the building mentioned in the application at the time the application was made. *Omaha Fire Ins. Co. v. Crighton*..... 314
22. Where insured was illiterate and his statements to obtain insurance were reduced to writing by insurer's agent, whether the representations written in the policy were made by insured, was *held* a question of fact for the jury. *Id.*
23. An illiterate person whose statements to obtain insurance were reduced to writing by insurer's agent, *held* not bound by representations he did not make, though they were inserted in the written application. *Id.*
24. Evidence *held* sufficient to sustain a finding that insured did not represent his household goods were in the building mentioned in his application for insurance at the time the application was made. *Id.*
25. A trial court invaded the province of the jury in deciding the question whether the insurer issued the policy in reliance upon assured's false representations. *Kettenbach v. Omaha Life Ass'n*..... 846

Settlement.

26. *Held*, That the burden of establishing a settlement was on the insurer alleging it. *Omaha Fire Ins. Co. v. Thompson*.... 581
27. In a suit on a policy, agreement of insurer to pay a certain

Insurance—*concluded.*

sum in sixty days, acceptance of insured's orders, and admission of indebtedness as garnishee, the aggregate amount assumed being less than the amount of alleged settlement, *held* neither to operate as an accord and satisfaction, nor to estop insurer from rescinding the agreement for fraud. *Id.*

Interest. See USURY.

1. *Held*, On review, that a decree allowing interest pending appeal was warranted by a former judgment of the supreme court on a former appeal and by a stipulation of the parties made pending such former appeal. *Chappell v. Smith*..... 116
2. Where the proceeds of a note payable to a daughter were paid to her father, no demand upon him having been made for payment during his life-time, it was *held* that the daughter was only entitled to interest from the time she filed her claim against the father's estate. *Bell v. Rice*..... 547

Interpleader.

Where the proceeds of a life insurance policy were garnished in possession of an insurer subsequently sued in a different court by an assignee of the beneficiary, it was *held* that the company was entitled to an order requiring the garnisher to interplead in the action on the policy, and discharging the insurer from liability upon its paying the funds into court. *Hartford Life & Annuity Ins. Co. v. Cummings*..... 236

Intervention. See REVIEW, 34.

Denial of application of plaintiff's attorney for leave to intervene and prosecute his claim against defendant for fees, *held* proper, where plaintiff's case was settled and the action dismissed, without notice to defendant of a claim for an attorney's lien. *Cobbey v. Dorland*..... 373

Intoxicating Liquors.

1. Each act of keeping for the purpose of sale, without a license or permit issued by the proper body, any malt, spirituous, or vinous liquors, constitutes a misdemeanor. *Hans v. State*.... 151
2. Where an information contains two counts, each charging the keeping for sale, in violation of law, of a different kind of intoxicating liquors, and defendant is found guilty on both counts, a separate sentence is to be imposed for each conviction. *Id.*
3. A count charging the illegal sale of intoxicating liquors may be joined in an information containing a count charging the defendant with keeping such liquors for sale in violation of law. *Id.*
4. The unlawful intent with which intoxicating liquors are kept may be presumed by the recent prior sale by the defendant of the same kind of liquors, in violation of law. *Id.*
5. A contract for commission sales of intoxicating liquors by one as agent of another, neither of whom has been licensed, is void as against public policy. *Rocco v. Frapoli*..... 665

Issues. See REVIEW, 36-40.

Judgment. See EQUITY. INSOLVENCY. RES JUDICATA. REVIEW. 30-35, 49.

Default. Negligence.

1. The fact that default against a wife who was defendant in an ejectment suit resulted from negligence of her husband, will not justify a court of equity in setting aside the judgment. *Scott v. Wright* 849
2. Judgment permitted through negligence of counsel, *held* not the result of unavoidable casualty or misfortune. *Id.*

Estoppel.

3. A judgment in full force is binding upon the parties thereto, and their privies, as to the issues adjudicated. *Creighton v. Keith* 810

Findings.

4. A judgment that is not based on a finding, either general or special, is erroneous, though not for that reason void. *Maryott v. Gardner* 320

Injunction.

5. The rule whereby a party seeking affirmative aid of a court of equity to relieve him against a void judgment is required to disclose a meritorious defense to the cause of action does not apply in a case where the plaintiff is himself seeking affirmatively to enforce such judgment. *Campbell Printing Press & Mfg. Co. v. Marder* 283
6. In an action to enjoin the enforcement of a judgment, relief should not be granted because of the service of an unauthorized summons upon which such judgment was rendered, in the absence of a showing of the existence of a defense to the cause of action which formed the basis of the judgment assailed. *Fickes v. Vick* 401

Lien.

7. Land of J. T. Ward *held* not charged with the lien of a judgment erroneously entered against him as "S. T. Ward." *Aultman v. Ward* 442
8. Plaintiff's release, from the lien of a judgment, of specific property owned by one of several of the judgment defendants, will not discharge the other defendants from liability. *Council Bluffs Savings Bank v. Griswold* 753
9. A judgment defendant cannot, as a matter of right, unaffected by equitable considerations, insist upon the preservation of the lien upon particular property of his co-defendants. *Id.*
10. Where, to an action upon a joint and several obligation, all parties liable are made defendants, the fact that the judgment rendered is void as to one, does not render it void as to all. *Id.*

Summons.

11. A defect in the manner of service of summons or in the form

Judgment—*concluded.*
of return will not subject a judgment to collateral attack. *Campbell Printing Press & Mfg. Co. v. Marder*..... 283
12. Where attempted service of summons does not reach defendant, a judgment founded thereon is void. *Id.*

Judicial Sales. See EXECUTIONS. GUARDIAN AND WARD. LANDLORD AND TENANT, 10.

Jurisdiction. See ARBITRATION AND AWARD, 3, 4, 7. ATTACHMENT, 16. COUNTIES, 5. COURTS, 1. CRIMINAL LAW, 6. GUARDIAN AND WARD, 1. JUSTICE OF THE PEACE, 2.

Jury. See DAMAGES, 2. TRIAL, 2.
In an equity case the trial court may, in its discretion, impanel a jury and submit such issues of fact as it deems expedient. *Omaha Fire Ins. Co. v. Thompson*..... 580

Justice of the Peace. See CONTINUANCE, 3. EVIDENCE, 5. REVIEW, 41, 55.
1. A hearing on motion to dissolve an attachment is a "trial" within the meaning of sec. 279 of the Code defining that term, and within the meaning of sec. 11, ch. 28, Comp. Stats., fixing the fees of justices of the peace. *Gibson v. Sidney*..... 12
2. A justice of the peace may acquire jurisdiction to render judgment for $200 in a suit against a city for an injury sustained by plaintiff who fell into an unguarded excavation which was a nuisance within the meaning of sec. 621 of the Code. *City of Hastings v. Mills*..... 842

Laches. See BILL OF EXCEPTIONS, 1-4, 13. REVIEW, 42, 43. SALES, 8.

Landlord and Tenant.

Attornment.

1. Allegations by defendant that he was induced to enter into the lease by plaintiff's false representations of ownership, that plaintiff was not the owner of the premises, and that defendant accepted a lease from, and paid rent to, the true owner, *held* not to state a defense to an action for rent. *Nissen v. Turner*..... 272
2. A tenant who was not evicted, and who did not surrender his rights under the lease through which he obtained possession, cannot defend a suit by the lessor for rent on the ground that he attorned to another. *Mosher v. Cole*..... 636

Continuation of Tenancy.

3. Where a tenant with the consent of his landlord, express or implied, holds over his term, the law presumes a continuation of the original tenancy for another like term and upon the same conditions. *Bradley v. Slater*..... 682
4. The presumption that a hold-over tenant is bound for the second period upon the original terms, may be overthrown by evidence that he was to pay rent only for the time he occupied the premises. *Id.*
5. In a suit to recover from a hold-over tenant rent for the sec-

Landlord and Tenant—*concluded.*

ond term, evidence *held* insufficient to overthrow the presumption that he was bound for another period upon the original terms. *Id.*

6. Where a tenant does not vacate the premises when his lease expires, he may be treated by the landlord either as a tenant or as a trespasser. *Id.*

Destruction of Property. Rents.

7. The common law rule of construction of a covenant for payment of rent where a portion of the premises has been destroyed, *held* not in force. *Wattles v. South Omaha Ice & Coal Co.* 251

8. An express agreement of a lessee to keep in good repair the leased premises, and, at the end of the term, surrender their possession in as good condition as they were when he entered, natural decay, wear and tear excepted, is not, and does not include, a covenant to rebuild buildings destroyed without his fault. *Id.*

9. Where a substantial portion of leased premises is destroyed without the fault of the lessee, he is entitled to an apportionment of the rent covenanted to be paid and accruing thereafter, in the absence of an express assumption by him of the risk of such destruction. *Id.*

Partition of Premises.

10. Where realty owned by two persons has been leased for a term of years and partition has been decreed on petition of one of them, the lessee will become a tenant of the purchaser at the judicial sale. *Oliver v. Lansing*..... 828

Repairs.

11. Claims for repairs ordered by lessee before appointment of a receiver, *held* not charges against either the property or rent money in hands of the receiver, but individual debts of the lessee. *Estabrook v. Stevenson*..... 378

Larceny.

Evidence *held* sufficient to sustain a verdict of guilty in a case where accused was charged with the larceny of cattle. *Fanton v. State*..... 352

Lease. See LANDLORD AND TENANT.

Legislative Appropriations. See STATE, 1-4.

Levy. See ATTACHMENT, 1.

Libel and Slander.

1. A false or malicious publication, in print or writing, which tends to injure the reputation of another person, or to bring him into contempt, hatred, or ridicule, is libelous, and the publisher is amenable to the criminal law. *Raker v. State*.. 202

2. In a prosecution for criminal libel it is error to so instruct the jury as to cast upon the defendant the burden of establishing that the alleged publication was not libelous. *Id.*

Liens. See ATTORNEYS' LIENS. CHATTEL MORTGAGES. JUDGMENTS. MECHANICS' LIENS. MORTGAGES.

Life Insurance. See INSURANCE, 16-18.

Limitation of Actions. See HIGHWAYS, 1, 2. PARTNERSHIP, 2. SALES 3. USURY, 4.

1. Where a tax lien exists at the time a deed containing a covenant against incumbrance is executed, a cause of action immediately accrues in favor of the covenantee, which will be barred by limitation in five years. *Bellamy v. Chambers*..... 146
2. The defense of the statute of limitations cannot be invoked for the first time in the supreme court. *Bell v. Rice*..... 547
3. A cause of action against a railroad company for damages resulting from the negligent construction of ditches, arises when the injury occurs, and not when the ditches are completed. *Fremont, E. & M. V. R. Co. v. Harlin*..... 700

Lost Instruments. See WILLS, 1-3.

Majority. See MUNICIPAL CORPORATIONS, 12.

Malpractice.

A charge of malpractice against an attorney may be joined with a prosecution for a contempt of court where both charges involve a single transaction. *Blodgett v. State*..... 121

Mandamus.

Nature of Writ.

1. *Mandamus* can only be invoked to compel the performance of some particular act which the law especially enjoins as a duty resulting from an office, trust, or station. *State v. Piper* 25, 39
2. As a preventive remedy *mandamus* cannot take the place of injunction. *Id.*
3. *Mandamus* can only be resorted to for the purpose of compelling action, and is not a proceeding to correct errors. *Id.*

Pleading.

4. The facts recited in an alternative writ must be sufficient to entitle relator to the issuance of a peremptory writ. *King v. State* 66
5. On demurrer to recitals in the alternative writ, the recitals must all be considered, and the refusal of compliance upon certain grounds by respondent will be *held* to excuse technical exactness in stating why, on other grounds, relator is entitled to the relief sought. *Id.*
6. A writ of *mandamus* will only be allowed when the relator clearly establishes his right. *State v. Bartley*..... 874
7. Nothing essential to plaintiff's right to the writ will be taken by intendment. *Id.*

Auditor of State.

8. Writ allowed against the auditor of public accounts to com-

Mandamus—*concluded.*

pel him to issue a warrant for the salary of a court stenographer. *State v. Cornell*..... 526

District Judge.

9. Writ denied on application to compel a district judge to recall an order of sale issued upon a decree of foreclosure, no proper supersedeas having been filed. *State v. Ramsey*..... 166

Secretary of State.

10. Upon facts stated the writ was denied on application to compel the secretary of state to certify to the county clerks the names of certain persons as republican nominees for offices. *State v. Piper*..... 42

State Printing Board.

11. A bidder for state printing cannot obtain a writ to compel the state printing board to award him the contract where he fails to show that his bid was accompanied by the bond required by statute. *State v. Bartley*..... 874

Married Women. See HUSBAND AND WIFE.

Master and Servant.

Vice-Principal.

1. The most satisfactory evidence that one is a vice-principal is that his co-employes are under his supervision and control and subject to his orders. *Union P. R. Co. v. Doyle*..... 556
2. The fact that an employe is vested with authority to hire and discharge a co-employe is not conclusive evidence that as to such co-employe he is a vice-principal. *Id.*
3. Whether one of several employes of the same master is a vice-principal as to the co-employes, is generally a mixed question of law and fact to be determined by the facts and circumstances in the case in which it is presented. *Id.*
4. A section-hand who was injured while working with the section-boss, section-crew, and others on a gravel train, *held* not a fellow-servant of the foreman of the train, but a vice-principal. *Id*..... 555

Negligence.

5. Evidence *held* to sustain a finding that the negligence of a servant was not the proximate cause of his injury. *Id*..... 556
6. Evidence *held* not to sustain a finding that the negligence of a railway company was the proximate cause of a servant's injury. *Id.*
7. A verdict for negligence must have the support of competent positive evidence that the injury complained of was caused by the negligence of the master, or such negligence must be inferable from proved or conceded facts. *Chicago, B. & Q. R. Co. v. Soderberg*..... 674

Risks of Employment.

8. A servant by his contract of employment assumes the ordinary risks incident thereto. *Id.*

Mechanics' Liens. See SUBROGATION, 3.

1. The sworn statement of a subcontractor for a mechanic's lien must contain a description of the premises on which the improvement was erected. *Drexel v. Richards*..... 509
2. A description of the premises in the sworn statement of a subcontractor for a mechanic's lien is not insufficient where it renders the location susceptible of ready ascertainment by the aid of extrinsic evidence. *Id.*
3. A description of property in a statement for a mechanic's lien as the "Bartlett & Downing Block, Kearney, Buffalo county, Neb.," is a sufficient description of the premises, especially when there are no rights of third parties to be affected by the lien. *Id.*
4. The account of the items for the materials furnished and labor performed by a contractor or subcontractor, and for which a lien is claimed, and the affidavit thereto attached should be construed together, and if, when thus construed, they substantially comply with the statute it is sufficient. *Id.*
5. The filing of a claim for a mechanic's lien does not in itself establish such a lien. *Omaha Fire Ins. Co. v. Thompson*..... 580

Mistake. See ARBITRATION AND AWARD, 8. MORTGAGES, 7-9. SUBROGATION, 3.

To justify the reformation of a written contract for mistake, the mistake must be mutual and be established by clear, convincing, and satisfactory evidence. *Home Fire Ins. Co. v. Wood*.. 381

Mortgages. See EXECUTIONS, 1. HUSBAND AND WIFE, 5, 6. MANDAMUS, 9. NEGOTIABLE INSTRUMENTS, 9. SUBROGATION, 1-3.

Consideration.

1. A mortgage given to secure the guarantor of mortgagor's note *held* not void for want of consideration. *Steen v. Stretch*, 573

Execution.

2. A mortgage duly witnessed and acknowledged is of itself *prima facie* evidence that the mortgagor signed it. *Greeley State Bank v. Line*..... 434
3. A mortgage upon realty, other than a homestead, executed and delivered by mortgagor is valid between the parties and those having knowledge of its existence, though not lawfully acknowledged or witnessed. *Holmes v. Hull*..... 656

Assignment.

4. An equitable assignment of a note and mortgage may be made by sale and delivery without indorsement or written assignment, and the purchaser may maintain an action in his own name to foreclose the mortgage. *Greeley State Bank v. Line* 434

Fraudulent Release.

5. A fraudulent release by mortgagee after indorsement without recourse of the note, in favor of a third party having

Mortgages—*concluded.*

notice of the rights of the holder, does not of itself render the mortgagee liable in a suit *ex contractu* for the amount of the debt. *Smith v. Long*..... 749

Notice.

6. A subsequent incumbrancer *held* charged with notice by the record of a prior mortgage which did not truly state its conditions. *Steen v. Stretch*..... 573

Description.

7. A mortgage will not be invalidated by reason of an error in the description of the realty, where the remainder of the description is sufficiently definite to enable one to locate the land. *Carpenter Paper Co. v. Wilcox*..... 659

Reformation.

8. A mutual mistake in describing the property will justify reformation of the mortgage, not only as against mortgagor, but as against purchasers chargeable with notice of the mistake. *Id.*

9. Evidence *held* sufficient to justify the reformation of a mortgage on the ground of a mutual mistake in describing the property intended to be incumbered. *Id.*

Payment and Satisfaction.

10. Answer in a suit to foreclose a mortgage *held* to charge satisfaction of the debt. *Roberts v. Samson*..... 746

11. Facts stated in opinion *held* not to sustain the plea of payment. *Moore v. Pollock*..... 901

Municipal Corporations. See COSTS, 3. SCHOOLS AND SCHOOL DISTRICTS, 1. TAXATION, 1.

Dangerous Premises.

1. In a suit against a city for damages sustained by a plaintiff who fell into an unguarded excavation in a lot abutting on a street, a correct plan or drawing of the excavation and surroundings, *held* competent evidence. *Village of Culbertson v. Holliday*..... 229

2. A city *held* liable for the death of a child who fell from a piece of sidewalk while using it as a raft upon a pond situate partly in the street and partly upon private property, the accumulation of water being occasioned by the negligence of the city in grading the street and in constructing a sewer. *City of Omaha v. Richards*..... 804

Streets and Sidewalks.

3. A city is required to exercise reasonable care and diligence in keeping a street in a safe condition for travel, though the street may not be frequently used by the public. *City of South Omaha v. Powell*..... 798

4. Where a municipality improves any portion of a street for the purpose, and with the result, of inducing public travel thereon, there is a resulting duty to keep such portion of the

Municipal Corporations—*concluded.*

street in repair, and a consequent liability for the failure to do so. *City of Ord v. Nash*..... 335

5. The term "sidewalk" denotes that portion of the public highway set apart, by dedication, ordinance, or otherwise, for the use of persons traveling on foot. *Id.*

6. It is not error to charge that a city is required to keep its streets and sidewalks in a reasonably safe condition for travel, by night as well as by day. *Id.*

7. An instruction that it is the duty of a city to keep its streets in a reasonably safe condition for travel by all persons is not objectionable on the ground that it excludes from the jury the question of alleged contributory negligence by the plaintiff. *Id.*

8. Instructions *held* to correctly state the rule as to liability of a city for failure to keep its streets in safe condition for the use of the public. *City of Omaha v. Richards*..... 804

Title to Streets.

9. Under sec. 106, art. 1, ch. 14, Comp. Stats., the acknowledgment and registration of a plat subdividing tracts of land are equivalent to a deed in fee-simple of such portion of the premises platted as is on such plat set apart for streets and other public uses. *Ehmen v. Village of Gothenburg*..... 715

Parks.

10. The word "park" means a tract of land within or near a town or city devoted to purposes of amusement, pleasure, or exercise, and the word generally means a park open to the public. *Id.*

Funding Bonds. Elections.

11. The clause, "When the same shall have been authorized by a vote of the people," employed in sub. 21, sec. 67, art. 1, ch. 13*a*, Comp. Stats., relating to authority to issue municipal bonds, means authorized by a majority of the voters of the city. *Bryan v. City of Lincoln*..... 620

12. Under sub. 21, sec. 67, art. 1, ch. 13*a*, Comp. Stats., a proposition to authorize the issuance of funding bonds submitted at a general city election cannot be adopted unless it receives a majority of all the votes cast at such city election. *Id.*

Water Rent.

13. By sub. 15, sec. 69, ch. 14, Comp. Stats., 1887, the city of North Platte was authorized to contract with a corporation to erect and maintain a system of water-works, to supply the city with water, and to levy a water tax. *North Platte Water-Works Co. v. City of North Platte*..... 853

14. In a suit against a city to recover water rents, it was *held* unnecessary for plaintiff to plead the statute authorizing the city to enter into the contract under which the water was supplied. *Id.*

Mutual Benefit Insurance. See INSURANCE, 16-18.

Negligence. See BANKS AND BANKING, 1. BATHING RESORTS. JUDGMENTS, 1, 2. MASTER AND SERVANT, 5-7. MUNICIPAL CORPORATIONS, 7. PLEADING, 2. STREET RAILWAYS. WATERS, 9.

Contributory Negligence.

1. If a person, in the exercise of ordinary care, is injured through the negligence of another, he may recover; but if his own negligence contributed to or was the proximate cause of the injury he cannot recover. *Village of Culbertson v. Holliday* 229

Degrees of Negligence.

2. The doctrine of comparative negligence is not in force. *Id.*
3. In an action for damages for injuries alleged to have been sustained through the negligence of another, there is no such issue as the slight negligence of any one. *Id.*
4. Such expressions as "slight negligence" and "slight want of ordinary care" should not be used in instructions. *Id.*

Evidence.

5. It is error for a court to state to a jury a circumstance or group of circumstances as to which there has been evidence on the trial, and instruct that they amount to negligence. *Id.*
6. Whether a certain act or omission is or is not evidence of negligence is for the court, but whether such evidence convicts a party of negligence is for the jury. *Id.*
7. Where only one conclusion can be drawn from the undisputed facts, the court may direct a verdict consistent therewith. *Knapp v. Jones*..... 490
8. Evidence *held* insufficient to sustain a judgment against a railroad company in a suit by a section-hand who was injured by a passing locomotive. *Chicago, B. & Q. R. Co. v. Soderberg*, 674

Ordinary Care.

9. The law requires of a person the exercise of care and caution commensurate with the danger confronted, but this rule involves no more than the exercise of ordinary care and prudence in view of the circumstances. *Village of Culbertson v. Holliday* 229
10. The law does not require of an old person the exercise of greater care to avoid injury than it requires of a young and vigorous one. *Id.*
11. In avoiding injury the law does not require the exercise of extraordinary care. *Id.*
12. In an action for damages resulting from defendant's alleged negligence, plaintiff cannot recover where it appears that his failure to exercise ordinary care was the cause of the injury. *Knapp v. Jones*..... 490

Negotiable Instruments. See ALTERATION OF INSTRUMENTS. BANKS AND BANKING, 2-5. CHECKS. MORTGAGES, 4. PLEDGES.

Execution Sales.

1. The purchaser of a note at execution sale acquires only the defendant's interest. *Jones v. Wiesen*..... 244

Negotiable Instruments—*concluded.*

2. The purchaser of a note at execution sale occupies the same relation to the maker as he would have occupied had the note been indorsed to him without recourse by the payee. *Id.*

Indorsements. Rights of Transferees.

3. Where the payee of a negotiable note indorses and delivers it to his creditor to secure the payment of a debt owing to latter, the creditor becomes an innocent holder of the note and acquires a lien thereon for the amount of his debt, provided he took it before maturity, without notice of any defenses thereto. *Id.* 243

4. One who purchases for value a negotiable note, either before or after its maturity, with knowledge of a defense thereto, is entitled to enforce the collection of the entire note, provided his assignor was an innocent purchaser, before due, for value, in the usual course of business. *Id.* 244

5. Where a creditor of payee became an innocent holder of a note through an indorsement to secure the debt, a second creditor who paid the claim of the first creditor and took from him an assignment of the note, acquired the same lien and title possessed by the assignor, though the assignee knew that defenses existed against the note. *Id.*

6. In a suit by an indorsee of a note against the maker, *held* that the answer fails to state a defense. *First Nat. Bank of Dubuque v. McKibben* 513

7. In a suit by an indorsee of a note against the maker, its production by plaintiff, duly indorsed, raises a presumption that it was transferred before maturity for value, and the burden is on defendant to show that plaintiff is not an innocent holder. *Id.*

8. In a suit by an indorsee of a note against the maker, evidence *held* insufficient to sustain a verdict for defendant. *Id.*

9. Where a note provides it is governed by the conditions of a mortgage reciting that no general execution shall issue against the makers or indorsers of the note, but that mortgagee shall take the premises in full satisfaction of the debt, the makers and indorsers of the note are exempt from personal liability, and the remedy of the holder of the mortgage is restricted. *Scieroe v. First Nat. Bank of Kearney* 612

Parol Evidence.

10. In a suit on a note a contemporaneous contract in writing connected with the note by direct reference or by necessary implication, *held* admissible in evidence. *Id.*

11. A general indorsement of commercial paper may, except as against a *bona fide* holder, be explained and the precise terms of the agreement shown by parol evidence. *Whitney v. Spearman* 617

New Trial. See CRIMINAL LAW, 1. REVIEW, 44. SET-OFF AND COUNTER-CLAIM. TRIAL, 3, 4.

1. A judge may pass on a motion for a new trial in a case tried

New Trial—*concluded.*

before the judge of another district, where the latter ceased to preside before the hearing of the motion. *Lauder v. State,* 140

2. An assignment in a motion for a new trial that a group of instructions is erroneous is insufficient if any one of them was properly given. *City of South Omaha v. Powell*..... 798

Nominations. See ELECTIONS, 1-4.

Nonsuit. See DISMISSAL.

Notice. See MORTGAGES, 6. PLEDGES. SUMMONS.

Novation.

There can be no novation of a debt in the absence of an unqualified discharge of the original debtor by the creditor. *Western White Bronze Co. v. Portrey*..... 801

Nuisance. See JUSTICE OF THE PEACE, 2.

Office and Officers. See COUNTY TREASURERS. ELECTIONS, 1-4. STATE.

Parent and Child.

1. Generally, where a child renders services for a parent, the law presumes the services were gratuitously rendered. *Bell v. Rice* 547
2. Whether the evidence warrants the conclusion that a parent promised to pay for services rendered by a child is a question for the jury. *Id.*
3. A child may recover the value of services rendered for a parent where the evidence shows that the services were rendered under circumstances justifying the inference of a contract on part of the parent to make payment. *Id.*
4. Services rendered by a stepdaughter in caring for her imbecile stepfather, *held* necessaries for which his estate is liable. *Id.*
5. Where the proceeds of a note payable to a daughter were paid to her father, the latter's estate was *held* liable for the sum received by him, with interest from the date of filing the claim. *Id.*

Parks. See DEDICATION.

Parties. See BANKS AND BANKING, 6. JUDGMENTS, 10. MORTGAGES, 4. PARTNERSHIP, 1-4.

Partition.

1. In a cause within the law authorizing a partition, the right of plaintiff to a decree is imperative and absolutely binding upon courts of equity. *Oliver v. Lansing*..... 828
2. The fact that inconvenience in making distribution, or probable loss, is involved, does not affect the absolute right to have partition decreed. *Id.*

Partnership. See FRAUDULENT CONVEYANCES, 3.

1. The description of the individual members of a defendant

Partnership—*concluded.*

partnership firm does not make such individuals defendants, the reference to them being merely *descriptio personæ*. *Winters v. Means* 209

2. In a suit under sec. 27 of the Code to charge the property of an individual member of a firm with the payment of a judgment against it, an entry of appearance by the firm, and failure to interpose the statute of limitations as a defense, conclude the individual as to the binding force of such judgment with respect to the objection indicated. *Id.*

3. One who shared in the profits of a venture as compensation for services *held* not a partner, where he had no interest in or control over the property involved except as a salesman. *Whitney v. Gretna State Bank* 438

4. *Held*, That an action was not one brought under sec. 24 of the Code authorizing partnerships to sue without setting forth the names of the partners, that it did not abate on the death of a partner, and that it could properly be continued in the name of the survivor alone. *Union P. R. Co. v. Metcalf* 452

Payment. See INSURANCE, 8. PRINCIPAL AND AGENT, 5. SALES, 6, 7.

Sufficiency of allegation of payment in a suit to foreclose a mortgage. *Roberts v. Samson* 745

Personal Injuries. See NEGLIGENCE.

Physicians and Surgeons. See DAMAGES, 5, 6.

Pleading. See ASSAULT AND BATTERY, 2, 3. BANKS AND BANKING, 8. CARRIERS, 1. JUDGMENTS, 5. LANDLORD AND TENANT, 1. MANDAMUS, 4, 5. REPLEVIN, 4. RES JUDICATA. SET-OFF AND COUNTER-CLAIM. TAXATION, 1. TROVER AND CONVERSION.

Petition.

1. Petition *held* to state a cause of action in a suit by a teacher against a school district for breach of contract of employment. *Wallace v. School District* 171

2. A petition charging a railroad company with carelessly and negligently constructing a ditch, *held* good as against a general demurrer, though subject to attack by motion to make it more definite and certain. *Fremont, E. & M. V. R. Co. v. Harlin* 698

3. Facts averred in a petition *held* insufficient to authorize the court, in the exercise of equity jurisdiction, to set aside a judgment by default in an ejectment suit. *Scott v. Wright* 852

4. Petition *held* to state a cause of action against a city for water rents. *North Platte Water-Works Co. v. City of North Platte* 853

Answer.

5. *Held*, That one answering to the merits of an amended petition and participating in the trial, waived the right to complain

Pleading—*concluded.*

that a new cause of action was stated in the amended petition. *Grotte v. Nagle* 363

6. 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. *Hopewell v. McGrew* 789

7. Averments of an answer attacked by general demurrer *held* sufficient to show the existence and probate of a will through which defendant claimed title. *Koopman v. Carroll* 824

Demurrer.

8. Averments of legal conclusions in a pleading are not admitted by a demurrer. *State v. Ramsey* 167

9. A general demurrer will not lie to a pleading sufficient in substance but wanting in form or completeness. *Roberts v. Samson* 745

10. A pleading assailed by general demurrer will be *held* to charge what can be implied from the statements therein by reasonable and fair intendment. *Id.*

Reply.

11. In a suit in the nature of trover against a sheriff, it was *held* proper for plaintiff to plead in his reply that the property seized by the defendant was already *in custodia legis*. *Beagle v. Smith* 446

Amendments.

12. An order overruling a motion to strike an amended petition from the files, *held* equivalent to leave to file the amended petition. *Grotte v. Nagle* 363

13. An amendment of a pleading to conform to the proof *held* proper. *Id.* 364

Pledges. See NEGOTIABLE INSTRUMENTS, 5.

Where a wife to whom a note had been assigned delivered it to her husband to be deposited in bank for collection, the husband borrowing money from the bank and pledging the note as security, it was *held* that the assignment was sufficient to put the bank on inquiry as to the husband's title to the note. *Norfolk Nat. Bank v. Nenow* 429

Practice. See CONFLICT OF LAWS, 3. DISMISSAL.

Preferences. See CORPORATIONS, 4-6. FRAUD, 2.

Prescription. See HIGHWAYS, 1, 2.

Principal and Agent. See BANKS AND BANKING, 5. BROKERS. CONTRACTS, 4, 6. INSURANCE, 5.

Agent's Abuse of Trust.

1. An agent who, upon learning that his agency is soon to be revoked, abuses his trust by wrongfully canceling policies of his principal and by transferring the risks to other companies, is liable to the company which issued the policies canceled for the premiums thereon. *Northern Assurance Co. v. Hamilton* 248

Principal and Agent—*concluded.*

Authority of Agent.

2. A husband may act as the agent of his wife, but in order to bind her he must previously be authorized, or she must, with a knowledge of his acts, subsequently ratify them. *Norfolk Nat. Bank v. Nenow* 429

3. Evidence *held* sufficient to show that a contract pledging defendant's credit was within the scope of the authority of the agent by whom it was executed. *Oberne v. Burke* 764

4. A collecting agent cannot extinguish a debt due his principal, by setting off against it his own debt, unless authorized to do so by his principal. *Western White Bronze Co. v. Portrey* .. 801

5. An agent employed to make collection of commercial paper is, as the result of that relation, authorized to receive in payment such coin or currency only as is by law declared to be a legal tender, or which is by common consent treated as money. *Moore v. Pollock* 900

Ratification.

6. Evidence *held* sufficient to warrant a jury in finding that defendant ratified a contract made by an agent. *Oberne v. Burke* 764

7. A ratification by a principal of the unauthorized act of his agent may be inferred from the conduct of the former inconsistent with any intention other than a purpose to adopt such act as his own. *Id.*

Principal and Surety. See ALTERATION OF INSTRUMENTS, 1. ATTACHMENT, 4.

The liability of a surety is measured by, and will not be extended beyond, the strict terms of his contract. *Hopewell v. McGrew* 789

Printing. See STATE, 5.

Privileged Communications. See EVIDENCE, 10-12.

Process. See SUMMONS.

Public Policy. See CONTRACTS, 6-8.

Questions for Jury. See INSURANCE, 22, 25. NEGLIGENCE, 6. PARENT AND CHILD, 2. WATERS, 4.

Questions of Fact. See CONTRACTS, 2.

Railroad Companies. See CARRIERS. DAMAGES, 3. MASTER AND SERVANT, 1-6. STREET RAILWAYS.

1. An order of the state board of transportation requiring a railroad company to surrender a portion of its right of way to one buying and shipping grain, for an elevator site, is unconstitutional and void. *Chicago, B. & Q. R. Co. v. State* ... 399

2. One who builds a fence between his land and the right of way of a railroad company upon its failure to do so after notice, can recover the expense incurred only by showing that the fence complies with the requirements of sec. 1, art. 1, ch. 72, Comp. Stats. *Chicago, B. & Q. R. Co. v. Lyon* 640

Real Estate. See MORTGAGES. VENDOR AND VENDEE.

Real Estate Agents. See BROKERS.

Receivers. See BANKS AND BANKING, 6, 7, 11-13. LANDLORD AND TENANT, 11.

Where a receiver, without authority, advertises and sells assets after the date fixed by the decree, the sale is void and cannot be rendered valid by confirmation over objections. *Ackerman v. Ackerman* 55

Reference.

The action of the trial court in returning the case to the referee for further finding in respect to an item as to which the petition was allowed to be amended to conform to the proof, and the reception of a supplemental report containing such finding, and its consideration in the final settlement of the issues, approved. *Grotte v. Nagle*..... 365

Reformation of Instruments. See MISTAKE. MORTGAGES, 7-9.

Registration. See MUNICIPAL CORPORATIONS, 9.

Relatives. See FRAUDULENT CONVEYANCES, 1, 4, 5.

Release. See EMINENT DOMAIN, 2. JUDGMENT, 9. MORTGAGES, 5.

Religious Societies.

Where the right of a faction of a church to control its property or records is mainly dependent upon matters of religious doctrine, as to which the disputing factions entertain diverse views, civil courts should decline to interfere. *Moseman v. Heitshusen* 420

Rents. See LANDLORD AND TENANT, 2, 8, 9. VENDOR AND VENDEE, 8.

Replevin. See EXECUTIONS, 7.

Damages.

1. Where the property has been returned to defendant for failure of plaintiff to give the statutory undertaking, and the action proceeds as one for conversion, the measure of his damages, in case the right of property and of possession is found in his favor, is the market value of the property, with interest. *Baum v. Union Savings Bank*..... 387

Ownership. Pleading.

2. Where plaintiff bases his right to the possession of property upon a special ownership he must in his petition plead the facts which create such special ownership. *Griffing v. Curtis*, 334
3. Plaintiff's allegation of general ownership and right of possession cannot be proved by introducing in evidence a mortgage on the chattels replevied. *Robinson v. Kilpatrick*..... 795
4. A plaintiff who claims a special ownership by virtue of a chattel mortgage must allege facts showing his interest in the property and his right to possession. *Norcross v. Baldwin* 885

Replevin—*concluded.*

Suit on Bond.

5. Delivery of the specific property affected by the judgment in a replevin case amounts to a satisfaction of the judgment, except unpaid costs and damages; and thereafter liability on the replevin bond is limited to unpaid costs and damages. *Otto v. Burch*..... 894

6. Where a defendant who has successfully defended an action of replevin obtains possession of the property by a second suit, instead of resorting to the bond given for his protection, he thereby waives right to the alternative relief of recovery of the value thereof. *Id.*

Rescission. See SALES, 8-10.

Res Judicata. See COUNTIES, 4. PARTNERSHIP, 2.

Where defendant pleads fraud and breach of warranty in a suit on the first of a series of notes given for the same consideration, a judgment for plaintiff may be pleaded as a bar to the same defense in an action on the second note of the series. *Gilmore v. Whiteman*..... 760

Review. See BILL OF EXCEPTIONS. COUNTIES, 4. CRIMINAL LAW, 1. INSTRUCTIONS. INTEREST, 1. TRIAL, 9, 10.

Abstracts.

1. In a case submitted on an agreed printed abstract, the court will not look beyond the abstract, and unless error affirmatively appears therefrom the judgment below will be affirmed. *Closson v. Rohman*..... 323

2. In a case submitted on an abstract the court will not examine the transcript. *North Platte Water-Works Co. v. City of North Platte*..... 853

Assignments of Error.

3. An assignment of error relating to a group of instructions, where the ruling as to any one of the group against which the assignment is directed is without error, may be overruled. *Behrends v. Beyschlag*..... 304
Town v. Missouri P. R. Co..... 769

4. The question as to whether there was error in the assessment of the amount of recovery will not be considered unless raised by a proper assignment of error. *Montgomery v. Albion Nat. Bank* 652

5. In an error proceeding, a point not presented by an assignment of error will be disregarded, though argued in briefs of counsel. *Clarke v. Nebraska Savings & Exchange Bank*..... 669

6. Under an assignment of error that the damages awarded are excessive, the supreme court will not review the action of the trial court in admitting in evidence items of damage. *Roberts v. Hopper* 681

7. A party may be permitted to amend his petition in error to cover a point presented below. *Robinson v. Kilpatrick*..... 795

Review—*continued.*

8. Assignments of error requiring an examination of evidence may be overruled in absence of a bill of exceptions. *Chicago Lumber Co. v. Benjamin* 143

Bill of Exceptions.

9. A bill of exceptions not authenticated according to statute will be disregarded upon review. *Royse v. State Nat. Bank of St. Joseph* 16
10. An unauthenticated bill of exceptions will be disregarded in the supreme court. *Chicago Lumber Co. v. Benjamin* 143
11. A bill of exceptions will be disregarded upon review unless certified by the clerk of the trial court to be the original or a true copy. *Reuther v. Zimbleman* 165
12. A bill of exceptions not authenticated by the clerk of the district court will be disregarded. *Talcott v. Field* 635
13. A bill of exceptions may be considered upon satisfactory proof of its proper authentication, though the authentication has been lost. *Winters v. Means* 209
14. A decree supported by the pleadings may be affirmed upon appeal where the clerk below failed to authenticate the bill of exceptions. *Berger v. Lincoln County* 687
15. Where affidavits for a continuance are to be considered upon review, they must be embodied in a bill of exceptions. *Hans v. State* 150
16. Where the bill of exceptions reveals that material evidence introduced on the trial has been omitted, the court cannot review an order denying a motion to direct a verdict, when to do so would require an examination of the proofs. *Id.* 151
17. Assignments of error involving an examination of the evidence will be disregarded where the bill of exceptions has been quashed. *Reynolds v. McCandless* 225
18. Questions of fact cannot be considered where the record presents no proper evidence that the alleged facts existed. *Iowa Loan & Trust Co. v. Walker* 667
19. In absence of a bill of exceptions issues of fact cannot be considered in the appellate court, though the transcript recites that it contains the agreed statement of facts upon which the cause was determined. *Stuart v. Burcham* 823
20. One desiring to obtain a review of a ruling upon a question of fact should preserve the evidence by means of a bill of exceptions, allowed in the manner provided by law. *Douglas v. Smith* 899

Briefs.

21. A question discussed in the briefs but not raised by an assignment of error will be disregarded. *Raker v. State* 202

Evidence.

22. The judgment should not be disturbed where the only question presented is one of fact as to which the evidence is conflicting. *Shafer v. Hostetler* 71

Review—*continued.*

23. Evidence, though conflicting, *held* sufficient to sustain a decree enjoining defendant from obstructing an alley. *Ryley v. Sandean* 111
24. Questions of fact determined upon conflicting evidence will not be reviewed in the supreme court. *Montgomery v. Albion Nat. Bank* 652
25. A judgment supported by sufficient evidence will be affirmed, where no question of law is presented. *Emerson v. Kilroy*.... 591
26. A finding on conflicting evidence will not be disturbed unless manifestly wrong. *Woods v. Hart*..... 497
27. A reversal will not be entered for insufficiency of evidence unless the judgment is manifestly wrong. *Stewart v. Smith*.. 631
28. The record must show an abuse of discretion on part of the trial court in order to authorize the reversal of a judgment on account of the admission of evidence of experiments introduced for the purpose of contradicting or corroborating witnesses. *City of Ord v. Nash*..... 336
29. It is not reversible error for a court to reject an offer of competent and relevant evidence if the evidence rejected, when considered with all other evidence bearing on the issue to which it was directed, would not support the conclusion sought to be established by the rejected evidence. *Whitney v. Gretna State Bank*..... 438

Final Orders.

30. An order of the board of equalization relating to assessment of taxes is a final order, and an error proceeding may be prosecuted therefrom. *Webster v. City of Lincoln*..... 1
31. Unless provided by law. appeal will not lie from a decision of the board of equalization. *Id.*
32. An appeal or proceeding in error will not lie directly to the supreme court to review the decisions of the secretary of state under the Australian ballot law. *State v. Piper*.....25, 39
33. A finding without a judgment in a summary prosecution for contempt of court will not be reviewed by means of proceedings in error. *Blodgett v. State*..... 121
34. An order striking a petition of intervention from the record, on the ground that it was not filed within the time allowed, is not such a final order as will be reviewed upon petition in error. *Whitney v. Spearman*..... 617
35. In a proceeding under ch. 8, Comp. Stats., to wind up an insolvent bank, a judgment overruling the bank's motion to discharge an order requiring the receiver to sue stockholders for their unpaid subscriptions, is appealable. *State v. German Savings Bank* 734

Issues.

36. Petition in error may be dismissed where it presents no question of an existing substantive right of plaintiff in error. *Edgerton v. State*..... 72

Review—*continued.*

37. On appeal to the district court the cause must be tried with the issues unchanged, except as to matter arising after the trial in the inferior court. *Bellamy v. Chambers*..... 146
38. Grounds for setting aside a judicial sale are unavailing on review unless they were presented in the court below. *Creighton University v. Riley*..... 341
39. The statute of limitations cannot be invoked for the first time in the supreme court. *Bell v. Rice*..... 547
40. Questions not raised below will be disregarded upon review. *Raymond v. Leinberger*..... 817

Jurisdictional Amount.

41. Whether a judgment of a justice of the peace is appealable depends upon the amount claimed in the bill of particulars and not upon the amount recovered. *Bates v. Phœnix Publishing Co*..... 79

Laches.

42. A judgment or decree from which no appeal has been taken within the statutory time will not be reviewed by the appellate court. *Omaha Loan & Trust Co. Savings Bank v. Knight*.. 342
43. An appeal taken to the supreme court after six months from the date of rendition of the decree sought to be reviewed, may be dismissed. *Renard v. Thomas*..... 398

New Trial.

44. An assignment in a petition in error that the court erred in denying the motion for a new trial is too indefinite to be available where several distinct grounds are stated in the motion. *Hans v. State*..... 151

Objections.

45. A record to review error in permitting improper remarks of counsel must show an objection at the time, a ruling thereon, and an exception to the ruling. *Golder v. Lund*..... 867

Prejudicial Error.

46. A judgment will not be reversed for error in instructions where prejudice to the party complaining has not been shown. *Storz v. Finklestein*..... 177
47. Prejudicial error only is ground for reversal. *Merchants Savings Bank of Providence v. Noll*..... 615
48. Refusal to allow a continuance applied for on the ground of absent witnesses, where it is admitted that the witnesses, if present, would testify as stated in the affidavit in support of the motion, is not ground for reversal, in absence of an abuse of discretion on part of the trial court. *Fanton v. State*, 351

Remedy.

49. A proceeding in error to review an order of the board of equalization in a matter within its jursdiction, will generally afford an adequate remedy. *Webster v. City of Lincoln*..... 1

Supersedeas.

50. A supersedeas bond is not essential to a review of a decree in equity. *Creighton v. Keith*..... 810

Review—*concluded.*

51. A supersedeas bond is not essential to a review of a final order, but is indispensable to a stay of proceedings pending review. *State v. Ramsey*..... 166

52. A supersedeas bond is necessary to a stay of proceedings under a decree in equity pending appeal. *Creighton v. Keith*.... 810

53. A bond, though filed and approved, will not operate as a supersedeas unless it contains the conditions prescribed by law. *State v. Ramsey*..... 167

54. A proper supersedeas bond executed, filed, and approved in a cause will not supersede a decree subsequently rendered in another action between the same parties. *Id.*

Transcripts.

55. On motion to dismiss appeal from a justice of the peace on the ground that the amount claimed was less than $20, the district court, in determining its jurisdiction, should look alone to the transcript authenticated by the justice. *Bates v. Phœnix Publishing Co*..... 79

56. A judgment within the jurisdiction of the district court may be affirmed when presented for review upon the original pleadings and a certified copy of the final order assailed. *Peck v. Nebraska Loan & Trust Co*..... 227

57. The original pleadings and a certified copy of the judgment below will not answer the purpose of a transcript of the proceedings. *Id.*

58. Original pleadings below will not take the place of a statutory transcript for review, though the parties stipulate that such papers may be used for that purpose. *Smith v. Beagle*.. 445

59. The certified transcript of proceedings below imports verity. *Merchants Savings Bank of Providence v. Noll*..... 615

60. Where the transcript for review is incorrect or incomplete, it can only be corrected in the court below. *Id.*

61. The record as to the time a finding was made prevails as against an objection based on the hypothesis that the finding was earlier made, in the absence of some showing of record in support of the objection. *Seaver v. Hall*..... 878

Trial.

62. Where a judgment of a county court is reversed by a district court in a proceeding in error, the district court may retain the cause for trial. *Maryott v. Gardner*..... 320

Revocation. See WILLS, 5, 6.

Sales. See CORPORATIONS, 1. GUARANTY. RECEIVERS.

Bill of Sale.

1. A bill of sale in payment of an antecedent debt, in absence of an intent to defraud other creditors of the seller, *held* valid. *Rachman v. Clapp*..... 648

Deceit.

2. The rule that a purchaser cannot rely upon representations

Sales—*concluded.*

as to a matter of law, does not apply to a representation relating to the law of another state. *Wood v. Roeder*..... 476

3. One who was induced, through false and fraudulent representations of seller as to the statute of limitations, to buy an uncollectable county warrant issued in another state, may maintain an action against the seller for the purchase money, where payment of the warrant has been refused on the ground that the claim is barred. *Id.*
4. A buyer may rely upon representations consisting of direct statements or asserted facts, where an investigation would be necessary to ascertain the truth. *Olcott v. Bolton*..... 780

Description of Property.

5. Where a contract contains two descriptions of the property to be conveyed, one correct and the other false in fact, the latter should be rejected as surplusage. *Woods v. Hart*..... 497

Payment.

6. Under a contract for the sale of corn, stating price, and time and place of delivery, but not providing for time, place, or manner of payment, the seller may require payment in cash on delivery. *Behrends v. Beyschlag*..... 305
7. Under a contract for the sale of corn where payment is to be made on delivery, it is not necessary for the buyer to have, at the time and place of delivery, sufficient money to pay for all the corn purchased, he being able, ready, and willing during the whole time assigned for delivery to make payment in the manner contemplated by the contract. *Id.*

Rescission.

8. A buyer who returned the property and demanded a rescission as soon as he learned that the seller's representations were false, asserted his rights in time to be protected. *Olcott v. Bolton*..... 779
9. The fact that a buyer obtained information other than that contained in the seller's statements will not prevent him from rescinding the contract for false representations of the seller, the falsity not having been discovered until after sale. *Id.*
10. One injured by purchasing bank stock in reliance upon material and false representations positively made by the seller as statements of fact relating to the value of the stock, may rescind the contract or sue for damages, though the seller was without knowledge as to the truth or falsity of the statements and believed them to be true. *Id.*

Schools and School Districts.

1. Fines, penalties, or license moneys, in the hands of the treasurer of a city of the first class having over 8,000 and less than 25,000 inhabitants, are properly distributable among the common schools which territorially constitute a part of the city. *King v. State*..... 66
2. Where a teacher was employed for three months with option

Schools and School Districts—*concluded.*

to her to teach during the school year, service rendered by her after the expiration of three months, without objection, *held* to have been performed under the original contract of employment, and that a new contract was not necessary to bind the district for the entire school year. *Wallace v. School District* 171

3. A qualified teacher cannot be discharged at the pleasure of the district, but only where just cause exists therefor, in absence of a stipulation to the contrary in the contract of employment. *Id.*
4. Where a teacher duly employed for a fixed period is wrongfully dismissed before expiration of the term, the district is liable. *Id.*

Secretary of State. See ELECTIONS, 1-4.

Sentence. See CRIMINAL LAW, 6. INTOXICATING LIQUORS, 2.

Set-Off and Counter-Claim. See PRINCIPAL AND AGENT, 4. USURY.

Where, to a counter-claim well pleaded, the plaintiff interposes no reply, a verdict in his favor in excess of the amount claimed in his petition, less the amount of such counter-claim, should be set aside as unsupported by the pleading. *Ashland Land & Live Stock Co. v. Woodford*..... 118

Sheriffs and Constables. See EXECUTIONS. SUMMONS, 2.

Special Findings. See TRIAL, 9, 10.

Specific Performance. See VENDOR AND VENDEE, 8.

Evidence *held* to sustain findings for plaintiff in an action for the specific enforcement of a contract for the exchange of property. *Woods v. Hart*..... 497

State.

1. In absence of a specific appropriation made by law, the executive officers have no power to expend public funds. *State v. Moore* 88
2. An appropriation, within the meaning of the constitution, is the setting apart by law of a certain sum from the public revenue for a specified purpose, so that the executive officers are authorized to expend that sum, and no more, for that purpose, and no other. *Id.*
3. An appropriation is not specific if it leaves the amount to be expended to be limited only by the extent of claims which may regularly be made upon it by the recipients, the amount of those claims being uncertain. *Id.*
4. Appropriations can only extend to the end of the next fiscal quarter succeeding the adjournment of the next regular session of the legislature, and an act by its express terms enduring for a longer period cannot be construed as carrying an appropriation without making it void as in conflict with the constitution. *Id.*

State—*concluded.*

5. The state printing board will not be mandamused to award a printing contract to one who fails to show that his bid was accompanied by the bond required by statute. *State v. Bartley* 874

State Board of Transportation. See RAILROAD COMPANIES, 1.

Statute of Frauds.

The statute of frauds relative to the sale of lands will not enable one who has obtained the title and possession of real property to avoid making payment therefor merely because there had been no formal acceptance in writing of the original written offer of the purchaser. *Griffith v. Thompson*..... 424

Statutes. See BANKS AND BANKING, 13. MUNICIPAL CORPORATIONS, 12. Table, *ante*, p. liii.

1. When certain language is used in a statute and language of similar import has previously been used in other acts, and has received a practical interpretation by the legislative and executive departments of the government, while such practical construction will not control the courts in construing the later act, it will generally be presumed that the language of the later act was adopted with a view to such practical construction given the earlier act. *State v. Moore*..... 89
2. A simultaneous repeal and re-enactment of a statute, or section thereof, in terms or in substance, is a mere affirmance of the original and not a repeal thereof in the strict or constitutional sense. *Steuberg v. State*..... 127
   Douglas County v. Keller..... 139
3. The act of 1887 entitled "An act to amend section 23 of an act entitled 'An act concerning counties and county officers,' approved March 1, A. D. 1879," did not repeal the succeeding section 24 of the act of 1879, as dependent upon section 23; neither did it repeal section 24 by implication. *Id.*
4. An act complete in itself is not inimical to the constitutional requirement that no law shall be amended unless the new act contains the section or sections so amended, though such complete act may be repugnant to, or in conflict with, a prior law not referred to nor in express terms repealed by the later act. *State v. Cornell*..... 526
5. The act entitled "An act to amend chapter 13 of the Revised Statutes of 1866, entitled 'Courts,'" approved Feb. 27, 1879 (Session Laws, p. 82), was an act complete in itself, and the provisions therein made for stenographic reporters and their compensation were germane to its purposes. *Id.*

Stenographers. See STATUTES, 5.

Stipulations. See BILL OF EXCEPTIONS, 8. INTEREST, 1.

Stock. See CORPORATIONS, 1.

Stockholders. See BANKS AND BANKING, 6, 7, 11-13.

Street Railways.

1. Street railway companies are common carriers, and as such are required to exercise more than ordinary skill and precaution in order to insure the safety of passengers. *East Omaha Street R. Co. v. Godola*..... 906
2. A street railway company, by undertaking the transportation of passengers for hire, assumes towards them the relation of a common carrier, without regard to the character of the easement possessed by it in its right of way. *Id.*
3. Standing on the platform of a crowded street car in motion is not such neligence as will prevent a passenger from recovering for injuries resulting from the negligence of persons in charge of the car. *Id.*

Streets. See HIGHWAYS.

Subrogation.

1. The right of subrogation exists in favor of a creditor who has paid the amount of a mortgage or other incumbrance in order to protect his own subordinate lien, or when as the holder of such subordinate lien he has, through mistake or inadvertence, satisfied a prior lien upon the property covered thereby. *Seicroe v. Homan*..... 601
2. The right of subrogation must in every case rest upon some recognized principle of equity jurisprudence, such as a mistake of fact, an agreement or understanding that the money advanced was for the express purpose designated, or the like. *Id.*
3. Evidence *held* sufficient to sustain a finding that a mortgagee, in discharging his liens, and in taking a second mortgage, did not act through inadvertence or mistake, and that he was not entitled to subrogation as against the rights of intervening lienors. *Id.*

Sugar Bounties. See BOUNTIES.

Summons. See APPEARANCE. INSURANCE, 10.

1. There was no service upon a corporation where the persons served were not officers of, or connected with, the corporation. *Campbell Printing Press & Mfg. Co. v. Marder*..... 283
2. Extrinsic evidence is admissible to impeach the return of an officer as to service of process. *Id.*

Supersedeas. See REVIEW, 50-54.

Supreme Court. See COURTS, 1.

Surface Water. See DAMAGES, 3. WATERS.

Taxation. See LIMITATION OF ACTIONS, 1. MUNICIPAL CORPORATIONS, 13.

1. Where plaintiff in a suit to enjoin the collection of taxes claims that an error proceeding from an order of the board of equalization would be inadequate, the facts upon which

Taxation—*concluded.*

his claim is based must be pleaded and proved. *Webster v. City of Lincoln* 1

2. A county board has no authority to levy taxes which in the aggregate exceed $1.50 per $100 valuation, unless authorized so to do by the vote of the electors of the county, except for the payment of indebtedness existing at the date of the adoption of the constitution. *Chicago, B. & Q. R. Co. v. Nemaha County* 393
3. Taxes levied in excess of the constitutional limit are illegal and unauthorized. *Id.*
4. Remedies where one pays illegal taxes under protest. *Id.*
5. One paying, under protest, taxes in excess of the constitutional limit, may recover such excess in an action at law without presenting his claim to the county board. *Id.*

Teachers. See SCHOOLS AND SCHOOL DISTRICTS, 2-4.

Time. See VENDOR AND VENDEE, 8.

Transcripts. See REVIEW, 55-61.

Trees. See DAMAGES, 3.

Trial. See CRIMINAL LAW. DAMAGES, 2. JURY. JUSTICE OF THE PEACE, 1. NEW TRIAL. SET-OFF AND COUNTER-CLAIM.

Exceptions.

1. An exception, well taken, to the exclusion of evidence is not waived by a failure to present the same ground of objection by an exception to an instruction. *Rosenthal v. Ogden* 219

Jurors. Memoranda.

2. In a suit on a fire insurance policy to recover the value of articles destroyed, *held* that the court did not abuse its discretion in permitting jurors, during the trial, to make memoranda of the articles and of the value placed thereon by the evidence. *Omaha Fire Ins. Co. v. Crighton* 314

Misconduct of Attorneys.

3. Generally a judgment will not be reversed for improper remarks of counsel, where the jury is directed to disregard the statements, and the misconduct is not repeated. *Golder v. Lund* 367
4. An admonition by counsel directing the jury to disregard improper remarks made by him is equivalent to one directed by the court. *Id.*

Verdicts and Findings.

5. A verdict which is responsive to all the issues made by the pleadings will not be rejected because of immaterial findings. *Baum Iron Co. v. Union Savings Bank* 387
6. Where a verdict is sufficient to authorize a judgment, and there is no substantial variance between it and the judgment, the case will not be reversed for an informality in the verdict. *Id.*

Trial—*concluded.*

7. Where only one conclusion can be drawn from the undisputed facts, the court may direct a verdict consistent therewith. *Knapp v. Jones* 490
8. General and special verdicts *held* not inconsistent. *Town v. Missouri P. R. Co* 769
9. Error cannot be predicated upon failure of the court to include in a list of questions for special findings one not requested. *Id.*
10. Where an answer to a question submitted for a special finding would have been immaterial, a judgment on the general verdict, without such special finding, *held* not prejudicially erroneous. *Id.*

Trover and Conversion. See EXECUTIONS, 7. REPLEVIN, 1.

In an action by a mortgagee of chattels against a stranger for conversion of the property, the petition must set out the facts constituting plaintiff's special ownership. *Raymond v. Miller* 506

Trusts. See FRAUDULENT CONVEYANCES, 7.

Where the cashier of a bank used the bank's funds to purchase stock in another bank, a court of equity may charge the stock with a trust in favor of the bank whose funds were wrongfully used to purchase the stock. *Tecumseh Nat. Bank v. Russell* 277

Ultra Vires. See HIGHWAYS, 3.

Usury.

1. Any rate of interest agreed upon not exceeding ten per cent per annum is valid, and interest may be taken yearly or for any shorter period, or in advance. *Steen v. Stretch* 572
2. *Held*, Not usurious to compute interest according to the method known as "bank discount." *Id.*
3. A loan of money with which the borrower paid a usurious debt, *held* not tainted with usury. *Id.*
4. Usury paid to a national bank cannot be set off in a suit by it, commenced more than two years after such payment, to recover the principal debt. *Montgomery v. Albion Nat. Bank*.. 652
5. Where, in a suit on a note, the defense of usury is established, the defendant is entitled to recover his costs, and such recovery applies to costs incurred in suing out an attachment in the case. *Id.*
6. To constitute a plea of usury facts must be stated which disclose a contract between the parties thereto by which there is received or reserved a rate of interest in excess of the maximum allowed by law. *McKinley v. Aldrich* 785

Vendor and Vendee. See COUNTIES, 3, 4. GUARDIAN AND WARD. SALES. STATUTE OF FRAUDS.

Description of Property.

1. A contract for the exchange of realty is not void for indefi-

Vendor and Vendee—*concluded.*

niteness of description, where the description is sufficient, by aid of evidence *aliunde*, to enable the property to be identified. *Woods v. Hart* 497

False Representations.

2. Evidnece examined, and *held* to sustain a judgment for damages on account of fraudulent representations by the vendor touching the character and value of improvements upon lands conveyed. *Mullen v. Kinsey* 466

3. A purchaser has a right to rely upon the representations of his vendor as to the quality and location of the land, and the character of the improvements thereon, whenever the facts concerning which such representations are made are not within the knowledge of the purchaser. *Id.*

Bona Fide Purchasers.

4. Evidence *held* sufficient to sustain findings that defendants were innocent purchasers for value from J. T. Ward, and that they did not assume payment of plaintiffs' judgment erroneously entered against him as "S. T. Ward." *Aultman v. Ward* 942

5. A *bona fide* purchaser of land is one who purchases it for a valuable consideration, paid or parted with, without notice of any suspicious circumstances to put him upon inquiry. *Carpenter Paper Co. v. Wilcox* 659

Breach of Contract. Damages.

6. Where a vendor of land cannot make title, the vendee may at his election recover payments of purchase money with interest, or damages for the loss of his bargain. *Seaver v. Hall*, 878

7. Where two or more persons have contracted to convey land to a third person, the vendors cannot, by contract or conveyance among themselves, release any of them from the obligation to respond to the vendee for damages arising from a breach of the contract. *Id.*

Specific Performance.

8. Where time is not of the essence of the contract, a vendor who is unable to make title at the time he should convey, may have specific performance by tendering good title at any time before decree, provided he has acted in good faith and specific performance can be enforced without injustice to the vendee, and in such case an awarding of rents to the vendee together with costs, in the absence of special circumstances, adjusts the equities. *Id.*

Verdict. See TRIAL.

Vice-Principal. See MASTER AND SERVANT, 1-4.

Waiver. See APPEARANCE, 1. ARBITRATION AND AWARD, 4. BILL OF EXCEPTIONS, 1-4, 13. CORPORATIONS, 2. INSURANCE, 8. PLEADING, 6.

Warrants. See SALES, 3.

Water Companies. See MUNICIPAL CORPORATIONS, 13, 14.

Waters.

Surface Waters.

1. The doctrine of the common law in regard to surface waters is in force. *Town v. Missouri P. R. Co*..... 769
2. Surface waters may be controlled by the owner of the land on which they originate or over which they flow. *Id.*
3. In constructing an embankment across a well-defined channel cut by surface waters, some provision may be necessary for the allowance of the flow of the surface water. *Id.*
4. Whether an embankment across a well-defined channel cut by surface waters has been negligently constructed, and whether the negligence, if any, is the proximate cause of injury, are generally questions of fact for the jury. *Id.*

Water-Courses.

5. A water-course is a stream as distinguished from mere surface drainage occasioned by freshets or other extraordinary causes. *Id*..... 768
6. To constitute a water-course the size of the stream is not material. *Id.*
7. There may be a water-course without a continuous flow of water. *Id.*
8. The right of a land owner to control surface water must be so exercised as not to unnecessarily or negligently cause injury to the rights and property of others. *Id*..... 769
9. Evidence *held* sufficient to sustain a finding that damages by surface water did not result from negligence of a railroad company in constructing an embankment across a channel cut by surface water. *Id.*

Wills.

Lost Will.

1. The contents of a lost will cannot be proved solely by the declarations of the testator. *Clark v. Turner*..... 290
2. Testator's declarations may be admissible to corroborate more direct evidence. *Id.*
3. The testimony of a witness as to the contents of a will, his knowledge being derived from the testator's reading the will to him, and not from having himself inspected it, is in effect only testimony as to the testator's declarations. *Id.*

Attorneys' Fees.

4. Attorneys' fees cannot be allowed in contest proceedings to unsuccessful proponents of a will, and if such proponents are entitled to reimbursement out of the estate, it must be had in the course of administration. *Id.*

Revocation.

5. The common-law doctrine that the revocation of a will may be implied from subsequent changes in the condition or circumstances of the testator obtains in so far as it has not been modified by statute. *Baacke v. Baacke*..... 18

Wills—*concluded.*

6. An absolute revocation of a will cannot be implied from the obtaining of a divorce from the testator by his wife after the making of the will, from the death of one of his children for whom provision was made in the will, and from the birth of three children to such deceased child, prior to the testator's death. *Id.*

Witnesses. See ASSAULT AND BATTERY, 5. CRIMINAL LAW, 4. EVIDENCE, 3, 10-14.

Words and Phrases.

1. "Action." *Gibson v. Sidney*..... 12
2. "Appropriations." *State v. Moore*..... 88
3. "Bank discount." *Steen v. Stretch*..... 575
4. "Cause." *Gibson v. Sidney*..... 12
5. "Claims." *Douglas County v. Taylor*..... 536
6. "Necessaries." *Bell v. Rice*..... 547
7. "Park." *Ehmen v. Village of Gothenburg*..... 715
8. "People." *Bryan v. City of Lincoln*..... 622
9. "Sidewalk." *City of Ord v. Nash*..... 335
10. "When the same shall have been authorized by a vote of the people." *Bryan v. City of Lincoln*..... 620

Writs. See SUMMONS.