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REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

JANUARY AND SEPTEMBER TERMS, 1892.

VOLUME XXXV.

D. A. CAMPBELL,
OFFICIAL REPORTER.

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BY D. A. CAMPBELL, REPORTER OF THE SUPREME COURT,
In behalf of the people of Nebraska.

THE SUPREME COURT

OF

NEBRASKA.

1892.

CHIEF JUSTICE,

SAMUEL MAXWELL,

JUDGES,

T. L. NORVAL,
A. M. POST.

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ATTORNEY GENERAL,

GEORGE H. HASTINGS.

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J. E. BUSH.....Beatrice.

Second District—

S. M. CHAPMAN.....Plattsmouth.

Third District—

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JESSE B. STRODE.....Lincoln.
A. S. TIBBETS.....Lincoln.

Fourth District—

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Sixth District—

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Seventh District—

W. G. HASTINGS.....Wilber.

Eighth District—

W. F. NORRIS.....Ponca.

Ninth District—

N. D. JACKSON.....Neligh.

Tenth District—

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Twelfth District—

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Thirteenth District—

WILLIAM NEVILLE.....North Platte.

Fourteenth District—

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Fifteenth District—

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M. P. KINKAID.....O'Neill.

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The syllabus in each case was prepared by the judge writing the opinion, in accordance with rule 20.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, A. D. 1892.

PRESENT:

HON. SAMUEL MAXWELL, CHIEF JUSTICE.
HON. T. L. NORVAL, } JUDGES.
HON. A. M. POST, }

EDGAR A. BOURNE ET AL. V. STATE, EX REL. JOHN W. TAYLOR.

[FILED JUNE 11, 1892.]

1. **Schools:** REGULATIONS: THE BOARD OF TRUSTEES of a high school has power to adopt and enforce appropriate and reasonable rules and regulations for the government and management of the schools under its control.

2. ———: ———: REPORTS TO BE SIGNED BY PARENTS. A rule which makes it the duty of a teacher to keep a record of the standing of each pupil in the studies pursued by him, of his attendance and deportment, to send each month by the pupil a written report of the same to his parent or guardian, and which requires such parent or guardian to sign and return the same to the teacher, is a reasonable one.

ERROR to the district court for Nemaha county. Tried below before BRODY, J.

E. W. Thomas, and *E. A. Bourne*, for plaintiffs in error:

Whether a rule or regulation of the school authorities is reasonable or valid is a question of law for the court. (*Fertich v. Michener*, 111 Ind., 472; *State v. Vanderbilt*, 18 N. E. Rep. [Ind.], 366.) The rule in the case at bar is reasonable and proper. (*King v. Sch. Board*, 71 Mo., 629; *Burdick v. Babcock*, 31 Ia., 562; *Abel v. Clark*, 24 Pac. Rep. [Cal.], 383; *Deskins v. Gore*, 85 Mo., 485.

W. H. Kelligar, and *G. W. Cornell, contra:*

Regulations by a school board will be set aside by the courts whenever found to be unreasonable, or not in accordance with the general law of the state. (*State v. School Dist.*, 31 Neb., 552; *State v. White*, 82 Ind., 278; *Morrow v. Wood*, 35 Wis., 59; *Trustees v. Van Allen*, 87 Ill., 303.) The rule is void, first, because it does not concern the imparting of knowledge, and, second, because, as applied in this case, it is a violation of the written law of this state. (*State v. Bd. of Education*, 63 Wis., 234; *State v. Sch. Dist.*, 31 Neb., 552; *Perkins v. Board*, 9 N. W. Rep. [Ia.], 356; *Holman v. Trustees*, 43 N. W. Rep. [Mich.], 997.)

NORVAL, J.

This was a proceeding by *mandamus* brought in the district court to compel the board of trustees of school district No. 36 of Nemaha county to reinstate Guy R. Taylor, the relator's son, as a pupil in the public schools. Issues were formed and the cause was tried in vacation before the Hon. J. H. Broady, one of the judges of the district court of that county, who granted a peremptory writ of *mandamus* as prayed.

The facts are these: Nemaha City constitutes school district No. 36 of Nemaha county and is governed by a board of trustees consisting of six members. The relator is a resident and a taxpayer of said district. His son, Guy

R., is about twelve years of age, and for some time prior to the 9th day of March, 1891, was a pupil in regular attendance and in good standing in the public schools of said district. One Thomas J. Williamson is, and has been for some time, the principal of said school. The school board had adopted rules for the government of the public schools which relator's child was attending, and the principal was charged with the enforcement of the same. One of these rules, which had been continuously enforced since September, 1890, was to the effect that the teacher keep a record showing the attendance, deportment, and standing in scholarship of each pupil, and that at the end of each month the teacher should make from such record a report card for each pupil showing his punctuality, deportment, and scholarship for the month, and send the same by such pupil to his parent or guardian. The rule further required each pupil, within eight days, to return to the teacher this report card signed by his parent or guardian, and in case of failure to so return the same, duly signed, the pupil was to be sent home to get it signed. Of the existence of this rule relator and his child had been duly informed, and each month from September, 1890, to February of the following year the principal of the schools and made out and delivered a report card to relator's son as required by the rules and regulations of the board of trustees, which was regularly returned duly signed by the relator. In February, 1891, the monthly report card of said Guy R. Taylor was made out and sent to relator in the usual manner, which relator refused to sign, and the same was returned to the principal unsigned. Thereupon Mr. Williamson sent Guy home for the purpose of obtaining his father's signature, who, on returning to school, reported that neither his father nor mother would sign the same, and he was again sent home with the same result. The matter was brought before the school board at their next regular meeting, and the principal was directed to enforce the rule. While no order or

resolution has been passed by the school board either suspending or expelling relator's son from the schools, yet the enforcement of the rule above referred to has had the effect of excluding him from the school until the monthly report card is signed and returned. This, to all intents and purposes, amounts to a suspension.

The school district of which respondents are trustees was organized under subdivision 6 of chapter 79, Compiled Statutes, entitled "Schools." Section 3 of said subdivision provides that "Said trustees shall have power to classify and grade the scholars in such district, and cause them to be taught in such schools and departments as they may deem expedient; to establish in such district a high school when ordered by a vote of the district at any annual meeting, and to determine the qualifications for admission to such schools, and the price to be paid for tuition on any branch therein; to employ all teachers necessary for the several schools of said district; to prescribe courses of study and text-books for the use of said schools, and to make such rules and regulations as they may think needful for the government of the schools, and for the preservation of the property of the district, and also to determine the rate of tuition to be paid by non-resident pupils attending any school in said district." By this section, and the incidental powers possessed by school boards, the board of trustees of a school district has the power to adopt and enforce suitable rules and regulations for the discipline, government, and management of the schools under its control, but the rules must be reasonable and just. The authority thus conferred carries with it the power to enforce such rules, when absolutely necessary, by the suspension or expulsion from the school of any pupil who has persistently non-complied with the same. This is practically conceded by counsel for relator, but it is contended that the rule in question, under which relator's son was excluded from the school, is unreasonable, because it does not relate to a sub-

ject which concerns the education of the pupil or the discipline of the school, therefore the respondents had no authority to adopt or enforce the same. In this view we are unable to concur. It will be noticed that this statute expressly confers upon the trustees the power to classify and grade the scholars. To do this successfully it is important for them to know the progress made by each pupil. There is probably no better manner of determining the proficiency of the students in their studies than by a correct system of marking by the teachers on their daily recitations. This, when conscientiously done, materially aids in the proper classification of the pupils. Some system of marking the standing and proficiency of the pupils is generally adopted by all graded schools. It tends to stimulate the pupils to higher scholarship. That the respondents had the power to require the teacher to keep a record showing the standing and proficiency of each scholar in the branches taught, as well as his attendance and punctuality, cannot be doubted, and we think a rule is not unreasonable or harsh which makes it the duty of the teacher to send each month by each pupil a written report of his standing to his parent or guardian for examination, and to require that the same be returned to the teacher with the signature of the parent or guardian. By this method the parent is not only informed of the standing of his child, but the regularity of his attendance. The relator has frequently recognized the reasonableness of this rule by repeatedly signing and returning to the teacher the report cards. No valid excuse has been offered for not signing the last one sent him. The objection made at the time for so doing was that his son's standing was not so good as it had been during the months preceding. His excuse did not justify him in refusing to comply with a rule prescribed by the board.

An examination of authorities cited in relator's brief will show that they do not sustain the position for which he contends.

State v. Board of Education, 63 Wis., 234, was a case where a pupil was suspended for refusing to comply with a regulation of the school, to the effect that each scholar, when returning to school after recess, should bring a stick of wood for the fire. It was decided that the regulation was invalid and that a pupil cannot be suspended for failing to comply therewith.

In *Holman v. School Trustees*, 43 N. W. Rep. [Mich.], 997, it was held that a rule adopted by the school board which authorized the suspension of a pupil from school for failure to pay for or replace a window-pane broken by him, was without authority and void. To the same effect is *Perkins v. School District*, 9 N. W. Rep. [Ia.], 356.

In *State v. School District*, 31 Neb., 552, it was held that while the school trustees of a high school have the power to prescribe what branches shall be taught and what text-book shall be used, the parent has the right to decide what particular branch of studies of those prescribed to be taught shall be pursued by his child, and, if the selection is reasonable, it must be respected by the board.

It is obvious that none of these decisions meet the question now before us. It is clear that the relator is not entitled to the relief demanded. The judgment is reversed and the action

DISMISSED.

THE other judges concur.

CLEMENS OSKAMP ET AL. V. JAMES GADSDEN.

[FILED JUNE 11, 1892.]

Evidence: CONTRACT BY TELEPHONE: MESSAGE REPEATED BY OPERATOR. Defendant called at the public telephone station at Schuyler and asked the operator to request plaintiffs to step to the telephone in their place of business in Omaha as he desired to converse with them. H., one of the plaintiffs, answered the call, but owing to the conditions of the atmosphere the parties were unable to communicate directly with each other. The telephone operator at Fremont, an intermediate station, proposed to and did transmit defendant's message to plaintiff offering to sell them a quantity of hay, and he also repeated to the defendant their answer accepting the proposition. In an action for a breach of the contract it was *held*, that the conversation was admissible in evidence, and that it was competent for the defendant to state the contents of plaintiffs' answer to his message as repeated by the operator at Fremont at the time it came over the wire.

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

Isaac Adams, for plaintiffs in error:

Gadsden's testimony is irrelevant, and hearsay or derivative. (Stevens, Dig. of Ev., art. 62.) To hold Gadsden's testimony competent is contrary to public policy, for the following reasons:

(*a.*) Since it was repetition of the language of another, that language might not have been correctly repeated, either through original misapprehension, subsequent failure of memory, or willful misrepresentation.

(*b.*) The statements testified to were made by a person who was neither under the obligations of an oath, nor subject to cross-examination respecting accuracy or veracity.

(*c.*) It would be to introduce a new and distinct excep-

tion to the doctrine excluding hearsay evidence from judicial investigations, and one based upon a different foundation from the established exceptions to this doctrine. The operator at Fremont was not the plaintiff's agent. The principle to be applied here is the same as in case of a message transmitted by telegraph, where the original, as against the sender, and the one by which the sender is bound, is the message as received. (*Ayer v. W. U. Tel. Co.*, 79 Me., 493; *Tel. Co. v. Shotter*, 71 Ga.,.760; *Durkee v. R. Co.*, 29 Vt., 137; *Saveland v. Green*, 40 Wis., 431; *Morgan v. People*, 59 Ill., 58; *Howley v. Whipple*, 48 N. H., 488.) The ruling now complained of goes farther than *Sullivan v. Kuykendall*, 82 Ky., 483, in that it permits testimony of what Gadsden said to the operator when Gadsden was not in a situation to know whether the operator repeated his message as given or not.

Richmond & Legge, contra:

The testimony of Gadsden is the best evidence, and is admissible on the grounds of agency. There are stronger reasons for holding the operator at Fremont the agent of both parties than in the case of *Sullivan v. Kuykendall*, 82 Ky., 483, for in that case the operator was at the station at one end of the line, and in the case at bar the operator repeating the message was at an intermediate point and acted as interpreter for both parties. Viewing the operator at Fremont as the agent of defendant Gadsden, it is clear that she was his agent to repeat to plaintiff only the message which he delivered to her, and that he would not be bound by any message which she, as the employe of the telephone company, saw fit to deliver. (Gray, Telegraphs, sec. 105.)

NORVAL, J.

Plaintiffs in error brought suit in the court below to recover damages for the alleged breach of contract by the de-

fendant in his refusing to deliver a quantity of hay claimed to have been purchased by them from him. The jury returned a verdict for defendant, upon which judgment was entered.

In 1888 plaintiffs were engaged in the city of Omaha in the flour, feed, grain, and hay business. Defendant resided at Schuyler, and had about 150 tons of baled hay which he desired to sell. Prior to the middle of April of that year plaintiffs and defendant had some correspondence about the purchase and sale of this hay, but no contract was entered into at that time. On May 1, 1888, defendant sent the following letter to plaintiffs:

"*Oskamp, Haines & Co., Omaha, Neb.*—GENTLEMEN: What is your price for pressed hay now? Mine is still for sale if I can get as much as others are getting. I would rather close out the entire amount at once if I can find a customer, and will give the use of my barn till July 14th if buyer wants to speculate. There is scarcely any hay left here. Some on the prairie will not be hauled this season on account of bottoms being covered with water.

"Yours truly, JAMES GADSDEN."

In answer to the above plaintiffs wrote defendant as follows:

"OMAHA, May 2, 1888.

Mr. James Gadsden, Schuyler, Neb.—DEAR SIR: Answering yours of the 1st. The market seems to be glutted now with hay. Have bought some at $7.75 on track since we bought that of yours. If you want to sell now and mean business, we will give you $8.25 per ton on track here, if it is all like the cars we had, but we do not leave this offer open longer than Saturday, but we prefer acceptance by wire, as we are figuring upon 800 tons at a trifle better price. Sample car now coming, and if we get that all, have got to crowd the market here. Have about 140 tons bought now, and would not want yours at any price with that large lot.

"We would not take the risks of your barn an hour, and you could ship it all as fast as you pleased, having storage for 500 tons. Our full storage capacity here is 1,000 tons. Now, about weights, you can have any one weigh it here after testing our track scale, or we will pay you by the bale. OSKAMP & HAINES."

On May 4 defendant called at the telephone office in Schuyler and requested the operator to call up plaintiffs, as he desired to talk to them. Plaintiffs have a telephone in their office and Mr. Haines, one of the firm, answered the call, but owing to the condition of the atmosphere the line was not working well, so that the parties were unable to communicate directly with each other. The telephone operator at Fremont, an intermediate station between Omaha and Schuyler, proposed to, and did, transmit defendant's message to plaintiffs and repeated their answer to the defendant. The entire conversation was carried on through the assistance of the operator at Fremont, she repeating the message of each party. It is agreed that a contract was entered into at that time by telephone, but there is a conflict in the evidence as to its terms. The plaintiffs introduced testimony tending to show that defendant sold his entire lot of hay at $8.25 per ton on track in Omaha, to be shipped two car loads per day. On the other hand, the testimony of the defendant goes to show that plaintiffs' proposition contained in their letter of May 2 was not accepted by the defendant, but that the contract was for only two car loads. Two car loads of hay only were shipped to and received by plaintiffs. Subsequently defendant brought an action against plaintiffs to recover for said two car loads of hay, in which Gadsden recovered the full amount claimed, which judgment plaintiffs in error have paid. The burden was upon the plaintiffs to establish the contract and breach of the same, substantially as alleged by them. The jury passed upon the conflicting testimony and found that the terms of the contract respecting the quantity

of the hay sold were as claimed by the defendant. We are satisfied that there is not such a preponderance of the evidence in the plaintiff's favor as to justify us in disturbing the finding.

Error is assigned because the court admitted the testimony of the defendant as to the conversation over the telephone between the witness and Mr. Haines, one of the plaintiffs, as repeated over the wire by Mrs. Cummings, the telephone operator at Fremont. It is contended that the testimony of the witness, of what the operator repeated to him as the conversation progressed, as being said by Mr. Haines, is irrelevant and hearsay. The question thus presented is a new one to this court and there are but few decided cases which aid us in our investigation Upon principle, it seems to us that the testimony is competent and its admission violated no rule of evidence. It was admissible on the grounds of agency. The operator at Fremont was the agent of defendant in communicating defendant's message to Haines, and she was also the latter's agent in transmitting or reporting his answer thereto to defendant. The books on evidence, as well as the adjudicated cases, lay down the rule that the statements of an agent within the line of his authority are admissible in evidence against his principal. Likewise it has been held that when a conversation is carried on between persons of different nationalities through an interpreter, the statement made by the latter at the time the conversation occurred as to what was then said by the parties is competent evidence and may be proven by calling persons who were present and heard it. This is too well settled to require the citation of authorities. There are certainly stronger reasons for holding the statement made by the operator and testified to by defendant is admissible than in the case of an interpreter. Both Haines and defendant heard and understood the operator at Fremont and knew what she was saying, or at least could have done so. Each knew whether

his message was being correctly repeated to the other by the operator. Not so where persons converse through an interpreter. If the testimony objected to was incompetent and hearsay, then the testimony of Haines relating to the same conversation should, for the same reason, have been excluded. He did not hear what defendant said, but testified to what the operator reported as having been said. The operator at Fremont was not the agent of the defendant alone, but she was plaintiffs' agent in repeating their answer to defendant's message.

That conversations held through the medium of telephone are admissible as evidence in proper cases, cannot be doubted. Such have been the holdings of the courts in cases where the question has been before them. In a criminal case, *People v. Ward*, 3 N. Y. Crim. Rep., 483, it was held that where a witness testifies that he conversed with a particular person over the telephone and recognized his voice, it was competent for him to state the communication which he made.

In *Wolfe v. M. P. R. Co.*, 97 Mo., 473, it was ruled that if the voice was not identified or recognized, but the conversation is held through a telephone kept in a business house or office, it is admissible, the effect or weight of such evidence, when admitted, to be determined by the jury. (See *Globe Printing Co. v. Stahl*, 23 Mo. App., 451.)

A case quite analogous to the one at bar is *Sullivan v. Kuykendall*, 82 Ky., 483. In that case the parties did not have conversation directly with each other over the telephone, but conversation was conducted by an operator in charge of a public telephone station at one end of the line. It was held that the conversation was admissible in evidence and that it was competent for the person receiving the message to state what the operator at the time reported as being said by the sender. The court in the opinion says: "When one is using the telephone, if he knows that he is talking to the operator, he also knows that he is making him

an agent to repeat what he is saying to another party; and in such a case, certainly the statements of the operator are competent, being the declarations of the agent, and made during the progress of the transaction. If he is ignorant whether he is talking to the person with whom he wishes to communicate or with the operator, or even any third party, yet he does it with the expectation and intention on his part that in case he is not talking with the one for whom the information was intended, it will be communicated to that person; and he thereby makes the person receiving it his agent to communicate what he may have said. This should certainly be the rule as to an operator, because a person using a telephone knows that there is one at each station whose business it is to so act; and we think that the necessities of a growing business require this rule, and that it is sanctioned by the known rules of evidence."

Our conclusion is that the court did not err in admitting the testimony of the defendant.

It is claimed that the court erred in refusing certain instructions requested by the plaintiff, but as they raise the same question we have been considering, the objections will be overruled without further comment. The judgment below is

AFFIRMED.

THE other judges concur.

STATE OF NEBRASKA, EX REL. GEO. H. HASTINGS, ATTORNEY GENERAL, V. HOWARD B. SMITH.

[FILED JUNE 11, 1892.]

1. **Metropolitan Cities: FIRE AND POLICE COMMISSIONERS: STATUTES.** The act approved April 9, 1891, by which section 145 of chapter 12*a*, Compiled Statutes of 1889 (charter of the city of Omaha), was so amended as to provide for the appoint-

ment as fire and police commissioners of said city of members of the three parties casting the largest vote at the last city election, does not take effect until the expiration of the terms of office of the two commissioners who were appointed May, 1889.

2. ———: ———: REMOVAL. The general provision contained in section 172 of the charter of the city of Omaha, for the removal of officers of the city, upon charges, by the district court, is not exclusive.

3. ———: ———: ———: CONSTITUTIONAL LAW. The provision of section 12, article 5, of the constitution, empowering the governor to remove all officers appointed by him, applies only to officers mentioned in the constitution.

4. ———: ———: ———: DISCRETION. Where by law there is no fixed term of office and the incumbent holds during the pleasure of the appointing power, the power of removal is discretionary and may be exercised without notice or hearing.

5. ———: ———: ———: SPECIFIC CHARGES: NOTICE. Where the incumbent is elected or appointed for a definite term, and is removable only for specified cause, the power of removal cannot be exercised until there has been preferred against him specific charges of which he shall have notice, and an opportunity afforded him to be heard in his defense.

6. ———: ———: ———: OFFICIAL MISCONDUCT: CHARGES: DEFENSE. By the charter of the city of Omaha the governor is authorized to remove members of the board of fire and police commissioners only for the cause named, viz., official misconduct and upon charges specifying the particular act or acts to be proved and an opportunity to be heard in their own defense.

7. ———: ———: ———. The question whether the power to remove is judicial in the sense that the officers named are entitled to have the question of cause therefor heard by the courts, and if not, whether the action of the executive can be reviewed by the courts, is not raised in this case and is not determined.

ORIGINAL proceeding in nature of *quo warranto*.

Geo. H. Hastings, Attorney General, V. O. Strickler, and *J. W. Edgerton*, for relator:

The executive may move without preferring charges, serving notice, or having a formal trial. (*State v. McGarry*, 21 Wis., 496; *Wilcox v. People*, 90 Ill., 186; *Eckloff v. Dist.*

of Col., 135 U. S., 240; *Keenan v. Perry*, 24 Tex., 253.) A constitutional question is clearly recognized, and where the question is addressed to the discretion of the department called upon to make the construction, the decision is final. (*Wright v. Defrees*, 8 Ind., 298; *State v. Doherty*, 25 La. Ann., 119; *Att'y Gen'l, ex rel. Taylor, v. Brown*, 1 Wis., 413; *People v. Stout*, 19 How. Pr. [N. Y.], 171.) The power to remove an officer is not a judicial power. (*People v. Whitlock*, 92 N. Y., 191; *People v. Stout*, 11 Abb. Pr. [N. Y.], 17; *People v. Mays*, 7 N. E. Rep. [Ill.], 660; *Donahue v. County*, 100 Ill., 94; *Houseman v. Commonwealth*, 100 Pa. St., 222; *State v. Oleson*, 15 Neb., 247; *Smith v. Brown*, 59 Cal., 672; *People v. Hill*, 7 Id., 97; *State v. Prince*, 45 Wis., 610; *Taft v. Adams*, 3 Gray [Mass.], 126: *Ex parte Wiley*, 54 Ala., 226; *Keenan v. Perry*, 24 Tex., 253; *Patton v. Vaughan*, 39 Ark., 211; *Dullam v. Willson*, 53 Mich., 392.) In granting a charter to a metropolitan city the legislature has the right to determine that the board of fire and police commissioners should be non-partisan. The reasons which may have induced the legislature to pass such a law are not properly a subject of inquiry. (Cooley, Const. Lim., 155; *Turner v. Althaus*, 6 Neb., 55; *Bradshaw v. Omaha*, 1 Id., 16.)

An additional brief was filed in behalf of relator, in which *Chas. Ogden* appears with those above named as counsel, and the following contentions were urged: The legislature has power to abolish or abridge the term of any office not mentioned in the constitution. (*People v. Haskell*, 5 Cal., 357; *People v. Banvard*, 27 Id., 470; *State v. Pyle*, 1 Ore., 149; *Bryan v. Cattell*, 15 Ia., 538; *Davis v. State*, 7 Md., 151; *Conner v. Mayor*, 2 Sandf. [N. Y.], 355; *Coffin v. State*, 7 Ind., 157; *Benford v. Gibson*, 15 Ala., 521.) Here is a power lodged in the governor. It is for him to say whether there is official misconduct. (*State v. Doherty*, 25 La. Ann., 119; *People v. Mays*, 117 Ill., 257; *People v. Platt*, 19 How. Pr. [N. Y.], 171; *State v. Mc-*

Garry, 21 Wis., 496; *Keenan v. Perry*, 24 Tex., 253.) The question is one of constitutional interpretation. (*State v. Yoist*, 25 La. Ann., 396; *State v. Abbott*, 6 S. Rep. [La.], 805.)

Lake, Hamilton & Maxwell, contra:

Section 12 of article 5 of the constitution is not applicable to fire and police commissioners of the city of Omaha. The governor's power to remove such officers is determined and limited by sections 2448 and 2475 of the act governing metropolitan cities. (Cons. Stats., sec. 2448, 2475; *State v. Seavey*, 22 Neb., 454.) The existence of one of the causes for removal is a judicial question, and must be determined by the judicial department of the state. (*Page v. Hardin*, 8 B. Mon. [Ky.], 648; *Honey v. Graham*, 39 Tex., 1; *State v. Pritchard*, 36 N. J. L., 101; *State v. Harrison*, 113 Ind., 434; *People v. Stuart*, 74 Mich., 411.) The governor cannot remove one of the fire and police commissioners until (1) specific charges have been made; (2) notice of such charges given; (3) an opportunity furnished the commissioner to be heard in his own defense. (*Commonwealth v. Slifer*, 25 Pa. St., 23; *State v. Seay*, 64 Mo., 89; *State v. Lusk*, 18 Id., 333; *Hogan v. Carberry*, 4 W. L. Bul., 113; *State v. Hawkins*, 44 O. St., 98; *Dullam v. Willson*, 53 Mich., 392; *Ham v. Board of Police*, 142 Mass., 90; *State v. St. Louis*, 90 Mo., 19; *Board of Aldermen v. Darrow*, 13 Colo., 460; *Biggs v. McBride*, 17 Ore., 640; *Hallgrene v. Campbell*, 46 N. W. Rep. [Mich.], 381; *Field v. Com.*, 32 Pa. St., 478.)

POST, J.

This is an original proceeding by the attorney general against the respondent for the purpose of testing the title of the latter to the office of member of the board of fire and police commissioners of the city of Omaha. The material part of the petition is as follows:

"That on or about the 2d day of May, 1890, Howard B. Smith respondent herein, was appointed by the Hon. John M. Thayer, who was at that time governor of the state of Nebraska, as a member of the board of fire and police commissioners of the city of Omaha, and thereupon entered into said office, and continued to occupy said office and to exercise the duties thereof until the 23d day of February, 1892. On the said 23d of February, 1892, the Hon. James E. Boyd, who was then and is now the governor of the state of Nebraska, by virtue of the authority vested in him by the constitution and laws of the state of Nebraska, removed the respondent for cause, from said office of fire and police commissioner of the city of Omaha.

"That on the 23d day of February, 1892, D. Clem Deaver was duly appointed and commissioned by the Hon. James E. Boyd, governor as aforesaid, a member of the board of fire and police commissioners of the city of Omaha to succeed Howard B. Smith, respondent; that he accepted said appointment and immediately took the oath of office and filed with the city clerk of the city of Omaha a good and sufficient bond as required by law, and claims the right to exercise the duties and to enjoy the privileges of said office.

"Notwithstanding the appointment of said D. Clem Deaver to said office, said Howard B. Smith, respondent, did on the 23d day of February, 1892, and has continuously since that time, without any legal warrant, claim, or right, used and exercised, and still does unlawfully use and exercise, the office of fire and police commissioner in the city of Omaha, in place of said Deaver, and claims to be a member of said board of fire and police commissioners in place of Deaver, and to have, use, or employ all the rights, privileges, and franchises of said office, to the damage and prejudice to the rights of said city of Omaha, and also against the peace of the state of Nebraska; that the said Deaver is a member of the independent party, one of

the three political parties casting the highest number of votes at the municipal election held in the city of Omaha in December, 1890.

"That prior to the appointment of said Deaver on the 23d day of February, 1892, as aforesaid, no member of the independent party had been appointed as a member of the board of fire and police commissioners of the city of Omaha as required by law, and that said Deaver is the only member of said board appointed who belongs to said party.

"Said relator therefore prays judgment that the respondent be declared not entitled to said office, and that he be ousted therefrom, and that D. Clem Deaver be declared entitled to said office and installed therein, to assume the execution of the duties thereof."

The answer, omitting formal and immaterial parts, is as follows.

"That in the month of May, 1887, the Hon. John M. Thayer, governor of the state of Nebraska, appointed Christian Hartman, George I. Gilbert, L. M. Bennett, and this respondent fire and police commissioners of the city of Omaha; that said Hartman and Gilbert were reputed to be and were members of one political party, to-wit, of the democratic party, and said Bennett and Smith of a different political party, to-wit, of the republican party; that said Hartman and Bennett were appointed to serve for the term of four years; that said Gilbert and this respondent were appointed to serve for the term of two years; that all of said appointees duly qualified and entered upon the discharge of their duties as such commissioners and continued in the discharge of their duties until the month of May, 1889; that in said month of May, 1889, George I. Gilbert and this respondent were reappointed and duly commissioned by the Hon. John M. Thayer, governor of the state of Nebraska, to serve for a term of four years thereafter; that said Gilbert and this respondent duly qualified and entered upon the discharge

of their duties as fire and police commissioners of the city of Omaha, and have continued in the discharge of said duties down to the present time; that respondent's term of office does not expire until May 10, 1893.

"That in the month of May, 1891, the Hon. John M. Thayer, governor of the state of Nebraska, reappointed and commissioned Christian Hartman as fire and police commissioner of the city of Omaha for a term of four years, and appointed and commissioned Wm. Coburn, a member of the republican party, for the term of four years to succeed L. M. Bennett; that said Hartman and Coburn duly qualified and entered upon the discharge of their duties as fire and police commissioners of the city of Omaha, and have continued in the discharge thereof since said time.

"That on the 23d day of February, 1892, the Hon. James E. Boyd, governor as aforesaid, without authority of law and without cause therefor, assumed to remove this respondent from his said office of fire and police commissioner of the city of Omaha; that on and before said day there were no charges of any name or nature or of any description against this respondent filed in the office of the governor of the state of Nebraska, or in the office of any other officer of the state of Nebraska, or of the city of Omaha; that notwithstanding the absence of any cause for such action, and notwithstanding the provisions of the constitution and statutes of Nebraska, said Boyd on the 23d day of February, 1892, without any notice given this respondent and without giving this respondent any opportunity to be heard, wrote this respondent the following letter:

"'STATE OF NEBRASKA, EXECUTIVE DEPARTMENT,
"'LINCOLN, February 23, 1892.

"'*Howard B. Smith, Esq., Omaha, Neb.*—DEAR SIR: In accordance with the constitution and laws of the state of Nebraska, you are hereby notified that I have this day

removed you, for cause, from the office of fire and police commissioner for the city of Omaha, and have declared said office vacant.

"'Yours truly, JAMES E. BOYD,
"'*Governor.*'

"And then and thereby assumed to remove this respondent arbitrarily from his said office; that letters of like import were also sent to said Gilbert and Hartman and Coburn; that thereupon said Boyd assumed, without authority of law, to reappoint on the 23d day of February, 1892, said Coburn to succeed himself, and to appoint one George W. Shields to succeed said George I. Gilbert, and to appoint one C. V. Gallagher to succeed Christian Hartman, and to appoint D. Clem Deaver to succeed this respondent."

To this answer a general demurrer has been filed by the state, thus presenting the real question involved, viz., the power of the governor under the charter of the city of Omaha to remove members of the board of fire and police commissioners for cause other than official misconduct, or for the cause named, without charges, and an opportunity to be heard in their own defense. The office in controversy was created by provision of the act approved March 30, 1887, entitled "An act incorporating metropolitan cities, and defining, regulating, and prescribing their duties, powers, and government," which, for convenience, will be referred to as the charter of the city of Omaha. Section 145 of said charter as enacted, as far as material to the question under consideration, is as follows;

"In each city of the metropolitan class there shall be a board of fire and police, to consist of the mayor (who shall be *ex-officio* chairman of said board) and four electors of said city, to be appointed by the governor. The governor shall appoint as the commissioners above, four citizens, not more than two of whom shall be of the political party; two of them, of different political party faith and allegiance, shall be designated in their appointment to serve for

two years, and the other two, also of different political party faith, shall be designated to serve for four years. And thereafter, at the expiration of said term, and each period of two years, the governor shall appoint two members of said board. For official misconduct the governor may remove any of said commissioners; and all vacancies in said board, by death, resignation, or removal, shall be filled by the governor for the unexpired term, and all vacancies from whatever cause shall be so filled that not more than two of the members of said board shall be of the same political party, or so reputed. All powers and duties connected with and incident to the appointment, removal, government, and discipline of the officers and members of the fire and police departments of the city, under such rules and regulations as may be prescribed by ordinance, shall be vested in and exercised by said board."

In 1891 this section was amended so as to provide that at least one of the members of said board shall belong to each of the three political parties casting the largest vote for city officers at the last preceding election. It is provided, however, by the section as amended that "The terms and powers of the members of said board heretofore appointed by the governor of the state shall not be affected or changed by any amendments hereto." If we understand the position of counsel for the state, they claim that this proviso was intended to have a prospective effect only; that the amendment took effect immediately upon its approval, without exception or reservation in favor of the members of the board as then constituted; that it should be construed, not as exempting the then members of the board from the operation, but as a limitation upon the power of future legislatures. The evident purpose of the provision for commissioners from the different parties is to remove the police department of the greatest city of our state from the influence of partisan politics. This object is one to be commended certainly, and to which the courts will give

effect when possible without violating the recognized rules of construction. The wisdom of a division of the powers and responsibilities of the board between the three parties will not be called in question. For the purposes of this case we will assume that the legislature has power to authorize the removal of the respondent, or any member of the board in order, to give place thereon to a representative of the independent party. It is plain to us, however, that they have not done so.

Construction, as defined by Dr. Leiber, is the "drawing of conclusions respecting subjects that lie beyond the direct expression of the text—conclusions that are within the spirit but not the letter of the text." Tested by this definition the language of the amendatory act leaves no room for construction. Respondent was appointed in May, 1889, for the term of four years. He was in office when the amendment took effect in 1891, and his term, in the language of the act, is not "affected or changed" thereby. The solution of the next question presented is attended with greater difficulty, viz., Are the provisions of the charter relating to the removal of members of the board of fire and police commissioners of the city of Omaha in conflict with the provisions of the constitution upon the subject? The constitutional provisions upon the subject are found in sections 10, 11, and 12 of article 5, entitled "Executive Department," as follows:

"Sec. 10. The governor shall nominate and, by and with the advice and consent of the senate (expressed by a majority of all the senators elected voting, by yeas and nays), appoint all officers whose offices are established by this constitution, or which may be created by law, and whose appointment or election is not otherwise by law or herein provided for; and no such officer shall be appointed or elected by the legislature.

"Sec. 11. In case of a vacancy during the recess of the senate, in any office which is not elective, the governor

shall make a temporary appointment until the next meeting of the senate, when he shall nominate some person to fill such office; and any person so nominated, who is confirmed by the senate (a majority of all the senators elected concurring by voting yeas and nays), shall hold his office during the remainder of the term, and until his successor shall be appointed and qualified.

"Sec. 12. The governor shall have power to remove any officer whom he may appoint, in case of incompetency, neglect of duty, or malfeasance in office, and he may declare his office vacant, and fill the same as herein provided in other cases of vacancy."

It is claimed on one hand that the provision of section 12 is applicable to all officers appointed by the governor regardless of their character, and is, therefore, a limitation upon the power of the legislature, while on the other hand it is contended that it can have application only to officers named in or contemplated by the constitution.

The case of *Wilcox v. People*, 90 Ill., 186, relied upon by counsel for the state, is in many respects similar to this, and calls for especial notice in this connection. In 1869 an act was passed incorporating the West Chicago park commissioners. The members thereof were appointed by the governor for the term of seven years. They were given power, among other things, to lay out, govern, and manage parks; to pass ordinances for the government of the same; to levy special assessments upon property to be benefited, and to possess, in that regard, all the power then possessed by the city of Chicago in respect to public squares; to acquire property for said purpose by condemnation or otherwise, etc. The act further provides that the members thereof might be removed by the circuit court after trial and conviction upon sworn charges, etc. In 1870 the present constitution of that state was adopted, and which includes the provisions for appointment and removal by the governor, from which ours appear to have

been copied. In 1877 the governor removed the relator Wilcox and other members of said board for incompetency. In determining the question of his power under the constitution to remove officers the supreme court held, first, that the commissioners named were officers within the meaning of the constitution, not mere municipal officers, but agencies of the state at large, although their functions were to be performed within the town of West Chicago; second, the effect of the constitution was to make the power of removal by the governor co-extensive with his power of appointment; third, the prior act for removal of the commissioners by the court after trial, etc., was in conflict with the constitution and was superseded thereby; fourth, since the constitution had invested the governor with power to remove officers, but was silent as to the mode of its exercise, he might determine for himself whether any of the statutory causes therefor existed, and that his discretion, when exercised, is final and binding upon the courts. That case, although decided subsequent to the adoption of our constitution in 1875, is entitled to a careful consideration in placing a construction upon it.

It may be said to be an elementary rule of construction that whenever a legislative act can be so construed as to avoid a conflict with the constitution and give it the force of law it will be so construed, although such construction may not be the most obvious or natural one. (Cooley on Const. Limitation, 184; *Pleuler v. State*, 11 Neb., 547.) Another recognized rule of construction is that constitutional limitations upon the power of the legislature in respect to offices will be confined to those offices which are specially enumerated in the constitution, unless the contrary clearly appears therefrom. All others may be abolished or the terms, functions, and emoluments thereof changed by law. This rule is fully sustained by the authorities cited by relator. Contemporaneous constructions by the legislature of the constitutional provisions quoted

indicate that they were understood from the adoption of the constitution to apply only to offices named therein. For instance, the first legislature elected under the constitution, in 1877, provided for a commission to revise the laws of the state, to be appointed by the governor without the consent of the senate. In 1879 the legislature created what is known as the fish commission, the members of which were to be appointed by the governor with the consent of the senate. In 1883 the legislature authorized the governor to appoint a superintendent, etc., for the hospital for the insane without the consent of the senate. In 1885 the governor was authorized to appoint a superintendent of the census, also an inspector of bees and honey in each county, without the consent of the senate, and a live stock commission to be confirmed by the senate. These, and many other acts, might be cited, as showing the understanding of the different legislatures that the constitutional provisions in question were to have no application to offices created by law. We are unable to believe, when viewed in the light of twelve years of legislative and judicial history, under the constitution, that it was ever intended as a restriction upon the power of the legislature over officers not within the contemplation of the men who framed it or the people who adopted it. Police commissioners of Omaha are in one sense state officers, since they are charged with a duty in the interest of the public at large. But so far as their appointment, government and removal were concerned, at the time of the adoption of the constitution, they were essentially municipal agents, and not state officers. To our minds, therefore, to hold that such officers are within the constitutional prohibition is neither a necessary nor reasonable construction thereof.

There is still a more cogent objection to the decision in *Wilcox v. People*, viz., it is in conflict with the course of decisions in this state. In *State v. Seavey*, 22 Neb., 454, it was, in effect, held that the constitutional provisions in

question did not apply to these particular officers, hence it was not essential to a valid appointment that it should be with the consent of the senate. The case of *Douglas County v. Timme*, 32 Neb., 272, we regard as decisive of the question. The provision under consideration in that case was section 16, article 3, of the constitution, which, in terms, provides that the compensation of no public officer shall be increased or diminished during his term of office. It was held that the above provision applies only to offices created by the constitution. The foregoing conclusion is in harmony with *State v. Kalb*, 50 Wis., 176, cited in the opinion of the present chief justice. The reasoning of the courts in the cases named must control in this.

We come now to an examination of some of the provisions of the charter of the city bearing upon the question at issue. In addition to the provision for removal of fire and police commissioners in section 145, it is provided by section 172 as follows:

"Sec. 172. The power to remove from his office the mayor or any councilman or other officer mentioned in this act in any city of the metropolitan class, for good and sufficient cause, is hereby conferred upon the district court for the county in which such city is situated; and whenever any two of the city councilmen shall make and file with the clerk of said court the proper charges and specifications against the mayor, alleging and showing that he is guilty of malfeasance or misfeasance as such officer, or that he is incompetent or neglects any of his duties as mayor, or that for any other good and sufficient cause stated he should be removed from his office as mayor, or whenever the mayor shall make and file with the clerk of said court the proper charges and specifications against any councilman or other officer mentioned in this act, alleging and showing that he is guilty of malfeasance or misfeasance in such office, or that he is incompetent, or neglects any of his duties, or that

for any other good and sufficient cause stated he should be removed from his office, the judge of such court may issue the proper writ requiring such officer to appear before him, on a day therein named, not more than ten days after the service of such writ, together with a copy of such charges and specifications upon such officer, to show cause why he should not be removed from his office. The proceedings in such case shall take precedence of all civil causes and be conducted according to the rules of such court in such cases made and provided, and such officer may be suspended from the duties of his office during the pendency of such proceedings by order of said court."

It is urged by counsel for respondent that the above provision is exclusive and should be construed as a limitation upon the powers of the governor, and that he is authorized to remove the officer above named only upon a trial and finding by the district court. To this proposition we cannot assent. The governor is, by section 145, empowered to remove these particular officers for a specific cause. This special provision is not in conflict with the general provision for removal of officers of the city. The question, however, to which most prominence is given by counsel is that of the power of the governor to remove without giving the officer an opportunity to be heard in his defense. It is claimed by relator that the removal of an officer is a purely executive act, and therefore the governor may remove without charges, serving notice, or hearing of any kind.

Before referring to the contention of the respondent we will examine some of the authorities relied upon by the relator in addition to *Wilcox v. People, supra.*

State v. McGarry, 21 Wis., 496, is substantially as follows: The county board were, by a special provision applicable to M. county only, authorized to remove the inspector of the house of correction for incompetency, improper conduct, or other cause satisfactory to the board, which

cause should be particularly assigned in writing and entered upon the minutes of the board, with the yeas and nays upon a vote of removal. It was held that the board might remove *ex parte* without notice or a hearing of any kind. Chief Justice Dixon in the opinion of the court says: "The only question of judicial cognizance is whether the board has kept within the jurisdiction or whether the cause assigned is a cause for removal under the statute."

In *Keenan v. Perry*, 24 Tex., 253, the plaintiff was removed by the governor, as superintendent of the asylum for the insane. The law provided for his removal for incompetency, misconduct, and refusal to discharge the duties of his office. It was held that the law invested the governor with exclusive power to remove, and that his action was final and conclusive. This case, however, appears to be inconsistent with a later case in the same court, which will be noticed hereafter.

In *Wright v. Defrees*, 8 Ind., 298, it was held that the power of the executive to remove an officer for a given cause implies power to judge of the existence of such cause, and the power being vested exclusively in the executive, cannot be controlled in the exercise of any other branch of the government.

In *State v. Doherty*, 25 La., 119, the same reasoning is used as in the last case, with the same conclusion.

In *Att'y Gen'l v. Brown*, 1 Wis., 442, it is held that where the law authorizes the removal of an officer for cause or upon notice, in the absence of express authority for an appeal or review, the courts have no authority to inquire into the grounds for removal. But in that case the governor was expressly authorized to remove the commissioner when he should believe that the best interests of the state demanded such removal.

In *People v. Stout*, 19 How. Pr. [N. Y.], 171, the term of office was not fixed by law, and the mayor was authorized to remove with the consent of the board of aldermen.

In *Territory v. Cox*, 6 Dak., 501, there is an able and exhaustive discussion of the character of the power of the executive to remove officers, concluding with the opinion that it is purely executive and in no sense judicial. The judgment of the court is, however, placed upon the statute which provides for an examination of the accounts of all public officers charged with the disbursement of public money. The examiner is required to report to the governor any failure of duty by financial officers when he (the governor) is authorized in his discretion to take such action for the public security as the exigencies of the case demand. It was held that the executive had authority in his discretion to remove the trustees of an asylum for the insane upon the report of an examination of their accounts by the public examiner.

In *Eckloff v. Dist. of Columbia*, 135 U. S., 240, the commissioners, by statute, had power to abolish any office, reduce the number of employes, remove from office, etc. The only contention in that case was that the unrestricted right above was subject to the limitation of a prior act of congress, but the court held that the prior act had been superseded by the law first above mentioned.

It is contended on the other hand that the governor has no power under the charter of the city to remove the respondent without, first, specific charges; second, notice of such charges; third, an opportunity to be heard in his own defense. Sustaining this proposition are two classes of authorities, as will be hereafter noticed. One class holding that the determination of the existence of cause for removal is a function of the judiciary, and that, as a condition to removal by the executive, the incumbent is entitled to have the question determined by the courts. The others hold that the executive is possessed of limited judicial functions, and that he has power to determine the question of cause for removal.

In *Page v. Hardin*, 8 B. Mon. [Ky.], 648, the constitu-

tion of Kentucky provided that the secretary of state should hold office during the term of the governor if he so long behave himself well. The governor, by an instrument in due form, declared that the secretary appointed was guilty of willful neglect and refusal to live at the seat of government and perform his duties as secretary, had abandoned the said office, and, in the judgment of the governor, the said office has become vacant for causes aforesaid. The successor appointed was held not entitled to the office. The court says: "The secretary being removable for breach of good behavior only, the ascertainment of the breach must precede the removal; in other words, the officer must be convicted of misbehavior in office. And we shall not argue to prove that, in a government of laws, a conviction whereby an individual may be deprived of valuable rights and interests, and may moreover be seriously affected in his good fame and standing, implies a charge and trial and judgment, with the opportunity of defense and proof."

In *Honey v. Graham*, 39 Tex., 1, the governor, during the absence from the state of the defendant, issued a proclamation declaring his office of treasurer vacant, and in an action to determine his title to the office it was held that the action of the governor was void. The court says: "The power of the governor to fill a vacancy when one exists is not disputed. The power to create a vacancy is denied by every authority, except where the office is filled by the governor's choice of an incumbent without concurrence of the senate or election by the people, and the term of office is undefined by law."

In *State v. Police Com'rs*, 36 N. J. Law, 101, the police commissioners of Jersey City had been convicted of malfeasance in office, whereupon the governor declared their offices vacant. This act was held to be void on the ground that the right to remove an officer for misbehavior calls for the exercise of judicial functions. Chief Justice Beasley, in the opinion in which he refers with approval to *Page v.*

Hardin, supra, says: "Indeed, among all the cases that I have examined, I find no exemplification of the exercise of such an act of authority. On the contrary, it seems to me quite clear that a removal of an officer holding for a definite term, by the sovereign *mero motu,* on the plea of misbehavior, would have been a plain usurpation. I can find nowhere any traces of such a right having been claimed."

In *Com. v. Slifer,* 25 Pa. St., 23, it is said: "We are unwilling to believe that the governor intended, without cause, to remove an officer, appointed for a term of years, before the term had expired. That he possessed the power of removal is conceded; but the power is to be exercised upon cause shown. It exists only where 'the officer fails and neglects faithfully to perform the duties of his office.' It is true that the executive is made the judge, and that his opinion or judgment is conclusive, so far as it relates to the question of removal. But that judgment is not to be pronounced without notice, without any charge or specification, and without any opportunity given to the officer to make his defense. The reputation and the right of the incumbent to the office for the term specified in his commission are involved, and he has a right to know the accusation and to be heard in his defense."

The case of *Dullam v. Willson,* 53 Mich., 392, is strikingly similar to this in all essential respects. By the constitution of that state the governor is authorized to remove from office any officer for gross neglect of duty, or for corrupt conduct in office, or for any other misfeasance or malfeasance. The notice of removal in that case is as follows:

"EXECUTIVE OFFICE, LANSING, July 2, 1883.

"*To Jas. C. Wilson*—SIR: I have this day, for your official misconduct and habitual neglect of duty, removed you from the office of trustee of the Michigan Institute for the Deaf and Dumb. * * *

"Respectfully, J. W. BEGOLE."

The court, in passing upon the power to thus remove, holds that the authority conferred upon the governor to remove officers can only be exercised upon charges which shall specify the particular act relied upon to make out the cause alleged, of which the incumbent shall have notice and a reasonable opportunity for a hearing thereon, at which he may produce proofs. Judges Champlin and Campbell filed carefully prepared opinions, in which they cite the authorities bearing upon the subject in this country and England, the former of whom concludes as follows: "I have examined carefully the authorities cited upon the brief of the learned counsel for relator in support of the position that no notice is required to be given, and that the action of the executive is final and conclusive. It is sufficient to say, without commenting specially upon them, that the reasoning of those cases does not commend itself to my judgment. They appear to me to be opposed not only to the decided weight of authority, but also to the fundamental principles of justice."

In *Hallgrene v. Campbell*, 46 N. W. Rep. [Mich.], 381, it is said: "We have not found any case where an officer who was appointed for a fixed term (and when the power of removal was not expressly declared by law to be discretionary) has been held to be removable except for cause, and wherever cause must be assigned for the removal of an officer, he is entitled to notice and a chance to defend."

In *Ham v. Board*, 142 Mass., 90, the board of police were authorized to remove for cause. It was held that they had no power to remove until after notice and an opportunity by the official in question to be heard in his own defense.

In *State v. St. Louis*, 90 Mo., 19, the statute authorized the removal of any elected officer of the city of St. Louis for cause. The court says: "When the removal is not discretionary, but must be for cause, as is the case here, and nothing is said as to the procedure, a specification of

the charges, notice, and an opportunity to be heard, are essential. This, we think, is the result of the authorities before cited. The proceedings in this case are wanting in all these requisites; for, if indeed any charges were ever made against the relator at all, they were the product of the minds of the members of this committee and by them kept from the knowledge of the accused."

In Dillon on Mun. Corp. [4th Ed.], sec. 250, the author says that where the right of removal is confined to specific causes, such power cannot be exercised until there have been formulated charges against the officer, notice thereof, and an opportunity for defense. The following cases also support the principle of the foregoing: *Biggs v. McBride*, 17 Ore., 640; *State v. Hawkins*, 44 O. St., 98; *Hogan v. Carberry*, 4 Cin. Law Bul., 113.

It seems plain to us that the doctrine of these cases is in accord with the weight of authority and is supported by the soundest reasons. The tendency of current opinion is strongly in the direction of fixed and definite terms of office, and in favor of making the officeholder, so far as practicable without impairing the public service, independent of the appointing power. It is in obedience to a settled public conviction upon the subject that congress annually appropriates large sums of money to accomplish reforms in the civil service of the general government. It is this sentiment that is expressed in the provision in the charter of the city of Omaha under consideration. The purpose of the legislature in adopting the provision in question was twofold: First, as has been said, to provide an efficient police department for a great city by removing it from the influence of local politics; second, to provide against the effects of fluctuation in state politics, by fixed terms for the police commissioners, to be removed for specific causes only. Without further elaboration our conclusion is that the charter of the city of Omaha does not authorize the removal of the fire and police commis-

sioners thereof except for official misconduct, nor until they have been notified of the particular act or acts of misconduct with which they are charged, and an opportunity afforded them to be heard in their own defense. The questions whether the power of removal is judicial in the sense that the officers aforesaid are entitled to have the question of cause for removal submitted to the courts for determination, and if not, whether the courts have jurisdiction to review the action of the governor, are not raised by the record and are not determined. Since the answer states a complete defense, it follows that the demurrer thereto should be

OVERRULED.

THE other judges concur.

CLARK D. GILLESPIE, ADMINISTRATOR, V. CITY OF LINCOLN.

[FILED JUNE 11, 1892.]

1. **Municipal Corporations:** FIRE DEPARTMENT: NEGLIGENCE. A city is not liable at common law for the negligent acts of the members of its fire department.

2. ———: ———: ———: CASE STATED. Plaintiff's intestate was struck and killed by a ladder wagon or truck belonging to the fire department of the defendant city, through the negligence of the driver thereof, a member of said department, while driving along one of the streets of the city for the purpose of exercising a team of horses belonging to the department. *Held*, That the city is not liable.

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

Chas. O. Whedon, for plaintiff in error:

Liability of a city for the acts of its employes "is based upon the right which the employer has to select his servants, to discharge them if not competent, and to direct them while in his employ." (*Kelly v. New York*, 11 N. Y., 432.) It is the duty of a municipal corporation to keep its streets in a reasonably safe condition for public use (*Lincoln v. Walker*, 18 Neb., 251; *Same v. Gillilan*, Id., 119; *Same v. Holmes*, 20 Id., 39; *Same v. Woodward*, 19 Id., 259; *Plattsmouth v. Mitchell*, 20 Id., 230; *Hutson v. New York*, 9 N. Y., 163; *Todd v. Troy*, 61 Id., 506; *Clemence v. Auburn*, 66 Id., 334; *Evans v. Utica*, 69 Id., 166; *Niven v. Rochester*, 76 Id., 619; *Weed v. Ballston*, Id., 329; *Saulsbury v. Ithaca*, 94 Id., 27; *Dewire v. Bailey*, 131 Mass., 169), and the agents of the corporation are bound to exercise an active vigilance in the performance of that duty. (*Todd v. Troy*, 61 N. Y., 506; *Atlanta v. Perdue*, 53 Ga., 607; *Rosenberg v. Des Moines*, 41 Ia., 415; *Chicago v. Hoy*, 75 Ill., 530; *New York v. Bailey*, 2 Denio [N. Y.], 433.) One of the duties of a municipal corporation is to use reasonable care in the conduct of any work which it undertakes. (*Chicago v. O'Brennan*, 65 Ill., 160; *Chicago v. Turner*, 80 Id., 419; *Freeport v. Isbell*, 83 Id., 440.) When the city has the appointment and supervision of the employes, and the duty to be performed is for its benefit, it is liable for their negligent acts. (*New York v. Bailey*, 2 Denio [N. Y.], 433; *Tormey v. New York*, 12 Hun [N. Y.], 542; *Walsh v. New York*, 41 Id., 299.) So where the duty is imposed on the city and the officers or departments are simply made by the charter agents of the corporation. (*Martin v. Brooklyn*, 1 Hill [N. Y.], 545; *Niven v. Rochester*, 76 N. Y., 619; *Barnes v. Dist. of Col.*, 91 U. S., 540; *Ehrgott v. New York*, 96 N. Y., 264; *Groves v. Rochester*, 39 Hun [N. Y.], 5. The municipal corporation is as much subject

as a private citizen to the usual rule, *sic utere tuo ut alienum non lædas.* (*Goodloe v. Cincinnati*, 4 O., 513; *Rhodes v. Cleveland*, 10 Id., 160; *McCombs v. Town Council*, 15 Id., 479.)

E. P. Holmes, contra:

It is the uniform rule, as established by a long line of decisions, that there is no liability on the part of a municipality for injuries occasioned by the negligent act of members of its fire department. (Dillon, Mun. Corp., sec. 976; *Grube v. St. Paul*, 34 Minn., 402; *Fisher v. Boston*, 104 Mass., 94; *Wilcox v. Chicago*, 107 Ill., 334; *Greenwood v. Louisville*, 13 Bush [Ky.], 226; *Wheeler v. Cincinnati*, 19 O. St., 19; *Hayes v. Oshkosh*, 38 Wis., 314; *Condict v. Jersey City*, 46 N. J. Law, 157; *Hafford v. New Bedford*, 16 Gray [Mass.], 297; *Jewett v. New Haven*, 38 Conn., 368; *Hurford v. Omaha*, 4 Neb., 336; *Veazie v. China*, 50 Me., 526; *N. Y. v. Furze*, 3 Hill [N. Y.], 612; *Barney v. Lowell*, 98 Mass., 570; *Van Horn v. Des Moines*, 63 Ia., 447; *Ogg v. Lansing*, 35 Id., 495; *Yule v. New Orleans*, 25 La Ann., 394.)

POST, J.

This case comes into this court on a petition in error. The error assigned is the sustaining of a demurrer by the district court of Lancaster county to the petition of plaintiff in error, the material part of which is as follows:

"That on and prior to the 29th day of May, 1889, the said defendant had an organized and paid fire department, and had and owned engines, hose, hose carts, ladders, wagons, trucks, and other apparatus for the use by, and which was used by, said defendant in its fire department in extinguishing fires.

"That said defendant then had and owned horses which were used by said defendant in drawing said wagons, trucks, hose carts, and engines to the place in said city where a

fire might be burning, and for other purposes; that among other apparatus the said defendant then owned a large truck, or wagon, upwards of twenty feet in length, which was used by the defendant in transporting about the city long ladders used by said fire department.

"That said defendant, at the time of committing of the wrongs hereinafter mentioned, had in its pay and employ one Peter Keykendall, who was under the direction and control of the defendant, and whose duty it was, under the direction of said defendant, to drive the team attached to said ladder truck, or wagon, about the city; and said wagon was not at the time hereinbefore mentioned, May 29, 1889, supplied with any brake or lock, or other appliance, for stopping said wagon when in motion, or to assist the horses to said wagon attached in stopping the same; that the distance between the front and hind wheels to said truck or wagon was about eighteen feet; that said wagon or truck, when loaded with ladders and other apparatus, carried thereon, and with the driver thereon, weighed upwards of two thousand pounds.

"That Ninth street extends through said city from north to south and intersects and crosses P, R, and S streets in said city, and said Ninth street and said P, R, and S streets have for many years last past been public streets in said city, and on said 29th day of May, 1889, said Ninth street was paved with wood, and between S and P streets was a paved and smooth street, and from S to R street had a smooth and level surface and was free from obstruction and was paved with wood.

"That the said Peter Keykendall, under his employment, was by the defendant required to drive said ladder truck or wagon about the city, when no fires were burning which required to be extinguished by said defendant or said fire department, for the purpose of exercising the horses to said wagon attached, and was also required to drive said horses attached to said wagon when the same was heavily loaded,

on and along the public streets of the said city at a furious rate of speed and as fast as said horses could be made to run, without any regard whatever for the lives or safety of citizens of the city who might be upon the streets, and this when no fire or fires were burning which required the action of the defendant or its fire department to extinguish, for the sole and only purpose of exercising said horses.

"That on the 29th day of May, 1889, the said Peter Keykendall, then being in the employ of the defendant and acting under the orders and direction of the defendant, drove a span of large, high-spirited, and powerful horses, attached to said ladder truck or wagon, about the public streets of said city for the purpose of exercising said horses. Said wagon or truck was loaded with ladders and other apparatus and the driver rode thereon, and said wagon with its load weighed upwards of two thousand pounds; that said wagon was not on said day supplied with any lock or brake or other appliances for stopping or assisting in stopping said wagon when in motion, as the defendant then well knew.

"That said Keykendall on said day drove said span of horses to said wagon attached as aforesaid on and along said Ninth street at a furious and dangerous rate of speed and as fast as said horses could be driven, when there was no fire burning which required the services of said fire department or any of its members or employes of said city to extinguish, but said horses were driven for exercise only; that Clark D. Gillespie, an infant of tender years, being then but six years of age, was at the time crossing said Ninth street near the place where said street intersects and crosses R street at the north side of said R street, and said span of horses were driven upon said Clark D. Gillespie and he was thrown upon the pavement and the front wheel of said wagon was driven over and across his body; that said boy, after being knocked down and run over by said horses and by one of the front wheels of said wagon, raised

his head and attempted to rise from the pavement when he was struck and run over by one of the hind wheels of said truck or wagon and was instantly killed. That the killing of said boy was caused by the driving over him of said team and wagon as aforesaid.

"Plaintiff further says that at said time said team and wagon was not being driven to any fire which required to be extinguished, but was being driven on and along said street for the sole and only purpose of exercising said horses under the direction and orders of the defendant at a dangerous rate of speed, and were driven so fast that it was impossible for the said Clark D. Gillespie to escape being run over. That the said Clark D. Gillespie was the son of the plaintiff.

"That on the 22d of July, 1889, the plaintiff was by the county court of said Lancaster county duly appointed administrator of the estate of said Clark D. Gillespie, and gave the bond by said court required and took the oath by law required in such cases.

"That on or about the 22d of July, 1889, plaintiff presented to the city council his claim for damages sustained by the estate of said Clark D. Gillespie by reason of the killing of him, the said Clark D. Gillespie, together with the names of the witnesses and a statement of the time, place, nature, circumstances, and cause of the injury and damages complained of, which claim was verified by the oath of the plaintiff; that afterwards, and on or about the 12th of August, 1889, said claim was by the defendant and the mayor and council thereof, to which it was presented as aforesaid, rejected and disallowed.

"That by reason of the killing of said Clark D. Gillespie as aforesaid the estate of the deceased has sustained damages in the sum of $5,000, for which sum plaintiff prays judgment with interest from the 12th of August, 1889, and for costs."

The contention of the defendant in error is that no lia-

bility exists on the part of a city like Lincoln for injuries occasioned by the negligent acts of members of its fire department. This exemption is placed upon the ground that in performing their duties, firemen act in obedience to a legislative command, and although appointed and paid by the city they are to be regarded rather as officers charged with a public duty, than as servants of the city. Public policy, it is claimed, forbids the imposition upon a city of liability for the negligence of this class of employes, since they are engaged in the discharge of a duty imposed by law for the welfare of the public, and from which the city, as a corporation, derives no benefit or advantage. Counsel for plaintiff in error, while not conceding the rule to be as stated, insists that it could have no application to the case at bar for the reason that the statute under which the fire department of the city of Lincoln is organized and governed is permissive only, and whatever is done by the city in that respect it does voluntarily, and therefore the rule *respondeat superior* is applicable. To this proposition we cannot consent. The provision on the subject is found in subdivision XXXIII, section 67, of the charter of the city of Lincoln: "Cities governed under the provisions of this act shall have power by ordinance to provide for the organization of a fire department, to procure fire engines, hooks, ladders, buckets, and other apparatus, and to organize fire engine, hook and ladder, and bucket companies, and to prescribe rules of duty and the government thereof, with such penalties as the council may deem proper, not exceeding one hundred dollars, and to make the necessary appropriations therefor, and to establish regulations for the protection from and the extinguishment of fires." This language, although permissive in form, is in one sense mandatory. True it is not mandatory in the fullest sense of the word, since the duty of the city to provide protection to life and property from fire cannot be enforced by *mandamus* or other remedy. It is not every duty imposed upon the state

or the different agencies thereof called municipal corporations that can be thus enforced. (*Kentucky v. Dennison*, 65 U. S., 66; Dillon on Munic. Corp. [4th Ed.], 98.) It is none the less a duty on the part of the city because the law has not provided a means for its enforcement by the mandate of the court. There existed a moral or equitable obligation on the part of the defendant city to provide means of protection from fires within its limits, and in the discharge of that duty provision was made for its fire department. If defendant is to answer for the wrongful act of Keykendall, the driver of the ladder wagon, it must be upon the rule *respondeat superior*. It is clear that upon no other principle is it chargeable. In this connection it should be noted that the claim is made by plaintiff that Keykendall, in driving the team at the time in question, was acting within the scope of his authority. Counsel says in his brief: "The exercising of the team was a proper thing to do. It lies in the way of a proper discharge of the functions of the department. It was not *ultra vires*. The way in which it was performed is what we complain of." Taking it for granted, then, that the driving of the team at the time in question was a proper exercise of the functions of the fire department of the city, and within the line of duty of the driver, we will proceed to examine some of the authorities bearing upon the question involved.

In Dillon on Munic. Corp. [4th Ed.], 974, the rule is stated thus: "If the corporation appoints or elects them, can control them in the discharge of their duties, can continue or remove them, can hold them responsible for the manner in which they discharge their trust, and if those duties relate to the exercise of corporative powers, and are for the peculiar benefit of the corporation in its local or special interest, they may justly be regarded as its agents or servants, and the maxim of *respondeat superior* applies. But if, on the other hand, they are elected or appointed by the corporation, in obedience to the statute, to perform a

public service, not peculiarly local or corporate, but because this mode of selection has been deemed expedient by the legislature in the distribution of the powers of the government, if they are independent of the corporation as to the tenure of their office and the manner of discharging their duties, they are not to be regarded as the servants or agents of the corporation, for whose acts or negligence it is impliedly liable, but as public or state officers with such powers and duties as the statute confers upon them, and the doctrine of *respondeat superior* is not applicable."

Among the officers who are not servants of a city within the foregoing rule, and for whose negligence it will not be chargeable, the learned author enumerates policemen, health officers, and firemen. The rule as to the liability of the latter the author states in section 976, as follows: "The exemption from liability in these and the like cases is upon the ground that the service is performed by the corporation in obedience to an act of the legislature; is one in which the corporation, as such, has no particular interest, and from which it derives no special benefit in its corporate capacity; that the members of the fire department, although appointed, employed, and paid by the city corporation, are not the agents and servants of the city, for whose conduct it is liable, but they act rather as officers of the city, charged with a public service, for whose negligence in the discharge of official duty no action lies against the city. Without being expressly given the maxim of *respondeat superior* has therefore no application." To the same effect see 2 Thompson on Neg., 735; Sherm. & Redfield on Neg., 295, 296.

Hayes v. The City of Oshkosh, 33 Wis., 314, was an action to recover damages resulting from a fire occasioned by the negligent use of an engine employed in suppressing a fire in the neighborhood. Chief Justice Dixon, in the opinion, says: "Neither the charter of the city nor the general statutes of the state contain any peculiar provision imposing liability in cases of this kind, and the decisions

elsewhere are numerous and uniform that no such liability exists."

Wilcox v. City of Chicago, 107 Ill., 334, is directly in point. In that case the plaintiff sought to recover for injuries occasioned by a collision between his carriage and a hook and ladder wagon of the city, through the negligence of the driver while in the discharge of his duty. In the opinion of the court, by Judge Walker, it is said: "To allow recoveries for the negligence of the fire department would almost certainly subject property holders to as great if not greater burdens than are suffered from damage by fire. Sound public policy would forbid it, if it were not prohibited by authority."

In *Fisher v. City of Boston*, 104 Mass., 94, the plaintiff received personal injuries through the negligent use of hose by a fire company of the city in extinguishing a fire on adjoining premises. Judge Gray, in the opinion of the court, says: "But the extinguishment of fires is not for the immediate advantage of the town in its corporate capacity, nor is any part of the expense thereof authorized to be assessed upon owners of buildings or other special class of persons whose property is peculiarly benefited or protected thereby. In the absence of express statute, therefore, municipal corporations are no more liable to actions for injuries occasioned by reason of negligence in using or keeping in repair the fire engines owned by them than in the case of a town or highway."

In *Hafford v. New Bedford*, 16 Gray [N. Y.], 297, the plaintiff was struck and injured by a hose cart on a sidewalk of a public street. The fireman in charge thereof had negligently drawn it along and upon the sidewalk from the engine house ten or fifteen rods distant. The city was held not liable.

In *Jewett v. New Haven*, 38 Conn., 368, the plaintiff, without negligence on his part, was struck and injured in a public street by a hose cart which was being driven to

the engine house for an additional supply of hose for use at a fire then raging, but at a dangerous rate of speed and without the exercise of reasonable precaution for the safety of passers-by. It was held the rule *respondeat superior* did not apply and the city was not chargeable.

In *Dodge v. Granger*, Sup. Ct. R. I., 24 Atl. Rep., 100, a very recent case, on the authority of cases above cited, the city was held not liable for injuries caused by contact with a ladder projecting across the sidewalk in front of an engine house negligently permitted by the firemen to remain in that position while engaged in cleaning the house. This principle has been repeatedly applied to other officers or employes of municipal corporations, as in *Maxmilian v. Mayor*, 62 N. Y., 160, where plaintiff's intestate was killed by a collision with an ambulance wagon, which was caused by the negligence of the driver, an employe of the commissioners of public charities and corrections; *Haight v. New York*, 24 Fed. Rep., 93, where, following the last case, it is held that the city is not liable for damage caused by a collision with a steamboat owned by the city, but in the exclusive use of the board of charities and corrections; *Condict v. Jersey City*, 46 N. J. Law, 157, where the deceased was killed through the negligence of a driver employed by the board of public works to remove garbage from the streets to a public dumping ground; *Calwell v. City of Boone*, 51 Ia., 687, where the injury resulted from the wrongful act of a policeman paid by the city; *Ogg v. City of Lansing*, 35 Ia., 495; *Brown v. Vinalhaven*, 65 Me., 402, and *Barbour v. Ellsworth*, 67 Id., 294, in each of which it was held that the city was not chargeable with the negligence of its health officers; *Burrill v. Augusta*, 78 Me., 118, in which plaintiff's horse was frightened by the escape of steam from a fire engine negligently allowed to remain in the street; *Elliott v. Philadelphia*, 75 Pa. St., 347, where plaintiff's horse was killed through the negligence of a police officer by whom he had been arrested for violation of an

ordinance of the city against fast driving; *Bryant v. St. Paul*, 33 Minn., 289, where the plaintiff fell into a vault negligently left open and exposed by the board of health. In the last case the distinction between the class of officers above mentioned and other agents of the city is clearly pointed out by Vanderburg, judge, as follows: "The duties of such officers are not municipal or corporate duties with which the corporation is charged in consideration of charter privileges, but are police or governmental functions which could be discharged equally well through agents appointed by the state, though usually associated with and appointed by the municipal body."

There are many cases in the reports of the states and the United States in harmony with the foregoing, among which are *Smith v. Rochester*, 76 N. Y., 506; *Van Horn v. Des Moines*, 63 Ia., 447; *O'Meara v. New York*, 1 Daly [N. Y.], 425; *Wheeler v. Cincinnati*, 19 O. St., 19; *Howard v. San Francisco*, 51 Cal., 52; *Ham v. Mayor*, 70 N. Y., 459; *Welsh v. Rutland*, 56 Vt., 228.

The cases cited by plaintiff may be said to sustain the proposition that the law imposes upon a city the duty to keep its streets in a reasonably safe condition for use by the public, and for a neglect of that duty it will be answerable. They are plainly distinguishable from those to which we have referred, since the duty of the city with reference to its streets is a corporate duty. As said by Judge Folger in *Maxmilian v. Mayor, supra:* "It is a duty with which the city is charged for its own corporate benefit to be performed by its own agents as its own corporate act." This distinction is made also in *Ehrgott v. Mayor*, 96 N. Y., 274, one of the cases cited by plaintiff. To the extent that the exemption of a city from liability for acts of officers herein enumerated affects the general rule of liability for obstruction of the streets of the city it must be held to be an exception thereto—an exception based upon a public policy which subordinates mere private interests

to the welfare of the general public. The judgment is right and is

AFFIRMED.

THE other judges concur.

M. E. SMITH ET AL. V. BOYER & DAVIDSON.

[FILED JUNE 11, 1892.]

1. **Attachment: ORDER DISCHARGING: REVIEW.** In reviewing an order of the district court or a judge thereof, discharging an attachment, the evidence being conflicting, the same presumption prevails in favor of the correctness of the ruling complained of, as in cases of finding and judgment upon a formal trial.
2. ——: ——: ——. The order of a judge discharging an attachment in such case will not be disturbed by this court unless it is clearly against the weight of evidence.

REHEARING of case reported 29 Neb., 76.

R. M. Snavely, and *E. M. Bartlett,* for plaintiffs in error.

G. M. Lambertson, contra.

POST, J.

The facts in this case are fully stated in the opinion previously filed, 29 Neb., 76. At the time of the filing of that opinion the conclusion was reached by the court that the order of the district court discharging the attachment was not sustained by the evidence and that the judgment should be reversed. A rehearing was subsequently allowed, and, with the assistance of additional briefs, has been again considered.

It is not necessary to discuss the question of the validity of the mortgages to Holland and the First National Bank

of Indianola. There is no evidence in the record which tends to impeach either; nor is that question put in issue by the motion to discharge the attachment. The only question presented by the motion is the right of plaintiffs to an attachment against the defendants Boyer & Davidson. Defendants, at the time of the execution of the mortgages, were indebted to Raymond Bros. exceeding $2,000. For this amount they executed their three separate notes and immediately confessed judgment on each in the county court of Red Willow county, but refused to confess judgment in favor of plaintiffs. In addition to the stock of goods covered by the mortgages there is no evidence in the record that defendants owned any property except the sum of $187.50 due from one McClung, which, after the execution of the mortgages, Boyer, one of defendants, discounted for $175; a bill, the amount of which does not appear, due from one Sibbett, which was paid September 24 from the proceeds of a loan upon a note with Boyer as surety, and a trotting horse estimated to be worth $300 or $400. It is in evidence, however, that Boyer's wife claimed the horse in question as her separate property. The only witness who claims any knowledge of the facts testifies that Davidson had no property whatever aside from his interest in the stock of goods. There is also evidence tending to prove that Boyer "run away" to Kansas, but this is denied by Mr. Starr, one of the witnesses for defendants, who testifies positively that Boyer remained in Indianola for two days after the day on which he is charged with having fled to Kansas. There is other evidence in the record, but the testimony tending to establish the ground for attachment is either denied by other witnesses or explained in a way which is consistent with the honest intentions of the defendants.

The motion to discharge raised a question of fact to be determined by the district judge, and his finding thereon should not be disturbed unless clearly against the weight

of evidence. This identical question was before the court in *Britton v. Boyer*, 27 Neb., 522, in which it was held that the ruling of the district judge in discharging the attachment was supported by sufficient evidence, and the order aforesaid was affirmed. It has been repeatedly held by this court that the same presumption exists in favor of the correctness of the ruling of the court or judge upon a motion to discharge an attachment where the evidence is conflicting as of any other finding or judgment. (*Mayer v. Zingre*, 18 Neb., 458; *Johnson v. Steele*, 23 Id., 82.) Had the motion been overruled by the district judge it is probable that his decision would have been sustained by an application of the same rule in view of the conflicting character of the evidence. It is the opinion of some of the members of the court that the preponderance of evidence is in favor of the attachment, but not so clearly so as to call for a reversal of the order discharging it. The rule above stated is a safe one, and justice is more certain of attainment by it than by the trial of issues of fact anew in this court. The order of the district court is

AFFIRMED.

THE other judges concur.

FREMONT, E. & M. V. R. CO. V. CLAUS MATTHEIS.

[FILED JUNE 11, 1892.]

1. **Eminent Domain**: DAMAGES: STATUTORY REMEDY EXCLUSIVE. In this state the special remedy provided by statute for determining, by condemnation proceeding, the damage to land when a part thereof is taken for right of way purposes by a railroad company, is exclusive. (*R. V. R. Co. v. Fink*, 18 Neb., 82.)

2. ——: ——: APPRAISERS: A PETITION FOR THE APPOINTMENT

of a commission to appraise damage for the taking of property for right of way, which sets forth that the petitioner desires to acquire a strip 100 feet wide through a particular tract, and refers to an accompanying plat for a more particular description, is sufficient.

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

John B. Hawley and *B. T. White*, for plaintiff in error:

Plaintiff having by acquiescence permitted defendant to construct and operate its railroad over his land, trespass, ejectment, or injunction will not lie. (*Right v. Beard*, 13 East [Eng.], 210; *Hamlin v. R. Co.*, 61 Wis., 515; *M. & N. R. Co. v. Strange*, 63 Wis., 178; *Goodin v. Canal Co.*, 18 O. St., 169; *St. Julien v. R. Co.*, 33 Am. & Eng. R. Cases [La.], 92; Pierce, Railroads, 169; *L. N. A. & C. R. Co. v. Soltweddle*, 36 Am. & Eng. R. Cas. [Ind.], 577; *Kittell v. R. Co.*, 55 Vt., 96.) Where the statute gives the railroad company and the land-owner the equal right to institute condemnation proceedings, that remedy must be sought by the land-owner to recover the value of the land taken and damages to the remainder not taken. (Pierce, Railroads, 178, 224; 1 Rorer, Railroads, 338; Mills, Em. Dom., sec. 87; *R. V. R. Co. v. Fink*, 18 Neb., 82; *Hull v. R. Co.*, 21 Id., 374; *B. & M. R. Co. v. Reinhackle*, 15 Id., 279; *R. V. R. Co. v. Fellers*, 16 Id., 169; *Calking v. Baldwin*, 1 Wend. [N. Y.], 667; *Flagg v. Worcester*, 79 Mass., 601; *Daniels v. R. Co.*, 35 Ia., 129; *L. M. R. Co. v. Whitacre*, 8 O. St., 590; *Hanlan v. R. Co.*, 61 Wis., 521.) The condemnation proceedings offered in evidence by the defendant and admitted by the court were conclusive upon the parties, and estopped the plaintiff from all claim on account of the matters set forth in his petition. (*Bradley v. Steam Packet Co.* 9 Pet. [U. S.], 107; *B. & P. R. Co. v. Fifth Bap. Ch.*, 108 U. S., 317; *Uline v. R. Co.*, 101 N. Y., 98; *Ma-*

hon v. R. Co., 24 Id., 659; *Hussner v. R. Co.*, 114 Id., 433; *Powers v. Ware*, 4 Pick. [Mass.], 106; 1 Sutherland, Damages, 189, 190, 191; 1 Herman, Estoppel and Res Adjudicata, secs. 219, 222; *Haines v. Flinn*, 26 Neb., 380; *Gayer v. Parker*, 24 Id., 644; *Weber v. Morris*, 36 N. J. L., 213; *Madden v. Smith*, 28 Kan., 799; *Covington & C. Bridge Co. v. Sargent*, 27 O. St., 233; *Baird v. U. S.*, 96 U. S., 430; 2 Beach, Law of Railways, secs. 818, 824; Lewis, Em. Dom., sec. 565; *Spaulding v. Arlington*, 126 Mass., 492; *Van Schoick v. Canal Co.*, 20 N. J. L., 249; *C. & A. R. Co. v. S. & N. W. R. Co.*, 67 Ill., 142; *C., R. I. & P. R. Co. v. Smith*, 111 Ill., 363; *White v. R. Co.*, 23 N. W. Rep. [Ind.], 782; *Masters v. McHolland*, 12 Kan., 23; *People v. Wasson*, 64 N. Y., 167; *State v. R. Co.*, 29 Neb., 412.) If plaintiff was not satisfied with the award in the condemnation case, his only remedy was by appeal. By his dismissal of his appeal he is estopped to further complain. (*Bosland v. R. Co.*, 8 Ia., 148; *A., T. & S. F. R. Co. v. Patch*, 28 Kan., 470; *Reisner v. Strong*, 24 Id., 410; *Allison v. Commissioners*, 54 Ill., 170; *M. & N. W. R. Co. v. Woodworth*, 32 Minn., 452; *State v. G. I. & W. C. R. Co.*, 31 Neb., 209.)

Switzler & McIntosh, contra:

The facts do not admit of the application of the principle of estoppel plaintiff has not acquiesced. (*Spofford v. R. Co.*, 66 Me., 47.) When applied to private or *quasi*-public corporations, the remedy by statute is cumulative. (*Crawfordsville, etc., R. Co. v. Wright*, 5 Ind., 252; *In re Buffalo*, 78 N. Y., 362; *Robinson v. Mathwick*, 5 Neb., 255; *Dusenbury v. M. U. Tel. Co.*, 64 How. Pr. [N. Y.], 206.) Even in the case of public corporations, the remedy is exclusive only when the statutory manner of proceeding has been strictly complied with. (*Smith v. R. Co.*, 67 Ill., 195; *Hamor v. Bar Harbor*, 78 Me., 133; *Perry v. Worcester*, 6 Gray [Mass.], 546; *Hull v. West-*

field, 133 Mass., 434; *Spring v. Russell*, 7 Me., 273; *Loop v. Chamberlain*, 20 Wis., 146; *Hall v. Pickering*, 40 Me., 556; *Wamesit Power Co. v. Allen*, 120 Mass., 352; *Badgerly v. Commissioners*, 1 Dis. [O.], 320.) The answer is demurrable and no evidence should be received under it. It does not set forth the oath taken, the description of the land taken, or that the land was the same as that involved in this case. (*Hazen v. R. Co.*, 2 Gray [Mass.], 579; *Pres. & Div. R. Co. v. Wright*, 5 Ind., 252; *Stanton v. Henry*, 11 Johns. [N. Y.], 133; *Pio Pico v. Colimas*, 32 Cal., 578; *Squires v. Seward*, 16 How. Pr. [N. Y.], 478; *Althause v. Rice*, 4 E. D. Smith [N. Y.], 348; *Ferris v. Brown*, 3 Barb. [N. Y.], 105; *Haight v. Badgeley*, 15 Id., 499; *London v. Lumber Co.*, 8 S. Rep. [Ala.], 281; *Natl. Docks, etc., Co. v. State*, 21 Atl. Rep. [N. J.], 570; *Vail v. R. Co.*, 20 N. J. L., 189; *Penn. R. Co. v. Porter*, 29 Pa. St., 169; *Jeffries v. Swampscott*, 105 Mass., 535; *Lewiston v. Co. Com'rs*, 30 Me., 19; *Smith v. R. Co.*, 105 Ill., 511.) The notice served on the land-owner failed to give a description of the land, to state the time when the commissioners would appear, or to give any description of the cuts and fills, hence it was fatally defective. (*Penn. R. Co. v. Porter*, 29 Pa. St. 168; *P. & R. I. R. Co. v. Warner*, 61 Ill., 52; *Spofford v. R. Co.*, 66 Me., 44; *Wilson v. Lynn*, 119 Mass., 174.) An appeal is no waiver of trespass, although the appeal may be still pending. (*Stringham v. R. Co.*, 33 Wis., 471; *Ray v. R. Co.*, 4 Neb., 439; *Damp v. Dane*, 29 Wis., 420). Plaintiff could sue for the value of the land and damages, and judgment in this case vests title in the railroad and settles the controversy. (*I. & G. N. R. Co. v. Benitos*, 59 Tex., 326; *W. & W. R. Co. v. Fechheimer*, 36 Kan., 45; *Jamison v. Springfield*, 53 Mo., 224; *Soulard v. St. Louis*, 36 Id., 554; *Blesch v. R. Co.*, 43 Wis., 192; *Stein v. Burden*, 24 Ala., 146; *Mitchell v. Ladew*, 36 Mo., 532; *Selden v. Canal Co.*, 24 Barb. [N. Y.], 362.) Immature crops are elements of damage.

(*Merrett v. Bowe*, 67 Ia., 636; *Gilmore v. Pitts*, 104 Pa., St., 275; *Gilbert v. Kennedy*, 22 Mich., 117.)

POST, J.

This was an action of trespass in the district court of Douglas county. The trespass charged is the construction upon and through the land of the plaintiff below, of the railroad track of the defendant company, and the appropriation and use of a part of said premises for the purpose aforesaid. In his petition he alleges that he has been damaged as follows: First—Value of land taken, $2,500. Second—Value of growing crop (garden vegetables) thereon $2,000. Third—Damage to remainder of premises, $8,000. The defendant relied upon a prior condemnation of the property taken, for the purpose of its right of way, and compensation paid therefor. The case was submitted to a jury upon the testimony of the plaintiff and the following verdict returned:

"We, the jury duly impaneled and sworn to try the issues in this case under the instruction of the court and the evidence, do find as follows:

"First—The land of the plaintiff not taken by the defendant was damaged by reason of the construction of defendant's road in the sum of $3,500.

"Second—We further find that the value of the crops or growing vegetables which were destroyed by the defendant in the construction of its said road and which belonged to the plaintiff was of the sum of $1,000.

"Third—We further find that the total damage to the plaintiff for crops or vegetables destroyed by defendant, and the damage to the remainder of plaintiff's land, is the sum of $4,500, which amount we so assess in his favor.

Damages	$4,500 00
Interest	840 00
Total	$5,340 00

"PIERCE RYAN, *Foreman.*"

A motion for a new trial having been overruled, judgment was entered upon the verdict and the case removed to this court by a petition in error. It is necessary to notice but a few of the questions presented by the record. From the bill of exceptions it appears that a petition had been previously presented to the county judge of said county for the appointment of commissioners to assess the damage to the plaintiff by reason of the appropriation of the property in question for its right of way; that in accordance with the prayer of said petition six disinterested freeholders were selected and sworn to assess the damage as aforesaid; that said commissioners subsequently and in due time personally examined said property and assessed plaintiff's damage at $960, as appears from their report, as follows:

"We, the undersigned, disinterested freeholders and commissioners, residents of Douglas county, Nebraska, appointed by the county judge of said county to appraise the damages accruing to Claus Mattheis by reason of the appropriation of that part of the following described real estate, taken for right of way, side tracks, wood and water stations, depot grounds, and railroad purposes, by the Fremont, Elkhorn & Missouri Valley Railroad Company, situated in said Douglas county, as shown on the plat and profile of said railroad as submitted to us by the agent of said railroad company, and on file in the county court for Douglas county, Nebraska, viz.:

"A strip of ground across the real estate in the ——— and described as follows: The south half of the northeast quarter of the southeast quarter of section thirty-six (36), in township fifteen (15) north, of range twelve (12) east, of the sixth principal meridian, being a strip of land one hundred feet in width, it being fifty (50) feet in width on each side of the center line of said railroad as surveyed, staked out, and located over and across the premises above described, all as is shown by the plat hereto attached,

marked 'A,' and made a part hereof, and belonging to Claus Mattheis, having been duly qualified, and having each personally examined said premises on the 10th day of June, 1887, at the hour of 10 A. M., being the day and the time mentioned in the notice filed with the county judge, at the office of said county judge, in said county, and attached hereto, find the quantity of land taken, and the value thereof, as follows, to-wit: one and $\frac{60}{100}$ acres of land at $600 per acre, amounting to the sum of $960, and we hereby accordingly award and appraise the damages to the said owners thereof at the total sum of nine hundred and sixty and $\frac{no}{100}$ dollars."

The amount named in the report, to-wit, $960, was deposited by the defendant below with the county judge for plaintiff's use before entering upon the premises. The latter, being dissatisfied with the amount assessed in his favor, undertook to appeal to the district court, and filed therein a transcript of the condemnation proceeding, but failing to give the bond required by law or have summons issued was dismissed for want of prosecution. Proof of the above proceedings having been made at the trial, the court on its own motion gave the following instructions, to which exception was taken:

"I. That the award made by the appraisers of the value of the land, and the return thereof into the county court, the record of which has been introduced in evidence, is binding upon the parties hereto, and that question is not and cannot be a subject of inquiry by you.

"II. The appraisers not having made any estimate of the damages which the plaintiff sustained by reason of the depreciation in value of the remainder of his land not taken for right of way nor for the destruction of the crop of vegetables growing upon his land at the time of its appropriation by the defendant, you will allow the plaintiff such damages for such items as the testimony satisfies you he has sustained, not exceeding the amount claimed in the petition therefor."

It is contended by counsel for plaintiff in error that the court, having found the condemnation proceeding to be valid, should have directed a verdict in its favor on the ground that the statutory remedy for the assessment of damages in such cases is exclusive. In this claim counsel are sustained by the decisions of this court. In *R. V. R. Co. v. Fink*, 18 Neb., 82, it is held that "The statutory mode of acquiring the right of way and ascertaining the damage therefor is exclusive as to the manner of assessing the value of the land taken with damage to the residue of the tract, but does not include damage to the possession by the wrongful entry upon the land before condemnation." This case is not claimed by defendant in error to be within the exception noted above, and from an inspection of the petition it is apparent that it is not. Counsel for defendant in error contend that the remedy by condemnation is not exclusive in this case, and we have devoted considerable time to a re-examination of the question. A second investigation has satisfied us of the soundness of the rule stated in *R. V. R. Co. v. Fink*, and that this case is within both the letter and reasoning thereof. That case is in harmony with the views of all text writers and certainly of a great majority of well considered cases on the subject. The following may be cited as among the many authorities in point: Pierce on Railroads, 178; Mills on Eminent Domain, sec. 87; 1 Rorer on Railways, 335; *Daniels v. N. W. R. Co.*, 35 Ia., 129. In 6 Am. & Eng. Ency. of Law, 604, it is said "The special remedy provided by statute for determining the compensation for property taken is not cumulative but exclusive, but where the company alone can take the initiative, the land-owner will not be deprived of his right of action at common law." In a note to the first proposition the author cites as supporting the text cases from eighteen different states.

It is next insisted by counsel that the petition for condemnation was not sufficient to give the county judge juris-

diction, hence the rule above stated is not applicable. The statutory remedy is as available to the defendant in error as to the railroad company. And if the condemnation proceeding is void for want of jurisdiction we can see no reason, either upon principle or authority, why the defendant in error should not be required to pursue the remedy specially provided for the ascertainment of his damage. But we think the county judge had jurisdiction.

The objection made to the petition is that the description of the land is not sufficiently specific. The allegation of the petition is "The right of way one hundred feet wide over, across, and through the * * * northeast quarter of the southeast quarter of section No. thirty-six, township No. fifteen, range No. twelve east, * * * all of the above described property being fully described and marked by red lines upon the plat hereto attached and marked Exhibit B and made a part hereof. The following named persons have and claim title, ownership, and interest in the above described real estate, to-wit, * * * C. Mattheis." The exhibit named is a plat of the premises, showing the location of the right of way, but not having marked thereon any notes showing the courses and distances. The notice served upon defendant in error describes the property to be condemned as follows: "A right of way one hundred feet wide over, across, and through the northeast quarter of the southeast quarter of section thirty-six, township fifteen, range twelve east, all as surveyed, staked out, and located on said land, all as more fully appears from the petition on file," etc. The report of the commissioners describes the property substantially as above.

The cases cited by defendant in error upon this question arose mostly under statutes which required an accurate description of the boundaries by monuments, etc. In *Vail v. Morris & Essex R. R.*, 21 N. J. L., 189, and *Nat. Dock, etc., Co. v. State*, 21 Atl. Rep. [N. J.], 570, the statute

required the commissioners to transmit with their award a description of the land, the quantity taken, by whom owned, how situated and bounded, and described in writing, to be filed in the clerk's office and there kept as a public record." It is obvious that a technical description is contemplated by this provision. The description in this case is quite as definite as in *K. C. R. Co. v. Story*, 10 S. W. Rep. [Mo.], 203, where, under a statute requiring a specific description, it was held sufficient. In *Kuschke v. St. Paul*, 47 N. W. Rep. [Minn.], 786, Chief Justice Gilfillan says: "The notice was not for the information of strangers to the property fronting on the street, but of owners and persons interested in it. If it contained enough in connection with what they already had notice of to apprise them what property was to be taken, the purpose of the notice was accomplished." We are satisfied to follow these authorities. The proceeding under our statute is exceedingly informal, and while it must not be lacking in any essential to the jurisdiction of the commissioners, we have no occasion to follow the decisions under statutes which prescribe conditions to the exercise of the right of eminent domain not found in ours. We agree with counsel that a condition to the application of the rule above stated is that the railroad company must act in good faith. A corporation cannot in this way acquire property for any other purposes than those enumerated in the statutes, and if it attempted to do so the land-owner would have his election of remedies. There is nothing in this record, however, from which to impugn the motives of the company. The evidence in the record discloses that the road was built and we have no right to presume that the land is now used for any other purpose than that for which it was condemned.

Lastly, it is urged that it does not appear that the parties cannot agree upon the compensation. The testimony of the defendant in error does not sustain the claim. It

is apparent that he could not agree with the agent of the company who had the matter of right of way in charge. The court erred in giving the instructions set out and in not directing a verdict for the defendant below, for which the judgment must be

REVERSED.

THE other judges concur.

DENNIS CUNNINGHAM V. FRANCIS C. FULLER.

[FILED JUNE 30, 1892.]

1. **Evidence**: DECLARATIONS AS TO TITLE. The declarations of a person in the possession of property, as to his title, are admissible evidence against him and all persons claiming under him.
2. ———. *Held*, That certain testimony set forth in the opinion was improperly rejected.
3. **An instruction** asked by a party which conforms to the proof introduced by him should be given. A party is entitled to have his case submitted to the jury upon his theory as shown by the evidence.

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

Cowin & McHugh, for plaintiff in error, cited, that the declarations of Duncan as to the ownership of the property should have been received: *Dorsey v. Dorsey*, 3 H. & J. [Md.], 506; *Strickler v. Todd*, 10 S. & R. [Pa.], 63; *Jackson v. Davis*, 5 Cow. [N. Y.], 123; *Bird v. Smith*, 8 Watts [Pa.], 434; *Waring v. Warren*, 1 Johns. [N. Y.], 340; *Ivat v. Finch*, 1 Taunt. [Eng.], 142; *Stewart v. Cheatham*, 3 Yerg. [Tenn.], 60; *Smith v. Montgomery's Adm'rs*, 5 Monroe [Ky.], 502; *Forsyth v. Kreakbaum*, 7 Id., 97;

Guy v. Hall, 3 Murphy [N. Car.], 150; *Johnson v. Patterson*, 2 Hawks [N. Car.], 183.

C. A. Baldwin (*F. L. Weaver* with him), *contra*, cited: 1 Greenl., Ev., secs. 109, 110.

MAXWELL, CH. J.

This is a contest over a building. The plaintiff alleges that he purchased the building for $1,300 and paid $100 in cash; the remaining $1,200 being debts against the building which he assumed; that the building had been used for a saloon, and the plaintiff designed to continue the use of it for that business; that one Ennis had been in the saloon before the plaintiff purchased it and one Duncan had an interest in the business, and the $1,200 were to be paid out of the receipts of the saloon, upon the payment of which Duncan was to own one-third of the building and Ennis one-third, the remaining third to be in the plaintiff; the title, however, to remain in the plaintiff until such payments were made. The common source of title was Gromer & Yates. The defendant contends that Gromer & Yates sold the property to Duncan, from whom the defendant purchased it. None of the transactions between the plaintiff Ennis and Duncan were reduced to writing. On the trial of the cause the jury returned a verdict for the defendant, upon which judgment was rendered.

The plaintiff introduced testimony in support of his theory of his case, and that the building had been used as a saloon for some five or six months after the arrangement above spoken of was made, and about $600 of the indebtedness had been paid, when the custom of the saloon fell off and the business was unprofitable and both Ennis and Duncan quit the saloon. Soon after this Duncan made a bill of sale of the property in controversy to the defendant, and upon this bill of sale he bases his claim of title to the property.

On the trial of the cause the plaintiff offered "to prove by the plaintiff that subsequent to the time when this witness went into possession of the property, as testified to by him, and after the $600 were paid, as testified by him, out of the proceeds of the business of this saloon upon the debts assumed, as testified by him, that he, George W. Duncan, in a conversation with this witness, admitted that he would become the owner of one-third of the property in controversy when the debts so assumed were paid out of the proceeds of said business." This was objected to on behalf of the defendant, and the objection sustained, to which exceptions were taken. In this we think the court erred. The declarations of a person in the possession of land as to his title are admissible evidence against him and all persons claiming under him. (*Jackson v. Bard*, 4 Johns. [N. Y.], 230; *Dorsey v. Dorsey*, 3 Har. & Johns. [Md.], 426; *Strickler v. Todd*, 10 S. & R. [Pa.], 63; *Jackson v. Davis*, 5 Cow. [N. Y.], 123; *Corbin v. Jackson*, 14 Wend. [N. Y.], 619; *Bird v. Smith*, 8 Watts [Pa.], 434.) This principle is applicable to personal property (*Durham v. Shannon*, 116 Ind., 403), and was recognized by this court in *Campbell v. Holland*, 22 Neb., 587.

Second—The plaintiff offered to prove that, by the terms of the agreement between the plaintiff Ennis and Duncan, the plaintiff was to be personally and exclusively responsible for all that portion of the $1,200 indebtedness referred to which would not be paid off by the proceeds of the saloon business. This offer was objected to and the testimony excluded. In this we think the court erred. The plaintiff should be permitted to offer such proof as he may have in support of his theory of the case. The contract being verbal, the proof necessarily must be so, and the court should permit full inquiry into the facts of the case.

Third—The plaintiff asked the court to give the following instruction: "The court instructs you that if you

believe from the evidence in this case that the property in question was purchased from Gromer & Yates by Dennis Cunningham, John Ennis, and George W. Duncan, under the agreement that the ownership of the property in question was to be and remain in Dennis Cunningham until the proceeds of the business carried on with the property should pay the debts thereof, and if you further believe from the evidence in this case that said proceeds of said business did not pay the debts thereof before the bringing of this suit, then and in that case Dennis Cunningham was, at the time of bringing this suit, the owner of the property in controversy." This was refused, to which exceptions were duly taken. In this we think the court erred. This instruction conformed to the plaintiff's theory. He had introduced proof in support of this view of the case, and the jury should have been told directly what the effect would be if they found this evidence to be true. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

THE OMAHA AUCTION & STORAGE CO. ET AL. V. HARRIET ROGERS.

[FILED JUNE 30, 1892.]

1. **Opinion Evidence:** VALUE. A person who has a general knowledge of the value of household goods may testify as to such value although he may not have dealt in goods of that kind. (Rogers on Expert Testimony, sec. 152.)

2. **Mortgages:** SATISFACTION: CONVERSION BY MORTGAGEE. A mortgagee, after due notice, may sell a sufficient amount of the

mortgaged property to satisfy the mortgage debt; but if he sell more than sufficient to satisfy the same and costs necessarily incurred, he will be liable for conversion of such excess.

3. **Instructions,** set out in the opinion, *held,* to be a correct statement of the law.

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

Cavanagh & Thomas, for plaintiff in error, cited: *Engster v. State,* 11 Neb., 542; *Holmes v. Bailey,* 16 Id., 305; *Ahlman v. Meyer,* 19 Id., 68; *Holmes v. Bell,* 3 Cush. [Mass.], 322; *N. E. Mtg. Sec. Co. v. Aughe,* 12 Neb., 506; *Perkins v. Conant,* 29 Ill., 184.

J. W. West, contra, cited: *Charter v. Stevens,* 3 Denio [N. Y.], 33.

MAXWELL, CH. J.

This action was brought by the defendant in error to recover from one Octave Bouscaren the value of certain household goods sold under an alleged foreclosure of a chattel mortgage. The plaintiffs in error (defendants below) alleged in their answer that the goods were sold under a chattel mortgage executed by Mrs. Rogers to one named Conalline, which mortgage was assigned to Bouscaren. Mrs. Rogers in her reply alleges usury in the transaction in which the chattel mortgage was given, and a tender of the amount lawfully due thereon prior to the sale. The cause was submitted to a jury, which returned a verdict in favor of Mrs. Rogers for the sum of $408.02, upon which judgment was rendered.

The chattel mortgage is as follows:

"This indenture, made the 25th day of June, A. D. 1888, between Mrs. G. C. Rogers, party of the first part, and G. Conalline, party of the second part,

"Witnesseth, That said party of the first part, in con-

sideration of $97.50 in hand, has bargained and sold, and by these presents do grant and convey, unto the said party of the second part the following described goods, chattels, and property, to-wit: One bedroom set, composed of marble top, black walnut, washstand, dresser, and bed; three oil paintings; one marble top center table; one large mirror; one upholstered black walnut sofa; one upholstered rocking chair; one black walnut upholstered arm chair; one cane rocking chair; one bronze clock; one set antique oak bedroom furniture, composed of bed, washstand, and dresser, together with all chairs, bedding, etc.; one No. 3 Silvia stove, not sold; and all carpets, ornaments, rugs, and personal property of any description contained in the house known as 1211 Dodge street, Omaha, Nebraska, and agreed to be kept on such premises; together with all the appurtenances and all the estate, title, and interest of the said party of the first part therein.

"The condition of the above sale is such, that whereas the said party of the first part has executed and delivered to the said party of the second part certain promissory note of even date herewith, payable in ninety days, and bearing interest at the rate of ten per cent per annum after maturity:

"Now if the said party of the first part shall well and truly pay unto the said party of the second part the said note and interest thereon according to the tenor and effect thereof, then this conveyance shall be void; otherwise to be and remain in full force and effect. But in case the said party of the first part shall fail to pay the full amount of said promissory note, principal and interest, according to the tenor and effect thereof, then, in that case, the said party of the second part is hereby authorized and empowered to take possession of the above described property and sell the same at public sale, after giving twenty days' notice of such sale by advertisement thereof in some newspaper published in said county of Douglas; and after pay-

ing all the costs, charges, and expenses of every nature incurred in and about the collection of said note, shall apply the remaining proceeds of said sale in payment of said note, principal and interest, and pay over the surplus, if any there be, to the said party of the first part.

"It is hereby expressly agreed that the said party of the second part shall have the right at any time, at his election, to take possession of the above described property and hold the same.

"Witness my hand the day and year first above written.

"MRS. G. C. ROGERS.

"In presence of

"O. BOUSCAREN."

The goods were sold under mortgage on the 23d of April, 1889.

The testimony of Mrs. Rogers is that she borrowed $75 from Bouscaren and executed a note and mortgage to him for $97.50, due in three months, that she made various payments during the ensuing nine months, amounting in all to $69. Bouscaren testifies that he made the loan, that he was not certain as to the exact amount, but he thought he loaned $90. He admits that in any event the loan was grossly usurious. He also admits receiving $65 as payment on the debt before the foreclosure of the mortgage. The note and mortgage seem to have been taken in the name of Conalline to enable Bouscaren to claim that he was an innocent purchaser thereof.

The first objection made by the plaintiff in error is that Mrs. Rogers was not competent to testify as to the value of the goods. It is true she was not dealing in goods, but her testimony shows that she was acquainted with goods of this character and knew something of their value. Her first statement as a witness was that she knew the value of the goods, and her cross-examination failed to show that she did not possess sufficient knowledge to testify as to their value. Her testimony is fair, and while she did not

profess to be a dealer in second-hand goods she did show a sufficient knowledge to entitle her to testify as to the value. (Rogers on Expert Testimony [2d Ed.], sec. 152.

Second—It is claimed that there was no conversion of the goods shown. We think differently, however. It is admitted that considerable more goods were sold than were necessary to satisfy the debt. Where such is the case, the mortgagee is liable for the conversion of the goods so unnecessarily sold. (*Charter v. Stevens*, 3 Denio [N. Y.], 34.)

Third—Objections are made to instructions 1 and 2 given by the court on its own motion. The instructions, however, should be considered as a whole, and when so considered, they are unobjectionable. They are as follows:

"This action is brought by the plaintiff to recover damages which she claims to have sustained by reason of the alleged wrongful conversion by the defendants of the property of the plaintiff. The defendants allege as a defense to the action:

"First—That the goods, for the alleged wrongful conversion of which this suit is brought, were stored with the defendant. The Omaha Auction & Storage Company was to have a first lien on the goods for storage charges, and that such charges were not paid, except the sum of $2.

"Second—That a chattel mortgage had been given by the plaintiff to one G. Conalline, which had been assigned to O. Bouscaren, who took possession of the property and sold the same at public auction; that the defendant Creighton acted as the auctioneer at said sale, and that the proceeds of the sale were applied to the payment of the balance due for storage of the goods to the Omaha Auction & Storage Company and to the expenses of the sale, and to the amount remaining due under the mortgage, and that the goods sold for all they were worth.

"The plaintiff for reply admits that the goods were sold under a chattel mortgage, but she alleges that the mortgage was given by her to secure a loan of money made by de-

fendant Bouscaren to her, and that for said loan the defendant Bouscaren received a greater rate of interest than was allowed by law, and that of the amount so loaned no more than the sum of $6 remained due thereon at the time of sale, and that such sum was tendered to the defendant before the sale, and that the amount due for storage of the goods with the Omaha Auction & Storage Company had been tendered to such company before the sale.

"You are instructed:

"I. It will be your duty to inquire, First, whether or not there was usury in the transaction between the plaintiff and Bouscaren; and if you find, under the testimony, there was usury, then he, Bouscaren, would be entitled to claim under his mortgage only the amount he had actually loaned to the plaintiff without interest, and she, the plaintiff, would be entitled to claim as a credit upon such amount of principal any payments which she may have made.

"II. Upon the basis above given in the previous instruction, you will ascertain from the testimony the amount which was due to Bouscaren at the time of the sale under his mortgage, and to satisfy such amount, with the expenses of the sale, he, Bouscaren, was entitled to sell so much of the goods covered by the mortgage as was necessary for that purpose. But if he sold any more of such goods than was necessary to satisfy the amount legally due him under his mortgage, with the expenses of the sale, he would be liable for the fair market value of such goods so sold in excess of the amount required in this action.

"III. If you shall find from the testimony that any amount which may have been due for storage of the goods to the defendant, the Omaha Auction & Storage Company, was tendered by the plaintiff to the company or its agent, then the defendants were not justified in selling the goods for such charge for storage, provided you find from the testimony that such tender was kept good by the plaintiff

by retaining the same for such company, and so notifying it that the amount was subject to its demand.

"IV. If, under the foregoing instructions, you find for the plaintiff, you will ascertain from the testimony the fair market value of such of the goods as were sold after a sufficient amount had been realized to satisfy the amount due under the chattel mortgage, with the expenses of the sale, and upon that amount compute interest at the rate of seven per cent per annum from the date of the commencement of this action, to-wit, May 23, 1889, up to the first day of this term, September 22, 1890.

"V. You are instructed that under the laws of this state, as provided by statutory enactment, where a note is given for a loan of money, and for the use thereof a sum of money is received, reserved, or contracted for by the lender exceeding a rate of ten dollars per year upon one hundred dollars, then such a note is an usurious contract and the lender can only recover the principal without interest, and if any interest shall have been paid by the borrower thereon, then the sum or sums so paid are to be credited upon the principal.

"Second—If you find from the evidence that the chattel mortgage under which defendants justify themselves in the sale of the goods in controversy was given to secure an usurious note, as defined in these instructions, and if you further find from the evidence that plaintiff has paid any sum or sums thereon as interest or otherwise, and if, after deducting said sum or sums of money so paid, if any such there were, from the sum of money which plaintiff actually received upon said note, you find that there was still a balance due upon said note, and if you further find that defendants, in selling said goods under said chattel mortgage, sold the same in parcels, then, upon such a state of facts, the court instructs you that after having sold such a part of said goods as realized a sum of money sufficient to pay any such balance, if any such there was, together with all

costs incurred in keeping, advertising, and selling said goods, then the said mortgage lien was extinguished as to the goods remaining unsold, and the selling of other of said goods under said chattel mortgage was in law a conversion of the same, for the value of which defendants are liable to plaintiff."

It is contended on behalf of the plaintiff in error that the question of usury can be raised only in an action to collect the interest. The statute does not prescribe the nature of the action in which the defense of usury may be made and the court has no right to do so. The defendant took possession of the goods and was entitled to a sufficient amount to satisfy his legal claim for the money loaned and no more. He took possession and sought to appropriate all the property to his own use. The amount of his claim is put in issue by the pleadings and testimony received thereunder and was properly submitted to the jury. The right to sell for the storage is not claimed by the plaintiff in error. There is no error in the record and the judgment is

AFFIRMED.

THE other judges concur.

CITY OF OMAHA V. FREDERICKA JENSEN.

[FILED JUNE 30, 1892.]

1. **Municipal Corporations:** UNSAFE STREETS. Where an excavation is made in a public street under contract with the city authorities, such city cannot shift the responsibility for keeping its streets in a safe condition onto a contractor and thus relieve itself from liability for neglect to erect proper barriers to prevent accidents by falling into such excavation. It may no doubt require a contractor to indemnify it against loss occasioned by such accidents.

2. ———: ———: NOTICE. Where a city causes an excavation to be made in a public street it cannot plead want of notice of the failure to erect barriers to prevent accidents by falling into the excavation. It is its duty to see that such barriers are erected and kept up.

3. **Evidence**: TESTIMONY OF ABSENT WITNESS AT FORMER TRIAL. Where a witness has testified on a former trial of the case, and his testimony reduced to writing in open court by the stenographic reporter, and the witness is absent from the state, such testimony, if otherwise competent, is admissible in evidence; and an objection "that no sufficient cause has been shown for the reading of that testimony" is not an objection to the mode of certifying the same, and was properly overruled.

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

A. J. Poppleton, for plaintiff in error:

The court erred in refusing the instruction asked. (Dillon, Munic. Corp., sec. 1015; *Craig v. Sedalia*, 63 Mo., 417; *Brown v. Glasgow*, 57 Id., 157; Cooley, Torts, 745 and cases cited.) The court erred in admitting the testimony of Nels Christensen. (*Spielman v. Flynn*, 19 Neb., 346.)

Connell & Ives, contra:

The city is not relieved of its liability by virtue of its contract with Thompson, the contractor. (*Palmer v. Lincoln*, 5 Neb., 137; *Lincoln v. Walker*, 18 Id., 248; *McAllister v. Albany*, 23 Pac. Rep. [Ore.], 845.) No notice, either actual or constructive, of the dangerous condition of the street is required. (*City of Birmingham v. McCrary*, 4 S. Rep. [Ala.], 630; *Brusso v. Buffalo*, 90 N. Y., 679; *Hanniford v. Kansas*, 15 S. W. Rep. [Mo.], 753; *Springfield v. Le Claire*, 49 Ill., 476; *Chicago v. Johnson*, 53 Ill., 91.) There are three fatal objections to the consideration of the alleged error relating to Christensen's testimony: It was not pointed out during the trial. It was not even in

the most remote and general way embraced in the motion for a new trial. It is not assigned in the petition in error. (*Dietrichs v. R. Co.*, 13 Neb., 48; *R. V. R. Co. v. Hayes*, Id., 491; *Yates v. Kinney*, 25 Id., 122.)

MAXWELL, CH. J.

The defendant in error brought an action against the city of Omaha to recover for personal injuries caused by falling into an excavation in that city, which was negligently left without guards or other protection. The city pleads two defenses: First, that the injury was caused by the negligence of the party injured; and, second, that the sewer trench described in plaintiff's petition was at said date being constructed under a contract made to the lowest bidder as provided and required by the charter of the city of Omaha in that regard, and under and by virtue of the terms of said contract the contractor was to erect and maintain the necessary guards, signals, and protection on and around said work, so as to prevent the danger of accidents to travelers upon the street, and that under and by virtue of the terms of said contract, the defendant, the city of Omaha, had nothing whatever to do with the maintaining of such guards, signals, and protections, and the defendant further saith that it had no knowledge, directly or otherwise, that the contractor was not maintaining the necessary and proper guards, signals, or protection, and that the defendant did not have notice that such signals, guards, or protections were not maintained by said contractor." On the trial of the cause the jury returned a verdict in favor of Mrs. Jensen for the sum of $2,000, on which judgment was rendered.

It is contended, first, that the city was not liable, for the reason that the proof shows that it had expressly stipulated with the contractor that he should place guards around the excavation, and that it had no actual notice of his failure to supply them, and that the danger had not existed a suf-

ficient length of time to charge the city with the implied notice. The attorney for the city thereupon requested the court to give the following instruction: "The jury are instructed that under the terms and conditions of the contract, introduced in evidence by the defendant, under which the sewer was being constructed, the city is not liable in damages to the plaintiff for the failure of the contractor to place or maintain guards or signals, unless you find from the evidence that the city, by and through its officers, had actual knowledge that guards or signals were not put up over the sewer as a warning to travelers on that part of the street. Whereas this sewer trench had been dug on the very day of the happening of the accident, you are instructed, as a matter of law, that the want of signals or guards upon that evening had not existed for a sufficient length of time to constitute constructive or presumptive notice to the city that the sewer was left unguarded and unprotected, so there could be no recovery in this case unless the plaintiff has proven that the city, through its proper officers, did have actual knowledge that the contractor had omitted to put up the proper signals or guards, and that after such knowledge had come to the officers or its proper agents, they had length of time to see that the same were put up before the accident happened. You are further instructed that the plaintiff does not claim to have introduced any evidence to prove that any officers of the city of Omaha had any actual knowledge that guards and signals were not put up by the sewer trench, you should therefore find for the defendant." This the court refused to give, to which exceptions were duly taken. In this there was no error. Where the injury is the result of the work itself, however skillfully performed, and not in the manner of performance, the city will be liable for an injury sustained by a party in the exercise of due care; in other words, where the obstruction or defect which occasioned the injury results directly from the acts which the contractor agrees or is authorized

to do, the person who causes the obstruction or defect will be liable. Thus, suppose the city caused a ditch to be dug across the street and the same should be left open and unguarded, the city cannot plead as a defense that the contractor agreed to keep guards around the excavation, because it cannot surrender its control of the streets so as to relieve it from liability. (*Palmer v. City of Lincoln*, 5 Neb., 136; *McAllister v. Albany*, 23 Pac. Rep. [Ore.], 845; *Storrs v. Utica*, 17 N. Y., 108; *Robbins v. Chicago*, 4 Wall. [U. S.], 679; *Circleville v. Neuding*, 41 O. St., 469.)

In the case last cited it is said: "The relation between the city and Barndt was clearly that of employer and independent contractor, and the rule is generally that for injuries occurring in the progress of work carried on by parties in that relation, the contractor alone is liable. But this liability is limited to those injuries which are collateral to the work to be performed and which arise from the negligence or wrongful act of the contractor or his agents or servants. Where, however, the work to be performed is necessarily dangerous, or the obligation rests upon the employer to keep the subject of the work in a safe condition the rule has no application. This distinction has been taken in this state in a number of cases: *Carman v. Railroad Co.*, 4 O. St., 399; *Tiffin v. McCormack*, 34 Id., 638; *Hughes v. Railway Co.*, 39 Id., 461; and elsewhere in *McCafferty v. Railroad Co.*, 61 N. Y., 178; *Prentiss v. Boston*, 112 Mass., 43; *City of Logansport v. Dick*, 70 Ind., 65; *Crawfordsville v. Smith*, 79 Id., 308; *Robbins v. Chicago*, 4 Wall. [U. S.], 657.

In this case the cistern contracted for was to be built in a street, and to be eighteen feet wide and twenty feet deep. Such an excavation in a street, unless protected to guard persons and animals using the street from falling into it, was necessarily dangerous. The city was under the statutory obligation at the time of the accident to keep its streets open, in repair, and free from nuisance, and it could not

cast this duty upon a contractor, so as to relieve itself from liability to one who should receive an injury. It is primarily liable for an injury resulting from such dangerous place in a street. No doubt a city may require a contractor to indemnify it against loss for damages caused by his negligence in the performance of the work, but that question is not before us.

Second—It is claimed the city is not liable, because it had no notice, either actual or constructive. In a case of this kind no notice is necessary. The city had authorized the excavation in question and it was its duty to see that the proper guards were placed around it.

Third—It is claimed that the court erred in admitting the testimony of Nels Christensen. It appears from the record that Christensen's testimony had been taken by the court's stenographic reporter on a former trial of this case. This testimony was objected to "for the reason that no sufficient cause has been shown for reading that testimony." The objections were overruled and the testimony admitted. In this it is claimed there is error, and we are referred to the case of *Spielman v. Flynn*, 19 Neb., 342. In that case it was held that a certified copy of the stenographic reporter's record of proceedings in the district court is admissible in all cases where the original would be. That, we think, is a correct statement of the law on that point. In the case at bar Christensen is shown to have been absent from the state, and his testimony on a former trial, if otherwise unobjectionable, is admissible. The objection is not to the mode of certifying the evidence. Had it been, as the stenographic reporter was present in court, no doubt he would have made the proper certificate. The objections were properly overruled. There is no error in the record and the judgment is

AFFIRMED.

THE other judges concur.

CHRISTIAN F. HAMAN v. THE OMAHA HORSE RY. CO.

[FILED JUNE 30, 1892.]

1. **Assault**: WORDS OF PROVOCATION alone will not justify an assault, although they may constitute a ground of mitigation of damages.
2. ———: STREET RAILWAYS: IN EJECTING A PASSENGER from the street car the conductor can use no more force than is necessary for that purpose, and if he do so the company will be liable.
3. ———: MEASURE OF DAMAGES. The rule as to the measure of damages as stated in the tenth paragraph of the instructions in *McClure v. Shelton*, 29 Neb., 374, 375, approved.

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

C. A. Baldwin, for plaintiff in error:

The company is liable for the act complained of (*McKinley v. R. Co.*, 44 Ia., 314; *Goddard v. R. Co.*, 57 Me., 202; *Hanson v. R. Co.*, 62 Id., 84; *Bryant v. Rich*, 106 Mass., 180; *N. W. R. Co. v. Hack*, 66 Ill., 238; *Craker v. R. Co.*, 36 Wis., 657; *Smith v. R. Co.*, 23 O. St., 10; *Rounds v. R. Co.*, 64 N. Y., 129; *Peck v. R. Co.*, 70 Id., 587; *Shea v. R. Co.*, 62 Id., 180.)

Geo. E. Pritchett, contra:

If the assault was as claimed, the defendant is not liable, because the same was a willful trespass and entirely outside the driver's employment. (*McManus v. Crickett*, 1 East Term [Eng.], 106; *Isaacs v. R. Co.*, 47 N. Y., 123; *Towanda Coal Co. v. Heeman*, 86 Pa. St., 418; *Coleman v. R. Co.*, 106 Mass., 174.) A new trial may not be granted on account of the smallness of damages. (*Shoff v. Wells*, 1 Neb., 168.)

MAXWELL, CH. J.

This is an action to recover for personal injuries inflicted upon plaintiff by one of defendant's employes, who at the time was in charge of one of defendant's cars, as driver and conductor thereof, and upon which car plaintiff had taken a seat as a passenger thereon, his fare having been paid by a fellow passenger. The plaintiff says that after he had so taken a seat in defendant's car; and after his fare was so paid, the driver demanded of plaintiff that he personally pay a fare, over which demand some words were had between them, and the plaintiff threatened to report the driver and his conduct to the superintendent of the railway; that thereupon the driver made an assault upon the plaintiff, striking him with great force while plaintiff was so seated in the car, and at the same time shoving plaintiff's head through the glass of one of the windows of the car; that plaintiff undertook to and did leave the car, and the driver followed him for quite a distance from the car, pounding plaintiff with a club until he was stopped by some laborers near by. And he says that the assault so made upon him, and the injuries inflicted, caused him great pain of body and mind, and disgrace and humiliation, for which he asks judgment for damages. The defendant in its answer denies the assault and battery, and at the same time pleads justification for the conduct of its driver. On the trial, the jury returned a verdict in favor of the plaintiff for the sum of ten cents, upon which judgment was rendered.

There is but little conflict in the testimony, except upon the point whether the plaintiff used any abusive language to the driver. The plaintiff was the inspector of paving and curbing and other public improvements in the city of Omaha, and he, with Mr. Fox, a contractor, entered the Cuming street car at the turn-table on Thirty-sixth street. He testifies:

Mr. Fox stepped on the car first and I followed him. He walks up before sitting down—up to the box—and puts in some money, whatever it was I could not swear, but he put in some money. I took my nickel out and followed him right up and when I come to put it in he says, "Hold on, I paid your fare." So we both walked back and sat down. I sat on the rear end next to the door and Mr. Fox sat right next to me on the south side. So the driver stopped by that time his car, and he ties his lines and he comes in and sat down and talked to a girl who brought up a little bit of a girl about fifteen years of age probably, and he had some conversation with her that was not very decent for a driver in a car. There was another lady with a child of about twelve or thirteen years in there, but there was nothing said about it until he finally drove off.

Q. Which way did he drive?

A. He went east. Then he came down about to where the switch was at that time—there is a double track now—about Thirty-third street. I said to Mr. Fox, "Are you sure you paid my fare?" Then he says, "Do you think I would tell you if I didn't?" I says, "He is ringing the bell for somebody." Well, we sat a little while longer and he rang the bell again. Then he went up—Mr. Fox went up and had some talk with him—the door was open, and he had his head on the outside towards the driver. What he talked—the first part—I could not hear it; but finally he came in and he took out another dime. He says, "Here is another dime, I will put that in, and after looking in the box to see if it is in there so you will be sure about it." That was all that was said, and he came back and sat down, and he put the dime in the box and the driver satisfied himself it was in the box. Then he came back and sat down. I says, "Did you pay for both of us?" He says, "Yes." He says, "He denies that I paid anything at all." So I walked up to the driver. I says, "You deny that man

paid you any money when he got on the car?" He says, "Yes, neither you or him." I says, "I know I did not, but that man paid you some money." He says, "No, he didn't." I says, "I know better; I am going to report you to Mr. Smith as soon as I get down town." That is all I said, and went back and sat down. He says, when I walked back, "I do not give a damn for you or Smith; I am running this car; it is all right."

In this he is corroborated by the testimony of Mr. Fox. Their testimony clearly shows that upon entering the car Mr. Fox deposited ten cents in the box for himself and the plaintiff. The driver, however, insisted, after starting the car, that they had not paid, and, apparently to avoid any difficulty, they paid a second time. There is no doubt this is the case.

The driver was called as a witness on behalf of the company and testified as follows:

Mr. Fox came out to the front of the car to me and asked if I was ringing for him. I said, "Yes, put your fare in the box." "Well," he says, "we have paid our fare." "No, sir," I says, "you did not." I guess he forgot all about it. Well, he went back in and did not say a word. He went back and spoke to the other gentleman behind, and he came in to the front of the car and he says to me, he says: "You son of a bitch, I will report you to Smith, and he dropped a dime in the box."

Q. This man here?

A. Yes, and then he went back and sat down in the southwest end of the car and Fox stood on the rear platform. There were three ladies in the car and a child at the time and I stopped the car and went back and told them they could not speak such language as that in the car in the presence of ladies, they could not ride here and do that. I says, "Get out of here." So I took them by the collar of the coat or the vest rather, and was taking him out on the back platform of the door, by the collar, when he hit

me on the nose, and Mr. Fox was standing on the platform also, and he hit me in the back of the head, so I pulled both of them out in the street, both of them, and we got in a fuss on the street.

Q. Did Fox sit down in the car at all on the trip?

A. No, sir.

Q. I understood you to say that he had put no money in the box at all?

A. No, sir, he did not.

Q. And it was Haman here, the plaintiff here, who put the ten cents in the box after Fox had been up and talked with you about paying fare.

A. Yes, sir.

On his cross-examination he states that the plaintiff called him the objectionable name but once in the car; that he then deposited ten cents in the box and then took his seat; that he remained in his seat "it might be five minutes," when he went into the car and commenced the assault on the plaintiff. A number of witnesses testify that he forcibly ejected both the plaintiff and Fox from the car and struck the plaintiff in the face and followed the plaintiff some distance from the car and struck him with a club, and when remonstrated with by a number of gentlemen who were on the sidewalk, he answered, "Go on about your business or I will give you some." It appears that the same driver, but a short time before, at a point on Cuming street, where a sewer was being constructed and the street consequently obstructed, drove his car in such a manner as to nearly precipitate two members of the board of public works into a sewer, and when remonstrated with by the parties who had just escaped injury, he told them to go to hell. Complaint was made to Mr. Smith, the superintendent, who it seems did not suspend the driver for even a single day, but required him to apologize to the gentlemen who had been insulted, and ask their forgiveness, which, on a promise of better conduct in the future,

was freely granted. The company therefore was apprised of the character of this man, if such notice was necessary.

On the trial the court instructed the jury as follows: "You are further instructed, however, that if you believe from the evidence that the driver, Ed. Kogan, assaulted the plaintiffs, yet, if you further believe from the evidence that the plaintiff invited and provoked such assault, by using profane, vile, and abusive language toward said Kogan, and that the assault and beating complained of were in resentment of such language and caused by it, then in that event you are instructed that the defendant is not liable in damages on account of injuries received by plaintiff under such circumstances, and your verdict should be for the defendant." This instruction is clearly erroneous. All the authorities agree that words of provocation alone will not justify an assault. (*Sorgenfrei v. Schroeder*, 75 Ill., 397; *Ogden v. Claycomb*, 52 Id., 366; *Donnelly v. Harris*, 41 Id., 126; *State v. Griffin*, 87 Mo., 608; *Collins v. Todd*, 17 Id., 537; *State v. Wood*, 1 Bay [S. Car.], 351; *Winfield v. State*, 3 Greene [Ia.], 339; *Birchard v. Booth*, 4 Wis., 67; *Mitchell v. State*, 41 Ga., 527; *Suggs v. Anderson*, 12 Id., 461; *Lee v. Woolsey*, 19 Johns. [N. Y.], 319; S. C., 10 Am. Dec., 230; *Avery v. Ray*, 1 Mass., 12; *Cushman v. Ryan*, 1 Story [U. S.], 91; 1 Am. & Eng. Encyc. of Law, 803.) Where, however, the provocation is recent, it may be shown in mitigation of damages.

Second—But even if the driver had been justified in removing the plaintiff from the car, he would not be protected in using a greater degree of force than was apparently reasonably necessary, and if he did so the company would be liable. In this case the driver's own testimony shows that his conduct was brutal in the extreme, and is not justified by anything that appears in the record.

Third—The court failed to instruct clearly on the measure of damages. In *McClure v. Shelton*, 29 Neb., 374, 375, this court approved an instruction as to the measure

of damages in case of assault and battery, which, in the main, is applicable to a case like this, with the addition that the party is entitled to compensation for the humiliation of a forcible and violent expulsion from the car. It is not disputed that the company is liable for the acts of its employes in a case of this kind, and if it were, there is no doubt of such liability. (*McKinley v. C. & N. W. R. Co.*, 44 Ia., 314; *Goddard v. Grand Trunk R. Co.* 57 Me., 202; 62 Id., 84; *Bryant v. Rich*, 106 Mass., 180; *N. W. R. Co. v. Hack*, 66 Ill., 238; *Craker v. C. & N. W. R. Co.*, 36 Wis., 657; *Smith v. P. & Ft. W. & C. R. Co.*, 23 O. St., 10; *Rounds v. Del. R. Co.*, 64 N. Y., 129; *Peck v. C. R. Co.*, 70 Id., 587; *Shea v. Sixth Ave. R. Co.*, 62 Id., 180.) The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

GEO. LEAVITT ET AL. V. E. R. SIZER.

[FILED JUNE 30, 1892.]

1. **Review:** OBJECTIONS NOT RAISED BELOW. Where the clerk of the court and deputy sheriff were interested in the result of the action, and hence in drawing the jury and talesmen, but no objection was made until after the trial, *held*, that the objections should have been presented to the trial court before the trial, otherwise they cannot be considered by the supreme court.
2. **A finding** of fact set out in the opinion *held* contrary to the weight of evidence.
3. **Instructions** copied in the opinion *held* to be erroneous.

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

Leese & Stewart, for plaintiff in error, cited: *Savage v. Stevens*, 126 Mass., 207; *Morgan v. Hardy*, 16 Neb., 427; *Bollman v. Loomis*, 41 Conn., 581; Bigelow, Frauds, 496; 2 Herman, Estoppel, sec. 1078.

Abbott, Selleck & Lane, contra, cited: *Sycamore Co. v. Grundrad*, 16 Neb., 537; *City of Lincoln v. Holmes*, 20 Id., 47.

MAXWELL, CH. J.

This is an action upon three promissory notes, dated December 17, 1886, one for $500, due in three years, with interest at ten per cent, payable semi-annually, and two coupon notes, each for the sum of $25. These notes were secured by a B. & M. land contract for the northwest quarter and west half of the northeast quarter of section 37, township 3, range 15 west. The notes were given to W. A. Selleck and by him indorsed to Sizer.

The defendants below (plaintiffs in error) allege in their answer "that on or about the 17th day of December, 1886, defendants conveyed to plaintiff the following described real estate, situate in Lancaster county, Nebraska, viz.: The west half of the northeast quarter of section 22, township 11, range 6 east, of the value of $2,000, with incumbrance of $500; and, in consideration of said conveyance, the plaintiff on said date assigned to defendant George Leavitt a certain contract for the sale of the following described lands of the Burlington & Missouri River Railroad Company in Nebraska with plaintiff, to-wit: The west half of the northeast quarter and the northwest quarter of section 33, township 3, range 15 west, of the value of $500, and no more, and upon which there was owing from plaintiff to said railroad company, for purchase money under said contract, the sum of $473, the value of plaintiff's interest therein by him assigned being no more than $27. In negotiating for the exchange of said

lands one C. W. Hoxie, a brother-in-law of plaintiff, acted for and on behalf of plaintiff, was plaintiff's duly authorized agent, and his acts as such were by plaintiff approved aud ratified. To induce defendants to convey said lands to plaintiff, the plaintiff and said Hoxie, intending to cheat and defraud defendants, falsely and fraudulently represented to these defendants that the said railroad lands in Franklin county, covered by said contract, were of the value of $10 per acre, and of the aggregate value of $2,400, and of the value of $2,000 over and above the sum owing thereon for purchase money, and that the same was good, smooth, tillable land; that said contract was ample and sufficient security for a loan of $500, and that plaintiff could and would procure a person to make such a loan upon the security of said contract if defendants would convey said Lancaster lands to plaintiff. And further to execute and carry out their said intent to cheat and defraud defendants, plaintiff furnished the money therefor to and procured one W. A. Selleck to make said loan of $500 to defendants, who falsely pretended for himself to loan the same to defendants upon the faith and credit of a conditional assignment of said railroad land contract as security for the repayment thereof. At the time of making said conveyance and exchange of lands defendants were not acquainted with the value of said railroad lands in Franklin county and had no means of knowing the same, except the aforesaid representations of plaintiff, Hoxie, and Selleck.

"Relying on said representations, and believing them to be true, defendants were induced to and did convey said Lancaster county lands to plaintiff and paid plaintiff $27, all of the value of $2,027, for no other consideration than the assignment to them by plaintiff of the executory contract for the conveyance of the aforesaid railroad land in Franklin county, and at the same time defendants executed the note mentioned in plaintiff's petition.

"That said representations of plaintiff, Hoxie, and Sel-

leck, were wholly false as plaintiff well knew; said railroad lands were not of the value of $10 per acre, nor $2,400 in the aggregate, nor $2,000 above unpaid purchase money; was not good, smooth, tillable land, and said W. A. Selleck did not make said loan of $500 on the faith and security of said contract, but on the contrary said lands were not in fact of greater value than $2.50 per acre, $500 in the aggregate, and $27 above unpaid purchase money due thereon, and was rough, broken by sloughs and canyons and untillable; the said contract did not afford sufficient nor ample security for a loan of $500 or any other sum, all of which the plaintiff and said Hoxie and Selleck well knew; and fraudulently concealing the same from the defendants the plaintiff by collusion procured said Selleck to make said loan and get defendants' said note therefor for plaintiff's own use and benefit, in pursuance of a concerted and collusive scheme entered into by plaintiff and C. W. Hoxie and W. A. Selleck to cheat and defraud defendants; that by reason of the premises defendants have suffered damages in the sum of $1,000."

On the trial of the cause the jury returned a verdict in favor of Sizer for the sum of $594.58, and made special findings as follows:

"First—What was the value of the Franklin county land at the time of the exchange, over and above the amount due the railroad? Five hundred and twenty-seven dollars.

"Third—Did C. W. Hoxie in negotiating the exchange, act in the interest of and in behalf of plaintiff Sizer? Yes; in consummating this exchange.

"Fourth—Did C. W. Hoxie, in negotiating the exchange, act for both plaintiff and defendant? Yes; in consummating this exchange.

"Fifth—Is the Franklin county land rough and untillable? Yes.

"Sixth—Were Sizer and Hoxie, or either of them, in-

formed, at the time of the exchange, as to the true character of the Franklin land? No.

"Seventh—Did Hoxie do or say anything that would justify Leavitt in believing that the Franklin county land was of sufficient value, above incumbrance, adequately to secure a loan of $500? Yes."

It is claimed on behalf of the plaintiffs in error that because Sizer was clerk of the court at the time of the trial and Hoxie deputy sheriff, and as one-half of the jurors were talesmen, that, therefore, the jury was in fact impaneled in the interest of the plaintiff below. Where the officers of the court, particularly those who assist in drawing the jury, are interested in the result of an action, the court should take every precaution to prevent a failure of justice. Unless a trial is conducted in a fair and impartial manner, and before disinterested and unbiased jurors, it is liable to result in a wrong verdict. Constitutional guarantees of a fair trial before an impartial jury would amount to very little unless the courts will give effect to the constitution. A party complaining, however, must bring the matter to the attention of the court at the trial in some of the modes provided by law, otherwise the objections are waived.

The testimony tends to show that Mr. Sizer had visited the land in 1885 and knew that it was rough and untillable and the special finding to the contrary is against the clear weight of evidence. Hoxie professed entire ignorance as to the character of the land, although it is pretty evident that he knew its general character.

Third—The fourth instruction given by the court on its own motion is as follows:

"The jury are further instructed that this action is founded upon a charge of fraudulent representations, made by plaintiff and his agents to defendants; in order to constitute such a fraud within the meaning of the law, it must be clear by a preponderance of evidence that the plaintiff

or his agents intended to commit, and did commit, a fraud upon the defendants in manner complained of in defendant's counter-claim, otherwise the defendant cannot recover upon his counter-claim. The defendant is not entitled to anything upon this counter-claim unless you believe from the evidence that the plaintiff or his agents made the representations alleged; that such representations were false; that the parties making them knew they were false, or had no apparently good reason to believe them to be true; that they were made with the intent to defraud the defendants, and defendants were thereby induced to make the trade in question, and sustained damages by means thereof."

The words "that the defendants are not entitled to recover anything on their counter-claim unless such representations were false, and that the parties making them knew they were false," were liable to mislead the jury. The rule is that where a party without knowing whether his statements are true or false, makes an assertion as to any particular matter upon which the other party has relied and has suffered damages, the party thereby defrauded will be entitled to relief. (*Phillips v. Jones*, 12 Neb., 215; *Smith v. Richards*, 13 Pet., 38; *Trumball v. Gadlen*, 2 Strobh. Eq., 14; *McFerron v. Taylor*, 3 Cranch, 281.) The court therefore erred in giving this instruction.

The court also erred in giving the following instruction:

"Before you can find for the defendant you must find, either that the plaintiff personally made the representations claimed by the defendant, or that said Hoxie was the agent of the plaintiff, or that he made said representations and that the plaintiff, knowing what representations had been made by said Hoxie, afterwards ratified them."

This instruction is clearly wrong. A principal who retains the benefit of a contract made by his agent thereby adopts all the instrumentalities employed by such agent to effect the contract. In other words, a party cannot retain the benefits derived from the fraudulent conduct of his

agent without being charged with the instrumentalities employed to accomplish the purpose. (*Rogers v. Empkie Hardware Co.*, 24 Neb., 653; *N. E. Mtge. Sec. Co. v. Henderson*, 13 Id., 574; *McKeighan v. Hopkins*, 19 Id., 33.)

There are other errors which need not be noticed. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

CHICAGO, B. & Q. R. Co. v. A. J. GUSTIN.

[FILED JUNE 30, 1892.]

1. **Justice of the Peace:** PLEADING: APPEAL. Where an action is brought before a justice of the peace the plaintiff is required to file a bill of particulars of his demand, and the defendant, if required by the plaintiff, his agent or attorney, shall file a like bill of the particulars he may claim as a set-off. These are the only pleadings required in an ordinary action before a justice of the peace. Where such action is appealed to the district court, and the answer contains new matter, the plaintiff may follow the procedure in the district court and reply to such new matter.
2. **Evidence:** BILL OF LADING *held* to have been properly admitted in evidence.
3. ———. There was no conflict in the evidence as to the character of the goods and that they belonged to the fourth class.

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

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

The reply should have been stricken from the files. (*O'Leary v. Iskey*, 12 Neb., 136; *Courtnay v. Price*, Id.,

189; *Dillon v. Russell*, 5 Id., 488; *Williams v. Evans*, 6 Id., 218; Maxwell, Pl. & Pr., 108; *Durbin v. Fisk*, 16 O. St., 534.) As to other points: *Savage v. Aiken*, 21 Neb., 610; *Moore v. Besse*, 30 Cal., 570; *Smith v. Weage*, 21 Wis., 442; *Harris v. Harris*, 10 Id., 468; *Vaughn v. R. Co.*, 9 Am. & Eng. R. Cas. 41; *Hill v. R. Co.*, Id., 21; *Sumner v. R. Co.*, Id., 18; *Little Rock R. Co. v. Daniels*, 32 Id., 479; *Galveston R. Co. v. Kutac*, 37 Id., 470.

C. G. Dawes, contra, cited:

As to the character of a bill of lading: Lawson, Cont. of Carriers, par. 102; *Cincinnati, etc., R. Co. v. Pontius*, 19 O. St., 221; *White v. Van Kirk*, 25 Barb. [N. Y.], 16; *Wolfe v. Myers*, 3 Sandf. [N. Y.], 7; *Maghee v. Camden*, 45 N. Y., 514; *Manhattan Oil Co. v. R. Co.*, 54 Id., 197; *Judson v. R. Co.*, 6 Allen [Mass.], 486; *Mich. Cent. R. Co. v. Hale*, 6 Mich., 243. Admission of bill of lading in evidence: *Neally v. Greenough*, 5 Fost. [N. H.], 325; *Didier v. Auge*, 15 La. An., 398.

MAXWELL, CH. J.

The defendant in error brought an action in replevin against the plaintiff in error, in the county court of Lancaster county, to recover the possession of certain goods. The case was appealed to the district court, and as a point is made on the pleadings, it becomes necessary to set them out. The petition is as follows:

"The above named plaintiff complains of the above named defendant, and for cause of action says that he is the owner of, and entitled to the immediate possession of, the following described goods and chattels, to-wit: one box of iron castings, of a weight of 125 pounds, of the value of $15; that the said defendant wrongfully and unlawfully detained the said goods and chattels from the possession of the said plaintiff, and has detained the same as aforesaid

for the space of two days, to plaintiff's damage in the sum of $50; that said goods were not taken in execution on any order or judgment against said plaintiff, or for the payment of any tax, fine, or amercement assessed against him, or by virtue of any order of delivery issued under the chapter of the Code of Civil Procedure providing for the replevin of property, or on any other *mesne* or final process issued against the said plaintiff.

"Wherefore the said plaintiff prays judgment against the said defendant that he, the said defendant, do return to the said plaintiff the said goods and chattels so unlawfully detained, and for the said sum of $50, his damages so as aforesaid sustained by reason of said unlawful detention, or for said sum of $15, the value of said property, with damages as aforesaid, in case it shall be found that a return thereof cannot be had."

To this petition the defendant below filed an answer as follows:

"Now comes the defendant above named, and for answer to the petition filed by the plaintiff, denies that he is the owner and entitled to the immediate possession of the property described in said petition, and denies that the defendant wrongfully and unlawfully detained the same for the time mentioned in the plaintiff's petition or for any other time, and denies that the plaintiff is damaged.

"Further answering the said petition, the defendant says that it is a common carrier, owning and operating a line of railroad from the city of Chicago, westwardly, through Illinois, Iowa, and through the town of Lincoln, Nebraska; that at the station of Wann, in the state of Illinois, on defendant's line of road, it received for shipment, in the regular course of business as a common carrier, one box of saddlery hardware weighing 125 pounds, consigned by the Eberhard Manufacturing Company to the plaintiff, A. J. Gustin, at Lincoln, Nebraska, the same being the goods and chattels mentioned in the plaintiff's petition, and the

said defendant carried the said freight from the said town of Wann, in the state of Illinois, to the city of Lincoln, Nebraska, for the plaintiff above named, and having thus carried the same for the plaintiff as a common carrier, the defendant had and has a lien upon and especial property in the said bill of freight thus carried for the freight charges due for the said carriage and shipment, and this defendant had such lien upon and especial property in the said freight described in plaintiff's petition at and prior to the time of the commencement of this action. The defendant therefore alleges that it had the lawful possession and lawful right to hold possession of the same until the freight charges for the said shipment were duly paid."

"The defendant denies each and every allegation contained therein, except as hereinbefore stated and admitted."

To this answer Gustin filed a reply as follows:

"Now comes plaintiff, A. J. Gustin, and for reply to answer of defendant denies each and every allegation therein contained, except as hereinafter stated and qualified, to-wit: That said defendant is a common carrier, operating a line as stated in said answer; that it received at Wann, Illinois, a box of iron castings consigned by the Eberhard Manufacturing Company to the plaintiff. Plaintiff particularly denies the allegations of said defendant that said box contained saddlery hardware, but alleges and avers that it contained iron castings. Plaintiff further admits that said box of iron castings was carried by said defendant to Lincoln, state of Nebraska."

The railway company thereupon filed a motion to strike the reply from the files, because it raised a new issue, no reply having been filed in the county court. The motion was overruled and this is the first error complained of.

Section 951 of the Code provides for the filing of a bill of particulars of the plaintiff's demand, and the defendant, when required by the plaintiff, his agent or attorney, must file a like bill of the particulars he may claim as set-

off, and it is declared that "the evidence on the trial shall be confined to the evidence set forth in said bills." Section 952 provides for the amendment of the bills of particulars. These are all the pleadings required in an ordinary action before a justice of the peace, and as this action was properly recognizable before a justice, the same procedure would prevail in the county court as if the action had been tried in a justice court. There was no error, therefore, in overruling the motion.

Second—The plaintiff below offered in evidence the following bill of lading:

"12–14–86–150 M. Form 71.

"CLEVELAND, COLUMBUS, CINCINNATI & INDIANAPOLIS RY. CO.

"EDGAR HILL, Gen'l Freight Agent, Cleveland, O.

"A. S. WHITE, Assist. Gen'l Freight Agent, Cleveland, O.

This bill of lading to be presented by consignee without alteration or erasure.	CLEVELAND, O., 9–8, 1888.
MARKS, CONSIGNEE, ETC.	Received from the Eberhard Manf. Co., in apparent good order, except as noted, the packages described below (contents and value unknown), marked and consigned as per ——.
A. J. Gustin, Lincoln, Neb.	
This bill of lading contracts rates from —— to Wann, Ill, via ——, at 25c per lot, and charges advanced at $——.	

One box iron castings $1 25

(Printed across the end: "C., C., C. & I. Ry. Gen'l Freight F. A., Pivi Sch. 8, 1888. E. L. Campbell, per —— B. This stamps receipts for freight but not for rates. Rate, 292 pr. 100 lbs. Wann, Ill., to Lincoln, Neb. Guaranteed by Western road.")

which the C., C., C. & I. Ry. agrees to transport with as reasonable despatch as its general business will permit to destination, if on its road, or otherwise to the place on its road where the same is to be delivered to any connecting

carrier, and there deliver to the consignee or to such connecting carrier upon the following *terms* and *conditions*, which are hereby agreed to by the shipper, and by him accepted as just and reasonable, and which are for the benefit of everyone over whose line said goods are transported:

"1st. Neither this company, nor any other carrier receiving said property to carry on its route to destination, is bound to carry the same by any particular train, or in time for any particular market, and any carrier in forwarding said property from the point where it leaves its line is to be held as a forwarder only.

"2d. Neither this company nor any such other carrier shall be liable for any loss of or damage to said property by dangers or accident incident to railroad transportation, or by fires or floods while at depots, stations, yards, landings, warehouses, or in transit. And said property is to be carried at owner's risk of leakage, breakage, chafing, loss in weight, or loss or damage caused by changes in weather, or by heat, frost, wet or decay, and if any portion of its route to destination is by water, of all damages incident to navigation.

"3d. Responsibility of any carrier shall cease as soon as said property is ready for delivery to next carrier or to consignee, and each carrier shall be liable only for loss or damage occurring on its own line, and in case of loss or damage to such property for which any carrier shall be responsible, its value or cost at time and place of shipment shall govern settlement therefor, unless a value has been agreed upon with shipper or is determined by the classification upon which the rate is based, in which case the value so fixed by agreement or classification shall govern; and any carrier liable on account of loss of or damage to such property shall have the benefit of any insurance effected thereon by or on account of the owner or consignee thereof.

"4th. Such property shall be subject to the necessary cooperage and baling at owner's cost; and if the owner or

consignee is to unload said property, the delivering carrier may make a reasonable charge per day for the detention of any car after the same has been held twenty-four hours for unloading, and may add such charge to the freight due and hold said property subject to a lien therefor."

* * * * * * *

This bill was objected to, for the reason that there was no evidence of its authenticity and because the company could not bind the C., B. & Q. Railway Company. These objections were overruled and the bill received.

It will be observed that the answer of the railroad company admits receiving at Wann, Illinois, a box of saddlery hardware weighing 125 pounds; admits in effect all that is claimed in the petition, except that they do not wrongfully withhold the same, and it alleges that the hardware is a kind classified as No. 2 in the schedule. There was no error in admitting the bill of lading, therefore. In a case of this kind, where the employment is not denied, it is probable that the bill is *prima facie* admissible in evidence, and a denial of its genuineness must be made by the adverse party to require proof on the point, but it is unnecessary to determine that point. It appears from the testimony that goods are not infrequently labeled improperly. Thus, common hardware in boxes is placed in the fourth class, while saddlery hardware is classified as No. 2; that the companies have inspectors to open the packages and place the goods in the proper class; that in this instance the inspector opened the box, which was filled with japanned iron rings, and, as Mr. Gustin had been engaged in the saddlery business, he at once seems to have assumed that the rings were designed for that business, and at once classified the goods as No. 2, the freight on which is eighteen cents per hundred. It is clearly shown that the rings are a new patent designed for a neck yoke for horses, and in no way connected with saddlery hardware. Upon this point there is practically no dispute, so that the classifi-

cation No. 4 is correct, and the rates as shown by the schedule are less than sixty-two cents per hundred, and as Mr. Gustin had offered to pay that sum, he was entitled to recover. There is no error in the record, and the judgment is

AFFIRMED.

THE other judges concur.

R. L. MCDONALD ET AL. v. E. R. BOWMAN, SHERIFF.

[FILED JUNE 30, 1892.]

Attachment: REPLEVIN. On the 27th of January, 1890, one T. executed a chattel mortgage to M. upon his stock of "dry goods, notions," etc., and the book accounts, to secure the payment of the sum of $1,453.47. On the 30th of the same month M. executed a mortgage to the S. Co. upon his stock of flour, etc., to secure the sum of $85.75. On the next day two suits of attachment were brought against T., which were levied upon a part of the goods mortgaged, whereupon the mortgagees brought replevin against the sheriff and reclaimed the goods. On the trial of the cause the jury returned a verdict in favor of the sheriff for $405.47, and found the value of the goods in possession of the mortgagees to be $1,700, and of the book accounts $489. It appeared also that the mortgagees were in possession, selling the goods at private sale. *Held*, That if it was conceded that the mortgagees' lien was superior to that of the attaching creditors, which we do not decide, still, there is sufficient to pay all the liens, and without a showing of prejudice to the mortgagees the judgment would not be reversed.

ERROR to the district court for Jefferson county. Tried below before BROADY, J.

Letton & Hinshaw, for plaintiff in error.

Hazlett & Le Hane, Charles O. Bates, and *Hambel & Heasty, contra.*

MAXWELL, CH. J.

On the 27th of January, 1891, A. W. Tester, of the village of Gladstone, being engaged in the mercantile business in the village of Gladstone, executed a chattel mortgage to R. L. McDonald "upon all my goods, notions and furnishing goods, boots and shoes and rubber goods, groceries, tobacco, and all book accounts now due said A. W. Tester, amounting to $489," etc., to secure the payment of the sum of $1,453.47. On the 30th of that month Tester executed a chattel mortgage to the Symes Grocer Company upon "all the stock of groceries and flour" in his store, to secure the payment of the sum of $85.93. On the 31st of that month an action by attachment was brought against Tester by the Lycoming Rubber Company to recover the sum of $95.39 and costs; this action was brought in the county court. On the same day an action by attachment was brought in the district court by Mannet & Heinrichs against Tester to recover the sum of $250 and costs. These attachments were levied upon a part of the goods in question. The mortgagees thereupon brought an action of replevin, and on the trial of the cause the jury found that the defendant was entitled to the possession of the property levied upon, and that the value of such possession was the sum of $405.72. The jury also found the value of the goods in the possession of the mortgagees was the sum of $1,700, and the value of the book accounts assigned to M. to be the sum of $489. Judgment was thereupon entered on the verdict. The mortgagees bring the cause into this court and a large number of errors are assigned, which, in our view, need not be considered.

This is a contest between creditors. So far as appears the mortgages were made in good faith to secure valid

claims. The attachments also seem to have been issued and levied in good faith, and the claims upon which they were predicated, valid debts against Tester. So far as appears the plaintiffs still have enough property in their hands to satisfy their claims and costs. This being so, if all that is claimed by them as to the priority of liens is true, which we do not decide, still they are not injured. It is the duty of the court to apply the property as far as possible to payment of the liens against the debtor, and to require such payment to be made without unnecessary delay. Error does not affirmatively appear in the record and the judgment is

AFFIRMED.

THE other judges concur.

DAVID F. ANDERSON, ADMR., v. CHICAGO, B. & Q. R. CO.

[FILED JUNE 30, 1892.]

1. **Negligence Causing Death:** CONTRIBUTORY NEGLIGENCE: BURDEN OF PROOF. Where, in an action for damages against a railroad company for wrongfully causing the death of plaintiff's intestate, the plaintiff proves his case without disclosing any negligence on the part of his intestate, contributory negligence is a matter of defense, and the burden of establishing it is on the defendant.

2. ———: ———: ERROR WITHOUT PREJUDICE. A verdict against the defendant in such an action will not be reversed on application of plaintiff, because of the giving of an erroneous instruction to the jury on the question of contributory negligence, its giving being error without prejudice.

3. ———: MEASURE OF DAMAGES. In case of a verdict in favor of the plaintiff, he is entitled to recover such a sum as the jury may deem from the evidence a fair and just compensation to the next of kin, for the pecuniary loss sustained by them, resulting

from the death which is made the basis of the suit, not exceeding the statutory amount.

4. ———. *Held*, The evidence sustained a verdict for nominal damages.

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

G. M. Lambertson, for plaintiff in error:

The court erred in giving the first instruction (*Lincoln v. Walker*, 18 Neb., 244; *Hough v. R. Co.*, 100 U. S., 213), and in giving the third instruction. As to the fourth instruction: *Johnson v. R. Co.*, 18 Neb., 699; 3 Sutherland, Damages, 182; *Chicago v. Scholten*, 75 Ill., 468; *McIntyre v. R. Co.*, 37 N. Y., 287; *R. Co. v. Kirk*, 90 Pa. St., 15; *R. Co. v. Barron*, 5 Wall. [U. S.], 90; *Grotenkemper v. Harris*, 25 O. St., 510; *Penn. R. Co. v. McCloskey*, 110 Pa. St., 436. The damages are inadequate. The petition states a cause of action. (*Baltimore R. Co. v. Rowan*, 3 N. E. Rep. [Ind.], 627; *Hough v. R. Co.*, 100 U. S., 224; *Kane v. R. Co.*, 128 Id., 94; *Dist. of Col. v. McElligott*, 117 Id., 621; *N. P. R. Co. v. Hurbert*, 116 Id., 642; *Hosic v. R. Co.*, 75 Ia., 683; *Conners v. R. Co.*, 74 Id., 383; *R. & D. R. Co. v. Norment*, 84 Va., 167; *Fredenburg v. R. Co.*, 114 N. Y., 582; *Plank v. R. Co.*, 60 Id., 607; *Busby v. R. Co.*, 107 Id., 374; *Johnson v. R. Co.*, 18 Neb., 699.)

T. M. Marquett & J. W. Deweese, contra, cited, as to the first instruction: *C., C., C. & I. R. Co. v. Elliott*, 28 O. St., 352; *City of Lincoln v. Walker*, 18 Neb., 248; *R. Co. v. Coates*, 15 Am. & Eng. R. Cas. [Ia.], 265; *Parish v. State*, 14 Neb., 67; *S. C. & P. R. Co. v. Finlayson*, 16 Id., 578; *Gray v. Farmer*, 19 Id., 71; *Bartling v. Behrends*, 20 Id., 215; *Campbell v. Holland*, 22 Id., 607. As to the third instruction: *Dist. of Col. v. McElligott*, 117 U. S., 621; *Hough v. R. Co.*, 100 Id., 234; *Gibson v. R. Co.*, 63 N.

Y., 449. The measure of damages is not the value of a life but the pecuniary loss of the next of kin. (*Grotenkemper v. Harris*, 25 O. St., 510; *Johnson v. R. Co.*, 18 Neb., 700; *N. Chicago Rolling Mills v. Morrissey*, 18 Am. & Eng. R. Cas., 47; *C., B. & Q. R. Co. v. Sykes*, 96 Ill., 173; *R. Co. v. Coates*, 15 Am. & Eng. R. Cas., 265; *Steel v. Kurtz*, 28 O. St., 199; *Van Brunt v. R. Co.*, 44 N. W. Rep. [Mich.], 323; *Clifton v. Lanning*, 61 Mich., 359.) The amount of damages to be recovered is peculiarly within the judgment and discretion of the jury. (*Johnson v. R. Co.*, 18 Neb., 699.) The contributory negligence of deceased, as shown by the testimony in this case, prevents a recovery. (*Brice v. R. Co.*, 38 Am. & Eng. R. Cases [Ky.], 38; *N. Cent. R. Co. v. Husson*, 12 Id. [Pa.], 241; *Hathaway v. R. Co.*, Id. [Mich.], 249; *A., T. & S. F. Co. v. Plunkett*, 2 Id. [Kan.], 139; *Day v. R. Co.*, 2 Id. [Mich.], 126.)

NORVAL, J.

This action was brought by David F. Anderson, as administrator of John Mossholder, deceased, against the Chicago, Burlington & Quincy Railroad Company for damages for negligently causing the death of plaintiff's intestate. Verdict and judgment for the plaintiff for the sum of $1, to reverse which plaintiff brings the cause here on error.

It appears that the intestate was, on November 7, 1887, in the employment of the defendant as brakeman on a freight train on the line of road from Wymore to Superior. At Wymore the train was made up, and contained, among others, a flat car loaded with long bridge timbers, some of which on one side projected over the end of the car a sufficient distance to strike against the end of the box car next to it. When the train reached Strang some of the cars were uncoupled and set out and others were taken in. Mossholder, while attempting to couple the flat car before mentioned to a box car was caught between the projecting

timbers and the box car and killed. Plaintiff insists that the car was loaded in such a manner as to endanger the lives of the employes, and that the defendant was negligent in placing it in the train and requiring the deceased to make the coupling. Defendant admits the accident and death of the intestate, but denies that its employes were negligent, and alleges that Mossholder was guilty of contributory negligence.

Complaint is made of the giving of certain instructions, and that the damages assessed by the jury are inadequate. The first and third instructions given at the request of the defendant are as follows:

"1. In this case the plaintiff, as administrator of the estate of John Mossholder, deceased, seeks to recover damages from the defendant on account of the death of said Mossholder, claiming that said death was caused by the negligence of the defendant, and that said Mossholder was free from negligence. The fact that said Mossholder was killed while coupling cars is admitted, but the defendant denies that his death was caused by the negligence of the defendant, and alleges that it was the result of the carelessness and negligence of the deceased himself. The burden of proof is upon the plaintiff to establish these two propositions of fact:

"First—That the deceased came to his death on account of the negligence of the said railroad company.

"Second—That the deceased himself was not guilty of carelessness or negligence, which caused or contributed to the accident and death. The jury are therefore instructed that unless you are satisfied, by a preponderance of the testimony, of the truth of both these propositions, then the plaintiff will not be entitled to recover, and your verdict should be for the defendant.

"3. The claim is made in this case that the cars were improperly loaded, or that they were received by the defendant, and hauled over its road after they were improp-

erly loaded with timbers. If you believe this to be true, then you will determine from the evidence:

"First—Whether the manner of loading complained of was the usual and customary way of loading and hauling such cars and timbers.

"Second—Whether the deceased knew of this manner of loading and hauling, or by proper care and attention to his business might have known of it.

"The court instructs you that if the loading of this car, or the receiving and hauling of it, by the defendant was the usual and customary manner of doing the business, and the deceased knew or might by proper care and attention have known of it, then the plaintiff cannot recover for negligence and neglect of company in hauling a car thus loaded, if you shall find same was negligence."

It is claimed that the first of these instructions misstated the rule as to the burden of proof upon the question of contributory negligence. That instead of the plaintiff being obliged to prove that the deceased was free from fault, the burden rested upon the defendant to establish that the intestate was guilty of contributory negligence. The same point was considered by this court in the case of *City of Lincoln v. Walker*, 18 Neb., 244, where, after a consideration of the conflicting authorities, it was ruled that when the plaintiff makes out his case without showing negligence on his part, contributory negligence is a matter of defense, and the burden of establishing it is on the defendant. The instruction under consideration conflicts with the rule laid down in the case to which reference has been made, and should not have been given.

As to the third instruction, for the purposes of this case, it may be conceded that it was erroneous. But that is not sufficient ground for a new trial. Plaintiff was in no manner prejudiced on the trial of the cause by the giving of either of these instructions, for the reason that the jury found in his favor upon every issue. They found that the

accident was the result of the negligence of the defendant and that the deceased was not at the time guilty of carelessness or negligence that contributed to his death. This would have been their finding, had the charge of the court on that subject been never so favorable to the plaintiff.

Objection is made to the fourth paragraph of the charge relating to the measure of damages, which reads as follow:

"The court instructs the jury as to the measure of damages, that if you find for the plaintiff the law allows no punitive damages, but only compensatory damages, that is, compensation to the next of kin for the pecuniary loss sustained by the death of their relative. These perhaps are in their nature uncertain and indefinite, for if the deceased had lived they might not have been benefited, and if not, then no pecuniary injury would have resulted to them from his death. It is difficult to get at the pecuniary loss with precision and accuracy, but, taking all the facts and circumstances of the case into consideration, you are, according to your deliberate judgment, to determine whether the parties for whose benefit this action was brought have suffered any pecuniary injury, and if so, you are to assess such damages as you shall deem fair and just, remembering that it is only the pecuniary value of the life of the deceased to his next of kin, that is, the pecuniary value they would have derived had his life not been terminated, that constitutes their claim for damages on account of his death."

It is claimed that the vice in this charge consists in the court limiting the plaintiff's recovery to the pecuniary loss sustained by the next of kin, resulting from the death of intestate. Counsel for plaintiff insists that the measure of damages is the value of the life of the deceased. In considering the question it is important to keep in mind the provision of the statute of this state relating to actions for damages for the death of the person caused by the wrongful act or neglect of another.

Section 2, chapter 21, Compiled Statutes, provides:

"That every such action shall be brought by and in the name of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries, resulting from such death, to the wife and next of kin of such deceased person, not exceeding the sum of five thousand dollars," etc.

Under these provisions, in actions like this, the plaintiff is entitled to recover such an amount of damages as the jury may deem from the evidence a fair and just compensation to the next of kin, having reference only to the pecuniary loss resulting from the death which is made the foundation of the suit. The damages are not to be estimated by the value of the life lost, but such a sum as the proof shows will compensate the next of kin for the pecuniary injury which they have sustained by such death. This is the rule adopted by the courts of other states under statutes similar to our own. (*Grotenkemper et al. v. Harris*, 25 O. St., 500; *Steel v. Kurtz*, 28 Id., 199; *C., B. & Q. R. Co. v. Payne*, 56 Ill., 534; *Rafferty v. Buckman*, 46 Ia., 195; *Meynning v. R. Co.*, 59 Mich., 262; *Van Brunt v. R. Co.*, 44 N. W. Rep. [Mich.], 321.)

The court, in the case at bar, correctly stated the rule of damages. The instruction was doubtless copied from the one given in *Grotenkemper v. Harris, supra*, which was approved by the supreme court of Ohio.

The only other error assigned relates to the amount of damages. Did the proofs justify the jury in fixing the amount they did? It is in evidence that deceased, at the time of his death, was an unmarried adult about twenty-

two years of age. Neither his father nor mother were living. There were surviving the deceased eleven brothers and sisters, all of whom but two had reached their majority and the most of whom were married. The deceased was addicted to the use of intoxicating liquors and was careless in his work. At the time of his death he was receiving the sum of $45 per month, but prior to his engagement with the defendant he received only $15 per month. The testimony fails to show that he saved his earnings, or that he had been in the habit of making contributions from his own means for the maintenance and support of any of his brothers and sisters, or that they were in any manner dependent upon him. True, he at one time sent $15 to his sister Dolly while she was in Wyoming, but for what purpose does not appear. The jury would not have been justified in assessing damages not founded upon the testimony. Under the proof they were warranted in inferring that the next of kin were not pecuniarily injured by the death of the intestate, hence plaintiff was only entitled to recover nominal damages. Upon the whole record we are satisfied that no error prejudicial to the rights of the plaintiff has been committed. The judgment is therefore

AFFIRMED.

THE other judges concur.

SECOND CONGREGATIONAL CHURCH SOCIETY OF OMAHA V. CITY OF OMAHA.

[FILED JUNE 30, 1892.]

Estoppel: CITIES: STREETS: CHANGE OF GRADE. When the authorities of a city change the grade of a street, appoint appraisers to assess the damages of abutting owners, and confirm the award when returned, the city, on the trial of an appeal taken by the land-owner from the assessment of damages, cannot urge defects and irregularities in its own proceedings in changing the grade to defeat a recovery.

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

C. A. Baldwin, *W. J. Connell*, and *W. C. Ives*, for plaintiff in error, cited: *Huling v. R. Co.*, 9 Sup. Ct. Rep. [Kan.], 604; Lewis, Em. Domain, sec. 414.

A. J. Poppleton, contra.

NORVAL, J.

In 1887 plaintiff in error was the owner of lot 2 in Jacob's addition to the city of Omaha, also parts of lots 35 and 36 in Clark's addition to said city. All of the aforementioned lots front upon St. Mary's avenue, between Twenty-sixth and Twenty-seventh streets. In the year above stated the city council of Omaha passed an ordinance changing the grade of Twenty-seventh street from St. Mary's avenue to Leavenworth street, and that of St. Mary's avenue between Twenty-sixth and Twenty-seventh streets. Appraisers were appointed, who assessed plaintiff's damages at $100, and from the award it took an appeal to the district court. Upon the trial the plaintiff offered in evidence the ordinance changing the grade, the appointment of appraisers, their oath and report, and the

proceedings of the city council confirming the appraisers' report, all of which were excluded by the court. Likewise all testimony offered by the plaintiff to support its claim of damages was excluded, and under the direction of the court the jury returned a verdict for the city.

It is contended by counsel for defendant in error that the proceedings taken by the city in the assessment of damages were so defective as to render the award a nullity, therefore no appeal would lie therefrom, and, as we understand it, this was the view taken by the trial court. The point is made that no legal oath was taken by the appraisers. Each made oath "that he is a resident and freeholder in the city of Omaha in said county, and is not interested in the taking and appropriation of the property and land declared by ordinance No. 82 necessary to be appropriated for the use of said city for changing the grade of Twenty-seventh street from St. Mary's avenue to Leavenworth street, and having been appointed by the mayor, with the approval of the council of said city, as one of the disinterested freeholders of said city to assess the damage to the owners of the property, respectively, to be taken by such appropriation, taking into consideration special benefits, if any, this affiant hereby accepts said appointment, and here makes oath to perform the duties of said appointment with fidelity and impartiality."

It will be observed that the appraisers were not sworn to assess the damages to property abutting on St. Mary's avenue, occasioned by the changing of the grade of that street, but to appraise the damages to owners of property appropriated to the use of the city for the changing of the grade of Twenty-seventh street from St. Mary's avenue to Leavenworth street. Clearly they were not sworn to act upon the property located on St. Mary's avenue, upon which street plaintiff's property abuts. In this respect the oath was insufficient, but the objection could not be urged in the district court on the trial of the appeal taken from

the award of the appraisers. The land-owner waives the defect by appealing, and the city, by changing the grade, and confirming the appraisers' report, waived its right to object that a valid oath was not taken. (*Trester v. M. P. Ry. Co.*, 33 Neb., 171.) Ordinarily, such an appeal is limited to the mere question of damages. Especially is this true where, as in the case at bar, no pleadings are filed presenting an issue upon matters other than the amount of damages sustained. To us it appears unjust, inequitable, and contrary to every principle of right to permit the city, after it has damaged property by changing the grade of the street upon which it abuts, to urge defects in its proceedings to defeat an appeal taken by the land-owner to recover a fair compensation for the damages sustained. To do so would be to allow the city to take advantage of its own wrong after it had accomplished that which it undertook to do, the change of the street grade. Such a rule courts should not sanction.

What has been said disposes of all objections urged by the city against the regularity of its proceedings. The court should have received the testimony tendered by the plaintiff on the question of damages. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

STATE, EX REL. JUSTIN A. WILCOX, V. HENRY CRABTREE ET AL.

[FILED JUNE 30, 1892.]

1. **Referees:** FINDINGS: REVIEW. The report of a referee upon questions of fact has the same effect as the verdict of a jury, and will not be set aside as being against the weight of evidence unless it is clearly wrong.
2. **County Seat:** RELOCATION: PETITION: MANDAMUS. A petition was presented to the board of county commissioners of Red Willow county, purporting to be signed by 1,541 resident electors of the county, requesting said board to call a special election for the relocation of the county seat, which petition contained a statement of all the matters required to be set out therein by section 1, article 3, chapter 17, Compiled Statutes. Subsequently, during the pendency of said petition, a remonstrance was filed with said board against the calling of an election, and also a petition signed by 285 of the persons who had previously signed the petition requesting that their names be stricken therefrom. After deducting all who were disqualified petitioners and those who had withdrawn their names, the petition was signed by 1,106 resident electors of said county, which exceeded in number three-fifths of all the votes cast in said county at the preceding general election. The county board denied the petition. *Held*, That the duty to call the election being enjoined by law, *mandamus* will lie to enforce the performance of the same.
3. ———: ———: ———: COSTS. The relator is entitled to costs against the county.

ORIGINAL application for *mandamus*.

J. S. Le Hew, and *Sidney Dodge*, for relator, cited: Angell & Ames, Corp., 239, 679; *People v. Com'rs*, 4 Neb., 157; *Bouton v. Supervisors*, 84 Ill., 384; *State v. McMillan*, 8 Jones [N. Car.], 174; *Com'rs v. Batty*, 10 Neb., 176.

R. M. Snavely, for respondent, cited, contending that *mandamus* would not lie: *Howland v. Eldredge*, 43 N. Y.,

457; *People v. Brennan*, 39 Barb. [N. Y.], 651; *Seymour v. Ely*, 37 Conn., 103; *State v. Nemaha Co.*, 10 Neb., 33; *State v. Nelson*, 21 Id., 572; *Dixon v. Judge*, 4 Mo., 286; *Dane v. Derby*, 89 Am. Dec. [Me.], 729, and note; *State v. McCrillus*, 4 Kan., 214; *State v. Supervisors*, 29 Wis., 79; *Doster v. Howe*, 28 Kan., 353; *Cushing v. Stoughton*, 60 Mass., 389; *Nelson v. Milford*, 7 Pick. [Mass.], 18; *Simmons v. Hanover*, 23 Id., 188; *Bancroft v. Linfield*, 18 Id., 556; *Boone Co. v. Armstrong*, 23 Neb., 766; *State v. Clarey*, 25 Id., 403.

Fritz Westermann, for M. E. Wheeler, intervenor, cited, contending that the county was liable for costs: *Tatlock v. Louisa Co.*, 46 Ia., 138; *Jordan v. Osceola Co.*, 59 Id., 388; *Bouton v. Supervisors*, 84 Ill., 384 *Cushing v. Stoughton*, 60 Mass., 389; *Doster v. Howe*, 28 Kan., 355; *Thomas v. Wilton*, 40 O. St., 516; *Windburn v. Litchfield*, 22 Conn., 226; *People v. Stocking*, 50 Barb. [N. Y.], 573; *Stanton Co. v. Madison Co.*, 10 Neb., 308.

NORVAL, J.

This is an original application to this court for a peremptory *mandamus* to compel the board of county commissioners of Red Willow county to call a special election for the purpose of voting on the question of the location of the county seat of said county. Upon issue being joined the cause was referred to J. B. Cessna, Esq., to take the proofs and report the same to the court, with his findings of fact. The referee, after hearing the evidence, has made and filed his report, which consists of fifty-one special findings, and returned therewith a transcript of the testimony, which contains over 2,000 closely type-written pages, including exhibits. Numerous exceptions were filed to the findings of the referee. Subsequently, but before the submission of the case to the court, the board of county commissioners filed an answer withdrawing all op-

position to the granting of the writ, and asking to be relieved from the payment of costs.

It appears from the petition, and the referee so found, that at the general election held in Red Willow county on the 5th day of November, 1889, there were cast 1,589 votes, and no more; that on the 25th day of April, 1890, there was filed with and presented to the board of county commissioners of said county a petition purporting to be signed by 1,541 resident electors of said county, praying said board to call a special election for the purpose of submitting to the electors of the county the question of relocating the county seat; that in addition to the names of the petitioners the petition contained, and had set opposite their respective names, the age, the section, the township, and range on which, or the city in which, the petitioner resided, and the term of his residence in the county. On the same day a like petition was filed with said board purporting to be signed by twelve other resident electors of said county. Prior to the filing of the petition last named a remonstrance was filed with the said board protesting against the calling of the election. Subsequently other petitions were filed with said board, signed by 285 of the persons who had previously signed the original petition, requesting that their names be stricken off of said petition and protesting against the calling of the election. On April 30, 1890, but after the presentation to the board of said petitions and remonstrances, another petition, of the same tenor and effect as the original, was filed with said county commissioners, purporting to be signed by twenty-seven other resident electors of the county. The original petition presented to the county board was signed by 1,106 resident electors of said county, or more than three-fifths of the qualified voters of the county, according to the returns of votes cast at the preceding general election, after deducting those who had withdrawn their names from the petition. The petition and remonstrance were pending before the county commissioners sev-

eral days, and, finally, on May 6, 1890, without hearing any testimony, a majority of the county board refused to submit to a vote of the people of the county the proposition to relocate the county seat.

The referee finds, in substance, that the county commissioners refused to hear any testimony as to the qualifications of the petitioners or the genuineness of their signatures, which finding is excepted to, as not being supported by the evidence. It is the only objection urged against the report in the brief of the respondents. Considerable testimony was taken upon this branch of the case, which was of the most conflicting character. The record discloses that the county board, at the meeting on April 30, 1890, adopted a motion to the effect that the petition for relocation *prima facie* proved itself, and that the burden of proof was upon the remonstrators. No proof being offered attacking the petition, the county board proceeded to examine the petition and remonstrance, to ascertain therefrom whether the petition was signed by a sufficient number of qualified electors to warrant the calling of an election. They made out two lists of names of the petitioners, one containing those who were personally known to the board as qualified voters, and the other the names of those who were not so known to them. Upon the first list were placed 491 names, and upon the other 865. On May 6, 1890, the board having met to further investigate the matter, passed a motion requiring the petitioners to introduce their proof on the sufficiency of their petition.

The testimony introduced by the relator tends to show that counsel for petitioners, with several witnesses, were at the time present before the board, and that said attorneys thereupon asked permission to call witnesses to establish that the petition was signed by more than three-fifths of the legal voters residing in the county, which said request was refused. The witnesses called by respondents testified that no such request was ever made. While the testimony

is conflicting, the evidence is ample to sustain the findings of the referee. The report of a referee upon questions of fact has the same effect as the verdict of a jury, and will not be set aside as being against the weight of evidence unless it is clearly wrong. (*Brown v. O'Brien*, 4 Neb., 195; *Cattle v. Haddax*, 14 Id., 527.)

Section 1, article 3, chapter 17, Compiled Statutes, provides: "Whenever the inhabitants of any county are desirous of changing their county seat, and upon petitions therefor being presented to the county commissioners, signed by resident electors of said county, equal in number to three-fifths of all the votes cast in said county at the last general election held therein, said petition shall contain, in addition to the names of the petitioners, the section, township, and range on which, or town or city in which, the petitioners reside, their ages and time of residence in the county, it shall be the duty of such board of commissioners to forthwith call a special election in said county for the purpose of submitting to the qualified electors thereof the question of the relocation of the county seat," etc.

The petition first presented to the county commissioners in every essential particular complied with the requirements of the above section, and contained the requisite number of petitioners. After deducting the names of the persons who were not qualified petitioners and those who, after signing the petition, had subsequently signed a remonstrance against the same, the petition contained the names of qualified petitioners in excess of three-fifths of all the votes cast at the preceding general election. It was therefore the duty of the board under the law to have called an election and submitted the proposition to relocate the county seat to a vote of the people. The respondent having refused to perform a plain statutory duty, the relator is entitled to the relief demanded.

The only question remaining to be considered is as to costs. We think the taxable costs should go against the county. The proceedings are against the county board,

and not the respondents as individuals. The county commissioners represent the county. They failed to perform a duty, not as individuals, but in their official capacity as representatives of Red Willow county. They employed counsel to appear for them, who filed an answer, and every step was hotly contested until just before the submission of the cause, when another answer was filed which, in effect, confesses the right of the relator to the writ. This change in the issues did not relieve the county from liability for the legal costs. Whether the commissioners are liable to the county therefor on their official bonds does not arise in the case and we express no opinion thereon. The amount of compensation of the referee, as well as the fees of the stenographers for taking and transcribing of the testimony, will be hereafter determined.

A peremptory writ of *mandamus* will issue to said respondent board commanding them, at their next session, to call a special election in said county and submit to the qualified electors thereof the question of relocation of the county seat of said county.

JUDGMENT ACCORDINGLY.

THE other judges concur.

HENRY LIVESEY V. NELS O. BROWN ET AL., IMPLEADED WITH CRANE ELEVATOR COMPANY, APPELLANT, AND OMAHA LUMBER COMPANY, APPELLEE.

[FILED JUNE 30, 1892.]

1. **Mechanics' Liens:** HOW SECURED. Under the mechanic's lien law of this state the person who furnishes any material for the construction of a building by virtue of a contract, express or implied, with the owner thereof, is entitled to a lien thereon for

the amount due for the same, upon filing a sworn statement of his account with the register of deeds of the proper county within four months of the time of furnishing such material.

2. **Deeds**: PAROL CONTRACT TO RECONVEY: CONSTRUCTIVE NOTICE. Where an absolute deed, properly executed and acknowledged, is given and intended only as a mortgage, and the contract to reconvey rests in parol, the proper recording of the instrument is constructive notice of the interest of the grantee in the property therein described.

3. ——: ——: MECHANICS' LIENS: PRIORITY. Such lien is superior to a mechanic's lien for materials furnished under a contract entered into with the grantor after the recording of such deed.

4. **Pleading.** Every material averment in a petition, not denied by the answer, for the purposes of the action will be taken as true.

APPEAL from the district court for Douglas county. Heard below before CLARKSON, J.

Cavanagh & Thomas, for appellant, the Crane Elevator Co., cited: *Simon v. Brown*, 3 Yeates [Pa.], 186; *Heister v. Fortner*, 2 Binn. [Pa.], 40; *M. & M. Bank v. Bank of Pa.*, 7 W. & S. [Pa.], 335; *Friedley v. Hamilton*, 17 S. & R. [Pa.], 70; Wade, Notice, secs. 187, 188; *Dey v. Dunham*, 2 Johns. Ch. [N. Y.], 188; *Weide v. Geh*, 21 Minn., 454; *Russell's App.*, 15 Pa. St., 322; *Britton's App.*, 45 Id., 172.

Richmond & Legge, for appellee.

Kennedy, Gilbert & Anderson, for plaintiff.

Isaac Adams, for Goodman & Cooper.

James B. Meikle, for Omaha Cut Stone Company.

NORVAL, J.

This action was brought by Henry Livesey to foreclose a mechanic's lien upon lot 3 in block 317, in the city of Omaha, and the building situated thereon owned by the

defendant Nels O. Brown. The defendants Goodman & Cooper, Omaha Cut Stone Company, and Crane Elevator Company each filed a cross-petition setting up a mechanic's lien on the same property and praying a foreclosure thereof. The Portsmouth Savings Bank in its cross-petition asks the foreclosure of a mortgage, and the Omaha Lumber Company claims a lien by virtue of a deed absolute on its face, which was intended as a mortgage. Upon the trial the district court entered a decree allowing all the liens, giving the Portsmouth Savings Bank the first lien against the premises, the plaintiff Livesey and the defendants the Omaha Cut Stone Company and Goodman & Cooper second liens, the Omaha Lumber Company a third lien, and the Crane Elevator Company a lien subsequent and junior to all the others. The Crane Elevator Company appeals.

The only questions presented for our consideration are whether appellee is entitled to a lien upon the property, and if so, is such lien prior and superior to the lien or claim of the Omaha Lumber Company. The undisputed facts are these: On the 20th day of March, 1889, the defendant Brown, the owner of the lot, being indebted to the Omaha Lumber Company in the sum of $18,000, executed and delivered to one R. W. Clayton, the secretary and treasurer of the Omaha Lumber Company, for its use and benefit a warranty deed on said lot to secure the payment of said indebtedness, which deed was duly recorded on the 9th day of December, 1889. The deed, though absolute on its face, was intended as a mortgage. In the month of February, 1880, the Crane Elevator Company entered into a contract with Brown for the placing of an elevator in the building on said lot. Work was commenced in March, but was not completed until July 21, 1890. The lien was filed September 29, 1890.

It is argued by counsel for appellee that as appellant failed to file its lien within sixty days from the completion

of the work it was not entitled to a lien. If Brown is to be regarded as a contractor merely, and not the owner of the premises, the argument would be unanswerable, for the statute requires a subcontractor to file with the register of deeds of the proper county a sworn statement of his claim for lien within sixty days from the performing of the labor or the furnishing of materials, machinery, or fixtures, in order to secure a lien therefor. Notwithstanding Brown had, prior to the making of the contract with appellant, executed an absolute deed to the property, yet, as it was not intended as an absolute transfer of the property therein described, but was given merely to secure a debt and was intended only as a mortgage, he was in equity the owner of the lot and could lawfully contract in his own name for the making of the improvement. It is a principle of law too well settled to justify a reference to the authorities, that a deed of real estate, absolute in form, executed, and intended as security for the payment of a sum of money is, in effect, only a mortgage and will be so considered as between the parties and all others having knowledge of the purpose for which it was given. Brown did not occupy the position of contractor with the holder of the equitable mortgage, but contracted with appellant in his own right as owner of the property, as he had a perfect right to do, and under the mechanic's lien law the Crane Elevator Company had four months from the completion of the work in which to file its claim for lien. It was filed in due time.

It is conceded, and such is undoubtedly the rule, that the lien of a mortgage is superior to a mechanic's lien for labor performed or materials furnished under a contract entered into after the recording of the mortgage, or where the laborer or material-man has actual notice of the existence of an unrecorded mortgage. In this case there is no proof showing that the Crane Elevator Company had actual notice that the deed executed by Brown was intended as a mortgage, or that the deed was in existence. It is

urged for appellant that the recording of the deed was insufficient to give constructive notice that it was intended as a mortgage, but that it was only notice of what it purported to be, an unconditional conveyance; in other words, that the recording of the deed was of no avail as against a subsequent incumbrance without actual notice of the real character of the transaction, and that the lien of appellant is prior and superior to the right of appellee. Counsel have cited in support of this position several decisions from the courts of other states, and also section 25 of chapter 73, Compiled Statutes, entitled "Real Estate," which declares that "Every deed conveying real estate, which by any other instrument in writing shall appear to have been intended only as security in the nature of a mortgage, though it be an absolute conveyance in terms, shall be considered as a mortgage; and the person for whose benefit such deed shall be made shall not derive any advantage from the recording thereof, unless every writing operating as a defeasance of the same, or explanatory of its being designed to have the effect only of a mortgage or conditional deed, be also recorded therewith, and at the same time." By this section, where a deed absolute on its face is given, which is intended only to take effect as a mortgage, and the mortgagee executes and delivers to the mortgagor a written defeasance, the registry of the deed without recording the defeasance is notice to no one of the rights of the holder of such a conveyance; that, although spread upon the records, it is to be regarded the same as an unrecorded mortgage so far as creditors and subsequent purchasers are concerned. Such is clearly the meaning of the section. Its provisions have no application to a case where there is no written defeasance to an absolute deed given as security for a debt or loan, but the contract to reconvey rests entirely in parol. Where, as in this case, the defeasance is a verbal one, obviously it cannot be recorded and the above section could not control. In such case the proper recording

of the absolute conveyance will fully protect the rights of the mortgagee. It being notice to the world of a greater interest than he has to the property, it certainly ought to be regarded as sufficient notice of his true interest therein. The record was notice at least that the grantee had some right or interest in the premises, and, had inquiry been made of him or the grantor, the true nature of the transaction would have been disclosed. We are aware that these views are not in harmony with the cases cited by appellant, but are believed to be supported by the weight of authority in this country. (Jones on Mortgages, sec. 548; *Kemper v. Campbell*, 44 O. St., 210; *Christie v. Hale*, 46 Ill., 117; *Marston v. Williams*, 47 N. W. Rep. [Minn.], 644; *Shaw v. Wilshire*, 65 Me., 485.)

Counsel for appellant have cited in their brief Wade on Law of Notice, which lays down the principle that instruments must be recorded in their true character to impart constructive notice; that an absolute deed, when intended as a mortgage, should be registered in the record of mortgages. This may be true, but we are not now called upon to determine the question, as it does not arise in this case. The cross-petition of the Omaha Lumber Company alleges that the deed in question was duly recorded in the office of the register of deeds of Douglas county on the 9th day of December, 1889. This averment is not denied by the answer of the Crane Elevator Company, nor is it controverted by the evidence, and it must be taken as true that the instrument was recorded in the proper record. Our conclusion is that the district court did not err in giving appellee the prior lien. The judgment is

AFFIRMED.

THE other judges concur.

D. E. JOHNSON v. WILBUR F. SWAYZE.

[FILED JUNE 30, 1892.]

1. **Errors:** WAIVER. The failure to except to the ruling of the trial court, to the admission or exclusion of testimony, is a waiver of the error.
2. **Pleading:** AMENDMENT DISCRETIONARY. The refusing of permission to amend a pleading in an action pending in the district court rests largely in the legal discretion of the court, and unless there has been abuse of such discretion which has deprived the party of a substantial right, this court will not interfere.

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

Brome, Andrews & Sheean, for plaintiff in error.

Balliet & Points, contra.

NORVAL, J.

The defendant in error brought suit in the district court against plaintiff in error upon a promissory note, of which the following is a copy:

"NEVADA, IOWA, June 25, 1888.

"One year after date I promise to pay to the order of Wilbur F. Swayze, at First National Bank, Nevada, Iowa, twelve hundred dollars, value received, with interest at the rate of eight per cent per annum until paid. If interest is not paid when due, the same shall bear interest at ten per cent; and if expense and costs are incurred by the holder in consequence of a failure to pay at maturity, the undersigned agrees to pay reasonable attorney's fees if suit is brought on this note.

"Due June 25, 1889.

"$1,200. D. E. JOHNSON."

The petition alleges that said note was executed and delivered by Johnson at Nevada, in the state of Iowa; that no part thereof has been paid except the sum of $78.22; that the laws of the state of Iowa, where said note was made and by its terms was payable, provides that attorneys' fees shall be allowed and taxed as costs on the amount found due at the rate of ten per cent on the first $200, five per cent on the next $300, three per cent on the next $500, and one per cent on all in excess of $1,000 so found due. It is further alleged that $52.40 is a reasonable attorney's fee in the case.

The answer is a general denial.

Upon the trial the court directed the jury to return a verdict for the plaintiff below for the face of the note and interest less the amount indorsed as above stated.

Two errors are assigned:

First—In admitting the note in evidence.

Second—In not granting the defendant time to prepare and file an amended answer.

The first objection urged must be overruled. The proper foundation for the introduction of the note was laid before it was offered in evidence by the testimony of the plaintiff, who testified to the defendant's signature and that the instrument was received by plaintiff at Nevada, Iowa. It is argued that while plaintiff declared upon a note executed in Iowa, the testimony received prior to the offer of the same in evidence shows that it was made at Omaha, in this state, therefore there was a fatal variance between the petition and proof. We are unable to find in the record any testimony to support this contention. Plaintiff was the only witness examined before the note was received in evidence, and if we have correctly read his testimony, it does not contain anything tending to show that the note was executed at a place different from that mentioned on its face. The instrument given in evidence corresponds in every respect with the copy set out in the petition. Be-

sides, it having been admitted without objection, error cannot be predicated thereon.

There was no abuse of discretion in the court refusing, after the commencement of the trial, to grant the defendant time in which to prepare and file an amended answer. He did not state to the court the facts he desired to set up in the proposed answer, but simply that the note was obtained by conspiracy and fraud. This was a mere conclusion, and was insufficient. No excuse was given for not pleading the facts constituting the fraud in the original answer. He must have known of the fraud at that time, if any existed, and he had ample time to plead all defenses before the trial, as the suit had then been pending for more than a year. He chose to rely upon a general denial, and yet upon the witness stand he admitted the execution and delivery of the note. True, he says he signed it at Omaha, but in our opinion it was quite immaterial where the note was made, for upon the trial the plaintiff did not seek to enforce it according to the laws of Iowa, but withdrew and waived his claim for attorney's fees.

The errors assigned are overruled and the judgment is

AFFIRMED.

THE other judges concur.

THE COUNTY OF LANCASTER ET AL., APPELLEES, V. ELLEN RUSH ET AL., APPELLANTS.

[FILED JUNE 30, 1892.]

1. **Tax Liens: FORECLOSURE BY COUNTY.** Under the statutes in force since February 15, 1877, a county treasurer is not compelled to seize and sell personal property of the taxpayer for real estate taxes before offering the realty.

2. ———: ———. The proviso clause of section 1, article IV, chapter 77, Compiled Statutes, restricting the foreclosure of tax liens by counties to cases where the amount due on the tax certificate exceeds the sum of $200, is inimical to the provisions of section 4, article IX, of the constitution, and is void.

3. ———: ———. Power is conferred upon counties to foreclose tax liens by sections 1 and 2, article V, chapter 77, Compiled Statutes.

4. **Demurrer:** A MISJOINDER of parties plaintiff is not a cause for demurrer.

5. **Tax Liens:** FORECLOSURE: IRREGULAR ASSESSMENT. In 1869 the town of L. was incorporated, and there was included in its boundaries certain agricultural lands not platted. Subsequently it was incorporated as a city of the first class, including the same unplatted lands, and the proper city authorities assessed the lands in question and levied taxes thereon for municipal purposes. The lands were subsequently sold for taxes, and a tax certificate was issued to the purchaser. In an action to foreclose the tax lien it was *held*, that the action of the county commissioners incorporating the town was not void, though the unplatted lands were included, and that the taxes in question were valid.

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

J. R. Webster, for appellant, cited: *Peet v. O'Brien*, 5 Neb., 362; *Johnson v. Hahn*, 4 Id., 139; *Pettit v. Black*, 8 Id., 59; *Lyman v. Anderson*, 9 Id., 378; *Miller v. Hurford*, 11 Id., 377; *Neb. City v. Gas Co.*, 9 Id., 346; Cooley, Taxation, 13, 359, 364; *Jones v. Robbins*, 8 Gray [Mass.], 339; *Campau v. City*, 14 Mich., 285; *Slauson v. Racine*, 13 Wis., 451; *State v. Dousman*, 28 Id., 547; *State v. Lancaster*, 17 Neb., 85; *Lathrop v. Mills*, 19 Cal., 514; *Att'y Gen'l v. Harris*, 19 Nev., 222.

R. D. Stearns, N. Z. Snell, G. M. Lambertson, H. J. Whitmore, A. W. Scott, and *Westermann, Low & Gould*, *contra*, cited: *Kittle v. Shervin*, 11 Neb., 67; *Wood v. Helmer*, 10 Id., 68; *Turner v. Althaus*, 6 Id., 54; *Clother v.*

Maher, 15 Id., 6; *Otoe Co. v. Brown*, 16 Id., 400; *Davey v. Dakota City*, 19 Id., 724; *Stuart v. Kalamazoo*, 30 Mich., 69; *People v. Maynard*, 15 Id., 463; *Shumway v. Bennett*, 29 Id., 452; *S. Platte Land Co. v. Buffalo Co.*, 15 Neb., 605; *Blanchard v. Bissell*, 11 O. St., 96; *People v. Carpenter*, 24 N. Y., 86; *Powers v. Co. Com'rs*, 8 O. St., 285; *Kountz v. Omaha*, 5 Dill. [U. S.], 443; *Mathis v. Boggs*, 19 Neb., 698; *Lawton v. Steel*, 7 L. R. A. [N. Y.], 134; *State v. Tuttle*, 53 Wis., 45; *Santo v. State*, 2 Ia., 165; *Robinson v. Bidwell*, 22 Cal., 379; *Muldoon v. Levi*, 25 Neb., 457.

NORVAL, J.

On the 22d day of May, 1884, lot 6, in block 3, in Lavender's addition to Lincoln, now part of lots 16 and 17, in block 3, McMurtry's addition to Lincoln, was purchased by the county commissioners for the delinquent taxes due thereon for the years 1870, 1881, and 1882, and for city taxes for the years 1872 and 1875, amounting to $11.27, including interest and penalty, and a tax certificate was duly issued. This suit was brought by the appellees to foreclose the tax lien. The petition contains a table of the items of county and state taxes, and of city tax of each year, and alleges that the sum due is $27.42. A motion was filed to strike out of the petition all items of tax of the year 1872 and prior years, which was overruled and defendants excepted. To the petition a demurrer was filed that:

1. The petition does not state a cause of action.
2. That the claim does not amount to $200.
3. That parties plaintiff are improperly joined.
4. Because no part of the tax is paid by either of plaintiffs.

This demurrer being overruled, the appellants answered, pleading three defenses:

1. That the claim is less than $200.

2. That plaintiffs are improperly joined.

3. That the city tax is invalid, because Lavender's addition was not legally within the corporate limits of the city of Lincoln at the time the city taxes were levied on said lot.

There was a demurrer to the first and second defenses, which was sustained and defendants excepted, and to the third defense the plaintiffs replied by a general denial. The cause was tried to the court, and judgment was rendered for the plaintiffs for the full amount claimed in the petition.

The defendants' motion to strike out of the petition all items of taxes levied prior to and including the year 1872 was properly denied. The basis of the motion is that the taxes for said years were levied under a statute requiring county treasurers to seize and sell personal property for real estate taxes, and the petition omits to allege an attempt and failure to make the tax by distress and sale of chattels. The provisions of sections 49 and 50 of the revenue law, approved February 15, 1869, and amended June 6, 1871, making it necessary to exhaust the personal property by distress and sale before the realty should become liable for the taxes assessed upon it, were repealed by an act of the legislature of this state, approved February 15, 1877. (Session Laws 1877, p. 43.) This act took effect prior to the sale of the real estate for taxes, May 22, 1884, and the failure of the appellees to allege an attempt to collect the tax by distress of goods is immaterial. Since the taking effect of the repealing act a county treasurer is not compelled to seize and sell the personalty of the taxpayer for real estate taxes before selling the real estate. (*Kittle v. Shervin*, 11 Neb., 65; *State v. Cain*, 18 Id., 631.)

It is urged that the petition did not allege a cause of action, because the amount claimed to be due upon the tax certificate does not amount to $200. The precise question was before the court in *County of Lancaster v. Trimble*, 33 Neb., 121, decided at the present term, and the same

case upon rehearing, 34 Neb., 752, and it was held that the proviso clause of section 1, article 4, chapter 77, Compiled Statutes, restricting the foreclosure of tax liens by counties to cases where the amount due on the tax certificate exceeds the sum of $200, is inimical to the provisions of section 1, article 9, of the constitution. The conclusion there reached is sound. The constitution requires that all the taxable property in the state shall contribute its proportionate share of taxes, and prohibits the legislature from releasing the property of an individual from the taxes imposed thereon. The only remedy for the enforcement of the collection of the tax levied on the real estate in question is by foreclosure proceedings, and if such action cannot be maintained because the amount due is less than $200, then said real estate is released from said taxes, and an increased burden will necessarily fall upon other property. We adhere to the conclusion of the court announced in the second hearing of *Lancaster County v. Trimble, supra*, to the effect that in addition to the special provisions of statute providing for the foreclosure of a tax lien by a county, the power is conferred by sections 1 and 2, article 5, chapter 77, Compiled Statutes.

The third point of the appellants' demurrer to the petition was rightly overruled. A misjoinder of parties plaintiff is not a cause for demurrer. (*Davey v. Dakota Co.*, 19 Neb., 721.) The city of Lincoln had an interest in the amount due on the tax certificate to the extent of the unpaid delinquent city taxes against the lot. Under section 40 of the Civil Code all persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiff." It was not necessary, however, that the city should be made a party plaintiff. The action could have been prosecuted in the name of the county to collect the entire delinquent taxes levied for state, county, school district, municipal, and other purposes. In such case the county treasurer, when the money

is collected, is required to account and pay over to the state treasurer, school district treasurer, and city treasurer the proportion of the amount actually received due each. The city of Lincoln being a party to the suit, the court found what portion of the whole amount was due it. The appellants were not prejudiced thereby.

It is finally urged that the city tax imposed upon this lot is void, for the reason that the lot was not at the time within the limits of the city of Lincoln, and therefore was not properly taxable for municipal purposes. On the 7th day of April, 1869, the county commissioners of Lancaster county, upon a petition presented them for that purpose, incorporated the town, now city, of Lincoln, which included in its boundaries the east half of the northwest quarter of section 25, town 10 north, range 6 east. This tract in 1869 was occupied by the owner as a farm. It had not yet been platted or subdivided, nor was it used for urban purposes. Subsequently, on the 22d day of April, 1869, the owner of the land made, executed, and filed for record a plat known as Lavender's Addition to Lincoln, which included a portion of said tract. Lots were subsequently conveyed in said addition by Luke Lavender, the proprietor, with reference to that plat. The lot on which the tax which is in controversy in this suit was in the said east half of the northwest quarter of section 25.

Counsel for appellants contend that said tract was not legally taken into the corporate limits, for the reason that the commissioners had no authority to take into the boundaries of the town ground in excess of ten acres not platted or subdivided nor used for urban purposes, and for that reason the tax was unauthorized and void. The same question was passed upon by this court in *McClay v. City of Lincoln*, 32 Neb., 412; and it was held that the action of the county commissioners incorporating the town of Lincoln was not void, although lands not platted, but used for agricultural purposes, were included in the boun-

daries of the corporation, and that where the proper authorities of Lincoln have assessed and levied taxes on such unplatted lands for municipal purposes, which were subsequently paid by the owners under protest and notice, an action could not be maintained by them to recover the taxes thus paid. The question was carefully considered in that case, and numerous precedents are cited which sustain the conclusion reached. The decision is authority for holding that the city taxes involved in this case are valid. The judgment of the district court is

AFFIRMED.

THE other judges concur.

JOHN I. REDICK, APPELLANT, V. CITY OF OMAHA, APPELLEE.

[FILED JULY 1, 1892.]

Special Assessments: INJUNCTION. In an action to enjoin certain special assessments for the improvement of a public street, *held*, that neither the pleadings nor proof presented a case to entitle the plaintiff to relief.

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

W. A. Redick, for appellant:

The mode of levying the tax (according to benefits) is the measure of the power, and if levied in any other mode it is unauthorized and void. (*Zottman's Case*, 20 Cal., 102; *Paving Co. v. Painter*, 35 Id., 699; *Murphy v. Louisville*, 9 Bush [Ky.], 189.) This assessment is void, because based on the *cost* of the work, and not on special benefits

assessed and apportioned. (*Johnson v. Milwaukee*, 40 Wis., 315; *Watkins v. Zwietusch*, 47 Id., 513; *Hanscom v. Omaha*, 11 Neb., 37; *Thomas v. Gain*, 35 Mich., 156.) An assessment by foot-frontage rule has been held void, as not according to benefits. (*State v. Hudson*, 5 Dutch. [N. J.], 104; *State v. Bergen*, 1 Zabr. [N. J.], 342; *State v. Jersey City*, 4 Id., 662; *State v. Passaic*, 8 Vroom [N. J.], 65; *Cronin v. Jersey City*, 9 Id., 410; *St. John v. E. St. Louis*, 50 Ill., 92.) An assessment by the foot-front rule cannot be sustained upon rural lot or land. (*Cleveland v. Tripp*, 13 R. I., 61; *Kaiser v. Weise*, 85 Pa. St., 366; *Perry v. Little Rock*, 32 Ark., 31; *State v. Dist. Court of Ramsey Co.*, 29 Minn., 62; *Masters v. Scroggs*, 3 M. & S. [Eng.], 447; *Stafford v. Hamston*, 2 B. & B. [Eng.], 691.)

A. J. Poppleton, contra:

The determination of the board of equalization as to the method of assessment is exclusively within its jurisdiction. (*Teegarden v. Racine*, 14 N. W. Rep. [Wis.], 614; *Lent v. Tilson*, 14 Pac. Rep. [Cal.], 71; *Paulson v. Portland*, 19 Pac. Rep. [Ore.], 155; *Hunt v. Rahway*, 39 N. J. L. 646; *Little Rock v. Katzenstein*, 12 S. W. Rep. [Ark.], 199.) A foot-front assessment, where the benefits are found by the board of equalization of the council to be equal and uniform, is expressly authorized by section 42 of the charter. (*O'Reilly v. Kingston*, 21 N. E. Rep. [N. Y.], 1004; *McCormick v. Harrisburg*, 18 Atl. Rep. [Pa.], 126; *Winona Co. v. Watertown*, 44 N. W. Rep. [S. Dak.], 1072; *Wilber v. Springfield*, 14 N. E. Rep. [Ill.], 871; *Davis v. Lynchburg*, 6 S. E. Rep. [Va.], 230.) Equity will not interfere to enjoin the collection of a tax unless some special reason is shown affecting the validity of the assessment or unless the tax sought to be enjoined was not authorized. (Cooley, Taxation, 536; *Hannewinkle v. Georgetown*, 15 Wall. [U. S.], 548; *Kellogg v. Oshkosh*, 14 Wis., 678; *Dodd v. Hartford*, 25 Conn., 232; *Arnold v. Middleton*,

39 Id., 401; *Loud v. Charlestown*, 99 Mass., 209; *Whiting v. Boston*, 106 Id., 350; *Page v. St. Louis*, 20 Mo., 136; *Marsh v. Brooklyn*, 59 N. Y., 280.) Appellant had a legal remedy under the statutes by paying his tax under protest and bringing an action to recover it back. Having failed to avail himself of this, he has no standing in a court of equity. (*Adsit v. Lieb*, 76 Ill., 198; *Peoria v. Kidder*, 26 Id., 351; *Archer v. Terre Haute*, 102 Id., 493; *Andrews v. Rumsey*, 75 Id., 598.) Appellant does not, in his petition, tender or deposit the amount of the assessment admitted to be due, therefore he has no standing in a court of equity. (*Barker v. Omaha*, 16 Neb., 271; *Hallenbeck v. Hahn*, 2 Id., 426; *Wood v. Helmer*, 10 Id., 75; *Hunt v. Easterday*, 10 Id., 165; *Boeck v. Merriam*, Id., 201.)

MAXWELL, CH. J.

This action was brought by the plaintiff against the defendant to enjoin the collection of certain special taxes assessed against the property of the plaintiff described in the petition, on the ground that said assessment was unconstitutional and void. Issues were joined and on the trial of the cause the court made special findings as follows:

"The evidence is quite meager, but it sufficiently appears therefrom, and from the pleadings, that the tax in question was levied according to foot-frontage, upon property along a portion of Farnam street, to pay for one-half of the expense of certain grading in front of plaintiff's property. The tax was at the rate of about $1.68½ per front foot upon a strip 132 feet deep of the tract in question, which had not been divided into lots and blocks. The tract was a little less than 600 feet square; the frontage being about 586 feet, and the taxes being $9,561.82.

"Second—There was no attempt to show by proofs that as a fact this exceeded the special benefits conferred upon plaintiff's property by the grading, or was more in proportion to such benefits than the tax upon other property

similarly benefited. The case rests upon the theory that a tax by foot-frontage is unconstitutional, illegal, and arbitrary, and therefore void. In this case the board of equalization and council determined that the rule was just, and there is no evidence to the contrary. The record does not show that the plaintiff made any complaint, at the time, against the apportionment of the expenses; or that his property was charged with more than its just share. (See 10 Neb., 216; 11 Id., 75; Id., 347.)

"Facts of which the court may take judicial notice regarding the boundaries, situation, and progress of the city, at and subsequent to the time in question, refute the theory of the petition, that the premises were mere agricultural lands, unsusceptible of benefits from municipal improvements. It is within the common knowledge that these extend far beyond its boundaries, in all directions, into populous wards, and districts of elegant and costly residences, and high priced city property. The plaintiff makes no offer to pay any portion of the tax, or grading expense, but stands upon the proposition that the tax was a nullity. If that were so, the court, under the circumstances, might properly leave him to his legal remedies for resisting it, or defending against any title or lien set upon it. (See 16 Neb., 269, and numerous cases holding that he who seeks equity must do equity.) The action must be dismissed for want of equity at plaintiff's cost."

The court thereupon dismissed the action for want of equity.

The pleadings and evidence tend to show that the assessment was substantially correct, and fail to show any ground for equitable relief on behalf of the plaintiff. He waited until the improvement was made, without raising any objections to the improvement itself or the mode of assessment, and the proof fails to show that the rule adopted is inequitable. The plaintiff fails also to offer to pay the amount justly due for such improvement, and therefore does

not commend himself to a court of equity. There is no material error in the record and the judgment is

AFFIRMED.

THE other judges concur.

WILLIAM M. POWERS v. JACOB E. HOUSE.

[FILED JULY 1, 1892.]

Review. *Held*, That there is no material error in the record.

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

A. C. Wakeley, for plaintiff in error.

A. N. Ferguson, and *Winfield S. Strawn, contra.*

MAXWELL, CH. J.

The plaintiff in the suit below was Jacob E. House. The defendants were George R. Scougal, Martin P. Ohlman, William M. Powers, Miles T. Wooley, and F. M. Ziebach, of whom Powers only was served. The plaintiff House is a civil engineer, and resides in the city of Omaha. The defendants constituted a committee appointed at a meeting of the citizens of Yankton, Dakota, and resided in Yankton. This committee was appointed for the purpose of supervising and taking charge of a survey of a proposed line of railroad from Yankton to Sioux Falls, in the then territory of Dakota.

The petition alleges, in substance, the employment of the plaintiff by this committee at a salary of $200 per month and expenses; that the plaintiff commenced work about

September 23, 1887, and continued in it until the middle of November, 1887; that thereby there became due him $400 for his services; that his fares and expenses incurred in the prosecution of the work amounted to $91.85; that he was paid upon account $200, and that there is due him $291.85 with interest.

The answer upon behalf of Mr. Powers, the only defendant upon whom service was had, sets up the following defenses:

"First—That the plaintiff House was hired by the committee, to be paid at the rate of $200 per month, the plaintiff agreeing to find and run a good practicable line for the proposed road, and also, in consideration of being allowed to be absent from the field of operations when not needed, he would at all other times be present for the carrying on of the work, and would devote such time, attention, and skill to the making of the survey as might be necessary and requisite; that the plaintiff entered upon the prosecution of his work September 26, 1887, and upon November 2, 1887, was notified by the committee that his services were no longer needed."

The answer then sets up the law of Dakota relating to the limited obligation of a party acting as agent.

As a further defense and as a counter-claim it is alleged in answer that the plaintiff House was frequently, for days together, absent from the field of operations on the survey when his assistance and skill were needed for the proper carrying on of the work; that the plaintiff so negligently and carelessly did his work that it was of no value whatever; that the line projected by the plaintiff was never used, and that the amount expended in the survey, to-wit, over $800, was lost to the defendants, and that the entire work had to be done over at great expense to the defendants.

In reply the plaintiff denies that he was hired in the city of Yankton, but insists that the contract was made in the city of Omaha by one J. H. Teller, representing the com-

mittee. The plaintiff also denies the allegations of the answer, setting up the Dakota statute as to the liability of agents. The plaintiff also denies that he negligently or unskillfully performed the work, or that the defendants have suffered damages to the extent of $800, or any other sum. The plaintiff then sets up that the line that he was hired to run was only a preliminary line, and if not used by the defendants it was not his fault.

On the trial of the cause the jury returned a verdict in favor of House for the sum of $327, upon which judgment was rendered.

The testimony tends to show the following in regard to the contract between House and the defendants. The citizens of Yankton had for some time been desirous of building a railroad from the city of Yankton, Dakota, to the city of Sioux Falls, Dakota, a distance of about seventy miles. With this end in view, a public meeting of the citizens of Yankton was held, money was raised by subscription, and a committee comprising five of the representative citizens of that place was appointed. The duty of this committee was to provide for a survey of the proposed railroad and to disburse the funds collected at the meeting for carrying on the project. The country which it was proposed the new railroad should traverse between the points spoken of was, in part, rough and hilly, and presented in places points of difficulty as to grade, and in general was of such a nature as to require the skill and experience of an expert civil engineer; that one of the principal inducements to the making of the proposed road lay in the fact that it was to be adopted and used by the St. Paul, Minneapolis & Manitoba Railroad Company. To meet the requirements of the latter road it was necessary that the new road should have no grades exceeding thirty feet to the mile. For these reasons the services of an engineer skilled in the location of a railroad were absolutely necessary. At the request of the committee and in fact constituting a member of

it, Mr. J. H. Teller, mayor of the city, was deputized to go to Omaha, ascertain whether he could procure an engineer competent for the work proposed, acquaint him with the salient points to be obtained, ascertain the terms upon which the work could be done, and report the result of his investigations to the committee at Yankton. In the performance of this, Mr. Teller came to Omaha and consulted two engineers, one of whom was Mr. House. He acquainted House with the object of his visit, told him that the committee having the matter in charge had sent him to procure a locating engineer, that the road would be adopted by the Manitoba Railroad Company, and that its grades must not exceed thirty feet to the mile. The terms of payment were discussed. The terms proposed by House were $200 a month for such portion of his time as he might actually be needed in the field. House explained to Teller that upon the level prairie no locating engineer would be needed, and that he thought it would be practicable to run the survey in the manner indicated; that is, House only to be in the field a portion of the time, and to be allowed to return to Omaha when not actually needed on the line. House explained that were he to give his entire time to the work he would charge $25 per day, but if he gave only divided time to the work he would undertake it for $200 per month. Mr. Teller inquired of Mr. House, what experience in general he had had in the location of railroads. Mr. Teller informed Mr. House that he was not authorized to close the contract but would return to Yankton, report their conversation to the committee, and if he was wanted upon the terms indicated, to-wit, $200 per month and divided time, he would notify him. Mr. Teller returned to Yankton and submitted to the committee the proposition made by House, the committee accepted it, and Mr. Teller was directed to so notify Mr. House, which he did. The letter is set out in the record and need not be further noticed. It is unnecessary to review the testimony at length.

The defendant in error did not guarantee a line whose grade should not exceed thirty feet to the mile, and there is no proof that such a line could be obtained. He seems to have done all that was required of him as far as he was able. Even if we should hold that the contract was made in Dakota, still it would not alter the rights of the parties, as there seems to be no proof that the plaintiff in error acted as agent for any one in this transaction. Upon the whole case there is no material error in the record and the judgment is

AFFIRMED.

THE other judges concur.

MARTIN ITTNER V. WILLIAM T. ROBINSON ET AL.

[FILED JULY 1, 1892.]

1. **Appeal:** IDENTITY OF ISSUES. Where a cause has been appealed to the district court and an amended petition filed which contains the same cause of action set forth in the court below, but the facts are set out more in detail, a motion to strike the new matter from the petition *held* to be properly overruled.
2. **Lease:** CONTRACT BY LESSEE TO PAY TAXES DOES NOT INCLUDE SPECIAL ASSESSMENTS. While in a general sense the word "taxes" includes special assessments, and special assessments are made under the taxing power, yet there is a clear distinction between the two; special assessments are a peculiar class of taxes which are laid upon property benefited according to some equitable rule, while taxes, as generally understood, mean the burdens imposed by the government for state, county, city, township or school district purposes; in other words, the money necessary to defray the expenses of government. A promise by a lessee of real estate to pay all taxes upon the property does not apply to special assessments for the construction of a sewer.

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

Winfield S. Strawn, for plaintiff in error, cited: *Cassady v. Hammer*, 62 Ia., 359; *In re Mayor*, 11 Johns. [N. Y.], 77; *Blake v. Baker*, 115 Mass., 188; *Love v. Howard*, 6 R. I., 116; *Municipality v. Curell*, 7 La., 203; *Beals v. Rubber Co.*, 11 R. I., 381.

Switzler & McIntosh, contra, cited: *Second Universalist Soc. v. Providence*, 6 R. I., 235; *In re College St.*, 8 Id., 474; *In re Dorrance St.*, 4 Id., 230; *Jeffrey v. Neal*, 6 L. R., C. P. [Eng.], 240; *Tidswell v. Whitworth*, 2 Id., 326; *Barrett v. Duke of Bedford*, 8 Term Rep. [Eng.], 602; *W. & St. P. R. Co. v. Watertown*, 44 N. W. Rep. [S. Dak.], 1072; *R. Co. v. Lynchburg*, 81 Va., 473; *Norfolk v. Ellis*, 26 Gratt. [Va.], 224; *King v. Portland*, 2 Ore., 156; *Manning v. Klippel*, 9 Id., 373; *Inhabitants v. Morton*, 25 Mo., 593; *Weeks v. Milwaukee*, 10 Wis., 242; *Hill v. Higdon*, 5 O. St., 243; *Twycross v. R. Co.*, 10 Gray [Mass.], 293; *Blake v. Baker*, 115 Mass., 188.

MAXWELL, CH. J.

This action was brought by the plaintiff against the defendant to oust the defendant from the possession of certain real estate. A demurrer to the petition was sustained and the action dismissed. The petition is as follows:

"Now comes Martin Ittner, guardian of the minor heirs of Benjamin Ittner, deceased, and states that he is such guardian and duly qualified as such, and that he was formerly the administrator of Benjamin Ittner, deceased, and for complaint against the defendants William T. Robinson and ——— Hardin, real name unknown, and Hardin & Robinson states that * * * the minor heirs of Benjamin Ittner, deceased, * * * are as follows: Horace H. Ittner, Ernest A. Ittner, and Henrietta Maud Ittner.

"Plaintiff states that said minors are seized in fee-simple of an interest in nine acres of land, more or less, in the northwest quarter of the southwest quarter of section

10, in township 15 north, of range 13 east, with the appurtenances thereunto belonging, and numbered as lot 55 for taxable purposes, but not including the brick house and about two acres of land occupied by Mrs. Ittner, wife of deceased, in 1881, all in Douglas county, state of Nebraska, and avers that they are entitled to the possession thereof. Plaintiff says that on or about the 23d day of March, 1881, plaintiff, who was their said administrator, leased said premises to one Edward Reed for the term of twelve years, which lease has since been assigned by said Edward Reed to the defendants, who entered into the possession thereof, and are now in possession. Plaintiff says that in said lease are found the following conditions, which plaintiff claims are binding upon defendants, as follows, viz.: 'And the said Edward Reed, in consideration of the leasing aforesaid, doth agree to pay as rent for said premises the sum of $150 per annum, payable semi-annually in advance, for the period as aforesaid, together with all taxes that may be assessed against said premises during the continuance thereof.' It was further provided in said lease that it is agreed that the estate shall not be liable for the costs of any improvements or repairs put upon the place, or for any damage for opening streets through the premises by the city or otherwise. It was further provided in said lease that it is expressly agreed and understood by and between the parties hereto that in case the rent above reserved, or any part thereof, be not paid at the time the same becomes due and payable, or if any other condition or agreement herein contained on the part or behalf of the said Edward Reed be not by him fully complied with and performed, then and in that case the said Ittner, or his successors in authority, shall have the right, at his option, to declare this lease at an end and thereby cancel and annul the same and retake immediate possession of said premises and to put out and remove any person occupying the same. It was also provided in said lease that the cov-

enants and agreements in this lease shall succeed to and be binding upon the respective heirs, executors, administrators, and assigns of the parties hereto. Plaintiff says said lease was recorded the same day of its execution and delivery, in the office of the county clerk of said county, and before the assignment thereof from said Reed to defendants.

"Plaintiff says that the sewer tax in district No. 79 of the city of Omaha has been assessed and levied on the said premises and became delinquent on February 3, 1889, and is still due and unpaid, and plaintiff has requested the defendants to pay the same, but they have failed and refused so to do, and now refuse so to do, being liable therefor, as plaintiff claims, under the covenants in said lease contained as above set forth. Plaintiff says that on or about August 31, 1889, he notified the defendant Robinson personally that unless that tax was paid by said defendant, that he should cancel the lease and take possession of said premises; that said defendants have refused to pay said tax, after said Harding has promised to do so, and by reason of the premises they now, and at the commencement of this suit, unlawfully and forcibly hold over their term.

"Plaintiff says that on the 31st day of August, 1889, plaintiff served upon the defendant a notice, in writing, to leave the said premises. Plaintiff says said taxes are a lien on said premises. Plaintiff asks restitution of said premises and costs of suit."

A motion was made to strike out certain parts of the petition upon the ground that this being an appeal case it must be tried substantially upon the same issues as in the court below. The matter objected to does not change the cause of action. It is simply a more detailed and definite statement of the facts on which the plaintiff bases his claim for relief. This, in certain cases, is admissible. The motion therefore was properly overruled.

Second—The principal contention of the plaintiff is, that

the provision in the lease, that the lessee or his assignee should pay "all taxes that may be assessed against said premises during the continuance" of the lease, includes special assessments.

Judge Cooley says: "Special assessments are a peculiar species of taxation, standing apart from the general burdens imposed for state and municipal purposes, and governed by principles that do not apply generally. The general levy of taxes is understood to exact contributions in return for the general benefits of government, and it promises nothing to the persons taxed, beyond what may be anticipated from an administration of the laws for individual protection and the general public good. Special assessments, on the other hand, are made upon the assumption that a portion of the community is to be specially and peculiarly benefited, in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds; and in addition to the general levy, they demand that special contributions, in consideration of the special benefit, shall be made by the persons receiving it." (Cooley on Taxation, 416.)

He also says: "Some of the cases assume the narrow ground that the constitutional provisions refer solely to state taxation, or that, if they go further to the general taxation for state, county, and municipal purposes, but the view generally expressed is, that though assessments are laid under the taxing power, and are in a certain sense taxes, yet that they are a peculiar class of taxes, and not within the meaning of that term as it is usually employed in our constitutions and statutes. Others are rested on both reasons. (Id., 436.)

A leading case on this question is *Matter of the Mayor, etc., of N. Y.*, 11 Johns. [N. Y.], 77. In that case, the statute of New York exempted churches or places of public worship from being taxed by any law of the state. It was held that this exemption applied only to general and public

taxes and did not include assessments of the benefit resulting to the property from opening and enlarging public streets.

In *Bleecker v. Ballou*, 3 Wend. [N. Y.], 263, a tenant took a lease of certain real estate for twenty-one years and covenanted "to pay all taxes, charges, and impositions" which could be imposed upon the demised premises during the term. It is said "there is no doubt the assessment in question is not a tax, that being a sum imposed as is supposed for some public benefit." It was held, however, that the words "charges and impositions" included assessments, and hence that the lessee was liable for the same. The question was very ably reviewed by the supreme court of South Dakota in *Winona, etc., R. Co. v. City of Watertown*, 44 N. W. Rep. [S. D.], 1072. In that case a territorial statute exempted the property of the railway from "all taxation." It was held that the real estate of the company was not thereby exempted from an assessment for local municipal improvement, and that such an assessment was not taxation within the meaning of the grant.

It will be conceded that the power to levy special assessments is derived from the taxing power of the government, but the word "taxes" without more is not generally understood to include assessments. In the case at bar the defendants agreed to pay a certain amount of rent semi-annually, and to pay the taxes upon the property. Had the parties intended that the defendants should pay for the construction of a sewer or other improvements which would greatly enhance the value of the property, no doubt they would have so provided. In our view, the agreement to pay taxes included simply the ordinary taxes upon the property, and did not include special assessments for the construction of sewers. The judgment of the district court is right and is

AFFIRMED.

THE other judges concur.

WEEPING WATER ELECTRIC LIGHT CO. V. J. H. HALDEMAN ET AL.

[FILED JULY 1, 1892.]

1. **Jurors**: MOTION TO QUASH PANEL: VERIFICATION. A motion to quash the panel of jurors, because not drawn in proportion to the number of electors of the several precincts of a county, was verified by the attorney upon mere belief. *Held*, Not sufficient to justify the court in quashing the panel.

2. ———: ———: WAIVER. After the jury was called into the box the attorney who had filed objections to the panel waived all objections to the jury, and also his peremptory challenges. *Held*, A waiver of objections that the jury was not properly drawn.

3. **Review.** The verdict and judgment conformed to the proof, and are affirmed.

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

H. D. Travis, for plaintiff in error, cited: *Bohanan v. State*, 15 Neb., 211; *Gardner v. Turner*, 9 Johns. [N. Y.], 261; *Price v. McComas*, 21 Neb., 195; *Grimes v. Cannell*, 23 Id., 187; *Cole v. Kerr*, 19 Id., 553; *Stonebraker v. Ford*, 81 Id., 532; *Elder v. Miller*, 60 Me., 118; *Bank v. Farrer*, 46 Id., 293; *Gray v. Currier*, 62 Ia., 535; *Tootle v. Lyster*, 26 Kan., 589; *Golden v. Cockril*, 1 Id., 259; *Ellis v. Martin*, 60 Ala., 394; *Bowers v. Andrews*, 52 Miss., 596; *Winter v. Landphere*, 42 Ia., 471; *Tindall v. Wasson*, 74 Ind., 496; *Beall v. White*, 94 U. S., 382; *Steavens v. Pence*, 56 Ia., 257; *Argues v. Wasson*, 51 Cal., 620; *Ludwig v. Kipp*, 20 Hun [N. Y.], 265; *Reed v. Carpenter*, 20 O., 88; *La. State Bank v. Senecal*, 13 La., 525; *Natl. Bank v. Norton*, 1 Hill [N. Y.], 572; *Washington Bank v. Lewis*, 22 Pick. [Mass.], 24; *Black v. Winterstein*, 6 Neb., 225.

J. H. Haldeman, contra, cited: *Clark v. Saline Co.,* 9 Neb., 522; Jones, Chat. Mort., sec. 65; *Peters v. Parsons,* 18 Neb., 191; *Jordan v. Bank,* 11 Id., 503.

MAXWELL, CH. J.

This is an action in replevin brought by the plaintiff against the defendants to recover the possession of "one dynamo, one exciter, one engine, two reostats, one volt meter, one ampere meter, one lightning arrester, six switches, one ground director, together with all wires, sockets, lamps, poles, cross-arms, insulators, cleats, copper brushes, and belts, and all attachments and regulating instruments whatsoever belonging to the Weeping Water Electric Light Plant." The property was taken possession of by the plaintiffs under the order of replevin, and on the trial of the cause the jury returned a verdict in favor of the Westinghouse Electric Company as follows: "We, the jury, duly impaneled and sworn in the above entitled cause, do find that at the commencement of this action the Westinghouse Electric Company, defendant, was entitled to the possession of the property in question, and we find the value of such possession to be the sum of $2,897.26; we further find and assess the said defendant's damages for the detention of said property in the sum of $——." A motion for a new trial having been overruled, judgment was entered in favor of the Westinghouse Electric Company for the possession of the property, or in case such property could not be returned, the value thereof, to-wit, the sum of $2,897.26 and costs, and the case as to Haldeman was dismissed.

The first error relied upon by the plaintiff is the overruling of the motion to quash the panel of petit jurors. The motion is as follows:

"Comes now the plaintiff, by its attorney, and objects to the panel of petit jurors drawn for the March term, 1891,

of the district court of Cass county, for the following reasons, to-wit:

"First—The panel was selected on the basis of the total vote of Cass county cast at the general election in 1889, which was 4,376, whereas the panel should have been selected on the basis of the general election of 1890, held in November of said year, the total of which vote was 5,145. The following table shows the jurors as drawn and as they should have been drawn, which shows that the jurors are not distributed among the several precincts as nearly as may be, as required by section 658 of Civil Procedure:

Vote of 1890.....4,376
Vote of 1891.....5,145

PRECINCT.	Vote of 1890.	Jurors March Term, 1891.	Correct No. Jurors.	Errors.
Tipton	245	3	3	.....
Greenwood	195	3	2	1
Salt Creek	237	3	3	.....
Stove Creek	286	3	3	.....
Elmwood	221	2	3	1
South Bend	167	2	2	.....
Weeping Water Pr.	161	2	2	.....
Center	189	3	2	1
Louisville	223	3	3	.....
Avoca	227	2	3	1
Mt. Pleasant	167	2	2	.....
Eight Mile Grove	242	3	3	.....
Liberty	375	4	4	.....
Rock Bluffs	318	3	4	1
Plattsmouth Pr.	285	3	3	.....
W. W. City, 1st Wd.	116	1	1	.....
W. W. City, 2d Wd.	126	1	1	.....
W. W. City, 3d Wd.	74	1	1	.....
Platts. City, 1st Wd.	242	3	3	.....
Platts. City, 2d Wd.	304	4 less 1	4 less 1	.....
Platts. City, 3d Wd.	316	4	4	.....
Platts. City, 4th Wd.	290	4	3	1
Platts. City, 5th Wd.	139	1	2	1
	5,145	61	67	.....

"Second—One Maurice O'Rourke was called to fill a vacancy in regular panel caused by absence of regular juror; he having been a member of the regular panel within two years prior to this time and not eligible as a juror; and further, that the sheriff failed to summon C. O. Cole, of Plattsmouth precinct, through a mistake of the name, the name being S. O. Cole instead of C. O. Cole; that Plattsmouth precinct is not represented by the number of jurors to which it is entitled. The aforesaid panel does not constitute a legal jury within the meaning of the statute for the reasons aforesaid, and the plaintiff objects to going to trial at this time and moves to quash the panel.

"H. D. TRAVIS,
"*Att'y Pl'ff.*

"STATE OF NEBRASKA, } ss.
CASS COUNTY. }

"H. D. Travis, being first duly sworn, deposes and says that he is attorney for plaintiff in above entitled cause, and that the facts stated in the foregoing instrument are true, as he verily believes. H. D. TRAVIS."

"Subscribed in my presence and sworn to before me this 6th day of March, A. D. 1891.

"[SEAL.] J. M. LYDA,
"*Notary Public.*"

It will be observed that this motion is verified upon belief of the attorney. The Code permits ordinary pleadings to be verified upon information and belief. The object is to appeal to the conscience of the pleader and thereby obtain a truthful statement of the facts. When, however, the pleading is to be used as an affidavit as well as a pleading it must be verified positively. The evidence is not sufficient therefore to warrant the court in setting aside the panel of jurors.

Second—The evidence shows that the attorney of the plaintiff in error afterwards waived all objections for cause to the jurors called to try the case and also his peremptory

challenges. This, in our view, is a waiver of challenge to the array, even if it had been properly made.

Third—The testimony shows that on the 3d day of December, 1889, J. P. Smith and J. H. Bellows executed a chattel mortgage upon the property in question for part of the purchase price of said property to the Westinghouse Electric Light Company; that no part of said debt was paid; that about that time the plaintiff company organized and claims to have purchased the property in question. It is sufficient to say that if it did so purchase it, it did so with knowledge of the Westinghouse claim and mortgage, and is in no sense an innocent purchaser. The judgment is the only one that should be rendered upon the evidence and is

AFFIRMED.

THE other judges concur.

NEBRASKA RY. CO., APPELLANT, V. HELEN CULVER ET AL., APPELLEES.

[FILED JULY 1, 1892.]

1. **Statute of Limitations.** *Held*, That the statute of limitations had not run in favor of the plaintiff.
2. **Res Adjudicata.** That the question involved had already been determined in the case of *Hull v. C., B. & Q. R. Co.*, 21 Neb., 371; S. C., 24 Id., 740.

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

Chas. E. Magoon, for appellant, cited: *Deerfield v. Conn. Riv. R. Co.*, 144 Mass., 338; *Mueller v. Fruen*, 36 Minn., 274; Gould, Waters, sec. 329; Angell, Water-

courses, sec. 203 *et seq.;* Washburn, Easements, 84; *Haight v. Price,* 21 N. Y., 241; *Prentice v. Geiger,* 74 N. Y., 341; *Vail v. Mix,* 74 Ill., 127; *Coe v. Mfg. Co.,* 35 Conn., 175; *Tootle v. Clifton,* 22 O. St., 247; *Scheuber v. Held,* 47 Wis., 340; *O. & Ind. R. Co. v. Zinn,* 18 O. St., 417; *Barker v. Salmon,* 2 Met. [Mass.], 32; *Brown v. King,* 5 Id., 173; *Ashley v. Ashley,* 4 Gray [Mass.], 197; *James v. R. Co.,* 91 Ill., 554; *Schall v. R. Co.,* 35 Pa. St., 191; *Day v. R. Co.,* 41 O. St., 392; *Gatling v. Lane,* 17 Neb., 83; *Haywood v. Thomas,* Id., 241; *Fitzgerald v. Brewster,* 31 Id., 51; *Valentine v. Mahoney,* 37 Cal., 389; *Samuel v. Dinkins,* 12 Rich. [S. Car.], 172; *Mann v. Rogers,* 35 Cal., 316; *Harbin v. Roberts,* 33 Ga., 45; *Gregg v. Wells,* 10 Ad. & E. [Eng.], 90; *Chapman v. Chapman,* 59 Pa. St., 214; *Crest v. Jack,* 3 Watts [Pa.], 238; *Woods v. Wilson,* 37 Pa. St., 383; *Brooks v. Curtis,* 4 Lans. [N. Y.], 283; *Bourdier v. R. Co.,* 35 La. Ann., 949; *Goodin v. Canal Co.,* 18 O. St., 179; *Kellogg v. Ely,* 15 Id., 64; *State v. Graham,* 21 Neb., 355; Taylor, Landlord & Ten., sec. 180; *Forbes v. Caldwell,* 39 Kan., 19; *Doe v. Reynolds,* 27 Ala., 364; *Jackson v. Haviland,* 13 Johns. [N. Y.], 229; *Smith v. Trabue,* 1 McLean [U. S.], 87; *Smith v. Hornback,* 4 Litt. [Ky.], 232; *Wheeler v. Ryerss,* 4 Hill [N. Y.], 467; *Hopkins v. Calloway,* 7 Cold. [Tenn.], 37; *Oetgen v. Ross,* 47 Ill., 142; *Smith v. Pretty,* 22 Wis., 655; *Cadwallader v. Harris,* 76 Ill., 370; *Magwire v. Labeaume,* 7 Mo. App., 179; *Read v. Allen,* 56 Tex., 180; *Newman v. Bank,* 80 Cal., 371; *Stout v. Tall,* 9 S. W. Rep. [Tex.], 331; *Spotts v. Hanley,* 85 Cal., 155; *Valentine v. Mahoney,* 37 Id., 399; *Calderwood v. Brooks,* 28 Id., 152; *Wheelock v. Warschauer,* 34 Id., 265; *Dutton v. Warschauer,* 21 Id., 620; *Douglas v. Fulda,* 45 Id., 592; *Shay v. McNamara,* 54 Id., 175; *Chant v. Reynolds,* 49 Id., 213; *Richardson v. Pickering,* 41 N. H., 386; *State v. Holloway,* 8 Blackf. [Ind.], 47; *Dodge v. R. Co.,* 20 Neb., 276; *Barker v. Salmon,* 2 Met. [Mass.], 32; *Finlay v.*

Cook, 54 Barb. [N. Y.], 9; Tyler, Eject., 873; *Stettnische v. Lamb*, 18 Neb., 626; *Pullman Car Co. v. M. P. R. Co.*, 115 U. S., 587.

Lamb, Ricketts & Wilson, contra, cited: *Powell v. Bagg*, 8 Gray [Mass.], 441; *R. Co. v. Danberg*, 2 Saw. [U. S.], 452; *Hazelton v. Putnam*, 3 Pin. [Wis.], 107; 3 Washburn, R. Prop. [5th Ed.], 144, 315, 362; *McCall v. Neely*, 3 Watts [Pa.], 71; *Wheeler v. Bates*, 21 N. H., 460; *Drew v. Westfield*, 124 Mass., 461; *Slater v. Rawson*, 6 Met. [Mass.], 439; *Smith v. Burtis*, 6 Johns. [N. Y.], 216; *Cooper v. Smith*, 9 S. & R. [Pa.], 26; *Cagle v. Parker*, 2 S. E. Rep. [N. Car.], 76; *Morse v. Copeland*, 2 Gray [Mass.], 302; *Smith v. Miller*, 11 Id., 145; *C. & N. W. R. Co. v. Hoag*, 90 Ill., 349; *Tinkham v. Arnold*, 3 Me., 120; 2 Greenl., Ev., 539; *Edson v. Munsell*, 10 Allen [Mass.], 568; *Parker v. Foote*, 19 Wend. [N. Y.], 309; *Sargent v. Ballard*, 9 Pick. [Mass.], 251; *Daniels v. C. & N. W. R. Co.*, 35 Ia., 129; *Colvin v. Burnet*, 17 Wend. [N. Y.], 564; *Pierre v. Fernald*, 26 Me., 440; *Liford's Case*, 11 Coke [Eng.], 51; *Dewey v. Osborne*, 4 Cow. [N. Y.], 329; *Dunn v. Miller*, 75 Mo., 272; *Read v. Allen*, 56 Tex., 176; *Newman v. Bank*, 80 Cal., 368; *Stout v. Tall*, 9 S. W. Rep. [Tex.], 321; *Spotts v. Hanley*, 24 Pac. Rep. [Cal.], 741; *Reynolds v. Willard*, 22 Id., 261; *Watkins v. Peck*, 13 N. H., 360; *New Orleans v. Shakespeare*, 39 La. Ann., 1033; *Ward v. Parlin*, 30 Neb., 384, and cases cited; *Hoagland v. Lusk*, 33 Neb., 376; *Viele v. Judson*, 82 N. Y., 40; *Earl v. Stevens*, 57 Vt., 478; *Crossmon v. May*, 68 Ind., 244; *Stockman v. Land Co.*, 28 Pac. Rep. [Cal.], 117; *Allen v. Shaw*, 61 N. H., 97; *Taylor v. Ely*, 25 Conn., 250; *Stevens v. Dennett*, 51 N. H., 342; *Patterson v. Hitchcock*, 3 Colo., 536; *Griffith v. Wright*, 6 Id., 250; *Pitcher v. Dove*, 99 Ind., 178; *Monks v. Belden*, 80 Mo., 639; *Bales v. Perry*, 51 Id., 449; *Staton v. Bryant*, 55 Miss., 261; *Wazata v. R. Co.*, 49 N. W. Rep. [Minn.], 205; *Fer-*

guson v. Millikin, 42 Mich., 441; *Royce v. Watrous*, 73 N. Y., 597; *Buckingham v. Hanna*, 2 O. St., 551; *Henshaw v. Bissell*, 18 Wall. [U. S.], 255; *Brant v. Coal Co.*, 93 U. S., 326; *Lance's Appeal*, 55 Pa. St., 25; *Odneal v. Sherman*, 14 S. W. Rep. [Tex.], 31; *Lyon v. McDonald*, Id., 261; *Hahn v. Baker Lodge*, 27 Pac. Rep. [Ore.], 167; *Dennis v. Spencer*, 47 N. W. Rep. [Minn.], 795; *Ger. Ins. Co. v. Fairbanks*, 32 Neb., 750; *Mabary v. Dollarhide*, 11 S. W. Rep. [Mo.], 611; *Bruce v. Platt*, 80 N. Y., 379; *Hollingshead v. Woodard*, 107 Id., 96; *Mumma v. Potomac*, 8 Pet. [U. S.], 286; *Dobson v. Simonton*, 86 N. Car., 492; *Phillips v. Wickham*, 1 Paige Ch. [N. Y.], 595; *Briggs v. Penniman*, 8 Cow. [N. Y.], 387; *Gains v. Bank*, 12 Ark., 769; *Christian Soc. v. Proctor*, 27 Ill., 414; *Boyce v. M. E. Church*, 46 Md., 359; *Greenwood v. R. Co.*, 10 Gray [Mass.], 373; *M. R. & Ft. S. R. Co. v. Shirley*, 20 Kan., 660; *Greeley v. Smith*, 3 Story [U. S.], 657; *Natl. Bank v. Colby*, 21 Wall. [U. S.], 615; *Alexandria v. Fairfax*, 95 U. S., 774; *Strickland v. Prichard*, 37 Vt., 324; *Mfg. Co. v. Marsh*, 1 Cush. [Mass.], 507; *Mahone v. R. Co.*, 111 Mass., 75; *President M. & M. Co. v. Coquard*, 40 Mo. App., 40.

MAXWELL, CH. J.

On the 30th day of September, 1885, Charles J. Hull commenced an action in ejectment in the district court of Lancaster county against the Chicago, Burlington & Quincy Railroad Company, Humphrey Bros. Hardware Company, and S. A. Brown & Co. to recover possession of lots 14, 15, 16, and 17 in block 70 of Lincoln. April 15, 1886, the defendant railroad company filed an amended answer, presenting the following defenses:

First—General denial.

Second—Condemnation proceedings by the Burlington & Missouri River Railroad Company in December, 1879.

Third—Ten-year statute of limitations.

Fourth—That the Chicago, Burlington & Quincy Railroad Company with its predecessors, the Burlington & Missouri River Railroad Company and the Nebraska Railway Company, had been in open, notorious, and exclusive possession of said lots since July, 1874.

All the allegations of this answer were put in issue by the reply. A trial to the court, a jury having been waived, resulted in a judgment for plaintiff Hull as to lots 14 and 17, and for the defendant railroad company as to lots 15 and 16. The case was then brought to this court by Hull upon error, both parties filing petitions in error. Upon a hearing in this court the judgment of the court below was affirmed so far as it was in favor of Hull and reversed so far as it was against him. The opinion in that case is reported in *Hull v. C., B. & Q. R. Co.*, 21 Neb., 371. The case went back to the district court, and upon leave the defendant railroad company filed another amended answer, in which the following defenses were interposed:

First—General denial.

Second—That the Nebraska Railway Company in 1874 took open, notorious, and public possession of said lots, and condemned them as required by law, and by itself and its lessees, the Burlington & Missouri River Railroad Company in Nebraska and the Chicago Burlington & Quincy Railroad Company, had continuous, open, notorious, public, and exclusive possession for more than ten years; that the plaintiff had actual knowledge of the possession, use, and occupancy of the lots by the three companies named, and that plaintiff by his knowledge and silence was estopped to assert his title.

Third—That the Nebraska Railway Company is a necessary party to the action.

Fourth—Ten years statute of limitation.

This answer having been put in issue by a reply, a trial was had on the 14th day of September, 1887, resulting in a judgment for the plaintiff Hull as to lots 15 and 16.

The defendant company prosecuted a proceeding in error to this court to reverse this judgment, which proceeding resulted in affirming the judgment of the court below. This second opinion is found in *C., B. & Q. R. Co. v. Hull*, 24 Neb., 740. On the 15th day of October, 1887, by virtue of a writ of restitution, the sheriff put the plaintiff Hull into possession of lots 14 and 17, and on the same day Hull leased these lots to S. A. Brown & Co., and on the 23d day of February, 1888, Hull's title to lots 15 and 16 having been affirmed by this court, he leased those lots to Humphrey Bros. Hardware Company. On November 1, 1887, the plaintiff herein filed its petition in this case and procured from Judge Field a temporary injunction restraining said Hull from prosecuting the ejectment case heretofore mentioned, and in said petition asked to have the title to said lots quieted in the plaintiff, on the grounds that plaintiff had acquired title by adverse possession, and that Hull was estopped by his conduct from asserting his title. To this petition the defendant Hull filed an answer, setting up the following defenses:

First—Denying the existence of the plaintiff.

Second—That an action to quiet title would not lie, because defendant was in possession of the property.

Third—That the plaintiff, by its general attorney, appeared in the ejectment suit and pleaded the title of plaintiff and procured an adjudication thereof.

Fourth—That the pretended condemnation proceedings taken by the plaintiff in 1876 were void.

Fifth—That by commencing the condemnation proceedings of 1876 the plaintiff recognized the title of defendant and could not claim adversely thereto.

Sixth—That the condemnation money deposited by the plaintiff had been withdrawn.

Seventh—That in 1877 these lots were wholly abandoned for railroad purposes and reverted to the defendant.

Charles J. Hull having died on the 12th of February,

1889, this cause was, on the 1st day of April, 1889, revived in the name of Helen Culver, sole devisee under the will. Plaintiff replied by a general denial, and the cause coming on for trial to the court on the 6th day of December, 1889, a decree was rendered dismissing the plaintiff's bill, whereupon the case was brought to this court on appeal.

The testimony shows that in the year 1875 the Midland Pacific railway located its line over a portion of these lots. Afterwards, in the same year, the Midland company was consolidated with the Brownville, Fort Kearney & Pacific Railway Company. The new corporation was called the Nebraska Railway Company. In December, 1875, the Nebraska Railway Company attempted to condemn the lots in controversy and deposited the amount at which they were appraised with the county judge of Lancaster county. This deposit was withdrawn in the year 1880. In June, 1877, the Nebraska Railway Company leased its line of road to the Burlington & Missouri River Railroad Company for the term of 999 years. The terms of the lease would indicate that it was practically a conveyance. The lease is as follows:

"It is agreed by and between the Burlington & Missouri River Railroad Company in Nebraska, of the one part, and the Nebraska Railway Company, of the other part:

"First—That the Nebraska Railway Company shall lease and demise, and it does hereby lease and demise, to the Burlington & Missouri River Railroad Company in Nebraska all of its railroad, depot grounds, depots, franchises, and property in use or connected with or that hereafter may be acquired for the use of said railroad, but excluding all land received from the state of Nebraska or other sources, except right of way, or depot grounds used, or to be used for the operation of its road, to have and to hold for the period of 999 years from the date hereof.

"Second—The Burlington & Missouri River Railroad

Company in Nebraska agrees to pay as and by way of rent, in the manner hereinafter stated, the earnings of said road after deducting what in the judgment of said company shall be the necessary expenses for the operation of the same, and for placing and keeping the same in good running order, and all taxes; that is to say, the said net earnings are to be first applied by the said Burlington & Missouri River Railroad Company in Nebraska to the payment, first, of interest, and, next, of the principal of the first mortgage bonds which have been issued on said railroad from Brownville to the city of Seward, in Seward county, Nebraska, at the rate of $20,000 per mile of road, bearing interest at the rate of seven per cent per annum, free of United States tax, and, second, the residue to be paid over to the lessors.

"In witness whereof, the said parties have caused their corporate seals to be hereunto affixed, and the same to be subscribed by their respective presidents, on this 5th day of June, A. D. 1877.

"[SEAL.] NEBRASKA RAILWAY COMPANY,
"By B. G. SMITH, *President.*

"Attest:
"CHAS. D. SMITH, *Secretary.*

"[SEAL.] THE BURLINGTON & MISSOURI RIVER RAILROAD COMPANY IN NEBRASKA,
"By GEORGE TYSON, *President.*

Attest:
"J. W. DENNISON, *Secretary.*"

The principal contention of the plaintiff is that it has acquired title by adverse possession. We think differently, however. The proof clearly shows that it recognized the title of Hull in attempting to condemn his property and the deposit of the money with the county judge. This money, had the condemnation been legal, represented the land condemned.

It is claimed on behalf of the plaintiff that the money

was withdrawn without its knowledge or consent; whether so or not is not material in this case. The money remained as the purchase price of the land, and was withdrawn by the beneficiary under the lease, and an attempt made to recondemn the land in question. It is very clear, therefore, that the plaintiff was not in possession adversely for more than ten years prior to the time that Hull instituted the action in ejectment. We do not decide that the statute of limitations will or will not run in favor of a railway company, as the question does not arise. In addition to this, these questions were fully adjudicated in *Hull v. C., B. & Q. R. Co.*, 21 Neb., 371. In the opinion in that case Judge REESE very fully states the reasons why the railway should not recover, as follows: The statute requiring the notice to be published in "some newspaper published in the county" clearly means that the whole publication shall be made in one paper "four consecutive weeks." This was not done, and no jurisdiction was acquired. Virtually no notice was given. The proceedings constitute no justification. (*R. Co. v. Fink, supra.*)

The next question presented is as to the statute of limitations. This point in the case is referred to but not discussed by defendant in error in its brief. It is true that defendant in error and its predecessors were in possession of a part, if not all, of the property in dispute more than ten years prior to the commencement of this suit. But we cannot see how it can be held that this possession was, during all of the time alluded to, adverse to the title or ownership of plaintiff. In the first instance the title and ownership of plaintiff, or some other person unknown, perhaps, was recognized by the condemnation proceedings of 1875. The damage to the owner as found by the appraisers was placed to his credit with the county judge, where it remained until it was withdrawn in 1880. Had it not been for the fact at that time new proceedings had been instituted against plaintiff by name

as the owner, it might be that subsequent to that date the possession of defendant would have been adverse. But by that proceeding his title and ownership were directly admitted and recognized, and on the 7th day of April, 1880, the condemnation money found due by the appraisers was deposited with the county judge as plaintiff's damages. These acts amount to a clear and definite acknowledgment of plaintiff's ownership of the property, and would arrest the statute of limitations even if it had commenced to run. (*Erskine v. North*, 14 Gratt. [Va.], 60; *Walbrunn v. Balben*, 68 Mo., 164; Wood on Limitations, 578; *Lovell v. Frost*, 44 Cal., 471; *Dietrick v. Noel*, 42 O. St., 18; *Stump v. Henry*, 6 Md., 201; Tyler on Ejectment and Adverse Enjoyment, 125 and 921; *Koons v. Steele*, 19 Pa. St., 203.) We hold, therefore, that neither the condemnation proceedings, nor the statute of limitations, as shown by the evidence on the trial, constituted a defense to plaintiff's action. This decision was adhered to in the same case in 24 Neb., 740. These decisions settle the rights of the parties, and the attempt to relitigate in this case the question which is already determined should not be encouraged. The decision of the court below is right and is

AFFIRMED.

THE other judges concur.

THEO. OLESON ET AL. V. CITY OF PLATTSMOUTH ET AL.

[FILED JULY 1, 1892.]

1. **Negligence:** DAMAGES FROM CONSTRUCTION OF SEWER: REVIEW. In an action against a contractor for the construction of a sewer for damages to a brick building from settling, caused by the negligence of the contractor in the excavation for the sewer, *held*, that, in view of the sharp conflict in the evidence, the judgment of the court below would be affirmed.

2. ———: ———. The contractor was justified, as shown by the evidence, in not prosecuting the work at night or on Sundays.

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

John C. Shea, for appellants Haubens & Shelton, cited: *Birmingham v. M'Crary*, 4 S. Rep. [Ala.], 631; Woods, Master & Servant, sec. 314; *Water Co. v. Ware*, 16 Wall. [U. S.], 566; 2 Dillon, Mun. Corp., sec. 1029; *Wray v. Evans*, 80 Pa. St., 102; *Chicago v. Robins*, 2 Black [U. S.], 418.

C. S. Polk, contra.

MAXWELL, CH. J.

This cause originated by Haubens & Shelton entering into a written contract with the city of Plattsmouth to construct a sewer in said city, under the instructions and according to the plans and specifications given by the city. The sewer was constructed during the year 1889 through an alley for some distance, and which alley was on block 35, bounded on either side by brick buildings, which, at the point where the principal damages complained of occurred, were the property of Henry Boeck. Haubens & Shelton gave a bond for the fulfillment of the contract.

After the sewer was completed these claims for damages to adjacent property owners were filed with the city council, one each by Boeck, White, and Dovey. By the conditions of their contract five per cent of the contract price was held back for six months, amounting in this case to $2,165, which, with interest at time of trial in district court, amounted to $2,231.47. The original case, as instituted, was by the bondsmen of the contractors, Theo. Oleson *et al.*, to enjoin the city from paying over this five per cent indemnity until the damages were settled, and upon the issues as then joined no question is now being litigated, as no one is contesting them, but the injunction still remains in force. Afterwards amended pleadings were filed and the issue changed to a contest between the contractors and city over the aforesaid five per cent indemnity.

By the provisions of the contract the city was to furnish plans and specifications by which to construct said sewer, which also provided that it shall be built subject to the directions of the engineer placed in charge of said work by the party of the first part, subject to the acceptance of the said work by the engineer and board of public works and approval thereof by the mayor and council," and the contract contains the following provisions:

"Sec. 18. Haubens & Shelton, contractors, expressly bind themselves to indemnify and save harmless the city of Plattsmouth from all suits or actions of every name or description brought against the city, for or on account of any injury or damage received or sustained by any party or parties by or from Haubens & Shelton, or their servants or agents, in the construction of said work, or by or in consequence of any negligence in guarding the same, or any improper materials used in its construction, or by or on account of any act or omission of the said Haubens & Shelton, or their agents."

On the trial of the cause a jury was waived and the court found the issues and rendered judgment as follows:

"On the 28th day of June this cause came on to be heard on the pleadings filed in this case and upon the evidence, and was submitted to the court and taken under advisement.

"And now on this 11th day of August, 1890, the court, having been fully informed and advised in the premises, finds that there is due from the city of Plattsmouth, defendant, to the defendants Haubens & Shelton, sewer contractors, the sum of $652.03; that in the building and construction of the sewer through the alley in block 35, in Plattsmouth city, defendants Haubens & Shelton were guilty of negligence and want of due care, and thereby caused the damage to buildings and improvements of Henry Boeck in the sum of and amount of $1,500, and that under the contract between said city and its co-defendants Haubens & Shelton said Haubens & Shelton are liable to said city for the amount of such damages, together with the costs incurred in and about the prosecution of the said suit between the said city of Plattsmouth and said Henry Boeck, which costs amount to the sum of eighty-five and $\frac{38}{100}$ dollars; and that the said city had the right to withhold said sum of $1,500 from the amount due said contractors, together with the sum of $85.38, costs incurred in the said suit against the city of Plattsmouth.

"The court further finds as a matter of fact that Haubens & Shelton had due notice of the pendency of the said action between the city of Plattsmouth and Henry Boeck and were present in court, represented by counsel, when said cause was tried and assisted in the defense thereof.

"It is therefore considered by the court that Haubens & Shelton recover from the said city of Plattsmouth the sum of $625.03 and costs of this action; and that said city shall withhold the sum of $1,585.38 of the amount due said contractors, and the injunction heretofore granted in this case be dissolved."

The sewer seems to have been well constructed, of good

material, and according to the plans and specifications. Under the contract the contractors would not be liable for damages unless they were negligent in the performance of their contract, whereby another sustained damages. The only negligence proved was the great delay in passing the brick building of Henry Boeck, which he testifies was about thirty days, and on the part of the contractor is stated to be two weeks. Boeck claims that he insisted that the contractors should procure a sufficient light and cause the men to work nights, also that they should have worked on Sundays, and that he requested them to do so, which they refused to do. The overseer to supervise the work testifies that he refused permission to work at night, as such work was liable to be defective, and this is not denied. As to the neglect to work on Sundays we think the contractors were perfectly justified in their refusal. Sunday is a day of rest. Experience has demonstrated the necessity of the Divine law creating the Sabbath in order that both the minds and bodies of men may recuperate from the labors of the week. Works of necessity or mercy are excepted, but the necessity which will justify labor must be pressing and immediate. If it can be deferred until the following or succeeding day, there is no justification for working on Sunday. This leaves but one question, viz, Was there undue delay in the construction of the sewer after the excavations therefor were made? The alley at that point is thirteen feet in width, and the completed sewer is nearly ten feet in width. The excavation for the sewer extended several feet below the footing of the walls of Boeck's buildings. This excavation, according to his testimony, remained open for a long time, and was the direct cause of his building settling, and the cause of the injury.

On the part of the contractors it is shown that Boeck had a cistern in his cellar near the sewer which would contain about 130 barrels of water; that the cistern was full of water; that Boeck said nothing about this to the con-

tractors, but the water leaked through the wall into the excavation, when they investigated the cause and found the cistern, which they caused to be emptied of its contents at once. It is pretty evident that the testimony in regard to the cistern is in the main correct, and under proper issues would have been a question for a jury.

It is impossible in the condition of the record for this court to say to what extent, if at all, it caused the injury. The injury was, no doubt, caused by the deep excavation which was necessary in order to bring the bottom of the sewer to the grade established by the engineer, but the contractor should have used reasonable diligence under all the circumstances to prevent injury, and the proof upon the question of diligence is conflicting and nearly equally balanced, and therefore we cannot review the facts. The judgment is

AFFIRMED.

THE other judges concur.

WILLIAM RUDOLPH, APPELLANT, V. E. F. DAVIS ET AL., APPELLEES.

[FILED JULY 1, 1892.]

Review. Where the testimony is conflicting and does not preponderate in favor of either party to such an extent as to show that it is clearly wrong, the judgment will not be set aside.

APPEAL from the district court for Gage county. Heard below before BROADY, J.

A. D. McCandless, for appellant.

Pemberton & Bush, contra.

MAXWELL, CH. J.

This action was brought in the district court of Gage county to enjoin the sheriff of that county from selling certain real estate. The plaintiff alleges in his petition "that on the 8th day of November, 1887, the defendant Julius Kuhn obtained a judgment against one Philip Hornberg before H. G. Mecklin, a justice of the peace in and for Gage county, for $134.80 and the costs therein taxed at $6.25; that on the 21st day of November said Philip Hornberg filed a stay bond in said action, with one I. O. Martin as surety, and which said stay was filed and approved by said justice with knowledge and consent of the attorney for said Julius Kuhn, for the purpose of staying said judgment for three months.

"Second—On or about the 21st day of February, 1888, and at the date of the expiration of said stay, said Philip Hornberg paid said judgment to the attorney of said Julius Kuhn, who received the same and then and there agreed to cancel and satisfy said judgment.

"Third—On the 3d day of March, 1888, notwithstanding said judgment was fully paid, the said Julius Kuhn caused a transcript thereof to be made and filed with the clerk of the district court of Gage county, Nebraska, and on or about the 2d day of August, 1889, said Julius Kuhn caused an execution to be issued on said judgment and levied upon the following described real estate in Gage county, viz.: The southwest quarter of the southeast quarter of section 33, in town 1, range 7 east, and the northeast quarter of the northeast quarter of section 1, town 1, range 6 east; and the defendant E. F. Davis, sheriff as aforesaid, is proceeding to sell said real estate and has advertised the same for sale on the 7th day of September, 1889, under said execution, and will sell said land, unless restrained by this court.

"Fourth—That on the 26th day of February, 1889,

this plaintiff purchased said land from Philip Hornberg, for value, and took a deed therefor, and is now the owner thereof, and said judgment is a cloud upon plaintiff's title, and the said sale under said execution, if not restrained by this court, will create a cloud on plaintiff's title to said land.

"Fifth—That at the time plaintiff purchased said land said judgment, and all costs made thereon, had been fully paid to the said Julius Kuhn.

"Sixth—Plaintiff has no adequate remedy at law to protect his property from this judgment."

The answer is a general denial.

On the trial of the cause the court found the issues in favor of the defendants and dismissed the action.

The questions presented to this court are whether or not the finding and judgment are against the weight of evidence. It is unnecessary to review the testimony at length. It is sufficient to say that it is conflicting and turns upon the credibility of the witnesses. If the testimony of Philip Hornberg is true, he has been greatly wronged. According to his statements he nearly paid the debt in full and then permitted a judgment to be taken against him for $135. He is corroborated to some extent, but his testimony fails to reach that degree of certainty to show that the judgment in this case is clearly wrong. The judgment must therefore be

AFFIRMED.

THE other judges concur.

L. A. STALEY v. C. C. HOUSEL ET AL.

[FILED JULY 1, 1892.]

1. **Ejectment:** GENERAL DENIAL: EVIDENCE ADMISSIBLE UNDER. Under a general denial, in an action of ejectment, the defendant may show that a deed in plaintiff's chain of title was procured by fraud and undue means.
2. ——: ——: ——. The defendant, under such an answer, may prove, by any legal evidence which he may have, any fact which will defeat the plaintiff's cause of action.
3. **Deeds:** FRAUD: EVIDENCE examined, and *held*, to sustain the finding that the deed from J. B. P. to K. L. C. was procured by fraud and undue means.
4. **The instructions** given and refused, *held*, properly given and refused.

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

Estabrook, Irvine & Clapp, for plaintiff in error:

Evidence of fraud or undue influence cannot be given under the general issue in ejectment. (*A. & N. R. Co. v. Washburn*, 5 Neb., 122; *B. & M. R. Co. v. Lancaster Co.*, 7 Id., 37; *Peet v. O'Brien*, 5 Id., 360; *Jones v. Seward Co.*, 10 Id., 161; *Ins. Co. v. Barnd*, 16 Id., 90; *C., B. & Q. R. Co. v. Manning*, 23 Id., 552; *Allen v. Saunders*, 6 Id., 441; *B. & M. R. Co. v. Harris*, 8 Id., 142; *Hamilton v. Ross*, 23 Id., 634; *Young v. Greenlee*, 82 N. Car., 346; *Fish v. Benson*, 71 Cal., 428; *Lombard v. Cowham*, 34 Wis., 486; *Taylor v. Courtnay*, 19 Neb., 196; *Fairbanks v. Long*, 91 Mo., 628.)

Jno. L. Webster, contra:

Granting that the defense made—that the deed from Plummer to Christopher was obtainable by fraud—was an

equitable defense, still it was admissible under a general denial. (*Franklin v. Kelley*, 2 Neb., 80; *Armstrong v. Brownfield*, 32 Kan., 116; *Clayton v. Sch. Dist.*, 20 Id., 256; *Buzzell v. Gallagher*, 28 Wis., 678; *Catlin v. Bennatt*, 47 Tex., 165; *Ayers v. Duprey*, 27 Id., 604; *Johnson v. Byler*, 38 Id., 606; *Mayer v. Ramsey*, 46 Id., 371; *McCall v. Carpenter*, 18 How. [U. S.], 297; *Jackson v. Myers*, 11 Wend. [N. Y.], 533; *Wicks v. Smith*, 18 Kan., 508; *Stout v. Hyatt*, 13 Id., 242; *Mather v. Hutchison*, 25 Wis., 27; *Begg v. Begg*, 56 Id., 534; *Carter v. Scaggs*, 38 Mo., 302; *Brown v. Brown*, 45 Id., 412; *Meyers v. Gale*, Id., 416; *Williams v. Barnett*, 52 Tex., 130; *Warren v. Jacksonville*, 15 Ill., 236; *Stubblefield v. Borders*, 92 Id., 279; *Semple v. Cook*, 50 Cal., 29; *Willson v. Cleaveland*, 30 Id., 201; *Bell v. Bed Rock*, 36 Id., 219; *Kimball v. Gearhart*, 12 Id., 50; *Bell v. Brown*, 22 Id., 672; *Kent v. Agard*, 24 Wis., 378.) The jury was justified in finding that the deed was obtained by fraud and void. (*Burch v. Smith*, 15 Tex., 219; *Pickett v. Pipkin*, 64 Ala., 520; *Linn v. Wright*, 18 Tex., 337; Bigelow, Fraud, 2, 71, 190, 191; *Turner v. Turner*, 44 Mo., 535; *Todd v. Grove*, 33 Md., 188; *Bailey v. Litten*, 52 Ala., 282; *Mead v. Coombs*, 26 N. J. Eq., 173; *Bailey v. Woodbury*, 50 Vt., 166; *Leighton v. Orr*, 44 Ia., 679; *Moore v. Moore*, 56 Cal., 89; *Dean v. Negley*, 41 Pa. St., 312; *Coulson v. Allison*, 2 De G., F. & J., 521; *Hargreave v. Everhard*, 6 Ir. Ch. Rep., 278; *Farmer v. Farmer*, 1 H. L. Cas. [Eng.], 724; *Bayliss v. Williams*, 6 Cold. [Tenn.], 440.) The deed from Plummer to Christopher being without consideration and obtained by social influences, she and her grantee may be decreed to hold the property in trust and compelled to reconvey at the suit of the grantor or his heirs. (*Nichols v. McCarthy*, 53 Conn., 299; *Archer v. Hudson*, 7 Beav. [Eng.], 560; *Anderson v. Ellsworth*, 3 Giff. [Eng.], 154; *Munson v. Carter*, 19 Neb., 293.)

NORVAL, J.

This is an action in ejectment brought by plaintiff in error to recover the possession of lot 8 in block 352, in the city of Omaha, and damages for withholding said premises from plaintiff. The petition is in the ordinary form.

The defendants for answer deny that plaintiff is the legal owner of the lot or entitled to the possession of the same, or that defendants wrongfully withheld possession thereof; aver that defendants and their grantors have had adverse possession of the lot under a claim of title for more than ten years prior to the bringing of this action. The answer further alleges:

"Fourth—The defendants for further answer say that said plaintiff claims title under and by virtue of a deed made and executed to him by one Kate Graham, formerly Kate Christopher, and that said Kate Christopher obtained her title by conveyance from one Jesse B. Plummer in the year 1868, and these defendants further say that said deed of conveyance from said Plummer to said Christopher was without any consideration and was obtained by said Kate Christopher from said Jesse B. Plummer by fraud and deception practiced upon him, the said Plummer, by her, the said Kate Christopher, and that said Kate Christopher was only to hold said title in trust for said Plummer, his assignees and devisees, and that said Kate Christopher was not to have, and did not claim to have, any legal title in or to said premises by virtue of said deed to her, and that the same was retained by her in fraud of the rights of said Plummer and of his assigns and devisees. That said Plummer in his lifetime made and executed a will by which he devised said real estate to one Valentine, and that said Valentine afterwards, by deed duly executed, conveyed her interest in said property to these defendants."

The answer also sets up that the conveyance from Graham to plaintiff was without consideration and was

made for the purpose of enabling him to bring this suit; that defendants have paid taxes on the lot in the sum of $2,000 and made lasting improvement thereon of the value of $2,000.

Each allegation of the answer is denied by the reply filed by plaintiff.

From a verdict and judgment in favor of defendants plaintiff prosecutes error.

The evidence discloses that on and for several years prior to the 10th day of February, 1868, the lot in litigation was owned by one Jesse B. Plummer, he having purchased the same at a sale under a decree of foreclosure as the property of one C. J. Christopher, the former husband of Kate L. Christopher and the immediate grantor of plaintiff. Prior to the sale Christopher disappeared and is supposed to be dead. At the time Plummer bid in the property, Kate Christopher was residing thereon and for many years afterwards she and Plummer lived together upon the premises, occupying the same house. On February 10, 1868, said Jesse B. Plummer conveyed the property in dispute by deed of general warranty to said Kate L. Christopher, reserving to the grantor a life estate, which deed was duly recorded on the same day. On November 3, 1869, said Kate L. Christopher married one George Graham. Soon thereafter they left Omaha, leaving Plummer in possession of the premises, and have not since resided there. The lot was conveyed by deed of quitclaim on the 17th day of May, 1884, by said Kate L. Graham to the plaintiff Lorin A. Staley, which deed was filed for record June 6, 1884.

It further appears from the record that Plummer died in 1887, leaving a last will and testament, bearing date the 20th day of February, 1873, by which all his property, real as well as personal, was devised to his daughter, Ellen Olivia Valentine, which will has been duly admitted to probate. It is contended by defendants that the convey-

ance from Plummer to Kate L. Christopher was without consideration, and that the same was procured by fraud and undue influence, therefore the lot, upon the death of Plummer, passed under the will to his said daughter. The defendants, for the purpose of establishing title to the lot in themselves, introduced in evidence a deed to said lot from said Ellen O. Valentine and her husband, Joseph T. Valentine, to the defendants Charles C. Housel and Reuben Allen, bearing date December 8, 1883; a deed from said Reuben Allen and wife to the defendant Everett G. Ballou, dated March 31, 1884, for an undivided one-third of the lot; also two tax deeds from the treasurer of Douglas county to the defendant Housel, and also a deed from the treasurer of Douglas county to the defendants Housel and Allen.

The defense of adverse possession is not sustained by the proofs; in fact it is not relied upon in this court, nor was that issue submitted to the jury in the court below. The tax deeds above referred to were void on their face and were therefore insufficient to establish title in the defendants. Nothing is now claimed by counsel for defendants for these treasurers' deeds, and they will not be further considered. It will be observed that plaintiff has shown a complete chain of title to the premises in himself, and therefore was entitled to recover, unless the deed from Plummer to plaintiff's grantor, Kate L. Christopher, was obtained by fraud or undue influence. Whether it was thus procured is one of the principal questions presented by the record. Before entering upon this investigation we will pause to consider whether the evidence produced by the defendants to show fraud was admissible under the issues raised by the pleadings. An objection to its introduction was made on the trial by the plaintiff, which was overruled by the court. The evidence was not admissible under the fourth paragraph of the answer, which we have copied above. The allegation therein of fraud is a mere conclusion. No

fact constituting the fraud is averred. A party charging fraud and undue influence must plead the facts. A mere allegation of their existence is not sufficient. (*Arnold v. Baker*, 6 Neb., 134; *Clark v. Dayton*, Id., 192; *Aultman v. Steinan*, 8 Id., 113.)

The evidence tending to show that the deed from Plummer to Christopher was obtained by fraud and undue influence was, however, admissible under the general denial of the answer. The question was squarely presented and decided in *Franklin v. Kelley*, 2 Neb., 79. It was there held that the defendant, in an action of ejectment, may show that a deed in plaintiff's chain of title was procured by fraud, without specially pleading the fraud in the answer. Chief Justice MASON, in delivering the opinion of the court, says:

"In whatever aspect the offer of the defendants is regarded, it is within the rule that fraud may be shown in ejectment to avoid a deed; and the refusal of the court to hear the evidence was error. One other matter only remains to be noticed. It is insisted that this matter should have been specially pleaded. It is undoubtedly true, that the theory of the system of pleading under the Code generally is, that the facts necessary to constitute a cause of action or defense shall be stated. But, in respect of actions for the recovery of real property, another rule has been adopted. Why this is so is not very clear. It may be because, as two trials, of course, are given in that class of actions, the parties are supposed to learn, from what is shown on the first, what will be the issue on the final trial. But, whatever the reason, it is apparent that in this class of actions, as also in cases of replevin, the facts need not be stated. That being the rule of pleading contained in the Code, we have only to enforce it here."

The decision has never been directly overruled, nor its soundness questioned, but the same principle was recognized and applied by this court in *Dale v. Hunneman*, 12

Neb., 221. That was an action of ejectment, the answer being a general denial. MAXWELL, Ch. J., in the opinion says: "Where the facts stated in the petition are denied, the plaintiff, to be entitled to recover, must prove that he possesses a legal estate in the premises, and is entitled to the possession of the same. If the defendant possesses an equity which negatives the plaintiff's right of possession, such equity may be proved under a general denial, as it is a mere defense to the action. But if the defendant seek affirmative relief, such as to enforce a contract which does not give him the right of possession, but does give him a right to demand a specific execution of the contract by the plaintiff, upon which the right to continue in possession of the premises depends, he must plead the facts entitling him to such relief. And his answer must contain all the facts necessary to entitle him to such relief."

Numerous cases are cited by defendants' counsel from the courts of other states which sustain the position for which they contend, among others, *Stout v. Hyatt*, 13 Kan., 242; *Clayton v. School District*, 20 Id., 256; *Wicks v. Smith*, 18 Id., 508; *Armstrong v. Brownfield*, 32 Id., 116; *Jones v. Cohen*, 82 N. Car., 75; *Lain v. Shepardson*, 23 Wis., 224; *Mather v. Hutchinson*, 25 Id., 27; *Williams v. Barnett*, 52 Tex., 130; and *Sparrow v. Rhoades*, 76 Cal., 208.

The case of *Mathers v. Hutchinson, supra*, is quite in point. The action was to recover real estate, the answer being a general denial. The defendant offered testimony tending to prove that a certain tax deed, under which the plaintiff claimed title, was procured by fraud. The evidence was objected to upon the ground that the facts constituting the fraud were not pleaded in the answer. The court in passing upon the question says: "The complaint was in the ordinary form, and did not disclose the origin of the plaintiff's title. And we have held that in such an action, under such a complaint, the defendant, under the general denial, must be allowed to prove anything which

would defeat the title offered by the plaintiff. Any other rule would place him at a great disadvantage. The plaintiff, not being bound to disclose the title relied on in his complaint, may, at the trial, offer any evidence of title which he pleases. With such a rule as to the plaintiff, it would be manifestly unjust to exclude the defendant from proving that the title offered by the plaintiff was void for fraud or any other reason, because he had not specifically set forth the facts in his answer. It would require him to foreknow and avoid, by specific allegations, a title which the plaintiff was not bound to disclose at all."

After a careful examination of the authorities we are satisfied that the rule is correctly stated in *Franklin v. Kelley* and should be adhered to. The general rules of pleading do not apply to actions like this. The plaintiff is not required to disclose in his petition the origin of his title, nor the facts upon which he relies for a recovery. It is sufficient to aver that he has a legal estate in, and is entitled to, the possession of the property in controversy, and that the defendant unlawfully withholds possession. (Code, sec. 626.) The statute has also provided that in an action of ejectment it is sufficient for the defendant to deny generally the title averred in the petition. (Code, sec. 627.) Under such an answer he may prove any fact tending to show that the plaintiff has not the title or the right of possession to the land in controversy. If the defendant in ejectment desires affirmative relief, he must set up in the answer the facts entitling him thereto. The rule for which plaintiff contends would place the defendant at a disadvantage, as it would oblige him to anticipate the nature of plaintiff's evidence, and allege specifically in his answer a defense to a deed which plaintiff might introduce under his general allegation of title. Such a rule would be not only unjust but contrary to the meaning of the section of Code to which reference has been made.

The case of *Uppfalt v. Nelson*, 18 Neb., 533, is cited by

plaintiff, claiming that it, in effect, overrules *Franklin v. Kelley, supra,* upon the question under consideration. What the equities of the defendant in the case cited were, and whether he was seeking affirmative relief without having pleaded the facts in his answer, we are not advised, as the published opinion does not disclose, nor has the writer the record at hand so he can determine the same. If the defendant therein was in the position of seeking affirmative equitable relief, then the decision accords with the views we have expressed above, and is in harmony with the second Nebraska case. There is language used in the opinion of *Uppfalt v. Nelson,* from which the inference could be drawn that any equitable matter relied upon by defendant in an action of ejectment to defeat the title set up by the plaintiff, or his right to possession, to be available must be pleaded in the answer, which is contrary to the principle decided in *Franklin v. Kelley,* and *Dale v. Hunneman.* In so far as there is an apparent or real conflict in the opinions referred to, the two reported in the second and twelfth volumes of our reports, we are of the opinion, upon reason as well as authority, should be adhered to.

Was the jury warranted in finding that the deed from Plummer to Kate Christopher was without consideration and obtained by fraud and undue influence? The evidence clearly shows that at the time the conveyance was executed Plummer was a drinking man, about sixty years of age, feeble physically, irritable in temperament, childish, and at times acted like a person unbalanced mentally. For some time prior to and on the day of the making of the deed Kate Christopher had been living with him in the house on the lot in litigation. The house had three rooms, contained but one bed; Kate Christopher was thirty or thirty-five years of age, strong, vigorous, and intelligent, in appearance handsome and attractive, possessed of no money or property. Plummer was completely under her influence and control. After the making of the deed

she left him and married one Graham. It appears from the testimony of Byron Reed, the officer before whom the acknowledgment was taken, that she paid no money to Plummer when the deed was executed.

Mrs. Johanna Knight testified that she was acquainted with Kate Christopher while she lived with Plummer; that after the death of the latter she called to see witness and they had a conversation in regard to the deed. We quote from the bill of exceptions:

Q. What did she say, if anything, about getting the property?

A. She introduced herself to me as "Mrs. Graham." I said, "I thought you was Mr. Plummer's wife." "No," she said, "I never was married to him; I wasn't his wife." I said to her, "I understood he signed his lot away to you, or you got it away some way from him." She said, "Yes, he signed it to me," she says, "he signed it to me for me to take care of him." "Well," I says, "why didn't you stay with him and take care of him? He died a pauper, and had nothing to take care of himself with." She says, "I couldn't live there with him because he was jealous of me. There was no living with him."

Q. What further was said, if anything, about this deed? Let me ask you if anything was said about the heirs setting aside this deed or trouble that would come from it?

A. I said to her, "What do you intend to do with this property?" She says: "I will sell it if I can." I says to her, "Then I wouldn't touch it. I wouldn't touch heirs' property." Because Mr. Plummer told me he had a daughter, and I says, "Some day, if she is a smart woman, she will come and tear your title all to pieces, because you did not perform your duty to Plummer. We saw him starving and suffering." She said, "She didn't care," and that was her reply.

Q. What was said, if anything, by her about Plummer signing this deed when he didn't know what he was doing?

A. I said, "It is whispered among the neighbors he deeded this to you when he was delirious from fever." She said, "Of course the doctor was sick, but I don't know but what he had his senses."

Q. Was anything said between you about what Plummer had said about her ceasing to stay with him after he made the deed?

A. I said, "When you persuaded that childish old man"—I was in there after taking care of him, because he was suffering from starvation—I said, "what agreement did you make?" She said, "I was to stay with him while he lived, if he secured me, or gave me this property—this lot, so I would have something for my labor." "Now," I said, "Kate"—I was disgusted with her, any way—I said, "you didn't perform your duty. You promised that poor, childish old man that you would stay with him and be his friend, and he died a pauper, dependent on his Omaha friends, in Omaha city." She didn't say one word.

On cross-examination she further testified that Kate Christopher informed her that during the conversation mentioned, Plummer was in bed at the time he signed the deed, but she did not know whether he was delirious or not; that Plummer also told witness on one occasion that "if he ever signed the deed, it was when he did not have his senses."

The testimony of this witness is in no manner contradicted. The record fully discloses that Plummer was completely under the control of Kate Christopher. The testimony, although largely circumstantial in its nature, was ample to justify the jury in concluding that Plummer sustained illicit sexual relations with this woman while they were living together, and that by means of such unlawful cohabitation the weak-minded old man yielded to her demands and was induced to execute the deed without receiving lawful consideration therefor. The entire transaction was so unconscionable that a court of equity will

not uphold it. (*Gibson v. Jeyes*, 6 Ves. [Eng.], 226; *Shipman v. Furniss*, 69 Ala., 555; *Leighton v. Orr*, 44 Ia., 679; *Hanna v. Wilcox*, 53 Ia., 547; *Bivins v. Jarnigan*, 3 Baxt. [Tenn.], 282; Cooley on Torts, 515.)

The defendant Housel had used 4,000 or 5,000 loads of dirt to level the lot; he repaired the house at an expense of $550, erected fences, moved two houses on the lot, yet Kate Christopher, although aware that these improvements were being made, did not object to the same, thus indicating that she placed but little, if any, reliance in her title. The equities are with the defendants.

Exception was taken to the giving of the first instruction requested by the defendants, which was in this language: "The jury are instructed that the question of determining whether the deed from Plummer to Kate Christopher was obtained by fraud or undue influence is a question peculiarly within the province of the jury to decide from all the evidence, and in determining this question the jury must take into consideration the relationship existing between Plummer and Kate Christopher at and before the time of the making of the deed, the ages of the respective parties, the amount of the consideration, if any, having been paid for the deed, the understanding of the parties as to the condition upon which the deed should be made, if there was any understanding, and all the other circumstances surrounding the transaction."

It is conceded by plaintiff's counsel that the instruction is correct as an abstract proposition of law, but it is claimed that the same was not based upon the testimony, and, therefore, was erroneous. We do not think the criticism merited. There was before the jury testimony tending to prove every matter embraced in the charge of the court. The instruction was pertinent and proper.

The court refused to give the plaintiff's fifth request, which was to the effect that the want of consideration for the conveyance, or the fact that the consideration was ille-

gal and against public policy, was immaterial; that, although the defendants established such want of consideration, or the illegality of consideration, it would not entitle them to a verdict. While it is true that neither the want of a valid consideration for the deed, nor the fact that it was executed upon an illegal or immoral consideration, would not, of itself, avoid the deed, it does not follow that the proof of such facts was immaterial and should have been disregarded by the jury. They were proper matters to be considered, in connection with the other facts and circumstances appearing in evidence, in determining whether the deed was obtained by undue means. The jury were told in the tenth and eleventh paragraphs of the court's charge that the want of a consideration for the conveyance, or the fact that it was executed to induce the grantee to continue illicit relations with Plummer, would not be sufficient grounds for setting aside the deed. The charge was as favorable to the plaintiff as he had a right to expect, and no error was committed in refusing to instruct as prayed by the fifth request.

Plaintiff's thirteenth and fourteenth instructions were properly refused. They were upon the subject of the ratification of the deed by Plummer. They were erroneous in failing to state that the acquiescence of Plummer in the conveyance, to be binding upon him or those claiming through him, must have been with full knowledge of all the facts affecting the validity of the deed. This element was entirely omitted from the instructions.

Complaint is made because the court refused the following instruction:

"15. If you find that the deed from Plummer to Christopher was procured by fraud or undue influence, but further find that plaintiff paid a valuable consideration for the same, and took said deed without notice of the fraud, your verdict should be for the plaintiff."

We are not surprised at the refusal of the court to so

instruct, as there are no facts upon which the request could be predicated. Plaintiff is not in the attitude of a good faith purchaser for value without notice. He claims under a quitclaim deed, and there is nothing to show that he ever paid a dollar therefor, except the presumption arising from the amount expressed in the deed, which sum did not exceed one-tenth the real value of the lot at the time of the transfer. Housel was in possession of the premises, therefore plaintiff took his deed with notice of the rights of Housel. Every phase of the case was fairly submitted to the jury. The judgment is

AFFIRMED.

THE other judges concur.

THE WALTON PLOW CO., APPELLANT, V. L. S. CAMPBELL ET AL., APPELLEES.

[FILED JULY 1, 1892.]

1. **Promissory Note:** ALTERATION: MAY BE SHOWN UNDER GENERAL DENIAL. In an action to foreclose a real estate mortgage the petition alleges the execution and delivery of the note, to secure which the mortgage was given, and sets out a copy of the note. *Held*, That evidence showing that the note has been materially altered after its execution was admissible under an answer denying each and every allegation contained in the petition.

2. ———: ———: WHEN MATERIAL. An unauthorized alteration of a non-negotiable promissory note by the payee, after the execution thereof, by the insertion of the word "bearer" after the name of the payee, is a material alteration, which will nullify the instrument.

3. ———: ———: BARS RECOVERY. Where a promissory note has been altered by the payee in a material matter and with a fraudulent purpose, no recovery can be had upon the instrument, or upon the original consideration for which it was given.

4. ———: ———: CANCELS THE DEBT. The fraudulent alteration of a promissory note secured by a mortgage cancels the debt which it evidenced and discharges the mortgage.

APPEAL to the district court for Phelps county. Heard below before GASLIN, J.

Atkinson & Doty, for appellants, cited: *Oliver v. Hawley*, 5 Neb., 444; *Vogle v. Ripper*, 34 Ill., 100; *Croswell v. Labree*, 81 Me., 44; *Wilson v. Hayes*, 12 Am. St. Rep. [Minn.], 758; *Shephard v. Whetstone*, 1 N. W. Rep. [Ia.], 753; *Rowley v. Jewett*, 6 Id., 354; *First Natl. Bank v. Carson*, 27 N. W. Rep. [Mich.], 589; *Weaver v. Bromley*, 31 Id., 839; Greenleaf, Ev., sec. 655; *Robinson v. Ins. Co.*, 25 Ia., 430; *Bank v. Shaffer*, 9 Neb., 1; *Gillette v. Smith*, 18 Hun [N. Y.], 10; *Smith v. Smith*, 13 Am. St. Rep. [S. Car.], 633.

S. A. Dravo, and *Leese & Stewart*, *contra*, cited: *Wilcox v. Saunders*, 4 Neb., 572; *Union Natl. Bank v. Roberts*, 45 Wis., 373; *Croswell v. Labree*, 81 Me., 44; *McCauley v. Gordon*, 64 Ga., 221; *Morehead v. Bank*, 5 W. Va., 74; *Needles v. Shaffer*, 60 Ia., 65; 2 Dan., Neg. Inst., secs. 1410, 1412; *Savings Bank v. Shaffer*, 9 Neb., 1; *Booth v. Powers*, 56 N. Y., 22; *Vogle v. Ripper*, 34 Ill., 100; *Smith v. Smith*, 13 Am. St. Rep. [S. Car.], 633.

NORVAL, J.

This is an action to foreclose a real estate mortgage given by L. S. Campbell and wife to one D. H. Duperon to secure the payment of a promissory note for the sum of $100, with interest at ten per cent from date thereof. Plaintiff is the owner and holder of said note and mortgage.

The defendants answered denying each and every allegation of the petition. The lower court found the issues in favor of the defendants and dismissed the action.

The court permitted the defendants, over plaintiff's ob-

jection, to introduce testimony tending to prove that the note had been materially altered since its execution by writing in the word "bearer," although the note was non-negotiable when signed. At the close of the trial the defendants, with the permission of the court, filed an amended answer denying each and every allegation of the petition and alleging that on or about the date of the note sued on they executed and delivered to D. H. Duperon a note calling for $100, due in six months from date; that the note read "D. H. Duperon," the words "or order" being erased by defendants before the same was signed; that after the defendants signed said note, and without their consent, the word "bearer" was fraudulently written therein over the words erased.

The first question presented for our decision is, was evidence showing that the note had been altered after its execution admissible under the general denial in the original answer? We think the answer must be in the affirmative. The petition alleges the execution and delivery of the note by the defendants, and the instrument is set out in the body of the pleading in its altered form. The general denial put in issue every material averment of the petition, and the affirmative was upon the plaintiff to prove the making and delivery of the identical note mentioned in the petition, and so continued to the close of the case. (*Donovan v. Fowler*, 17 Neb., 247; *First Natl. Bank v. Carson*, 30 Id., 107.)

Under a general denial the defendants were entitled to disprove the material facts stated in the petition. Evidence that they did not sign the instrument sued, or that it had been materially altered after delivery, was clearly admissible under the original answer. It is only affirmative defenses that the Code requires to be pleaded. The defense of alteration was not new matter required to be set up in the answer. If the note was altered without defendants' consent, after its execution and delivery, by inserting therein

the word "bearer," then it was not their note, and evidence tending to establish such fact tended to rebut or disprove the evidence offered by the plaintiff, that the defendants made the note described in the petition and introduced on the trial. We do not think it was necessary to allege the alteration in the answer, and the court did not err in receiving the evidence offered on this question under the general denial. (Abbott, Trial Ev., 407; *Boomer v. Koon*, 6 Hun [N. Y.], 645; *Lincoln v. Lincoln*, 12 Gray [Mass.], 45.)

It follows from what has been said that plaintiff was not prejudiced by the filing of the amended answer, as it presented no issue not raised by the general denial of the first answer. No objection was made to the granting permission to file an amended answer, therefore the defendants cannot now urge the ruling as a ground for reversing the case.

It is undisputed that the note, when signed by defendants, was non-negotiable, and that after its delivery, but before the instrument came into the possession of plaintiff it was changed by inserting the word "bearer." The writing of this word in the body of the note changed its character and invalidated the instrument. The alteration is a material one, and, being unauthorized by the makers, no action could be maintained thereon. (*Booth v. Powers*, 56 N. Y., 22; *Union Natl. Bank v. Roberts*, 45 Wis., 373; *Croswell v. Labree*, 81 Me., 44; *McCauley v. Gordon*, 64 Ga., 221; *Morehead v. Bank*, 5 W. Va., 74; *Needles v. Shaffer*, 60 Ia., 65.)

But it is contended by counsel for appellant that the payee having indorsed the note, and plaintiff having received the same in good faith in the usual course of business, the indorsee has a right of action upon the note, notwithstanding the alteration thereof. We cannot agree with counsel in this contention. This court has more than once held that the unauthorized material alteration of a negotiable note

by the payee nullifies the instrument, even in the hands of a *bona fide* holder. (*Palmer v. Largent*, 5 Neb., 223; *Brown v. Straw*, 6 Id., 536; *Davis v. Henry*, 13 Id., 497.)

It is finally insisted the district court erred in ruling that the mortgage given to secure the note was no lien upon the property described in the mortgage; in other words, that plaintiff was entitled to a decree of foreclosure, notwithstanding the alteration of the note it was given to secure. Authorities are to be found which sustain the position contended for by counsel. The leading case so holding is *Gillette v. Powell*, Spear's Eq. [S. Car.], 144. This case was followed by the supreme court of South Carolina in *Plyler v. Elliott*, 19 S. Car., 257, and *Smith v. Smith*, 27 Id., 166; S. C., 3 S. E. Rep., 78. The court of last resort in the state of Illinois has held that where a mortgagee has fraudulently made a material alteration of a note, to secure which the mortgage was executed, the debt is thereby discharged and defeats a foreclosure of the mortgage; but if the alteration, although material, was not made with a fraudulent purpose, it will not have that effect. (*Vogle v. Ripper*, 34 Ill., 100; *Elliott v. Blair*, 47 Id., 342.) So far as we are advised, the question is now presented to this court for the first time.

The effect of a material alteration of a note depends upon the person by whom and the intention with which it was made. If changed by a stranger without the consent of the parties to the instrument, the rights of the holder will not be affected thereby. The material alteration of a note by the payee, although made without any fraudulent intent, renders the paper void, yet the holder may recover in an action brought upon the original consideration. The effect of an alteration of such paper, innocently made under an honest mistake of right, was considered by this court in *Savings Bank v. Shaffer*, 9 Neb., 1, and it was there ruled that while the alteration vitiates the instrument, it would not defeat a recovery upon the original considera-

tion for which such note was given. The weight of authority is in favor of the doctrine that a fraudulent alteration of a promissory note in a material matter, not only avoids the instrument, but works a forfeiture of the debt for which it was executed. In such case no recovery can be had in any form of action. The law will not permit the holder to take the chances of gain by fraudulently altering the note, without risk of loss in case of detection. (Daniels on Neg. Inst., sec. 1410*a*; *Newell v. Mayberry*, 3 Leigh [Va.], 250; *Martendale v. Follet*, 1 N. H., 95; *Smith v. Mace*, 44 Id., 553; *Bigelow v. Stilphen*, 35 Vt., 521; *Whitmer v. Frye*, 10 Mo., 349; *Waring v. Smyth*, 2 Barb., Ch. [N. Y.], 135; *Warder, Bushnell & Glessner Co. v. Willyard*, 49 N. W. Rep. [Minn.], 300.)

It is inferable from the record that the insertion of the word "bearer" was not made for an honest purpose. Applying the above principles to the case at bar, we are unable to perceive upon what ground it can be held that the mortgage should be enforced. If the fraudulent alteration avoided the note and extinguished the debt, it also discharged the mortgage by which it was secured. The cancellation of the debt released the lien of the mortgage. The plaintiff not only lost his right of action on the note, but on the mortgage as well. (*Sherman v. Sherman*, 3 Ind., 337; *Tate v. Fletcher*, 77 Id., 102; *McCorkle v. Doby*, 1 Stro. [S. Car.], 396.)

In *Gillette v. Powell, supra*, it does not appear that the alteration was fraudulently made, hence that case is not an authority on the question under consideration.

The case of *Plyler v. Elliott, supra*, was decided by a divided court. The opinion of the majority is placed upon the untenable ground that the fraudulent material alteration of a note does not discharge the debt, but merely takes away all remedy upon the note itself. The writer of that opinion, in substance, contends that, as to the effect upon the debt, there is no substantial difference between that of a note

barred by the statute of limitations and one made void by fraudulent alteration, and that both are controlled by the same principle of law. In this it seems to us that the author of the opinion has fallen into a grave error. The statute of limitations only takes away the remedy, while the fraudulent alteration of a note goes further. It reaches to the debt itself and extinguishes it. The fact that an action can be brought on a mortgage, though the note which it secures is barred, is no ground for holding that the mortgage cannot be enforced in this case to compel the payment of the debt for which the altered note was given. A barred note, so secured by a mortgage, continues as evidence of debt until the statute runs against the mortgage. (*Cheney v. Woodruff*, 20 Neb., 124; *Cheney v. Janssen*, Id., 128.) It is the judgment of this court that the judgment appealed from should be

AFFIRMED.

POST J., concurs.

MAXWELL, CH. J., dissenting.

I am unable to give my assent to the decision of the majority of the court for the following reasons:

The plaintiff brought an action in the district court of Phelps county against the defendants to foreclose a mortgage upon real estate. The action was brought on the 19th day of December, 1889. No answer was filed until the 7th day of April, 1890, which seems to have been the day on which the trial took place, when the defendants, by leave of court, filed a general denial. The note appears to have been introduced in evidence without objection. The defendant, L. S. Campbell, was called as a witness in his own behalf, and testified as follows:

Q. State if that note is in the same condition it was when you signed it.

Counsel for plaintiff objects, as immaterial, irrelevant, and incompetent. Overruled. Plaintiff excepts.

A. No, sir.

Q. What change has been made, if any?

Objected to, as immaterial, irrelevant, and incompetent. Overruled. Plaintiff excepts.

A. The word "bearer" has been written in there.

Q. Any words been erased out—were the words "or order" erased?

A. Yes, sir; I erased them myself.

Upon this evidence the court held that there was an alteration and that it was fraudulent; and thereafter, but so far as appears not in open court, permitted an amended answer to be filed to conform to the alleged proof and rendered judgment in favor of the defendants and against the plaintiff, dismissing the action. It is very clear that the court erred in permitting an affirmative defense to be proved under a general denial. The requirement of the Code, that affirmative defenses shall be pleaded, is reasonable and just, and it is the duty of the court to see that this rule is not infringed. If a party has a defense, he must set it forth so that the adverse party may be prepared to meet it. Otherwise, if he rests his case upon a general denial, his proof will be restricted to controverting the facts stated in the petition. To permit a defendant, against the objection of the plaintiff, to prove a defense entirely different from that set forth in his answer, and then amend his answer to conform to his proof, is a gross violation of the rules of pleading and is liable to be fraught with great injustice, and particularly is this true where, as is evident in this case, the wrong was deliberately planned. The plaintiff is the indorsee of the note. He evidently is an innocent purchaser. Now, had the defendant set up in his answer the defense that the note had been altered by adding the word "bearer," the testimony of the payee and others could have been taken and thus the indorsee have been prepared to defend his rights. Here was a snap judgment taken which deprived the plaintiff of a trial

upon the real questions decided, viz., the alteration. That question has not in fact been tried yet. If the defendant may conceal his defense under a general denial and on the trial prove a defense which, in the absence of counteracting proof, will defeat the action, and which the plaintiff, taken by surprise, cannot be prepared to meet, why may he not prove payment, release, accord, and satisfaction, or other defense, and thus the beneficial effects of the Code as to pleading affirmative defenses be lost. This is a step, and a most important one, in that direction. But the defendants, by filing an amended answer, in effect admit that such an answer is necessary.

It is the duty of the courts to uphold honesty and fair dealing and protect and enforce the rights of every one.

From time immemorial courts of equity have granted continuances to permit one or both parties to obtain proof, add new parties or otherwise protect and save their rights, and under the Code this practice is still in force. In addition to this, a court will not determine without a hearing that an alteration is fraudulent. The presumption of innocence prevails until overcome by proof. It is not claimed by the defendants that they have any defense against the note itself that would be defeated by a transfer thereof to an innocent purchaser. How, then, are they defrauded, or can be? They can lose nothing by the transfer. The judgment should be reversed and the cause remanded for trial upon the amended answer.

NEBRASKA NATL. BANK OF OMAHA v. LOGAN & STANTON.

[FILED JULY 2, 1892.]

Banks: CHECKS: DISHONOR: DILIGENCE. On Friday, November 16, 1888, the firm of L. & S., of V., Nebraska, drew a check on the State Bank of V., in which they had funds, in favor of M. B. & Co., of O., in this state, and transmitted the same by mail to M. B. & Co. at O. In the letter which contained the check were the words in red ink: "Rush this check through." The check was received by M. B. & Co. on Saturday after its date and by them indorsed and delivered to the Nebraska National Bank for its face value, and without notice to rush the check. The bank at O. had previously had dealings with the State Bank at V. and had found it more prompt in remitting collections than the other banks at that place, and it at once sent the check to the bank on which it was drawn for payment. It was received on Monday morning after its date and on the next day the State Bank transmitted to the Nebraska National a draft on a bank in L., where it had no funds, which check was refused, of which the drawers were duly notified. On Tuesday night after the date of the check the bank at V. stopped payment, and the officers absconded, leaving no money or property of the bank. *Held*, That the Nebraska National Bank had shown reasonable diligence and had acted in good faith and that L. & S. were liable as drawers of the check.

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

Morris & Beekman, for plaintiff in error, cited: *Titus v. Merchants Bank*, 35 N. J. L., 588; *Russell v. Hankey*, 6 Term Rep. [Eng.], 12; *Griffin v. Rice*, 1 Hilt. [N. Y.], 184; *People v. Merchants Bank*, 78 N. Y., 269; *Fonner v. Smith*, 31 Neb., 107; *Freeholders v. State Bank*, 32 N. J. Eq., 467.

E. G. B. McGilton, contra, cited: *Allen v. Bank*, 22 Wend. [N. Y.], 215; *Striessguth v. Bank*, 44 N. W. Rep.

[Minn.], 797; *Exchange Bank v. Third Natl. Bank*, 112 U. S., 276; *Reeves v. Bank*, 8 O. St., 465; *Simpson v. Waldby*, 30 N. W. Rep. [Mich.], 199; *Titus v. Merchants Bank*, 35 N. J. L., 588; 1 Dan., Neg. Inst., sec., 243; *Commercial Bank v. Union Bank*, 11 N. Y., 203; *Ger. Natl. Bank v. Burns*, 21 Pac. Rep. [Cal.], 714; *Merchants Natl. Bank v. Goodman*, 109 Pa. St., 422; Morse, Banking, sec. 236; *Drovers Bank v. Provision Co.*, 117 Ill., 100; *Forbes v. Bank*, 10 Neb., 338; *Smedes v. Bank*, 20 Johns. [N. Y.], 372; *Bowling v. Harrison*, 6 How. [U. S.], 248; *Van Vechten v. Pruyn*, 13 N. Y., 549; *Smith v. Miller*, 43 Id., 171; Morse, Banking, secs. 421 *d* and *f*.

MAXWELL, CH. J.

The petition in this case was submitted on demurrer in the year 1890 and the petition sustained. In that case the demurrer was overruled and the cause remanded for further proceedings, it being held that if the facts stated in the petition were true the plaintiff had shown due diligence and was entitled to recover. (*Bank v. Logan*, 29 Neb., 278.) Upon the case being remanded, an answer was duly filed by the defendants Logan & Stanton, to which a reply was made. No answer appears to have been filed by McCord, Brady & Co., and on the trial of the cause the case was dismissed by the plaintiff as to them. The parties entered into a stipulation as to the facts as follows:

"It is agreed by the parties hereto that a jury is waived, that this action shall be submitted to the court upon this agreed statement of facts, and that no further evidence shall be introduced, but judgment shall be rendered upon this statement of facts, which the parties agree are all the facts involved in the transaction which is the subject of this action, and which is as follows:

"On Friday, November 16, 1888, the defendants Logan & Stanton, at Valparaiso, Nebraska, drew their check as a copartnership for the sum of $481.75, payable to the order

of McCord, Brady & Co., upon the State Bank of Valparaiso, located at Valparaiso, Nebraska, about seventy miles from Omaha, Nebraska, which check reached McCord, Brady & Co. on Saturday, the 17th day of November, 1888, and on the same day the said McCord, Brady & Co. sold and delivered the same by indorsement to the plaintiff, who paid the full amount thereof to said McCord, Brady & Co. On the said Saturday, the 17th day of November, 1888, plaintiff sent said check by mail to the State Bank of Valparaiso with instructions to remit the amount thereof to the plaintiff, which said check was received by the said drawee bank on Monday morning, November 19, 1888. On Tuesday, November 20, 1888, said drawee bank sent to plaintiff a worthless draft on the German National Bank of Lincoln for the amount of said check, said drawee bank having no funds in the German National Bank of Lincoln. Said draft being received by the plaintiff on Wednesday, the 21st of November, 1888, plaintiff refused to accept said draft, having on that day learned of the failure of said drawee bank, and being notified by telegraph from the German National Bank that said drawee bank had no funds to meet said draft. Plaintiff notified said Logan & Stanton on the 22d day of November, 1888, of the non-payment of said check, and that plaintiff, as holder of said check, would look to them for the payment of the same and demanded payment thereof. The defendants Logan & Stanton drew said check and prepared the letter of remittance on said 16th day of November, 1888, just before the time for the departure of the mail for Omaha, between which time and the mailing of the same the circumstance arose which aroused a suspicion in their minds as to the solvency of the drawee bank and in the short time left before the mail was due to leave Valparaiso they had time only to write in red ink across the letter of remittance, 'Rush this check through,' which they did write on the letter of remittance.

"The suspicious circumstance referred to was this: The

said Logan & Stanton received advices from New York that one of the drawee's drafts had gone to protest. Immediately, but after the mail had left for Omaha, an explanation was demanded by Logan & Stanton from the officers of the bank, which explanation was satisfactory to Logan & Stanton, they being informed that the drawee bank had changed its bank of deposit in New York, the dishonored draft having been presented at the New York deposit bank a few hours before the change in deposit had been effected. The said McCord, Brady & Co. did not communicate to the plaintiff the advice given them in the letter of remittance from Logan & Stanton.

"The said drawee bank continued in business and honored all checks presented over the counter during Monday and Tuesday, the 19th and 20th of November, 1888. Logan & Stanton had funds sufficient on deposit to their credit with the said bank to meet the check on said days. Other checks were presented over the counter drawn by Logan & Stanton on said days.

"There was another bank in the village of Valparaiso to which said check might have been sent for presentment and collection, but plaintiff had theretofore had business dealings with both banks in Valparaiso and had found the State Bank of Valparaiso, the drawee of said check, the more prompt in remitting collections.

"At the close of business on Tuesday, the 20th of November, 1888, the drawee bank closed its doors, became insolvent, and never again resumed business, the officers thereof fled to parts unknown, taking all available funds, including the funds of these defendants on deposit for the purpose of meeting said check, leaving no property, real or personal."

On this statement of facts the court below found for the defendant and dismissed the action.

The statement of facts is very unsatisfactory. It is sought to charge the plaintiff with negligence in sending

the check to the drawee with the request to remit. It seems that it had had some experience with the banks at Valparaiso and had found the drawee bank more prompt in making remittances than the other. The plaintiff would seem, therefore, to have acted in good faith in transmitting the check to that bank.

Upon the agreed statement of facts it is conceded that a draft in favor of the defendants by the Valparaiso bank had gone to protest in New York city a day or two before the check in question was drawn. That the defendants believed there was danger of the bank's insolvency is shown by the words written in their letter to McCord, Brady & Co., "to rush this check through." The only construction that can be placed upon these words is that they believed the insolvency of the bank was imminent. Their explanation that the Valparaiso bank had changed its correspondent at New York is far from satisfactory, particularly as there is no statement that funds had been provided with the new correspondent in that city to meet the defendants' draft. So in regard to what checks were drawn from the Valparaiso bank on Monday and Tuesday preceding the failure.

The case amounts to this: The defendants had notice of facts which would indicate that the Valparaiso bank was about to stop payment. The plaintiff had no such notice. It can scarcely be said, therefore, that the parties were on an equality, or that the check if presented by a third party on Monday and the cash demanded would have been paid. So far as we can see, the insolvency of the bank was apparent to the defendants when the check was drawn, and there must have been some reason not stated in the stipulation why the check was not drawn in their favor and presented by the defendants themselves and their funds withdrawn. We need not speculate upon the reason for such failure, but the agreed statement is not sufficiently definite as to the condition of the bank on Monday and

Tuesday to warrant us in holding that the check if presented by a third party on either of those days would have been paid in cash. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

ELIZA PHILLIPS, APPELLANT, V. OTTO KUHN ET AL., APPELLEES.

[FILED JULY 2, 1892.

Judgments: SATISFACTION BY COMPROMISE: ATTORNEYS: AUTHORITY. One K. recovered a judgment of $1,000 against one P. for slander. There was some doubt about the correctness of the judgment, and it was supposed the case would be taken to the supreme court. Thereupon the attorneys in the case entered into a compromise that P. should pay the sum of $600 in full satisfaction of the judgment, which sum was paid and the judgment satisfied of record. Two years afterwards K. moved on notice to set the satisfaction aside upon the ground that he was the *sole* owner of the judgment and that his attorneys had no authority to compromise the same. The motion was sustained. Afterwards P. brought an action to enjoin the collection of the excess of $600 and alleged, among other things, that K. owned but half of the judgment and that his attorneys who effected the compromise owned the other half, with other allegations of like character. *Held*, That the petition stated a cause of action and that P. was entitled to equitable relief.

APPEAL from the district court for Platte county. Heard below before MARSHALL, J.

M. Whitmoyer, for appellant:

The compromise and entry of satisfaction was meritorious and should be sustained. (*Boyce v. Berger*, 11 Neb.,

401; *Treitschke v. Grain Co.*, 10 Id., 361; *Paine v. Wilcox*, 16 Wis., 230–1.) A notice that a motion had been filed to set aside the entry of satisfaction, falls far short of giving the court jurisdiction to make a decree, setting aside the entry. (*Pope v. Hooper*, 6 Neb., 186; Freeman, Executions, secs. 81, 83; *Webb v. Anspach*, 3 O. St., 522.)

G. G. Bowman, contra:

An attorney at law has no right to release his client's judgment without his knowledge or consent. (*Kirk's Appeal*, 87 Pa. St., 243; *Levy v. Brown*, 56 Miss., 83; *Nolan v. Jackson*, 16 Ill., 272; *Jackson v. Bartlett*, 8 Johns. [N. Y.], 362; *Brackett v. Norton*, 4 Conn., 517; *Derwort v. Loomer*, 21 Id., 245; *Langdon v. Potter*, 13 Mass., 320; *Hamrick v. Combs*, 14 Neb., 381.) The notice gave ample time to appear and defend, and the court had jurisdiction. (*Bruen v. Bruen*, 43 Ill., 408; *Wilson v. Stillwell*, 14 O. St., 464; *Laughlin v. Fairbanks*, 8 Mo., 367.)

MAXWELL, CH. J.

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

"That on the 3d day of March, 1885, the plaintiff was, and from thence hitherto and still is, the owner and in possession of the following described real estate, to-wit: Commencing at a point 132 feet south of the northeast corner of lot No. 1 in block No. 85, on formerly Olive street, thence north along said street twenty-two feet, thence west eighty feet along line of business lot No. 5, thence south twenty-two feet to alley, thence east eighty feet to the place of beginning, situated in the city of Columbus, Platte county, Nebraska; also the east third of lot No. 2 in block No. 118, in said city. On or about the 30th day of March, 1885, said Otto Kuhn recovered a

judgment for the sum of $1,000 in the district court of Platte county, Nebraska, against said Eliza Phillips, and on or about the 11th day of July, 1885, said judgment was fully paid, satisfied, and discharged, and the same so entered of record on the judgment and execution docket of said court in words and figures as follows, to-wit:

"'On July 11, 1885, the within judgment is fully paid and satisfied and the same is hereby discharged.

"'McFARLAND & COWDERY,
"'CORNELIUS & SULLIVAN,
"'By B. R. COWDERY,
"'*Attorneys for Plaintiff.*

"'Attest:
"'G. HEITKEMPER, *Clerk.*
"'By G. B. SPEICE, *Dept.*'

"On the 14th day of September, 1887, a notice was served upon said plaintiff, which is in words and figures following, to-wit:

"'In the District Court of Platte County, Nebraska.

"'OTTO KUHN
v.
ELIZA PHILLIPS.

"'The said Eliza Phillips, defendant, is hereby notified that I have filed a motion in said district court to set aside the entry of satisfaction of the judgment in the above entitled cause; that said motion will be heard at the court house in Platte county, on Saturday, the 17th day of September, 1887, at ten o'clock A. M., or as soon thereafter as I can be heard. Affidavits will be used in the hearing of said motion.

"'September 13, 1887. OTTO KUHN,
"'By G. G. BOWMAN,
"'*His Attorney.*'

"On the 15th day of September, 1887, a motion was filed in said cause, which is in words and figures as follows, to-wit:

"'In the District Court of Platte County, Nebraska.

"'OTTO KUHN
v.
ELIZA PHILLIPS.

"'Whereas, on the 30th day of March, 1885, the plaintiff, Otto Kuhn, recovered a judgment against said Eliza Phillips, defendant, for the sum of $1,000 and costs of suit in a certain action then pending in the district court of Platte county, wherein Otto Kuhn was plaintiff and Eliza Phillips was defendant, which judgment is still in force, unrevoked, and unsatisfied; and whereas, on the 11th day of June, 1885, a certain pretended entry of satisfaction of said judgment was entered on the judgment and execution docket of said district court in the words and figures following, to-wit:

"'"July 11, 1885. The within judgment is fully paid and satisfied and the same is hereby discharged.

"'"McFARLAND & COWDERY,
"'"CORNELIUS & SULLIVAN,
"'"By B. R. COWDERY,
"'"*Attorneys for Plaintiff.*"

"'The said Otto Kuhn, plaintiff, therefore moves the court to set aside the said entry of satisfaction of the said judgment for the following reasons:

"'First—That said Otto Kuhn was the sole owner of said judgment at the time said entry was made.

"'Second—That said judgment was not then and never has been fully paid.

"'Third—That on the said 11th day of June, 1885, the said B. R. Cowdery, without the knowledge or permission of said Otto Kuhn, and without any legal authority whatever, undertook to compromise said judgment for the sum of $600, and then and there received upon said judgment said sum of $600, in consideration of which sum he, the said Cowdery, made said entry of satisfaction; that the said defendant then and there was, and still is, solvent, and

that said entry of satisfaction was made in fraud of plaintiff's rights; that there is due and owing to said Otto Kuhn from said Eliza Phillips on said judgment the sum of $400 with interest thereon from March 30 to July 11, 1885.

"'OTTO KUHN,
"'By G. G. BOWMAN,
"'*His Attorney.*'

"On the 17th day of September, 1887, a judgment and decree was rendered upon said motion by said court, which is in words and figures as follows, to-wit:

"'In the District Court of Platte County, Nebraska.

"'OTTO KUHN
v.
ELIZA PHILLIPS.

"'September 17, 1887. This cause came on to be heard upon the motion of Otto Kuhn, plaintiff, to set aside the entry of satisfaction of the judgment heretofore rendered in said cause, to-wit, on the —— day of March, 1885, and the evidence, and was submitted to the court, on consideration whereof the court finds that due notice of the pending of said motion has been given to said Eliza Phillips, defendant; that on the 11th day of June, 1885, there was paid by defendant upon said judgment the sum of $600, and no more, and that there is still due and unpaid upon said judgment the sum of $400, together with the interest from the 30th day of March, 1885, at the rate of seven per cent per annum, and that the entry of satisfaction of said judgment was made and entered on the record of said court without any legal authority, and is still null and void. It is therefore considered by the court that the entry of satisfaction of said judgment be, and the same is hereby, vacated, set aside, and annulled, and declared of no force or effect, and that the plaintiff have execution for the sum of $400 and interest from March 30, 1885, and costs.'

"On or about the 19th day of September, 1887, an execution was issued on said judgment at the instance of said

Otto Kuhn and placed in the hands of said Daniel C. Kavanaugh, sheriff of said Platte county, who, on the —— day of October, 1887, levied the same upon said real estate as the property of said Eliza Phillips, and advertised said real estate for sale on the 28th day of November, 1887, under said execution.

"Plaintiff alleges that said attorneys, McFarland & Cowdery and Cornelius & Sullivan, who made and entered said satisfaction of said judgment, were the duly authorized attorneys in said cause, and had an interest in said judgment to the extent of one-half the value thereof; that said B. R. Cowdery was a member of the firm of said McFarland & Cowdery, and was duly authorized to make said entry of satisfaction of said judgment; that after said judgment obtained March 30, 1885, was rendered against this plaintiff she was about to institute proceedings in court to contest said judgment and have the same annulled and set aside, for which purpose she employed attorneys and had a petition prepared in the month of June, 1885, a copy of which said petition is hereto attached and made a part of this petition, marked Exhibit 'A'; that each and every allegation of said petition hereto attached is true, and was made in good faith; that said Otto Kuhn and his said attorneys became informed of the purpose of said Eliza Phillips to contest said judgment, and for the purpose of avoiding the uncertainties of the regularity and validity of said judgment and having the same set aside, and to avoid further litigation concerning the same, in consideration whereof said McFarland & Cowdery and Cornelius & Sullivan, attorneys for said Kuhn in said cause, with the full knowledge, consent, and direction of said Otto Kuhn, entered into and made a compromise agreement with said Eliza Phillips, by which it was mutually agreed that the said Eliza Phillips should pay, and the said Otto Kuhn should receive, the sum of $600 in full payment and satisfaction of said judgment; that said sum of $600 was thereupon by said Eliza

Phillips paid, and said amount was by said Otto Kuhn received in full satisfaction and discharge of said judgment, and said entry of satisfaction and discharge of said judgment and said entry of satisfaction of said judgment, on the 11th day of July, 1885, was duly made and authorized. Said judgment rendered on the 17th day of September, 1887, vacating and annulling said entry of satisfaction of said judgment and awarding execution, should be set aside and vacated for the following reasons:

"First—Said entry of satisfaction of said judgment was made in good faith and for good and valid consideration and ought in justice to remain in full force and effect.

"Second—That said notice of said motion to set aside said entry of satisfaction was not served a reasonable time before the hearing of said motion to give defendant an opportunity to defend.

"Third—That said motion did not emanate from the court, or by the direction of the court.

"Fourth—Said motion was unauthorized.

"Fifth—Said notice was insufficient to give the court jurisdiction over the defendant.

"Sixth—Said motion was false in the following recital: 'That I have filed a motion in said district court to set aside the entry of satisfaction of the judgment in the above entitled cause.' No such motion had been filed before service of said notice.

"Seventh—Said motion was false in stating that affidavits would be used in the hearing of said motion. No affidavits were filed or used in the court.

"Plaintiff further alleges that after said judgment was satisfied and discharged, said real estate was duly mortgaged by said plaintiff for the sum of $1,200, with the full knowledge and belief of said mortgagor and mortgagee that said judgment was fully discharged and no longer a lien upon said premises, which said mortgage lien is still wholly unpaid and in full force; that if the satisfaction

and discharge of said judgment is not allowed to be and remain in full force and effect, said mortgagee will be deprived of his right to a prior lien upon said premises and his rights will be greatly impaired and imperiled, to the great injury and injustice of said mortgagee; that plaintiff has no adequate remedy at law, and a sale of said real estate will cast a cloud upon plaintiff's title to the same.

"The plaintiff therefore prays for an order restraining the sale of said real estate under said execution and that on the final hearing of said cause said injunction be made perpetual and that said judgment annulling and setting aside said entry of said judgment be canceled and vacated, and for such other relief as is just and equitable."

Exhibit "A" is attached to the petition, from which it appears that the original action was brought against Eliza Phillips for "willfully and maliciously contriving and intending to injure the said Otto Kuhn and destroy his domestic happiness and alienate from him the affections of his wife and deprive him of her comfort, society, and assistance, did falsely state and represent to his said wife that said Otto Kuhn was a blasphemous and an immoral, irreligious, depraved, hypocritical, and godless man and wholly in the power and under the influence of the devil, and that it would be useless for his said wife to try to reclaim him from the bondage of the devil, as he was hopelessly and irretrievably lost; and the said defendant Otto Kuhn further alleged in his said petition that on or about October 1, 1882, and at divers times thereafter, your defendant herein, with the like evil and malicious intent and purpose, did falsely state and represent to the said Otto Kuhn's wife that he had before and at the time of his marriage with the said Rosina Kummer a lawful wife living in Germany, and that the said marriage with the said Rosina Kummer was wholly null and void, and that the said Rosina was not his wife at all, and that it would be sinful and criminal for her to cohabit with him; and that on or about the said 1st day

of October, 1882, and many times thereafter, your plaintiff herein, wrongfully and maliciously intending to injure him without any just cause, did advise, induce, and persuade and entice the said Rosina Kuhn not to cohabit with him; that his said wife, Rosina Kuhn, believing said statements and representations, and relying on their truth, drove him from her house and refused to longer cohabit with him and had since the 1st day of October, 1882, so refused; that the said Otto Kuhn claimed damages by reason of the aforesaid matters in the sum of $10,000 from your plaintiff." His was a verdict upon a very doubtful claim, which was liable to be reversed in the supreme court. The attorneys for Mr. Kuhn recognizing the fact, and to prevent a review of the cause, effected a compromise of the claim, and were thereupon paid the amount agreed upon. Afterwards Kuhn comes before the court and claims to be the sole owner of the judgment, and denies the authority of his attorneys to compromise the judgment, and the court evidently acted upon that view of the case. If the allegations of the petition are true, however, he was the owner of but half of the judgment, and his attorneys who effected the compromise and received the amount agreed upon were the owners of the other half. These allegations, if true, were a fraud upon the court and the plaintiff in error, for which she is entitled to relief. The rule is that where a judgment has been procured by artifice or concealment on the part of the plaintiff, a court of equity will grant appropriate relief. (*Tomkins v. Tomkins*, 11 N. J. Eq., 512; *Griffith v. Reynolds*, 4 Gratt. [Va.], 46; *Pratt v. Northam*, 5 Mason [U. S.], 95; *Fish v. Lane*, 2 Hayw. [N. Car.], 522; 1 Black on Judgments, sec. 37.)

In *Spencer v. Vigneaux*, 20 Cal., 442, S. sued V., G. and D., as partners, for $22,000. V. had paid $10,000 on this claim, but concealed the fact, and the plaintiff took judgment for the entire amount. Afterwards the partners discovered the true state of the account, and insisted on a

credit on the judgment for $10,000, and the court granted an injunction to prevent the enforcement of the original judgment. Indeed, the rule is general that a court of equity will grant relief against a judgment procured by the creditor's fraudulent concealment of facts. (*Cal. Beet Sugar Co. v. Porter*, 68 Cal., 369; *Chambers v. Robbins*, 28 Conn., 552; *Stone v. Lewman*, 28 Ind., 97; *Johnson v. Unversaw*, 30 Id., 435; *Rogers v. Gwinn*, 21 Ia., 58; *Dobson v. Pearce*, 12 N. Y., 165; *Holland v. Trotter*, 22 Gratt. [Va.], 136; 10 Am. & Eng. Ency. of Law, 143.)

A court of equity will grant relief upon the facts stated in the petition. The judgment of the district court is reversed, the demurrer overruled, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

POST, J., concurs.

NORVAL, J., dissenting.

I do not concur in the above opinion of the majority of the court. An attorney who obtains a judgment for his client cannot, in the absence of special authority so to do, receive in satisfaction of the judgment a less amount than is due thereon. Such was the holding of this court in *Hamrick v. Combs*, 14 Neb., 381.

The petition shows that the district court, in which the judgment was rendered, which is sought to be enjoined in this action, on motion of Otto Kuhn, and notice thereof given to Eliza Phillips, set aside and vacated the entry of satisfaction of the judgment, and awarded execution for the sum remaining unpaid. That the court had jurisdiction to hear and determine the matter on motion cannot be doubted (*Wilson v. Stillwell*, 14 O. St., 464; *Laughlin v. Fairbanks*, 8 Mo., 367), and its decision upon the motion is conclusive upon the parties until reversed in a direct proceeding brought for that purpose. If Kuhn's attorneys

were authorized to make the compromise and settlement of the judgment, or if the entry of satisfaction was made with Kuhn's knowledge or consent, or if the attorneys were part owners of the judgment, as is now alleged in the petition, the same should have been urged on the hearing of the motion. It is now too late to do so. The order of the district court vacating the entry of satisfaction, in our view, is *res adjudicata*, as to all matters which were or could have been litigated on the hearing of the motion. It is a bar to this action, and the district court did not err in sustaining the demurrer to the petition. The judgment should be affirmed.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

SEPTEMBER TERM, A. D. 1892.

PRESENT:

HON. SAMUEL MAXWELL, CHIEF JUSTICE.
HON. T. L. NORVAL, } JUDGES.
HON. A. M. POST, }

AB. KIRSCHBAUM ET AL. v. W. T. SCOTT ET AL.

[FILED SEPTEMBER 21, 1892.]

1. **Attorney:** UNAUTHORIZED APPEARANCE. Where an attorney waives process and appears for a defendant, his authority to do so will be presumed; but the defendant may deny and disprove such authority, in which case he will not be bound by the attorney's appearance.

2. ——: ——: ATTACHMENT. In the case stated, *held*, that the questions presented, aside from the want of authority of the attorneys to appear, are, first, that the action on which the attachment issued arose upon contract; and, second, that the garnishees acted in good faith in the garnishment proceedings.

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

Halleck F. Rose, J. S. Bishop, and *S. B. Pound,* for plaintiffs in error:

Unauthorized appearance by attorneys confers no jurisdiction, and judgment entered in such a case is a nullity. (*Price v. Ward,* 1 Dutch. [25 N. J. L.], 225; *Osborn v. Bank,* 9 Wheat. [U. S.], 829; *Shelton v. Tiffin,* 6 How. [U. S], 186; *Sherrard v. Nevius,* 2 Carter [Ind.], 241; *Hess v. Cole,* 3 Zab. [23 N. J. L.], 116; *Anderson v. Hawhe,* 115 Ill., 33; *Parker v. Spencer,* 61 Tex., 155; *Critchfield v. Porter,* 3 O., 521; *Frye v. Calhoun County,* 14 Ill., 132; *Harshey v. Blackmarr,* 20 Ia., 161; *Kepley v. Irwin,* 14 Neb., 300; *Eaton v. Hasty,* 6 Id., 419; *McDowell v. Gregory,* 14 Id., 36; *Vorce v. Page,* 28 Id., 294.)

Harwood, Ames & Kelly, and *E. A. Gilbert, contra.*

MAXWELL, CH. J.

In 1887 the plaintiffs had a claim for $900, or more against the firm of Hopkins & Cowan. This was sent to L. C. Burr, of Lincoln, for collection. He sent the account to the defendants, and there is some claim on their part that proceedings by attachment to collect the debt were instituted. No issue of that kind is made in the pleadings, but the proof tends to show that such was the case. The matter, however, was afterwards settled by taking the notes of Hopkins & Cowan for the amount claimed, due in thirty days and six months. These notes were paid at maturity; but on paying the second note the defendants were garnished in an action before a justice of the peace, wherein one James H. Hamilton was plaintiff and the plaintiffs herein defendants. The transcript of that judgment is as follows:

"Transcript of proceedings had before J. C. Carnahan, a justice of the peace in and for York township, York, Nebraska, in February of the year 1888, in an action

wherein James H. Hamilton was plaintiff and Ab. Kirschbaum, Emil Selig, Morris May, and Simon Kirschbaum, comprising the firm of Ab. Kirschbaum & Co., were defendants.

"February 9, 1888, plaintiff filed his affidavit in attachment against the defendants, on the ground of non-residence, and praying judgment in the sum of $71.

"February 9, 1888, summons issued returnable February 14, 1888, at 10 A. M., and delivered to George Shreck, constable.

"February 9, 1888, order of attachment issued returnable February 14, 1888, at 10 A. M., and delivered to G. W. Shreck, constable.

"February 14, 1888, summons returned indorsed as follows, to-wit:

"'STATE OF NEBRASKA, } ss.
YORK COUNTY. }

"'Received this writ on the 10th day of February, 1888, and I hereby certify that I am unable to find the within named defendants in my county.

"'G. W. SHRECK.

"'Fees, $1. *Constable.*'

"'February 14, 1888, order of attachment returned, indorsed as follows, to-wit:"

The justice then copies the returns, showing service upon the garnishees, and their answer. The justice then made the following order:

"It is therefore ordered that they (the garnishees) pay into court the said $130, to apply on this claim and costs, or so much thereof as will pay this claim and costs.

"March 15, 1888, case called at 10 A. M., and all parties appeared in court. The defendant appeared by Scott & Gilbert, attorneys.

"Plaintiff appeared in person and by Sedgwick & Power, attorneys, and introduced in evidence their bill of particulars, and called as witness F. C. Power, who was sworn and gave evidence in the case.

"From the evidence in the case I do find and say that there is due from the defendants Ab. Kirschbaum *et al.* the sum of $71.50.

"It is therefore considered and adjudged by me, this 15th day of March, 1888, that the plaintiff J. H. Hamilton have and recover of and from the defendant Ab. Kirschbaum & Co. the sum of $71.50, with interest thereon from the date hereof at the rate of 7 per cent per annum, and the costs of this action herein expended, taxed at $8.65.

"J. C. CARNAHAN,
"*Justice of the Peace.*

"March 23, 1888, transcript made and delivered to plaintiffs.

"April 21, 1888, received the above judgment, interest, and costs in full of Scott & Gilbert, garnishees.

"J. C. CARNAHAN."

It will be observed that there is nothing to show that the action is upon contract, or that the case is one in which an attachment against a non-resident would lie. The proof, however, tends to show that the action was brought by Hamilton, as sheriff, for attorney's fees and expenses incurred by him in defending an action in Platte county for the wrongful attachment of the goods of Hopkins and Cowan. It seems that before levying the attachment in question the sheriff had demanded an indemnifying bond, which had been given, and it is claimed that the suit before the justice was upon such bond. Whether it was a legitimate claim or not we are unable from the proof to determine; but as there must be a new trial, that, if put in issue, will be a proper subject of inquiry in the next trial.

The defendants, having been served with process as garnishees, appeared and answered as to amount of money in their hands, and they were ordered to hold $130 until the further order of the court. The defendants then, as attorneys for the plaintiff, appeared in the case of *Hamilton*

v. Kirschbaum et al., although advised by Mr. Burr not to do so, but to let Mr. Hamilton obtain service by publication and in the meantime correspond with the plaintiffs.

It is true Mr. Burr advised the defendants to endeavor to induce Mr. Hamilton to dismiss the case; but the record wholly fails to show any authority from Burr to authorize the defendants to appear for the plaintiffs. There is nothing to show that Burr had such general authority, and it is very clear that he did not attempt to exercise it. The rule is well settled that where an attorney appears for a defendant not served with process, it will be presumed that he had authority to appear; but if the defendant may prove that he had no such power, his rights cannot be affected by the unauthorized appearance. (*Kepley v. Irwin*, 14 Neb., 300; *Denton v. Noyes*, 6 Johns. [N. Y.], 298; *Frye v. Calhoun*, 14 Ill., 132; *Legere v. Richard*, 10 La. Ann., 669; *Handley v. Statelor*, Lit. Select Cases [Ky.], 186; *Hess v. Cole*, 3 Zab., 116 [23 N. J. L.]; *Anderson v. Hawhe*, 115 Ill., 33.)

There was no authority for the defendants to appear in the case, and the final judgment in favor of Hamilton is void. The case, therefore, stands upon the answer in garnishment, and whether the same was made in good faith, and also whether the action was one in which an attachment would lie; these questions, upon proper issues, may be determined in the next trial; but unless justified by the garnishment proceedings in paying the money to the justice, the defendants will be liable for the same. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

UNION PACIFIC RAILWAY COMPANY v. JOHN PETER MERTES.

[FILED SEPTEMBER 21, 1892.]

1. **Dismissal: NON-PAYMENT OF COSTS: RULE UNDER THE CODE.** Under the common law, where an action is dismissed for want of prosecution, at the costs of the plaintiff, the plaintiff is required to pay such costs before prosecuting a second action for the same cause. In equity procedure, however, this rule is not enforced. A court of equity will be governed by the circumstances of each case, and where there is a valid excuse given for the failure to pay the costs in the former suit, will not compel such payment as a condition of permitting the second to proceed. The equity rule prevails under the Code, and while the court will not permit vexatious litigation, it will, in a proper case, excuse the non-payment of costs in the case previously instituted.
2. **Motion to Direct Verdict.** If a party desires to submit his case to the jury on the evidence of the plaintiff, and asks an instruction that the jury find for the defendant, he should make his motion to that effect without reservation. If he does not, the court may refuse to entertain it.
3. **The questions of negligence** were properly submitted to the jury.
4. **Contributory Negligence.** Although a party may have negligently exposed himself to an injury, yet if the defendant, after discovering his exposed situation, inflicts the injury upon him through a failure to exercise ordinary care, the plaintiff may recover damages.

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

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

H. B. Holsman, and *Mahoney, Minahan & Smyth, contra.*

MAXWELL, CH. J.

The plaintiff below in his petition alleges, in substance, that on the 14th day of June, 1885, in Douglas county and state of Nebraska, he was injured by the defendant; that said injury was done by defendant running a locomotive engine against plaintiff, thereby fracturing four ribs and doing him other bodily injury; that on account of said injury the plaintiff is wholly and completely disabled for manual labor; that said disability is permanent; that said injury was done to the plaintiff at a point on the defendant's line of railroad in said county and state where said railroad is crossed and intersected by a public county road, or on said line of road near said crossing; that the said public road passes over the said railroad at the place where the locomotive of defendant struck and injured plaintiff; that the agents and servants of the defendant negligently and carelessly ran a locomotive engine against said plaintiff; that said injury to plaintiff was caused wholly by the negligence and carelessness of the agents and servants of the defendant in charge of said locomotive engine; that plaintiff was not guilty of contributory negligence; that the plaintiff had earned his living by manual labor; that his labor was worth the sum of five hundred and ninety-two dollars annually; that before said injury he was in good health and able to work; that the plaintiff's age at the date of the injury was about forty-nine years; and that he had an expectancy of life of $21\frac{81}{100}$ years; that on account of said injury the plaintiff has suffered much pain, and had to employ a surgeon to treat said injury, which surgical aid cost the sum of four hundred dollars. Wherefore he prayed for damage in the amount of one thousand nine hundred and ninety-nine dollars.

The defendant filed an amended answer, in which it denied that plaintiff was injured in the manner or to the extent alleged in the petition; denied that the plaintiff was

injured at the place alleged in the said petition; denied that plaintiff was injured by being struck by defendant's locomotive engine at a point on its road where it crosses a public road; denied that its agents and servants in charge of said locomotive engine were guilty of carelessness and negligence; denied that its agents negligently and carelessly ran said locomotive engine against said plaintiff; denied that plaintiff was injured in any manner, or to any extent, by reason of any fault or negligence on the part of the defendant, its servants or employes; that if plaintiff was injured as alleged in the petition, or to any extent, it was through his own fault and carelessness contributing thereto, and not through any fault or carelessness attributable to this defendant.

In an action in the United States district court then pending, wherein the plaintiff below was plaintiff and the defendant below was defendant, and wherein the same cause of action set up and recited in plaintiff's petition was then in said court pending for trial, and in which said action the said plaintiff had complained of and against said defendant of and concerning the very same alleged wrong and injury in the petition herein alleged and mentioned, the court made an order as follows:

"JOHN PETER MERTES
v.
UNION PACIFIC RY. CO. } Dismissal.

"This cause coming on for hearing upon the regular call of the docket, and the plaintiff failing to appear, upon motion of the defendant, by A. J. Poppleton, its attorney, it is ordered by the court that this cause be, and the same is hereby, dismissed, for the want of prosecution, at the cost of plaintiff, and that execution issue therefor."

That afterwards, on the 8th day of October, 1890, the plaintiff below filed a motion in the district court of Douglas county, based on the records of the proceedings in the United States circuit court, by which motion the defend-

ant prayed the court to arrest the action, and asked for judgment of nonsuit against the plaintiff on account of said judgment in the United States circuit court, and because the plaintiff had not paid said costs. Thereupon the plaintiff offered and read in evidence, in resistance of defendant's motion, his affidavit of merits, and admitting therein that he had not paid the costs adjudged against him in the United States circuit court, and averring that he had not paid the same on account of his poverty and inability to earn anything on account of the injury set forth in the petition, and that the only thing of value that he owned was his cause of action against the company for personal injury, and that he could not obey any order requiring him to pay costs in the United States circuit court on account of his poverty."

The motion to dismiss was overruled, and this is the first error complained of.

Under the common law, where an action is dismissed without prejudice at the costs of the plaintiff, he cannot maintain a second action until he has paid the judgment for costs in the first action (*Weston v. Withers*, 2 Term Rep. [Eng.], 511), and the plea of poverty is no excuse (Id.). The rule seems to have originated in ejectment cases, which, under the common law, could be brought without limit. In the case cited, however, the action was for unlawful distress of property, and seems to have been attended with circumstances of peculiar hardship, yet the court applied the rule in ejectment cases.

The common law rule has been recognized in many cases in this country. (*Perkins v. Hinman*, 19 Johns., 237; *Jackson v. Edwards*, 1 Cow. [N. Y.], 138; *Jackson v. Carpenter*, 3 Id., 22; *Jackson v. Schauber*, 4 Wend. [N. Y.], 216; *Kentish v. Tatham*, 6 Hill [N. Y.], 372; *Felt v. Amidon*, 48 Wis., 66.) In *Stebbins v. Grant*, 19 Johns. [N. Y.], 196, the court recognized the common law rule, but refused to apply it in suits in equity. A court of equity will be gov-

erned by the circumstances of each case, and where there is a valid excuse given for the failure to pay the costs incurred in the former action, it will not compel such payment as a condition of permitting the second to proceed.

Under the Code there is no doubt the equity rule prevails; and while the court will not permit vexatious litigation, it will in a proper case excuse the non-payment of costs in the case previously instituted.

The common law procedure was for a rule to show cause, and the order required the payment of costs by a day named, or the cause to be dismissed. It was not by motion to dismiss, as in the case at bar. In any view of the case, therefore, the motion was properly overruled.

Second—It is claimed that the court erred in overruling the motion to instruct against the plaintiff below upon the conclusion of his testimony in chief. It is unnecessary to examine this question, as upon the overruling of the motion the defendant below offered testimony in support of the defense, and thus waived any error, if such there was, in overruling the motion. In addition to this, the motion was not absolute and without reservation, but upon condition.

Third—The testimony tends to show that the accident occurred on Sunday, the 14th day of June, 1885, at or near what was then known as Sheeley's crossing of the Union Pacific railway—now Twenty-sixth street in the city of Omaha; that the defendant resided on the line of said railway at or near said crossing; that in the morning of that day he went into the city and was shaved, and afterwards attended church. He had also taken a dram of whiskey in the morning and two after the service. The proof, however, fails to show that he was in any manner affected by the liquor. He started for home between 12 M. and 12:30, and followed the streets as far as Seventeenth street at the lumber yard, and from there followed the railroad to Sheeley's crossing. At Sheeley's crossing,

and for several blocks east and west of that point, there was at the time of the accident a double track on the railway, the tracks being about nine feet apart. The trains running into Omaha went in on the south track, and those going out, on the north one. It appears to have been customary for persons who lived along the railway to walk on the tracks, and the plaintiff testifies that he got on the south track, walked up that until he heard and saw a Missouri Pacific freight train going into Omaha on that track, when he stepped into the space between the two tracks or roads and walked there until he reached Sheeley's crossing, when in crossing the north track he was struck by an engine.

The plaintiff below testifies that the Missouri Pacific train passed him near Twenty-fourth street, and he was then walking between the tracks, and continued to walk between the tracks until he reached Sheeley's crossing, when he turned to the right and crossed the north track; that he was on the end of a tie and about to step off when the engine struck him; that there is a curve in the railway east of Sheeley's crossing, so that a person cannot see down the track more than twenty or thirty yards; that almost immediately before he was struck the engineer had blown the whistle "toot, toot," but there was not time to step off the tie.

The testimony of the engineer corroborates this testimony in several respects, as he testifies, in effect, that the plaintiff below was not run over, but was struck with the cross-bar of the engine.

The engineer testifies that he was running a light engine without a load to Gilmore for the purpose of taking a train from there to Grand Island; that the tender of the engine had an air-brake upon it which was under the control of the engineer; that he noticed the plaintiff below walking between the tracks until he was just east of Sheeley's crossing, when he stepped upon the track to cross the same.

On cross-examination the engineer testified that he could stop that engine, as it was running, in from thirty to forty-five feet. The efforts he made to stop the engine are stated by himself as follows:

Q. Did you reverse the engine or attempt to reverse it when you saw this man on the track?

A. It was not necessary.

Q. The question I asked you is, did you do it, not whether it was necessary or not?

A. When I saw him on the track I reversed the engine.

BY THE COURT: Answer the question just as it is asked, and not wait for the court to tell you again.

BY MR. SMYTH: When you first saw this man did you reverse the engine?

A. I did not.

Q. Did you attempt to reverse it?

A. I did not shut the steam off. I put the air-brake on and shut off the steam and went slower and slower.

Q. Did you put on the air-brake the moment you saw him?

A. When I saw him on the track?

Q. When you saw him first you put on the air-brake?

A. I went slower; yes, sir.

Q. State whether or not you applied the brakes when you saw this man first.

A. Yes, sir.

Q. Instantly, upon seeing him you applied the brakes?

A. I went slower.

Q. Did you apply the brakes?

A. Yes, sir; what brake I had.

Q. Did you shut off the steam when you saw him first?

A. Yes, sir.

Q. You shut it all off just the moment you saw him; is that correct?

A. Yes, sir; I think so, anyway.

Q. You attempted to do it?

A. I did do it.

From which it appears that he did not attempt to stop the engine, but simply slow up.

The engineer and some other witnesses testify that the accident occurred just east of the Sheeley crossing, on the private grounds of the railway near a telegraph pole, and that the plaintiff being improperly on the track the company is not liable.

Upon the question as to the place where the accident occurred there is a direct conflict in the testimony. A number of witnesses testify that it occurred on the crossing, and that the telegraph pole has been moved since the accident. The question, therefore, was proper for a jury to consider.

But suppose the accident did not occur on the crossing, but the engineer, after seeing the imminent danger to the party on the track, could, by the exercise of ordinary care, have stopped his engine and prevented the accident, but did not, the company would without doubt be liable.

The rule is, that although the plaintiff has negligently exposed himself to an injury, yet if the defendant, after discovering the exposed condition, inflicts the injury upon him through a failure to exercise ordinary care, the plaintiff may recover damages. (2 Thompson on Negligence, 1157; *Barker v. Savage*, 45 N. Y., 191, 194; *Brown v. Lynn*, 31 Pa. St., 510; *Northern, etc., R. Co. v. Price*, 29 Md., 420; *Locke v. First Division, etc., R. Co.*, 15 Minn., 350; *Nelson v. Atlantic, etc., R. Co.*, 68 Mo., 593; *O'Keefe v. Chicago, etc., R. Co.*, 32 Ia., 467; *Morris v. Chicago, etc., R. Co.*, 45 Id., 29.)

The rule is very clearly stated by Judge Thompson in his valuable work on Negligence, pp. 1105–1157. In *McKean v. B., C. R. & N. Ry. Co.*, 55 Ia., 192, it is said the rule is required by humanity and reason, citing *Morris v. C., B. & Q. R. Co.*, 45 Ia., 29. To the same effect,

Brown v. H. & St. J. R. Co., 50 Mo., 461; *Omaha Horse R. Co. v. Doolittle*, 7 Neb., 481; *Burnett v. B. & M. R. Co.*, 16 Id., 332; *Cook v. Pickrel*, 20 Id., 433; *U. P. R. Co. v. Sue*, 25 Id., 772.

Even if it be conceded that the plaintiff below was unlawfully on the track, and did not look for an engine before crossing the same, still there is testimony in the record from which the jury would be warranted in finding that after the engineer became aware of the perilous condition of the plaintiff below he could, by the exercise of ordinary care, have stopped the engine. This was proper to submit to the jury.

After the testimony of the plaintiff below had been introduced the court permitted the jury, under proper instructions, to visit the scene of the accident in a body, so that they might be better able to apply the testimony.

The verdict was for $1,000. The injuries are shown to have been very severe, and the verdict certainly is not excessive. All questions seem to have been fairly submitted to the jury, and no error is apparent in the record. The judgment is therefore

AFFIRMED.

THE other judges concur.

FRANCIS WILKINS V. ERNEST F. WILKINS.

[FILED SEPTEMBER 21, 1892.]

1. **Insanity: VALIDITY OF CONTRACT BETWEEN FATHER AND SON.** One F. W., father of E. F. W., assisted in paying and securing certain debts of his son, and received a bill of sale from the son of certain personal property which he took possession of. The proof clearly established the fact that the son, a year or more before the execution of the bill of sale, had been injured and his mind affected so as to incapacitate him to transact busi-

ness, and that his father had knowledge of these facts. In an action of replevin by the son to recover the property, the contract, not being for necessaries, was *held* void.

2. **Subrogation.** It is probable that in a proper proceeding the father may be subrogated to the rights of creditors of his son, whose debts he apparently in good faith paid, or secured, in whole or in part.

ERROR to the district court for York county. Tried below before NORVAL, J.

Sedgwick & Power, for plaintiff in error.

E. A. Gilbert, contra.

MAXWELL, CH. J.

This is an action of replevin brought by the defendant in error against the plaintiff in error to recover the possession of certain personal property. On the trial of the cause the jury disagreed, whereupon, by stipulation, the cause was submitted to the court upon the evidence, and judgment was rendered in favor of plaintiff below.

The plaintiff in error is the father of the defendant in error. In January, 1887, the son executed to his father a bill of sale as follows:

"Know all men by these presents, that I, E. F. Wilkins, of York county, Nebraska, for and in consideration of the sum of $1,000, do hereby sell and transfer unto Francis Wilkins, of York county, Nebraska, the following described property, to-wit: One pair of mules; one pair of mares, one black and one gray, seven years old; one brown horse, twelve years old; one iron-gray colt, coming three years old; three cows; one heifer; one calf; one Deering self-binder; one Deering mower; sulky hayrake; one sulky stirring plow; two corn plows; one Moline wagon; one harrow; 1,000 bushels of corn. And I warrant the title thereto against all persons whomsoever.

"E. F. WILKINS.

"C. W. FAILING."

The father took possession of a portion of the above property and the son afterwards instituted this action and regained the property taken. The defense was and is, that the son was *non compos mentis*, and hence that he was incapable of making a contract.

The testimony tends to show that some two years before the execution of the contract the son had been injured by a severe fall that had affected his brain, and that since that time he had to a great extent been incapacitated to transact business. So far as we can judge, the father was anxious to aid his son to pay and secure certain debts and obligations and aided him in doing so, but well knowing at the time his condition. The bill of sale, however, was not given to secure a debt for necessaries and is not binding on the son. It is probable that in a proper proceeding the father may be subrogated to the rights of creditors of his son whose claims were satisfied, or secured, in whole or in part; but under the pleadings he cannot have that relief in this action. The judgment is

AFFIRMED.

POST, J., concurs.

NORVAL, J., took no part in the decision.

STAR UNION LUMBER COMPANY, APPELLANT, V. A. M. FINNEY ET AL., APPLELLEES, IMPLEADED WITH D. C. BRYANT, APPELLANT.

[FILED SEPTEMBER 21, 1892.]

1. **Mechanic's Lien: PROCEDURE TO ENFORCE: APPEAL.** An action was instituted to foreclose a mechanic's lien and have certain policies of insurance taken in the name of the land-owner assigned to the plaintiff. *Held*, That the action being instituted

as one in equity, the procedure in equity in regard to appeals to the supreme court applies, even if some of the proceedings were in the nature of an action at law.

2. **The testimony** and conduct of the parties clearly established the making and delivery of the policies of insurance.

3. **Fire Insurance:** INSURABLE INTEREST: PROOF OF LOSS. An adjuster filled out the proof of loss and stated therein that the insured was the owner in fee-simple, when in fact he claimed under a contract. This he handed to the insured and requested him to go before a notary public and make oath to the same. The proof was not read to the insured, and he testified that he did not read the same but supposed that it had been filled out properly. *Held*, That the evidence showed the insured had an insurable interest in the property, and that the proof of loss would have been equally available had the insured stated the actual facts as to his ownership, and that the company was not prejudiced by the misstatement.

4. **Assignment of Claim.** After a loss has occurred the insured may assign the right to recover for same without the consent of the insurance company, and the assignee may recover in his own name.

5. **Condition in Policy Waived.** The provision in a policy of insurance, that the company shall have sixty days in which to pay the loss, is personal, and may be waived by it. It is merely a provision that during the time stated it shall not be liable for costs.

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

Irvine & Clapp, for Star Union Lumber Company, appellant:

Refusal of insurance companies to pay, and their denial of liability on the policies, estop them from claiming benefit of provision in policy allowing sixty days for payment of loss. (*Allegre v. Md. Ins. Co.*, 6 H. & J. [Md.], 337; *Hoffecker Bros. v. Ins. Co.*, 5 Houst. [Del.], 101; *Williamsburg Ins. Co. v. Cary*, 83 Ill., 453; *State Ins. Co. v. Maackens*, 38 N. J. L., 564.) Contract of insurance is complete on acceptance of risk by company and before

issuing policy. (*Home Ins. Co. v. Curtis*, 32 Mich., 402; *Lungstrass v. German Fire Ins. Co.*, 48 Mo., 201; *Krumm v. Jefferson Ins. Co.*, 40 O. St., 225; *Neb. & Ia. Ins. Co. v. Seivers*, 27 Neb., 541; *Baldwin v. Choteau Ins. Co.*, 56 Mo., 151.) Where insured has insurable interest covenants and warranties as to title appearing in policy cannot be set up by insurer to defeat policy when no representation as to title was previously made. (*Commonwealth v. Hide & Leather Ins. Co.*, 112 Mass., 136; *Castner v. Farmers' Mut. Ins. Co.*, 46 Mich., 15; *Hoffecker v. Ins. Co.*, 5 Houst. [Del.], 101; *Tiefenthal v. Citizens Mut. Co.*, 53 Mich., 306; *Western Assurance Co. v. Mason*, 5 Bradw. [Ill.], 141; *Phila. Tool Co. v. Assurance Co.*, 132 Pa. St., 236; *American Basket Co. v. Farmville Ins. Co.*, 3 Hughes [U. S.], 251; *Stache v. St. Paul F. & M. Ins. Co.*, 49 Wis., 89.) A misstatement as to title in proof of loss is not material unless made fraudulently. (*Lamb v. Council Bluffs Ins. Co.*, 70 Ia., 238; *Helbing v. Svea Ins. Co.*, 54 Cal., 156; *Little v. Phœnix Ins. Co.*, 123 Mass., 380.)

Fawcett & Sturdevant, for D. C. Bryant, appellant.

A. S. Churchill, for appellees.

MAXWELL, CH. J.

This action was brought in the district court of Douglas county to foreclose a mechanic's lien on lots 1 and 2, block 34, of Albright's Choice, an addition to South Omaha. The amount claimed to be due and unpaid is the sum of $1,192.50.

It is alleged in the petition, in substance, that William G. Albright was seized in fee of the lots above described; that early in the year 1888 he sold the same and gave a contract of purchase, which after various assignments was transferred to A. M. Finney; that in April, 1888, the defendant Coy, being a contractor and builder, entered into a

contract with the defendant Finney to construct eleven houses, according to certain plans and specifications, for the agreed price of $585 for each house; that Coy thereupon purchased from the plaintiff large quantities of lumber and other material for the erection of said houses, which lumber and material was of the value of $1,192.50, and was used by said contractor in the erection of five of said houses; that within sixty days, to-wit, on June 28, 1888, the plaintiff filed the necessary statement in the office of register of deeds of said county to obtain a mechanic's lien upon said property for the amount so due; that during the construction of said houses Finney agreed with the defendant Coy that he would insure said houses and keep the same insured for the benefit of Coy and the plaintiff, and in pursuance of said agreement he did insure each of said houses in the sum of $500 against loss or damage by fire; that three of said houses were insured in the New Hampshire Insurance Company and two of said houses by the Dwelling House Insurance Company. The numbers of the several policies are set out in the petition.

It is also alleged that while the insurance was taken for the benefit of Coy and the plaintiff, that the defendant Finney wrongfully and fraudulently caused said policies to be written in his own favor; that on the 26th of May, 1888, four of said houses were destroyed by fire; that due notice of said loss was given to said companies, and there is now due from the Dwelling House Insurance Company the sum of $53.62 and from the New Hampshire Insurance Company the sum of $1,059.63; that since said losses occurred the defendant Finney has agreed to assign said policy to the plaintiff to apply on said debt, but has refused to make said assignment in writing.

Albright answered the petition, setting out the amount due on the contract, and alleging a willingness to convey upon receiving the amount due.

In November, 1888, a supplemental petition was filed

by the plaintiff, wherein it is alleged that on the 2d day of July, 1888, Finney duly transferred all his interest in said policies to the plaintiff. A few days thereafter D. C. Bryant, who had been permitted to intervene, filed an answer, wherein he claims that on the 6th day of June, 1888, A. M. Finney assigned to him a policy of insurance upon one of said houses to secure the sum of $353.20, and upon which he prays judgment.

The Dwelling House Insurance Company, in its amended answer to the petition and supplemental petition, alleges "that Finney was not the owner of said lots in fee-simple, and that it was not aware of the fact until the bringing of this action; that each of said policies contain, among other conditions, agreement, and warranties, the following, to-wit: 'If the interest of the assured in said property, or any part thereof, now is or shall become any other or less than a perfect, legal, and equitable title and ownership free from all liens whatever, except as stated in writing hereon, or if the buildings, or either of them, stand on leased ground or land of which the assured has not a perfect title, or if this policy shall be assigned without written consent hereon, then, and in every such case, this policy shall be absolutely void.' That the houses did not stand upon ground or land of which the said A. M. Finney had a perfect title, either at the time of the issuance of the policy or at the time of loss, nor was there any written statement upon either of said policies that the interest of the assured was other or less than a perfect, legal, and equitable title and ownership free from all liens whatever; that said property was not then, is not now, nor has it been free of all liens since the date of said policies; that the liens and incumbrances exceeded the whole value of the property, and this defendant under said policy is not liable by reason thereof.

"This defendant further says the policies were never delivered, nor was the premium ever paid, nor was any time

given in which to pay the premium, nor was any note given therefor; that the policies were purloined from the office of the agent of this company without his knowledge or consent; that said policies would not have been delivered if applied for until the premium was first paid; that the said A. M. Finney in his proofs of loss stated under oath 'that he was the owner in fee-simple of said lots.'"

Then follows a provision of the policy that the insured shall forthwith give a written notice of the loss, etc., and "that any misrepresentation in the proofs or examination as to the loss or damage shall forfeit all claims under this policy," and that "no act or omission of the company, or any act of its officers or agents, shall be deemed, construed, or held to be a waiver of a full and strict compliance with the foregoing provisions of the terms and conditions of this policy, nor is extension of time to the assured for compliance, except it be a waiver or extension in express terms and in writing signed by the president or secretary of the company." There is also a denial that there has been any adjustment of the loss or any waiver of the conditions of the policy.

The substituted answer of the New Hampshire Fire Insurance Company is substantially the same as the above, but the facts are set out more in detail.

The plaintiff and Bryant each filed a reply to these answers which need not be noticed.

On the trial of the cause a decree was rendered in favor of Albright and against Finney for the sum of $680.72, which was declared a first lien upon the said premises; that there is due from the defendant Coy to the plaintiff the sum of $1,359.45, for material furnished by the plaintiff to said Coy for the erection of dwelling houses upon said premises as alleged in the petition. The court also finds that the necessary steps were taken by the plaintiff to obtain a mechanic's lien and that the same is a valid lien for the amount above specified, subject only to the lien of Al-

bright; as between the plaintiff and the insurance companies and Bryant and the insurance company the court found for the companies and dismissed the action. The case is brought into this court by appeal.

The contest in this case is wholly between the insurance companies and the plaintiff and Bryant.

The first objection made on behalf of the insurance companies is that the action is one at law, and, therefore, cannot be brought into this court by appeal.

It is a sufficient answer to this objection to say that the action was instituted as one in equity; that the relief sought was equitable in its nature and it was tried as an action in equity. This objection, therefore, would be of no avail, even if the final recovery had been of a purely legal nature. There is nothing, therefore, in the first objection.

Second—The testimony tends to show that A. M. Finney had a contract of purchase for the lots in question; that a portion of the purchase money had been paid for the same; that about April 10, 1888, Finney entered into a contract with Coy to erect five houses on the lots at the agreed price of $585 each; that Coy thereupon proceeded to erect the buildings and procured a large part of the material therefor from the plaintiff; that about the time the buildings were completed, Finney insured the same for the sum of $500 each, in the companies named, three of the risks being taken by the New Hampshire Company and two by the Dwelling House Company. The testimony also tends to show that the same agent represented both of the defendant companies, that this agent employed as solicitor E. E. Finney, a brother of A. M. Finney, and that the applications in this case were made by such solicitor. The policies were filled out, and it is claimed on behalf of the companies that they were not delivered. This claim, however, is clearly disproved by the conduct of the parties. It appears that the agent, after the loss, paid the amount of the premiums himself and was credited with the amount on the

books of the company. This he says was a month or two after the loss occurred. The exact date, however, is not material, neither is the state of the account between E. E. Finney and the agent anywhere set out. The premiums were paid, and if the money was advanced by the agent, it is an admission that the policies were lawfully issued. A few weeks after the loss occurred the adjuster of the New Hampshire Company, together with the agent at Omaha and A. M. Finney, visited the place where the fire occurred, and the adjuster of the New Hampshire Company made the following:

"Estimated cost of rebuilding, by H. B. Jeffers, contractor..... $325 00
"Damage to foundation..... 28 21

$353 21

"OMAHA, June 15, 1888.

"Assured's contractor had put $431.81 into this house, but we found we could construct it for less money.

"FRED W. LEE, *Adj.*

"Agency, Omaha, Neb. Assured, A. M. Finney. Date of fire, May 19, 1888. Proof made June 15, 1888. Policy No. 306426. Amount of policy, $650. Amount awarded, $353.21. Adjusted by Fred W. Lee."

"Estimated cost of rebuilding, by H. B. Jeffers, contractor..... $325 00
"Damage to foundation..... 28 21

$353 21

"OMAHA, June 15, 1888.

"Assured's contractor had put $413.81 into the house, but we found we could construct it for less money.

"FRED W. LEE, *Adj.*

"Agency, Omaha, Neb. Assured, A. M. Finney. Date of fire, May 19, 1888. Proof made June 15, 1888.

Policy No. 306425. Amount of policy, $650. Amount awarded, $353.21. Adjusted by Fred W. Lee."

"Estimated cost of rebuilding, by H. B. Jeffers, contractor..... $325 00

"Damage to foundation..... 28 21

$353 21

"OMAHA, June 15, 1888.

"Assured's contractor had put $431.81 into this house, but we found we could construct it for less money.

"FRED W. LEE, *Adj.*

"Agency, Omaha, Neb. Assured, A. M. Finney. Date of fire, May 19, 1888. Proof made June 15, 1888. Policy No. 306427. Amount of policy, $650. Amount awarded, $353.21. Adjusted by Fred W. Lee."

The proof of loss was filled out by Mr. Lee, who, in describing the title of A. M. Finney, said:

"The property insured belonged exclusively to A. M. Finney, and no other person or persons had any interest therein.

"If the loss is on building, state whether real estate is owned in fee-simple or held on lease. Fee-simple.

"State the nature and amount of incumbrance at time of the fire. One hundred and twenty-five dollars, proportionate share of purchase money on lots."

Mr. Finney testifies that Lee told him to take the proof of loss and go before a notary public and make oath to it; that he saw the amount of loss claimed was right and he did not read the instrument.

A great deal of stress is laid by the companies upon the character of title which Finney in his proof of loss stated that he possessed, viz., a fee-simple.

It is difficult to perceive the force of the objection. Finney had an insurable interest in the property, and, so far as appears, the right of payment would have been the same had he claimed under the contract instead of an absolute

title. The companies have failed to point out in what manner they have been prejudiced by this misstatement, which to some extent was the fault of their own adjuster.

It is claimed that a policy could not be assigned without the assent of the company. However this may be as to a policy before a loss occurs, the objection does not apply as to the assignment of a claim for a loss after it occurs. It is also claimed that the action is premature, having been brought before the expiration of sixty days after the loss occurred. This is a provision in favor of the company that may be waived, and will be unless insisted upon, and in no case could extend beyond taxing the costs to plaintiff; in other words, the company has sixty days in which to pay the loss, and it cannot be subjected to costs of an action during that time.

Upon the whole case it is apparent that the equities of the case are with the plaintiff and Bryant, and that the court erred in dismissing the action as to the insurance companies. The judgment of the district court is therefore reversed and judgment will be entered in this court in favor of the plaintiff and D. C. Bryant upon the coming in of the report of the referee, to be hereafter appointed. The cause is referred to ———— to ascertain the amount due on the policies, and the amount due to the plaintiff and D. C. Bryant respectively, and report the same with all convenient speed to this court.

JUDGMENT ACCORDINGLY.

THE other judges concur.

PATRICK H. MALLOY V. ANNIE MALLOY.

[FILED SEPTEMBER 21, 1892.]

1. **Ejectment:** CONTRACT TO RECONVEY. In January, 1884, one E. D. M. leased eighty acres of school land from the state and in February of the same year entered into a contract with one C. P. to surrender his lease to him, and he, C. P., was to advance the first payment and purchase the land from the state, taking the contract in his own name, and E. D. M., upon the repayment of the money advanced and interest thereon, was to receive an assignment of the contract. In July, 1885, E. D. M. died intestate and without issue. C. P. filed his claim against the estate for the money loaned, interest, and taxes paid and afterwards withdrew the same and assigned the contract to the plaintiff, the father of E. D. M. Neither E. D. M. nor his wife, the defendant, had paid any part of the money loaned and paid out by C. P. *Held*, That, stripped of all questions of descent which do not control, the plaintiff stands in the shoes of C. P. and the defendant must perform the contract of E. D. M., and the plaintiff is entitled to a decree of foreclosure and sale for the amount due.

2. ———. A mortgagee cannot maintain ejectment to recover possession of real estate.

3. ———. The plaintiff must possess a legal estate to maintain ejectment.

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

M. B. Reese, J. R. Gilkeson, and *Geo. I. Wright*, for plaintiff in error.

S. H. Sornborger, contra.

MAXWELL, CH. J.

This action was brought in the district court of Saunders county by the plaintiff against the defendant to recover the possession of the east half of the southwest quarter of section 36, in township 17, range 6, in said county.

The petition alleges, in substance, that about January 1, 1884, one Edward D. Malloy, a son of the plaintiff and husband of the defendant, leased the land above described from the state; that in February, 1884, he assigned said lease to one Charles Perky by virtue of an agreement with Perky that he should purchase the land from the state and pay the money due on the contract and give said Malloy the privilege of purchasing the land in two or three weeks by repaying Perky the amount due on said purchase; that in pursuance of said agreement Perky purchased said land from the state and took the contract of purchase in his own name; that E. D. Malloy wholly failed to pay said Perky the amount due on said contract; that in March, 1886, Perky assigned said contract to the plaintiff; that on July 5, 1885, Edward D. Malloy died intestate, leaving no heirs except his widow, the defendant, and his father, the plaintiff herein, and the defendant claims that such widow is entitled to the estate during her natural life.

For second cause of action the plaintiff claims $600 for rents and profits.

Various defenses were set up by the defendant, and it is admitted by her that Perky paid on said purchase the sum of $67.40. There is no claim that E. D. Malloy or the defendant has been repaid any of the money paid upon the contract in question. The prayer of the defendant is:

"Wherefore the defendant prays the judgment of the court that the plaintiff go hence without day. And the defendant further prays the court to find the amount, if any, of the principal sum of the purchase price under said contract of purchase, which has been paid by the plaintiff, and what amount of the interest thereon he has paid; also what amount of the principal is now or is to become due, and is not paid to the state, and what amount of interest on the same is now due and to become due, and is unpaid; and that the court may decree that the plaintiff pay the principal sums provided for in said contract when the

same become due, and that the defendant may reimburse plaintiff for any sums paid to the said Charles Perky or the state on account of interest on said contract of purchase, and be required to pay the interest now due the state, and pay the future accruing interest as the same becomes due from time to time, and for such other, further, or different relief between the parties hereto as may seem to the court to be meet, just, and equitable."

The case was tried as an action of ejectment, and a jury called which found for the defendant, and the action was dismissed.

The testimony clearly shows that the plaintiff in error merely possesses an equitable estate in the land. The facts are substantially as follows: Perky advanced the first payment on the land, and some additional money for unpaid rent, in all $67.40. On February 12, 1884, Perky wrote a card to Edward saying, "The amount due on your school land is $67.40," and that was the last communication with reference to said land between Perky and Edward. Edward died in July, 1885, without issue. A few days after Edward's death, Perky offered through one Murphy to assign the contract to the defendant if she would pay him the $67.40, with interest thereon. On November 21, 1885, Perky, at the request of the county judge, filed a claim for $79.75 against Edward's estate, which was based on the purchase money paid on said contract, on condition that if the claim was paid by December 1 he would assign the contract. On November 25, 1885, a hearing on claims against said estate was had, and the defendant's attorney objecting to its allowance, said claim, with other unallowed ones, was continued to March 4, 1886. On December 5, 1885, Patrick Malloy, the plaintiff, paid $31.95 on the aforesaid contract of sale, and on March 4, 1886, Perky assigned said contract to Patrick, and withdrew his claim from the files of the county court. The administrators of Edward's estate inventoried said land as belonging thereto,

and the county court, on February 23, 1886, made an order assigning the real estate, not describing it, of E. D. Malloy, situate in said county, to the defendant for life, and remainder to the plaintiff. Said land is in cultivation, and was at the time of the commencement of this suit.

Stripped of all questions as to rights of heirship, which are not the controlling questions in this case, and the plaintiff is possessed of the rights of Charles Perky in the premises, and the defendant of the rights of Edward D. Malloy. It is very clear that Perky held the contract as security for the payment of the moneys advanced by him, and that the plaintiff, by taking an assignment of the contract, stands in his shoes; but neither Edward D. Malloy nor the defendant ever paid anything on the contract. These facts are substantially conceded. It was the duty of the court, therefore, upon the issues and proof to have found the amount due the plaintiff upon the contract in question, and required its payment by a day to be named, failing in which the interest of the defendant should be sold under a decree of foreclosure. Originally the action of ejectment was devised to enable a tenant for years to recover the possession of the devised premises during the term. At common law, to maintain the action, it was necessary for the plaintiff in case of contest to establish four points, viz.: First, title in his lessor; second, a lease for the present term; third, that the lessee entered in possession of said lease, and, fourth, that the defendant ousted or ejected him. (3 Blacks. Com., 202; *Dale v. Hunneman*, 12 Neb., 223.)

Afterwards the action was so modified as to present but two questions, viz., title and the right of possession, and that rule prevails under the Code. To entitle the plaintiff to recover he must possess a legal estate in the premises and be entitled to the immediate possession. (*Dale v. Hunneman*, 12 Neb., 221; *O'Brien v. Gaslin*, 20 Id., 347.)

A lease for years will confer upon the lessee a legal estate and he may recover possession where his lessor but for

the lease could do so. A party who holds under a contract for the purchase is not in law deemed possessed of a legal estate in the premises, and unless expressly authorized by statute to do so, cannot maintain ejectment. The statement of facts in the petition clearly shows that the plaintiff's title is equitable. It is true he alleges that he has a legal estate in the premises, but the facts stated show that this is untrue. In addition to this, the assignment by Edward D. Malloy and the entry of the land by Perky are but parts of one transaction, the whole being a loan of money upon the land, and in this state a mortgagee cannot maintain ejectment to recover the possession of real estate. (*Kyger v. Ryley*, 2 Neb., 20.)

It is evident, however, that the plaintiff and defendant have rights in the premises which only a court of equity can adjust. The judgment is reversed and the cause remanded to the district court for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

JONATHAN C. KINGSLEY ET AL. V. E. A. BUTTERFIELD.

[FILED SEPTEMBER 21, 1892.]

1. **Breach of Contract:** DAMAGES: PLEADING. Damages which necessarily result from the injury complained of may be recovered without any special statement of the same, and a motion to make the petition more "definite and certain," by stating in what manner the plaintiff has been damaged by the matters complained of, and the nature and character of such damages, was properly overruled.

2. **Contract:** FAILURE TO PERFORM. No exceptions were taken to the instructions nor any ruling of the court on the trial, and it

being admitted that the defendants below had failed to comply with their contract to lay out and open a public road, the building of a railway on the proposed route will not relieve them from the payment of damages for the failure to perform.

ERROR to the district court for York county. Tried below before NORVAL, J.

Sedgwick & Power, for plaintiffs in error.

George B. France, contra.

MAXWELL, CH. J.

This is an action upon a contract as follows: "This agreement, made and entered into this 10th day of December, 1886, by and between E. A. Butterfield, of York county, Nebraska, and Jonathan C. Kingsley, C. J. Nobes, Cyrus Hutchins, George Hopkins, and C. M. Cowan, of York county, Nebraska, witnesseth:

"That the said E. A. Butterfield, party of the first part, for and in consideration of the covenants and agreements of the said Jonathan C. Kingsley, C. J. Nobes, Cyrus Hutchins, George Hopkins, and C. M. Cowan, party of the second part, agrees to sell and convey to him, the said Jonathan C. Kingsley, the southeast quarter of section No. 1, in township No. 10 north, of range No. 3 west, in York county, Nebraska; and the said party of the second part, for and in consideration of the agreements of said first party, as hereinbefore stated, agrees to open and maintain a public road commencing on a point on the public road running east and west along the south side of said land not more than twenty rods west from the southeast corner of said land, running thence due north to the county road, running east and west through the center of section No. 1, in township No. 10 north, of range 3 west, in York county, Nebraska; said road to be opened and in condition for use within one year from the date of these presents. For the faithful performance of all which the said parties

hereto bind themselves in the penal sum of $250, to be paid as damages for the non-fulfillment of this contract."

It is alleged in the petition "That said defendants, and each of them, have neglected and refused, and still do neglect and refuse, to open and maintain a public road commencing on a point on the public road running east and west along the south side of said land not more than twenty rods west from the southeast corner of said land, running thence due north to the county road, running east and west through the center of section 1, township 10 north, of range 3 west, in York county, Nebraska; and said defendants have neglected and refused, and still neglect and refuse, to open and maintain any road whatever on said piece of land at the place and in the manner that said agreement requires the said defendants to do, to plaintiff's damage in the sum of $250, and plaintiff has been damaged by reason of the premises, and by reason of defendants' neglecting to perform their part of the said agreement, in the sum of $250."

A motion was thereupon filed by the defendants below to require the plaintiff below to make his petition "more definite and certain, by stating in what manner the plaintiff was damaged and the character of such damages." This motion was overruled and that is the first error complained of. The court did not err in overruling the motion. The general rule as to pleading damages is as follows: "Such damages as may be presumed necessary to result from the breach of contract need not be stated with any great particularity in the declaration. But in other cases it is necessary to state the damages resulting from the breach of contract specifically and circumstantially in order to apprise the defendant of the facts intended to be proved." (1 Chitty Pl., 371.) Damages which necessarily result from the injury complained of may be recovered without a special statement of the same. (*Bristol v. Gridley*, 28 Conn., 201; *Vanderslice v. Newton*, 4 N. Y., 130; Swan's Pr. & Prec., 229; Maxw., Code Pl., 79.)

Second—No exceptions were taken to the instructions and no attempt is made to point out any specific error in the rulings of the court. It is admitted that the plaintiffs in error (defendants below) failed to perform their contract, but we are asked to hold that the location of a line of railway on the proposed route prevented them and hence relieved them from liability. We cannot so hold. The plaintiffs in error no doubt were compensated for the right of way taken for the railroad, and whether so or not the contract they had entered into, and for which they had received a consideration, was not performed and the jury found the damages to be the sum stated in the contract with interest. This verdict is supported by the evidence and the judgment is

AFFIRMED.

POST, J., concurs.

NORVAL, J., did not sit.

WAYNE COUNTY V. L. C. COBB ET AL.

[FILED SEPTEMBER 21, 1892.]

County Boundaries. The boundaries of an organized county cannot be lawfully changed, so as to add to such county adjoining unorganized territory, unless a majority of the inhabitants of such territory so petition the county board of the county to which it is proposed to be added, nor unless the proposition has received the sanction of a majority of the voters of such county at an election duly called and held therein for that purpose.

ORIGINAL action.

James Britton, W. M. Wright, and *Brome, Andrews & Sheean,* for plaintiff.

J. M. Curry, and *Leese & Stewart, contra.*

NORVAL, J.

This action was brought by Wayne county against L. C. Cobb, M. C. Wheeler, and J. S. Lemmon, members of the board of county commissioners of Thurston county, and C. C. Maryott, the county treasurer of said county, praying that the defendants, and each of them, be perpetually enjoined from exercising any official functions or powers with respect to certain territory, described in the petition, which plaintiff claims to be within the boundaries of Wayne county, and from collecting revenue from said territory and the property and inhabitants thereof, and that said territory be adjudged to be a part of the county of Wayne and not a portion of Thurston county.

After issues were formed the cause was referred, by consent of the parties, to Eugene Moore, Esq., to take the testimony and report the same with his findings of fact thereon. Subsequently the referee made the following findings:

"First—I find that the territory described in the petition of the plaintiff, alleged to be a part of Wayne county, Nebraska, was, April 17, 1854, set apart as a part of the Omaha Indian reservation, by treaty with the United States government, and that at the date at which the plaintiff claims that said territory became a part of Wayne county, the said territory was a part of the Omaha and Winnebago Indian reservation.

"Second—I find that at the time said territory is alleged to have been attached to and became a part of the plaintiff, Wayne county, it was occupied by the Omaha and Winnebago Indians in common as their reservation.

"Third—I find that, in the years 1880 and 1881, there were about 2,500 Omaha and Winnebago Indians and about twenty-five white persons, government employes, living upon and inhabiting said Omaha and Winnebago reservation, and that a few white persons, who were herdsmen, lived upon and occupied for a time, during the years

mentioned, that portion of the said reservation described in the plaintiff's petition, and that said parties had no rights of residence on said territory than that they acquired by reason of being in charge of private herds of cattle.

"Fourth—I find that a majority of the inhabitants of Wayne county signed a petition asking the legislature to attach that part of the reservation described in the plaintiff's petition to Wayne county.

"Fifth—I find that no petition from the legal voters of Wayne county has ever been presented to the county commissioners of said county, nor has there ever been any election held or vote taken in said county to attach said territory in dispute to said Wayne county.

"Sixth—I find that, from 1881 to 1889, Wayne county has assumed jurisdiction over the territory described in the plaintiff's petition, and levied and collected the taxes and built bridges and improved the public roads within said territory.

"Seventh—I find that, since the organization of Thurston county, said Thurston county has exercised exclusive jurisdiction over the territory in dispute and has levied and collected the taxes, improved the roads, and built and repaired the bridges.

"Eighth—I find that Pender, the county seat of Thurston county, has a population of about 800 people; that it has a number of store buildings, churches, and business blocks, ranging in value from $1,000 to $15,000 each.

"Ninth—I find that the bonded indebtedness of Thurston county, of all sorts, is about four thousand dollars, and that the floating indebtedness of said county is about six or seven thousand dollars.

"Tenth—I find that Thurston county, as now existing, contains four hundred and sixteen square miles and no more, and that a severance of the land in dispute from said county will leave Thurston county but three hundred and sixty square miles.

"Eleventh—I find that the Indians now living in what is now known as Thurston county have had their lands allotted to them in severalty and have severed their tribal relations and are now living thereon and claiming to be citizens of the state of Nebraska, having all the qualifications of citizens under and by virtue of the act of congress of 1887, known as the Dawes Bill, and have been living thereon and claiming to be such citizens ever since July 1, 1887.

"Twelfth—I find that the inhabitants and voters of Wayne county did not consent that the territory in dispute should be stricken from said Wayne county at any time or in any manner.

"Thirteenth—I find that the people and taxpayers living upon the disputed territory described in plaintiff's petition prefer that said territory shall be and remain a part of Thurston county.

"Fourteenth—I find that the county of Wayne is, and for twenty years last past has been, a county duly organized under and by virtue of the laws of Nebraska.

"Fifteenth—I find that the county of Thurston claims to be a duly organized county under the laws of Nebraska, and that the defendants Cobb, Wheeler, and Lemmon claim to be the lawful county commissioners, and the defendant Maryott claims to be the lawful county treasurer of said county, and all of said defendants exercised the authority and functions of their respective offices.

"Sixteenth—I find that no petition was ever signed, nor has any election ever been held, or vote taken by the inhabitants, if any, residing on the territory mentioned in the petition and in controversy herein, nor by the inhabitants residing on any part of the Omaha and Winnebago Indian reservations, to attach any of said territory to Wayne county, nor has the consent of any of the inhabitants of any of said territory or reservation ever been obtained to attach said territory to Wayne county."

The legislature of 1881 sought to change the boundaries of Wayne county by adding to said county a strip of territory four miles wide by fourteen miles long, adjoining on the east of said county, which was a part of the Omaha and Winnebago reservation. Subsequently, in 1889, the legislature created and established Thurston county, including within its boundaries the aforesaid strip of land, containing fifty-six sections. The main question presented is the validity of the legislative enactment extending the boundaries of Wayne county. If valid, the territory in dispute is still a part of said county, and the act of 1889, which detached said territory therefrom and made the same a part of the county of Thurston, would contravene sections 2 and 3, article X, of the state constitution, because the people of Wayne county, neither by vote nor petition, asked to have said territory stricken from said county.

It is urged that the act of 1881, extending the boundaries of Wayne county, is illegal for two reasons: First, because the added territory was at the time a portion of an Indian reservation, the occupants of which had not then severed their tribal relations; therefore the legislature had no authority to attach the same to an organized county without the consent of congress; second, because the question of attaching said territory to Wayne county was never submitted to a vote of the people thereof.

In our view it will only be necessary to consider and pass upon the second or last ground of objection.

Section 3, article X, of the constitution declares that "There shall be no territory stricken from any organized county unless a majority of the voters living in such territory shall petition for such division, and no territory shall be added to any organized county without the consent of the majority of the voters of the county to which it is proposed to be added," etc. The quoted constitutional provision restricts the power of the legislature to change the boundaries of any organized county. After a county has been formed or established it is not within the author-

ity or jurisdiction of the law-making body to change the boundaries thereof by either striking a portion therefrom, or by adding territory thereto, unless a majority of the qualified electors of the county consent to such change. It appears from the findings of the referee that no election was ever held or vote taken in Wayne county upon the proposition to annex thereto the territory in dispute. While it is true the majority of the inhabitants of said county petitioned the legislature to attach the territory, such act was not a compliance with the requirements of the statute then in force relative to the adding of unorganized territory to an organized county. .

Section 9, article I, chapter 18, Compiled Statutes 1881, provides that "Where any unorganized territory, not exceeding two townships, lies adjoining to and is not embraced within the boundaries of any county, and a majority of the inhabitants of said territory petition to the commissioners of said adjoining county to be attached to the same, the county board of said county shall, within three months, order an election as provided for in sections 4, 5, and 6 of this act, and said territory shall become attached to said county by a majority vote of the same, and be subject in all other respects to the provisions of this act."

While the constitution requires that the proposition to change the boundaries of an organized county so as to include therein unorganized territory must receive the sanction of a majority of votes of the county, the legislature has by the above provision pointed out the mode of procedure. It prescribes that the manner of taking the expression of the people upon the proposition shall be by ballot at an election called for that purpose by the county board of the county. No such an election having ever been called or held in Wayne county, the territory in question was never legally a part of said county. It follows that the action must be

DISMISSED.

THE other judges concur.

J. M. MILLER v. ANTELOPE COUNTY.

[FILED SEPTEMBER 21, 1892.]

Review: PRACTICE: A MOTION FOR A NEW TRIAL is necessary to obtain a review by petition in error of the rulings of the trial court on the admission or exclusion of testimony, or to secure a review of the evidence for the purpose of determining whether it is sufficient to sustain the finding and judgment.

ERROR to the district court for Antelope county. Tried below before NORRIS, J.

B. B. Willey, for plaintiff in error.

J. F. Boyd, contra.

NORVAL, J.

The plaintiff in error presented to the county board of Antelope county an account for $44.50 for medical services rendered by him to one Christian Mosher, a pauper, at the request of E. F. Skinner, a justice of the peace of said county, which claim was rejected by the board, and Miller appealed from the decision to the district court. Upon the trial there the court found the issues for the county and rendered judgment, dismissing the action.

The petition in error contains two assignments:

First—The court erred in admitting the evidence of the witness T. W. Dennis.

Second—The findings are not sustained by sufficient evidence.

We are precluded from examining either of the errors assigned, for the reason no motion for a new trial was made in the court below. The filing of such a motion was indispensable, in order to review the rulings of the court on the admission or rejection of testimony, or to secure a review of the evidence for the purpose of determining whether

it sustains the finding and judgment. (*Cropsey v. Wiggenhorn*, 3 Neb., 108; *Hosford v. Stone*, 6 Id., 380; *Lichty v. Clark*, 10 Id., 472; *Cruts v. Wray*, 19 Id., 581; *Weitz v. Wolfe*, 28 Id., 500.)

As neither of the errors assigned can be considered by this court, for the reason stated, the judgment of the district court must be

AFFIRMED.

THE other judges concur.

MARTIN DEVINE V. IRA J. BURLESON.

[FILED SEPTEMBER 21, 1892.]

Forcible Entry and Detention: DESCRIPTION OF LAND. A description of a tract of land in a complaint in an action of forcible entry and detainer, before a justice of the peace of Holt county, as the "N. W. ¼ section 20, township 29, range 14 west," is not void for uncertainty, although neither the meridian, county, nor state is given. There is but one tract of land in this state to which such description is applicable, and that is situated in the county where the action was originally brought.

ERROR to the district court for Holt county. Tried below before TIFFANY, J.

M. P. Kinkaid, for plaintiff in error.

M. F. Harrington, contra.

NORVAL, J.

This is an action for the forcible entry and detainer of real property, commenced by Ira J. Burleson, before T. W. Iron, a justice of the peace of Holt county, where the plaintiff had judgment. The defendant took the case on error to the district court, where the judgment of the justice was sustained.

But a single proposition is submitted for our consideration, and that is, Does the complaint sufficiently describe the premises for the possession of which the action is brought? The description in the complaint is the "northwest quarter section 20, township 29, range 14 west." It is insisted that the description is not sufficiently definite, as neither the meridian, county, nor state is given. The objection is untenable. The description is not defective, for the premises are definitely described. There is no uncertainty as to the lands intended. True, the meridian is omitted, but the courts of this state will take judicial notice of the mode of the general government of surveying public lands, and that there is but one meridian line in this state. We know that there is but one tract of land in this state to which the description contained in the complaint is applicable, and that is situated in Holt county. The premises could be established and identified by a competent surveyor without difficulty. The case is brought within the authority of *Cummings v. Winters*, 19 Neb., 719. It was there held that a notice to quit in forcible entry and detainer, which described the premises as "the northeast quarter of section 28, 37, R. 7," sufficiently identified the property. (See *Butler v. Davis et al.*, 5 Neb., 521.)

A description in a deed like the one contained in the complaint before us would not be void for uncertainty. (*Kykendale v. Clinton*, 3 Kan., 85; *Atwater v. Schenck*, 9 Wis., 160; *Doughtery v. Purdy*, 18 Ill., 206; *Billings v. Kankakee Coal Co.*, 67 Id., 489; *Kile v. Yellowhead*, 80 Id., 208; *Smith v. Crawford*, 81 Id., 296; *Russell v. Sweezey*, 22 Mich., 235.)

It follows from what has been said that the judgment of the district court must be

AFFIRMED.

THE other judges concur.

JOHN T. BELL ET AL. V. GEORGE P. PAUL.

[FILED SEPTEMBER 21, 1892.]

1. **Principal and Surety: BUILDER'S BOND: LIABILITY OF SURETY.** A contractor entered into a written agreement with the owner to furnish all materials and erect for him a building in accordance with certain plans and specifications, and deliver the same free from all liens for labor or materials; and the contract further provided that the contractor was to receive therefor a stipulated sum, payable as the work progressed, on the estimates of the architect, less fifteen per cent, which was to be retained by the owner until the expiration of ninety days from the completion of the work, and then was payable only in the event that there were no liens upon the property for labor or materials supplied through the contractor. A bond was given by the contractor, with sureties, to complete the building according to the contract, and turn the same over to the owner discharged of all liens. Payments were made to the contractor without the consent of the sureties, during the progress of the work, without estimates of the architect, and in excess of eighty-five per cent of the contract price. In an action on the bond it was *held*, that the sureties were discharged from liability.

2. **Damages.** *Held*, That the tenth instruction to the jury did not correctly state the rule of damages in an action upon the bond.

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

Kennedy & Learned, for plaintiffs in error:

Surety may stand on terms of his contract, and if material variation be made therein, without his consent, he will be discharged. (*Brennan v. Clark*, 29 Neb., 385; *Simonson v. Thori*, 31 Minn., 861; *Miller v. Stewart*, 9 Wheat. [U. S.], 703; *Judah v. Zimmerman*, 22 Ind., 392; *Dorsey v. McGee*, 30 Neb. 657.) The *per centum* fund to be retained under a building contract is to indemnify defendant in error against loss in case of failure of builder to complete contract, as well as a protection to sureties on

builder's bond; and defendant in error's failure to retain the fund released the sureties on the builder's bond. (*St. Mary's College v. Meagher*, 11 S. W. Rep. Ky., 608; *Calvert v. London Dock Co.*, 2 Keen [Eng.], 639; *Bragg v. Shain*, 49 Cal., 131; *Ryan v. Trustees*, 14 Ill., 20; *Dullaghan v. Fitch*, 42 Wis., 682.)

Mahoney, Minahan & Smyth, contra, cited: *Starr v. Blanter*, 76 Ia., 356; *Ryan v. Morton*, 65 Tex., 258; *Pascault v. Cochran*, 34 Fed. Rep., 358; *Casey v. Gunn*, 29 Mo. App., 14; *Haine v. Dambach*, 4 Pa. County Ct. Rep., 633; *Hagood v. Blythe*, 37 Fed. Rep., 249; *Board Sch. Drs. v. Judice*, 2 So. Rep. [La.], 792.

NORVAL, J.

This is an action by George P. Paul against Norling & Reynolds, as principals, and John T. Bell and Ed. L. Howe, as sureties, on a certain building contract bond. The trial resulted in a verdict in favor of the plaintiff below in the sum of $1,418.86. A motion for a new trial having been filed by the defendants the plaintiff filed a *remittitur* for $122.36, whereupon the court overruled the motion for a new trial, and rendered judgment in plaintiff's favor for the sum assessed by the jury, less the amount of said *remittitur*. The sureties bring the cause into this court for review by petition in error.

A brief statement of the facts will assist in a proper understanding of the questions presented. On the 30th day of April, 1887, Norling & Reynolds, contractors and builders, entered into a written contract with George P. Paul, by which they agreed to furnish all materials and perform all the labor necessary to build, finish, and complete in good, first-class and workmanlike manner, for said Paul, in the city of Omaha, to his complete satisfaction, a frame dwelling, plumbing and heating excepted. The material was to be furnished and the labor performed under

the supervision and direction of George L. Fisher, architect, and in accordance with the plans and specifications prepared by him. The contractors were to receive the sum of $3,465, which was payable as the work progressed, on the estimates of the architect, which were to be based on the value of the work performed and material furnished, and the amount of each estimate was to be paid, less fifteen per cent, which was to be retained until the expiration of ninety days from the completion of the work and its acceptance by the architect and owner, and it was then to be payable only in the event that there were no liens upon the property for labor or materials supplied through the contractors. It was also stipulated in the contract that should Norling & Reynolds, at any time during the progress of the work, refuse or neglect to supply sufficient materials or workmen, or cause any unreasonable suspension or neglect of the work, or fail or refuse to comply with any of their agreements in said contract contained, then said Paul was to have the right and power to enter upon and take possession of said premises, and provide materials and workmen sufficient to finish the work, after giving forty-eight hours' notice in writing. The expense of said notice and the costs of finishing the work were to be deducted from the contract price. It was further provided that the contractors should give a bond in the sum of $1,200 for the faithful performance of the contract, and to complete the work at time specified, and turn over the building free from all incumbrances or liens for labor or material.

On the 3d day of May, 1887, the bond in suit was executed, which contained the following condition: "Now if said Norling & Reynolds furnish all material and perform all labor in connection with said building as per said plans and specifications and contract, and turn over said building free from liens for labor or materials furnished through said Norling & Reynolds, then these presents to be void, otherwise to be of full force and effect."

Work was commenced under the contract in the month of May, and on the 3d day of September, 1887, the contractors, after having partially completed the building, either abandoned the contract or were excluded from the completion of the same by the owner, whereupon said Paul finished the job, paying for materials and labor used in completing the building the sum of $421.43. It also appears that the owner paid the contractors during the progress of the work, prior to the alleged abandonment, $2,422.50, and after which he paid about $2,500 without estimates, on orders of the contractors given to the mechanics who had worked under Norling & Reynolds, and to the persons who had furnished them materials for the erection of the building. The cost of the structure exceeded the contract price in nearly the sum of $1,900.

It is insisted that the contractors were prevented from completing the building by the owner taking possession thereof and excluding them therefrom; therefore the sureties were discharged from all liability on the bond. The question was fairly submitted to the jury, whether Norling & Reynolds voluntarily abandoned the work and refused to proceed with the same, or whether they were prevented from so doing without their consent, by Mr. Paul assuming the control of the building and the completion of the same, and they found that the contractors voluntarily abandoned the work. We think the testimony justified the finding. The reason they did not finish the job was because the architect declined to give an estimate on September 3, 1887. The fact that one was refused furnished no valid excuse to the contractors to abandon the contract and refuse to complete the building, even had they been entitled to an estimate. Until one was furnished the owner was not obliged to pay; that is clear; nor was his failing so to do any justification for their abandonment of the job.

Counsel urge that the sureties are not liable because payments were made the contractors in violation of the terms

of the contract. It is uncontradicted that the sum of $300 was paid Norling & Reynolds on May 21, 1887, without an estimate of the architect; the first estimate of the architect was not furnished until seven days later. The defendant in error contends, and such, we think, is the proper inference to be drawn from the evidence, that this sum was advanced to or loaned the contractors with the understanding that the same should be refunded when the first estimate was made; that on May 28 the architect gave an estimate certifying that the contractors were entitled to a payment of $600, less fifteen per cent. The $300 previously advanced was then deducted therefrom, and there was paid Norling & Reynolds, under the estimate, $210, and no more. We do not yield assent to the proposition that the advancement of the $300, under the circumstances, released the sureties. It was not in fact, nor in law, a payment upon the contract, but a mere loan of that amount of money, until an estimate was obtained, which did not in any manner violate the contract or discharge the sureties. But payments were made contrary to the provisions of the contract. It is conceded by both parties that but six estimates were given by the architect, which amounted in the aggregate to $2,850, less the fifteen per cent reserved by the contract, or $2,422.50 net. The last estimate bears date August 13, 1887. The proof shows that on September 3, Norling & Reynolds applied to the architect for a further estimate, which was refused, and no other estimate was ever given; yet, notwithstanding this, the defendant in error subsequently disregarded the terms of the contract by accepting and paying orders drawn on him by the contractors in favor of different parties, for materials furnished and labor performed in the erection of the building, amounting to several hundred dollars, without the consent of the sureties, so that the entire contract price, and more, was paid to the contractors, counting the amounts paid on their orders without estimates. By the contract fifteen per cent was to

be retained by Mr. Paul and was not to be paid over by him until after the building was completed, and was then payable only in the event that there were no liens filed for labor performed or materials furnished. The provision of the contract relating to the retention of the fifteen per cent was intended as a protection of both Mr. Paul and the sureties upon the bond. It constituted a fund in the hands of Mr. Paul, with which to pay off and discharge any liens that might be filed against the building, and the sureties had a right to insist that the fund thus created should be retained, and that payments should be made according to the contract. The failure of the defendant in error to retain the fifteen per cent released the sureties. (*Bragg v. Shain*, 49 Cal., 131; *St. Mary's College v. Meagher*, 11 S. W. Rep. [Ky.], 609.)

It is insisted that the stipulation of the contract relating to payments on estimates has reference only to payments made to the contractors. Granted; but how does that affect the defendant in error? Numerous payments were made without estimates, on orders given by the contractors on Mr. Paul. The payment of these orders by the drawee was, in effect, a payment to the contractors. Nor is it material that the orders were given and paid after it is claimed the work was abandoned by Norling & Reynolds; that they had violated the contract did not justify the other party to disregard the provisions written therein on his part to be performed. A party who seeks to enforce a contract must not, himself, have been guilty of a breach thereof.

Objections are made to several paragraphs of the charge of the court, but one of which we will notice, and that relates to the tenth instruction, which reads as follows:

"If, under the testimony adduced upon the trial and the instructions above given you, you shall find for the plaintiff, you will assess as his damages such amount as the testimony shows he was obliged to and did expend in the

payment and discharge of obligations which had been incurred by the contractors for work performed and materials furnished for the erection of the building and which were actually applied to that purpose, and for which the persons performing the work or furnishing the materials would be entitled to a lien upon the building for such amounts, and which had not been paid by the contractors. But in no event can you return a greater amount in your verdict than the penalty of the bond, to-wit, $1,200, with interest on such amount at the rate of seven per cent per annum from the commencement of this action."

This instruction is clearly erroneous, in that it fails to state the true rule of damages. By it the jury were told to allow the plaintiff the amounts paid in liquidation of claims for labor performed and materials furnished under the contract for the construction of the building, instead of limiting the recovery to the amount paid in settlement of liens against the property. The extent of the obligation of the sureties was that the contractors should complete the building and turn over the same to the owners "free from liens for labor or materials furnished through Norling & Reynolds." Further than this, they did not undertake or promise.

It is admitted that only one lien was filed against the building, which was on a claim for $358.80, for brick furnished by one Thomas Murry, yet the judgment was for $1,296.50, the full penalty of the bond, with interest. It is quite immaterial that the amount paid by Mr. Paul was justly due for labor performed and materials supplied in the construction of the building. As liens therefor had not been filed, the payment was entirely voluntary. Plaintiffs in error did not obligate themselves that the contractors should pay for all labor and materials, only that the building should be delivered to the owner free from all liens. Sureties are not bound beyond the terms of their engagements.

For the reasons stated, the judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

JACOB V. CONSAUL ET AL. v. FRANK L. SHELDON.

[FILED SEPTEMBER 21, 1892.]

1. **Proceeding in Error**: JOINT JUDGMENT: DEFECT OF PARTIES: WAIVER. While all the parties to a joint judgment that is sought to be reviewed by this court by a petition in error should be made parties herein, yet, where the cause is submitted to this court on its merits, and no objection is interposed, that there is a defect of parties until after such submission, it will be taken to constitute a waiver of the absence of proper parties.

2. **Pleadings**: ALLEGATIONS TAKEN AS TRUE UNLESS DENIED. Every material allegation of new matter in a pleading not denied by the answer or reply, for the purposes of the action is to be taken as true.

3. **Proof of Admitted Facts**: HARMLESS ERROR. The admission of testimony to prove a fact admitted by the pleadings is error without prejudice, for which a judgment will not be reversed.

4. **Introduction of Evidence**: ORDER DISCRETIONARY. The order in which a party shall introduce his testimony rests in the discretion of the presiding judge.

5. **Building Contract**: MEASURE OF DAMAGES FOR BREACH. Where a building is not erected within the time limited by the building contract through the default or neglect of the contractor, the owner is entitled to recover his damages thereby sustained. In such case it is not error for the owner to prove that the building had been leased for a stipulated sum and that the tenant was to take possession as soon as the work was completed, when it is shown that the reasonable rental value exceeded the amount of rent reserved by the lease.

6. **Credibility of Witness**: HOW TESTED. It is competent to show on cross-examination of a witness that he is hostile or

unfriendly towards one of the parties, and if he deny such fact, it is proper to contradict him by proving his declarations or statements made out of court. Such evidence, to be admissible, must tend to show that the witness entertains such hostility at the time of the trial.

7. ———: ———: DISCRETION OF TRIAL COURT. The extent to which a witness may be cross-examined for the purpose of showing his bias is within the discretion of the trial court, and unless there has been an abuse of discretion the judgment will not be reversed.

8. **Excluded Testimony:** ADMITTING CURES ERROR. Where offered testimony is excluded, the error, if any, is cured by the subsequent admission of the same evidence.

9. **Building Contract:** SURETIES ON BOND. A building contract contained a provision to the effect that the owner, during the progress of the work, might make changes or alterations in the plans of the building, and that the making thereof should not avoid the contract. In an action upon the contractor's bond it was *held* that the making of reasonable changes, which did not materially increase the costs of the building beyond the contract price, will not release the sureties.

10. ———: ———. A surety cannot urge the default of his principal as a ground for discharge from his obligation.

11. ———: CHANGE IN PLANS. When the plans and specifications for a building are changed after the contract is signed, without the knowledge or consent of either of the parties, the same will not vitiate the contract.

12. **Instructions.** *Held*, That there is no reversible error in the charge of the court, and that the instructions requested, which were not given, were properly refused.

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

Charles O. Whedon, for plaintiffs in error.

Pound & Burr, contra.

NORVAL, J.

Jacob V. Consaul, a contractor and builder, entered into two contracts with the defendant in error for the construc-

tion of two buildings. For the faithful performance of said contracts Consaul entered into two bonds, in the sum of $5,000 each, with Palmer Way, Charles C. Munson, and Zehrung & Henkle as sureties. The action is on these bonds. There was a verdict in the lower court in favor of Sheldon for $3,000, and a joint judgment was rendered thereon against all the defendants below for the amount found by the jury. The plaintiffs in error excepted, and brought the proceedings here for review upon numerous assignments of error.

The cause was submitted to this court on March 18, 1891, by written stipulation of the parties, upon printed briefs filed on the merits. Subsequently the defendant in error filed a motion to dismiss the petition in error for the want of proper parties. Before passing to the errors assigned, we will consider the question raised by the motion to dismiss.

It is insisted that Elmer E. Henkle was not made a party to the proceedings in error, and that he has not made any appearance in this court. While his name is given in the title of the cause in the petition in error as one of the plaintiffs in error, it fully appears from the body of the pleading that Munson, Way, Zehrung, and Consaul alone are seeking a reversal of the judgment. The affidavit of Mr. Henkle, filed in support of the motion, discloses that the proceedings in error were instituted and carried on without his knowledge or consent; that he never authorized any person to appear for him in this court, and never consented to be a party plaintiff or defendant, but that his name was inadvertently inserted in the petition in error. Mr. Henkle, being one of the defendants in the joint judgment sought to be reversed by these proceedings, should have been made a party, either as plaintiff or defendant. It has been held, and we think rightly, that when all parties to a joint judgment have not been made parties to the proceedings in error brought to reverse such judgment the

defendant may have the same dismissed. (*Wolf v. Murphy*, 21 Neb., 472; *Hendrickson v. Sullivan*, 28 Id., 790.) While good practice requires that all the parties to the judgment below should be before this court, it does not follow that the motion to dismiss the petition in error, made at this late day, should be sustained. The parties, having submitted the cause on its merits, waived the objection that there is a defect of parties. Such a defect is waived unless it is taken advantage of before the submission of the case upon the record of the court below. Had the objection been timely made, the ruling upon the motion might have been different, but not having interposed the same until so late a date in the proceedings the motion to dismiss is overruled.

The first error assigned in the brief of counsel for plaintiffs in error is based upon the ruling of the trial court in admitting certain testimony of the witness E. E. Henkle. The defendant Zehrung, in his answer, denied that he ever signed or authorized any person to sign for him the bonds in suit, and avers that he and Henkle, at the time said bonds were executed, were partners in the hardware business in the city of Lincoln, under the firm name of Zehrung & Henkle; and that Henkle had no right or authority to sign the firm name to said bonds, and that said Zehrung never at any time assented thereto. The plaintiff, for reply, denied each and every allegation in said answer contained. Henkle, in his amended answer, admits that he signed the firm name to the bonds, and alleges, in substance, among other things, that such signing was within the scope of the partnership, and that Zehrung was fully apprised of the fact, and ratified the same. Upon the trial Mr. Henkle testified, in effect, over the objection of Zehrung, that he signed the name of his firm to the bonds; that when the same was signed Mr. Zehrung was in Colfax, Iowa, and on his return to Lincoln a short time afterwards witness informed Zehrung of the fact of the signing and that the ob-

ject and purpose in so doing was to secure to the firm Consaul's patronage; that Zehrung thereupon acquiesced in what his partner had done, and the firm thereafter continued to furnish materials to Consaul under said arrangement and collected pay for the same. As the pleadings stood, the testimony of the witness Henkle, to which objection was made, was unnecessary. The allegations in Henkle's amended answer were not controverted by any other pleading filed in the case; therefore, for the purposes of the trial, it must be taken as true that Zehrung acquiesced in and ratified the signing of the firm name to the bonds. Although the introduction of testimony on that branch of the case was not necessary, its admission was not prejudicial error.

Objection is made because the court permitted defendant in error to introduce in evidence the record of mechanics' liens which had been filed against the property, before he had shown the amount due on the liens, or the amount he had paid to discharge the same. While it is true that it was indispensable that the plaintiff should prove the amounts due on these liens and the sum paid out by him to satisfy and discharge the same, it is unimportant whether such proof was introduced before or after the liens were put in evidence. After the liens were received in evidence, the amount due on each and the amount paid by the plaintiff below to satisfy the same, were amply proven. This was sufficient. The order in which a party shall introduce his testimony is discretionary with the trial court.

The objection that copies of the records of the liens, as well as the original liens, were permitted to be received in evidence is without merit. Plaintiffs in error were not in the least prejudiced thereby.

Defendant in error testified that about the time the contract was let he rented one of the buildings erected by Consaul, known as the Windsor Block, to one Criley for a term of years at $350 a month, and that the lessee was to

take possession the first of October, the time specified in the building contract for the completion of the work, but that he was unable to do so until the following March, owing to the fact that the building was not finished until that time. This testimony was at the time objected to by the defendants. The purpose of its introduction was to show that plaintiff had been damaged by reason of the non-completion of the building according to the terms of the contract. Testimony of what the building had been rented for was pertinent, as bearing upon the question of damages, especially when followed by other testimony, as was done in this case, showing that the reasonable rental value of the building was more than Criley had agreed to pay. The fact that the lease was in writing did not make oral testimony of the fact of the leasing, and the amount of rent to be paid, incompetent. Plaintiff having leased the property for less than its fair rental value, he could only claim as damages the amount he leased the same for during the time the tenant was kept out of possession through the fault of the contractor.

William Gray, the architect who drew the plans and specifications for the buildings, was sworn as a witness on behalf of the plaintiff below. It is now claimed that the court erred in refusing to allow him to answer certain questions propounded to him on cross-examination. After having testified on such examination that he had felt unfriendly towards the defendant Consaul at times, but had no such feelings at the time of the trial, he was asked, "Did you have a conversation with the defendant James V. Consaul, Charles P. Larson, and one Hall in front of the State National Bank of Lincoln, about the last of June, 1887; I think his name was W. J. Hall?" Witness answered, "I don't remember the man; I can't place him, but so far as the other two men are concerned I might have; I would not say that I did not." He was afterwards asked on cross-examination the following questions:

Q. Did you at that time and place, after Mr. Consaul had left the party and before he got out of sight, say to Larson in the presence of Hall, referring to Consaul, "There goes a man I'll do up, by God"?

Q. Did you say to Charles P. Larson in your office, in the city of Lincoln, state of Nebraska, in July, 1887, in speaking of the defendant Consaul, you would do Consaul up so bad he would never do any more work in Lincoln?

Q. Did you say to Charles P. Larson at your office in June, 1887, after the contract had been let to Consaul, that Consaul had taken advantage of Sheldon, and that you would get even with Consaul?

Q. Did you say to Charles P. Larson in front of the Appelget block, on Twelfth street in the city of Lincoln, between P and Q streets, in December, 1887, about the 15th, in reply to a question of Larson's as to how Consaul was getting along, that he paid no attention to you and that you would let him go ahead until he got through and then your turn would come?

To each of these interrogatories counsel for plaintiff objected, as incompetent, immaterial, and irrelevant. The objection was sustained and the testimony excluded.

Subsequently, the defendants called Mr. Larson as a witness, and after having testified that he had had a conversation with Mr. Gray in front of the State National Bank building in the presence of Hall in the latter part of June, 1887, after Mr. Consaul had left, the witness was asked if Gray did not at that time state to him, "There goes a man I will do up, by God." He was then asked to state what Mr. Gray said in that conversation in regard to Consaul. He was also asked if, in a conversation had with Gray in his office in Lincoln, in July, 1887, Gray did not say that he would do Consaul up so bad he would never do any more work in Lincoln. Witness was further interrogated, if in the same conversation Gray did not say that "Consaul had taken advantage of Sheldon, and that he [Gray]

would get even with Consaul for that." These questions were objected to, and the objections sustained.

It is now insisted that the questions put to the witness Gray on cross-examination and those propounded to Mr. Larson were proper, and that the court erred in not allowing them to be answered. It is no doubt true that, as a general rule, it is permissible to interrogate a witness in cross-examination as to whether he is hostile or unfriendly to the party to the suit not calling him, or whether he has not expressed feelings of hostility towards such party, and if he deny such fact, it is proper to contradict him by calling other witnesses and proving by them his declarations or statements made out of court. And this for the purpose of enabling the triers of fact to judge of the impartiality of the witnesses' testimony and the weight to be given it. It does not, however, follow from this, nor can we yield assent to the proposition, that the judgment should be reversed because answers were not taken to the questions objected to. While it is proper to prove the bias or prejudice of a witness by his evidence, given on his cross-examination, the extent of the examination is within the sound discretion of the trial court, and unless there has been an abuse of discretion the judgment will not be disturbed on account of its rulings. The rule is tersely stated in the note to section 450 of 1 Greenleaf on Evidence, thus: "The extent to which a witness may be cross-examined as to facts otherwise immaterial, for the purpose of testing his bias and credibility, is ordinarily within the discretion of the court, no rule of law being violated." We take it that it must appear from such examination that the hostility, bias, or prejudice of the witness towards a party to the suit existed at the time of the trial. (*Higham v. Gault*, 15 Hun [N. Y.], 383.)

In the case at bar the record discloses that prior to propounding the questions to the witness Gray, to which complaint is made, Mr. Gray admitted that he had felt

unfriendly toward the defendant Consaul at times, but disclaimed any such feeling at the time he gave his testimony. It also appears, by the questions put to both Gray and Larson, that it was sought to prove the ill-feeling of the former towards Consaul nearly three years prior to the trial. Had the questions propounded been answered and such answers been most favorable to the plaintiffs in error, they would have tended only to prove what Mr. Gray had already admitted, that he had at times felt unfriendly toward Consaul. We are unable to discover that plaintiffs in error were prejudiced by excluding the testimony of the witness Gray, or that the court abused its discretion in that regard.

As the questions propounded to Mr. Gray were excluded, there was nothing for the witness Larson to contradict, and the questions put to him were properly overruled. There is another reason why the excluding of the testimony of Mr. Larson is not sufficient ground for reversing the judgment, and that is, counsel for plaintiff in error made no statement of what he expected to prove by the witness. Under the repeated holdings of this court such a statement was necessary in order to obtain a review of the action of the trial court in sustaining an objection to a question propounded to a party's own witness. (*Kearney Co. v. Kent*, 5 Neb., 227; *Masters v. Marsh*, 19 Id., 458; *Mathews v. State*, Id., 330; *Connelly v. Edgerton*, 22 Id., 82; *Burns v. City of Fairmont*, 28 Id., 866.)

On page 559 of the bill of exceptions appears an offer made by the defendant to prove by the witness Palmer Way, who was then upon the stand, that the first details furnished by the architect for the bases of the bay windows were incorrect; that the bases could not be put on because of the defective details; that the architect by reason thereof was compelled to, and did, subsequently, after the lapse of considerable time, furnish other details, and that the delay of the contractor in completing his work was occasioned by

the failure of the architect to furnish proper details. This testimony was excluded and the ruling of the court is now assigned for error. A sufficient answer to the objection is, that the witness afterward, and before he left the stand, was permitted to, and did, testify fully upon that subject, so that the error in the ruling complained of was thereby cured.

A number of changes and alterations were made in the buildings, which increased the cost thereof, after the letting of the contracts and the signing of the bonds. But such changes and alterations did not have the effect to release and discharge the sureties, for the reason the contracts expressly provided that the owner might make alterations in the plans of the buildings and that the making of the same should not release the sureties. Each contract contained this stipulation: "Should the proprietor, at any time during the progress of the work, require any alterations of, deviations from, or additions in the said contract, specifications, or plans, he shall have the right and power to make such change or changes, and the same shall in no way injuriously affect or make void the contract." This provision was ample authority for all changes and alterations which were made in the buildings. We must not be understood as claiming that the owner had the right to make such changes as he saw proper, regardless of cost and the character and extent of such alterations. The changes and additions must be reasonable and not materially increase the cost of the buildings beyond the original contract price. The evidence shows that the alterations were not unreasonable, and that the additional labor and materials did not greatly exceed the value of the work called for by the original contract, which was omitted. Each of the contracts contained this clause: "No new work of any description done on the premises, or any work of any kind whatsoever, shall be considered as extra, unless a separate estimate in writing for the same, before

its commencement, shall have been submitted by the contractor to the superintendent and the proprietor, and their signatures obtained thereto, and the contractors shall receive payment for such work as soon as it is done. In case of days' work, statement of the same must be delivered to the proprietor, at the latest, during the week following that in which the work may have been done, and only such days' work and extra work will be paid for as such as agreed on and authorized in writing." Complaint is made because the above provision was disregarded. Obviously said stipulation was inserted in the contracts solely for the protection of the defendant in error and a compliance therewith he might waive. It was made the duty of the contractor to make and submit estimates of all new work to the superintendent and the owner, and the sureties cannot be heard to urge the failure of their principal to comply with the terms of the contract on his part to be performed, as a reason why they should be released from liability on the bonds. To do so would be to permit them to take advantage of the default of their principal, which would be contrary to legal rules.

From the testimony it appears that the word "glazed" was written on the plans of the Sheldon block, after the contract was let, without the knowledge or consent of Consaul or his sureties, thus indicating that glazed doors were to be used. The word was written on the plans by one F. C. Fisk, an employe in the office of the architect Gray, which he testified was done at the direction of Mr. Gray, for convenience, so that the specifications and plans might agree. The writing of the word "glazed" on the plans did not affect the validity of the contract, nor discharge the sureties from their obligation, for the very good reason that it nowhere appears in the testimony that Sheldon authorized or directed the writing of the word, or that it was inserted with his knowledge or consent. Again, the plaintiffs in error were not injured by thus changing the plans, for

the reason that the word "glazed" appeared in the specifications at the time the contract was entered into. The plans and specifications were parts of the contract of the parties and were to be construed together. The contract expressly provided "that the specifications and drawings are intended to co-operate, so that any works exhibited in the drawings, and not mentioned in the specifications, or *vice versa*, are to be executed the same as if mentioned in the specifications and set forth in the drawings, to the true intent and meaning of the said drawings and specifications." Under this stipulation, as the specifications called for "glazed" doors, the contractor was required to furnish such, although they were not called for by the plans. So that the writing of the word complained of on the plans was not such an alteration as rendered the contract void. The rights of the parties were not thereby in the least changed.

Objection is made to the giving by the court of an oral instruction to the jury during the progress of the trial. The bill of exceptions shows that immediately after the questions had been put to the witness Larson, to which we have already referred in this opinion, the court orally gave this direction to the jury: "The court instructs the jury to disregard this testimony entirely on this point." It is insisted that the court can no more instruct the jury orally during the introduction of testimony than it can charge the jury orally after the testimony is in. It is not necessary to determine whether or not the above direction of the court was in violation of the statute which requires all instructions to be reduced to writing, for it is plain that the oral instruction was not prejudicial. The court had refused to permit the witness Larson to answer all questions put to him regarding threats alleged to have been made by Mr. Gray, so there was no testimony before the jury on that subject to be considered.

Several instructions requested by the defendants the

court refused to give to the jury, and such refusals are assigned for error. Instructions numbered 6, 7, 8, 9, and 10, requested by the defendants and refused by the court, will be considered together. It is not deemed necessary to copy them into this opinion. They are all upon the same subject and are to the effect that if, after the contracts for the erection of the buildings had been made, the contracts were changed either as to the kinds of materials, or in the plans of construction, by the verbal agreements between Sheldon and Consaul, without the consent of the sureties, the sureties would be released from liability on the bonds sued on. It is true, as a general proposition, that a material change in the terms of a contract, to secure the performance of which a bond is given, releases the sureties thereon, when such alteration is made without the assent of the surety, even though the surety may sustain no loss by the change. But the rule has no application where, as in the case at bar, the contracts expressly authorize the owner of the buildings to make reasonable alterations therein during the progress of the work, and that the same should not invalidate the contract. In such case the surety is not released by reason of the making of such changes by the owner, notwithstanding the surety did not consent thereto.

The court did not err in refusing requests numbered 13 and 14. The first of which states, in substance, if the jury find that the plaintiff or his architect, Gray, caused to be written on the plans of the building known as the Sheldon block, at the openings indicating doors, the word "glazed" after the bond and contract for said building were executed and after the contractor had entered upon the erection of the building, and that the insertion of said word was without the consent of the sureties on such bond, then the jury should find for said sureties. One fault with this request is that it assumed that there was testimony before the jury upon which they could find that the plaintiff caused the word "glazed" to be written on such plans,

when the bill of exceptions contains no testimony from which such an inference could be drawn. Another objection to the request is, it ignores the evidence which tended to show that the original specifications for said building called for glazed doors. If such evidence was true, then, under the provision of the contract already mentioned, which required the contractor to execute work called for by the specifications, although not mentioned in the drawings, and *vice versa*, the writing of the word "glazed" on the plans was not a material change or alteration thereof. The fourteenth request lays down the proposition that if the architect, after the contract and bond were given, wrote, or caused to be written, certain words in the specifications of the Sheldon block without the consent of the signers of said bond, the plaintiff cannot recover thereon. The instruction was properly refused. The insertion of the words mentioned in the request could not have the effect to release the sureties, unless the plaintiff authorized the writing of the same, or consented thereto; to establish which there is not a particle of evidence.

The defendants' eighteenth request to the court to instruct the jury, which was refused, reads as follows: "The contracts set out in the pleadings in this case each provide that in case of payments, which are to be made as the work progresses, a certificate shall be obtained from the architect to the effect that the work is done in strict accordance with the drawings and specifications, and that he considers the payment justly due. The jury is instructed that these certificates, unless impeached for fraud or mistake, are conclusive as to the character of the work done prior to the making of such certificates, and the plaintiff cannot now be heard to say that the work done before the making of such certificates was not done in strict accordance with the drawings." The plaintiff below on the trial and in his pleading claimed damages by reason of the use by the contractor in the construction of the buildings of poor and in-

ferior materials, defective workmanship, and the omission to perform certain work and furnish materials called for by the terms of the contracts. The evidence discloses that from time to time, during the progress of the work, numerous payments were made by Sheldon to Consaul upon certificates furnished by the architect to the contractor. The theory of the defendants is that such payments having been made upon the certificates of the architect, without making any objection as to the manner in which the work was being done, plaintiff is estopped, under the provisions of the contracts, from now insisting that work was not done in accordance with the plans and specifications, unless he first impeach the certificates of the architect for fraud or mistake. Two cases decided by the supreme court of Illinois are cited in support of the contention of plaintiffs in error upon this point. This court has also decided that the certificate of the architect is conclusive as to the character of the work done prior to the making of such certificate. But neither of the contracts in the cases passed upon by this court, nor those before the Illinois court, contained all the provisions which are to be found in the contracts we are considering. While each of these contracts provides for the payment to the contractor, as the work progressed, eighty per cent of the contract price, upon the certificate of the architect to the effect that the work is done in strict accordance with the drawings and specifications, and that he considered the payments justly due, each also contained the further stipulation, which is not found in either of the contracts before the court in the cases alluded to, that "said certificate, however, in no way lessening the total and final responsibility of the contractor, neither shall it exempt the contractor from liability to replace work, if it be afterwards discovered to have been done ill or not, according to the drawings and specifications, either in execution or materials." The parties having by this clause agreed that the certificate of the architect should not be conclusive, it

was not error for the court to refuse to charge the jury as requested by the eighteenth instruction. To have done so would have been prejudicial to the plaintiff.

The record shows that the buildings were not completed within the time mentioned in the contracts. The fault, in part, was with the contractor. There is also evidence tending to show that some delay was caused by the failure of the architect to furnish the details for the work. The defendants requested the court to charge the jury, by the sixteenth and twenty-third instructions, that if any delay in the completion of the buildings was occasioned by the failure of the architect to furnish the details, the sureties are not liable for any damages caused by the contractor not completing the work in time. While neither Consaul nor the sureties are liable for damages resulting from any delays caused by either the plaintiff or the architect, it is not true that the defendants are thereby relieved from liability for loss resulting to the plaintiff for delays attributed solely to the default or neglect of the contractor. For his own delays he and the sureties must respond in damages. This question was fairly submitted to the jury by an instruction given by the court on its own motion.

Exceptions were taken by the defendants to several paragraphs of the charge of the court. The objections urged against the instructions have, we think, been sufficiently answered in the foregoing discussion, and it can serve no useful purpose to now review the objections. It is sufficient to say that we find nothing in the charge to the jury that calls for a reversal of the case. The judgment is

AFFIRMED.

THE other judges concur.

EBENEZER HARDS v. PLATTE VALLEY IMPROVEMENT COMPANY.

[FILED SEPTEMBER 28, 1892.]

1. **Corporations**: CAPITAL STOCK: SUBSCRIPTION: ACTION TO RECOVER. Where the subscription contract of a proposed corporation fixes the capital stock at a certain sum—as $4,000, divided into shares of $100 each—the whole amount of capital so fixed must be fully secured by a *bona fide* subscription before an action will lie upon the personal contract of the subscribers to the stock to recover an assessment on the several shares, unless there is a provision in the subscription contract to proceed in the execution of the main design before the whole amount of capital is subscribed.

2. ——: ——: WAIVER OF CONDITIONS OF CONTRACT: EVIDENCE. There is testimony in the record which tends to show that the defendant waived the conditions of the contract in respect to the amount of stock to be subscribed before entering upon the main purpose of the corporation, viz., the construction of a public hall, and this should have been submitted to the jury.

3. **Directing Verdict.** The court erred in directing a verdict.

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

Rice & Watson, and *J. C. Patterson*, for plaintiff in error.

A. Ewing, and *J. W. Sparks, contra.*

MAXWELL, CH. J.

This is an action brought by the defendant in error against the plaintiff in error to recover on a subscription for stock to an association, the general nature of whose business was declared in the articles of incorporation "shall be the erection and operation of a suitable hall for the use of societies, organized meetings, or such other purposes as the trustees may see fit for the benefit of the stockholders." The petition alleges that the amount of capital stock was

fixed at $4,000, which was all in good faith subscribed before the bringing of this action.

The defendant, in the third paragraph of his answer, after denying that the plaintiff below is a valid corporation, says: "And defendant further answering says that he admits that on or after the 23d day of September, 1886, he subscribed for one share of stock for $100 in said pretended plaintiff corporation, but alleges that said subscription by said defendant for said share of stock was made with the express agreement and understanding by and between said pretended corporation and said defendant that the full amount of the capital stock of said pretended, and at said time prospective, corporation had been taken and subscribed for, including said defendant's subscription, by good, lawful, solvent, and *bona fide* subscribers, and that said subscription and contract thus made by and between said pretended and prospective corporation and said defendant, was conditional and was not to be valid and binding upon said defendant unless said full amount of capital stock had been and was subscribed for, including said defendant's subscription; and defendant further says, that under and by virtue of said conditional agreement and conditional subscription for said stock, but without any knowledge upon his part that said full amount of capital stock had not been subscribed, or without waiving or intending to waive any of his rights under and by virtue of the terms of said conditional agreement and subscription for said stock, he paid six months' assessments on installments of $2.50 each, commencing in September, 1886." He then proceeds to allege that there were certain misrepresentations made to him in regard to the proposed lease of a certain lot for ninety-nine years, and that the building plans had been modified, etc.

The testimony tends to show that a contract for a perpetual lease for the lot spoken of was obtained, but that there was a mortgage for a considerable amount on the property,

The testimony also shows that but thirty-seven shares of stock, in the aggregate $3,700, were in good faith subscribed when the work was undertaken and the building erected and suit brought.

In *Estabrook v. Omaha Hotel Co.*, 5 Neb., 78, Judge GANTT quoted with approval the case of *Fry's Ex'r v. Lexington, etc., R. Co.*, 2 Met. [Ky.], 323–4, that "where a given amount of stock is required to be subscribed before the corporation is authorized to go into operation, this requisition must be regarded as an indispensable condition precedent. Each subscriber undertakes to pay the amount of his subscription only in the event and upon the condition that the whole amount of the capital stock required by the charter to enable the company to organize and commence operations in its corporate capacity shall be subscribed. And in *Livesey v. Hotel Co.*, 5 Neb., 66, 67, the same able judge says: "The rule seems to be well established, that when the charter or subscription contract specifically fixes the capital stock at a certain amount, divided into shares of a certain amount each, the whole amount of capital so fixed and required for the accomplishment of the main design of the company must be fully secured by a *bona fide* subscription before an action will lie upon the personal contract of subscribers to stock to recover an assessment levied on the shares of stock, unless there is some clear provision in the contract to proceed in the execution of the main design with a less subscription than the whole amount of capital specified. This rule seems to be founded on the principle that, by the terms of the grant to the corporation, it is essential to the power of assessment for the general objects and purposes of the institution that the whole capital stock required by the condition precedent must be represented and acted upon by the assessment. This doctrine has undergone an exhaustive discussion in many cases, and it is not deemed necessary to bring into view the arguments in support of it. (*Salem Mill-dam Co. v. Ropes*, 6 Pick. [Mass.], 23; *Id.*, 9 Pick., 195; *Cabot & West*

Springfield Bridge v. Chapin, 6 Cush. [Mass.], 53; *Schurtz v. S. & T. R. Co.*, 9 Mich., 269; *Topeka Bridge v. Cummings*, 3 Kan., 76; *Somerset Railroad Co. v. Clarke*, 61 Me., 384; *N. H. Central R. Co. v. Johnson*, 30 N. H., 404; *Peoria & Rock Island R. Co. v. Preston*, 35 Ia., 118.) And the rule is the same in England. (*Fox v. Clifton*, 6 Bing. [Eng.], 776; *Pitchford v. Davis*, 5 M. & W., 2; 4 Moody & M., 151.)" Those cases were very fully considered and the authorities examined.

It may not be improper to state that the very able judge before whom the Nebraska cases cited were tried in the district court, after the argument in this court became convinced that he had erred, and when but one of his associates was present, and before the opinions were written, announced that the cases would be reversed, the court being unanimous.

Second—There is some proof tending to show that it was proposed to increase the capital stock to $6,000, and some of the shares were taken on that basis. It is evident there was no actual change in the proposed amount of capital stock; that still remained at $4,000, and the proposition to increase the stock to $6,000 was not adopted. It is unnecessary, therefore, to consider that phase of the case.

Third—There is some testimony tending to show that the defendant below waived the conditions of the contract of subscription as to the amount subscribed so as to permit the erection of the building in question with less than $4,000 capital stock subscribed. This should have been submitted to the jury for their consideration. The court, therefore, erred in directing a verdict and rendering judgment thereon. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

NORVAL, J., concurs.

POST, J., did not sit.

MISSOURI PACIFIC RAILWAY COMPANY v. EDWIN TWISS ET AL.

[FILED SEPTEMBER 28, 1892.]

1. **Common Carriers**: CONNECTING LINES: AGENCY. Where several common carriers unite to form a line for the transportation of merchandise and receive goods and give a through bill of lading, each carrier becomes the agent of the others to carry into effect the transportation and delivery of the property.
2. ——: RECOVERY FOR ANOTHER'S NEGLIGENCE: ULTIMATE LIABILITY: EVIDENCE. The testimony tends to show that the property in question, a piano, was injured through the negligence of the defendants and no one else; that they had attempted to settle the damages caused thereby both before and after suit was brought; that they were witnesses in two trials to recover such damages, and must have known that they were ultimately responsible for the same.
3. ——: ——: NOTICE TO PARTY ULTIMATELY LIABLE: EFFECT OF JUDGMENT. In such case knowledge of the pendency of the suit and its object, and that if a recovery was had it would be for the default of the defendants and no one else, is sufficient to impose upon the defendants the duty of making any defense they may have to the action, and in case they fail to do so the judgment will be conclusive against them as to the amount of the judgment.
4. ——: ——: ——: ——: MEASURE OF DAMAGES. The measure of damages is the amount of the judgment, interest thereon, and taxable costs.

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

B. P. Waggener, and *A. N. Sullivan*, for plaintiff in error:

Where several carriers unite to complete a line of transportation and receive goods for freight and give a through bill of lading, each carrier is the agent of all the others to accomplish the carriage and delivery of the goods, and is liable for any damage to them, on whatever part of the line

the damage is received. (*Texas & P. R. Co. v. Fort*, 9 Am. & Eng. R. R. Cases, 392; *Texas & P. R. Co. v. Ferguson*, 9 Id., 395.) Where receiving carrier has to pay damages for neglect of connecting line, it has a right of action against the carrier at fault. (*C. & N. W. R. Co. v. N. L. Packet Co.*, 70 Ill., 217.) And in the latter case the measure of damages is the amount recovered in the first action, where the carrier at fault has knowledge of its pendency. (*C. & N. W. R. Co. v. N. L. Packet Co., supra; Littleton v. Richardson*, 34 N. H., 179; *Veazie v. R. R.*, 49 Me., 119; *Portland v. Richardson*, 54 Id., 46; *Seneca Falls v. Zalinski*, 8 Hun [N. Y.], 571; *Robbins v. Chicago*, 4 Wall. [U. S.], 657; *Boston v. Worthington*, 10 Gray [Mass.], 496.)

Beeson & Root, contra.

MAXWELL, CH. J.

It is alleged in the petition, in substance, that during the month of October, 1886, the defendants were common carriers of goods and merchandise from the plaintiff's depot in Louisville, Nebraska, to the depot of the C., B. & Q. R. R., in said village, about the distance of one mile; that on the 11th day of that month one J. P. Young shipped a piano from Weeping Water on the line of plaintiff's railroad to be carried to Louisville and there delivered to the C., B. & Q. R. R., to be transported on the latter road to Plattsmouth; that the defendants received freight in less than car load lots from the plaintiff at its depot in Louisville to be by them carried to and delivered to the C., B. & Q. R. R. at its depot there; that they were in fact an intermediate transportation company; that the plaintiff fully performed all the conditions of said contract on its part and delivered said piano in good condition to the defendants at Louisville, to be transported by them to the depot of the C., B. & Q. R.

R. at that place to be forwarded to Plattsmouth; that the defendants so negligently performed their duty in transferring said piano as to permit the same to fall out of the vehicle on which it was being carried and it was thereby broken and damaged; that said Young thereupon brought suit against the plaintiff for said injuries and recovered a judgment against plaintiff for the sum of $150 and costs of suit taxed at $63.05; that said judgment was affirmed by the supreme court; that of all said suits and proceedings the defendants had due notice; that there is due from the defendants to the plaintiff the sum of $302.48, with interest from the 4th day of April, 1889.

The answer of the defendants consists of a number of specific denials, which need not be noticed.

On the trial of the cause the jury returned a verdict in favor of the plaintiff for the sum of $106.75, upon which judgment was rendered.

The testimony shows that the plaintiff, in connection with other common carriers, undertook to carry the piano beyond its own line and deliver the same to Young; in other words, several common carriers in effect formed a line for the transportation of the property beyond the limits of their respective lines and gave in this case a through bill of lading. In such case each carrier is the agent of the others to accomplish the carriage and delivery of the goods. (*R. Co. v. Campbell*, 36 O. St., 647; *Beard v. St. L. & A. T. H. Ry. Co.*, 44 N.W. Rep. [Ia.], 803; *A., T. & S. F. R. Co. v. Roach*, 35 Kan., 740; *K. C., St. J. & C. B. R. Co. v. Rodebaugh*, 38 Id., 49; *Tex. & P. R. Co. v. Fort*, 9 Am. & Eng. R. R. Cases [Tex.], 392.)

That the piano was injured by the negligence of the defendants is not denied, and is clearly shown by the proof. In such case the party sustaining the injury may bring his action directly against the carrier committing the injury, or against the one that undertook to transport the goods. (*A., T. & S. F. R. Co. v. Roach, supra; U. P. Ry. v.*

Marston, 30 Neb., 241.) As between the carriers, however, each one is liable for the result of its own negligence, and although the first carrier may have assumed the responsibility for the transportation of property beyond its own line, and damages may be recovered against it for a failure in that regard, yet the carrier causing the injury will be liable to it for such damages; in other words, the party guilty of the wrong is ultimately liable therefor. This doctrine, in another form, has frequently been applied where a covenantee has been evicted from possession by paramount title. (*Smith v. Compton*, 3 B. & Ad. [Eng.], 407; *Williamson v. Williamson*, 71 Me., 442; *Bever v. North*, 107 Ind., 544; *St. Louis v. Bissell*, 46 Mo., 157; *Wendel v. North*, 24 Wis., 223; *Mason v. Kellogg*, 38 Mich., 132; 2 Black on Judgments, sec. 567.)

In *Bever v. North*, *supra*, it was held that it was unnecessary to allege in the petition that the covenantor was required to defend. It was held that the covenantee need not appeal from the judgment of ouster, but might rely on his judgment. In this class of cases it is necessary to give notice to the covenantor in order that the judgment may be conclusive against him, and he should not only be notified of the action, and be requested to defend it, but if he desires should be allowed to do so to the utmost extent of the law. (*Eaton v. Lyman*, 26 Wis., 61.)

The above rules have been applied to cases where persons are responsible over to another either by express contract or operation of law. Thus, where damages were recovered against a sheriff for the escape of a prisoner caused by its failure to provide a jail, and he in turn sued the county for its neglect in that regard, it was held that the record of the judgment against the sheriff might be received in evidence against the county to show the amount he was compelled to pay. (*Coms. v. Butt*, 2 O., 348.) So, where a judgment has been recovered against a municipal corporation for injuries caused by an obstruction or defect

in the public road or street of which the wrong-doer has notice, is conclusive evidence of the obstruction or defect in the road or street, the injury to the individual, and the amount of damages. (*Milford v. Holbrook*, 9 Allen [Mass.], 17; *Boston v. Worthington*, 10 Gray [Mass.], 498; *Davis v. Smith*, 79 Me., 351; *Littleton v. Richardson*, 34 N. H., 187; *Robbins v. Chicago*, 4 Wall. [U. S.], 657.)

Where the action is brought against a municipality for a wrong committed by a third person by reason of which the municipality is liable and judgment is recovered against it, it has been held in a number of cases that it was sufficient if the wrong-doer knew that the suit was pending for that cause and he could have made his defense if he so desired. It is said in one case: "The legal presumption is that he knew he was answerable over to the corporation, and if so, it must also be presumed that he knew he had a right to defend the suit." (*Robbins v. Chicago*, 4 Wall., 657; *Chicago v. Robbins*, 2 Black [U. S.], 418.) In other words, where the wrong for which the city was sued was committed by the defendant alone, and if a judgment is recovered against it, it will be because of such wrong. The knowledge of the wrong-doer that an action is pending to recover for the injury is sufficient notice to him to justify his action, and if possible prevent a recovery, and that if judgment is recovered he will ultimately be liable.

In the case at bar the defendant Twiss was called as a witness in both the county and district courts. He recognized his liability for the damages, both before and after suit was brought, by endeavoring to effect a settlement of the same. It is true the proof fails to show an actual request to defend the action, but as he and his partner had committed the injury, they must have known they were ultimately liable for the same, and the plaintiff had an action over against them. Having this knowledge, it was their duty to defend the action if such defense they had. There is a material difference between a case like the one

at bar and one where an action is brought by a covenantee against his covenantor. There the nature of the covenant claimed to have been broken, as well as the existence of the covenant itself, may be in issue, as well as the claim of the plaintiff. So if an action is brought against a municipality for an injury from a defective sidewalk which it was the duty of the lot-owner to maintain in good repair, notice may be required because the lot-owner may be presumed to have no knowledge of the injury, or that it occurred on his premises, or even that the sidewalk was defective. Where, however, the party knows that the injury was caused by himself and no one else, and that if a recovery is had it will be because of his neglect and wrong, it is sufficient that he has knowledge of the pendency of the suit and could defend if he so desired. (*Chicago v. Robbins*, 2 Black [U. S.], 418; *Robbins v. Chicago*, 4 Wall. [U. S.], 657, 672.)

The case was tried upon the theory that the defendants were not bound by the amount of the judgment, and the instructions are based on that view of the law. The measure of damages which the plaintiff is entitled to recover is the amount of the judgment against it with interest and costs. (*Ottumwa v. Parks*, 43 Ia., 119.) The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

GERMAN INSURANCE COMPANY OF FREEPORT, ILLINOIS, v. JOSEPH B. PENROD ET AL.

[FILED SEPTEMBER 28, 1892.]

1. **Continuance:** ABSENT WITNESS: AFFIDAVIT. In an action upon a policy of insurance it appeared that the loss occurred December 24, 1889; that suit was begun May 9, 1890, and the issues made up June 30, 1890; that at the September term of the district court the case was passed till November 24th, when the trial was set for the 28th, on the morning of which day the defendants' attorneys filed certain affidavits, in which they stated, in substance, that the state agent was absent; that they did not know of his whereabouts; that he possessed important papers and that they could not safely proceed to trial without him, but failed to state what papers he possessed, or what they expected to prove by him, or any reason for the failure to take his deposition. *Held*, That the court did not err in overruling the motion for a continuance.
2. **Fire Insurance:** BUILDING IN COURSE OF ERECTION: LOSS BEFORE OCCUPANCY. Where the testimony showed that the agent had power to and did issue the policy; that he filled out an application for insurance upon a building in process of construction, to be signed by the owner, and stated in the application that the building was being erected, although it was intended for the use of tenants and was stated in the policy to be so occupied, *held*, that, construing the several provisions of the application together, it did appear that the building was in course of construction, and being burned before it was completed, the fact that the building was vacant was no defense.
3. ———: AGENT'S AUTHORITY. As the agent had power to issue the policy, he had authority also to make any changes as to the person entitled to the benefit thereof which did not increase the risk; therefore, where the policy was for $1,000 and a mortgage named in the application for $700 was executed by the insured, an assignment of so much of the policy as would cover the mortgage was authorized by the agent. *Held*, Within his powers.
4. **Evidence** *held* to sustain the verdict, and there is no material error in the instructions.
5. **Valued Policy Act.** No particular objection has been pointed out in the statute of 1889, and it is sustained.

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

Rickards & Prout, for plaintiff in error.

A. H. Babcock, and *Geo. A. Murphy, contra.*

MAXWELL, CH. J.

This is an action brought in the district court of Gage county to recover $1,000 on a policy of insurance on a dwelling house. On the trial of the cause the jury returned a verdict in favor of Penrod for $1,000, less $700 in favor of Parker as mortgagee, on which judgment was rendered. The loss occurred on the night of the 24th of December, 1889, and this action was brought May 9, 1890, and the issues were made up June 30 of that year. The case stood for trial at the September term of the district court of that county, but apparently by consent was passed until near the close of the term. On the 24th of November, 1890, the case was set down for trial on the 28th of that month. On the 28th the attorneys for the defendant below filed affidavits asking that the case be continued till the foot of the docket was reached, and, in effect, saying in their affidavits that they could not be ready for trial without the testimony of the general agent of the company, and that they had been unable to reach him by telegraph or otherwise. There is no statement of what facts it was expected this agent would testify to, nor are we informed of any reason why his deposition has not been taken. If the showing made for a continuance would be held sufficient it would be possible to continue any case. It appears that the trial took place on the 2d of December, 1889, and the jury was discharged on the next day. The defendants below do not seem to have been forced to trial with undue haste and have no just cause of complaint in that regard.

The testimony shows that in the summer of 1889 Pen-

rod was erecting a dwelling house in the city of Beatrice; his brothers were doing the carpenter work and seem to have worked on this house when not otherwise employed; that the plaintiff Penrod is a painter and working at his trade, and performed labor on the house when not painting for others; that in the latter part of August, 1889, the agent of the defendant below at Beatrice spoke to a brother of Penrod about insuring the house. This was communicated to Penrod, who took out a policy for three years, paying the premium therefor. The application was filled out by the agent, and states that the house was in course of erection; that there was an incumbrance on it for $800. The agent, who seems to have had knowledge of the manner in which the house was being erected, filled out the application, and issued the policy with that knowledge. The house was designed to be rented when completed, and it is stated in the application to be in the occupation of a tenant. This was not intended as a statement that the house was then occupied but was designed to apply to the property when it was completed. The insured seems to have trusted implicitly to the agent, who may be presumed to be familiar with the ordinary mode of filling out applications, and seems to have acted to some extent upon his own knowledge. The agent testifies:

Q. Did you negotiate this policy with the plaintiff Penrod?

A. Yes, sir.

Q. Where did you meet Mr. Penrod first?

A. J. B. Penrod I met in my office.

Q. How long did you talk with him before you effected this insurance?

A. Well, I couldn't tell exactly, but a very few minutes.

Q. Did you go and examine the property at that time?

A. No, sir.

Q. State whether he reported to you the condition of the property.

A. He told me the building was not completed.

Q. Who drew up this policy?

A. I did.

Q. When?

A. The 26th day of August, 1889.

Q. Was that the same day the application was made?

A. Yes, sir.

Q. When did you deliver it?

A. I can't tell exactly when I did deliver it; if I remember right they came in after it—sometime after.

Q. This clause here in regard to permission to complete building, is that in your handwriting?

A. Yes, sir.

Q. Now this clause in regard to the "Loss payable to mortgagee as his interest may appear, October 9, 1888," did you write that?

A. Yes, sir.

Q. Now you may state whether you sent this policy in to the general company before you delivered it.

A. No, sir.

Q. Did you have the power to issue policies?

A. Yes, sir.

Q. Did you have power also to note these remarks that I called your attention to?

A. Yes, sir.

Here we have an agent who, so far as appears, is the sole representative of the insurance company at Beatrice. He is authorized to receive applications for insurance, determine whether or not they are satisfactory and issue policies thereon. Having this power, he fills out an application for the insured to sign, obtains his signature to the same and the premium demanded, and thereupon in the name of his principal, whose accredited agent he is, issues a policy of insurance. The insured having complied with all the requests of the agent and paid the premium, naturally supposed that in case of total loss he would be indemnified to

the extent of the insurance. The policy purports to be given in good faith as a contract of indemnity in case of loss. It is not to be hedged about with onerous or impracticable conditions which have a tendency to defeat its object in whole or in part. If an agent may make a contract to bind the insurer, the terms and conditions of that contract are necessarily under his control. The general rule applies, that the principal will be bound by the apparent authority of the agent, and the apparent authority of the agent in this case justifies the insured in relying upon his assurances in filling out the application and the leave indorsed on the policy to borrow $700, which will presently be noticed.

It appears that on the 4th day of October, 1889, Penrod executed a mortgage for the sum of $700 to H. W. Parker for money borrowed, and upon application the agent indorsed on the policy "October 9, 1889, loss, if any, payable to H. W. Parker, mortgagee, as his interest may appear." This was signed by the agent. As heretofore stated, the agent had power to issue the policy, and that carries with it power to make a change in the beneficiary. This in no wise affected the risk and is unavailing.

It is claimed that the evidence fails to sustain the verdict. We think differently, however. There is no charge of fraud or bad faith on the part of the insured. The company has received and retained the premium. A contract of insurance is for indemnity in case of loss. To many honest persons the failure to pay without an expensive lawsuit means great embarrassment, sometimes bankruptcy. If unconscionable pretexts can be used to defeat a just claim for a loss, the insured is not only robbed of the amount paid for a premium but also of his property, and experience has shown that such pretexts can nearly always be found where they are available.

The verdict, in our view, is the only one that should have been rendered. It appears that the adjuster of the

company, after the loss, went to Beatrice, and the insured went with him into the office of the agent, where apparently there were none others in the room. The adjuster then locked the door and then informed the insured that they would not pay the loss because the premises were vacant. The evident purpose was to effect, if possible, a reduction of the amount of claim for the loss. No one can object to a manly claim for such a reduction where there are any apparent grounds for the same, but the course pursued in this case, as disclosed by the record, would seem to be unworthy of a reputable company.

Some objections are made to the instructions, but no particular error has been pointed out and they seem to be correct.

Objections are also made to the valued policy act of 1889, but in our view it is a valid act, and the amount allowed for prosecuting the action is not excessive. There is no material error in the record and the judgment is

AFFIRMED.

THE other judges concur.

FRED W. GRAY, APPELLANT, V. GEORGE ELBLING ET AL., APPELLEES.

[FILED SEPTEMBER 28, 1892.]

1. **Bill of Exceptions**: TIME FOR ALLOWANCE: SIGNED BY JUDGE AFTER TIME EXPIRED. Upon the facts shown by the record it does not appear that there was an order extending the time to prepare a bill of exceptions or application for an extension of time. There was no authority, therefore, for the judge to sign the bill, and a motion to quash is well taken.

2. **Pleadings.** Upon the issues made by the pleadings the plaintiff is entitled to judgment.

3. ———: DEFECTIVE ANSWER. An answer in effect that the defendant is not indebted the full amount claimed in the petition is not a denial of any fact on which the right to recover depends and raises no issue.

APPEAL from the district court for Saunders county. Heard below before MARSHALL, J.

Frank Dean, for appellant.

Geo. W. Simpson, contra.

MAXWELL, CH. J.

This action was brought by the plaintiff against George Elbling to foreclose a mechanic's lien on lots 9 and 10, in block 20, in the County Addition to Wahoo. On the trial of the cause the court found the issues in favor of the defendant and dismissed the action. It appears from the affidavits on file that the action was submitted to the court in July, 1890, and taken under advisement; that on the 16th day of August of that year a decision was rendered.

It is claimed on behalf of the plaintiff that the time in which to prepare a bill of exceptions was extended forty days from the adjournment of the court *sine die*, and the affidavits of the plaintiff's attorney, and also of the clerk of the court, are filed in support of that contention. On the other hand, the defendant and his attorney both swear that there was no such extension of time. The district judge overruled the motion to correct the record to show such extension—in effect holding that no order extending the time had been made. He signed the bill of exceptions, however, on the 8th day of October, 1890, and within the time which he was authorized to grant an extension of time and sign the bill. It would seem to be proper, where any reasonable excuse is given for the failure to present the bill within the time limited by the order of the court, but within the limit fixed by law to which it may be ex-

tended, for the judge to make an order extending the time and thereupon sign the bill if correct; and if he refused to extend the time, to refuse also to sign the bill. Such refusal would make a direct issue as to the right of the party presenting the bill to have the same authenticated without the delay and expense incident to docketing the cause in this court to be here determined whether or not the judge had authority to sign the bill. If such authority existed the manner of its exercise ordinarily could not be called in question. The law in relation to the preparation and signing of bills of exceptions is remedial in its nature and should be liberally construed. This rule prevails in some of the common law states and is fundamental under the Code. The judge, by overruling the motion to enter the alleged order extending the time to forty days from the rising of the court, in effect held that no such order had been made, and it does not appear that there was any cause whatever for the delay. The bill was signed, therefore, without authority, and the motion to quash the same is sustained.

On the face of the pleadings, however, it is apparent that the judgment is wrong and cannot be sustained. The petition is as follows, omitting the title:

"The plaintiff complains of the defendant George Elbling for that on or about the 21st day of April, 1887, plaintiff entered into a verbal contract with the defendant George Elbling to furnish to him building material for the erection of a dwelling house on lots 9 and 10 in block 20, County Addition to Wahoo, Nebraska, the city of Wahoo, Saunders county, state of Nebraska. In pursuance of said contract plaintiff furnished to said defendant George Elbling building material, consisting of doors, windows, shingles, lumber, lime, etc., an itemized account of the same, with credits and offsets, being set out in the mechanic's lien filed and recorded in the clerk's office in said county, and a copy of which is attached hereto and made a part hereof,

for the erection of said dwelling house, said material being furnished on and between the 21st day of April, 1887, and the 8th day of July, 1887, amounting to the sum of $311; that on the 20th day of April, 1887, said defendant George Elbling paid to said plaintiff the sum of $60, and on the 7th day of May, 1887, said defendant George Elbling returned windows, and for which said plaintiff gave him credit for $16.20, and on the 18th day of May for shingles returned said plaintiff gave him, said George Elbling, credit for 81 cents, amounting in the aggregate to the sum of $77.01, leaving a balance due in favor of said plaintiff amounting to the sum of $233.99.

"The defendant George Elbling at the time plaintiff furnished said material was the owner in fee of said lot.

"That on the 8th day of November, 1887, and within four months from the time and of furnishing said material the plaintiff made an itemized account in writing of said material furnished the defendant George Elbling, under said contract, together with all credits and offsets, and after making oath thereto as required by law, filed the same in the clerk's office of Saunders county and claimed a mechanic's lien therefor upon said lots and the buildings thereon for the sum of $233.99, with interest at ten per cent per annum from the 8th day of November, 1887. The sum of $233.99 with interest at ten per cent per annum from the 8th day of November, 1887, now remains due and unpaid on said account.

"That the defendants Anna Elbling and Theodore G. Dockstader have or claim some lien or interest in said premises, but plaintiff avers that the same is subordinate to plaintiff's claim, and plaintiff asks that they be compelled to set the same up, or be forever cut off from asserting the same.

"Plaintiff therefore prays judgment against the defendant George Elbling for the sum of $233.99, with interest at ten per cent per annum from the 8th day of November,

1887, and costs of suit, and that said premises may be sold and the proceeds thereof applied to the payment of said judgment, interest, and costs, and for such other and further relief as may be just and equitable."

To this Elbling answered as follows:

"The defendant George Elbling, for his separate answer to the petition of plaintiff, says: He admits buying certain lumber and building material from Fred W. Gray, plaintiff herein, in the year 1887; admits making payments on account of said purchase to the amount of $77.01.

"This defendant denies that plaintiff, within four months of the furnishing of the material mentioned and set forth in his petition, made an itemized account in writing of the same as required by law and filed the same with the clerk of Saunders county, Nebraska; denies that plaintiff has any lien upon lots 9 and 10, block 20, in the original town of Wahoo, and denies that plaintiff has any lien upon the property of this answering defendant.

"This defendant admits that he is indebted to the plaintiff, on account of lumber and building material sold by plaintiff to this defendant, but denies that the balance due plaintiff amounts to the sum of $233.99.

"This defendant admits that Anna Elbling and Theodore G. Dockstader have an interest in and to the premises of this defendant, and this defendant denies each and every allegation in plaintiff's petition not herein specifically admitted.

"The defendant further says the pretended mechanic's lien set out by plaintiff was not filed within four months of the furnishing the material to the defendant to construct a house, and that the last item of said account was by the defendant brought long after the material for the construction of his house was furnished; that the same, the two screens, were not included in any estimate or bill of material furnished to or ordered by this defendant for the construction of a dwelling house."

The reply is a general denial.

An itemized copy of the account is made a part of the petition and need not be copied here, as there is no dispute as to the items in the account having been received by Elbling, nor that the first item was furnished April 21, 1890, and the last July 8 of that year, or that these materials were furnished under a verbal contract for the erection of said house. Elbling in his answer "admits buying certain lumber and building material from Fred W. Gray, plaintiff herein, in the year 1887; admits making payments on account of said purchase to the amount of $77.01." He "denies that the plaintiff filed his mechanic's lien within four months, because the last item was a disconnected transaction." There is no allegation in either the petition or answer that an estimate was made and any of the material furnished thereunder. So far as the pleadings show there was a verbal contract to furnish material to build a house; in effect, that the defendant procured all or a considerable part of the material to be used in the erection of his house from the plaintiff. Some of that furnished was taken back and Elbling received credit therefor.

An examination of the account shows that all through the latter part of May and the month of June, 1890, material was furnished from a week to ten days apart. Thus, May 28, 1890, is an item for lumber; June 8 are two items for lumber; June 15 are four items of lumber; June 21 are three items. The next item is July 8, for screen doors. These would naturally be put on about the time the house was completed, and, so far as appears, the account had been kept open up to this time. The screen doors were furnished for the house, and, so far as appears, were placed thereon, and this court has no right to assume that there were separate contracts when the defendant has stated no facts showing such to be the case.

The same question was raised directly by a sufficient answer in *Ballou v. Black*, 17 Neb., 389. In that case

"the lumber furnished by plaintiff for the erection of defendant's building was delivered in five parcels of nearly equal value: one on the 12th, one on the 14th, one on the 17th, one on the 20th, and one on the 28th days of September, and the sworn statement for lien was filed for record on the 25th day of November of the same year; held, that the same constituted but one delivery, and that the lien was filed in due time to cover the whole." It is said (p. 396) "The time within which the whole of the lumber was delivered, according to the plaintiff's bill, was reasonable, and as to time should be treated as one delivery." This case was adhered to in *Ballou v. Black*, 21 Neb., 131. The rule stated in these cases seems equally as applicable in the case at bar.

The defendant Elbling denies that he is indebted to the plaintiff in the full amount claimed in the petition, but admits he is indebted to him. How much less he is indebted he does not state. The smallest fraction of one cent less than the amount claimed would sustain that defense, if defense it may be called. It is well settled under the Code that the plea of *nil debet* is not sufficient, as it puts in issue no fact. (*Wells v. McPike*, 21 Cal., 215; *Seeley v. Engell*, 17 Barb. [N. Y.], 530; *Drake v. Cockroft*, 4 E. D. Smith [N. Y.], 34; Maxwell, Code Pl., 393.) Under the issues as presented, therefore, the plaintiff is entitled to judgment for the full amount of his claim, and to the foreclosure of his lien upon the property.

There is a denial in the answer that the plaintiff's lien attaches to "lots 9 and 10, in block 20, in the original town of Wahoo." The plaintiff has made no claim of that kind and the answer does not meet the averments of the petition. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

WILLIE ROBB V. STATE OF NEBRASKA.

[FILED SEPTEMBER 28, 1892.]

1. **Larceny:** EVIDENCE: POSSESSION OF STOLEN PROPERTY. The possession of stolen property, recently after the larceny thereof, when unexplained, may be sufficient to warrant the jury in inferring the guilt of the party in whose possession it is found. Whether such inference should be drawn is a question of fact exclusively for the jury.

2. ———: ———: INSTRUCTIONS. On a prosecution for larceny, a charge that "the possession by an accused person of personal property proved to have been recently stolen is sufficient to fasten the guilt of its larceny upon the accused *prima facie*, and calls upon him to prove the innocence of his possession," is erroneous, in that it omits to state that it is only when the possession is unexplained that the inference of guilt arises, and because it is in effect an instruction that the burden of proof shifted during the trial to the defendant.

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

W. L. Cundiff, for plaintiff in error:

It was error for the court to instruct the jury that the possession by an accused person of property proved to have been recently stolen is sufficient to fasten the guilt of its larceny upon the accused *prima facie*, and calls upon him to prove the innocence of his possession. (*People v. Ah Ki*, 20 Cal., 178; *Thompson v. People*, 4 Neb., 529; *People v. Juan Antonio*, 27 Cal., 404; *Durant v. People*, 13 Mich., 352; *State v. Merrick*, 19 Me., 398; Thompson on Trials, 2535; 1 Phillips, Evidence, 638; *People v. Noregea*, 48 Cal., 123; *People v. Chambers*, 18 Id., 383; *State v. Hodge*, 50 N. H., 510; 1 Greenleaf, Evidence 34; 3 Id., 31.)

George H. Hastings, Attorney General, contra, cited: *Thompson v. People*, 4 Neb., 528; *Thompson v. State*, 6

Id., 107; *Smith v. State*, 17 Id., 361; *McLain v. State*, 18 Id., 158; *State v. Merrick*, 19 Me., 398; 1 Phillips, Evidence, 634; Sackett, Instructions, 746; *Sahlinger v. People*, 102 Ill., 241; *Fowle v. State*, 47 Wis., 545; *State v. Pennyman*, 68 Ia., 216; *Johnson v. Miller*, 29 N. W. Rep. [Ia.], 743.

NORVAL, J.

The plaintiff in error was informed against in the Lancaster county district court, charged with the larceny of a gold watch from the person of one Henry Burcham on the 10th day of September, 1890. On the trial plaintiff in error was convicted and sentenced to imprisonment in the penitentiary for the period of two years and six months.

A number of errors are assigned in the motion for a new trial, but the giving of the fourth paragraph of the charge to the jury only is relied on for a reversal in this court. The instruction to which objection is made reads as follows:

"You are instructed that the possession by an accused person of property proved to have been recently stolen is sufficient to fasten the guilt of its larceny upon the accused *prima facie*, and calls upon him to prove the innocence of his possession. In this case, then, if you find from the evidence that the watch in question was stolen from the person of Henry Burcham at the time and place as alleged, and if you further find from the evidence beyond a reasonable doubt that shortly after the alleged theft the defendant herein had the watch in his possession, then the presumption *prima facie* would be that the defendant stole the watch, and such presumption would be sufficient to warrant you in finding that the defendant did steal the watch from the said Burcham at the time and place alleged in the information, unless the defendant would make some explanation, or account for the possession of said watch, upon some theory, other than having gained the

possession of said watch by theft. But in this case, if the evidence offered by the defendant as to the manner in which he came into the possession of said watch satisfactorily accounts for the possession of said watch to your minds, or leaves a reasonable doubt in your minds as to whether or not he gained the possession of said watch honestly or not, then you should give the defendant the benefit of such explanation or doubt and acquit him."

At the consultation it was agreed that the giving of the above was seriously prejudicial to the rights of the accused. In a criminal prosecution for larceny the rule is that the possession of stolen property, recently after a larceny thereof, when unexplained, may be sufficient to warrant the jury in drawing an inference of guilt of the party in whose possession it is found. The effect to be given to the fact of possession is solely for the jury to determine when considered in connection with all the other facts and circumstances proven on the trial. (*Thompson v. People*, 4 Neb., 529; *Thompson v. State*, 6 Id., 102; *Grentzinger v. State*, 31 Id., 460; 2 Thompson on Trials, 1894.)

The first part of the instruction, although in the exact language used by this court in the opinion in *Smith v. State*, 17 Neb., 361, is, we think, faulty. It omits to state that it is only where the possession of goods recently stolen is unexplained that the presumption *prima facie* of guilt arises. Again, the use in the charge of the sentence, "and calls upon him to prove the innocence of his possession," is certainly objectionable, as it is, in effect, an instruction that the burden of proof shifted during the trial to the accused. While the defendant was required to introduce evidence tending to show that he came honestly by the watch, he was not obliged to establish the innocence of his possession thereof by a preponderance of the evidence, as the jury were in effect instructed by the court. If the testimony created a reasonable doubt in the minds of the jury upon that point, the defendant was entitled to an acquittal.

True, by the last part of the charge the jury were told, in effect, that if they entertained a reasonable doubt as to whether the defendant obtained possession of the watch honestly or not, they should acquit, yet this did not cure the misstatement of the law upon that point in the same instruction, for the reason that the jury were left in doubt as to which portion of the instruction contained a correct statement of the law. (*Wasson v. Palmer*, 13 Neb., 376; *Fitzgerald v. Meyer*, 25 Id., 77; *Ballard v. State*, 19 Id., 609.) For the reason stated the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

THE other judges concur.

RUDOLPH ULDRICH ET AL. V. IDA GILMORE ET AL.

[FILED SEPTEMBER 28, 1892.]

1. **Liquors:** DEALER'S BOND: SURETIES. Where a liquor dealer's bond contains no provision for the payment of all damages which may be adjudged against him under the license law, no action can be maintained against the sureties thereon for damages resulting from the sale of intoxicating liquors by the principal in the bond.
2. ——: ——: ACTION BY MARRIED WOMAN: INSTRUCTIONS: MEASURE OF DAMAGES. In an action for damages by a married woman against a saloon-keeper for loss of means of support resulting from the sale of liquors to her husband, it is error to instruct the jury that habits of the husband prior to the acts complained of are immaterial. Although the fact that he drank to excess will not defeat a recovery, yet such fact may properly be considered by the jury as affecting the measure of damages.
3. **Defendants' instructions,** as modified by the court, were properly given.

ERROR to the district court for Saline county. Tried below before MORRIS, J.

Hastings & McGintie, for plaintiffs in error, cited: *Boyer v. Barr*, 8 Neb., 71; *Roose v. Perkins*, 9 Id., 315; *Boldt v. Budwig*, 19 Id., 745; *Rouse v. Melsheimer*, 46 N. W. Rep. [Mich.], 372; Comp. Stats. Neb., ch. 50, secs. 15, 16.

Abbott & Abbott, and *W. J. Bryan, contra*, cited: *Bollman v. Pasewalk*, 22 Neb., 766; *Thomas v. Hinkley*, 19 Id., 328; *Elshire v. Schuyler*, 15 Id., 561; *Kerkow v. Bauer*, 15 Id., 150; *McClay v. Worrall*, 18 Id., 52; *Warrick v. Rounds*, 17 Id., 416; *Roberts v. Taylor*, 19 Id., 190.

NORVAL, J.

This action was brought by defendants in error, a married woman and her minor children, against the principals and their sureties on two liquor bonds to recover damages resulting from a loss of means of support caused by the intoxication of Thomas Gilmore, the husband of Ida Gilmore and the father of the other plaintiffs. The verdict of the jury was in favor of the plaintiffs below, with an award of damages assessed at $500.

The errors relied upon to procure a reversal of the judgment are as follows:

1. The admission in evidence of the two bonds declared upon.

2. The damages assessed by the jury are excessive.

3. The verdict is contrary to the fifth and sixth paragraphs of the instructions asked by the plaintiffs.

4. The court erred in giving the first instruction asked by plaintiffs.

5. The court erred in changing the first and second instructions requested by defendants.

6. The court erred in refusing defendants' third instruction.

It is first insisted that the trial court erred in permitting the introduction in evidence of the saloon bonds sued upon in this action. The bonds are alike, except as to the names of the makers. Each bond runs to the village of Tobias, is for the sum of $5,000, and contains the following condition: "Now if the above bounden * * * shall in all respects comply with chapter 50 of the Compiled Statutes of Nebraska, entitled 'Liquors,' and shall furthermore comply with ordinance No. 6 of village ordinances, entitled 'An ordinance licensing and regulating the sale of malt, spirituous, and vinous liquors within the village of Tobias,' and moreover pay promptly all fines, penalities, and forfeitures that may be adjudged against the said * * * then and in such case this obligation to be void, otherwise it shall remain in full force and effect."

By section 6 of chapter 50 of the Compiled Statutes, it is provided that the bond given by an applicant for liquor license shall be conditioned that "he will not violate any of the provisions of this act, and that he will pay all damages, fines, and penalties and forfeitures which may be adjudged against him under the provisions of this act."

It will be observed that the bonds in suit do not comply with the requirements of the above quoted statutory provision, in that they contain no provision for the payment of damages. A surety is only liable according to the terms of his obligation. Beyond that he is not answerable. This is an action for damages, and as the sureties never obligated themselves to pay any damages resulting from the liquor traffic, the suit as to them must fail. (*Sexson v. Kelley*, 3 Neb., 104).

As to the persons named as principals in the bonds, they are personally liable, without reference to their bonds, for any injury occasioned by the furnishing of intoxicating liq-

uors to Thomas Gilmore. This question was passed upon in *Roose v. Perkins*, 9 Neb., 304, and *Jones v. Bates*, 26 Id., 693. If all the allegations in the petition relating to the bonds were eliminated therefrom, the petition would still state sufficient facts to constitute a cause of action against Conrad Most and Rudolph Uldrich.

It is next insisted that the court erred in giving the following instruction at the request of the plaintiffs: "The court instructs the jury for plaintiffs that the habits of Thomas Gilmore prior to May 1, 1888, are immaterial, and if you believe that said Thomas Gilmore bought liquor of the defendants Most and Uldrich, and that the purchase and use of such liquor damaged these plaintiffs, then you should find in their favor for the amount of such damage, even though you should further believe that said Gilmore was an intemperate man before May 1, 1888." The fact that the husband and father drank intoxicating liquors to excess prior to May 1, 1888, the date of the saloon license, will not preclude the plaintiffs from maintaining their action. Under the statute every person who furnishes intoxicating liquors to another, although he may be a drunkard, is liable for all the damage which results therefrom. While the fact of the intemperate habits of Mr. Gilmore prior to, and at the time of, the sales in controversy does not relieve the saloon-keepers from responsibility, yet such fact may properly be considered as affecting the measure of damages. The instruction was prejudicial and should not have been given. (*Dunlavey v. Watson*, 38 Ia., 398; *Rouse v. Melsheimer*, 82 Mich., 172; Black on Intoxicating Liquors, sec. 324.)

Complaint is made of the changing by the trial court of the first and second instructions requested by defendants. By these requests it was sought to limit the right of compensation to damages caused by the use of intoxicating liquors, of which some part was furnished by some one of the defendants. The instructions were changed by substi-

tuting the words "contributed to" for "caused," and as thus changed were given. In this there was no reversible error. As already stated the defendants were liable for all damages resulting from the use of intoxicants by Gilmore to which the liquors furnished by them to him contributed. (*Kerkow v. Bauer*, 15 Neb., 150; *Elshire v. Schuyler*, Id., 561; *Warrick v. Rounds*, 17 Id., 416; *McClay v. Worrall*, 18 Id., 52; *Roberts v. Taylor*, 19 Id., 190.)

Lastly, it is insisted that the court below erred in refusing to give the defendants' third request. The substance of it having been given by the court in other instructions, it was not error to refuse to repeat it. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

THE other judges concur.

RICHARD L. MILLS v. ISAAC B. TRAVER.

[FILED SEPTEMBER 28, 1892.]

1. **Ejectment:** PLEADING: DESCRIPTION OF LAND. In an action of ejectment to recover certain real estate which the petition described by metes and bounds, commencing at the southeast corner of the northwest quarter of the northwest quarter of a specified section, town, and range, a motion to make the petition more definite and certain, by requiring the plaintiff to set forth therein by some definite landmark or survey where said corner is situated, was *held* properly overruled.

2. ———: ADVERSE POSSESSION: PUBLIC LAND: HOMESTEAD: WHEN STATUTE BEGINS TO RUN. A party acquired title to public lands under the United States homestead law, to a portion of which another person claims title by adverse possession, *held*, that the statute of limitations did not begin to run against the party entering the land in favor of the one holding adversely, until the right to the patent was completed by the per-

formance of every act required of the entryman by the homestead law.

3. The evidence, although conflicting, is sufficient to sustain the finding that the possession of the defendant of the land in question had not been adverse and exclusive for the period of ten years before the commencement of the suit.

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

A. Ewing, and *Lee & Thompson*, for plaintiff in error.

John Patterson, and *Webster & White, contra.*

NORVAL, J.

On the 1st day of August, 1888, defendant in error commenced an action in the district court of Merrick county to recover the possession of the strip of land described in his petition by metes and bounds. The plaintiff in error filed a motion to make the petition more definite and certain, which was overruled by the court, and an exception to the ruling was entered upon the record. Afterwards an answer was filed, denying that defendant in error is the owner of the land in controversy, or is entitled to the possession thereof, and alleging that plaintiff in error has been in the open, notorious, exclusive, adverse, and uninterrupted possession of said strip of land, as owner, for more than ten years prior to the bringing of the suit. The reply is a general denial. There was a trial to a jury, with verdict and judgment for defendant in error. The jury also made special findings as follows:

"Question 1. Of the two surveys referred to by the witnesses, to-wit, that made by McLean in the year 1869, and that made by Patterson in the year 1888, which one, if either, do you find was correct, and which survey, if either, fixed and established the true dividing line between the premises of the plaintiff and defendant? Answer. The Patterson survey. I. H. CASTLE, *Foreman.*

"Question 2. Had the defendant been in the actual, adverse, exclusive, and uninterrupted possession of any part of the premises in controversy for the period of ten years previous to the commencement of this action, to-wit, August 1, 1888? If so, state what part thereof. Answer. No. I. H. CASTLE, *Foreman.*"

Complaint is made in the brief of counsel for plaintiff in error of the overruling of the motion to make the petition more definite and certain, by "requiring the defendant in error to set forth therein by some definite landmark or survey where the southeast corner of the northwest quarter of the northwest quarter of section 6, township 13 north, of range 5 west, in Merrick county, is situated." Said corner is the point mentioned in the petition where the pleader starts to bound the tract therein described, and which is in litigation herein. The petition does not allege how said corner is marked, whether by a visible mound, stake or stone, nor was such an allegation necessary to enable a person to locate the land in controversy. The motion was properly overruled.

No complaint is now made of the rulings of the court below on the trial, or of the instructions given and refused. But it is insisted that the verdict of the jury is not sustained by the evidence, which objection we will now consider.

The parties own adjoining lands. The plaintiff in error is the owner of the southwest quarter of the northeast quarter and the southeast quarter of the northwest quarter of section 6 of township 12, range 5, in Merrick county, and also lots 7 and 8 of said section. Defendant in error owns the west half of the northwest quarter and the west half of the southwest quarter of said section 6. The controversy is as to the location of the true line dividing their lands, each party claiming that the strip in dispute is within the boundary lines of his land.

It appears in evidence that plaintiff in error entered all

of his land, with the exception of lots 7 and 8, under the provisions of the United States homestead law, in 1868. For the purposes of locating the corners of his homestead, he had the same surveyed in 1869 by one John McLean, the county surveyor of the county. Defendant in error entered the said west half of the northwest quarter under the timber culture acts of congress on September 22, 1873, and acquired title thereto by virtue of a patent issued to him on March 20, 1886. To the west half of the southwest quarter he acquired title by purchase. In 1888, M. Patterson, the acting county surveyor of the county, at the request of Mr. Traver, surveyed the said lands of plaintiff and defendant and located the line dividing their premises, which line is some eighty links east of the one surveyed by Mr. McLean in 1869. The question is, which survey was correct? If the Patterson survey truly located the line dividing the premises of the parties, then the strip of land in controversy is embraced within the boundary of the lands owned by defendant in error; otherwise not. Whether said survey is accurate and correct depends entirely upon whether the point where Mr. Patterson started to run his lines was the true northwest corner of section 6, as established by the government surveyor. That the place where Mr. Patterson started his survey was the true governmental corner was testified to by defendant in error and several of his witnesses, while the testimony of plaintiff in error and his witness is to the effect that the northwest corner of said section 6 is twenty-two feet west of the place where the Patterson survey commenced. It is impossible to reconcile the testimony of the witnesses. The evidence bearing upon the question was submitted to the jury under proper instructions and they found that the Patterson survey was correct, and located the line dividing the premises of the parties. The finding, being sustained by the evidence, will not be molested.

One question remains to be considered. Has plaintiff in

error acquired title by adverse possession? As to that part of the strip in dispute lying north of the quarter section line and west of Mills's homestead, there is evidence tending to show that for ten years prior to the bringing of the suit Mr. Mills had plowed and planted to crops up to within a distance of a few feet of the line located by the McLean survey, which plaintiff in error says he left for a private way to the section line road. Conceding that he was in the exclusive possession thereof as owner for the statutory period, yet he did not acquire title thereto by such possession, for the reason the same was a part of Traver's timber claim and he had not complied with the law so as to entitle him to a patent for the land until 1885, or about three years before suit was commenced. The statute of limitations did not commence to run against defendant in error until his right to the patent was complete. (*Carroll v. Patrick*, 23 Neb., 847; *Gibson v. Chouteau*, 13 Wall. [U. S.], 92; *Sparks v. Pierce*, 115 U. S., 408; *Simmons v. Ogle*, 105 Id., 550; *Nichols v. Council*, 9 S. W. Rep. [Ark.], 305; *Steele v. Boley*, 22 Pac. Rep. [Utah.] 311.)

As to the remainder of the strip which lies south of the quarter section line and west of said lots 7 and 8, there is a sharp conflict in the testimony bearing upon the question of Mills's possession of the same. The above mentioned lots were taken by him as a timber claim in the fall of 1877. The testimony introduced by plaintiff in error tends to show that prior to said year a few furrows had been plowed on the strip in controversy by a prior occupant of said lots 7 and 8; that in the spring of 1878 Mr. Mills planted a row of forest trees along the east side of said strip on said plowing, about twelve feet apart; that subsequently he planted other trees between them, which are now standing and growing, and that during a portion of the time since 1878 plaintiff in error has cultivated and farmed said plowed strip of ground. The testimony on the part of the defendant in error is to the effect that the

trees were not planted by Mr. Mills until the spring of 1879, and that afterwards, and prior to the commencement of this action, one John Good, a tenant of Traver's, with the knowledge of Mr. Mills, and without any protest or objection upon his part, harvested the hay for two years on said strip west of the row of trees. This was admitted by Mr. Mills upon the witness stand. The first act of possession of plaintiff in error was the planting of the trees already mentioned, and if they were not put out until the year 1879, as some of the witnesses testify, and the jury must have so found, then it is clear that he has not been in possession of said strip of land for ten years prior to the bringing of this suit. But even though the trees were planted in 1878, still plaintiff in error's possession has not been exclusive and uninterrupted for the statutory period, for the reason that the continuity of his possession had been broken. The verdict of the jury is sustained by the evidence, and the judgment is

AFFIRMED.

MAXWELL, CH. J., concurs.

POST, J., took no part in the decision.

ADDISON ROADS, APPELLANT, V. EXPERIENCE ESTABROOK, APPELLEE, IMPLEADED WITH J. B. WHITTIER, APPELLANT.

[FILED SEPTEMBER 28, 1892.]

1. **Taxes: FORECLOSURE OF LIEN.** In an equitable proceeding to foreclose a lien for taxes the court will not consider questions which go only to the manner of the assessment or levy of the tax in question or other irregularity or informality in the proceedings.

2. ———: VALIDITY OF ASSESSMENT: FAILURE TO RECORD PLAT. In the summer of 1854 one J. surveyed the site of the city of Omaha and subdivided it into lots and blocks and streets and alleys, marking all corners with hardwood stakes. He made a manuscript plat of the area surveyed, showing the streets and alleys, lots and blocks, but containing no figures indicating the dimensions of the lots or the width of the streets and alleys. Said plat was soon afterward lithographed and has ever since been generally recognized as authentic by the public and property owners of the city. In 1857 the mayor, who had in the meantime entered said town site, under the laws of congress, in trust for the owners and occupants thereof, conveyed by deed certain lots therein to the defendant, who immediately inclosed them in accordance with the lines run by J. and the stakes as originally set by him. He has since repeatedly recognized said plat and survey as authentic by executing leases and conveyances of parts of said property by reference thereto. The property of the city, including the lots in controversy, has from the first been assessed for taxation in accordance with the said plat, and the streets adjacent to said lots improved by the city at great expense. *Held*, That taxes assessed against said property when listed for taxation according to the description on the said plat will not be held void for the reason that said plat was never recorded.

3. **Defective Title:** RECOVERY OF TAXES PAID. When the title of a purchaser for delinquent taxes shall fail he is entitled to recover in a proceeding to foreclose his lien, not only the taxes for which the property in question was sold and such as are subsequently levied, but also such as were levied for previous years and paid subsequent to the date of his purchase.

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

Montgomery & Jeffrey, for appellants:

In a proceeding in equity to enforce a tax lien the court will look to the statute and not to the assessment as the foundation of such lien, and will regard the amount of taxes against the property, as borne upon the books of the county, as unalterably established. (*Otoe County v. Mathews*, 18 Neb., 470; *Lammers v. Comstock*, 20 Id., 345; *Merriam v. Dovey*, 25 Id., 622.) Where there is no re-

corded plat of city property, a description by lot and block, referring to the recognized survey, is sufficient for levy and assessment of taxes, and by the recognized survey the description by lot and block is definite. (*Holts v. Streitz*, 16 Neb., 249; *Bryant v. Estabrook*, Id., 223; *Janesville v. Markoe*, 18 Wis., 356; *Finney v. Boyd*, 26 Id., 356.)

E. Estabrook, contra:

Land cannot be assessed for taxes as a village lot where there is no recorded plat. (*Johnson v. Scott*, 11 Mich., 232; *Manley v. Gibson*, 13 Ill., 308; *Jones v. Johnston*, 18 How. [U. S.], 154; *People v. C. & A. R. Co.*, 96 Ill., 369; *Shepard v. Shepard*, 36 Mich., 174; *Sandford v. People*, 102 Ill., 374; *Sharpe v. Dillman*, 77 Ind., 280; *Merton v. Dolphin*, 28 Wis., 459; *People v. Reat*, 107 Ill., 584; *Village of Winnetka v. Prouty*, Id., 221.)

POST, J.

The plaintiff herein filed in the district court of Douglas county five petitions praying for decrees of foreclosure of tax liens upon as many separate lots of land, to-wit: the east thirty-two feet of lot 2, and all of lots 3, 6, 7, and 8 in block 70 in the city of Omaha. The several actions were consolidated by order of the district court and tried together. From the judgment of the district court the plaintiff appeals. From the bill of exceptions it appears that on the 8th day of September, 1875, the property above described was sold by the treasurer of Douglas county to plaintiff for delinquent taxes and that treasurer's deeds were subsequently executed in his favor. The deeds aforesaid it is conceded are void on account of informalities in their execution. Plaintiff has also paid taxes subsequently assessed against each of said lots. In the action involving lot 3 Jackson B. Whittier is made a defendant since he also claims a lien by reason of a subsequent purchase for delinquent taxes. He answered setting up his lien and

praying for a decree of foreclosure. There is no controversy with respect to the purchase of the property for delinquent taxes, or the amounts of the payments therefor, by plaintiff or Whittier. The defenses relied on are two in number and will be noticed in the order presented.

"First—That the proceedings of the assessor and other officers preceding the charging of the taxes upon the books of the city and county treasurers were irregular and of so defective a character as to render the taxes charged void and not a lien upon the property."

The principal objections to the proceedings are that the property was not listed by the owner, and no refusal to list, or other reason why not so listed, was given by the assessors; that the assessor's oath was not attached to the rolls; that the name of the owner was not, in most instances, given, and, in such instances, that the lots were not assessed as unknown, and other like irregularities. No claim is made to the effect that the amounts charged were excessive, or that the payment thereof would burden the defendant beyond his fair proportion of the taxation required for the needs of the public. It has been frequently held by this court that in equitable proceedings to foreclose liens for taxes we will not consider objections which go only to the manner of the assessment, or the levy of the tax, or the conducting of the sale. (See *Otoe County v. Mathews*, 18 Neb., 466; *Lammers v. Comstock*, 20 Id., 345; *Merriam v. Dovey*, 25 Id., 622.) These cases are in point and are conclusive of the question.

The second defense is that the property in question has no legal existence, for the reason that no such description of land is anywhere recorded. The material facts, as shown by the bill of exceptions, are as follows: Early in the year 1854 several citizens of the state of Iowa associated themselves together under the corporate name of the Council Bluffs and Nebraska Ferry Company, for the purpose of locating a town on a site within the present boundaries of

the city of Omaha. For that purpose they employed A. D. Jones to make a survey of the premises. At that time Nebraska had just been organized as a territory, but no part thereof had been surveyed by the government.

Mr. Jones began his work on the west bank of the Missouri river, near what is now known as Iler's distillery, from thence he ran a line west to Sixteenth street, and from thence north and west to about Byron Reed's present addition to the city, and from thence directly north to Webster street, and from thence east to the Missouri river, and thence along the line of the river south to the place of beginning. The claim thus laid out was known as the claim of the Council Bluffs and Nebraska Ferry Company. Afterwards the company employed Jones to survey a part of this claim into lots and blocks, streets and alleys; he did so, and made a plat of the area now lying between Jackson street on the south, Webster street on the north, Ninth street on the east, and Sixteenth street on the west. He made a manuscript plat thereof, and the town which he thus laid out was called Omaha. He designated the corners of lots and blocks and streets and alleys with hardwood stakes driven into the ground. Such stakes remained in existence for many years thereafter, and many of them up to a comparatively recent date, but at the present time all have rotted away or have been otherwise destroyed. According to this survey and the plat subsequently prepared by Mr. Jones, block 70, the property in controversy, was subdivided into eight lots fronting endwise toward the east and west. The dimensions of the lots and blocks were not indicated on the plat, but from the bill of exceptions it appears that the lots were sixty by one hundred and thirty-two feet in size. Block 70, as shown by the Jones plat and all subsequent plats and maps of the city, is bounded as follows: On the east by Ninth street, on the west by Tenth street, on the south by Capitol avenue, and on the north by Davenport street.

From the plat or manuscript map aforesaid the first printed map of Omaha was copied, and which has since been known as the A. D. Jones map. In the year 1855 the company aforesaid caused another plat to be made, embracing the area surveyed by Jones and including other contiguous territory, all of which they called the plat of Omaha city. That part surveyed by Jones was not resurveyed, and there never has been a survey for the purpose of designating streets and alleys, lots and blocks, other than that of Mr. Jones. Upon the plat of the second survey and the map subsequently issued in accordance therewith no dimensions of lots or streets and alleys appear. Upon it block 70 is designated as on the first or Jones map, subdivided into eight lots, but fronting endwise toward the north and south instead of the east and west as on the Jones map. In 1857 another map was printed, known as the Poppleton & Beyers map, purporting to embrace the same area as the former maps. On this map block 70 appears as on the Jones map, except that the lots front endwise to the north and south as in the last named map. Afterward a map was issued by O. F. Davis, which, with respect to block 70, followed that of Poppleton & Beyers'. It appears that the two maps last named were in common use during a limited time only. They were followed by maps issued by Byron Reed and Geo. P. Bemis, which, as regards block 70, conform to the Jones survey and map. Subsequent maps have followed the Jones survey. During the years when the taxes in controversy were levied, either the Reed map, or others subsequently issued, but conforming to the Jones survey, have been in general use in the city.

Shortly after the Jones survey the land included therein was entered in trust for the owners and occupants thereof, by the mayor of Omaha, who subsequently conveyed the property, designating the lots and blocks as indicated by the Jones map. In the summer of 1855 defendant Estabrook

took possession of the lots in controversy, and has ever since continued in possession thereof, either by himself or tenants. On the 5th day of May, 1857, Enos Lowe, mayor, conveyed said lots to defendant by deed, which is the basis of his title. In said deed, at the instance of the defendant, the description of the lots is made to conform to the subdivisions of the Jones map, and also of that of Poppleton & Beyers, the description being as follows: "All those tracts or parcels of land being in the city of Omaha, * * * as originally surveyed by A. D. Jones, and lithographed by the Council Bluffs and Nebraska Ferry Company, to-wit, lot 8, in block 70, being the south half of lots 7 and 8, of the plat of Poppleton & Beyers," etc. He testifies that he had the property thus described in accordance with both maps as a precaution in order to avoid future doubt or uncertainty as to the boundaries of his property. It appears from the testimony of J. M. Woolworth, who prepared the form of deed used by the mayor, and before whom most of the deeds were acknowledged, that as a rule such deeds contained no reference to any plat or map except the so-called Jones map. Among other things the witness says: "Some of the parties applying for deeds requested that reference be made to the plat of Poppleton & Beyers, but not many." Mr. Poppleton testifies that the Poppleton & Beyers map was a business venture of the firm of which he was a member. It was prepared by his partner, and he is unable to say whether or not the latter had ever surveyed the territory in question or had ever been engaged in subdividing any part thereof into lots and blocks.

It is apparent to us from the record that the maps prepared from the Jones survey, and on which the lots in block 70 front endwise to the east and west, are the ones generally recognized and accepted as correct by the property owners and the public officers of the city of Omaha and Douglas county. In accordance with that survey the

property of the city has been assessed for taxation for more than thirty-five years. Omaha has in that time grown from a frontier village to a city of 150,000 inhabitants. Defendant's property has in the meantime increased in value many times. Thousands of dollars have been contributed by adjoining proprietors as taxes levied by the county and city, which have been expended for costly improvements, thereby enhancing the value of the property in question. Shall he now be relieved from his just contribution to the public revenue because the original proprietors of the town site have neglected to comply with a direction of the statute, to have a copy of the plat filed and recorded in the proper office? The survey, although irregular in not recording the courses, distances, etc., is the one through which defendant must trace his title for any purpose. From the stakes set out by the surveyor the boundaries of the lots were readily determined, and according to them he enclosed the lots in 1855. He has also subsequently recognized the accuracy of the survey and map of Mr. Jones by leases and conveyances of parts of the property in question. For instance he has frequently executed leases for parts of the property which must be referred to the Jones survey, as otherwise they would include property which he did not own, occupy, or claim. Thus far we have made no reference to the case of *Bryant v. Estabrook*, 16 Neb., 217. In that case the same question was presented, involving the same property, when it was held that the city of Omaha, having in fact been laid out into streets and alleys, lots and blocks, more than twenty-five years previous, during all of which time the streets and alleys had been used and enjoyed by the public and the lots taxed as such, the regularity of the proceeding, including the laying out, platting, and recording thereof, will be presumed. It is urged that on the facts of this case it is distinguishable from that, but we think otherwise. The view we are disposed to take is that the facts

disclosed by the evidence in this case, except as to the filing and recording of the plat, are those which, as said by the court in *Bryant v. Estabrook*, will be conclusively presumed.

In a brief of considerable length and unusual merit counsel for defendant has assailed the rule as well as the reasoning in *Bryant v. Estabrook*. In that case it is said: "The authorities are not all one way, and yet it is perhaps fair to say the weight of authority cited sustains his (defendant's) position." We are constrained to make the same admission. The earlier cases and many recent ones in other states tend to establish the rule that for the purpose of taxation the property must be described by reference to the government survey, or, if subdivided, by reference to an authenticated plat. The proposition, however, is that on the facts in this case the defendant is in no position to invoke that rule in his behalf. Such was the view of the court in *Bryant v. Estabrook*. We are convinced that the rule there announced is in all respects equitable, and are satisfied to adhere to it.

There is a further contention, viz., that as a considerable portion of the taxes in question were paid by plaintiff after his purchase in 1875, and were levied for years prior to the taxes for which he purchased, he cannot recover in this action. This claim is based upon the language of the act of 1871, which provides that "such purchaser, his heirs or assigns, may pay all taxes lawfully assessed on the real estate after such purchase, and when the said title shall fail shall have a lien for all such taxes."

In *Miller v. Hurford*, 11 Neb., 385, the land had been sold for the taxes of 1873 and 1874. In the decree of foreclosure, taxes subsequently paid for the years 1870 and 1871 were included. In the opinion the present chief justice says: "We are not entirely clear as to the right of the plaintiff to include taxes paid for the years 1870 and

1871, but no objection is made to the judgment on that ground." In *Shoenheit v. Nelson*, 16 Neb., 235, the chief justice, referring to the doubt expressed in *Miller v. Hurford*, of the right to include taxes paid since the purchase of land at tax sale but for previous years, says, "A mortgagee to protect his security may pay taxes which are a legal charge upon the mortgaged premises." And after citing authorities in support of the foregoing proposition, continues: "The extent to which this rule would apply in favor of a purchaser at tax sale is not now before the court, although no good reason would seem to exist against its application in such case." The act of 1871, however, is not the only provision upon the subject. By section 1 of the act approved February 19, 1875 (sec. 1, art. V, revenue law), it is provided, "That any person, persons, or corporation having by virtue of any provisions of the tax or revenue laws of this state a lien upon any real property for taxes assessed thereon may enforce such lien by an action in the nature of a foreclosure of a mortgage for the sale of so much real estate as may be necessary for that purpose, and costs of suit." By the revenue law then in force taxes were declared to be a perpetual lien on the property. It was in terms provided by section 64 (Gen. Stats., 922), that the owner may redeem within two years, by paying the amount named in the tax certificate, with interest, together with all other taxes subsequently paid, whether for any year or years previous or subsequent to said sale. The various provisions above referred to must be construed together. Our conclusion from them is that plaintiff's title having failed, he is entitled to recover all the taxes for which he has a lien, which will include not only taxes for which the property was sold, and such as were subsequently levied, but also such as were levied for previous years and paid subsequent to the date of his purchase. The judgment of the district court is reversed and the case remanded for an accounting in that court, or if plaintiff

should elect to have final judgment entered in this court it will be referred here for an accounting.

JUDGMENT ACCORDINGLY.

THE other judges concur.

CHARLES T. EDEE v. ALBERT D. STRUNK.

[FILED SEPTEMBER 28, 1892.]

1. **Receivers: LIABILITY FOR ACTS DONE UNDER INVALID APPOINTMENT.** An order by a court, or judge thereof apparently within his jurisdiction, appointing a receiver, which is regular on its face, is *prima facie* valid; and where, in obedience to such order, the receiver collects money and in good faith applies it in discharge of taxes due upon the property named therein and for necessary repairs, such order is a sufficient justification in an action against the receiver to recover the rents collected by him after it has been vacated for want of sufficient notice of the application therefor.

2. ———: ———. Such an order, when apparently valid, is a sufficient defense as to acts done in good faith in obedience to its commands; but if the receiver claims property or other rights as such, he is required to show a valid appointment. The case of *Johnson v. Powers*, 21 Neb., 292, distinguished.

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

G. M. Humphrey, and *H. C. Lindsay*, for plaintiff in error:

The order appointing a receiver was void; and money collected thereunder may be recovered by the party entitled to receive it, in an action for money had and received. (*Johnson v. Powers*, 21 Neb., 292.)

A. H. Babcock, and *J. K. Goudy, contra:*

The prevailing rule is that the process, regular on its face, is sufficient to protect the officer against personal responsibility in serving it; but when he claims property under it, he must show a valid judgment. (*Gidday v. Witherspoon*, 35 Mich., 368; *Beach v. Botsford*, 1 Doug. [Mich.], 199; *Adams v. Hubbard*, 30 Mich., 104.)

POST, J.

This was an action in the district court of Pawnee county in which the plaintiff in error sought to recover from the defendant in error money which the latter had collected as receiver under an appointment alleged to be void. The facts, so far as they are material to a consideration of the question involved, are as follows: Plaintiff in error was the owner of certain property in Pawnee City on which there were liens amounting in the aggregate to more than $16,000, exclusive of taxes, which amounted to $251.66. On the 11th day of February, 1889, two of the creditors commenced an action in the district court to foreclose their joint lien. On the 5th day of March, following, the plaintiffs in the foreclosure suit filed a motion for the appointment of a receiver to take charge of the property and collect the rents and profits thereof, on the ground that said property was insufficient security and the mortgagor insolvent. On the 9th day of March said motion was submitted to Hon. J. H. Broady, judge of said court at Beatrice, within the same judicial district, who thereupon made an order in writing appointing the defendant in error, sheriff of Pawnee county, receiver, and directed him to take possession of the property in question, collect the rents thereof, and pay the taxes, keep the buildings insured, etc. This order was filed in the district court of Pawnee county March 13, and the defendant in error, having given bond as directed by the order, took possession of the prop-

erty. On the 29th day of May, following, the said order was set aside and vacated, on the ground that the notice of the application for the appointment of the receiver had not been served on plaintiff in error a sufficient length of time prior to the making of the order. In the meantime defendant in error, while in possession of the property as receiver, had collected rents to the amount of $251.66. He had also expended for repairs on the property $25.30, and paid taxes due thereon $215.90. On the vacation of the order appointing the defendant in error receiver, suit was instituted against him by plaintiff in error to recover the full amount of the rents collected. The only question presented, therefore, is whether the defendant in error should be credited with the amount paid for repairing the property and for the taxes due thereon, since it is not seriously contended that the repairs in question were not necessary or that the taxes were not due and delinquent.

The case of *Johnson v. Powers*, 21 Neb., 292, is relied upon by the plaintiff in error. In that case it is said that under the provisions of section 274 of the Code an order appointing a receiver without the statutory notice is not voidable merely, but void. That case came up on the ruling of the district court on a demurrer to the petition below. In said petition it was alleged that no notice whatever was served on any of the parties interested, and that no bond had been given by the pretended receiver. It does not appear from the petition that any part of the money collected had been disbursed in accordance with the order of the court. It is clear, therefore, that said petition stated a cause of action. This case, however, differs from that in one material respect. Here the receiver is seeking to justify under an order valid on its face. His defense is, that he paid out the money in accordance with the order of the district judge, an order which, as he claims, he was not bound to, and in fact had not the right to call in question. The rule is now well settled that the recital of jurisdictional

facts in an order appointing a receiver is *prima facie* evidence thereof. (*Potter v. Merchants Bank*, 28 N. Y., 641; *Wright v. Nostrand*, 94 Id., 45; Gluck and Becker on Receivers of Corp., 159, n. 1.) It is true that on a pleading which puts in issue the question of jurisdiction the adverse party may disprove the recitals, not only in an order appointing a receiver, but also in a judgment or decree. Has the plaintiff in error, by his petition, put in issue the question of the jurisdiction of the judge in making the order in question? The only allegation on the subject is the following:

"Third—That the said A. D. Strunk is acting as receiver without any authority of this court or of law whatever; that this plaintiff was not a party to, nor had he any notice of, the appointment of the said A. D. Strunk as receiver, and that all of his acts were null and void, and that his pretended appointment was of no effect whatever."

From the transcript it appears that plaintiff was a party to the foreclosure suit, hence that allegation need not be considered. It will be noticed that it is not alleged that the notice was not in fact served upon him, nor does it appear that he was not present at the hearing of the motion in person or by counsel. It does appear that eleven of the defendants appeared by counsel, but the record does not disclose who of them thus appeared. The petition, in our judgment, is wanting in the allegations essential to put in issue the question of the jurisdiction of the order. We do not, however, base our conclusion alone upon that ground, but also upon the ground that the order, being *prima facie* regular and valid, is a sufficient justification. We can see no reason on authority, and certainly none on principle, why the rule which is interposed for the protection of ministerial officers should not be equally available to the defendant in error. A sheriff, according to the prevailing authorities, will be justified by a process regular and valid on its face (*Gidday v. Witherspoon*, 35 Mich., 368; *Adams v. Hubbard*,

30 Id., 104; *Newburg v. Munshower*, 29 O. St., 617; *Cornell v. Barnes*, 7 Hill [N. Y.], 35; Crocker on Sheriffs, secs. 284, 286), although, should he claim property under it, he is required to show a valid writ. The defendant in error is making no claim to the money which came into his hands in obeying the order in question; nor has the plaintiff suffered any loss. The money in controversy has been expended for his benefit. It appears to us that the reasons for the rule exempting a sheriff from liability in the cases cited above should apply with especial force in cases like this. The receiver holds his office by appointment direct from the court or judge and, when valid, he becomes an officer of the court, subject to its orders and liable for a disobedience thereof. It is his right and duty in certain cases to apply to the court for advice, and we think the policy of the law is not to require him to obey the judgment of the court or order of the judge at his peril. *Johnson v. Powers, supra*, was correctly decided upon the record; but as authority must be restricted to cases within the facts of that case, we do not find any error in the record, and the finding and judgment of the district court for $10.46, the balance in the hands of the defendant in error, is

AFFIRMED.

THE other judges concur.

C. S. WORLEY v. SAMUEL SHONG.

[FILED SEPTEMBER 28, 1892.]

1. **Appeal:** CONCLUSIVENESS OF RECORD. In all appellate proceedings the records of the trial court, when properly verified, import absolute verity.

2. **Diminution of Record:** RULE TO CORRECT JUSTICE'S JOURNAL ENTRY ON HIS DOCKET NOT ALLOWED. On the suggestion

of a diminution of the record, if it appears that any material part of the record has been omitted, the court will, by rule, require such record to be supplied; but a rule will not be allowed to require a justice of the peace to correct a journal entry on his docket.

3. **Justice of the Peace:** JURY TRIAL: TIME OF ENTERING JUDGMENT ON VERDICT. In a trial to a jury before a justice of the peace a verdict was returned and filed at twenty-five minutes after 8 o'clock P. M., but judgment was not entered thereon until the next day. *Held*, That the judgment was not entered immediately within the meaning of section 1002 of the Code, and that the justice had lost jurisdiction at the time the entry of judgment was made.

ERROR to the district court for Box Butte county. Tried below before KINKAID, J.

W. M. Iodence, for plaintiff in error.

C. W. Gilman, and *B. F. Gilman, contra.*

POST, J.

The plaintiff in error sued the defendant in error before a justice of the peace of Box Butte county. The cause was tried to a jury, resulting in a verdict for the plaintiff. From the transcript of the justice it appears that the verdict was returned and filed at 8 o'clock and 25 minutes P. M. February 4, 1890, but that judgment was not entered thereon until the next day. Defendant in error filed a petition in error in the district court of said county, by which he sought to reverse said judgment, on the ground that it was not entered immediately upon the returning of the verdict, as provided by section 1002 of the Code. In the district court he filed an affidavit to the effect that the justice did, in fact, enter judgment on the day the verdict was returned and immediately thereafter, and so entered it on his docket, but had subsequently altered the entry so as to show that it was not entered until the following day. Upon this showing he suggested a diminution of the record and moved for an

order requiring the justice to certify accordingly. This motion was overruled, to which exception was taken. The district court did not err in overruling the motion aforesaid. In all appellate proceedings the record of the trial court, when properly prepared and verified, imports absolute verity. (Elliott on Appellate Proceedings, 186.) It is one thing to amend the transcript and quite a different thing to change the record. (Id., 190.)

The rule is well settled, both in appeals and proceedings in error, that this suggestion will be entertained and the rule allowed only when it is made to appear that there is an additional record in the trial court; in short, that some part of the record has been omitted. For the purpose of the petition in error the district court rightly held that the transcript of the justice, duly certified, could not be impeached. The district court, having refused to allow an order for the correction of the record by the justice of the peace, entered judgment reversing the judgment for plaintiff. The court evidently followed *Thompson v. Church*, 13 Neb., 287, and *Austin v. Brock*, 16 Id., 642, in holding that the judgment was not entered "immediately" upon the finding and return of the verdict within the meaning of section 1002 of the Code. This case is clearly within the rule announced in the above cases. It may be that a more liberal construction would have been in harmony with the spirit of the Code, but having been the recognized rule in this court for many years, it will be adhered to until changed by the legislature. We are of the opinion that the justice of the peace had lost jurisdiction at the time the entry of judgment was made. The judgment of the district court is right and should be

AFFIRMED.

THE other judges concur.

SAMUEL STRATTON, APPELLEE, V. FRANCIS E. REISDORPH ET AL., APPELLANTS, IMPLEADED WITH OMAHA LUMBER COMPANY, APPELLEE.

[FILED SEPTEMBER 28, 1892.]

1. **Mortgage Foreclosure:** NOTICE OF SALE. In a notice of sale of real estate under a decree of foreclosure, while it is proper to state the amount of the decree, such statement is not essential to the validity of the notice.
2. ———: PARTIES. In a foreclosure proceeding the holder of a prior mortgage is not a necessary party.
3. ———: FINDINGS: PRIOR INCUMBRANCES. In a foreclosure proceeding, where the holder of a prior mortgage is not made a party, it is not necessary for the court to find the amount due on such mortgage, since the holder, not being a party to the suit, will not be concluded thereby; and the provisions of the Code for the ascertainment of prior liens by the appraisers are adequate to preserve the rights of the mortgagor or others standing in the same relation to the mortgaged property.
4. ———: CONFIRMATION: IRREGULARITIES IN DECREE. Where parties have been personally served with summons and make an appearance in a suit to foreclose a mortgage, they cannot afterward, to defeat confirmation, assail the decree for a mere irregularity.

APPEAL from the district court for Saunders county. Heard below before MARSHALL, J.

David Van Etten, and *O. C. Tarpenning*, for appellants.

T. B. Wilson, and *Reese & Gilkeson*, for appellee Stratton.

POST, J.

This is an appeal from an order of the district court of Saunders county confirming the sale of certain real estate, under an order of sale issued upon a decree of foreclosure. The appellants, who were defendants below, filed answer

in the district court, but a demurrer thereto was sustained. To this ruling appellant took no exception and pleaded no further. An order of sale was issued April 23, 1890, under which the sheriff sold the land, making his return June 3, following, on which day the preliminary order to show cause against the confirmation of sale was made On the 4th day of June certain objections and exceptions to the sale were filed, and on the next day the order of confirmation was entered. From this order defendants appeal.

The first objection is, that the notice of sale is insufficient because it does not state the amount of the decree, nor any amount. An examination of the notice, as published, shows that it complies with all of the provisions of statute. There is no requirement that the notice shall contain a statement of the amount found due by the decree. That is a matter of public record. The notice refers to the decree and the order of sale. This is sufficient.

The next contention is, that the sheriff had no authority to sell subject to the mortgage of the Lombard Investment Company, inasmuch as there was no finding of the amount due thereon. This is, in effect, an attack upon the decree, as it is therein found that the Lombard Investment Company has a prior lien and an order is awarded for the sale of the property subject to said mortgage. The investment company was not a necessary party to the suit. (*White v. Bartlett*, 14 Neb., 320.) The district court had jurisdiction of the subject of the action and of the parties, hence questions which affect the regularity of the decree are concluded thereby. The decree cannot be assailed for any mere irregularity upon a motion to set aside a sale. (*Parrat v. Neligh*, 7 Neb., 456; *State Bank v. Scofield*, 9 Id., 499.) But the decree is not irregular. The Lombard Investment Company, not being a party to the foreclosure proceeding, would not have been bound by any finding as to the amount due on its mortgage. Nor can the failure to find the amount due on a prior mortgage in such case prejudice the mort-

gagor or other party standing in the same relation to the mortgaged property. The provisions of the Code for the appraisement of property sold on execution or at judicial sale, sections 491*a*, 491*b*, 491*c*, 491*d*, are adequate for his protection. Under these provisions the appraisers are required to find the amount of prior liens from the best evidence obtainable, viz., the records of the county clerk, the clerk of the district court, and the county treasurer. They act judicially, and should specifically enumerate the liens and incumbrances which they find against the property. (*Sessions v. Irwin*, 8 Neb., 5.)

The question not being an open one in this state, we do not deem it necessary to examine the cases cited by counsel for defendants. The sum deducted on account of the prior mortgage, $900, is the amount found by the appraisers; and as no attempt was made to impeach their finding, it must be presumed to be correct.

Other objections in the defendants' brief do not call for discussion, since they are not predicated upon any state of facts which appear of record. In fact, so far as they are to be regarded as statements of fact, they are direct contradictions of the record. The proceedings in the district court appear to have been in all respects regular, and the order confirming the sale is

AFFIRMED.

THE other judges concur.

JOHN FITZGERALD ET AL., ADMINISTRATORS, V. SIMON P. BENADOM.

[FILED SEPTEMBER 28, 1892.]

1. **Record for Review: BILL OF EXCEPTIONS: AFFIDAVITS.** Where issues of fact are tried on affidavits, this court will not review the order of the district court upon such evidence, unless the affidavits are identified and preserved in the form of a bill of exceptions.

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

James E. Philpott, for plaintiffs in error.

Abbott, Selleck & Lane, contra.

POST, J.

Defendant in error recovered judgment against John Sheedy in the district court of Lancaster county, for $40.87 and costs. Defendant below subsequently filed a petition in error in this court for the purpose of having said judgment reviewed. On suggestion of his death since the filing of the petition in error, the action was revived in the name of the administrators of his estate, S. M. Melick and John Fitzgerald. The action was originally commenced before a justice of the peace and brought into the district court by appeal. A motion was made in the district court to strike out the petition, for the reason that the cause of action stated therein was not the same as that tried before the justice. This motion was overruled, to which exception was taken, and is the error assigned in this court. The record does not contain any of the proceedings before the justice. The only evidence as to the issues at that time is the affidavits of counsel. The question as to what issues

were submitted to the justice of the peace is, therefore, one of fact. The district court appears to have found for the plaintiff below upon that question, and evidently determined that the cause of action before the justice was substantially the same as that stated in the petition. This ruling we cannot review, since the evidence submitted to the district court upon the hearing of the motion has not been preserved. It has been often held that where issues of fact are tried in the district court upon affidavits, such evidence must be preserved in the form of a bill of exceptions in order to enable this court to review the judgment or order complained of. This rule is so well settled that it is needless to cite the cases in point. The judgment of the district court is

AFFIRMED.

THE other judges concur.

THOMAS CARR V. EDWARD M. LUSCHER.

[FILED OCTOBER 5, 1892.]

1. **Appeal from Justice's Court: TRIAL: ISSUES.** Under the decision of this court in *Cleghorn v. Waterman*, 16 Neb., 226, which has been followed ever since, a defendant who has appeared in an action before a justice of the peace may appeal from the judgment, notwithstanding he was not present at the trial. On the trial of such a case, in an ordinary action, it will be assumed that the cause of action is denied, and it will devolve on the plaintiff to prove the same; and in case the defendant appeals, his defense will be restricted to a like denial.

2. ———: PLEADING: COUNTER-CLAIM. Motion to strike out counter-claim *held* properly sustained.

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

Wooley & Gibson, for plaintiff in error:

The plaintiff in error appeared as defendant in justice's court and was entitled to appeal. The issues can be made up in the appellate court, and the trial court erred in sustaining the motion of plaintiff below to strike out that portion of the amended answer setting up a counter-claim. (*Smith v. Borden*, 22 Neb., 488; *Andrews v. Mullin*, 14 Id., 248; *Sanchez v. Candelaria*, 23 Pac. Rep. [N. M.], 239; *Wagner v. Evers*, 20 Neb., 183; Code Civil Procedure, secs. 951, 1010.)

T. C. Munger, contra:

The same issues must be tried on appeal that were tried in the court below. (*Baier v. Humpall*, 16 Neb., 128; *Courtnay v. Price*, 12 Id., 192; *O'Leary v. Iskey*, Id., 137; *Fuller v. Schroeder*, 20 Id., 636; *Sawyer v. Brown*, 17 Id., 172; *U. P. R. Co. v. Ogilvy*, 18 Id., 638; *Sells v. Haggard*, 21 Id., 361; *Clendenning v. Crawford*, 7 Id., 476; *Cain v. Harden*, 1 Ore., 360; *Marx v. Trussell*, 50 Miss., 498.) A counter-claim is a separate cause, and if not presented below cannot be appealed. (*Burbage v. Squires*, 3 Met. [Ky.], 77; *Cross v. Eaton*, 48 Mich., 184; *Wilson v. Wilson*, 30 O. St., 372; *Grant v. Ludlow*, 8 Id., 32; Maxwell's Justice Pr., 169; *Callahan v. Newell*, 61 Miss., 437.)

MAXWELL, CH. J.

The defendant in error brought an action against the plaintiff in error before a justice of the peace to recover the sum of $63.25. A summons was duly issued and served, which was returnable June 30, 1890, at 9 o'clock A. M. At the time to which the cause was continued the plaintiff in error failed to appear and judgment was rendered against him for the sum of $63.25 and costs. He then appealed the cause to the district court and in that court

filed an answer to the petition of the defendant in error as follows:

"Comes now the above named defendant and for amended answer to the plaintiff's petition admits that he employed the plaintiff as a traveling salesman, and agreed to pay him the sum of twenty-five cents per box for soap sold by him, but denies that defendant agreed to pay any traveling or other expenses whatever.

"Further answering, the defendant alleges that he advanced and paid to plaintiff the sum of $75, which was about $13 more than was due plaintiff, and defendant is not indebted to plaintiff in any sum whatever.

"Further answering by way of counter-claim, defendant alleges that while plaintiff was so employed by defendant, as hereinbefore stated, the plaintiff, without defendant's knowledge or consent, falsely represented the quality of defendant's stock and promised defendant's customers to fill orders in violations of defendant's instructions, whereby defendant lost his customers in the territory traveled by plaintiff, to defendant's damage in the sum of $200.

"Wherefore defendant prays judgment against the plaintiff in the sum of $200 and costs of suit."

The defendant in error thereupon moved to strike out of the defendant's amended answer filed May 4, 1891, beginning "further answering, defendant alleges that he advanced and paid to plaintiff," and ending "wherefore defendant prays judgment against the plaintiff in the sum of $200 and costs of suit," and all words included between said clauses, being all after the words "or other expenses whatever," for the reason that the issues in the court below, where this cause was tried and from which it was appealed, did not include the matters set up in the said words of the amended answer, nor was the trial upon the said matter so set forth, and the issues by the amended answer are not the issues in the court below.

The motion was sustained as to the claim for damages

and overruled as to payment. The defendant in error thereupon filed a reply denying payment. On the trial of the cause the jury returned a verdict in favor of the defendant in error for the sum of $65.48, upon which judgment was rendered.

The defendant below (plaintiff in error) brings the cause into this court, and the only question presented is the ruling of the court in striking out of the answer the counter-claim for damages.

The plaintiff in error relies upon *Smith v. Borden*, 22 Neb., 487–8, to sustain his position. In that case, however, the defendant did not set up a counter-claim or set-off, and the only question presented was the liability of the defendant to the plaintiff. The court felt constrained in view of the decision of a majority of the court in *Cleghorn v. Waterman*, 16 Neb., 226, to hold that an appeal would lie where there had been an appearance. That case was followed by *Crippen v. Church*, 17 Neb., 304. These cases are a wide departure from *Clendenning v. Crawford*, 7 Neb., 474, in which it was held that the party appealing must have contested the case before the justice. The court, as at present constituted, view the last case cited with favor and regard it as a correct statement of the law, but as it is desirable to adhere to a practice when once established, we will follow the later decisions. We will not extend the rule, however.

A defendant, by failing to appear at the trial before the justice, cannot thereby obtain an advantage. He cannot refuse there to present his claim, set-off, or counter-claim, and on an appeal plead and prove the same. From the nature of the case before the justice, the issue is the right of the plaintiff to recover on his claim. For the purpose of the trial the claim is treated as denied, and it devolves on the plaintiff to prove the same; and on appeal the same issue is presented. The court did not err, therefore, in striking out the alleged defense of the defendant below,

and there is no error in the record. The judgment is therefore

AFFIRMED.

THE other judges concur.

STATE OF NEBRASKA, EX REL. CLARKE GAPEN, V. A. B. SOMERS.

[FILED OCTOBER 5, 1892.]

1. **Cities of Metropolitan Class**: COMMISSIONER OF HEALTH: AUTHORITY OF MAYOR TO REMOVE. A commissioner of health for a city of the metropolitan class is to be appointed by the mayor and approved by the council, and "shall hold office for a term of two years, * * * unless sooner removed." In 1889 the statute was amended so as to read "All officers appointed by the mayor and confirmed by the council shall hold the office to which they may be appointed until the end of the mayor's term of office and until their successors are appointed and qualified, unless sooner removed or the ordinance creating the office shall be repealed, except as otherwise provided in section 104," and in 1891 the statute was amended to provide that the mayor, on the second Tuesday in January after his election, is required to appoint certain officers, which provision seems to include the commissioner of health. *Held*, Construing these provisions together, that the mayor had authority at the time stated to remove the commissioner, without having made charges, and appoint one in his place.

2. ———: ———: ———. Where the statute authorizing the appointment contains a reservation of the right of removal without preferring charges, and this power is exercised by the removal of the incumbent and the appointment of another in his stead, the right of the former to the office will cease.

3. ———: ———: TERM OF OFFICE: POWER TO REMOVE RETAINED: PREFERRING CHARGES NOT NECESSARY. Where a person is appointed to an office for a definite period and there is a provision that to obtain his removal charges must be preferred against him, he cannot be removed unless such charges

are made; but this rule does not apply to a case where the power of removal is retained and no charges are required.

4. ———: ———: LAW GOVERNING REMOVAL OF OFFICERS FOR FIXED TERM DOES NOT APPLY. Section 172 of the act in relation to metropolitan cities does not apply to the officers of the class last named.

ORIGINAL proceeding in nature of *quo warranto.*

William D. Beckett, and *Gurley & Marple,* for relator.

W. J. Connell, contra.

MAXWELL, CH. J.

This action is brought by the relator to oust the defendant from the office of commissioner of health for the city of Omaha and to install the relator therein. The relator was appointed to the office on the 28th of April, 1891.

It appears from the record that at the election for mayor of said city in the fall of 1891 George P. Bemis was elected mayor thereof and entered upon the duties of said office on the 5th day of January, 1892; the mayor removed the relator from said office and appointed the defendant to the position, who thereupon entered upon the duties of his office and has ever since exercised the same.

It is claimed on behalf of the relator that the mayor does not possess the power to remove the commissioner of health, and that therefore his action in the premises is unauthorized and void. Section 30, chapter 12*a*, Compiled Statutes, relating to cities of the metropolitan class, so far as it applies to the appointment of commissioner, is as follows: "Said commissioner of health shall be appointed by the mayor, subject to the approval of a majority of the council; shall hold office for a term of two years from date of appointment, unless sooner removed or retired."

Section 104 provides for a board of public works "which shall consist of three members, residents of such city, to be appointed by the mayor by and with the consent of the

council before the first Monday of July, 1887, for the term of one, two, and three years respectively, the term of office of each to be designated by the mayor; and annually thereafter there shall be appointed, as hereinbefore provided, one member, whose term of office shall be three years."

The statute also provides for removing any of such officers by the city council upon charges being preferred, the party accused to be served with a copy.

Section 143, as amended in 1891, is as follows: "Upon the second Tuesday after the election in 1887, and on the second Tuesday in January after each general city election, the mayor, subject to confirmation by the city council, shall appoint the following officers, to-wit: A city engineer, a city attorney, an assistant city attorney, a city prosecutor, a street commissioner, an inspector of buildings, a boiler inspector, and such other appointive officers as may be authorized herein or specially provided for by ordinance. It shall require a majority of all the members of the council to confirm each of said appointments. Upon the failure or refusal of the council to confirm any of said appointments, it shall be the duty of the mayor, on the first Tuesday of each month thereafter, to make other appointments for such offices if the appointees thereto be not confirmed, and to so continue until approved by the council."

Section 144 provides: "All officers appointed by the mayor and confirmed by the council shall hold the office to which they may be appointed until the end of the mayor's term of office and until their successors are appointed and qualified, unless sooner removed, or the ordinance creating the office shall be repealed, except as otherwise provided in section 104."

We find no reference to sections 143 and 144 in the brief of the attorneys for the relator. One of these sections was amended in 1889 and the other at the last session of the legislature.

An examination of the several sections of the act shows that certain officers, like the board of public works, consisting of three members, are appointed for one, two, and three years, and there is a provision for filing specific charges against each of the members of such board and removing the person adjudged to be guilty. Where an office is held in that way, there can be no removal except for cause. Where, however, the right of removal is reserved in the appointing power without the necessity of making charges, it may be exercised in the discretion of the appointing power, even before the expiration of the term. This principle is recognized in *State, ex rel. Carter, v. Board of Public Lands and Buildings*, 7 Neb., 42.

Sections 143 and 144, above copied, relate alone to officers whose terms expire with that of the mayor or those removable at pleasure without preferring charges.

In the late case of *State v. Smith*, 35 Neb., 13, the parties held for a definite period which had not elapsed, and there was a provision that in order to remove any of the members of the board it was necessary to prefer charges against them, and it was held that a removal of such officers without such charges having been made was unauthorized. That, we think, is a correct statement of the law; but it does not apply to this case, as the right of removal is impliedly retained in the hands of the mayor. We are referred to section 172, which is as follows: "The power to remove from his office the mayor or any councilman or other officer mentioned in this act in any city of the metropolitan class, for good and sufficient cause, is hereby conferred upon the district court for the county in which such city is situated, and whenever any two of the city councilmen shall make and file with the clerk of said court the proper charges and specifications against the mayor, alleging and showing that he is guilty of malfeasance or misfeasance as such officer, or that he is incompetent or neglects any of his duties as mayor, or that for any

other good and sufficient cause stated he should be removed from his office as mayor, or whenever the mayor shall make and file with the clerk of said court the proper charges and specifications against any councilman or other officer mentioned in this act, alleging and showing that he is guilty of malfeasance or misfeasance in such office, or that he is incompetent, or neglects any of his duties, or that for any other good and sufficient cause stated he should be removed from his office, the judge of such court may issue the proper writ requiring such officer to appear before him, on a day therein named, not more than ten days after the service of such writ, together with a copy of such charges and specifications upon such officer, to show cause why he should not be removed from his office. The proceedings in such case shall take precedence of all civil causes and be conducted according to the rules of such court in such cases made and provided, and such officer may be suspended from the duties of his office during the pendency of such proceedings by order of said court."

This section applies to those officers who hold for definite terms and can be removed only by proceedings against them. As to several of such officers its provisions are cumulative, that is, provides an additional tribunal for the determination of the rights of the parties, but does not include cases of the kind here involved. The writ must be denied and the action

DISMISSED.

THE other judges concur.

STATE OF NEBRASKA, EX REL. C. J. ELLIOTT, V. C. T. HOLLIDAY.

[FILED OCTOBER 5, 1892.]

1. **Judicial Sales:** DUTIES OF OFFICERS CONDUCTING: COURT TO SUPERVISE. In selling real estate under mortgage foreclosure the court may appoint a master commissioner or the sheriff to conduct the sale. It is the duty of the officer thus appointed to conduct all the proceedings leading up to and the sale itself in a fair, impartial manner so that the property may be sold for the best price possible. This officer is under the control of the court, and it is its duty to see that the advertisement of sale is published in a paper that will give it general publicity so as to invite competition, and that the sale in other respects is fairly conducted.

2. ——: SUPREME COURT MAY REVIEW BUT NOT DIRECT PROCEEDINGS BY MANDAMUS. If the trial court errs in any of its proceedings, its action may be reviewed in the supreme court; but this court will not by *mandamus* direct the officer making the sale to advertise the same in any particular newspaper.

ORIGINAL application for *mandamus*.

C. J. Elliott, and *Sullivan & Gutterson*, for relator.

An executive officer may be required to perform ministerial or executive duty, though party interested may have a remedy at law against him for failure to do so. (*Fremont v. Crippen*, 10 Cal., 211; *People v. McClay*, 2 Neb., 7; *Williams v. Smith*, 6 Cal., 91; *People v. Fleming*, 4 Denio [N. Y.], 137.)

Hutchinson & Dickinson, and *Campbell & Dean, contra:*

Until it is made to appear that application was first made to court entering decree, or that the latter court is powerless to enforce its decree, *mandamus* will not issue from this court. (*State v. Fillmore Co.*, 32 Neb., 870; *State v. Moores*, 29 Id., 122; *Pickell v. Owen*, 24 N. W. Rep. [Ia.], 8.)

MAXWELL, CH. J.

This is an action for a peremptory writ of *mandamus* to compel the defendant, who is sheriff of Custer county, to advertise sales of real estate under foreclosure of mortgages in certain newspapers.

It is alleged in the petition "That the relator, who is an attorney at law in regular practice in the courts of Nebraska, did, on the 24th day of October, 1891, the same being one of the regular days of the October, 1891, term of the district court of Custer county, Nebraska, as attorney for the plaintiff therein, obtain a decree of foreclosure in said district court in a certain cause there and then pending in said court, wherein the American Freehold Land Mortgage Company, of London, was plaintiff, and George W. Losey was defendant, wherein said court found that there was due to the plaintiff the sum of $753.14, with interest at the rate of eight per cent per annum from the 20th day of October, 1891, which constituted a first lien on the mortgaged premises described in the petition in said cause, viz., the southeast quarter of section 23, township 17 north, range 20 west, 6th P. M.; and that unless said defendant pay said amount so found due within twenty days after the rendition of said decree, that said mortgaged premises be sold as upon execution to satisfy said decree.

"That more than twenty days, viz., about eighty days, elapsed after the rendition of said decree, and the said defendant had not paid the amount so found due, nor any part thereof, nor had there been filed in said cause any request for stay of sale. Whereupon relator filed with the district clerk of said Custer county, Nebraska, a *præcipe* for order of sale in said cause, which was duly issued under the seal of said court, a copy of which said order of sale is hereto attached, marked 'Exhibit A,' and prayed to be taken as a part hereof; that upon the receipt of said order of sale he at once prepared the notice of sale required by

the statute and caused the same to be inserted for publication in the *Custer Leader*, a newspaper of general circulation in said Custer county, Nebraska, which said newspaper is printed and published at Broken Bow, in said county, and within about three miles of the land described in said order of sale and notice, and which said newspaper has a circulation equal to, if not larger, than any other newspaper published in said county; that as soon as relator was able to find the defendant herein, viz., on the first day of March, 1892, who was and still is the sheriff of said Custer county, he tendered to said defendant said order of sale, together with the certificate of liens and incumbrances as shown by the records of the district clerk's office, and a copy of the notice of sale hereinbefore referred to, upon which was the certificate of the publisher of said *Custer Leader*, that said notice had been duly inserted in said paper on the 18th day of February, 1892, to be published for five consecutive weeks, and that the fees for the publication had been fully paid by the plaintiff, a copy of which said certificate is hereto attached, also copy of notice, and marked 'Exhibit B,' and prayed to be taken as a part hereof. At the same time relator tendered to said defendant, in current money of the United States, the sum of $7.75 as advance sheriff's fees as follows, viz.:

For making levy	$0 50
Calling appraisers	50
Swearing appraisers	50
Fees of appraisers	1 00
Copy of appraisement	25
Advertising sale	50
Mileage, five miles	50
County treasurer's certificate of tax liens	2 00
County clerk's certificate of liens and incumbrance,	2 00

and demanded said defendant to proceed to appraise and sell said property in accordance with said order of sale and notice. And relator avers that said defendant then and

there absolutely refused to accept said order of sale, or to proceed to appraise the property described therein, or to sell, or to take any action whatever in the matter, unless relator would then and there pay him, in addition to the amount already tendered, the further sum of $5 as a publication fee, for a new notice of sale to be by him inserted in some other newspaper to be selected by him; that afterwards, on the 2d day of March, 1892, he renewed the tender above referred to, and tendered to said defendant in addition thereto the further sum of $3 for a new notice to be published in the *Custer Leader* selected by relator, or in some other paper that would publish the same for $3, if the said defendant was of the opinion that he could not legally proceed to sell under the notice already inserted by the relator, and the said defendant absolutely refused to accept said tender and publish the notice of sale in said *Custer Leader*, as requested by said relator, or in any other paper for the sum of $3; that while the said sheriff of Custer county had regularly taxed as costs on orders of sale the sum of $5 publication fee, yet the majority of publishers of newspapers in said Custer county only charge and are willing to contract for the publication of said sale notices, in the manner and for the time required by law, for the sum of $3 each, which is the amount charged by the *Custer Leader* for the notice so inserted by relator, as hereinabove set forth; that all of the newspapers published in said Custer county, except those published in the interests of a certain political party, known as the independent or people's party, have in the past and are now willing to publish the notice herein described, and all others of the same kind, for the sum of $3; that said defendant was elected by and belongs to the said independent or people's party; that the newspapers published in the interests of said party demand the sum of $5 for publishing said notice, and refuse to publish the same for a less sum, and said defendant insists on having all notices

of the above description published in said papers so demanding therefor the sum of $5 aforesaid, thereby compelling the plaintiff's clients to pay the sum of $2 in each case as tribute to his said party; that the majority of the said newspapers of said independent party, in which said defendant proposes to publish said sale notices, are papers published in rural towns, remote from the county seat of Custer county, and of such small circulation as in effect to utterly defeat the object of the law requiring the greatest possible publicity to be given of the time and place of such sales."

To this the defendant has filed a general demurrer.

No copy of the notice is set out in the petition, but it is alleged that the relator published the same without consulting the sheriff, and in fact without his knowledge, so far as appears, and this court is asked to approve of such practice by compelling the officer to accept the notice as his own. It is true that it is alleged that the officer will insert the notice in some newspaper other than the one selected by the attorney, and for advertising which a higher price will be paid than in the paper selected by the relator. For the purpose of the demurrer this is conceded to be true, and also that the officer may advertise in an obscure paper; still the remedy for these wrongs is not by *mandamus* from this court.

Section 852 of the Code provides that "All sales of mortgaged premises under a decree in chancery shall be made by a sheriff, or some other person authorized by the court, in the county where the premises or some part of them are situated; and in all cases where the sheriff shall make such sale he shall act in his official capacity, and he shall be liable on his official bond for all his acts therein, and shall receive the same compensation as is provided by law for like services upon sales under execution."

Section 451 provides: "Real property may be conveyed by master commissioners as hereinafter provided: First—

When, by an order or judgment in an action or proceeding, a party is ordered to convey such property to another, and he shall neglect or refuse to comply with such order or judgment. Second—When specific real property is required to be sold under an order or judgment of the court."

Section 452 provides: "A sheriff may act as a master commissioner under the second subdivision of the preceding section. Sales made under the same shall conform in all respects to the law regulating sales of land upon execution."

Section 453 provides: "The deed of a master commissioner shall contain the like recital, and shall be executed, acknowledged, and recorded as the deed of a sheriff of real property sold under execution."

It will thus be seen that, while a sheriff may sell real estate under a mortgage foreclosure, and as he has given bond for his official acts and is presumed to be familiar with the duties, he is usually appointed for that purpose or permitted to conduct the sale. The court, however, may appoint another to perform that duty.

The court is presumed to act impartially and for the best interests of both the creditor and debtor. The creditor is entitled to have his mortgage satisfied, the debtor also has rights in the premises, and is entitled to a fair appraisement of his property, and the property must, under the Code, sell for at least two-thirds of the net cash value so ascertained. The officer making the sale, whether he be sheriff or a master commissioner appointed by the court, is so far under its orders as to be answerable to it for any abuse of his powers or violation of his duty, and, no doubt, the court, upon the proper application, and being convinced that there was danger of an abuse of power on his part, may remove him and appoint another in his place. Neither the court itself, nor any of its officers, has any right to show partiality or unfairness in the performance of his functions, and it is the duty of the court to see that its officers do not give cause for suspicion of wrong. The

object of advertising property for sale is in order that publicity may be given to the sale and competition invited. Legal advertisements should not be inserted in an obscure paper where the probabilities are that they will be seen by but few, where there is a paper of general circulation in the county, because the object of the law will be in part at least defeated. To preserve impartiality and fairness the officer should not be under the direction or control of either party. Under the statute the plaintiff may become the purchaser of the estate; and while it is true that the sum bid must equal two-thirds of the net appraisement, still, if he could control the officer, there is danger that the appraisement would be fixed at much less than the true value. It is a power liable to abuse and should be jealously guarded by the courts.

The plaintiff, or his attorney, may, in a proper case, order an execution or order of sale to be issued and delivered to the officer, but neither can control the performance of his duty. These matters are almost wholly under the control of the trial court in the first instance at least. If an error is committed by that court or an abuse of discretion to the prejudice of one of the parties, the action complained of may be reviewed in this court in some of the modes provided by law. The trial court has jurisdiction of the subject-matter and the parties. Both are directly under its control and supervision, and this supervision should not be interrupted by proceedings by *mandamus* in this court If the court should exercise jurisdiction in such case it would lead to endless confusion. So far as appears, no application has been made to the district court, and it has had no opportunity to act in the premises.

The petition fails to state a cause of action. The demurrer is therefore sustained, and as it is apparent that the relator is not entitled to a *mandamus*, the action is

DISMISSED.

THE other judges concur.

MARIA HELLMAN, EXECUTRIX, v. EVA OLIVER.

[FILED OCTOBER 5, 1892.]

1. **Landlord and Tenant:** ACTION FOR RENT: ESTOPPEL. In an action upon a lease to recover rent, the defendant alleged that the building was leased for an unlawful purpose, naming it, to which the plaintiff replied that the same defense had been interposed to an action upon other installments of rent, and overruled. *Held*, That the proof failed to establish an estoppel.

2. ———: LEASING PREMISES FOR UNLAWFUL PURPOSE: INSTRUCTIONS. Where the defense to an action for rent was that the building was leased by the plaintiff for an unlawful purpose, which was stated, an instruction to the jury, in substance, that they may determine if the house was to be "used for such unlawful purpose," "or other unlawful purposes," is erroneous.

3. ———: ———: PLEADING. The unlawful purpose which it is claimed renders the contract illegal and void must be pleaded, and unless so pleaded, should not be submitted to the jury.

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

Chas. E. Clapp, for plaintiff in error:

The adjudication on merits of defense that premises were leased for unlawful purposes, had in the former action on the same lease, is a bar to maintenance of that defense in this case. (*Danziger v. Williams*, 91 Pa. St., 234; *Hanna v. Read*, 102 Ill., 596; *Guest v. Brooklyn*, 79 N. Y., 624; *Betts v. Starr*, 5 Conn., 550; *Spencer v. Dearsth*, 43 Vt., 98; *Babcock v. Camp*, 12 O. St., 11; *Foster v. Konkright*, 70 Ind., 123; *Beloit v. Morgan*, 7 Wall. [U. S.], 619; *Davis v. Brown*, 4 Otto [U. S.], 423.)

Gannon & Donovan, contra:

Matter cannot be proved to have been passed upon, except it be such as might have been given in evidence under

the issue joined. (Freeman, Judgments, 313; *Briggs v. Wells*, 12 Barb. [N. Y.], 567; *Knickerbocker v. Beam*, 42 Kan., 17; *Cromwell v. County*, 94 U. S., 353; *Davis v. Brown*, Id., 423; *Russell v. Place*, Id., 606.)

MAXWELL, CH. J.

This action was brought by the plaintiff to recover rent for a certain dwelling house from the 9th day of June, 1888, to the 9th day of May, 1889, at $125 per month.

The defendant in her answer admits the execution of the lease, but alleges that it terminated on the 9th of October, 1888, at which time she surrendered possession. She also alleges, in substance, that it was agreed between the parties that the place was to be kept as a house of assignation, and that it was agreed that in case the house was closed by the public authorities before the expiration of the written lease, the defendant should thereupon surrender the possession and the lease should cease and determine; and that the public authorities closed the house on the 9th of October, 1888.

In the reply the plaintiff denies the facts stated in the answer and alleges that the same facts were put in issue in the defendant's answer for another installment of rent accruing upon the same lease, and the defendant is therefore estopped to set the same up in this case.

On the trial of the cause the jury found in favor of the defendant, and a motion for a new trial having been overruled, judgment was entered dismissing the action.

It is unnecessary to set out the answer pleaded as an estoppel. In our view it is not sufficient for that purpose and was not a bar to the defense interposed by the defendant in this action.

The court at the request of the defendant gave the following instruction:

"You are instructed that although it may be expressly provided in the lease that the premises should not be used

for some particular unlawful purpose, still, if the intention of the parties to the same was that they might be used for such unlawful purposes, or other unlawful purposes, the said lease is an illegal contract and the plaintiff cannot recover upon it; and if you find that it was the intention and understanding of both parties hereto that the premises would be used for such unlawful and immoral purpose, then your verdict must be for the defendant."

In this we think the court erred. The answer of the defendant alleges a single unlawful purpose, which is designated. The proof was directed to that point, and the jury should have been restricted to the question presented. To instruct the jury that they might consider "other unlawful purposes" not put in issue, left them at liberty to consider any matter which they may have deemed unlawful. Under the Code the facts constituting the alleged illegality which renders the contract invalid must be pleaded and the proof will be restricted to proving or disproving such facts; otherwise it might be impossible to defend against a general charge of unlawful purposes.

There are errors also in the instructions given by the court on its own motion, but, as no exceptions seem to have been taken, they cannot be considered. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

NELLIE A. FIGLEY V. J. F. BRADSHAW ET AL., APPELLEES, IMPLEADED WITH GOODRICH BROS. BANKING COMPANY, APPELLANT.

[FILED OCTOBER 5, 1892.]

1. **Mortgages:** PRINCIPAL AND AGENT. A person who received an application through an agent for a loan upon real estate sent a draft for the amount of the loan, payable to the mortgagor, to his agent, one C. at S., and instructed him to have certain liens on the property satisfied. The agent procured the indorsement of the mortgagor on the draft and retained the same on the pretense of satisfying the liens, but instead of doing so absconded with the money without paying the claims. *Held*, That the proof failed to show a delivery of the draft to the mortgagor, and did show that C. was intrusted with the same as agent of the lender.

2. ———: FAILURE OF CONSIDERATION: CANCELLATION. The loan having failed, a mortgage for the commission in procuring the same was properly canceled.

3. ———: ———: BONA FIDE PURCHASER: JUDGMENT AGAINST ASSIGNOR. The note and mortgage being void and having been transferred to a *bona fide* purchaser, judgment was properly rendered against the party making the assignment.

APPEAL from the district court for Nuckolls county. Heard below before MORRIS, J.

Letton & Hinshaw, for appellant.

S. A. Searle, contra.

MAXWELL, CH. J.

This action was brought by the plaintiff against Bradshaw and wife to foreclose a certain mortgage. The other defendants were joined because they claimed an interest in the mortgaged premises.

The controversy in this court relates to a certain mort-

gage made by Bradshaw and wife upon the property described in the petition for the sum of $700 in favor of L. W. Goodrich. The loan was effected through one Samuel Carto at Superior. It appears from the evidence that there were certain liens upon the property then due and the loan was effected to pay off such liens. A draft for $705 was sent by Mr. Goodrich to Carto. This draft was payable to Bradshaw. This, at Carto's request, he indorsed, but the possession was retained by Carto, who informed Bradshaw that he was to satisfy the liens out of the same. Carto thereupon collected the draft and left the country without paying the liens. Goodrich transferred the note and mortgage to Markham before due and he claims to be an innocent purchaser.

The court below made special findings; in effect, that Carto was the agent of Goodrich and that there had been no delivery of the draft. It also found that a mortgage given to Goodrich Bros. for commission was without consideration and that Markham was a *bona fide* purchaser, and rendered judgment as follows:

"It is therefore considered and adjudged by the court unless there shall be paid to the clerk of this court within twenty days from the entry of this decree, for the use and benefit of the said defendant, D. G. Markham, the said sum of $803.10, that the defendants' (Bradshaw) equity of redemption be foreclosed and said mortgaged property be sold, and an order of sale be issued to the sheriff of said Nuckolls county, Nebraska, commanding him to sell said lots 11 and 12, in block 18, in the city of Superior, Nebraska, and bring the proceeds thereof into court, to be applied in satisfaction of the amount so found due, subject to the liens of Nellie A. Figley and the Beatrice Savings Bank Company.

"It is also considered and adjudged by the court that as to the notes and mortgage of Goodrich Bros. Banking Company, the same are decreed void and of no effect, being

without consideration, and that the mortgage be satisfied of record and canceled, and that the defendants Bradshaw have and recover of Goodrich Bros. Banking Company the sum of $803.10, and that the costs of these proceedings be taxed to Goodrich Bros. Banking Company."

The judgment is sustained by the clear weight of evidence. Even Mr. Goodrich's own testimony shows that the draft was sent to Carto to clear off the liens on the property, and this agent seems to have betrayed his trust and failed to discharge the duty he had assumed and the employer must bear the loss. We do not care to comment on the testimony at length. The judgment of the court below is right and is

AFFIRMED.

THE other judges concur.

W. F. DOLAN ET AL. V. ELVIN S. ARMSTRONG.

[FILED OCTOBER 5, 1892.]

1. **Attachment:** MOTION TO DISSOLVE: EVIDENCE: BURDEN OF PROOF. When a defendant moves to dissolve an attachment on the ground that the affidavit for the attachment is untrue, and files in support thereof his affidavit denying the facts stated in the original affidavit for attachment, the burden of proof is upon the plaintiff to sustain the attachment by a preponderance of the evidence.

2. ———: ———: REVIEW. The order of the trial court made at the hearing of such a motion, upon affidavits, will not be reversed by the supreme court, where there is a conflict of evidence, unless the ruling is manifestly against the clear weight thereof.

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

Conlon & Groves, R. W. Sabin, and *Griggs, Rinaker & Bibb,* for plaintiffs in error.

Rickards & Prout, contra.

NORVAL, J.

Plaintiffs in error commenced their action in the court below against defendant in error to recover the sum of $1,155.77 for goods sold and delivered. At the same time an affidavit for an order of attachment was filed, which alleges as grounds therefor "that the defendant E. S. Armstrong is about to remove his property, or a part thereof, out of the jurisdiction of the court with the intent to defraud his creditors; that the defendant is about to convert his property, or a part thereof, into money for the purpose of placing it beyond the reach of his creditors; that the defendant has property and rights in action which he conceals; that the defendant has assigned, removed, and disposed of, and is about to assign, remove, and dispose of, his property with the intent to defraud his creditors; that the defendant has fraudulently contracted the debt and has fraudulently incurred the obligation for which suit is about to be commenced."

On the proper undertaking being filed, an order of attachment was issued, which was executed by levying on the property of defendant.

Subsequently, but before the trial of the cause upon its merits, the defendant filed a motion to dissolve the attachment and discharge the attached property, on the ground and for the reason that the facts stated in the affidavit, upon which the order of attachment was issued, were false and untrue. Numerous affidavits were read in support of the motion, and counter-affidavits were presented by the plaintiffs. Upon the hearing, the attachment was dissolved, which ruling of the court is assigned for error.

Counsel for plaintiffs in error have abandoned all

grounds set up in the original affidavit for attachment, except the last, that the defendant fraudulently contracted the debt and incurred the obligation for which suit was brought.

At and for some time previous to the suing out of the attachment defendant in error was engaged in the mercantile business at Blue Springs. On the 29th day of December, 1890, he was indebted to plaintiffs in error in the sum of $1,262.19 for goods sold and delivered, of which amount the sum of $482.77 was then past due. On said date plaintiffs in error sent their attorney, George W. Groves, to Blue Springs for the purpose of collecting or securing their said claim. The attorney called upon Mr. Armstrong at the latter's place of business and demanded payment of the debt, or security. Defendant in error refused to give security, but paid the sum of $100 to apply on the account, and promised to reduce the claim at least $300 in three weeks, and also made a statement as to his financial condition, which seemed to satisfy Mr. Groves, and the demand for security or payment was not then further pressed. It appears from the record that after December 29, and prior to the suing out of the attachment, plaintiffs in error sold and delivered other goods to Armstrong to the amount of $815.55, and during the same period they were paid by defendant over $800, which was applied on their account for goods sold previous to December 29, thus leaving due the sum of $340.22 on Armstrong's indebtedness incurred prior to said date, and the full amount of the goods since that time purchased. It is contended that defendant in error made a false and untrue statement regarding the value of his property, the amount of incumbrances thereon, and the amount of his liabilities to creditors other than plaintiffs in error, and that, relying on such representations, and believing the same to be true, the goods were sold to defendant upon credit. As to goods sold prior to December 29, 1890, and which are included in the account sued on,

there is no competent or legal proof that defendant made any false representations to plaintiffs to induce the sale, or that he had prior thereto made any statement to them about his financial condition. We have not overlooked the fact that Mr. Groves, in one of his numerous affidavits filed in support of the attachment, does say that defendant, prior to November 26, 1890, in a letter written to plaintiffs, represented that "he was in good circumstances, and soon would be able to reduce their claim, as he was getting in better shape." This is the only testimony to be found in the entire record which plaintiffs could in any manner rely upon as tending to show that defendant made any representations to plaintiffs about his financial standing prior to December 29, and to us it is not convincing. Mr. Groves purports to give in his affidavit the contents of a letter, which, if ever written by Armstrong, and of this there is no competent proof, the affidavit discloses is still in existence, which letter it does not appear from the testimony Mr. Groves ever saw or had in his possession. Such testimony is wholly insufficient to sustain the charge of fraud or disprove the positive allegation made by defendant in his affidavit, that the debt upon which the attachment was issued was not fraudulently contracted. Fraud cannot be presumed, but must be proven by the party alleging it, by a clear preponderance of the evidence. The plaintiffs have shown no cause for an attachment for the goods bought prior to December 29, and even though sufficient cause existed for the issuing of an attachment for the goods purchased subsequent to said date, the attachment could not be sustained.

The precise point was ruled upon in *Mayer v. Zingre*, 18 Neb., 458. There an attachment was issued upon two causes of action, one for a debt fraudulently contracted and the other not so incurred. An order of attachment was issued, covering both causes of action, upon an affidavit alleging that "said defendant fraudulently contracted

the debt and incurred the obligation for which this suit was brought." It was held that the attachment was properly discharged for want of grounds covering the whole indebtedness.

But we are not compelled to rest our decision upon this ground alone, as no cause for granting an order of attachment existed as to any portion of the goods purchased by defendant. There is no room for dispute that Armstrong on December 29, 1890, made a statement to Groves of the nature and value of his assets, as well as the amount of his indebtedness. The testimony is conflicting, not only as to what the representations were, but also whether the same were true or false.

Mr. Groves in his affidavit states that the defendant represented that he was in good financial condition and circumstances; that he owned the store building and the lot in Blue Springs, on which the same is situated, of the value of $6,000, with an incumbrance of $1,800; that he owned 160 acres of land in Deuel county, Dakota, worth $2,400, with an incumbrance of $1,300; that his stock of goods was worth $2,500 and was unincumbered; that he had book accounts which could be collected to the amount of $2,000; that he was buying no goods except what he was then purchasing of plaintiffs, and that he was not indebted to all his creditors more than $300, except what he owed plaintiffs and the amount of liens on the real estate.

The affidavits of W. P. McDonald, the book-keeper and credit man for plaintiffs, and C. J. Drury, one of the plaintiffs, contain substantially the same allegations as made by Mr. Groves in his affidavit.

Plaintiffs also read on the hearing the following statements in writing signed by defendant:

"The following property is owned entirely by me: One two-story brick store building in the city of Blue Springs, Nebraska, and land occupied by said building, reasonably worth the sum of $6,000, with $1,800 incumbrance; stock

of goods, wares, and merchandise worth the sum of $2,500, no incumbrance; book accounts which can be collected, $2,000; 160 acres of land in Deuel county, Dakota, incumbrance $1,300; store building, insured, $2,000. I do not owe in the aggregate more than $300, except what I owe Dolan, Drury & Co. E. S. ARMSTRONG."

The defendant in his affidavit denies that he ever, at any time, stated to Groves or plaintiffs that he was in good financial condition, or that he was not buying any goods to run his store except what he was purchasing from Dolan, Drury & Co., and avers that he was at the time selling and handling goods in his business which plaintiffs did not handle and could not furnish, as they well knew; denies that he represented that he was not indebted to all his creditors to exceed $300, except mortgages on his real estate, or that he stated that his store building was worth $6,000, or that his land in Dakota was worth $2,400, but charges the fact to be that said Groves, while in defendant's store, had a blank paper in his possession on which he pretended to take down the statement, which he, Groves, requested defendant to make, and that in the making of the statement Groves asked defendant what the store building was worth, and to which defendant replied he did not know the value thereof, but that it cost about $6,000, and that there was an incumbrance thereon of about $1,800. Alleges that the building did cost defendant $6,200; that he did not state that his stock was worth $2,500, but did say that he did not know the value of the goods, whereupon Groves requested him to guess as nearly as he could their worth, and that thereupon defendant said about $2,000. Admits that he stated that he had book accounts in the neighborhood of $2,000 at the time and avers that said statement was true; denies that he represented what the Dakota land was worth but informed Groves that the banker had written defendant it was of the value of $1,800, but that defendant personally knew nothing about it except that it was mortgaged for

$1,500; that he informed Groves that his indebtedness for goods alone, aside from what he owed plaintiffs, would amount to about $500; that thereupon Groves handed the statement to defendant for his signature, and affiant believes that the same had been written consistently with the representations he had made, and being busy waiting on customers, signed the same without careful reading; that the statements so made, so far as the same were correctly written down by Groves, are true.

The averments in the affidavits of McDonald and Drury relating to the representations of the defendant are entitled to no weight, for the reason that the uncontradicted testimony shows that neither of the affiants were present at Blue Springs at the time the representations were made and therefore could not have known personally of the transaction. They doubtless testified from information received from Groves or derived from the written statement signed by defendant, or both, which would be hearsay and inadmissible. The trial court had before it on one side, then, the affidavit of Groves and the written statement signed by defendant, and on the other side, the defendant's own testimony. As we have seen, the facts testified to by defendant are contradicted by Groves and the written statement, which raised a question of veracity for the trial court to decide. If the trial judge believed the testimony of defendant and accepted as reasonable and reliable his explanation in regard to the making and signing of the written statement, then he was justified in finding that defendant's version of the transaction was true. The conclusion reached by the trial court on the question is not so clearly against the preponderance of the evidence as to warrant us in disturbing it. To do so would be to ignore the rule which has been so often announced and applied by this court in cases of this kind, that the findings of fact by a trial court will not be reversed when there is a conflict of evidence, unless manifestly wrong. (*Mayer v. Zingre*, 18

Neb., 458; *Holland v. Commercial Bank*, 22 Id., 571; *Johnson & Co. v. Steele*, 23 Id., 82; *Feder, Nusbaum & Co. v. Solomon & Nathan*, 26 Id., 266.)

Accepting then as true the testimony of defendant bearing upon the subject of representations, does the evidence show his statements were false? We answer in the negative. The evidence is overwhelming that the defendant truthfully stated the value of his property, the amount of incumbrances thereon, and the amount of his indebtedness. There is no foundation for the charge that he fraudulently contracted the debt for the recovery of which suit was brought. The order of the district court dissolving the attachment is

AFFIRMED.

THE other judges concur.

STATE OF NEBRASKA, EX REL. IRA L. BARE ET AL., V. LINCOLN COUNTY ET AL.

[FILED OCTOBER 5, 1892.]

Mandamus to County Board: AWARD OF CONTRACT FOR PRINTING AND PUBLISHING DELINQUENT TAX LIST. While a county board may, in its discretion, let the contract for printing and publishing the delinquent tax list and the proceeding of the board to the lowest bidder, yet, as there is no provision of statute making it the duty of such board to so award the contract, *mandamus* will not issue to compel such action. *State v. Dixon County*, 24 Neb., 106, adhered to.

ORIGINAL application for *mandamus*.

George E. French, A. H. Church, T. C. Patterson, and *Grimes & Wilcox*, for relators.

George T. Snelling, and *T. Fulton Gantt, contra.*

NORVAL, J.

This is an application for a peremptory *mandamus* to require the board of supervisors of Lincoln county to award to relators the contract for the county printing and for publishing the delinquent tax list for the year 1892.

It appears from the pleadings and evidence that one of the relators, Ira L. Bare, is the owner and publisher of the *North Platte Tribune*, a newspaper published at North Platte, and of general circulation in said Lincoln county; that the other relator, Harvey W. Hill, is the owner and publisher of the *North Platte Telegraph*, a weekly newspaper published at North Platte, and of general circulation throughout said county; that on the 28th day of November, and for four successive weeks thereafter, the county clerk of said county published in the said *North Platte Telegraph* a notice to the effect that bids would be received until noon of the 1st day of January, 1892, for all books, blanks, and stationery required for the use of the county officers, together with all printing, publishing, and advertising required for the year 1892, the board reserving the right to reject any and all bids; that said printing, publishing, and advertising were for a greater sum than $200; that, pursuant to said notice, relators, on December 31, 1891, made and filed the following bid:

"NORTH PLATTE, NEB, December 31, 1891.

"To the Honorable Board of County Commissioners of Lincoln County: We, the undersigned, publishers respectively of the *North Platte Tribune* and of the *North Platte Telegraph*, submit the following bid for the county publishing for the year 1892:

"The commissioners' proceedings in full, road notices, treasurer's statements, bond propositions, and official notices of the county clerk will be published in both of said

papers at one-twentieth of the legal rate, that is, one-fortieth of the legal rate to go to each publisher; the delinquent tax list will be published in each of the said papers at one-half the legal rate, each paper to receive five cents for each land description and two and one-half cents for each lot description.

"Bond in any reasonable sum for the faithful performance of the work to be furnished by each of the undersigned in case the contract is awarded to us.

"Respectfully yours,

"IRA L. BARE,

"*Publisher of the Tribune.*

"HARVEY H. HILL,

"*Publisher of the Telegraph.*"

That on the same day the Independent Era Publishing Company, in response to said notice, filed its bid agreeing to publish all proceedings of the board free of charge, publish all road notices, election notices, notice to voters, and all other notices ordered by the board or county clerk, for one-half statutory rates, and soliciting the tax list on the terms specified by section 109, chapter 77, of the Compiled Statutes. The bid also specified prices for furnishing the county with blanks and commercial printing. That it always has been the usage and custom in said county for the county clerk to advertise for and invite bids from the various newspapers published in said county, to be filed with the county board, to do the county printing, publishing, and advertising required by law, and it has been the custom of the county board to award the contract upon such bids so filed to the lowest and best responsible bidder; that although relator's bid is the lowest and best the county board refused to award the contract to them to do said publishing, printing, and advertising, and refused to designate the *North Platte Telegraph* and the *North Platte Tribune* as the newspapers in which said printing, publishing, and advertising should be done for the year 1892, but said

board at its meeting held on January 2, 1892, passed a resolution to the effect that the county clerk having exceeded his authority in advertising for bids for county printing, publishing, and advertising, all bids on file for such work, other than for books, blanks, and stationery, be ignored. That subsequently, on the 9th day of January, 1892, the county board passed and spread upon its records the following:

"Whereas it is by law made the duty of the county commissioners to designate a newspaper published in the county of Lincoln, Nebraska, having a general circulation therein, to do the printing and advertising for their county, other than books, blanks, and stationery, for the year 1892, it is therefore resolved by the board of county commissioners of Lincoln county, in regular session, that the *Independent Era*, published in the city of North Platte, Lincoln county, Nebraska, be and is hereby designated as the newspaper in which shall be published and advertised the notices of sales of real estate upon which taxes are delinquent and remain unpaid, otherwise known as delinquent tax list, as provided in section 109 of chapter 77 of the Compiled Statutes, entitled 'Revenue,' together with commissioners' proceedings of regular and special meetings, and such other printing, publishing, and advertising as may be necessary for the county of Lincoln, Nebraska, for the year 1892."

It is not claimed by the respondents that the bid of the Independent Era Publishing Company was either the lowest or the best, but on the contrary it is conceded that the bid of relators is by far the lowest and best. The only question, therefore, presented by the record in this case for the court to determine is, Does the statute make it the duty of a county board to advertise for bids, and let by contract to the lowest bidder all county printing, publishing, and advertising, such as publishing the proceedings of the board and the printing of the delinquent tax list? The

same question was fully considered by this court in *State v. Dixon Co.*, 24 Neb., 106, in which it was held that a county board was not required to let by contract to the lowest bidder the printing of the proceedings of the board or the publishing of the notice required by law to be given by the county treasurer of the sale of real property for delinquent taxes due and unpaid thereon. We have re-examined the question, and are satisfied that the decision in *State v. Dixon County* is sound and should be adhered to.

There is no provision of statute making the duty of county boards to let contracts for county printing, publishing, and advertising of the character involved herein to the lowest and best bidder. The legislature has, however, enacted provisions requiring county boards to award contract for the furnishing of all books, blanks, and stationery required for the use of the county officers to the lowest bidder when the cost of furnishing the same exceeds the sum of $200 per year. (See sections 149, 150, 151, and 152, chapter 18, Compiled Statutes.) In view of the provisions of said sections the omission of the law-makers to provide that contracts for the printing of the delinquent tax list and the publishing of the proceedings of the board shall be awarded upon competitive bids is significant. The only proper conclusion to be drawn from the failure to so provide is that no legal duty rests upon a county board to invite bids for such work, or to award contracts therefor to the lowest and best bidder. The fact that it had in previous years been the custom in Lincoln county to let the contract for county printing, publishing, and advertising to the lowest bidder does not change the legal aspect of the case. While there is no law which requires county boards to let such contracts in the mode contended for by the relators, yet it is within their discretion so to do. Although the respondents did not act for the best interest of the county in making the contract complained of in this

action, yet, as no statutory provision has been disregarded, the relators are not entitled to the relief demanded. The writ is denied.

DISMISSED.

THE other judges concur.

ST. PAUL FIRE & MARINE INSURANCE COMPANY ET AL. V. SOLOMON GOTTHELF.

[FILED OCTOBER 5, 1892.]

1. **Harmless Error.** A judgment will not be reversed on account of harmless error.
2. **Fire Insurance:** NOTICE OF LOSS: TERMS OF POLICY: WAIVER. Provisions of an insurance policy covering a stock of goods, for notice of loss within a specified time and in a particular manner, will be held to have been waived by the insurer where, with knowledge of the loss of part of said stock by fire, it, by its adjusting agent, demands and obtains possession of the remainder of the goods and books of the insured and is engaged several days, with the help of the latter, in ascertaining the amount of the loss.
3. **Corroborating Evidence:** USE OF MEMORANDUM BY WITNESS: BOOK ENTRIES. A witness who at the time of purchasing a bill of goods entered each item in a book, together with the cost thereof, may use such book as a memorandum, and when it is shown by his testimony that he knows the entries therein to be correct and that they were made at the time of the transaction in question, such book may properly be introduced in evidence, not for the purpose of proving the purchase of the goods, but in corroboration of the witness and as a detailed statement of the items involved.
4. **Trial:** LEADING QUESTION: DISCRETION OF TRIAL COURT. As a general rule, the allowing of a leading question is a matter within the discretion of the trial court, and a judgment should not be reversed on that ground unless it is apparent that there has been a clear abuse of discretion.

5. **Award:** VOID FOR UNCERTAINTY. An award will be held void for uncertainty when no amount is named therein or means indicated by which it can be ascertained.

6. ———: ———. *Held*, That the finding in the record was a mere invoice of goods and not an award of arbitrators.

7. **Instructions:** HOW CONSTRUED. A paragraph of a charge to the jury should be construed as a whole, and, if so construed it correctly states the law, will not be condemned because a detached part thereof, construed by itself, might be subject to criticism.

8. ———. *Held*, That there is no error in the giving and refusing of instructions prejudicial to plaintiffs in error.

9. **Evidence** examined, and *held* sufficient to sustain the verdict and judgment of the district court.

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

Six separate actions were commenced by Solomon Gotthelf against The St. Paul Fire & Marine Insurance Company, The Hamburg-Bremen Fire Insurance Company, The Anglo-Nevada Assurance Corporation, The North British & Mercantile Insurance Company, The Oakland Home Insurance Company, and The United States Fire Insurance Company. By agreement of the parties the actions were consolidated and tried together. Judgment was rendered for plaintiff below, to reverse which each defendant prosecuted proceedings in error.

Chas. O. Whedon, for plaintiffs in error:

The facts as pleaded did not constitute a waiver of proof of loss. (*Blossom v. Lycoming Ins. Co.*, 64 N. Y., 162; *Brink v. Hanover Ins. Co.*, 70 N. Y., 593; *Von Genechtin v. Citizens Ins. Co.*, 39 N. W. Rep. [Ia], 881; *Briggs v. Fireman's Fund Ins. Co.*, 31 N. W. Rep. [Mich.], 616; *Beatty v. Lycoming County Mutual Ins. Co.*, 66 Pa. St., 9.) The award was final as between the parties. (*Goodridge v. Dustin*, 5 Met. [Mass.], 363; *Wheeler v. Watertown Ins.*

Co., 131 Mass., 1; *Koon v. Hollingsworth*, 97 Ill., 54; *Kimball v. Walker*, 30 Id., 482; *Burchell v. Marsh*, 17 How. [U. S.], 344; *Hadaway v. Kelly*, 78 Ill., 286; *Tynan v. Tate*, 3 Neb., 390; *Holmes v. Aery*, 12 Mass., 134.

Pound & Burr, contra:

The facts alleged in the petitions and proved on the trial show complete waiver of proof of loss. (*Franklin Ins. Co. v. Updegraff*, 43 Pa. St., 359; *Blake v. Ins. Co.*, 12 Gray [Mass.], 265; *Susquehanna Ins. Co. v. Staats*, 102 Pa. St., 529; *Graves v. Washington Ins. Co.*, 12 Allen [Mass.], 391; *Phœnix Ins. Co. v. Barnd*, 16 Neb., 89; *Carroll v. Girard Ins. Co.*, 72 Cal., 297; *Bammessel v. Brewers Ins. Co.*, 43 Wis., 463.)

POST, J.

The defendant in error commenced six different actions in the district court of Lancaster county on separate policies of insurance by the plaintiffs in error to recover for damage by fire to a stock of goods covered by said policies. By agreement of parties the several actions were consolidated and tried together, resulting in verdicts against each of the companies named. A motion for a new trial was made by each of the defendants below, which motions were overruled and judgments entered in accordance with the verdicts, and said cases removed to this court by petitions in error. The pleadings are the same in each case, except as to the amount of damage claimed. The first error alleged in the brief of plaintiffs in error is the overruling of their motion to require the plaintiff below to separately state and number his causes of action. Each petition contained two causes of action, one on the policy of insurance and the other for money expended for clerk's and appraisers' fees. The ruling complained of, if erroneous, is error without prejudice, since, on the submission of the case, the jury were instructed that there could be no recovery for

money expended for clerk hire or appraisers' fees, and expressly limited the right of plaintiff below to recover to the other cause of action, viz., for damage to the stock of goods.

Second—It is claimed that the district court erred in denying the motion of defendants below to strike out the seventh paragraph of the petition, as follows: "That immediately after said fire the different insurance companies who had policies and risks upon the aforesaid goods and property were notified and informed of said fire, and that each of said companies, as well as defendant, sent or had duly authorized agents to come upon the said premises and adjust the loss caused by said fire and took an inventory of said goods and property, and said defendant, after taking said inventory, and all of said other insurance companies, insisted that plaintiff's loss was only $2,000, when in truth and in fact it was and is $8,222.53, and that they thereby waived any proof of loss as required by said different policies and by the policy of the defendant." The foregoing allegation should be construed in connection with the eighth paragraph as follows: "That shortly after the said fire the several agents and adjusters of the said defendant, and all companies having policies on said stock with defendant, came to the city of Lincoln and, at their request and demand, took charge of the goods and stock, as well as the books of plaintiff, and the plaintiff chose one person, and said agents and adjusters the other, and they proceeded and took an inventory of said goods for the purpose of ascertaining how much the loss of plaintiff was, and for a period of over one month the said agents and adjusters had possession and control of said books stock, and property, and the plaintiff aided and assisted them all that he could, and the inventory was taken in duplicate, one was kept by the plaintiff and one by the defendant and his other insurance agents and adjusters; and the inventory so made by plaintiff and defendant found that

there was $7,208.09 worth of goods and property in stock, not deducting any damage therefrom, and not deducting any goods that was a total loss by said fire, and which inventory plaintiff will produce at the trial of this action, and from which, together with plaintiff's books, it will fully appear that the loss at said fire was and is the said sum of $8,222.53." These allegations, in our judgment, sufficiently charge a waiver of the conditions of the policies with respect to proof of loss.

The same question was fully considered by this court in the case of *Billings v. The German Ins. Co.*, 34 Neb., 502. The conclusion there reached, which we believe to be in accord with the clear weight of authority, was that similar provisions in a policy of insurance for forfeiture will be held to have been waived by the insurer when it is informed of the fact by reason of which the forfeiture is claimed, but thereafter continues to treat the contract as binding and induces the insured to act in that belief. The facts alleged in this case bring it clearly within the rule above stated. If, as alleged, the insurance companies, by their adjusting agents, soon after the fire, demanded and obtained possession of the stock of goods in question, and also the books of the insured, and retained possession thereof for a month, being, during all of said time, engaged, with the assistance of the latter, in ascertaining the amount of the loss, such facts would amount to a waiver of the proof of loss and excuse the making of such proof in the manner and within the time specified in the policies. The authorities cited in *Billings v. The German Ins. Co.* fully sustain this proposition. Also in the answers filed in the district court it is charged that the amount of loss was by mutual agreement submitted to arbitration, and that an award was made which is pleaded as a defense. This, we think, is a waiver of the proof of loss provided by the policies. (*Carroll v. Ins. Co.*, 72 Cal., 297; *Bammessel v. Ins. Co.*, 43 Wis., 463.)

Third—Plaintiff below, to prove the amount and value of the goods insured, introduced evidence tending to show that in the month of October, 1887, he had purchased a bill of goods of August Vick in the city of St. Louis amounting to about $2,300. He testified that at the time he purchased said goods he correctly entered every item with the cost thereof in a book. In this he is corroborated by Mr. Vick. Said book, with the entries therein, having been identified, was offered in evidence in connection with the testimony of the plaintiff below and received over the objection of the defendants, and which is now assigned as error. It will be observed that the book was used by the witness as a memorandum only in connection with his testimony. In order to lay the foundation for the admission in evidence of an entry used for that purpose it must be shown by the witness that he once knew the facts stated in the memorandum, and that he made the entry at the time or soon after the transaction; that he intended to make it correctly, and that he believed it to be true. (15 Am. & Eng. Ency. of Law, 263.) The book was rightly admitted, the proper foundation having been laid, not as proving the purchase of the goods, but in corroboration of plaintiff below and as a detailed statement of the items involved. (1 Greenleaf on Evidence, 437 and note.)

Fourth—A further objection is made that the time of the purchase of the so-called Vick bill was too remote for the purpose of proving value at the time of the fire January, 1889. There is nothing in the objection made. A considerable part of the stock had been destroyed by the fire and the portion saved was badly damaged. Plaintiff below was for that reason properly permitted to show the amount and value of the original stock and subsequent purchases and to deduct the amount of sales since he commenced business in October, 1887, and value of goods remaining after the fire. This was proper, and the value of the goods in the Vick bill was therefore a proper subject for consideration by the jury.

Fifth—Objection was made to a leading question put to plaintiff below, as a witness in his own behalf, by his counsel. The court may in its discretion permit leading questions, and where there has been no abuse of that discretion a judgment will not be reversed on that ground alone. In this case there does not appear to have been an abuse of discretion. Nor can plaintiffs in error be said to be prejudiced thereby, as substantially the same answer had been previously given to other questions without objection.

Sixth—Defendant in error was asked, on cross-examination, how much he paid Vick for the goods bought of the latter in October, 1887, to which objection was interposed and sustained on the ground that it was immaterial, which ruling is now assigned as error. The ruling in question could not have prejudiced the plaintiffs in error, for the reason that the witness had already testified on direct examination that he could not give the value of the goods without referring to the book above mentioned. Also, on cross-examination he had testified without objection as follows:

Q. What did you pay for the goods you bought in that book (referring to the memorandum above mentioned)?

A. I can't remember.

Q. About how much?

A. I can't remember.

Q. About what did you pay for them?

A. I don't remember; I cannot tell you.

We have no reason to infer that further cross-examination on that subject would have profited the plaintiffs in error, and cannot say that the court erred in the limitation imposed.

Seventh—Defendant in error was asked on direct examination what per cent should be added to the cost price of goods for freight, unpacking, marking, and exposing them for sale, to which objection was made on the ground that it was incompetent and immaterial. The cost of handling,

as well as freight charges, was a proper subject for consideration under the pleadings. The objection raises no question except that of the materiality of the evidence, and was therefore rightly overruled.

Eighth—In the several answers it was alleged that all of the questions involved had been submitted to arbitrators, who made an award, and which is one of the defenses relied on. This allegation is denied by the defendant in error, who alleges in his reply that the so-called arbitrators were selected merely for the purpose of making an inventory of the goods remaining after the fire. This question was submitted to the jury under instructions which fairly state the law. The finding for the defendant in error on that issue cannot be said to be so decidedly against the weight of evidence as to call for action by this court. Nor are we referred to any finding or report having the semblance of an award. The only return made by the arbitrators or appraisers is entitled an "Invoice of Stock of Solomon Gotthelf taken January 19, 1889." It comprises fifty-four pages of a book, which in three columns show, respectively, the items appraised, the cost thereof, and the damage thereto. On some of the pages are figures indicating the per cent deducted on account of damage. There is a footing in pencil mark on each page of the column, indicating the cost and the damage, but no total appears of either. An award will be held void for uncertainty when no amount is named, or means indicated by which it can be found. (*Waite v. Barry*, 12 Wend. [N. Y.], 377.) The finding in question includes only the stock as it appeared after, and makes no reference whatever to the value thereof before the fire. We think the jury were warranted on the evidence before them in finding for defendant in error on the question of arbitration.

Ninth—Exceptions were taken to the refusing of instructions asked and the giving of others by the court on its own motion. The instructions in question are too nu-

merous to copy into this opinion. They may be for convenience divided into two sets or classes. The first set refers to the question of waiver. Those given state the law in accordance with the view already expressed, and in giving them and refusing those asked there is no error. The other instructions to which objection is made refer mostly to the question of damage. On the trial it was agreed "that the books of the plaintiff, exclusive of the little book B already introduced in evidence, show that the purchase of goods by the plaintiff before the fire amounted to the sum of $13,574.87; and that from this amount of goods the plaintiff had sold goods to the amount of $12,685 before the fire." Referring to the above stipulation the court charged the jury as follows: "Fifth—If you should find for the plaintiff in this action, then, in determining the damage sustained by the plaintiff, it would be proper for you to take into account the total value of the goods purchased by the plaintiff prior to the fire, which in this action it is admitted by both parties, excluding the goods as shown in the little book called 'Exhibit B,' to be $13,574.88. It is further admitted by the evidence that the plaintiff had sold out of said goods prior to the fire $12,685 worth of goods. To determine the amount of the goods on hand at the time of the fire, you should deduct from the amount of goods sold the amount of profits upon said goods as shown by the evidence and this method, that is, taking all the goods purchased by the plaintiff that the evidence shows went into said stock, prior to the time of said fire, deducting from said goods the amount of the sales, less the profits as shown by the evidence, would be one method of determining the value of goods on hand at the time of the fire. The question of profits upon the sales made by the plaintiff is a question for you to determine from all the evidence before you, and in determining this question you should consider the evidence as to the amount of profits upon the several different kinds and classes of goods, and allow such profits

as the evidence shows you to have been made upon the kind and class and character of goods handled and sold by the plaintiff. In determining the value of the goods on hand after the fire, and the damage to the same, it is proper that you should take into consideration the invoice and appraisal offered in evidence and give to it such weight as you believe it is entitled to under all the evidence. In determining the value of the goods at the time of the fire you should determine the value of said goods in this market as shown by the evidence. It is proper to take into account the cost price of said goods as shown by the evidence, and to this cost price you should add such a sum as you believe from the evidence is necessary to make the real and actual value of said goods in this market at the time of said fire. No arbitrary or particular sum should be allowed by you, but you should determine its value from the evidence before you in this case. If you should find for the plaintiff in these actions, then you will determine from the evidence whether or not there was a total loss of any of the goods and property of said plaintiff by said fire, and determine from all the evidence the value of such goods, if any, you find to have been totally destroyed and allow the plaintiff therefor."

The objection to the instruction set out is that the court misconstrues the agreement referred to therein. In this contention we agree with counsel for plaintiffs in error, as the agreement in question relates to the first cost of the goods only, while the court seems to construe it as referring to the value thereof. The instruction as a whole, however, fairly states the law, and the jury could not have been misled by the direction contained therein. By it they are in effect directed to determine the value of the goods on hand at the time of the fire from all the evidence before them, including cost thereof.

Tenth—Finally it is contended that the damage is excessive. We have carefully read over the voluminous

record and are unable to say that the total of the verdicts is excessive within the rule which would warrant a reversal by this court. There is a sharp conflict of testimony upon that question. The principal controversy on that branch of the case was the profits realized on the goods sold by defendant in error. By the agreement above referred to it appears that he had made sales from the stock in question to the amount of $12,685. In determining the value of the stock therefore the profits included in the amount of the sales become material. Three witnesses, including the defendant in error, testify from actual knowledge that the goods in question had sold at a profit of one hundred per cent, and in this they are corroborated by a fourth. Calculating the profits at fifty per cent, the verdict may still be sustained. There is no prejudicial error in the record and the judgment below is

AFFIRMED.

THE other judges concur.

JOHN W. BOWMAN, APPELLANT, V. OLIVER K. GRIFFITH ET AL., APPELLEES.

[FILED OCTOBER 5, 1892.]

1. **Deed**: PRESUMPTION OF DELIVERY AND ACCEPTANCE. When a deed, which is beneficial in its character to the grantee named therein, is properly acknowledged and recorded, the presumption of law is that it was delivered by the grantor and accepted by the grantee.

2. ———: RECORD: RECITALS. Where a deed, beneficial to the grantee, recites that it is executed for the purpose of correcting an error in a prior deed between the same parties, the record thereof is evidence of the facts therein recited.

3. **Bona Fide Purchaser of Real Estate.** Where a claim to real estate can be sustained only upon the ground that the person asserting it is a subsequent purchaser in good faith, such person is required to show affirmatively that he purchased without notice of the equities of another, and relying upon the apparent ownership of his grantor.

4. **On the evidence** in the record, *held*, that the defendant is not an innocent purchaser for value.

5. **Statements of Agent:** ESTOPPEL. Statements of an agent with authority to collect rents and care for the property of his principal will not be received in disparagement of the title of the latter so as to work an estoppel in favor of one who purchased from a stranger claiming adversely to such principal.

6. **Quitclaim Deed:** ACCEPTANCE BY GRANTEE. One who accepts a quitclaim deed from his grantor is bound, at his peril, to ascertain what equities, if any, exist against his title.

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

G. M. Lambertson, for appellant.

Chas. O. Whedon, contra.

POST, J.

This action was begun in the district court of Lancaster county by the plaintiff to quiet title, as against the defendants, to the northwest quarter of the northeast quarter of section 26, township 11 north, of range 6, in said county.

From the pleadings and proofs it appears that plaintiff claims title through the following conveyances: First—Patent from the United States to John Brown, August 1, 1868; filed for record July 1, 1871. Second—John Brown to Thomas Hyde, warranty deed, July 5, 1869; filed for record August 18, 1869. Third—Thomas Hyde to Reddington Stanhope, warranty deed, May 22, 1883; filed for record May 26, 1883. Fourth—Reddington Stanhope to F. M. Hall, quitclaim deed, July 21, 1883; filed for rec-

ord July 23, 1883. Fifth—F. M. Hall to A. B. Smith, warranty deed, July 21, 1884; filed for record August 5, 1884. Sixth—A. B. Smith to J. W. Bowman, plaintiff, warranty deed, September 21, 1885; filed for record September 23, 1885.

The defendant W. C. Griffith filed a disclaimer in the district court, but the other defendant, Oliver K. Griffith, disputes plaintiff's claim, and by way of cross-bill asks to have the title to the property in controversy quieted in him. He claims title through the following conveyances: First—Patent, United States to John Brown, August 1, 1868; filed for record July 1, 1871. Second—John Brown to Hazleton S. Moore, warranty deed, December 8, 1868; filed for record December 18, 1868. Third—Hazleton S. Moore to Oliver K. Griffith, defendant, warranty deed, January 14, 1880; filed for record January 19, 1880.

The first question presented by the record is whether the deed from Brown to Moore, through which defendant claims, includes the property in controversy. That deed, as appears from the above statement, was filed for record long before the execution of the deed from Brown to Hyde, hence it is apparent that if sufficient to pass the title to the grantee therein, Hyde could acquire no title by his deed. According to the description in the deed in question the property conveyed by Brown to Moore is "The northwest quarter and the southwest quarter of the northeast quarter of section 26," etc. The description, we think, does not include the property in controversy. The said deed on its face purports to convey two hundred acres, to-wit, all of the northwest quarter of the section aforesaid and the southwest quarter of the northeast quarter thereof. It is evident therefore that the record of said deed was not notice of any equitable claim that Moore may have had to said property at the time of the conveyance by Brown to Hyde, hence if the latter was a *bona fide* purchaser within the true definition of the term, he acquired a good title thereto

as against Moore and the defendant who claims through him. In *Coggswell v. Griffith*, 23 Neb., 334, on the evidence in the record it was held that Brown had sold to Moore the west half of the northeast quarter of said section, including the land in controversy, and intended to convey the same to him, but by mutual mistake the description above quoted was inserted in the deed instead of the land intended to be conveyed thereby. That case was decided upon evidence not before us now, hence, although apparently relied upon by both plaintiff and defendant, cannot be said to be authority for either. The question is therefore, on the record of this case, What are the equities of Moore and his grantees in the subject of the controversy? This brings us to the consideration of an instrument not enumerated in either list of conveyances comprising the respective chains of title. The defendant having laid the necessary foundation therefor, introduced in evidence the record of a subsequent deed from Brown to Hyde, dated May 15, 1870, and filed for record the same day. Said deed is in the usual form and the property conveyed is the southwest quarter of the northwest quarter of section 26, etc., and appears to have been made for the purpose of correcting an error in the prior deed between the same parties, dated July 5, 1869, under which the plaintiff claims. Among others it contains the following recital:

"This deed is made to correct a mistake made by the above named grantors to the above named grantee, dated the 5th day of July, A. D. 1869, whereby the above named grantors conveyed to said grantees the northwest quarter of the northeast quarter of section 26 aforesaid, together with other portions of said section in said deed described, whereas the lands intended to be conveyed thereby were, and are, the east half of the northeast quarter of section 26 aforesaid, and the south half of the northwest quarter of section aforesaid, the northwest quarter of the northeast quarter of said section 26 in said deed de-

scribed having been previously conveyed to H. S. Moore by deed, dated the 8th day of December, 1868."

It is argued by defendant that the above record does not prove the error alleged in the first deed, inasmuch as Hyde did not reconvey the property in controversy to Brown but subsequently deeded it to Stanhope. Aside from the recital in the record set out above, there is in this case no evidence of any title, legal or equitable, in defendant or his grantor, Moore. His rights therefore depend upon the inference which is to be drawn from the recording of the second deed. If that instrument was delivered and accepted by the parties, and for the purpose expressed therein, that fact, it must be conceded, is evidence from which we should find that Moore was the equitable owner of the property in dispute, and that he should recover unless plaintiff's equities are superior by reason of having purchased without notice of the rights of the former, which will be considered hereafter. The general rule is that the registration of a deed is *prima facie* evidence of its delivery. (Devlin on Deeds, 292.)

It is said by Judge Dillon in *Robinson v. Gould*, 26 Ia., 89, that "when a deed beneficial in its character to the grantee has been properly acknowledged and recorded, the presumption of law in favor of the grantee is that it has been delivered, and the burden of proof is upon the party claiming the nondelivery to clearly overcome that presumption." That the deed under consideration was beneficial to Hyde will not be questioned, since by it Brown conveys to him forty acres of land, the southeast quarter of the northeast quarter of the section aforesaid not included in the prior deed. The presumption is that he Hyde, took and holds title to the property last described under that conveyance. On the other hand, the deed was certainly not beneficial to Brown, who thereby conveyed the property last described. We think, therefore, that the acceptance of said deed by Hyde, the only beneficiary thereof,

should be presumed from the fact that it was subsequently filed for record, and that the record aforesaid was rightly admitted in evidence. That instrument fully proves the facts as alleged by defendant, viz., the mistake in the prior deed to Hyde and that Moore was, at the time of the execution thereof, the equitable owner of the property in controversy. Nor is the presumption aforesaid overcome by the fact that Hyde subsequently asserted title to said land by deeding it to Stanhope. He was required to accept or reject the said deed as an entirety. By taking title through it he must be held to have assented to the conditions upon which the property named therein was conveyed. In other words, as between Brown and Hyde, it is an admission by the latter that the land in dispute was in equity the property of the former and his grantees.

We come now to the question, is plaintiff a *bona fide* purchaser? His contention is that he purchased the property without notice of any claim of the defendant thereto and that his equities are therefore superior and should prevail against those of the latter. A *bona fide* purchaser is one who purchases for value without notice of the equities of third parties. (*Snowden v. Tyler*, 21 Neb., 199.) The question of the equities of the respective parties is distinctly presented by the pleadings. And the plaintiff while a witness in his own behalf testifies as follows:

Q. You say you made no inquiry about the title before you bought it?

A. No, sir; none whatever.

It does not appear from his testimony that he relied upon the title of Smith, his grantor, or that he paid the consideration named without notice of the rights of the defendant. Nor does it appear that he was ever advised in whom the record title rested. This showing falls far short of establishing his claim to the rights of a subsequent purchaser in good faith. The burden was upon him and he was bound to prove both payment in ignorance of defend-

ant's equities and that he relied upon the title of his grantor. (*Shotwell v. Harrison*, 22 Mich., 410; *Sillyman v. King*, 36 Ia., 207; *Denning v. Smith*, 3 Johns. Ch. [N. Y.], 332; *Seymour v. McKinstry*, 106 N. Y., 230.) In the last case cited it is held on the authority of *Denning v. Smith, supra*, that where a claim can be sustained only upon the ground that the person asserting it is an innocent purchaser he must positively deny the equitable rights of another, although not charged. It is claimed that defendant is estopped to now claim the land in controversy, because W. C. Griffith, his agent, stated to Mr. Hall, through whom plaintiff claims, that he, defendant, made no claim to said property. There are at least two sufficient reasons why the statement aforesaid will not work an estoppel as against the defendant O. K. Griffith: First—It is not shown that W. C. Griffith had any such authority as would bind his principal, O. K. Griffith, by a statement in disparagement of his title, Second—Hall, who was then negotiating for the property, accepted a quitclaim deed from Stanhope, his grantor. (*Snowden v. Tyler, supra.*)

Finally, it is claimed that defendant is estopped to claim this forty acres for the reason that in the case of *Coggswell v. Griffith, supra*, his contention was that he had purchased two hundred acres from Moore. A sufficient answer to this claim is that the property now in controversy was not involved in that suit. Neither are the parties identical, hence defendant would not be concluded by any decree in that case, had the court therein assumed to determine the rights of the parties with respect to the property in controversy, which it is clear was not attempted. At most it can only be said that he, in that case, insisted upon a construction of his deed inconsistent with the one he now contends for. Whatever view we may feel constrained to take of his conduct in that case as a question of morals, it is apparent that plaintiff has not been misled thereby to his detriment, and that in legal contemplation he is not now

estopped to demand the property which in equity he is entitled to recover. The judgment of the district court is

AFFIRMED.

THE other judges concur.

WILLIAM TIPPY V. STATE OF NEBRASKA.

[FILED OCTOBER 11, 1892.]

1. **District Court: TERMS IN DIFFERENT COUNTIES OF SAME DISTRICT AT SAME TIME.** The general rule is that a court cannot be held at a time when there is clearly no authority to hold it, and if there was no statutory authority to that effect the district court in those districts having but one judge could not be held in two counties of the same district at the same time, but, under the constitution and statutes of this state, terms of the district court may be held at the same time in different counties of the same judicial district, and, when necessary, the district court sitting in any county may be continued into and held during the term fixed for holding such court in any other county within the district, or, it may be adjourned and held beyond such time.
2. There is no material error in the record.

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

Shannon S. Alley, for plaintiff in error:

Unless authorized by statute, terms of court cannot be held in different counties at the same time in any district having but one judge. (*Bates v. Gage*, 40 Cal., 183; *People v. O'Neil*, 47 Id., 109; Freeman, Judgments, sec. 121; *Batten v. State*, 80 Ind., 394; *Dunn v. State*, 2 Ark., 229; *In re Millington*, 24 Kan., 214; *Grable v. State*, 2 G. Greene [Ia.], 559; *Archer v. Ross*, 2 Scammon [Ill.], 303; *Gregg*

v. Cooke, Peck [Tenn.], 82; *Galusha v. Butterfield*, 2 Scammon [Ill.], 227; *Smithson v. Dillon*, 16 Ind., 169; *Samuels v. State*, 3 Mo., 42; *Cain v. Goda*, 84 Ind., 209; *McCool v. State*, 7 Id., 378.)

George H. Hastings, Attorney General, contra:

A term of court may be held in one county of a district which laps onto the term of another county in the same district. (*State v. Leahy*, 1 Wis., 225; *State v. Knight*, 19 Ia., 94; *State v. Stevens*, 25 N. W. Rep. [Ia.], 777; *State v. Peterson*, 25 Id., 780; *Brewer v. State*, 6 Lea [Tenn.], 198; *Cheek v. Bank*, 9 Heiskell [Tenn.], 489; *State v. Clark*, 30 Ia., 168; *Harris v. Gest*, 4 O. St., 473; *State v. Montgomery*, 8 Kan., 351; *Cook v. Smith*, 54 Ia., 636.)

MAXWELL, CH. J.

The plaintiff in error was convicted of manslaughter in the district court of Saline county and sentenced to imprisonment in the penitentiary for ten years. He relies upon two errors for a reversal of the judgment. First—That there is but one judge in the seventh judicial district; that in 1891 the terms were fixed by law, viz., Saline county, September 15; Clay county, November 10; Fillmore county, November 24; that W. H. Morris was sole judge; that the term in Saline county which had been in session on November 9 was adjourned to the 17th of that month; that on the 17th of November, 1891, William Gaslin held court in Saline county, and the trial and conviction of the plaintiff in error took place before him; that while Judge Gaslin was holding court in Saline county, Judge Morris was holding the regular term of court in Clay county, and therefore the court in Saline county had no jurisdiction at that time to try and sentence the plaintiff in error.

The general rule no doubt is that a court cannot be held at a time when there is clearly no authority to hold it, and

where the terms of court are fixed by statute so that one term closes in a particular county at a definite time and a term in another county begins, there being but one judge in the district, court cannot be held in two counties at the same time for the reason that the authority is wanting. (*Cain v. Goda*, 84 Ind., 209; *In re Millington*, 24 Kan., 214; *Dunn v. State*, 2 Ark., 229; *Garlick v. Dunn*, 42 Ala., 404; Freeman, Judgments, sec. 121; *Bates v. Gage*, 40 Cal., 183; *Smurr v. State*, 105 Ind., 125.)

In the case last cited it is said: "The question of power or authority might, perhaps, have arisen had the adjourned term been fixed at a time when the law imperatively required that the Kosciusko circuit court should be in session; but its adjourned term was not fixed at a time when that court was required to be in session. On the contrary, it was fixed at a time when the judge might rightfully have adjourned that court. This feature is a prominent one, and distinguishes the case from such cases as that of *In re Millington, supra*," and it was held that the adjourned term was held under legal authority. In *State v. Stevens*, 25 N. W. Rep. [Ia.], 777, the supreme court of Iowa held that where a trial was in progress at the time fixed for holding court in another county, the judge could adjourn the term in such other county for one week to give sufficient time to complete the trial, and the same ruling was made by that court in *State v. Peterson*, 25 N. W. Rep. [Ia.], 780. These cases, although they do not refer to, yet overrule, *Davis v. Fish*, 1 G. Greene [Ia.], 106, and *Grable v. State*, 2 G. Greene [Ia.], 559. In *State v. Leahy*, 1 Wis., 225, and *State v. Montgomery*, 8 Kan., 351, it was held, in effect, that the judge may adjourn the term of the district to a day subsequent to that fixed by law for the commencement of the regular term of court in another county in the same district.

In all the cases cited the terms were fixed by law. In this state, to avoid some of the difficulties which existed under the former system, the constitution authorizes the

judges of the several districts to fix the terms of court in their respective districts. (Art. XVI, sec. 26.) The constitution, also to provide for the necessities of some of the counties of the state where one judge would be unable to transact the business of a county, authorizes the election of two or more judges in a district. (*State v. Stevenson*, 18 Neb., 416.)

Section 1061 of the Consolidated Statutes provides: "The judges of the district court shall, on the 1st day of January of each year, fix the time of holding terms of court in the counties composing their respective districts, during the ensuing year, and cause the same to be published throughout the district, if the same can be done without expense. The clerk of each district court shall note on the bar docket of each term the time so fixed for holding court in his county. The terms shall be so fixed as not to conflict with the time fixed by rules of the supreme court for the hearing of causes therein from said districts. The clerk of the supreme court shall, before the 1st day of January of each year, notify each district judge of the times fixed by the supreme court for the hearing of causes from his district. All terms of the district court shall be held at the county seat in the court house, or other place provided by the county board. Terms of court may be held at the same time in different counties in the same judicial district by the judge of the district court thereof, if there be more than one, and, upon request of the judge or judges of such court, any term in such district may be held by a judge of the district court of any other district of the state. When necessary, the district court sitting in any county may be continued into and held during the time fixed for holding such court in any other county within the district, or may be adjourned and held beyond such time." This section was amended in 1885 to cover the very point in controversy here, by permitting two judges, when necessary, to sit in the different counties of

a district at the same time. This disposes of this objection.

Second—It is not seriously questioned that the evidence is sufficient to establish the guilt of the plaintiff in error, although it is intimated that the sentence is too severe.

There is no material error in the record and the judgment is

AFFIRMED.

THE other judges concur.

JOSEPH SUITER V. PARK NATIONAL BANK OF CHICAGO.

[FILED OCTOBER 11, 1892.]

1. **Trial**: OPENING AND CLOSING. When, in an action on a note on the issue made by the pleadings, the plaintiff would be required to prove any fact to entitle him to recover, he has the right to open and close. If, however, the defendant in his answer admits the plaintiff's cause of action, but sets up new matter, such as usury for a defense, so that the defense would fail without proof of such new matter, the defendant is entitled to open and close.
2. **Directing Verdict.** Where, from the testimony before the jury, different minds might draw different conclusions, it is error to direct a verdict.
3. **Usury**: PROMISSORY NOTE: BONA FIDE HOLDER: ONUS PROBANDI. When usury is clearly established in the transaction, the burden of proof is on the person holding the instrument to show that he is a *bona fide* holder for value before maturity.

ERROR to the district court for Saline county. Tried below before MORRIS, J.

L. W. Colby, and *Pemberton & Bush*, for plaintiff in error.

F. I. Foss, and *Hastings & McGintie, contra.*

MAXWELL, CH. J.

This action was brought in the court below upon a promissory note, as follows:

"$4,309.38. DE WITT, NEB., January 10, 1889.

"On the 10th day of June, 1889, after date, for value received, I promise to pay to the order of Fayette I. Foss, of Crete, Neb., four thousand three hundred nine and $\frac{38}{100}$ dollars, with interest at the rate of 10 per cent per annum from maturity until paid. Negotiable and payable at the De Witt Bank at De Witt, Neb.

"No. 1377. Due 6-10-'89. JOSEPH SUITER."

Said note was endorsed as follows:

"For value received I hereby waive notice of protest and non-payment, and guarantee payment of the within note. FAYETTE I. FOSS.

"6-25. Cr. on the within note; Cr. on $1,790.14; Cr. on $1.40."

The note was afterwards indorsed by the cashier of the De Witt Bank and delivered to the defendant in error.

It is admitted that $1,790 and $1.40 have been paid on the note.

Suiter in his answer, which is very long, admits the making of the note, but alleges, in substance, that the note in question is the culmination of a long series of usurious transactions, which are set out at length, and that the plaintiff below is not a *bona fide* purchaser and holder of the note.

On the trial of the cause the court directed a verdict for the plaintiff below and the jury returned a verdict in its favor for $2610.68, and a motion for a new trial having been overruled, judgment was entered on the verdict.

The first objection of the plaintiff in error is that he was denied the right to open and close on the trial, and was thereby prejudiced. If the testimony in the case justi-

fied the court in directing the jury to find a verdict for the plaintiff below there would be no error in having denied the defendant below the right to open and close, if the defendant below admitted the cause of action of the plaintiff below, so that he had nothing to prove except for the new matter to entitle him to recover, then the defendant was entitled to the opening and closing. An examination of the answer shows that the defendant below admitted the making and delivery of the note and all the facts stated in the petition, so that no proof would be required on the face of the pleadings, if the cause was submitted in that form, to entitle the plaintiff below to recover.

Judge Thompson, in his valuable work on Trials, after stating the rule adopted by this court that if, on the pleadings, the plaintiff would be required to prove any fact to entitle him to recover, he is entitled to open and close (*Rolfe v. Pilloud*, 16 Neb., 21; *Osborne v. Kline*, 18 Id., 344; *Vifquain v. Finch*, 15 Id., 505; *Mizer v. Bristol*, 30 Id., 138), says: "Where the action is upon a contract which, by its terms, liquidates the damages—as upon a promissory note, bill of exchange, bank check, bill single, policy of life or fire insurance, or any other written instrument which, by its terms, fixes the amount of the recovery—and the defendant admits the execution of the instrument, but sets up an affirmative defense, such as duress, fraud, want of jurisdiction, usury, a discharge under an insolvent debtor's act or in bankruptcy, want of title in the plaintiff, tender, or other affirmative matter of defense, or pleads a set-off or counter claim—in all such cases the plaintiff has nothing to prove in order to recover; upon a default an inquiry of damages would be unnecessary; and, therefore, the right to begin and reply is with the defendant." (Thompson on Trials, sec. 231.) He cites the cases to which the reader is referred.

The defense of usury is an affirmative one, which, being proven, the burden is on the plaintiff below to show it is a

bona fide purchaser for value before maturity, and, therefore, entitled to protection. This alone, however, will not give it the right to open and close, as the necessity for such proof depends upon the condition that the defendant below establish the usury. Otherwise it can make no difference to him whether the plaintiff below is a purchaser for value or not, as the amount of consideration for the indorsement would be no defense in favor of the maker of the note. The defendant, therefore, was entitled to open and close.

2. There is testimony in the record in regard to the indorsement from which different minds might draw different conclusions, and it should have been submitted to the jury. (*Houck v. Gue*, 30 Neb., 113; *C., B. & Q. R. Co. v. Barnard*, 32 Id., 306.) As there must be a new trial, we do not care to comment on this testimony, or say anything which might be used to influence the jury on the next trial. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

ISAAC HAGGIN V. LOVISA HAGGIN.

[FILED OCTOBER 11, 1892.]

1. **Marriage**: SOLEMNIZED BY UNAUTHORIZED PERSON: VALIDITY. Where a marriage is solemnized before any person professing to be a justice of the peace, minister of the gospel, or other person authorized by law to solemnize marriages, and it is consummated with the full belief, on the part of the persons so married, or either of them, that they have been lawfully joined in wedlock, the marriage will be valid, although the person before whom it was solemnized had no authority.

2. ———: LICENSE NOT ESSENTIAL TO VALIDITY. A license to marry is but a preliminary step in the proceedings. It takes the place of proclamation of the bans in a church as practiced under the British ecclesiastical law, and, while the solemnization of a marriage without a license would render the party performing the ceremony liable, it will not affect the validity of the marriage, if otherwise legal.

3. ———: FOREIGN LAWS: FAILURE TO PLEAD. In the absence of pleading and proof to the contrary, the laws of another state will be presumed to be like our own.

4. **Action by Wife Against Husband.** On the facts set forth in the petition, *held*, that the wife could not recover from her husband upon the cause of action therein stated, but that she was entitled to have satisfaction of a former judgment for alimony set aside and the judgment reinstated. Leave given to remit $1,375 from judgment.

ERROR to the district court for Saline county. Tried below before MORRIS, J.

Abbott & Abbott, for plaintiff in error.

Hastings & McGintie, contra.

MAXWELL, CH. J.

This action was brought in the court below by the defendant in error against the plaintiff in error to recover damages, and on the trial the jury returned a verdict in her favor for the sum of $1,675, upon which judgment was rendered. There is no bill of exceptions, and the only question is the sufficiency of the petition to sustain the judgment. The petition is as follows:

"The plaintiff Lovisa E. Haggin complains of the defendant Isaac Haggin and says, that on the 22d day of June, A. D. 1886, she was, as the wife of said defendant, divorced from said defendant by a decree of district court of said Saline county, Nebraska, and that the said plaintiff recovered a judgment of $300, her alimony against said defendant, at the same time and in said court and that

thereafter, to-wit, on or about the 17th day of August, 1886, the said defendant again proposed marriage to said plaintiff and was accepted by said plaintiff, the said defendant telling said plaintiff at the time that it would be necessary to go to the state of Kansas to have the marriage ceremony performed, by reason of having been divorced in the state of Nebraska, and that plaintiff, believing the story of the said defendant, and relying on the same, was induced to, and did go with said defendant to the said state of Kansas on the 20th day of August, A. D. 1886; and that on the 20th day of August, A. D. 1886, at the American House, in the city of Washington, in the county of Washington, in the state of Kansas, the said defendant had a marriage ceremony performed by a reputed clergyman, between said plaintiff and defendant, the said plaintiff believing the representations of said defendant made at said time, that said marriage was in accordance with the laws of the said state of Kansas and was made by a licensed clergyman and one duly empowered by the laws of the said state of Kansas to perform the said marriage rite, or ceremony, and that said marriage was on the part of said defendant made in good faith and for the purpose of living with said plaintiff as her husband, yet the said plaintiff avers that said marriage was not made in accordance with the laws of the state of Kansas, and was not performed by a licensed clergyman, nor by any one else having authority or the right to marry people, all of which said defendant well knew at the time, and that said marriage was a mock or false marriage ceremony, arranged and performed by the said defendant and the said reputed clergyman, who was a stranger to said plaintiff, for the purpose of basely deceiving said plaintiff, and to practice a fraud upon her and to induce said plaintiff, through the belief that she was the wife of said defendant, to receipt the aforesaid judgment for alimony in full, and to induce said plaintiff to go to the said state of Kansas to live, where said defendant agreed to go and live with

the plaintiff as soon as he could arrange his business in Nebraska.

"And the plaintiff further avers, that, believing that she was the wife of said defendant, and that she was honestly and legally married to said defendant, she did, on the day following said supposed marriage, viz., the 21st day of August, A. D. 1886, come back to Saline county, Nebraska, and lived and cohabited with the said defendant as his wife and did, at the solicitation of said defendant, and without value received and without receiving any pay therefor, on or about August 20, 1886, receipt the judgment docket of the district court of Saline county, Nebraska, for the said $300 alimony, and that at the solicitation and request of said defendant, she went, on the 24th day of September, 1886, to the said state of Kansas to live, where she remained without any means whatever except what she obtained by working out for other people, and being entirely destitute she was unable to return to Saline county, Nebraska, until the 14th day of November, 1887.

"Plaintiff further avers that said defendant now refuses to acknowledge said plaintiff as his wife, or to acknowledge the marriage ceremony as aforesaid as legal and binding, and denies that he is in any way bound to her, the said plaintiff.

"And said plaintiff further avers that she has, by reason of the fraud practiced upon her as aforesaid, in said false marriage, and by reason of the premises herein, been damaged in the sum of five thousand dollars.

"Wherefore plaintiff prays judgment against said defendant in the said sum of five thousand dollars, her damages so as aforesaid sustained, and the costs of this suit, and for such other and further relief as the nature of her case and equity may require."

The facts stated in the petition tend to show a valid marriage. In the absence of allegations to the contrary, the laws of Kansas in relation to marriage will be presumed

to be the same as the laws of this state. (*Moses v. Comstock*, 4 Neb., 519; Story's Conf. of Laws [7th ed.], secs. 637, 637*a*.) Section 1407 of the Consolidated Statutes provides: "No marriage solemnized before any person professing to be a justice of the peace, or a minister of the gospel, shall be deemed or adjudged to be void, nor shall the validity thereof be in any way affected on account of any want of jurisdiction or authority in such supposed justice or minister; *Provided*, The marriage be consummated with a full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage." The words "minister of the gospel" evidently were intended to include all clergymen of every denomination and faith. It will thus be seen that although the person who performed the marriage ceremony was not authorized to do so, yet if either party believed he was so authorized, the marriage will be valid. And although a license is required, yet a failure to procure the same, although it may render the person performing the ceremony liable, will not of itself affect the validity of the marriage. (2 Kent's Comm. [13th ed.], 86, note *b*; *Blackburn v. Crawfords*, 3 Wall. [U. S.], 185; *Carmichael v. State*, 12 O. St., 555.)

In the case last cited the plaintiff in error, who had a wife then living, was married a second time. The second marriage had been performed by a person who had no license or authority to perform the marriage ceremony. The court sustained a conviction for bigamy against the husband. It is said: "The act of the general assembly is 'An act regulating marriages;' it does not profess to create or confer a right to marry, but only to regulate the exercise of a right, the existence of which is pre-supposed. The consequences of denying validity and effect to the exercise of the right would be so serious that an intention to do so will not be inferred, but must be clearly expressed."

In *Meister v. Moore*, 96 U. S., 76, it is said: "A statute

may declare that no marriages shall be valid unless they are solemnized in a prescribed manner; but such an enactment is a very different thing from a law requiring all marriages to be entered into in the presence of a magistrate or a clergyman, or that it be preceded by a license or publication of bans, or be attested by witnesses. Such formal provisions may be construed as merely directory, instead of being treated as destructive of a common law right to form the marriage relation by words of present assent; and such, we think, has been the rule generally adopted in construing statutes regulating marriage. Whatever directions they may give respecting its formation or solemnization, courts have usually held a marriage good at common law to be good notwithstanding the statutes, unless they contain express words of nullity. (*Catterall v. Sweetman*, 1 Rob. Ecc. [Eng.], 304; *Port v. Port*, 70 Ill., 484; *Campbell v. Gullatt*, 43 Ala., 57; 14 Am. & Eng. Encyc. of Law, 514.)

The practice in Great Britain under the ecclesiastical laws or rules appears to be the announcement in a particular church of the intended marriage, the purpose being to give all persons who may oppose the marriage an opportunity to present their objections before the marriage takes place. (Pothier on Marriage, p. 2, C. 2; 1 Bouv., Law Dict. [14th ed.], 189.) The principal object is to prevent ill-advised and clandestine marriages. The statute requiring license is designed to take the place of publication of bans, and the law as to both is directory, and the failure to observe it does not affect the validity of the marriage. The marriage, therefore, was valid and the defendant in error is the wife of the plaintiff in error, and she cannot recover damages for a void marriage. There is but little doubt that such an action may be maintained by the party injured where by means of a pretense of marriage, but without validity, the plaintiff below had sustained wrongs of the kind mentioned in the petition.

Second—It is alleged that by means of said marriage the plaintiff below was induced to release the former judgment against the defendant below for alimony.

The petition, liberally construed, shows that this was effected through the false pretenses of the defendant below. The plaintiff below, so far as appears, is entitled to judgment for that amount with interest. The plaintiff below, therefore, has leave, within thirty days, to remit from the judgment the sum of $1,375, in which case the judgment will be affirmed; otherwise the judgment will be reversed and the cause remanded for further proceedings.

JUDGMENT ACCORDINGLY.

THE other judges concur.

FRANK TAYLOR ET AL. V. KEARNEY COUNTY.

[FILED OCTOBER 11, 1892.]

1. **County Treasurer:** FEES: COUNTIES UNDER TOWNSHIP ORGANIZATION. Sec. 20, ch. 28, Comp. Stats., allows the county treasurer certain fees "on all moneys collected by him," etc Sec. 87, ch. 77, provides that "The county treasurers shall be *ex-officio* county collectors of taxes within and for their respective counties, and in counties under township organization, town treasurers shall be the collectors of taxes in their respective townships," and sections 89 and 90 provide the manner in which taxes are to be collected. *Held*, That the words "on all moneys collected by him" (the county treasurer) refer solely to such taxes as he has collected from the taxpayers, and that he is not entitled to fees on moneys paid to him by township treasurers.
2. **The finding and judgment** upon other matters submitted are right and need not be reviewed at length.

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

B. F. Smith, and *Leese & Stewart*, for plaintiffs in error.

J. N. Wolff, and *St. Clair & McPheely*, *contra*.

MAXWELL, CH. J.

The plaintiff in error was treasurer of Kearney county for the years 1884, 1885, 1886, and 1887, having served two terms. During his first term the county was under township organization. In making settlement with the county board a dispute arose as to the right of the plaintiff in error to retain certain sums as fees, and the county brought this action to recover an alleged balance. The cause was submitted to the court on a stipulation of facts, as follows:

"It is hereby stipulated by the parties that in 1884 the following amounts were collected:

Total state tax collected	$7,305 33
Of this amount the treasurer collected	7,124 43
Paid to him by township treasurer	180 90
Total county tax	28,552 83
Of this amount he collected	28,046 82
By township treasurer	506 01
Total school tax	11,829 22
Of this amount he collected	11,536 83
Paid him by township treasurer	292 39
Treasurer also collected for fines	102 00
Liquor license	1,000 00
Peddler's license	12 50
State school apportionment	4,792 35

"Also paid to treasurer, other than tax, the following amounts:

County general fund, from Jensen	$498 25
County general fund, from Harding	24 45
School bond fund, village Minden	720 00

"And it is hereby stipulated that the court shall find:

"First, the amount of funds the treasurer is entitled to upon the taxes collected as above set forth.

"Second—As to whether the treasurer shall be entitled to charge fees upon the total amounts collected by himself and also paid to him by the township treasurer.

"Third—Whether the treasurer is entitled to charge fees upon the moneys paid to him other than taxes, and whether this should be included in the total amount of moneys collected by him.

"Fourth—Whether the treasurer shall be entitled to charge fees on school moneys, such as fines, liquor license, and peddler's license.

"Fifth—Whether or not the treasurer is entitled to charge fees on the state school apportionment.

"Sixth—It is further stipulated and agreed that the findings of the court as to the amount of fees the treasurer is entitled for the year 1884 shall be the basis for the years 1885–6–7, and that the computation shall be made upon such findings, and a judgment entered in accordance with this stipulation, and in certain other cause now pending, involving same questions and between same parties, being suit on bond for years 1886 and 1887."

* * * "Upon the pleadings, report of referee, the evidence, and stipulation the court finds:

"First—That treasurer is entitled to fees upon the total amount collected by him, but is not entitled to charge fees on money paid him by the township treasurer.

"Second—That the county treasurer is not entitled to fees upon money collected by others and paid to him, and such moneys should not be included in the total amount of money collected by him.

"Third—That the county treasurer is not entitled to fees on moneys paid to him received for liquor licenses, peddler's licenses, fines, forfeiture of recognizances, belonging to the school fund collected by city treasurers and others than said county treasurer; but pursuant to provis-

ions of section 2, subdivision 11, chapter 79, Statutes of Nebraska, and section 20, chapter 28, said Statutes of Nebraska, he is entitled to the commission of one per cent on all school moneys by him directly and actually collected and not collected by and paid over to him by others.

"Fourth—Pursuant to provisions of section 8, chapter 79, subdivision 11, Statutes of Nebraska, the county treasurer is not entitled to fees for receiving and disbursing the state school apportionment.

"The court finds there is due from defendants to plaintiff $720.98, and its costs taxed at $——."

The errors assigned will be noticed in their order.

First—That the treasurer is not entitled to fees upon money paid to him by the township treasurer.

Sec. 20, ch. 28, Comp. Stats., provides: "Each county treasurer shall receive for his services the following fees: On all moneys collected by him for each fiscal year under three thousand dollars, ten per cent; for all sums over three thousand dollars and under five thousand dollars, four per cent; on all sums over five thousand dollars, two per cent. On all sums collected, percentage shall be allowed but once, and in computing the amount collected for the purpose of charging percentage, all sums, from whatever fund derived, shall be included together, except the school fund. For going to the seat of government to settle with the state treasurer and returning therefrom, a traveling fee of ten cents per mile, to be paid out of the state treasury; for advertising and selling lands for delinquent tax, an additional fee of five per cent, to be collected only in case such lands are actually sold, and then in cash, of the person buying the same; but for all other cases and services the treasurer shall be paid in the same *pro rata* from the respective funds collected by him, whether the same be in money, state, or county warrants. On school moneys by him collected he shall receive a commission of but one per cent; and in all cases where persons outside of the

state apply to the treasurer by letter to pay taxes the treasurer is authorized to charge a fee of one dollar for each tax receipt by him sent to such person."

Sec. 87, ch. 77, provides: "The county treasurers shall be *ex officio* county collectors of taxes within and for their respective counties, and in counties under township organization town treasurers shall be the collectors of taxes in their respective townships, and the treasurer of each city or village, not included within the limits of any township, shall be the collector of taxes therein."

Sec. 89 provides: "No demand for taxes shall be necessary, but it shall be the duty of every person subject to taxation under the laws of the state to attend at the treasurer's office at the county seat and pay his taxes; *Provided*, That in counties under township organization the town collector shall, as soon as he receives the tax book or books, call at least once on the person taxed at his place of residence or business, if in town, city, or village, and shall demand payment of the taxes charged to him on his property. And if any person neglect so to attend and pay his personal taxes, or shall neglect and refuse after being called upon by the town collector, until after the 1st day of January next, after such taxes become due, the treasurer, either by himself or deputy, or the sheriff of the county, when directed by distress warrant issued by said treasurer to said sheriff or the town collector, is directed to levy and collect the same, together with the penalty and costs of collection by distress and sale of personal property belonging to such person, in the manner provided by law for the levy and sale on execution, and the treasurer and town collector shall be entitled to the same fees for their services as are allowed by law for selling property under execution; *Provided*, That in case no personal property of the delinquent can be found, it shall be the duty of the treasurer and town collector, when directed so to do by order of the board of county commissioners or the board of supervisors, to com-

mence suit by civil action in the district court of said county in the same manner as other civil actions are commenced, and prosecute the same to judgment and collection by attachment, execution, or garnishment, as the case may require, and that no property whatever shall be exempt from levy and sale under process issued on the judgment obtained in such action; and in case judgment shall be recovered, costs shall follow the judgment without regard to the amount of said judgment; *Provided, further*, That in case any person having personal property assessed, and upon which the taxes are unpaid, shall, in the opinion of the treasurer and town collector, be about to remove out of the county or in any other manner seek to put his personal property out of the reach of the treasurer or collector, it shall be the duty of the treasurer and town collector to collect such taxes by distress or attachment, as the case may require, at any time after the tax has become due, etc.

Sec. 90 authorizes the treasurer in certain cases to distrain goods, etc.

Sec. 101 provides: "If any collector shall fail to appear and make final settlement, or pay over the amount in his hands, when required in this chapter, the county clerk shall forthwith cause the bond of such collector to be put in suit, and recovery may be had thereon for the amount due from such collector as charged in his tax list, less the credits to which he may be entitled under the provisions of this chapter, and costs of suit. No act or settlement by such collector after the commencement of any such action shall avoid his liability for costs of such suit."

It will be seen that the township treasurer is to collect the taxes from the taxpayers and pay the same over to the county treasurer at a certain time, and in case he fails to perform his duty the county clerk—not the treasurer—is to bring suit upon his bond. The words "collect taxes," as used in the statute, mean to obtain payment of the same

from the taxpayers. In most cases such payments will be made voluntarily, but the power to collect carries with it the authority to use force in the manner pointed out by law to obtain payment. The theory and intention of the law are that taxes shall be equitably and fairly distributed so that no person shall be required to pay more than his just proportion and that every one who possesses property shall pay. The securing of these taxes from taxpayers, therefore, is the collection referred to in the statute for which fees are to be allowed. But it is said there was no provision at the time indicated for the payment of fees to township treasurers. That question does not arise in this case and need not be considered. The fees allowed the county treasurer are regulated by law and he can claim nothing as fees because of an alleged failure to provide for some other officer. It is claimed, under the construction here given, the fees of the county treasurer would be so reduced as to make the office unprofitable. The remedy, however, is with the legislature and not the court.

Second—The finding and judgment of the court upon the other matters involved seem to be right and need not be reviewed at length. The judgment is right and is

AFFIRMED.

THE other judges concur.

GEORGE A. HOAGLAND V. GEORGE A. WAY ET AL.

[FILED OCTOBER 11, 1892.]

1. **District Courts: ERROR IN ENTRY OF DECREE: CORRECTION AFTER TERM.** A district court has the power to correct a mistake in the record entry of a decree at a term subsequent to that at which it was rendered so as to make the same correspond

to the decree actually pronounced by the court, and to conform to the pleadings in the case.

2. ——: ——: ——: WAIVER. The taking of a stay of order of sale by the defendant is not a waiver of his right to apply to the district court, under the provisions of sec. 602 of the Code, for the correction of a mistake in the record entry of the decree.

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

Switzler & McIntosh, and *H. Whitmore*, for plaintiff in error:

The trial court was without authority to change the decree at a subsequent term by petition filed after stay of execution had been entered. (*Miller v. Hyers*, 11 Neb., 474; *Sullivan v. Clark*, 12 Id., 578; *Banks v. Hitchcock*, 20 Id., 315.)

E. A. Fletcher, and *M. A. Hartigan*, *contra*.

NORVAL, J.

The facts are undisputed, and briefly stated are these: W. B. Mendenhall, one of the defendants in error, brought his action in the district court of Franklin county against George A. Way and Lydia J. Way, to foreclose a mortgage executed by them, and covering the south half of the southeast quarter of section 25, in township 2 north, range 15 west; also lots 9 and 10 in block 1 of the Academy addition to the village of Franklin. To the suit, plaintiff in error, George A. Hoagland, and the Security State Bank, N. A. Smith, and Franklin County Lumber Company were made defendants. The Security State Bank filed an answer and cross-petition praying the foreclosure of a mortgage upon the above described real estate, executed by the the Ways. George A. Hoagland also filed an answer and cross-petition asking the foreclosure of a mortgage given to him by the Ways upon said eighty-acre tract. The

cause was submitted to the court on the 28th day of January, 1890, upon the pleadings and evidence; and on the same day the court entered a decree of foreclosure, which gave Mendenhall a prior lien for $653.08, the Security State Bank a second lien for $159.73, and Hoagland a third lien for $824.60. By the decree the lots, as well as the eighty-acre tract, were ordered to be sold and the proceeds of sale directed to be brought into court and applied to the payment of the liens in the order of their priority.

On the 10th day of February, 1890, the Ways filed with the clerk of the court a written request for a stay of the order of sale. On May 9, following, the Ways filed a petition in the district court setting up that the decree, as prepared and enrolled, did not conform to the pleadings, in that it gave Hoagland a lien upon said lots 8 and 9, which constituted the homestead of the Ways, although the lots were not included in his mortgage, nor were they described in his cross-petition. That the decree as signed and enrolled was drafted, prepared, and submitted by the counsel for Mendenhall and the Security State Bank, without the same having been submitted for amendment or inspection to the counsel of the Ways, and that it was signed by the court without the knowledge of its conditions, contents, operations, and effect, and praying that said decree be corrected and modified so as to confirm to the pleadings and proofs. To this petition all the parties in interest appeared and answered. The cause came on for hearing at the May term of court on the 24th day of June, 1890, and the court found that the decree was incorrect, and the same was modified and corrected to conform to the pleadings. By the modified decree Hoagland was not given a lien upon said lots 9 and 10. This is assigned for error.

Ample power is conferred upon a district court to correct or modify a judgment, at a term subsequent to that at which it was rendered, for errors or mistake of the clerk, or for any irregularity in procuring it to be entered, so as

to make the record correspond to the judgment actually pronounced by the court, and to conform to the pleadings in the case. (Code, secs. 602, 603, 604.) It is undisputed that Hoagland's mortgage did not cover the lots above mentioned, yet by mistake, in drawing the original decree, he was given a lien upon these lots, and they were ordered to be sold and the proceeds applied in satisfaction of the same. A bare inspection of the original pleadings is sufficient to show that such mistake occurred in preparing the decree, as Hoagland in his cross-petition did not claim a lien upon said lots. Under the statute the district court had jurisdiction to correct or modify the decree at a term of court subsequent to that at which it was entered. (*Garrison v. People*, 6 Neb., 274; *Wilkins v. Wilkins*, 26 Id., 235; *Brownlee v. Davidson*, 28 Id., 785.)

It is urged that, as the execution of the original decree was stayed by the Ways, the trial court had no jurisdiction to afterward change or modify the decree. We cannot adopt this view. By section 477*e* of the Code it is provided that "no proceedings in error or appeal shall be allowed after such stay has been taken," etc. It is upon this provision, and certain decisions of this court that counsel for plaintiff in error rely. We are unable to perceive that the statutory provision quoted has any application to the case at bar. The object and purpose of its enactment was to deprive a suitor of the right to prosecute an appeal or petition in error to reverse the judgment after taking a stay. The Ways, after having taken the statutory stay, could not have the original decree reviewed in this court, but the filing of the request for a stay did not have the effect to deprive them of the right to apply to the district court, under the provisions of section 602 of the Code, for correction of the record entry of the decree, so that the same should conform to the pleading and the decree actually rendered. To so hold would be contrary to both the letter and spirit of the quoted section of the statute relating to the stay of executions and orders of sale.

The three cases cited in the brief of plaintiff in error do not conflict with the conclusion we have reached, as a brief examination will disclose.

In the case of *Miller v. Hyers*, 11 Neb., 474, it appears that one Jacob Lefever obtained a decree of foreclosure of a mortgage in the district court of Cass county against Jason G. Miller and wife. Within the time fixed by law the Millers filed with the clerk of the court a written request for a stay. After the expiration of the stay an order of sale was issued and placed in the hands of Hyers, as sheriff, for execution, who proceeded to advertise the mortgaged premises for sale. Miller thereupon commenced an action setting up a defense to the original cause of action in the foreclosure suit, and obtained an injunction restraining Hyers and Lefever from proceeding with the sale. The defendants set up in their answer the fact of the entry of the stay of the order of sale, and upon the hearing the district court dissolved the injunction and dismissed the suit. On error to this court it was ruled that by taking the stay Miller waived any error in the foreclosure suit. In the case before us the Ways did not attempt to urge a defense to the original suit in the application to correct the decree.

Banks v. Hitchcock, 20 Neb., 315, was an appeal from an order of the district court, denying a new trial, applied for under the provisions of section 318 of the Code, after the applicant had obtained a stay of execution. It was held that the taking of a stay was a waiver of the right to apply for a new trial. Clearly the doctrine announced in these two cases should not be further extended. The case of *Sullivan Savings Institution v. Clark*, 12 Neb., 578, was an appeal from a decree of foreclosure of a mortgage. At a subsequent term of the district court Clark, after filing a request for a stay of the order of sale, applied to the district court to correct the judgment by allowing him $150 in addition to the sum allowed him in the decree. It was held, and we think correctly, that by taking a stay he

waived the right to have the decree reviewed on error or appeal. We are of the opinion that the district court did not err in correcting the decree, and the decision is

AFFIRMED.

THE other judges concur.

CHARLES A. CARLSON, APPELLEE, V. ANDREW BECKMAN ET AL., APPELLANTS.

[FILED OCTOBER 11, 1892.]

1. **Bill of Exceptions**: SETTLEMENT IN CASES TRIED BEFORE REFEREE. It is the duty of a referee to settle and sign the bill of exceptions in a case tried before him. Neither the district judge nor the clerk of the district court has any authority to sign a bill of exceptions in such a case.
2. ———: MOTION TO QUASH: PRACTICE. A motion to dismiss an appeal will not be sustained on the ground that the bill of exceptions attached to the transcript filed in this court was not properly signed. Objections to a bill of exceptions must be raised by motion to quash.
3. **Accounting**: DEMAND: COSTS. In an action for an accounting, by a principal against his agent, the defendant in his answer denied that he was indebted to plaintiff, or that he had any moneys or property belonging to him, and averred that he had accounted for all matters in controversy prior to the bringing of the suit, and also contested the case all through the trial upon the theory that nothing was due from him. It was *held*, that the plaintiff was not required to prove a demand for an accounting prior to instituting the suit, in order to entitle him to recover costs.
4. ———: COSTS. That the judgment against the defendant in such an action is less than $200 will not alone prevent the plaintiff from recovering his costs, since a justice of the peace has no jurisdiction of that kind of a case.

APPEAL from the district court for Burt county. Heard below before CLARKSON, J.

Sears & Thomas, for appellants.

H. H. Bowes, contra.

NORVAL, J.

This action was brought in the court below by appellee against appellants for an accounting. The cause was referred to Robert B. Daley, Esq., to take the testimony and report the same to the court with his findings of fact and conclusion of law thereon. The referee found that appellants were indebted to appellee in the sum of $440.10. On the coming in of the report the appellee filed a motion to confirm the same, and exceptions to the report were filed by the appellants. The district court sustained the exceptions as to certain findings of the referee, and modified the report by reducing the amount due from appellants to $189, and judgment was rendered in favor of the appellee for said sum and costs. Appellants filed a motion to tax the costs to appellee, which was overruled by the court, and an exception was taken to the ruling.

The appellee moves to dismiss the appeal because the bill of exceptions was not settled and allowed by the referee, who heard the cause. An inspection of the record shows that the bill of exceptions was never signed by the referee, but was settled by both the district judge and the clerk of the district court. It has been frequently held by this court that in a case tried before a referee the bill of exceptions should be signed by him and not by the judge. Neither the judge nor clerk had any authority to settle the bill. (*Light v. Kennard*, 10 Neb., 330; *Turner v. Turner*, 12 Id., 161, *State, ex rel. Dunterman, v. Gaslin*, 30 Id., 651.)

The objection urged against the bill of exceptions should have been raised by motion to quash and not by motion to dismiss the appeal. The failure of the referee to sign the bill is not sufficient ground for dismissing the appeal.

As was said by LAKE, Ch. J., in *Hollenbeck v. Tarkinson*, 14 Neb., 430: "Although a bill of exceptions may possibly embody all the grounds on which a reversal of the judgment is sought, and but for which there would necessarily be an affirmance, still we regard it as the better practice, when it is desired to raise the question of its validity, to do so by a motion to quash. By pursuing this course we are relieved of the duty of examining the record to ascertain whether it may not present, as records not infrequently do, other questions for consideration than those depending on the bill of exceptions." (*Mewis v. Johnson Harvester Co.*, 5 Neb., 217; *Baldwin v. Foss*, 14 Id., 455.) The motion to dismiss is overruled.

While we could have entirely disregarded the bill of exceptions because the same was not settled by the referee, so as to make it a part of the record in the case, we have examined the testimony contained in the bill, for the purpose of ascertaining whether it sustains the judgment. While the evidence relating to some of the items involved in the accounting is conflicting, that introduced by the appellee, we are convinced, is ample to support the findings of the referee as modified by the court below.

The only question yet remaining to be considered by us is, Who should pay the costs of the action? Appellants insist that they should not, for two reasons: First, no demand was made by appellee for an accounting before he instituted the suit; second, the amount of the recovery is less than $200. The rule is that an agent ordinarily will not be charged with the costs and expenses of a suit brought by the principal for an accounting where no demand therefor has been made upon the agent before the bringing of the action. In this case appellee introduced evidence tending to show that appellants, prior to the bringing of the suit, were called upon for an accounting and settlement, and that the request was not complied with. Besides, appellants, in their amended answer, deny that they

were indebted to the appellee in any sum whatever, or that they have any money, notes, or property of any kind belonging to him, but aver that they have accounted to him at different times, for all the matters in controversy, just preceding the bringing of this suit. The record also shows that appellants contested the case all through the trial on the theory that nothing was due from them to appellee. Such being the condition of the answer, and the attitude of appellants on the trial, it was unnecessary to prove that a request for an accounting was made, for it is obvious if such a demand had been made, it would not have been complied with. The law does not require the performance of a useless act. Had the appellants desired to be relieved of the payment of costs, they should have shown a willingness by their pleading, and upon the trial, to render a full and complete account of their transactions with the appellee.

There is no merit in the second ground urged by appellants why they should not be charged with the costs of this case. The fact that the judgment was less than $200 is no valid reason why appellee should not recover his costs. This being an action for an accounting growing out of fiduciary relations, a justice of the peace had no jurisdiction of the case. The district courts alone have original jurisdiction of this kind of an action, therefore the party who shall pay the costs is not determined by the amount of the recovery. The judgment of the district court is

AFFIRMED.

THE other judges concur.

W. S. WEIR v. S. J. ANTHONY.

[FILED OCTOBER 11, 1892.]

Contract of Guaranty: ASSIGNMENT: RIGHT OF ASSIGNEE TO MAINTAIN ACTION. Under the statute of this state, a contract of guaranty is assignable, and the assignee may maintain an action thereon in his own name.

ERROR to the district court for Clay county. Tried below before MORRIS, J.

Prickett & Pope, for plaintiff in error, cited, as to right of assignee to sue on contract of guaranty in his own name: *Craig v. Parkis*, 40 N. Y., 181; *Stillman v. Northrup*, 17 N. E. Rep. [N. Y.], 379; *Waldron v. Harring*, 28 Mich., 493; *Bank v. Carpenter*, 41 Ia., 518.

J. L. Epperson, and *Charles H. Epperson, contra*, cited: Brandt, Suretyship, secs. 35, 36, 97; 3 Kent, Comm., 183; 2 Parsons, Contracts, 3; 9 Am. & Eng. Enc. Law, 76; 1 Bouv., Law Dic., 645; 4 Lawson, Rights, Remedies, & Pr., 2737; 2 Daniels, Neg. Inst., sec. 1774; Story, Prom. Notes, sec. 484; *Smith v. Dickinson*, 6 Humph. [Tenn.], 261; *Smith v. Starr*, 4 Hun [N. Y.], 123; *Watson v. McLaren*, 19 Wend. [N. Y.], 559; *Walsh v. Bailie*, 10 Johns. [N. Y.], 80; *Bank v. Brady*, 3 McLean [U. S.], 269; *Mellen v. Whipple*, 1 Gray [Mass.], 317; *Colburn v. Phillips*, 13 Id., 69; *Blymire v. Boistle*, 6 Watts [Pa.], 182; *Fortune v. Brazier*, 10 Ala., 793; *Grant v. Naylor*, 4 Cranch [U. S.], 224; *McDoal v. Yeomans*, 8 Watts [Pa.], 361; *Ekel v. Snevily*, 3 Watts & S. [Pa.], 272; *Ten Eyck v. Brown*, 4 Chand. [Wis.], 151; *Sanford v. Norton*, 14 Vt., 233.

NORVAL, J.

This action was brought by W. S. Weir against S. J. Anthony in the county court of Clay county, upon a writ-

ten contract of guaranty made by the defendant to recover the amount of three certain promissory notes executed by one William Watson, payable to the order of the Weir Plow Company, and transferred to the plaintiff.

The petition alleges, substantially, that William Watson, on the 7th day of September, 1886, executed and delivered to the Weir Plow Company his three promissory notes of that date, payable to its order; two for the sum of $132.41 each, with ten per cent interest from November 1, 1886, due December 15, 1886, and January 15, 1887, respectively, and the other note for the sum of $166.10, payable November 1, 1887, with interest at ten per cent from June 1, 1887; that no payments have been made upon said notes, except the sum of $26 on January 12, 1887, $5 on January 29, 1887, and $53.95 on June 24, 1887. The petition further alleges: "That said notes were given for goods bought of said Weir Plow Company by Wm. Watson subsequent to the 20th day of January, 1886, and during that year; that on the said 20th day of January, 1886, said defendant executed and delivered to plaintiff his special promise in writing to answer for the debt of said Wm. Watson, as evidenced by the above promissory notes, in words and figures as follows:

"'GUARANTY.

"'In consideration of the credit which Weir Plow Company may extend to Wm. Watson, of Fairfield, Neb., upon the within contract, and of one dollar to me in hand paid by said Weir Plow Company, the receipt whereof is hereby acknowledged, I hereby guarantee to said Weir Plow Company the complete fulfillment of said contract upon the part of said Wm. Watson, and payment at maturity of all notes and accounts made by said Wm. Watson in pursuance of said contract, including also payment of all goods that said Wm. Watson may order of said Weir Plow Company subsequent to this date and during the

year 1886. I further guarantee payment to said Weir Plow Company of all notes at maturity that may be taken by them in full or part payment of the indebtedness of said Wm. Watson, under this contract, and also payment of all notes taken by them in payment of any indebtedness of said Wm. Watson to said Weir Plow Company for implements ordered by him subsequent to this date and during the year 1886, whether said notes are the notes of Wm. Watson or other persons. I hereby waive all notices to me, as guarantor, of default in payment of any of said notes or accounts. (Signed) S. J. ANTHONY.'

"The plaintiff alleges that in consideration of said guarantee, and relying upon the same, the Weir Plow Company afterwards sold said Wm. Watson implements as per bills hereto attached marked Exhibits 'A,' 'B,' and 'C,' and on September 7, 1886, took said Wm. Watson's notes, as above mentioned, for balance due for said goods and implements so sold and delivered on the faith and credit of the said guarantee of defendant. When said notes became due they were duly presented for payment to Wm. Watson and refused, except as above set forth, and Mr. S. J. Anthony, the defendant, was then promptly requested to pay the same. No part of said notes have been paid and there is now due from the defendant to the plaintiff the sum of $600.

"The plaintiff further alleges that on the —— day of ——, 188–, the said Weir Plow Company, for valuable consideration, duly transferred and delivered to the plaintiff the above mentioned promissory notes and guaranty as follows:

"'Without recourse pay to the order of W. S. Weir.

"'WEIR PLOW COMPANY,

"'Per W. M. GOLBROTH,

"'*Ass't Cashier.*'"

To the petition the defendant filed a demurrer, alleging two grounds:

First—That the plaintiff had no legal capacity to sue.

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

The demurrer was sustained by the county court and the action dismissed. Plaintiff prosecuted a petition in error to the district court, where the decision of the county court was affirmed.

The only point presented for the consideration of this court is this: Is the contract of guaranty set out in the petition assignable, so as to vest the right to bring the action thereon in the name of the assignee?

It is argued by counsel for defendant that, as the guaranty sued on was made to the Weir Plow Company, the contract was personal to the party to whom it was made, and therefore it was neither negotiable nor assignable. At common law, a contract of guaranty could not be assigned so as to enable the assignee to enforce the same in his own name. But under our statute this rule is changed. Sections 29 and 30 of the Code of Civil Procedure are as follows:

"Sec. 29. Every action must be prosecuted in the name of the real party in interest," etc.

"Sec. 30. The assignee of a thing in action may maintain an action thereon in his own name and behalf without the name of the assignor."

Under these provisions, where a contract of guaranty is transferred by assignment, the assignee is vested with power to sue and recover upon it in his own name. Plaintiff is the real party in interest and is the proper and only party who can maintain the suit. (*Mills v. Murry*, 1 Neb., 327; *Hoagland v. Van Etten*, 23 Id., 462; *First Natl. Bank of Dubuque v. Carpenter*, 41 Ia., 518; *Lemmon v. Strong*, 59 Conn., 448; *Craig v. Parkis*, 40 N. Y., 181; *Stillman v. Northrup*, 109 Id., 473; *Everson v. Gere*, 122 Id., 290; *Waldron v. Harring*, 28 Mich., 493.)

The authorities cited by counsel for defendant are not

applicable, for the reason that they are from states having statutes unlike ours and where the common law rule as to the assignability of a contract of guaranty prevails. It follows that the demurrer to the petition should have been overruled. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

ROBERT HENDRESCHKE V. HARVARD HIGH SCHOOL DISTRICT.

[FILED OCTOBER 11, 1892.]

1. **Special Tribunal:** JURISDICTION EXCLUSIVE. Where a statute upon a particular subject has provided a special tribunal for the determination of questions pertaining to such subject, the jurisdiction of such tribunal is exclusive, unless otherwise expressed or clearly implied from the act.
2. **County Superintendent:** JURISDICTION: SCHOOL DISTRICTS. The county superintendent in this state has exclusive original jurisdiction in all matters pertaining to the division of counties into school districts.

ERROR to the district court for Clay county. Tried below before MORRIS, J.

Thomas H. Matters, for plaintiff in error.

Leslie G. Hurd, and *T. A. Barbour*, *contra*.

POST, J.

The only question presented by the record in this case is that of the original jurisdiction of the district court as

a court of equity to create new school districts, or by decree to change the boundaries of existing ones. The district court resolved this question against the plaintiff in error by an order sustaining a demurrer to his petition. We fully agree with the district court that under the provisions of our school law, section 4, subdivision 1, chapter 79, Compiled Statutes, the county superintendent of schools has exclusive original jurisdiction of all matters pertaining to the division of counties into school districts. The rule is well settled that where a statute upon a particular subject has provided a special tribunal for the determination of questions pertaining to that subject, the jurisdiction thus conferred is exclusive, unless otherwise expressed or clearly manifested. (Hawes, Jurisdiction, 36; *Macklot v. Davenport*, 17 Ia., 379; *Dodson v. Scraggs*, 47 Mo., 285.) Such in effect has been the holding of this court. (*State v. Palmer*, 18 Neb., 644; *State v. C., St. P., M. & O. R. Co.*, 19 Id., 476; *Cowles v. School District*, 23 Id., 655; *State v. Clary*, 25 Id., 403.) The judgment of the district court is

AFFIRMED.

THE other judges concur.

STATE OF NEBRASKA, EX REL. CUSTER COUNTY AGRICULTURAL SOCIETY AND LIVE STOCK EXCHANGE, V. JOHN ROBINSON ET AL.

[FILED OCTOBER 11, 1892.]

1. **Constitution: LAWS: TITLE OF ACT.** The provision of section 11, article 3, of the constitution, that "No bill shall contain more than one subject, and the same shall be clearly expressed in its title," has no application to laws in force at the time of the adoption thereof.

2. ———: SPECIAL LEGISLATION: AGRICULTURAL SOCIETIES. The provision of section 12, chapter 2, Compiled Statutes, entitled "Agriculture," for the payment to agricultural societies complying with the provisions thereof, of a sum equal to three cents for each inhabitant from the county general fund of the several counties, does not conflict with the provisions of section 15, article 3, of the constitution.

3. ———: LEGISLATIVE POWER. The legislature has authority under the constitution to determine what purposes are matters of public concern, so as to render taxation therefor admissible.

4. **Agricultural Societies: DEFINED.** Agricultural societies are not corporations within the ordinary meaning of the term, but rather agencies adopted by the state for the purpose of promoting the interests of agriculture and manufacturing.

5. ———: AID BY TAXATION: MANDAMUS TO COUNTY BOARD. In a *mandamus* proceeding to compel the board of supervisors to include in the estimate of expenses for the current year the amount payable to an agricultural society by provision of statute, the fact that another society in the same county has complied with the conditions necessary to entitle it to demand payment from the county is no defense where it does not appear that such society is making any claim upon the county for funds under the provisions of the statute.

ORIGINAL application for *mandamus*.

J. S. Kirkpatrick, and *Sullivan & Gutterson*, for relator.

E. P. Campbell, County Attorney, contra.

POST, J.

This is an original application for a writ of *mandamus* to compel the respondents, who comprise the board of supervisors of Custer county, to include in their estimate of expenses for the year 1892 an amount sufficient to pay to the relator three cents for each inhabitant of said county for the years 1891 and 1892 in accordance with the provisions of section 12, chapter 2, Compiled Statutes, entitled "Agriculture." It appears from the allegations of the petition, none of which are denied, that the relator is an agri-

cultural society duly and legally organized in conformity with the statute in question, and that it has complied with all the requirements of law to entitle it to demand from the county the sum of money provided for by the section above referred to. The first objection raised by the respondents is that the law is unconstitutional for the reason that the title of the original act is not sufficiently comprehensive to include the section under consideration, which provides for payment out of the county general fund to county agricultural societies complying with the requirement thereof, a sum in each year equal to three cents for each inhabitant of the several counties. The act in question was passed by the territorial legislature in the year 1866 and at the time of its passage contained the features which it is now claimed render it unconstitutional and void. Although it has been amended frequently it is conceded that the amendments are not material to the questions raised and need not for that reason be noticed. The provisions of the constitution with reference to titles of acts have no application to laws then existing. It was expressly provided by the constitution of 1866, section 1, article 11, that laws then in force should remain in force until repealed or amended by the legislature, and the same provision is found in section 1, article 16, of our present constitution.

Second—It is urged as an objection to the law that it contravenes section 15, article 3, of the constitution, which provides that "The legislature shall not pass local or special laws * * * granting to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise whatever." We are unable to perceive wherein the law is susceptible of such a construction. The limitation contained in the above section of the constitution was evidently intended as a remedy for the evil of special legislation and cannot by any reasonable or natural construction be held to apply to the act under consid-

eration. It has been frequently held by this court that a law which is general and uniform throughout the state, and operates alike upon all persons or localities which come within the relations and circumstances provided for, is not objectionable to the constitution or wanting in uniformity. (*State v. Berka*, 20 Neb., 375; *Lancaster Co. v. Trimble*, 33 Id., 121.) The act in question is certainly uniform in its operation, and applicable alike to all counties in the state, and is in no sense a special law within the meaning of the constitution.

Third—As a general rule, under the constitution the legislature is invested with authority to determine what purposes are matters of public concern, so as to render taxation admissible. (Cooley, Taxation, 103.)

There has been no reason suggested in the argument, and none occurs to us, for excluding agricultural and horticultural exhibitions from the list of public enterprises for which taxes may be imposed. It is provided by section 13 of the act that premiums shall be awarded for improvement of the soil, crops, tillage, manures, implements, stock, articles of domestic industry, and such other articles, productions, and improvements as they (the society) may deem proper, and best calculated to promote the agricultural and manufacturing interests of the county and state. Agricultural societies are not corporations in the ordinary sense of the term, but rather agencies of the state created for the purpose of assisting in promoting our most important industry. Among the general purposes for which taxes are imposed, Adam Smith enumerates: 1. Public works and institutions for facilitating the commerce of society. 2. Institutions for the education of youth. 3. Institutions for the instruction of people of all ages. Doctor Wayland, in his work on the same subject, includes among the purposes for which public funds may be expended, expenses for maintaining education, which he classifies as common and scientific. (See also Cooley on Taxation, 106 and 107,

and cases cited.) The purpose for which the money is appropriated is, when viewed in the light of authority, clearly one of public utility, and, therefore, permissible under the constitution.

Fourth—A further objection to the writ is raised in the answer, viz., that another society, to-wit, The Callaway Agricultural Society, is also duly organized and has complied with all the requirements of statute to entitle it to demand payment of the money provided by law. There is no merit in this contention, since it does not appear that the Callaway Agricultural Society held an exhibition in either of the years in question, or that it makes any claim to contribution from the treasury of the county. It is admitted that the amount due relator for the year 1891, was included in the estimate for that year, but that respondents refused to allow the claim or draw a warrant therefor. It is further admitted that the general fund levy for the year 1891 has been exhausted in the payment of other legitimate expenses of the county, and that relator's claim for that year must be paid out of the levy for subsequent years. That claim is a valid and subsisting indebtedness of the county and should have been included in the estimate for 1892, together with the amount payable to relator in that year. The relator is entitled to the relief sought, and a peremptory writ of *mandamus* is

ALLOWED.

THE other judges concur.

FERDINAND STREITZ, APPELLANT, V. A. J. FREDERICK HARTMAN ET AL., APPELLEES.

[FILED OCTOBER 13, 1892.]

1. **Cumbering Record: COSTS.** Where unnecessary papers are included in the transcript, as the original petition where there is an amended one, the summons and return to the same, together with motions and demurrers to the petition where no point is made upon such pleadings or papers, the costs of the same will be taxed to the party at fault.
2. **Trusts: RIGHTS OF TRUSTEE.** The members of an association joined together and purchased a tract of land near O., the title being taken in the name of a trustee. The land was platted into eighty-four lots, seven acres being reserved for the trustee. One lot was given to J. B. for services, and the other lots were conveyed to the several shareholders, who each received his deed in full satisfaction of the trust. *Held*, That a grantee from a shareholder could not open up the trust and require the trustee to account and convey to him land not included in his purchase, and that there was no equity in his petition.
3. ———: LACHES: ENFORCEMENT OF STALE CLAIMS. It is not the policy of the law to enforce stale claims which are asserted after the witnesses are dispersed or dead.
4. **Statute of Limitations.** The action is barred by the statute of limitations.

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

Switzler & McIntosh, for appellant.

Edward W. Simeral, Mahoney, Minahan & Smyth, Congdon, Clarkson & Hunt, and *A. J. Poppleton, contra.*

MAXWELL, CH. J.

It is alleged in the petition, in substance, that on the 10th day of May, 1857, there was organized at Dubuque,

Iowa, an association known as the Homestead Society, for the purpose of procuring for the members thereof a quantity of real estate at or near Omaha; that in pursuance of the purpose of the organization, forty acres of land were purchased and the title to the same taken in the name of John George Hartman, trustee for the several shareholders; that Hartman took immediate possession of the land and laid the same out as an addition to Omaha; and a plat of said addition was duly filed in the county clerk's office; that said addition was divided into eighty-four lots, which were to be given to the members of said association according to the interest or share of each member; that by the terms of the articles of association each member was entitled to recover one full lot and a fraction of a lot for each fraction of a share possessed by him; that there was a mistake in surveying and platting said ground, by reason of which the point of beginning the survey was placed thirty-five feet north and seventeen and one-half feet east of the actual corner, hence on the opposite side of the tract, the survey overlapped upon lands owned by others from seventeen and one-half to thirty-five feet; that by reason of said mistake there still remains, unappropriated, a strip of ground (giving boundaries) about 980 feet in length by thirty-five in width; that no part of said strip has been conveyed by Hartman as trustee; that the plaintiff owns lots 1, 2, 3, 4, and 23 in said addition; that certain lots named border on the overlap, and hence are short from seventeen and one-half to thirty-five feet in length, and the plaintiff asks to be compensated for said deficiency out of the unappropriated strip above referred to; that the last named lots were conveyed to the original shareholders as full lots, but by said mistake the grantees did not obtain their full share; that the plaintiff has succeeded to the rights of said grantees.

The plaintiff then sets out what he claims to be the interest of some of the lot-owners and says: "That by reason

of the shortage in the lots as above set forth there has been an inequitable distribution of said property; that whereas nearly all of the original shareholders have received full lots, this plaintiff and those under whom he claims received only fractions thereof as above stated, and consequently he has been greatly damaged in his said rights, which he alleges should be made good out of the unused and unsold strip referred to above.

"The plaintiff prays the court that an accounting may be had of the amount of land due him by virtue of the facts as hereinbefore stated and set forth, and that whenever the same is ascertained, the said trustee be decreed to convey to him as much of said strip of land as would reimburse him for said loss and shortage; that his title to the same be quieted as against the other defendants and their successors or grantees, and for such further relief as in equity may seem just and proper."

The defendant John G. Hartman, is dead, but the action proceeded against his sons, who answered, in substance, that they admit the organization of the association, the trust character of the land purchased, and allege that the land was divided into eighty-four lots and conveyances duly made to the several shareholders, eighty-three in number, and the eighty-fourth lot was conveyed to William Banner for services rendered the association; that the strip of land in controversy is not in their possession, but is possessed by other parties who have acquired a title by adverse possession; that seven acres of the land were donated to John G. Hartman for his services in the discharge of the trust; that the plaintiff was not a *cestui que trust* of said Hartman and has no claim upon him whatever; that three of the shareholders have not come forward to claim a share in said land; that each grantee under whom the plaintiff claims title "took said lots from the trustee in full of all claims and demands which he had against said trustee (Hartman), and that therefore no

trust relation existed between said trustee and any of his said grantees." There is also the defense of adverse possession for more than ten years.

It is unnecessary to set out the substance of the other pleadings.

On the trial of the cause the court found that, as to the Hartmans, the amended petition fails to show any equity in behalf of the plaintiff, and as to the other defendants fails to state a cause of action. The court therefore found the issues in favor of the defendants and dismissed the action.

In the record we find the original petition, although no point is made on it. There is also the summons and return, although the defendants appeared in the case. Then there is an amended petition, etc. These unnecessary papers tend to incumber the record and consume the time of the court, as in order to ascertain what questions are in issue the pleadings are read in their order, and no time should be wasted over papers not properly in the case; and the costs of such papers will, in all cases, be taxed to the party at fault.

Second—The judgment of the court below is clearly right.

Where a trustee conveys to a *cestui que trust* in satisfaction of the trust and he is satisfied, being of full age and capable of contracting, his grantee cannot bring an action upon the trust agreement—in effect, to open up the trust and for a redistribution.

Third—It is very clear also that as each conveyance was made, the person receiving the same accepted it in full of his share of the trust estate, and the trustee was thereupon, in effect as to that trust, discharged, and as to each, the statute of limitations began to run from that time.

It is not the policy of the law to keep alive stale claims, and enforce them after many of the witnesses are gone, no one knows where, or are dead. This trust was undertaken

nearly thirty-five years ago and many of the deeds to the shareholders were made but a few years short of that time. No attempt was made within a reasonable time to question the trust, and it has never, so far as appears, been questioned by any of the original shareholders. The plaintiff appears to be a speculator in the claims and fails to show any equity in his petition. He purchased certain lots. The size of such lots was well known or could easily have been ascertained. The mistake, which is admitted, had been made a third of a century ago and the plaintiff is not in a condition to rectify it, nor indeed could all the *cestuis que trust* together do so. The judgment is

AFFIRMED.

THE other judges concur.

CAPITAL NATIONAL BANK, APPELLANT, V. JOHN W. WILLIAMS ET AL., APPELLEES.

[FILED OCTOBER 13, 1892.]

1. **Mortgage**: PROMISSORY NOTE: FORGED SIGNATURE: WEIGHT OF EVIDENCE. In an action to foreclose a mortgage upon real estate, the jury found that the purported maker did not sign either the note or mortgage, and the verdict being set aside, substantially the same findings were made by the trial court. A number of genuine signatures of the defendant were submitted to the jury and court for a comparison of handwriting, and such signatures are preserved in the record; but the proof fails to reach that degree of certainty to show that the judgment of the court below is clearly wrong.

2. ———: FORGERY: CANCELLATION OF LIEN. *Held*, That the evidence tended to establish the fact that the mortgage was a forgery, and that a judgment canceling the apparent lien caused by such mortgage on the real estate was right.

APPEAL from the district court for Fillmore county. Heard below before MORRIS, J.

John P. Maule, and *Charles H. Sloan*, for appellant.

Ong & Jensen, contra.

MAXWELL, CH. J.

This action was brought to foreclose a mortgage upon real estate. The note which the alleged mortgage was given to secure is as follows:

"$790.30. FAIRMONT, NEB., January 19, 1887.

"January 19, 1890, after date, for value received, I, or we, promise to pay I. B. Chase, or order, seven hundred and ninety and $\frac{30}{100}$ dollars at First National Bank, Fairmont, Neb., with interest at ten per cent per annum after date. JOHN W. WILLIAMS."

The defendant filed an answer to the petition as follows:

"Now comes the defendant, John W. Williams and for a further and more specific answer * * * says that he never executed the note described in plaintiff's petition, nor the mortgage purporting to secure the same, upon the land therein described and which he is informed and believes has been spread upon the records in the office of the recorder of deeds in the county of Fillmore, in the state of Nebraska, and never authorized any person to sign said note or said mortgage for him, and never acknowledged before any officer authorized by law to take acknowledgments of deeds or mortgages the execution thereof, and never delivered such a note or mortgage, or either of them, to I. B. Chase, or any other person or corporation whatsoever.

* * * "That at the time said note and mortgage purported to have been executed he was living with his family, Sarah A. Williams and five children, upon said

land, and was occupying the same as a homestead, and had been so occupying the same for several years prior thereto, and has occupied the said land as aforesaid since the time the said mortgage purports to have been executed, and up to the 1st day of March, A. D. 1890, and that said mortgage does not purport to be executed or acknowledged by the said Sarah A. Williams, wife of this defendant, and would, therefore, in any event be void. He therefore prays that the petition be dismissed on final hearing and that this defendant recover his costs."

To this answer the plaintiff filed a reply as follows:

"Plaintiff says that when said note and mortgage were by said defendant executed and delivered, said premises so mortgaged were worth $6,000, or above all incumbrances the sum of $3,800; that as a matter of fact that said premises have been recently heretofore sold by said defendant, to-wit, on or about the —— day of ——, A. D. 1889, to one Benj. Le Fevre, co-defendant herein, for the sum of $5,500, or for the sum of $3,300 above all incumbrances; that from said $3,300 there has been an amount sufficient to pay plaintiff's demand deposited in the Citizens Bank of Geneva, and the same is there still on deposit, subject to the outcome of this suit, and that after the deduction of the amount of said deposit for said purpose from said $3,300 there remains more than the sum of $2,000, claimed by the defendant as exemptions under the laws of the state of Nebraska, if the court should find that defendant is entitled to any exemption."

On the trial of the cause special questions were submitted to the jury: First, Did Williams sign the note in question? and second, Did he sign the mortgage sought to be foreclosed? To both of these questions the jury answered "No."

A motion was filed on behalf of plaintiff to set aside the verdict: First, because the jury was impaneled at the request of the court, and second, because the verdict was

against the weight of evidence. The motion was thereupon sustained and the verdict set aside.

The cause was then submitted to the court upon the evidence, which found the issues in favor of the defendant, and that the mortgage was a forgery, fraudulent, and canceled the same and dismissed the action.

Williams denies absolutely the making of either the note or mortgage. The note purporting to be signed by Williams was submitted to the jury, and ten other instruments which contained his genuine signature, to enable the court and jury to compare the signature on the note with his signatures admitted to be genuine. The originals are before us. It is true that the signature on the note is very similar to the signatures on two of the papers which are admitted to contain his genuine signature. The proof, however, fails to show that the finding and judgment of the court are clearly wrong and therefore cannot be disturbed.

Second—The original mortgage was not produced. The existence of a genuine mortgage was denied. There was a failure to account for the original in a satisfactory manner and the proof tends to show that the mortgage never had any legal existence. The purported note and mortgage were transferred to the plaintiff by an insolvent bank in Fairmont as collateral security, but the plaintiff possesses no greater rights than its assignor.

It is unnecessary to consider the other questions, as the mortgage has no validity. The judgment of the district court is

AFFIRMED.

THE other judges concur.

HENRY A. HOMAN ET AL. V. MARIA HELLMAN, EXECUTRIX.

[FILED OCTOBER 26, 1892.]

1. **Action to Quiet Title: AMENDING PETITION TO STATE CAUSE OF ACTION IN EJECTMENT.** An action was brought by a party out of possession to quiet and confirm his title to real estate. In his answer the defendant made the objection that the action would not lie, and the court sustained the objection; thereupon the court permitted the plaintiff, upon payment of all costs, to amend his petition to state a cause of action in ejectment *Held*, No error.
2. **Practice: AMENDMENT OF PLEADINGS.** So long as the subject of the action remains substantially the same, an amendment may be permitted to adapt the relief to the facts relied upon for a recovery.
3. **Judgments: MODIFICATION WITHOUT NOTICE VOID.** A decree foreclosing a mortgage upon real estate is a final judgment upon which the parties to the suit may rely, and any change therein or modification thereof without lawful notice, particularly after the term at which it was rendered, is null and void.

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

Hall & McCulloch, for plaintiffs in error:

Where decree has once been entered, no supplemental order can be made without notice, and the findings in the original decree are conclusive upon the parties thereto. (*Mulvey v. Carpenter*, 78 Ill., 586; *Blake v. McMurtry*, 25 Neb., 291; *Symns v. Noxon*, 29 Id., 404.)

H. D. Estabrook, and *Irvine & Clapp, contra:*

The amendment of the petition did not change the object of the action, which was the enforcement of plaintiffs' right to the land. It has been the practice of this court to permit such amendment. (*McKeighan v. Hopkins*, 14 Neb.,

361; S. C., 19 Id., 33; *Gregory v. Lancaster County Bank*, 16 Neb., 411.) The proceedings on which supplemental order was obtained in foreclosure suit were regular: First—Because the court still retained jurisdiction of the case. Decree of foreclosure is not such a final decree as removes the case from the docket. Court retains jurisdiction to carry decree into effect, as well as to determine rights reserved, and complete the foreclosure in accordance with those rights. (*Brinckerhoff v. Thallhimer*, 2 Johns. Ch. [N. Y.], 486; *Coffey v. Coffey*, 16 Ill, 141; *Sessions v. Peay*, 23 Ark., 39; *Suffern v. Johnson*, 1 Paige [N. Y.], 450; *Boone v. Clark*, 21 N. E. Rep. [Ill.], 850.) Second—Court may order execution of deed, already ordered years before, where the former order was not complied with. (*Lamb v. Sherman*, 19 Neb., 688.) Third—The mortgagee is shown affirmatively to have received notice of the proceeding. Fourth—The court was one of general jurisdiction, and it is presumed all acts were done necessary to confer jurisdiction. (*Hilton v. Bachman*, 24 Neb., 490; *Seward v. Didier*, 16 Id., 58; *Hastings Sch. Dist. v. Caldwell*, 16 Id., 72; *Saxon v. Cain*, 19 Id., 491; *O'Brien v. Gaslin*, 20 Id., 347.)

MAXWELL, CH. J.

In March, 1887, the defendant in error brought an action in the district court of Douglas county against the plaintiffs in error to remove a cloud and quiet the title to the northwest quarter of the northeast quarter of section 34, township 16 north, of range 13 east, in Douglas county. An amended answer was filed by the defendant below in which he alleged that the plaintiff below was not in possession of the land, and therefore could not maintain an action to quiet title, and the court so held. The plaintiff below thereupon asked leave to amend his petition so as to bring the action in ejectment. This leave was granted upon the payment of all costs; and this is the first error complained of.

There was no error in permitting the amendment. In *McKeighan v. Hopkins*, 14 Neb., 361, and the same case, 19 Neb., 33, an action was brought in ejectment and an amendment permitted to make the action one to redeem. To the same effect, *Gregory v. Lancaster Co. Bank*, 16 Neb., 411. These cases were decided upon the theory that so long as the action relates to the same thing the form may be changed so as to adapt the relief to the facts proved. It is true that under the common law and chancery practice such an amendment would not have been allowed, but under the Code, so long as the identity of the subject of action remains substantially the same, the form of the remedy may be changed. (*Robinson v. Willoughby*, 67 N. Car., 84; *Bullard v. Johnson*, 65 Id., 436; *Roberts v. Swearingen*, 8 Neb., 363; *Caldwell v. Meshew*, 13 S. W. Rep. [Ark.], 761; *Barnes v. Hekla Ins. Co.*, 39 N. W. Rep. [Ia.], 122; *Esch v. Home Ins. Co.*, 43 Id. 229; *Argersinger v. Levor*, 54 Hun [N. Y.], 613; *Gourley v. St. L., etc., Ry. Co.*, 35 Mo. App., 87; Maxw., Code Pl., 578.)

Second—It appears from the record that in August, 1857, an instrument was executed, purporting to be a deed of the Florence Land Company for the northeast quarter of section No. 34, in township 16 north, of range 13 east, containing 160 acres, which was pre-empted by John Seltzer, on which was laid land warrant No. 30,908 in the name of John S. Mink, and by the said John Seltzer conveyed to the Florence Land Company. This deed is signed by Philip C. Chapman and attested by James C. Mitchell, and is acknowledged. This deed, although absolute in form, was, in fact, a mortgage, and in February, 1860, Parker brought an action against the Florence Land Company to have the deed declared a mortgage and foreclosed; and a decree was entered as prayed for in the petition, and a deed executed to Parker on the 20th of July, 1860, by one J. G. Chapman as master in chancery.

On the 26th of March, 1858, the Florence Land Com-

pany gave a promissory note to James G. Megeath, and in October, 1859, he brought suit thereon, and recovered a judgment July 6, 1860; and on the 22d of September, 1863, an execution was duly issued on the judgment, and the land in controversy sold to Charles H. Brown, who afterwards conveyed to Joseph Megeath, who conveyed to Homan & Bingham.

In 1868 Parker sold 160 acres of land, including that in controversy, to George W. Forbes, who gave a purchase money mortgage to Parker. In May, 1876, Parker brought an action to foreclose the mortgage, and Lucinda Randolph, who had purchased the forty acres in controversy, was made a defendant with some twenty others, the general allegation as to their interests being as follows:

"The said plaintiff also says that the said defendant Forbes has not paid the taxes levied and assessed against the said premises, but has suffered the same to become delinquent, and that the said premises, or a portion thereof, have been sold for taxes.

"The said plaintiff also says that the other defendants herein named have, or claim, some interest in, or lien upon, the said premises, or some portion thereof, either by purchase or by mortgage or judgment liens, or otherwise, but of the exact nature or extent of the said interest or liens, the said plaintiff is not advised, but plaintiff alleges that the said interests or liens of whatever kind or nature were all acquired subsequent to the execution and recording of the said mortgage to the said plaintiff hereinbefore described, and are subject thereto."

In its decree the court found that Parker had redeemed the northeast quarter of the southwest quarter of section 34, and paid therefor the sum of $184.32, and found the amount due on the mortgage to be the sum of $2,966.67. The court, after directing the sale of a portion of the mortgaged premises, rendered a decree as follows:

"And the court further finds that since the execution

of the said mortgage the said Forbes has suffered a portion of the said lands in said petition described, to-wit, the northwest quarter of the northeast quarter of the said section 34, to be sold for taxes, and that the time for the redemption of the same having expired, a deed was made to the purchaser at said tax sale for said lands by the county treasurer of said county, and that the said purchaser now holds the tax title to said lands.

"And the court further finds that since the execution of said mortgage the said Forbes has sold and conveyed to different purchasers, and at different times, portions of the said lands in said mortgage described, designating the same as lots in said Forbes's subdivision of the southwest quarter of said section 34, and that the said portions so sold were designated and conveyed in the following order to-wit:

"First—Lots 5 and 6 in said subdivision, to A. Rosenberry, March 24, 1869.

"Second—Lot 4 in said subdivision, to Darius Pearce, April 5, 1869.

"Third—Lot 3 in said subdivision, to John H. Burnett, November 16, 1871.

"Fourth—Lot 8 in said subdivision, to Mortimer A. McCoy, August 14, 1872.

"Fifth—Lot 7 in said subdivision, to J. W. Dorsey, March 8, 1873.

And the said Forbes still holds the legal title to lots 1 and 2 in said subdivision, and also to the northeast quarter of the southwest quarter of said section 34.

"It is therefore ordered and adjudged that the said defendant George W. Forbes do, within twenty days from this date, pay to the said plaintiff the said sum of $2,966.67, the amount so found due upon said note and mortgage herein, and the further sum of $248.32, the sums paid to redeem said lands from sales for taxes as aforesaid, with interest on all of said sums from the first day of this term and the costs of this suit, and that in default thereof the

said land in the petition be sold by the sheriff at the time of said county of Douglas, and that in making said sale the said sheriff observe the subdivision into lots which has been made by the said Forbes of the northwest quarter of the southwest quarter of said section 34, township 16, range 13 east, and that the sale of said lots and lands be made in the following order:

"First—The northeast quarter of the southwest quarter of section 34, township 16, range 13, and lots 1 and 2 of Forbes's subdivision of the southwest quarter of said section 34, township 16, range 13, and if the proceeds of the sale of said portions of said lands shall be insufficient to satisfy the amounts hereinbefore found due to the plaintiff with interest and costs, it is further ordered and adjudged that the said sheriff proceed to sell the remaining lots in said Forbes's subdivision of said southwest quarter of said section 34, which are situated in the north half of said southwest quarter of said section, or so many thereof as may be necessary to make the balance which may be still due to the said plaintiff herein, with interest and costs, and that in selling said lots he proceed in the inverse order of said conveyance so made by the said Forbes thereof, commencing with the lot No. 7, sold to the said J. W. Dorsey, being the last lot sold in the order of conveyances, and proceeding in said inverse order to sell so many and no more of said lots as may be necessary to satisfy the balance which may remain due to the said plaintiff, with interest and costs, and that if any surplus should remain therefrom, the said sheriff return the same into court for further order, and out of the proceeds of said sale the said sheriff is ordered to pay," etc.

This decree was entered at the October term, 1877, of the district court of Douglas county. In September, 1880, the attorney of Parker filed the following in the district court:

"District Court, Douglas County, October Term, A. D. 1887.

"JAMES M. PARKER
v.
GEORGE W. FORBES ET AL. } Decree.

"The said James W. Forbes, plaintiff, now comes and represents to the court that all the property described in the decree rendered in the above entitled cause, and therein ordered to be sold, has been sold by the sheriff as required by said decree, and that the total proceeds of said sale were insufficient to satisfy the amount found due to the said plaintiff under said decree and costs.

"Wherefore the said plaintiff prays that a supplementary decree may be entered herein, ordering and directing the sale by the sheriff of the remaining forty acres included in the mortgage given by the said Forbes to plaintiff, described in the original petition, and which was not ordered to be sold in the original decree entered herein, to-wit, the northwest quarter of the northeast quarter of section No. 34, township No. 16, range 13 east, to satisfy the balance remaining due on said decree and costs."

The plaintiff's attorney filed an affidavit that he notified Forbes by letter; that he was then at Deadwood, Dakota, and that Forbes acknowledged the receipt of the letter. No other notice appears to have been given. The court thereupon made the following order:

"This cause coming on to be heard this day on the petition of the said plaintiff for an order directing the sale of the remaining forty acres of land included in the mortgage described in the original petition herein, and the court being satisfied that due notice has been given of this application, and it appearing that there was still remaining due on the first day of this term a balance of $182.28 on the original decree rendered herein, after applying the proceeds of the sale of all the real estate described in the said original decree which was sold thereunder:

"It is ordered that the forty acres of land in said original decree described and which remains unsold, to-wit, the northwest quarter of the northeast quarter of section 34, township 16, range 13 east, be sold by the sheriff at the time of said county of Douglas according to law, and that out of the proceeds of said sale he pay, first, the costs of said sale and of this proceeding; second, the balance remaining due as aforesaid upon said original decree as hereinbefore found, with interest, and that the surplus, if any, he return into court to abide its further order, and that upon the return of said sheriff of said sale and the confirmation thereof the said George W. Forbes and all persons claiming through or under him be forever excluded from all right, interest or equity of redemption in or to said premises above described or any part thereof," and the plaintiff below claims title under this supplemental decree.

Under this decree the land was sold to Ellen P. Forbes, the wife of James Forbes, for the sum of $107, the sale was confirmed and a deed made by the sheriff to her, and afterwards she made a deed for said land to the defendant in error. The court below found the issues in favor of the defendant in error and rendered judgment accordingly.

The defendant below claims title under the sale on the Megeath judgment and a deed from Lucinda Randolph. On the trial of the cause the defendant below offered in evidence a deed from Lucinda Randolph to the plaintiffs in error for the land in question. This was objected to, as being irrelevant, incompetent, and no title having been shown in Lucinda Randolph. The objection was sustained and the deed excluded. In this we think the court erred, but in the view we take of the case it is not material, as the plaintiff below failed to show title in himself. The decree rendered in 1877 was final so far as the rights of persons affected thereby were concerned. Any party deeming himself aggrieved thereby could have appealed to

the supreme court. The plaintiff in error and also Lucinda Randolph could rest upon the decree as rendered until they were notified in some of the modes provided by law for modifying or vacating the same, and any attempt to change it without such notice is a nullity. This question was before this court in *Blake v. McMurtry*, 25 Neb., 290, and it was held that a modification of a decree without notice to a party affected thereby was null and void and of no effect. It is not the policy of the law to conduct proceedings in court secretly or surreptitiously or without notice. To so hold would open the door to gross frauds. There was no authority, therefore, to render the supplemental decree in 1880, and the sale and all proceedings thereunder are void.

There are other errors in the record which need not be noticed. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

ELIZABETH YEATMAN V. ELIZABETH J. YEATMAN.

[FILED OCTOBER 26, 1892.]

Allowance by County Judge of Claim Against Estate of Decedent: COLLATERAL ATTACK. An order of a county judge, duly made without fraud or collusion, allowing a claim against the estate of a deceased person is a final order, and unless appealed from will be conclusive and have the effect of a judgment and not be open to collateral attack.

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

M. A. Hartigan, and *J. C. Hartigan*, for plaintiff in error.

Tibbets, Morey & Ferris, contra.

MAXWELL, CH. J.

In 1879 one Griffin Yeatman made and delivered to the plaintiff a promissory note as follows:

"$500. HASTINGS, ADAMS CO., NEB., June 1, 1879.

"One year after date I promise to pay to Elizabeth Yeatman, or order, the sum of five hundred dollars, with lawful interest, without defalcation, for value received.

"(Signed) GRIFFIN YEATMAN."

Prior to September, 1886, Griffin Yeatman died and Elizabeth J. Yeatman was appointed administratrix of his estate. On the 10th of that month the note in question was allowed with other claims against said estate. The record entry is as follows:

"In the matter of allowance of claims against the estate of Griffin Yeatman, deceased.

"September 10, 1886. Comes now Elizabeth J. Yeatman, administratrix of the estate of Griffin Yeatman, deceased, and claims filed against estate examined, approved, and allowed by this court as follows respectively:

"The claimant, Elizabeth Yeatman, being present with the administratrix, and amount of her claim agreed on.

"Patrick McNeal, note, $200, with interest at eight per cent from December 1, 1885.

"Elizabeth Yeatman, note, $756, including interest to this date."

This order is duly signed by the county judge of Adams county and was evidently made after due notice. From this order no appeal was taken, and, so far as appears, that order is now in full force.

On November 25, 1889, the defendant in error presented her account to the county judge for final settlement, and the court, after allowing various items, made an order which, so far as it relates to this claim, is as follows:

"It is further found by the court that the claim of Elizabeth Yeatman was duly allowed against said estate of Griffin Yeatman, deceased, on September 10, 1886, in the sum of seven hundred and fifty-six dollars; that all other claims allowed against said estate have been paid, but that said administratrix has neglected and refused to pay said claim of Elizabeth Yeatman, and has expended a large amount of money in payment of claims not allowed, as aforesaid, and in investments without authority of law or any order from the court, leaving said claim and interest unpaid." * * * "And it is further adjudged and ordered by this court that said Elizabeth J. Yeatman, administratrix of the estate of Griffin Yeatman, deceased, pay to said claimant, Elizabeth Yeatman, on her said claim of seven hundred and fifty-six dollars allowed against said estate, with accrued interest thereon at seven per cent per annum from September 10, 1886, the sum of eight hundred and eleven dollars and twenty-two cents, without further delay, and that said administratrix proceed to sell at private sale sufficient personal property belonging to said estate to pay the balance in full on said claim of Elizabeth Yeatman, and that said administratrix pay said claim in full and make due report thereof to this court."

From this order the plaintiff appealed to the district court. A motion was thereupon made in that court to quash the appeal because not taken within the time fixed by law. The motion was sustained and the appeal dismissed and that is the error complained of.

It is claimed on behalf of the appellant that the order of the county judge, September 10, 1886, allowing the account was not a final order and, therefore, that no appeal would lie therefrom. It is also claimed that the last order

copied above is the final judgment in the case. We think differently, however. The allowance of a claim against an estate is a judicial act and has all the force and effect of a judgment, and will be conclusive unless reversed or vacated in some of the modes provided by law. (*Shoemaker v. Brown*, 10 Kan., 383.) In this case it is said: "All their allowances of demands against the estate, all their settlements with administrators, indeed all their official acts requiring the exercise of judgment and discretion, are, in their nature, judicial determinations, and are binding upon all the property of the estate, and upon any interest in such property that any person may have as heir, devisee, or legatee. The settlements with administrators especially come within the jurisdiction."

In *Jameson v. Barber*, 56 Wis., 630, the same ruling was made. To the same effect, *Estate of Schroeder*, 46 Cal., 319; *Beckett v. Selover*, 7 Id., 239; *Deck's Estate v. Gherke*, 6 Id., 666; *Tutt v. Boyer*, 51 Mo., 425; *Jones v. Brinker*, 20 Id., 87; *Kennerly v. Shepley*, 15 Id., 640; *Cossitt v. Biscoe*, 12 Ark., 97; *Swann v. House*, 50 Tex., 650; *Campbell v. Strong*, Hempst. [U. S.], 265. In two states it appears to be held that the allowance of an account is not final and conclusive. (*State v. Bowen*, 45 Miss., 347; *Levering v. Levering*, 64 Md., 399; Black on Judgments, sec. 641.) In *State v. Buffalo Co.*, 6 Neb., 454, it was held that the allowance of an account by a county board was a judicial act, and unless appealed from, the order allowing the claim would be final and conclusive; and the same doctrine had previously been announced in *Brown v. Otoe Co.*, 6 Neb., 111. The allowance of the note as a claim against the estate on the 10th of September, 1886, was a final order.

The fact that the note was apparently barred by the statute of limitations cannot be considered at this time. The presumption is that the administratrix acted in good faith. Payments may have been made on the note which

were not endorsed thereon, or for other cause, which does not appear, the note may have been a binding obligation against the estate. If it was not, it was the duty of those entrusted with the settlement of the estate to take the necessary steps by appeal to contest the allowance of the same. Having failed to do so the estate is bound by the order allowing the same, and it is now too late to raise the objection. The appeal was properly dismissed and the judgment is

AFFIRMED.

THE other judges concur.

ELKHORN LAND & TOWN LOT CO. v. DIXON COUNTY ET AL.

[FILED OCTOBER 26, 1892.]

1. **Taxation:** PUBLIC LANDS: RAILROAD GRANTS. Upon the facts stated in the petition, *held*, that the railway company had earned the lands in controversy at the time the taxes were levied and that the state had, prior to said levy, parted with its title to the plaintiff's grantor and that the lands were taxable although the United States did not approve the selection of the state until after the levy of the taxes.
2. ———: LANDS OMITTED FROM ASSESSMENT ROLLS: AUTHORITY OF COUNTY CLERK TO ENTER. Under section 50 of chapter 46, Rev. Stats., the county clerk had authority, where lands in his county had not been assessed, to "enter the same upon the assessment roll and assess the value."

ERROR to the district court for Dixon county. Tried below before NORRIS, J.

Davis & Gantt, for plaintiff in error.

J. J. McCarthy, contra.

MAXWELL, CH. J.

This action was brought by the plaintiff against the defendants to have an alleged cloud removed from certain lands possessed by it in Dixon county caused by the levy of taxes thereon by the county clerk of Dixon county in July, 1871. The petition is too long to copy here. The cancellation of the alleged cloud is sought on two grounds, which will be noticed in their order.

First—It is alleged, in substance, that the plaintiff derives title from the state; that the state derived title under the act of September 4, 1841, granting five hundred thousand acres of land to each new state for purposes of internal improvement; that on April 16, 1870, the state selected the lands in question, which selection was approved by the United States, October 13, 1871; that on February 15, 1869, the legislature of the state passed an act donating certain of said lands to such railroad companies as complied with said act by building ten or more miles of railroad; that after February 15, 1869, and before November, 1871, the F., E. & M. V. R. Co. built its third ten miles of railroad and thereupon the governor appointed commissioners, who approved of the same, whereupon, on the 30th day of November, 1870, the governor, in compliance with said law, issued letters patent for said lands to said railroad company, which afterwards conveyed to the plaintiff. It will be observed that the lands were not assessed until the next year after the railway company had obtained its patents. The company, therefore, had not only earned its lands but the state had recognized its right to the same and conveyed its title.

The case falls directly within that of *White v. B. & M. R. Co.*, 5 Neb., 393. In that case the section of road in dispute had not been accepted until sometime after the lands were assessed. The evidence that the company had earned the lands by the construction of the required

twenty miles of railroad was the certificate of approval, and until that was obtained its absolute right to the lands did not attach; therefore, the tax was held to be void. In the case at bar, however, the railway company was the owner of the land when the tax was levied, and neither it nor the plaintiff has any just cause of complaint if the court denies it relief.

Second—It is alleged that the assessment was made by the county clerk and that he had no authority to assess the same. Section 50, chapter 46, of the Revised Statutes, which was then in force, was as follows: "If on the assessment roll or tax list there be any error in the name of the person assessed or taxed, the name may be changed, and the tax collected from the person intended, if he be taxable and can be identified by the assessor or treasurer, and when the treasurer, after the tax list is committed to him, shall ascertain that any land or other property is omitted he shall report the fact to the county clerk, who, upon being satisfied thereof, shall enter the same upon his assessment roll, and assess the value, and the treasurer shall enter it upon the tax list, and collect the tax as in other cases." Here is full power given the county clerk to make the assessment. There is no complaint that the property was assessed too high, or any ground stated for equitable relief. There is no equity in the petition and the judgment of the court below is

AFFIRMED.

THE other judges concur.

JOHN F. CARVER, APPELLANT, V. FRANK TAYLOR, APPELLEE.

[FILED OCTOBER 26, 1892.]

1. **Real Estate**: BREACH OF CONTRACT TO CONVEY: PETITION. *Held*, That the cause of action set forth in the petition relates solely to the breach of contract of the defendant to convey the real estate described in the petition.

2. ———: ———: MEASURE OF DAMAGES. In case of the breach of an executory contract to convey real estate where the vendor having title refuses or puts it beyond his power to convey, and no part of the consideration has been paid, the measure of damages which the vendee is entitled to recover is the value of the land at the time the contract should have been performed less the contract price.

3. ———: ———: ———: NOMINAL DAMAGES. Where the land is of less value than the contract price, the vendee is entitled to recover nominal damages for the breach of contract.

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

M. A. Hartigan, and *J. C. Hartigan*, for appellant.

Jno. M. Ragan, contra.

MAXWELL, CH. J.

The cause of action is set forth in the petition as follows:

"First—That on the 19th day of January, 1889, the plaintiff John F. Carver entered into a contract with the defendant Frank Taylor in words and figures as follows:

"'Agreement made and entered into this 19th day of January, 1889, by and between John F. Carver, of Allen county, Indiana, as agent, and Frank Taylor, of Adams county, Nebraska, in which agreement the said Frank Taylor, of the second part, agrees to convey by warranty

deed, clear of all incumbrances, the following described real estate, to-wit: Lots numbered 1, 2, 3, 4, 5, 6, and 7, in block number 2, in Birdsall's addition to the city of Hastings, Adams county, Nebraska; said lots front on Colorado avenue, and are each fifty feet front, running back one hundred and fifty feet to an alley on the west end of said lots. Said Frank Taylor also agrees to convey, by warranty deed, clear of all incumbrances, to said John F. Carver lot No. 8 in aforesaid addition; said lot also fronting on Colorado avenue to the east, and seventy-five feet front, and running back 150 feet to the aforesaid alley, said lot being in block No. 2 in Birdsall's addition to the city of Hastings.

"'It is mutually agreed that the aforesaid lots shall be rated at $8,000 in the exchange to be effected by this agreement and under its terms. In addition to the conveyance of the above described lots the said Frank Taylor agrees to pay to the said John F. Carver, or his order, $4,000 on the terms and conditions of this agreement. In consideration of the conveyance of the aforesaid lots and the payment of the $4,000 by the said Frank Taylor to the said John F. Carver, the said John F. Carver, of the first part, or agent, agrees to furnish to the said Frank Taylor, or the bank designated in this agreement, one case each, consisting of 10,000 cigars of the following brands of cigars, to-wit, one case of "Our Defense," one case "Flowers," one case of "Henry Clay," one case of "Iron King," one case of "American," one case "La Rosa," one case "The Stunner," one case the "Mountaineer," one case "Excelsior," one case "Royal Chiefs," and also eleven cases of "Peerless," and seven cases of "Our Pearl." The said Frank Taylor agrees to execute the aforesaid warranty deeds for the aforesaid lots, and deposit the same, together with abstracts, showing a complete and satisfactory title to be vested in said Frank Taylor to said lots, both deeds and abstracts to be deposited in trust

in the First National Bank of Hastings, Neb., to be held in trust by said bank under the provisions of this agreement, until said John F. Carver, or the manufacturers, shall furnish to said bank the required amount of cigar stock agreed upon in this contract. Said John F. Carver, of the first part, agrees to furnish the brands at the following rates per thousand, to-wit: "Our Pearl," $50 per M; "Peerless," at $38 per M; "Our Defense," at $35 per M; "Flowers," at $35 per M; "Henry Clay," at $40 per M; "Iron King," $39 per M; "American," $40 per M; "La Rosa," $49 per M; "The Stunner," $45 per M; "The Mountaineer," $45 per M; "The Excelsior," at $52 per M; "Royal Chief," $55 per M.'

"The further conditions of this agreement are as follows, to-wit:

"'The said Frank Taylor agrees to pay one-third in cash for any and all orders made under this agreement, the same to be paid out of the $4,000 deposited in the said bank by said Taylor. The said Frank Taylor agrees, on each and every order made under this agreement for cigar stock, to furnish a statement from said bank, and made out by officers of said bank, to said John F. Carver, that the aforesaid bank will pay the aforesaid one-third amount of each and every bill so ordered by the said Frank Taylor in cash, on receipt of the bill of lading and the goods from any railroad or express company that may deliver the goods to said bank on the order of said Frank Taylor to said John F. Carver, the amount to be paid in cash on the different brands per M, on receipt of the same, is as follows, to wit: "Peerless," $12.66⅔ per M; "Our Pearl," $16.66⅔ per M; "Our Defense," $11.66⅔ per M; "Flowers," $11.66⅔ per M; "Henry Clay," $13.33⅓ per M; "Iron King," $13 per M; "American," $13.33⅓ per M; "La Rosa," $15 per M; "The Stunner," $15 per M; "Mountaineer," $15 per M; "The Excelsior," $17.33⅓ per M; "Royal Chiefs,"

$18.33\frac{1}{3}$ per M. The said amounts to be paid by the aforesaid bank in cash on receipt of the bill of lading and the goods.

"'The said John F. Carver, as agent, agrees to deliver the said bill of goods as soon after the said Frank Taylor sends his order to the said John F. Carver, or the manufacturers, or the parties who furnish said stock to said John F. Carver deliver the same on John F. Carver's order for said stock in such amounts as said Frank Taylor shall order, when accompanied by the aforesaid statement from bank, that said bank will pay for said goods on receipt of same as specified in their agreement.

"'It is mutually agreed that said Frank Taylor shall furnish as many duplicates of said statement on each order as said John F. Carver may require, not to exceed five duplicates of each order and statement from bank. It is mutually agreed that the aforesaid bank shall hold in trust the aforesaid deeds for the aforesaid lots until their contract is fulfilled.

"'It is further agreed by said Frank Taylor that upon the completion of their contract, and filling the same by the delivery of the aforesaid amount of cigar stock, that the aforesaid bank shall turn over, and the said Frank Taylor hereby directs and empowers the said bank to turn over, the said deeds to John F. Carver, or his order, on the filling of this contract.

"'It is agreed that a sample of the aforesaid brands of cigars shall be deposited with the deeds and abstracts to the aforesaid lots, together with a copy of this agreement, in the aforesaid bank, to be held in trust by said bank for both parties to this agreement, and that the cigars furnished under the provisions of this agreement shall be of the brands specified, and conform in quality to said samples deposited in said bank, and the said Frank Taylor agrees to order in not less than case lots for any brand ordered at any time, and to order said goods in a reasonable time after said goods are packed and ready for shipment.

"'Said Frank Taylor agrees to pay all freight or expressage on said bill of goods from the points of shipment to the city of Hastings, Neb., said goods to be shipped as ordered, by freight or express as said Frank Taylor shall order same.

"'Witness our hands this 19th day of January, 1889.

"'JOHN F. CARVER.

"'FRANK TAYLOR.'

"Second—The plaintiff further shows unto the court that he has in all things pertaining to the said contract, its duties and obligations, fully performed the same; * * * that the defendant Frank Taylor has refused and still refuses to perform and fulfill the conditions of the said contract as he has undertaken so to do.

"Third— * * * That the lands and lots set out in the plaintiff's petition, and specifically designated in the contract as being lots 1, 2, 3, 4, 5, 6, and 7 in block No. 2, were in truth and in fact subdivided by the defendant Frank Taylor, and set out in the contract to represent a larger number of lots than the said space of ground in truth and in fact represents.

"Fourth— * * * That the said lands as truly described upon the plat of the city of Hastings, or the portion of said plat in which it is included, is truthfully and correctly described as follows: Lots 1 and 2, block 2, Birdsall's addition, or that the division and representation, as well as the description in the contract, was made for the false, fraudulent, and dishonest purposes of misleading, cheating, and defrauding this plaintiff.

"Fifth— * * * That he has no remedy outside of the court of equity by which he can obtain a full and fair redress of the wrongs and injuries, as well as the loss and damage caused to this plaintiff by this defendant's conduct.

"The plaintiff therefore prays that the court order, adjudge, and decree that the said defendant specifically perform and execute the said contract as by him made and agreed;

that said contract be corrected and reformed to cover and include the exact description of the said lands as the same are really described in the aforesaid plat, the said land being the land included in the said contract by erroneous, fraudulent, and deceptive description given by said defendant.

"The plaintiff further prays that should this honorable court find and declare that the said contract and agreement is not susceptible and subject to a specific performance, then, and in that event, the plaintiff prays that the said action may be retained by the court as an action at law, and that he should have and recover from said defendant his damages by reason of the premises in the same, and in the sum of $10,000, with his costs and disbursements in and about the said action made and expended."

To this petition an answer was filed, in which it is alleged that the defendant has conveyed the lots in dispute and therefore cannot convey the same. On the trial of the cause the court rendered judgment in favor of the plaintiff for five cents damages, from which the plaintiff appeals.

We have carefully read all the evidence and exhibits and are fully convinced that the judgment is right. It will be observed that the petition is framed to enforce specific performance, or to recover damages for the failure to convey the land. In such case the measure of damages, where, as in this case, the vendor had title when the conveyance should have been made, and refuses to convey or disables himself from so doing by parting with the title, is the value of the property at the time the contract was to be performed, less the purchase price. (*Dustin v. Newcomer*, 8 O., 50; *Hopkins v. Lee*, 6 Wheat. [U. S.], 109; *Wells v. Abernethy*, 5 Conn., 222.)

In *Hopkins v. Lee, supra*, the court says: "The rule is settled in this court that, in an action by the vendee for a breach of contract on the part of the vendor for not delivering the article, the measure of damages is its price at the

time of its breach. The price being settled by the contract, which is generally the case, makes no difference, nor ought it to make any; otherwise the vendor, if the article have risen in value, would always have it in his power to discharge himself from his contract, and put the enhanced value in his own pocket; nor can it make any difference in principle whether the contract be for real or personal property if the lands, as is the case here, have not been improved or built on. In both cases the vendee is entitled to have the thing agreed for at the contract price, and to sell it himself at its increased value. If it be withheld, the owner ought to make good to him the difference." The court in this case found that the defendant had acted in good faith and, in effect, that he was unable to convey to the plaintiff, but as the proof clearly shows that the land was of much less value than the price at which it was agreed the plaintiff should purchase the same, he suffered no actual damages by the refusal of the defendant to convey. The defendant, however, would be liable for nominal damages for a breach of the contract.

No facts are stated in the petition showing a loss of the plaintiff upon the cigars, and the proof upon that point is equally unsatisfactory. The plaintiff claims to have contracted for a part of the cigars, but what part he fails to state. He does not allege or claim that he had purchased and had, under the contract, any of the cigars. It is true he states in his testimony that he had contracted with three firms known to manufacture certain cigars for this contract, but he fails to state any fact from which the court would be justified in awarding him substantial damages. Upon the whole case it is apparent that the judgment is right and it is

AFFIRMED.

THE other judges concur.

WITHERS & KOLLS v. BRITTAIN, SMITH & CO. ET AL.

[FILED OCTOBER 26, 1892.]

Attachment: CONTRACT: UNLIQUIDATED DAMAGES RECOVERABLE ON ATTACHMENT BOND. An action upon an undertaking for an attachment is one arising upon contract and may be maintained by attachment against the property of a non-resident. The fact that the damages are unliquidated does not change the character of the action.

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

Thompson Brothers, for plaintiffs in error:

An action arising upon an attachment bond is an action on a contract. (*Raymond v. Green*, 12 Neb., 218.)

Thummel & Platt, contra:

Attachment will not lie for unliquidated damages resulting from the breach of contract, unless there is something in the contract itself which affords a rule by which they may be estimated. (*Clarks v. Wilson*, 3 Wash. [C. C. U. S.], 560; *Jeffery v. Wooley*, 5 Halstead [N. J. L.], 123; *Barber v. Robeson*, 3 Green [N. J. L.], 17; *Hazard v. Jordon*, 12 Ala., 180.)

MAXWELL, CH. J.

This action was brought by attachment on an undertaking as follows: "We bind ourselves to the defendants (meaning Withers & Kolls, plaintiffs) that the plaintiffs, Brittain, Smith & Co., shall pay to the said defendants the damages, not exceeding $2,500, which they may sustain by reason of the attachment in this action if the order thereof be wrongfully obtained," to recover the sum of $2,500 for the wrongful issuing of the attachment. Certain property of

the defendants was levied upon, whereupon they made a motion to dissolve the attachment, "Because the facts stated in the affidavit are not sufficient to justify the issuing the same; that the attachment bond mentioned in the said affidavit was sworn out by plaintiffs on a suit pending in the district court of Hall county, Nebraska, for damages, and not on contract, judgment or decree executed by the defendants Brittain, Smith & Co. and H. J. Palmer; that said H. J. Palmer is a resident of Hall county, Nebraska; that the action so pending is one for damages, yet unliquidated, unsettled, and undetermined, and there is no authority in law for the issuing the said writ of attachment against a non-resident of the state or otherwise." The motion was sustained and the attachment discharged.

The defendants are non-residents of the state and the sole question presented is, Does the cause of action arise upon contract?

Section 198 of the Code provides: "An attachment shall not be granted on the ground that the defendant is a foreign corporation, or a non-resident of the state, for any claim other than a debt or demand arising upon contract, judgment, or decree." An undertaking made in a legal proceeding is an agreement or contract in a certain contingency to perform certain acts, as if judgment is rendered in favor of the adverse party, to pay the judgment. So if an attachment is issued, an undertaking is given to pay the defendant all damages which he may sustain by reason of the attachment, if the order be wrongfully obtained. Here is an agreement to pay the damages if the attachment is dissolved; in effect, that if no sufficient cause existed for issuing the same, the party undertaking will compensate the one whose property is attached for the damages he may thereby sustain. Now, will any one contend that an action on the undertaking is not upon this agreement. The fact that the damages are unliquidated can make no difference. The contract limits the liability of the obligors to

the amount stated in the undertaking, so that in no event can it exceed that sum, but to the extent of the injury a recovery may be had up to that limit.

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

REVERSED AND REMANDED.

THE other judges concur.

FRED W. GRAY V. SCHOOL DISTRICT OF NORFOLK.

[FILED OCTOBER 26, 1892.]

1. **Statutory Bonds**: REQUIREMENTS: WAIVER: LIABILITY OF SURETIES. While a statutory bond must conform substantially to the requirement of the statute in respect to penalty, conditions, form, and number of sureties, yet, where two or more sureties are required and it is signed by but one, who by his words or acts waives additional sureties, he will be held liable.
2. **Contractor's Bond**: LIABILITY OF SURETIES. A surety on the bond of a contractor for the erection of a building is bound only in the manner and to the extent provided in the obligation, and if payments are made to the contractor in excess of the amounts due on the estimates, he will not be liable for such excess.
3. **Mandamus to School District.** *Held*, Upon the facts stated in the petition, that *mandamus* would lie.

ERROR to the district court for Madison county. Tried below before POWERS, J.

Wharton & Baird, for plaintiff in error.

Barnes & Tyler and *John R. Hays, contra.*

MAXWELL, CH. J.

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

"The relator, Fred W. Gray, of the city of Omaha, in Douglas county, Nebraska, respectfully states and informs the court that the school district of Norfolk, in the said county of Madison, on or about the 26th day of November, 1889, entered into a written agreement with one Martin T. Murphy, of Omaha, Nebraska, whereby the said Murphy agreed with the said school district of Norfolk, to well and sufficiently erect, furnish and deliver in a perfect, and thoroughly workmanlike manner, on or before the 1st day of August, 1890, a school house situated on lots 6 and 7, in block 5, of Koeninstein's first addition to the city of Norfolk, in said Madison county, Nebraska, according to the plans and specifications made and furnished by J. C. Stitt, architect, to the satisfaction and under the direction of said architect. In consideration of which the said school district agreed to pay the said Murphy the sum of $22,500. Providing in said contract, among other things, that on the first of each month during the progress of the work thereby agreed to be performed, the architect should make an estimate of the materials furnished on the ground and of the work done since the last previous estimate, and upon said estimate being furnished to the said school district in writing, it should thereupon pay the said Murphy eighty-five per cent of said estimate, and the remaining amount should be payable upon the completion of said school building. And providing further, amongst other things in said contract, that said school district should have the right, at their election, instead of paying on the architect's estimates to said Murphy the amount from time to time found due and payable, to pay the amount for material or labor on said building to the party or parties furnishing

the same, and that the receipts of such party or parties furnishing such material or labor should be accepted by said Murphy as so much cash in hand paid. And providing further in said contract, amongst other things, that should said Murphy, at any time during the progress of said building, refuse or neglect to supply a sufficiency of material or workmen, or cause any unreasonable neglect or suspension of work, or fail to comply with any of the said articles of agreement, the school board of said district, or any committee thereof, should have the power and right to enter upon and take possession of the premises and provide material and workmen sufficient to finish said buildings, after giving forty-eight hours' notice in writing and personally delivering to said Murphy, and that the expense of such notice and the finishing of the said building would be deducted from the amount of said contract. And providing further, amongst other things, that no assignment of said contract or any interest therein by said Murphy should be of any validity, or binding upon said school district unless the assent thereto of said school district should be obtained in writing. Which contract was duly signed by said school district and the said Martin T. Murphy, all of which will fully appear by reference to the same, a copy of which is herewith filed, marked 'Exhibit A' and made part hereof.

"Second—The relator further represents and informs the court that for the purpose of securing to said school district compliance with the terms of said contract, the said Martin T. Murphy, as principal, and Fred W. Gray, the relator, as surety, executed and delivered to the school board of said school district their bond in the penal sum of $10,000, bearing date November 26, 1889. Providing in said bond that the conditions of the same were such, that whereas the said Murphy had been awarded the contract for the erection and completion of a school building in Norfolk, Madison county, Nebraska, for the agreed price

of $22,500, that if the said Murphy should well and truly erect and complete said building according to the drawings, plans, and specifications prepared by the architect, J. C. Stitt, and that if the said Murphy should in all respects comply with his contract for the erection and completion of said building within the time mentioned in said contract, and should pay all laborers and mechanics for labor that should be performed, and all material-men for material that should be used in the erection of said building, and perform all said contract, then, in that case, said obligation should be void and of no effect, but otherwise should be and remain in full force and virtue. All of which will fully appear by reference to said bond, a copy of which is herewith filed, marked 'Exhibit B' and made part hereof.

"Third—The relator further represents and informs the court, that on or about the 1st day of December, 1890, the school board of said district notified the relator that said Martin T. Murphy had not complied with the terms of said contract in the erection of said school building, and demanded of the relator compliance with the terms of said contract, under and by virtue of the provisions of the said bond on which the relator was surety, and that accordingly the relator proceeded to confer with the said school board of said school district and the said Martin T. Murphy, and in consideration of the premises and of one dollar and for other good and valuable consideration and of the liability of the relator upon said bond, the relator secured from said Martin T. Murphy, by and with the knowledge and consent of the said school board, an assignment to him, the relator, of all right, title, and interest of the said Murphy, in or to said contract, and authority from said Murphy to collect from said school district the amounts due and to become due on said contract; which assignment and authority was given by said Murphy, in writing, on the 11th day of December, 1890, as will fully appear by reference to the same, a copy of which is herewith filed, marked 'Exhibit C,' and made part hereof.

"Fourth—The relator further represents and informs the court that upon receiving said notice and demand from said board and assignment from said Murphy as aforesaid, the relator, in compliance therewith, and with the knowledge and consent and request of said school district, proceeded to furnish the materials, labor, and skill for the completion of said building in accordance with the terms of said contract, and that thereupon, between the 17th day of December, 1890, and the 21st day of April, 1891, the relator paid expenses, furnished materials, skill, and labor upon said school building in accordance with said notice and demand from said school board, and in accordance with the terms of said contract, and with the knowledge and consent of said school board amounting in all to the sum of $7,742.63, and the said school board paid thereon to the relator on December 15, 1890, the sum of $1,000; on January 2, 1891, the sum of $48.22; on January 9, 1891, the sum of $1,173.43; on February 17, 1891, the sum of $1,109.17; on April 24, 1891, the sum of $10.50; and on April 24, 1891, the sum of $85.50, making total payments of $3,426.82; leaving balance due the relator of $4,315.81, no part of which has been paid. All of which will fully appear by reference to an itemized account of said expenses and payments, a copy of which is herewith filed, marked 'Exhibit D,' and made part hereof.

"Fifth—The relator further represents and informs the court that the relator on the 21st day of April, 1891, completed said building in accordance with the terms of said contract between said school district and Martin T. Murphy, and the said school board of said district received said building from the relator, and were fully satisfied with the completion thereof as performed by the relator; and that there is now due the relator for the expenses, materials, skill and labor performed in the completion of said building as aforesaid the said balance of $4,315.81, and that said school district has sufficient funds in the

treasury thereof belonging to the said building fund to pay said sum to the relator, and that the board of said school district have neglected and refused, and still neglect and refuse to execute and deliver to the relator the necessary warrant on the treasurer of said school district for said sum.

"Sixth—That relator further represents and informs the court that at the time the relator commenced furnishing materials, skill, labor, and expenses of completing said school building it was understood and agreed, by and between the relator and the school board of said school district, that eighty-five per cent of the architect's estimates, which should be made thereafter in accordance with the terms of said contract, and also the balance then due and which might become due upon said contract upon the completion of said building, should be paid by said school district to the relator, and that in pursuance of said understanding and agreement with the said board, and with the full knowledge and consent of said school board, the relator proceeded to furnish the said skill, labor, materials, and expenses for the completion of said building, and did complete the same to the full satisfaction of said school district; that in pursuance of said understanding and agreement the said school board of said district paid to the relator on December 15, 1890, the said sum of $1,000; and on January 2, 1891, the said sum of $48.22; and on January 8, 1891, the said sum of $1,173.43, being eighty-five per cent of the architect's January estimate; and on February 17, 1891, the sum of $1,109.17, being eighty-five per cent of the architect's February estimate; and on April 24, 1891, the said sums of $85.50 and $10.50, being for extras furnished by the relator in the completion of said building; that on or about the —— day of March, 1891, the said school board of said school district at a meeting thereof, adopted and caused to be spread upon the records of said board a preamble and resolution, of which the following is a copy, to-wit:

"The following preamble and resolution was offered:

"'WHEREAS, In the contract with M. T. Murphy for the erection of the school building, now nearly completed, it is provided that the school board shall have the right, at their election, instead of paying on architect's estimates to the contractor, the amount for material or labor on such building to the party or parties furnishing material or performing labor, and the receipts of any and all such parties to the amount actually due them shall be accepted by the said Murphy as though so much cash in hand paid; and

"'WHEREAS, The bond given by M. T. Murphy, as principal, and Fred W. Gray, as surety, for the faithful performance of said contract, provides that if the said Murphy shall pay all laborers and mechanics for labor that shall be performed, and all material-men for material that shall be used in the erection of said building and in performing his said contract, then, in that case, said obligation to be void, but otherwise to be and remain in full force; and

"'WHEREAS, There is a large number of claims filed with this board for material furnished and for labor performed in the erection of said school building which are not paid, but which this board is desirous should be paid, to-wit:

Norfolk Brick & Tile Company	$1,891 80
Chicago Lumber Company	49 08
T. W. Wheaton	390 80
L. C. Mittelstadt	149 39
C. F. Eiseley	144 39
Acme Pressed Brick Company	562 25
Jno. Nurer	6 00
Welshans & Gibson	248 26
C. W. Babcock & Co	716 00
Edwards & McCollough Lumber Company	4 40
August Pasewalk	6 00
Otto Buckel	4 65
T. H. Batte	15 00
Jno. Ingoldsby	40 00
Adamant Wall Plaster Company	279 70

"'AND WHEREAS, The said Murphy and said Gray have each neglected, failed, and refused to pay any of said claims: Therefore,

"'*Resolved*, That in order that justice may be done to all parties, it is hereby ordered that this board does hereby elect, as is provided it may do, to pay said claims and to tender to said Murphy and to said Gray receipts from said parties instead of cash to the amount actually due said parties.

"'*Resolved*, That the secretary of this board is hereby directed to issue the warrants of the district on the proper fund to the said parties for not more than the amounts mentioned and for not more than is actually due them, and to tender the receipts taken for payment to the contractor, M. T. Murphy, and to Fred W. Gray, instead of cash on estimates as heretofore, except that the claims of the Adamant Wall Plaster Company, $279.70, shall not be included nor paid for want of funds.'

"And the relator further represents and informs the court that said resolution was adopted by said school board without the knowledge or consent of the relators, and that the relator, on being informed that said resolution had been adopted by said board on the 27th day of March, 1891, thereupon proceeded to notify said board that he would refuse to receive in settlement of said contract any receipts for payments made by said board to mechanics or materialmen for labor performed or materials furnished for said building except such payments be for materials furnished or labor performed after the date of the assignment of said contract by said Murphy to the relator, and that upon April 1, 1891, or as soon thereafter as the relator could be heard, he would apply to Hon. Isaac Powers, Jr., judge of the district court of the seventh judicial district of Nebraska, for a writ of *mandamus* requiring said board to pay to the relator all sums of money due upon the estimates for the month of February which had been made,

and estimate for the month of March to be hereafter made, and all other sums that might become due from said board under contract. Which notice was reduced to writing and served upon said school board on the 27th day of March, 1891, and is in the words and figures following, to-wit:

"'To the Board of Education of the School District of Norfolk: You are hereby notified that I demand all moneys due and to accrue upon the contract heretofore entered into between M. T. Murphy and your honorable board for the construction of a high school building in the said district, and I shall refuse to receive in settlement of such contract any receipts for payments made by you to mechanics or material-men for labor performed or material furnished for said building, except such payments be for labor performed or material furnished since the assignment of said contract by said Murphy to me, and you are further notified that upon April 1, or as soon thereafter as I can be heard, I shall apply to Hon. Isaac Powers, Jr., a judge of the district court of the seventh judicial district of Nebraska, for a writ of *mandamus* requiring you to pay to me all sums of money due upon estimate for the month of February already made, and estimate for the month of March, to be made on the first day of April, and shall hold you personally responsible for any misappropriation of the funds due and to become due upon said contract by payment to any other persons, or otherwise.'"

A copy of the contract and bond are set out as exhibits and need not be noticed.

The first objection of the plaintiff in error is that the bond in question is void on its face because it is signed by but one surety (*Cutler v. Roberts*, 7 Neb., 4), while the statute requires at least two. In the case cited it was held that a statutory bond must conform substantially to the requirements of the statute in respect to its penalty, condition, form and number of sureties, and a surety may insist, as a defense in an action on a bond signed by but one surety

where the statute requires two or more, that he is not liable thereon unless he waive the condition. That, we think, is a correct statement of the law, but it is doubtful if it applies to the case at bar.

The contractor and surety were both residents of Omaha, and we are led to infer that the relator did not expect another surety to sign the bond with him but voluntarily become sole surety for Murphy. If such was the case, it would be a waiver of additional sureties on the bond. The fact that he recognized his liability to the defendant for the completion of the building is a strong, if not a controlling, circumstance to show a waiver on the relator's part. The contract provides for monthly estimates. "On the first day of each month, during the progress of the work hereby agreed to be performed, the architect shall make an estimate of the materials furnished, and on the ground, and of the work done since the last previous estimate, and not included in any previous estimate, and when said estimate is furnished said first party in writing, said first party shall thereupon pay said second party eighty-five per cent of said estimate, and the amount remaining on completion of said contract shall become due and payable when said school building shall be fully finished and accepted by said architect and by the school board, or a committee designated by the said board for the purpose, and when the said first party shall be fully satisfied that no liens or claims of any kind exist against said property or any part thereof for which said first party would or could be liable. *Provided,* Said first party shall have the right, at their election, instead of paying on the architect's estimate to the second party the amount from time to time found due and payable, to pay the amount for material or labor on said building to the party or parties furnishing material or performing labor, and the receipt of any and all such parties to the amount actually due them shall be accepted by the second party as though so much cash in hand paid." This provision, if the allegations of

the petition are true, has been disregarded. The defendant no doubt had a right under the contract to pay the workmen and material-men instead of paying the contractor, but to hold the surety liable the payments must be made upon each estimate so far as it is sought to charge the eighty-five per cent. No doubt claims of that kind may be deducted from the fifteen per cent held back till the completion of the contract. The surety had a right to rely upon the conditions of the contract (*Brennan v. Clark*, 29 Neb., 386), and it was held in the case cited that "The sureties on the bond of a contractor for the erection of a building are bound only in the manner and to the extent provided in the obligation. And when the contract provided that the work was to be done under the supervision of an architect named, and payments to be made only on estimates made by him from time to time as the work progressed, and certain payments were made without such supervision and estimates, that the sureties were entitled to a deduction for any injury they may have sustained thereby." (*Simonson v. Thori*, 31 N. W. Rep. [Minn.], 861; *Miller v. Stewart*, 9 Wheat. [U. S.], 680; *Mayhew v. Boyd*, 5 Md., 102; *Brigham v. Wentworth*, 11 Cush., 123; *Paine v. Jones*, 76 N. Y. 274; *Atlanta Nat. Bank v. Douglass*, 51 Ga., 205; *Ryan v. Shawneetown*, 14 Ill., 20; *Judah v. Zimmerman*, 22 Ind., 388; *Calvert v. London Dock Co.*, 2 Keen [Eng.], 639; *Bragg v. Shain*, 49 Cal., 131; *Dundas v. Sterling*, 4 Pa. St., 73; *Weir Plow Co. v. Walmsley*, 110 Ind., 242; *Taylor v. Johnson*, 17 Ga., 521.) If the allegations of the petition are true, therefore, the defendant paid estimates in excess of those provided for in the contract, and to that extent the surety may not be liable. Sufficient is alleged to require the defendant to answer.

Third—The amount due appears to be admitted, but it is sought to apply the same in payment of claims instead of paying it to the relator. This being so, the relator may sustain an action by *mandamus*. The judgment of the

district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

WILLIAM BELCHER ET AL. V. GEORGE F. PALMER.

[FILED OCTOBER 26, 1892.]

1. **Pleading:** SUFFICIENCY OF PETITION WHEN ATTACKED AFTER JUDGMENT. Petition and exhibit set out in opinion held sufficient after judgment to sustain it, as the defendant who could avail himself of the defense does not object.
2. **Jurisdiction:** SUMMONS: DEFENDANTS RESIDING IN DIFFERENT COUNTIES. Where there is no charge of collusion or fraud between the indorser and holder of a promissory note as to the liability of such indorser, and an action is brought against him in the county where he resides within the state, and service had on him there, a summons may be issued and served on the makers in other counties of the state.

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

O. A. Abbott, and *A. M. Robbins*, for plaintiffs in error.

Thummel & Platt, contra.

MAXWELL, CH. J.

This action was brought in the county court of Hall county by the defendant in error against the plaintiffs in error and H. J. Palmer. The petition is as follows:

"The said plaintiff demands judgment against said defendant for the sum of $530, with interest thereon from the 27th day of October, A. D. 1883, at ten per cent per

annum, and costs of suit, upon a promissory note made and delivered by defendant, in the name of A. Rowan and Wm. Belcher, to H. J. Palmer, and assigned to plaintiff, who is now the owner thereof. A copy of said note is hereto attached, marked 'Exhibit A,' and made a part hereof. Said note is now long past due and no part of same has been paid. And there is now due from the defendant to the plaintiff upon said note the amount first above demanded, with interest, as stated above."

The promissory note with the indorsements thereon is as follows:

"$530. LAW OFFICE OF THUMMEL & PLATT,
"GRAND ISLAND, NEB., Oct. 27, 1883.

"October 27, 1884, after date, for value received, we, or either of us, promise to pay to the order of H. J. Palmer, five hundred and thirty dollars, at Thummel & Platt's office, with interest at ten per cent per annum from date until paid. Secured by C. mortgage dated on 10-27-'83, on two mules, two horses, one wagon, sixteen head of cattle. A. ROWAN.
"WM. BELCHER."

Indorsement on back:

"March 4, 1885, credit by sale of horses taken back, $30; less expenses as follows:

One month keep at $1 per day	$30 00
Advertising of foreclosure	6 25
Sale	1 00
	$37 25

"H. J. PALMER."

William Belcher answered the petition, in substance, that he was a resident of Loup county, Nebraska, and that Rowan was also a resident of Loup county, but the defendant H. J. Palmer is, as defendant believes, a resident of Hall county. That Palmer was not jointly indebted

with said defendants on said note, and therefore there has been no legal and proper service on the answering defendants.

Rowan demurred to the petition: first, because the court had no jurisdiction, and second, because the petition fails to state a cause of action. Default was taken against Palmer. The cause was then continued, by consent of parties present, to the 5th day of November, 1889, at 9 o'clock A. M. Various continuances were had by agreement until March 27, 1890, when the demurrer was overruled, whereupon Rowan answered, in substance, that he is a resident of Valley county, that the note was transferred to the plaintiff below long after it became due; that no demand for payment was ever made upon him or Belcher, nor any notice of non-payment given to H. J. Palmer, and third, that he paid on said note to H. J. Palmer $350 in one span of horses. A reply was filed which need not be noticed. The cause was further continued to June 16, 1890, when a trial was had. The docket entry is as follows:

"June 16, 1890, 10 A. M. Plaintiff present by attorney. Defendants A. Rowan and Wm. Belcher present in person and by attorneys, O. A. Abbott and A. M. Robbins. Case called. W. H. Platt, G. F. Palmer, and H. J. Palmer sworn and examined on behalf of plaintiff. Plaintiff rests. Defendant moved to dismiss action for the reason that plaintiff has proven no demand on the makers of the note sued on, and has failed to prove any notice to the indorser thereon of a failure to pay by said makers. Motion argued, submitted, and overruled, to which defendants excepted. Defendants Wm. Belcher and A. Rowan sworn and examined on their own behalf. Depositions of sundry witnesses read on behalf of defendants. Defendants rest. Plaintiff calls J. A. Clement, Fritz Langman, F. E. Stroud, O. U. Wescott and John Fonner, who were sworn and examined on behalf of plaintiff in

rebuttal. Case argued and submitted and taken under advisement by the court till June 17, 1890, 9 A. M.

"June 17, 1890, 9 A. M. I find for the plaintiff that there is due from said defendants, A. Rowan and Wm. Belcher, as makers, and H. J. Palmer, as endorser, to said plaintiff upon said note, the sum of $648.77, principal and interest. It is therefore considered by me that said plaintiff recover from said defendants, A. Rowan and Wm. Belcher, as makers, and H. J. Palmer, as endorser, the said sum of $648.77, the amount so as aforesaid found due, and the cost of suit herein, taxed at $41.20, judgment to draw interest at ten per cent, as provided in said note, execution to issue."

The case was taken on error to the district court, where the judgment of the county court was affirmed. None of the evidence is preserved. H. J. Palmer is not here objecting either to the petition or judgment. There is no allegation of collusion or fraud in the answer or any fact to show that the judgment is unjust, but because of the failure to allege a waiver of demand and notice, or facts to show such demand and notice, we are asked to hold that the judgment cannot be sustained, and this, too, by parties who are not affected by the failure to plead these facts. This we cannot do. In the absence of collusion or fraud, neither of which is charged, Belcher and Rowan cannot object to the rendering of judgment against Palmer. It is unnecessary to discuss the matter. On the pleadings alone there is no prejudicial error shown. The judgment of the court below is right and is

AFFIRMED.

THE other judges concur.

TOWNSHIP OF INAVALE V. JUDSON BAILEY, COUNTY CLERK, ET AL.

[FILED OCTOBER 26, 1892.]

County Supervisors: PROCEEDINGS OF BOARD: MAJORITY VOTE: HOW DETERMINED: CHANGING TOWNSHIP BOUNDARIES. Section 912 of the Consolidated Statutes provides that "two-thirds of the whole number of supervisors elected shall constitute a quorum, and a majority thereof, if present, may transact business." In changing the boundaries of a township, there were present seventeen members of the board, of which eight voted in favor of the change and seven against, and two refrained from voting. *Held*, That it was the duty of all present to vote, and those not voting must be counted in making up the aggregate, and that as less than a majority had voted in favor of the proposition, it had failed.

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

John R. Wilcox, for plaintiff in error.

Case & McNeny, contra.

MAXWELL, CH. J.

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

"Your petitioner says that it is one of the townships of Webster county, Nebraska; that defendant Walnut Creek township is also one of the townships of said county; that defendant Judson Bailey, is county clerk of said county, and defendant Manley McNitt is treasurer of said county.

"Your petitioner says that prior to and up to June 21, 1888, the south boundary of Inavale township was the Republican river, and the boundary of defendant Walnut Creek township was the same portion of the Republican river; that some time prior to said June 21, 1888, the de-

fendant Walnut Creek township, without notice to plaintiff, presented to the defendant board of supervisors a petition signed solely by residents and property owners of said Walnut Creek township, praying the said board to change the boundary of the said Inavale and Walnut Creek townships so as to make the township line between towns 1 and 2, range 12, the boundary between said townships instead of the river; plaintiff says that the effect of this change, when made, was to transfer from Inavale township to Walnut Creek township the following lands and the personal property of those living thereon, to-wit: lots 1, 2, 3, 4, and 5 of section 1, town 2, range 12; lots 1, 2, 3, 4, 5, and 6, section 2, town 1, range 12; northeast quarter the north half, and southeast quarter of the northwest quarter, and lots 3, 4, 5, and 6, section 3, town 1, range 12; northwest quarter, the north half, the northeast quarter, and lots 3, 4, 5, and 6, section 4, town 1, range 12; all the north half, and lots 3, 4, 5, and 6, section 5, town 1, range 12; all section 6, and north half northeast quarter, the northeast quarter of the northwest quarter, and lots 4, 5, and 6, section 7, town 1, range 12.

"Plaintiff says that all the owners of said land and property remonstrated and objected against said change, but that the said defendant board of supervisors illegally and unlawfully made such change, and defendant Bailey threatens to put, is putting, or has put said property upon the tax list of Webster county, Nebraska, for the year 1888, as though said property was in Walnut Creek township, and to put it upon the township tax list of said township. Defendant McNitt threatens to collect the township taxes for the year 1888 upon said property and pay them over to the said Walnut Creek township.

"Plaintiff prays that defendant Bailey may be ordered to put said property upon the tax list of Inavale township in both township and county tax books; that the said pretended change in the boundary lines of said plaintiff and

defendant townships may be declared illegal and void, and that defendant McNitt may be ordered to pay over the township taxes which he may collect upon said property to plaintiff."

This petition was duly verified. The petition was amended by adding the following:

"Comes now plaintiff and amends his petition by adding the following allegations thereto: That said order for said change of boundaries is void, for that there were present at the meeting of the defendant board of county supervisors, June 21, 1888, at which said order was made, seventeen members of the board; that the question of the change of boundaries came up before said board on the two reports of the committees, and the majority report against the change of boundaries was rejected. The minority report in favor of said change was decided and accepted by a yea and nay vote, and resulted in eight yeas and seven nays, two members present not voting, and that no further or other action was taken except to declare the report of the committee accepted, and it is upon that state of facts that defendant clerk and treasurer threaten to act.

"Affiant says that said board has a set of rules governing their proceedings, rule 8 of which is: 'In order to carry any question it shall be necessary for a majority of the members present to vote in the affirmative.'"

Section 912 of the Consolidated Statutes provides: "Two-thirds of all the supervisors elected in any county shall constitute a quorum for the transaction of business, and all questions which shall arise at meetings shall be determined by the votes of a majority of the supervisors present, except in cases otherwise provided for." It is the duty of all members present to vote upon every proposition properly before the board for its determination. The members are to transact the county business. It may be presumed that each member intends to perform his duty faithfully and efficiently. This requires him to use his

best judgment and act upon every proposition submitted. If one member may shirk his duty in that regard why may not all? The intention of the law is that all present shall vote. The law is not that only a majority of those voting shall be necessary, but of those present. Each member takes an oath to faithfully discharge his duty. This means every duty—not such as he may desire to discharge, but every duty connected with his office. It is his duty, therefore, to vote upon every proposition properly before the board, and if two voters are present but do not vote, they are nevertheless to be counted in making up the aggregate of the votes. The petition therefore states a cause of action, and the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

SAMUEL P. FARRINGTON ET AL., APPELLEES, V. JOSEPH D. STONE ET AL., APPELLANTS.

[FILED OCTOBER 26, 1892.]

1. **Creditor's Bill:** BONA FIDE PURCHASER. In the decree of the district court the defendant Sarah A. Stone was found to be a *bona fide* purchaser, and entitled to a prior lien to the extent of $600. *Held*, That the proof tended to show that she was a *bona fide* purchaser, and entitled to hold the entire property as such.

2. ———: FRAUDULENT CONVEYANCE. It is not sufficient that the vendor desires to defeat the payment of a claim by the transfer of his property; to render the conveyance fraudulent it must be taken with knowledge, actual or constructive, of the proposed fraud, or there must be a want of consideration.

3. ———: ———. While a transfer of property to a relative by a

person liable on a claim, where the effect will be to defeat the payment of the same, will be scrutinized very closely, yet it will be sustained, if made in good faith for an adequate consideration.

APPEAL from the district court for Fillmore county. Heard below before MORRIS J.

John D. Pope, and *Charles H. Sloan*, for appellants.

Ong & Jensen, and *Robert Ryan, contra.*

MAXWELL, CH. J.

This is a creditor's bill, brought by the plaintiffs against the defendants in the district court of Fillmore county, to have certain real estate, described in the petition, declared the property of Joseph D. Stone, and applied to the payment of the plaintiffs' judgment. The facts, as they appear, are substantially as follows:

In July, 1882, one Woodruff was engaged in the mercantile business in Friend, Nebraska, and being indebted in a considerable amount to various persons, among others the plaintiffs, sold and transferred his entire stock of goods, book accounts, etc., to Joseph D. Stone, who was then engaged in banking at Friend. The plaintiff brought suit against Woodruff by attachment, and levied upon a portion of the goods transferred to Stone, who, in the meantime, had transferred the same to one Starkey. Starkey brought an action against the officer for the conversion of the goods, and recovered judgment, which was reversed in this court. (*Lane v. Starkey*, 15 Neb., 285.) On the second trial, judgment was rendered in favor of Starkey, which was affirmed in this court. (*Lane v. Starkey*, 20 Neb., 586.) The plaintiffs thereupon brought an action against Stone for the amount of the judgment paid by them, and a judgment was rendered in their favor on the 18th of June, 1888, for the sum of $1,348.63 and costs.

No appeal was taken from that judgment and it is now in full force. An execution was issued on this judgment, which, on the 6th day of January, 1890, was returned *nulla bona*. Afterwards, an execution was issued on a transcript of the judgment in Fillmore county, and a levy made on the land in question.

On the 14th of December, 1888, Joseph D. Stone and wife sold and conveyed the land in controversy to Sarah A. Stone, for the expressed consideration of $4,000. The question to be determined is the good faith of this transaction. The court below held, in effect, that Sarah A. Stone was a good faith purchaser to the extent of $600 and gave her a lien prior to the plaintiffs on the land for that amount and interest, and ordered the land sold and the proceeds applied to the plaintiffs' judgment. In the deed of conveyance from Joseph D. Stone and wife we find the following: "That we, Joseph D. Stone and Charity F. Stone, husband and wife, of the county of Saline and state of Nebraska, for and in consideration of the sum of four thousand dollars in hand paid, do hereby grant, bargain, sell, convey, and confirm unto Sarah A. Stone, of the county of Fillmore and state of Nebraska, the following described real estate, situated in —— county and state of Nebraska, to-wit: The northeast quarter of section 14, in township 8 north, of range 2 west, in the district of lands subject to sale at Lincoln, Nebraska, containing one hundred and sixty acres. This deed is subject to a mortgage of sixteen hundred dollars, which is assumed by the party of the second part and agrees to pay as a part of the purchase money."

The testimony tends to show that Sarah A. Stone had considerable property and had done business in her own name for many years; and some time prior to this transfer had had an interest in a mill with J. D. Stone, but this had been terminated before the deed in question was made. It also appears that several years ago J. D. Stone had started a small bank at Friend on borrowed capital; that

the husband of Sarah had assisted him to the extent of his ability; that Sarah had owned a number of steers which were sold and the proceeds paid to J. D. Stone as a loan; that in November, 1888, J. D. Stone sold the land in question to Sarah for $4,000. Of this amount she was to be credited the amount of $400 with interest for the loans derived from the sale of the steers; that she assumed the $1,600 mortgage and gave her individual notes for $2,000, one for the sum of $1,000 with interest at ten per cent, due in 1891, and the other for a like amount with interest due in 1893; that upon one of these notes the sum of $600 has been paid. So far as appears the land was sold for a fair price and the evidence fails to show a want of good faith on the part of Sarah.

The testimony tends to show that J. D. Stone did not consider the plaintiffs' claim a just debt, and that he had used expressions that indicated an intention on his part to pay his other debts but to avoid payment of this claim if he could. If all that is alleged on behalf of the plaintiffs in that regard is true, while it would show an intention on his part to avoid payment, still it could not affect a *bona fide* purchaser. The fact that Sarah was the wife of the son of J. D. Stone, while a circumstance that requires the court to scrutinize the transaction very closely, yet does not deprive her of her rights which she acquired in good faith, and without intention of defrauding creditors of J. D. Stone. In no proper sense were the plaintiffs creditors of Stone. The judgment evidently was recovered against him upon the ground that he in bad faith had purchased the stock of goods and accounts of Woodruff and thereby defeated the plaintiffs of their just dues. That is an action for tort, and while no doubt a recovery may be had in such case it is because of the wrong done to plaintiffs. This question does not arise, but the testimony fails to show that any creditor has been defrauded.

It seems that the judge of the district court made a sup-

plemental order for the examination of Sarah, while this action was pending, without requiring notice to be given to her or her attorney; that an attorney for the plaintiff, with a short-hand reporter, went to her residence and administered to her an oath and then proceeded to question her in regard to the transaction, and the substance of that testimony is in evidence on behalf of the plaintiffs. No court should grant an order of that kind except upon notice. It is evident that the order was obtained without notice and the whole proceedings were *ex parte*. We do not care to comment on such procedure. Upon the whole case it is apparent that the defendant Sarah is a *bona fide* purchaser and is entitled to protection. The judgment of the district court is reversed and the action dismissed.

REVERSED AND ACTION DISMISSED.

THE other judges concur.

WILLIAM G. SMITH V. WIGTON & WHITHAM.

[FILED OCTOBER 26, 1892.]

1. **Pleadings:** AMENDED SUPERSEDE ORIGINAL. Defendant having filed an answer to the petition, and plaintiff thereupon filing an amended petition, to which defendant answers without making the original answer part of the second answer, the case stands for trial on the amended pleadings, and the original pleadings are disregarded.
2. **Action for Money Had and Received:** DEFENSE UNDER CONTRACT MUST BE PLEADED. Where the defendant claims money as due him under a contract with the plaintiff, he must plead the facts showing his right to retain the same.
3. ——: PLEADINGS: GENERAL DENIAL: FACTS IN ISSUE. In an action in substance for money had and received, a general denial only puts in issue the receipt of the money.

ERROR to the district court for Madison county. Tried below before NORRIS, J.

H. C. Brome, for plaintiff in error.

J. B. Barnes, contra.

MAXWELL, CH. J.

This action was brought by the plaintiff against the defendants to recover the sum of $3,500.47 with interest and costs. The amended petition is as follows:

"Comes now the plaintiff and by order of court files this his amended petition, and for cause of action against the defendant states:

"First—That on or about the 23d day of March, 1888, the defendant received from the clerk of the district court of Platte county, Nebraska, the sum of ten thousand seven hundred and ninety-five and $\frac{25}{100}$ dollars to and for the use of plaintiff.

"Second—That on or about the 2d day of April, 1888, and before the commencement of this action, plaintiff demanded an accounting, settlement, and payment thereof from the defendants.

"Third—That the defendants have failed to account for or pay over to said plaintiff any part of said sum except the sum of $7,668.50, leaving a balance still due, owing, unpaid, and not accounted for to this plaintiff, amounting to three thousand one hundred twenty-six and $\frac{75}{100}$ dollars, which last named sum the defendants refuse to pay plaintiff.

"Fourth—That said defendants did not obtain said money from said clerk of the district court of Platte county, Nebraska, under or by virtue of any contract with this plaintiff.

"Wherefore plaintiff prays judgment against the defendants for the sum of three thousand one hundred and twenty-six and $\frac{75}{100}$ dollars, and interest thereon at seven per cent per annum from March 23, 1888, and the costs of suit."

It appears that prior to the filing of the amended peti-

tion, the plaintiff had filed a petition in which he did set out in substance a contract of employment of the defendants, and that they had prosecuted the suit to judgment, and collected thereon the sum of $10,795.28, forty per cent of which was to be retained as attorney fees; that they had paid the plaintiff the sum of $5,225, leaving a balance due the plaintiff of the sum of $1,251.67, with interest and costs.

The answer to the amended petition is a general denial. In the first answer the contract is denied, but it is alleged that the plaintiff was unable to pay the expenses of the suit, and that the defendants loaned the plaintiff money to pay the same, to-wit, the sum of $344.30, which sum was to be deducted from the amount of the plaintiff's judgment. They also allege that instead of forty per cent of the judgment they were to have fifty per cent. We are unable to see any benefit the parties can derive from the original pleadings. Where amended pleadings are filed, the case is tried upon the amended pleadings alone. (*Bank v. Telegraph Co.*, 30 O. St., 555; Maxw., Code Pl., 583.) An amended answer supersedes the first answer. (*Reihl v. Likowski*, 33 Kan., 515.)

Second—The issue presented by the amended pleadings is the receipt and retention of more than $3,000 of plaintiff's money by the defendants. The proof clearly shows that they collected more than $10,000 on a judgment recovered in favor of the plaintiff and that they still retain more than $3,000. If this is retained in pursuance of a contract to that effect it should be pleaded. It is properly a matter of defense as a justification by the defendants for retaining the money. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.