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REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

JANUARY TERM, 1893.

VOLUME XXXVI.

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.

1893.

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(Laws 1893, chapter 16, page 150.)

SECTION 1. The supreme court of the state, immediately upon the taking effect of this act, shall appoint three persons, no two of whom shall be adherents to the same political party, and who shall have attained the age of thirty years and are citizens of the United States and of this state, and regularly admitted as attorneys at law in this state, and in good standing of the bar thereof, as commissioners of the supreme court.

SEC. 2. It shall be the duty of said commissioners, under such rules and regulations as the supreme court may adopt, to aid and assist the court in the performance of its duties in the disposition of the numerous cases now pending in said court, or that shall be brought into said court during the term of office of such commissioners.

SEC. 3. The said commissioners shall hold office for the period of three years from and after their appointment, during which time they shall not engage in the practice of the law. They shall each receive a salary equal to the salary of a judge of the supreme court, payable at the same time and in the same manner as salaries of the judges of the supreme court are paid. Before entering upon the discharge of their duties they shall each take the oath provided for in section one (1) of article fourteen (14) of the constitution of this state. All vacancies in this commission shall be filled in like manner as the original appointment.

SEC. 4. Whereas an emergency exists, this act shall take effect and be in force from and after its passage and paproval.

Approved March 9, A. D. 1893.

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. 1893.

PRESENT:

HON. SAMUEL MAXWELL, CHIEF JUSTICE.
HON. T. L. NORVAL, HON. A. M. POST, } JUDGES.
HON. ROBERT RYAN, HON. JOHN M. RAGAN, HON. FRANK IRVINE, } COMMISSIONERS.

DAVID M. STUART, APPELLEE, V. GEORGE W. HERVEY, APPELLANT, IMPLEADED WITH CARLOS S. HAYES ET AL., APPELLEES.

FILED JANUARY 3, 1893. No. 4862.

1. **Deeds**: PROOF OF DELIVERY. *Held*, That the proof fails to show a delivery of the deed or any equitable right to charge the defendant Hayes with the payment of the notes in question.

2. ———: ———: LIABILITY OF GRANTEE FOR MORTGAGE DEBT. Where by the terms of a deed a grantee assumes a debt secured by a mortgage on the land and the grantee denies the debt and the delivery of the deed, to bind such grantee the proof must show an actual delivery, from which, if he retains the deed, an acceptance may be presumed. Very clear proof will be required where the property conveyed is of much less value than the incumbrance which it is alleged the grantee assumed.

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

McCoy & Olmsted, for appellant.

Holmes & Hays, for appellee Carlos S. Hayes.

Williams & Williams, for appellee Norman A. Kuhn.

E. E. Clippinger, for appellee David M. Stuart.

MAXWELL, CH. J.

This action was brought in the district court of Douglas county to foreclose a mortgage executed by the defendant Hervey, upon lots 2 and 6, in block 1, in South Exchange Place, in South Omaha. The mortgage was given to secure four notes, each for the sum of $200. At the time of trial three of these notes were owned by the plaintiff and one by Norman Kuhn. It is alleged in the petition that Hervey sold these lots to Hayes and that in the conveyance he assumed the payment of the notes. This Hayes in his answer denies, but alleges that he had no knowledge of the execution of the deed until long after its date; that the deed was never delivered to nor accepted by him; that it was not recorded, and the defendant never has and does not now claim any right or title thereunder. The court below rendered a decree of foreclosure against Hervey, but dismissed the action as to Hayes, on the ground that the proof failed to show a delivery of the deed.

The testimony tends to show that in May, 1888, Hayes was the owner of one-half of Hayes' addition to Norfolk; that Wilson & Miller, a firm of dealers in real estate, had a half interest in said addition, although the title was in Hayes; that Wilson & Miller sold the lot in said addition to one Brady, and received therefor $25 in cash and a tract of land in Dakota. This deed, for some cause, was not

recorded. Wilson & Miller exchanged the Dakota land for the lots in question and assumed for Hayes the payment of said notes. Hayes claims that he had no knowledge of this transfer, and denies that Wilson & Miller had any authority to make the exchange as above stated. The proof in this case fails to show such authority. It also fails to show a delivery of the deed. In a case of this kind, where the grantee assumes a debt against the land conveyed, the proof must clearly show an actual delivery of the deed to the grantee; and particularly is this true where the property conveyed seems to be of much less value than the incumbrance. If a deed is duly delivered and retained by the grantee an acceptance may be presumed. In the case at bar the proof fails to show a delivery, hence there could be no acceptance, and fails to show any equitable grounds on which to base a recovery against Hayes. The judgment is right and is

AFFIRMED.

THE other judges concur.

METROPOLITAN BUILDING & LOAN ASSOCIATION, APPELLANT, V. VAN PELT BROS., APPELLEES.

FILED JANUARY 3, 1893. No. 4634.

1. **Promissory Note**: FRAUD AND MISREPRESENTATION. *Held*, That the proof fails to show that the note in suit was executed by the corporation without authority.
2. ———: ———: CONFLICT OF EVIDENCE. The testimony upon the material questions of fact is conflicting, and the court is not justified in reversing the case.

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

Saunders, Macfarland & Dickey, for appellant.

Henry D. Estabrook, contra.

MAXWELL, CH. J.

This action was brought in the district court of Douglas county to restrain the defendant from disposing of a promissory note for the sum of $1,500, given by the plaintiff and delivered to the defendants, and that said note be delivered up and canceled on the ground that it was obtained by fraud and misrepresentation. In their answer the defendants denied the fraud and misrepresentation and prayed for judgment on the note. There was a reply, which need not be noticed. On the trial of the cause the court found for the defendants and rendered judgment in their favor for the sum of $1,733.25.

The testimony tends to show that in 1887 the defendants were doing business at Des Moines, Iowa; that in January of that year they came to Omaha and entered into a contract with the plaintiff wherein they agreed to remove their paint factory from Des Moines and locate the same in Omaha Heights, an addition to the city of Omaha, owned by the plaintiff. There is testimony tending to show that they promised to use diligence, enterprise, and zeal in carrying on the work; that they would employ a considerable number of hands (the parties do not agree as to the number), and would continue said works in operation for at least five years. In consideration of the foregoing the defendants were to receive certain lots and moneys from the Omaha Heights syndicate, and from the members of the plaintiff association individual notes to the amount of $2,000. The works were removed to Omaha early in 1888, and the defendants commenced to manufacture there in March of that year and have continued to do so until the present time. It is true that it appears that a

corporation has been formed in which the defendants are the principal stockholders, and that this corporation is now conducting the business. In June of that year the note in question was given in lieu of the notes of the members of the plaintiff organization of the amount of $2,000. It is claimed on behalf of the plaintiff that there was no authority to give this note and that it is void. In our view sufficient is shown to establish the authority of the corporation to execute the note, and it is unnecessary to discuss the doctrine of *ultra vires*.

The remaining question is one of fact, viz., as to the number of persons the defendant employed at Des Moines and would employ at Omaha. Upon this point there is a direct conflict in the evidence, and it is impossible for this court to say that the judgment is wrong. There is no material error in the record, and the judgment is

AFFIRMED.

THE other judges concur.

WYETH HARDWARE & MANUFACTURING CO. V. SINO SHEARER.

FILED JANUARY 3, 1893. No. 4913.

Guaranty: WEIGHT OF EVIDENCE. The testimony being conflicting, and the verdict not being against the clear weight of the evidence, the judgment is affirmed.

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

McClure & Anderson and *J. M. Johnson*, for plaintiff in error.

W. S. Morlan, G. W. Norris, and *C. B. Roberts, contra.*

MAXWELL, CH. J.

This is an action upon the following guaranty:

"*To Wyeth Hardware & Mfg. Co., St. Joseph, Mo.*— GENTLEMEN: I hereby guarantee to you payment for any goods purchased by J. W. Shearer, to the amount of $500. This guarantee to continue and remain in force until you are notified by me to the contrary.

"Dated at Beaver City, Febr. 6th, 1886.

"SINO SHEARER."

In the answer the defendant alleges that Sino Shearer went out of business in the spring of 1887, and settled with the plaintiff and paid it in full; that the defendant notified the plaintiff not to sell any more goods upon the guaranty, and demanded a return of the same; that in the year 1888 Sino Shearer again went into business, and purchased the goods in question on his own credit, and after due notice to the plaintiff not to sell any more goods on the guaranty.

The reply is a general denial.

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

The principal ground upon which a reversal is sought is the want of sufficient evidence to sustain the verdict. Isaac Shearer, a son of the defendant, testified that he commenced the harness business, at Beaver City, in 1886; that he closed up his business in the spring of 1887, and settled with the plaintiff and paid it in full. He testifies as follows:

Q. State if you know anything about notice being given to the Wyeth Hardware Company to return the guarantee that your father gave in this case—had given to them when you went into business for the first time.

A. They were notified of it. There was; I wrote to them for that guarantee myself.

Q. Under whose instructions, if any one's?

A. My father's.

Q. Was that guarantee ever returned?

A. No, sir.

Q. Now then, what did you do with the letter that you wrote to them?

A. I sent a letter to them.

Q. Where did you send it—how did you send it?

A. I sent it by mail to the Wyeth Hardware Company.

Q. Where did you deposit the letter.

A. In the post-office at Beaver City.

Q. Where was it directed?

A. To St. Joseph, Mo.

Q. To whom?

A. William Wyeth Hardware Company.

Q. Was the postage prepaid on that letter?

A. Yes, sir.

Q. What, Mr. Shearer, did you do when you went out of business in 1887?

A. I went to Washington Territory.

Q. Go ahead, Mr. Shearer—how long were you gone?

A. I was gone something over six months.

Q. When you got back, did you go into the harness business again?

A. Not immediately.

Q. How soon after you got back?

A. Something like three months—along there—it might have been a little more.

Q. From the time you went out of business in Beaver City to the time when you again went into business, how much time elapsed?

A. Something nearly a year.

He further testifies:

Q. You say that there was a conversation that took

place between Mr. Shearer, the defendant—your father, and Mr. Curtain, and yourself, at the time you went into business again, or near that time?

A. Mr. Curtain and I were standing talking in the store, and father came in and I introduced Mr. Curtain to father, and told father his business, and father told me to be very careful what I bought, so that I would not buy too much, so I could pay for them, for that he would not be responsible for anything — for anything more that I bought.

Q. Where was Mr. Curtain at that time?

A. I don't know—he was right by—the conversation was directed to both of us.

Q. At the time you settled up business with the Wyeth Hardware Company and paid them when you went out of business, state to the jury whose money you used to make that settlement.

Q. Well, at the time you settled up with the Wyeth Hardware Company, at or about the time you went out of business the first time, state whose money you used to make that settlement.

A. I used father's.

The testimony of Sino Shearer, the father of J. W. Shearer, corroborates that of the son. He also testifies that when the guaranty was given in 1886, his son was under the age of twenty-one years, and that was the reason the guaranty was given; that in 1887 his son went out of business and paid the plaintiff in full up to that time; that the son left the state and was gone six months and did not go into business the second time for about six months after he returned.

This testimony is not denied. It also appears that the goods for which this action is brought were furnished after the son had gone into business the second time. Mr. Curtain denies that he was ever notified that the guaranty was withdrawn, as also do some of the members of the plaint-

iff firm, but the evidence is so nearly balanced that we cannot disturb the verdict. The judgment must therefore be

AFFIRMED.

THE other judges concur.

STATE OF NEBRASKA, EX REL. CHESTER NORTON, V. CHARLES VAN CAMP, COUNTY CLERK, AND JAMES G. KRUSE, INTERVENOR.

FILED JANUARY 3, 1893. No. 5880.

ORIGINAL application for *mandamus* to compel the respondent, Charles Van Camp, county clerk of Knox county, to call to his assistance two disinterested electors of the twentieth representative district, and with them compare the abstracts of votes cast at the election held November 8, 1892, made by the canvassing boards of the counties of Knox and Boyd for representative, and returned to said county clerk of Knox county by the county clerks of said counties, and issue to the person appearing from said abstracts to have the highest number of votes a certificate of election as representative from said twentieth district in the legislature of Nebraska to convene January 3, 1893. Finding and judgment for relator. *Writ allowed.*

A. W. Agee, for relator.

A. J. Sawyer and *Thomas H. Matters, contra.*

MAXWELL, CH. J., dissenting.

I am unable to assent to the judgment of the majority of the court and I will as briefly as possible state the reasons for failing to do so.

The proof shows beyond question that Boyd county has in fact been attached to Holt county from 1883 to 1890; that two years ago one of the representatives from the district comprising what is now Holt and Boyd counties was a resident of Turtle Creek precinct, in what is now Boyd county; that a supervisor from that precinct sat with the board of supervisors of Holt county and the latter county levied taxes in that county which were collected and paid. These things were a matter of record, which seem to have been kept in Holt county. This state of affairs continued until Boyd county was organized two years ago. There is no proof to the contrary on this point, so that it is established beyond a doubt. But it is claimed that this territory was not lawfully attached to Holt and therefore the proceedings in that regard are void. The testimony shows that in 1883 an election was held in Holt county to attach this territory to Holt; that at the election a majority of the votes cast upon that proposition was in favor of attaching the territory named to Holt, but that a majority of all the votes cast at that election was not in favor of the proposition. The county board, however, declared the proposition carried and thereafter exercised jurisdiction over that territory. It thus was, in fact, attached to Holt county and became to that extent organized territory, and was not within the provision of the statute as to unorganized territory. As a matter of fact the territory of what is now Boyd county has been attached to Holt for election purposes and not to Knox, from 1883 to the present time. It is true there is some proof tending to show that in 1890 some fifty or sixty persons came from what is now Boyd county into Knox county and voted. Some or all of these were challenged, and swore in their votes. The proof also tends to show that there was an exciting county division election which involved at least one county seat, and presumably that the votes were received by the judges and clerks on that account. These voters are shown to have

come from a portion of the territory between the Missouri and the Niobrara rivers, near to the town of Niobrara. So far as appears these votes were illegally cast, and instead of being an argument in favor of the relator are against him, because if the territory in question had in fact been attached to Knox, the electors thereof no doubt would have applied to the county board of Knox county to create one or more precincts in such territory and appoint election boards. This was done by Holt county, and the proof shows was not done by Knox county. To illustrate, in the early history of this state Lancaster county was attached to Cass county for election, judicial, and revenue purposes, but the people of Lancaster county did not go into Cass county to vote, but election precincts were organized in Lancaster county, where the electors voted and elected their own precinct officers. The votes when cast were returned to Plattsmouth and canvassed there and the records were kept there, and taxes levied by the authorities of that county. In 1862 a member of the legislature in Lancaster county, with three in Cass, was nominated by the electors of Cass and Lancaster counties and elected. Later, Saunders county was attached to Cass county for like purposes. Precincts were created in Saunders county by the proper county authorities of Cass county and the electors of Saunders county voted in their own county and elected their own precinct officers. In 1865 the electors of Cass and Saunders counties elected a member of the legislature from Saunders county, and three from Cass. Taxes were levied and collected by the proper authorities of Cass county and the records were kept at Plattsmouth. Now this is just what was done by Holt county. Will any one contend that the mere voting of fifty or sixty persons, who are claimed to be residents of Boyd county in an exciting county division and county seat election, establishes the right to count the votes of Boyd county for the relator in this case? The truth is, it is apparent, that the casting

of these votes was a fraud upon those voters of Knox county, who were opposed to a division of the county, as the testimony shows that all but thirty-five votes were in favor of such division. There is danger of committing a like wrong upon all the electors of Knox county by counting the votes of Boyd county in this case. As a matter of fact, therefore, Knox county never has exercised, or attempted to exercise, jurisdiction over the territory comprising Boyd county. If it is said the law applies to all unorganized territory, the answer is, this was not unorganized territory, because it was attached to Holt county for election, judicial, and revenue purposes, and the law applies only to territory not otherwise assigned, so that all may be protected and represented. The language of the statute is:

"All counties which have not been organized in the manner provided by law, or any unorganized territory in the state, shall be attached to the nearest organized county *directly east*, for election, judicial, and revenue purposes; *Provided*, That Sioux county shall be attached to Cheyenne county for all the purposes provided for in this section; *Provided further*, That if no county lies *directly* east of any such unorganized territory or county, then such unorganized territory or county shall be attached to the county *directly south*, or if there be no such county, then to the county directly north, and if there be no county directly north, then to the county directly west of such unorganized territory or county.

"Sec. 147. The county authorities to which any unorganized county or territory is attached shall exercise control over, and their jurisdiction shall extend to, such unorganized county or territory the same as if it were a part of their own county.

"Sec. 148. If two or more organized counties, or portions thereof, lie directly east of any unorganized county, then the portions of territory of such unorganized county which lie either north or south of a line running directly

west and in continuation of the boundary line between such organized counties shall be attached to the organized county directly east of such territory, for all purposes of this subdivision." (Secs. 146, 147, and 148, ch. 18, Comp. Stats.)

Suppose, therefore, that the territory in question was unorganized, it is to be attached to the nearest organized county *directly east.* If there is no organized county directly east, then it is to be attached to the nearest organized county *directly south.* Webster defines the word "directly," "In a direct manner; in a straight line or course; without curving, swerving, or deviation." Directly east, therefore, means in a direct line on the same parallel east of Boyd county. An examination of a good map will show that Boyd county is northwest of Knox county; that the northwest corner of Knox county joins the southeast corner of Boyd county—the points of contact extending about seven miles, and that only a triangular point of Boyd county extends as far south as Knox; that Boyd county extends north to the 43d parallel, while Knox county at no point reaches within ten miles of that degree of latitude; that nearly all of Boyd county is north of the degree of latitude that passes along the north line of Knox county.

It is very evident, therefore, that Knox county is not directly east of Boyd county, but is southeast, while Holt county is directly south of Boyd county, and the latter county is and was properly attached to that county for election purposes. It is very clear to my mind that the authorities of Knox never had any right to interfere in the affairs of Boyd county, and they seem to have recognized this fact by not doing so.

But suppose that Knox county had jurisdiction over the territory in question, still the relator is not entitled to the writ. The certificate of nomination shows that the convention was held at Creighton; that a resident of

Knox county was elected president of the convention, and another resident of that county secretary. There is no proof that a call for a convention of this kind was made by any one; or that the republicans of Boyd county were invited, or even notified to attend. A convention to be lawful must represent the whole district, otherwise it would be possible to pack a convention in the interest of particular individuals. No doubt the convention in this case was a fair convention of Knox county, but it should appear from the proof that Boyd county was invited to participate therein, otherwise it cannot be called a *district* convention. This is particularly true under the Australian ballot law of this state. It is conceded that no votes were ever before cast in that district as a *district for representative.* How, then, could it be said that the republican party of the *district* had at the preceding election cast one per cent of the votes? The statement is a mistake, and the only way a person could be nominated in the district, even if one existed, was by petition. In addition to this, the sample ballots do not contain the name of the relator. It is true the name of the relator is written in both the sample and official ballots, but this does not comply with the law. That requires the name to be *printed* in both. The proof also shows that certain friends of the defendant, after the *mandamus* proceedings, circulated a petition, as he claims, without his knowledge, to nominate him in Boyd county for the office in question; that the petition was signed by fifty-three names, but the clerk of Boyd county did not insert the defendant's name in either the sample or official ballots. Whether this was done with or without his knowledge does not in any manner affect this case, as if there was no legal district the casting of votes could not make it legal.

It also appears that the clerk had previously refused to insert the relator's name on the sample and official ballots, and that the district court compelled him to insert the same,

which he did by *writing* in the relator's name without any designation of the office for which he was a candidate. The clerk evidently did not regard Boyd county as a part of the district and seems to have refused on that ground. The defendant was not a party to the *mandamus* proceedings, and we have no means of knowing what facts were before the district court, but as the defendant's name was entirely omitted from the ballots and the relator's written therein, it is evident to me that there was not a legal ballot cast in Boyd county for the relator. In a *mandamus* proceeding of that kind there is but little doubt that all the candidates for the particular office in dispute are proper parties defendant in order that they may protect their rights. The question would then be contested and cases determined on their merits. An *ex parte* order is granted almost as a matter of course and is entitled in a case like that at bar to but little consideration. The uniform rule adhered to by this court from the first has been to deny the writ of *mandamus* unless the right is *clear*. It must be free from doubt. Now, will any one say, in view of all the facts, that the relator's right to the seat is free from doubt? I think not. It is not a question of the success of one party or another. There is a principle underlying all questions of this kind that the will of the people as expressed through the ballot box shall govern.

This court from the first has compelled the counting of votes cast in pursuance of law in any legal subdivision of the state. The trouble with this case is, there was no representative district created either in fact or in law in which any votes were cast in Boyd county for the relator. There is no pretense that the records of the territory of Boyd county were kept in Knox county; that any taxes were ever levied there, or any jurisdiction of any manner or kind ever exercised, or attempted to be exercised, by the authorities of Knox county. All these things were done by Holt county under a colorable annexation of that county

to Holt. For seven years the jurisdiction of Holt county was undisputed. The legislature itself, in 1890, permitted a member to retain his seat who was a resident of Boyd county and who was elected by the joint votes of Holt and the territory of Boyd county, and that is the district to which Boyd county belongs. Here was annexation in fact under the forms of law. I believe the election in Holt county, in 1883, for the annexation of Boyd county, was held in pursuance of law, and if it was material it could readily be so demonstrated, but, in my view, it is not in this case material. No one will contend that a change in an election district, made in pursuance of apparent authority and an election held thereunder, can be treated as void. To illustrate: In 1860 a large part of Dodge county was added to Washington county and Fontanelle, the county seat, absorbed by that county. Now, suppose that a candidate for the legislature in Dodge county, in 1861, had ignored the change and been a candidate from the county of Dodge as it formerly existed, and suppose, including the old territory of Dodge, he had the highest number of votes, would he thereby have been entitled to a seat in the legislature as against his competitor? And would this court, by *mandamus*, have compelled the clerk of Dodge county to have issued a certificate of such election? I think not, because the court in a collateral proceeding, after election, in a contest between opposing candidates, will not pass upon the validity of the act creating the several districts, provided that they have been created under color of the law.

This, so far as I know, is the first attempt of the kind in this state. The sole ground on which the relator claims a right to a certificate is that Boyd county is directly west of Knox, but it is very clear that the territory of Boyd county is not directly west and not unorganized territory, and was, in fact, annexed to another county, and cannot be placed in the same district with Knox without

doing violence to both the letter and the spirit of the law. As well have joined Cedar county to Knox and ask this court to compel the counting of the votes cast for a party in Cedar county in the alleged district composed of Cedar and Knox as in this case. The house of representatives is the only proper tribunal to examine into all the facts in the case and determine the rights of the parties. It must ultimately determine the question, and this court is not, in my opinion, warranted in interfering in behalf of the relator, but may safely trust the case to a co-ordinate department of the state government. I emphatically protest against the findings and judgment in this case, as in my view they are unwarranted by either the pleadings or proof, and are calculated to forestall the action of the house of representatives. I think the writ should be denied.*

STRAUT RICHARDS V. STATE OF NEBRASKA.

FILED JANUARY 3, 1893. No. 4591.

1. **Rape:** ADMISSIBILITY OF EVIDENCE. In a charge of rape, where no complaint was made for about seven months after the commission of the alleged offense and not until concealment by reason of pregnancy was no longer possible, *held*, that the statements of the prosecutrix were not admissible in evidence, but independent facts, such as the condition of her clothing at the time, are admissible.

2. ———: ———: EVIDENCE. Proof of deformity of prosecutrix, as by the want of a hand, is proper, as tending to show diminished power of resistance.

3. ———: ———. A charge of rape made months after the alleged commission of the same, where there were no marks of violence on the person or clothing of the prosecutrix, or evidence of excitement, or change in her demeanor, cannot be sustained unless there is very strong corroborating proof of the commission of the offense.

* For majority opinion see *post*, p 91.

4. ———: ———. Where the accused testifies in his own behalf and admits the sexual intercourse, but denies the use of force, it is for the jury to determine the facts from the testimony.

5. ———: ———. INSTRUCTIONS taken together, *held*, to state the law correctly.

6. ———: TRIAL: CONDUCT OF JUROR. A juror will not be permitted to state to his fellow jurors, while they are considering their verdict, facts in the case within his own personal knowledge. He should make the same known during the trial and testify as witness in the case.

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

George B. France, *Robert Humphrey*, and *N. V. Harlan*, for plaintiff in error.

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

MAXWELL, CH. J.

March 26, 1888, the prosecutrix, Blanche Sheeks, commenced a term of school about four and one-half miles west and one-half of a mile south of York, Nebraska. The term continued until June 10, 1888. She boarded from Monday until Friday at the house of Joseph J. Richards, father of the accused. She was seventeen and the accused nineteen years of age. They had been acquainted from childhood, having lived as neighbors for many years, but at this date the prosecutrix lived with her father in the city of York. In September and November of said year the prosecutrix taught another term of school at the same place. During this term she boarded at home, but kept her horse at the barn of Mr. Richards. During the spring term the prosecutrix was taken home on Fridays and back to her school on Mondays by some member of her family. The Richards family consisted of father, mother, Albert, Lot, Roy, Pearl, and the accused. On Friday or Saturday evening of the second week of school

no one of the family came for the prosecutrix, and she rode home in a buggy with the accused, who was going after the mail at York. She reached home after dark, spoke kindly to the members of her family, went into the kitchen and got a drink of water, went upstairs to her room, and was seen no more that night, except by her sister, with whom she slept. On the following Monday she went back to her school and continued to board with Mr. Richards during the remainder of the term, where, during all that time, the accused stayed as a member of the family. The school house was just across the public road from Mr. Richards' house. The accused remained a member of his father's family until about October 9, 1888, when, with his sister Pearl, he went to Lincoln, Illinois, on a visit, where the Richards family, prior to 1888, had resided and where two married sisters then resided. In November, 1888, the prosecutrix, being seven months in the family way, made a charge of rape against the accused, saying it was committed on the ride, the 6th or 7th of April, 1888. A requisition was obtained and the accused was brought back on the charge as far as Lincoln, Nebraska, where he escaped. He was afterwards arrested at Louisville, Kentucky, where he was attending a commercial school. In November, 1890, the case was tried and he was convicted. A motion for a new trial was made and overruled and the accused was sentenced for three years in the penitentiary. In impaneling the jury the court allowed the state to challenge J. W. Small and exclude him from the jury for cause. The evidence of Small, in substance, is, that he heard the evidence of one witness on the former trial; that he had not paid much attention to it; that he did not form or express any opinion in the case, and that he had no bias or prejudice. Substantially the same objections were made to the jurors Campbell, Miller, and Bohl, and they may be considered together.

A trial court, in impaneling a jury to serve in a partic-

ular case, has a very extensive discretion in discharging a person called as a juror, who might, as shown by his answers, not make an entirely fit or competent person to serve as a juror. This rule, however, should not be applied to retaining jurors. (*State v. Miller*, 29 Kan., 43; Maxw., Cr. Proc., 581.) In the case cited from Kansas it is said: "We do not think that the court below committed any substantial error as against the defendant, for, although it may be that Estlinbaum, the juror excused, was not so absolutely incompetent to serve as a juror that the court below could have committed material error by permitting him to serve as a juror, yet it cannot be doubted but that twelve men more competent could easily have been found and obtained to serve on the jury. We can hardly see how the court could commit substantial error by discharging any person from the jury when twelve other good, lawful, and competent men could easily be had to serve on the jury. (*Stout v. Hyatt*, 13 Kan., 232; *A., T. & S. F. R. Co. v. Franklin*, 23 Id., 74.) There is an immense difference between discharging a juror and retaining him. To discharge him can seldom, if ever, do harm, while to retain him, if his competency is doubtful, may do immense injury to one party or the other."

The reasons given by the Kansas supreme court are satisfactory. The court may, where it appears from the evidence that there is some ground for believing that the juror may not be entirely impartial, discharge him, and error will not lie, provided a fair jury is obtained. The first error assigned, therefore, is overruled.

2. "That the court erred in permitting testimony as to the physical condition of the prosecutrix at or about the time the offense is alleged to have been committed, as it appears that she has but one hand." In this there is no error, as the evidence tended to show her inability to resist the alleged force of the accused. The second error assigned, therefore, is unavailing.

3. The third objection is to the failure of the prosecutrix to make complaint for many months after the crime was committed, and proof of her statements when made. The charge is made as having occurred early in April, 1888, while the child was born in January, 1889. The prosecutrix, in her testimony, testifies that the connection was accomplished by force and intimidation, by the production of a revolver at a lonely place on the road some distance east of the Richards residence; that her drawers were torn by the accused in front and down one leg; that she did not immediately complain, because the accused told her that her certificate would be revoked and that she was fearful of certain injuries to herself in case complaint was made. She is corroborated as to the torn condition of her underclothing by her mother.

Robert Tucker, a witness called on behalf of the state, testifies that he and another person, armed with a requisition, went to Illinois and arrested the accused; that he had a number of conversations with him in regard to this occurrence; that at one time he freely and voluntarily said:

A. In referring to this matter, Mr. Richards told me that he was very sorry for his family. He said he had a nice family and his folks would be sorry for him; that he was sorry for his family and not for himself, but for his mother and his sisters and the connection of the family, and then he went on and talked in that line, and finally said he expected that he was elected for a term in the penitentiary, I think he termed it the "pen." He didn't seem to care so much for himself as the others.

Q. What did he say about Miss Sheeks?

A. He said that Blanche was a nice girl, and that the girl he had left in Illinois was a nice girl; he seemed to have several nice girls on hands just then.

The accused testified in his own behalf on his direct examination as follows:

Q. Do you know about the length of time you were coming in?

A. Why, no; I don't know exactly how long, but probably it wouldn't be later than about three-quarters of an hour; I don't know just exactly.

Q. You may state what occurred on the way coming, if anything.

A. Why, after we turned there into that road that runs there by Mr. Hibbard's we came to a house about forty rods from the corner, the Frenchman's house, and about forty rods east from that there is a large draw, and just before we got to the draw I made some advances towards Miss Sheeks, and the manner in which she received them, without any resistance to them, led me to believe that she was not unwilling for further advances, and as we drove down into the draw I asked her if she had any objections to our going down into the draw there, or insinuated in such a way that she knew; and so I proposed that we go down into it, and she said she hadn't; and we turned down the first big draw we came into—we turned down and went down in that about—I think it was about forty rods from the road—and the draw there is a branch of the draw there running west, a small draw—and we entered that and turned into this branch draw and drove so that people couldn't see us from the road, and there we stopped and I had connection with her there.

Q. And what did you do after that?

A. Well, I just put up the top; in the meantime I had the top down; I think I put up the top and straightened around and went on into York.

Q. Well, now, you may state what resistance, if any, she made.

A. No, sir; there was no resistance whatever. She was perfectly willing, if she had not been willing I should never have gone down in the draw.

From other portions of the testimony it appears that he planned the drive into York that evening, as he informed his mother at dinner, in the presence of the prosecutrix,

that such was his intention and asked his mother to have an early supper. It will be observed that the sexual intercourse is admitted by the accused, but force is denied. He also denies the use of a revolver, or that he had one. This simplifies the question somewhat. The statements of the prosecutrix were not admitted in evidence and no objections on these grounds can be sustained. Such statements were not admissible as part of the *res gestæ*.

4. Objections are made to certain parts of some of the instructions, but in construing them they must be considered together. They are as follows:

"3. The material allegations contained in the information under which the defendant is being tried are as follows: That the defendant, in York county, Nebraska, on the 7th day of April, A. D. 1888, in and upon one Blanche Sheeks, then and there being, forcibly, violently, unlawfully, and feloniously did make an assault, and her, the said Blanche Sheeks, then and there forcibly, unlawfully and against her will, feloniously did ravish and carnally know, she, the said Blanche Sheeks, not being the daughter or sister of him, the said Straut Richards, and the said Blanche Sheeks being then and there above the age of fifteen years.

"4. Rape is defined to be the unlawful carnal knowledge by a man of a woman or a female child, forcibly and against her will.

"5. The charge made against the defendant is in its nature a most heinous one and well calculated to create strong prejudice against the accused, and the attention of the jury is directed to the difficulty growing out of the nature of the usual circumstances connected with the commission of such a crime in defending against the accusation of rape. It is your duty to carefully consider all the evidence in the case and the law as given you by the court in arriving at what your verdict will be in this case. You must find on the part of the woman not merely a passive

policy or equivocal submission to the defendant, such resistance will not do. Voluntary submission on the part of the woman while she has power to resist, no matter how reluctantly yielded, removes from the act an essential element of the crime of rape. If the carnal knowledge was with the voluntary consent of the woman, no matter how tardily given or how much force had theretofore been employed, it is not rape unless you find from the evidence beyond a reasonable doubt that the said Blanche Sheeks was prevented from making resistance and submitted to sexual intercourse with the defendant through fear of personal violence, as explained in the next instruction.

"6. The court instructs the jury that where a woman submits to sexual intercourse, through fear of personal violence, and to avoid the infliction of great personal injury upon herself, and to save her life, then such carnal intercourse is punishable as a rape, and if the jury believe from the evidence, beyond a reasonable doubt, that the defendant had sexual intercourse with the said Blanche Sheeks, against her will, then the defendant may be guilty of the crime of rape, although the said Blanche Sheeks did not make the utmost physical resistance of which she was capable to prevent such intercourse, provided the jury further believe from the evidence, beyond a reasonable doubt, that the defendant threatened to use force and to do her great bodily injury, or to kill her in case she did not submit, and that she did submit to such intercourse through fear that defendant would do her great bodily injury, or kill her.

"6½. Under the law of this state, if the defendant avails himself of the right to testify and clearly and explicitly denies the commission of offense, then there must be testimony corroborating that of the prosecutrix to authorize a conviction; but it is not essential, in order to obtain a conviction, that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated

as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the guilt of the accused is established beyond a reasonable doubt.

"7. If the jury believe from the evidence that at the time the offense is alleged to have been committed the said Blanche Sheeks made no outcry, and did not complain of the commission of the offense to others, but concealed it for a considerable length of time afterwards, then the jury should take these circumstances into consideration with all the other evidence in determining the question of the guilt or innocence of the defendant, and whether a rape in fact was committed.

"8. The law throws around the defendant the presumption of innocence and requires the state to establish by the evidence beyond a reasonable doubt every material fact averred in the information under which the defendant is being tried; and it is the duty of the jury to give the defendant in this case the full benefit of this presumption and to acquit the defendant unless the evidence establishes his guilt beyond a reasonable doubt.

"9. You are the judges of the credibility of the witnesses and of the weight to be given to the testimony of each and all of them. In determining the issues in this case you should take into consideration the whole of the evidence, giving to the several parts thereof such weight as you think they are entitled to. And in determining the weight to be given to the testimony of the several witnesses you should take into consideration their interest in the event of the case, if any such is proved; their conduct and demeanor while testifying; their apparent intelligence, fairness, or bias, if any such appears; the reasonableness of the story told by them; and all the evidence and circumstances tending to corroborate or contradict such witnesses, if any such are proved; and you may take into consideration any interest which any witness may have in the result

of this case, if any such is proved, and give to the testimony of such witness such weight as you think it is entitled to.

"10. The defendant has testified in this case as a witness in his own behalf, and in determining the weight to be given to his testimony you are at liberty to consider the degree of interest which he has in the result of this action and determine yourselves, from the testimony, the weight to be given to his testimony.

"11. By a reasonable doubt is not meant that the accused may possibly be innocent of the crime charged, but it means an actual doubt, having some reason for its basis. A reasonable doubt that entitles to an acquittal is a doubt of guilt reasonably arising from all the evidence in the case. The proof is deemed to be beyond a reasonable doubt when the evidence is sufficient to impress the judgment and understanding of ordinary, prudent men with a conviction on which they would act in their most important concerns and affairs of life.

"12. If the proof of guilt amount to a moral certainty or such a moral certainty as convinces the minds of the jury as reasonable men, beyond a reasonable doubt, it is sufficient.

"13. If you believe that the evidence against the defendant has established all the material allegations contained in the information under which the defendant is being tried, beyond a reasonable doubt, you should convict the defendant.

"14. If the evidence against the defendant is not sufficient to establish his guilt beyond a reasonable doubt, it is your duty to return a verdict of not guilty.

"15. The court gives the jury with these instructions two forms of verdict, one finding the defendant guilty. After you have agreed upon your verdict, the verdict agreed upon should be signed by your foreman and returned into open court."

These instructions, taken together, are substantially correct, and appear to cover all phases of the proof.

Too much importance is given to criticism of the testimony of the accused, but the prejudice is not sufficient to cause a reversal. The conduct of the prosecutrix is inexplicable on the theory that the act was accomplished by force and against her will. So far as appears there was no visible mark of violence noticeable on either her person or clothing. She does not seem to have been excited, nor was anything noticed out of the ordinary course. Then the fact that she concealed the act as long as concealment was possible and intended, as she testifies, if nothing came of it to say nothing about it, is a strong circumstance against the theory of force. If the case rested upon her testimony alone it would not be sufficient to establish the commission of the offense. The testimony and admission of the accused, however, to some extent corroborates that of the prosecutrix. He admits the sexual intercourse and states where it took place; that he drove off the public road down the ravine some forty rods, and into a side ravine, may have been for the purpose he states, or perhaps where her cry for help could not be heard. The purpose must be gathered from the testimony. His conduct also since tended to show a sense of guilt, so that it is impossible for a court to say as a matter of law that the offense was not what the prosecutrix claims it to be, and that matter must be determined by a jury. (*Matthews v. State*, 19 Neb., 330; *Reynolds v. State*, 27 Id., 90.)

The accused filed an affidavit in support of the motion for a new trial in which he alleges that two of the jurors (naming them) stated to the jury while considering their verdict that the accused ruined other girls and was an improper person to run at large, and should be convicted on general principles. One of the jurors accused has filed an affidavit in which he denies many of the statements made by the accused. The denials, however, are not as broad as the

accusation. The other juror makes no denial. If a juror knows any facts pertinent to the case it is his duty to make them known and testify as a witness. He cannot be permitted to testify before the jury as to facts which he claims are within his personal knowledge, because it is for the court to say what evidence is admissible in the cause. If the affidavit of the accused is true, one of the jurors named stated facts to the jury which were not admissible in evidence and were of a highly prejudicial character. The judgment must therefore be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

NORVAL, J., not sitting. POST, J., concurs on the ground that there is not sufficient evidence to sustain the judgment of conviction.

J. J. IMHOFF V. JACOB E. HOUSE.

FILED JANUARY 3, 1893. No. 4889.

1. **Allegata et Probata.** A party is not allowed to allege in his petition one cause of action and prove another upon the trial. The *allegata* and *probata* must agree.
2. **Sufficiency of Evidence in Action for Services Rendered.** The evidence in the case *held* insufficient to support the verdict.

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

F. I. Foss, and *Hall, McCulloch & English*, for plaintiff in error.

Winfield S. Strawn, contra.

NORVAL, J.

This action was brought by defendant in error against Frank I. Foss and J. J. Imhoff. There was no service of summons upon Foss, and upon a trial to a jury a verdict was rendered against Imhoff alone for $800. A motion for a new trial was made and overruled, and judgment was rendered against him for the amount assessed by the jury, with costs of suit.

The cause of action set up in the petition was not established on the trial. It is charged in the petition substantially that House is a civil engineer and was employed by Foss and Imhoff in 1887 to make a survey of the Lincoln Belt Line railway; that in pursuance of said contract of employment he entered upon said work, furnishing the necessary assistance therefor; that he devoted, by self and assistants, four months' time to said employment, and that the same was reasonably worth $200 per month, no part of which has been paid.

It will be noticed that the petition does not charge that there was any contract or agreed price plaintiff was to receive for his services, but he seeks to recover on a *quantum meruit* for the reasonable value of the services rendered. No testimony is to be found in the record as to their value, but the undisputed evidence establishes that prior to the commencement of the work it was definitely agreed that plaintiff should receive $20 per day. The proof does not conform to the allegations of the petition. A party cannot allege one state of facts and prove another. The *allegata* and *probata* must agree.

If the variance between the pleading and proofs was the only objection to the verdict and judgment we might permit the plaintiff to amend his petition to conform to the proofs, inasmuch as no objection was made on the trial to the introduction of the testimony on that branch of the case. But there is another reason why the verdict cannot

stand. The clear preponderance of the evidence shows that the plaintiff did not contract with or perform the work for Mr. Imhoff personally. It is undisputed that prior to the making of the contract a company had been formed known as the Lincoln Belt Railway Company, which had a board of directors; Mr. Foss was vice president of the company and Mr. Imhoff was general manager thereof. The latter was authorized by the board of directors to employ some one to make a preliminary survey of the line of its proposed road. Of all these facts Imhoff and Foss both testify that the plaintiff House was informed before the contract of hiring was entered into, and he failed to deny it. Foss and Imhoff, as such officers of the company, employed House, not on their own account, but on behalf of the company. By the terms of the engagement the plaintiff was to hire the necessary assistants to do the work in the field, and he was to superintend the same, make all maps and profiles, as well as estimates of the costs of building the road. This was done as agreed. It appears that the actual work of making the surveys was performed in about a month by an engineer and assistants sent by plaintiff, who were subsequently paid for their services by said company. It is also undisputed that after plaintiff had completed his part of the work he made out and presented a bill to the Lincoln Belt Railway Company for his services and repeatedly urged its payment. The board of directors objected to the bill as being unreasonable and directed the secretary of the company to correspond with plaintiff with reference to the same for the purpose of procuring a reduction of the bill. The record shows that numerous letters passed between the secretary and Mr. House, without any adjustment of the claim being effected. Finally plaintiff brought this suit without ever having presented a bill to Imhoff personally for his services. The conclusion is irresistible, from the facts proved, that the plaintiff was employed by and the work was performed for the Lin-

coln Belt Railway Company and that the jury were not justified in rendering a verdict against the plaintiff in error. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

ANHEUSER-BUSCH BREWING ASSOCIATION, APPELLANT, v. CREIGHTON MORRIS, ASSIGNEE OF THE FARMERS & MERCHANTS BANK OF HUMBOLDT, APPELLEE.

FILED JANUARY 3, 1893. No. 5114.

1. **Banks**: VOLUNTARY ASSIGNMENTS: PREFERRED CREDITORS. Where a bank collects money for another, it holds the same as trustee of the owner, and on the making of an assignment by the bank for the benefit of its creditors the trust character still adheres to the fund in the hands of the assignee, and the owner is entitled to have his claim allowed by the county court as a preferred claim.

2. ———: ———: ———: WAIVER OF RIGHT TO PREFERRED CLAIMS. In such case, where the owner files his claim with the county judge in the regular way, which is allowed like that of an ordinary creditor, no preference being given, from which allowance no appeal is taken, and he afterwards accepts from the assignee two dividends declared, he waives his right to afterwards insist upon the payment of his claim in full.

3. **Voluntary Assignments**: PREFERRED CLAIMS: COUNTY JUDGE. It is the duty of the county judge, at the same time he audits and allows a claim against an assigned estate, to determine whether or not it is entitled to preference, and if he finds that it is, to order the same paid as a preferred claim. His decision is, in effect, a judgment, which is conclusive, unless appealed from.

APPEAL from the district court of Richardson county. Heard below before APPELGET, J.

Story & Story, for appellant:

The plaintiff's money was a trust fund. It can be followed into the assignee's hands, and under sec. 24, ch. 6, Comp. Stats., should be paid in full as a preferred claim. (*National Bank v. Insurance Co.*, 104 U. S., 54; *Harrison v. Smith*, 83 Mo., 210; *Peak v. Ellicott*, 30 Kan., 156; *Englar v. Offutt*, 70 Md., 78; *Farmers & Mechanics Bank v. King*, 57 Pa. St., 202; *McLeod v. Evans*, 28 N. W. Rep. [Wis.], 173.)

J. R. Wilhite and *Edwin Falloon, contra.*

NORVAL J.

On July 1, 1889, the Farmers & Merchants Bank of Humboldt made an assignment for the benefit of its creditors. Subsequently, Creighton Morris was elected by the creditors of the bank as assignee of the assigned estate, and qualified as such. Claims have been allowed by the county court of Richardson county against the estate aggregating more than double the appraised value of the assigned property. On September 13, 1889, appellant filed its claim as a creditor of said assigned estate to the amount of $827.83, for moneys collected by the bank for appellant and not remitted, which was allowed by the county court October 17, 1889, as an ordinary claim, no preference being given. Subsequently, on October 28, 1889, a ten per cent dividend was declared, and appellant, as a creditor, took the ten per cent upon his claim allowed. Afterwards, on May 13, 1890, a six per cent dividend was declared, and appellant accepted its *pro rata* share. On the 6th day of June, 1891, appellant filed with the county court its verified petition alleging that its claim was for trust moneys and praying that the same should be paid in full as a preferred claim, which application was denied on July 27, 1891, and on the same

day a five per cent dividend was declared, but appellant declined to accept its *pro rata* share and appealed to the district court, where the decision of the county court was affirmed.

It is argued by the appellant, in effect, that the money collected for it by the bank was a trust fund in the hands of the latter, and that the making of the assignment did not divest the money of its trust character. There can be no doubt of the soundness of the proposition stated. This money collected by the bank did not belong to it, but to appellant, and it did not pass by the assignment to the assignee as a part of the assets of the bank. The assignee took the money subject to the trust in favor of the owner, and appellant was entitled under the provisions of the assignment law to have the same paid as a preferred claim against the estate, unless he has waived his right to such preference. The decisions cited in the brief of appellant fully sustain this conclusion, and we have been unable to find any in conflict therewith. (*McLeod v. Evans*, 28 N. W. Rep. [Wis.], 173; *Farmers & Mechanics Bank v. King*, 57 Pa. St., 202; *Peak v. Ellicott*, 30 Kan., 156; *People v. City Bank of Rochester*, 96 N. Y., 32; *Cragie v. Hadley*, 99 Id., 131; *National Bank v. Ins. Co.*, 104 U. S., 54.)

The decision in *Wilson v. Coburn*, 35 Neb., 530, is clearly distinguishable from the case at bar. There an insolvent bank received a deposit of a sum of money from one Henry Wilson, and soon thereafter the bank made an assignment for the benefit of its creditors. The depositor filed with the county judge his claim, and a petition praying that he be adjudged a preferred creditor, and for an order for the payment of his claim in full. It was ruled that the fact that the bank, within the knowledge of its officers, received the depositor's money under circumstances which amounted to a fraud upon him, was not of itself sufficient to entitle him to a preference over other creditors

from the funds of the bank in the hands of the assignee. The depositing of the money with the bank under the circumstances stated created the relation of debtor and creditor, and as the sum deposited had gone into and was mingled with the general funds of the bank, so as not to be capable of identification, or of being distinguished from the other assets of the bank in the assignee's hands, the depositor had no right to preference. In the case before us the transaction between the appellant and the assignor did not create the relation of a debtor and creditor, but the money collected constituted a trust fund in the hands of the bank for the benefit of the owner, and the assignment did not have the effect to divest it of such trust. The assignee stands in the place of the bank, and by the assignment he acquired no greater right to the money than the bank possessed.

Has appellant waived its right to insist upon the payment of its claim in full by having the same allowed as an ordinary debt against the estate, and by accepting two dividends from the assignee? It is plain that the answer must be in the affirmative.

Section 16 of the assignment law provides, among other things, that the county court shall fix a time within which claims against the assigned estate shall be filed.

Section 17 of the same act declares that "On the day following the day fixed under the provisions of the preceding section all uncontested claims shall, by the county judge, be allowed and entered of record, with the amounts thereof, in a book to be provided and kept for that purpose. Upon all contested claims the county judge shall order pleadings, as nearly as practicable like those in ordinary civil actions in said court, to be summarily made up, and thereupon said cause shall proceed in said court as in ordinary civil actions therein; but no such cause shall be continued for a longer time in the aggregate than sixty days from the day so fixed."

Section 18 provides that "Judgment in said action shall be that such claim or some amount thereof be allowed, or that the same be disallowed, or that the assignee have and recover from the person making the claim a certain amount. If the claim shall be allowed, judgment for costs shall be adjudged against the party or parties contesting the same. If the claim be allowed in part only, the court adjudicating the same shall apportion the costs or adjudge them as may be just. If the claim be wholly disallowed, or the assignee recover judgment, costs shall be adjudged against the claimant, but in no case shall the costs be paid out of the assigned estate except as in this act otherwise provided. In such cause the claimant shall be named as plaintiff, and the contestant or contestants as defendant. Judgment in favor of the assignee or for costs shall be collected as in other cases. Whenever any contested claim shall be finally allowed, or so much thereof as shall be finally allowed, shall be entered of record in like manner as other claims."

Section 19 provides that "no petition in error shall be allowed from the judgment of the county court upon a contested claim, but either party may appeal therefrom as in other cases."

Sections 22, 23, and 24 read as follows:

"Sec. 22. At the expiration of three months from the date of the inventory and appraisement, or sooner if, and as often as, the assignee shall be in the possession of sufficient funds, the county court shall order a distribution of all moneys in the assignee's hands, fixing the amount in dollars and cents to be paid to each person entitled thereto, and thereupon the assignee and his sureties shall become liable to such person therefor absolutely. The court may also enforce obedience to such order by the assignee by attachment for contempt, and may commit him to the common jail of the county, or any other suitable place of confinement and safe keeping until he shall comply therewith.

"Sec. 23. As soon as the entire estate shall have been converted into money the county court shall make a like order for the final distribution thereof, which shall have the same effect and may be enforced in like manner as the order mentioned in the last preceding section.

"Sec. 24. Moneys coming into the hands of the assignee shall be distributed in the following manner: First—To the payment of fees and allowances of the assignee, county judge, clerks, sheriff, and officers. Second—To the payment of any public tax or assessment charged against the assignor or assignors or his or their property. Third—To the payment of preferred claims in full. Fourth—The balance shall be divided among the creditors so that the amount paid to each shall bear the same relation to the whole sum to be so divided that the amount of such creditor's claim shall bear to the aggregate amount of all the claims proven."

The statute authorizes and requires the county judge to pass upon claims filed against an assigned estate. Manifestly it is his duty at the time he passes upon and audits a claim to investigate and determine whether it is entitled to preference, and if he finds that it is, to allow the same as a preferred claim. His decision entered of record is in effect a judgment, which is final and conclusive upon all parties, unless an appeal is taken therefrom to the district court in the manner and within the time indicated by section 19 above quoted. (2 Black, Judgments, sec. 641; *Eppright v. Kauffman*, 1 S. W. Rep. [Mo.], 736.)

Appellant insists that the proper time for the county judge to determine whether the owner of a claim is entitled to preference is when the order of distribution is made. It will be conceded that in a suit to foreclose several mortgages, unless the priority of liens is determined when the decree is rendered, each lien-holder will share alike in the proceeds of the sale of the mortgaged premises. The time to determine in such a case the priority of liens clearly is

not after the sale of property. Applying the same rule to the settlement of insolvent estates we conclude that the status of a claim, whether it shall be preferred or not, must be fixed and determined by the county judge at the time the same is passed on and allowed by him, and not when he makes an order for the distribution of the money in the hands of the assignee. This view is strengthened by the reading of section 24, copied above, which declares the manner in which money belonging to an assigned estate shall be distributed. By the third subdivision of the section preferred claims are to be paid in full, and by the next subdivision the balance of the assets is to be divided among the creditors *pro rata*. From this it is plain that the status of the owner of each claim, whether entitled to a preference or not, must be judicially determined before there can be a distribution of the assets among the creditors of the assignor. The appellant's claim was allowed as an ordinary claim, and by failing to appeal therefrom, and by accepting as a creditor the two dividends declared, it waived its right to insist upon the payment of its claim in full as a preferred creditor. In reaching this conclusion we have not overlooked the decision in *McLeod v. Evans, supra*, wherein a contrary doctrine is stated. In view of our statutory provisions we do not regard that case as authority here. It follows that, as the decision of the county court and of the district court are in harmony with the views that we have expressed, the judgments of both courts must be

AFFIRMED.

THE other judges concur.

JAMES ASHFORD V. STATE OF NEBRASKA.

FILED JANUARY 3, 1893. No. 4708.

1. **Criminal Law: CONFESSIONS.** In a criminal prosecution the confession or admission of the accused is not alone sufficient to justify a conviction. That the crime charged has been committed must be established by other testimony. A voluntary confession may be proved for the purpose of connecting the accused with the offense.
2. ———: BURGLARY: PROOF. On a trial for burglary, under section 48 of the Criminal Code, an essential element of the crime is that the breaking and entering were committed in the night season, and unless this element is proved beyond a reasonable doubt, the accused should be acquitted.
3. ———: ———: PLEADING. In such a case the intent with which the breaking and entering were done must be proved as laid in the information.
4. ———: SUFFICIENCY OF EVIDENCE. Evidence in the case *held* insufficient to sustain the verdict and judgment.

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

A. C. Read and *J. D. Pilcher*, for plaintiff in error.

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

NORVAL, J.

Plaintiff in error was tried and convicted in the court below of the crime of burglary and adjudged to be imprisoned in the penitentiary for the term of seven years. From that judgment he prosecutes error.

The information charges, in substance and effect, that the plaintiff in error, in the night season of the 23d day of February, 1890, in Douglas county, broke and entered a dwelling house owned by Jettie Reynolds, with intent to commit the crime of larceny.

It is urged that the evidence fails to support the verdict, and this is the only ground on which a reversal is asked.

It appears that Jettie Reynolds, the complaining witness, kept a house of prostitution in the city of Omaha, and that the plaintiff in error, who is a colored man, had been in her employ as a servant for some time prior to Christmas, 1889, at which date he was discharged. The evidence introduced by the state shows that about 2 o'clock on the morning of February 23, 1890, Jettie Reynolds, before retiring, locked the doors of her house, and when she arose about 9 o'clock in the forenoon of that day it was discovered that the doors of the house had been unlocked, and were open, and also that pots, containing plants, had been taken from a window in the pantry and placed upon the floor. It was further established that when plaintiff in error was arrested, which was a few days after the alleged burglary, he had upon his person several keys which would unlock the doors of the house in controversy.

Upon the trial one Sarah Payne, a cook in the employ of Jettie Reynolds, testified that on the evening of February 24th the accused had a conversation with the witness in which he stated that he entered the house about 4 o'clock in the morning of the day laid in the information, through the pantry window, which he had opened for that purpose, and that he went out the same way that he entered.

The defendant offered some testimony tending to prove an *alibi*.

This prosecution is brought under section 48 of the Criminal Code, which provides that "if any person shall, in the night season, willfully, maliciously, and forcibly break and enter into any dwelling house, shop, office, store house, mill, pottery, factory, water craft, school house, church, or meeting house, barn or stable, warehouse, malt house, still house, railroad car factory, station house, or railroad car, with the intent to kill, rob, commit a rape, or with intent to steal property of any value, or commit any felony,

every person so offending shall be deemed guilty of burglary, and shall be imprisoned in the penitentiary not more than ten nor less than one year." One of the essential ingredients of the crime charged is that the breaking and entry were done in the night time. There is absolutely no testimony in the record as to the exact time the house was entered, except the admission of the defendant already referred to. Aside from his admissions the proofs only establish that the entry was made some time between the hours of 2 and 9 in the morning; but whether it was before or after daylight does not appear. There is also a lack of evidence as to the location of the Reynolds house, as to whether it is situated in the quiet or busy portion of the city and as to whether there were other residences or houses in the same vicinity. If located in the heart of the city the probabilities that the entry was made before daylight would be greater than if situated in a more sparsely settled portion. The admission of the defendant was competent evidence, not for the purpose of proving that the crime alleged had been committed, but for the purpose of connecting the accused with the offense. In a criminal prosecution every element constituting the crime must be proved by evidence other than the mere admissions or confessions of the accused. As was said by Maxwell, C. J., in his opinion in *Priest v. State*, 10 Neb., 399: "That a crime has actually been committed must necessarily be the foundation of every criminal prosecution, and this must be proved by other testimony than a confession, the confession being allowed for the purpose of connecting the accused with the offense." There can be no doubt of the correctness of the rule stated, and applying it to the facts in the case at bar it is clear that the evidence fails to show beyond a reasonable doubt that the house was broken and entered into in the night season, and therefore the crime of burglary is not made out.

We must not be understood as intimating that in a pros-

ecution for burglary the time when the breaking and entering into the building were committed must be established by direct proof, and cannot be inferred from the facts and circumstances surrounding the transaction, for, doubtless, that ingredient of the offense may be established like any other fact in a criminal case. What we wish to be understood as holding is, that, from the facts proved in this case, it could as well be inferred that the defendant broke and entered the house in the day-time as in the night season.

Again, there is no evidence as to the intent with which the breaking and entering were done. It is charged in the information that they were made with the intent to steal and carry away the goods and chattels of Jettie Reynolds. That such was the purpose will not be presumed from the mere fact of breaking and entering into the building. It is conceded that nothing was stolen therefrom by the defendant. Had there been, then, from that fact, it might be inferred that the object and purpose of the accused was larceny, since the presumption is that every sane person is presumed to have intended that which his acts indicate his intentions to have been. (3 Greenleaf Ev., sec. 13.) In this case there is no direct evidence of the object of the person in entering the building, which at the time was occupied by the complaining witness and others. If the intention or purpose was theft, why did he not accomplish it, as there was nothing to prevent him from so doing? It is not claimed that he was discovered in the act by any one, and that by reason thereof he was frightened away before carrying out his purpose. Doubtless there are cases where the motive with which a person breaks and enters a building may be presumed from the act alone. If one, in the night time, was to break and enter a building containing hardware, jewelry, clothing, or other property of value, belonging to another, and in which building there was no person at the time of the breaking, his act alone, unex-

plained, would be very strong evidence that it was done for the purpose of committing the crime of larceny. But we do not think from the mere act of breaking and entering a house like the one in question, occupied at the time by the proprietress and others, that it must necessarily be presumed that the motive or intention was larceny rather than the commission of some other crime. In a prosecution for burglary, in determining the intention of the defendant, it is proper to consider the act of breaking and entering the building in connection with all the other facts and circumstances of the transaction disclosed by the evidence.

After having carefully examined the testimony in the bill of exceptions, we think it insufficient to sustain the verdict. The judgment is reversed and the cause is remanded to the court below for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

JOHN HAKANSON V. HENRY BRODKE.

FILED JANUARY 3, 1893. No. 4308.

1. Replevin: DIRECTING VERDICT. The refusal of the trial court to direct a verdict in the case for the defendant *held* proper.
2. ——: INSTRUCTIONS: SUFFICIENCY OF EVIDENCE. *Held*, That there is no error in the charge of the court, and that the verdict is sustained by the evidence.
3. ——: ATTACHMENT: JUSTIFICATION OF OFFICER SERVING WRIT. Following the repeated decisions of this court it was held that where a sheriff levies a writ of attachment upon property found in the possession of one not a party to the suit in an action of replevin therefor by such person, the office to justify the taking is required to show that the attachment writ was reg-

ularly issued. In other words that the writ is regular on its face and was issued upon a sufficient affidavit by a court having jurisdiction of the parties and the subject-matter of the action.

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

Charles W. Haller, for plaintiff in error.

Cavanagh, Atwell & Thomas, contra.

NORVAL, J.

This is an action of replevin brought before a justice of the peace by Henry Brodke against John Hakanson to recover possession of a small stock of goods, consisting of cigars, tobacco, notions, fruits, etc. The plaintiff recovered a judgment before the justice, whereupon the defendant appealed to the district court, where the plaintiff again recovered a verdict and judgment.

Error is assigned because the court refused to instruct the jury to return a verdict in favor of the plaintiff in error, and for the giving of the following instruction by the court on its own motion: "That the testimony having shown that the plaintiff at the time of the commencement of this action held a chattel mortgage on the stock of goods described in the petition, and that he had taken possession of the goods thereunder, and that the amount to secure which the mortgage had been given had not been paid, he, the plaintiff, was entitled to the possession of the property included in his mortgage as against the defendant in this action."

The evidence is uncontradicted that one Elias Grossfeld was the owner of the property in controversy on the 25th day of April, 1888, on which day he mortgaged the property to Brodke to secure the payment of $100 borrowed money; that on the 6th day of the following July, Max Meyer attached the goods as the property of Grossfeld,

and on the same day, Brodke having claimed the property under his mortgage, the possession thereof was surrendered to one Catlin for the defendant in error; that on the following day John Hakanson, as constable, took the property under a writ of attachment issued by a justice of the peace at the suit of Meyer & Raapke against Grossfeld.

If we are able to comprehend the force of the testimony the only verdict which could have been properly rendered was the one returned by the jury. The validity of the chattel mortgage is not questioned. The mortgagee was in possession of the property, claiming title thereto by virtue of his mortgage, when the Meyer & Raapke attachment was levied. The officer attempted to justify under the writ of attachment which had been placed in his hands, yet none of the papers or proceedings in the attachment case were introduced at the trial, except the attachment writ. This alone was insufficient to justify the taking of the property from the possession of a stranger to the suit, but the officer should have gone farther and shown that the writ was issued upon a proper affidavit by a court having jurisdiction of the parties as well as the subject-matter of the suit. This has been repeatedly held by this court. (*Williams v. Eikenberry*, 22 Neb., 210, 25 Id., 721; *Oberfelder v. Kavanaugh*, 21 Id., 483; *Paxton v. Moravek*, 31 Id., 305; *Bartlett v. Chesebrough*, 32 Id., 339; *Winchell v. McKinzie*, 35 Id., 813.)

It is argued that defendant in error had parted with his interest in the goods in controversy to Catlin before Meyer & Raapke attached. This contention is not sustained by the evidence. While there had been some negotiations between Brodke and Catlin for the sale by the former to the latter of his interest in the property prior to the attachment, yet the sale had not been closed when the attachment in question was levied.

There being no conflict in the evidence, and the only conclusion which can be drawn from the facts and circum-

stances proved is that the plaintiff below was entitled to the possession of the property at the commencement of the action, the trial judge did not err in refusing to direct a verdict for the defendant, nor in giving the instruction complained of. The judgment is clearly right, and is

AFFIRMED.

THE other judges concur.

JAMES A. COSTELLO, SHERIFF, v. HENRY CHAMBERLAIN.

FILED JANUARY 3, 1893. No. 4857.

1. **Voluntary Assignments:** PREFERRED CREDITORS. A debtor in failing circumstances may lawfully prefer one or more of his creditors and secure such creditors by mortgage or conveyance absolute, provided the transaction is in good faith and not made with intent to defraud other creditors.
2. ———: CONSTRUCTION OF INSTRUMENTS TRANSFERRING TITLE TO PERSONAL PROPERTY. An instrument in the form of a mortgage or bill of sale will not be held to be an assignment for the benefit of creditors unless it creates trust in favor of some person or persons other than the mortgagor or vendor.
3. ———: ———: RULE APPLIED. H., a merchant in failing circumstances, with intent to prefer certain creditors, executed to C. a bill of sale of his entire stock of goods, the latter paying the preferred claims in full out of the consideration named in the bill of sale. In an action of replevin by C. against the sheriff, who had seized the goods on an order of attachment in favor of an unsecured creditor, *held*, that inasmuch as C. is the only person beneficially interested in the transfer, it cannot be held to be an assignment for the benefit of creditors, and that it is immaterial whether the bill of sale was intended as an absolute sale or as a mortgage only.
4. **Evidence** examined, and *held* sufficient to sustain the verdict and judgment of the trial court.

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

Abbott & Caldwell, for plaintiff in error.

Thompson Bros., contra.

POST, J.

This was an action of replevin in the district court of Hall county, the pleading being in the usual form. Trial and judgment for the plaintiff below, whereupon the case was removed to this court upon petition in error. The material facts are as follows: For about a year previous to the 18th day of January, 1890, John W. A. Hoppel had been engaged in business as a general merchant in the town of Wood River. On the day above named he was, it is admitted, in failing circumstances, his assets, aside from a homestead of small value, consisting of a stock of merchandise worth, according to the estimate of witness, from $1,400 to $2,000, with liabilities amounting to $2,864. Among his creditors were certain parties residing at Wood River, mostly for money advanced, to-wit: J. Bowen, $600; F. M. Penney, $100; The First National Bank of Wood River, $300. Of the last named amount, $100 was on his unsecured note and $200 secured by the note of Mr. Bowen. The morning of the day named Bowen, after making an ineffectual effort to have Hoppel pay or secure the $600 due him, called upon the defendant in error, who was cashier of the bank above named, and of which he, Bowen, was a stockholder, and made some inquiry about the standing and credit of Hoppel. The question of the value and cost of the goods was also discussed. Hoppel followed Bowen to the bank, where he executed to Chamberlain an instrument in the form of a bill of sale, by which he conveyed to the latter his entire stock of goods for the expressed consideration of $1,600. Chamberlain, at the

time, paid the full amount of the consideration named in the bill of sale, as follows: Cash to Bowen, $600, being the amount due from Hoppel; by paying and satisfying in full the notes of Hoppel above named, $400, and the balance, $600 in cash, to Hoppel. Upon the execution of the bill of sale, Chamberlain took possession of the goods in controversy, which were seized by the plaintiff in error as sheriff two days later to satisfy an order of attachment against Hoppel in favor of Allen Brothers.

A question to which prominence was given at the trial below, and also in this court, is whether the transaction is to be treated as a sale of the stock of goods by Hoppel, or whether the so-called bill of sale was intended merely as a security for the $1,600 advanced by Chamberlain. It is claimed by the latter that he purchased the goods for the consideration named, while the testimony of the former is relied upon to prove that the transaction is but a mortgage. This contention is supported by the fact that Hoppel, on the delivery of the bill of sale, executed to Chamberlain a note for $1,600. The latter, however, explains the execution of the note last mentioned thus: In the purchase of the goods in question he was acting in the interest of the bank and the money paid was a part of its funds, and that he insisted upon the note in order to balance his books until the goods could be disposed of in order to avoid having them appear as a part of the resources of the bank. As the law applicable to this branch of the case plaintiff requested the following instruction: "You are also instructed that if you find from the evidence that the bill of sale was made to enable Chamberlain to dispose of the goods and out of the proceeds pay Hoppel's indebtedness to the bank, to Bowen and Peycke Bros., and that after such debts were paid any part of the goods or their value was to be returned to the said Hoppel, then such sale was void, and you should find for the defendant without regard to what the intentions of the parties or either of them might have been."

It is claimed that this case is within the rule stated in *Bonns v. Carter*, 20 Neb., 566, and that in refusing to give the foregoing instruction the trial court erred. We have no occasion to consider the question of the effect of subsequent decisions upon that case as authority, since it is clear to us that it can have no application to the facts disclosed by the evidence in this. The mortgage in that case was held to be void on the ground that it created an express trust in favor of third parties named therein and was, in contemplation of law, an assignment for the benefit of certain preferred creditors. In this case there is no trust in favor of any third person. Chamberlain, the defendant in error, is the only beneficiary of the contract, whether construed as a mortgage or a sale. The claims of Bowen, Penney, and the bank were all satisfied in full out of the money advanced by him, and it is not claimed that he stood in the relation of trustee toward any other creditor. An assignment for the benefit of creditors implies a trust in favor of some person or persons other than the assignor. It was Hoppel's right to prefer the claims of these particular creditors, or of Chamberlain, who, to say the least, had succeeded to their rights. (*Davis v. Scott*, 22 Neb., 154; *Hershiser v. Higman*, 31 Id., 531; *Brown v. Williams*, 34 Id., 376; *Hamilton v. Isaac*, 34 Id., 709.) It is immaterial, therefore, whether the contract should be construed as a sale or as a mortgage, for in either event the defendant in error would be entitled to the possession of the property in controversy as against other creditors, provided the transaction was in good faith within the definition frequently given by this court. The trial court rightly refused the instruction in question.

2. The chief reliance of plaintiff in error is apparently upon the proposition that the transfer of the stock of goods to Chamberlain, by Hoppel, was in fraud of the other creditors of the latter. He claims broadly that the officers of the bank, including the defendant in error, being aware

of the purpose of Hoppel to defraud his creditors, knowingly assisted him to place his property beyond their reach, and that the transfer to him is therefore void. The facts relied upon to sustain the claim of fraud are as follows: Bowen, on the day in question, stated to Chamberlain, in substance, that Hoppel was in a bad fix and unable to pay the $600 due him; that a collection in favor of Lindsay & Co., of Omaha, against Hoppel had been returned by the bank the day previous, and it then held for collection against him a draft by Peycke Bros. for $5.50; that the value of the goods conveyed greatly exceeded the consideration paid. Chamberlain testified, when asked on cross-examination his reasons for buying the stock of goods, that his object was to protect the bank and Hoppel's home creditors. It is admitted that Hoppel's account with the bank was at the time overdrawn, but the amount of his overdraft does not appear. It is admitted that according to an invoice taken January 1, preceding, the value of the stock was $2,400, cost price, but it was not claimed, at the time of the transfer to Chamberlain, that it exceeded $2,000 in value. On the other hand defendant in error testifies that he had no knowledge that Hoppel was indebted for goods except to Lindsay & Co. and Peycke Bros. The amount of the draft returned to the former is not shown by the evidence, nor does it appear whether it was secured or not, or that it had ever been presented for acceptance or payment. It also appears that the draft of Peycke Bros. was paid by Hoppel at the time of the conveyance, and the claim of Lindsay & Co. was subsequently secured by mortgage on his homestead. Hoppel, who testifies with apparent candor and fairness, on cross-examination says:

Q. Can you tell the first thing you said to Chamberlain?

A. Well, I told him I was in bad circumstances, * * and wanted to fix matters up.

Q. You told him you were in bad circumstances?

A. Yes, and that I owed Bowen $600.

Q. Tell him that you owed any other parties?

A. I told him I owed—well he knew I owed the bank—that is all.

Q. Tell him about anybody else?

A. No, sir.

Q. Didn't tell him a word about them; he didn't ask you how much you owed or to whom?

A. No, sir.

Q. Did he go on and make out a bill of sale without anything further being said?

A. No, sir; he asked me how—what the trouble was of course.

Q. What did you tell him?

A. I told him I had been sick * * * and that I owed Mr. Bowen and that he wanted his money and I wanted to get some money.

Q. Did you ask him to loan you the money? Did you ask him the best way to fix it up?

A. I don't know as I did.

Q. Who made the first proposition about buying the stock of goods?

A. Just then I gave him a bill of sale of the goods.

Q. Who made the first proposition about buying the goods, you or he?

A. I suppose I did.

Q. What was the first terms you offered? What was your first proposition in regard to the sale of the stock?

A. I told him I owed Mr. Bowen $600, and he had some against me, and I was so I did not know whether I could work or not, and the stock would be worth $1,600.

The value of the stock, according to the witness for the defendant in error, was from $1,400 to $1,600. At the time of the transfer, it will be remembered, Hoppel was indebted to the bank $400, including the Penney note, which

it held by assignment, of which amount $200 was unsecured, and the reasonable inference is that the object of Chamberlain was to protect it as well as Bowen, who was a customer and stockholder. It is not, however, seriously claimed that the contract is void for that reason alone. The question of fraud or good faith is one of fact, and was fairly submitted to the jury upon instructions, which it is admitted correctly state the law. With the verdict upon the evidence we are not at liberty to interfere. That a judgment or order will not be reversed for the reason that it is not in accordance with the preponderance of evidence, is a rule so often announced by this court as to render the citation of the cases wholly superfluous. The district court did not err in overruling the motion of plaintiff in error for a new trial, and the judgment is

AFFIRMED.

THE other judges concur.

ANDREW F. BLOOMER, APPELLEE, v. LUCIAN C. NOLAN ET AL., APPELLANTS.

FILED JANUARY 3, 1893. No. 4455.

1. **Contract of Infant:** DISAFFIRMANCE: CONDITIONS OF GRANTING RELIEF. One who seeks to disaffirm a contract on the ground that he was an infant at the time of its execution is required to return so much of the consideration received by him as remains in his possession at the time of such election, but is not required to return an equivalent for such part thereof as may have been disposed of by him during his minority.

2. ———: MECHANICS' LIEN ON PROPERTY OF INFANT. The property of an infant is not subject to a mechanic's lien for material purchased by him during his infancy, nor will he be held to have ratified the contract so as to entitle the material-man to a

lien thereon by retaining the property after he attains his majority.

3. ——— : ——— : DECREE : SUFFICIENCY OF EVIDENCE. Evidence examined, and *held* not sufficient to sustain the decree of the district court allowing a mechanic's lien in favor of the plaintiff.

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

Sedgwick & Power, for appellants.

George B. France, contra.

POST, J.

This was an action in the district court of York county to foreclose a mechanic's lien. Decree was entered in favor of the plaintiff in accordance with the prayer of his petition, from which the defendants have appealed. In his petition the plaintiff alleges that on or about the 18th day of August, 1886, he entered into a verbal contract with the defendants, by virtue of which he was to furnish them building material for the erection of a dwelling house upon premises owned by them, to-wit, a quarter section of land in said county, and that in pursuance of said contract he furnished to defendants, between the date last named and the 17th day of September, 1886, building material to the amount and of the value of $224.98. It also appears from the petition that an itemized statement of the account, duly verified, was filed with the county clerk within four months from the time of furnishing of said material. The defendants filed separate answers, that of Mosher being a general denial, while Nolan, in addition to a general denial, alleges that at and during all the times mentioned in the petition he was a minor under twenty-one years of age. The reply to the answer of Nolan is a general denial. The ground of the judgment against the last named defendant is not clear from the record. It is

true that he purchased the material, as alleged by the plaintiff, but it is clear from the undisputed evidence that he was at the time a minor, but nineteen years of age. There is no foundation for the contention that he has ratified the contract since attaining his majority, first, because that question is not put in issue by the pleadings, and second, because there is no sufficient evidence to support such a contention. There is no evidence whatever of an express ratification, neither will a ratification be inferred from the retention of the property by him. The rule is well settled that one who seeks to avoid a contract on the ground of infancy will be required to make restitution of so much of the consideration only as is retained by him when he attains his majority, or when he elects to disaffirm. (*Green v. Green*, 69 N. Y., 553; *Jenkins v. Jenkins*, 12 Ia., 195; *Burgett v. Barrick*, 25 Kan, 527; *Bartlett v. Drake*, 100 Mass., 174; *Reynolds v. McCurry*, 100 Ill., 356; *Craig v. Van Bebber*, 100 Mo., 584; *Price v. Furman*, 27 Vt., 268; Tyler, Infancy [2d ed.], 37.) The law which is designed to protect the young and inexperienced would be ineffectual for that purpose if an infant was required, as a condition to relief, to return an equivalent for property wasted or squandered. It is clear also from the evidence in the record that Nolan had no interest in the property at the time he attained his majority and was incapable of making restitution. But the rule which requires restitution has no application to cases like the one under consideration. "There can be no mechanic's lien upon the land of a minor, for he can make no contract which is binding upon himself or property. The lien is incident only to a legal liability to pay a debt. It is immaterial that the minor represented himself to be of age. Even if there be a contract for erecting buildings upon a minor's property with his guardian, no lien is conferred, if the guardian had no authority in law to make the contract. Of course a minor may ratify a contract made

during his minority out of which liens might arise. But such ratification cannot be implied from his retaining his property and collecting rents from it. The ratification must be an intentional acknowledgment of the obligation of the contract." (Jones, Liens, sec. 1239). The infancy of Nolan is a complete defense and the judgment against him cannot be sustained.

It remains to be determined whether the judgment against Mosher and the decree of foreclosure against the premises described is sustained by the evidence. From the testimony of the plaintiff it appears that the contract under which he furnished the lumber was made with Nolan on the 30th day of July, 1886, and a considerable part thereof furnished prior to August 28 following. On the last named day Mosher, who then owned the land, conveyed it by deed to Nolan who, on the same day, mortgaged it to the New Hampshire Banking Company for $1,200, and immediately reconveyed to Mosher, in whom the record title has remained. In plaintiff's direct examination he does not mention Mosher's name in connection with the contract, except to state that he was informed by Nolan that the lumber was to build a house on the Ed. Mosher place. On cross-examination he is asked:

Q. You had nothing to do with Mr. Mosher about this contract, did you?

A. I made no contract with him personally; no, sir.

Q. Did Mr. Mosher ever have any talk with you in regard to furnishing the lumber bill?

A. No, sir.

Q. Did you charge the lumber to Mr. Mosher?

A. It isn't charged to Mr. Mosher.

Q. Did you charge it to Mosher on your books?

A. No, sir.

It is also apparent from his cross-examination that the first written charge against Mosher was at the time of the filing of the lien.

Mosher testifies in his own behalf that he did not authorize the purchase of the lumber by Nolan, and had no knowledge of its having been used on the premises until after the completion of the building. It appears that his home was in the city of York, and according to his testimony he did not visit the premises between the time the lumber was procured by Nolan and the following spring. The execution of the two deeds and the mortgage on August 28 is explained by him thus: He had agreed to trade the quarter section in question to Nolan for an eighty-acre tract owned by the latter, and an additional consideration which does not clearly appear from the record. The conveyance was made to enable Nolan to raise the money by mortgaging to the New Hampshire Banking Company, for which Mosher was agent. The money received as the proceeds of the mortgage was paid to Mosher, who executed a bond for a deed in favor of Nolan, who had already gone into possession, and who continued in possession of the premises until October 17, 1888, on which day he executed a deed therefor to Mosher. The last named deed purports to convey the property, subject to the mortgage in favor of the New Hampshire Banking Company, and contains the following recital: "All mechanics' liens appearing of record against said premises are invalid and illegal." According to the testimony of Mosher it was executed in consequence of the fact having come to his knowledge that Nolan was a minor at the time of the execution of the first conveyance by him. To entitle a material-man to recover under the provisions of section 1 of the mechanics' lien law, it is just as essential for him to prove a contract or agreement, express or implied, with the owner or his agent as it is to prove the furnishing of the material claimed for or the filing of the verified account thereof with the register of deeds. (Jones, Liens, 1235, 1236.) It is suggested that the decree for plaintiff may be sustained on the ground that Nolan was acting as the agent of Mosher in the

purchase of the lumber. That contention, however, has no foundation in the record, for the evidence clearly proves that Mosher not only did not authorize the purchase of the lumber, but was ignorant of the building of the house until long after its completion. We are satisfied, after a careful examination of the record, that the plaintiff is not entitled to a lien, and the decree of the district court should be reversed and the action dismissed.

REVERSED AND DISMISSED.

THE other judges concur.

MARY MAJORS V. NICHOLAS N. EDWARDS ET AL.

FILED JANUARY 4, 1893. No. 4749.

1. **Summons: AFFIDAVIT FOR SERVICE BY PUBLICATION: SERVICE.** An affidavit for service by publication was in the following form: "Isaac Edwards, being duly sworn, deposeth and saith that he is the attorney for said plaintiff; that said John Edwards is not in the state of Nebraska, and that said Mary Majors is a non-resident of said state of Nebraska, and is now absent from said state; that service of a summons cannot be made within the state of Nebraska on the said defendant to be served by publication, and that the case is one of those mentioned in the seventy-seventh section of the Code of Civil Procedure, and further saith not." *Held*, That as the object of the action was specified in sec. 77 of the Code, that there was not an entire omission to state the material facts showing a right to make service by publication and therefore it was not void, and that a decree of foreclosure rendered upon constructive service based on such affidavit would be sustained.

2. ———: ———. A mistake in the title of an affidavit is immaterial after judgment.

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

John W. Lytle, for plaintiff in error.

Breckenridge, Breckenridge & Crofoot, and *Kennedy, Gilbert & Anderson, contra.*

MAXWELL, CH. J.

This is an action to redeem lots 9, 10, 11, 12, 13, 14, 15, and 16, in block 27, in Wilcox's 2d addition to the city of Omaha. The court below found the issues in favor of the defendant and dismissed the action. It appears from the record that in the year 1878 one John Edwards brought an action in the district court to foreclose a mortgage on said lots; that the sole defendant was the plaintiff in this action; that she was a non-resident of the state and service was had upon her by publication; that a decree of foreclosure was duly rendered and the property sold to one Nicholas N. Edwards, who has conveyed to various parties. The sole ground upon which the right to redeem as claimed is that the affidavit for publication is insufficient to give the court jurisdiction. The affidavit is as follows:

"In the District Court in and for the County of *Messar* and State of Nebraska.

"JOHN EDWARDS
v.
MARY MAJORS.

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

"Isaac Edwards, being duly sworn, deposeth and saith that he is the attorney for said plaintiff; that said John Edwards is not in the state of Nebraska, and that said Mary Majors is a non-resident of said state of Nebraska, and is now absent from said state; that service of a summons cannot be made within the state of Nebraska on the said defendant to be served by publication, and that the case is one of those mentioned in the seventy-seventh

section of the Code of Civil Procedure, and further saith not. ISAAC EDWARDS.

"Subscribed in my presence and sworn to before me this 14th day of October, 1878. WM. H. IJAMS,
"*Clerk.*"

The objections to said affidavit are set forth in the petition as follows: "That said affidavit does not set forth the nature of the action, nor a description of the property in controversy, nor that said property is in Douglas county, nor that it is an action in which the statute permits the service by publication, nor the court in which the action is pending; and that the notice of publication is not sufficient in law, in not being proved by an affidavit of the printer of the newspaper in which it was published, nor his foreman or principal clerk, by reason whereof the court had no jurisdiction to render said decree."

Sec. 77 of the Code is as follows: "Service may be made by publication in either of the following cases: *First*—In actions brought under the 51st, 52d, and 53d sections of this code, where any or all of the defendants reside out of the state. *Second*—In actions brought to establish or set aside a will, where any or all of the defendants reside out of the state. *Third*—In actions brought against a non-resident of this state, or a foreign corporation, having in this state property or debts owing to them, sought to be taken by any of the provisional remedies, or to be appropriated in any way. *Fourth*—In actions which relate to, or the subject of which is, real or personal property in this state where any defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partially in excluding him from any interest therein, and such defendant is a non-resident of the state or a foreign corporation. *Fifth*—In all actions where the defendant being a resident of the state has departed therefrom, or from the county of his residence, with intent to delay or defraud his creditors, or to avoid the service of

a summons, or keeps himself concealed therein with like intent."

The principal case relied on by the plaintiff to secure a reversal is *Atkins v. Atkins*, 9 Neb., 191. That was an action for a divorce, and the affidavit was as follows:

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

"Henry Atkins, being first duly sworn, on oath says: That he is the plaintiff in the above entitled action; that service of summons cannot be made within this state on the defendant, Rebecca Atkins, on whom service by publication is desired, and that this cause is one mentioned in section No. 77, of title V of the Revised Statutes of Nebraska as amended. HENRY ATKINS."

It will be observed that section 77 does not apply to divorce proceedings, there being a special provision in the statute relating to divorce and alimony, which regulates the service when made by publication. The difficulty in the Atkins case was that there was no positive statement of the plaintiff under oath as to the nature of the cause of action, to show that the court had authority in the premises to grant a decree. Had these facts appeared in the affidavit it would not have been void, even if informally or defectively stated, provided there was not an entire omission of some material fact. In the case at bar, however, there is not an entire omission to state the nature of the cause of action. It is stated informally, it is true, and it would be much better to state directly, that the object of the action was to foreclose a mortgage upon real estate, but sufficient is shown to entitle the plaintiff to make service by publication. The mistake in the title of the affidavit is immaterial after a decree is rendered. The judgment is therefore right and is

AFFIRMED.

THE other judges concur.

STATE OF NEBRASKA, EX REL. STATE JOURNAL CO., V. JAMES E. BOYD, GOVERNOR, ET AL.

FILED JANUARY 4, 1893. No. 5822.

1. **Contingent Fund Appropriated for Governor's Office:** DISCRETION OF GOVERNOR: MANDAMUS. The governor is vested with a discretion in the use of the contingent fund appropriated by the legislature. He may in his discretion use said fund for the purchase of stationery needed by the state, but will not be required by *mandamus* to approve a warrant drawn against it on account of books and stationery ordered by him.

2. ——: OFFICE SUPPLIES. In the fund for books, blanks, and printing in the governor's office there still remains unexpended the sum of $152. *Held*, That this sum should be applied to the payment of blanks furnished for said office.

ORIGINAL application for *mandamus*.

Marquett, Deweese & Hall, and *A. G. Greenlee*, for relator.

George H. Hastings, Attorney General, contra.

PER CURIAM.

The relator states in its application for a *mandamus* that "it is a corporation duly organized and existing under and by virtue of the laws of the state of Nebraska; that James E. Boyd is governor, and Thos. H. Benton auditor of the state of Nebraska; that on the 9th, 16th, 20th, 22d, 26th, and 31st days of January, and on the 9th, 16th, and 20th days of February, and the 6th and 31st days of March, of the year 1891, the relator herein sold and delivered to James E. Boyd, governor of the state of Nebraska, the following goods, wares, and merchandise as shown by a bill of the same, which is hereto attached, marked 'Exhibit A,' and made a part of this application.

"Relator alleges the fact to be that the said James E. Boyd, governor, purchased said goods for and on behalf of the state of Nebraska, to be used by the governor of said state in his office as governor, and that the said bill has never been paid, nor any part thereof, although the same is long past due.

"Relator further alleges the fact to be that the said James E. Boyd, governor, has failed, neglected, and refused to approve said bill, or to approve a voucher drawn for the same, and that the said Thos. H. Benton, as auditor of the state of Nebraska, has refused to draw a warrant for the payment of said bill, assigning as the reason therefor that the goods, having been purchased by the governor for his department, it was his duty to approve or O. K. the said bill as being correct, and that the said auditor has refused to draw a warrant for the same because the said James E. Boyd, governor, has refused to approve the said bill as correct, due and owing to the relator.

"Relator further alleges the fact to be that the prices charged in said bill for said goods were the reasonable value of the same, and that the relator herein is entitled to the payment from the respondents herein of the sum of $386.60, together with interest thereon as provided by law, and that the respondents, and each of them, have refused to pay the said claim, or to draw a warrant for the same, and that the relator herein is remediless in the premises except by the interposition of this court of the writ of *mandamus*.

"Relator further represents to the court that the legislature of the state of Nebraska appropriated for the year ending March 31, 1892, and March 31, 1893, for the office of the governor of the state of Nebraska, for the purpose of paying for such books, blanks, and printing as might be used in said office, the sum of $600, and for the purpose of buying stationery, the sum of $500, and a contingent of the sum of $2,000, and for postage the sum of

$460, and that there is at this time a sufficient sum of money in the funds so designated and placed at the disposal of the said governor of the state of Nebraska against which warrants may be drawn for the payment of the relator's claim.

"The relator further alleges the fact to be that the said James E. Boyd, as governor, had not incurred indebtedness beyond the amount appropriated by the legislature for his department at the time the indebtedness herein sought to be collected was incurred.

"Wherefore the relator prays for a writ of *mandamus*, directed to James E. Boyd, governor of the state of Nebraska, commanding him to approve said bill as correct, and that upon the approval of the same by him, that the said Thos. H. Benton, auditor of the state of Nebraska, be directed to draw a warrant in favor of the relator herein for the amount of said bill, to-wit, the sum of $386.60, together with interest thereon at the rate of seven per cent per annum from the 1st of October, 1892."

To this the governor files an answer as follows:

"Comes now James E. Boyd, governor of the state of Nebraska, one of the respondents in the foregoing action, and for answer to said application for a writ of *mandamus*, herein filed by said relator, says:

"He admits that he is governor of the state of Nebraska, duly elected, qualified, and acting as such, and was such governor during all the time mentioned and described in said plaintiff's application, that is to say, from January 9th, 1891 to March 31st, 1891, and so continued to discharge the duties of governor of the state of Nebraska, until May 5th, 1891, when he was relieved of his said office by an order and judgment of this honorable court, which judgment continued in force until the same was reversed, on the 5th day of February, 1892. Since which time, until the present, he has continued to exercise all the functions and discharge all the duties pertaining to said

office. That the legislature of the state of Nebraska, by an act duly passed and approved on the 6th day of April, 1891, made an appropriation for the office of the governor of the state of Nebraska, for the payment of the current expenses of said office for the year ending March 31st, 1892, and March 31st, 1893, as follows:

Postage	$400
Books, blanks, and printing	600
Stationery	500
Telegraph, telephone, and express	400
Contingent fund	2,000
Furniture and repairs	200
House rent for governor	2,000
Stenographer	300
Book-keeper and recorder	225
Messenger	225
Salary of governor	5,000
Salary of private secretary	4,000
Stenographer	2,400
Clerk	2,000
Messenger and assistant clerk	2,000

"That the above and foregoing are all the items that were appropriated by said legislature for said office of governor, and all the funds of every description under the control of this respondent as such governor.

"This respondent further says that the several items of merchandise mentioned and described in relator's application for a writ of *mandamus* consist of stationery, and stationery alone, and if properly chargeable at all, were all chargeable to the item of stationery mentioned in said appropriation of $500 for stationery, but this respondent alleges that said appropriation for said purpose has been exhausted in the payment of bills of stationery bought by this respondent and the occupant of the said office of governor during the time that he was not discharging the duties thereof, between May 5, 1891, and February 5, 1892, as

aforesaid, except the sum of $52.52, which is the entire amount still remaining on hand of the stationery fund, the sum of $447.48 having already been drawn as aforesaid. That of the item of $600, so as aforesaid appropriated for books, blanks, and printing, the sum of $135.33 remains, but no more. This respondent alleges that said bill of said relators is not properly chargeable to said fund, as the same is not books, blanks, and printing, or either of said articles.

"That of the item of $2,000, so as aforesaid appropriated by said legislature to said office for a contingent fund, there has been drawn by this respondent, and by John M. Thayer, while he was discharging the duties of the office of governor of Nebraska, between the 5th day of May, 1891, and the 5th day of February, 1892, the sum of $1,725.35, and there yet remains of said contingent fund on hand and subject to be drawn by this respondent the sum of $274.65, and no more. That section 22, article 3, of the constitution of the state of Nebraska, among other things, provides that no money shall be drawn from the treasury except in pursuance of a specific appropriation made by law, and on the presentation of a warrant issued by the auditor thereon, and no money shall be diverted from any appropriation made for any purpose, or taken from any fund whatever, either by joint or separate resolution.

"This respondent submits to this honorable court that the only fund at his command with which he could pay said bill of said relator is the stationery fund, of which there still remains in his hands unexpended the sum of $52.52, as aforesaid; that he is now, and at all times has been, ready and willing to draw, sign, and approve a voucher for said sum, but no more, for the reason that said sum is all the funds at the command of this respondent, available for the payment of the bill of relator, and as great a sum as this respondent can by law approve, draw,

or sign a voucher for, by reason of such appropriation for stationery being exhausted, but said relator refuses to accept the same, and this respondent further submits that under the constitution and the law of the state he cannot pay said bill, or any part thereof, from either said contingent fund or from the appropriation so as aforesaid made for books, blanks, and printing, nor can he lawfully pay the same from any other fund or appropriation made by said legislature.

"Wherefore, this respondent prays judgment of the court that said action may be dismissed, that he may go hence without day, and recover his costs herein expended."

By stipulation "It is admitted that the appropriation made by the legislature of the said state for the office of governor, as set up in the application of relator, is as follows:

Books, blanks, and printing	$600
Stationery	500
Contingent fund	2,500

"That the balance unexpended of the funds so appropriated for books, blanks, and printing is $145.33; that the sum unexpended of the amount so appropriated for stationery is $52.52; that the amount unexpended of the funds appropriated for contingent fund is $274.65.

"It is agreed that the bill as itemized and attached to the application is a correct statement of the goods for the use of the governor's office, and that the prices named therein are the usual and reasonable prices for all said goods, and that the said goods were of the character and kind described therein.

"The said defendant, James E. Boyd, as governor of the said state, has refused to allow the said bill, or to issue a voucher therefor, except against the fund so appropriated for stationery, and that if this honorable court shall be of the opinion that any of said items can be legally paid out of the other funds above named, the amount of such items

may be required to be paid out of such other funds up to the amount unexpended, as above stipulated.

"It is agreed that if the court desires to inspect any of the goods enumerated in said item, in order to ascertain to which of the above named classes they belong, either party may introduce goods of like character in evidence."

It is conceded that blanks of various kinds of the value of more than $200 were furnished by the relator for the governor's office for which payment has not been made. It also appears that $152 still remain in the fund for books, blanks, and printing, and in our view this sum may be applied to the payment of the relator's claim. A portion of the relator's claim is for stationery for a sum in excess of $52. This claim the defendant offers to approve, and no doubt is ready to do so, for blanks to the extent named. No writ will therefore be issued unless further application is made.

As to the contingent fund the writ must be denied, unless the governor can be required to apply this particular fund to the purpose of paying for the stationery in question. We are clear that he cannot be required to do so, since it is apparent that he is by law vested with a discretion in the use of that fund, and the writ of *mandamus* will not be used to control an officer in the exercise of his discretion. This is elementary.

JUDGMENT ACCORDINGLY.

MARC A. UPTON ET AL. V. THOMAS C. KENNEDY.

FILED JANUARY 4, 1893. NO. 4859.

1. **Sham Pleadings:** GENERAL DENIAL. Where the answer to a petition is a general denial and it appears from the pleadings themselves that it is false it may be stricken from the files as sham.

2. ——: ——: AFFIDAVITS. **Where a general denial is sufficient in form and there is nothing on the face of pleadings to show that it is false the court will not enter into an examination of the merits of the defense upon affidavits.**

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

De France & Richardson, for plaintiffs in error.

Wharton & Baird, contra.

MAXWELL, CH. J.

On the 17th day of April, 1889, the defendant, M. A. Upton, executed a promissory note for $800 to Chittenden, and to secure the payment of the same Upton and wife executed a mortgage upon lot 20, block 3, in Brown Park addition to South Omaha; also on said date he executed a second note to Chittenden for $800, and to secure the payment of the same he and his wife executed a mortgage upon lots 13 and 14, in block 6, in said addition. On the same date as the first and second notes Upton executed a third note to Chittenden for $800, and to secure the payment of the same he and his wife executed a mortgage to Chittenden on lot 22, in block 3, in the aforesaid addition. Chittenden assigned the mortgages to the plaintiff, and default having been made, an action was brought to foreclose the same. To the petition so filed the defendants, Upton and wife, filed an answer, as follows: "Come now M. A. Upton and Mary A. Upton, defendants, and for their separate answer to the petition of the plaintiff herein they deny each and every allegation in said petition contained." This was duly verified. The plaintiff thereupon filed a motion as follows: "Now comes the plaintiff and moves the court to strike the answer of M. A. Upton and Mary A. Upton from the files of this court, because the same is sham and frivolous, and bases

this motion on the affidavits herewith filed and the original mortgage selected (executed) by the defendants, Marc A. Upton and Mary A. Upton, together with his notes secured thereby." This motion is supported by these affidavits, in substance, that each of the affiants had had a conversation with Marc A. Upton, and that he had admitted that the notes were genuine, and impliedly that he would pay the same as soon as he could. On the hearing of the motion the judge interrogated the attorneys in the case if they intended to dispute the genuineness of the notes, and they informed the judge that they did not, but insisted that they were entitled to make any defense available under a general denial. The court, however, sustained the motion and struck the answer from the files, as sham, and the plaintiff took a decree of foreclosure and sale by default. The sole question is the ruling of the court on the motion.

A sham pleading is defined as one which is good in form but false in fact. (Bliss, Code Pl., sec. 422; Maxw., Code Pl., 553.) The codes of Colorado, Indiana, Iowa, Kentucky, New York, North Carolina, South Carolina, and Wisconsin contain provisions for striking out sham answers or defenses. The subject is not named in the other code states, but as the power existed at common law it is no doubt retained under the code. An examination of the cases will show a direct conflict in the decisions as to what answers will be stricken out as sham. The better rule seems to be to treat all answers which are false on their face as shams. Thus, suppose the maker of a note or other instrument sued on should, in the verification of his answer, swear that he had no knowledge, information, or belief as to the genuineness of the instrument and, therefore, denied the same. In such case the answer would be false on its face, because the alleged maker must have known whether the instrument was true or false. So if it appears that he had knowledge from public records, it is his duty to ex-

amine the same and frame his answer accordingly. But unless these facts appear on the face of the record the court will not enter into an investigation of the facts upon affidavits to determine the *bona fides* of the defense. And particularly is this true where the answer, as in this case, is verified. (*Wayland v. Tysen*, 45 N. Y., 281; Pom. Rem., sec. 685; Maxw., Code Pl., 554.) Affidavits are a very imperfect mode of presenting testimony to a court. There being no cross-examination, if skillfully drawn, they may cover up or distort the truth so as to present the facts in a false light. In *Scofield v. State National Bank*, 9 Neb., 316, this court held that where the answer raises issues of fact apparently in good faith, the court would not strike it from the files as being untrue. The rule established in that case is the true one, we think, and will be adhered to. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

ELIZABETH M. DAVIS, APPELLANT, V. MAURICE SULLIVAN, APPELLEE.

FILED JANUARY 4, 1893. No. 4776.

Injunction: SURFACE WATER: SUFFICIENCY OF EVIDENCE. The plaintiff owned a lot in the city of Omaha, which she purchased in the spring of 1873 and took possession of the same in the fall of that year. The lot was inclosed. The defendant purchased the lot adjoining the plaintiff's lot on the south in 1872 and took possession thereof, and the division fence between the two lots was recognized as the true line for seventeen years. In an action to enjoin the defendant from permitting surface water to flow on the plaintiff's lot, *held*, that there was a failure of proof to entitle the plaintiff to recover and there was no equity in the petition.

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

Holmes & Macomber, for appellant.

Cowin & McHugh, contra.

MAXWELL, CH. J.

This is an action to restrain the defendant from permitting surface water to flow from his lot upon the premises of the plaintiff and prevent him from interfering with any barriers she may erect and maintain to prevent the flow of such water, and for general relief. On the trial of the cause the court found the issues in favor of the defendant and dismissed the action. The plaintiff appeals.

The plaintiff in this case is the owner of the east half of lot 9, in block 4, in Kountze & Ruth's addition to the city of Omaha. The defendant is the owner of lot 10, in said block, adjoining and south of said lot 9. The land in this block slopes downward from south to north at a somewhat abrupt grade, and it also slopes somewhat from the west toward the east. The lots in said block extend east and west from Eighteenth street to Nineteenth street. Just east of the center of the lots, and hence about the middle of the block, a ditch or gully has long existed, extending from south to north through the entire block. The ground in the block inclined from Eighteenth street westward to this ditch or gully and from Nineteenth street eastward to the same. Thus the surface water of said block found its natural and accustomed outlet through this ditch or gully running northward therein through the block to St. Mary's avenue. The defendant purchased lot 10 in 1872, and at once entered into possession thereof. The plaintiff purchased lot 9 in the spring of 1873, going into possession thereof in the fall of that year. At the time Mr. Sullivan purchased his lot there was a fence along its north side on

the line between his lot and the lot in question. This fence was standing when Mrs. Davis purchased her lot. It remained standing, being at times repaired on the same line, until 1886. About a year after the plaintiff had purchased and occupied lot 9, a fence was built along the north side of her lot, separating it from lot 8. Plaintiff's lot has thus been inclosed by fence on the north and south since 1874. Plaintiff's lot has, according to the plat and her deed, a frontage and width of fifty feet, and from 1874, when her north fence was built, she has had her full width and frontage of fifty feet inclosed, and enjoyed the possession thereof. In 1886 the plaintiff sold the west half of her lot and erected a block of three tenement houses upon the east half of her said lot. In grading and excavating for these tenements she caused the earth therefrom to be placed immediately in the rear of said buildings, which thereby raised the surface of the ground in the rear of said buildings several feet and obstructed the flow of the surface water. This seems to have caused the surface water which flowed from the southern part of the block to run on the plaintiff's lot and at times into her tenement houses. To prevent this the plaintiff undertook to construct a drain south of said tenements to carry off this surface water eastward to Eighteenth street. The defendant claims that this drain was being constructed across the line on his lot, to which he in vigorous terms seems to have objected. The plaintiff thereupon brought this action. The court below, hearing all the evidence, found the issues in favor of the defendant and dismissed the action. Mrs. Davis testifies as follows:

Q. Was there a fence on the south of that house?

A. Yes, sir.

Q. State to the court whether that fence was there when you moved on the property.

A. Yes, sir; dividing us from Mr. Sullivan's lot.

Q. Mr. Sullivan owned the lot south of it?

A. Yes, sir.

Q. State whether or not that fence remained all the time you were living on the lot.

A. Yes; the fence remained there until we commenced to build the brick building.

Q. Until you commenced to build the brick building?

A. Yes, sir; Mr. Sullivan had a sewer through the lot and caused the earth to fall about the time we were building.

Q. That was for his house?

A. Yes, sir.

Q. Did the yard inclosing your house extend over to that fence?

A. Yes, sir.

Q. Then were you in possession of it all the time from 1873 until beginning the building?

A. Yes, sir.

Q. Do you know while you were there where the fence was on the north side of the lot?

A. Just about fifty feet from the south fence.

Q. When was that fence on the north side of your lot built? Was it there when you went there?

A. No, sir; that was built about a year afterwards, I think.

Q. Do you know the distance between those two fences?

A. Yes, sir.

Q. Can you state the distance?

A. That we occupied?

Q. Yes.

A. Fifty feet.

Q. The distance in between the fences?

A. Fifty feet; Mr. Davis measured two or three times.

The division line between the plaintiff's lot and that of the defendant seems to have been accurately marked out by the fence in question, and the parties have treated it as the true line for nearly twenty years. The testimony tends to

show that it is the correct line, and that the defendant in defending his own possession was not in the wrong. There is also a failure to show that the defendant collects the surface water on his lot and causes or permits it to flow onto that of the plaintiff. There is no equity in the petition, and the judgment of the court below is

AFFIRMED.

THE other judges concur.

WALTON E. BURLINGIM v. J. M. COOPER ET AL.

FILED JANUARY 4, 1893. No. 4819.

1. **Action:** WHEN COMMENCED. An action is begun in this state by filing a petition in the district court upon which summons is issued which is served on the defendant.
2. **Mechanics' Liens:** FORECLOSURE: SUMMONS: LIMITATION OF ACTIONS. A mechanic's lien continues in force for two years after the date of filing the lien, and in case an action is brought to foreclose the same, until judgment is recovered and satisfied. If a summons is issued before the expiration of the two years from the filing of the lien, it may be served afterwards within the statutory time, but if not issued until after the expiration of two years, an action to enforce the lien will be barred.
3. ——: ——: NEW PROMISE: PROOF. *Held*, That the proof failed to show a new promise of the purchaser of the property to pay the debt.

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

Winfield S. Strawn, for plaintiff in error.

Fawcett, Churchill & Sturdevant, and *James W. Carr*, *contra.*

MAXWELL, CH. J.

The plaintiff is a lumber dealer in building material, and sold sufficient of said material to Peterson for the erection of a cottage on the middle one-third of lot 1, block 13, of the Improvement Association addition to Omaha. The title to the lot at the time of the contract was in S. E. Rogers, but Peterson's wife had purchased the same. Cooper was the contractor who erected the building and seems to have been anxious to befriend Peterson. Selden purchased the premises from Peterson after the erection of the cottage. The testimony shows that the last item on the plaintiff's account was furnished on the 29th of April, 1887, and that a mechanic's lien was filed on the 27th of June of that year. A petition to foreclose the lien was filed on the 26th of June, 1889, but no summons was issued until July 11, 1889. On the trial of the cause the court rendered judgment against Peterson for the sum of $194, but held that the lien was barred before bringing the action and therefore dismissed the action as to the defendant Selden. The plaintiff contends that the action was commenced by filing the petition and that therefore the court erred. Section 19 of the Code provides, "An action shall be deemed commenced within the meaning of this title, as to the defendant, at the date of the summons which is served on him; where service by publication is proper, the action shall be deemed commenced at the date of the first publication, which publication shall be regularly made." Section 3 of the mechanics' lien law provides that where the lien is obtained it shall remain in force for two years after the filing of such lien. Section 4 provides that where suit is commenced the lien shall continue until the suit is determined and satisfied. The suit, however, must be brought within two years from the filing of the lien, otherwise the lien will be barred. If the summons in this case had been issued within two years, it

might have been served on the defendant after the expiration of that time, because the statute so provides. This question has been twice before this court in error cases, and it was held that a summons issued after the expiration of a year from the date of final judgment was too late. (*Baker v. Sloss*, 13 Neb., 230; *R. V. R. Co. v. Sayer*, 13 Id., 280.) The same rule applies in the case at bar. The action was not commenced within the meaning of the statute until summons was issued which was served on the defendant, and as this was not done within two years the bar of the statute as to the lien was complete.

But it is sought to hold Selden upon the ground that he promised to pay the debt. The promise is alleged to be contained in the following letter:

"OMAHA, NEB., April 5th, 1889.

"*W. E. Burlingim, Esq., Omaha, Neb.*—DEAR SIR: Your letter of March 22d was received in due time. I have delayed answering in hopes I would be able to pay you some money, but find that I am unable to do so at present. I have about $2,500 in brick which I am trying to sell. It was with expectations of selling that I hoped to get money for you. I think I will be able to sell within a short time and then I will let you have some money, but do not see any way to raise it in any other way.

"Hoping that you will be patient with me for a short time I remain,

"Yours truly, D. J. SELDEN."

The letter to Selden, to which this is an answer, was not produced, nor could its contents be shown, so that it is not certain that the promise applies to this claim. If Selden purchased the premises, and as part of the consideration agreed to pay the debt, no doubt he would be liable therefor, but such facts are not established by the proof. The judgment is right and is

AFFIRMED.

THE other judges concur.

JOHN P. SHONING V. WILLIAM COBURN, SHERIFF.

FILED JANUARY 17, 1893. No. 4830.

1. **Action on Replevin Bond:** PLEADING. *Held*, That the petition states a cause of action, and that the new matter in the answer was not material.
2. **Waiver of Jury Trial:** OBJECTIONS: REVIEW. Where objection is made that the record fails to show that a jury was waived and the cause tried to the court, it must appear that the objection was made and overruled in the trial court. It is unavailing if made for the first time in the supreme court.

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

Saunders & Macfarland, for plaintiff in error.

John T. Cathers, contra.

MAXWELL, CH. J.

This action was brought upon an undertaking by the defendant in error against the plaintiff in error to recover thereon, and on a trial of the cause the court rendered judgment in favor of defendant in error for the amount claimed. There is no bill of exceptions and the cause is submitted on the pleadings. It is claimed on behalf of the plaintiff in error that the petition fails to state a cause of action. First, because the plaintiff's interest does not appear affirmatively, and second, because it does not appear that a return of the property cannot be had. The petition is as follows:

"The plaintiff complains of the defendant for that on the —— day of August, A. D. 1888, Charles W. Mount commenced an action of replevin in Justice Gustave Anderson's court, a justice of the peace of Omaha in and for

Douglas county, Nebraska, against the plaintiff, as sheriff, and took from plaintiff, on a writ of replevin, certain specific personal property, which the plaintiff had levied upon by virtue of an execution issued to him as sheriff out of the county court of Douglas county, Nebraska, against said Charles W. Mount.

"2. On the trial of said cause in said justice court, on the —— day of August, A. D. 1888, the justice found that the right of property and the right of possession was in (this) plaintiff, and that the value of said property was $200, and judgment was rendered against said Charles W. Mount, that (this) plaintiff have a return of said property, or the value thereof.

"3. The said Charles W. Mount did not return said property, but appealed said case to the district court of Douglas county, and did make an undertaking to this plaintiff in the sum of $420, on the 18th day of August, 1888, of which the following is a copy:

"'STATE OF NEBRASKA, } ss.
DOUGLAS COUNTY. }

"'The State of Nebraska. In Justice Court. Before G. Anderson, a Justice of the Peace for 4th Precinct of Douglas County, Nebraska.

"'CHARLES W. MOUNT }
vs. }
WILLIAM COBURN, SHERIFF. }

"'Whereas on the 13th day of August, 1888, William Coburn, sheriff, recovered a judgment against Charles W. Mount before Gustave Anderson, a justice of the peace, for the sum of $200, and costs of suit, taxed at $——, and the said defendant intends to appeal said cause to the district court of Douglas county:

"'Now, therefore, I, John P. Shoning, do promise and undertake to the said William Coburn, sheriff, in the sum of $420, that the said Charles W. Mount shall prosecute his appeal to effect, and without unnecessary delay, and

that said appellant, if judgment be adjudged against him on the appeal, will satisfy such judgment and costs.

"'JOHN P. SHONING.

"'Executed in my presence and surety approved by me, this 18th day of August, 1888.

"'GUSTAVE ANDERSON,

"'*Justice of the Peace.*'

"A transcript from said justice court was filed in the district court of Douglas county on or about August 20, A. D. 1888, as will be seen by reference to docket 10, page 6, of the records of said court.

"4. On the trial of said cause in said court on the 27th day of June, 1889, the right of property and the right of possession of said property was found to be in the defendant (William Coburn, sheriff,) at the commencement of said action, and that the value of said property was $200, and the interest on the same was $10.40. Whereupon judgment was rendered up against the plaintiff (Charles W. Mount) that the defendant have a return of said property, or the value thereof, $200, and interest, $10.40.

"5. Said Charles W. Mount had not returned nor offered to return said property.

"6. On the 30th day of December, A. D. 1889, an execution was issued to the sheriff of Douglas county on said judgment against Charles W. Mount, and returned wholly unsatisfied on the 8th day of January, 1890.

"On the 9th day of January, 1890, an alias execution was issued against said Charles W. Mount on said judgment, and returned on the 5th day of February, 1890, wholly unsatisfied.

"7. On or about the 12th day of November, 1889, John P. Shoning defendant, paid $100 on said judgment.

"8. The plaintiff has sustained damages in the premises in the sum of $142.08.

"9. The plaintiff therefore prays judgment against the defendant for the sum of $142.08, with interest on $210.40

from the 13th day of May, 1889, to the 12th day of November, 1889, and on $110.40 from the 12th day of November, 1889, and costs of this suit."

It is also claimed that it does not appear that the plaintiff below has exhausted his remedy at law as required by section 196 of the Code. In our view, the petition states a cause of action. It appears that the undertaking was given to the defendant in error; that the judgment of the justice was affirmed by the district court; that the property has not been returned and that executions have been issued against Mount and returned unsatisfied. If the plaintiff in error has returned or offered to return the property that is a matter of defense to which he is entitled, but it is sufficient on that point to allege in the petition that the property has not been returned. It is alleged in the answer that one J. F. Boyd is sheriff, and not the defendant in error, and that is not denied in the reply. We are unable to see any force in this objection. While the defendant in error is designated as sheriff, there is nothing to show that this is not a personal matter. The objection that his interest does not appear, is therefore unavailing. There is also an objection that the case was tried to the court, and it does not appear that a jury was waived. It is a sufficient answer to say that no objection appears to have been made on that ground in the court below and it cannot be made for the first time in this court.

On behalf of the defendant in error it is contended that where a jury is waived and the cause tried to the court that the judgment cannot be reviewed. This, however, is a mistake when applied to the district court, but in an action at law a motion for a new trial assigning the alleged errors arising on the trial must be filed and overruled before such rulings can be reviewed. There is no error in the record and the judgment is

AFFIRMED.

THE other judges concur.

GEORGE W. HOWELL V. ALMA MILLING COMPANY ET AL.

FILED JANUARY 17, 1893. No. 4043.

1. **Parties:** TRANSFER OF CAUSE OF ACTION: SUBSTITUTION. Where a plaintiff transfers his interest in the subject of the action to another during the pendency of the cause, the suit may be prosecuted to final termination in the name of the original plaintiff, or the person to whom the transfer is made may be substituted as plaintiff.

2. ———: ———: ———: APPEAL BOND: SURETY. A bank brought an action in a county court on two promissory notes held by it as collateral security, and recovered judgment thereon against the maker. The defendant took an appeal to the district court, the usual statutory bond being executed. While the cause was pending in the appellate court the indebtedness due the bank by the pledgor of the notes was paid, after which one H., to whom the said notes, prior to the bringing of the suit, had also been pledged as collateral security for a debt due him, subject to the claim of the bank, was substituted in place of the bank as plaintiff, who recovered judgment against the maker of the notes. *Held*, That the surety in the appeal bond or undertaking was not released by the substitution of H. as plaintiff.

3. **Appeal Bond:** LIABILITY OF SURETY. The mere continuance of a cause in an appellate court by stipulation of the parties, without the consent of the surety in the appeal bond will not operate to discharge such surety.

4. ———: ———. By an agreement between the parties to an appeal pending in the district court, a judgment was rendered therein against the party appealing, without the knowledge or consent of the surety on the appeal bond. *Held*, In the absence of proof of fraud or collusion between the principal and the creditor, that the stipulation for judgment did not release the surety from liability on the appeal bond.

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

Smith & Solomon and *Morning & Keester*, for plaintiff in error.

Case & McNeny and *C. C. Flansburg, contra:*

The defendant in error Goble is not liable upon the bond, because the plaintiff in error was substituted for the Commercial National Bank without his consent after the giving of the bond and during the pendency of the action in the district court. (*Phillips v. Wells*, 2 Sneed [Tenn.], 154; *Harris v. Taylor*, 3 Id., 541; *Irwin v. Sanders*, 5 Yerg. [Tenn.], 287; *Smith v. Roby*, 6 Heisk. [Tenn.], 546.)

NORVAL, J.

This action was brought by the plaintiff in error upon an appeal undertaking. There was judgment in the court below for the defendants. To reverse this judgment a petition in error was filed in this court. The facts briefly stated are these:

On the 1st day of November, 1885, the Nebraska Lumber Company turned over a large number of notes to the Commercial National Bank of Omaha as collateral security for money borrowed. Among the notes so turned over were two against the Alma Milling Company; one for $361.85 and the other for $326, exclusive of interest. Afterwards, on the 30th day of December, 1885, the Nebraska Lumber Company assigned, subject to the rights of said bank, the same securities, including the said two notes executed by the Alma Milling Company, to the plaintiff, as collateral security for a debt from said lumber company to plaintiff.

On the 7th day of June, 1886, the said Commercial National Bank brought suit in the county court of Harlan county against the said Alma Milling Company upon the two notes above mentioned, and recovered judgment thereon for the sum of $723.37 and costs. From this judgment the Alma Milling Company took an appeal to the district court, the defendant in error F. E. Goble signing the appeal bond or undertaking as surety; which bond was con-

ditioned that the principal should prosecute its appeal to effect without unnecessary delay, and if judgment should be adjudged against it on appeal, satisfy such judgment and costs.

While said cause was pending on appeal in the district court the claim of the said Commercial National Bank against the Alma Milling Company, for the payment of which said notes were held as collateral security, was paid and discharged in full, so that said bank was no longer the real party in interest in said suit. The collateral notes were turned over to the plaintiff in error by virtue of the agreement above referred to, made between the Nebraska Lumber Company and said George W. Howell. After the notes were so turned over on the 23d day of November, 1881, the said Howell, the plaintiff in error herein, was substituted as a party plaintiff in said action in lieu of the Commercial National Bank. It was agreed between the plaintiff in error and the Alma Milling Company that in case the latter would consent or allow the former to be substituted as plaintiff for the bank that said cause should be continued to February 20, 1888; that in accordance with said agreement said cause was so continued without the knowledge or consent of the surety. Said cause was subsequently continued from time to time by stipulation of parties in open court until May 6, 1889, when judgment was rendered against said Alma Milling Company by agreement between it and the plaintiff for the sum of $900 and costs of suit. Execution has been issued on said judgment and returned unsatisfied for want of property whereon to levy. Whereupon this action was brought upon said appeal undertaking to recover the amount of said judgment and costs.

It is contended by counsel for defendants in error that the substitution, after the cause was appealed to the district court, of plaintiff in error as party plaintiff in place of the Commercial National Bank, the original plaintiff, without

the knowledge or consent of F. E. Goble, the surety in the appeal bond, operated as a release of the surety. We consider the position altogether untenable. We are unable to perceive how the substitution of George W. Howell as plaintiff in lieu of the bank could have the effect to discharge the surety. The reason for the substitution arose solely from the fact that the indebtedness of the Alma Milling Company to the bank had been fully paid off after the appeal had been taken. The bank, therefore, no longer had any interest in the litigation. The notes declared on, prior to the institution of the action, had been pledged by the Nebraska Lumber Company to plaintiff in error as collateral security for its indebtedness to him, so that when the claim of the bank was satisfied, plaintiff in error was entitled to prosecute the suit either in his own name or in the name of the bank.

Section 45 of the Code of Civil Procedure, which was in force when the appeal was taken, provides that "An action does not abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, during its pendency, if the cause of action survive or continue. In the case of the marriage of a female party, the fact being suggested on the record, the husband may be made a party with his wife; and, in case of the death or other disability of a party, the court may allow the action to continue by or against his representative or successor in interest. In case of any other transfer of interest, the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action." There can be no doubt that under this statute the payment by the Nebraska Lumber Company of its indebtedness to the bank did not abate the action on the collateral notes. The section quoted confers ample power upon a court, where there has been a transfer by the plaintiff of his interest in the subject of the action during the pendency of the suit, to allow the person to whom the transfer

is made to be substituted in place of the original plaintiff. The substitution was made according to the provision of the statute. It is conceded that plaintiff in error had a right to be substituted as plaintiff in place of the bank, but it is urged that the surety is not liable on his bond for a judgment obtained by the substituted party against the principal. The law permitting the substitution of parties in case of the transfer of interest must have been known to the surety in the appeal undertaking when he became surety, and he must be held to have signed the bond subject to such contingency. In this case it is stipulated that at the time Goble signed the appeal undertaking he knew that the notes were held as collateral security, and was informed and believed that the claim of the bank against the Alma Milling Company would be paid by the collection of other securities held by the bank. The surety knew, in case the bank ceased to have any interest in the notes sued on during the pendency of the action, that the court had the power to permit the substitution of the party interested in the subject of the suit. The surety took this risk of substitution. He was not in the least prejudiced by the change of plaintiffs. The cause of action remained the same. He was not placed in a worse situation, for had there been no substitution Howell could have prosecuted the suit to judgment in the name of the original plaintiff. (*Magenau v. Bell*, 13 Neb., 247; *Temple v. Smith*, Id., 513; *Dodge v. Omaha & Southwestern R. Co.*, 20 Id., 276.)

The undertaking of the surety was that his principal should prosecute its appeal to effect without unnecessary delay, and that the principal should satisfy any judgment which should be rendered against it in the appeal. The surety was responsible for any judgment which should be rendered against the principal on the cause of action sued on, whether obtained by the original plaintiff or a substituted party. We are satisfied that the substitution of Howell as plaintiff in lieu of the bank did not release the

surety from liability on the appeal undertaking. (*Hanna v. International Petroleum Co.*, 23 O. St., 622; *Christal v. Kelly*, 88 N. Y., 285; *Sherry v. State Bank of Ind.*, 6 Ind., 397.)

There are some Tennessee decisions cited in the brief of counsel for defendants in error which are not in harmony with the views we have already expressed, but they are not well considered cases, and are in conflict with the weight of authority in this country.

The case of *Andre v. Fitzhugh*, 18 Mich., 93, is distinguishable from the one at bar. There an attachment suit was commenced against three defendants, and the sheriff levied the writ upon certain personal property. To prevent the removal of the attached property, a statutory bond with sureties was executed, conditioned that if the obligors should well and truly pay any judgment which might be recovered by the plaintiff in his attachment suit within sixty days after the judgment should be recovered, then the obligation should be void, but otherwise of force. On the trial of the attachment suit the plaintiff discontinued as to two of the defendants in attachment without the consent of the sureties, and obtained judgment against the third for $4,692.61. The judgment not having been paid, suit was commenced upon the bond to recover the amount of said judgment. The supreme court ruled that the discontinuance as to the two defendants in attachment operated as a discharge of the sureties on the bond. This decision is placed upon the ground that the discontinuance as to the two defendants increased the risk of the sureties. The court in the opinion say: "The sureties on entering into the contract measure the risk they incur by the chances which the plaintiff has to recover against the defendants in the writ and the ability of the latter in case of defeat to refund to the plaintiff or sureties themselves, if called on." The court in speaking of such change of parties say: "It would have the effect to com-

pel the sureties to look for indemnity to such defendant or defendants as should be left in the case at judgment, instead of the whole number of defendants named in the writ at the giving of the bond; and it might well happen that in the responsibility of the latter the sureties would know themselves to be safe, while in that of the former they would know themselves to be without remedy."

In the case we are considering, the risk of the surety was not increased by the substitution of Howell as plaintiff; hence the Michigan case is not in point. The fact that the original suit was continued from time to time by agreement, without the consent of the surety, did not operate as a release of the latter, nor did the rendition of the judgment by consent of the principal in the bond have the effect to discharge the surety from liability. The court had the power to grant the continuances irrespective of the agreement of the parties. Had it done so on the application of either party without the consent of the other, the surety would have been bound, since his undertaking contemplated a possible exercise of such power. The fact that the continuances were granted upon the stipulation of the parties does not, we think, make any difference. By the execution of the appeal bond the surety conferred upon his principal authority to do everything that was necessary to be done in the case. The condition of the bond was sufficiently broad to include whatever judgment might be rendered against the principal in the appeal case, whether by agreement or otherwise. In the absence of proof of fraud or collusion between the principal and the creditor, the stipulations did not have the effect to release the surety from liability on the appeal bond. (*Boynton v. Phelps* 52 Ill., 210; *Bailey v. Rosenthal*, 56 Mo., 385; *Chase v. Beraud*, 29 Cal., 138.)

Boynton v. Phelps, supra, was an action against a principal and his sureties upon an injunction bond given in a suit brought by a judgment debtor to restrain the collec-

tion of a judgment at law. The plaintiff in the injunction suit, without the consent of his sureties, dismissed his action by agreement with the owner of the judgment. It was held, in the absence of fraud and collusion between the parties, that the mere dismissing of the injunction suit by consent did not discharge the sureties on the bond.

In the Missouri case cited the defendant appealed from a judgment rendered by a justice of the peace, and in the appellate court the plaintiff took a voluntary nonsuit, which was subsequently, during the same term, set aside by agreement between the parties without the consent of the sureties on the appeal bond. The case was then tried and judgment was rendered against the defendant and his sureties. It was held that the sureties were liable for such judgment.

In *Chase v. Beraud, supra*, it was decided that where an appeal was dismissed by agreement between the principal in the appeal bond and the creditor, it operates as an affirmance of the judgment and charges the surety in the appeal bond.

In *Ammons v. Whitehead*, 31 Miss., 99, certain parties became sureties on three bonds given to secure appeals from three judgments rendered by a justice of the peace against the same defendant and in favor of the same plaintiff. In the circuit court the three cases were consolidated by agreement of the parties and afterwards, by stipulation between the principal and creditors, without the assent of the sureties, a judgment was rendered in said court against the principal and sureties with stay of execution for twelve months. It was held that the sureties were not released from their liability. This being a well considered case we reproduce a portion of the opinion here. The court said that "the bonds were executed for the purpose of having the cases retried in the circuit court, and their legal effect was to give that court jurisdiction to determine the cases, and to render judgment, if necessary, against both the

principal and sureties. Their condition was, substantially, that if the judgments should be there affirmed, they would abide by and perform the judgment of the court to be rendered thereupon. From their very nature, the obligation of the sureties was contingent and uncertain. They were given for the express purpose of enabling the principal to carry on the litigation, and, in the event that he should be unsuccessful, the law under which they were given provided that the judgment should be rendered against both the principal and sureties. Even if the sureties are not to be considered bound as parties to the judgment, so as to be debarred of the right to complain in a collateral proceeding of what was done in the proceeding, the necessary legal effect of their execution of the bonds was to confer upon the principal full power to do whatever he might deem necessary and proper in defending or determining the suits in the circuit court. The principal might have withdrawn all defense and submitted to judgments in the three cases immediately upon their presentation in the circuit court, and upon the same reason he was authorized to compromise the suits upon terms advantageous to himself. This was no violation of the obligation of the sureties, nor a variation of the terms of their obligation, for that was entirely contingent and uncertain, except that the parties had, by the necessary legal effect of the act, submitted themselves to whatever might be done in the determination of the suit by their principal, under the sanction of the court. There was no fixed obligation, the terms of which were varied by the creditor and principal, so that the sureties were deprived of the right of subrogation; nor did the stay of execution deprive them of any right or security which existed in their behalf before the rendition of the judgment and the entry of the stay. And whether the sureties be regarded as parties to the judgment, and as such bound by the proceedings in the suit, or as bound by the action of their principal by reason of the power necessarily

conferred upon him by the purpose and legal effect of the bonds, it is clear that the sureties are not within the rule which discharges such parties in consequence of indulgence given to their principal."

The cases on which defendant relies are not in point, as a brief reference to them will show. In *McKay v. Dodge*, 5 Ala., 388, two parties agreed to submit certain matters in dispute between them to the award of certain specified persons. Afterwards a third person signed, as surety, a bond for one of the parties, conditioned that the principal would perform the award which might be made against him on the submission. Subsequently, without the consent of the surety, by agreement between the parties two persons were substituted in place of two of the arbitrators, who failed to attend, and an award was made. The court held in an action on the bond that the change in the arbitrators was such an alteration of the original contract as exonerated the surety from liability. It is plain that there was a material change in the contract. The surety obligated himself that his principal should perform an award made by certain designated arbitrators, and not one made by any other or different person. The change of arbitrators was a new contract, which was not binding on the surety. *Johnson v. Flint*, 34 Ala., 673, was a suit on a bond executed to secure an appeal of a cause to the supreme court. In the appellate court an agreement was entered into between the parties to the appeal, without the knowledge or consent of the sureties on the appeal bond, to the effect that the judgment should be affirmed for a specified sum, which was $400 less than the superseded judgment, and that a certain mill and machinery in controversy were to be the property of the appellee. It was held that the sureties on the bond were released. The ground of this decision is that by the new agreement entered into without the consent of the sureties, founded upon a sufficient consideration, by which the parties stipulated for mutual advantages, the

principal was precluded from prosecuting his suit to effect. In the case at bar the contract of the sureties was not varied or changed. The agreement between the creditor and principal, that judgment should be rendered against the latter, was a mere voluntary and discretionary exercise of authority on the part of the principal. He secured no concessions or advantage for signing the agreement. There was merely a waiver by the principal of his defense to the suit, if he had one, and of such a waiver all the authorities hold the surety cannot take advantage. We are persuaded that the mere fact that the principal consented to the rendition of the judgment does not affect the liability of the surety. *Johnson v. Planters' Bank*, 43 Am. Dec. [Miss.], 480, was an action against Johnson as surety on a promissory note. The principal on the note had died and his estate was regularly administered, but the note had not been presented as a claim against the estate within the time prescribed by statute. It was decided that the surety was not thereby discharged. The case lacks analogy and is not an authority on the question we are considering. The other cases cited by counsel for the defendant are not in point.

We are forced to the conclusion that the district court erred in holding that the surety was not liable. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

THE other judges concur.

STATE OF NEBRASKA, EX REL. CHESTER NORTON, V. CHARLES VAN CAMP, COUNTY CLERK, AND JAMES G. KRUSE, INTERVENOR.

FILED JANUARY 17, 1893. No. 5880.

1. **Certificate of Election:** DUTIES OF CANVASSING OFFICERS: MANDAMUS: STATE LEGISLATURE. While each house of the legislature is, by the constitution, made the judge of the election and qualification of its members, the courts will, by *mandamus*, compel the proper canvassing officers to discharge their duties and issue certificates of election to the parties who, from the returns, appear to have been elected thereto, but the awarding of a certificate of election in obedience to the mandate of the court will not conclude the legislature in determining the question in proceedings by contest.

2. **Supreme Court:** INTERPRETATION OF CONSTITUTIONAL AND STATUTORY PROVISIONS. An interpretation given to a statutory or constitutional provision by the court of last resort becomes a standard to be applied in all cases, and is binding upon all departments of the government, including the legislature.

3. ———: ———: ELECTIVE FRANCHISE: REPRESENTATION. It is contemplated by our constitution and the election laws enacted in pursuance thereof that every qualified elector of the state shall be entitled to vote at some precinct or voting place for the respective state and county officers at each election. Hence, a construction will not be adopted which would have the effect to disfranchise a considerable number of voters or to deprive a county of representation in the legislature unless such construction is rendered necessary by express and unequivocal language of the statute or constitution.

4. **County Organization:** UNORGANIZED TERRITORY: REPRESENTATIVE DISTRICTS. B. county was organized in 1891, at which time it was unorganized territory, and has never, by general apportionment law or special act, been attached to any representative district. It is a narrow strip lying between H. county and the northern boundary of the state, eight townships long from east to west and has less than three townships in width. It adjoins K. county along its entire eastern boundary, although further west it extends north to the 43d parallel about

ten miles beyond the northern boundary of K. county, at which point it is bounded on the east by the state of South Dakota. *Held*, That it is directly west of K. county, within the meaning of section 146, chap. 18, Comp. Stats., and was, while unorganized territory, attached to said county for election purposes. MAXWELL, Ch. J., dissents.

5. ———: ———: ———. The legislature never having attached it to any representative district, it remains a part of the 20th district, notwithstanding its organization as a county. MAXWELL, Ch. J., dissents.

6. **Extension of County Boundaries:** UNORGANIZED TERRITORY: ELECTIONS. In 1883 an act was approved extending the boundaries of H. county directly north, so as to include the unorganized territory which is now B. county, but providing that it should not take effect until a majority of the legal voters of said county should give their assent at the next general election. At the general election in 1883 there were cast in said county 1,821 votes, of which 878 only were in favor of said proposition. *Held*, That the proposition was defeated, and an order entered by the county board in 1885 declaring it adopted is a nullity.

7. ———: ———: ATTACHMENT OF COUNTIES FOR ELECTION PURPOSES. The boundaries of H. county being clearly defined by law, and not including any part of the territory subsequently organized as B. county, *held*, there could be no *de facto* attachment of the latter to the former so as to entitle the voters thereof to participate in elections in H. county. MAXWELL, Ch. J., dissents.

8. **Election Returns:** DUTIES OF CANVASSING BOARD: CERTIFICATES OF ELECTION. It is settled by a long line of decisions of this court that a canvassing board has no authority to go behind the returns and inquire into the legality of the votes. Their duty is to canvass the votes as certified to them, and a certificate of election issued upon a canvass of a part of the vote of a representative district is without authority of law, and void.

9. **Regularity of Nomination of Candidates:** CERTIFICATES. Neither a canvassing board nor the court in a *mandamus* proceeding will inquire into the regularity of the nomination of the candidates, nor the sufficiency of their certificates of nomination. MAXWELL, Ch. J., dissents so far as it applies to courts.

10. ———. *Held*, On the proofs, that the nomination of the relator was regular and sufficient in form and substance. MAXWELL, Ch J., dissents.

11. **Construction of Election Law.** Provisions of the election law which are not essential to a fair election will be held to be formal and directory only unless declared to be mandatory by the law itself.

12. **Written and Printed Ballots.** The vote of B. county for the relator should not be rejected, for the reason that his name was written on the sample and official ballots by the clerk after they had been printed and were ready for distribution. MAXWELL, Ch. J., dissents.

13. **Ballots:** DESIGNATION OF REPRESENTATIVE DISTRICT. Votes for representative will not be rejected because the number of the district is not designated upon the official ballot in counties included in one district only.

ORIGINAL application for *mandamus* to compel the respondent, Charles Van Camp, county clerk of Knox county, to call to his assistance two disinterested electors of the twentieth representative district, and with them compare the abstracts of votes cast at the election held November 8, 1892, made by the canvassing boards of the counties of Knox and Boyd for representative, and returned to said county clerk of Knox county by the county clerks of said counties, and issue to the person appearing from said abstracts to have the highest number of votes a certificate of election as representative from said twentieth district in the legislature of Nebraska to convene January 3, 1893. *Writ allowed.*

A. W. Agee, for relator.

A. J. Sawyer and *Thomas H. Matters, contra*

POST, J.

It is an elementary rule that the writ of *mandamus* will be denied unless the right of the petitioner to the relief demanded is clear. That rule applies with especial force to cases like the one under consideration, where the subject of the controversy is the office of representative in the legis-

lature. It is a fact known to all, and to which we cannot close our eyes, that in like cases, particularly in times of unusual political excitement, partisan bias and prejudice are liable to be imputed to judges on account of the soundest decisions, and by men who would without hesitation submit to their judgment controversies involving their fortunes and their honor. It is not my purpose to comment upon this peculiarity of our national character, or to condemn it as existing without sufficient cause. But attention is directed to it as an additional reason why the courts of the country should refuse to interfere, except in cases where the right is clear and the duty plainly enjoined by law. I have, however, no hesitation in saying that this case is clearly within both the letter and the spirit of the rule. In fact, there is no question of law involved herein but has been settled by repeated decisions of this court, to which I will hereafter refer. But before discussing the case upon its merits I will notice the argument against the jurisdiction of the court, on the ground that the house of representatives is made the exclusive judge of the election and qualification of its members, and that the judgment of the court would tend to forestall action by the law making power, although that argument is too trite to call for especial notice at this time. The courts *have* jurisdiction in such cases, fortunately for the cause of constitutional government. That fact is too well settled to admit of controversy. As said by Judge McCrary, in his work on the Law of Elections, 350: "The courts will not undertake to decide upon the right of a party to hold a seat in the legislature where by the constitution each house is made the judge of the election and qualification of its own members, but a court may, by *mandamus*, compel the proper certifying officers to discharge their duties and arm the parties elected to such legislative body with the credentials necessary to enable them to assert their rights before the proper tribunal."

It is contemplated that each house of the legislature shall be organized by the persons who are *prima facie* members thereof. It requires no argument to prove the disastrous consequences of a different construction of the constitution. An illustration is quite sufficient for the purpose. In *State, ex rel. Christy, v. Stein*, 35 Neb., 848, and two other cases involving the same issues recently decided by this court, the controversy was, who upon the face of the returns were entitled to certificates of election. Suppose the respondent, the clerk of Clay county, had issued certificates to the relators therein, will it be contended that the court would have been powerless to afford relief, and that the relators must have been permitted to participate in the organization of the legislature to which they were not elected, simply because the canvassing officer had been guilty of misfeasance or malfeasance in office? Yet the case at bar is much stronger on its merits than the imaginary one. Here the question of the relator's right to a certificate of election is but an incident to the more important question of the rights of the people of Boyd county to representation in the popular branch of the legislature. For it is too plain for argument that unless said county is included within the twentieth representative district, the people thereof are disfranchised so far as representation in the house is concerned; and that such anomalous condition must continue until 1899, which will be the first legislature elected under the next apportionment law. It is also argued against our jurisdiction that the house of representatives will not be bound by the judgment of the court and may entirely ignore or defy its authority. It must be confessed that legislative bodies frequently fail to distinguish clearly between the power and the right in questions involving party supremacy. This is a weakness common to parties and of which all have furnished conspicuous illustrations. But our duty as well as our responsibility ends with a determination of the controversy submitted to us. It may

be suggested, however, in this connection that there are some things which are conclusively presumed and which no court will permit to be questioned in advance, among which is that a co-ordinate branch of the government will not resort to revolutionary methods. A careful examination into the subject will prove that there can be no conflict of jurisdiction between the legislative and judicial departments of the government. The extent to which judicial power will be exercised is to compel ministerial officers to discharge their duty and issue certificates of election to the parties entitled thereto upon the face of the returns, leaving it to the legislature to determine the question of the validity of the election.

The last proposition, however, is subject to one qualification, viz., where the court of last resort has placed a construction upon a constitutional or statutory provision, such construction is binding upon all departments of the state government including the legislature. (See Cooley's Const. Limitations [5th ed.], 55, 56.) As said by one of the ablest of authors, "an interpretation of an act by the court of last resort under a constitutional government becomes a part of the act itself." An illustration of this rule is found in the case of *State v. Van Duyn*, 24 Neb., 586. By the legislative apportionment act of 1881, Sarpy county comprised the eighth representative district and was entitled to one representative. That act was repealed by the act of 1887, which provides that the eighth district shall consist of Cass and Otoe counties, but making no provision for a representative from Sarpy county. It was held in the case named, the present chief justice delivering the opinion of the court, that the legislature could not deprive a county of representation in that body, hence the present apportionment law is unconstitutional so far as Sarpy county is concerned and that county is entitled to a member of the house under the former act. The judgment of the court in that case was certainly binding upon

the legislature, and while the house may have the power, it would have no more right to exclude the member elect from that county than from any other county of the state.

2. This controversy is between Norton, the relator, and Kruse, the intervenor, who were at the late election the candidates of the republican and independent parties for representative of twentieth representative district.

In Knox county the vote as returned and canvassed is as follows:

Kruse, independent	723	votes
Norton, republican	681	"
Sherman, democrat	509	"
Buckmaster, prohibition	112	"

In Boyd county the vote as canvassed and returned to the county clerk of Knox county is—

Norton	201	votes
Kruse	4	"
Sherman	30	"

It is apparent from the above tables that if the relator is entitled to have counted in his favor the votes cast in Boyd county he is entitled to the certificate of election and the writ of *mandamus* was properly allowed. The apportionment act of 1887 provides that Knox county shall comprise the twentieth representative district and be entitled to one representative. But by sections 146 and 147 of chapter 18, Comp. Stats., entitled "Counties and County Officers," it is provided as follows:

"Sec. 146.. All counties which have not been organized in the manner provided by law, or any unorganized territory in the state, shall be attached to the nearest organized county directly east for election, judicial, and revenue purposes; * * * *Provided further*, That if no county lies directly east of any such unorganized territory or county, then such unorganized territory or county shall be attached to the county directly south, or if there be no such county, then to the county directly north, and if there be no county

directly north, then to the county directly west of such unorganized territory or county.

"Sec. 147. The county authorities to which any unorganized county or territory is attached shall exercise control over, and their jurisdiction shall extend to, such unorganized county or territory the same as if it were a part of their own county."

Repeated constructions have been given to the above provision by this court, uniformly to the effect that for all purposes of county government unorganized territory is attached to the nearest county directly east thereof. For instance, in *Ex parte Crawford*, 12 Neb., 379, it was held that the district court of Holt county had jurisdiction to punish for crimes committed in the unorganized territory directly west of that county. In the opinion of the court LAKE, chief justice, says: "As to these three purposes (election, judicial, and revenue) there are no restrictive or qualifying words in the act, but the attachment becomes complete and said territory to all intents made practically a part of that county. Indeed this effect is made still more manifest, if possible, by reference to the next section which provides [quoting section 147]. The full extent of such jurisdiction and control can be correctly measured only by a resort to all the various laws relative to county officers and their duties respecting election, judicial, and revenue matters."

Boyd county was organized in pursuance of an act approved April 9, 1891, and is a strip eight townships in length extending from east to west and less than three townships in width at the widest point, all of which, with the exception of a small fraction, was acquired by this state under the provisions of an act of congress approved March 23, 1882, and which was, at the time named, within the boundary of Dakota Territory. The act above mentioned also provides that the jurisdiction of this state shall not attach to the territory so acquired until the extinguishment

of the Indian title thereto, and the announcement thereof by proclamation of the president; which, according to admissions of counsel, was October 23, 1890. It is apparent from an examination of a correct map of the state that under the general act referred to this territory could be attached to no organized county of the state other than Knox for any purpose. It is bounded on the east by Knox and no other county of the state. It is true the line of the eastern boundary is short, not exceeding one congressional township and a half. It is also true that the northern boundary extends about the same distance beyond the northernmost limit of Knox county and lies directly west of a portion of South Dakota. It is a rule of construction, universally recognized, that acts which confer or extend the elective franchise should be liberally construed. (See Sutherland, Stat. Con., sec. 441.) Here is a prosperous county of the state rapidly developing in population and wealth which it is proposed to disfranchise upon the barest technicality, for there is no provision for the dividing of unorganized territory between two or more counties except that contained in section 148, which is that where two or more counties lie directly east of an unorganized county "the portions of territory of such unorganized county which lie either north or south of a line running directly west and in continuation of the boundary line between such organized counties shall be attached to the organized county directly east of such territory for all purposes of this subdivision." A statute should never be so construed as to work a public mischief, unless such construction is required by the explicit and unequivocal language of the act or by necessary implication therefrom. (*People v. Lambier*, 5 Denio [N. Y.], 9; *Smith v. People*, 47 N. Y., 330.) In Sutherland, Stat. Con., sec. 323, it is said: "But an interpretation of a statute which must lead to consequences which are mischievous and absurd is inadmissible, if it is susceptible of an interpreta-

tion by which such consequences may be avoided." The opinion of the chief justice in *State v. Van Duyn, supra,* is regarded as a leading authority in support of the above rule and is without doubt directly in point. We should adopt that construction, when possible, which will secure to the people of the state their constitutional right to vote for and be represented by officers of their choice, although such construction may not be the most obvious or natural from the language of the statute.

3. It follows that on the extinguishment of the Indian title to the territory now comprising Boyd county, and notice thereof by the proclamation of the president, said territory, by virtue of the general statute, became attached to Knox county for election purposes and became a part of the twentieth representative district, and has never been attached to any other representative district, either by general or special act. It is settled beyond controversy in this state that the legislature cannot, under the pretense of subdividing a county or the state for election purposes, disfranchise a part of the people by making no provision for the exercise of their constitutional rights. In addition to *State v. Van Duyn* see *Peard v. State,* 34 Neb., 372, and authorities cited. It is not the province of the courts to supply omissions by the legislature, but, as said by Judge Niblack, in *Duncan v. Shenk,* 109 Ind., 26, "Our election laws were enacted upon the evident theory that every qualified voter of the state is entitled to vote at some precinct or voting place at every election except when restrained by some provision of the state constitution."

4. The chief justice has filed a dissenting opinion in which he argues that Boyd county is for election purposes attached to Holt county. Before noticing the reasons advanced for his conclusion I will say that in my opinion the boundaries of Holt county are clearly defined by law, and there could be no *de facto* attachment thereto of Boyd county for election purposes; hence the objection to the

proofs of the intervenor upon that branch of the case is so obviously sound as to render further examination unnecessary. The only warrant for the claim that Boyd county is attached to Holt county for any purpose is the act of March 1, 1883, providing that all of said territory should be attached to the last named county, provided a majority of the legal voters thereof should give their assent to the proposition at the next general election. At the general election of 1883 there were cast 1,821 votes in said county, of which 872 only were in favor of said proposition. It is clear, upon authority, that the proposition was defeated. (*State v. Lancaster Co.*, 6 Neb., 474.) And such appears to have been the understanding at the time, for one of intervenor's witnesses, a resident of Holt county, testifies that it was generally understood that the proposition was defeated, and that the county clerk refused to certify that it had carried. But on the 23d day of January, 1885, a resolution was adopted by the county board declaring it carried. It appears, however, from the several acts of the legislature, subsequent to 1883, that the territory in question was always, prior to the organization of Boyd county, regarded as unorganized territory. For instance, in the judicial apportionment of 1887 the twelfth district included Holt county and the unorganized territory north of said county, and by the legislative apportionment act of 1887 the thirteenth senatorial district includes the unorganized territory north of Holt county. The attaching of said territory to judicial and senatorial districts which adjoin it on the south, but not on the east, without reference to it in the section defining representative districts, indicates an intention on the part of the legislature for it to become, when the Indian title should be extinguished, a part of the twentieth representative district, by virtue of the general statute. But if anything is lacking in the way of legislative construction it is supplied by the act creating Boyd county, which provides that "The unorganized

territory lying north of Holt county be organized into a new county and be called Boyd county." (Laws of 1891, 224.)

5. I observe from the opinion of the chief justice that he has overlooked several material facts, which is due, no doubt, to the lack of time for its preparation, since it appears to have been filed before there had been an opportunity to assign the case to a member of the majority to prepare the opinion of the court. For instance he says: "The proof shows beyond question that Boyd county has in fact been attached to Holt county from 1883 to 1890; that two years ago one of the representatives from the district comprising what is now Holt and Boyd counties was a resident of Turtle Creek township, in what is now Boyd county; that a supervisor from that precinct sat with the supervisors of Holt county and the latter levied taxes in that county which were collected and paid. These things were a matter of record which seems to have been kept in Holt county. This state of affairs continued until Boyd county was organized two years ago. There is no proof to the contrary on this point, so that it is established beyond a doubt." It does appear from the testimony of witnesses that for the years 1888 and 1889 Turtle Creek township, now a part of Boyd county, elected a supervisor who sat with the county board of Holt county, and that the last named county assessed and collected taxes on the property in said township for the years named. It also appears that a resident of Turtle Creek township was in the fall of 1890 a candidate for the office of representative from Holt county. Further than this the foregoing statement is not warranted by the proofs. There is no evidence within my knowledge of the case that Holt county ever exercised or claimed jurisdiction for any purpose over any part of Boyd county, aside from the township above named, or at any time prior to the year 1888, nor is the ground of its assumed jurisdiction over a fraction thereof appar-

ent from the record. Had a resident of Boyd county been permitted to represent Holt county in the legislature, that fact might be regarded as a legislative construction of more or less weight, but the assertion of the chief justice is contradicted by the undisputed proofs, which show that the candidate referred to was defeated. There is, however, one fact which alone is conclusive of the question of a *de facto* annexation, viz., since the approval of the act creating Boyd county there has been no person in either county, so far as the record discloses, who has ever regarded that county as a part of the fiftieth representative district which is comprised of Holt county. That district is entitled to two members of the house and it is fair to presume that there were, at the election in 1892, at least four candidates for representative. Yet we have no evidence that certificates of nomination were filed by any of them in Boyd county. On the other hand it is apparent that said county was regarded by all of the leading political parties as a part of the twentieth district, since it appears from the documentary evidence that on the 16th day of September, 1892, the certificate of nomination of Z. G. Sherman, by the democratic party of the twentieth representative district, was filed with the clerk of Boyd county. On the 15th day of October following the certificate of the relator was filed in said county and on the 24th day of October fifty-three persons, claiming to be electors of the twentieth district, filed a petition, in due form, requesting the clerk of said county to place the name of Kruse, the intervenor, on the ticket as the independent candidate for representative from said district. The clerk having refused to place the name of the relator upon the official or sample ballot, the latter applied to Hon. M. P. Kinkaid, one of the judges of the fifteenth judicial district, for a writ of *mandamus* requiring the clerk to print his name on the ballot, which application was heard upon sufficient notice and the writ allowed as prayed.

It is suggested by the chief justice that the petition above referred to was filed by friends of Kruse without his knowledge, after the institution of the *mandamus* proceeding, but here, too, he misconceives the record. The intervenor's petition aforesaid was filed in Boyd county October 24, while the application for the writ of *mandamus* was not made until the next day. It further appears from the poll book introduced in evidence that at the general election in 1890, at which the intervenor was a candidate for representative from the twentieth district, there were cast by residents of Boyd county at the nearest polling place in Knox county seventy-nine votes, of which eight only were challenged. The question of the legality of these votes is not involved in the present controversy, but reference is made to them for the purpose of showing that so far as there existed a *de facto* annexation of that territory to any organized county it was to Knox and not to Holt county.

6. The chief justice further says: "There is no proof that a call for a convention of this kind (of Knox and Boyd counties) was made by any one; or that the republicans of Boyd county were invited or even notified to attend. * * * No doubt the convention in this case was a fair convention of Knox county, but it should appear from the proof that Boyd county was invited to participate therein." There is no proposition more firmly settled by decisions of this court than that neither the canvassing board nor the court in a *mandamus* proceeding will go behind the returns and inquire into the legality of the votes. (*Hagge v. State*, 10 Neb., 51; *State v. Stearns*, 11 Id., 106; *State v. Peacock*, 15 Id., 442; *State v. Wilson*, 24 Id., 139; *State v. Elder*, 31 Id., 169.) In the first case cited above the present chief justice, referring to canvassing officers, uses the following pertinent language: "Their duties are purely ministerial. If illegal votes have been cast or irregularities occurred affecting the right of the person declared elected to office the law provides for contesting such

election, but a canvassing board cannot go behind the returns." And in the last named case in which a writ of *mandamus* was allowed against the speaker of the house of representatives requiring him to open and publish the returns of the election for state officers, he says: "The rule is that each board is to receive the returns transmitted to it, if in due form, as correct, and ascertain and declare the result as appears from such returns." On the authority of the cases cited it is clear that we have no right to inquire into the regularity of the relator's nomination. However, authorities directly in point are not wanting. In *People v. Shaw*, N. Y. Court of Appeals, 31 N. E. Rep., 512, and *State v. Board of Canvassers of Cascade Co.*, 31 Pac. Rep., 536, Sup. Court Mont., both arising under the Australian ballot law, it is held that the canvassers could not go behind the returns for the purpose of inquiring into the legality of the nomination of the candidates. But it is apparent that the nomination of the relator was regular and sufficient, both in form and substance. It will be observed that the chief justice does not say that there was any offer to show that Boyd county was not in fact represented at the convention in question. The truth is, there was no such proof. But suppose, for the sake of argument, that such was the fact and Boyd county was not included in the call for the convention and was not represented therein. The court will not so construe the law as to disfranchise the voters of that county for any such irregularity. A strong case in this court is *State v. Thayer*, 31 Neb., 82, in which it was held that an election to fill a vacancy in the office of district judge was valid, although the notice prescribed by law for such an election had been entirely omitted on the ground that such provision is merely directory.

7. As to the form of the certificate, which is set out at length below, it is doubtful if there has ever been one more formal and complete filed in any office in the state:

"THE STATE OF NEBRASKA, }
KNOX COUNTY. } ss.

"We, W. H. Needham, chairman, and E. H. Purcell, secretary, presiding officers and secretary of the republican convention of the twentieth representative district of Nebraska had and held in Creighton, in Knox county, state of Nebraska, on the 26th day of July, 1892, pursuant to a call for the purpose of making nomination to public office for said representative district as the candidate of the republican party, certify that the said convention was made up and composed of electors representing the republican party, being a political party which, at the last election before holden, said representative district convention polled at least one per centum of the entire vote cast in said district; that said convention was duly organized by the election of W. H. Needham, a resident of Bloomfield, of Morton township, in Knox county, as its chairman and presiding officer, and by the election of E. H. Purcell, of Verdigris township, in Knox county, as secretary, members of said convention, and that the following nomination was made by said convention, resident of said representative district, at the place immediately following the name, to-wit: For representative of twentieth district of Nebraska, *Chester A. Norton*, of Morrillville P. O., Knox county, Nebraska. The said named person is a regular nominee of the republican party of said twentieth representative district of Nebraska for the respective office immediately preceding his name, and his name should be printed on the sample and official ballots as a candidate of the republican party in and for said representative district for said office.

"W. H. NEEDHAM,

"*Chairman of the republican party of the twentieth representative district of Nebraska, residence in said representative district at Bloomfield, Knox county, Nebraska.*

"———— ————.

"*Secretary of the republican party of the twentieth representative district of Nebraska, residence in said representative district, Verdigris P. O., Knox county, Nebraska.*

"THE STATE OF NEBRASKA, }
KNOX COUNTY. }

"I, W. H. Needham, being first duly sworn, depose and say that I am a resident of Bloomfield, in Morton township, in said county and state; that I was duly elected chairman and presiding officer of the republican convention of the twentieth representative district of Nebraska, had and held at Creighton, in said county, on the 26th day of July, 1892; that I signed the written certificate of nomination as chairman and presiding officer of said convention, and that said certificate and the statements therein contained are true to the best of my knowledge and belief.

W. H. NEEDHAM,
"*Chairman.*

"Sworn to before W. C. MILLER,
"*Notary Public of Knox Co.*

"THE STATE OF NEBRASKA, }
KNOX COUNTY. }

"I, E. H. Purcell, being first duly sworn, depose and say that I am a resident of Verdigris, in Verdigris township, in said county and state; that I was duly elected secretary of the republican convention of the twentieth representative district of Nebraska, held at Creighton, in said county, on the 26th day of July, 1892; that I signed the written certificate of nomination as such secretary, and that said certificate and the statements therein contained are true to the best of my knowledge and belief.

"E. H. PURCELL,
"*Secretary.*

"Sworn to before D. E. JOHNSON,
"*Notary Public, Knox Co.*"

8. The chief justice further says: "It is true the name of the relator is written on both the sample and official ballots, but this does not comply with the law. That requires them to be printed on both." It should be stated in this connection that the clerk of Boyd county, after the

writ of *mandamus* had been served upon him, wrote the relator's name with ink upon both the official and sample ballots which had been printed and were ready for distribution, presumably to save the cost of printing others. It was held by this court in *State v. Russell*, 34 Neb., 116, that the provision of our law for the making of ballots with ink is directory only, and that ballots otherwise regular should not, in the absence of fraud, be rejected because they are marked with a pencil. In the absence of a plain provision to the contrary, a printed instrument will be held to comply with a statute providing for a written one. In *Temple v. Mead*, 4 Vt., 535, it was held that printed ballots are within the meaning of a constitutional provision requiring them to be "fairly written." And to the same effect is *Henshaw v. Hoster*, 9 Pick. [Mass.], 312. This court has uniformly held those provisions of the election law to be formal and directory merely, which are not essential to a fair election unless declared to be mandatory by the statute itself. In the appendix to Mr. Wigmore's Treatise on the Australian Ballot Law, he says: "Wherever our statutes do not expressly declare that particular informalities avoid the ballot, it would seem best to consider their requirements as directory only. The whole purpose of the ballot, as an institution, is to obtain a correct expression of intention, and if in a given case the intention is clear, it is an entire misconception of the purpose of the requirements to treat them as essentials, that is, as objects in themselves, and not merely as means." There is no claim that the writing of the relator's name on the ballots was a distinguishing mark within the meaning of the statute, and it is plain that it was not. (*State v. Russell, supra.*) We cannot adopt the strict construction contended for by the chief justice, without reversing a well recognized rule of this court, and disregarding the settled law on the subject.

9. There is still another objection argued by counsel, viz., that the votes cast for the relator in Boyd county are void

for the reason that the number of the district was not designated upon the ballots. Upon both the official and sample ballots his name appears under the following printed direction: "For representative —— district. Vote for one." In *State v. Howe*, 28 Neb., 618, it was held that words descriptive of the district do not constitute a part of the legal designation of the office, and may be treated as surplusage. That case is conclusive of the question now under consideration. The question of the effect of such an omission in counties included within two or more districts is not involved in the objection and is not determined. The tendency of the judiciary should always be in the direction of conservatism, and any encroachment upon the powers conferred upon the other departments of the government should be strenuously resisted. The questions involved in this case, however, are purely judicial, and, as has been shown, have all been settled by previous decisions of this court. Boyd county is not only a part of the twentieth representative district, but the nomination of the relator is in substantial compliance with law, and the votes cast for him in said county should be counted in his favor. Since it was the duty of the canvassing board to canvass all the votes certified to it from the counties of Knox and Boyd and to issue a certificate to the party appearing therefrom to have been elected, the certificate issued to the intervenor upon a canvass of the vote of Knox county only is without authority of law, and void, and the writ of *mandamus* should be allowed as prayed.

WRIT ALLOWED.

NORVAL, J., concurs.

MAXWELL, CH. J., dissents. See *ante*, p. 9.

JOHN CURTIN ET AL. V. MARIA ATKINSON.

FILED JANUARY 17, 1893. NO. 3731.

1. **Liquors**: DEALER'S BOND: CONSTRUCTION: LIABILITY OF SURETIES. An undertaking will be strictly construed in favor of sureties and their liability will not be extended by construction beyond their specific agreement.
2. ——— : ——— : ———. The term traffic in intoxicating drinks, as used in section 15, chap. 50, Comp. Stats., will, in action on a license bond, be held to mean the sale or furnishing of liquors to third persons, and not the use thereof by the saloon-keeper.
3. ——— : ——— INJURIES BY SALOON-KEEPER WHILE INTOXICATED: LIABILITY OF SURETIES FOR DAMAGES. S., a saloon-keeper, while intoxicated in his own saloon, shot and killed the plaintiff's husband. *Held*, That the drinking of the liquor by S. was not the traffic in intoxicating liquor within the meaning of the law, or such as will render his sureties liable in an action upon his bond.
4. **Error Proceedings**: PARTIES IN SUPREME COURT. The second point of the syllabus in this case in 29 Neb., 612, overruled.

REHEARING of case reported in 29 Neb., 612.

P. O. Cassidy, E. M. Wolfe, B. S. Baker, and *W. P. Freeman*, for plaintiffs in error.

John Saxon and *Hambel & Heasty, contra.*

POST, J.

On a former hearing of this case it was held that the court did not acquire jurisdiction to review the judgment below, for the reason that the defendants therein were not all made parties to the proceeding in error. (See *Curtin v. Atkinson*, 29 Neb., 612.) By reference to the record in the case, we observe that the petition in error was filed in this court on the 28th day of June, 1889. On the 30th day of

August, following, the plaintiffs in error's brief was served upon the attorney for the defendant in error. On the 16th day of September, 1889, defendant in error filed herein a paper entitled "An answer to the petition in error." On the 31st day of October, 1889, defendant in error filed a brief upon the merits of the case, and on the same day it was argued and submitted upon its merits. If the answer to the petition in error presents an issue of law it was never called to the attention of the court otherwise than by the submission of the case upon its merits. It is also claimed by counsel, and undisputed by the record, that they had no notice whatever of the answer aforesaid previous to the filing of the opinion herein, at the January, 1890, term. It may be conceded here that had objection been made at the proper time, on the ground that the parties to the judgment had not all been joined as plaintiffs or defendants in error, such omission would have been held fatal to the prosecution of the petition in error. A rehearing was subsequently allowed upon motion of plaintiffs in error. Since, then, the identical question has been carefully considered in the case of *Consaul v. Sheldon*, 35 Neb., 247, and the conclusion reached that where parties to a proceeding in error submit the controversy upon its merits, they will be held to have waived the objection that there is a defect of parties. We regard that case as decisive of the question now under consideration. There is, however, a more substantial objection to the proposition for which the defendant in error contends. A careful examination of the so-called answer satisfies us that it was not intended as an objection to the proceeding, on the ground of a defect of parties, but rather upon the ground that the plaintiffs in error, sureties upon the bond, were concluded by the judgment against their principal. We copy the pleading at length, as follows:

"And now comes the defendant in error, and for answer to the petition in error of said plaintiffs says, that said

plaintiffs ought not to have their said action thereof against her, because the said plaintiffs were the sureties upon the license bond of one Patrick H. Shiel, and said Shiel is not joined with said plaintiffs in prosecuting this petition in error. Defendant further says that said bond was and is an obligation on the part of said plaintiffs in error to become responsible for the result of litigation against the said Shiel, to-wit, an obligation to pay and become responsible for all damages adjudged against said Shiel under the provisions of chapter 50, Statutes of Nebraska. And defendant avers that said Shiel having, without fraud or collusion with defendant, acquiesced in, and submitted to, said judgment against him, plaintiffs have no standing to maintain their said action and petition in error against her, but that said judgment is conclusive against said plaintiffs, and they ought not be heard to question said judgment in any manner or form whatever.

"This defendant, for further answer and defense, avers that the several matters and things specified in plaintiffs' petition in error do not constitute error to the prejudice of the said plaintiffs, or their legal rights as sureties upon said bond after judgment thereon against their principal, said Patrick H. Shiel. Wherefore defendant prays that said judgment may be affirmed and that she may have and recover her costs herein expended."

Had the pleader omitted all after the first sentence, it is possible that the pleadings might have been construed as an objection in the nature of a demurrer on the ground of a defect of parties. But construing all the several parts thereof together, it is obvious that the objection is not on account of the omission of Shiel as a party, but rather to the right of plaintiffs in error to maintain the action. In other words, it involves the merits of the controversy instead of the question of parties. Had defendant in error sought to avail herself of the failure to make Shiel a party to the petition in error, she should have called the attention

of the court to the omission before submission of the case on its merits.

2. We come now to a consideration of the controversy upon its merits. Several propositions are discussed by counsel, but they are mainly subsidiary to the one controlling question, viz.: Does the petition below state a cause of action against the plaintiffs in error? It is in substance alleged therein that Shiel was a licensed saloon-keeper and had given bond as required by law with plaintiffs in error as sureties. That during the time for which he was licensed to sell liquors said Shiel drank liquor to excess and finally, during a fit of intoxication in his saloon, shot and killed the plaintiff's husband. By reference to section 6, chapter 50, Comp. Stats., it will be observed that every licensed saloon-keeper is required to give a bond with at least two sufficient sureties, conditioned that he will not violate any of the provisions of the act, and will pay all damages, fines, penalties, and forfeitures which may be adjudged against him under the provisions of the act, and that said bond may be sued on for the use of any person who may be injured by the selling or giving away of intoxicating liquor by the person licensed.

By section 15 it is provided that "the person so licensed shall pay all damages that the community or individuals may sustain in consequence of such traffic, he shall support all paupers, widows, and orphans, and the expense of all civil and criminal prosecutions growing out of or justly attributable to his traffic in intoxicating drinks, said damage to be recovered in any court of competent jurisdiction in an action on the bond required in section 6 of the act," etc.

By section 16 it is provided as follows: "It shall be lawful for any married woman, or any other person at her request, to institute and maintain in her own name a suit on any such bond for all damages sustained by herself and children on account of such traffic, and the money when collected shall be paid over for the use of herself and children.

By section 17 it is provided, in substance, that when any one has become a public charge by reason of the selling or giving to him of intoxicating liquors, the city or county interested may recover in an action on the bond of the saloon-keeper guilty of selling or giving liquor to such person. By section 18 it is provided as follows:

"On the trial of any suit under the provisions hereof, the cause or foundation of which shall be the acts done or injuries inflicted by a person under the influence of liquor, it shall only be necessary to sustain the action to prove that the defendant or defendants sold or gave liquor to the person so intoxicated, or under the influence of liquor, whose acts or injuries are complained of, on that day or about that time when said acts were committed or said injuries received; and in an action for damages brought by a married woman, or other person whose support legally devolves upon a person disqualified by intemperance from earning the same, it shall only be necessary to prove that the defendant has given or sold intoxicating drinks to such person during the period of such disqualification."

The contention of the defendant in error is that the term traffic as used in sections 15 and 16 should be construed to mean calling, occupation, or employment, and that the injury for which she sues is the result direct or remote of such occupation or employment. The policy of this court has been to give to the civil damage feature of our liquor law the most liberal construction possible in favor of innocent sufferers from the effect of the liquor traffic. For instance, in *McClay v. Worrall*, 18 Neb., 44, it was held that the injured party is not limited to such damages as are the natural and proximate result of the furnishing of the liquor, but that a woman may recover from a saloon-keeper for injuries inflicted upon her son by a third party in consequence of liquor furnished the latter. In *Wardell v. McConnell*, 23 Neb., 152 it was held that the

liability of the surety does not terminate with the bond, but where the principal furnishes liquor to one who is thereby disqualified to earn a support for his family, the liability of the surety continues throughout such period of disqualification. And in *Buckmaster v. McElroy*, 20 Neb., 557, it was held that one who had suffered injury in consequence of his own voluntary intoxication may recover on the bond of the saloon-keeper from whom the liquor was procured. We are not disposed to recede from the position taken in previous decisions, notwithstanding the last named case has been the subject of no little criticism, particularly by Mr. Black in his recent work on Intoxicating Liquors, 291. But to further extend the liability of the saloon-keeper would be a palpable misconstruction of the liquor law and an unmistakable encroachment upon the powers of the legislature. By a closer examination of section 15, which is relied upon as authority for the action, we notice that the saloon-keeper is required to pay all damages that the community or individuals may suffer in consequence of *such* traffic, evidently referring to the selling or giving away of liquors as provided in the preceding sections. The word "traffic" is defined by Bouvier thus: "Commerce, trade, sale, or exchange; or merchandise, bills, money, and the like." Webster defines it thus: "Commerce, either by barter or by buying and selling; trade. This word, like *trade*, comprehends every species of dealing in the exchange or passing of goods or merchandise from hand to hand for an equivalent, unless the business of retailing may be excepted. It signifies appropriately foreign trade, but is not limited to that." We find the definition in the Century dictionary substantially the same as the last above. One of the most familiar rules of construction is that words are to be taken in their ordinary grammatical sense, unless such a construction would be obviously repugnant to the framers of the instrument, or would lead to some other inconvenience or absurdity. (Sedgwick on Const.

[2d ed.], 220.) The above rule is especially applicable to actions against sureties whose liability will never be held to extend beyond the precise term of their contract. (*Ludlow v. Simond*, 2 Caines' Cases [N. Y.], 1; *Walsh v. Bailie*, 10 Johns. [N. Y.], 180; *Lanuse v. Barker*, Id., 312; *Pennoyer v. Watson*, 16 Id., 100; *Tunison v. Cramer*, 5 N. J. L., 499; *Gates v. McKee*, 13 N. Y., 232; *Ward v. Stahl*, 81 Id., 406; *National Mechanics' Banking Ass'n v. Conkling*, 90 Id., 116; *State v. Medary*, 17 O., 554.)

The argument of the defendant in error, that the word traffic should be construed to mean the calling or occupation of the saloon-keeper appears on first impression to be quite plausible; but a more careful examination of the question has convinced us that it is not sound. The plaintiffs in error, by the conditions in their bond, undertook to answer for all damage which the community or individuals might suffer by reason of the traffic of their principal in intoxicating liquors. They are presumed to have had in view all the damage incident to the sale or furnishing of liquor to third persons. But they had a right to interpret and rely upon the language of the statute according to its ordinary and grammatical sense. They did not undertake that Sheil would not drink liquor, and the use thereof by him was in no sense a breach of the conditions of the bond, and if they must respond in this case why should their liability be limited to acts done by their principal while intoxicated? And why are they not liable for every assault and battery committed by him, at least upon the premises occupied as a saloon? We have found no case directly in point, yet authorities are not wanting which sustain the position of the plaintiffs in error. In *Lueken v. People*, 3 Ill. App., 375, which was an action upon a saloon-keeper's bond, the bartender of L., the saloon-keeper, sold liquor to B., whereby the latter became intoxicated and became engaged in an altercation with the bartender, who threw a glass tumbler at B., but missed him

and struck the plaintiff, a by-stander. It was held that he could not recover. The obligation which those plaintiffs assumed was to answer for damages incident to the traffic in intoxicating liquors by their principal, that is the selling or furnishing of liquor to others and not the use thereof himself. It follows that the judgment against the plaintiffs in error is wrong and should be

REVERSED.

THE other judges concur.

A. H. BOWMAN, SHERIFF, ET AL. v. FIRST NATIONAL BANK OF NELSON.

FILED JANUARY 18, 1893. No. 4194.

Executions: LIEN OF LEVY ON PERSONALTY: REPLEVIN: LIABILITY OF SHERIFFS. A sheriff levied an execution upon a quantity of personal property as belonging to one H., the judgment debtor. A portion of this property was taken under an order of replevin in favor of the wife of H. She gave a bond and the property was delivered to her. Afterwards, on the trial of the cause, judgment was rendered against her, whereupon she returned the property to the officer. He thereupon levied an execution in favor of another party on a part of said property and sold the same and applied the proceeds in satisfaction of said execution. *Held*, That the lien of the first execution was not divested and that the officer was liable to the first execution creditor.

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

W. A. Bergstresser, for plaintiffs in error.

S. A. Searle, contra.

MAXWELL, CH J.

This action was brought by the defendant in error against the plaintiff in error and the sureties on his official bond for levying a second execution upon property of a judgment debtor upon which the plaintiff in error had previously levied an execution in favor of the defendant in error, by reason of which the plaintiff in error sold the property under the second execution and applied the proceeds of said sale in satisfaction thereof, whereby the defendant in error suffered loss. On the trial of the cause in the court below the defendant in error recovered. The only question presented to this court is the sufficiency of the petition.

The petition shows the corporate existence of the bank; the election, qualification, and bond of Mr. Bowman; "that on the 12th day of April, 1887, the defendant in error recovered two judgments against one H. H. Speer in the county court of Nuckolls county, one for $858.50 and the other for $814.50 and costs; that on the 11th of January, 1888, executions were issued on these judgments and delivered to a deputy of the defendant, who levied the same upon a large amount of property (describing it) of one H. H. Speer; that afterwards, on the 24th of the same month and before the day of sale of said property under said executions a portion of the property (describing it) was taken under an order of replevin in an action by Eva A. Speer as her own property; that she executed a bond in said cause, which was duly approved and the property delivered to her. That on said 10th day of February, 1888, the county judge of said county, issued out of said court at the request of the plaintiff herein, two certain orders of sale, upon said judgments, directed to the defendant A. H. Bowman, sheriff of said Nuckolls county, commanding him that the said personal property, so levied upon by him in behalf of said plaintiff as the property of H. H. Speer (describ-

ing the property) which remains unsold, that he come at the same as soon as possible and expose to sale, to satisfy said judgments hereinbefore referred to, giving amounts of each in each order of sale; in the one, however, naming the increase costs $67.95 and reciting payment thereon in the sum of $22.85, which orders of sale were in due form, ordering the sheriff to pay the money so made to the party entitled thereto, and making each returnable in thirty days from said 10th day of February, A. D. 1888, which orders of sale were then and there delivered to said defendant.

"11. That said replevin suit of Eva A. Speer then pending in said court was continued on the return day to the first day of the February term of said court, and then set for trial in said court on the 17th day of February, A. D. 1888.

"12. That on the 27th day of January, A. D. 1888, the firm of Crawford & Hutchinson caused an execution to be issued out of the district court of Nuckolls county, Nebraska, in a cause and upon a judgment rendered in said district court, wherein said Crawford & Hutchinson were plaintiffs and the said H. H. Speer was defendant, directed to the sheriff of said county, the defendant herein, and on same day delivered to him for service, which execution was against the said H. H. Speer alone, and not against Eva A. Speer.

"13. That said defendant sheriff thereupon wrongfully levied the said execution in favor of Crawford & Hutchinson, upon a large portion of the said property so replevied by the said Eva A. Speer from said defendant's deputy as aforesaid, and so held by said Eva A. Speer under her replevin bond pending the trial of said replevin cause, which was at that time still pending and undetermined, and among other property so by the defendant wrongfully levied upon was the twenty-four head of cattle hereinbefore specifically enumerated and described; the said defendant sheriff then and there knowing, and having due notice of the plaintiffs'

rights in the premises and their said prior levy, and then and there having in his possession their said order of sale with instructions from the plaintiffs herein to levy and collect the same, on said property, so soon as, and in case of determination of said replevin suits should be had in favor of said sheriff, who justified his rights in said replevin suit under and by virtue of the said first execution so held by him and levied in favor of the plaintiffs herein.

"14. That said replevin suit of Eva A. Speer was tried in said county court an February 17th and 18th, the jury bringing in their verdict on February 19th, on which was rendered a judgment in due form, awarding to defendant therein who justified as aforesaid under plaintiffs' executions, a return of said property (including the cattle hereinafter described with other property) and in case a return could not be had, that he recover the value of his possession of same in the sum of $1,037.66 and that defendant recover his costs therein expended, taxed at $110.35, the plaintiffs herein furnishing counsel and every assistance in their power to and for said officer, defendant in the trial of said cause.

"15. That the defendant having advertised said property so by him wrongfully levied upon as aforesaid, on the 27th day of January, 1888, for sale under said execution of Crawford & Hutchinson on February 20, at 10 o'clock A. M., the jury in said replevin cause having found against Eva A. Speer, and a judgment having been thereon ordered in due form before said sale was had, the said Eva A. Speer demanded of said defendant sheriff that he receive said property in satisfaction of said replevin judgment and then and there forbid his selling said property, or any of it, that had been in controversy in said replevin suit under said execution, in favor of Crawford & Hutchinson, which notice and tender and demand of said Eva A. Speer was made upon the said defendant before the opening of said sale on the morning of the 20th day of February, 1888.

"16. That said plaintiffs by their attorney, on said 20th day of February, A. D. 1888, notified said sheriff that said plaintiffs claimed the right to have said cattle and other property so by him levied upon under their said executions and orders of sale in favor of said First National Bank, and forbid his selling said property that had been involved in said replevin suit (and which was then and there turned over to said defendant sheriff, or attempted to be so returned to him) under said execution in favor of Crawford & Hutchinson against said Eva A. Speer, and then and there demanded of said defendant that he advertise and sell the whole of said property so in controversy under their said two executions and orders of sale.

"17. That said defendant, in violation of his duty and obligation to plaintiffs herein, refused to receive said property under plaintiffs' executions and orders of sale issued on their said judgments hereinbefore mentioned, but proceeded to sell, and did sell, the following goods, chattels, and property, to-wit: one white cow, one horn broken; one white last spring's calf; one red heifer, three years old past; one yellowish cow; one red and white cow, one horn broken; one red and white heifer; one yearling calf; one red heifer, three years old; one red cow, some white in face; one red and white cow; one red heifer, coming two years old; one red heifer calf; one red and white spotted heifer; one red and white steer calf; one red cow; one red and white cow; one roan cow; one spotted steer calf, with white face; one spotted steer calf, with white face; one red and white heifer calf; one spotted cow; one roan cow; one white steer calf, and one red steer calf, being twenty-four head of cattle in all, and of the value of $600, which said cattle were a portion of the cattle so by said sheriff levied upon under plaintiffs' executions and which said cattle were also included in the number of cattle so by said Eva A. Speer replevied from the defendant sheriff, the right to the possession of which

were found and adjudicated to be in the defendant sheriff, he claiming them under said plaintiffs' executions and by the said Eva A. Speer attempted to be returned to the said defendant sheriff, which said cattle the defendant wrongfully sold under said executions in favor of said Crawford & Hutchinson on said 20th day of February, A. D. 1888, and paid the proceeds of said sale into the district court of said county, which proceeds have since been paid to said Crawford & Hutchinson, by reason of which said wrongful sale by said sheriff plaintiffs' lien upon and right to have it sold under plaintiffs' executions and orders of sale has been lost and said property has been scattered and placed out of the reach of said plaintiffs and the proceeds thereof cannot be applied to the payment of plaintiffs' debt, to plaintiffs' damage.

"18. That the said H. H. Speer is wholly insolvent and has no property, either real or personal, out of which said plaintiffs can collect their debt and judgments.

"19. That no part of plaintiffs' debt and judgments hereinbefore described has been collected and paid, except the sum of $315.24, which was the amount realized from the sale of the balance of said personal property so returnd by Eva A. Speer to said defendant sheriff (except one herd pony and said twenty-four head of cattle), which last named sale was had by said defendant under plaintiffs' orders of sale hereinbefore described, on the 5th day of March, A. D. 1888, the proceeds of which sale were $406.72, and the additional costs were $46.38 in addition to the $67.95 increase costs hereinbefore named and set forth.

"20. That the said replevin suit of Eva A. Speer is fully settled and determined, and that she, or her bondsmen for her, have paid the costs adjudged against her as aforesaid.

"21. That said defendant A. H. Bowman did not faithfully perform the duties of his said office as required by law, and has wholly failed to perform the same as hereinbefore

set forth, to the plaintiffs' damage in the premises in the sum of $600, together with interest thereon from the 5th day of March, A. D. 1888.

"Wherefore said plaintiffs pray judgment against said defendants for said sum of $600 and interest thereon from the 5th day of March, A. D. 1888, and for costs of suit."

It will thus be seen that the defendants in error had acquired a lien on the property in controversy by the levy thereon. A sale under this levy was suspended by the action in replevin, but was not divested. The property is shown to have belonged to H. H. Speer, and, so far as appears, was liable to be taken for the payment of these debts. This being so it was the duty of the officer to have sold the property under the writs of *venditioni exponas*, and as he failed to do so, but sold it under a second execution and applied the proceeds to the satisfaction thereof, he is liable. A case somewhat similar to this was decided by the supreme court of Iowa (*Cox v. Currier*, 62 Ia., 551), and it was held to be the duty of the officer to sell the property under the levy. It is very clear that the petition states a cause of action and there is no error in the record. The judgment is therefore

AFFIRMED.

THE other judges concur.

KANSAS MANUFACTURING COMPANY V. O. H. LUMRY ET AL.

FILED JANUARY 18, 1893. No. 4663.

Guaranty: EVIDENCE: REVIEW. The questions of fact were submitted to the jury upon the various phases of the proof, and there is no error in the record.

ERROR from the district court of Nance county. Tried below before MARSHALL, J.

Lamb, Ricketts & Wilson, for plaintiff in error.

Meiklejohn & Thompson, contra.

MAXWELL, CH. J.

This action was brought in the district court of Nance county to recover from the defendants the sum of $100, with interest from the 15th day of January, 1887, the action being based on the guarantee by the defendants in error of the payment of a certain promissory note, executed by one J. A. Johnson, of the date of January 1, 1887. The defense is based on the alleged fact that the note was given for the purchase of a certain wagon by Johnson from the plaintiff. That the plaintiff warranted the wagon as follows:

"We warrant all of the spring wagons of our manufacture for the period of one year from the date of their purchase as follows: That they are well made in every part and of good material; that their strength is sufficient, with fair and reasonable usage, to carry as stated in this catalogue, and for breakage or failure on account of poor workmanship, or defect in material, we agree to make good all reasonable charges in the following manner: We will either furnish the broken or defective part at our factory or nearest agency, or we will pay for the new parts at the price stated in our price list of repairs, less the trade discount. No claim will be considered under this warranty unless the same be presented to us within one year from the purchase of the wagon.

"KANSAS MANUFACTURING COMPANY."

The evidence shows the sale, the warranty, and the defect, and that the plaintiff was notified, and to remedy the

defect had forwarded a new axle and a new wheel, which failed to remedy the defect when applied; that the sale was made about the 13th of August, 1886; that the defendants procured the return of the wagon to their place of business about the 15th of November, 1888, and thereafter shipped it to the plaintiff at Leavenworth, Kansas; that the plaintiff refused to receive it, and brought suit on the guaranty. The case was tried at the March, 1890, term of the district court, and resulted in a judgment against the plaintiff for costs. One Jackson, an employe of the defendants in error, testifies in effect that one Townsend, the general agent of the plaintiff, in November, 1888, instructed him to notify the defendants to return the wagon to the plaintiff, and he gave the notice as requested, and the wagon was thereupon returned. Townsend denies that he instructed Jackson to so inform the defendants, but that he gave him the following:

"FULLERTON, NEB., 11-15, 1888.

"MS. LUMRY BROS.: I wish you would ship the spring wagon wheel and axle back to our factory, —— ship via U. P. Ry., and mark B-L 'For repairs.' That will entitle us to ½ rate. Please ship as soon as possible and oblige, Truly yours, C. TOWNSEND."

It seems to be admitted by Jackson that he received the written notice, but he testifies that he received the oral instructions as well; that he communicated the same to the defendants and they acted upon them and returned the, wagon to the plaintiff. This testimony was proper to submit to the jury, and the instructions seem to conform to the various phases of the proof; and the jury having found against the plaintiff, it is difficult to see upon what ground the verdict can be set aside.

AFFIRMED.

THE other judges concur.

SAMUEL B. GERBER, APPELLEE, V. B. F. JONES ET AL., APPELLANTS.

FILED JANUARY 18, 1893. No. 4339.

1. **Review.** Upon the main issues in the pleadings the findings and judgment are sustained by the evidence.
2. **Accounting:** PARTNERSHIP. There is an error of computation in favor of the plaintiff, of the sum of $413, to be deducted from the decree.
3. ———: ———: FINDINGS. No account is taken in the decree of the value of the property conveyed by Coates to the plaintiff, which is claimed by the defendant to be of the value of $8,000, and admitted by the plaintiff to be of the value of $2,000. *Held*, That the plaintiff within thirty days may reconvey the property, or in case of failure to do so, a reference will be ordered to ascertain the value and report the same to the court, and upon the approval of the report final judgment will be entered in this court.

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

G. M. Lambertson, C. W. Gilman, W. H. Westover, and *A. L. Field,* for appellants.

Thomas Darnall, James H. Danskin, and *John P. Arnott, contra.*

MAXWELL, CH. J.

On or about the 1st day of May, 1887, the plaintiff entered into an agreement in writing with the defendants to form a partnership to engage in the business of banking, of which Samuel B. Gerber was to be president, E. A. Coates cashier, and B. F. Jones assistant cashier. The plaintiff was to furnish $3,300 as present capital, and the name of the bank was to be the Farmers & Traders Bank of Hemingford, Box Butte county, Nebraska. The

defendants were to transact the business of the institution and furnish the building free of rent, and the profits and losses were to be equally divided between the plaintiff and the defendants. The agreement was to remain in force for the period of two years; that the defendants exercise control of the business from the 1st day of May, 1887, to the 22d day of February, 1888; that according to his agreement plaintiff paid to the copartnership, at the commencement of the business, $3,300, and subsequently between the 4th day of June, 1887, and the 4th day of February following, paid to the copartnership the further sum of $6,143.67; that the defendants paid no money into the business; that the defendants from time to time withdrew from the business and applied to their own use large sums of money, greatly in excess of what they were entitled to receive under the agreement, the total amount of which is the sum of $8,643.67; that the plaintiff discovered this fact about the 22d day of February, 1888, and demanded from the defendants the payment of said sum of $8,643.67, which they refused to pay. The plaintiff prays that the defendants be enjoined from interfering or intermeddling with the business and property of the copartnership, and be enjoined from disposing of any of their properties and effects until the further order of the court; that the copartnership be dissolved, and that an account may be taken of the moneys received by the plaintiff and the defendants during the existence of the copartnership, and that the plaintiff may have judgment against the defendants, and each of them, for the amount found due him from them, and for such other relief as in equity he is entitled to.

The defendant B. F. Jones, for answer, 1st, admits the formation of the partnership; 2d, denies each and every other allegation contained in the petition; 3d, alleges that on the 5th day of November, 1887, said partnership ceased by mutual agreement and consent, the said B. F. Jones retiring from the firm; that at said last mentioned date a full settlement

was had of the partnership affairs, and the said Jones released from further liability; 4th, that since his retirement the business has been conducted by the plaintiff and the defendant Coates in a very careless and negligent manner, so much so that the money and other assets of the copartnership might have been lost, abstracted, or stolen; that the plaintiff has withdrawn at various times large sums of money, for which he has not accounted. Wherefore he prays the dismissal of the action.

The reply to this answer is, in effect, a general denial.

The defendant Coates, in his amended answer, admits the formation of the partnership, but denies each and every other allegation contained in the petition; alleges that an accounting and settlement of partnership affairs was had on the 5th day of November, 1887; that the plaintiff Samuel B. Gerber had access to and control of the partnership business after the 5th day of May, 1887, and took exclusive possession of the same after the 1st day of February, 1888; that the plaintiff appropriated large sums of money from time to time to his own use out of the partnership assets; that the business of the firm was conducted in a very careless and negligent manner after plaintiff took exclusive possession of the same, so that the money of the copartnership could have been abstracted or taken by other persons; that on or about the 2d day of April, 1888, he, Coates, was induced by the plaintiff and his attorneys, by the use of undue influence, to convey to said Gerber certain pieces and parcels of land of the value of $8,030.60, to be held in trust until the settlement of partnership accounts in controversy; that said Samuel B. Gerber has disposed of the same, or part thereof, for his own use and benefit; that all of the above described property was conveyed without any consideration whatever. The defendant therefore prays that the said Samuel B. Gerber be enjoined from disposing of the above described property and that the same be reconveyed to him, the said defendant, or

in lieu thereof, that this defendant recover judgment against the plaintiff for the value of said property, in the sum of $8,030.60, and such other relief as in equity and justice he may be entitled to.

For a reply to the answer of the defendant Coates, plaintiff denies that upon the 5th day of November, or at any other time, an accounting and settlement was had of partnership affairs; 2d, denies that he had access to or control over the partnership business between May 5th, 1887, and the 22d of February, 1888; 3d, denies that any undue influence was used by the plaintiff or his attorney to induce the defendant Coates to convey the land therein described to the plaintiff, but avers the fact to be that said lands were conveyed to him in trust, pending the settlement of the bank difficulty, and that said property was by agreement to be applied to reimburse the plaintiff for the loss sustained by the shortage in said bank, occasioned by the fault, negligence, and misapplication of the funds of said bank, all of which was the property of the plaintiff, by the defendants Coates and Jones, so far as said property might go to accomplish the purpose of liquidating the loss and damage sustained by the plaintiff thereby; denies that the property so as aforesaid conveyed by the defendant Coates was of the value alleged in the answer, or of any greater value than $2,000.

On the trial of the cause the court found as follows:

"First—That plaintiff and defendants entered into the agreement as alleged in said petition; that plaintiff furnished for the use of said copartnership, from the 1st day of May, 1887, to the 22d day of February, 1888, the sum of $13,037, to be used in said banking business by said copartnership; that plaintiff withdrew from said copartnership for his own use the sum of $3,700, and no more.

"Second—The court further finds that by the terms of said agreement the defendants jointly and severally agreed to conduct, manage, and control the business of said co-

partnership and account to the plaintiff for the money contributed by him to the said copartnership.

"Third—The court further finds that the defendants, nor either of them, ever contributed any money or property to the copartnership.

"Fourth—The court further finds that the plaintiff, under and by virtue of said agreement and the evidence, was under no obligation to participate in the management or control of said copartnership in any manner, and the court further finds that the plaintiff did not in fact participate in the management or control of said copartnership business from May 1st, 1887, until the 22d of February, 1888.

"Fifth—The court further finds that there was no dissolution of said copartnership on November 5th, 1887, as alleged in the answers of defendants, and further that there was no accounting had on said 5th day of November, 1887, nor at any other time, but that said copartnership still existed without any accounting from the 1st day of May, 1887, until the 22d day of February, 1888.

"Sixth—The court therefore finds there is due plaintiff from defendants, and each of them, the sum of $9,750. It is therefore considered by the court that the partnership heretofore existing between Samuel D. Gerber, the plaintiff, and E. A. Coates and F. B. Jones, defendants, be and is hereby dissolved, and that the plaintiff recover of and against the defendants, and each of them, jointly and severally, the sum of $9,750, and the costs of this action, taxed at ——.

The principal matters involved in the case are upon disputed questions of fact. The testimony tends to show that the defendants conducted the bank in a very careless and inefficient manner, and that they used considerable sums of money in the payment of their own debts. There is no doubt the very large shortage in the case was due to this appropriation or their neglect or wrong. The findings of the court therefore will not be disturbed. There are

some errors in the decree which we will now proceed to point out and correct.

The court finds that the plaintiff put into the firm $13,037 and drew out $3,700, which deducted from the sum first named leaves $9,337, instead of $9,750. The judgment therefore will be modified as above indicated.

The defendant Coates conveyed to the plaintiff a considerable amount of property claimed by Coates to be of the value of over $8,000, and by the plaintiff admitted to be of the value of $2,000. We find no value affixed to this property or deduction made therefor. This property must be reconveyed or a deduction made for the value thereof. This value the parties may agree upon if able to do so, or the court will refer the matter to ascertain the value. The judgment of the court below is therefore modified in respect to these matters, and in regard to all other matters is affirmed. The plaintiff may reconvey the property to Coates within thirty days, or in case he fails to do so the cause will be referred to —— to take testimony and find the value of the property conveyed, and upon the approval of his report, final judgment will be entered in this court.

JUDGMENT ACCORDINGLY.

THE other judges concur.

LILLIE LEIGH, ADMINISTRATRIX, V. OMAHA STREET RAILWAY COMPANY.

FILED JANUARY 18, 1893. No. 4875.

1. **Master and Servant**: PERSONAL INJURIES: DEFECTIVE APPLIANCES: NEGLIGENCE. It is the duty of a master to furnish his servants with such appliances for his work as are suitable and may be used with safety, and if the servant is injured by

reason of defective appliances furnished by his master, the latter will be liable for damages unless he can show that he has used due care in the selection of the same.

2. ———: ———: ———: ———: EVIDENCE: QUESTION FOR JURY. The driver of a street car propelled by horses was given a span of horses to propel the car, one of which was a broncho and would kick when struck, which fact was known to the master but of which the driver was not aware and was not informed by the master. The car was under the care of a conductor, who permitted the same to be overcrowded, every available foot of space, both in the car and on the platform, being filled. On attempting to start the car the broncho refused to pull, whereupon the driver, who was crowded close to the broncho, slapped it with the lines, when it kicked him in the abdomen, causing death in a few hours. *Held*, That there was sufficient testimony to submit the questions of fact to a jury.

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

Cowin & McHugh for plaintiff in error.

John L. Webster and *Breckenridge, Breckenridge & Crofoot, contra.*

MAXWELL, CH. J.

This is an action to recover for the death of Elmer Leigh, the husband of the plaintiff. The testimony tends to show that on the 5th of September, 1889, the county fair of Douglas county was in progress at North Omaha; that one of the means of transportation to the fair grounds was by way of the cable cars running north on Twentieth street to Lake street; that from that point to the fair grounds the defendant operated a stub line of road, with street cars drawn by horses, the passengers being transferred to the horse cars from the cable cars; that Elmer Leigh was driver of one of the cars on the stub line; that he had been in the employ of the company about three weeks; that one of the horses he was furnished with was a bron-

cho, which the company had owned for some four years; that this animal was gentle in the barn, but when hitched up and struck with a line or whip would kick; that Leigh had never driven the horse until that day, and, so far as appears, did not know of the horse's peculiarities or failings. There is testimony tending to show that this fault was known to the company. The testimony also tends to show that on the day named there was a conductor on the car to collect fares, and that the car was crowded so that every available inch of space within the car and on the platforms was occupied by passengers, and the driver forced by the pressure of the crowd close to the broncho; that the car stopped on the corner of Twentieth and Spence streets to take on another passenger, when the conductor gave the signal to start. This Leigh attempted to do, but the broncho refused to pull, whereupon he slapped it with the lines on the back. The broncho thereupon still refused to pull, but crowded against the other horse and kicked Leigh on the abdomen, of which soon afterwards he died. There is proof of the right of the plaintiff to bring action, the loss sustained by her, and that Leigh's death was caused by the kick. At the conclusion of the plaintiff's testimony, the court, on motion of defendant, granted a nonsuit and dismissed the action. In *Smith v. Sioux City & P. R. Co.*, 15 Neb., 583, Judge REESE very clearly states the rule as follows: "If the evidence so introduced tends in any degree to sustain the allegations of the plaintiff's petition, the action of the court in summarily dismissing the action will be deemed prejudicial to the plaintiff, and a new trial will be ordered." The testimony clearly shows the relation of employe and employer between Leigh and the defendant. This being so, it is a fundamental rule of law that the master is to furnish his servant with such appliances for his work as are suitable and may be used with safety, and if the servant is injured by reason of defective appliances placed in his hands by the master, or his agent, the master will

be liable, unless he can clearly show that he has used due care in the selection of the same. (*Weems v. Mathiewson*, 4 McQueens [Eng.], 215; *Feltham v. England*, 36 L. J., Q. B. [Eng.], 14; *Warner v. Erie R. Co.*, 39 N. Y., 468; *Hough v. Texas & P. Ry. Co.*, 100 U. S., 213; *Wabash Ry. Co. v. McDaniels*, 107 Id., 454–459; *Chicago & N. W. R. Co. v. Sweet*, 45 Ill., 202; *Noyes v. Smith*, 28 Vt., 59; *Northcoate v. Bachelder*, 111 Mass., 322; *Camp Point Mfg. Co. v. Ballou*, 71 Ill., 418; *Kranz v. White*, 8 Bradwell [Ill. App. Ct.], 583.) Now here was an animal which would kick on being struck, and the owner knew it, yet he delivered it to Leigh on the street car, to drive, without informing him of the fault. It is the duty of such driver to stand on the front platform, close to the horses. In effect, a defective, and under some circumstances dangerous, appliance in the propelling power of the car was used. The fact that it was an animal instead of a steam-engine, can make no difference. It was the duty of the defendant to furnish the deceased with a safe team, or inform him of its bad or vicious habits, so that he could guard against them. There is some testimony that the car was overloaded, through the fault of the conductor, and that was one of the causes which contributed to the death of the driver. Upon the whole case it is apparent that there was sufficient evidence to submit to the jury and the court erred in taking it from them. The judgment is therefore reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

CITY OF OMAHA V. MARK HANSEN.

FILED JANUARY 18, 1893. No. 3960.

1. **Eminent Domain**: PUBLIC IMPROVEMENTS: DAMAGES: INSTRUCTIONS. Where rented property is injured by a public improvement it is proper on an inquiry of the damages to inquire to what extent, if any, the improvement will affect the rental value. This is merely an element of damage for the jury to consider, keeping in view the fact that the measure of damages is the difference between the value of the property immediately before and immediately after the construction of the same and disregarding public benefits.
2. Instructions taken as a whole state the law correctly.

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

A. J. Poppleton, for plaintiff in error.

Hall, McCulloch & English, contra.

MAXWELL, CH. J.

The defendant is the owner of the lot on the southeast corner of Jones and Eleventh streets in the city of Omaha, on which, at the time of the trial, he had three buildings, one being a two-story brick on Eleventh street, one a two story frame fronting on Eleventh street, and a cottage on the back part of the lot. The plaintiff constructed a viaduct on Eleventh street over the railway tracks which extends past the plaintiff's lot, being at that point more than thirty feet above the surface of the lot. The viaduct extends along Eleventh street from the south line of Jackson street to near Mason street, being about 1,000 feet in length. This is an appeal from the award of damages. On the trial of the cause in the district court the jury returned a verdict in favor of Hansen for the sum of $2,300, upon which judgment was rendered.

The city relies upon three errors to secure a reversal of the case. These will be noticed in their order.

"First—That the court erred in permitting the witness, M. R. Risdon, to be asked the following question: 'Q. What in your opinion is the effect of loss of rental value of the property caused by the building of the viaduct, taking into consideration the various damages that you have stated as caused by the viaduct?' To which he answered as follows: 'A. That is a difficult question for me to answer, for the reason I cannot determine whether I could rent it at all or not. I should think it would depreciate it from 50 per cent any way—you might not be able to rent it at all; I haven't any means of determining that.'"

The objection is to the first part of the question, but it will be seen that the witness was unable to answer, and, therefore, no injury resulted. The question, however, would seem to be proper. While it is true that the measure of damages is the difference in value of the property with the improvement and without it, excluding general benefits, yet the value is to be ascertained from considering all the uses to which the property may be applied, and the rental value is one item that may or may not influence the jury. It is true property has a value in most cases even if it cannot be rented. This property, however, in all probability, can be rented, and it was proper to inquire if the structure in question diminished the rental value thereof. The objection therefore is overruled.

Second—The second objection is to the testimony of William Fitch, on the ground that he had not shown himself competent to answer the question. It is sufficient answer to say that the attorney is mistaken when he makes the statement, as it does appear that he had a sufficient knowledge of the value of real estate to testify in the case. The objection is therefore overruled.

Third—The third assignment is error in giving par-

agraphs 1, 2, 3, 4, 5, and 6, of the instructions, which are as follows:

"1. The jury are instructed that the fact that other persons having property in the vicinity of the viaduct have waived claim of damages for its construction is not material to the question of plaintiff's damages, and should not be considered by them in this case.

"2. The jury are instructed that in considering the question of damages they may consider any consequential damages caused by the construction of the viaduct to the property of the plaintiff. Modified by inserting after the word 'caused,' in the second line, the word 'directly.'

"3. The jury are instructed that the general increase of travel upon the Eleventh street viaduct, and on Eleventh street at each end of the viaduct, common to all that street caused by the erection of the viaduct, if they find it to exist, is not a special benefit to, nor could such be deducted from any damages found to be sustained by plaintiff.

"4. The jury are instructed that if they believe any witness is interested in the result of this case, or is prejudiced or biased in respect thereto, they are at liberty to consider the interest, prejudice, or bias as affecting the credibility and weight of the witness' testimony.

"5. The jury are instructed that if they believe that any witness has made threats with reference to plaintiff's recovery, or that plaintiff should not recover for damages against the city, they are at liberty to consider that fact as affecting such witness' credibility.

"6. The jury are instructed that in considering the testimony of any witness, they are at liberty to consider his official position, if any, towards the city of Omaha, and any interest he may have, if any, adverse to plaintiff's recovery."

The particular objection is to the third. The instruction must be considered with reference to the testimony on that point. That showed the viaduct to be over thirty feet

above Hansen's lot. Just what particular benefit he could receive from the increased travel up near the roofs of his houses does not appear. It is very clear that, as applied to the testimony in the case, it was not erroneous. It is very evident that the verdict is not excessive and that there is no error in the record. The judgment is therefore

AFFIRMED.

THE other judges concur.

R. H. HENRY, EXECUTOR, v. JAMES VLIET ET AL.

FILED JANUARY 18, 1893. No. 3634.

1. Sales: FRAUD OF PURCHASER: RESCISSION. Where goods were sold to be paid for on delivery, either in cash or secured note payable in thirty days, but the purchaser fraudulently managed to obtain possession of the property without complying with the conditions, the purchaser was insolvent and mortgaged the property in question to secure pre-existing debts, *held*, that the seller, upon discovery of the fraud, could rescind the sale and reclaim the goods from the mortgagee.
2. The first clause of the syllabus in *Henry v. Vliet*, 33 Neb., 130, overruled.

REHEARING of case reported in 33 Neb., 130.

Cornish & Robertson, for plaintiff in error.

Hall & McCulloch, *contra*.

MAXWELL, CH. J.

This is an action of replevin to recover the possession of 60 barrels of 74 gasoline, 750 cases 100 flash oil, 300 cases $\frac{2}{5}$ 150 W. W. oil of great value. The answer of the

defendant below (plaintiff in error) was a general denial. On the trial of the cause the jury returned a verdict in favor of the defendants in error for the property in dispute and "that the defendant is indebted to the plaintiff in the sum of $757.52 for goods not found." Judgment was rendered on the verdict. The substantial facts in the case are as follows:

One L. A. Stewart, doing business in Omaha as L. A. Stewart & Co., during the months of April, May, June and July, 1887, seems to have purchased goods from every one who would sell to him on credit. He seems to have had but little property and less integrity. Early in July of that year he purchased from the plaintiff below four car loads of oil, which were to be paid for in cash on delivery or by a secured note or draft accepted by some bank. Upon the arrival of the property he managed to obtain possession of the same without either paying the cash or giving secured note. He thereupon executed a chattel mortgage on the same, together with other property, to Henry to secure the payment of one note for $5,000, dated April 30, 1887, due ninety days from the date thereof; one note for $5,000, dated June 10, 1887, due in ninety days from the date thereof; one note for $2,500, dated June 25, 1887, due in ninety days from the date thereof; and one note for $2,500, dated June 22, 1887, due in ninety days from the date thereof; and also three certain drafts drawn by L. A. Stewart & Co., on W. R. Stewart, of Des Moines, Iowa, in the aggregate sum of $4,957.50. The notes described in said mortgage (with the exception of one for $2,500, dated June 25, 1887) were renewals of prior indebtedness, $10,000, which was first loaned January 2, 1886. The bills of exchange secured by said chattel mortgage consisted of one draft drawn July 19, 1887, upon Will R. Stewart, Jr., of Des Moines, Iowa, for $850; one draft for $2,617.50, dated July 20, 1887, upon Will R. Stewart, Jr.; one draft upon W. R. Stewart, Jr., for

$1,490, dated July 21, 1887, all of which said drafts were protested for non-acceptance; said drafts were deposited in the Bank of Omaha, of which Andrew Henry was the sole owner, and received as cash, and L. A. Stewart & Co. were allowed to draw against them as so much cash on deposit.

At the time of the giving of said mortgage, there was in the Bank of Omaha, to the credit of L. A. Stewart & Co., the sum of $274.50. The notes secured by said mortgage were all signed by L. A. Stewart & Co., and also by W. R. Stewart, Jr. It had been the custom of W. R. Stewart, Jr., to honor the drafts of L. A. Stewart & Co. upon him. It also appears that on July 20, 1887, W. R. Stewart, Jr., of Des Moines, Iowa, accompanied by his attorney, Mr. Dudley, came to Omaha and insisted upon L. A. Stewart & Co. securing the indebtedness to the Bank of Omaha, upon which W. R. Stewart, Jr., was liable as surety. A mortgage was thereupon prepared by L. A. Stewart & Co., conveying the stock of goods and accounts of the said L. A. Stewart & Co., including the goods in controversy in this action, and W. R. Morris, attorney for L. A. Stewart & Co., W. R. Stewart, Jr., and his attorney, Mr. Dudley, on the morning of the 22d of July, 1887, presented the same to Henry, and demanded that in consideration of the entire indebtedness to said Andrew Henry being secured, the said Andrew Henry should release the said W. R. Stewart, Jr., from liability by reason of said notes. The mortgage was thereupon received by Henry. There is a conflict of testimony on this point. The evidence of W. R. Morris and W. R. Stewart, Jr., being that said W. R. Stewart, Jr., was absolutely released from his liability upon said notes; and the testimony of Edward J. Cornish was that Andrew Henry agreed, as part consideration of said mortgage, not to press W. R. Stewart, Jr., upon the notes or to bring suit, or in any manner to make claim for payment upon the notes until the mort-

gaged property should be entirely exhausted, and this we are convinced is the truth in regard to the transaction. W. R. Stewart, Jr., therefore, is still liable on those obligations.

It is unnecessary for us to review the various assignments of error at length. The conceded facts show that the property in question was sold for cash on receipt, or secured notes; that Stewart obtained the property without paying for it; that he soon afterwards executed the mortgage in question; that Henry knew, or had the means of knowing, that the property in question had not been paid for, and in no sense is he a *bona fide* purchaser. The same is true of W. R. Stewart, Jr. As against these parties, therefore, the owner of the goods had a right to reclaim them.

Some reflections are made upon the plaintiff in error in defendant in error's brief, but there is no ground for such insinuations, as he seems to have done nothing inconsistent with fairness and integrity, but the claims of the defendant in error are superior to his. It follows that the judgment is right and that the opinion in this case on the former hearing, which is reported in 33 Neb., 130, should be overruled. The judgment of the district court is

AFFIRMED.

THE other judges concur.

WILLIAM F. HOLLINGSWORTH V. SAUNDERS COUNTY.

FILED JANUARY 18, 1893. No. 4387.

1. **Negligence:** DEFECTIVE BRIDGES: DAMAGES: LIABILITY OF COUNTY. Where a county board negligently fails to keep a public bridge in suitable repair so as to be in a safe condition

for travel, and damages have been occasioned by reason thereof, under the act of the legislature of 1889, the county is liable therefor to the person sustaining the damages, unless he has been guilty of contributory negligence.

2. ———: ———: ———: ———: PRESENTATION OF CLAIM TO COUNTY BOARD. The person sustaining the damages may maintain an original action against the county whose duty it was to keep the bridge in repair. He is not required to present his claim for damages to the county board for allowance or rejection, since the provisions of section 37, chapter 18, Compiled Statutes, do not apply to demands arising upon torts.

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

George I. Wright, for plaintiff in error.

B. F. Hines and *G. W. Simpson, contra.*

NORVAL, J.

This action was brought by the plaintiff in error against the county, alleging in his petition:

"First—That the defendant is a county duly organized under and by virtue of the laws of the state of Nebraska, and is not under township organization.

"Second—That on and for some time prior to the 15th of August, 1889, a certain bridge on, and belonging to, and forming a part of the public road which lies and runs north and south between sections 32 and 33, in township 14, range 8, in Wahoo precinct, in said county of Saunders, and state of Nebraska, which road was a public road and highway, and was much traveled and used by the citizens of said county and by the public generally, was out of repair and dangerous to the public travel, and one of the main posts which supported the said bridge was gone from under it, and the approach to the bridge from the north side thereof had been washed away in such manner as to become and be in a dangerous condition, and that at the

said time the said condition of the said approach was covered up by planks so as not to be observable to a person traveling in a wagon, and that the said bridge was, at said time, and for some time prior thereto had been, dangerous to pass over with ordinary loads or travel, of all of which the defendant had due notice.

"Third—That on the 15th day of August, 1889, and for some time prior thereto, said bridge was allowed to be and remain exposed to public travel, without guards or notice to prevent the public from passing or traveling over the same.

"Fourth—That during the afternoon of the 15th day of August, 1889, this plaintiff, with his said team of horses, attached to a lumber wagon, loaded with fifty bushels of oats therein, was passing along the said public road from the south going north, and the plaintiff drove his team upon the said bridge, intending to cross the same, but, while lawfully traveling on said road and bridge, and accidentally and without fault on his part, because of the said post being gone from under the said bridge and the condition of said bridge, this plaintiff, his team, harness, wagon, and oats were precipitated from the said bridge to the ground and water under the said bridge.

"Fifth—That by reason of the premises the plaintiff was damaged in the sum of $400 to his horses, wagon, harness, and oats.

"Sixth—That this plaintiff was not familiar with said road, he not having passed over it for many months preceding the time of the injury complained of herein.

"Seventh—That the defendant had the means of knowledge of the condition of said bridge at the said time, and had failed to repair the same, after having had a reasonable time to do so, and that the damages to plaintiff's property was caused by the said bridge not being in sufficient repair, the said bridge being one which the said defendant was liable to keep in repair.

"Wherefore the plaintiff prays for judgment for $400 and costs."

The district court sustained a general demurrer to the petition and dismissed the action.

In *Woods v. Colfax County*, 10 Neb., 552, it was decided that neither at common law, nor under the statutes of this state as then existing, was a county liable for damages occasioned by the negligence of the county board in failing to keep a public bridge in suitable repair and safe condition for travel. It is perfectly plain that a county is not liable for the acts or negligence of its officers unless made so by legislative enactment. The question, therefore, presented by the record before us is, whether or not, under the statute in force at the time of the injury complained of, is a county liable for damages sustained by an individual in consequence of its failure to keep in safe repair a public bridge.

The legislature of 1889 enacted a law which took effect July 1, 1889, entitled "An act relating to highways and bridges, and liabilities of counties for not keeping the same in repair." (Laws 1889, chap. 7; Compiled Statutes 1891, p. 733.) By section 4 of said act it is provided that "if special damage happens to any person, his team, carriage, or other property, by means of insufficiency, or want of repairs of a highway or bridge, which the county or counties are liable to keep in repair, the person sustaining the damage may recover in a case against the county, and if damages accrue in consequence of the insufficiency or want of repair of a road or bridge, erected and maintained by two or more counties, the action can be brought against all of the counties liable for the repairs of the same, and damages and costs shall be paid by the counties in proportion as they are liable for the repairs; *Provided, however*, That such action is commenced within thirty (30) days of the time of said injury or damage occurring."

The language employed by the legislature in the section

quoted is clear and explicit, and leaves no room for judicial interpretation. It is clear that in case a county board negligently fails to keep a highway or public bridge in suitable repair, so as to be in a safe condition for travel, and damages have been occasioned by reason thereof, the county is liable therefor, at the suit of the party injured, unless the plaintiff has been guilty of contributory negligence.

It is finally urged that the demurrer was rightfully sustained for the reason that the plaintiff failed to present to the county board a claim for damages. The county attorney contends that the district court has not original jurisdiction of a case like this, but that plaintiff should have presented his claim for damages to the board of county commissioners for their allowance or rejection, under section 37, chapter 18, Compiled Statutes, 1889, which provides that "Before any claim against a county is audited and allowed, the claimant, or his agent, shall verify the same by his affidavit, stating that the several items therein mentioned are just and true, and the services charged therein, or articles furnished, as the case may be, were rendered or furnished as therein charged, and that the amount claimed is due and unpaid, after allowing just credits. All claims against a county must be filed with the county clerk. And when the claim of any person against a county is disallowed, in whole or in part, by the county board, such person may appeal from the decision of the board to the district court of the same county, by causing a written notice to be served on the county clerk, within twenty days after making such decision, and executing a bond to such county with sufficient security, to be approved by the county clerk, conditioned for the faithful prosecution of such appeal, and the payment of all costs that shall be adjudged against the appellant. Upon the disallowance of any claim, it shall be the duty of the county clerk to notify the claimant, his agent or attorney, in writing of the

fact, within five days after such disallowance. Notice mailed within said time shall be deemed sufficient."

This section has been frequently considered by this court, and in an unbroken line of decisions it has been held substantially that an original suit on an account or claim against a county cannot be maintained, but that the remedy by appeal from the decision of the county board is exclusive. (*Brown v. Otoe Co.*, 6 Neb., 111; *Clark v. Dayton*, Id., 192; *State, ex rel. Clark, v. Buffalo Co.*, Id., 454; *Dixon Co. v. Barnes*, 13 Id., 294; *Richardson Co. v. Hull*, 24 Id., 536.) These cases are to the effect that the statute applies to claims or demands arising upon contracts. They do not sustain the doctrine contended for by the county attorney, that unliquidated demands against counties for damages arising, as in this case, from a tort must be presented to the board for its audit and allowance under the provisions of said section 37. True, it is stated in the opinion in *Richardson Co. v. Hull*, 24 Neb., 542, that "the language of either statute seems sufficient to confer the power on the county board to hear and determine the claim or demand of a citizen against the county of whatever nature, under contract or by tort." That was not a suit for damages, but one to recover from the county moneys which had been paid by Hull as taxes upon lands owned by him which were not subject to taxation. The amount of his claim was liquidated. It is obvious that the above quotation from the opinion already mentioned is merely *obiter dicta*. This being an action for unliquidated damages, does not fall within the purview of said section 37, therefore it was not indispensable to the right of the plaintiff to maintain his suit that he should have presented his claim to the county board. (*Nance v. Falls City*, 16 Neb., 85; *Village of Ponca v. Crawford*, 18 Id., 555.) The Falls City case was an action brought in the district court by the administrator of George L. Nance to recover damages from the city for negligently causing the death of his intestate. The law

relating to cities of the second class contained a provision to the effect that all claims must be presented to the city council for allowance or rejection, to entitle a person to recover costs. It was decided that the word "claim" refers only to claims arising upon contract, and not upon tort. This decision was followed with approval in the later case of the *Village of Ponca v. Crawford, supra.*

Again, we conclude that the statute of 1889, which imposed a liability upon counties for damages resulting from the failure to keep roads and bridges in repair, authorized the bringing an original suit in any court of competent jurisdiction to recover such damages. It will be noticed that section 4 of the act provides that "the person sustaining the damage may recover in a case against the county," and further, the action can be brought against all of the counties, etc. It also requires that the *action* shall be brought within thirty days after the injury or damage occurs. It is plain to be seen that the legislature contemplated the bringing of a suit in a court of law, and that the person sustaining damages should not be required to present his claim to the county board.

We are forced to the conclusion that the petition states a cause of action and that the court below erred in sustaining the demurrer thereto and dismissing the action. The judgment of the district court is reversed and the cause remanded for further proceedings in accordance with the law.

REVERSED AND REMANDED.

THE other judges concur.

EMMA H. ROSE V. C. C. MUNFORD, APPELLANT, IMPLEADED WITH WHITFIELD SANFORD, APPELLEE, ET AL.

FILED JANUARY 18, 1893. No. 4537.

1. **Usury.** An agreement to pay annually in advance the highest legal rate of interest for the use of money, does not make the contract usurious.
2. ———: COUPON NOTES: INTEREST. Where a party loans money at the maximum rate allowed by statute and coupon notes are taken for the interest, which stipulate that interest shall be allowed thereon after maturity, at ten per cent, the contract is not thereby tainted with the vice of usury. In such case no interest will be allowed on such coupons.
3. ———: PLEADING: EVIDENCE. *Held*, That the answer does not allege sufficient facts to constitute a plea of usury, and that the evidence fails to prove that the contract was usurious.

APPEAL from the district court of Saunders county. Heard below before POST, J.

S. H. Sornborger, for appellant.

H. Gilkeson and *J. R. Gilkeson, contra.*

NORVAL, J.

This action was brought by Emma H. Rose to foreclose a mortgage executed by C. C. Munford and wife. To the suit Whitfield Sanford, W. H. Dickinson, and others were made parties defendant. Sanford filed an answer and cross-petition, setting up his mortgage on the premises given by the Munfords, and Dickinson likewise filed an answer and cross-petition, setting up his mortgage made by the same parties. To the cross-petition of Dickinson, Munford answered, pleading duress. To Sanford's cross-petition Munford filed an answer which, after admitting

the execution of the notes and mortgage, alleges "that all of the consideration of any kind that this defendant received or had from any person or persons whomsoever, for the said notes and mortgage, was the sum of $641.15, paid by the said Sanford to one N. H. Bell on or about March 27, 1885, for the defendant, and the further sum of $358.85, paid by the said Sanford to W. H. Dickinson on or about March 27, 1885, for this defendant; that this defendant received no other or further sums of money from the said Sanford (than those above) for the said notes and mortgage; that at the time the said money was paid for this defendant, as aforesaid, this defendant owed to one Charles W. Sanford, the son of said defendant W. Sanford, a small sum on a promissory note dated January 9, 1884, due in ninety days, given for $168, with ten per cent interest from maturity thereof, which said promissory note had indorsed thereon the following, to-wit, 'Paid interest to date and $68 principal April 19, 1884,' a portion of said promissory note being usury, but the exact amount thereof is unknown to this defendant; that at the time of the payment of said money as aforesaid in March, 1885, the said Sanford, defendant, turned over said note to the aforesaid N. H. Bell, who still holds the same, but as to whether the said Sanford considers he had paid or released the said note is to this defendant unknown, but if the said Sanford did pay the said note, the total amount of consideration received by this defendant for the said note and mortgage to said Sanford given does not exceed at the most the sum of $1,100, and interest at ten per cent per annum on $100 from April 19, 1884, to the date of said note and mortgage, January 1, 1885, or less than $1,107.50 in all; that this defendant has received no other or further consideration for the said notes and mortgage than as stated."

Sanford for reply denies every allegation in said Munford's answer contained.

At the trial the court below found the issues in Sanford's favor, and gave him a first lien on the mortgaged property, and also as between Munford and Dickinson, in favor of the latter. A decree was rendered foreclosing all the mortgages. Munford appeals from the findings and decree entered in favor of Sanford.

The first contention of appellant is that the contract entered into between Munford and Sanford is usurious upon its face. The mortgage was given to secure a principal note for $1,186.85, bearing date January 1, 1885, due ten years from date with ten per cent interest after maturity thereof, and nine interest coupon notes, each for the sum of $118.68; one due and payable on the first day of January, 1886, and one maturing on the first day of January of each year thereafter, each bearing interest at the rate of ten per centum from maturity. There was also another note for $118.68, due January 1, 1886, drawing ten per cent interest from date until paid. This last note was given for the first year's interest. It will be noticed that the interest coupons were so drawn as to require the borrower to pay interest annually in advance. It is urged that this makes the contract usurious, since the interest stipulated for is the maximum rate allowed by law.

Section 1, chapter 44, Compiled Statutes, declares that "any rate of interest which may be agreed upon, not exceeding ten dollars per year upon one hundred dollars, shall be valid upon any loan or forbearance of money, goods, or things in action; which rate of interest so agreed upon may be taken yearly, or for any shorter period, or in advance, if so expressly agreed."

The construction placed upon the above provision by counsel for appellant is that when the loan is for a longer period than a year at the highest rate, the interest may be taken annually, but not in advance. In other words, interest can be lawfully taken in advance only when the contract is to be performed within a year. We do not yield

assent to such interpretation. The words used by the legislature have no such meaning. The statute provides that when it is so agreed interest "may be taken yearly, or for a shorter period, or in advance." The right to stipulate that the borrower shall pay interest in advance does not depend upon the time the loan runs. To hold that it does, would be interpolating words into the statute. The agreement in this case to pay interest annually in advance does not taint the transaction with usury. (*Leonard v. Cox*, 10 Neb., 541; *McGill v. Ware*, 4 Scam. [Ill.], 21; *Goodrich v. Reynolds*, 31 Ill., 490; *Mitchell v. Lyman*, 77 Id., 525; *Hoyt v. Pawtucket Institution for Savings*, 110 Id., 390; *Telford v. Garrels*, 24 N. E. Rep. [Ill.], 573; *Manhattan Co. v. Osgood*, 15 Johnson [N. Y.], 162.)

It is the settled law of this state, when a party loans money at the highest legal rate, and coupon notes are taken for the interest, which stipulate that interest shall be allowed thereon after maturity at the maximum rate, that the contract is not thereby rendered usurious, but that no interest will be allowed on such coupons. (*Hayer v. Blake*, 16 Neb., 12; *Mathews v. Toogood*, 23 Id., 536, 25 Id., 99; *Richardson v. Campbell*, 27 Id., 644.)

We agree with appellee that the answer does not allege sufficient facts to constitute the defense of usury. To make a contract usurious there must be an agreement between the borrower and lender by which the latter receives or reserves a greater rate of interest than the law allows. There must be an intent on the part of the borrower to give and of the lender to receive interest in excess of the legal limit. (*Leonard v. Cox*, 10 Neb., 541; *New England Co. v. Sanford*, 16 Id., 689.)

Testing the answer by the above rule the pleading is clearly insufficient. The facts alleged therein do not show that the contract was usurious, nor can it be inferred from the facts stated that there was an intent to evade the law on the subject of usury. It fails to aver the rate of in-

terest agreed upon. True, the answer sets up the amount of money received by Munford on the loan, but it does not state that the difference between the amount so received and the face of the note was intentionally retained by Sanford as interest, nor can any such a conclusion be properly drawn from the facts alleged. As was said by the present chief justice in his opinion in the *New England Co. v. Sanford, supra:* "The proof cannot make a stronger defense than the answer in the case. It is, therefore, essential in pleading usury to state with whom the usurious agreement was made, its nature, and the amount of usurious interest agreed upon or received. The court will not presume that the parties intended to evade the law, but there must be an allegation to that effect." (*Anglo-American L. M. & A. Co. v. Brohman*, 33 Neb., 409.)

The defense of usury is not made out by the evidence. Appellant insists that he only borrowed $1,000, and that the difference between that sum and the face of the note was reserved at the time by C. W. Sanford, the son and agent of appellee, as a bonus. This the appellee denies. It is undisputed that of the sum borrowed, $358.85 were paid by appellant's directions to W. H. Dickinson, and the further sum of $641.15 was likewise by Munford's orders paid to N. H. Bell, to apply on a note and mortgage given by Munford to Mrs. Rose. The money was borrowed for the purpose of making these payments, and appellant admits that $1,000 of the money was so applied. It is also conceded that appellant was indebted to said C. W. Sanford on a promissory note calling for $168 and interest, on which had been paid $68 and interest to April 19, 1884. There is in the record evidence tending to establish that said C. W. Sanford also held a $30 note against appellant, and that both of these notes were paid out of the loan made by appellee to Munford. C. W. Sanford testified that he was paid out of the money borrowed $186.85 in satisfaction of these two notes. From

the evidence we think that it is more than probable that these two notes held by C. W. Sanford were usurious. It is evident that more than the statutory rate of interest must have been computed on these notes to have amounted to $186.85. But the fact that usurious interest was charged on these notes does not taint the transaction between Munford and Whitfield Sanford with the vice of usury. The two transactions were entirely separate and distinct.

Lastly, it is insisted that the contract is usurious because the money was not paid over until some time after January 1, 1885, the date of the note, and from which time interest began to run on the loan. It appears that the understanding between the parties was that Sanford was to make the loan and furnish the money on the 1st day of January, 1885, and by Munford's directions the papers were drawn up and dated that day. The loan was not closed at that time for the reason that the mortgages of W. H. Dickinson and Mrs. Rose on the property had not been released of record. The agreement when the loan was negotiated was that Sanford should have the first lien on the premises. The Dickinson mortgage was not released until January 12, on which date $358.85 were advanced on the loan. The Rose mortgage was not released until March 28, when the balance of the money was paid by Sanford. There is no foundation in the evidence for the charge that the notes and mortgage given to Sanford were dated back or that the money was withheld by Sanford for the purpose of obtaining a higher rate of interest than the statute permits. That the money was not paid earlier was the entire fault of appellant in not sooner procuring releases of prior incumbrances. The defense of usury is not established. There being no error in the record the judgment of the court below is

AFFIRMED.

MAXWELL, CH. J., concurs.

POST, J., having presided in the court below, did not sit.

C. P. HENDERSON ET AL. V. SAMUEL NOTT.

FILED JANUARY 18, 1893. No. 4755.

1. **Exemptions:** CONTRACTORS: LABORERS. A person who contracts to furnish all help and make and burn brick for a certain price per thousand, and also agrees to keep the machinery furnished by the other party in good repair, to supply oil for the same, and feed and care for the team furnished by the other party, is not entitled to the benefits of section 531 of the Code, which declares that "nothing in this chapter shall be so construed as to exempt any property in this state from execution or attachment for clerks', laborers', or mechanics' wages," etc.

2 ———: ———: ———. The purpose of the legislature in enacting said provision was to secure to every person belonging to either of the classes therein specifically enumerated a compensation for his own personal services. Persons who contract for and furnish the labor and services of others, whether with or without their own services, for a stipulated price for the joint labor of all, are not entitled to the benefit of the statute.

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

Abbott & Caldwell, for plaintiffs in error.

NORVAL, J.

The defendant in error commenced an action in the county court against the plaintiffs in error upon six different causes of action. The first cause of action alleged in the petition is on an account stated between the parties for work and labor performed by plaintiff for defendants, amounting to $106.28. The second cause of action is for three days' work at $1.50 per day. The third count of the petition is in the sum of $10 for work performed for defendants in moving a kiln of brick. The fourth count is for the sum of $40 for services rendered in erecting for defendants a brick wall for a brick kiln. The fifth cause

of action is for a balance of $5.75 alleged to be due plaintiff for providing feed, stabling, care, and attention for two horses belonging to defendants. The sixth count is to recover the sum of $328 upon a written contract, of which the following is a copy:

"This agreement, made between C. P. Henderson and J. B. Henderson, partners under the firm name of C. P. Henderson & Bro., brick makers of Phillips, Hamilton county, Nebraska, party of the first part, and Samuel Nott, now of the same county, party of the second part, to-wit: Party of second part agrees to furnish and pay all help and make and burn good merchantable brick for three ($3) per thousand; to keep all machinery in good repair; in case of breakage in any part of the machinery not to the fault of party of the second part, then the party of the first part to replace the same; the party of the first part to furnish one team of horses, and the party of the second part to feed and keep the same in good order. To furnish and keep machinery well oiled. It is also agreed that party of the first part is to furnish all coal on cars at Phillips to burn all brick made by party of the second part.

"Grand Island, July 22, '90.

"C. P. HENDERSON.
"J. B. HENDERSON.
"SAMUEL NOTT.

"Witness:
"M. L. DOLAN.
"J. T. NOTT."

The defendants in their answer, after admitting certain of the allegations of the petition and denying others, pleaded a counter-claim against the plaintiff, amounting to $267.55. On the trial the county court found there was due on the first, second, third, and sixth causes of action from the defendants $429.70; that nothing was due on the fourth and fifth causes of action; that there was due from plaintiff to defendants the sum of $144.88; and judgment was ren-

dered in favor of the plaintiff for $288.82, the difference between said sums, as laborers' wages, together with cost of suit. The defendants below prosecuted error to the district court, the error complained of there, as well as here, being the rendition of a judgment for laborers' wages. The judgment of the county court was affirmed.

The evidence in the case was not preserved by a bill of exceptions. The only question, therefore, presented is whether, under the petition, Nott was entitled to a judgment for laborers' wages for the amount rendered. It will be perceived that the total amount claimed in the first three causes of action stated in the petition is only $120.70, so that a portion of plaintiff's recovery must have been based upon his sixth cause of action. Under the contract set up in said count of the petition, and copied above, was defendant in error entitled to a judgment for laborers' wages for the amount due thereunder? The argument of counsel for plaintiffs in error against the right of Nott to such a judgment is briefly this: That a wage laborer, in contemplation of the statute, is one who depends upon his daily labor for sustenance; that the mere fact that manual labor enters into and forms a part of the consideration of a contract does not of itself entitle the party to a wage laborer's judgment; that one who employs others, and uses machinery to carry on the work, or contracts for undertakings which involve the employment of other persons, machinery, and materials, is not a wage laborer. The determination of the question involved in this case calls for a construction of section 531 of the Code of Civil Procedure, which declares that "nothing in this chapter shall be so construed as to exempt any property in this state from execution or attachment for clerks', laborers', or mechanics' wages, for money due and owing by any attorney at law for money or other valuable consideration received by said attorney for any person or persons," etc.

Under the above provision no property of a debtor is exempt from levy and sale on execution or attachment on a debt for the wages of a laborer, mechanic, or clerk. It is not claimed that the indebtedness to Nott under the contract already mentioned was for services performed by him for plaintiffs in error, either as a clerk or mechanic, but both the county and district courts ruled that the debt was for laborers' wages; so that if defendant in error is entitled to the benefit of the statute it is because what was done by him in pursuance of the contract was as a laborer in the sense contemplated by the above provision. The purpose of the legislature in enacting the section was to give protection to the classes mentioned therein. It was designed to furnish relief to the persons specifically enumerated in the collection of debts due them for their personal services, and not to those who contract and furnish the labor and services of others. Such a contractor is not a laborer within the meaning of the provision, nor is he entitled to its protection. Plaintiff below is not a laborer in the popular sense or the common understanding of that word. The term "laborer," in the sense of this statute is one who is hired to do manual or menial labor for another, but it does not include every person who performs labor for compensation. The authorities fully sustain the proposition.

In *Brockway v. Innes*, 39 Mich., 47, it was decided that an assistant civil engineer of a railroad company is not a "laborer within the meaning of a constitutional provision making stockholders of a corporation liable for labor debts of the corporation." And in *Jones v. Avery*, 50 Mich., 326, it was held that a traveling salesman, selling by sample, did not come within the meaning of the same constitutional provision. To the same effect is *Price v. Kirk*, 90 Pa. St., 47.

In *Wildner v. Ferguson*, 43 N. W. Rep. [Minn.], 794, it was ruled that an agent who sells goods by sample, driv-

ing about for that purpose, with his own horse and buggy, receiving a weekly salary, is not within the purview of a statute which exempts the "wages of any laboring man or woman in any sum not exceeding fifty dollars, due for services rendered by him or them and during ninety days preceding the issue of process," etc.

In re Ho King, 14 Fed. Rep., 724, it was held that a theatrical actor is not a laborer within the popular sense in which the term is used, and that the word does not include any person but those whose occupation involves physical toil and who work for wages.

We do not think the indebtedness of plaintiff in error arising under the contract we are considering, is laborers' wages in the sense in which that word is ordinarily and in our statute used. By the contract, Nott agreed to manufacture for plaintiffs in error good merchantable brick, for which they were to pay him a certain price per thousand. He was to hire the laborers and pay them their wages, keep the machinery in repair, feed the team furnished by the Hendersons, and furnish the oil for the machinery. Nott was a contractor, and not a laborer in the common acceptation of the term, therefore he does not come within either the words or spirit of the statute, and is not entitled to its benefits.

The decisions already cited and those in *Aikin v. Wasson*, 24 N. Y., 482; *Coffin v. Reynolds*, 37 Id., 640; *Balch v. New York & O. M. R. Co.*, 46 Id., 521; *Wakefield v. Fargo*, 90 Id., 213; *Groves v. Kan. City, St. J. & C. B. R. Co.*, 57 Mo., 304; *Mann v. Burt*, 35 Kan., 10, in principle sustain this conclusion.

In *Balch v. New York & O. M. R. Co.* the head-note states the decision as follows: "The words 'laborers' and 'labor,' as used in the general railroad act of 1850, which gives a laborer a claim against the company for the indebtedness of a contractor in certain cases, and to a limited amount, are used in their ordinary and usual senses, and imply the

personal services and work of the individual designed to be protected. The former does not include one who contracts for and furnishes the labor and services of others, or who contracts for and furnishes a team or teams, whether with or without his own services."

In *Aikin v. Wasson*, under an act making stockholders in a corporation liable for debts due its laborers and servants for service performed for the corporation, it was held that a contractor for the construction of a portion of the company's road was neither a laborer nor servant.

Mann v. Burt, supra, was an action against a contractor and railroad company for labor performed by the plaintiff for the contractor upon the road under a statute which makes a railroad company liable for the debts of the contractor to "laborers, mechanics, and material-men, and persons who supply such contractor with provisions or goods of any kind," when the railroad company fails to take from the contractor engaged in the construction of its road a good and sufficient bond. The railroad company, as one defense alleged in its answer, in substance, that the persons for whose services the suit was brought were employed by the contractors in the capacity of foremen, clerks, time keepers, and teamsters in connection with their terms. Plaintiff demurred to the defense, which was overruled by the trial court, and which ruling was assigned for error in the supreme court. The court in the syllabus say: "Where a teamster and his team are employed by the contractor for a certain price per day for the joint labor of both, and no agreement is made respecting the price or value of the personal services of the teamster, the debt will constitute a single and indivisible demand for which the railroad company is not chargeable." (See *Atcherson v. Troy & Boston R. Co.*, 6 Abb. Pr. Rep., n. s. [N. Y.], 329.)

It follows from the views that we have expressed and the decisions referred to that the judgment of the county

court and that of the district court should be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

MILO HODGKINS ET AL. V. STATE OF NEBRASKA.

FILED JANUARY 18, 1893. No. 4462.

1. **Indictment and Information.** It is not necessary in an information or indictment to use the precise words of the statute. It is sufficient if the words used are identical in meaning with those used in the statute.
2. **Assault and Battery:** INFORMATION. In an information for assault and battery it was alleged that the defendants "did willfully and maliciously make an assault upon * * * and did then and there unlawfully strike, beat, and wound, etc." *Held*, Sufficient.
3. ——: ——: VERIFICATION: OBJECTION: WAIVER. Objection to an information on the ground that it was verified before a notary public instead of a magistrate should be made before going to trial, otherwise it will be held to have been waived.

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

Billingsley & Woodward and *Robert J. Greene*, for plaintiffs in error.

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

POST, J.

The first question presented by the record in this case is the sufficiency of the information, which is here set out:

"In the District Court of Lancaster County, Nebraska. The State of Nebraska, plaintiff, v. Hodgkins and Frank Trumble, defendants.

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

"John W. Mussetter, being first duly sworn, on his oath complains that the defendants, Milo Hodgkins and Frank Trumble, for that said Milo Hodgkins and Frank Trumble, at the county of Lancaster and state of Nebraska, on the 13th day of March, 1890, in and upon the bodies of Marshal Stein and O. W. McAllister did then and there willfully and maliciously make an assault upon, and them, the said Marshal Stein and the said O. W. McAllister, unlawfully did strike, beat, and wound, contrary to the statutes in such case made and provided, and against the peace and dignity of the state of Nebraska.

"JOHN W. MUSSETTER.

"Subscribed in my presence and sworn to before me this 15th day of March, A. D. 1890.

"M. A. CAMERON,
"*Notary Public.*"

By reference to section 17 of the Criminal Code, defining assault and battery, it will be observed that the language thereof is: "If any person shall *unlawfully* assault or threaten [another] in a menacing manner, or shall *unlawfully* strike or wound another, the person so offending shall, upon conviction thereof, be fined," etc. The language of the information is, "did willfully and maliciously make an assault upon * * * and unlawfully did strike, beat, and wound, contrary to the statute." The information is sufficient. It is not necessary in charging an offense to use the precise words of the statute. It is sufficient if words are used which are identical in meaning to those in the statute. (*Whitman v. State*, 17 Neb., 224.) The words willfully and maliciously are equivalent to the term unlawfully.

It is argued that there is no valid information, for the reason that the charge upon which plaintiffs in error were tried was sworn to before a notary public. It has been held by this court, in *Richards v. State*, 22 Neb., 145, and *Davis v. State*, 31 Id., 247, that the information should be sworn to before some judicial officer. In the last above case, however, it was held that an objection to the information on that ground will be waived unless made before verdict. And Judge NORVAL, in the opinion of the court, uses the following language: "It (the objection) should have been raised by motion to quash before pleading to the information." This prosecution originated before the county judge of Lancaster county, with whom the above information was filed. Plaintiffs in error, having been convicted in that court, appealed to the district court. The first record we find of any objection to the information is after the jury had been sworn in the district court, where it appears they objected to any evidence being offered or received:

"1st. Because there is no legal presentment as required by the constitution and laws of the state.

"2d. The affidavit of plaintiff does not contain facts sufficient to constitute a criminal action.

"3d. There is no complaint filed in this case as required by law."

In the opinion of the writer the objection set out above should be held to apply only to the form of the information and the sufficiency of the allegations therein contained, and not to the want of a proper verification. But it is clear that the objection, even if sufficient, comes too late after a trial before the county judge upon the merits of the case, and after a jury had been selected and sworn in the district court. The provision for the verification of an information before a magistrate is surely not more imperative than the provision found in section 585 of the Criminal Code, that no information shall be filed against

any person, except fugitives from justice, until such person shall have had a preliminary examination as provided by law. Yet it has been repeatedly held that by pleading not guilty and going to trial on the issue thus formed the accused waives his right to object on the ground that he has not had a preliminary examination. (*Cowan v. State*, 22 Neb., 519; *Washburn v. People*, 10 Mich., 383; *People v. Jones*, 24 Id., 215; *People v. Williams*, 53 N. W. Rep. [Mich.], 779.) It is evident that the plaintiffs in error are not now in a position to assert that the information was not legally verified. The judgment of the district court is right and is

AFFIRMED.

THE other judges concur.

AUGUSTUS GILCHRIST V. CITY OF SOUTH OMAHA.

FILED FEBRUARY 1, 1893. No. 4880.

Municipal Corporations: INJURY FROM DEFECTIVE STREETS: NEGLIGENCE. One G., a non-resident, in passing from the Union Pacific depot in South Omaha to Twenty-third and P streets in said city, in the night season, went east on N street to Twenty-fourth street, then south on Twenty-fourth street nearly to O, when he noticed stairs about ten feet in height in front of a private residence. He ascended the stairs, which he mistook for those on a block near the point of his destination, and in continuing on towards his destination fell into the excavation caused by grading O street in said city, and was severely injured. *Held*, That the proof failed to show negligence on the part of the city.

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

Winfield S. Strawn, for plaintiff in error, cited: *Burnham v. Boston*, 10 Allen [Mass.], 290; *South Omaha v. Cunningham*, 31 Neb., 316; *Omaha v. Randolph*, 30 Id., 699; *Lincoln v. Walker*, 18 Id., 250; *Valparaiso v. Donovan*, 28 Id., 406; *Lincoln v. Smith*, 28 Id., 762.

Charles Offutt, contra, cited: *Rice v. Montpelier*, 19 Vt., 470; *Cassidy v. Stockbridge*, 21 Id., 319; *Sparhawk v. Salem*, 83 Mass., 30; *Scranton v. Hill*, 102 Pa. St., 378; *Skyes v. Pawlet*, 43 Vt., 446; *Wheeler v. Westport*, 30 Wis., 403; *Kellogg v. Northampton*, 4 Gray [Mass.], 65; *Smith v. Wendell*, 7 Cush. [Mass.], 498; *Howard v. North Bridgewater*, 16 Pick. [Mass.], 189; *Shepardson v. Colerain*, 13 Met. [Mass.], 55; *Goodin v. Des Moines*, 55 Ia., 67; *Blake v. Newfield*, 68 Me., 365; *Chicago, B. & Q. R. Co. v. Barnard*, 32 Neb., 306; *People v. Cook*, 8 N. Y., 67; *Kelsey v. Northern Light Oil Co.*, 45 Id., 509; *Neuendorff v. World Mutual Life Ins. Co.*, 69 Id., 389; *Baulec v. New York & H. Ry. Co.*, 59 Id., 356; *Toomey v. South Coast Ry. Co.*, 3 C. B. n. s. [Eng.], 146; *Hyatt v. Johnston*, 91 Pa. St., 200; *Ryder v. Wombwell*, L. R. 4 Exch. [Eng.], 39; *Schuylkill & Dauphin Improvement Co. v. Munson*, 14 Wall. [U. S.], 442; *Pleasants v. Fant*, 22 Id., 120; *Commissioners of Marion Co. v. Clark*, 94 U. S., 284; *Griggs v. Houston*, 104 Id., 553; *Bagley v. Cleveland Rolling Mill Co.*, 21 Fed. Rep., 159; *Bagley v. Bowe*, 105 N. Y., 179; *Bulger v. Rosa*, 119 Id., 460; *Longley v. Daley*, 46 N. W. Rep. [So. Dak.], 247.

MAXWELL, CH. J.

This is an action to recover for injuries sustained by the plaintiff by falling into the excavation of O and Twenty-fourth streets in the defendant city. Upon the conclusion of the testimony in the court below the court directed the jury to return a verdict for the defendant, which was done, and the action dismissed.

It appears from the record that the plaintiff is a resident of Montgomery county, Iowa; that he had visited South Omaha in April, 1887; that his brother resided on the northwest corner of Twenty-third and P streets in said city; that the streets of said city are numbered from the east side of the city westward, No. 1 being the first street on the east; that the letters of the alphabet are used to designate the streets running east and west, the first street on the north side of the city being A street; that about 8 P. M. on the night of December 3, 1888, the plaintiff reached South Omaha over the Union Pacific railway. He was alone, and undertook to walk to his brother's residence. The night was dark. He followed N street east from the depot to Twenty-fourth street, then went south on Twenty-fourth street nearly to O. At this point he noticed stairs about ten feet in height, leading up from Twenty-fourth street, as graded, to the top of the bank. These stairs were in front of a private residence, and had been erected by the owner thereof to obtain access to his dwelling. The plaintiff, however, ascended the stairs and continued in the direction of his brother's residence, and fell over the perpendicular embankment, about fifteen feet in depth, caused by grading O street. The plaintiff was very severely injured, and if entitled to recover at all the amount claimed probably would not more than compensate him for his injuries. A number of witnesses testify that the plaintiff, soon after the injury, stated that he had mistaken the stairs; that he should have gone another block and then gone up certain stairs, which would have led to his brother's house. This testimony he does not deny.

We have carefully read both the pleadings and proof in this case, and fail to find any evidence of negligence on the part of the city. In *South Omaha v. Cunningham*, 31 Neb., 316, a trail or track, which had been in common use, ran along a deep excavation for a street, was left

without protection or guard, in consequence of which the defendant in error fell into the excavation, and died of his injuries. The court held, and we think properly, that it was the duty of the city to erect barriers to obstruct this trail or way, and as it had failed to do so it was liable. But that case differs from this in its essential facts. It is very evident that the evidence fails to show a right of the plaintiff to recover against the defendant, and there is no error in the record. The judgment is therefore

AFFIRMED.

THE other judges concur.

ARMOUR-CUDAHY PACKING COMPANY v. JOHN E. HART.

FILED FEBRUARY 1, 1893. No. 4424.

Master and Servant: JUSTIFICATION FOR DISCHARGE OF SERVANT BEFORE EXPIRATION OF TERM OF EMPLOYMENT: EVIDENCE. The plaintiff was employed for one year at a salary as superintendent and general manager of a large packing house, but was discharged before the expiration of the year. In an action to recover salary for the time after his discharge, *held*, that the proof showed such neglect of duty on his part as to justify his discharge.

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

Cowin & McHugh, for plaintiff in error.

M. V. Gannon and *Brogan, Tunnicliff & Perley, contra.*

MAXWELL, CH. J.

About November 17, 1887, the defendant in error entered into the employment of the plaintiff in error as fore-

man and general manager for the plaintiff in error at South Omaha, such employment to continue for one year at a salary of $2,500 per year. On the 28th of April, 1888, the defendant in error was notified by his employers that he would be discharged and to look out for other business. He was discharged early in June of that year but was paid up to July 1, 1888. This action is brought to recover for the remainder of the year. On the trial of the cause the jury returned a verdict in favor of the defendant in error for the sum of $833.33. The errors assigned are that the verdict is against the weight of evidence and error in giving and refusing certain instructions. The defendant in error testifies as to his duties as follows:

Q. What were your duties under your alleged employment with Mr. Cudahy; did you say what were your duties?

A. My duties, it was to oversee the working of the house; general foreman.

Q. Now, to oversee the whole business?

A. With the exception of the clerical part.

Q. What was that overseeing to consist of?

A. To see that the work was done properly.

Q. What work?

A. All the work of the house with the exception of the machinist department and the clerical department; that I had nothing to do with.

Q. Slaughtering?

A. Yes, sir.

Q. You oversaw that?

A. Yes, sir.

Q. And the curing?

A. Yes, sir.

Mr. Cudahy testifies in regard to his duties as follows:

A. He had full charge of our house—the general working of it; the conducting of our business generally through the house.

Q. Now in detail, that would require him to do what?

A. That would require him to look after the killing, the cutting, the curing, the delivery of meats, the weights, and the business generally.

Q. Now, after he went to work, you may state in what manner he did his work from the first, and what conversations you had right along with him in regard to it.

A. Well, there were a great many things that appeared to me to be wrong.

Q. And that were wrong?

A. That were wrong.

By the court: It may stand if he goes on and specifies what was wrong.

* * * * * * *

Q. Just go right on and speak about his work wherein that was wrong.

A. One time in the winter that we first opened up here I came here from Chicago and found that our hogs, the Saturday's killing, on Sunday, were all froze, and that means a great loss in cutting.

Q. How should they be kept?

A. They should be kept in a temperature probably about twenty.

Q. Now, to what extent was this?

A. It was one day's killing.

Q. How much would that be?

A. About 2,500 hogs. And then another time——

Q. State what conversation you had with Hart about that.

A. Well, Hart was manager of the house, and I called him up and asked him why he let those hogs freeze, and why he did not put them in the chill room where they would not have frozen, and his reply—I do not remember what it was.

Q. What is the effect of that freezing?

A. The effect is that it would waste about twenty-five cents a hog, I think.

Q. Now state what else. Go on after that.

A. At another time after that he put all the hogs into the chill room while the weather was mild outside and closed the chill room up, and on Monday morning the hogs were so stiff that it was very wasteful in cutting, and also there was a great risk in the curing. The meat was in such a soft condition, and was kept in such a warm temperature that it was not safe to cure the meat.

Q. How much was there of that?

A. About 2,500 hogs.

Q. What did you say to him about that?

A. I brought him up into the chill room and asked him why it was so, and while it was 10 or 11 o'clock yet the windows were all closed, and I insisted upon the windows being opened then and there.

Q. What did he then say about that?

A. I do not recollect what his reply was.

Q. Now, what else?

A. Well, after that there was—that was during the winter, and then later in the spring, I one day made a thorough trip through the house, and I called Mr. Hart and told him that the house appeared to be in fairly good condition except one thing, and that was in the cellar. I told him, now I wish you would attend to the cellar and feel it as your duty to look after that part of the house, and I will take care of the balance of it, and I do want you to take care of that. Well, some time after that, in the course of twenty or thirty days, I went into the cellar, and they were delivering meat, and I asked the man in charge of that department if he was not inspecting the meat to see it was cured properly and that it was sweet on delivery, as we were having some complaints. So I asked for a trier and inspected the meat myself, and found there was a large portion of it that was soured.

Q. What is that? What does soured mean?

A. Soured meat is rejected. It is off quality.

Q. What is the condition of it?

A. It is spoiled.

Q. What is that caused by?

A. It is caused by neglect, and caused by allowing the house to raise to a too high temperature, and then in not handling meat often enough. The meat, after it goes into salt, is handled from five to eight days afterwards and then it is turned again, and some of this meat I found run up to twelve or fourteen days without being handled.

Q. Did you speak to Hart, and what did he say about that?

A. After I found that meat was all bad, we had some, I think probably 3,000,000 pounds of meat in the house—dry salt meat.

Q. How much?

A. Three million, and I think there was seventy-five per cent of that that was bad. There was fully half of it anyway.

Q. What did Hart say about that?

A. Well, on that occasion, that was what I dismissed him for. That was one of the things.

Q. You may state, Mr. Cudahy, just your conversation with him when you dismissed him?

A. I told him that Mr. Armour objected to having him in our employ any longer, or that he would be employed in anything that he might be connected with. So I think Hart said that that was not quite right to discharge him for that. So I said, the amount of it is you are not running this business satisfactorily, and we cannot live under it.

Q. What was said in reply to that, if anything?

A. Well there was not anything.

Q. Do you know about what time that was?

A. Well it was in the spring sometime, I think; about sometime in May, and I told him I would extend his salary to the first of June. I think it was about the first of May.

Q. Was it extended afterwards?

A. I afterwards sent him to settle up some spoiled meat that was sent out under his supervision.

Q. Where was that sent?

A. To Memphis. Some four car-loads of meat, I think, it cost me about $1,000. I sent him to settle that up, and that carried him into a few days in June, and then I said we will extend your salary until the first of July.

Q. And that was a fact?

A. Yes, sir.

Q. Was there anything said to him about your helping him to get another place?

A. I told him that I would do anything that I could for him, and that he could always depend upon me and call upon me in case he needed anything—whenever he saw I could do anything for him I was perfectly willing and ready to do anything that I could for him.

In this testimony Cudahy is corroborated by a number of witnesses. In the testimony of the defendant in error in rebuttal he confirms many of the statements of Mr. Cudahy. Taking the testimony together it is clearly shown that the defendant in error did not attend to his duties faithfully and efficiently. It is true he attempts to excuse his failure by the statement that the works were new and the men not accustomed to the business, but this can be no excuse for the failure to perform his duty in March, 1888, and later. The works had been in constant operation from the month of November, 1887, and the men accustomed to their duties. It also appears that the defendant in error constantly used intoxicating liquors in considerable quantities, and permitted those foremen immediately under him to use such liquors. It is clearly shown that liquor for the use of the defendant in error and others was constantly kept at hand and was continually drank, thus the influence of the manager was given in favor of its use by subordinates and employes. The offense is much

more serious when committed by one in authority than by a mere laborer, as the example and influence of the manager is thus placed in favor of its use. With the amount of liquor shown to have been consumed by the defendant in error and his subordinates it is not a matter of surprise that duties were neglected and the plaintiff in error sustained loss. In our view the evidence shows so much neglect of duty on the part of the defendant in error as to justify his discharge. It is unnecessary to review the instructions.

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

REVERSED AND REMANDED.

THE other judges concur.

GEORGE H. GLADE V. CHARLES C. WHITE ET AL.

FILED FEBRUARY 1, 1893. No. 4523.

Master and Servant: EMPLOYMENT OF SERVANT BY MEMBER OF PARTNERSHIP: ACTION AGAINST FIRM FOR WAGES: EVIDENCE. Under the issues presented by the pleadings the question presented is whether or not the plaintiff was employed by the firm of W. & G., and rendered services for it, or whether he was employed by G., his father, and represented him as a member of the firm. *Held*, That the evidence clearly established the fact that the plaintiff was employed and represented G., his father, and not the firm of W. & G., and that such firm was not liable for his services.

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

Hastings & McGintie and *M. A. Hartigan*, for plaintiff in error.

F. I. Foss, contra.

MAXWELL, CH. J.

In the year 1882 the defendant White became a partner with George W. Bridges in the milling business at Crete, and this relation continued until May, 1885, when Bridges sold his interest to John D. Glade. Glade was a well to do farmer who resided a short distance from Crete. The plaintiff is his son, and in the spring of 1885 was about twenty-two years of age. So far as appears neither of the Glades had any experience in the milling business. The business seems to have been very profitable, and was continued on an extensive scale until December, 1888, when White purchased the interest of Glade in the property and assumed the debts. Afterwards this action was brought by the plaintiff against the firm for services. The defendants filed separate answers. John D. Glade in his answer admits the service of the plaintiff, and in effect asks that judgment be rendered against the firm. White, in his answer, first denies the facts stated in the petition except as to certain matters admitted, but alleged that the plaintiff represented his father in the milling business, and that there was no agreement or claim for wages during the existence of said partnership. Other facts tending to show that the plaintiff had no right to recover are pleaded, which need not be noticed. On the trial of the cause the jury found in favor of White, but against John D. Glade, in the sum of $5,000, upon which judgment was rendered. The question presented by the issue is this: Was the plaintiff an employe of the firm of White & Glade, or did he represent his father in the business?

W. H. Vance, a witness called by White, testifies:

A. During the first week in January, 1888, I was standing in the post-office window, about noon, waiting for the mail to be distributed. While there Glade came in—

I had been introduced to him the Sunday evening before—and for the first time entered into a little conversation with him. I asked Mr. Glade if he was employed at the mill; he rather hesitated in his reply, and from the manner in which he——

(Objected to by the plaintiff.)

Q. What took place?

A. I asked Mr. Glade if he was employed at the mill He gave me somewhat of an evasive answer. I asked him then if he was a partner of Mr. White's, I believe I said "You must be the partner of Mr. White's," and he replied "No, sir; I am not the partner of Mr. White, I am the active partner; my father is the silent partner, I represent my father's interest in the firm." He used these terms, that he was the active partner and his father was the silent partner and he represented his father's interest in the firm."

The plaintiff does not deny this. He claims that he does not remember.

John R. Johnson testifies:

A. The first conversation I had with Glade was in the morning; I was coming up at the time the deal was made. The day the deal was made I talked with Mr. Glade and his father down to the mill and Mr. Bridges, myself, John D. Glade, and George Glade looked the property over, and I went down to the dam and was showing him where the lines were, discussing about a piece of ground that was to be left out, and they bought the mill there, that is, they closed the deal so far as words were concerned, right at that place, and I asked John Glade if he was going to attend to the mill and he said he was not, he was buying it for George; and I said, "are you going to have it deeded to George?" and he said, "Oh, no, I will let George run it; he is a good boy and I am going to let him run it for me and look after my interests."

Q. What conversation did you have that day with George, at or about the same time?

A. He said he was going to run it for his father.

Q. Where did that conversation take place?

A. It was talked around, I don't know just where; we were walking. They were going to enter into a contract that day.

This is not directly denied.

George D. Stevens testifies:

Q. Do you remember some time in the month of May, 1885, of having a conversation with George H. Glade in the state bank in regard to same?

A. I do.

Q. State that conversation.

A. I cannot give it—it was quite a long conversation I had with him, and part of it was about the purchase of the mill by his father, and he then told me—I think I asked him, I am sure I did, if his father was going in the milling business. He told me that he was going to run it.

Q. Did you have any other conversation in regard to that matter with Mr. Glade about that time?

A. Why, I have talked to Mr. George Glade a great many times about it.

Q. In the conversations what did he say in regard to——

(Objected to as incompetent.)

A. Possibly I did not understand that.

Q. Tell what conversation or talk took place, and when and where.

A. I could not begin and give the number of times I have ever talked with him about this matter, the exact conversation, but in all the conversations I have ever had with him in reference to this matter I have understood from him and lead to believe from what he said—

By the court: State what he said.

A. He said a great many times to me that he was managing and looking after his father's interest in the mill. At one time I asked him if White spent his own time there, and he said no, he was to look after the outside

interest while he remained there and looked after his father's interest, and looked after the mill when Mr. White was not there. I cannot give the number of times that I have conversed with Mr. Glade on that matter.

A number of other witnesses testify to the same effect. The plaintiff was unable to remember many of these conversations, but in our view the fact is established beyond question that the plaintiff rendered his services to his father and not to the milling company, and that White is not liable. It is unnecessary to review the various assignments of error at length. The judgment is the only one that should be rendered on the evidence, and it is

AFFIRMED.

THE other judges concur.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT, V. MERRICK COUNTY ET AL., APPELLEES.

FILED FEBRUARY 1, 1893. No. 4656.

Taxes Upon Material for Railroad Construction: ENJOINING COLLECTION. In an action to enjoin certain taxes assessed by the local assessor upon material for the construction of a railroad which was piled up near Central City and had so remained for a long time, *held*, that the material was taxable, and in the absence of proof that it had been assessed by the state board, there was no presumption to that effect, and that the taxes assessed by the local assessor would not be enjoined.

APPEAL from the district court of Merrick county. Heard below before POST, J.

A. W. Agee and *Marquett & Deweese*, for appellant.

A. Ewing and *W. T. Thompson, contra.*

MAXWELL, CH. J.

In the years 1887 and 1888 the plaintiff was engaged in extending its line north from Central City and stored at that point a large quantity of material for the construction, repair, and operation of its said road. A portion of this material was not used for the purposes named, but remained on the ground at that point in the spring of 1889. This being so the assessor of Central City secured the listing of the property by the tax agent of the plaintiff and fixed the value of the property for the purposes of taxation at $60,242.54, and taxes to the amount of $2,948.75 were levied thereon. The plaintiff thereupon brought this action to enjoin the payment of the taxes and on the trial of the cause required the court to make special findings, which it did as follows:

"1. That said plaintiff is, and for several years last past has been, a corporation duly organized and existing according to law, and as such engaged in the operation of various lines of railroad in this state, of which it is the owner; that among said lines of railroad is a line of railroad extending from Lincoln to Aurora, Nebraska, through the counties of Lancaster, Seward, York, and Hamilton, and thence northerly to Central City, in Merrick county, which line is known as the Nebraska railroad and the Republican Valley railroad; also a line of railroad extending from Central City in Merrick county through the counties of Howard, Greeley, Garfield, and Valley, known as the Lincoln & Black Hills railroad, and various other lines, all being known as the Burlington system, and all owned and operated by the plaintiff under one common management and in one name, to-wit, The Burlington & Missouri River Railroad Company in Nebraska.

"2. That all of said lines of road are operated as a single

system and without any distinction between lines having different charter names, all lines being managed and controlled by the same general officers.

"3. That said Republican Valley railroad, and said Lincoln & Black Hills railroad were built during the years of 1887 and 1888.

"4. That for the purpose of constructing its said lines of railroad and keeping the same in repair, and constructing depot buildings, platforms, and telegraph lines necessary for the successful operation of its said several lines of railroad, and keeping the same in repair, material belonging to the plaintiff, and consisting of rails, ties, spikes, bolts, telegraph poles, and other material and fixtures, was shipped and piled up near Central City, Nebraska, in Lone Tree precinct, in close proximity to the main and side tracks of plaintiff's line of railroad at said point, a portion being within fifty-one feet of the main line of the center track of the plaintiff's line of road.

"5. The evidence does not show the extent of the plaintiff's depot grounds at Central City, nor its right of way through Lone Tree precinct, nor at any point in said precinct.

"6. The ground upon which said material was piled up lay on each side of the main track, and was about 3,000 feet long, and had running through it the main track and five side tracks, and was necessary for storing material necessary for the construction, operation, and repair of the plaintiff's lines of road.

"7. All of said material was personal property, necessary and intended for use, and was used in the construction, repair, and operation of plaintiff's lines of road, and was stored in said precinct temporarily for convenience in shipping out and using the same in the construction, repair, and operation of said lines of road. No part of the same was personal property for use in any general office building, machine shop, or repair shop, or store houses, or

for use at any particular point on said line of road, but the same was shipped out and used as needed in the construction and repair and operation of the various lines of road built, owned, and operated by the plaintiff.

"8. On the 25th day of May, 1889, one E. Van Tyle, who was then acting in the capacity of tax auditor for the plaintiff, or the Burlington & Missouri River Railroad Company in Nebraska, commonly known as the B. & M. R. R. R. Co., made out a list or schedule of the personal property of said B. & M. R. R. R. Co. subject to taxation in Lone Tree precinct, Merrick county, for said year, and the property so listed by said Van Tyle is the same property which is described in plaintiff's petition, and amounts to $60,242.34 in value.

"9. That said list or schedule was delivered by said Van Tyle to the precinct assessor of said Lone Tree precinct, and by him entered upon the tax list for said precinct, and assessed at $60,242.34.

"10. That said precinct tax list was afterwards returned to the county clerk of Merrick county, and after the assessments for said year had been equalized by the state and county boards of equalization, the tax complained of, to-wit, $2,948.75, was levied by the county board of Merrick county on account of the personal property so listed by said Van Tyle, and assessed by the assessor of Lone Tree precinct.

"11. That the said property so listed by said Van Tyle with the precinct assessor was transcribed on the county tax list for said year, and extended upon said lists as property of the B. & M. R. R. R. Co.

"12. The plaintiff did not appear before the board of equalization for said year for the purpose of having said assessment corrected, nor did the B. & M. R. R. R. Co., or its agents, or any of the agents for the plaintiff appear for said purpose.

"13. The property described in plaintiff's petition was

not returned by it or the B. & M. R. R. R. Co., or any of its or their agents, to the auditor of public accounts for assessment and taxation for said year by the state board of equalization, and the same has not been assessed for said year otherwise than by the assessor of said Lone Tree precinct.

"14. Neither the plaintiff nor the B. M. R. R. R. Co., nor any of their agents, have paid or offered to pay the taxes upon said property for said year 1889.

"15. That the defendant, J. B. Templin, as treasurer of said county, has issued a tax warrant for the collection of said tax to the defendant W. H. Crites, sheriff of said county; and that at the time of the commencement of this action said sheriff held said warrant and threatened to levy the same on and take possession of the cars and property of the plaintiff, and sell the same for the payment of said tax; and still threatens to, and will levy on such property and collect said tax, unless restrained by injunction.

"CONCLUSIONS OF LAW.

"1. That plaintiff had a plain, speedy, and adequate remedy at law.

"2. That on the facts as proved it is not entitled to relief in this proceeding.

"3. That plaintiff's bill should be dismissed.

"It is therefore ordered and decreed that the plaintiff's bill be dismissed and that it go hence without relief, and that the temporary injunction heretofore allowed be dissolved and discharged. It is further ordered and adjudged that defendants recover of and from the plaintiff the costs herein expended taxed at $——."

The principal complaint of the plaintiff is, that there is no evidence to support the 13th finding, and that the presumption is that the state board assessed the property in question, hence it is liable to double taxation thereon. We must remember that the object of this action is to enjoin

the taxes in question, not because the property was not taxable, but because it had already been assessed. Relief is to be granted, if at all, upon proof of such double assessment. This proof is to be furnished by the plaintiff. Did the plaintiff return the property in question to the state board? If it did, the return will show. If it did not, it has no cause of complaint. The revenue law of this state is designed to make a fair and just apportionment of taxes upon all the taxable property of the state whether the owner be a wealthy corporation or a person of but little means. There is no complaint that the property is assessed too high or that the tax itself is unjust if the property has not already been assessed by the state board. The proof fails to show that it was so assessed. There is no equity in the petition and the judgment is

AFFIRMED.

NORVAL, J., concurs.

POST, J., not sitting.

STATE OF NEBRASKA, EX REL. JOHN F. CROMELIEN, V. JAMES E. BOYD, GOVERNOR.

FILED FEBRUARY 1, 1893. No. 5776.

Additional Representation in Congress: ELECTION PROCLAMATION: MANDAMUS TO GOVERNOR: JURISDICTION. By the apportionment act of February 7, 1891, Nebraska is entitled to six representatives in congress after the 3d day of March, 1893. In an action to compel the governor to call an election for three additional members of congress to fill a vacancy caused by the want of representation in the present congress, *held*, that the question was a political and not a judicial one; that by reason of improved methods the census was more rapidly taken and the returns classified than formerly,

so that the population of each state was known a few months after the enumeration was made, and that to deprive those states entitled to increased representation for two years was unjust, but congress must provide the remedy.

ORIGINAL application for *mandamus.*

John F. Cromelien and *H. D. Estabrook,* for relator.

George H. Hastings, Attorney General, contra.

MAXWELL, CH. J.

This action was begun November 1, 1892, the object being to compel the defendant, as governor of the state, to issue his proclamation for the election on November 8, 1892, of three additional members of congress. The questions involved were too important to be decided without a full examination, and in the short time before the election a thorough investigation could not be made, hence the decision was delayed. In the petition the relator alleges: " * * * that on March 1, 1892, was approved an act by the senate and house of representatives of the United States of America in congress assembled, entitled 'An act to provide for taking the eleventh and subsequent censuses,' section 1 of which said act providing that the census of the population, wealth, and industry of the United States shall be taken as of date of June 1, 1890, a copy of which said act is hereto attached, marked 'Exhibit A,' and made a part hereof; that the census of the population of the United States was made in pursuance of said act, and duly promulgated prior to the 12th day of December, A. D. 1890; that it was found from said census that in certain states in the Union there had not been sufficient increase in the population of said states to warrant an increase, or entitling said states to an additional number of representatives in congress, that is to say, Connecticut, Delaware, Florida, Idaho, Indiana, Iowa,

Kentucky, Louisiana, Maine, Maryland, Mississippi, Montana, Nevada, New Hampshire, New York, North Carolina, North Dakota, Ohio, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Virginia, West Virginia, and Wyoming.

"That in the fifty-first congress, and for ten years prior thereto, said states had, under existing apportionment acts, been entitled to the following number of representatives, to-wit: Connecticut, 4; Delaware, 1; Florida, 2; Idaho, 1; Indiana, 13; Iowa, 11; Kentucky, 11; Louisiana, 6; Maine, 4; Maryland, 6; Mississippi, 7; Montana, 1; Nevada, 1; New Hampshire, 2; New York, 34; North Carolina, 9; North Dakota, 1; Ohio, 21; Rhode Island, 2; South Carolina, 7; South Dakota, 2; Tennessee, 10; Vermont, 2; Virginia, 10; West Virginia, 4, and Wyoming, 1.

"That in the fifty-second congress of the United States, being the present congress, each and every of said states last above mentioned was represented by the same number of representatives as in the fifty-first congress, and those prior thereto, that is to say, each of said states had and has in said fifty-second congress the number of representatives last above enumerated, and will continue so to have said representation for the ensuing ten years.

" * * * that prior to the census of 1890, under the apportionment act of 1880, the state of Nebraska has been entitled to three representatives in congress, and that in the fifty-first congress Nebraska was represented by three congressmen, and had been so represented for ten years prior thereto; that immediately upon the promulgation of the census of 1890 it was apparent that for Nebraska to have an equal representation in the fifty-second congress with the states heretofore enumerated, three additional representatives should be elected from said state of Nebraska, and that in the fifty-second congress Nebraska was, and is, entitled to six representatives, but your relator makes

known to your honorable court that the fifty-first congress of the United States, ignoring the rights of Nebraska to an equal representation with the other states in the Union in all subsequent congresses, passed an act approved February 7, 1891, entitled 'An act making an apportionment of representatives in congress among the several states under the eleventh census,' section 1 of which said act provides *that after the 3d day of March, 1893*, the house of representatives shall be composed of 356 members, to be apportioned among the several states, giving to the states herein first enumerated the same number of representatives that said states had in the fifty-first congress, and all congresses subsequent to the census of 1880, and to the state of Nebraska six representatives.

"Your relator claims that in so far as said apportionment act passed by said fifty-first congress undertakes to postpone the equal representation of Nebraska in the congress of the United States until after the 3d day of March, 1893, that said act is nugatory and void, and that the state of Nebraska was, and is, under the apportionment act adopted by the fifty-first congress as the basis of representation, entitled to six representatives in the present congress, a copy of which said apportionment act is hereto attached, marked 'Exhibit B,' and made a part hereof.

" * * * that the people of the state of Nebraska did not and have not elected three additional congressmen at large to fill the vacancies in said fifty-second congress, as provided in the apportionment act of February 7, 1891, and that there are now existing three vacancies in the present congress, which ought to be filled by a special election of three congressmen at large, by the people of the state of Nebraska; that on the 29th day of October, A. D. 1892, and at divers and sundry times prior thereto, your relator demanded of his excellency, James E. Boyd, governor of the state of Nebraska, being the respondent herein, that he issue his proclamation as provided by statute, for a special

election to fill said vacancies in congress; that on the 17th day of October, 1892, your relator addressed a communication to his excellency, Governor Boyd, directing his attention to the matter herein involved, and emphasizing the duty of said Boyd as governor, to issue his proclamation as provided by law for a special election to fill the vacancies aforesaid, a copy of which said communication is hereto attached, marked 'Exhibit C,' and made a part hereof; that said Governor Boyd has not replied to said communication in writing, but said Governor Boyd has informed your relator verbally that he had referred the communication aforesaid to the attorney general of the state of Nebraska for his legal opinion on the points involved, and had not obtained as yet an expression of opinion; that on the 29th day of October, A. D. 1892, he called personally upon said Governor Boyd at the governor's office in the capitol, in the city of Lincoln, Nebraska, and made formal demand that he issue his proclamation for a special election to fill the vacancies aforesaid; and the said Governor Boyd then and there positively refused to issue such proclamation, giving as his reason, that the matters in question were of too vast importance, the legality of the proposed action too dubious, and the consequences possibly too serious for him to assume the responsibility until the supreme court or attorney general had instructed him as to his legal duties in the premises; and the said Boyd, as governor of the state of Nebraska, joins herein with your relator, asking that this honorable court make a solution of the difficulty and thus prevent a legal controversy."

He also sets forth a copy of the act for the census of June, 1890, and the apportionment act of February 7, 1891, which is as follows:

"That after the 3d of March, 1893, the house of representatives shall be composed of 356 members, to be apportioned as follows: Alabama, 9; Arkansas, 6; California, 7; Colorado, 2; Connecticut, 4; Delaware, 1; Florida, 2;

Georgia, 11; Idaho, 1; Illinois, 22; Indiana, 13; Iowa, 11; Kansas, 8; Kentucky, 11; Louisiana, 6; Maine, 4; Maryland, 6; Massachusetts, 13; Michigan, 12; Minnesota, 7; Mississippi, 7; Missouri, 15; Montana, 1; Nebraska, 6; Nevada, 1; New Hampshire, 2; New Jersey, 8; New York, 34; North Carolina, 9; North Dakota, 1; Ohio, 21; Oregon, 2; Pennsylvania, 30; Rhode Island, 2; South Carolina, 7; Tennessee, 10; Texas, 13; Vermont, 2; Virginia, 10; Washington, 2; West Virginia, 4; Wisconsin, 10; Wyoming, 1.

"Sec. 2. That whenever a new state is admitted to the Union, the representative or representatives assigned to it shall be in addition to the number, 356.

"Sec. 3. That in each state entitled under this apportionment, the number to which such state may be entitled in the fifty-third and each subsequent congress shall be elected by districts composed of contiguous territory and containing as nearly as practicable an equal number of inhabitants. The said districts shall be equal to the number of the representatives to which such state may be entitled in congress, no one district electing more than one representative.

"Sec. 4. That in case of an increase in the number of representatives which may be given to any state under this apportionment, such additional representative or representatives shall be elected by the state at large, and the other representatives by the district now prescribed by law, until the legislature of such state, in the manner herein prescribed, shall redistrict such state, and if there be no increase in the number of representatives from a state the representatives thereof shall be elected from the districts now prescribed by law until such state be redistricted as herein prescribed by the legislature of such state.

"Sec. 5. That all acts and parts of acts inconsistent with this act are hereby repealed.

"Approved February 7, 1891."

He has accompanied his application with an elaborate printed argument, in which he contends with great force that, as a matter of strict right, Nebraska is, and has been since February 7, 1892, entitled to six representatives in congress. The justice of this claim will not be denied, but can this court correct the wrong? We think not. Section I, article I, of the constitution of the United States provides:

"All legislative powers herein granted shall be vested in a congress of the United States, which shall consist of a senate and house of representatives.

"Sec. II. 1. The house of representatives shall be composed of members chosen every second year by the people of the several states; and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

"2. No person shall be a representative who shall not have attained the age of twenty-five years and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

"3. Representatives and direct taxes shall be apportioned among the several states which may be included within this Union according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every 30,000, but each state shall have at least one representative; and until such enumeration shall be made, the state of New Hampshire shall be entitled to choose three; Massachusetts, eight; Rhode Island and Providence

Plantations, one; Connecticut, five; New York, six: New Jersey, four; Pennsylvania, eight; Delaware, one; Maryland, six; Virginia, ten; North Carolina, five; South Carolina, five; and Georgia, three.

"4. When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

"5. The house of representatives shall choose their speaker and other officers, and shall have the sole power of impeachment."

Section 2 of the fourteenth amendment is as follows: "Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislatures thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in anyway abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state."

It will be seen that the apportionment of representatives among the several states, after the taking of each decennial census, is made by congress upon some fixed rule or ratio which applies equally to all the states. The apportionment is, so far as appears, fair, and the only complaint is that it should take effect in 1891 instead of 1893. There is much force in the objection that the states entitled to increased representation are thereby deprived of the same for two years. The question, however, is political rather than judicial, and it is difficult to perceive in what way the

courts can remedy the defect. With the present improved modes of taking the census and classifying the returns, the population of each state can be ascertained within a few months after the actual enumeration, so that the apportionment can be made in December or January following the taking of the census. It would seem but justice that this should take effect in the succeeding congress, and we may confidently trust to that spirit of fairness so characteristic of the American people, to correct the wrong. The courts, however, have no authority to declare that a greater number of representatives shall be elected and admitted to congress than the statute specifies, and the writ must be denied and the action

DISMISSED.

The other judges concur.

UNION PACIFIC RAILWAY COMPANY v. EMIL KELLER.

FILED FEBRUARY 1, 1893. No. 4412.

1. **Railroad Companies:** DAMAGE BY FIRE FROM LOCOMOTIVE: NEGLIGENCE. In an action to recover damages for loss occasioned by railway fires it devolves on the plaintiff to prove by a preponderance of the evidence that the fire was communicated by sparks or cinders from the railway engines.

2. ——— : ——— : ———: EVIDENCE. It need not be proved that any particular engine was at fault, but it will be sufficient if it is proved that the fire was set by any engine passing over the defendant's railway, and the evidence may be wholly circumstantial, as, first, that it was possible for fire to reach the plaintiff's property from the defendant's engines, and, second, facts tending to show that it probably originated from that cause and no other.

3. ——— : ——— : PROOF OF NEGLIGENCE UNNECESSARY. Where the proof shows that a fire originated from an engine running

over the defendant's railway, it is unnecessary for the plaintiff to show affirmatively any defect in the construction or condition of the engine, or any negligence in its management. Negligence will be presumed from the fact that fire was set out.

4. **Review**: EVIDENCE *held* to sustain the verdict, and there is no material error in the record.

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

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

Gillespie & Murphy, contra.

MAXWELL, CH. J.

This is an action to recover damages for the destruction by fire of a granary and about 1,200 bushels of oats on the plaintiff in error's right of way at Kearney. On the trial of the cause in the court below a verdict was returned for the sum of $300, upon which judgment was rendered. The plaintiff below in his petition alleges, in substance, "that on or about the 29th day of September, 1888, the plaintiff was the owner of a certain granary containing about 1,200 bushels of oats, situated on the defendant's right of way in the city of Kearney, Nebraska, 'by and with the consent and permission of said defendant'; that on or about the 29th day of September defendant, by its servants, etc., in operating and running its engines over said line of road at or near said granary * * * negligently and carelessly permitted an engine to cast out sparks and coals of fire therefrom, which set on fire combustible material situated on defendant's right of way; that said fire spread onto and over the granary of said plaintiff, and totally destroyed the same without any fault or negligence on the part of the plaintiff. That the granary was worth the sum of $75; that it contained 1,200 bushels of oats, whose market value at the

time of the fire in the city of Kearney was twenty-five cents per bushel. Judgment prayed for $375, with interest at the rate of seven per cent per annum from the 29th day of September, 1888, with costs."

In its answer the railway company denies that Keller was the owner of the granary destroyed; denies that he built the same on the company's right of way with the consent of the company; denies that it negligently and carelessly permitted one of its locomotives to cast out sparks and coals of fire, or permitted its engines to set out fire; denies that the plaintiff's building was of the value of $75, or that it contained 1,200 bushels of oats, and denies the damages, etc. It also alleges that the plaintiff's granary was erected on that portion of the right of way held by the Bogue & Sherwood Company under a written lease which exempted the company from liability for loss by fire, etc.

The reply is a general denial.

The testimony tends to show that one David Bohrer, erected the building in question, to store grain in to ship over the railway. The building was erected with the understanding that it should be moved off the right of way whenever the company demanded. Bohrer does not seem to have shipped any grain, but sold the building to Keller who seems to have had a large quantity of oats therein for shipment. The testimony also shows that before the fire the company had leased the ground on which the building stood, with other ground, to Bogue & Sherwood Company; that that company had erected coal sheds on a part of the ground so leased but did not need the ground on which the granary stood, and therefore consented to permit the building to remain for a time. So far as we can see, Bogue & Sherwood Company's lease does not enter into the case. There is testimony in the record tending to show that engine No. 805 passed through Kearney shortly before the fire, going west; that this engine set out fire at five differ-

ent places along the railroad a short distance east of Kearney. There is also testimony from which the jury would be justified in finding that the engine in question set out the fire. Certain witnesses were called to prove that the engine in question was in good repair and had modern appliances to prevent the escape of fire. The scope of this testimony may be inferred from that of W. S. Dolson. He testified in regard to the fire as follows:

Q. Do you know how long before that there was any engine in the yard?

A. I cannot say positively; I know there had not been any in the yard for two hours.

Q. State what locomotive you were handling that day.

A. Eight hundred and five.

Q. How long have you been acting in the capacity of fireman and locomotive engineer?

A. About nine years.

Q. State your experience in handling engines.

A. I have served about three years running one, and over six firing.

Q. State what are the most approved appliances, if any, used to prevent the escape of fire from a locomotive.

A. They have kind of a reflecting plate and a fine netting.

Q. State, if at the time you were handling this engine on this day, your engine was properly provided with a reflecting plate.

A. Yes, sir; and a proper netting also.

Q. State if you examined it.

A. No, sir; I did not examine it myself; the engines are overhauled every trip.

Q. State if your engine was throwing any fire during this trip.

A. She was throwing no fire to speak of that I could see.

Q. State if she was throwing fire while you were running through the yard.

A. We were not working any steam to amount to anything, and in working no steam an engine will not throw any fire.

Q. Explain how it is that in working no steam an engine will not throw any fire.

A. In working steam the exhaust draws the fire through the flues out of the stack, but if she is shut off there is no exhaust and we cannot throw any.

Q. You were running in the yards without working steam?

A. Yes, sir; I pulled off with a few cars and then backed down; there was only two or three cars and they would not work the engine hard enough to throw fire.

He also states that on the straight smoke-stacks they do not use spark arresters, some other device being substituted.

The court instructed the jury as follows:

"1. To warrant the jury in finding for the plaintiff you must first determine from the evidence whether the fire which occasioned the damage complained of originated from the engine of defendant as averred in plaintiff's petition, and in addition thereto you must find that the fire originated from the negligence of defendant's servants by means of their carelessness, or by means of defective engines or machinery, and the plaintiff did not directly, by his own negligence, contribute toward the destruction of the house and oats sued for herein.

"2. If the evidence fails to satisfy you that the fire which caused the injury originated from the defendant's engine you will inquire no further, and at once render a verdict for the defendant, and you will bear in mind that it is incumbent upon the plaintiff by a preponderance of evidence to satisfy you that the fire which did the injury originated from the defendant's engine.

"3. If you are satisfied that the fire did originate from the engine as claimed, then the burden is upon the de-

fendant to remove a presumption, though small, indeed, of negligence; to show you that the engine of the defendant from which the fire escaped was in good order, properly constructed, and provided with the usual appliances and spark arrester to prevent the escape of fire, and if you so find, then it is your duty to find for the defendant, as the defendant would not be liable if they used the most approved appliances, engine, and machinery, and it was carefully handled and managed by the servants of the defendant, unless the jury believe the defendant or its employes were guilty of actual negligence.

"4. Though the jury believe from the evidence that the engine of defendant were supplied with a 'spark arrester' and other contrivances to prevent the escape of fire from the engine of the most approved style and pattern, yet if the jury believe from the evidence that the employes or servants of defendant operating its locomotives at the time of the fire mentioned in the petition failed or neglected to exercise due care and caution in so operating and running said locomotive, and that for want of such due care and caution the said fire was communicated by said locomotive or engines to the house of plaintiff described in the petition, then they will find for the plaintiff.

"5. If you find the fire which occasioned the damage complained of originated from defendant's engine by the carelessness of defendant's servants having same in charge, or from a defective engine and one without latest appliances to prevent escape and spread of fire, and you further find the negligence of the plaintiff did not contribute toward the damage, you will find for the plaintiff, and assess his damages at such sum as you think the evidence shows the house and oats were damaged.

"6. If you find from the evidence that defendant permitted plaintiff to keep the house on the right of way, conditioned that plaintiff should remove the same upon notice, and you find that defendant's engine, by the emission of

sparks from a defective engine, or that by reason of defendant's servants neglecting to exercise due care and caution in operating said engine, and that from such want of care and caution the fire was communicated to plaintiff's house, you will find for the plaintiff.

"7. You are the sole judges of the credit that ought to be given to the testimony of the different witnesses, and you are not bound to believe anything to be a fact because a witness has stated it to be, provided the jury believe from all the evidence that such witness is mistaken or has knowingly testified falsely. Take this case, and from all the facts and circumstances of the case, return such a verdict as you believe to be just."

These instructions, taken together, submit the questions involved fairly, as shown by the testimony, to the jury.

The company also asked the following instructions which were given by the court:

"The jury are instructed that the burden of the proof is on the plaintiff to show conclusively that the fire that burned his barn or granary was negligently and carelessly set out by the defendant, and unless he should so show you must find for the defendant. In considering this, you will bear in mind that even though the plaintiff shows that the defendant's engine did set out the fire, this of itself is not negligence, for if the defendant shows that the engine alleged to have set the fire was provided with all the appliances commonly used in preventing fire from escaping, it will not be liable for such a precaution, will not allow the plaintiff to recover.

"2. The jury will bear in mind that if the plaintiff does show that the fire was caused by the defendant, it is competent for the defendant to show that the engine or engines alleged to have caused the fire were provided with the best known appliances for preventing fire from escaping from the smoke-stack or ash pan, and if the defendant does prove that it has used all due care and caution to pre-

vent fire by equipping the engine with such appliances, and that its engine or engines were handled by competent and careful men and in a safe manner, you must find for the defendant, even though you may believe the fire was caused by the defendant's engines. That is, if the defendant has used care to prevent fire it has done all that is required of it, and will then not be liable.

"3. If you should find that the plaintiff's building which was burned was on the defendant's right of way, and was not used as a warehouse for storing goods awaiting shipment, and that plaintiff, or the one of whom he purchased the building, was ordered by the defendant to remove the building from the ground, and neglected and refused to comply with such order, he cannot recover, and you must find for the defendant, for, if after being warned to remove from the right of way, the law presumes he took all the risk upon himself of loss in not complying with the demand, and remaining there did so at his own risk. You cannot presume that he was ignorant of the danger and exposure to fire.

"4. If you find that the plaintiff was on the defendant's right of way by virtue of a lease, either verbal or written, made with the defendant, or from any one as a sublessee, to whom it had rented the ground, and that one of the conditions of the lease was that the lessee assumed all risks of damage by fire caused by defendant as a part of the consideration he cannot recover, and you must find for the defendant; such a release from damages would be valid, and constitute a bar to plaintiff's recovering."

These instructions certainly were very favorable to the company.

It also asked the following instructions, which were given as modified:

"1. The jury are instructed that the burden of the proof is on the plaintiff to show conclusively that the fire that burned his barn and granary was negligently and care-

lessly set out by the defendant, and unless he should so show, you must find for the defendant. In considering this, you will bear in mind that even though the plaintiff shows that the defendant's engine did set out the fire, this of itself is not negligence, for if the defendant shows that the engine alleged to have set the fire was provided with all the appliances commonly used in preventing fire from escaping, it will not be liable for such a precaution, will not allow the plaintiff to recover. (Modified as follows:) Unless you find from the evidence that by the carelessness of the defendant's servants having the engine in charge.

"Modifications excepted to by the defendant.

"3. If you find that the plaintiff's building, which was burned on the defendant's right of way, and was not used as a warehouse for storing goods awaiting shipment, and that plaintiff, or the one of whom he purchased the building, was ordered by the defendant to remove the building from the ground and neglected and refused to comply with such order, he cannot recover, and you must find for the defendant; for, if after being warned to remove from the right of way, the law presumes he took all the risk upon himself of loss, in not complying with the demand, and remaining there did so at his own risk. You cannot presume that he was ignorant of the danger and exposure to fire. Unless you find that the fire was occasioned by the gross negligence of the defendant.

"Modifications excepted to by defendant.

"4. If you find that the plaintiff was on the defendant's right of way by virtue of a lease, either verbal or written, made with the defendant or, from any one as a sublessee to whom it had rented the ground, and that one of the conditions of the lease was that the lessee assumed all risks of damage by fire caused by defendant as a part of the consideration, he cannot recover, and you must find for the defendant; such a release from damages would be valid and would constitute a bar to plaintiff's recovering. (Modified

as follows:) Unless you find the fire was occasioned by the gross negligence of the defendant.

"Modifications excepted to by the defendant."

These instructions, even with the modifications, are very favorable to the plaintiff in error, and it cannot complain on that ground.

It devolves on the plaintiff to prove by a preponderance of the evidence that the fire was communicated by sparks or cinders from the railway engines. It need not be shown that any particular engine was at fault, but it will be sufficient if the fire is proved to have been set by any engine passing over the defendant's railway, and the evidence may be wholly circumstantial, as, first, that it was possible for fire to reach the plaintiff's property from the defendant's engines, and, second, facts tending to show that it probably originated from that cause and no other. (*Field v. N. Y. Central R. Co.*, 32 N. Y., 339; *Karsen v. Milwaukee & St. P. R. Co.*, 29 Minn., 12; *Longabaugh v. Virginia City & T. R. Co.*, 9 Nev., 271; *Grand Trunk R. Co. v. Richardson*, 91 U. S., 454; 8 Am. & Eng. Encyc. of Law, 7–8, and cases cited.) When, however, the evidence shows that a fire originated from an engine running over the defendant's railway it is unnecessary for the plaintiff to show affirmatively any defect in the construction or condition of the engine or any negligence in its management. (*Burlington & M. R. R. Co. v. Westover*, 4 Neb., 268.) In the case cited it is said: "There is a direct conflict of authorities in this country on this question. In many of the cases, particularly the early ones, it being held that it devolved on the plaintiff to prove negligence on the part of the defendant. The better rule appears to be, where it is shown that a fire has originated from sparks thrown out by an engine, to require the company to show that their engine was properly constructed, equipped, and operated. The reason for the rule, as stated in a late case in Wisconsin, being "that the agents and employes of the road know, or

are at least bound to know, that the engine is properly equipped to prevent fire from escaping, and that they know whether any mechanical contrivances were employed for that purpose, and if so, what was their character. Whilst, on the other hand, persons not connected with the road, and who only see trains passing at a high rate of speed, have no such means of information." (*Spaulding v. Chicago & N. W. R. Co.*, 30 Wis., 122; 8 Am. & Eng. Encyc. of Law, 9–10, and cases cited.) The cases on this question are classified by states in the work last mentioned, from which it will be seen that a majority of the decisions sustain the rule as above set forth. There was no error in the modification complained of. Even then they were prejudicial to the defendant in error, but no complaint is made on that ground by him. Upon the whole case there is no material error in the record, and the judgment is

AFFIRMED.

THE other judges concur.

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

FILED FEBRUARY 1, 1893. No. 4924.

1. **Remedy for Indefinite Pleadings.** Where the allegations of a pleading are indefinite, the remedy is by motion to have the same made more definite and certain.
2. **Action to Recover Penalty for Taking Usurious Interest:** RIGHT OF INSPECTING DEFENDANT'S BOOKS: ORDER FOR INSPECTION: POWER OF COURT. The plaintiff in a civil action made a written demand upon the defendant for an inspection and copy, or permission to take a copy, of certain specified entries in a certain book belonging to, in the possession of,

and under the control of the latter, relating to the merits of the suit, which demand was not complied with within four days. *Held*, That under section 394 of the Code the court in which the action is pending, or the judge thereof in vacation, has the power, on motion and notice to the defendant, to order that an inspection and copy, or permission to take a copy, of such entries shall be given within a specified time, and on a failure of the defendant to comply with such order, the court may exclude the entries from being given in evidence, or if wanted as evidence by the plaintiff, may direct the jury to presume them to be such as the plaintiff by affidavit alleges them to be.

3. ———: LIMITATION. The limitation of two years within which suit may be brought against a national bank, under section 5198 of the Revised Statutes of the United States, for taking usurious interest, begins to run from the time when the usurious interest is paid.

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

F. I. Foss, for plaintiff in error.

Abbott & Abbott, contra.

NORVAL, J.

On the 9th day of February, 1889, Benjamin A. Smith brought his action against the above named bank in the district court to recover the sum of $294.66, as a penalty, under section 5198 of the Revised Statutes of the United States, for knowingly taking and receiving usurious interest for the use and forbearance of money. The bank answered by a general denial. There was a trial to the court, which resulted in a judgment in favor of the plaintiff for $207.64. Each party filed a motion for a new trial. The motions were denied, and both parties prosecute error to this court.

Counsel for the bank insists that the petition is not sufficiently definite and certain to admit of the introduction of any evidence thereunder. This objection must be overruled. The facts constituting the several causes of action

are clearly, and with reasonable certainty, stated in the petition. Besides, no motion was filed in the court below attacking the pleading. Where the averments in a pleading are indefinite, the remedy, under the Code, is by a motion to have the same made more definite and certain. (*Farrar v. Triplett*, 7 Neb., 237; *Deaver v. Bennett*, 29 Id., 812.)

The next point made by the same counsel is that there was no competent evidence before the court below upon which to base a judgment. The only testimony introduced on the trial was the affidavit of Benjamin A. Smith, the plaintiff below, which purports to give the contents of certain portions of the discount register kept by the bank, relating to the various transactions between the bank and Smith in the matter of the payment of usurious interest. The dates and amounts of all such payments are stated. The question presented is, whether the affidavit was proper evidence of what the book referred to contained.

Section 394 of the Code of Civil Procedure provides that "Either party, or his attorney, may demand of the adverse party an inspection and copy, or permission to take a copy, of a book, paper, or document in his possession or under his control containing evidence relating to the merits of the action or defense therein. Such demand shall be in writing, specifying the book, paper, or document with sufficient particularity to enable the other party to distinguish it, and if compliance with the demand within four days be refused, the court or judge, on motion and notice to the adverse party, may, in their discretion, order the adverse party to give the other, within a specified time, an inspection and copy, or permission to take a copy, of such book, paper, or document; and on failure to comply with such order the court may exclude the paper or document from being given in evidence, or, if wanted as evidence by the party applying, may direct the jury to presume it to be such as the party by affidavit alleges it to

be. This section is not to be construed to prevent a party from compelling another to produce any book, paper, or document when he is examined as a witness."

The record in this case shows that on the 20th day of June, 1890, plaintiff below made a written demand upon John C. Thurston, Esq., the cashier of the defendant bank, for an inspection and copy, or permission to take a copy of the entries upon the discount register kept by said bank, showing the amount of interest or discount paid by said Smith to the bank for money borrowed, or for notes discounted by it for him between certain specified dates. The demand not having been complied with within four days, or any other time, plaintiff on the 30th day of June, 1890, previous written notice thereof having been given to the bank, made application to the honorable judge of the district court of the county in which the action was pending, at his chambers in the city of Crete, for an order requiring the bank to give an inspection and copy of said entries in said book, or permission to take a copy thereof, which application was granted by said judge, and the bank was ordered and directed to give plaintiff, within ten days, an inspection and copy, or permission to make a copy of said entries. Although this order was duly served upon the bank on the next day after the same was made, the defendant absolutely failed and refused to comply therewith.

An inspection of the proceedings convinces the writer that the demand, notice, and order allowing an inspection, each with sufficient certainty or particularity described the book desired as to authorize the judge to make the order. It is objected that no fees were tendered by the plaintiff for such copy. None were demanded by any officer of the bank; besides, there is no statutory provision which requires that a party shall either pay or tender fees in order to entitle him to an inspection of a book or paper in the possession of his adversary. The bank was

not required to make a copy of the entries. It was optional with it so to do, or permit the plaintiff to make the copy himself.

It is also claimed that the judge had no jurisdiction to make the order in question in vacation. A sufficient answer to this objection is that the section quoted confers such power. It provides that the "court or judge" may make the order. It is obvious that the plaintiff has in every essential particular complied with all the requirements of the statute, so as to entitle him to prove by his own affidavit the contents of the book in question, so far as the same relate to the transactions between the parties. Our conclusion is that the court did not err in allowing plaintiff's affidavit to go in evidence, and that the bank has no just cause to complain of the judgment rendered.

The plaintiff below insists that the judgment should have been for a much larger sum. The evidence discloses that usurious interest to the amount of $103.86 was paid by him to the bank within two years before the commencement of the suit. The recovery was for double said sum. It is also established that the further sum of $88 was paid upon another and distinct loan of money, as illegal interest, more than two years prior to the inception of the action, but that the loan upon which said usurious interest was received was not fully paid until May 27, 1887, which was within two years preceding the bringing of the suit. The bank takes the position that the statute of limitations has run against the recovery of the penalty for the taking of the usurious sum of $88, while the plaintiff below contends that the limitation of two years within which suit may be brought against a national bank for taking usurious interest begins to run from the payment of the note on which such interest is reserved. The question presented involves the true interpretation of the proviso clause of section 5198 of the Revised Statutes of the United States. The section declares that "the tak-

ing, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; *Provided*, Such action is commenced within two years from the time the usurious transaction occurred."

What is meant by the phrase "from the time the usurious transaction occurred," in the connection in which it is used in the section? Clearly it does not refer to the time the usurious contract is entered into, for the section gives the borrower no right of action to recover a penalty where unlawful interest is stipulated for and not paid. But in such case the loaner merely forfeits the entire interest. Nor is it the payment of the principal sum borrowed which gives the right to sue for the penalty. The actual receipt of the illegal interest is the foundation of the borrower's right to recover the penalty and the actual payment of interest in excess of the legal rate is the "usurious transaction" referred to in the section. The period of limitation begins to run from the time the cause of action accrues. If the interpretation for which plaintiff contends should be adopted, then it would follow that a suit to recover the penalty for taking usurious interest by a national bank cannot be maintained until the loan is fully paid off. Stated differently, one who has paid large sums of money as illegal interest on a loan and is unable to pay the entire debt is not entitled to the benefit of the section. Such was not the intention of congress, nor is it the fair and reasonable import of the language of the section. The right to maintain an action to recover the penalty prescribed by

said section 5198 accrues as soon as any unlawful interest is paid, and the two years' limitation begins to run from the time such payment is made. The following cases support the doctrine: *Shinkle v. First Nat. Bank*, 22 O. St., 516; *Hintermister v. Bank*, 64 N. Y., 212; *Stephens v. Monongahela Nat. Bank*, 88 Pa. St., 157; *Brown v. Second Nat. Bank*, 72 Id., 209; *Lynch v. Merchants Nat. Bank*, 22 W. Va., 554; *National Bank of Rahway v. Carpenter*, 52 N. J. L., 165; *Stout v. Ennis Nat. Bank*, 8 S. W. Rep. [Tex.], 808; *Henderson Nat. Bank v. Alves*, 15 S. W. Rep. [Ky.], 132.

In *Lynch v. Merchants Nat. Bank, supra*, the court in considering the identical question herein involved, after citing and quoting from numerous decisions from the courts of different states, in the opinion say: "If these cases do not expressly decide that the right of action for the prescribed penalty accrues at the instant any excessive interest is paid, whether it be on the original discount or at any subsequent renewal, and that each payment is in itself a cause of action against which the limitation commences to run, they so clearly indicate that such is the proper construction of the statute as to leave no doubt on the question. I have been unable to find any authority or precedent to the contrary. And as to the construction indicated, if not established by these cases, is in consonance with the letter and spirit of the statute as well as in accord with the evident reason and policy of congress in enacting it, I feel no hesitation in adopting it. Each payment of illegal interest must be regarded as a 'transaction' within the intent of the statute, and when such payment is actually made or occurs, the two years' limitation commences to run as to that payment from that time, and so on for each successive payment on renewals of the same loan; and if, when the action is commenced for the penalty, any one or more of such payments of illegal interest occurred more than two years prior thereto, no recovery can be had for it, although the original loan be then unpaid."

Both upon reason and authority we are satisfied that the action to recover the penalty for receiving the $88 illegal interest is barred, since the same was taken more than two years before this suit was brought. Doubtless the limitation does not commence to run until the usurious loan is paid off, in a case where payments are made to a national bank on such a loan, and there is no agreement or understanding that the same is to be applied in discharge of usurious interest agreed to be paid for the use of the money, for in such a case the law will apply the payments on the principal, and not on the usurious interest; hence there would be no usurious transaction until the sum borrowed had been repaid. The judgment is

AFFIRMED.

THE other judges concur.

MCCORMICK HARVESTING MACHINE COMPANY V. JOHN S. SCHNEIDER.

FILED FEBRUARY 1, 1893. No. 4934.

1. **Setting Aside Judgment in County Court.** It is a well settled rule in this state that a judgment rendered in a county court in the absence of the defendant may be set aside, under the provisions of section 1001 of the Code of Civil Procedure, although the amount claimed by the plaintiff exceeds $200.
2. ———: SPECIAL APPEARANCE. In an action before a county court the defendant appeared for the sole purpose of objecting to the jurisdiction of the court, which objection was overruled, and the defendant not appearing further, judgment was rendered against him. *Held*, That such appearance did not deprive him of the right to have the judgment set aside under the provisions of said section 1001.
3. **Service of Summons:** WAIVER OF DEFECTS. The filing of a motion to set aside the default is a waiver of all defects and irregularities in the service of the summons.

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

H. M. Uttley, for plaintiff in error.

G. M. Cleveland, contra.

NORVAL, J.

This was an action brought by plaintiff in error in the county court of Holt county upon a foreign judgment to recover the sum of $261.45. A summons was issued and placed in the hands of the sheriff for service, who made due return of service thereof upon the defendant by leaving a true and certified copy of the same, with all indorsements thereon, at the defendant's usual place of residence. Subsequently the defendant appeared before the county court and filed an affidavit alleging "that the only summons or copy of summons served upon or delivered to him, or left at his usual place of residence, in this case is the purported copy of summons hereto attached as Exhibit A, and made part hereof." Exhibit A is a true copy of the original summons, except that it contained no indorsement of the amount for which judgment was asked. The defendant making no further appearance in the case, judgment was rendered against him for $261.45. Within ten days thereafter defendant filed a motion under section 1001 of the Code to set aside the judgment, which motion was denied. He thereupon prosecuted error to the district court, alleging the following grounds for reversal:

"1. The court erred in overruling the objection to the jurisdiction of the court, which objection was on the ground that no copy of the summons was ever served on the defendant in said case in the county court.

"2. The court erred in refusing to set aside the default."

The district court reversed the judgment of the county court, and this is the error complained of here.

It is a well settled rule of this court that where a defendant has entered no appearance in a cause in a justice court, he may, as a matter of right, have the judgment therein entered against him set aside. It has likewise been held that the provisions of section 1001 of the Code, relating to the setting aside of judgments before justices of the peace, apply to causes in the county court, regardless of the amount in dispute. (*State v. Smith*, 11 Neb., 238; *Tootle v. Jones*, 19 Id., 588.) But where a defendant has entered an appearance he is not entitled to have the judgment set aside, even though he may have been absent on the day of trial. (*Strine v. Kaufman*, 12 Neb., 424; *Western Mutual Benevolent Ass'n v. Pace*, 23 Id., 495; *Smythe v. Kastler*, 16 Id., 264.) It has been held that procuring the issuance of subpœnas, or the filing of a motion for security for costs, or to dismiss the action, constitutes such an appearance as to defeat his right to have the default set aside, under the provisions of said section 1001, upon the ground that judgment was entered in his absence. (*Raymond v. Strine*, 14 Neb., 236; *Bell Bros. v. White Lake Lumber Co.*, 21 Id., 525; *Howard Bros. v. Jay*, 25 Id., 279.)

Do the facts in the case at bar bring it within the principle of the decisions last cited? We do not think so. In each of the cases to which we have referred the defendant made a general appearance in the action, while in the case at bar the defendant appeared for the sole purpose of objecting to the jurisdiction of the court, or questioning its power to render any judgment against him. Whether his ground of objection was sufficient or not is quite immaterial, inasmuch as the question sought to be raised was purely jurisdictional. The appearance was not general. As he did not by motion or otherwise seek to call into operation the powers of the court, except on the question of jurisdiction, the appearance was special, and he did not thereby waive his right under the statute to have the

judgment rendered against him in his absence set aside. Therefore the county court erred in overruling the motion to set aside the default.

The defendant by filing his motion to set the judgment aside waived all defects in the service of the summons. (*Crowell v. Galloway*, 3 Neb., 220; *Freeman v. Burks*, 16 Id., 328.)

The judgment of the district court is clearly right and is

AFFIRMED.

THE other judges concur.

EMMA L. VAN ETTEN V. DAVID J. SELDEN.

FILED FEBRUARY 1, 1893. No. 4315.

1. **Costs of Justice of the Peace: ITEMIZED STATEMENT: WAIVER.** Under section 32, chapter 28, Compiled Statutes, a justice of the peace before bringing suit for his fees must, when requested so to do, make and furnish the party for whom the services were rendered an itemized bill of his costs in order to maintain an action therefor. Such statement may be waived by the party entitled thereto.
2. **Costs of Constable: ITEMIZED STATEMENT UPON RETURN OF WRIT.** A constable is not entitled to fees for serving a writ placed in his hands, where he fails to return upon the process the particular items of his costs.
3. **Review: EVIDENCE** examined, and the verdict of the jury *held* to be excessive, and the judgment reversed, unless defendant in error file a remittitur as stated in the opinion.

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

David Van Etten, for plaintiff in error.

A. S. Churchill, contra.

NORVAL, J.

This action originated in a justice court. Subsequently it was appealed to the district court. The suit was instituted by David J. Selden to recover the sum of $12.15 alleged to be due him for fees in cases brought by plaintiff in error against different parties before said Selden, a justice of the peace. Of the above sum, $9.30 were claimed to be due for fees of the justice, and the remainder was for constable's costs, alleged to have been assigned to defendant in error. There was a verdict for the plaintiff in the district court for $9.30, and judgment was subsequently rendered thereon in his favor for said amount.

It is contended that there can be no recovery for the reason that no itemized statement of the fees sued for was ever presented or furnished the defendant.

Section 32, chapter 28, Compiled Statutes, declares that "it shall be lawful for any person to refuse payment of fees to any officer who will not make out a bill of particulars, signed by himself, if required, and also a receipt or discharge signed by him for fees paid."

It requires no argument to show that, under the foregoing provisions of the statute, it is necessary that an officer before bringing suit for his fees, when requested so to do, furnish the party for whom the services were rendered an itemized bill of his costs, in order to maintain an action therefor. A party indebted for fees may waive such itemized account.

The defendant in error testified that no itemized statement of costs was demanded by Mrs. Van Etten, nor any one for her, before suit was brought; that he mailed to her a bill of the costs which gave the gross amount of his fees, and that he likewise demanded payment of Mrs. Van Etten; that on the day of the trial of this cause in the justice court Mr. Van Etten requested a bill of items of the costs, to which Mr. Selden replied that he would furnish it, and

he then produced his dockets and showed him the various items of his fees therein charged; whereupon Mr. Van Etten assured him that that was entirely satisfactory. Although testimony was introduced by the defendant below tending to show that prior to the institution of the action Mr. Van Etten demanded an itemized account of the costs, and that the request was not complied with, the evidence in the record was ample to warrant the jury in finding that the making and furnishing of the itemized account of the costs were waived by the defendant.

The answer filed to the petition is in effect a general denial. The plaintiff in error failed to raise by her pleading the defense now insisted upon, that the plaintiff below failed or refused to make out and furnish a bill of particulars of his fees. This defense is unavailing.

As to the fees of Constable King, amounting to $2.85, which were assigned to Selden, there can be no recovery in this action, and the jury were so instructed, inasmuch as there is no proof in the record before us that the constable made return upon the writ placed in his hands for service, of the particular items of charges for fees for making such service. (Compiled Statutes, 1891, sec. 33, ch. 28.)

Complaint is made because the trial court refused to permit plaintiff in error to show that Selden was indebted to Mr. Van Etten in the sum of $10 for professional services rendered. The offered testimony was properly excluded. No counter-claim, offset, or payment was pleaded in the answer. If Selden owed Mr. Van Etten anything, the latter has his remedy. Such claim is not a proper offset in an action against Mrs. Van Etten.

An examination of the evidence discloses that the amount assessed by the jury is too large. The action is to recover costs made by Mrs. Van Etten in three cases commenced by her before defendant in error, in each of which she recovered judgment. In the suit against

Henry Jess, the justice's fees amounted to $2.05; in the case against F. L. Gillette, they were $2.60, and in the action against Robert J. Skiles, the total justice's fees charged are $4.10. The entire amount of fees in the three cases is $8.75, or fifty-five cents less than the amount found by the jury.

Again, in the Gillette case there is a charge of twenty-five cents for entering default, in addition to the statutory fee of fifty cents for rendering judgment. We are unable to find any law or authority permitting a justice of the peace to charge twenty-five cents or any other sum for entering the default of a party. The $4.10 in the Skiles case include an item of seventy cents for granting a continuance, while only fifty cents is allowed by law a justice for such services. Unless defendant in error files a remittitur for the sum of $1 with the clerk of this court within thirty days from the filing of this opinion, the judgment will be reversed, but in case such remittitur is filed within the time stated, the judgment will be affirmed for $8.30.

JUDGMENT ACCORDINGLY.

THE other judges concur.

WILLIAM R. MORSE V. WILLIAM H. C. RICE.

FILED FEBRUARY 1, 1893. No. 4785.

1. **Receipt:** CONTRACT: PAROL TESTIMONY. A written receipt may be explained or contradicted by parol testimony. But when it embodies a contract it cannot be contradicted, but is conclusive upon the parties, in the absence of fraud or mistake. Rule applied.
2. **Certificate of Deposit:** INTEREST: DEMAND. In an action upon a demand certificate of deposit it was *held*, in the absence

of any agreement as to interest, that interest is to be computed at the rate of seven per cent from the time payment of the certificate was demanded of the defendant, and in case no such demand has been made, then from the date of the commencement of the action.

3. **Evidence:** INSTRUCTIONS. *Held*, That there is no error in the charge of the court, and that the evidence sustains the verdict of the jury.

ERROR from the district court of Merrick county. Tried below before MARSHALL, J.

J. W. Sparks and *J. C. Martin*, for plaintiff in error.

A. Ewing and *W. R. Watson, contra.*

NORVAL, J.

On the 11th day of January, 1890, defendant in error brought his action in the district court to recover the sum of four thousand dollars and interest upon two certificates of deposit, executed by plaintiff in error for the sum of $2,000 each, dated respectively January 25, 1888, and February 3, 1888. The certificates are alike except as to dates and numbers, and in words and figures following:

"$2,000. CLARKS, NEB., January 25th, 1888. No. 2089.

"W. H. C. Rice has deposited with W. R. Morse, banker, two thousand dollars, payable to the order of himself in current funds on the return of this certificate properly endorsed, any month after date, with interest at — per cent per annum.

"This certificate will not be paid until due, and interest ceases at maturity. W. R. MORSE."

The petition filed in the court below is in the usual form. The answer admits the execution and delivery of the certificates, denies that payment thereof was ever demanded, and alleges that defendant, on the 14th day of January, 1889, transferred to plaintiff a certain promissory note for

$280, drawing interest at ten per cent from July 14, 1888, which note, it is averred, plaintiff has collected and agreed to give defendant credit therefor upon said certificates of deposit. The defendant further pleads payment on the 12th day of February, 1889, of the sum of $1,152, by transferring to plaintiff three promissory notes aggregating that sum.

The plaintiff for reply admits the receipt of the notes; avers that they were transferred to him by defendant as collateral security for the payment of said certificates of deposit, and that no part of said notes has ever been paid.

Upon the trial the jury returned a verdict in favor of the plaintiff for $4,060.77. Defendant brings the cause to this court for review on error.

It is undisputed that Mr. Morse delivered to Mr. Rice, as collateral security, a promissory note executed by one Fremont Hoy, calling for the sum of $280, and interest. As the testimony shows that no part of this note has ever been collected or paid, plaintiff in error is not entitled to a credit in this action on account of said note.

It is conceded that on the 12th day of February, 1889, plaintiff in error turned over to defendant in error three promissory notes described as follows: One for $67, dated February 1, 1889, due in nine months, drawing interest at ten per cent from date, signed by Ray Miller and Albert Miller; one for $535, drawing interest at ten per cent, executed by Henderson Miller and Albert Miller, bearing date February 1, 1889. The other was signed by Albert Miller and Henderson Miller, calling for $550 with interest at ten per cent, dated February 1, 1889, and due in nine months. No part of these notes has been paid. At the time the notes were delivered to Mr. Rice he executed an instrument and gave the same to Mr. Morse, as follows:

"CENTRAL CITY, Feb. 12, 1889.

"Received of W. R. Morse three notes in amount of $1,152, for which I hereby credit on account.

"W. H. C. RICE."

On the trial plaintiff below introduced testimony tending to establish that at the time the notes were delivered to him and the above receipt therefor was given, the agreement between the parties was that the notes were taken solely as security for the payment of the certificates of deposit, and at the same time Mr. Morse further promised to take up these notes in thirty days and pay one-half of the certificates, and pay the remainder before the following July.

It is contended that the trial court erred in admitting oral evidence to contradict or explain the receipt. It is an elementary rule that parol contemporaneous evidence is inadmissible for the purpose of explaining, varying, or modifying the terms of a valid written contract. In such case the writing must govern. It is also a well settled principal of law that a simple receipt is only *prima facie* evidence of the truth of the statement therein contained, and as between the parties is always subject to parol explanation or contradiction. But when a receipt also embodies a stipulation in the nature of a contract, it is not open to contradiction, but is conclusive upon the parties, in the absence of proof of fraud or mistake. Among the numerous authorities which sustain this doctrine may be cited: *Price v. Treat*, 29 Neb., 536; *Morris v. St. Paul & C. R. Co.*, 21 Minn., 91; *Cummings v. Baars*, 36 Id., 350; *Elsbarg v. Myrman*, 41 Id., 541; *American Bridge Co. v. Murphy*, 13 Kan., 35; *Clark v. Marbourg*, 33 Id., 471; *St. Louis, Ft. S. & W. R. Co. v. Davis*, 35 Id., 464; *Stapleton v. King*, 33 Ia., 28; *Kellogg v. Richards*, 14 Wend. [N. Y.], 116; *Coon v. Knap*, 8 N. Y., 402; *Smith v. Holland*, 61 Id., 635; *Michigan C. R. Co. v. Dunham*, 30 Mich., 128; *McAllister v. Engle*, 52 Id., 56; *Smith v.*

Schulenberg, 34 Wis., 41; *McKinney v. Harvie*, 35 N. W. Rep. [Minn.], 668; *Grant v. Frost*, 13 Atl. Rep. [Me.], 881.

We do not agree with counsel for plaintiff in error that the writing in question is a contract within the rule excluding parol evidence. In law it is only a receipt, and, as such, was open to explanation by parol proof. It was competent to show by oral testimony what took place between the parties previous to and at the time the receipt was given; in other words, what the actual transaction was; that, if such was the case, the three notes were received, not as payment upon the certificates of deposit, but solely as collateral security. The exception to the admission of the testimony in this case already referred to must therefore be overruled.

While the plaintiff in error testified on the trial that the understanding between the parties at the time was that he was to receive credit for the certificates for the amount of the three notes, we are satisfied, after a careful perusal of the bill of exceptions, that the jury were justified in not accepting that view of the transaction. No indorsement was ever made upon the certificates in suit of the amount of the three notes, nor was defendant in error ever requested to make such indorsement. No claim was made by the plaintiff in error, prior to the commencement of this action, that the notes were to be credited, whether collected or not, upon the certificates of deposit. The letters which passed between the parties since the giving of the receipt, copies of which are in the record, as well as the fact that Mr. Morse urged the makers of the notes to pay them after they had been turned over to Mr. Rice, corroborate the testimony of the plaintiff below.

Complaint is made of the giving of the seventh paragraph of the court's charge to the jury relating to the question whether or not the notes were given and accepted as absolute payment, or merely as collateral security. This

was proper in view of the conflicting evidence. Counsel are in error in assuming that the court thereby submitted to the jury the question of the legal interpretation of the written receipt. No such proposition was presented to them to decide. The court permitted both parties to introduce parol testimony relating to the turning over of the notes and the giving the receipt for the same, and from the entire testimony the jury were to determine what the transaction was.

Exception is taken to the fifth instruction, which reads as follows:

"5. The jury are instructed that if from the evidence they believe that the plaintiff by his authorized agent, on the 24th day of December, 1888, made demand of the defendant for payment of said certificates of deposit, then said certificates of deposit would draw interest from that date until the present at the rate of seven per cent per annum. If the jury do not find that said demand was made at that time, then said certificates of deposit would draw interest at the rate of seven per cent per annum from the 11th day of January, 1890, the date of the commencement of this suit."

The testimony introduced by defendant in error tends to show that the certificates of deposit were presented to Mr. Morse on the 24th day of December, 1888, and payment thereof requested. On the other hand there was testimony to the effect that payment of the certificates was never asked. It will be observed that the certificates were due and payable on demand, but no rate of interest was specified. They would draw interest only at the rate of seven per cent from the time payment was demanded of defendant and if no demand was made, then from the date of the institution of the action. We think the instruction was correct in substance and form. The judgment of the district court is clearly right and is

AFFIRMED.

THE other judges concur.

MERCHANTS NATIONAL BANK OF OMAHA V. EDWARD S. JAFFRAY ET AL.

FILED FEBRUARY 1, 1893. NO. 4759.

1. **Attachment:** ORDER: JUDICIAL ACT. An order by a district or county judge allowing an attachment in an action on a claim not due is a judicial act within the meaning of sec. 38, ch. 19, Comp. Stats.
2. **An order made by a judge on Sunday or a legal holiday** allowing an attachment in an action on a debt not due is void.

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

George E. Pritchett, for plaintiff in error.

Kennedy & Learned, contra.

POST, J.

This is a controversy between attaching creditors. The plaintiff in error on the 25th day of December, 1890, filed its petition in the district court of Douglas county against Henry Eiseman and Simon Eiseman claiming judgment for $3,580 on a debt not due. At the same time it filed an affidavit in substantial compliance with section 238 of the Code, whereupon an order was on the same day made by Hon. Geo. W. Doane, one of the judges of the district court for said county, allowing an attachment against the property of the defendant therein, which was issued in due form and by virtue of which the property in controversy was on the day above named seized by the sheriff. The order of attachment through which defendant in error claims was issued December 26, 1890.

There are several questions argued which it is not necessary to notice, as the judgment of the district court must

be affirmed on the ground that the order of attachment through which the plaintiff claims is void.

It is by sec. 38, ch. 19, Comp. Stats., provided that "No court can be opened, nor can any judicial business be transacted, on Sunday, or on any legal holiday, except, first, to give instructions to a jury then deliberating on their verdict; second, to receive a verdict or discharge a jury; third, to exercise the powers of a single magistrate in a criminal proceeding."

And by sec. 8, ch. 41, it is provided as follows:

"That the following days, to-wit, the first day of January, February twenty-second, and the twenty-second of April, which shall be known as 'Arbor Day,' the twenty-fifth day of December, the thirtieth day of May, and July fourth, and any day appointed or recommended by the governor of this state or the president of the United States as a day of fast or thanksgiving, and when any one of these days shall occur on Sunday, then the Monday following shall, for all purposes whatsoever as regards the presenting for payment or acceptance, and the protesting and giving notice of the dishonor of bills of exchange, bank checks, or promissory notes, made after the passage of this act, be deemed public holidays, and be treated and considered as is the first day of the week commonly called Sunday; *Provided*, That when any one of these days shall occur on Monday, any bill of exchange, bank check, or promissory note, made after the passage of this act, which but for this act would fall due and be payable on such Monday, shall become due and payable on the day thereafter."

It is not deemed necessary to discuss the question of the validity of an order of attachment or the service thereof on Sunday or a legal holiday in ordinary cases, that is, for debts already due. There is, to say the least, a diversity of opinion upon the subject. A respectable line of authorities hold such acts to be purely ministerial and therefore

not within the inhibition of the statute particularly when assailed in collateral proceedings. But an order of a judge allowing an attachment as in this case is clearly within the statute. Judicial acts are defined to be "such acts as are performed in the exercise of judicial power." (Hawes, Jurisdiction, 4.) Bouvier defines judicial power thus: "Belonging to or emanating from a judge as such, the authority vested in a judge." "Whatever emanates from a judge as such, or proceeds from a court of justice is judicial." (*In re Cooper*, 22 N. Y., 82.) An attachment will be allowed in an action for a claim before it is due only upon the grounds and the conditions prescribed by statute. One of the conditions is that the plaintiff or his attorney shall make oath in writing showing the nature of his claim and when it will become due. (Code, 238.) When the application is made the court or judge must determine judicially that the action is one of those contemplated by the statute and that the showing is sufficient to entitle the plaintiff to an attachment. The validity of the attachment under which the defendant claims depends upon the order made by the judge on the 25th day of December, a legal holiday. That order was a judicial act expressly forbidden by statute and is therefore void. (*Moore v. Herron*, 17 Neb., 697.) It follows that the judgment of the district court is right and should be

AFFIRMED.

THE other judges concur.

GEORGE W. SPRAGUE V. FRANK C. FULLER ET AL.

FILED FEBRUARY 1, 1893. No. 4116.

Ejectment: PROOF OF ADVERSE POSSESSION: REVIEW. Evidence examined, and *held* to sustain the finding and decree of the district court.

ERROR from the district court of York county. Tried below before NORVAL, J.

George B. France and *N. V. Harlan*, for plaintiffs in error.

L. W. Osborn and *W. H. Farnsworth, contra.*

POST, J.

This was an action by the defendants in error in the district court of York county to recover possession of lot No. 5, in block No. 42, in the city of York. The issues in the district court involved the rights of numerous defendants, who claimed title to separate subdivisions of the lot above described, but the controversy in this court is limited to the north half thereof. It is conceded that the defendants in error have shown a perfect chain of title in themselves from the United States, their immediate grantor being D. N. Smith, who conveyed to them by warranty deed on the 16th day of July, 1871. The defense relied upon by the plaintiff in error is adverse possession in himself and grantors under color of title for more than ten years last preceding the commencement of the action. On the 14th day of September, 1874, the said lot 5 was sold for taxes by the treasurer of York county to James Wildish, to whom a certificate was issued in due form. On the 17th day of August, 1877, a treasurer's deed was executed to Polly Ann Richardson, assignee of said certificate, through whom plaintiff in error claims by means of certain *mesne* conveyances. It is admitted by counsel for plaintiff in error that the treasurer's deed to Mrs. Richardson is void and insufficient to pass the title to the property in controversy, but it is claimed that it gives color of title and is sufficient to enable her and her grantees to avail themselves of the provisions of the statute of limitations as against the defendants in error. The last proposition may be con-

ceded, we think; still, the judgment is right and must be affirmed. There is a clear failure of proof of adverse possession for the statutory period. It is true that Mrs. Richardson is shown to have resided upon lot 5 as early as July, 1877, but it is clear from her testimony that she never held or claimed the north half of said lot adversely to defendants in error. On her direct examination she says: "Why, I bought one-half of the lot from Mr. Moore, and he said at some future time I could sign it over to his wife, and he sent Mr. Penn and Ray to me to sign a deed, and I signed that deed before I knew what I was doing." It should be stated in this connection that the witness evidently refers to the assignment to her of the tax certificate above mentioned by Moore, who held by assignment from Wildish, the purchaser. It also appears that she conveyed the north half of said lot to William Penn and Charles Ray, through whom plaintiff in error claims, on the 1st day of September, 1877. Again, the witness says: "When I bought the whole lot I paid—if I bought the whole lot I was to pay $60 for it, and if I only took half I paid $30." Again, on cross-examination, she is asked:

Q. And you never received anything for it [the north half]?

A. No, sir.

Q. Well, that is not an answer to the question?

A. If I bought the north lot?

Q. Yes.

A. I bought the north lot.

Q. And that you only claimed the south half?

A. That is all I did claim or ever will.

We are satisfied from the evidence in the record that the agreement between the witness and Mr. Moore was that she should purchase a half of the interest of the latter in the lot by virtue of the tax certificate, and on the execution to her of a deed, by the treasurer, hold title to one-half of the lot in trust for him, and that the deed to Penn

and Ray was but the execution of said trust. The earliest date, therefore, from which plaintiff in error can claim adverse possession in his grantors is September 1, 1877, when Penn and Ray went into possession, under their deed above mentioned, and which is less than ten years prior to the commencement of the action.

2. It is argued that one of the defendants in error, Jones, did not authorize the bringing of the action. But the proof does not sustain said claim, even admitting it to be material under the issues. The testimony of Messrs. Osborn and Farnsworth, attorneys for defendants in error, who were examined by plaintiff in error, is to the effect that they have never had any communication with Mr. Jones, and did not know his residence; that the action was brought under the direction and employment of Mr. Fuller. The presumption is that the latter had authority to act in behalf of his co-plaintiff. The judgment of the district court is right and should be

AFFIRMED.

MAXWELL, CH. J., concurs.

NORVAL, J., not sitting.

UNION INSURANCE COMPANY OF CALIFORNIA V. JOSEPH S. BARWICK, AND GERMAN-AMERICAN INSURANCE COMPANY OF NEW YORK V. JOSEPH S. BARWICK.

FILED FEBRUARY 15, 1893. Nos. 5453, 5454.

1. **Fire Insurance: ASSIGNMENT OF POLICY: ACTION FOR LOSS: PROPER PARTY PLAINTIFF.** A business man having insured his stock of good for $4,000, made a formal assignment of the

policies with the consent of the insurers to one B, to secure a contingent liability as indorser on his notes. He also executed a chattel mortgage on his goods for the same purpose. The notes were paid by the maker and B. released from liability on the notes. In an action on the policies for a loss, *held*, that it was properly brought in the name of the insured.

2. ———: PROOF OF LOSS: WAIVER OF OBJECTIONS. Where proof of loss is furnished to the insurance company to which it objects, it must return the same with its objections within a reasonable time or its objections will be unavailing.

3. ———: ARBITRATION: PROVISION OF POLICY. A provision in a policy of insurance for arbitration is of no force where the insurance company denies its liability on the policy.

4. ———: CHANGE OF TITLE TO INSURED CHATTELS. A mortgage of chattels to secure a contingent liability of the mortgagee as indorsee and under which the mortgagee does not take possession is not such change of title as to avoid the policy.

5. ———: INSTRUCTIONS set out in the record *held* not prejudicial to the companies.

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

Joseph S. Barwick brought suit against The Union Insurance Company of California and The German-American Insurance Company of New York, to recover upon their policies the amount of insurance written by each upon his wholesale stock of cigars and tobacco. The causes were tried together, and judgment rendered against each of the defendants. The companies prosecuted proceedings in error, and the cases were reviewed together upon the same record. *Judgments affirmed.*

Charles Offutt, for plaintiffs in error:

The petitions showed that Barwick had disposed of his title to recovery. He was not the real party in interest, and had no right to maintain either action in his own name. (Sec. 29, Code; *Lytle v. Lytle* 2 Met. [Ky.], 127.) The written assignment could not be changed by acts of

Barwick, and the action must be brought in the name of the assignee. (Sec. 29, Code; *Mills v. Murry*, 1 Neb., 327.) One is the real party in interest, and must bring the action in his own name, whenever a final judgment in an action brought by him would be a complete bar to any other action on the same demand by any other party. (Pomeroy, Remedies, secs. 128–129; *Killmore v. Culver*, 24 Barb. [N. Y.], 656–657; *James v. Chalmers*, 6 N. Y., 209–215; Hawes, Parties to Actions, sec. 34; *Hays v. Hathorn*, 74 N. Y., 486; Pomeroy, Remedies and Remedial Rights [2d ed.], secs. 126, 132; Bliss, Code Pleading, sec. 46.) This rule applies to insurance polices payable to mortgagee "as his interest may appear." (*Bonefant v. American Ins. Co.*, 76 Mich., 653; *Westchester Fire Ins. Co. v. Coverdale*, 48 Kan., 446; *Glover v. Wells*, 29 N. E. Rep. [Ill.], 680; *Fogg v. Ins. Co.*, 10 Cush. [Mass.], 346; *Southern Fertilizer Co. v. Reames*, 11 S. E. Rep. [N. Car.], 467; *Hastings v. Westchester Fire Ins. Co.*, 73 N. Y., 149.) There was a total failure to make and furnish proofs of loss called for by each policy. Furnishing proofs of loss was a condition precedent to suit. (*German Ins. Co. v. Fairbank*, 32 Neb., 750; *McCann v. Ætna Ins. Co.*, 3 Id., 207.) There was a total failure of proof on the question of arbitration. An award by arbitrators was a condition precedent to suit. (*Scott v. Avery*, 5 H. L. Cas. [Eng.], 811; *Viney v. Bignold*, 20 Q. B. D. [Eng.], 172; *Delaware & Hudson Canal v. Pennsylvania Coal Co.*, 50 N. Y., 250; *Wolff v. Ins. Co.*, 21 Vroom [N. J. Law], 453; *Hall v. Norwalk Ins. Co.*, 57 Conn., 105, 114; *Adams v. Ins. Co.*, 70 Cal., 198; *Carroll v. Girard Ins. Co.*, 72 Cal., 297; *Gauche v. Ins. Co.*, 10 Fed. Rep., 347; s. c. 4 Woods [U. S.], 102; *Hamilton v. Ins. Co.*, 136 U. S., 242; *Hutchinson v. Ins. Co.*, 26 N. E. Rep. [Mass.], 440; *Morley v. Ins. Co.*, 20 Ins. L. J. [Mich], 581; *Gasser v. Sun Fire Office*, 42 Minn., 315; *Davenport v. Long Island Ins. Co.*, 10 Daly [N. Y.], 535.) The proofs of loss were not fur-

nished. The requirement as to a certificate from a public officer is not less imperative than other conditions. (2 Phillips, Insurance, 472; *Woosley v. Wood*, 6 Term R. [Eng.], 710; *Ins. Co. v. Lawrence*, 2 Peters [U. S.], 25; *Gilligan v. Ins. Co.*, 87 N. Y., 626; *Ins. Co. v. Sennett*, 41 Pa. St., 161; *Mueller v. Ins. Co.*, 87 Id., 399; *Kelly v. Sun Fire Office*, 20 Ins. L. J. [Pa.], 407.) The pleadings alleged a performance of the conditions, not their waiver, and it was error to admit evidence tending to prove a waiver, or to instruct the jury as to what constituted a waiver. (*German Ins. Co. v. Fairbank*, 32 Neb., 753; *Phœnix Ins. Co. v. Bachelder*, Id., 493; *Livesey v. Omaha Hotel Co.*, 5 Neb., 50; *Lumbert v. Palmer*, 29 Ia., 108; *Eiseman v. Hawkeye Ins. Co.*, 74 Id., 11; *Baldwin v. Munn*, 2 Wend. [N. Y.], 399; *Oakley v. Morton*, 11 N. Y., 29; *Pier v. Heinrichoffen*, 52 Mo., 333.) The sufficiency of the proofs of loss was for the court, not the jury, to determine. (*Miller v. Ins. Co.*, 2 E. D. Smith [N. Y.], 268; *Klein v. Ins. Co.*, 13 Pa. St., 247; *Ins. Co. v. O'Neill*, 1 Atl. Rep. [Pa.], 592; *Ins. Co. v. Doll*, 35 Md., 89; *Ins. Co. v. Stibbe*, 46 Id., 302; *Neese v. Ins. Co.*, 55 Ia., 604; *Ins. Co. v. Shepard*, 12 S. E. Rep. [Ga.], 22; *Gauche v. Ins. Co.*, 10 Fed. Rep., 356.) The delivery of the key was a delivery of the goods. (*Chaplin v. Rogers*, 1 East [Eng.], 192; Benjamin, Sales [6th Am. ed.], 1043; 12 Am. & Eng. Encyl. Law, 519.) The chattel mortgage effected a change of title. (*Stewart v. Otoe Co.*, 2 Neb., 185; *Adams v. Nebraska City National Bank*, 4 Id., 373; *Marseilles Manufacturing Co. v. Morgan*, 12 Id., 69; *Ahlman v. Meyer*, 19 Id., 68; *Nelson v. Garey*, 15 Id., 535; *Loeb v. Milner*, 21 Id., 399; *Schumitsch v. American Ins. Co.*, 48 Wis., 30; *Western Massachusetts Ins. Co. v. Riker*, 10 Mich., 280; *Foote v. Phenix Ins. Co.*, 119 Mass., 259; *Farmers Ins. Co. v. Archer*, 36 O. St., 608; *Baldwin v. Phœnix Ins. Co.*, 60 N. H., 164; *Tallman v. Atlantic Fire Ins. Co.*, 3 Keyes [N. Y.], 87; *Olney v. German Ins. Co.*,

50 N. W. Rep. [Mich.], 100; *Lee v. Agricultural Ins. Co.*, 44 N. W. Rep. [Ia.], 683; *East Texas Fire Ins. Co. v. Clarke*, 15 S. W. Rep. [Tex.], 166.) What is a "material part" of a contract is a question of law, and the jury should have been instructed on that question. (*Oliver v. Hawley*, 5 Neb., 444; *Palmer v. Largent*, 5 Id., 223; Thompson, Trials, secs. 1395, 1950, 2187.) It was error to leave the question of waiver to the jury without stating what facts and circumstances would constitute a waiver. (*Estabrook v. Omaha Hotel Co.*, 5 Neb., 76; *Boehme v. Omaha Hotel Co.*, Id., 80.)

Talbot & Bryan, contra:

A policy of insurance is to be construed, if possible, so as to carry into effect the purpose for which the premium was paid and it was issued. (*Phœnix Ins. Co. v. Barnard*, 16 Neb., 90; *Springfield Ins. Co. v. McLimans*, 28 Id., 850; *German Ins. Co. v. Penrod*, 35 Id., 273.) Barwick is the real party in interest. An assignment as collateral security is not a "sale, transfer, or change of title," within the meaning of the policy. (*Ayers v. Hartford Ins. Co.*, 21 Ia., 193; *Hoagland v. Van Etten*, 22 Neb., 681.) The testimony shows that Barwick was always in possession. The giving of the chattel mortgage without a transfer of the property did not invalidate the policies. (*Byers v. Ins. Co.*, 35 O. St., 619; *Ins. Co. v. Spankneble*, 52 Ill., 53; *Aurora Fire Ins. Co. v. Eddy*, 55 Id., 213; May, Ins., sec, 269; *Quarrier v. Peabody Ins. Co.*, 10 W. Va., 507; *Judge v. Connecticut Fire Ins. Co.*, 132 Mass., 521; *Hennessey v. Manhattan Fire Ins. Co.*, 28 Hun [N. Y.], 98; *Hanover Fire Ins. Co. v. Conover*, 20 Brad. [Ill.], 297; *Nussbaum v. Northern Ins. Co.*, 37 Fed. Rep., 524; *Ins. Co. v. Gordon*, 68 Tex., 144; *Bryan v. Traders Ins. Co.*, 145 Mass., 389; *Hammell v. Queen's Ins. Co.*, 54 Wis., 72; *Loy v. Ins. Co.*, 24 Minn., 315; *Phœnix Ins. Co. v. Mutual Life Ins. Co.*, 101 Ind.,

393; *Ins. Co. v. Grover & Baker Machine Co.*, 41 Mich., 131; *Marts v. Ins. Co.*, 44 N. J. L., 478; *Ins. Co. v. Jackson*, 83 Ill., 302; *Lane v. Ins. Co.*, 28 American Decisions, 154; *Humphry v. Ins. Co.*, 15 Blatchford [U. S.], 35; *Orrell v. Hampden Fire Ins. Co.*, 13 Gray [Mass.], 431; *Shepherd v. Union Fire Ins. Co.*, 38 N. H., 232; *Jackson v. Ins. Co.*, 23 Pick. [Mass.], 418; *Rice v. Tower*, 1 Gray [Mass.], 426; *Rollins v. Ins. Co.*, 5 Foster [N. H.], 200; *Jecko v. Ins. Co.*, 7 Mo. App., 308; *Savage v. Ins. Co.*, 52 N. Y., 502; *Van Dusen v. Charter Oak Ins. Co.*, 1 Rob. [N. Y.], 55; *McNamara v. Ins. Co.*, 47 N. W. Rep. [S. Dak.], 288.) The question of ownership by the insured is for the jury. (*Planters Mutual Ins. Co. v. Engle*, 52 Md., 468; *Pittsburgh Ins. Co. v. Frazee*, 107 Pa. St., 521.) The companies by denying all liability dispensed with the necessity of furnishing proof of loss. (*Phenix Ins. Co. v. Bachelder*, 32 Neb., 494.) The companies denied liability, and it was therefore unnecessary to demand an award by arbitrators. (*Pratt v. N. Y. Central Ins. Co.*, 55 N. Y., 505; *Franklin Fire Ins. Co. v. Chicago Ice Co.*, 36 Md., 102; *Ætna Fire Ins. Co. v. Tyler*, 16 Wend. [N. Y.], 385.) Neither party demanded arbitration, and an award was for that reason unnecessary. (*Wright v. Susquehanna Mutual Fire Ins. Co.*, 20 Atl. Rep. [Pa.], 716; *Bailey v. Ætna Ins. Co.*, 46 N. W. Rep. [Wis.], 440.) Under an allegation of performance of a condition proof of a waiver is admissible without alleging the waiver. (May, Insurance, sec. 589; *Schultz v. Merchants Ins. Co.*, 57 Mo., 331; *Pennsylvania Fire Ins. Co. v. Dougherty*, 102 Pa. St., 568; *Levy v. Peabody Ins. Co.*, 10 W. Va., 560; *Smith v. Ins. Co.*, 33 Up. Can. Q. B., 70; *Russell v. State Ins. Co.*, 55 Mo., 592; *German Fire Ins. Co. v. Grunert*, 112 Ill., 69.) Parties are estopped from objecting to defective notice by a denial of liability and a failure to object to the sufficiency of the proof of loss, and by endeavoring with the insured to ascertain the amount of loss. (May, Ins., sec. 505; *Manhattan*

Fire Ins. Co. v. Stein, 5 Bush [Ky.], 652; *Ligon's Adm'r v. Ins. Co.*, 87 Tenn., 341; *Ins. Co. v. Neve*, 2 McMullen [S. Car.], 237; *Lewis v. Ins. Co.*, 52 Me., 492; *Ins. Co. v. Schueller*, 60 Ill., 465; *O'Conner v. Ins. Co.*, 31 Wis., 160; *Grange Milling Co. v. Assurance Co.*, 118 Ill., 396.) The sufficiency of the proofs of loss and waiver were questions for the jury to pass upon. (*New Orleans Ins. Association v. Matthews*, 65 Miss., 301; *Chadbourne v. German-American Ins. Co.*, 31 Fed. Rep., 533; *Knickerbocker v. Gould*, 80 Ill., 388; *Edwards v. Baltimore Ins. Co.*, 3 Gill [Md.], 176; *Mercantile Ins. Co. v. Holthaus*, 43 Mich., 423; *Kramer v. People's Ins. Co.*, 14 Mo. App., 584; *O'Brien v. Phenix Ins. Co.*, 76 N. Y., 459; *McPike v. Western Assn. Co.*, 61 Miss., 37; *Solomon v. Metropolitan Ins. Co.*, 10 Jones & Sp. [N. Y.], 22; *Enterprise Ins. Co. v. Parisot*, 35 O. St., 35; *Lowry v. Lancashire Ins. Co.*, 32 Hun [N. Y.], 329; *Argall v. Old North State Ins. Co.*, 84 N. Car., 355; *Farmers Mutual Fire Ins. Co. v. Moyer*, 97 Pa. St., 441; *Crawford County Mutual Ins. Co. v. Cochran*, 88 Pa. St., 230; *Miller v. Germania Fire Ins. Co.*, 13 Phila. [Pa.], 551; *Todd v. Ætna Ins. Co.*, 2 W. N. C. [Pa.], 227; *Fawcett v. Ins. Co*, 27 Up. Can. Q. B., 225; *American Fire Ins. Co. v. Hazen*, 17 W. N. C. [Pa.], 249.) The trial court stated what facts constitute a waiver, and it was proper to leave it to the jury to say what facts were proved. (*Dreyfus v. Aul*, 29 Neb., 197.)

MAXWELL, CH. J.

On the 12th day of January, 1890, the defendant insured "his wholesale stock of cigars, cigarettes, snuffs, pipes, and all kinds of tobacco, including packages, cases, and boxes containing same, and other merchandise usually kept by wholesale tobacconists, all of which contained in the second story and basement, brick, composition roof, building, situate on lot A of subdivision of lots 11 and 12, block 33, Lincoln, Nebraska," with each of

the plaintiffs in error for the sum of $2,000, said policies to continue in force for one year. On the 17th of February, 1890, the stock of goods, then alleged to be of the value of $6,500, was badly injured by fire, the loss claimed being $5,000. After the loss the adjusters of both of the insurance companies named appeared and examined the goods, but seem to have failed to make an adjustment of the loss, hence the defendant in error brought an action in the district court of Lancaster county upon both policies. The cases were tried together, and the jury returned a verdict in favor of the defendant in error and against each company for the sum of..... $1,750 00
With interest at seven per cent..... 140 87

$1,890 87

And a motion for a new trial having been overruled, judgment was entered on the verdict.

Four errors are relied upon by the plaintiffs in error to secure a reversal of the case. These will be noticed in their order.

"1. That the plaintiff was not the real party in interest, as he had assigned his interest in the goods."

The testimony shows that C. C. Burr, of Lincoln, had befriended the defendant in error and among other things had indorsed his notes for considerable sums at the First National Bank of Lincoln. Burr seems to have asked for no security, but the defendant in error, to protect him from possible loss, assigned the policies with the assent of the companies to him, "as his interest should appear," and also executed a chattel mortgage on a part or all of his goods to Burr to secure the same contingent liability. There was no change of possession, and the defendant in error paid the notes in question and released Burr from liability thereon. He (Burr) was a witness on the stand and disclaims any right, title, or interest in the goods in question. It also appears that the defendant in error is

the only party who has any right or title to the property. The defendant in error, therefore, is the real party in interest, and the first error assigned is not well taken.

"2. That two conditions precedent were not complied with, viz., proof of loss and submission to arbitration."

The propositions are considered together in both briefs, but we will consider them separately.

1. The proof shows that both companies were notified of the loss immediately after it occurred; that an adjuster appeared and with the defendant in error took an account of the goods and personally saw and inspected the injured goods, and seems to have obtained a pretty accurate view of the condition of the stock before the fire. The principal object of proof of loss is to obtain a correct statement from the owner of the property injured or destroyed, of the amount of the loss and the date of its occurrence. Other things are required in the proof, but they are subsidiary to the main statements. If objections are made to the form of the proof they should be communicated to the insured and he should be required to make out a full statement; otherwise the objections will be unavailing. A company may have notice from their own agent at a given point that a certain loss has occurred, and if it acts upon that information and sends an adjuster to estimate the amount of the same, etc., it is no doubt a waiver of proof.

We find the following letter in the record:

"OMAHA, NEB., 31st March, '90.

"*J. S. Barwick, Esq., Lincoln, Neb.*—DEAR SIR: I am in receipt of a paper containing a list of goods said to have been damaged by fire on February 17, 1890, which are alleged to have been insured under policy 1313 of the German-American Insurance Company, said paper being signed and sworn to by you.

"If we are correctly informed you parted completely with the title of all goods which may have been covered by any policy of ours on February 4, 1890, and have not

since become the owner of any such goods, consequently we fail to recognize any liability towards you.

"Respectfully, FRANCIS DANA,
"*Special Agent.*"

In the case at bar the testimony shows that proof of loss was made, to which no objections were taken, and it is now too late.

2. The Union Insurance Company's policy contains this provision: "The amount of sound value and of loss or damage shall be determined by agreement between this company and the assured, but if differences shall arise as to the amount of any loss or damage, or as to any question, matter, or thing, except the validity of the contract or the liability of this company, concerning or arising out of this insurance, every such difference shall, at the written request of either party, be submitted to competent and impartial persons, one to be chosen by each party, and the two so chosen shall select an umpire to act with them in case of their disagreement; and the award, in writing, of any two of them shall be binding and conclusive as to the amount of such loss or damage, or as to any question, matter, or thing so submitted." There is no claim that either party desired to arbitrate the matters in difference between them, and hence the provision has no force. In the German Insurance policy there is no provision for arbitration. That provision, however, is inserted in a policy for the purpose of having the amount of the loss adjusted in an amicable manner, where, in fact, the insurance company admits its liability, but is uncertain as to the amount of the loss. If the company denies its liability for the loss there would be nothing from its standpoint to arbitrate. Hence, the rule does not apply where the company denies its liability. (*German-Am. Ins. Co. v. Etherton*, 25 Neb., 505.) In the case cited it was held that a provision of the kind named in a policy was void, the effect being to oust the courts of their legitimate jurisdiction. The second objection is not well taken.

3. The third error assigned is that the proofs of loss were not sufficient, and were for the court and not the jury to pass upon. We do not care to comment further upon the proofs of loss. They were sufficient to notify the companies and they acted upon such notice, but refused to pay the loss. If the proofs were defective the defects were waived.

4. The fourth error is in refusing to hold that the chattel mortgage referred to did not avoid the policy. It is now well settled that a mortgage of chattels, where there is no change of possession, will not avoid a policy of insurance.

In *Byers v. Farmers Ins. Co.*, 35 O. St., 606, the fifth point in the syllabus is as follows: "It was a condition of the policy, that 'if the property be sold or transferred, or any change take place in the title, either by legal process or otherwise, * * * without the consent of the company, the policy shall be void.' This condition was not broken by the execution of a mortgage on the property without such consent." (See, also, *Commercial Ins. Co. v. Spankneble*, 52 Ill., 53; *Aurora Fire Ins. Co. v. Eddy*, 55 Id., 213; May, Ins., sec. 269, and cases in note; *Quarrier v. Peabody Ins. Co.*, 27 Am. Rep., 582; *Bryan v. Traders Ins. Co.*, 145 Mass., 389.)

In *Hammel v. Queen's Ins. Co.*, 54 Wis., 72, 11 N. W. Rep., 351, it is said: "In *Strong v. Ins. Co.*, 10 Pick., 40, it was held that a condition in the policy which provided, 'that if the property should be sold or conveyed in whole or in part the policy should be void,' was not broken by a sale upon execution and that the provision in the policy referred only to voluntary assignments. (See, also, *Smith v. Putnam*, 3 Pick., 221; *Doe v. Carter*, 8 Term R., 57; *Stetson v. Ins. Co.*, 4 Mass., 330; *Franklin Ins. Co. v. Findley*, 6 Whart., 483; Wood, Ins., sec. 326; *Baley v. Ins. Co.*, 80 N. Y., 21; *Barlow v. Ins. Co.*, 63 Id., 399; *Commercial Ins. Co. v. Spankneble*, 52 Ill., 53; *Starkweather v. Ins. Co.*, 2 Abb.

[U. S. C. C.], 67.) These cases and numerous others that might be cited seem to settle the question that the condition prohibiting a sale, transfer, or conveyance of the insured property is to be construed as limited to a voluntary transfer, and not to a sale or transfer made by adverse legal proceedings. In all these and similar cases it is probable that if an adverse legal sale, transfer, or conveyance of the insured property had been made previous to the loss, so as to divest the insured of all right, title, or interest therein, no recovery could be had for want of an insurable interest in the policy-holder at the time of the loss."

It is also said (11 N. W. Rep., 355): "In the following cases it is held that executory contracts for the sale of the insured property do not avoid the policy under similar conditions: *Ins. Co. v. Lawrence*, 4 Metc. [Ky.], 9; *Martin v. Ins. Co.*, 11 Barb. [N. Y.], 624; *Clinton v. Ins. Co.*, 45 N. Y., 454; *Phillips v. Ins. Co.*, 10 Cush., 350; *Hill v. Ins. Co.*, 59 Pa. St., 474; *Washington v. Ins. Co.*, 32 Md., 421; *Jackson v. Ins. Co.*, 16 B. Mon. [Ky.], 224; *Power v. Ins. Co.*, 19 La., 28; *Hutchinson v. Wright*, 25 Beav., 444. The last case was a marine insurance, and before loss the assured transferred his interest to a third person by an absolute conveyance, and his vendee was entered as owner on the register; but upon the trial it was proved that the transfer was in fact a mortgage. The defendant insisted the policy was avoided under two provisions of the association. The first was that if the ship was sold, the risk should cease from the date of the sale, unless notice was given to the secretary. No notice of sale or mortgage either was given to the secretary. The other provision was, 'that no vessel which is mortgaged shall be insured, unless the mortgagee give a written guarantee,' etc. No such guarantee had been given. It was held the plaintiff could recover, notwithstanding the form of his conveyance, upon proof that it was intended as a mortgage in fact; and, second, that the mortgage given after the in-

surance was not a violation of the second provision. It seems to us that the words used in the condition in this policy clearly look to such a sale, transfer, or alienation as passes the title and carries with it the right of possession. Such is the definition of the words 'sold,' 'transferred,' 'alienated'; and, if they are made to include a sale upon execution, it is by giving them a meaning which they do not ordinarily receive. The added words, 'change in the title or possession,' do not extend the meaning. It is the title to the estate which is to be changed, not a mere right which may or may not ripen into a change of title." These cases and many others which might be cited show that a mere security does not transfer the title and defeat a recovery for loss. The fourth point, therefore, is not well taken.

5. The fifth error assigned is in giving the fourth paragraph of the instruction, which is as follows: "You are instructed that the insurance policies issued by defendants to plaintiff constitute contracts in writing between the insurer and insured, equally binding upon each party to the agreement; and if it appears that either party to the agreement has failed to comply with the terms thereof in any material part, then the party so failing cannot insist upon the performance of the agreement by the other party, unless you should further find that compliance with the agreement on the part of the party failing had been waived by the other party." It must be confessed that the particular object of this instruction is not apparent. It seems to be an indirect mode of saying to the jury that if they found that the plaintiff below had not complied with the conditions of the policy in any respect, then he could not recover. It is evidently directed at the plaintiff below, and was prejudicial to him, and the attorney for the companies does not contend that it was prejudicial to them. The other instructions are not objected to, and are presumed to be correct. Upon the whole case it is apparent that the plaintiff below is entitled to recover, and no real

defense has been shown to the action. A contract of fire insurance is one of indemnity in case of loss or damage by fire. Like any other contract, it should be sustained if possible. Where there has been an actual loss without fault of the accused it should be adjusted and paid with reasonable promptness. That is the contract; and there is no justice in contending in court for years against a just claim in order to secure a compromise or diminution in the amount. There is nothing in this record that tends to impeach the good faith of the defendant in error, and so far as appears his claim is just. The judgment is

AFFIRMED.

THE other judges concur.

LANNING, ANTRAM & COMPANY V. JOSEPH BURNS.

FILED FEBRUARY 15, 1893. No. 4895.

Negotiable Instruments: ACTION ON CHECK WHERE PAYMENT WAS STOPPED: PARTIAL FAILURE OF CONSIDERATION. In an action against the drawer of a negotiable check who had stopped payment of the same, the defendant in his answer admitted that a portion of the amount was due the payee, but alleged that there was partial failure of consideration *Held*, That upon the pleadings the plaintiff could recover the amount admitted to be due, and that a judgment for the defendant could not be sustained.

2. ———: ———: BONA FIDE PURCHASER: DEFENSE. In an action between the parties on a negotiable instrument and persons not *bona fide* purchasers for value before maturity a partial defense is available.

3. ———: ———: ———: NOTICE. If the plaintiffs are *bona fide* purchasers without notice they are entitled to protection.

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

A. G. Greenlee, and *Marquett, Deweese & Hall,* for plaintiff in error.

Pound & Burr, contra.

MAXWELL, CH. J.

This is an action upon a check given by the defendant. On the trial of the cause the jury returned a verdict for the defendant, upon which judgment was rendered. It is claimed by the plaintiff that on the issues made by the pleadings the plaintiff is entitled to recover and that the judgment cannot be sustained. The petition is as follows:

"The plaintiff complains of the defendant and says that it is a corporation organized and existing under and by virtue of the laws of the state of Kansas, and doing business as bankers in said state; that on the 31st day of January, 1889, this defendant executed, signed, and delivered to George H. Allen a check on the Lincoln National Bank of Lincoln, Neb., for $163.12, payable to the said George H. Allen, or order. On the same day said check was by the said George H. Allen, for a valuable consideration, and in the due course of business, assigned to Kerndt Brothers, and was by them for a valuable consideration, and due course of business, and without notice, assigned to this plaintiff, and that afterwards the said Joseph Burns, without any right or authority so to do, stopped the payment of said check, to the damage of this plaintiff in the sum of $163.12.

"2. On the 4th day of February, 1889, said check was protested for non-payment, and the costs of protesting the same are $3.29.

"Wherefore plaintiff prays judgment against said defendant for the sum of $163.12 with interest from the 31st day of January, 1889, and $3.29 with interest from the 4th day of February, 1889, and costs of suit."

To this petition the defendant filed an answer as follows:

"Now comes the defendant, Joseph Burns, and for answer to the petition of the plaintiff filed herein says: He admits that the plaintiff is a corporation organized and existing under and by virtue of the law of the state of Kansas and doing business as bankers in said state; that on the 31st day of January, 1889, defendant executed, signed, and delivered to George H. Allen a check on the Lincoln National Bank of Lincoln, Nebraska, for $163.12, payable to the order of said George H. Allen; admits that on the same date said check was by the said George H. Allen for a valuable consideration assigned to Kerndt Brothers, and by them for a valuable consideration assigned to plaintiff, and that afterwards the defendant stopped the payment of said check; admits that said check was on the 4th day of February, 1889, protested for non-payment. And defendant denies each and every allegation in said plaintiff's petition contained; that said check was given said Allen on said 31st day of January, 1889, by defendant at Bird City, Kansas, in the conditional payment of a balance of account between defendant and said Allen; that said Allen so took said check upon the express condition that payment of the same would be stopped by defendant, if upon reaching his office and books he should find that the representations made by said Allen to obtain said check were untrue, and that the consideration, or a part of the consideration thereof, had failed; that the representations made to this defendant by said Allen were untrue; that the consideration for the same failed to the amount of $100, and that said check was obtained by fraud upon this defendant; that the plaintiff and said Kerndt Brothers had due, actual, and legal notice that said check was given by defendant and accepted by said Allen upon said condition, and that payment of the same was liable to be stopped, and defendant says that plaintiff took said check with such notice; that C. L. Antram is the cashier of the plaintiff and that Morris Kerndt is a member of the firm of Kerndt Brothers, and was, on

said 31st day of January, 1889, the city treasurer of said Bird City, Kansas.

"Wherefore the defendant prays that the plaintiff's appeal in this case may be dismissed, and that defendant may go hence and recover his costs."

The reply denies the new matter set forth in the answer and that there was any fraud or misrepresentation. The original check, with the indorsements thereon, was introduced in evidence and is as follows:

"24066. LINCOLN, NEB., Jan. 31, 1889. No. ——

"Lincoln National Bank, 3 29

"Pay to G. H. Allen, or order, $163 12

one hundred and sixty-three $\frac{12}{100}$ dollars. ——

Count $166 41

"JOSEPH BURNS."

It is indorsed as follows: "G. H. Allen. Kerndt Brothers. Pay to A. Yeazel, cashier, for collection account of Lanning, Antram & Co., Bird City, Kansas. C. L. Antram, cashier. Pay C. T. Boggs, cashier, or order, for account of Exchange National Bank, Hastings, Neb. A. Yeazel, cashier."

It will thus be seen that defendant really pleads a failure of consideration to the amount of $100, and in effect admits the remainder of the debt. Therefore, if the action was between the original parties, the plaintiff, upon the pleadings, would be entitled to recover a portion of the claim. The rule is thus stated by Daniel, 1 Neg. Inst, sec. 201: "Whenever the defendant is entitled to go into the question of consideration, he may set up the partial as well as the total want of consideration. Thus, where the drawer of a bill for £19 5*s*., payable to his own order, sued the acceptor, and it appeared that the bill was accepted for value as to £10 only, and as an accommodation to the plaintiff as to the residue it was held that although with respect to third persons the amount of the bill might be £19 5*s*., yet as between these parties it was an accept-

ance to the amount of £10 only. So, where a note was given by A to B for the sum of £32 6*s.* 10*d.*, upon B's representation and assurance that that amount was due, whereas A owed B £10 14*s.* 11*d.*, and no more, the note was held good only for the amount that was actually due. So, where a father gives his son a note partly for services and partly as a gratuity, the partial want of consideration might be pleaded as to such portion of the amount as was gratuitous; and it would be no objection that no distinct amount was fixed upon as compensation for the services, but it would be for the jury to settle what amount was founded on the one consideration, and what on the other." (Thompson, Bills [Wilson's ed.], 64; Byles, Bills [Sharwood's ed.], 239; *Darnell v. Williams*, 2 Stark. [Eng.], 166 [3 E. C. L. R.]; *Barber v. Backhouse*, 1 Peake [Eng.], 86; *Clark v. Lazarus*, 2 M. & G. [Eng.], 167; *Forman v. Wright*, 11 C. B. [Eng.], 481.) The words of the plea, "fraudulently and deceitfully," were rejected as surplusage. (*Parish v. Stone*, 14 Pick. [Mass.], 198.) In addition to this there is testimony in the record tending to show that the plaintiff is a *bona fide* holder, and as such entitled to protection. As there must be a new trial, we will not discuss the facts. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

C. GEE WO v. STATE OF NEBRASKA.

FILED FEBRUARY 15, 1893. No. 5485.

1. **Information:** NEGATIVE AVERMENT OF PROVISO IN STATUTE. In charging an offense under a statute the general rule is that a negative averment of the matter of a proviso is not required in an information, unless the matter of such proviso enters into and becomes a part of the description of the offense, or is a qualification of the language defining or creating it.
2. ———: ———: PHYSICIANS: PRACTICE IN VIOLATION OF LAW. Where, however, the matters of the proviso point directly to the character of the offense, or where the statute includes two or more classes which will be affected thereby, such as physicians who remove into the state to practice after the passage of an act to regulate the practice of medicine, and persons who were residing in the state and practicing under a former act, in such cases the information must show on its face that the accused does not belong to either class.
3. **Statutes:** ACT CREATING STATE BOARD OF HEALTH. Act held to be within the power of the legislature, and in its general scope not in conflict with the constitution.

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

W. S. Shoemaker, for plaintiff in error.

George H. Hastings, Attorney General, and *Jacob Fawcett*, for the state.

MAXWELL, CH. J.

The plaintiff in error was convicted of practicing medicine in the state without lawful authority so to do as provided in the act of 1891, to establish a state board of health, and to regulate the practice of medicine in the state of Nebraska, and was sentenced to pay a fine and costs. The act of 1891 superseded the law of 1881. It

appears from the record that the plaintiff in error in 1889 had filed the statement and affidavit required by the law of 1881, and was practicing under that law when the act of 1891 took effect. The first error alleged is that the information fails to charge an offense. It is as follows:

"THE STATE OF NEBRASKA, } ss.
COUNTY OF DOUGLAS. }

"Of the May term of the district court of the 4th judicial district of the state of Nebraska, within and for the county of Douglas and state of Nebraska, in the year of our Lord 1892. I, Timothy J. Mahoney, county attorney in and for the county of Douglas, in said state of Nebraska, who prosecutes for and in behalf of said state in the district court of said district, sitting in and for said county of Douglas, and duly empowered by law to inform of offenses committed in said county of Douglas, come now here in the name and by the authority of the state of Nebraska, and give the court to understand and be informed that on the 29th day of March, A. D. 1892, C. Gee Wo, late of the county of Douglas aforesaid, in the county of Douglas and state of Nebraska aforesaid, then and there being, then and there did unlawfully practice medicine, surgery, and obstetrics, and the branches thereof, without first having obtained and registered a certificate from the state board of health authorizing him, the said C. Gee Wo, to practice medicine, surgery, and obstetrics as required by law, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Nebraska."

Section 9 of the act of 1891 is as follows: "It shall be the duty of all persons intending to practice medicine, surgery, and obstetrics in the state of Nebraska, before beginning the practice thereof in any branch thereof, to present his diploma to said board, together with his affidavit that he is a lawful possessor of the same, that he has attended the full course of study required for the degree of M. D.,

and that he is the person therein named. Such affidavit may be taken before any person authorized to administer oaths, and the same shall be attested under the hand and official seal of such official, if he has a seal, and any person swearing falsely in such affidavit shall be guilty of perjury, and subject to the penalty therefor."

Section 11 is as follows: "All physicians who shall be engaged in practice at the time of the passage of this act shall, within six months thereafter, present to said board their diplomas and affidavits as hereinbefore provided, or, in the case of persons not graduates who were entitled to registration and practice under the provisions of the act entitled 'An act to regulate the practice of medicine in the state of Nebraska,' approved March 3d, 1881, on affidavit showing them to have been entitled to so register and practice, and a certified transcript of their registration under said act, and upon their doing so shall be entitled to the certificate herein provided, which they shall file with the county clerk as herein provided; *Provided*, That no one having the qualifications required in, and having complied with, said act of March 3d, 1881, shall be liable to prosecution for failure to comply with this act until the expiration of said period of six months."

It will be observed that there are two classes of persons entitled to registration. First, those who are about to begin the practice of medicine in the state; and second, persons already engaged in the practice under the act of 1881, when the act of 1891 took effect.

In *State v. Phippin*, 70 Mich., 11, the defendant was arrested for unlawfully advertising and holding himself out to practice medicine. The act of 1883, under which the defendant was arrested and tried, prescribed the necessary qualifications to practice medicine in the state as follows:

"The necessary qualifications to practice medicine in this state shall be: 1. That every person who shall have actually practiced medicine continuously for at least five

years in this state, and who is practicing when this act shall take effect, shall be deemed qualified to practice medicine in this state, after having registered in the office of the county clerk as provided by this act. 2. Every graduate of any legally authorized medical school in this state, or in any one of the United States, or in any other country, shall be deemed qualified to practice medicine and surgery in all its departments after having registered as provided by this act; *Provided*, That the provisions of this act shall not be construed so as to prohibit any student or under-graduate from practicing with and under the instruction of any person legally qualified to practice medicine and surgery under and by the provisions of this act; *Provided*, That every person qualified to practice medicine and surgery under the provisions of this act shall, within three months after this act shall take effect, file with the county clerk of the county wherein he has been engaged in practice, or in which he intends to practice, a statement sworn to, setting forth: 1. If he is actually engaged in practice in said county, the length of time he has been engaged in such continuous practice, and if a graduate of any medical college, the name of the same, and where located."

The substance of the information in that case is as follows: "That on the 29th day of June, and between that day and the day of making this complaint (July 28th), at the city of Cedar Rapids, in the county of Kent, one William W. Phippin did then and there advertise and hold himself out to the public as authorized to practice medicine, and did practice medicine in the city, county, and state aforesaid, without having the qualification required by law so to do, to-wit, he (the said William W. Phippin) not having practiced medicine continuously for five years in this state and he (the said William W. Phippin) not being a graduate of any legally authorized medical college in said state, or in any of the United States, or in any other country, against the forms of the statute," etc.

It will be observed that the Michigan statute, like that of this state, provides for two classes of persons who may practice medicine, and the information shows on its face that the defendant belonged to neither class and therefore was not authorized to practice medicine in the state. Mr. Bishop, in Directions and Forms, sec. 999, has given a somewhat similar form against an unlicensed physician. It is claimed on behalf of the state that the second class is a mere exception and therefore need not be negatived. Mr. Chitty, Cr. Law, vol. 1, 232, in speaking of exceptions, says: "And it is never necessary to negative all the exceptions which by some other statute than that which creates the offense might render it legal, for these must be shown by defendant for his own justification. Thus, an indictment for a misdemeanor against a receiver of stolen goods need not aver that the principal has not been convicted. And in general all matters of defense must come from the defendant and need not be anticipated by the prosecutor; nor is it necessary for him to negative the commission of a higher offense. So it is never necessary to state the conclusion of law to be derived from the premises, but merely to state the facts and leave the court to draw the inference." (*Rex v. Pemberton*, 2 Burr. [Eng.], 1036; *King v. Reynolds*, 1 Wm. Bla. [Eng.], 230; *King v. Baxter*, 5 T. R. [Eng.], 84; *King v. Higgins*, 2 East T. R. [Eng.], 19, 20.) Thus, in an indictment for disobedience of a justice's order it need not be averred that the order was not revoked, nor is it necessary to negative the commission of a higher crime. (*Rex v. Higgins*, 2 East T. R. [Eng.], 5–20; 1 Bish., Cr. Pro., sec. 513.) From an examination of all the cases the true rule appears to be, a negative averment to the matter of an exception or proviso in a statute is not requisite in an indictment or information, unless the matter of such exception or proviso enters into or becomes apart of the description of the offense, or a qualification of the language defining or creating it. Therefore the proviso in the stat-

ute excepting from its operation those persons who conscientiously observe the seventh day of the week as the Sabbath, instead of the first, need not be referred to. The reason is, the proviso is not a part of the description of the offense, but is in the nature of a personal privilege—to keep the seventh day of the week as the Sabbath in the place of the first, but whether the defendant is entitled to the benefit of the proviso must be determined from the evidence. A different rule prevails, however, where the matter of the proviso points directly to the character of the offense, and is made a material qualification of the statutory description of it, as in an indictment for selling liquor, where the proviso was, "'That nothing contained in this section shall be so construed as to make it unlawful to sell any spirituous liquors for medicinal and pharmaceutical purposes.' In such case the indictment or information must contain the negative averment that the sale of the liquor was not for medicinal or pharmaceutical purposes." (*Hirn v. State*, 1 O. St., 16; *Billigheimer v. State*, 32 Id., 435; Maxw., Cr. Pro., 477.) Applying these rules to the information in question and it fails to show that the plaintiff in error belongs to either of the principal classes set forth in the statute, and is therefore insufficient. It is unnecessary, therefore, to examine the evidence.

2. It is claimed on behalf of the plaintiff in error that the act is in conflict with the constitution. The general power of the state to provide that only persons skilled in the healing of diseases shall hold themselves out to the public as physicians is undoubted.

This power cannot be used to build up any particular school of medicine, but is designed to permit only those qualified by education and good moral character to engage in the business. Even with the utmost care upon the part of the state it may well be questioned if some of the medical schools are as thorough as they should be. The relation between the physician and the patient is necessarily

confidential. If a person is afflicted with some ailment, or some member of his family is sick, and he calls to his aid a physician, he has a right to expect the ordinary degree of skill and care. His restoration or that of his loved ones—nay, life itself—may depend upon the skill, attention and good judgment of the physician. No one, therefore, should be permitted to practice who has not the necessary diploma, or has been in actual practice in the state for the time prescribed by statute. The board, however, is not to use its power arbitrarily nor to refuse a certificate in a proper case, nor to attempt to build up any particular system. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

FREMONT, ELKHORN & MISSOURI VALLEY RAILROAD COMPANY V. JOSEPH J. POUNDER.

FILED FEBRUARY 15, 1893. No. 4907.

1. **Railroad Companies: NEGLIGENCE: FENCES: GATES AT FARM CROSSINGS.** Under the statute, where a railway has been in operation in any county of the state for six months, it is its duty to erect and maintain on the sides of its road, except at crossings of public roads and within the limits of cities and villages, suitable and amply sufficient fences to prevent cattle, horses, etc., from getting on the railroad. Gates at farm crossings are a part of the inclosure of the railroad and must be suitable and amply sufficient to prevent stock from getting on the track.

2. ———: ———: ACTION TO RECOVER VALUE OF STOCK INJURED AND KILLED ON THE TRACK. *Held*, That the petition states a cause of action.

3. ———: NEGLIGENCE IN MAINTAINING GATEWAY AND IN HANDLING TRAINS: EVIDENCE: INSTRUCTIONS set out in the opinion are not erroneous.

4. ———: ———: ———: INSTRUCTIONS set out in opinion *held* properly refused.

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

John B. Hawley and *D. C. McKillip*, for plaintiff in error.

Norval Bros. and *Lowley*, *contra*.

MAXWELL, CH. J.

This is an action to recover the value of a horse of the defendant in error which was killed, it is alleged, by the fault of the plaintiff in error, and for injuries to another horse in the amount of $25. On the trial of the cause the jury returned a verdict in favor of the defendant in error for $140, with interest at seven per cent for one year and four months, and judgment was rendered thereon. There are four errors assigned in the brief of the plaintiff in error for a reversal of the case:

1. That the petition does not state a cause of action.
2. The court erred in giving instruction No. 8.
3. The court erred in giving instruction No. 1.
4. The court erred in refusing to give defendant's instructions 1, 1½, and 2 asked by the plaintiff in error.

The errors assigned will be considered in their order.

The petition is as follows: "The plaintiff complains of the defendant, for that said defendant is a corporation organized under the laws of the state of Nebraska; that on or about the 31st day of December, 1889, the defendant was operating a railroad through Seward county, said road being opened for use and used for more than six months in said county; that said railroad of defendant runs through

plaintiff's land on which he lives; that the line of road through the plaintiff's land is fenced, and is fenced for more than half a mile southwest on an adjoining piece of a large draw where there is a bridge of at least 100 feet in length, on which said road is built; that said bridge is not planked on the ties, but is left open, and the fence of said defendant's road runs up to and is fastened to the northeast end of said bridge, said bridge being from ten to twenty feet high from the ties to the ground; that the defendant when it fenced said road through plaintiff's land put in a gate on plaintiff's land to enable him to cross over its track from one side of his farm to the other, but said gate and fence were so poorly made and improperly constructed, with no fastenings of any kind to prevent the wind from blowing it open, and said defendant negligently and carelessly suffered and permitted the said gate and fence to be out of repair, and all of which facts the defendant had due notice, and negligently failed and neglected to repair, fix, fasten, and properly construct the same; that at the date last aforesaid the plaintiff's horses, grazing in plaintiff's pasture on the land aforesaid adjoining defendant's track, passed through the aforesaid defectively constructed and insufficiently secured gate upon the right of way of defendant, and the defendant while so operating its road as aforesaid, by its passenger train going southwest at the time and place aforesaid, by its agents and servants so running said passenger train as aforesaid, saw said plaintiff's horses upon its right of way and road bed of defendant close to the northeast end of the aforesaid bridge; that said train was stopped about 150 feet before reaching the bridge; that at the time said train stopped, the section men of defendant were endeavoring to drive said horses from the bridge toward and past the engine and passenger coaches, and before said horses could be driven up to and past said engine and cars aforesaid the defendant, by its servants and employes, negligently and carelessly started said engine and

cars aforesaid without giving said sectionmen time to get said horses past said engine and cars aforesaid, two of said horses being already scared and frightened were, by the carelessness and negligence of the defendant in starting its engine and cars aforesaid, driven into said bridge, whereby one of said horses was so injured that it died, and the other was greatly injured and damaged, to the plaintiff's damage of $150. Wherefore the plaintiff demands judgment for the sum of $150 and costs of this suit."

It will be observed that the plaintiff below states two grounds for a recovery. First, that the gate was insufficient and known to be such; and second, negligently frightening the horses so that they ran upon the bridge and were injured. The act of June 22, 1867, provides that the railway company "shall, within six months after the lines of such railroad or any part thereof are open, erect and thereafter maintain fences on the sides of their said railroads, or the part thereof so open for use, suitable and amply sufficient to prevent cattle, horses, sheep, and hogs from getting on the said railroad, except at the crossings of public roads and highways and within the limits of towns, cities, and villages, with openings or gates or bars at all the farm crossings of such railroad, for the use of the proprietors of the lands adjoining such railroad, and shall also construct, where the same has not already been done, and hereafter maintain at all road crossings, now existing or hereafter established, cattle guards suitable and sufficient to prevent cattle, horses, sheep, and hogs from getting on to such railroad, and so long as such fences and cattle guards shall not be made after the time hereinbefore prescribed for making the same shall have elapsed, and when such fences and guards, or any part thereof, are not in sufficiently good repair to accomplish the objects for which the same is herein prescribed is intended, such railroad corporation and its agents shall be liable for any and all damages which shall be done by the agents, engines, or trains of any

such corporation, or by the locomotives, engines, or trains of any other corporations permitted and running over or upon their said railroad, to any cattle, horses, sheep, or hogs thereon; and when such fences and guards shall have been fully and duly made, and shall be kept in good and sufficient repair, such railroad corporation shall not be liable for any such damages, unless negligently or willfully done.

"Sec. 2. Any railroad company hereafter running or operating its road in this state, and failing to fence on both sides thereof, against all live stock running at large at all points, shall be absolutely liable to the owner of any live stock injured, killed, or destroyed by their agents, employes, or engines, or by the agents, employes, or engines belonging to any other railroad company or person, running over or upon any such road or there being."

It is the duty of a railroad company to erect "suitable and amply sufficient gates at all farm crossings." We think sufficient is alleged to show that the gate in question did not conform to the statutory requirements and the proof fully sustains the allegations of the petition. The first objection is overruled.

2. The testimony tends to show that the railway in question runs through the lands of the defendant in error for a considerable distance; the railway company put in a farm crossing for him across the track with gates; that the gates are about eighteen feet in length and consist of four boards six inches in width and about seven-eighths of an inch in thickness. There are three cross-pieces to each gate, viz., one at each end and one in the middle. There were no hinges—the gates being held in place by an upright and cleats at each end. The testimony also shows that the railway fence at that place consists of four barbed wires; that the posts were not well braced and by reason of tightening the wires the posts were drawn out of perpendicular line, the effect of which was to render the gate too short

for the aperture and render it liable to be blown open by the wind. There is testimony also tending to show that the section boss had been notified of the condition of the gate and requested to fix the same. This, however, he denies. On December 31, 1889, the gate in question was blown open and the defendant in error's horses, which were in his pasture, escaped through the gateway onto the railway track, and were injured.

The instructions objected to are as follows: "If you find from the evidence that defendant, when it fenced its road through plaintiff's land, put in a gate, but so negligently and carelessly kept up and maintained such gateway across its right of way that plaintiff's horses passed through such gateway upon said defendant's right of way and railroad and were killed or injured in consequence thereof, then you should find for plaintiff." This conforms to the proof. The company is required to "erect and maintain fences on the sides of the railroad suitable and amply sufficient to prevent cattle, horses, sheep, and hogs" from getting on said railroad. A gate is a part of a railway fence and like it must be sufficient for the purpose indicated. There was no error therefore in the giving of this instruction.

3. The first instruction is as follows: "The jury are instructed that the plaintiff brings this action to recover the sum of $150 against the defendant, for, on the 31st day of December, 1889, defendant then, by its servants and employes, negligently and carelessly causing one of said plaintiff's horses to be killed and another to be injured and damaged, such horses being upon the defendant's right of way at the time, and going thereon through a gateway across such right of way, which plaintiff alleges was kept in such negligent manner that such gate was left open so as to permit such horses to pass in upon said defendant's right of way, and that being thereon, defendant, by its servants and employes, negligently and carelessly started

their engine and cars, and their passing upon such railroad then frightening such horses so that they were driven into defendant's bridge." It will be observed that the instruction conforms to the cause of action as set forth in the petition, and there was no error in giving the same.

4. The instructions asked by the railway company and refused are as follows:

"The jury are instructed that under the statutes and laws of this state the defendant railroad company cannot be held liable for any injury done to plaintiff's horses on the ground of negligence of defendant in not having or keeping the fence on the sides of its road, or any part thereof, or any gates therein, in sufficiently good repair to prevent horses from getting on its said railroad, or for any defect in said fence or gates alone, unless you find that the alleged injury to said horses was caused by actual collision with defendant's locomotive, engine, or trains.

"1½. You are instructed that under the statutory law of this state, to make a railroad company liable for injury to stock for want of a fence, or for want of a sufficient fence such as the law requires the company to erect and maintain to inclose its track, the injury to the stock must be caused by actual collision, that is, it must be done by the agents, engine, or cars of the company, or the willful misconduct of the trainmen in the course of their employment.

"2. You are further instructed that under the pleadings and evidence in this case the defendant cannot be held liable for any injury to plaintiff's horses, unless you find that said horses were willfully driven or frightened onto said bridge by defendant's employes in starting the train, said horses not having been injured by any actual collision or contact with the engine or cars of the train, and said engine and train of defendant's having come to a stop before said horses, or either of them, went on the bridge where injured."

These instructions were properly refused, as they do not

conform to the testimony and the law in the case. There is no error in the record, and the judgment is

AFFIRMED.

THE other judges concur.

JOHN D. THOMAS V. CHARLES W. EDGERTON, CONSTABLE, ET AL.

FILED FEBRUARY 15, 1893. No. 4671.

1. **Replevin Bonds: LIABILITY OF OFFICERS FOR SUFFICIENCY OF SURETIES: CONSTABLES.** At common law an officer was liable for the sufficiency of the sureties on a replevin bond; but under section 189 of the Code he is liable after twenty-four hours only where the defendant in replevin has excepted to the sufficiency of the sureties, and they or new sureties have failed to justify.

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

Bradley & De Lamatre, for plaintiff in error.

W. S. Felker, *G. A. Rutherford*, and *George H. Hastings*, *contra:*

The officer executing a writ of replevin is not liable for the sufficiency of the sureties on the replevin bond where the defendant fails to except thereto. (*Westervelt v. Bell*, 19 Wend. [N. Y.], 531; *Wilson v. Williams*, 18 Id., 585; Cobbey, Replevin, sec. 695.) A constable who approves the sureties on a replevin bond is protected by the provisions of sec. 189 of the Code. (*State v. Wait*, 23 Neb., 166.)

MAXWELL, CH. J.

This is an action brought by the plaintiff against Edgerton, who is a constable in the city of Omaha, and his sureties, for approving an insufficient undertaking given by one Helm in an action of replevin. The facts are substantially as follows: In December, 1886, one Olive Helm began an action in replevin against the plaintiff before a justice of the peace to recover the possession of certain goods, to which she claimed the right of possession. The order of replevin was placed in the hands of Edgerton for service. He thereupon seized the goods and delivered them to Helm upon the making and delivery to him of an undertaking signed by one J. F. Clapp as surety. The judgment in the replevin action was in favor of the plaintiff for a return of the goods or the value thereof assessed at $90. The goods could not be found, and it is alleged that Clapp is insolvent, and was known to Edgerton to be so when he approved the bond. There is no charge in the petition of willful misconduct on the part of Edgerton. On the trial of the cause judgment was rendered in favor of the defendants.

Section 1037 of the Code provides: "The officer shall not deliver to the plaintiff, his agent or attorney, the property so taken until there has been executed by one or more sufficient sureties of the plaintiff a written undertaking to the defendant in at least double the value of the property taken, but in no case less than $50, to the effect that the plaintiff shall duly prosecute the action, and pay all costs and damages which may be awarded against him."

Section 1040 provides: "If the undertaking required by section 1037 be not given within twenty-four hours from the taking of the property under said order, the officer shall return the property to the defendant. And if the officer deliver any property so taken to the plaintiff, his agent or attorney, or keep the same from the defend-

ant without taking such security within the time aforesaid, or if he take insufficient security, he shall be liable to the defendant in damages."

Section 189 also provides: "The defendant may, within twenty-four hours from the time the undertaking referred to in the preceding section is given by the plaintiff, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fails to do so, he must be deemed to have waived all objections to them. When the defendant excepts, the sureties must justify upon notice as bail on arrest. The sheriff or other officer shall be responsible for the sufficiency of the sureties until the objection to them is waived as above provided or until they justify. The property shall be delivered to the plaintiff, when the undertaking required by section 186 has been given." This is substantially section 210 of the Code of New York although in that state the exceptions may be filed "within three days." (Voorheis, Code [9th ed.], 394.)

The section above referred to seems to have been copied into the Code from the Revised Statutes of that state (2 Rev. Stat., 527, secs. 28–33).

In *Wilson v. Williams*, 18 Wend. [N. Y.], 585, the statute was construed, and it was held that the officer was not liable. The same ruling was made in *Westervelt v. Bell*, 19 Wend. [N. Y.], 531–533. In the latter case it is said: "The old precedent of declarations in actions on the case against the sheriff for taking insufficient sureties in replevin will no longer answer without some additional averments. Formerly the sheriff was answerable for the sufficiency of the sureties in all cases; but now he is liable only where the defendant in replevin has excepted to the sufficiency of the sureties, and they, or new sureties to be offered by the plaintiff, have failed to justify within the time prescribed by law. (2 R. S., 527, secs. 28–33.) It must now be averred in declaring against the sheriff that an exception was taken that the sureties or others in their

place did not justify, and that judgment of discontinuance has for that cause been rendered against the plaintiff in replevin." (See also Cobbey, Replevin, sec. 695.) No exceptions were filed to the sufficiency of the sureties and this fact is undisputed. The defendant, therefore, after twenty-four hours would not be liable. It is very clear that both the pleadings and proof fail to show a liability of the defendants, or either of them, to the plaintiff. The judgment is right and is

AFFIRMED.

THE other judges concur.

HENRY W. HAYNES V. AULTMAN, MILLER & COMPANY ET AL.

FILED FEBRUARY 15, 1893. No. 5066.

1. **Revivor of Judgment by Default:** DEFENSE: DEFECTIVE SERVICE OF SUMMONS. Where service upon a defendant is made by leaving a copy of the summons at his residence and judgment is taken against him thereon by default, he may, in an action to revive the judgment, show that the place of service was not his place of residence; that he nor any member of his family had notice of the action until after judgment had been rendered against him, together with any other defense to the judgment.

2. ———: ———: REVIEW: INJUNCTION. In an action to revive a dormant judgment certain defenses were set up which tended to show that the court when it rendered the judgment had no jurisdiction of the defendant and that he had a defense to the action. A demurrer to the answer was sustained. *Held*, That the defendant should have prosecuted error from the ruling on the answer and that he could not bring an action by injunction to enjoin the judgment and set up substantially the same facts as were set forth in his answer.

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

G. M. Cleveland and *E. W. Adams*, for plaintiff in error.

H. M. Uttley, contra.

MAXWELL, CH. J.

This is an action to enjoin a judgment. A demurrer was sustained to the amended petition, and the plaintiff not desiring to amend his petition the action was dismissed. The petition is as follows:

"The plaintiff complains of the defendants for that on the 8th day of July, 1880, the defendant Aultman, Miller & Co. obtained three several judgments against the plaintiff in his absence, before Michael Costello, a justice of the peace in and for Holt county, Nebraska, copies of the record of which judgment are hereto attached, marked respectively Exhibits A, B, and C, and made a part hereof.

"2. On the 6th day of April, 1881, said defendant Aultman, Miller & Co. caused a transcript of said judgments to be filed in the office of the clerk of the district court of Holt county, Nebraska.

"3. No execution was ever issued upon said judgments, or either of them, until the 12th day of December, 1889, as hereinafter stated, and prior to said last mentioned date no attempt was, by said Aultman, Miller & Co., ever made or threatened to be made to enforce said judgments, or either of them, or any part thereof, and this plaintiff believed from the facts hereinafter set out that no attempt ever would be made to collect said judgments or any part thereof, and the said judgments became dormant by a lapse of time and the operations of the law on the 8th day of July, 1885.

"4. That on the 27th day of August, 1888, the defendant Aultman, Miller & Co. filed in the office of the clerk of the district court of Holt county, Nebraska, three separate motions to revive said judgments, copies of which

motions are hereto attached, marked Exhibits 1, 2, and 3, and made a part hereof.

"5. That on the 30th day of August, 1888, the Hon. M. P. Kinkaid, judge of the district court of Holt county, Nebraska, made three separate orders commanding the plaintiff herein to show cause why said judgments should not be revived, which orders were, on the 10th day September, 1888, served on the plaintiff herein, copies of which orders are hereto attached, marked respectively Exhibits 4, 5, and 6, and made a part hereof.

"6. That on the 19th day of September, 1888, the plaintiff herein filed in the office of the clerk of the district court of Holt county, Nebraska, three separate answers, copies of which are hereto attached marked respectively Exhibits 7, 8, and 9, and made a part hereof.

"7. That on the 23d day of October, 1889, defendant Aultman, Miller & Co. filed in the office of the clerk of the district court of Holt county, Nebraska, a demurrer to said answers of the plaintiff, a copy of which demurrer is hereto attached, marked Exhibit 10, and made a part hereof.

"8. That on the 9th day of November, 1889, the district court of Holt county, being in session, sustained said demurrer and entered an order and judgment in said court intending to revive said judgment, a copy of which order and judgment is hereto attached, marked Exhibit 11, and made a part hereof.

"9. That on the 12th day of December, 1889, defendant Aultman, Miller & Co. caused an execution to issue out of said district court upon said order and judgment, and caused said execution to be placed in the hands of defendant H. C. McEvony, as sheriff of said county, and said defendant McEvony, as such sheriff, threatens to and is about to levy said execution upon the property, and unless restrained by the order of this court the defendant will cause the property of this plaintiff to be taken, levied

upon, and sold to satisfy said execution and said order and judgment.

"10. That the said judgments were rendered by said justice of the peace in plaintiff's absence and without his knowledge, and no summons or notice of any kind was ever served upon plaintiff in either of the actions in which said judgments were obtained, nor was a copy of any summons or notice of any kind ever left at the usual place of residence of the plaintiff in Holt county, nor with any members of his family in either of said actions, and plaintiff had no residence in Holt county at the time that the said judgments were rendered, and had no residence in Holt county at the time that the writs of summons in said action purport to have been served as set forth in the transcript of said judgments attached hereto, and no member of plaintiff's family resided in said county of Holt at said times, and plaintiff did not know that any of said actions had been begun or were pending against him until four or five weeks after the rendition of said judgments; that copies of said writs of summons were left at a house in Holt county about seven miles southeast of O'Neill, at which house plaintiff had at one time resided, but from which plaintiff and all his family had removed out of Holt county long before the date of the pretended service of said writs, and no copies of either of said writs was ever delivered to plaintiff or left at any other place as above set forth.

"11. That he had a good defense to each of said actions before said justice of the peace in this, that said pretended judgments were founded upon, and said actions brought upon, three promissory notes given by this plaintiff to defendant Aultman, Miller & Co. in payment for a combined reaper and mower which this plaintiff had purchased from defendant Aultman, Miller & Co. under a warranty that said machine was fit for use in cutting hay and grain, on which warranty defendant relied, and without which

said warranty he would not have purchased the same. Said machine was not fit to cut hay and grain as represented by the plaintiff, but was wholly worthless as a mowing machine, and wholly worthless as a reaping machine, and was of no value whatever for any purpose, wherefore there was an entire failure of the consideration for said notes, and the said defendant in said actions, plaintiff herein, would have appeared and made his defense to said action upon said notes if he had had any knowledge whatever that suit had been brought upon said notes, or either of them.

"12. At the time of the rendition of the judgments aforesaid, said justice of the peace, Michael Costello, had no jurisdiction of the person of the defendant therein, Henry W. Haynes, plaintiff herein, and said H. W. Haynes has never had any opportunity to present his defense to the notes sued upon in said actions, and upon which said judgments were rendered, and that, too, without fault or negligence upon his part; and the plaintiff has no remedy at law.

"Plaintiff therefore prays that the defendants may be enjoined from collecting said judgment and enforcing said execution, and from levying upon the property of this plaintiff to satisfy said execution, perpetually, or until such time as defendant Aultman, Miller & Co. will submit to a trial of said causes of action upon which said judgments were founded upon the merits thereof, and for such other relief as may be just and equitable."

It appears from the exhibits attached to the petition, and made a part of it, that in the action to revive the judgments the plaintiff herein filed an answer in which he alleged, in substance, that the judgments were void for want of a finding that Haynes had removed from Holt county when the summons was left at his late residence therein, and that he had no notice of said summons or action until it was too late to appear in the action either by appeal or to open the judgment; that the notes in ques-

tion were given for a combined reaping and mowing machine, which was of no account or value, and the consideration therefor failed. It also appears that a demurrer was filed by Aultman, Miller & Co. to said answer, which demurrer was sustained, and the actions revived for the amounts of the original judgments, interest, and costs. It is probable that the court erred in sustaining the demurrer in those cases, and if the ruling upon the demurrer was before us for review that it would be reversed.

Section 471 of the Code provides "that when a judgment is recovered against one or more persons jointly indebted upon contract, those who were not originally summoned may be made parties to the judgment by action." Where the return of an officer shows service by leaving the summons at the residence of the debtor, the debtor may show as a defense to the judgment that the place of service was not his place of residence. This principle is recognized in *Blodgett v. Utley*, 4 Neb., 25, *Lane v. First Nat. Bank*, 6 Kan., 75, and *Sage v. Hawley*, 16 Conn., 106. If the debtor and all the members of his family are absent from the county, and the time of their return is uncertain, or their absence will be protracted beyond the time of trial, it is evident that a summons left at the former residence would not be sufficient to apprise the debtor of the action. For the purposes of that trial the summons would not be served at the residence of the debtor. The theory of our law is that the debtor shall have personal service, or its equivalent—notice left at his actual residence, otherwise it would be possible to perpetrate gross frauds upon the party sued. None of these matters can be considered in this case. This is an attack upon the judgment as revived, and if the court had jurisdiction which rendered the same, and there was an opportunity to defend, this action cannot be sustained. Upon both of these points we must hold with the defendants. The judgment is therefore

AFFIRMED.

THE other judges concur.

STATE OF NEBRASKA, EX REL. SCHOOL DISTRICT OF SOUTH OMAHA, V. J. W. PADDOCK ET AL.

FILED FEBRUARY 15, 1893. No. 5881.

1. **Cities of the Second Class.** South Omaha, as shown by the census of 1890, is a city of the second class, having more than 8,000, and less than 25,000 inhabitants, and not a city of the first class.
2. **School Taxes:** ESTIMATES: LEVY: MANDAMUS. The school board of South Omaha, on the 6th day of June, 1892, made an estimate of the amount of school tax to be leved in said city for that year. This estimate was imperfect in its statements and details. The defendants held the same until July 14, 1892, when they refused to levy the tax. Afterwards proceedings in *mandamus* were instituted and the court rendered judgment for the defendants. Corrected estimates were then filed. ***Held***, That such estimates related back to June 6 of that year, and that it was the duty of the defendants to levy the tax.

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

E. T. Farnsworth, for plaintiff in error.

T. J. Mahoney, contra.

MAXWELL, CH. J.

The relator made an application to the defendants to levy a school tax in the school district of South Omaha, and as the defendants refused, the relator applied for a writ of *mandamus*. On the hearing the court rendered a judgment denying the writ because South Omaha was a city of the first class. In 1891 the legislature passed an act in relation to cities of the first class, the first section of which declares that all cities which, according to the census of 1890, contained more than 10,000 and less than 25,000 inhabitants should be cities of the first class. The census

returns show that South Omaha at the time the census was taken in 1890 contained 8,062 inhabitants, and therefore was not a city of the first class. No doubt it contains many more than 10,000 inhabitants at the present time, but that increase does not affect this case. South Omaha, however, is a city of the second class, having more than 8,000 and less than 25,000 inhabitants, and is governed by the provisions of the act in relation to such cities. I South Omaha is a city of the second class it is conceded that the defendants are the proper parties to levy the school taxes, unless there are objections, first, to the estimate and, second, to the time it was received. It will be admitted that the estimate is not as definite as is desirable. The whole amount required is stated, but the amount derived from licenses and other sources is stated at about $20,000, leaving it to be inferred that $15,000 should be levied upon the taxable property in the city for the support of schools. The second question is as to the time this tax should be levied. The first estimates were made by the school board on the 6th of June, 1892, and on the 18th of that month they were sent to the defendants. It appears that the resolution of the school board adopting the estimates contained a provision that the tax so levied was to be used for the support of schools, but in their report to the defendants these words were omitted, hence the defendants failed to levy the tax, and continued the cause until the 14th day of July, 1892, when they refused to levy the tax; thereupon an action was brought to compel such levy, and the court held "that the report of the board of education to the defendants was not made according to law." The school board thereupon held a meeting, at which the following proceedings were had:

"SOUTH OMAHA, August 12, 1892.

"*To the Honorable the Board of County Commissioners of Douglas County, Nebraska*—GENTLEMEN: At a meeting of the board of education of school district of South

Omaha, held on the 11th day of August, 1892, a corrected estimate of the funds required for all purposes was made, and the following resolution was adopted:

"*Resolved*, by this board, That the following is an estimate of the different funds required by school district of South Omaha for the fiscal year next ensuing: For the support of schools during the fiscal year next ensuing, the total sum of $30,000; for the purchase of a school site, the total sum of $2,500; for the erection of a school house, the total sum of $2,500; making a total amount of funds required for all purposes of $35,000. You will, therefore, please levy a tax on the taxable property of South Omaha, sufficient to raise the above mentioned funds, less the amount to be derived from other sources. The amount of funds in the hands of the treasurer of said district, and available for the support of school during the fiscal year next ensuing, is about $16,000; the amount expected to be raised from fines is about $100; the amount expected to be raised from licenses will be nothing above that already paid into the treasury, which is included in the $16,000 above mentioned; the amount expected to be raised from the state school money, apportioned to the district, will be about $4,000. That a duplicate of said estimate was duly sent to the city council of South Omaha.

"SCHOOL DISTRICT OF SOUTH OMAHA,
"By W. B. CHEEK, *President.*
"J. H. BULLA, *Acting Secretary.*"

A copy of this estimate was on the same day served on the defendants, but they refused to levy the tax, whereupon this action was brought to compel such levy. The court below refused to grant the writ because South Omaha was a city of the first class, and, therefore, its city council could levy the necessary taxes. In this the court was mistaken. The amended estimates, as filed in August, were but a continuation of those filed on June 6. The defendants should have notified the relator of the defects complained of and

given an opportunity to correct the same. The cause is very different from one where the first estimate was filed with the board after the levy was made. In such case the right to levy the tax would be very doubtful, but in the case at bar the defendants had the estimates before them—defective, it is true—showing that a tax should be levied. The judgment of the district court is reversed and a peremptory writ is awarded against the defendants as prayed.

REVERSED AND WRIT ALLOWED.

THE other judges concur.

J. T. HALE v. MISSOURI PACIFIC RAILWAY COMPANY.

FILED FEBRUARY 15, 1893. No. 4221.

1. **Carriers:** SHIPMENT OF LIVE STOCK: FAILURE TO FEED AND WATER: LIABILITY FOR DAMAGES: PLEADING. Section 4386, Rev. Stat. U. S., imposes a penalty upon a railway company which transports live stock, if the animals are kept in the cars more than twenty-eight consecutive hours, "unless prevented from so unloading by storm or other accidental causes." There is further exception where animals "have proper food, water, space, and opportunity to rest" on the cars. *Held*, That in addition to the penalty imposed by statute, a railway company which failed to comply with the above requirement would be liable in damages to the owner of the stock, but to state a cause of action the petition must show that the case is not within the exceptions named.

2. ———: ———: NEGLIGENCE: DAMAGES. In an action for the loss of three horses lost by negligence, and three which died from the same cause, the value of all being placed at $355, and for damages to two car loads, the jury returned a verdict for $335.84. *Held*, That it was apparent that the damages were awarded upon both causes of action set forth in the petition, and neither the pleadings, nor proof justifies a verdict for general damages.

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

Brome, Andrews, & Sheean, and *Byron Clark,* for plaintiff in error.

J. W. Orr and *A. N. Sullivan, contra.*

MAXWELL, CH. J.

This action was brought by the plaintiff against the defendant in the district court of Cass county to recover for the loss of six horses and damages for injuries to two car loads shipped from San Antonio, Texas, to Norfolk, Nebraska. On the trial of the cause the jury returned a verdict in favor of the plaintiff for the sum of $335.84, upon which judgment was rendered. A large number of questions are discussed in the brief of the plaintiff, which do not seem to arise in the case and need not be noticed.

There are two counts in the petition. In the first it is alleged "that in May, 1886, the plaintiff shipped 181 horses from San Antonio, Texas, to Omaha, and that three of the said horses, of the value of $175, escaped through the defendant's negligence and were lost."

The second cause of action is as follows.

"1. The plaintiff complains of the defendant for that the defendant now is, and at all times hereinafter mentioned has been, a corporation, organized and existing under and by virtue of the laws of the state of Missouri, and operating lines of railway into and through the states of Missouri, Texas, and Nebraska, and into and through the county of Cass in the said state of Nebraska.

"2. At all the times and dates hereinafter mentioned defendant was a common carrier engaged in the business of transporting goods, wares, merchandise, and live stock for hire, for the public generally, to and from points on the line of its said railway, and on lines connected there-

with, with an office at San Antonio, Texas, and was operating its lines of railway between said town of San Antonio, Texas, and various points in said state of Nebraska.

"3. On the 19th day of December, 1886, plaintiff was engaged in buying horses in the state of Texas, with headquarters at San Antonio in said state, for shipment to and sale at points in said state of Nebraska.

"4. On the date aforesaid the defendant, for a good and valuable consideration, did undertake to and contract with the plaintiff for the transportation by said defendant for plaintiff of two car loads of mares belonging to said plaintiff from said San Antonio, Texas, to Norfolk, Nebraska, and in that behalf to protect and care for said mares and deliver them in good and safe condition within a reasonable and proper time at the point last above named.

"5. Under and in pursuance of said contract, which was in writing, on the date aforesaid plaintiff delivered to said defendant at said San Antonio, Texas, for shipment to Norfolk, Nebraska, fifty-four head of mares, which were received by defendant and placed in two stock cars used for the shipment of stock.

"6. Said defendant did not transport said mares to Norfolk, Nebraska, in a good and sound condition, and did not protect and care for said mares while in defendant's custody, but to the contrary said defendant, by its agents and servants, carelessly and negligently failed and refused to furnish and provide cars properly furnished and bedded for the shipment of said mares, and negligently refused to enable or permit plaintiff to procure proper bedding for the cars in which said mares were shipped, and said defendant, by its servants and agents, carelessly and negligently, and wholly disregarding plaintiff's rights in the premises, kept said mares confined in said cars while transporting them over defendant's line of railway, from Muscogee, Indian Territory, to Kansas City, Missouri, for thirty-six hours without food or water, or care of any kind,

and carelessly and negligently refused to permit said mares to be unloaded and fed and watered and cared for by plaintiff while *en route* between said points.

"7. Said defendant, by its servants and agents, carelessly and negligently, and wholly disregarding plaintiff's rights in the premises, kept said mares confined in said cars while transporting them over defendant's line of railway from Kansas City, Missouri, to Norfolk, Nebraska, for forty hours without food, water, or care of any kind, and carelessly and negligently refused to permit said mares to be unloaded and fed and watered and cared for by plaintiff while *en route* between said points, although plaintiff offered and requested that he be allowed so to do.

"8. Defendant, by its servants and agents, negligently and without cause delayed the transportation of said mares between the points hereinafter referred to and kept said mares confined in said cars, while *en route* from San Antonio to Norfolk, five days longer than was necessary and required for the transportation of said mares between said points in a proper and careful manner.

"9. That by reason of said carelessness and negligent acts of the servants and agents of defendant hereinbefore mentioned, three of said mares became sick and died, and were wholly lost to plaintiff, to plaintiff's damages in the sum of $180. The mares so lost were of the value of $180, and the balance of said mares became sick and diseased and had their manes and tails eaten off, thirty-four of said number being with foal lost their colts, and all much depreciated in value, to plaintiff's damage in the sum of $1,850. Wherefore plaintiff prays judgment against said defendant for the sum of $1,900, with interest thereon from the 1st day of May, 1887, besides costs of suit."

It will be observed that the second shipment was made December, 1886; that the cars were eleven days on the way; that in two instances it is charged the animals were kept on the cars more than twenty-eight hours, contrary

to the act of congress of March 3, 1873 (sec. 4386, Rev. Stat. U. S.), "unless prevented from so unloading by storm or other accidental causes." There is also a further exception in section 4388, viz., that when animals "do have proper food, water, space, and opportunity to rest, the provisions in regard to their being unloaded shall not apply." The proof as to delay in feeding and watering the animals before reaching Kansas City shows that the train was somewhat delayed, so far as we can see without the fault of the employes, and there was a delay of two hours at Kansas City, by reason of an engine being off the track. The proof also shows that the delay at Kansas City was caused by reaching that place on Christmas eve, and no freight train left for Omaha until Sunday evening; that there were no facilities at Papillion for feeding stock but it was proposed to stop at Fremont where there were facilities, but the plaintiff went to sleep and the stock was carried by. It is true the plaintiff testifies that the conductor promised to wake him up at Fremont, but failed to do so. But it will not be seriously contended that the company would be liable because the conductor failed to awaken the plaintiff. It was no part of his duties, and while an act of courtesy which should have been performed, yet if the conductor, from forgetfulness or other cause, failed in that regard, the company is not liable. The petition should show that this case is not within either of these exceptions in order to state a liability of the defendant for loss or damage.

2. The statement of injury to the animals is too general to admit proof of special damages. Thus, it is charged that more than thirty of the mares lost their colts, but there is nothing to show that the defendant is at fault in the matter. It is not contended that the injury was caused by the slow rate of travel, or by the failure to feed, water, and rest regularly, nor by other neglect of the defendant than to the jolts and tremor of the cars. So in regard to the depreciation in value of the mares, the charge is gen-

eral, and the proof in regard to all of these matters is but little better than the petition. An important fact seems to have been given but little weight, that these animals were transported in the month of December about 1,100 miles north, from a comparatively mild climate to a much colder one, and the colder weather no doubt had much to do with the pinched appearance of the animals when they reached Norfolk. No loss seems to have occurred on the U. P. railway from Omaha to Norfolk, and it seems to be unnecessary to discuss that question. So in regard to liability of the defendant under its contract. As the plaintiff evidently recovered on both his causes of action in the court below, there is no material error in the record and the judgment is

AFFIRMED.

THE other judges concur.

SAMUEL S. PORTER V. SHERMAN COUNTY BANKING COMPANY ET AL.

FILED FEBRUARY 15, 1893. No. 4612.

1. **Evidence**: VERDICT: REVIEW. The evidence being in writing and practically undisputed as to the amount due the plaintiff, a verdict for a sum greatly less cannot be sustained.
2. **Private Banks**: CORPORATIONS: LIABILITY OF STOCKHOLDERS: UNPAID STOCK. W. and T. were conducting a private bank at L., and on November 1, 1887, organized a corporation with an alleged capital of $50,000, of which they retained a controlling interest. They turned over the deposits and assets of the private bank to the new corporation, and notes were taken from a number of the stockholders for the amount of their stock. *Held*, That the stockholders were liable for the unpaid stock held by each, and for a sum equal to the shares so held by each for all liabilities of the bank accruing while he was a stockholder.

3 **De Facto Corporations.** The proof tends to show a *de facto* corporation and not a partnership.

4. **Banks: FAILURE TO PUBLISH NOTICE OF CONDITION: LIABILITY OF STOCKHOLDERS.** The debts having been contracted by the bank before it was in default, the provisions of sections 136 and 139 of the corporation law do not apply.

5. **Misjoinder of Causes of Action: WAIVER OF DEFECT.** Where there is a misjoinder of causes of action which plainly appears on the face of the petition, the adverse party should demur for that cause. If he fails to do so he will waive the defect.

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

Nightingale Bros., for plaintiff in error.

G. M. Lambertson and *J. R. Scott, contra.*

J. H. Broady, amicus curiæ.

MAXWELL, CH. J.

This is an action against the banking company and the several stockholders thereof to recover the sum of $3,817.85, with interest. The cause of action is set forth in the petition as follows:

"The said Sherman County Banking Company, defendant, is indebted to plaintiff in the sum of $3,768.88, with interest from July 1, 1888, at nine per cent per annum, as per agreement on an account stated between said parties, for moneys deposited with and loaned to said banking company, said account being so stated on July 1, 1888, upon which statement a balance of $3,768.88 was found due plaintiff from said defendant, the Sherman County Banking Company; no part thereof has been paid, though often demanded.

"3. There is due plaintiff from said defendant, the Sherman County Banking Company, on an account cur-

rent the sum of $48.97. The following is a copy of said account with all credits, to-wit:

"DR.

To rent of room occupied by said Sherman County Banking Company from May 1, 1888, to January 1, 1889, at $20 per month.....		$160 00
To rent collected of I. J. Hughes, as agent of plaintiff, from July 22, 1888, to December 22, 1888, at $7 per month.....		35 00
		$195 00
"CR.		
By taxes paid for plaintiff.....	$146 03	
To balance due.....	$48 97	

"No part thereof has been paid, though often demanded.

"4. The defendants Ezra S. Hayhurst, Lyman J. Tracy, John Hogue, Milton A. Theis, Edward E. Whaley, H. J. Shupp, Charles A. Wheeler, William H. Morris, James K. Pearson, Joel R. Scott, Charles W. Gibson, and William R. Mellor were, at the time of contracting said debt by the Sherman County Banking Company, defendant, stockholders of said corporation, and still are, and at all times since November 1, 1887, have been, stockholders of said corporation. 'The said corporation made an assignment for the benefit of creditors on December 26, 1888, and is wholly insolvent.' (The last sentence is an amendment inserted by leave of court June 20, 1889.)

"The said Sherman County Banking Company, defendant, is not a duly organized and duly incorporated company under the laws of the state of Nebraska, but has wholly failed to comply with the provisions of chapter 16, Compiled Statutes of Nebraska, in relation to giving notice, and other requisitions of organization, and has failed to comply with general provisions of law governing cor-

porations. Such failure to comply with the law is specifically set forth as follows, to-wit:

"(*a.*) The articles of incorporation of said Sherman County Banking Company, as filed and recorded in the county clerk's office, of said county of Sherman, and state of Nebraska, do not set forth the time and conditions on which the capital stock of said corporation is to be paid in.

"(*b.*) No notice of the incorporation or organization of said Sherman County Banking Company was ever published by said corporation in any newspaper near the principal place of business of said corporation.

"(*c.*) No copy of the by-laws of said corporation, with the names of the officers appended thereto, was ever posted in a conspicuous place at the place of doing business of said corporation, in Loup City, Nebraska, subject to public inspection.

"(*d.*) No notice of the amount of all the existing debts of said corporation was ever printed and published in any newspaper, signed by the president and a majority of the directors of said corporation, since the time of commencing business of said corporation, on November 1, 1887, until the present time.

"(*e.*) The capital stock of said corporation was not fully subscribed at the date of filing the articles of incorporation of said Sherman County Banking Company, in the county clerk's office of said county, nor at any time thereafter.

"(*f.*) The capital stock of said corporation was not paid for in cash, but about 400 shares of said capital stock, representing a nominal value of $40,000, was paid for with the notes of said stockholders, payable to the order of said corporation, and part of the remaining $10,000 worth of said capital stock was paid for with real estate, which said corporation had no power to take and hold, and with worthless notes and securities belonging to Edward E. Whaley and Milton A. Theis, formerly partners, doing business as bankers under the firm name of the Sherman

County Banking Company, and only a very small portion of said capital stock was paid for with cash, to-wit, about $3,000.

"(*g.*) No quarterly statement under oath of the assets and liabilities of said corporation was ever made and published by said corporation as required by section 7, article XI, of the constitution of the state of Nebraska, entitled 'Corporations,' subdivision 'Miscellaneous Corporations.'

"6. By reason of the failure of said corporation, defendant, to comply with the provisions of the law as set forth in paragraph 8, the defendants Ezra S. Hayhurst, Lyman J. Tracy, John Hogue, Milton A. Theis, Edward E. Whaley, H. J. Shupp, Charles A. Wheeler, William H. Morris, James K. Pearson, Joel R. Scott, Charles W. Gibson, and William R. Mellor became and are jointly and severally liable to the plaintiff for the amount of the debt of said Sherman County Banking Company, defendant, as set forth in this petition, as stockholders of said corporation."

There is a joint answer of the defendants, in which they set up various defenses.

On the trial of the cause the jury returned a verdict for the plaintiff for the sum of $1,741.02, upon which judgment was rendered. It will be observed that one of the principal grounds upon which a recovery is sought against the stockholders is, that no articles of incorporation were entered into and filed before the bank commenced business. This, however, is a mistake, as articles were both filed and published, setting forth the essential facts required by statute, and the banking company, when doing business, was a *de facto* corporation. Where there is a substantial compliance with the law, mere defects, even if they exist, will not render the articles void, therefore the stockholders are not liable for the failure to incorporate.

2. The testimony tends to show that prior to November 1, 1887, Edward E. Whaley and Milton A. Theis were

conducting a bank at Loup City; that prior to that time the plaintiff had transacted business with said firm as bankers and had on deposit with them at the time of the transfer the sum of $2,711.35. This amount the new corporation assumed. It also collected rent and other moneys for the plaintiff to make up the amount claimed.

The Sherman County Banking Company filed its articles of incorporation in the county clerk's office on the 31st day of October, 1887. These articles authorized it to transact a general banking, exchange, and collecting business at Loup City. The capital stock is fixed at $50,000, with leave to increase the same from time to time to $300,000. It occupied the banking house formerly occupied by Whaley and Theis, who were the promoters and principal stockholders of the new bank. They turned over to the new bank the furniture, safe, and fixtures of the old one, which were valued at the sum of $1,489.37; also all real estate possessed by said parties, at the value of $10,506.79; all bills receivable or bills discounted of its predecessor, at the value of $67,635.74. In consideration of these alleged assets, the new banking company assumed the liabilities of the banking firm of Whaley & Theis, being ordinary deposits, $21,668.74, and time deposits, $10,236.95. The alleged assets were thus $47,726.21 in excess of the deposits. The bank failed December 26, 1888. The plaintiff, to establish his own claim, identified a pass book furnished him by the bank, from which it appears in the handwriting of the cashier of the bank that the balance due the plaintiff on deposit on July 1, 1888, was the sum of $3,768.88. The plaintiff, it appears, was at Loup City at the time named, and he examined the books of the bank and the sum stated seems to have been agreed upon as his due. The whole account, however, shows an error of $361.61, to be deducted, which leaves a balance due the plaintiff on the first day of July, 1888 of $3,407.27 upon the deposits, and a further sum of $47.42 to $207.40 upon

an account for rent, etc. As to the amount of deposits there is practically no dispute, so that in no event can the verdict be sustained. The testimony tends to show that in organizing the bank as a corporation but little of the capital stock was paid up. There were 500 shares in all. Of these Whaley & Theis had 134 each, thus having a controlling interest. The remainder of the shares were held by various persons, who, so far as we can see, acted in good faith. It is true they gave their notes to the bank in payment for their stock, but it seems to have been done in ignorance and without any actual intent to defraud. The two principal stockholders seem to have put in nothing except the comparatively worthless assets of their private bank, which as heretofore stated were valued at a great sum but were worth but little. Whaley & Theis no doubt knew when the new bank was organized that the assets turned over by them were comparatively worthless; but they seem to have stood well in the community, and no doubt were supposed to be doing a successful business, and after the new bank was organized the stock seems to have been of full par value. Thus we find an attempt to charge Morris twenty-five per cent premium on forty shares purchased by him. He refused to take the stock at the price charged, not because it was not worth that sum, but because he had not agreed to pay that amount. The purpose of the reorganization no doubt was to strengthen the bank by giving it greater credit, and as the stock could not be sold for ready cash, notes of the persons induced to become stockholders were taken. This is a mode of doing banking business that this court cannot commend, and where it is done for the purpose of defrauding, the court must denounce; but as to all the stockholders except Whaley and Theis, it is evident that there was no attempt to defraud, and that they are not personally liable.

Section 136, chap. 11, Gen. Stat., p. 200, is as follows: "Every corporation hereafter created shall give notice

annually, in some newspaper printed in the county, or counties, in which the business is transacted, and in case there is no newspaper printed therein, then in the nearest paper in the state, of the amount of all the existing debts of the corporation, which notice shall be signed by the president and majority of the directors; and if any corporation shall fail to do so, all the stockholders of the corporation shall be jointly and severally liable for all debts of the corporation then existing, and for all that shall be contracted before such notice is given."

Section 139 provides, "If any corporation fail to comply substantially with the provisions of this subdivision, in relation to giving notice and other requisitions of organization, the property of all the stockholders shall be liable for the corporate debts."

It will be seen that section 139 applies only where there has been a failure to comply substantially with the law in regard to organization and giving notice, as in *Abbott v. O. S. Co.*, 4 Neb., 416. In the case at bar, however, there was a substantial compliance with the law. A forfeiture is not favored in law because it tends to rob a party of his just rights; and the same rule applies where it is sought to charge a party personally with a debt which he did not assume, but is imposed because of some alleged wrong doing on his part. In such case the acts of omission or commission must clearly bring the case within the penal provisions of the statute. Otherwise there can be no recovery beyond the limit fixed in the constitution. This principle is recognized in *Smith v. Steele*, 8 Neb., 115, where the stockholders were held liable only for debts contracted while the corporation was in default in publishing the annual notice. The question then arises as to the right to proceed against the stockholders of the bank. We do not think this case comes within either section 136 or 139 of the chapter on corporations in the General Statutes, although this case was tried before the modification

of those sections in 1891, for the reason that the debt was not incurred while the officers of the bank were in default in publishing notice of the condition of the bank; so that those sections may be left out of the case. The stockholders are each liable for the amount of his unpaid stock, "and to its creditors over and above the amount of stock held by him to an amount equal to his respective stock or shares so held, for all its liabilities accruing while he remain such stockholder." (Constitution, art. XIII, sec. 7.) The cause of action accrued before our present banking law took effect, and is not governed by its provisions. The question of usury does not arise in the case and need not be considered. Where the officers of an insolvent bank, by willful, false representations as to the amount of paid-up stock of the bank, induce persons to deposit money therein, they are guilty of a wrong—in effect, of obtaining money under false pretenses, and they will be personally liable therefor. Some objection is made to a misjoinder of causes of action, but such misjoinder appeared on the face of the petition, and was cause of demurrer on that ground. As the objection was not raised it is waived. Upon the whole case, it is one proper for a court of equity to adjust, and it is evident that amended pleadings should be filed and further testimony taken. The judgment is therefore reversed and the cause remanded for further proceedings.

REVRSED AND REMANDED.

THE other judges concur.

CHARLES GARTNER V. STATE OF NEBRASKA.

FILED FEBRUARY 15, 1893. No. 5319.

1. **Criminal Law**: FINAL JUDGMENT: REVIEW ON ERROR. The rulings of the district court in a criminal case cannot be reviewed by this court prior to the rendition of a final judgment in the prosecution.
2. ———: INTERLOCUTORY ORDER: ERROR PROCEEDINGS. An order of the district court overruling a plea in abatement to an indictment, is not a final order within the meaning of the statute, and a petition in error cannot be prosecuted therefrom previous to the prisoner's conviction.

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

The plaintiff in error was indicted for fraudulently disposing of mortgaged property. From an order overruling his plea in abatement he commenced a proceeding in error. *Dismissed.*

G. M. Humphrey, for plaintiff in error.

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

The writ of error is available to any person convicted of a crime, but can issue only in those cases where the judgment of the lower court is final. In this case the plaintiff in error has been convicted of no crime, nor has final judgment been entered. The action is prematurely brought to this court. An order made by the trial court upon a motion to quash an indictment or information, or upon a challenge to the array or any other interlocutory order cannot be reviewed until final judgment has been entered. (*Grimes v. Chamberlain*, 27 Neb., 605; *Scofield v. State National Bank*, 8 Id., 16; *Cockle Mfg. Co. v. Clark*, 23 Id., 702; *Daniels v. Tibbets*, 16 Id., 666; *Aspinwall v. Aspinwall*, 18 Id., 463; *Green v. State*, 10 Id., 103; *Met-*

calf's Case, 11 Coke [Eng.], 38; *Rex v. Kenworthy*, 3 Dowling & Rylands [Eng.], 173; *People v. Merrill*, 14 N. Y., 74; *Loftin v. State*, 11 Sm. & M. [Miss.], 358; *Bogert v. People*, 6 Hun [N. Y.], 262; *Cochrane v. State*, 30 O. St., 61; *Kinsley v. State*, Id., 508; *Willingham v. State*, 14 Ala., 539; *Patten v. People*, 18 Mich., 314; *Hedges v. Madison Co.*, 1 Gilman [Ill.], 306; *Peet v. McGraw*, 21 Wend. [N. Y.], 667; *People v. Stearns*, 23 Id., 634; *State v. Dillon*, 3 Haywood [Tenn.], 174; Bishop, Criminal Procedure, sec. 1366; Wharton, Criminal Pleading and Practice, sec. 775; *Inskeep v. State*, 35 O. St., 482.)

NORVAL, J.

On the 21st day of April, 1891, an indictment was returned in the district court of Pawnee county against plaintiff in error, Charles Gartner, charging him with having fraudulently disposed of certain personal property, covered by a chattel mortgage, during the existence of the lien thereon. To this indictment plaintiff in error, at the October, 1891, term of said district court, filed a plea in abatement, alleging as grounds for quashing the indictment:

"1. That one Evan Davis, a member of the grand jury that found the indictment, was not, at the time of finding the same, a qualified elector in the state of Nebraska.

"2. The indictment was not found by a full and legal grand jury."

To this plea the county attorney answered by a general denial. The issue thus formed was tried to the court, and the plea in abatement was overruled. Whereupon plaintiff in error filed a motion for a new trial on his plea in abatement, which was overruled by the court, and an exception was taken to the ruling. The record shows that the cause was continued until the next succeeding term of the district court, and this appears to have been the last step taken in the case. There has been no trial upon the merits, nor has a final judgment been rendered.

We agree with the attorney general, that the case has been prematurely brought to this court. It has been held in this state, in an unbroken line of decisions in civil cases, that a writ of error does not lie to review the rulings of the district court in a cause until a final judgment has been rendered therein, disposing of the entire suit. And the rule is the same in criminal cases. (*Green v. State*, 10 Neb., 102.) An order of the district court overruling a plea in abatement to an indictment is interlocutory merely and not a final order, within the meaning of the statute governing proceedings in error. The ruling complained of cannot be reviewed upon error previous to the prisoner's conviction of the crime charged. (*Green v. State, supra; Kinsley v. State*, 3 O. St., 508; *Cochrane v. State*, 30 Id., 61; *Inskeep v. State*, 35 Id., 482; *People v. Merrill*, 14 N. Y., 74; *People v. Stearns*, 23 Wend. [N. Y.], 634; *Farrell v. State*, 7 Ind., 345; *Woolley v. State*, 8 Id., 377; *Pigg v. State*, 9 Id., 363; *Reese v. Beck*, Id., 238.) As there has been no final judgment in the court below, the petition in error is dismissed for want of jurisdiction.

DISMISSED.

THE other judges concur.

IN RE GORHAM F. BETTS.

FILED FEBRUARY 15, 1893. No. 5920.

1. **Habeas Corpus: REVIEW.** Mere errors and irregularities in a judgment or proceeding of a court in a criminal case, under and by virtue of which a person is imprisoned, which are not of such a character as render the proceedings void, cannot be reviewed on an application for a writ of *habeas corpus*. That writ cannot operate as a writ of error.

2. ———: ———: GRAND JURY. Defects or irregularities in the calling, drawing, or summoning of grand juries cannot be considered upon *habeas corpus*.

ORIGINAL application for writ of *habeas corpus*.

William B. Price and *Charles O. Whedon*, for petitioner.

George H. Hastings, Attorney General, and *N. Z. Snell*, for the state.

NORVAL, J.

This is an original application to this court by the petitioner, Gorham F. Betts, for a writ of *habeas corpus*. The petitioner is confined in the jail of Lancaster county by the sheriff of said county, by virtue of four warrants, or writs of *capias*, issued by the clerk of the district court of the said county of Lancaster, which said warrants were respectively issued and based upon four indictments found and returned into said court at the September, 1892, term thereof by the grand jury of said county, which said indictments charge the petitioner with the commission of divers felonies.

The petition for the writ of *habeas corpus* shows that the term of court at which said indictments were presented and filed commenced on the 19th day of September, 1892, and that the only order made by the judge of said court directing a grand jury to be drawn or summoned to attend at the said term of court was and is an order made in open court by the judges thereof on the 25th day of October, 1892.

The petition also charges, in substance, that neither the clerk of said district court, nor his deputy, together with either the sheriff, his deputy, or the coroner of said county, ten days, or any time, before the first day of the session of said district court at said term thereof, met and drew the names of sixteen persons to serve as grand jurors;

that the county board of said county did not twenty days, nor any number of days, before the commencement of the term of court at which said indictments were found and presented, select twenty-three persons, possessing the qualifications as provided in section 2 of chapter 43 of the Session Laws of 1889, to serve as grand jurors; that no order, proceeding, or step was made, had, or taken by either of the judges of said court, nor by the county board, the county clerk, his deputy, the sheriff, his deputy, nor the coroner in the selecting, drawing, or summoning of a grand jury for said September term of said court prior to the commencement of said term, nor for more than a month after such commencement.

The cause is submitted on a general demurrer to the petition. The sole ground upon which the writ is asked is that the grand jury which indicted the petitioner was not a legal body, for the alleged reason that the grand jurors were not ordered, selected, and summoned at the time and in the mode prescribed by section 5227 of Cobbey's Consolidated Statutes.

Whether the said grand jury was or was not a legally constituted tribunal we are not called upon to determine in this case, nor do we now decide. The supposed errors and defects relied upon are not jurisdictional, and hence are not available in a proceeding like this, for it is well established in this state that mere errors and irregularities in a judgment or proceedings of an inferior court in a criminal case, under and by virtue of which a person is imprisoned, or deprived of his liberty, but which are not of such a character as to render the proceedings absolutely void, cannot be reviewed on an application for a writ of *habeas corpus*. The writ cannot perform the office of a writ of error, but only reaches jurisdictional defects in the proceedings. (*Ex parte Fisher*, 6 Neb., 309; *In re Balcom*, 12 Id., 316; *State v. Banks*, 24 Id., 322; *Buchanan v. Mallalieu*, 25 Id., 201.) And the rule just stated has sup-

port in numerous decisions from other courts. (*State v. Orton*, 67 Ia., 554; *In re Graham*, 74 Wis., 450; *In re Ellis*, 44 N. W. Rep. [Mich.], 616; *In re Pikulik*, 51 Id. [Wis.], 261; *Emanuel v. State*, 36 Miss., 627; *Ex parte Boland*, 11 Tex. Ct. App., 159; *Ex parte Bowen*, 25 Fla., 214; *Com., ex rel. Davis, v. Lecky*, 1 Watts [Pa.], 66; *People v. Rulloff*, 5 Parker Cr. Rep. [N. Y.], 77; *Ex parte McCullough*, 35 Cal., 97; *Ex parte Mirande*, 14 Pac. Rep. [Cal.], 888; *In re Bion*, 59 Conn., 372; *Ex parte Smith*, 26 Pac. Rep. [Cal.], 638; *Ex parte Brandon*, 4 S. W. Rep. [Ark.], 452; *Ex parte McKnight*, 48 O. St., 588; *Ex parte Parks*, 93 U. S., 18; *Ex parte Prince*, 9 So. Rep. [Fla.], 659; *O'Malia v. Wentworth*, 65 Me., 129.)

The Texas court of appeals, in *Ex parte Boland, supra*, in speaking of the office of the writ of *habeas corpus*, say that "the writ may be resorted to when the proceedings sought to be inquired into are radical in their character, illegal, and void. (*Ex parte Slaren*, 3 Tex. Ct. App., 662.) It deals with such irregularities as render the proceedings void. (*Perry v. State*, 41 Tex., 488.) It does not reach such irregularities as would render a judgment voidable only, but only such irregularities as render the proceedings void. (*Ex parte McGill*, 6 Tex. Ct. App., 498.) Illegality is properly predicable of radical defects only, and signifies that which is contrary to the principles of law, as distinguishable from mere rules of procedure. (*Ex parte Scwartz*, 2 Tex. Ct. App., 75.) An irregularity is defined to be a want of adherence to some prescribed rule or mode of proceeding. It consists in omitting to do something which should have been done, or in doing it in an unreasonable time, or in an improper manner."

The principle deducible from the authorities already cited is that where the party applying for a writ of *habeas corpus* is held in custody under a process, regular on its face, issued by a court having jurisdiction of the offense charged and of the person, if the proceedings are not void, although

they may be erroneous or voidable, he cannot obtain relief by *habeas corpus*; but where the proceedings are wholly void, because of want of jurisdiction of the court over the subject-matter, or are illegal, as distinguishable from being merely erroneous, the writ of *habeas corpus* is an appropriate remedy.

The statute confers authority upon the judge of a district court to order a grand jury for any term he chooses. The authority thus conferred was exercised by calling the grand jury in question. The district court of Lancaster county had jurisdiction of the subject-matter, and it has the power to pass upon the validity of the organization of such grand jury. Its ruling, in case there should be a conviction, can be reviewed by a writ of error, but its proceedings cannot be assailed collaterally. Objections to the manner of drawing, summoning, and impaneling of a grand jury must be taken advantage of by plea in abatement to the indictment, or motion to quash, or they will be waived. (*McElvoy v. State*, 9 Neb., 157; *Davis v. State*, 31 Id., 247.)

Section 444 of the Criminal Code declares that "the accused shall be taken to have waived all defects which may be excepted to by a motion to quash or a plea in abatement by demurring to an indictment, or pleading in bar, or the general issue." A mere reading of the above statutory provision clearly shows that the supposed errors here relied upon for a discharge of the petitioner are defects not going to the matter of jurisdiction. If they were, they could not be waived. That is plain. Our conclusion is that the legality of the grand jury cannot be inquired into on *habeas corpus*. The authorities so hold. (*Ex parte Warris*, 9 So. Rep. [Fla.], 718; *In re Ellis*, 44 N. W. Rep. [Mich.], 616; *Ex parte McConnell*, 23 Pac. Rep. [Cal.], 1119; *In re Wilson*, 140 U. S., 575; *Ex parte Twohig*, 13 Nev., 302; *Ex parte Springer*, 1 Utah, 214.)

It follows from what we have already said that the de-

murrer to the application for the writ must be sustained, and the action

DISMISSED.

THE other judges concur.

STATE OF NEBRASKA v. WILLIAM J. YATES.

FILED FEBRUARY 15, 1893. No. 4982.

Criminal Law: JUSTICE OF THE PEACE: JURISDICTION. A justice of the peace has no jurisdiction to sit as a trial court in a criminal case where the statute creating the offense provides that the punishment may be both a fine and imprisonment. In such case the justice can proceed only as an examining magistrate.

EXCEPTIONS to the decision of the district court for Fillmore county, MORRIS, J., presiding. Filed under the provisions of section 515 of the Criminal Code. *Exceptions overruled.*

Charles H. Sloan, County Attorney, for the state.

F. B. Donisthorpe, contra.

NORVAL, J.

A complaint was filed in a justice court of Fillmore county charging the defendant with willfully resisting the coroner of said county while executing a certain writ of replevin, duly issued out of the district court of said county and placed in his hands for service. Over the objections of the defendant, a jury was impaneled, the defendant was tried, and the jury returned a verdict of guilty. Thereupon the justice sentenced Yates to pay a fine of $3. The defendant prosecuted a petition in error to the district

court, where the judgment of the justice was reversed and set aside. The county attorney, on behalf of the state, brings the case to this court under the provisions of section 515 of the Criminal Code.

The sole question presented for our decision is, did the justice court have jurisdiction to try and sentence the defendant?

The prosecution was brought under section 30 of the Criminal Code, which reads as follows: "If any person shall abuse any judge or justice of the peace, resist or abuse any sheriff, constable, or other officer in the execution of his office, the person so offending shall be fined in any sum not exceeding one hundred dollars, or imprisoned in the jail of the county not exceeding three months, *or both*, at the discretion of the court."

Section 18, article VI, of the constitution reads as follows: "Justices of the peace and police magistrates shall be elected in and for such districts, and have and exercise such jurisdiction as may be provided by law; *Provided*, That no justice of the peace shall have jurisdiction of any civil case where the amount in controversy shall exceed two hundred dollars, nor in a criminal case where the punishment may exceed three months' imprisonment *or* a fine of over one hundred dollars, nor in any matter wherein the title or boundaries of land may be in dispute."

By the provisions of the above section of the constitution the jurisdiction of a justice of the peace is limited in criminal cases to the trial of offenses where the punishment prescribed by statute does not exceed three months' imprisonment or a fine of not more than $100. A justice of the peace has no authority to impose both fine and imprisonment, nor to try and sentence in any case where the statute creating the offense provides that both a fine and imprisonment may be the sentence. In such case the justice can proceed only as an examining magistrate.

Applying this rule to the case before us, it is obvious that

the justice exceeded his jurisdiction both in impaneling a jury and in sentencing the defendant to pay a fine, for the reason that the section of the Criminal Code, above quoted provides that both a fine and imprisonment may be inflicted. The fact that the justice in this case only imposed a fine does not make such sentence valid. The jurisdiction of a justice of the peace in a criminal case is not determined by the punishment actually inflicted, but by the penalty provided by the statute creating the offense. If it exceeds the jurisdiction of such officer, as limited by the constitution, then the justice has no power to try or sentence.

Counsel have referred us to the case of *In re Stewart*, 16 Neb., 193. In that case Stewart was tried and convicted before a justice of an assault and battery, and sentenced to pay a fine of $50 and imprisonment in the county jail for three months. He was discharged by this court upon *habeas corpus*, upon the ground that the sentence of imprisonment was in excess of the power of the justice. Although the opinion filed in that case contains some expressions which appear to be in conflict with the views herein expressed, the judgment then rendered is in harmony with this opinion.

Our conclusion is that the district court did not err in reversing the judgment of the justice. The exceptions taken by the county attorney are therefore overruled.

EXCEPTIONS OVERRULED.

THE other judges concur.

FIRST NATIONAL BANK OF DENVER V. LOWREY BROS. ET AL.

FILED FEBRUARY 15, 1893. NO. 4474.

1. **Bill of Exceptions:** TIME FOR ALLOWANCE. The cause was tried in the district court on the 17th day of December, 1889, and forty days were given to reduce the exceptions to writing. The term of court adjourned without day December 23, and on the 29th day of the following month the trial judge, on a showing of diligence, granted an extension of thirty days' additional time in which to complete and serve a bill of exceptions. A draft of the bill was served on the attorneys of the successful party on February 19, 1890. *Held*, That the same was presented in time.

2. ———: NOTICE OF APPLICATION TO EXTEND TIME FOR ALLOWANCE UNNECESSARY. No notice of an application to the judge for an order extending the time for preparing and serving a bill of exceptions is necessary.

3. ———: ORDER EXTENDING TIME FOR ALLOWANCE: PRACTICE. On the granting of such an order, the proper practice is to file the same with the clerk of the district court.

4. ———: AMENDMENTS: NOTICE OF PRESENTATION FOR ALLOWANCE. Where no amendments are proposed to a bill of exceptions, no notice of the presentation of the bill to the judge for allowance is required to be served on the adverse party.

5. ———: CERTIFICATION BY TRIAL JUDGE. Certificate of the trial judge attached to the bill in this case, although informal, is sufficient.

6. ———: A bill of exceptions must be filed in the district court of the proper county.

7. **Instructions:** SUFFICIENCY OF EXCEPTIONS. A general exception to instructions, as "to the giving of the above instructions the plaintiff then and there excepted," is insufficient to lay the foundation for their review in the supreme court. Exception should be specifically taken to each paragraph of the charge claimed to be erroneous.

8. **An erroneous instruction** is not cured by merely giving another on the same subject contradicting it.

9. **Instructions**: EVIDENCE. It is reversible error for the court, in its charge to the jury, to give undue prominence to a portion of the testimony by special reference thereto, or to direct the jury what weight shall be given to particular items of the evidence.

10. **Chattel Mortgages**: RETENTION OF POSSESSION BY MORTGAGOR: PRESUMPTION OF FRAUD. The retention of the possession of personal property by a mortgagor is *prima facie* evidence of fraud, and the burden is cast upon the mortgagee to establish the *bona fides* of the transaction. The presumption of fraud, arising from the want of change of possession of the thing mortgaged, is not conclusive, but may be entirely rebutted by proof of good faith and the absence of an intent to defraud.

11. ———: ———: INSTRUCTIONS. An instruction in a suit between the creditors of the mortgagor and the mortgagee which requires the latter, in addition to proof of good faith and absence of a fraudulent intent, to satisfactorily explain why there was not an immediate delivery of the property and an actual and continued change of possession thereof, is erroneous.

12. ———: BILL OF SALE BY FAILING DEBTOR: FRAUD. A mortgage or bill of sale given by a failing debtor to secure an honest debt is not fraudulent, although the parties to the transaction knew that the claims of other creditors would be thereby defeated, provided the fair value of the property pledged as security does not greatly exceed the amount of the debt, interest, and probable expenses of foreclosure.

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

Case & McNeny and *C. C. Flansburg*, for plaintiff in error.

John P. Maule and *Morning & Keester, contra.*

NORVAL, J.

This cause was submitted to this court upon a motion to quash the bill of exceptions and upon the errors assigned in the petition in error. We will first consider the questions presented by the motion. Three grounds are assigned for quashing the bill.

First—It was served upon the attorneys for the defendants in error out of time.

Second—It has never been allowed by the trial judge, or ordered made a part of the record in the case, and it does not contain all the evidence.

Third—Because said bill has not been filed in the office of the clerk of the district court.

The record before us shows that the cause was tried to a jury at the December term, 1889, of the district court of Harlan county, and that a verdict and judgment were rendered against the plaintiff in error on the 17th day of December; that forty days from the rising of the court were allowed in which to reduce exceptions to writing; that the said term of court adjourned without day on the 23d day of December, 1889; that on the 29th of the following January the trial judge, on the application of the plaintiff in error, and a showing of diligence, granted an extension of thirty days from that time in which to complete and serve the bill of exceptions; that on the 19th day of February, 1890, a draft of the bill of exceptions was presented to Morning & Keester, attorneys of record for the defendants in error, who declined to propose any amendments thereto, or to examine it, but protested against the signing of the bill by the judge or clerk, on the ground that the same had not been presented to them for examination within forty days from the final adjournment of the court.

It is plain that plaintiff's draft of the bill of exceptions was served upon the adverse parties in sufficient time. Although the forty days given from the adjournment of the term to reduce the exceptions to writing had expired, it was presented before the expiration of the additional thirty days granted by the judge. This is conceded. That the judge, under our statute, had the power to thus extend the time for preparing and serving the bill, there is no room for doubt. That no notice of the application to the judge

for an extension of time was served upon the defendants in error, or their attorney, is immaterial, since such notice is not jurisdictional. This was expressly decided in *McDonald v. McAllister*, 32 Neb., 514.

It is urged that the order of the district judge allowing the extension of time should have been attached to the proposed bill. We regard the proper practice is to file the order with the clerk of the district court, which was done in this case, immediately following the granting of the order, but it was, by inadvertence of the clerk, placed in the files of another cause, on account of which the defendants in error were not aware of the existence of the order until some time afterwards.

It is also claimed no notice of the presentation of the bill to the judge for allowance was served upon defendants in error. Mr. Flansburg, one of the attorneys for plaintiff in error, has filed an affidavit in which he states that he gave notice to the attorneys of the adverse parties of the time of the presenting of the bill to the judge for his signature. Besides, we are not aware of any statute which requires the giving of a notice in such case. It is only when amendments are proposed that notice of the time and place of presenting the bill to the judge for settlement and allowance must be given. (See Code, sec. 311.) In this case no amendments of any kind were suggested.

The second ground for quashing the bill is contradicted by the record. Appended to the bill of exceptions we find the following certificate of the trial judge:

"Febr. 26, 1890. All evidence. True bill. Ordered part of record in this case. WILLIAM GASLIN,
"Judge 8th Judicial District, Nebr."

The foregoing certificate, although quite brief, we think is sufficient.

Although we are unable to find any indorsement upon the bill showing that the same was filed with the clerk of

the district court, the evidence before us shows that it was properly filed. Mr. Flansburg, in his affidavit filed in this court in resistance of the motion, states that "after the same was allowed and signed by the judge, this affiant took the said bill of exceptions, personally, to the clerk of the district court of this (Harlan) county, and saw him, the said clerk, mark the same filed, and if the same are not so marked now on the bill of exceptions, said marking has been erased, or the leaf bearing the same destroyed. That said bill was filed the second day after it was allowed." This testimony is in no respect contradicted or denied by any one. In addition, the clerk of the district court has attached to the record a certificate, under his hand and official seal, which states "that the foregoing is the original bill of exceptions in said cause and also a true and perfect transcript of the petition, answer, reply, and instructions given in said action, as the same are on file and of record in my office." In view of the facts above stated, and inasmuch as there is no evidence before us, tending to show that the bill of exceptions was not properly filed in the district court, the third, or last, objection to the bill is overruled, and the motion to quash, therefore, must be denied.

All the parties to this suit are creditors of the Alma Milling Company, a corporation doing business at Alma, this state. On the 21st day of December, 1888, the milling company, being indebted to the First National Bank of Denver in the sum of $10,300, executed and delivered to the bank a bill of sale upon the property in controversy, consisting of 1,425 sacks of flour and 500 bushels of wheat, for the purpose of securing its indebtedness to the bank. The bill of sale was duly filed in the proper county, on December 22, 1888, but the bank did not take immediate possession of the property under its said bill of sale, but left the property in the possession of the milling company. On the 27th day of December, 1888, the defend-

ants in error sued out writs of attachment against the milling company, and placed the same in the hands of L. E. Allen, the sheriff of Harlan county, for service, who levied the same upon the flour and wheat covered by said bill of sale. The First National Bank of Denver thereupon brought this suit against the sheriff to recover the possession of the property. Before the trial defendants in error were substituted as defendants in lieu of the sheriff. The cause was tried to a jury, who returned a verdict in favor of the defendants, upon which judgment was rendered.

The record shows that on the trial in the court below the *bona fides* of the bill of sale was questioned, and this was the principal question submitted to the jury for determination. The defendants claimed that the instrument was fraudulent as to the creditors of the Alma Milling Company, inasmuch as the bank had never taken possession of the property covered by the bill of sale, while the plaintiff insists that it accepted the bill of sale in good faith, for the purpose of securing a valid indebtedness, and without any intention of defrauding others, the creditors of the milling company, or hindering or delaying them in the collection of their debts.

The giving of the second, eighth, and ninth instructions requested by the defendants is assigned for error, which instructions are as follows:

"Second—In making it appear to you that the sale was made in good faith and without any intent to defraud the creditors of the Alma Milling Company, it is not enough for the plaintiff to show you that said Alma Milling Company owed it a debt, and that said alleged sale was made to pay or secure that debt.

"This is only one of the things it must show. It must go farther and satisfy you that the said sale was made in good faith and without any intent to defraud the creditors of the Alma Milling Company, or hinder or delay them in the collection of their debts against it.

"And they must satisfactorily explain to you why there was not an immediate delivery of said property, and an actual and continued change of possession thereof.

"And if the plaintiff has failed to satisfy you that said sale was made in good faith and without any intent to defraud, hinder, or delay the creditors of the Alma Milling Company in the collection of their claims against it; and if they have failed to satisfactorily explain to you why there was not an immediate delivery of the property and an actual and continued change of possession of the same, you should find for the defendants. Modified as follows: Provided you find from the evidence there was no change of possession of said property, and this instruction is not applicable unless you so find.

"Eighth—So, if in this case you should find from the evidence that the Alma Milling Company was in debt and could not pay its indebtedness in full, and that certain of its creditors were demanding their money and threatened suit if they were not paid, and if you also find that said milling company was owing the plaintiff, and that the plaintiff was not insisting on the payment of its claim, and was not urging that the same be secured, and if you further find that the Alma Milling Company requested plaintiff to accept this bill of sale, and that the same covered all or nearly all of the property of said company, and if you also find that there was not an immediate delivery of said property, and an actual and continued change of possession of the same, but the Alma Milling Company remained in possession of the same, and continued to run its mill and do business as it had previously done, then, and in that case, I instruct you as a matter of law that these things are strong evidence of a secret trust in favor of said Alma Milling Company, and of an intent to hinder and delay its creditors. And if from these facts and circumstances you believe there was such a trust and an intent to hinder and delay the creditors of said company you should find for the defendants.

"Ninth—It makes no difference even if the Alma Milling Company intended eventually to pay all its debts, and it makes no difference if it gave the bill of sale for the purpose of securing what it owed the plaintiff, yet, if you find from the evidence that it was the further intention of the Alma Milling Company in giving the said bill of sale to the plaintiff to hinder and delay its other creditors for a limited period only, and the plaintiff knew this, or knew enough facts to lead a reasonable man to believe such was the intention of the Alma Milling Company, the bill of sale would be void, and you should find for the defendants."

Counsel for defendants in error in their brief insist that these instructions cannot be reviewed by this court, for the reason it does not appear that the giving of these particular instructions was excepted to. The first or original transcript of the record in this case contains copies of the instructions given on the request of the defendants, following which appear these words: "To the giving of the above instructions the plaintiff there and then duly excepted." It must be conceded that this exception, under the numerous decisions of this court, some of which are cited in the brief of counsel, is too general and indefinite to lay the foundation for a review of the instructions. The rule is that each instruction, claimed to be erroneous, must be specifically excepted to. (*Brooks v. Dutcher*, 22 Neb., 644, and cases there cited.) It, however, appears from an amended transcript, filed by plaintiff in error, that it did at the time take an exception to each of the instructions copied above. The objection to our considering these instructions must, therefore, be overruled.

Section 11 of chapter 32, Compiled Statutes, declares that "every sale made by a vendor of goods and chattels in his possession, or under his control, and every assignment of goods and chattels, by way of mortgage or security, or upon any condition whatever, unless the same be

accompanied by an immediate delivery, and be followed by an actual and continued change of possession, of the thing sold, mortgaged, or assigned, shall be presumed to be fraudulent and void, as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith; and shall be conclusive evidence of fraud, unless it shall be made to appear, on the part of the persons claiming under such sale, or assignment, that the same was made in good faith, and without any intent to defraud such creditors or purchasers."

By this provision the legislature has made the retention of the possession of personal property, sold or mortgaged by the vendor or mortgagor, merely *prima facie* evidence of fraud, and casts the burden upon the vendee or mortgagee to establish the *bona fides* of the transaction. The presumption of fraud, raised by the statute from a want of change of possession, is not conclusive, but may be entirely rebutted by proof of good faith, and absence of intent to defraud. (*Pyle v. Warren*, 2 Neb., 252; *Robinson v. Uhl*, 6 Id., 328; *Brunswick v. McClay*, 7 Id., 137; *Jackson v. Dean*, 1 Doug. [Mich.], 519; *Hanford v. Artcher*, 4 Hill [N. Y.], 271.)

The section of the statute already quoted is an exact copy of the statute of New York, and an interpretation of it by the courts of that state is entitled to great weight here. The court for the correction of errors of the state of New York, in passing upon the identical question we are considering, in the case of *Hanford v. Artcher, supra*, in the opinion prepared by President Bradish, says: "From the declaration of the statute, that the facts enumerated therein shall be conclusive evidence of fraud, unless it shall be made to appear that the sale or assignment was made in good faith, and without any intent to defraud, the legal inference, as well as that of common sense, is, I think, irresistible, that if it be thus made to appear, those facts shall not be conclusive evidence of fraud; and that the presump-

tion of fraud raised therefrom shall be thus fully rebutted. The statute does not go on to provide that, in addition to proof of good faith and absence of intent to defraud, the party claiming under such sale or assignment shall also be held to show, by reasons to be approved by the court, why there had not been an immediate delivery, and an actual and continued change of possession." We regard this a fair and reasonable construction of our statute. When the vendee or mortgagee establishes both good faith and the absence of fraud, the legal presumption of fraud arising from his failure to take possession of the property is overcome.

By defendants' request No. 2 the plaintiff was not only required to prove good faith and the absence of an intent to defraud, but the jury were told that it "must satisfactorily explain to you why there was not an immediate delivery of said property, and an actual and continued change of possession thereof." The portion of the request just quoted was erroneous, and should not have been given. But counsel for the defendants contend that the error was cured by other portions of the charge, and the instructions, when construed together or considered as a whole, properly state the law. A misstatement of the law in one paragraph of the charge of the court cannot be cured by a correct instruction, for the reason the jury would not know which one to follow. (*Wasson v. Palmer*, 13 Neb., 376; *Ballard v. State*, 19 Id., 609; *Fitzgerald v. Meyer*, 25 Id., 77.)

The defendants' eighth request is objectionable. It not only gave undue prominence to certain portions of the evidence to the disparagement of the rest, but the jury were advised that certain things, particularly mentioned in the request to charge, "are *strong* evidence of a secret trust." It was the province of the jury, and not the court, to determine what weight should be given to the different items of evidence. The instruction was prejudicial to the plaintiff. (*Gillet v. Phelps*, 12 Wis., 392; *Wilcox v. Young*,

33 N. W. Rep. [Mich.], 765; *People v. Ah Sing*, 59 Cal., 400.)

It was error to give the defendants' ninth request. The bill of sale was given to secure the *bona fide* indebtedness of the milling company to the bank. The leaving of the property in the possession of the milling company placed the burden upon the bank to overcome the legal presumption that the transaction was fraudulent, and to establish that the security was taken in good faith, and without any intent to defraud. In this state a failing debtor has the right to give one creditor adequate security upon his property to secure a *bona fide* indebtedness to the exclusion of others, and if the same is taken in good faith, without any fraudulent purpose on the part of such creditor, the transaction will not be void, even though the debtor intended thereby to hinder and delay his other creditors in the collection of their debts and the person secured had knowledge of such purpose. A party who purchases property of an insolvent debtor with notice that the purpose of the seller is to hinder and defraud his creditors, will not be protected as against such creditors, although he may have paid for the property its full value. But the same rule does not apply here. A mortgage given by a failing debtor to secure an honest debt is not in violation of any principle of law, nor is it fraudulent, although the parties knew that the claims of other creditors would be thereby defeated. (*Dudley v. Danforth*, 61 N. Y., 626; *Ford v. Williams*, 3 B. Mon. [Ky.], 556; *Worland v. Kimberlin*, 6 Id., 608; *Covanhovan v. Hart*, 21 Pa. St., 495; *Bear's Estate*, 60 Id., 436; *Walker v. Marine Nat. Bank*, 98 Id., 578.)

For the foregoing reasons the judgment of the district court is reversed and set aside, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

STATE OF NEBRASKA, EX REL. GREELEY COUNTY, V. HENRY N. MILNE.

FILED FEBRUARY 15, 1893. No. 5318.

1. De Facto Officer: PAYMENT OF SALARY: LIABILITY OF COUNTY TO DE JURE OFFICER: MANDAMUS. Where a county has once made payment of the salary of a county office, to one actually in possession of the office, performing its duties with color of title, before his right to the office has been determined against him by a competent tribunal, it cannot afterwards be compelled to pay the same salary to the *de jure* officer.

ORIGINAL application for *mandamus*.

B. F. Griffith, Coffin & Stone, and *J. R. Swain*, for relator.

J. R. Hanna and *Robert Ryan, contra.*

NORVAL, J.

This is an application to this court for a peremptory writ of *mandamus*, to compel the respondent, ex-county treasurer of Greeley county, to pay into the treasury of said county certain moneys received by him as the treasurer of said county, which he failed to pay over to his successor in office. After the issues were made up, the cause was referred to Thomas J. Welty, Esq., to take the testimony and report the same to the court, with his findings of fact. The referee, after having heard the testimony, made and returned to this court his findings.

The material facts found by the referee, stated briefly, are these: On the 5th day of November, 1889, the respondent, Henry N. Milne, and one E. F. Cashman were opposing candidates for the office of treasurer of Greeley county, in this state. On a canvass of the votes of the county, the canvassing board found that the respondent

had received a majority of the votes cast at said election for said office, and a certificate of election was duly issued to him, on November 12, 1889. The respondent subscribed to and took the oath of office required by law, and executed and filed his official bond with the proper officer, which bond was approved on the 21st day of November, 1889. Soon after the canvass of the votes was had, Cashman instituted proceedings to contest the election. A trial was had and, on the 7th day of January, 1890, the county court of said county found that said Cashman was duly elected to and was entitled to the office. From this decision respondent removed the case to the district court by appeal, and on the 27th day of October, 1891, the district court, on the evidence adduced, found that respondent received at said election 407 votes and Cashman 403, and the latter being in possession of the office, it was adjudged that he be forthwith removed therefrom, and that respondent be installed in said office. From the judgment so rendered no appeal was taken, and respondent entered upon the performance of the duties of the office on the 28th day of October, 1891, and held the office and received the emoluments thereof until the expiration of his term. After the decision of the county court, Cashman qualified and took possession of the office, performed the duties and exercised the functions thereof, and received from the county the fees and salary belonging to the office until he was removed by the said judgment of ouster. At the expiration of respondent's term as county treasurer, he retained in his hands, of the moneys collected by him for said county, the sum of $2,783.95, which he refused to pay over to his successor, claiming the same as fees and salary of the office for the period he was excluded therefrom. Respondent has been paid the fees and emoluments of office during the time he exercised the duties of the office.

It will be observed that the respondent claims he is entitled to retain the money in controversy as fees and emol-

uments of the office of county treasurer of Greeley county during the time it was in the possession of Cashman, the latter having already received the compensation which attached to the office while the duties of the office were performed by him. The question presented for determination is, whether a *de jure* county officer can recover the salary or compensation which attaches to the office while it is in the possession of an officer *de facto*, who, before any judgment of ouster has been rendered against him, has been paid by the county the salary of the office. The question has never been passed upon by this court, and the decisions in other states are conflicting and irreconcilable. In establishing a precedent we shall adopt the rule which to us seems the best supported by reason and in harmony with judicial principles. The doctrine that the acts of an officer *de facto* are valid, so far as they affect third parties and the public, is so familiar and well settled that no citation of authorities is necessary to show it. The acts of such officer are sustained upon the ground that to question them would devolve upon every person transacting business with the officer the duty of determining for himself, at his peril, the right of the incumbent to the office he holds. Third parties assume no such risk. They are not bound to know that the person exercising the functions of a public office under color of authority is rightfully in possession of the office, but are warranted in recognizing him as the legal and valid officer, and are justified in dealing with him as such. If a person pays to a *de facto* officer the fees allowed by law for his services, he is protected, and will not be compelled to pay them the second time to the officer *de jure*. We think the same principle should govern in a case like the one at bar. Cashman was the *de facto* county treasurer of Greeley county, and performed the duties of the office under color of title from January 9, 1890, to October 28, 1891, during which time he received all the emoluments which attached to the office.

He took possession of the office in good faith by virtue of the decision in his favor of the contest court, and continued to occupy the office until the respondent was declared to be entitled to the same by virtue of a judgment of ouster obtained by him against Cashman on the final determination of the appeal in the contest case by the district court. The county board in settling with Cashman, and allowing him the fees and salary provided by law for the period during which he performed the duties of the office, the same having been made before the respondent came into possession, had a right to rely upon the apparent title of Cashman, and to treat him as an officer *de jure*. The board was justified in allowing him the emoluments of the office upon that assumption, and the county cannot be compelled to pay them again. We are aware that courts of high authority have sustained the contrary doctrine, but the decided preponderance of authorities support the conclusion we have reached. (*Steubenville v. Culp*, 38 O. St., 18; *Wayne Co. v. Benoit*, 20 Mich., 176; *Parker v. Supervisors of Dakota County*, 4 Minn., 30; *Dolan v. Mayor*, 68 N. Y., 274; *McVeany v. Mayor*, 80 Id., 185; *Terhune v. Mayor*, 88 Id., 247; *Hagan v. City of Brooklyn*, 126 Id., 643; *Saline Co. v. Anderson*, 20 Kan., 298; *Gorman v. Boise Co.*, 1 Idaho, 655; *Shaw v. County of Pima*, 18 Pac. Rep. [Ariz.], 273; *State v. Clark*, 52 Mo., 508; *Westberg v. City of Kansas*, 64 Id., 493; *Shannon v. Portsmouth*, 54 N. H., 183.)

The Michigan case was this: Emil P. Benoit and George Miller were candidates for the office of county treasurer. The latter was declared elected by the county canvassers and entered upon the performance of the duties of the office on the first day of January, 1867, and continued in such performance until November following, when, by a judgment of ouster, Benoit was declared entitled to the office. The board of county auditors, having settled with Miller and allowed him the salary for the actual time he

held the office, refused to allow the salary for the same period to Benoit. The latter at the close of his term withheld and refused to pay to his successor $2,583.33, that being the amount of salary for the time he was excluded from the office. In an action on his bond by the county to recover the sum so withheld, it was decided that he could not exact salary for the time Miller was actually in office.

Saline County v. Anderson, supra, was an action brought by Anderson against the county to recover $900 claimed to be due as salary as county clerk from January 10 to Octo- 10, 1876. It appears that Anderson and one Wildman were opposing candidates for county clerk. The former received a majority of the votes and was awarded the certificate of election. The election was contested and the contest court decided in favor of Wildman, awarding him the certificate of election and annulling Anderson's. Wildman qualified and took possession of the office on January 10. Anderson prosecuted error to the district court, and the judgment of the contest court was reversed. Wildman thereupon appealed to the supreme court, where the judgment of the district court was affirmed on December 5, 1876, and the office was delivered to Anderson. Wildman was paid the salary and fees of the office up to October 10, although the county board had during all the time full knowledge that the title to the office was in litigation and that the clerk *de facto* was insolvent. It was held that the clerk *de jure* had no cause of action against the county for such salary. Valentine, J., in delivering the opinion of the court, says: "Now as Wildman was an officer *de facto*, holding under color of title, every person had a right to recognize him as a legal and valid officer, and to treat him as such. The public, the county, the county commissioners, and private individuals had a right to do business with him as an officer, and to pay him for his services if they chose, without taking any risk of having to pay for such services a second time. It might be greatly to the interest of the public, or

of the individuals doing business with such officer, to pay him when his fees or salary become due; and should they not be allowed to consult the interest of the public and their interests to so pay him? It is not their fault that he is wrongfully in the possession of the office; and how are they to know whether he is in the possession of the office rightfully or wrongfully? Are they bound to know who is entitled to the office in advance of any final adjudication of the question by the courts? Are they bound to anticipate the decision of the courts? And are they bound to decide the question for themselves, as it thus comes up incidentally and collaterally in the payment of fees or salary? And if they should determine that the courts would eventually decide against the officer *de facto*, must they refrain from paying him any fees or salary at perhaps a great loss to themselves or to the public? * * * Now, the interest of the public, in the 'continuous discharge' of official duties, would authorize the payment of the legal fees or salary for the performance of such official duties to the person performing the same; and to allow a person not in the possession of the office, but who claims to be entitled thereto, to sue for the fees or salary thereof, would be to allow the question of the title to the office to be raised and determined against the officer *de facto* in a controversy in which he was not a party, and in which he could not be heard? Such certainly could not be allowed. But if this suit can be maintained, then it would be allowed. * * * It must be remembered that Wildman was not a mere usurper; but he was an officer *de facto*, having possession of the office under color of title. What would be the rule if he were a mere usurper, it is not necessary for us to decide in this case. All that we now decide is, that where a person is in the possession of the office of county clerk, under color of title, and is the county clerk *de facto*, and claims to be the county clerk *de jure*, and the board of county commissioners pays to him the salary due to the rightful incumbent of

such office, the county clerk *de jure* has no action against the county board for such salary, and this notwithstanding the fact that the county board may have known at the time they paid said salary that the question as to the title of the office was in litigation, and notwithstanding the fact that the county clerk *de facto* may be insolvent. The remedy of the county clerk *de jure* in such a case is an action against the county clerk *de facto*."

The supreme court of New York in *Dolan v. Mayor*, *supra*, in passing upon a case quite similar to the one at bar, held that the payment of the salary to an officer *de facto*, made while he was in possession, is a good defense to an action by the *de jure* officer to recover the same salary. This decision has been followed with approval by the same court in subsequent cases.

We are of the opinion that the respondent is not entitled to the money retained by him. He must pay the same to the county treasurer of Greeley county. A peremptory writ is allowed as prayed.

WRIT ALLOWED.

THE other judges concur.

WILLIAM H. STERNBERG V. STATE OF NEBRASKA.

FILED MARCH 1, 1893. No. 5198.

1. **Street Railways: CONTROL BY MUNICIPALITY: COMMUTATION TICKETS.** The street railway of the city of Lincoln is so far under the control of the municipality that the latter may fix the rates of fare for passage over said railway, and may require tickets six for twenty-five cents to be kept for sale by each conductor of a street car.
2. ———: ———: ———. A street railway has no depots. Its stopping places are on each street corner and it transacts its business with the public in its cars, and its tickets should be kept for sale where it transacts its business with the public.

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

William G. Clark, for plaintiff in error:

The ordinance requiring the street railway company to constitute its conductors agents for the sale of tickets is illegal and void. It is unreasonable and exceeds the police power of the state. The court has held a rule of a railroad company requiring passengers on freight trains to purchase tickets before entering the cars to be reasonable, and that non-compliance may be lawfully followed by expulsion, even when the offending passenger had no knowledge of the rule. (*Burlington & M. R. Co. v. Rose*, 11 Neb., 177; *Chicago & A. R. Co. v. Flagg*, 43 Ill., 364; *Arnold v. Illinois C. R. Co.*, 83 Id., 273; *Eaton v. Delaware, L. & W. R. Co.*, 15 Am. Rep., 513; *Cleveland, C. & C. R. Co. v. Bartram*, 11 O. St., 457; *Law v. Illinois C. R. Co.*, 32 Ia., 536.) A railroad company has a right to decide what grade or class of employes shall receive and handle its money. This rule is reasonable for the protection of the company against peculation and fraud. (*Cleveland, C. & C. R. Co. v. Bartram, supra.*) A carrier of passengers may require passengers to purchase tickets before entering the car or to submit to a penalty in the form of an increased toll for failure so to do. (*Chicago, B. & Q. R. Co. v. Griffin*, 68 Ill., 499; *Shelton v. Lake Shore & M. S. R. Co.*, 29 O. St., 214; *Downs v. New York & N. H. R. Co.*, 36 Conn., 287.) The spirit of modern legislation forbids discrimination in favor of a large patron, and requires of the carrier equal rates to all. The courts hold that such right exists at common law. (*Cock v. Chicago, R. I. & P. R. Co.*, 81 Ia., 561.) The powers of the city council have been prescribed at great length and with minute detail. The careful enumeration of such powers is in itself by all recognized canons of construction

a limitation thereof. The powers of a corporation, municipal or private, are limited to the privileges expressly conferred by its charter, or necessary to the enjoyment of such express privileges. (*Commonwealth v. Erie & N. E. R. Co.*, 27 Pa. St., 351; *Logan v. Pyne*, 43 Ia., 525; 2 Kyd, Corp., secs. 102-107; Willcock, Mun. Corp., 14 L L., sec. 769; Ang. & A., Priv. Corp., 111–239; 1 Dillon, Mun. Corp. [4th ed.], sec. 89.) For all purposes of jurisdiction corporations, municipal, are like inferior courts and must show the power given them in every case. If wanting, their proceedings must be holden void. (*Dunham v. City of Rochester*, 5 Cow. [N. Y.], 465; *Bloom v Xenia*, 32 O. St., 461; *State v. Atchison & N. R. Co.*, 24 Neb., 143; *Rochester v. Collins*, 12 Barb. [N. Y.], 559; *Grand Rapids v. Hughes*, 15 Mich., 54; *Horn v. People*, 26 Id., 224; *Eichels v. Evansville Street R. Co.*, 78 Ind., 261; *Huesing v. Rock Island*, 128 Ill., 465; *Brenham v. Brenham Water Co.*, 67 Tex., 542; *Spengler v. Trowbridge*, 62 Miss., 46; *Reed v. Toledo*, 18 O., 161; *Des Moines v. Gilchrist*, 67 Ia., 210; *Thomson v. Roe*, 22 How. [U. S.], 422; *Andrews v. Union Mutual Ins. Co.*, 37 Me., 256. *Thomas v. Richmond*, 12 Wall. [U. S.], 349; *Clark v. Davenport*, 14 Ia., 494; *Merriam v. Moody*, 25 Ia., 163.)

George H. Hastings, Attorney General, and *Adams & Scott*, for the state:

Under a city charter giving the council power to pass all ordinances necessary for the due administration of justice and the better government thereof, and to cause the removal or abatement of any nuisance, a passage of an ordidance requiring the street car company to put a driver and a conductor on each car is a proper exercise of the police power and not an infringement of the company's rights, not being unreasonable or oppressive. (*South Covington & C. St. R. Co. v. Berry*, 18 S. W. Rep. [Ky.], 1026.) A provision in such ordinance requiring the police to cause

every car not provided with a driver and conductor to be returned to the stable is not an attempt at enforcement without trial, but merely a means of preventing a nuisance by blockading travel. (*South Covington & C. St. R. Co. v. Berry, supra.*) An ordinance enacting that it shall not be lawful for any horse railway company, without having an agent in addition to the driver to assist in controlling the car and passengers, and to prevent accident and disturbance of the company, and to maintain order and secure the safety of the passengers is a reasonable regulation, and a valid exercise of the general police power vested in a city by its charter. (*State v. Trenton*, 20 Atl. Rep. [N. J.], 1076.) The doctrine of the New York cases is, that a passenger lawfully upon a train has a right to resist any attempt to remove him therefrom; and if, in consequence of his resisting, extraordinary force is used to remove him and he is injured thereby, he may recover. (*English v. Delaware & H. Canal Co.*, 66 N. Y., 455, 23 Am. Rep., 69; *Sanford v. Eighth Ave. R. Co.*, 23 N. Y., 343, 80 Am. Dec., 286.) In California it is provided by statute that the company must furnish tickets or checks to all passengers who apply for them. (Rev. Stats. Cal., 1882, sec. 502.) In Massachusetts, statutory regulations have been enacted with reference to the removal of snow and ice. (Rev. Stats. Mass., 1882, p. 113, sec. 26.) New York has a similar provision. (Rev. Stats. N. Y., 1889, ch. 252, sec. 9.) In New York a city ordinance has been sustained which prohibited the use of sand on the tracks. (*Drydock, E. B. & B. R. Co. v. New York*, 47 Hun [N. Y.], 221; Booth, Street Railway Law, p. 336.) And an ordinance of Philadelphia was sustained as a proper police regulation which required passenger cars to be numbered and licensed on the payment of a stipulated fee. (*Frankford & P. P. R. Co. v. Philadelphia*, 58 Pa. St., 119; Booth, Street Railway Law, p. 336.) Under the powers inherent in every sovereignty, a government may regulate the conduct of its

citizens toward each other, and, when necessary for the public good, the manner in which each shall use his own property. (Booth, Street Railway Law, p. 319; *Munn v. Ill.*, 94 U. S., 113; *Chicago, B. & Q. R. Co. v. Ia.*, 94 U. S., 155; *McAunich v. Mississippi & Mo. R. Co.*, 20 Ia., 343.) After a railroad company has received authority to use the streets it is subject, not to the charter conditions alone, but also to such further police regulations as the public safety and convenience may require. (Horr & Bemis, Mun. Pol. Ord., sec. 211; *St. Louis v. St. Louis R. Co.*, 89 Mo., 44.) Corporations chartered to do business in a city are to be regarded as inhabitants of the city, and unless exempted are subjected to its ordinances. (*Frankford & P. P. R. Co. v. Philadelphia*, 58 Pa. St., 119, *supra.*) A street railway company is a common carrier of passengers, with duties and responsibilities similar to those of a railroad company. (Booth, Street Railway Law, p. 442, sec. 324.) State or municipality has a right to regulate fare charged. (*Wakefield v. South Boston R. Co.*, 117 Mass., 544; *Buffalo Eastside R. Co. v. Buffalo St. R. Co.*, 111 N. Y., 132, 139; *Blake v. Winona & St. P. R. Co.*, 19 Minn., 418; *Illinois C. R. Co. v. People*, 95 Ill., 313; *Camden & A. R. Co. v. Briggs*, 22 N. J. L., 623.) Mr. Bush was within the law, and the conductor was without the law, and when the conductor refused to give Mr. Bush the package of tickets for Bush's twenty-five cents, he violated the law of the city. So the doctrine that a passenger lawfully upon a train has a right to resist any attempt to remove him therefrom, applies. (*English v. Delaware & H. Canal Co.*, 66 N. Y., 455, 23 Am. Rep., 69; *Sanford v. Eighth Ave. R. Co.*, 23 N. Y., 343, 80 Am. Dec., 286.)

N. Z. Snell, also, for the state.

MAXWELL, CH. J.

The plaintiff in error was convicted of assault and battery, and judgment rendered against him on the verdict.

The case was submitted to the court below on the following stipulation of facts:

"It is hereby stipulated and agreed that the Lincoln Street Railway Company is a corporation duly organized and existing under and by virtue of the laws of the state of Nebraska, running and operating in the city of Lincoln a line of street railway, and that on the 31st day of July, 1891, William H. Sternberg was a conductor on one of the cars of said company, and on the 27th day of August, 1891, A. L. Rice was also a conductor on one of said company's cars; that on the 31st day of July, 1891, one George H. Bush got upon one of the cars of the said company, on which William H. Sternberg was conductor, and demanded of the said conductor that he sell to the said George H. Bush six Lincoln street railway tickets for twenty-five cents, and that the said George H. Bush offered to pay to the said William H. Sternberg, as conductor, the sum of twenty-five cents for said tickets, and that Mr. Bush demanded a package of six tickets for twenty-five cents, and manifested a willingness to pay one of the six tickets to the conductor whenever said tickets were delivered to him, and whenever said package of tickets were delivered to him he was ready to pay and deliver the twenty-five cents, and for that purpose held the twenty-five cents in his hand in full view, and that said Sternberg refused to give him a package of six tickets for twenty-five cents, but on the contrary demanded of said George H. Bush that he pay the five cent fare, which was the customary charge for a single passage on the car, and that the said George H. Bush refused to pay the said five cent fare on said demand, and thereupon the said Sternberg notified him that he would have to leave said car, which the said Bush declined to do, and thereupon the said William H. Sternberg attempted to forcibly eject and evict said party from said car; the said Bush resisted, and the said Sternberg was unable by himself to put said party off, and

thereupon called to his assistance other parties; that the said Sternberg and the parties he called to his assistance took hold of and laid their hands upon the said Bush, said Bush all the time resisting with all his power, and the said Sternberg and the persons helping him overcame said Bush's resistance and forcibly ejected him from the car, said Sternberg and his assistants using, however, no more force than was necessary to overcome the resistance of Bush and put him off; that on the 27th day of August, 1891, A. L. Rice was a conductor on one of the cars of the said street railway company, and that on the said date one Edwin P. Le Fevre got upon said car on which the said Rice was conductor, to ride, and when he was asked for his fare by the said conductor the said Le Fevre demanded of the said A. L. Rice, conductor, that he sell to him six tickets for twenty-five cents, and the said E. P. Le Fevre was ready and willing, and tendered to the said conductor the twenty-five cents for the tickets, and the said conductor refused to sell said tickets to the said E. P. Le Fevre, but demanded of him five cents, which was the customary fare charged by the said company for a passage upon its cars, and the said Le Fevre refused to pay the same, but insisted on being sold six tickets for twenty-five cents, out of which he would pay to the conductor his fare for said passage; the said A. L. Rice, as conductor, still refusing to sell said tickets and insisting upon the said Le Fevre paying the five cent fare, which Le Fevre refused to do, and thereupon A. L. Rice laid his hands upon the said Le Fevre and forcibly evicted said Le Fevre from the car; that on both of said dates there was a rule and regulation made by said street car company by which its conductors were required to eject and put off from its cars any person who attempted to ride without paying the customary fare; that on all of the cars of the Lincoln Street Railway Company the fares are paid directly to the conductors and not dropped into the cash box, and if the conductors are re-

quired to sell tickets they would be obliged to handle the cash fares as well as those paid by tickets; that both the said E. P. Le Fevre and George H. Bush had ridden upon the said cars prior to these dates, and had attempted to buy six tickets for twenty-five cents from the conductors, and had been refused and had been notified that said conductors did not sell tickets on the cars; that prior to the putting on of the electric cars on the line of the street railway company all its lines had been operated by horse cars, and under the system as operated by horse cars there was only one man to the car, and he was the driver; and that all fares paid by the passengers on said cars were dropped into a cash box instead of being paid directly to the driver or conductor; that under said system it had been customary for several years for the driver on the horse cars to sell to passengers six tickets for twenty-five cents, as required by an ordinance of the city of Lincoln; that during the spring of '91 said system of street cars changed from horse cars to electricity, and that under said system all the fares, both cash and otherwise, are paid directly to the conductor; that under the present system of operating said street railway the various railroad ticket agents in the city sell tickets twenty-four for $1, instead of the conductor selling six for twenty-five cents to passengers; that the number of people who ride upon the cars of the Lincoln street railway per day is, upon an average, about 7,000, and about one-half of these would buy tickets of the conductors if six for twenty-five cents were sold by the conductor; that on said date there was in force an ordinance of the city of Lincoln in the words and figures following:

"1167. No company shall charge or receive more than five cents fare for each passenger carried on any of said roads, nor more than twenty-five cents for each package of six tickets.

"1168. Every street railroad company in this city shall keep for sale by the conductor or driver of each car pack-

ages of tickets of the required number for twenty-five cents each, ready for delivery during the running of the car to any passenger applying and paying for the same.

"1170. It shall be unlawful for any person to ride upon any street railroad car in the city of Lincoln without paying the customary fare (unless exempt by the rules of the company owning said railroad).

"1172. Any person who shall violate any of the provisions of this article shall, upon conviction thereof, be fined in any sum not exceeding $100, and be committed until such fine and prosecutions are paid."

On page 457 of the Municipal Code is an ordinance which provides as follows (referring to the Lincoln Street Railway Company): "Said railway company shall be subject to all reasonable regulations in the construction and use of said railway which may be imposed by ordinances."

On the trial of the cause the court instructed the jury as follows:

"The jury are instructed that the complaint charges that the defendant, on the 31st day of July, 1891, in the county of Lancaster and state of Nebraska and within the corporate limits of the city of Lincoln, did unlawfully in and upon one George H. Bush make an assault, and did then and there unlawfully strike and wound him, the said George H. Bush.

"2. The assault of the defendant upon the person of George H. Bush at the time and place alleged in the complaint is admitted by the defendant, and your verdict should be guilty as charged."

The jury returned a verdict finding Sternberg guilty as charged, and he was fined $5 and costs. The defense is made by the street railway company. The reasons set forth by it in its brief for holding the judgment erroneous are as follows:

"1. The ordinance requiring the street railway company to constitute its conductors agents for the sale of tickets was illegal and void.

"*a.* Because such requirement is unreasonable in law and in excess of the police power of the state.

"*b.* Because the council of the city of Lincoln was without power to enact such requirement.

"2. Because the complaining witness was himself a wrong-doer and voluntarily provoked and brought upon himself the alleged assault and was in any event rightfully ejected from said car.

"3. The ordinance is unreasonable and exceeds the police power of the state.

"4. The ordinance, which has no parallel in adjudged cases or in current history of municipal regulations, appears to have been suggested from the fact that at an early day when the cars were operated by mules or horses in charge of a single driver, the street railway company, or more exactly its predecessor, had sold tickets at the rate of six for twenty-five cents through the drivers. The drivers, however, were not permitted to take up such tickets or to collect fares, which, in each case, the passenger must personally deposit in a fare box. The driver was required to make change when necessary in a limited amount, but even then was not permitted to retain and deposit the fare. He returned the whole amount to the passenger, who dropped the fare into the box. Every one accustomed in those days to use the cars knows that this rule was rigidly enjoined and enforced, and that even for the aged or for women with children the driver was unable, on request, to receive or deposit the fare. Under rapid (electrical) transit, and with increased numbers of passengers, public safety requires, in most cases, two men instead of one to manage the cars, and public convenience demands, whether reasonable or not, that the conductor collect the fares. These great improvements render the sale of tickets by conductors unsafe and impracticable. The stipulation shows that a year ago the street railway company was carrying 7,000 passengers daily and that at least one-half would in any event pay cash. The con-

ductors then would receive $175 in cash and an equivalent of $140 in tickets. These amounts are constantly increasing, because Lincoln is a growing city and more persons use the cars each year. The opportunity for fraud and theft on the part of the conductor is manifest. A conductor on a crowded line might receive and does receive $15 to $30 daily. For half or two-thirds of the cash taken at the rate of five cents per fare he can substitute tickets necessarily in his possession at the rate of four cents per fare, embezzling daily from fifty cents to $2—$15 to $60 per month. The ratio of tickets to fares is necessarily uncertain and variable on different lines and dates. Detection even by secret service would be impossible, because a detective to form a correct judgment would watch so closely as to disclose his purpose."

The assertion that the ordinance in question is without a parallel in the current history of municipal regulations is not borne out by the cases cited. On the contrary street railways are constructed for the convenience of the public. The cars necessarily pass over a certain prescribed portion of the streets occupied by their tracks. Every street corner is a station where passengers may be received and discharged. The streets are for the benefit of all—the public generally as well as the portion represented by the street railway company. Now, as the company is permitted to use the public streets and along their tracks have a right of way on which it is entitled to preference over other vehicles passing along the streets, it necessarily follows that the general regulations and control of such railways are under the police powers in the city government, and the municipality may enact all reasonable rules for that purpose. (*South Covington & C. S. Ry. Co. v. Berry*, 18 S. W. Rep. [Ky.], 1026; *State v. Trenton*, 20 Atl. Rep. [N. J.], 1076; *St. Louis v. St. Louis R. Co.*, 89 Mo., 44.)

It will be observed in the case at bar that on page 457 of Municipal Code of Lincoln it is provided that "said

railway company shall be subject to all reasonable regulations in the construction and use of said railway which may be imposed by ordinances." The constitution of 1875, to prevent favoritism and fraud, required the consent of a majority of the electors thereof of any city, town, or incorporated village to the construction of a street railway. (Const., art. XIII, sec. 2). This, therefore, was the proposition submitted to the electors and accepted by them and the street railway company. In addition to this, paragraph 16, section 67, chapter 14, of the statute of 1889 grants the general power "to regulate and prescribe the manner of running street cars, to require the heating and cleaning of the same, and to fix and determine the fare charged."

It is claimed on behalf of the company that the power "to fix and determine the fare charged" does not confer the power to require tickets to be sold at all, and therefore that no authority for that purpose exists in favor of the city. This is begging the question. The power to fix the rates of fare necessarily carries with it all incidents necessary to carry the power into effect. Thus, for a single passage the fare is five cents. If six trips are to be made the price is fixed at six for twenty-five cents. A street railway has no depots. Its stations are the street corners and its business with the public is conducted on its cars. Is it unreasonable to require the company to sell its tickets at its places of doing business? We think not. The plea that it is liable to be defrauded by its employes if it sells tickets on the cars we believe does injustice to many faithful, reliable, and diligent persons whose integrity is above question, and is a mere pretext to evade the ordinance requiring tickets to be sold on the cars, as it will readily be seen from the stipulation of the facts that it is for the interest of the company not to sell tickets but to collect fares in cash. But even if the claim on behalf of the company is true, which we do not believe, it must comply with the ordinance. The question is one of power, and the power of the city

over the street railway is full and ample, and the requirement is reasonable and the company must perform on its part. Mr. Bush therefore had a right to demand six tickets of the plaintiff in error on offering to pay for the same and the plaintiff in error was guilty of a wrong in ejecting him from the cars. The judgment is right and is

AFFIRMED.

THE other judges concur.

E. L. RICE V. STATE OF NEBRASKA.

FILED MARCH 1, 1893. No. 5197.

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

William G. Clark, for plaintiff in error.

George H. Hastings, Attorney General, Adams & Scott, and *N. Z. Snell*, for the state.

MAXWELL, CH. J.

The questions involved in this case are identical with those in *Sternberg v. State*, just decided, *ante*, p. 307, and the same judgment will be entered. The judgment of the district court is therefore

AFFIRMED.

THE other judges concur.

MARTIN J. O'GRADY V. STATE OF NEBRASKA.

FILED MARCH 1, 1893. No. 5652.

1. **Criminal Law**: INSANITY FROM INTOXICATION: EXCUSE FOR CRIME: EVIDENCE. Intoxication is no justification or excuse for crime; but evidence of excessive intoxication by which the party is wholly deprived of reason, if the intoxication was not indulged in to commit crime, may be submitted to the jury for it to consider whether in fact a crime had been committed, or to determine the degree where the offense consists of several degrees.
2. **Instructions** set out in the record should be qualified as above.

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

Daniel F. Osgood, for plaintiff in error.

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

MAXWELL, CH. J.

The plaintiff in error was convicted of attempting to pass a forged check and was sentenced to imprisonment in the penitentiary for two years. All the testimony in the case upon that point tends to show that the plaintiff in error was intoxicated at the time, and the question presented is to what extent, if at all, excessive drunkenness not entered into for the purpose of committing crime may be considered by the jury in determining the intention of the accused. The court instructed the jury: "The jury are instructed that voluntary intoxication or drunkenness is no excuse for a crime committed under its influence, nor is any state of mind resulting from drunkenness, short of actual insanity or loss of reason, any excuse for a criminal act. Where without intoxication the law would impute a criminal intent, proof of drunkenness will not avail to disprove

such intent where the drunkenness is voluntary." It will be observed that the instruction contains two propositions, viz., that drunkenness is no excuse for crime unless it produces actual insanity or loss of reason, and, second, that where the intoxication is voluntary, proof of intoxication cannot be considered to disprove intent. The rule as stated in the second part of the instruction, being without qualification, is too broad. While it is true that intoxication is not a justification or excuse for crime it is also true that at the present time evidence of intoxication may be admitted to determine whether or not a crime has been committed or where it consists of several degrees depending on the intent, the grade of the offense.

Cline v. State, 43 O. St., 334, 335, which in our view states the law correctly, is as follows: "Where a person having the desire to do to another an unlawful injury, drinks intoxicating liquors to nerve himself to the commission of the crime, intoxication is held, and properly, to aggravate the offense; but at present the rule that intoxication aggravates crime is confined to cases of that class. The rule is well settled that intoxication is not a justification or an excuse for crime. To hold otherwise would be dangerous to and subversive of public welfare. But in many cases evidence of intoxication is admissible with a view to the question whether a crime has been committed, or where a crime consisting of degrees has been committed, such evidence may be important in determining a degree. Thus, an intoxicated person may have a counterfeit bank bill in his possession for a lawful purpose, and intending to pay a genuine bill to another person may, by reason of such intoxication, hand him the counterfeit bill; as intent in such case is of the essence of the offense, it is possible that in proving intoxication you go far to prove that no crime was committed. (*Pigman v. State*, 14 Ohio, 555.) So where the offense charged embraces deliberation, premeditation, some specific intent, or the like, evidence of intoxication

may be important, and it has frequently been admitted. (Id.; *Nichols v. State*, 8 O. St., 435; *Davis v. State*, 25 Id., 369; *Lytle v. State*, 31 Id., 196.) The leading case of *Pigman v. State* has been repeatedly cited with approval (*People v. Robinson*, 2 Park., 235; *People v. Harris*, 29 Cal., 678; *Roberts v. People*, 19 Mich., 401; *State v. Welch*, 21 Minn., 22; *Hopt v. People*, 104 U. S., 631; *State v. Johnson*, 40 Conn., 136), and no doubt the law upon the subject is correctly stated in that case, and that the rule as there expressed is humane and just, but there is always danger that undue weight will be attached to the fact of drunkenness where it is shown in a criminal case, and courts and juries should see that it is only used for the purpose above stated, and not as a cloak or justification for crime. See, also, *U. S. v. Drew*, 5 Mason, 28; s. c., 1 Lead. Crim. Cas. [2d ed.], 131, note; *Reg. v. Davis*, 14 Cox, C. C., 563; s. c., 28 Moak Eng. Rep., 657; note, Lawson on Insanity, 533–768, where all the cases are collected relating to the admissibility and effect in criminal cases of proof of intoxication."

Drunkenness is not favored as a defense, and in *Johnson v. Phifer*, 6 Neb., 402, this court held that it could not relieve a party from a contract on the ground that he was drunk when it was entered into unless his condition reached that degree which may be called excessive drunkenness, where a party is utterly deprived of reason and understanding. This, in our view, is the true rule. As much as we may desire to discourage drunkenness, and deplorable as the habit of drinking, with its train of wrecks and ruin, may be, we must still recognize the frailty of human beings, and adapt the law to the actual condition of the party.

In *Pigman v. State, supra*, it is said: "The older writers regarded drunkenness as an aggravation of the offense and excluded it for any purpose. It is a high crime against one's self, and offensive to society and good morals; yet

every man knows that acts may be committed in a fit of intoxication which would be abhorred in sober moments. And it seems strange that any one should ever have imagined that a person who committed an act from the effect of drink which he would not have done if sober, is worse than the man who commits it from sober and deliberate intent. The law regards an act done in sudden heat, in a moment of frenzy when passion has dethroned reason, as less criminal than the same act when performed in the cool and undisturbed possession of all the faculties. There is nothing the law so abhors as the cool, deliberate, and settled purpose to do mischief. That is a quality of a demon; whilst that which is done on great excitement, as when the mind is broken up by poison or intoxication although, to be punished, may to some extent be softened and set down to the infirmities of human nature. Hence, not regarding it as an aggravation, drunkenness, as anything else showing the state of mind or degree of knowledge, should go to the jury. Upon this principle, in modern cases, it has been permitted to be shown that the accused was drunk when he perpetrated the crime of killing, to rebut the idea that it was done in a cool and deliberate state of the mind necessary to constitute murder in the first degree. The principal is undoubtedly right. So, on a charge of passing counterfeit money; if the person is so drunk that he actually did not know that he had passed a bill that was counterfeit, he is not guilty. It oftentimes requires much skill to detect a counterfeit. The crime of passing counterfeit money consists of knowingly passing it. To rebut that knowledge, or to enable the jury to judge rightly of the matter, it is competent for the person charged to show that he was drunk at the time he passed the bill. It is a circumstance, among others, entitled to its just weight."

If he was so drunk as to be deprived of reason and understanding, that is a fact for the jury to consider with the other facts proved, in determining the guilt or innocence of

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

REVERSED AND REMANDED.

THE other judges concur.

FRANK P. KETCHELL V. STATE OF NEBRASKA.

FILED MARCH 1, 1893. No. 5942.

1. **False Pretenses.** In a prosecution for obtaining money by false pretenses the gist of the offense consists in obtaining the money of another by false pretenses, with the intent to cheat and defraud.
2. ———: EVIDENCE. The proof tends to show that the accused acted in good faith and in the reasonable belief that the draft would be paid.

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

V. O. Strickler and *E. R. Duffie,* for plaintiff in error.

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

MAXWELL, CH J.

The plaintiff in error was informed against by the county attorney of Douglas county for obtaining money by false pretenses. There are four counts in the information for separate transactions, which are alike, except as to dates and amounts. On the trial the jury found the plaintiff in error not guilty upon the first, second, and third counts of the information, but guilty on the fourth count, and he was sentenced to imprisonment in the penitentiary for three years. The fourth count is as follows:

"And the said Timothy J. Mahoney, county attorney, on his oath aforesaid, further gives the court to understand and be informed that said Frank P. Ketchell, on or about the 20th day of November, 1891, in the county of Douglas and state of Nebraska aforesaid, then and there being, and then and there intending, unlawfully, falsely, fraudulently, and feloniously to cheat and defraud one Oliver C. Campbell, did then and there unlawfully and feloniously pretend and represent to Oliver C. Campbell, and to one Henry Bloomer, the clerk and agent of said Oliver C. Campbell, which said representation was communicated to said Oliver C. Campbell, and which said communication was made by the said Frank P. Ketchell to the said Henry Bloomer for the purpose of being by the said Henry Bloomer the clerk and agent of the said Oliver C. Campbell, communicated to the said Oliver C. Campbell that one Farrand Ketchell, residing at or near Newark, in the state of New Jersey, was then and there a wealthy man, who had a large amount of property and money over and above his exemptions and liabilities, and who was then and there amply able to pay a certain draft upon said Farrand Ketchell in the sum of $350, and that the said Farrand Ketchell would pay said draft, and as soon as presented, and that the said Farrand Ketchell was then and there owing and indebted to the said Frank P. Ketchell an amount of money in excess of said sum of $350, out of which amount said Farrand Ketchell could pay said draft, and did then and there request said Oliver C. Campbell to indorse a draft drawn through the Omaha National Bank of the city of Omaha, upon the said Farrand Ketchell, at Newark, state of New Jersey, to enable the said Frank P. Ketchell to obtain from said Omaha National Bank the said sum of $350, the amount of said draft; that, relying upon said pretenses and representations and believing the same to be true, the said Oliver C. Campbell did then and there indorse his name across the back of said

the draft, and the said Henry Bloomer, agent and clerk of the said Oliver C. Campbell, did then and there present said draft to said Omaha National Bank of the city of Omaha, in the county of Douglas, and on faith and credit of the said indorsement of the said Oliver C. Campbell said Omaha National Bank did then and there pay and deliver to the said Henry Bloomer the amount of said draft, to-wit, the sum of $350, which said money so received upon the faith and credit of the said indorsement of the said Oliver C. Campbell, the said Henry Bloomer, agent and clerk of the said Oliver C. Campbell, did then and there, by reason of the said pretenses and representations, pay and deliver over to the said Frank P. Ketchell, and the said Frank P. Ketchell then and there, by said false pretenses and representations, did then and there obtain through the said Henry Bloomer from the said Oliver C. Campbell said sum of $350, lawful money of the United States, of the value of $350, the property of the said Oliver C. Campbell; that the said pretenses and representations were then and there wholly false and untrue, and the said Frank P. Ketchell, residing at or near Newark, New Jersey, was not then and there a man of great wealth and had not then and there property and money sufficient to pay said draft, over and above his liabilities and exemptions and was not then and there able to pay said draft, and the said Farrand Ketchell was not then and there indebted to the said Frank P. Ketchell in a sum sufficient to pay said draft, and had no funds whatever of the said Frank P. Ketchell out of which to pay said draft, all of which said representations the said Frank P. Ketchell well knew to be wholly false and untrue, and which said representations the said Frank P. Ketchell then and there made with the intent then and there to defraud the said Oliver C. Campbell, contrary to the form of the statute in such case made and provided and against the peace and dignity of the state of Nebraska."

Farrand Ketchell is the father of the plaintiff in error.

His testimony was taken by deposition, and, in substance, is that the plaintiff in error had authority to draw on him, and had done so for many years; that he had paid all such drafts prior to the ones mentioned in the information; that after about September 1, 1891, to the time the last of the drafts in question was drawn, the plaintiff in error had drawn on him for about $3,000, of which he had paid $1,700; that one of the reasons why he refused to pay the drafts in question was that he feared his son was being defrauded. It also appears that the drafts in question were accepted and judgment has been recovered thereon. He also testifies that a trust fund in favor of his son has been under his control, and that no settlement had ever taken place with the son. The testimony also shows that the first, second, and third drafts involved in the information had been accepted before Mr. Campbell indorsed the fourth one, and that he had notice to that effect, and it is evident, relied to a considerable extent thereon. Now, upon such proof, can a conviction for obtaining money by false pretenses be sustained? We think not. All the proof tends to show that when the plaintiff in error drew the draft in question he had reason to believe that it would be accepted and paid. To constitute the crime charged it is essential that there should be an intent on the part of the accused to cheat and defraud. (*People v. Kendall*, 25 Wend. [N. Y.], 399; s. c., 37 Am. Dec., 240; *Clark v. People*, 2 Lans. [N. Y.], 332; *Brown v. People*, 16 Hun [N. Y.], 537.) Such proof, no doubt, may be shown by circumstances. The proof in this case is insufficient to show an intent to defraud, and therefore the verdict must be set aside. It is pretty evident from the testimony, however, that the plaintiff in error should engage in some lawful employment and support himself. He seems to have reached the limit of his father's ability to maintain him and pay his bills, and drafts hereafter drawn and unpaid may, in all probability, place him in the attitude of procuring money thereon by false

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

REVERSED AND REMANDED.

THE other judges concur.

WILLIAM GRIFFIN, APPELLEE, V. HATTIE E. CHASE ET AL., APPELLANTS.

FILED MARCH 1, 1893. No. 4731.

1. **Banks**: COLLECTIONS: TRUST FUNDS: INSOLVENCY: AGENCY. A national bank received certain real estate mortgages and notes for collection and to remit the proceeds to the owner when collected. This was done with all but two mortgages which were collected by the president of the bank. The bank failed soon after the last collection spoken of and had been insolvent for several months before that time. *Held*, That the bank was the agent of the owner of the instruments above set forth, and that the money derived therefrom was a trust fund which did not become a part of the assets of the bank, and that the receiver thereof had no right to said fund or any part thereof.
2. **Mortgages**: CONSIDERATION: COLLECTIONS ON SECURITIES BY PRESIDENT OF INSOLVENT BANK. *Held*, That a mortgage executed by J. O. C. and wife was made to secure moneys received by J. O. C.
3. **The right of the wife** to have certain real estate of the husband applied to the satisfaction of the mortgage before resorting to her estate or the homestead, held for further argument and consideration.

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

Charles Offutt, for appellant Edward E. Balch, receiver.

J. W. Eller and *A. A. Whitman*, for appellant Hattie E. Chase.

Charles E. Magoon and *Will R. Gaylord*, for appellee.

MAXWELL, CH. J.

This is an action to foreclose two real estate mortgages given by the defendants Chase and wife upon lots 762, 763, 764, 765, 766, also lots 748, 749, 750, 751, 752, 753, lots 752 to 766 inclusive, and 748 to 753 inclusive in the town of Fairmont, in said Fillmore county, Nebraska. Of the above lots No. 767 is the sole property of Hattie E. Chase, the wife of J. O. Chase, and lots 765 and 766 are occupied as a homestead by Chase and family. The proof tends to show the following facts: In December, 1887, and January and February, 1888, the plaintiff, who resides in the state of New York, held a number of mortgages on real estate in Fillmore county which were payable at the Fillmore County Bank, and were then maturing. The evidence of these mortgage debts, together with releases, were sent by the plaintiff direct to the First National Bank of Fairmont with instructions to collect the amounts due in each instance and remit to him and deliver the respective releases on payment being made in full. In the progress of these transactions it appears that Griffin sent to this bank the following notes and mortgages:

Dec. 27, 1887, note of Campbell	$1,080 00
Dec. 27, 1887, note of Sikes	1,296 00
Dec. 27, 1887, note of Brown	540 00
Dec. 27, 1887, note of Watt	1,080 00
Dec. 27, 1887, note of Austin	540 00
Jan. 27, 1888, note of Heller	756 00
Mar. 6, 1888, note of Logsdon	459 00
Mar. 6, 1888, note of Holcomb	1,080 00
Total	$7,075 00

The bank collected all of the above, except the notes of Logsdon and Holcomb, and remitted the same to the plaint-

iff. J. O. Chase, the president of the First National Bank of Fairmont, personally received the amount due on the Logsdon and Holcomb mortgages. This fact is important in view of the defense made by the bank in question and the wife of Chase. There was also a balance due on the Watts mortgage collected, of a few hundred dollars. The testimony tends to show that J. O. Chase was president of the bank from early in 1887 until the spring of 1888, and all of the above obligations were received by the bank while he was president thereof; that the bank stopped payment on the 10th of May, 1888, and had been insolvent for many months before that time; that on the 10th of August, 1888, or three months after the failure of the bank the mortgages in question were executed. A receiver was appointed for the bank, who was permitted to intervene in this action, and has answered in effect that the plaintiff was a general depositor and creditor of the bank and is not entitled to preference, and that he should be required to share *pro rata* with other creditors. Mrs. Chase, the wife of J. O. Chase, answers that the debt secured by mortgage is that of the bank and not of J. O. Chase. The lot above described is her individual property; that the other lots named, as a homestead, are now occupied by her as such. She also pleads a want of consideration, and that the mortgage was obtained by duress. On the trial of the cause the court found as follows:

"The court also finds that there is due to the plaintiff upon the notes set forth in said petition, which said mortgage was given to secure, the sum of $2,940, and that the plaintiff is entitled to a foreclosure of said mortgage as prayed only on the following of said lots, that is to say, on lots 767, which was the individual lot of the defendant Hattie E. Chase, and upon lots 766 and 765, which were the homestead property of the defendants J. O. Chase and Hattie E. Chase. The court finds that as to said lots the said mortgage gave a lien to the plaintiff for the amount

of said mortgage thereupon, and that the execution of said mortgage did not confer or pass any right or title to said lots, or any thereof, to the defendant Edward E. Balch, the receiver of the First National Bank of Fairmont; the court further finds that the making of said mortgages, as to the remainder of said lots, that is to say, as to lots 748 to 753 inclusive, and 764 to 762 inclusive, operate as a transfer of all of said lots, to-wit, lots 764, 763, 762, 748, 749, 750, 751, 752, and 753 to and for the use and benefit of the creditors of the First National Bank of Fairmont, and that as the receiver of the First National Bank of Fairmont the defendant Edward E. Balch is entitled to the same, and all thereof, for the use and benefit of the creditors of the First National Bank of Fairmont."

The defendants appeal. In the defendants' briefs the matter is discussed as though the plaintiff was a general depositor of the bank and hence the mortgages in question inure to the benefit of the bank. This contention is not sustained by the proof. The letter of the plaintiff of March 6, 1888, in regard to the Logsdon and Holcomb mortgages is as follows:

"WEST TROY, N. Y., Mar. 6, 1888.

"To Cashier First National Bank, Fairmont, Neb.

Inclosed I hand you for collection and remittance notes and mortgages of Samuel Logsdon and wife..... $425 00
Int. due Feb. 17, '88..... 34 00

$459 00

John Holcomb and wife.....$1,000 00
Int. to Mar. 10, 1888..... 80 00

$1080 00

"A. Logsdon's money was on deposit at maturity of papers, his int. shd. recd. to that date. In all these cases please carry out faithfully the provisions of the papers. I do not know what to calculate in regard to some of these

fellows. I am told to send out papers and when they get there they are neglected.

"Yours, W. GRIFFIN.

"Please acknowledge receipt. W. GRIFFIN."

The testimony of Samuel Logsdon as to whom and when he paid the mortgages is as follows:

Q. Did you give a note and mortgage to William Griffin at one time?

A. Yes, sir.

Q. Did you ever pay that note and mortgage?

A. Yes, sir.

Q. How much was it?

A. Four hundred and twenty-five dollars principal.

Q. How much interest?

A. Thirty-four dollars, I think.

Q. When did you pay it?

A. About one month after it was due, I think about the 20th of March; it was due the 17th of February.

Q. To whom did you pay it?

A. J. O. Chase.

Q. How did you pay it?

A. I paid it in money.

Q. Did you pay anything besides the principal and interest?

A. I paid the exchange.

Q. What exchange?

A. It was the same as money; I placed coupon notes—the exchange was fifteen cents and then he charged me extra; I paid him the fifteen cents for the coupon and the rest I cannot tell you how much.

Q. State when you paid the money to Mr. Chase whether he said anything in regard to your paying exchange.

A. Yes, sir; he did.

Q. What was it?

A. I cannot tell you just what he said; I just paid him

fifteen cents and he charged me extra of course; I cannot tell you what he said.

Q. What, if anything, did he say about what he got out of it?

A. He said he just got his per cent for collecting, that was all he got out of it, and he never offered to do business for nothing, or something like that; I cannot exactly give you the words.

Similar testimony was given in regard to the payment of the Holcomb mortgage and interest. We think that the proof establishes the fact that the bank received the money in question of the plaintiff, as his agent, with directions to remit to him. The money was not to be deposited in the bank but sent at once. This simplifies the case very much. It is very clear that the bank was the agent of the plaintiff and that the relation of principal and agent existed between them. The bank therefore held the funds of the plaintiff as trust funds and they were never mingled with the funds of the bank with the plaintiff's consent.

In *Peak v. Ellicott*, 30 Kan., 156, where a party had paid to the cashier of a bank the amount of a note given by him to the bank, which the cashier claimed had been rediscounted in another town, but would be sent for and canceled, the bank soon afterwards failed without canceling the note. The court held that the money so received was a trust fund, which must be applied to the purposes indicated and that it did not become a part of the assets of the bank. To the same effect *Ellicott v. Barnes*, 31 Kan., 170.

In *McCleod v. Evans*, 66 Wis., 401, 28 N. W. Rep., 173, it was held that a banker who accepts for collection a draft, and in fact collects the money thereon, holds the same as trustee of the owner; and after his assignment for the benefit of creditors, the trust character still adheres to the funds in the hands of the assignee, irrespective of other creditors. (*Francis v. Evans*, 33 N. W. Rep. [Wis.], 93; *Anheuser-Busch Brewing Ass'n v. Morris*, 36 Neb., 31.)

Other cases to the same effect can readily be cited, but it is unnecessary. That these moneys were held in trust there is no doubt, and as such they did not belong to the bank or become a part of its assets. The receiver, therefore, has no interest in such moneys.

2. It clearly appears that J. O. Chase personally received about $1,600 of the money in question. There is no proof that he turned it over to the bank. He recognized his personal liability for the money by executing with his wife the mortgages in question. They were given, therefore, so far as the proof shows, to secure the debt of Chase and not of the bank. The objection of want of consideration therefore fails.

3. It is possible as between the wife as surety for her husband and creditors of the bank that her personal estate and homestead are liable only after the lots owned by J. O. Chase are sold. This phase of the case is not very clearly presented in either brief, and we will hear further argument upon it. Except as herein modified, the judgment of the court below is affirmed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

A. REUBER V. GEORGE E. CRAWFORD.

FILED MARCH 1, 1893. NO. 4470.

1. **Alteration of Promissory Note:** WEIGHT OF EVIDENCE. In an action upon a promissory note one of the defenses was that the note had been altered by the insertion of the figures "10," to indicate the rate of interest. *Held*, That a preponderance of the evidence failed to show such alteration, and that if the defendant's testimony was true the note would draw seven per cent.

2. ———: ———: BONA FIDE HOLDER. A party, on entering into a contract with an alleged fence company to act as its agent within a certain township for one year, gave his negotiable note for $120 with ten per cent interest, for the prospective profits to the company, the note to be returned at the expiration of the year, less the profits on the fence sold, if sufficient profits were not received to satisfy the note in full. The note was duly indorsed and transferred a few days after it was made. In an action by the holder against the maker, *held*, that a preponderance of the proof showed that he was a *bona fide* holder and entitled to recover.

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

Thummel & Platt, for plaintiff in error.

Thompson Bros., *contra*.

MAXWELL, CH. J.

This is an action upon a promissory note as follows:

"$120. GRAND ISLAND, NEBRASKA, August 4, 1887.

"One year after date I promise to pay to the order of Cole, Grant & Co. one hundred and twenty dollars, value received, with interest at 10 per cent per annum, payable at Hall County Fence Factory.

"G. E. CRAWFORD."

The defendant in his answer specifically denies many of the facts stated in the petition.

"2d. Admits the execution of the note, but alleges that it has been altered by inserting the figures '10' in that part of the note fixing the rate of interest, whereas in the note as he signed it there was a blank space left for the rate of interest.

"3d. That the instrument set forth in said plaintiff's petition as originally executed and as described in the second count of this answer was procured from this defendant by the said Cole, Grant & Co., and their agents, by fraud and misrepresentations in this, that they (the said Cole, Grant

& Co.) had established a manufactory in the city of Grand Island, Nebraska, in said county for the purpose of and was then manufacturing combination slat and wire fence under letters patent No. 298,032, dated May 6, 1884, and that they were, could, and would manufacture under said patent at said place fence of the following prices and so sell and turn the same over to this defendant if he would become their agent in said county, to-wit: 35–40c. per rod for 2 foot or hog fence, 55c. per rod for 6 wire fence, 60c. per rod for 8 wire fence, and 65c. per rod for 10 wire fence, all fence to be composed of No. 12 annealed steel and galvanized wire, and pickets 46 per rod. And that said fence would be a good and substantial fence, to be as good if not better fence than those then being manufactured and sold by James Cannon under the same patent in said county, and that the same could be manufactured and sold by them or others for said prices in said city, the same being the reasonable price therefor; that all of said representations of the said company and their said agent so made were false and untrue, as the said company and their said agent then well knew, and were made for the purpose of inducing the said defendant to become the agent for the said company for the sale of the said fence, and to induce him to give the said note or contract, and that relying upon the said false and fraudulent representations the said defendant executed the said note as it was before the said alteration was made, and delivered the said instrument to the said Cole, Grant & Co. through their said agents or servants, and that said instrument is therefore void, and that there was no other or further or different consideration for the giving of the said note or contract than as hereinbefore stated, and that the same was done without any consideration, and is therefore void, and that the said A. Reuber, and each and every one of the said parties mentioned in the said plaintiff's petition as being the holders and owners of the said note, had full and complete notice and knowledge

of the foregoing at the time and before they or either of them come into possession of said note, and that this defendant denies that either of said persons are innocent purchasers of said note for value before due, or at any other time, in the manner mentioned in said plaintiff's petition, or in any other way. Wherefore the said defendant asks that said note be declared void and of no effect, and that the same be ordered canceled, and for costs of suit."

On the trial of the cause the jury returned a verdict in favor of the defendant, and the action was dismissed. The original note is before us. It bears on its face evidence that it was filled out in full at the time it was made, and the person who filled the same out swears positively that such was the case. The only proof that it was not so filled out is the testimony to that effect of the defendant, but it is evident that he is mistaken, and a preponderance of the evidence is the other way. The agreement may have been as he contends, but it was filled out to draw ten per cent; and even if in the form the defendant contends for it would draw the legal rate, viz., seven per cent.

2. In August, 1887, the plaintiff and defendant entered into the following agreement:

"ARTICLE OF AGREEMENT

Made and entered into this 4th day of August, 1887, by and between Cole, Grant & Co., of Bloomington, state of Illinois, parties of the first part, and G. E. Crawford, of the county of Hall, state of Nebraska, party of the second part, witnesseth: That the said parties of the first part, as legal owners of letters patent Nos. 298,032, dated May 6, and 300,517, dated July 7, 1884, upon improved machines to manufacture the combination slat and wire fence, and desiring to establish a permanent industry in Hall county for the purpose of manufacturing and selling said fence, do hereby make and constitute the party of the sec-

ond part a lawful agent, with power to contract, build, or sell the manufactured fence in the township of Wood River, county of Hall, state of Nebraska.

"The manufactured fence to be kept in stock by the manufacturing agent, Merrill & Matheson, at Grand Island, county of Hall, state of Nebraska, and at all times to be furnished to the second party at wholesale prices: 35–40c. per rod for 2 foot or hog fence, 55c. per rod for 6 wire fence, 60c. per rod for 8 wire fence, and 65c. per rod for ten wire fence. All the fence to be composed of No. 12 annealed steel and galvanized wire, with 46 pickets per rod. The manufacturing agent has also bound himself by contract to use his endeavors to sell the fence, and on all sales made by him or at the factory to credit the township agent wherein the fence goes with all in excess of wholesale prices, the same to be sold so that the net profits to the agent shall at all times be 15c. per rod, or $48 per mile.

"The party of the second part, for and in consideration of the rights and privileges granted, does hereby agree to use his endeavors to sell the fence in the above named territory, keep a true account of the same, and remit by draft or postal order to the first parties 5c. per rod of the commission, after he has received all of the commission amounting to $360.00 on the first 7½ miles that are sold, as he has this day paid $120 to the first parties by the execution of his obligation, the commission on 2½ miles of fence, the said 2½ miles of fence to be sold in one year from the above date, as said obligation is given in consideration of the township, ⅔ interest in the business and privileges herein granted, and if said 2½ miles of fence are not sold at the expiration of one year, and said $120 not obtained by the extended date of one year from maturity of said obligation, said Cole, Grant & Co., or their authorized representatives, are unconditionally empowered to cancel said obligation of said agent and appoint another agent in his stead, returning to said agent the original ob-

ligation of $120, but not the amount of commissions paid thereon.

"The second party has also the right to use on all his own lands the fencing at factory prices, and the exclusive management of the business in his territory, and is to report amount of business by letter to the first parties at his general office in Bloomington, Ill., quarterly, on or before January, April, July, and October.

"In witness whereof, we have hereunto set our hands the day and year above written.

"COLE, GRANT & CO.
"G. E. CRAWFORD.

"NOTE.—Two of the above contracts are to be filled out exactly alike, and both of the contracting parties sign them, so each will hold a copy."

This is a very plausible agreement, with many advantages in favor of the alleged agent. It may have been fraudulent, although there is but little proof on that point. The defendant, however, in anticipation of profits to be derived from the sale of the fencing set forth in the contract, gave the note in question. This is negotiable, and he must have known that it was liable to be transferred to a *bona fide* holder. The note is, in effect, admitted to be genuine, and the plaintiff claims to be an innocent purchaser before maturity and without notice, and has introduced proof to sustain his contention. This proof preponderates over that of the defendant. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

JOHN D. GARMIRE V. JOHN A. WILLY.

FILED MARCH 1, 1893. No. 4529.

1. **County Court:** JURISDICTION: PARTY WALLS. A county court has jurisdiction of an action brought upon a party wall agreement to recover one-half the expense of building a party wall, where the amount sought to be recovered does not exceed the jurisdictional limit of such court.

2. **Party Wall Agreement:** COST OF CONSTRUCTION OF WALL: LIABILITY OF PURCHASER OF ADJOINING LOT. Where a party purchases a lot on which there is a party wall built by the owner of the adjoining lot, with notice, either actual or constructive, of a contract between his grantor and such adjoining lot owner, that the grantor will pay one-half the costs of constructing the wall whenever he shall use it, the agreement further stipulating that the covenants therein shall extend to and be binding upon each party, his heirs, administrators, and assigns, such purchaser is liable for the amount agreed to be paid by his grantor in case he makes use of the wall.

3. ———: REGISTRATION: NOTICE. The proper registration of a party wall agreement is constructive notice to all purchasers of the real estate affected by the agreement, and such notice is as effectual and binding as actual notice.

4. **Bona Fide Purchasers.** Where a purchaser of property pays the grantor the consideration therefor after he has received actual or constructive notice of a prior right or equity, he is not entitled to the protection which the law affords an innocent purchaser for value.

5. **Evidence:** REVIEW. *Held*, That the proof supports the verdict.

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

O. H. Scott and *Hambel & Heasty*, for plaintiff in error.

Manford Savage, M. H. Weiss, and *C. L. Richards*, *contra.*

NORVAL, J.

This was an action brought in the county court by John A. Willy against John D. Garmire, to recover one-half of the cost of a party wall constructed by Willy, under a written contract with one E. M. Correll, defendant's grantor, and for damages alleged to have been sustained by reason of the defendant carelessly and negligently cutting into and injuring said party wall and plaintiff's building. From a judgment in favor of the plaintiff in the county court the defendant appealed to the district court, where the cause was tried to a jury who, under the instructions of the court, found for the plaintiff, assessing his damages at the sum of $332.83, being one-half of the value and cost of the party wall.

In June, 1886, John A. Willy and E. M. Correll entered into a written contract, by the terms of which the former was authorized to construct a party wall upon the dividing line between their adjacent lots, in the town of Hebron, one-half of the wall to rest upon Correll's lot, and the other half on Willy's lot. It was expressly stipulated in the contract that when so built, Correll, upon the payment of one-half of the costs of the erection of said wall, should have the right to use the same as a party wall for any building he might thereafter construct on his lot. The contract also contained this provision: "It is mutually agreed that all the covenants and agreements herein contained shall extend to, and be obligatory upon, the heirs, administrators, and assigns of the respective parties." The agreement, though signed by the parties in June, 1886, was not acknowledged by them, so as to authorize it to be recorded, until September 21, 1888. It was duly filed for record on the day last above written, at 9:20 A. M.

Subsequent to the making of said contract, but prior to September, 1888, Willy erected a brick building, with a stone foundation thereunder, upon his lot, and in so doing

constructed a party wall in accordance with said agreement, resting one-half thereof upon his lot and the other half upon the one owned by Correll. After the party wall was erected, Correll sold and conveyed his lot to John D. Garmire, who erected a building thereon, and made use of the party wall as one of the walls for his building. Neither Correll nor Garmire having paid any portion of the cost of the party wall, this action was brought.

The first objection urged against the judgment is that the county court had no jurisdiction of the subject-matter, hence the district court acquired none by the appeal. The case of *Brondberg v. Babbott*, 14 Neb., 517, is cited to sustain the proposition. In that case it was held that the district court acquires no jurisdiction of a cause on appeal from the county court if the latter had no jurisdiction of the subject-matter. We concede the soundness of the doctrine therein announced, but it has no application to the case at bar, unless the proposition contended for by the defendant be true, namely, that the court had no jurisdiction to try and determine the case. Whether it had jurisdiction of the second and third causes of action alleged in the petition, which relate to damages to the party wall and plaintiff's building, it is not necessary to stop to inquire, inasmuch as no recovery was had upon either of these counts of the petition. The only question submitted to the jury to pass upon had reference to the value or cost of one-half of the party wall.

Has a county court jurisdiction in an action brought upon a party wall agreement to recover a portion of the cost of building a party wall? The answer must be in the affirmative.

By section 16 of article VI of the state constitution it is provided that "county courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlements of estates of deceased persons, appointment of guardians and settlement of their accounts, in all matters relating to apprentices, and such other jurisdiction

as may be given by general law. But they shall not have jurisdiction in criminal cases in which the punishment may exceed six months' imprisonment or a fine of over five hundred dollars; nor in actions in which title to real estate is sought to be recovered or may be drawn in question; nor in actions on mortgages, or contracts for the conveyance of real estate; nor in civil actions where the debt or sum claimed shall exceed one thousand dollars."

Section 2 of chapter 20, Compiled Statutes of 1891, declares that "county judges, in their respective counties, shall have and exercise the ordinary powers and jurisdiction of a justice of the peace, and shall, in civil cases, have concurrent jurisdiction with the district court in all civil cases in any sum not exceeding one thousand dollars, exclusive of costs; * * * *Provided*, That county courts shall not have jurisdiction: I. In any action for malicious prosecution. II. In any action against officers for misconduct in office, except where like proceedings can be had before justices of the peace. III. In actions for slander and libel. IV. In actions upon contracts for the sale of real estate. V. In any matter wherein the title or boundaries of land may be in dispute, nor to order or decree the sale or partition of real estate."

It is perfectly plain from a reading of the foregoing constitutional and statutory provisions that the county court had jurisdiction of the subject-matter of the action. The case does not come within any of the limitations upon the powers of such courts contained in the sections quoted. This is a plain action upon a contract for the recovery of money only.

In *Mushrush v. Devereaux*, 20 Neb., 49, it was held that a county court has jurisdiction in an action for money had and received, brought to recover money paid upon an agreement for the purchase and sale of land, where the defendant refused to perform his agreement to convey. To us it seems to follow logically from the principle of that decision

that the county court had jurisdiction of the subject-matter contained in the first count or cause of action in the petition filed in this case.

It is also contended by the defendant that there was neither privity of contract nor estate between the parties to the action, hence, if the agreement can be enforced against the defendant, it must be by equitable action and not by a suit at law. It is, doubtless, true the agreement created an equitable easement or charge upon the lot sold by Correll for the amount of the one-half of the cost of the construction of the party wall, which could have been enforced by appropriate equitable action. (See *Stehr v. Raben*, 33 Neb., 437.) But it does not follow from this that an action at law will not lie against Garmire, personally, to enforce the agreement. It must be conceded had Correll used the party wall before the sale of his lot, he would have been liable, under the agreement, for his portion or share of the cost of its erection. Garmire, having purchased the lot with notice of the agreement, occupies no better position with respect to the agreement than his grantor. By claiming the benefits of its provisions he became bound for the performance of the stipulation to pay one-half the cost of constructing the wall. Such an agreement attaches to the land. (*Burr v. Lamaster*, 30 Neb., 688; *Jordan v. Kraft*, 33 Id., 844; *Roche v. Ullman*, 104 Ill., 11.)

It is finally claimed that the court erred in directing the jury to find for the plaintiff, and this assignment is based upon the fact that the court did not submit to the jury the question whether or not the defendant knew of the party wall agreement at the time of the purchase of the lot. The evidence is conflicting upon the point whether the defendant had actual notice of the agreement before he made the purchase. He testified that he had no notice whatever, while plaintiff and Mr. Correll both testified positively that he had. If the case rested solely upon whether Gar-

mire had actual notice at the time of the purchase and sale, we would agree with defendant's counsel, that owing to the conflicting evidence the question should have been left to the jury.

But the record shows that the defendant had constructive notice of the terms of the party wall agreement, at least before the consideration for the lot was paid, which is as binding upon him as if he had received actual notice thereof. An optional contract for the purchase of the lot was made on September 20, 1888, which was the day prior to the recording of the party wall agreement. The price of the lot was fixed at $1,000. The agreement was that Correll should make a deed for the lot and deposit the same with the First National Bank of Hebron, to be delivered to Garmire on the payment of the full consideration, which was done. The latter was to and did draw his check on said bank for the sum of $100, payable to the order of Correll, which was likewise left with the bank. The following stipulation was written upon the back of the check:

"SEP. 20, '88.

"This check is given to bind the bargain for the sale of E. M. Correll's business lot on Lincoln Ave. for one thousand dollars, payable within sixty days from date. Lot located in block 15, town of Hebron. The option is good for 10 days and this check is returnable to maker within that time at his request. E. M. CORRELL."

It is uncontradicted that the money was not paid to Mr. Correll upon the check until thirty days after its date, and the remaining $900 of the purchase money was not paid until about thirty days later, when the deed was delivered and placed on record. In view of the facts appearing in this record we are forced to the conclusion that defendant was not an innocent purchaser. In order to constitute a grantee a *bona fide* purchaser he must have parted with the consideration before he receives notice of any prior

right or equity. At the time the defendant paid the purchase money he had constructive notice of the existence and terms of the party wall agreement entered into between his grantor and the plaintiff, since the agreement was then duly recorded. The judgment of the district court is

AFFIRMED.

THE other judges concur.

WILLIAM T. GILES, APPELLANT, V. J. THEO. MILLER, APPELLEE.

FILED MARCH 1, 1893. No. 4525.

1. **Homestead:** JOINT-TENANTS. A homestead may be claimed in lands held in joint-tenancy.

2. ———: ———: OCCUPANCY. An undivided interest in real estate, accompanied by the exclusive occupancy of the premises by the owner of such interest and his family as a home, is sufficient to support a homestead exemption.

3. ———: CLAIM OF EXEMPTION OF PERSONALTY: ESTOPPEL. Upon the facts stated in the opinion it was *held* that neither the plaintiff nor his grantors are estopped to claim that the property in controversy was a homestead at the time of the conveyance.

4. ———: VENDOR AND VENDEE: LIEN OF JUDGMENT BEFORE PURCHASE. Under the homestead law of 1879, the purchaser of lands held and occupied at the time of the conveyance as the homestead of the grantor, and which does not exceed in value the sum of $2,000, takes the same free from the lien of a judgment docketed prior to such purchase, but during the existence of the homestead right.

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

Rhea & Rhea, for appellant.

G. Norberg and *Walter A. Leese, contra.*

NORVAL, J.

This was an action brought by William T. Giles, plaintiff and appellant, to quiet the title to lots 3, 4, 5, and 6, in the northeast quarter of section 19, in township 7 north, of range 17 west, in Phelps county, and to enjoin the sale of said premises upon an execution issued on a judgment in favor of appellee and against one J. A. Giles. On the trial the district court found the issues for the defendant, and dismissed the action.

The record before us shows that on and for several years prior to the 4th day of March, 1889, plaintiff and said J. A. Giles were the owners of the real estate above described, each being the owner in fee of the undivided one-half interest therein; that said J. A. Giles during said time was a married man and resided upon said premises and occupied the same with his family as a homestead and farmed the same; that on the said 4th day of March, 1889, said J. A. Giles, his wife, Anna L., joining with him, by deed of general warranty, conveyed his interest in said land to the plaintiff herein, which deed was duly recorded the following day.

On the 15th day of October, 1888, the defendant and appellee, J. Theo. Miller, recovered a judgment against said J. A. Giles, before a justice of the peace of Phelps county, for $120.50 and costs. A certified transcript of said judgment was filed in the office of the clerk of the district court of said county, on October 18, 1888. Subsequently, on October 25, 1889, Miller caused an execution to be issued by the clerk of said court upon said transcript, and to be delivered to the sheriff of said county, who levied the same on said land, and the sheriff being about to sell the same, this suit was instituted. The proofs estab-

lish that the premises in controversy were, at all times herein stated, of less value than $2,000.

The plaintiff below contends that the filing of the transcript of said justice's judgment in the district court did not create a lien upon the lands in dispute, and that said real estate is not subject to sale upon execution issued upon said transcripted judgment, for the reason that said premises constituted the homestead of plaintiff's grantors, J. A. Giles and wife, at the time of the filing of such transcript, and from thence until the conveyance was made to plaintiff. The defendant Miller insists that a person cannot claim a homestead in lands which he owns in common with another, and inasmuch as J. A. Giles only owned an undivided interest in the property, such interest is subject to the lien of defendant's judgment against him, and may be sold on execution under it.

The precise question presented has never been passed upon by this court. That a homestead can be claimed by a tenant in common is affirmed by the courts of some of the states, while the contrary doctrine is held in other states.

Section 1 of the legislative enactment of 1879, entitled "An act to provide for the selection and disposition of homesteads, and to exempt the same from judgment liens, and from attachment levy, or sale, upon execution or other process," provides: "A homestead not exceeding in value $2,000, consisting of the dwelling house in which the claimant resides, and its appurtenances, and the land on which the same is situated, not exceeding 160 acres of land, to be selected by the owner thereof, and not in any incorporated city or village, or instead thereof, at the option of the claimant, a quantity of contiguous land, not exceeding two lots, within any incorporated city or village, shall be exempt from judgment liens and from execution or forced sale, except as in this chapter provided."

Neither the above provision, nor any other section of the

homestead law, specifies or defines the character of the ownership or interest in lands which is necessary to support the homestead right. We know that the purpose of the legislature in enacting the statute under consideration was to protect the debtor and his family in a home from a forced sale on execution or attachment. Keeping this object in view, and applying the liberal rule of construction which always obtains in the interpretation of exemption laws, we are constrained to hold that any estate or interest in lands which give the right of occupancy or possession is sufficient, if coupled with requisite occupancy, to entitle the person to the benefits of the provisions of the section above quoted. The ownership need not be of an estate in fee-simple, but the owner of the equitable title occupying under a contract of purchase may claim the exemption of the statute. So, we think, an undivided interest in real estate, accompanied by exclusive occupancy, will support the homestead claim. J. A. Giles, as the owner of an undivided interest in the property, was entitled to the exclusive possession as against every person but his co-tenant. The quantity and value of the land being within the statutory limit, and the requisite occupancy being established, we conclude that the judgment was not a lien upon the grantors' interest in the land. (*Lozo v. Sutherland*, 38 Mich., 168; *Sherrid v. Southwick*, 43 Id., 515; *Cleaver v. Bigelow*, 61 Id., 47; *Herdman v. Cooper*, 29 Ill. App., 589; *Feldes v. Duncan*, 30 Id., 469; *Conklin v. Foster*, 57 Ill., 104; *Potts v. Davenport*, 79 Id., 455; *Tarrant v. Swain*, 15 Kan., 146; *Thorn v. Thorn*, 14 Ia., 49; *Horn v. Tufts*, 39 N. H., 478; *McClary v. Bixby*, 36 Vt., 257; *Oswald v. McCauley*, 42 N. W. Rep. [Dak.], 769; *Kaser v. Haas*, 7 N. W. Rep. [Minn.], 824; Freeman, Co-Tenancy and Partition, sec. 54.)

Counsel for defendant insist that J. A. Giles waived his homestead rights in the property, by reason of his having claimed certain personal property as exempt from sale

under an execution issued against him on the said judgment in favor of said Miller. It appears that prior to the issuance of the execution, under which the real estate in question was about to be sold, and before the same was conveyed to this plaintiff, another execution was issued upon the same judgment, which was leved upon certain personal property owned by J. A. Giles. For the purpose of claiming his exemptions the said judgment debtor presented to the officer holding the execution, and filed with the justice before whom the judgment was rendered, a schedule or inventory of the whole of his personal property, in which he stated under oath that "I am the head of a family, and have neither lands, town lots, nor houses subject to execution as a homestead under the laws of this state, and that the above inventory and appraisement contains a true list of the whole of the personal property owned by me."

The property was not released from the levy, but the same was sold, under the writ, to one Phare, who at the time knew that the property was claimed as exempt. Subsequently J. A. Giles replevied the property from the purchaser, alleging in the affidavit therefor that the property was exempt. Giles was successful in the action. It is now claimed that he and those claiming under him are estopped to insist that the real estate was the homestead of J. A. Giles. No estoppel was either pleaded or proved in this case against the wife. So far as appears she had nothing to do with the filing of the inventory. It is not even shown that she knew its contents or that it had been filed, or that her husband claimed the personal property as exempt in lieu of a homestead. The homestead law was passed for the protection of the family of the debtor, and either husband or wife may claim the benefits of its provisions. The statute, in effect, provides, and it has been frequently held, that the homestead cannot be aliened or incumbered without the joint consent of both husband and wife. The husband alone cannot deed or mortgage it, so as to deprive either

himself or the wife of their interest in the homestead. So we conclude that Mrs. Giles was not concluded by the acts and conduct of her husband from claiming the property as a homestead.

The case falls within the principle of the decision in *Whitlock v. Gosson*, 35 Neb., 829. In that case one William Gosson, with his three children, moved to this state from Illinois and resided upon and occupied a tract of land in Madison county as a homestead. At the time of his removal to this state, and ever since, he had an insane wife who was and is an inmate of an asylum for the insane in the state of Illinois, and has never resided in this state. Gosson executed a mortgage on the homestead, in which he was described as a single man, and the credit was extended on the faith of that statement. It was held that the mortgagor was not thereby estopped to claim the mortgaged premises as a homestead and that the mortgage was void as to the homestead right. Judge POST in delivering the opinion of the court upon that question says: "Estoppel will not supply the want of power or make valid an act prohibited by express provisions of law. The statute, in effect, declares a conveyance or incumbrance of the family homestead by the husband alone void, not only as to the wife, but also as to the husband himself. Therefore neither is estopped from asserting the homestead rights as against the grantee or mortgagee. Such is the view sanctioned by the clear weight of authority, and supported by the soundest reasoning." (See *State, ex rel. Stevens, v. Carson*, 27 Neb., 501.)

As the real estate in dispute was the homestead of J. A. Giles at the time of the filing of the transcript of the judgment and at the time of plaintiff's purchase, defendant's judgment was not a lien on the property. The purchaser of land which is held and occupied by the owner and his family as a homestead, and which does not exceed in value $2,000, takes the same free from the lien of a

judgment docketed prior to such purchase, but during the existence of the homestead right. In other words, a judgment is not a lien upon homestead premises, and the owner can convey the same free from his previous judgment debts. (*Schribar v. Platt*, 19 Neb., 625.) It follows that the plaintiff is entitled to a judgment as prayed for in his petition, and the district court erred in dismissing the action. The judgment appealed from is reversed, and a decree will be entered in this court for the plaintiff in conformity to this opinion.

DECREE ACCORDINGLY.

THE other judges concur.

DE FOREST RICHARDS V. HIRAM G. MCMILLIN.

FILED MARCH 1, 1893. No. 4701.

1. **County Officers:** INELIGIBILITY: AUTHORITY OF COUNTY BOARD TO DECLARE VACANCIES AND MAKE APPOINTMENTS: HOLD-OVER OFFICERS. A county board is not authorized to declare vacant a county office and make an appointment to fill such vacancy on the sole ground that an officer elect is ineligible and therefore unable to qualify. The incumbent of such office has a right to qualify within ten days after it is ascertained that his successor elect is ineligible, and upon qualifying in the manner provided by law will be entitled to hold over until a successor is elected and qualified.

2. ———: ACTION TO RECOVER EMOLUMENTS FROM DE FACTO OFFICER. Where a claimant of an office sues a *de facto* officer to recover the emoluments thereof received by the latter, the plaintiff's title to the office is put in issue, and in order to recover he is required to prove that he is the *de jure* officer.

3. ———: ———: HOLD-OVER OFFICER: SUFFICIENCY OF EVIDENCE. Evidence examined, and *held* not sufficient to sustain a finding that the defendant in error qualified as treasurer of D. county in the manner and within the time prescribed by law, so as to en-

title him to hold over as his own successor, the treasurer elect having been adjudged ineligible.

4. ———: ———: ELIGIBILITY OF DE FACTO OFFICER: RES ADJUDICATA. *Held*, That the judgment in *State, ex rel. Richards, v. McMillen*, 23 Neb., 385, is conclusive of the question of the eligibility of the relator therein to the office of treasurer of Dawes county by election at the general election in 1885, but not of his eligibility to said office by appointment in the month of January, 1886.

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

Albert W. Crites, for plaintiff in error.

Alfred Bartow, contra.

POST, J.

This is a petition in error from the district court of Dawes county, the following being the material facts disclosed by the record: At the general election in 1885 the plaintiff in error was elected treasurer of said county. Before the commencement of his term of office the defendant in error, who was then treasurer of said county, commenced contest proceedings in the county court against him on the ground that he was ineligible to the said office by reason of not having resided in the state for six months previous to said election. On the 8th day of December, 1885, final judgment was entered by the county court in said proceeding, finding that the contestee therein, plaintiff in error, was ineligible, and declaring his said election null and void. From the judgment aforesaid an appeal was taken to the district court, but said appeal was subsequently dismissed on the motion of the appellant therein, leaving the judgment of the county court in full force and effect. On the 9th day of January, 1886, the county board of said county, at a meeting legally called, among other things, made the following record: "On motion the office of county

treasurer was declared vacant. It was moved by D. W. Sperling that De Forest Richards be appointed county treasurer;" and on the same day Mr. Richards filed his official bond, in which it is recited that he has been appointed treasurer of Dawes county, which was approved by the county board, and after having taken the oath of office he assumed the duties of said office, and which he continued to discharge until the end of the term, on the 5th day of January, 1888. The county board continued to recognize him as the treasurer of said county by delivering to him the tax lists for the years 1886 and 1887, and otherwise. The defendant in error, who claimed the right to hold over as treasurer of said county by reason of the ineligibility of the plaintiff in error in January, 1886, tendered a new and sufficient bond as treasurer, but which was rejected by the county board. On the 20th day of January, 1886, while the defendant in error still had possession of a part of the records and papers of said office, the plaintiff in error instituted a proceeding by *quo warranto* against him in this court for the purpose of testing his right and title to said office, which resulted in a final judgment against the relator therein. (See *State v. McMillen*, 23 Neb., 385.) After the plaintiff in error had surrendered the office to his successor elect, in 1888, this action was brought against him by the defendant in error to recover the emoluments thereof during his incumbency, and a trial had, resulting in a judgment for the plaintiff below in the sum of $2,030.87, and costs, whereupon the case was removed to this court by petition in error.

In considering the questions involved the fact should not be overlooked that the claim of the defendant in error to the emoluments of the office is based upon his alleged right to hold over on account of ineligibility of the plaintiff in error, his successor elect, while the claim of the latter is based upon his alleged appointment by the county board in January, 1886, and not his election in November, 1885.

It is claimed that the county board had no authority to make the appointment in question. By section 103, chapter 26, Compiled Statutes, entitled "Elections," it is provided, "Vacancies shall be filled in the following manner: In the office of the reporter of the supreme court, by the supreme court. In all other state and judicial district offices, and in the membership of any board or commission created by the state, where no other method is specially provided, by the governor. In county and precinct offices, by the county board; and in the membership of such board, by the county clerk, treasurer, and judge. In township offices, by the town board, but where the offices of the town board are all vacant the clerk shall appoint, and if there be no town clerk, the county clerk shall appoint. In city and village offices, by the mayor and council, or board of trustees." And by section 104 it is provided that "Every officer elected or appointed for a fixed term shall hold office until his successor is elected, or appointed and qualified, unless the statute under which he is elected or appointed expressly declares the contrary." There is certainly a respectable line of authorities holding that in the absence of a special statutory provision to the contrary, the failure of an officer elect, from any cause, to qualify will not create a vacancy so as to authorize the filling of such office by appointment in those states where officers hold until their successors are elected and qualified, but that the incumbent continues not merely as a *de facto* officer, but as an officer *de jure*. (See *State v. Howe*, 25 O. St., 588; *People v. Tilton*, 37 Cal., 614; *State v. Harrison*, 113 Ind., 434.) By our statute defining vacancies, section 101, chapter 26, Compiled Statutes, it is not declared that the failure of an officer elect to qualify, or a judgment declaring an election void, shall cause a vacancy. The only provision bearing upon the subject is subdivision 6 of said section, which provides that a vacancy shall exist in case of "a failure to elect at the proper time, there being no in-

cumbent to continue in office until his successor is elected and qualified, nor other provisions relating thereto." Our conclusion is that the county board was not authorized to declare the office in question vacant on the sole ground that the election was void on account of the ineligibility of the plaintiff in error, and that the defendant in error was authorized to hold over until the next general election, at least, on conditions to be hereafter noticed.

It is provided by section 17, chapter 10, Compiled Statutes, that "when the incumbent of an office is re-elected or reappointed he shall qualify by taking the oath and giving the bond as above directed, but when such officer has had public funds or property in his control his bond shall not be approved until he has produced and fully accounted for such funds and property, and when it is ascertained that the incumbent of an office holds over by reason of the non-election or non-appointment of a successor, or of the neglect or refusal of the successor to qualify, he shall qualify anew within ten days from the time at which his successor, if elected, should have qualified."

Construing the last clause of the above section with the provisions previously cited, we think the right of the defendant in error on the failure of his successor-elect to qualify by reason of his ineligibility was to hold over, or become his own successor upon giving a new bond and taking the oath of office precisely as if he had been elected to succeed himself. In other words, the statute contemplates that he should enter upon a new and different term upon complying with the statutory conditions, and not otherwise. Another proposition, which we regard as well settled by authority, is that the plaintiff below must recover upon the strength of his own title to the office, and not on account of any defect in that of his adversary. To state the same proposition differently, the fact that plaintiff in error may have been a *de facto* officer merely will not avail the

defendant in error in this action, unless the latter was the *de jure* officer. There is much confusion upon the subject of the right of a *de jure* officer to recover from a municipality which has made full payment to an officer *de facto*, but there is no exception to the rule that in order to recover the emoluments received by another while in possession of an office the plaintiff must prove a better title thereto than the incumbent. And for the reason just stated, the defendant in error must fail in this action, since it does not appear from the record that he was, during the time for which he claims, either the *de facto* or *de jure* treasurer of Dawes county. He certainly was not a *de facto* officer, for the reason that the county board installed the plaintiff in said office and delivered to him the tax lists for the two years in question. It is admitted that the latter collected all of the revenue received by the county during said years, and disbursed it in accordance with the orders of the county board. Nor can defendant in error upon the record be said to be an officer *de jure*. There is no evidence that he ever qualified as a hold-over officer by taking the oath of office as provided by law. It is true that according to an admission in the record he tendered a sufficient bond during the month of January, 1886, but there is no proof from which we can infer that it was within the time prescribed by statute. The question when he was required to requalify in view of the facts disclosed is not involved in this controversy, but that an incumbent must in such case qualify anew in order to be entitled to the rights of an officer *de jure* is settled by the case of *State, ex rel. Thayer v. Boyd*, 31 Neb., 682; *State, ex rel. James, v. Lynn*, Id., 770.

2. It is probable that the action of the board on January 9, 1886, declaring the office vacant and attempting to appoint the plaintiff in error treasurer, was without authority of law, for, as we have seen, the defendant in error had a right to qualify as his own successor within ten days after

it was ascertained that the plaintiff in error was ineligible. But never having requalified as the law requires, he is in no position to now call in question the title of the plaintiff in error who was at least a *de facto* officer.

3. There is no doubt of the eligibility of the plaintiff in error at the time of his appointment in January, 1886. The fact that he was ineligible to election in November, 1885, by reason of not having been a resident of the state six months, would afford no legal objection to his appointment to the same office two months later, at which time there is no doubt of his eligibility.

4. The only remaining question is the effect of the judgment of this court in the *quo warranto* proceedings above referred to, 23 Neb., 385. It is earnestly contended by defendant in error that the judgment therein is conclusive of the question now at issue, and such apparently was the opinion of the district court. From an examination of the opinion in that case our conclusion is that the only question therein involved was whether the relator was entitled to the office in question by reason of his having been a resident of the state six months before the commencement of the term for which he was elected, to-wit, in January, 1886, or whether the election was void, for the reason that he had not resided in the state for six months at the time of his election. The only point stated in the syllabus in that case is the following: "The relator was elected to the office of county treasurer at the annual election held November 3, 1885. At that date he had been a resident of the state for five months only, but was otherwise eligible. At the commencement of the term his residence in the state had been continuous for seven months. *Held*, That being ineligible to such election at the date thereof, under a fair construction of sec. 1, art. VII, of the constitution, and sec. 64, ch. 26, Comp. Stats., such ineligibility was not removed, for the purpose of that election, by reason of six months' continuous residence previous to the

commencement of the term." The question of the right of the defendant in error to the emoluments of the office while holding by virtue of the alleged appointment by the county board is certainly an open one, and which, as has been intimated, we are constrained to resolve in his favor. The judgment of the district court is reversed and the cause remanded for further proceedings therein.

REVERSED AND REMANDED.

THE other judges concur.

JOHN FLANNAGAN V. MARSHALL EDWARDS.

FILED MARCH 1, 1893. No. 4729.

Review: EVIDENCE in the record *held* sufficient to sustain the verdict and judgment of the district court.

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

David Van Etten, for plaintiff in error.

George A. Magney, contra.

POST, J.

This is a petition in error from Douglas county. The cause of action stated in the petition below is for work and labor performed by the plaintiff for the defendant therein, at the agreed rate of $50 per month from the 18th day of May, 1888, until the 20th day of January, following, and for five days' work at the agreed rate of $100 per month. For answer the defendant below alleges that he employed the plaintiff at the rate of $50 per month as overseer for

his brick yard at Beaver Crossing, Seward county, but that said amount was to be paid out of the proceeds of the brick burned, and not otherwise; that the plaintiff managed the business of burning brick in said yard in so unskillful a manner that no brick were burned therein. He denies all the other allegations of the petition. The defendant below also filed a counter-claim, in which he claims judgment for the sum of $911.75, on account of boarding and lodging, and money advanced, twenty-three cords of wood converted by the plaintiff below, the use of his team and wagon by the latter, and a milch cow, alleged to have been converted by him. The reply was a general denial. Trial and judgment for the plaintiff below for $53.65. A motion for a new trial having been overruled, the case was removed to this court on the petition in error of the defendant below. The only question presented by the petition in error is one of fact. We have read over the evidence in the record, and our conclusion is that the case is clearly within the rule so often announced, that a judgment will not be reversed for want of evidence, unless the burden of proof is plainly and unmistakably opposed to it. Here it is possible a verdict for the plaintiff in error might have been sustained by an application of the same rule, but the controlling question was, which set of witnesses should be credited by the jury, and with their judgment we have no right to interfere. The issues indicate the evidence of the parties respectively, and to set it out at length or to include a summary thereof in this opinion would serve no useful purpose. The judgment of the district court is right and is

AFFIRMED.

THE other judges concur.

OMAHA SOUTHERN RAILWAY COMPANY V. ALLEN BEESON.

FILED MARCH 1, 1893. NO. 4744.

1. **Eminent Domain:** CONDEMNATION PROCEEDINGS: SUBSTITUTION OF INDEMNITOR. A railroad company which has appropriated private property for right of way purposes, on appeal to the district court from an award of damage is not entitled to have a third party substituted and made a party in its stead, on the ground that such person has agreed to indemnify it for money expended for right of way.

2. **Intervention.** To entitle a third party to intervene in an action he must have some interest in the subject of the controversy. A mere contingent liability to answer over to the defendant, without any privity with the plaintiff, is not sufficient.

3. **Jury:** DISCRETION OF TRIAL COURT: REVIEW. In superintending the impaneling of a jury some discretion is necessarily confided to the court, and the excusing of a juror *for cause* will not be held ground for reversal, unless there appears to have been an abuse of discretion.

4. **Eminent Domain:** TRIAL OF APPEAL FROM AWARD OF DAMAGES: PHOTOGRAPH OF PREMISES: EVIDENCE. Where on a trial an inspection of the premises in question is proper, but impracticable or impossible, a photographic view thereof is admissible.

5. ———: ———: EVIDENCE. On trial of a condemnation proceeding it was not error to admit evidence tending to prove that the property in question (a tract of twenty-one acres adjoining the city of Plattsmouth) was susceptible of subdivision into smaller lots, by reason of which it was more valuable, and that in consequence of the construction of the railroad track subdivision thereof was rendered impossible, whereby the value of the tract was greatly impaired.

6. ———: ———: ———: ANNOYANCE FROM PASSING TRAINS. In such case, proof of annoyance by smoke and ashes from passing trains is admissible where the railroad track is constructed near the dwelling of the property owner, not as an independent element of damage, but as evidence tending to prove the value of the property after the construction of the track.

7. ——: ——: WITNESSES: VOLUNTEER EVIDENCE: EXCEPTIONS: REVIEW. Where a witness volunteers testimony not responsive to any question, and which is immaterial under the issues, the complaining party should object thereto or move to strike it out of the record. A new trial will not be allowed on account of such volunteer evidence when no objection is made to it at the time of the trial.

8. Vacancy of Highway: REVERSION: EMINENT DOMAIN. Where a public highway is vacated and abandoned as such by lawful authority, the land included therein reverts to the abutting proprietors and cannot be appropriated by a railroad company for right of way without making compensation to such proprietors.

9. Evidence examined, and *held*, to prove a mere expression of opinion of parties named in the record, and not an offer of compromise, and is therefore admissible under the issues.

10. Instructions set out examined, and *held*, not subject to criticism by the plaintiff in error.

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

A. N. Sullivan and *Byron Clark*, for plaintiff in error

E. H. Wooley and *Beeson & Root, contra.*

POST, J.

This is a petition in error from Cass county, and brings up for review the judgment of the district court, assessing the damage of defendant in error by the appropriation of certain property belonging to him adjoining the city of Plattsmouth by plaintiff in error for right of way purposes in the summer of 1890. The first error alleged is the refusal of the court to substitute for the railroad company, the defendant below, certain citizens of Plattsmouth who had agreed to indemnify said company for all money expended for right of way through the property of defendant in error. There is no error in the ruling complained of. A sufficient answer to the argument of the plaintiff in error

is, that the proposed intervenors are apparently satisfied with the ruling of the district court, the only party complaining being the railroad company. But the ruling was right, for the reason that the parties named had no direct interest in the subject of the controversy. There was no privity between them and the defendant in error, whose property had been appropriated. Their interest was a mere contingent liability to answer to the railroad company in case judgment was recovered against it in the condemnation proceeding. It was not an agreement made with the company for the benefit of the defendant in error, upon which an action could be maintained by the latter. There is no power conferred upon the court to dismiss a defendant against whom a cause of action is alleged and substitute in his stead a stranger to the record on the sole ground that the latter has agreed to satisfy the judgment of the court.

2. The second assignment is the sustaining of the challenge for cause, by the defendant in error to Edward O'Neill, who was called as a juror. In our opinion the juror was competent and the challenge might properly have been overruled, but so far as the record discloses the jury selected was perfectly fair, and the ruling complained of was, at most, error without prejudice. In superintending the impaneling of the jury some discretion is necessarily confided to the trial court, and the excusing of a juror by it for cause will not be held ground for reversal, unless there appears to have been a clear abuse of discretion. (Thompson on Trials, 88, and authorities cited; *Richards v. State*, 36 Neb., 19.) There is a wide distinction between the retention of a juror shown to be incompetent by reason of prejudice, or the like, and the improper excusing of one on the same grounds. In the one case the law presumes prejudice to the complaining party, while in the other, in the absence of proof, the presumption is that the jurors selected possess all of the statutory qualifications; hence, the

action of the court, if erroneous, is not prejudicial to the rights of either party.

3. Objection is next made to the admission in evidence of a photograph of the premises taken before the construction of the road. There was no error in the admission of the evidence. The condition and value of the premises before the construction of the road were proper subjects for the jury to consider, and where an inspection of the premises is proper but impracticable or impossible, a photographic view of it is admissible. (Thompson on Trials, 869.)

4. Defendant in error was permitted to introduce evidence tending to prove that before the construction of the road, his property, about twenty-one acres, was susceptible of subdivision into smaller tracts or lots, which fact it was claimed rendered it more valuable, and that after the building of the road, subdivision thereof was impossible, by reason of which its value was greatly diminished. It is not disputed that the property in question adjoins the city of Plattsmouth and was suitable for subdivision into suburban lots facing upon a public street. If the railroad track was so constructed as to render subdivision impracticable and the value of the property thereby impaired, such fact amounts to a direct injury to the property, for which the owner may recover in a condemnation proceeding. (*Atchison & N. R. Co. v. Boerner*, 34 Neb., 240; *Atchison & N. R. Co. v. Forney*, 35 Id., 607, and cases cited.) The court therefore did not err in receiving the evidence over the objection of plaintiff in error.

5. It is next argued that the court erred in receiving proof of annoyance to defendant in error on account of smoke and ashes from the engines passing on the track near his residence. It is evident from the record that the evidence referred to was admitted for the purpose of showing the value of the property after the construction of the road, and for no other purpose. For that purpose it was

clearly admissible. If the house was rendered intrinsically less valuable by reason of dust and smoke from passing engines, that fact was admissible not as an independent element of damage, but to be taken into consideration in determining the value of the entire tract as it then was burdened by the right of way.

6. Defendant in error, while testifying in his own behalf, was asked about the necessity of moving his house, and when about to answer an objection was made, whereupon he said, "I will drop that, and state my house is not in sight of any other house," and proceeded to testify that it would in the future be less desirable as a residence, owing to its liability to be visited by tramps. It may be admitted that the testimony with reference to the probability of annoyance by tramps was inadmissible and prejudicial, but it was entirely voluntary, not purporting to be in response to any question and received without objection at the time, and the objection thereto made for the first time in this court will not be considered.

7. It appears from documents offered in evidence by plaintiff in error and rejected, that a part of the land appropriated, to-wit, sixty-seven hundredths of an acre, was within the boundaries described in defendant in error's title papers, but had until recently been a part of a public highway, and which had been vacated as such on the petition of the defendant in error. The court did not err in excluding the evidence. On the vacation of the highway the land included therein reverted to the abutting proprietors and could not be taken for right of way by the railroad company without making compensation therefor. It also appears from the transcript that the particular fraction in question is included in the property condemned on the application of the plaintiff in error and it is now estopped to deny the title of defendant in error. (*Omaha, N. & B. H. R. Co. v. Gerrard*, 17 Neb., 587.)

8. Objection is made to the cross-examination of Mr.

Windham as a witness, who, after having testified to the value of the premises which included a vineyard of about an acre in extent was asked, "Suppose that vineyard is just an acre and that we sold the grapes not used by the family, for $150 cash, would that affect the value of the property?" To which he answered: "That would increase the value of the property." The witness had been called by the defendant in error to prove the value of the property before the construction of the track and upon cross-examination it was disclosed that he had no knowledge of the vineyard when he was properly permitted to answer the above question. No objection was made on the ground that the proper foundation had not been laid, and we can see no reason for criticising the action of the court in overruling the objection.

9. Certain witnesses were called by the railroad company, who fixed the defendant in error's damage at much less than the sum allowed by the jury. From their cross-examination it appears that they were members of a committee representing parties who had contracted to procure the right of way as a donation to the railroad company. They were then asked if they did not visit the premises and, after having estimated his damage, assure defendant in error that he was reasonably entitled to $1,000, a sum much greater than their estimate at the trial. The objection to the above question is that the admissions offered were in the nature of an offer of compromise. That contention is not justified by the record. The evidence tends to prove a mere expression of opinion by the witnesses and not an offer to compromise.

10. Exception was taken to each paragraph of the instructions given by the court, thirteen in all, but the ones to which prominence is given in the brief of plaintiff in error are the fourth, eighth, and ninth, which are as follows:

"Fourth Instruction.—In determining the amount to be

allowed the plaintiff for the 2.05 acres of land taken by the defendant you are to find from the evidence what was its fair market value at the time it was taken. By this is not meant what the strip of land taken for the right of way, by itself, would be worth in the market, but as a part of the piece of the land owned by the plaintiff, and of which it formed a part, what would be the fair market value per acre for such land and allow the plaintiff at such rate for the 2.05 acres."

"Eighth Instruction.—You are instructed that you should not take as a separate and distinct basis for the assessment of damages such remote contingencies as frightening of horses, liability of fires, and danger to persons or property from passing trains, such contingencies are only to be considered for the purpose of determining whether and to what extent the value of the property will be decreased by the building and operation of the railroad. If, in consequence of its exposure to such dangers, the actual value of the property will be diminished to any extent, then such decrease in value measures the actual loss to the owner in so far as the damages done to his land not taken by the railroad is concerned."

"Ninth Instruction.—You are instructed that the evidence establishes the fact that the plaintiff is the owner of a piece of land of about twenty-one acres in a body, and in considering the question of the damage done to the land not taken, if you find from the evidence that the entire tract taken as a whole was damaged, then you should allow for such damage. Evidence has been introduced tending to show what the effect the location of the defendant's road would have upon the plaintiff's land for division into town or suburban lots and sale for such purposes. This evidence was admitted to aid you in finding the real and actual fair market value of the plaintiff's land for any use or purpose which you may find from the evidence the land was reasonably adapted for. You are not allowed to fix any specula-

tive value upon the plaintiff's land, based upon what the same might in the future be worth, but to find from the evidence and your own observation what the land before and after the location of the defendant's road was fairly worth in the market as it was at said times."

As to the fourth instruction it is sufficient to say that there was no controversy about the amount of land taken. The only contention was that a part of said amount had previously been within the limits of a public highway, and the right of defendant in error to recover therefor has already been considered.

Plaintiff in error has no cause to complain of the eighth instruction. If the value of the property is diminished in consequence of its exposure to fire and the like, that fact was proper to be considered by the jury, as bearing upon the question of value.

The ninth instruction correctly states the law. The fact that the land of the defendant in error was susceptible of division into suburban lots before the construction of the track and that it is now useless for such purpose, would certainly entitle him to recover, provided the effect thereof would be to diminish the value of the entire tract.

We have examined the whole record and see no ground for reversal of the judgment of the district court.

AFFIRMED.

THE other judges concur.

WILLIAM A. POLLOCK, APPELLEE, V. BEDFORD B. BOYD, APPELLANT.

FILED MARCH 1, 1893. No. 4487.

1. **Judgments:** RESTRAINING COLLECTION: IRREGULARITIES: REVIEW. A court of equity will not enjoin the collection of a judgment at law on account of mere irregularities or errors on the part of the trial court. Errors at the trial or in the proceedings must be corrected in the trial court or by direct proceeding in the appellate court.

2. **Judgments by Default:** VALIDITY OF ORDER SETTING ASIDE: IRREGULARITIES: ASSIGNMENT: LIEN OF ASSIGNEE: CANCELLATION. One V. obtained judgment by default against P. in the county court of C. county. Within ten days thereafter P. filed a petition to vacate said judgment for various reasons, but containing all the allegations necessary to entitle him to have it set aside under the provisions of section 1001 of the Code. A summons was issued for V. and personally served, giving him more than five days' notice of the time set for hearing said petition. At the time named V. appeared and demurred to the petition, but made no objection on the ground that P. had mistaken his remedy. The court having ordered that the judgment be set aside and P. allowed to answer, the case was continued from time to time on the application of V. and finally dismissed for want of prosecution. V. subsequently executed an assignment of said judgment to B., who procured a transcript of so much of the proceedings in the county court as included the judgment and caused it to be filed and docketed in the office of the district court of said county and demanded and threatened to procure an execution thereon and cause the lands of P. in said county to be sold to satisfy said pretended judgment. In an action by P. to enjoin such execution and levy and to remove the cloud upon his title caused by said pretended judgment, *held*, that the action of the county court in setting aside said judgment upon the petition instead of a motion was a mere irregularity and the order in question is not void for want of jurisdiction.

3. **Evidence** examined, and *held* to sustain the decree of the district court.

APPEAL from the district court of Cedar county. Heard below before NORRIS, J.

B. B. Boyd and *J. C. Crawford*, for appellant.

Barnes & Tyler and *H. A. Miller & Son, contra.*

POST, J

This is an action in equity and was tried in the district court of Cedar county, resulting in a decree for the appellee, who was plaintiff therein, and from which the defendant appeals.

The petition states in substance that on or about the 9th of March, 1886, one Robert J. Valentine obtained a judgment against the plaintiff in the county court of Cedar county, by default, for the sum of $538.08 and costs taxed at $18.10; that afterwards said default judgment was set aside and defendant allowed to enter his appearance and defend, and afterward, on the 13th day of July, 1886, said cause was finally dismissed at the costs of the said Valentine; that on or about the 15th day of November, 1888, and long after said cause of action was finally dismissed, the defendant procured from the said Valentine an assignment of said pretended judgment, and on the 6th day of December, 1888, procured from the county judge of Cedar county a transcript of so much of the proceedings in said cause as showed the judgment against the plaintiff, purposely omitting the further proceedings setting aside said judgment and the final dismissal of said cause; that on the 6th day of November, 1888, defendant filed his said pretended transcript in the office of the clerk of the district court of Cedar county, and caused the same to be entered on the judgment docket of said court, and indexed as a valid and subsisting judgment against the plaintiff; that at the time said pretended transcript of judgment was filed in the district court plaintiff was and still is the owner of a large

amount of real estate situated in said county, and that the said pretended judgment appears to be a lien upon the said lands of plaintiff and casts a cloud upon his title to the same; that said defendant threatens to have execution issued on his said pretended judgment, and to levy the same on the lands of plaintiff, to sell the same thereunder, and will perform such unlawful acts unless restrained by the order of the court, etc.

The prayer of the petition is for a restraining order and that on a final hearing said pretended judgment be canceled and set aside, and the cloud removed from plaintiff's title, and for general equity relief.

The answer of defendant admits so much of the facts stated in the petition as relates to the entry of the judgment by default and the assignment of the judgment to defendant, and denies all of the other allegations thereof.

The real contention of the appellant is that the action of the county court in setting aside the judgment by default was without jurisdiction and void. On the 15th day of March, six days after the rendition of the judgment against him, the appellee Pollock filed in the county court a petition to vacate said judgment, and caused a summons to be issued for Valentine, the plaintiff therein. On the 26th day of March said summons was returned, showing personal service in due form. It also appears from the record that on the 5th day of April, the day set for the hearing of said petition, the said Valentine appeared by attorney and demurred to the petition for a new trial, which was sustained as to the first count and overruled as to the second count thereof, and a stipulation was filed allowing appellee until April 12 to amend his petition for a new trial, and allowing Valentine until April 17 to answer; that on the day last named said Valentine filed a demurrer to the amended petition, which was overruled, and there being no further appearance it was ordered that said judgment be set aside and vacated, and appellee Pol-

lock permitted to enter his appearance and defend on condition that he pay the costs taxed at $16.40 on or before the 3d day of May following. It also appears that said condition was performed by payment in full of the costs on the day last named. It further appears that on the 10th day of May the appellee filed a motion to require Valentine, plaintiff therein, to attach to his petition an itemized copy of his account, which was overruled; also, that the said plaintiff filed an amended petition on the 7th day of June, a second on the 11th of June, and a third on the 21st of the same month; that on the 6th day of July he again obtained leave to amend by the 13th of that month, on which day, having failed to amend in accordance with the order of the court, the action was dismissed for want of prosecution. At the time, therefore, of the assignment by Valentine to the appellant the latter had notice of all the facts disclosed by the record, and his equities are certainly not superior to those of his assignor. Appellee was entitled to have the judgment rendered against him in his absence set aside on motion and payment of costs if made within ten days. (Civil Code, 1001.) While the proceeding by petition was irregular it is clear that the order setting aside the judgment is not void for want of jurisdiction. The petition contains all the allegations required in a motion, and seems to have been so regarded by the court, which evidently disregarded the unnecessary allegations and granted the relief to which the appellee was entitled. Valentine, the plaintiff in that action, had notice of the application within the statutory time and appeared, but made no objection on the ground that the remedy of the appellee was by a proceeding entitled a motion instead of a petition. He also, subsequent to the setting aside of the judgment, continued to invoke the power of the court by filing amended petitions claiming judgment against the appellee for the same cause of action. Had he desired to have the order in question reviewed, it should have been

done in a direct proceeding. There is no equity in his present position, hence the decree of the district court is right and should be

AFFIRMED.

THE other judges concur.

MARY SHEEDY, APPELLEE, V. DENNIS SHEEDY ET AL., APPELLANTS.

FILED MARCH 1, 1893. NO. 5832.

1. **Administration**: ALLOWANCE TO WIDOW: APPEAL FROM COUNTY COURT: ISSUES IN APPELLATE COURT: JURY TRIAL. On appeal by the executor or heir at law from an order of the county court making an allowance out of the funds of the estate of a deceased person for the support of his widow, the district court will try and determine the issues involved in the same manner as on appeals in civil cases. It is error in such case to refuse a jury trial upon the demand of either party to the controversy.
2. **Evidence** examined, and *held* not to sustain the finding and judgment of the district court.

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

Marquett, Deweese & Hall, for appellants.

Charles O. Whedon, contra.

POST, J.

This is an appeal from a judgment of the district court of Lancaster county, confirming an order of the county court of said county allowing to the appellee Mary Sheedy, widow of John Sheedy, deceased, for her support out of

the funds of said estate, the sum of $83.33 per month until the further order of said court. The first error alleged is the refusal by the district court of a jury trial, when demanded by appellants. The proceedings in this case are governed by the provisions of section 47, chapter 20, Compiled Statutes, as follows: "Upon the filing of such transcript in the district court, that court shall be possessed of the action, and shall proceed to hear, try, and determine the same in like manner as upon appeals brought upon the judgment of the same court in civil actions." Civil actions which come into the district court by appeal from the county court, or from justices of the peace, are triable by jury in the absence of a special provision upon the subject. It follows, therefore, that the district court erred in denying the request of appellants for a jury trial.

2. A careful examination of the bill of exceptions has satisfied us that the judgment in this case is not supported by the proofs, and that the finding should have been against the appellee upon the merits of the case. There is nothing in the record from which the date of death of the deceased John Sheedy can be inferred, except the fact that the appellee was, by a previous order of the county court, allowed a year's support out of the funds of the estate at the rate of $83.33 per month, from and after March 19, 1891, which had been paid in full previous to the institution of this proceeding. She had also been allowed various sums, amounting in the aggregate to $500, which had also been paid. She was also allowed, and received, all of the household furniture, including a piano, also a horse and buggy and harness. The value of the personal estate of the deceased does not appear, but it is evidently trifling, since the claims allowed against the estate, amounting to $3,000, including the undertaker's bill, remained wholly unpaid at the time of the trial before the district court. The real estate of the deceased, exceeding $100,000 in value, does not appear to be especially productive, inasmuch as the rents there-

from have been mostly absorbed by the allowances to the appellee, leaving a balance insufficient to pay the taxes thereon and redeem a part of it which had previously been sold for delinquent taxes. The appellee, who is now a resident of California, did not testify in her own behalf, the only evidence in support of her claim being the testimony of her attorney, Mr. Whedon. According to the testimony of the latter, he is informed by the appellee that she is in need of money for her support and maintenance. It is also in evidence that appellee had previously brought suit in the district court for partition of the real estate of the deceased between herself and the appellants, that said cause had been tried and submitted to the court and was then under advisement before one of the judges thereof. There was, therefore, nothing wanting at the time but the judgment of the court in the partition suit to entitle her to possession of her distributive share of the estate. There is but one inference from the facts appearing of record, viz., that she has long since received in full the interest in the estate of her deceased husband to which she was by law entitled. The judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

THE other judges concur.

F. W. RAGOSS ET AL. V. CUMING COUNTY.

FILED MARCH 16, 1893. No. 5055.

1. **County Clerks: DEPUTIES: SALARIES: COUNTY BOARD.** Under the provisions of sec. 42, ch. 28, Comp. Stats., where the fees of the county clerk exceed $1,500, the county board may appoint such number of deputies as may be necessary and fix their sal-

ary at not to exceed $700, the same to be paid out of the fees received by the clerk.

2. ——: ——: ——: ——. Where the county board has appointed a deputy and fixed his salary, and he has actually rendered the service, those facts may be proved even if there is no record of the order in the minutes of the county board.

3. **County Board:** ORDERS: COLLATERAL ATTACK. Where the county board has before it a matter which it may reject or allow, and its action thereon will be final unless appealed from, its order in the premises cannot be attacked collaterally, except for fraud.

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

T. M. Franse, J. C. Crawford, and *M. McLaughlin,* for plaintiffs in error.

H. C. Brome and *P. M. Moodie, contra.*

MAXWELL, CH. J.

In 1881 Ragoss was elected county clerk of Cuming county and held the office for four years. The county board settled with him from time to time, and so far as appears he settled in full when he left the office. Afterwards this action was brought on his official bond to recover fees collected by him while in office. The fees claimed are as follows:

SCHEDULE "A."—FEES ENTERED UPON FEE BOOK.

1882.

For recording deeds	$656 00
For recording mortgages	381 05
For filing chattel mortgages	52 05
For recording chattel mortgages	5 25
For recording miscellaneous instruments	60 63
For making abstracts	108 55

1883.

For recording deeds	660 00

For recording mortgages	$392 10
For filing chattel mortgages	16 10
For recording chattel mortgages	4 00
For recording mechanics' liens	16 50
For recording miscellaneous instruments	59 25
For making abstracts	148 75
Total entered on fee book	$2,560 83

SCHEDULE "B."—FEES RECEIVED AND NOT ENTERED ON FEE BOOK.

1882.

For recording deeds	$74 25
For recording mortgages	115 50
For filing chattel mortgages	25 60
For recording chattel mortgages	4 00
For salary as clerk of board	400 00
For making assessors' books	100 00
For extra services	82 25

EXHIBIT "A."—2.

For services as commissioner of insanity	30 00
For making tax list	600 00
For making abstracts	560 59
Fees as clerk of district court	61 67

1883.

For recording deeds	119 00
For recording mortgages	125 50
For recording chattel mortgages	9 00
For filing chattel mortgages	60 40
For recording mechanics' liens	5 50
For recording miscellaneous instruments	8 25
For salary as clerk of board	400 00
For making assessors' books	100 00
For fees in state cases	142 73
For fees as commissioner of insanity	6 50
For miscellaneous	12 75
For recording official bonds	30 00

Searching records in West Point precinct case...	$24 00
For making tax list.....	650 00
For making abstracts	500 00
For fees as clerk of district court.....	358 67
Total amount of fees received during said years and not entered on fee book.....	$4,606 99
Adding fees so entered.....	2,560 83
Making grand total.....	$7,166 99
Deducting statutory allowance.....	3,000 00
	$4,166 99

To the petition Ragoss filed an answer as follows:

"Now comes the defendant F. W. Ragoss, and for answer to plaintiff's petition filed herein says:

"1st. He admits the allegations contained in the first paragraph of said petition.

"2d. He admits that by virtue of his election for the said office he held and exercised the functions of said office of county clerk of Cuming county, Nebraska, from the 5th day of January, 1882, to the 9th day of January, 1884; that during the said term he received as fees and entered upon the fee book the sum of $2,560.83; that he has not paid into the treasury of said Cuming county any portion of the fees received by him during said term.

"3d. That he denies each and every other allegation in plaintiff's petition contained, except what is hereinbefore expressly admitted.

"4th. That he did report to the said board of county commissioners all fees received by him, and for which he was properly chargeable, and made a full, complete, and satisfactory settlement with said board of county commissioners and received a full receipt and discharge for all fees received by him during his said term of office, from which settlement and allowance no appeal has ever been taken.

"5th. That at the time he entered upon the duties of said office there was a large amount of work in said office, and that in conformity to law, and with the permission, consent, and under the direction of said board of commissioners he employed a deputy clerk at a salary of $700 per annum, and two assistant clerks at $600 per annum each for the time actually employed, and paid to said deputy and assistant clerks the sum of $1,900 per annum, which, together with the $1,500 per annum allowed him by law, exceeded the amount of fees by him collected and for which he was properly chargeable.

"6th. That the employment of said deputy and assistant clerks was made upon application by him to the county board of county commissioners of said county, and upon their allowance, consent, approbation, and authority.

"7th. That inasmuch as the said plaintiff did not exhibit his said petition against this defendant within four years from the time the action accrued on the several items set out in said petition each and every item thereof is barred by the statute of limitations, and the plaintiff ought not to be permitted to prosecute the same.

"Wherefore defendant prays that he may be dismissed, and go hence without day and recover his costs in this case most wrongfully sustained."

The sureties also filed an answer which need not be noticed.

On the trial of the cause the court directed the jury to return a verdict for the county for the sum of $2,327.21. The jury thereupon returned a verdict for the sum named, upon which judgment was rendered. The items upon which this instruction is based are as follows:

For making tax list 1882	$600 00
For extra services 1882	82 25
For making assessors' books 1882	100 00
For making tax list 1883	650 00
For making assessors' books 1883	100 00
For searching records West Point precinct case	24 00

Ragoss entered upon the duties of his office in January, 1883. He seems to have been allowed one deputy to be paid out of the fees of his office. He offered to prove that a deputy named Hirschman had been appointed at a salary of $700 per year. This was objected to as "immaterial, not the best evidence, and incompetent." The objections were sustained and the evidence excluded. The defendants then offered "to prove by the witness on the stand and by the questions asked and ruled out that on or about the 10th day of January, 1882, F. W. Ragoss, county clerk of Cuming county, Nebraska, applied to the board of county commissioners for the privilege to appoint a deputy during his term of office; that said board of county commissioners found that it was necessary for him to have a deputy and empowered said F. W. Ragoss to appoint such deputy for the term for which he was elected and fixed the salary of such deputy at $700 per year, of which the commissioners made no record and there is no record of their proceedings; that he thereupon appointed such deputy for the term of two years at the salary of $700 per year. Plaintiff objects, as being incompetent, irrelevant, and immaterial, and not the best evidence. Objections sustained by the court. All of the defendants at the time severally except." In this the court clearly erred. The county board had authority to appoint a deputy, and if one was actually appointed it should have been shown. In April of that year the county board made an order as follows:

"APRIL 10, 1882.

"The board of county commissioners of Cuming county met pursuant to adjournment. Members present: C. Paul, Chas. Schulth, and W. W. Cones. The following proceedings were had: Minutes of last meeting read and approved, etc. In consideration of the application of the county clerk for assistants, and further considering that said county clerk and his deputy are insufficient to overcome their office work, therefore it was moved, seconded,

and carried that the county clerk be and is hereby empowered to hire one or two assistants, as he shall deem necessary, besides the deputy, at $600 salary a year; each said assistants are to be paid by him out of the overplus of fees, respectively all that is over $1,500 a year and deputy's salary; above allowance shall be counted from the commencement of his official term. Whereupon board adjourned until April 17, 1882.

"CON. PAUL.
"CHAS. SCHULTH.
"W. W. CONES.

"Attest:

"F. W. RAGOSS, *County Clerk.*"

The plaintiff in error also offered the following:

"MR. CRAWFORD: The defendants offer to prove by the foregoing questions that the county commissioners made no record of the application of F. W. Ragoss for the allowance of a deputy or of their action thereon, and that he did employ such deputy for the term of two years and pay him the sum of $700 per year. Plaintiff objects, as being incompetent, irrelevant, and immaterial, and that no proper foundation is laid. Objections sustained by the court. All of the defendants at the time severally except.

"MR. CRAWFORD: Defendants' counsel offers in evidence the official bond of C. Hirschman, deputy county clerk of Cuming county, Nebraska, for the term commencing in January, 1882, and ending in January, 1884, with the approval thereof by the commissioners of Cuming county as indorsed thereon. Plaintiff objects, as being immaterial. Objections sustained by the court. All of the defendants severally except."

Other testimony of like character was offered and excluded. The testimony also shows that the clerk made quarterly reports of his fees. Some of these reports were submitted to the county attorney and seem to have been approved by him.

Section 42, chapter 28, Compiled Statutes, provides "that every county * * * clerk * * * of each county, whose fees shall in the aggregate exceed the sum of $1,500, * * * shall pay such excess into the treasury of the county," etc. "*Provided*, That if the duties of any of the officers above named in any county of this state shall be such as to require one or more assistants or deputies, then such officers may retain an amount necessary to pay for such assistants or deputies not exceeding the sum of $700 per year for each of such deputies or assistants, except in counties having over 70,000 inhabitants, in which case such officer may retain such amount as may be necessary to pay the salaries of such deputies or assistants as the same shall be fixed by the board; but in no instance shall such officers receive more than the fees by them respectively and actually collected, nor shall any money be retained for deputy service unless the same be actually paid to such deputy for his services; *Provided further*, That neither of the officers above named shall have any deputy or assistants unless the board of county commissioners shall, upon application, have found the same to be necessary, and the board of county commissioners shall in all cases prescribe the number of deputies or assistants, the time for which they may be employed, and the compensation they are to receive."

Section 43 requires a quarterly report on the first Tuesday of January, April, July, and October of each year.

Section 44 requires the officer to keep a fee book, wherein shall be entered all fees received, etc.

Section 45 provides a penalty for neglect of any of these duties.

The general supervision of the clerk's office is in the county board. It is its duty to see that the duties of the office are properly and faithfully performed. Where the fees exceed $1,500, so much of the surplus as may be necessary may be applied to the payment of deputies. No money can be drawn from the treasury for that purpose, but

only so much of the surplus fees as may be necessary. Now the county board, being present and seeing what was necessary, as they supposed, authorized Ragoss to employ certain deputies and fixed their compensation. This was strictly within their powers and duties, and their action therein at most would be erroneous and is not, in the absence of fraud or collusion, open to collateral attack. So of the orders allowing the application of fees to the payment of such salaries. In this state such an order is in the nature of a final judgment. (*Brown v. Otoe County*, 6 Neb., 111; *Clark v. Dayton*, 6 Id., 192.) In both of the cases cited it was held that an appeal must be taken to the district court or the allowance of the claim would be conclusive. The case of *State v. Silver*, 9 Neb., 86, does not contravene this rule. In that case a *mandamus* was brought to require the county clerk to report fees received by him for making out the tax list and the writ was granted. *Bayha v. Webster County*, 18 Neb., 131, was an appeal from the order of the county board disallowing a claim for making out the tax list and therefore not like the case at bar. A county board in allowing a claim which the law authorizes them to act upon may make an honest mistake, and allow or disallow an order. If any person is aggrieved thereby the law provides an adequate remedy by appeal. There should be an end to litigation, and an officer who has faithfully performed the duties of his office and made a full settlement with the tribunal authorized to settle the same should be permitted to rest on such settlement, unless there is fraud, mistake, or imposition in making the same. The court erred in the exclusion of the testimony and in directing a verdict, but should have submitted all the facts under proper instructions to the jury. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

LYDIA MERRIAM, APPELLANT, V. JOHN A. GOODLETT ET AL., APPELLEES.

FILED MARCH 16, 1893. No. 4850.

1. **Contract to Convey Real Estate:** LACHES: SPECIFIC PERFORMANCE. One A. purchased certain real estate, and in pursuance of the contract entered into possession of the property and made improvements thereon. The contract contained a provision that time should be the essence of the contract. *Held*, That the circumstances of the case were not such as to make time the essence of the contract, and that a failure to perform at the day would not prevent the specific enforcement of the contract.

2. ———: ———: WAIVER. Where time originally is the essence of the contract, and the contracting party intends to insist on the stipulation and to put an end to the contract, he must do no act that can be construed into a waiver of the stipulation.

3. **Tax Lien:** FORECLOSURE: DECREE: TITLE. A tax lien on the land itself takes precedence of all other liens, and a decree foreclosing the same, and a sale thereunder, where all persons affected thereby are before the court, transfers to the purchaser under the decree an absolute title in fee of the land.

4. ———: ———: ———: REDEMPTION. If parties affected are not before the court their remedy is an action to redeem. If the court had jurisdiction the decree cannot be treated as void.

5. **Quieting Title:** EQUITY. A plaintiff filed a petition to remove a cloud from his title caused by an outstanding contract for the sale of the land, and also to remove a cloud caused by a mortgage, which it was alleged was barred by the statute of limitations. *Held*, That to entitle him to affirmative relief he must do equity by paying the amount due on the mortgage; but as the court had dismissed his petition for want of equity, he would not be required to pay the amount due on the barred mortgage.

6. **Mortgage Foreclosure:** LIMITATIONS. An action to foreclose a mortgage is barred in ten years from the time the debt becomes due, or from the date of the last payment or a new promise to pay the same, and under section 17 of the Code the time is not extended by the absence of the defendant from the state.

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

C. W. Seymour, for appellant.

Edwin F. Warren, contra.

MAXWELL, CH. J.

This is an action brought by the plaintiff in the district court of Otoe county to have a certain contract for the sale of lots 1, 2, 3, 4, 5, and 6, in block 168, in Nebraska City proper, canceled and held for naught, and to have a mortgage executed by one Boies to Paine & Co., in 1874, declared barred and satisfied, etc., and to quiet and confirm the title in the plaintiff. The contract under which the Goodletts hold is as follows: "I, S. N. Merriam, am held and firmly bound unto Jennie H. Goodlett in the sum of $1,500, conditioned that I will, time being the essence of this contract, on the first day of September, A. D. 1888, and on the full payment of her promissory note for $100 due on said date, payable to W. D. Merriam, make, execute, and deliver to said Jennie H. Goodlett a warranty deed, except for the taxes accruing after that for the year 1881, for the following described real estate, to-wit: One, two, three, four, five, and six (1, 2, 3, 4, 5, and 6), in block one hundred and sixty-eight, Nebraska City, county of Otoe, state of Nebraska.

"Conditioned also that the said Jennie H. Goodlett, at the same time, execute and deliver to me a mortgage on said premises to secure three promissory notes for three hundred dollars, each bearing date on this day, payable to W. D. Merriam, in which mortgage her husband, John A. Goodlett, shall join, and provided said Jennie H. Goodlett shall insure said property, not less than six hundred dollars, for the benefit of said W. D. Merriam in case of the non-payment of any of the three said promissory notes and in case of loss of houses and premises by fire, said insurance policy

to be obtained by the first day of July, 1883. Dated and signed at Nebraska City this 15th day of April, 1880.

"S. N. MERRIAM,
"By W. D. MERRIAM,
"*His Attorney in Fact.*

"In presence of
"G. W. COVELL."

This is duly acknowledged.

There is a second count in the petition for rents and profits.

Paine & Co. answer in effect that Boies executed a mortgage for $1,200 to them in 1874; that no part of the same has been paid; that Boies has been absent from the state nearly all the time since said mortgage became due, and that the same is now due and payable.

Goodlett and wife answer, in effect, that they have paid the interest promptly on said purchase as the same became due, and that such payments were accepted and credited to them by W. D. Merriam. They also allege that W. D. Merriam is the real party in interest in the case, and ask that he be made a plaintiff. They also allege that in 1888 they tendered the whole amount due on said lots to W. D. Merriam and demanded a warranty deed as provided in said contract, but the said Merriam refused to execute the same. They also allege that Paine & Co. claim a lien on the premises by virtue of said mortgage. They also allege that one Mathes did possess a tax lien on said lots, which he has assigned to Merriam.

In reply the plaintiff alleges proceedings in the United States circuit court for the foreclosure of tax liens on the premises and that he purchased the same under the decree.

On the trial of the cause the court held that W. D. Merriam was the real party in interest and was declared the plaintiff; that plaintiff's petition be dismissed; that Paine & Co. have a foreclosure of their mortgage, the amount found due exceeding $5,000; that the amount due from

the Goodletts to W. D. Merriam was $1,000; that the tax lien of Mathes had been assigned to the plaintiff before the commencement of the action; that W. D. Merriam specifically perform the contract with said Goodletts upon payment of $1,000, and convey said premises to her free of incumbrances; that Merriam pay the Paine Company the sum of $5,260, and that said lots be sold according to law to satisfy the same, etc.

It appears from the testimony that in 1878 Thaddeus W. Boies, the then owner of the lots in question, filed a petition in the district court of Otoe county to have the taxes and tax deeds of Selden N. Merriam on the lots in question declared null and void and not a cloud upon his title to the same. This cause, on the petition of Merriam, was removed into the United States circuit court for Nebraska. An answer was filed in that court, and in 1880 the following decree was entered:

"On reading and filing the said report of said Dwight G. Hull, master in chancery of this court, which report bears date the 31st day of May, A. D. 1880, and was in pursuance of an order of the court, heretofore made in this cause, referring it to said master to report the facts and find the law in said cause, from which it appears that the complainant, Thaddeus W. Boies, was the owner and in peaceable possession of lots numbered one, two, three, four, five, and six, in block numbered one hundred and sixty-eight, in Nebraska City, Otoe county, Nebraska; that on the 23d day of February, A. D. 1876, the said lots above described were sold by the then treasurer of Otoe county for the delinquent taxes of 1873, at private sale, by the assignee of defendant Merriam; that the holder and owner of said tax certificate has paid the taxes upon the said lots both prior and subsequent to said date; that from 1869 to 1875 the complainant had abundance of personal property in Otoe county out of which said taxes might have been made; that the tax sale of said real estate was

illegal and void, and that said pretended tax deed is void upon its face; that said respondent, Selden N. Merriam, should be subrogated to the rights of the county, and should be decreed to have a lien upon said real estate for all taxes paid, with twelve per cent interest from the date of such payment, and that there was due from said Thaddeus W. Boies, complainant, to the respondent, Selden N. Merriam, at the date of said report, to-wit, on the 31st day of May, 1880, for said principal and interest by reason of said tax purchase, the sum of nine hundred and two $\frac{73}{100}$ dollars. Whereupon it is ordered, adjudged, and decreed by the court that the exceptions to the said master's report filed herein be and the same are hereby overruled. And on motion of C. W. Seymour, counsel for the complainant, it is ordered, adjudged, and decreed, and this court doth order, adjudge, and decree, and that said report, and all things therein contained, stand ratified and confirmed.

"And it is further ordered, adjudged, and decreed that the said complainant, Thaddeus W. Boies, pay, or cause to be paid, to the respondent, Selden N. Merriam, the amount so reported due as aforesaid, together with ten per cent interest thereon from the date of said report, to-wit, the 31st day of May, A. D. 1880, on or before the 12th day of May, A. D. 1881. And in default thereof, that all and singular the said premises described and mentioned in said master's report made in this cause, to-wit, lots numbered one, two, three, four, five, and six, in block numbered one hundred and sixty-eight, in Nebraska City, Otoe county, state of Nebraska, or so much thereof as may be sufficient to raise the amount due the respondent for said principal and interest in this case, and which may be sold separately without material injury to the parties interested, be sold at public auction, by or under the direction of William Daily."

The court then proceeds to direct the procedure in conducting the sale, and taxed the costs, amounting to $116.45, to Merriam.

In 1881 the lots in question were sold under the decree and purchased by Selden N. Merriam for the sum of $800. The sale was reported to the court and confirmed, and a deed made to the said Merriam for the lots in question. In 1883 Merriam sold the lots in controversy to Mrs. Goodlett. It will be observed that in the contract of purchase time is made the essence of the contract and a failure to pay at the day is declared to be a cause of forfeiture. In equity time is not in general the essence of the contract, and under certain circumstances may be disregarded. In *Lennon v. Napper*, 2 Sch. & Lef. [Ir. Ch. R.], 684, Redesdale, J., says: "The courts, in all cases of contracts for estates of land, have been in the habit of relieving where the party from his own neglect had suffered a lapse of time, and from that, or other circumstance, could not maintain an action to recover damages at law." There are cases where time may be made the essence of a contract—as where a condition precedent, such as payment, is to be performed by a certain time before the vesting of any estate. (*Hatch v. Cobb*, 4 Johns. Ch. [N. Y.], 559; *Kempshall v. Stone*, 5 Id., 193.) So where it was agreed that the vendee should erect a house on the land by a day named, and make the first payment of the purchase price, and he did neither, and it was further agreed that if the vendee should fail to perform any of his covenants at the day that his rights under the contract should cease, it was held that the parties had made time essential. (*Wells v. Smith*, 7 Paige [N. Y.], 22; *Benedict v. Lynch*, 1 Johns. Ch. [N. Y.], 370.) In *Edgerton v. Peckham*, 11 Paige [N. Y.], 352, the contract contained a provision that if the vendee made default in any of his payments that he should forfeit the previous payments. This was held not a bar to specific performance. In *Edgerton v. Peckham, supra*, Gridley, V. C., in an able review of the authorities up to the year 1844, says:

"1. Time may have become of the essence of the contract by the rise or depreciation of the value of the prem-

ises contracted to be sold. And, therefore, one who has given evidence of the abandonment of the contract, by lying by to see whether it will or will not be a bargain to take the property, will not be relieved, though he may have paid some portion of the purchase money. And gross negligence is evidence of an abandonment which will be a bar to a bill for relief. This doctrine is advanced in and supported by a great variety of cases. (13 Ves., 244; 5 Id., 818, 720; s. c., 4 Id., 667; 4 John., 494; 3 John. Ch., 370.)

"2. Time may be of the essence of the contract, by reason of the nature of the interest in the property which is to be conveyed. Contracts for the purchase of stock are of this description; and the reason assigned is that the daily fluctuations in the price would render a punctual performance of the essence of the contract. (See 4 Ves., 492; 1 Sim. & Stew., 59.) So also in the case of the sale of a reversionary interest, where the vendor may be supposed to be in want of the consideration money, and to whom it is of importance that the money should be paid punctually. (*Newman v. Rogers*, 4 Bro. C. C., 391; *Ormond v. Anderson*, 2 Ball & Beat., 370.) So where there is an agreement to sell at a valuation, to be made within a certain time, by persons who are named. (6 Mad., 26.) So also in a sale of a lease depending on lives. (*Ormond v. Anderson*, 2 Ball & Beat., 370.) There a distinction is taken between such a case and a case of purchase, where time is said to be not of the essence of the contract, as a compensation for the delay may be paid in the interest, etc.

"3. Time may be of the essence of the contract when there is an express stipulation to that effect, and where the contract is executory at the time of the default; no part or no considerable part of the purchase money having been paid. And this is on a very plain principle, to-wit, that the performance, by the vendee, is a condition precedent to the performance of the contract by the vendor. It is believed that most of the modern cases which have been sup-

posed to establish the rule that a mere naked default will *ipso facto* work a forfeiture, not relievable in equity, will be found to fall within this class of cases, or the one last above mentioned. Such was the case of *Wells v. Smith*, 2 Edw. Ch. Rep., 78. There no part of the consideration money had been paid, though some money had been expended on the premises."

He also cites the cases where time has been the essence of the contract, but there has been a waiver by accepting payment while the vendee was in default. A court of equity looks to the substance of a contract, and when that is fulfilled and the general intention of the parties carried into effect, the court will relieve from any forfeiture or penalty inserted for the purpose of enforcing the contract. (Jeremy, Eq. Juris., 470; Fonbl. Eq. (4th Am. ed.), 130; *Edgerton v. Peckham*, 11 Paige [N. Y.], 358.) In the case at bar the substance of the contract was a sale of the lots in question to the Goodletts for a specified price with annual interest. The Goodletts, in pursuance of the contract, entered into possession and have retained the possession, paying the taxes and expending considerable sums in improvements thereon, etc. The interest has been paid or tendered up to the time of bringing this suit. There is no circumstance, therefore, that would make time the essence of the contract and thus rob the purchaser of his estate. But even if time was the essence of the contract, it has been waived by the acceptance of the interest while the Goodletts were in default. They are, therefore, entitled upon payment of the purchase price to specific performance of the contract.

It will be observed that Merriam derives his title to the lots in question through a decree of the United States circuit court foreclosing tax liens, and a sale thereunder, which was duly confirmed and a deed made to the purchaser. It will be observed also that many of these taxes antedate the mortgage to Paine & Co. Taxes assessed upon real estate constitute a lien thereon from the first day of April in each

year. A lien for taxes takes precedence of all other liens where the tax is assessed upon the land itself and not upon any particular interest therein (*Post v. Leet*, 8 Paige [N. Y.], 337; *Kern v. Towsley*, 45 Barb. [N. Y.], 150; *Dowdney v. New York*, 54 N. Y., 186; *Cochran v. Guild*, 106 Mass., 29; *Parker v. Baxter*, 2 Gray [Mass.], 185; Cooley, Taxation, 306; *D'Gette v. Sheldon*, 27 Neb., 829); and a change in the ownership will not affect the lien, as the law takes no notice of such change (*Oldhams v. Jones*, 5 B. Mon. [Ky.], 458; *Covington v. Boyle*, 6 Bush [Ky.], 204; Cooley, Taxation, 306). The foreclosure, therefore, extinguished the mortgage lien, even if it is not barred by the statute of limitations. As the mortgagee was not a party, if the mortgage lien is not barred, no doubt he could proceed in an action to redeem by setting up the necessary facts to entitle him to such relief. He must bring his action within the statutory period, however. An attempt was made to show that Boies was a non-resident of the state, and the statute of limitations did not run against him. There was some proof introduced tending to show that he had previously resided at Seward; that he had removed from there to Colorado or Kansas, but his family was still residing in Seward county. There is also proof that he was fearful that service of summons would be made upon him in Lancaster or Seward counties. Taking the proof all together, and it fails to show that Boies has been absent from this state for five years since the mortgage in question became due. Neither is it material when it is sought to enforce the mortgage against the land. The proviso to section 17 of the Code expressly excepts cases of foreclosure of real estate mortgages. Such foreclosure must be brought within ten years from the time the debt becomes due, or there is part payment or a new promise, or the action will be barred. In any view of the case, therefore, an action to foreclose the mortgage is barred. The plaintiff, however, by seeking to have the cloud re-

moved from his title and to have it confirmed in him subjects himself to the equity rule that he that seeks equity must do equity. The rule, however, is imposed as a condition of granting relief. If relief is denied, the rule will not be applied. For reasons which will presently be stated the judgment dismissing the plaintiff's action must be affirmed and the plaintiff denied any relief. He will not be required, therefore, to assume the mortgage in question. The judgment is in form personal, although probably not so intended. In a case of this kind the purchaser under the tax liens did not assume the mortgage debt and he is not personally liable therefor. The remedy, if one exist, is confined to the land itself. The Goodletts, within sixty days, may pay to the clerk of this court the sum of $1,000, with interest from the date of the decree in the court below. Upon the payment of which the plaintiff will be required to execute a deed as provided in the contract, and the money in question will not be delivered to him until the deed is made. The judgment will be modified to conform to this opinion.

JUDGMENT ACCORDINGLY.

THE other judges concur.

SARAH J. JAMES v. LUCY A. SUTTON.

FILED MARCH 16, 1893. No. 4569.

1. **Probate and Contest of Will: CAPACITY OF TESTATOR: EVIDENCE.** In an action to contest the probate of a will, the only issue being the capacity of the testator to make a will, *held*, that a verdict sustaining the will was supported by all the evidence.

2. ———: ———: ADMISSIBILITY OF EVIDENCE. In a contest over the probate of a will the parties objecting to such probate offered evidence tending to show that the testator many years before his death had given one of his children certain lands, describing them, etc., but had failed to convey the same. *Held*, Properly excluded, because it did not relate to the questions at issue, and if such gift had been made and possession given in pursuance thereof and the conditions complied with, those facts might be shown in a proper case to enforce, quiet, or confirm the title.

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

F. I. Foss, for plaintiff in error.

Hastings & McGintie, contra.

MAXWELL, CH. J.

The will of Hannibal Sutton of Saline county was admitted to probate on the 31st of February, 1889, and Lucy Sutton, the widow of Hannibal Sutton, named as executrix and granted letters testamentary. From the order admitting the will to probate an appeal was taken to the district court by a daughter of Hannibal Sutton. The objections filed by her to the probate of the will are as follows:

"And now comes the said Sarah J. James, plaintiff herein, and says that she is an heir at law of the said Hannibal Sutton, deceased, to-wit, the daughter of the said Hannibal Sutton, and she objects to the probating of the will of Hannibal Sutton, deceased, for the following reasons:

"1. She alleges that at the time the said will was executed that the said Hannibal Sutton was old, feeble, infirm, and of unsound mind.

"2. That the said Hannibal Sutton made said will under the influence, at the dictation, and by the request of his wife, Lucy A. Sutton, and that the said will was not the will of the said Hannibal Sutton, but the will of Lucy A. Sutton.

"3. That at the time said will was made the said Hannibal Sutton was not capable of making any will at all, and whatever was done was a nullity and absolutely void, and that the said Lucy A. Sutton, wife of Hannibal Sutton, procured Hannibal Sutton to make said will by fraud and undue influence which she practiced upon the said testator, and that the said Hannibal Sutton was not of sound and disposing mind and memory, and that she used undue influence upon him to accomplish the purpose of said will, made as it was at her dictation by the said Hannibal Sutton.

"4. Wherefore the plaintiff prays that a hearing may be had, and that upon final hearing the court may find that at the time said will was executed that the said Hannibal Sutton was of unsound mind and not capable of making a will; that fraud and undue influence were practiced upon him, and that the said will may be declared null and void, and that the plaintiff may recover her costs herein expended."

The answer is a general denial.

On the issues thus formed the cause was submitted to a jury, which made special findings as follows:

1. "Was Hannibal Sutton, at the time of the executing of the will, of sound mind, and did he execute it of his own free will without any restraint or undue influence being brought to bear upon him?

"Answer. Yes.

2. "Was any undue influence brought to bear upon Hannibal Sutton by any one at the time of making his will?

"Answer. No.

3. "Was this will in question executed by Hannibal Sutton of his own free will?

"Answer. Yes.

4. "Was Hannibal Sutton of sufficient sound mind to make a will at the time of making the will in question in this case?

"Answer. Yes."

And there was a general verdict for the proponent, upon which judgment was rendered. The principal errors relied upon are that the verdict is against the weight of evidence, and that the court erred in excluding certain testimony. It will be observed that the principal question involved is the capacity of Mr. Sutton to make a will. The testimony tends to show that the contestant and a Mrs. Schook are daughters of Sutton by his first wife; that their mother died about fifteen years before the making of the will in question; that about a year after their mother died their father married a second time and two sons were the issue of the second marriage. The second marriage does not appear to have been entirely harmonious, and his wife did not live with him continuously, but for two or more years had resided on her own property some distance from that of Sutton. The place she resided on seems to have been given to her by her husband, and so far as we can see he felt an interest in the welfare of his wife and the living apart seems to have been without irritation. The testimony also shows that Sutton was in feeble health for several months before his death; that he was living on his own land with the person who rented the farm, and had lived with that family for two or more years; that about five weeks before his death he had a severe attack of an obscure disease and was compelled to remain in bed; that about three weeks before his death the will in question was made. Mr. E. A. Hancock, of De Witt, who prepared the will, testifies as follows:

Q. Now just state to the jury all the facts and transactions that occurred at that time—the day—how did you come to go there?

A. I think that Mr. Tierley or Mr. Tierley's boy stopped at my house, and left word that Mr. Sutton wanted me to come and see him, and that he wished me to write his will, and get prepared to write his will, and I accordingly, the next day, I think it was in the morning, went to his house, and he

was in bed, and I was there some four to seven hours. I don't know how long, perhaps a third of a day. I took notes of what he wanted made, by his bed side, and then I went out in the other room and composed the will, and then came back, and in the presence of Mr. Tierley—I forget whether there was anybody else there or not, and read it over to him, and he sat up in bed, with a chair, I think, under him, bolstered up in bed, and he said that was all right; that that was just as he would have it, or something to that effect, and he signed it there, and we put our signatures as witnesses.

Q. During the time that you were there did you have any conversation with him?

A. Yes, sir, I had considerable conversation with him.

Q. About what matters?

A. About almost everything pertaining to his domestic relations, and his spiritual condition. He knew I was a minister of the gospel, as I had previously had conversation with him on that subject. This time we had a conversation on spiritual matters and his domestic relations, particularly in the presence of Mrs. Sutton, his wife.

Q. Who dictated what the terms of the will should be?

A. He alone.

Q. Did any one else dictate any portion of it?

A. Not a syllable or word.

There is no testimony in the record that fairly construed contradicts the testimony of Mr. Hancock. It is stated that Sutton was weak; that he seemed to be losing strength, etc., but there is no denial that he was rational and knew what he was doing when the will was made, and the verdict is sustained by all the evidence.

2. An attempt was made to prove that Sutton, a few years since, had given to one of his children 160 acres of land, but had failed to convey the same. This testimony was properly excluded. If such a gift was made and possession taken, in pursuance thereof, those facts may be shown

in a proper action to obtain title and the fact that the land was afterwards bequeathed would not defeat it, if the conditions have been complied with. Upon the whole case it is apparent that the judgment is right and it is

AFFIRMED.

THE other judges concur.

MONTAGUE T. HAMLEY ET AL., APPELLEES, V. GILMAN O. DOE ET AL., APPELLANTS.

FILED MARCH 16, 1893. No. 4600.

Action to Declare Deeds Mortgages and Redeem Land: COMPROMISE BEFORE TRIAL: ENFORCEMENT. A conveyed certain real estate to B by an absolute deed to secure the payment of a loan. The trust character of this deed was recognized by the grantee, who at various times promised that upon a sale of the property he would pay him the surplus in excess of the loan and interest. Afterwards A brought an action against B to redeem, and offered to pay the loan with interest. While the action was pending A and B entered into a stipulation as to the amount which A should pay to B, whereupon he would recover the premises. *Held*, That in the absence of fraud or misrepresentation the agreement was binding upon the parties, and would be enforced.

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

S. O. Campbell and *Wigton & Whitham*, for appellants.

Allen, Robinson & Reed, contra.

MAXWELL, CH. J.

This is an action to have certain deeds declared mortgages and to redeem the land. On the trial of the cause in

the district court a decree was rendered declaring the deeds mortgages, finding the amount due thereon to be the sum of $2,896, upon payment of the same to redeem the land. The action was brought in September, 1889, and in January, 1890, the parties entered into the following stipulation:

"The defendant Gilman O. Doe, recognizing the right of the plaintiffs to redeem said property, to-wit, the northwest quarter of section 24, and the northeast quarter of section 12, and the southeast quarter of section 1, all in township 23 north, of range 4 west of the 6 P. M., in Madison county, Nebraska, hereby stipulate and agree that in consideration of $2,617 $\frac{52}{100}$ to be paid to the clerk of said court within sixty days from the date of the decree of said court, the said sum above named, on being paid as above stipulated, shall be received in full satisfaction of all claims of said defendant, and that the court may and shall enter a decree in favor of plaintiffs accordingly. And the said Gilman O. Doe hereby authorizes and empowers the clerk of said court to apply the above named amount on a certain mortgage held by one David Reynolds on the southeast quarter of section 1, and the northeast quarter of section 12, all of township 23 north, of range 4 west of the 6th P. M., towards the payment and in cancellation of said mortgage, and if there shall be any moneys left after satisfying said mortgage the surplus to be paid by the clerk of the said court to said Gilman O. Doe, and if, after paying said amount, there should be still money due the said David Reynolds on said mortgage the said Gilman O. Doe hereby agrees to pay on demand.

"GILMAN O. DOE.

"MONTAGUE T. HAMLEY.

"Dated, North Loup, Nebraska, January 11, 1890.

"In presence of A. J. THATCH."

It was filed January 23, 1890. Afterwards, and before the trial, the defendant Doe served notice on the plaintiff that

he repudiated the stipulation and would not be bound by it. Notwithstanding this notice the court below admitted this stipulation in evidence, and this is the first error complained of. There was no error in admitting the stipulation. It was a settlement by the parties themselves of their dealings in relation to the land. There is no charge of fraud, misrepresentation, or unfairness, nor that there was an error in computation. The loan was made prior to 1879 at twelve per cent interest, and it is probable that the parties agreed to some reduction of that very high rate. However that may be, sufficient facts are not shown to justify the opening of the account and making a new computation. (*Kennedy v. Goodman*, 14 Neb., 588; *Hanley v. Noyes*, 28 N. W. Rep. [Minn.], 189; *Zimmer v. Becker*, 29 Id. [Wis.], 228; *Neibles v. Minneapolis & St. L. R. Co.*, 33 Id. [Minn.], 332; *Hall v. Wheeler*, 35 Id. [Minn.], 377.) Here was a proposition to permit redemption upon the payment of a certain sum. Suppose he had been the owner in fee and had made a proposition to sell to the plaintiff for the sum named, would any one contend that in the absence of fraud or misrepresentation that the sale would not be valid? I think not. The same principle applies in this case, and the agreement of the parties will be enforced. It is unnecessary to consider the other errors assigned. The judgment is right and is

AFFIRMED.

THE other judges concur.

STATE OF NEBRASKA, EX REL. ARTHUR TRUESDELL, v. CLAUS H. PLAMBECK, COUNTY JUDGE.

FILED MARCH 16, 1893. No. 5993.

1. **Mandamus:** TITLE TO OFFICE. The title to an office cannot be tried and determined on an application for a writ of *mandamus*.
2. ———: ———: APPROVAL OF OFFICIAL BOND. While *mandamus* is not the appropriate mode of trying the question of strict title to an office, yet, in such a proceeding brought to compel the respondent to approve the official bond, tendered by the relator, sufficient inquiry may be made to ascertain whether or not the relator's certificate of election or appointment is *prima facie* evidence of title to the office.
3. ———: ———: ———: CERTIFICATE OF APPOINTMENT. Dodge county is under township system of government. The territory comprising the city of Fremont constitutes a township in said county by said name, and is entitled to, and has been represented in the county board by two supervisors, chosen by the electors of said city. A vacancy having occurred in the office of one of the supervisors of said city, the relator was appointed by the mayor and city council of said city to fill such vacancy, who took the oath of office, executed a bond in due form, with sufficient sureties, and tendered the same within the time fixed by law to the respondent as county judge for approval. *Held*, That the certificate of appointment of the relator was *prima facie* evidence of his right to the office, and that it was the duty of the respondent to approve said bond and the sureties therein.

ORIGINAL application for *mandamus*.

F. Dolezal and *J. E. Frick*, for relator:

The title to an office is not to be passed upon or adjudicated in *mandamus*. (*State v. Jaynes*, 19 Neb., 164; *People v. Goetting*, 30 N. E. Rep. [N. Y.], 969.) The relator's certificate of appointment, with his official bond, was *prima facie* evidence of his title to the office, and the only question for the county judge was the sufficiency of the bond and sureties. He could not inquire into the validity

of relator's title. (Murfree, Official Bonds, sec. 320.) The contention between rival appointees and the validity of their claims is for another tribunal. (*Beck v. Jackson*, 43 Mo., 118.) The duty to approve the bond in this case is ministerial. (Murfree, Official Bonds, sec. 320, *supra*; *Beck v. Jackson*, 43 Mo., 118, *supra*.)

C. Hollenbeck, contra:

The appointment of the relator is void. Where a writ of *mandamus* is applied for it will not be awarded to enforce a mere abstract right unattended by any substantial benefit to the petitioner. (*Gormley v. Day*, 28 N. E. Rep. [Ill.], 693; High, Ex. Rem., p. 33, sec. 33, and cases cited.) When a person claims an office and presents his bond for approval he is required to show a *prima facie* title. (*Cope v. State*, 25 N. E. Rep. [Ind.], 866; *Commonwealth v. Common Council, Philadelphia*, 7 Am. Law Reg., 362.)

NORVAL, J.

This is an original application for a peremptory writ of *mandamus* to require the respondent, as county judge of Dodge county, to approve the bond and sureties therein of relator as supervisor of the city of Fremont in said county. The cause is submitted on a general demurrer interposed by the respondent to the petition.

It appears from the application of the relator that the county of Dodge is a county under township organization; that the city of Fremont is a municipal corporation situated within the territorial limits of said county, and having a population of more than 6,000 and less than 10,000 inhabitants; that said city of Fremont was and is, under the statute of this state, a town in said county by the name of said city, and was entitled under the provisions of section 7, chapter 26, Compiled Statutes, to be represented in the county board by two supervisors to be chosen from, and elected by, the legal voters of said city, as such town;

that at the general election held in November, 1892, W. H. Mead was elected by the electors of said city as one of the two supervisors of the city of Fremont, for the year thence ensuing, to represent said city in said county board; that the said Mead, after having received the notice and certificate of his election as such supervisor, refused to and failed to qualify, and the office thereby became vacant; that on the 21st day of January, 1893, while such vacancy existed, and while no person exercised or claimed the right to perform any of the duties of said office, the relator, a resident and elector of said city, was chosen and appointed by the mayor and council of the city of Fremont as supervisor to fill the vacancy aforesaid caused by the failure of the said Mead to qualify; that thereupon relator duly accepted said appointment, and on the 23d day of January, 1893, duly took and subscribed the oath of office, and executed a bond in due form with sufficient sureties, and on the same day presented the same, with the said oath of office duly indorsed thereon, with his certificate of appointment to said office, to the respondent, as such county judge, for his approval of said bond, and then and there demanded of respondent, as such county judge, the approval of said bond, yet the respondent refused to approve the same, and indorsed thereon his reason therefor, as follows:

"This bond was presented to me for approval this 23d day of January, 1893, and I refused, and refuse to approve this bond and the sureties therein for the reason and upon the ground that the mayor and council of the city of Fremont have no power to appoint or fill the vacancy in the office of supervisor from said city. I hold that such appointment and filling of vacancy are to be done by the county clerk, county treasurer, and county judge. So far as the form and sufficiency of said bond and the sureties therein are concerned I do not question the same, and do not in any degree rest my refusal thereon.

"CLAUS H. PLAMBECK,
"*County Judge.*"

It further appears from the petition that after relator had taken and subscribed the oath of office and executed with his sureties his bond as aforesaid, the county judge, together with the county treasurer and the county clerk of Dodge county, on January 23, 1893, appointed one Dominick Gannon to fill the said vacancy in said office, who immediately entered upon the discharge of the duties thereof, and refuses to surrender possession of such office to the relator. That relator desires to have his said bond approved in order that he may institute proper suit to test the validity of his title to said office.

It will be observed from the foregoing statement of the case that two persons make claim to the office of supervisor of the city of Fremont; the relator by virtue of an appointment by the mayor and city council of the said city of Fremont, and the said Dominick Gannon, who is exercising the duties of the said office under an appointment made by the county judge, county clerk, and county treasurer of the county of Dodge. There can be no doubt that the claims of the respective parties to the office in question cannot be adjudicated in this proceeding, since it is well established by frequent decisions of this and other courts that the title to an office cannot be tried and determined on an application for a writ of *mandamus*. The proper remedy to try such question is by *quo warranto*. (See *State v. Palmer*, 10 Neb., 203; *State v. Jaynes*, 19 Id., 164; *People v. Goetting*, 30 N. E. Rep. [N. Y.], 968.)

But the object and purpose of this action is not to induct the relator into an office already filled by another; it is to compel the respondent to approve his official bond, a duty imposed upon him by law, thereby to better enable the relator to test his title to the office in a proper proceeding before a competent tribunal, in which the incumbent of the office could be heard in his own behalf. Although the question of strict title to the office in dispute cannot be determined in a collateral proceeding like this, sufficient

investigation may be made to ascertain whether the certificate of appointment held by the relator is *prima facie* evidence of title. If relator makes claim to the office by virtue of color of title, he was entitled to have the respondent approve his bond, the sufficiency of the bond tendered being admitted, since by section 7, chapter 10, Compiled Statutes, it is made the duty of the county judge to approve the official bonds of the supervisors of his county.

Mr. Murfree in his valuable work on Official Bonds, in discussing the question under consideration, at section 320 says: "That the acceptance and approval by the proper county officer of an official bond is held in most of the states to be a ministerial duty, and that in a proper case its performance may be compelled by *mandamus*. In a case of this character, the supreme court of Pennsylvania said: 'Until the title of the relator is avoided it is good against all. He is authorized to enter upon the performance of the duties of the office, and the common council cannot delay him by declining to approve his sureties, if sufficient. A pending contest is nothing to this question. Let a peremptory *mandamus* issue as prayed for.' In this case, it will be observed, the refusal to act upon the bond of the officer was based upon the fact that there was a contested election, the relator being returned as elected, and his competitor claiming the office. The same rule applies, however, in other cases. The officer is entitled to have his bond approved if it is sufficient, and in any case to a decision of the question; the tribunal has only authority to reject it because in their opinion it is insufficient, and not for any other reason."

The contention of the respondent in this case is that he is not required to approve the bond tendered by the relator, for the reason that the appointment of Mr. Truesdell by the mayor and city council of the city of Fremont is void, for the want of power on the part of said city author-

ities to make it. It is further argued by counsel for respondent that the vacancy in the office of supervisor of said city, occasioned by the failure of Mr. Mead to qualify, could be filled only by appointment made by the county judge, county clerk, and county treasurer. This contention is based upon section 103 of chapter 26 of the Compiled Statutes, which declares as follows:

"Sec. 103. Vacancies shall be filled in the following manner: In the office of the reporter of the supreme court, by the supreme court. In all other state and judicial district offices, and in the membership of any board or commission created by the state, where no other method is specially provided, by the governor. In county and precinct offices, by the county board; and in the membership of such board, by the county clerk, treasury, and judge. In township offices, by the town board, but where the offices of the town board are all vacant the clerk shall appoint, and if there be no town clerk, the county clerk shall appoint. In city and village offices, by the mayor and city council or board of trustees."

Section 5, article IV, of chapter 18, Compiled Statutes, provides the manner in which a county under township organization shall be divided into towns and townships. The last clause of the section declares that no city of over "six thousand inhabitants shall be included within the corporate limits of any township, but the territory occupied by such city of over six thousand inhabitants shall constitute a town by the name of such city for the purpose of town meetings and organization as hereinafter provided."

Section 7 of chapter 26, entitled "Elections," provides, among other things, for the election of supervisors in cities and villages having a population of 1,000 or over in counties under township organization.

Section 103, above quoted, and section 102 of the same chapter, were cited and construed by this court in *State v. Taylor*, 26 Neb., 580. The contest in that case was over

the office of supervisor of "J" township in Seward county. A vacancy having occurred in the office of supervisor of said town, the relator Godard was appointed to fill the same by the county clerk, county judge, and county treasurer of Seward county. The respondent Taylor, at a special town meeting held in said township, was chosen supervisor of said town to fill the said vacancy, and thereafter duly qualified as such. The court decided against Godard's title to the office, holding that a supervisor, in respect to his election and appointment, is a township officer; that the vacancy caused by the resignation of such officer may be filled by appointment by the town board, but where the offices of the town board are all vacant, by the township clerk; and in case the offices of the town board are all vacant, and there is no town clerk, then by the county clerk. It was further held in the same case that there is no authority for filling the vacancy in any township office by the county clerk, county treasurer, and county judge. The writer, as present advised, doubts the soundness of the decision in the case to which reference has just been made, yet, inasmuch as the construction therein placed upon the statute under consideration has been acquiesced in ever since that opinion was handed down, and the rule not having been changed by judicial interpretation or legislative enactment, it must be regarded as the settled law of the state, and is binding upon the courts as a precedent in similar cases.

Counsel for respondent insists that the doctrine in *State v. Taylor, supra*, is not authority on the question now before the court. In that case, as already stated, the relator was appointed by a board consisting of the county clerk, county treasurer, and county judge, while in the case at bar the respondent was appointed by a like board, and the relator herein was chosen by the mayor and city council. The case referred to differs from this in that it was an action to try the title to the office of a supervisor of an ordinary township having a full quota of township officers,

while here the office in controversy is that of supervisor of a city, a municipal corporation governed and controlled by city officers. We think it can be fairly argued from the rule laid down in said case of *State v. Taylor*, and the sections of the statute mentioned above, that the vacancy in the office of supervisor of the city of Fremont can be properly filled by appointment made by the mayor and council of said city. At least, the appointment of the relator is *prima facie* evidence of title to the office; hence it was the duty of the respondent to have approved the bond of the relator. The statute confers no authority or power upon an officer whose duty it is to approve official bonds to pass upon or decide the validity of the claims to an office under conflicting commissions, nor can such approving officer refuse to approve the official bond presented to him by one claiming the office under color of title, even though the office may at the time be filled or claimed by another. (*Commonwealth v. Common Council, Philadelphia*, 7 Am. Law Reg. [Pa.], 362; *Beck v. Jackson*, 43 Mo., 117.)

The case last cited is squarely in point. That was a proceeding by *mandamus* to require the respondent, as judge of the tenth judicial circuit of the state of Missouri, to approve the bonds of the relator as clerk of the circuit court and recorder for the county of Cape Girardeau. The relator, having been appointed and commissioned by the governor of the state to such office to fill a vacancy occasioned by the death of one Horsten, the previous incumbent, presented his bonds to the respondent and requested the approval thereof, which the latter declined to do, and indorsed thereon that he refused to approve the same for the reason that he had appointed one Harrison to said offices, and already approved his bonds and put him in possession of the offices. The supreme court granted a peremptory writ of *mandamus*. In the opinion the court say: "The commission issued by the governor was at least

prima facie evidence of title to the office, and if the validity or legality should be disputed, that question can only be determined by a proceeding in the nature of a *quo warranto*, in case Harrison refuses to surrender the office."

The conclusion is irresistible that the petition of the relator herein states a cause of action, and that the demurrer thereto must be overruled.

DEMURRER OVERRULED.

THE other judges concur.

MICHAEL M. SULLIVAN v. E. H. BENEDICT.

FILED MARCH 16, 1893. No. 4933.

1. **Appeals from County Court:** BOND: FILING TRANSCRIPT. The law governing appeals from judgments before justices of the peace applies to appeals from the county court to the district court. The party desiring to appeal must file an appeal bond within ten days from the rendition of the judgment, and within thirty days from the date of the judgment he must procure and file in the district court a certified transcript of the proceedings.
2. **County Court:** APPEARANCE: SETTING ASIDE JUDGMENT: APPEAL. Where, in an action brought in the county court within the jurisdiction of a justice of the peace, the defendant enters his appearance, but absents himself on the day of trial, he is not entitled to have the judgment against him set aside, under the provisions of section 1001 of the Code, but may prosecute an appeal to the district court.
3. ———: RECORD FOR APPEAL: CONTRADICTION IN APPELLATE COURT. The record entry of a judgment rendered in the county court, as embodied in a duly authenticated transcript, imports absolute verity, and cannot be varied or contradicted by extrinsic evidence in the appellate court.

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

H. M. Uttley, for plaintiff in error:

A defendant against whom a judgment is rendered in the county court, by default and in his absence, has the right to appeal after he has applied to have the judgment set aside, under the provisions of sec. 1001 of the Code, and been denied. (*Clendenning v. Crawford*, 7 Neb., 474; *Gudtner v. Kilpatrick*, 14 Id., 347; *Adams v. Thompson*, 18 Id., 543.)

E. H. Benedict, contra.

NORVAL, J.

This action originated in the county court of Holt county, and from a judgment in favor of the plaintiff, E. H. Benedict, the defendant Sullivan prosecuted an appeal to the district court, where, on motion of the plaintiff, the appeal was dismissed. The ruling of the district court is now assigned for error.

The appeal was properly dismissed for the reason the same was not taken within the time limited by statute. The judgment was rendered against the defendant by the county court on the 23d day of September, 1889, while the appeal undertaking was not given until the 3d day of November, 1890, and the transcript was not filed in the district court until nine days later; so that more than a year had elapsed after the rendition of the judgment before any steps were taken to obtain a review of the case by appeal. The law governing appeals from judgments before justices of the peace regulates appeals from judgments of the county courts. The appeal undertaking must be given within ten days from the rendition of the judgment, and the appellant must procure and file his transcript of the proceedings in the district court within thirty days after the entry of the judgment. The plain requirements of the statute not having been complied with, the district court did not err in sustaining the appellee's motion to dismiss the appeal.

Plaintiff in error claims that the judgment was rendered in the county court by default, and having applied to have it set aside under section 1001 of the Code, and the application having been denied, he was entitled to an appeal, and that the time for taking and perfecting it did not begin to run until his motion to have the judgment opened up was overruled. The cases of *Clendenning v. Crawford*, 7 Neb., 474, *Gudtner v. Kilpatrick*, 14 Id., 347, and *Adams v. Thompson*, 18 Id., 543, are cited to sustain the proposition contended for. These decisions are to the effect that an appeal does not lie from a judgment rendered by default until after the defendant, against whom the same is entered, has applied to have the judgment set aside under the provisions of the Code, and his application has been denied. The rule cannot be invoked in this case, for the reason that the county court did not render judgment on default and in absence of the defendant. The transcript from the county court shows that on the return day of the summons the "parties appeared, and at the request of the defendant's attorney, cause continued until Monday, September 23, 1889, at 10 o'clock A. M., at costs of defendant, plaintiff consenting thereto." Although the defendant did not appear at the time to which the cause was adjourned, having entered an appearance on the return day of the summons, he was not entitled to have the judgment set aside. He mistook his remedy. He should have appealed. (*Strine v. Kaufman*, 12 Neb., 423; *Raymond v. Strine*, 14 Id., 236; *Steven v. Nebraska & Iowa Ins. Co.*, 29 Id., 187.)

In the district court affidavits were filed by the defendant to the effect that neither he nor his counsel were present in the county court on the return day of the cause, but that three or four days prior thereto, his attorney, Mr. Uttley, and the plaintiff went before the county judge, and at the request of Mr. Uttley, who was then contemplating a trip to Omaha to be absent several days, it was then agreed that when the day arrived on which the trial was set the case

should be passed until Mr. Uttley should return home, at which time he was to notify the plaintiff and the case was to be tried; that on Mr. Uttley's return from Omaha, on September 28, 1889, he learned that judgment had been rendered against his client and he immediately prepared a motion to set aside the same. These affidavits cannot be considered. It is conceded that the certified transcript made out by the county court is a true copy of the record of the proceedings in the case. The record of the county court, as embodied in a duly authenticated transcript, imports absolute verity and cannot be contradicted in the appellate court by extrinsic evidence. (*Haggerty v. Walker*, 21 Neb., 596; *Worley v. Shong*, 35 Id., 311; *State v. Hopewell*, Id., 822. We discover no error in the record and the judgment of the court below is

AFFIRMED.

THE other judges concur.

JAMES H. DUKEHART V. LETTA COUGHMAN.

FILED MARCH 16, 1893. NO. 5917.

1. **Bastardy: EVIDENCE.** In a prosecution for bastardy the guilt of the defendant is not required to be established beyond a reasonable doubt. In such a proceeding a preponderance of the evidence is sufficient.
2. ——: ——. The evidence in the case, although conflicting, is sufficient to support the verdict.
3. ——: ——: REVIEW. The rulings of the trial court on the admission of testimony examined and approved.

ERROR from the district court of Gage county. Tried below before BABCOCK, J.

Hardy & Wasson, for plaintiff in error.

Griggs, Rinaker & Bibb and *A. Hazlett, contra.*

NORVAL, J.

This is a proceeding by which it is sought to charge the plaintiff in error with being the father of a bastard child of Letta Coughman. The complaint was filed in the county court of Gage county, the plaintiff in error was arrested, and, after examination before said court, was bound over to the district court. The case was docketed in said court, and the plaintiff in error pleaded that he was not guilty of the charge. There was a trial by jury, and a verdict of guilty. It was thereupon adjudged that he was the father of the said illegitimate child, and that he should pay to the mother for the future maintenance and support of the child the sum of $50 a year for the period of ten years. From which judgment the defendant below brings the case to this court for review by proceedings in error.

It is strenuously insisted that the verdict of the jury is not sustained by the evidence. The record shows that the prosecutrix is an unmarried woman, and lives with her father and mother; that she became the mother of a child on the 10th day of June, 1892; that at and prior to the time it is alleged the child was begotten, plaintiff in error was a boarder in her father's family. She testified, both in the county court and in the district court, that plaintiff in error had sexual intercourse with her in her father's house in Holmesville on Sunday, the 6th day of September, 1891, while her father and mother were at church; that she only had intercourse with him once, and never had anything to do with any other person. She testified positively that defendant below is the father of her child. Plaintiff in error was examined as a witness in his own behalf, and denied that he was guilty of the act charged. He also attempted to establish an *alibi* by calling several witnesses, who testified that on the 6th day of September,

1891, the day on which it is alleged the child was begotten, plaintiff in error was in Blue Springs, which is four or five miles distant from Holmesville. On the other hand, testimony was introduced tending to show that Dukehart was at the house of Letta's father on the above mentioned date. The evidence being conflicting, it was the province of the jury to determine which witnesses should be believed and which disbelieved. If the jury accepted as true the testimony of the prosecutrix and her witnesses rather than that of the witnesses against her, and there being no more reason for rejecting the testimony of the witness on one side than on the other, it cannot be said that the verdict is not sustained by the evidence, or that it was the result of passion and prejudice on the part of the jury. We do not feel at liberty, on the record before us, to hold that the jury were not justified in returning a verdict of guilty. The paternity of the child was not required to be established beyond a reasonable doubt. In an action like this a preponderance of the evidence is sufficient. (*Altschuler v. Algaza*, 16 Neb., 631; *Strickler v. Grass*, 32 Id., 811.)

It is urged that there is no proof that the child was born alive, or was living at the time of the trial. Counsel for plaintiff in error misconceive the force and effect of the testimony of the prosecutrix, as the following quotation from her testimony shows:

Q. 5. Have you ever been married?

A. No, sir.

Q. 6. You may state if you are acquainted with the defendant J. H. Dukehart.

A. Yes, sir.

Q. 7. You may state, Miss Coughman, whether you are the mother of a child.

A. Yes, sir.

Q. 8. State whether or not that child is an illegitimate child—bastard. (Pointing to a child then held in the arms of plaintiff.)

A. Yes, sir.

Q. 9. You may state, Miss Coughman, who the father of that child is.

A. J. H. Dukehart.

Q. 10. This defendant sitting here?

A. Yes, sir.

Q. 11. When was the child born?

A. June the 10th.

Q. 12. What year?

A. Eighteen hundred and ninety-two.

Q. 13. You may state, Miss Coughman, upon or about what date this child was begotten.

A. The first Sunday in September, as far as I can tell.

Q. 14. This September?

A. Eighteen hundred and ninety-one.

Q. 17. And this child was born in Gage county, Nebraska?

A. Yes, sir.

Q. 18. And begotten in that county?

A. Yes, sir.

Upon cross-examination to the question, "When was it you claim *this* child was begotten?" the witness answered, "Last September, 1891; first Sunday in September, 1891."

The foregoing is the only testimony in the bill of exceptions relating to the birth of the child, and we think was ample proof that the child in question was not only born alive, but was living at the time of the trial.

Complaint is made because the prosecutrix was not permitted to answer three certain questions propounded to her on cross-examination. The first one had reference to the size of plaintiff in error, the question being, "he is a pretty small man." It was objected to, as immaterial, irrelevant, and incompetent, but the court did not make a ruling thereon. We are unable to see the materiality of the inquiry; besides, Dukehart was in the court room during the trial, and at the request of his counsel he and the prosecutrix stood up together before the jury, so that

they had the opportunity of comparing the sizes of the two. The other questions asked the prosecutrix were objectional, and the court did not err in not permitting them to be answered.

It is claimed that the court erred in sustaining the objections of the plaintiff below to each of the following questions submitted to the witness John Culver, who was sworn for the plaintiff in error:

Q. 334. I will ask you if you remember writing Mr. Dukehart a letter on the 4th of September, 1891, requesting him to meet you in Blue Springs on Sunday, the 6th of September, 1891?

(Objected to, as immaterial, irrelevant, and incompetent. Sustained. Exception.)

Q. 335. Did you write him a letter at that time?

(Objected to, as immaterial, irrelevant, and incompetent. Sustained. Exception.)

The record fails to disclose the relevancy of the testimony sought to be elicited by these interrogatories; besides, error cannot be predicated upon the sustaining of the objections for the reason counsel for plaintiff in error made no statement to the trial court of what he expected to prove by the witness. (*Masters v. Marsh*, 19 Neb., 458; *Mathews v. State*, 19 Id., 330; *Yates v Kinney*, 25 Id., 120; *Burns v. City of Fairmont*, 28 Id., 866.) No reversible error having been pointed out in the record the judgment of the district court is

AFFIRMED.

THE other judges concur.

FREDERICK K. BABCOCK v. CAROLINE A. PURCUPILE.

FILED MARCH 16, 1893. No. 4720.

1. **Contract**: SALE: RESCISSION. *Held*, That the defendant was not entitled to rescind the contract, and that plaintiff was entitled to recover the unpaid purchase price of the eggs.
2. ——: ——: ——: REVIEW: HARMLESS ERROR. *Held*, That the giving of the instructions, set out at length in the opinion, is not reversible error, since the verdict of the jury is the only one which should have been returned under the testimony.

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

Wharton & Baird, for plaintiff in error.

V. O. Strickler, contra.

NORVAL, J.

This action was brought by defendant in error to recover the value of eleven cases of eggs, sold and delivered by her to plaintiff in error. There was a trial to a jury, who returned a verdict in favor of the plaintiff below for the sum of $41.37, and for which amount judgment was rendered.

In 1888, defendant in error was engaged in the general merchandise business at Auburn, this state, the business being conducted by her husband, J. C. Purcupile. During the same time plaintiff in error was engaged in the grocery business in the city of Omaha. Prior to December 18 of that year, Mrs. Purcupile had sent Mr. Babcock several consignments of butter and eggs, on account of which he owed her a balance amounting to $31.65. On said date she also sold and delivered to him eleven cases of eggs, to

recover the purchase price of which this action was brought. Mr. Babcock admits the purchase and delivery of the eggs, but he insists, and the testimony on his behalf tends to show, that he bought them upon the expressed condition that the plaintiff would permit him to apply as a credit the said sum of $31.65, due her upon former shipments, on an account for groceries which had been previously contracted by J. H. Purcupile, a brother-in-law of the defendant in error, and that in pursuance of said agreement he so applied the money; that subsequently defendant in error objected to such application, and thereupon Mr. Babcock shipped by express to her address, at Auburn, six cases of the eggs, the other five cases having been previously disposed of. It is undisputed that prior to the bringing of the action plaintiff in error paid Mrs. Purcupile the above mentioned sum of $31.65, and also for the five cases of eggs which he had sold; but that he has failed and refused to pay for the other six cases. The evidence fails to show that defendant in error ever received the six cases in question. The testimony introduced by plaintiff in error to the effect that the eggs were purchased upon condition that the above mentioned sum should be credited to J. H. Purcupile's account was contradicted by other testimony on behalf of the defendant in error. J. C. Purcupile, the husband of Caroline A., and who made the sale for her, and his father Archibald, who was also present at the time the sale was made, each testified that the eggs were purchased unconditionally; that Mr. Babcock at the time asked that the balance due from him to plaintiff below on former shipments be applied on the account of J. H. Purcupile, and that such request was refused.

At the trial exceptions were taken to the giving of the third, fourth, and sixth paragraphs of the court's charge to the jury, and the principal grounds upon which we are asked to reverse the judgment are based upon said instructions. The instructions complained of are as follows:

"3. Even though you should find from the testimony that the eggs were purchased by the defendant upon the condition claimed by him, it was his duty, if he desired to rescind the contract by reason of the refusal of the plaintiff to comply with the condition, to return or offer to return the eggs, which he claimed were so conditionally purchased, to the plaintiff, and if, having disposed of a substantial part of such purchase, he had placed it beyond his power to return the eggs purchased under such condition, it is not in the power of the defendant to rescind the contract in part and to take the benefit of it in part. The return of a portion of the eggs therefore by the defendant to the plaintiff without the consent of the plaintiff did not relieve the defendant from liability for the purchase price of the eggs sold and delivered to the defendant.

"4. If, at the time of the purchase of the eleven cases of eggs by the defendant, it was agreed as part of the transaction that the amount due upon former shipments by the plaintiff to the defendant should be credited upon the amount due from J. H. Purcupile to the defendant, and that was done as claimed by the defendant, such agreement and credit became a closed transaction, and any demand subsequently made by the plaintiff from the defendant for payment of such old account would not justify the defendant in rescinding the contract of purchase of the eleven cases of eggs, especially after the plaintiff had disposed of a substantial part of such purchase; but in such case the remedy of the defendant was to insist upon the agreement, and refuse payment of such old account, which had been already paid by the credit upon the account of J. H. Purcupile, as claimed by the defendant.

"6. The fact that the defendant shipped six cases of the eggs to the plaintiff at Auburn, Nebraska, would not relieve defendant from his liability to pay for the same in the absence of proof that the eggs so shipped were accepted by the plaintiff, or that the defendant had the right to rescind

his contract of purchase, and if he undertook so to rescind, it was his duty to place the plaintiff in *statu quo* by returning all the eggs included in his purchase."

Counsel for defendant below concede that the general rule requires a party desiring to rescind a contract to place the other party in *statu quo*, but insist that the rule is not absolute; that in the case at bar Babcock was required only to do what he could to place the plaintiff in the same position; that having sold a part of the eggs and paid the seller for the same, the buyer, in order to rescind, was only required to return the eggs unsold; hence the instructions were erroneous. In the view we take of the case we do not deem it important to decide whether the charge of the court correctly laid down the law relating to the rescission of a sale of personal property, for it is to us plain that that there is no legal ground, either alleged or proved, for the rescission of the purchase in the case under consideration. In the first place, the defendant was not induced to enter into the contract under a mistake of fact, or through the false or fraudulent representations of the plaintiff as to an existing fact. All that is claimed is that the latter agreed that the former might apply the sum due on prior purchases on the indebtedness of J. H. Purcupile, and that plaintiff subsequently objected to such credit being made. Such refusal was not a sufficient excuse for rescinding the contract. If the eggs were bought upon the condition claimed by the defendant, he could have credited the brother-in-law's account with the amount due plaintiff on former consignments, and she could not have collected the same. But he voluntarily paid the money to plaintiff, which constituted a modification of the contract, and defendant is bound by the contract thus modified.

Again, the defendant is not entitled to a rescission for the reason that he did not return, nor offer to return, the eggs at the place where he received them. They were delivered to him in Omaha, while he sought to rescind by shipping a

portion of the eggs to plaintiff at Auburn several weeks after the purchase. We think upon the record before us the jury would not have been justified in returning a different verdict; hence defendant was not prejudiced by the instructions above mentioned. The judgment of the court below is

AFFIRMED.

THE other judges concur.

JOHN H. VON STEEN ET AL., APPELLEES, V. CITY OF BEATRICE, APPELLANT.

FILED MARCH 16, 1893. No. 5857.

1. **Municipal Corporations:** STATUTES: REPEAL BY IMPLICATION. The act of March 30, 1887, entitled "An act to amend sections 27 and 58, and to add subdivisions 58 and 59 to section 52, article 2, chapter 14, Compiled Statutes, relating to cities of the second class having over 5,000 inhabitants," etc., is a complete act covering the entire subject of the power of the class of cities designated with respect to the opening and improving of streets and alleys, and by implication repeals all prior acts in conflict therewith.

2. ———: ———: ———. The provision of subdivision 4 of section 52, article 2, chapter 14, Compiled Statutes, for the paving of streets in cities of the second class having over 5,000 and less than 25,000 inhabitants, without petition of the owners of property to be charged therefor, is in conflict with the provisions of the act of March 30, 1887, and is repealed thereby.

3. ———: PAVING STREETS: SPECIAL ASSESSMENTS: PUBLIC PROPERTY. The property of the state, counties, or school districts is not liable for special assessments for paving or otherwise improving the streets of cities of the second class having over 5,000 and less than 25,000 inhabitants.

4. ———: ———: A PETITION TO CONFER JURISDICTION upon the city council to order the paving of streets in any paving dis-

trict of cities having over 5,000 and less than 25,000 inhabitants must be signed unconditionally by the owners of the majority of the feet fronting thereon.

APPEAL from the district court of Gage county. Heard below before BABCOCK, J.

W. C. Le Hane, L. M. Pemberton, and *Griggs, Rinaker & Bibb,* for appellant.

E. R. Fogg and *E. O. Kretsinger, contra.*

POST, J.

This is an appeal from a decree of the district court of Gage county, enjoining the defendant, the city of Beatrice, from concluding a contract for the grading, paving and guttering of the streets in paving districts numbers 9 and 10 in said city. The pleadings are too voluminous to be set out in this opinion, but the contentions of the parties will be understood from the following statements: Ordinances were passed by the city council creating the aforesaid districts pursuant to petitions of property owners therein, and bonds voted to defray the cost of paving intersections of the streets and the parts thereof opposite alleys, and the city was about to let contracts for such improvements when restrained by an order of the district court. It is claimed by the plaintiffs that said ordinances are void and insufficient to authorize the paving of the streets in either district for the reason that the petitions therefor were not signed by the requisite number of property owners in said districts, or either of them, to confer upon the city council jurisdiction to act in the premises. It is argued, however, by counsel for the city that no petition is necessary in order to give the city council jurisdiction in cases where three-fourths of all the members thereof shall vote in favor of an ordinance for the paving or otherwise improving of the streets of the city. It is admitted that Beatrice is a city of

the second class of over 5,000 inhabitants and governed by the provisions of article 2, chapter 14, Compiled Statutes. The provision thereof upon which the contention of the city is based is subdivision 4 of section 52, as follows: "In addition to the powers heretofore granted cities under the provisions of this chapter, each city may enact ordinances or by-laws for the following purposes: To construct sidewalks, sewers, and drains; to curb, pave, gravel, macadamize and gutter any highway or alley therein, and to levy a special tax on the lots and parcels of land fronting on such highway or alley, to pay the expense of such improvement. But unless a majority of the resident owners of the property subject to assessment for such improvement petition the council to make the same, such improvement shall not be made until three-fourths of all the members of such council shall, by vote, assent to the making of the same."

Article 2 was first enacted in 1883, and entitled "An act to provide for the organization, government, and powers of cities of the second class having more than ten thousand inhabitants." (Laws of 1883, p. 130.) By an act approved March 5, 1885, the title of said act was amended so as to include within its provisions cities of the second class of over 5,000 inhabitants. March 30, 1887, an act was approved entitled "An act to amend sections 27 and 58, and to add subdivisions 58 and 59 to section 52, article 2, of chapter 14, Compiled Statutes, relating to cities of the second class having over 5,000 inhabitants and to repeal said original sections 27 and 58, and all acts and parts of acts in conflict with this act." Section 2 of the act last named provides "That section 52 of article 2 of chapter 14 of the Compiled Statutes * * * be amended by adding thereto the following subdivisions 58 and 59."

By subdivision 58 it is provided that "the city council shall have power to open, extend, widen, narrow, grade,

curb, gutter, and pave, or otherwise improve and keep in good repair, or cause the same to be done in any manner they may deem proper, any street, avenue, or alley within the limits of the city. * * * The mayor and council of such city shall have power and authority to levy and collect special taxes and assessments upon the lots and pieces of ground adjacent to, or abutting upon, the street, avenue, alley, or sidewalk thus in whole or part opened, widened, curbed, guttered, graded, parked, extended, constructed, or otherwise improved, or repaired, or which may be specially benefited by any of said improvements."

The foregoing is followed by seventeen provisos, covering sixteen pages of the Session Laws, from which it appears that the legislature had in contemplation all kinds of improvements to the streets of the city, as well as the manner of making assessments to defray the cost thereof, and intended the provisions therein to be exclusive. In fact, so far as it relates to the power of the city with respect to streets, alleys, and parks the act of 1887 covers the entire subject, and must be regarded as the charter of the city, and by implication repeals all prior acts in conflict therewith. (*State v. Benton*, 33 Neb., 823.) The fifth proviso of the act under consideration is as follows:

"*Provided further*, That curbing and guttering shall not be ordered or required to be laid on any street, avenue, or alley not ordered to be paved, except on the petition of a majority of the owners of the property abutting along the line of that portion of the street, avenue, or alley to be curbed and guttered. The mayor and council of any city governed by this act shall have power to pave, repave, or macadam any street or alley, or part thereof, in any city, and for that purpose to create suitable paving districts, which shall be consecutively numbered, such work to be done under contract and under the superintendence of the board of public works of the city; whenever the owners of lots or lands abutting upon the streets, or alleys, within

any paving district representing a majority of feet front thereon, shall petition the council to pave, repave, or macadam such streets or alleys, it shall be the duty of the mayor and council to pave, repave, or macadam the same, and in all cases of paving, repaving, and macadamizing, there shall be used such material as such majority of owners shall determine upon."

By the provision last quoted power is conferred upon the mayor and city council to pave, repave, or macadam streets and alleys in any district whenever the owners of lots or lands representing a majority of the feet fronting thereon shall petition therefor and not otherwise. By no reasonable or natural construction can said provision be reconciled with the one first cited, viz., subdivision 4 of section 52 of the original charter of the city, by which the council is authorized to pave the streets of any district without a petition therefor. The two provisions being irreconcilable, the act of 1887, being the later expression of the legislative will, must prevail.

2. The total frontage in district No. 9 is, according to the record, 3,280 feet and the petition purports to have been signed by the owners of 1,855 feet thereof. It is contended that the following names and descriptions of property were illegally counted on the petition:

"Alex. Graham, chairman county board, south half of lot 11, block 24, 440 feet.

"Rt. Rev. Thos. Bonacum, per Rev. A. J. Capellen, lots 11, 12, 13, and 14, block 7, 200 feet.

"Beatrice school district, by G. C. Saulsbury, president, block 21, 300 feet.

"J. E. Hays, lot 3, block 10, 60 feet.

"First Christian church, by John Ellis, chairman of trustees, lot 7, in block 35, 140 feet.

"Charles H. Spencer, lots 5, 6, 7, 8, and 9, block 25, 125 feet.

"John A. Moor, per J. A. Forbes, agent, lot 8, block 7, 70 feet.

"Richard Lowe, lot 6, block 22, 140 feet."

It will be observed that of the frontage represented by the petition, 440 feet is the property of Gage county, and 300 feet belongs to the school district of Beatrice. The question whether public property of like character, viz., the county court house and grounds, and the city school house and grounds, is liable for special assessments for public improvements, as in the case for the paving of streets adjacent thereto, has never been presented to the courts of this state. We find in the decisions upon the subject an irreconcilable conflict of opinion. It is provided by section 2 of our revenue law, ch. 77, Comp. Stats., that "The following property shall be exempt from taxation in this state: *First*—The property of the state, counties, and municipal corporations, both real and personal. *Second*—Such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery, and charitable purposes." Similar provisions have been construed as exempting the property mentioned therein from all contributions in the nature of taxation whether imposed for public purposes under the general revenue laws, or for local improvements such as are denominated special assessments. Opposing this view is the doctrine quite as well sustained by authority, that the immunity from taxation relates only to general, state, county, or other municipal taxes and not to assessments for improvements made under special laws or ordinances and local in their character.

It is not deemed necessary to review the cases cited in support of the different views by their respective advocates, since the solution of the question here presented depends upon a construction of the charter of the defendant city.

In subdivision 58 of section 52 of article 2, ch. 14, Comp. Stats., as amended in 1887, we find the following

language: "If in any city governed by this act there shall be any real estate not subject to assessment or special taxes for paving purposes, the mayor and council shall have the power to pave in front of the same and to pay the cost thereof that would otherwise be chargeable on such real estate in the same manner as herein provided for the paving of intersections of streets and paying therefor." The same provision is found in the acts for the incorporation and government of cities of the first class having over 25,000 inhabitants and of metropolitan cities. (Sec. 69, ch. 12*a*, and sec. 69, ch. 13*a*, Comp. Stats.) The meaning of the language quoted becomes apparent only when we assume that in the opinion of the legislature public property like that here involved is not liable to assessment for the improving of the streets under the ordinances of the city. It seems clear to us that the language, "real estate not subject to assessment or special taxes for paving purposes," has reference to the property enumerated in section 2 of the revenue law, for so far as we are aware no claim of exemption has been made in favor of any other property. We are confirmed in this view from an examination of the act of March 14, 1889, entitled "An act to incorporate cities of the first class having more than eight thousand and less than twenty-five thousand inhabitants, and regulating their powers, duties, and government." The last named act, so far as it relates to improvements of streets and alleys, appears to be a substantial copy of the charter of the defendant city, viz., the act of 1887. But instead of the provision above quoted from the act of 1887 we find the following:

"*Provided, further,* That if in any city governed by the provisions of this act there shall be any real estate belonging to any county, school district, or other municipal or quasi-municipal corporation abutting upon the street whereon paving or other special improvements have been ordered, it shall be the duty of the board of county com-

missioners, board of education, or other proper officers, to pay such special taxes; and, in the event of the neglect or refusal of such board or other officers to levy and collect the taxes necessary to pay for such improvements, the city may recover the amount of such special taxes in a proper action, and the judgment thus obtained may be enforced in the same manner as other judgments against municipal corporations."

The foregoing is the only express provision within our knowledge in any of the acts for the government of cities of the second class imposing upon the state, counties, or other municipalities a liability for special assessments. It is not the policy of the law to empower cities in this state to expend public funds for improvements where no liability exists therefor.

When we consider the several provisions for the payment by cities for paving streets adjacent to property not liable for special taxes in connection with the exception above noted, the only reasonable construction thereof is that the exemption from taxation in the revenue law in favor of state, county, and school district property was intended to apply to and include assessments like that involved in this controversy. Although it is probable the property of the Catholic church is entitled to exemption upon the same ground as that of the county and school district, the argument for its rejection is rather on the ground of want of authority of the Rev. Cappellen to sign in behalf of the bishop of Lincoln, who holds the title thereto. In view of the conclusion already stated we have no occasion to consider that question, for when we deduct 440 feet on account of property of the county, and 300 feet for the school district, it is evident that the petition was insufficient to confer jurisdiction upon the city council, and that the ordinance creating district No. 9, and all acts in pursuance thereof, are void.

3. The total frontage in district No. 10 is 5,153 feet.

The number of feet represented on the petition is 2,720⅔, of which it is claimed the following are illegal and should have been rejected: G. I. Piper, 50 feet, and J. E. Hill, 136⅔ feet, "on condition that grade is satisfactory and trees are not molested."

We agree with the district court that the petition to confer upon the council jurisdiction must be unconditional, and that no argument is required to prove that the signatures of Hill and Piper, with the property represented by them, should have been rejected.

4. It is also argued that the signature of Geo. R. Scott, representing sixty-five feet, should have been rejected on the ground that the real estate described is the property of his wife and that the signature of Jas. B. Buchanan, representing fifty feet, should have been rejected for the same reason.

It appears from the evidence that the parties named occupy the property signed for as their respective homesteads, the title thereof being in their wives. It appears that each was authorized to sign the petition in the name of his wife. By the charter of the city the council thereof is authorized to pave at the expense of property owners upon certain express conditions only, among which is a petition by *the owners* of the majority of the feet fronting, etc. The office of the petition is to authorize the council to subject private property to unusual burdens, and it is the right of every taxpayer of the district to demand a compliance with all conditions essential to give the city jurisdiction to exact from him unusual sums as special taxes. It cannot be said that Mrs. Scott and Mrs. Buchanan ever petitioned for the paving of district No. 10. The fact that they are now willing to ratify the acts of their husbands will not bind the objecting property owners. The petition cannot be likened to a simple contract so as to permit one contracting party to prove that the other was acting for an undisclosed principal. It is more analogous to a contract under seal

wherein the covenants can be enforced only against the covenantor. (See *Taft v. Brewster*, 9 Johns. [N. Y.], 334; *Stone v. Wood*, 7 Cow. [N. Y.], 453; *Guyon v. Lewis*, 7 Wend. [N. Y.], 26; *Briggs v. Partridge*, 64 N. Y., 357; *Kiersted v. Orange & A. R. R. Co.*, 69 Id., 343; *Mussey v. Scott*, 7 Cush. [Mass.], 126; *Sheldon v. Dunlap*, 16 N. J. L., 245; Mecham, Agency, 702, and cases cited.) It follows that the signatures of Scott and Buchanan, with the property represented by them on the petition, 115 feet, should also have been rejected, making a total, illegally counted, of 301⅔ feet, which deducted from the amount represented on the petition leaves 2,419 feet or less than a majority. The judgment of the court perpetually enjoining the letting of the contract is right and is

AFFIRMED.

THE other judges concur.

LEVI G. TODD, GUARDIAN, APPELLANT, V. ISAIAH L. CREMER ET AL., APPELLEES.

FILED MARCH 16, 1893. No. 4623.

1. **Assignments to Different Persons of Several Notes Secured by Single Mortgage:** FORECLOSURE: DISTRIBUTION OF PROCEEDS. Where several notes, secured by one mortgage, are transferred to different parties, such transfer amounts to an assignment *pro tanto* of the mortgage, and the several holders thereof will be entitled to share *pro rata* in the proceeds of the mortgaged property.

2. ———: ———: PARTIES: RES ADJUDICATA. A decree of foreclosure, to which the holders of the other notes secured by the same mortgage is not made a party, is not a bar to a subsequent foreclosure proceeding by the holder of such notes.

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

Edwin F. Warren, J. C. Watson, and *C. S. Polk,* for appellant.

A. N. Sullivan, contra.

POST, J.

This is an appeal from a decree of the district court of Cass county. The cause of action stated in the petition is substantially as follows: On the 9th day of February, 1885, two of the defendants, Sullivan and McLaughlin, sold to the defendant Cremer the east half of the southwest quarter of section 12, township 10, range 9 east, in Cass county, and as representing the consideration therefor, Cremer executed to them his six promissory notes, secured by mortgage upon the real estate above named, which was duly filed for record; one of said notes is for $500, maturing March 1, 1886, the others are for $300 each, and maturing March 1, 1887, March 1, 1888, March 1, 1889, March 1, 1890, and March 1, 1891; that the two notes last described were, before maturity thereof, transferred by said Sullivan and McLaughlin to plaintiff, and indorsed without recourse, and that said notes were received by the plaintiff as guardian of Thomas Lindsey, an insane person; that prior to February 10, 1888, said Sullivan and McLaughlin indorsed and transferred three of said notes, to-wit, those maturing March 1, 1887, March 1, 1888, and March 1, 1889, to the defendants, Geo. E. Dovey, Oliver Dovey, Horatio Dovey, and Mrs. E. G. Dovey, doing business in the firm name of E. G. Dovey & Son, who, on said 10th day of February, 1888, filed a petition in the district court of Cass county, in their firm name of E. G. Dovey & Son, for the foreclosure of the mortgage aforesaid; that neither plaintiff, nor his said ward, were

made parties to said foreclosure proceeding; that at the April term, 1888, Cremer having made default, a decree of foreclosure was entered in favor of the plaintiffs therein for the sum of $915 and costs; that on the expiration of a stay of execution allowed on the application of Cremer, an order of sale was issued on said decree, by virtue of which the mortgaged property was sold to said E. G. Dovey & Son for the sum of $850, which sale was subsequently confirmed and a deed executed and delivered in pursuance of said order. It is further alleged, that at the time of the foreclosure sale there was of record two mortgages, which were apparent liens upon said premises, to-wit, one in favor of the Phœnix Mutual Life Insurance Company for $350, and one in favor of Joseph Weckbach for $900, both executed by remote grantors of Sullivan and McLaughlin, but which had both been paid and satisfied in full, as the last named defendants well knew; but that said defendants, conspiring with the defendants Dovey, to defraud the plaintiff and his ward, procured the said mortgages to be deducted from the value of said land as prior liens, by reason of which it was sold for the nominal sum of $850, when it was in fact worth quite $3,000. It is also alleged that the said decree of foreclosure is void as to the plaintiff, by reason of the fraud alleged, and for the further reason that he was a necessary party thereto, and that it casts a cloud upon the title of the premises to his damage, and for which he has no adequate remedy at law. The prayer is for a vacation of the decree of foreclosure and sheriff's sale, and for an accounting and foreclosure of the mortgage, and for general equitable relief.

The defendants, except Cremer, who made default, join in an answer which need not be examined, but which puts in issue all of the allegations of fraud and conspiracy.

On the hearing, the district court, in addition to a general finding for the defendants, found the following facts:

"1st. That the allegations of fraud and conspiracy made against the defendants is not sustained by the evidence, and that the evidence shows that there was no conspiracy entered into to defraud the plaintiff and his ward.

"2d. That defendants did not take any undue advantage of the plaintiff and his ward in the sale of the east half (E. ½) of the southwest quarter, or (S. W. ¼), of section twelve (12), township ten (10) north, range nine (9), in Cass county, Nebraska.

"3d. That said east half (E. ½) of the southwest quarter (S. W. ¼) of section twelve, township ten (10) north, range nine (9), in Cass county, Nebraska, is worth the sum of $3,000, and that plaintiff and his ward, not having been made a party defendant in the foreclosure action of E. G. Dovey & Son v. Isaiah L. Cremer, have lost no rights by reason of said action, and that said mortgaged premises are ample security for plaintiff's said demand."

We are not called upon to review the findings of the district court for the reason that the allegations of fraud are wholly irrelevant to the real issue in the case. It is manifest that plaintiff is not concluded by the decree of foreclosure and that he is entitled to share *pro rata* with the holders of the several notes secured by the mortgage. (*Studebaker Mfg. Co. v. McCargur*, 20 Neb., 500.) It also appears from the allegations of the petition that the mortgaged property is ample security for the notes held by plaintiff.

2. We think the plaintiff is entitled to an accounting and foreclosure of the mortgage, and that the decree should be modified in that respect. The petition contains all of the allegations necessary to entitle him to that relief while the necessary parties are all before the court. We are disposed to regard the action as a foreclosure proceeding rather than as one for the purpose of relief on the ground of fraud. The cause will therefore be remanded with directions to the district court to allow an accounting between the parties

and a decree of foreclosure of the mortgage described in the record. In other respects the decree is affirmed.

MODIFIED AND AFFIRMED.

THE other judges concur.

ELI BROWN V. FARMERS & MERCHANTS BANKING COMPANY.

FILED MARCH 16, 1893. No. 4577.

1. **Voluntary Assignment:** FRAUDULENT CONVEYANCE OF CHATTELS BY ASSIGNOR: REPLEVIN BY ASSIGNEE. The fact that a chattel mortgage was executed a few hours previous to the making of a voluntary assignment by the mortgagor for the benefit of creditors is not conclusive evidence of fraud so as to entitle the assignee to recover the mortgaged property as a part of the assigned estate.
2. ———: ———: ———: RIGHTS AND AUTHORITY OF ASSIGNEE. Under the provisions of sections 42 and 43 of the assignment law, the rights of the assignee to recover property fraudulently transferred by the assignor are similar to those of a judgment creditor and must be enforced according to the forms of law. He is not authorized to forcibly seize and take property on the assumption that it was transferred by his assignor in fraud of the rights of creditors.
3. **Review:** EVIDENCE. *Held*, That the judgment of the district court is warranted by the findings of the referee.

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

J. L. Kaley and *A. F. Moore*, for plaintiff in error.

Case & McNeny, contra.

POST, J.

This was an action of replevin in the district court of Franklin county by the defendant in error against the plaintiff in error, defendant below, Eli Brown, sheriff of said county. The subject of the controversy is a stock of merchandise and fixtures claimed by the plaintiff below by virtue of a chattel mortgage executed by one Elder, while the defendant below claims under a general assignment executed to him as sheriff by said Elder. The issues having been made up, the case was by agreement sent to a referee for trial, with instructions to find the facts and state his conclusions of law. On the coming in of the report, judgment was entered thereon in accordance with the recommendation of the referee. The only question presented by the record in this court is whether the defendant in error is entitled to judgment upon the findings of the referee, which are here set out.

"1. That on July 9, 1888, the plaintiff, The Farmers & Merchants Banking Company, discounted a note of $1,000, signed by S. S. Elder, John W. Elder, and A. M. Williams & Co.

"2. That on October 1, 1888, the said S. S. Elder made a chattel mortgage on the goods in question to the plaintiff, which said chattel mortgage was recorded October 2, 1888, at 9 o'clock in the forenoon of said day and was accepted by the said plaintiff, and that afternoon the said plaintiff, at about 1 o'clock P. M. of said day, took possession of said goods.

"3. That on the 2d day of October, A. D. 1888, the said S. S. Elder made to the sheriff of Franklin county a general assignment for the benefit of all his creditors, which assignment was recorded on the 2d day of October, 1888, at 9 o'clock and 30 minutes A. M.

"4. That the plaintiff first heard of the assignment between 3 and 4 o'clock P. M. of October 2, 1888, after the plaintiff had accepted of the mortgage.

"5. That on the 8th day of October, 1888, the defendant, as assignee of S. S. Elder, took possession of the goods in question under said assignment and continued to hold the same until replevied in this suit."

Under the above state of facts the referee finds, as conclusions of law and fact:

"1. That the mortgage made on October 1, 1888, was made in good faith to secure a valid and *bona fide* indebtedness from the said S. S. Elder, John W. Elder, and A. M. Williams to the plaintiff.

"2. That said mortgage created a lien upon said property in question from the time of its execution and delivery in favor of the said plaintiff.

"3. That at the time when the said defendant took possession of said property, on the 8th of October, A. D. 1888, the said plaintiff had a prior lien upon the same.

"4. That at the time of the commencement of that suit the plaintiff, The Farmers & Merchants Banking Company had a qualified ownership in said property to the amount of their said note and mortgage, and was entitled to the immediate possession thereof, and that the same was unlawfully detained by the defendant."

The ground on which the mortgage is assailed by the sheriff as assignee is that it is void under the provisions of the assignment law.

The findings of the referee are quite indefinite. For instance, it does not appear, except by inference, that the mortgage upon which the defendant in error relies was given to secure the $1,000 note mentioned in finding No. 1, nor is the date of said note apparent, or the time when the indebtedness represented thereby was created. On the other hand, it is not found that the mortgagor, Elder, was insolvent on the 2d day of October, 1888, or contemplating insolvency, or that the defendant in error had reasonable cause to believe him to be insolvent or contemplating insolvency.

This is not an action in which the assignment is assailed on the ground that the execution of the mortgage a few hours prior thereto amounts to a preference of the bank as a creditor within the meaning of the assignment law. The contention is between the bank, defendant in error, and the assignee. It is provided by section 42 of the assignment law that "If a person, being insolvent or in contemplation of insolvency, within thirty days before the making of any assignment, makes a sale, assignment, transfer, or other conveyance of any description, of any part of his property to a person who then has reasonable cause to believe him insolvent or in contemplation of insolvency, and that such sale, assignment, transfer, or other conveyance is made with a view to prevent the property from coming to his assignee, * * * or to evade any of said provisions, the sale, assignment, transfer, or conveyance shall be void and the assignee may recover the property or the assets of the insolvent." It cannot be inferred from the report of the referee that the mortgage in question was executed in violation of any of the provisions of the section quoted. But assuming that it was fraudulent, that is, executed with an intention on the part of the mortgagor, Elder, to prefer the bank, and that the latter, by its managing officers, actively participated in such fraud, it does not follow that the assignee was entitled to possession of the property at the time of the commencement of the action in the district court. The defendant in error was in possession under the mortgage when the assignment was executed, and its possession of the property was continuous until it was taken by the assignee October 8.

In *Housel v. Cremer*, 13 Neb., 298, it was held that the assignee under a voluntary assignment cannot be permitted to urge that a sale of the property by his assignor previous to the assignment was fraudulent as to creditors of the latter, on the ground that a fraudulent conveyance is good as against the parties thereto and their representatives, and

that the rights of the assignee, with respect to the assigned estate, are simply those of the assignor at the time of the assignment. That was a case under the assignment law of 1877, and is intended as a statement of the rule applicable to common law assignments. The proposition that the assignee represents the assignor only would not be strictly accurate as applied to the assignment law of 1883. It would seem that by the provisions of section 42, above set out, the assignee may, in his discretion, proceed to recover property which rightfully belongs to the estate, but which has been diverted therefrom by the fraudulent act of his assignor. The authority conferred by the section named, as well as by section 43, is to recover the property according to the forms of law. His rights and remedies are similar to those of a judgment creditor, and he is not authorized to take by force property conveyed or transferred by the assignor wherever found in the possession of the purchaser.

It is due to counsel to say that the question to which most prominence is given in the brief of plaintiff in error, is the sufficiency of the evidence to sustain the findings. It is argued that the proofs clearly show that the mortgage was given by Elder for the purpose of defrauding creditors, which purpose was known to the officers of the bank, and which fact was available to Brown, the assignee, as a defense in the action against him on his bond. But the alleged bill of exceptions was stricken from the record on motion of defendant in error, for the reason that it was not allowed or signed by the referee. Our inquiry is restricted to the one proposition, viz., whether the court has correctly applied the law to the facts found by the referee. That question, as already intimated, should be resolved in favor of the judgment of the district court.

AFFIRMED.

THE other judges concur.

ANDREW J. HALE v. MICHAEL SHEEHAN.

FILED MARCH 16, 1893. No. 4943.

1. **Master and Servant:** CONTRACT: DISCHARGE OF EMPLOYE: ACTION FOR DAMAGES: ALLEGATIONS AND PROOF. In an action for wrongful discharge before the termination of his employment, the plaintiff must show that he is ready and willing to complete his contract.

2. ———: ———: ———: ———: ———. S. contracted for the service of himself and son for a given time at the rate of $50 per month. He alone went into the service of H., his employer, and was subsequently discharged before the termination of the period named in the contract. It does not appear that he ever tendered the services of his son, or that the latter was ready or willing to enter the employment of H. *Held*, That the discharge of S. was not a breach of the contract for which he could recover in an action for being wrongfully discharged, although he may recover in a proper action for the value of his services.

ERROR from the district court of Gage county. Tried below before BROADY, J.

A. Hardy, for plaintiff in error.

George A. Murphy and *Rickards & Prout, contra.*

POST, J.

This case comes into this court by petition in error from the district court of Gage county. The petition below contains two causes of action, the first of which is as follows:

"1st. That defendant Andrew J. Hale is indebted to plaintiff in the sum of $383.63, with interest thereon at the rate of seven per cent per annum from the first day of December, 1887, as a balance of money due and unpaid on a certain contract executed by plaintiff and defendant for the hire of plaintiff, for the performance of work and labor

by plaintiff for defendant, on defendant's Sicily Creek farm, in Gage county, Nebraska, and for boarding the farm hands of defendant by plaintiff, and for failure to furnish feed for plaintiff's hogs for 1890, and for the value of hogs for plaintiff's meat for 1890, a copy of which contract is hereto attached, marked Exhibit A, and made a part hereof.

"2d. The said contract expired by its terms on the 1st day of March, 1889, but has been renewed from year to year thereafter by the parties thereto, and which contract does not expire by its terms until the 1st day of March, 1891.

"3d. That by the terms of said contract, and the renewal thereof, the defendant agreed to employ plaintiff, and did employ plaintiff, at and for the sum of $50 per month, and plaintiff agreed to render services on said farm for said sum, and the parties thereto agreed in said contract that the work hands working on said farm should be boarded by plaintiff at the rate of $10 per month, and that said sums were to be paid monthly by defendant.

"4th. That under said contract plaintiff has performed work and labor for defendant, and boarded his work hands for him, from the 1st day of November, 1887, to the 23d day of October, 1890, when defendant wrongfully discharged plaintiff from his services and violated the provisions of said contract without any sufficient cause therefor, and during all said time plaintiff has performed well and truly all the services and kept all the conditions and agreements on his part in said contract contained.

"5th. Plaintiff further alleges that defendant has failed and refused to furnish feed for the hogs of plaintiff to fat the same sufficient for the meat for plaintiff's use for the year 1890, but on the contrary has sold plaintiff's hogs, which were being fatted for meat for his use for the year 1890, whereby defendant has violated the terms and covenants of his part in said contract contained."

The agreement mentioned in the petition is as follows:

"GAGE COUNTY, NEB., August 29, 1887.

"This memorandum of agreement, made and entered into this 29th day of August, 1887, between A. J. Hale of said county, party of the first part, and M. Sheehan of said county, party of the second part, witnesseth, that the said party of the first part has employed the said party of the second part, and his son William, to work for him on his farm, known as the Sicily Creek farm, for one year, four months, from the 1st day of November, 1887, for the sum of fifty dollars per month, and agrees to board all extra hands employed on said farm for the sum of ten dollars per month while working on said farm. Said Hale to furnish sulky plow for boy to use. Said Hale hereby agrees to pay said party of the first part the said sums hereinbefore specified for the time and purpose therein expressed. Said Hale also agrees to keep two cows and two calves for the said party of the second part, and to furnish feed for hogs sufficient for the meat for his own use. Said party of the second part is to keep his team on said farm as long as he wishes, free of charge, by using them the same as he does party of the first part.

"A. J. HALE.
"M. SHEEHAN."

The second cause of action is for the sum of $125.60 and interest, for extra meals furnished to the defendant below and his servants and employes, at the agreed rate of twenty-five cents per meal.

For answer the defendant below admits the execution of the agreement alleged, and denies the renewals thereof; admits that plaintiff and son commenced work for him November 1, 1887, at the rate of $50 per month, under said agreement, and that the said plaintiff remained in his employ until October 10, 1890, when he was discharged for good and sufficient cause, which is alleged, but which need not be noticed. It is also alleged in the answer that the

plaintiff's son worked for the defendant below two months, in each of the years 1888, 1889, and 1890, and at no other time. There is also a counter-claim for $450, for the negligence of the plaintiff below and for the conversion of property, the proceeds of the farm in question, and for the failure of his son to render services as stipulated.

The district court, on the trial of the cause, gave the following instructions, to which exception is taken:

"In relation to the discharge from further service, and under the contracts alleged in the petition, the law deems that both parties will act under it, or friendly to it, to promote its execution in good faith by both parties, and it is for you to say, from the evidence, whether either or both the parties have done so, and from the whole evidence determine whether the discharge of plaintiff by defendant was for good and sufficient cause, or was not for good and sufficient cause. If it was for good cause, the plaintiff would still be entitled to what he had already earned, less the amount of damages to the defendant resulting from plaintiff's failure to perform his part of the contract; but if the discharge was without cause, the plaintiff is entitled to any balance that may be due and unpaid, for services rendered under the contract, up to the time of the discharge."

By reference to the petition it will be seen the only employment of the plaintiff below was by virtue of the agreement set out above. His allegation is, "That by virtue of said contract and renewal thereof the defendant agreed to and did employ the plaintiff at and for the sum of $50 per month, and the plaintiff agreed to render services on said farm for said sum." On this branch of the case there is an utter failure of proof. The agreement introduced in evidence, and which is set out above, recites that "The party of the first part [defendant below] has employed the party of the second part [plaintiff below] and his son William to work for him * * * for $50 per month." If the plaintiff below worked for the defendant as alleged,

he is entitled to recover the value of his services. But in order to recover for a wrongful discharge he is required to allege and to prove a contract or agreement under which he would be entitled to employment, for it is an elementary rule that where one sues to recover by virtue of a contract it must appear that he has some rights under such contract. In this case the defendant below had contracted for the services of two persons. It does not appear from the pleadings that there was any agreement to employ the plaintiff below without his son, and for all that is disclosed the service of the latter was the principal inducement for the employment of the two. Presumptively the son was a minor, and, in contemplation of law, the servant of the plaintiff below. The latter could contract for the services of his son and recover therefor. It may also be assumed that a cause of action would accrue in his favor on said contract upon the refusal to employ both himself and his son. There is, however, no allegation that the defendant below has refused employment to the father and son, or that the services of the latter were ever tendered him. Since there is alleged no breach of the contract introduced in evidence, it follows that the question of damage on account of the discharge of the plaintiff below should not have been submitted to the jury, and the giving of the instructions complained of was error, for which the judgment should be

REVERSED.

THE other judges concur.

HENRY LARIMER V. ABSLAM WALLACE.

FILED MARCH 29, 1893. No. 4770.

1. **Guardian's Sale of Real Estate: NOTICE: PROOF: COLLATERAL ATTACK.** In a collateral attack on a guardian's sale of real estate, where all the steps required have been taken, a sale made and confirmed, and a deed made to the purchaser, the sale will be sustained if the court had jurisdiction, although there may be irregularities which in a direct proceeding would render the sale erroneous.

2. **———: PROOF OF POSTING NOTICE.** Proof by affidavits of posting public notices is not exclusive. The statute merely provides a mode which is sufficient, but does not provide that it shall supersede all other forms of proof.

ERROR from the district court of Gage county. Tried below before BROADY, J.

Griggs, Rinaker & Bibb and *W. V. A. Dodds*, for plaintiff in error:

There is no proof of the posting of notices of sale as required by Gen. Stats., sec. 56, p. 286; sec. 83, p. 291; sec. 90, p. 292, sec. 404, p. 593. Proof of posting the notices should be made by affidavit of the party who posted the same, stating when, where, and by whom the notices were posted. (*State v. Otoe County*, 6 Neb., 130.) A sheriff's return that notice was duly published will not be accepted as proof, the law providing the manner of proof to be by affidavit of any person having knowledge of the fact, specifying the time when, and the paper in which, the publication was made. (*Miller v. Lefever*, 10 Neb., 77.) There is no reference to the posting of any notices of sale in the case at bar. The record is entirely silent upon this point. The only reference to the posting of any notices is the reference to an entirely different piece of land, in the unverified report of the guardian. Proof of posting must be by

affidavit of some kind. If not so shown, and if not shown by the sworn report it is fatal. (*Persinger v. Jubb*, 52 Mich., 304; *Cooper v. Brock*, 41 Id., 488; *Thomas v. Le Baron*, 8 Met. [Mass.], 363; *Hudson v. Hulbert*, 15 Pick. [Mass.], 423; *Blossom v. Brightman*, 21 Id. [Mass.], 285; *Mundy v. Monroe*, 1 Mich., 68; *Woods v. Monroe*, 17 Id., 242.) Essentials required by statute must affirmatively appear on record, or be proved as by law required. (*Chase v. Ross*, 36 Wis., 268; *McCrubb v. Bray*, 36 Id., 268–333; *Blodgett v. Hitt*, 29 Id., 169.) This sale can be attacked collaterally. (*Montour v. Purdy*, 11 Minn., 278; *Davis v. Hudson*, 11 N. W. Rep. [Minn.], 136; *Babcock v. Cobb*, 11 Minn., 347; *Grier's Appeal*, 101 Pa. St., 412; *Williams v. Reed*, 5 Pick. [Mass.], 480; *Persinger v. Jubb*, 52 Mich., 304; *Sowards v. Pritchett*, 37 Ill., 517; *Ryder v. Flanders*, 30 Mich., 343; *Coe v. Nash*, 28 Id., 259; *Toll v. Wright*, 37 Id., 93; *Blackman v. Baumann*, 22 Wis., 611; *Thomas v. Le Baron*, 8 Met. [Mass.], 363; *Hathaway v. Clark*, 5 Pick. [Mass.], 490; *Loring v. Steineman*, 1 Met. [Mass.], 204; *Reynolds v. Schmidt*, 20 Wis., 380.) The license was not granted until after the sale was made. Eleven days elapsed between the last newspaper publication and time of sale. The proceeding was void. (*Hartley v. Croze*, 37 N. W. Rep. [Minn.], 450.)

A. H. Babcock and *J. A. Smith, contra:*

The evidence in this case is that the notice was published four consecutive weeks, commencing August 24, A. D. 1875, and that the sale occurred September 25, 1875. This would make the last publication September 14, which extended to next publication day, to-wit, September 21, or to within four days of the sale. This was sufficient compliance with the statute. (*Dexter v. Cranston*, 2 N. W. Rep. [Mich.], 674; *Morrow v. Weed*, 4 Ia., 95; *Frazier v. Steenrod*, 7 Id., 346; *Brigham v. Boston & Albany R. Co.*, 102 Mass., 14.) Proof by affidavit of the posting of notice is neither

exclusive nor necessary. The report of the guardian that she posted notice is *prima facie* evidence and its sufficiency cannot be attacked collaterally. (*Cooper v. Sunderland*, 3 Ia., 139; *Shawhan v. Loffer*, 24 Id., 228; *Stanley v. Noble*, 59 Id., 666; *Wade v. Carpenter*, 4 Id., 360; *Little v. Sinnett*, 7 Id., 324; *Frazier v. Steenrod*, 7 Id., 339; *Long v. Burnett*, 13 Id., 28; *Pursley v. Hayes*, 22 Id., 11; *Emery v. Vroman*, 19 Wis., 735.) The court had jurisdiction. If that jurisdiction was improvidently exercised, it is not to be corrected at the expense of a purchaser who had a right to rely upon the order of the court as an authority emanating from a competent jurisdiction. (*Perkins v. Fairfield*, 11 Mass., 227; *Stall v. Macalester*, 9 O., 23.) Non-compliance by a guardian with the requirements of the statute relative to the notice to be given of the sale of real estate of the ward, under license of the probate court, will not invalidate the title of a *bona fide* purchaser. (*Palmer v. Oakley*, 2 Douglas [Mich.], 433; *Woods v. Monroe*, 17 Id., 241–2; *Cooper v. Sunderland*, 3 Ia., 136.) The failure of a guardian to give security as required by statute upon obtaining an order for the sale of real estate will not render a sale void, regularly made and approved. (*Watts v. Cook*, 24 Kan., 278; *Bryan v. Bauder*, 23 Id., 95; *Fleming v. Bale*, 23 Id., 88.) When proceedings are in a court of general jurisdiction, and jurisdiction appears by record, even though it does not show everything necessary to regularity, yet it will be presumed, unless the contrary expressly appear; and even if irregularity or gross error do appear, the judgment cannot be questioned collaterally. This rule applies as well to proceedings under special statutes as under the common law. (*Falkner v. Guild*, 10 Wis., 506; *Carr v. Commercial Bank of Racine*, 16 Id., 52; *Allie v. Schmitz*, 17 Id., 175; *Robertson v. Kinkhead*, 26 Id., 560; *Seward v. Didier*, 16 Neb., 61; *Saxon v. Cain*, 19 Id., 488; *Trumble v. Williams*, 18 Id., 153; *Cooper v. Sunderland*, 3 Ia., 136; *Seymour v. Ricketts*, 21 Neb., 245;

Roberts v. Flanagan, 21 Id., 503; *Grignon's Lessee v. Astor*, 2 How. [U. S.], 339; *Thompson v. Tolmie*, 2 Peters [U. S.], 162; *Ballow v. Hudson*, 13 Gratt. [Va.], 672; *McPherson v. Cunliff*, 11 Serg. & R. [Pa.], 422; *Lalanne's Heirs v. Moreau*, 13 La., 433.) Guardian's sale of land cannot after *confirmation* be *collaterally* attacked as illegal in an action for the land brought against one who in good faith derives his title under the purchaser at such sale. (*Brown v. Christie*, 84 Am. Dec. [Tex.], 608; *Bunce v. Bunce*, 59 Ia., 537.)

MAXWELL, CH. J.

This is an action of ejectment to recover the southeast quarter of section 34, township 5, range 6 east. The defendant claims under a guardian's sale and the plaintiff claims that the proceedings were void. On the trial of the cause a jury was waived and the cause tried to the court, which found in favor of the defendant and dismissed the action. There is but little dispute as to the facts. The parties entered into a stipulation as follows:

"It is stipulated and agreed that the patent title to the land in this action was issued to Henry Larimer, a minor and the plaintiff in this action, dated September 1, 1868; that the defendant acquired title to said lands by regular chain of conveyance from Ellen E. Larimer, as guardian of Henry Larimer, the plaintiff in this action, based upon a sale of said land made by said guardian; that the title to said land is in the plaintiff, unless the proceedings of said guardian in the sale of said land is sufficient to convey plaintiff's title thereto, and if said proceedings of said guardian in making said sale are valid, then the title to said premises is in the defendant, and he is a purchaser in good faith and for a valuable consideration, except such notice as the records of conveyances disclose; that the abstract of title to the said land may be introduced in evidence and have the same force and effect as the original deeds of conveyance would have were they introduced."

The defendant then introduced in evidence proof of the guardian's appointment, etc., her petition to sell the land, as follows:

"In the district court of the first judicial district of Nebraska, held in and for Gage county.

"To the Honorable the said District Court:

"The petition of Ellen E. Larimer, of the county of Scott, in the state of Iowa, shows:

"1. That she is the mother and duly appointed guardian of Henry Larimer, a minor child, born September 19, 1865, as shown by the papers hereto attached, marked Exhibit 'A,' and that said child lives with your petitioner in the said county of Scott.

"2. That said Henry Larimer has no estate whatever, real or personal, except the following, to-wit: The S. E. ¼ of sec. 34 in T. 5, R. 6, in Gage county, Nebraska, which said lands he owns in fee.

"3. That said lands are uncultivated and wholly unproductive and are now liable for a large amount of unpaid taxes for a long time due thereon.

"4. That the value of said lands does not exceed $1,000.

"5. That said Henry Larimer is wholly dependent upon your petitioner for his support and education.

"6. That your petitioner is unable by reason of her poverty to support and educate said Henry Larimer in a proper manner, and that it would be to the great benefit of said Henry Larimer if said lands should be sold and the proceeds of the sale thereof be applied towards his education and support. And your petitioner asks that a license to sell said lands may be granted to her in the manner provided by law. ELLEN E. LARIMER.

"STATE OF IOWA, }
COUNTY OF SCOTT. }

"Ellen E. Larimer, having been first duly sworn, says that she is the named petitioner; that she has read the said

petition above written and knows that the contents thereof are true. "ELLEN E. LARIMER."

This was duly certified. This was presented to Judge Gantt, who made an order as follows:

"In the district court of the first judicial district, held in and for Gage county, Nebraska.

"In the matter of the application of Ellen E. Larimer, guardian of Henry Larimer, a minor child, to sell the S. E. ¼ of sec. 34, in T. 5 north, of R. 6 east, of the 6th principal meridian, in said Gage county, Nebraska, for the maintenance and education of said minor.

"It is now ordered that all persons next of kin of said ward, and all persons interested in the estate above described, appear before me at the court house in the city of Nebraska City, in the county of Otoe, Nebraska, on Friday, the 18th day of December, 1874, at the hour of 10 o'clock A. M. of that day, to show cause why a license should not be granted to said guardian to sell said real estate for the purpose aforesaid. Ordered, that a copy of this order be published four consecutive weeks in the Beatrice *Express*, prior to the time fixed for said hearing.

"Dated November 5, A. D. 1874.

"D. GANTT, *Judge.*"

A notice was published as follows:

"In the district court of the first judicial district, held in and for Gage county, Nebraska.

"In the matter of the application of Ellen E. Larimer, guardian of Henry Larimer, a minor child, to sell the S. E. ¼ of section 34, in T. 5 north, of R. 6 east, of the 6th principal meridian, in said Gage county, Nebraska, for the maintenance and education of said minor.

"It is now ordered that all persons next of kin of said ward, and all persons interested in the estate above described, appear before me at the court house in the city of Nebraska City, in the county of Otoe, Nebraska, on Fri-

day, the 18th day of December, 1874, at the hour of 10 o'clock A. M. of that day, to show cause why a license should not be granted to said guardian to sell said real estate for the purpose aforesaid. Ordered, that a copy of this order be published four consecutive weeks in the Beatrice *Express* prior to the time fixed for said hearing.

"D. GANTT, *Judge.*"

This is accompanied by the affidavit of the publisher that he published the same four successive weeks, commencing on the 19th day of November, 1874.

On the day set for the hearing, Judge Gantt granted the following license:

"In the district court of the first judicial district in and for Gage county.

"In the matter of the application of Ellen E. Larimer, guardian of Henry Larimer, to sell real estate of said minor.

"And now this 18th day of December, 1875, this cause came on to be heard, at chambers, at the court house in Nebraska City, Otoe county, in pursuance of the order heretofore made in this cause on all persons interested in the said estate, to show cause, if any they had, why a license should not be granted to said guardian to sell said real estate for the maintenance and education of said minor; and it appearing to the Hon. D. Gantt, judge, presiding in said first judicial district, that publication of said order and notice to the next of kin of said minor, and all persons interested in said estate, was duly made in the manner and for the time prescribed by law, in the Beatrice *Express*, a newspaper printed and having a general circulation in the said county of Gage, and the said judge having heard and examined the proofs of the said guardian (no one appearing to resist said application), and being fully advised in the premises, doth find that the income of said minor is not sufficient to maintain and educate the said minor. It

is therefore ordered that the said Ellen E. Larimer, as guardian aforesaid, be and is hereby licensed to sell the real estate of the said minor, in her said petition described, to-wit, the S. E. ¼ of sec. 34, in T. 5 N., R. 6 east, in said county of Gage, for the maintenance and education of said minor. And it is further ordered that said guardian shall, before making such sale, take and file the oath required by law, and shall make due publication and give notice of said sale in the manner and for the time prescribed by law. The terms of said sale shall be cash; and the said guardian is required to make full return of all her proceedings herein to the next term of the district court of said county of Gage. D. GANTT, *Judge.*"

There is also a copy of the appraisement as follows:

"INVENTORY OF PROPERTY.

"We, L. G. Coffin, sheriff of Gage county, in the state of Nebraska, Josiah Hawkins and Alfred Hazlett, two disinterested freeholders, residents of said county of Gage, the said Josiah Hawkins and Alfred Hazlett having been first duly sworn by said sheriff, do truly and impartially inventory and appraise the following property at its real value in money, to be sold as the property of Henry Larimer, by Ellen E. Larimer, his guardian, by virtue of a license granted by the district court of the first judicial district of the state of Nebraska, in and for the county of Gage, at the November term of said court, in the year 1874, to-wit: S. E. ¼ of sec. 34, T. 5 N., R. 6 east, in said Gage county, 160 acres, at $4 per acre, $640.

"Given under our hands this 23d day of September, A. D. 1875. L. G. COFFIN,

"*Sheriff of Gage County, Nebraska,*

"By O. H. PHILLIPS, *Deputy,*

"ALFRED HAZLETT,

"JOSIAH HAWKINS,

"*Appraisers.*"

There is also a report of sale as follows:

"Received the license hereto annexed, marked Exhibit 'A,' and, according to the command thereof, I did, on the 24th day of August, 1875, cause a notice (a copy of which is hereto annexed, marked Exhibit 'B'), to be published in the Beatrice *Courier*, a newspaper published in the county of Gage, Nebraska, and of general circulation therein, and continued the publication of the same for thirty-two days, and did post up copies of the said notice in five of the most public places in said Gage county, giving notice that I would, on the 25th day of September, 1875, at the south front door of the court house in said county, at 2 o'clock P. M. of said day, sell the said lands in said license mentioned, at public auction; and I did at said time and place sell said lands at public auction to Orren Stevens for the sum of $430, he being the highest and best bidder therefor. That before the sale of said lands I did cause the same to be appraised in the manner required by law, which said appraisement is hereto annexed, marked Exhibit 'C,' and that the said sum of $430 is more than two-thirds of the appraised value of said lands, to-wit, the S. E. ¼ of sec. 34, in T. 5 N., of R. 6 east, Gage county. That I did also before making said sale make and file with the clerk of the district court of said county the oath required by law. All done in Gage county, Nebraska.

"Witness my hand this 27th day of September, A. D. 1875. ELLEN E. LARIMER."

There is the oath of the guardian as follows:

"I, Ellen E. Larimer, being first duly sworn, make oath and say that I am the guardian above mentioned of the said minor, Henry Larimer; that in disposing of the following real estate, to-wit, the S. E. ¼ of sec. 34, T. 5 N., of R. 6 east, of the principal meridian, in Gage county, Nebraska, which said lands I am licensed to sell by the said district court, I will use my best endeavors to dispose

of the same in such manner as will be most convenient for the advantage of the said Henry Larimer and all other persons interested therein. "ELLEN E. LARIMER."

There is the bond, as follows:

"Know all men by these presents, that we, Ellen E. Larimer, of the county of Scott, in the state of Iowa, James Gamble, of the same place, and Joseph Suiter, of the county of Gage, in the state of Nebraska, are held and firmly bound unto the Hon. Daniel Gantt, judge of the district court of the first judicial district of Nebraska, and to his successors in office in the penal sum of $1,000, current money of the United States; the payment of which sum to be well and truly made we and each of us bind ourselves, our executors and administrators, jointly and severally, firmly by these presents.

"The condition of the above obligation is such, that if the said Ellen E. Larimer, guardian of Henry Larimer, shall as such guardian sell under a license from the said district court the following lands, to-wit, the S. E. ¼ of sec. 34, T. 5 N., of R. 6 east, in said Gage county, in the manner prescribed by law for the sale of real estate by executors and administrators, and if the said Ellen E. Larimer shall account for and dispose of the proceeds of said sale in the manner provided by law, then this obligation to be void, otherwise to be and remain in full force.

"Witness our hands and seals this 10th day of December, 1874. ELLEN E. LARIMER. [SEAL.]

"JAMES GAMBLE. [SEAL.]

"JOSEPH SUITER. [SEAL.]

"Subscribed and sworn to by Ellen E. Larimer and James Gamble before me, a notary public in and for Scott county, Iowa, this 10th day of December, A. D. 1874.

"JOHN W. BUCKMAN,

"*Notary Public, Scott County, Iowa.*

"The above bond and sureties therein approved.

"D. GANTT, *Judge.*"

The sale was advertised four weeks, the notice being as follows:

"SALE OF MINORS' LANDS BY GUARDIAN.

"By virtue of a license of the district court of the first judicial district of Nebraska, held in and for Gage county, to me granted, I, Ellen E. Larimer, guardian of Henry Larimer, a minor, will sell for cash at public auction on Saturday, the 25th day of September, A. D. 1875, at 2 o'clock P. M., at the south front door of the court house, in Beatrice, Gage county, Nebraska, the following real estate, situated in said Gage county, the land of said minor, to-wit, the southeast quarter of section 34, in T. 5 N., of R. 6 east. ELLEN E. LARIMER,

"*Guardian of Henry Larimer.*"

There is an affidavit of publication made by one of the publishers of the Beatrice *Courier*, a weekly newspaper, that the notice was published four consecutive weeks, commencing August 24, 1875; the fees, being $7.50, were paid. There is also the confirmation of the sale as follows:

"In the district court of the first judicial district of Nebraska, held in and for Gage county.

"In the matter of the application of Ellen E. Larimer, guardian of Henry Larimer, to sell the lands of said minor.

"CONFIRMATION OF SALE OF LANDS.

"And now, on this third day of November, 1875, comes the said Ellen E. Larimer, by S. C. B. Dean, her attorney, and the court having fully examined the papers in this cause, and being fully advised in the premises, order that the sale of the lands made by said Ellen E. Larimer, under the license for that purpose heretofore granted by said court, be confirmed, and is hereby ordered that a deed of said lands be made by said Ellen E. Larimer to Orren Stevens, the purchaser of said lands. D. GANTT, *Judge.*"

Also a receipt for the purchase money as follows:

"In the district court of the first judicial district of the state of Nebraska, held in and for Gage county.

"In the matter of the application of Ellen E. Larimer to sell the lands of Henry Larimer, a minor.

"RECEIPT FOR PURCHASE MONEY.

"I, Ellen E. Larimer, aboved named, do hereby certify that I have received from Orren Stevens the sum of $430, in full for purchase money of lands above mentioned, being the S. E. ¼ of sec. 34, T. 5 N., of R. 6 east, in said Gage county. ELLEN E. LARIMER.

"In presence of

"JAMES GAMBLE."

This is duly authenticated. It will thus be seen that every step required by statute was taken by the careful judge who made the orders in the case. The principal ground relied upon for a reversal of the case is that there is no proof of the posting of the notices of the sale of the land, and *State v. Otoe County*, 6 Neb., 130, is cited to sustain that view. That was a direct proceeding to establish a public road, and it was properly held that it should appear when, where, and by whom the notices are posted. It is also true that the Code provides that the posting or service of a notice may be proved by affidavit of any competent witness attached to a copy of such notice or paper, to be made within six months of the time of posting up. We do not understand this mode of proof to preclude all other kinds of proof. The statute merely provides what shall be sufficient proof, but does not make that exclusive. No doubt there was sufficient proof of such posting before Judge Gantt when he confirmed the sale, and the order of confirmation is not subject to collateral attack. Some point is made on the date of the notice of sale, and of a misdescription of the land, but there appears to be no substantial ground of objection on those grounds. In a collateral at-

tack on a guardian's sale of real estate, where all the steps required by statute have been taken, a sale made and confirmed and a deed made to the purchaser, the sale will be sustained if the court had jurisdiction, although there may be irregularities in the proceedings, which, in a direct proceeding, would render the judgment erroneous. The judgment is right and is

AFFIRMED.

THE other judges concur.

PACIFIC RAILWAY COMPANY IN NEBRASKA V. JAMES PERKINS.

FILED MARCH 29, 1893. No. 4940.

Condemnation Proceedings: NON-RESIDENT: DEFINITION. The word "non-resident," in section 100, chapter 16, Compiled Statutes, relating to condemnation proceedings for right of way for a railroad, means a non-resident of the state and not of the land affected, or of the county where it is situate.

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

B. P. Waggener, James W. Orr, G. W. Stubbs, and *David Martin,* for plaintiff in error.

Schomp & Corson, contra.

MAXWELL, CH, J.

In 1889 the defendant in error brought an action in the district court of Nuckolls county against the plaintiff in error for trespass in entering upon and occupying a strip of land for right of way through the southwest quarter

of section 33, township 2 north, of range 7 west, in said county, said land being the property of the defendant in error. The plaintiff in error justified its entry upon the land and occupation of said strip by virtue of certain condemnation proceedings and the payment of the award of the commissioners to the county judge of said county. The reply consists of certain specific denials. On the trial of the cause certain questions were submitted to the jury which, with their answers, are as follows:

Q. 1. Did the plaintiff, James Perkins, ever live upon or occupy the S. W. ¼ of sec. 33, T. 2, R. 7, in Nuckolls county, Nebraska?

A. No.

Q. 2. Did the plaintiff James Perkins ever reside in Nuckolls county, Nebraska?

A. No.

Q. 3. Had said land up to the time of the location of the defendant's railroad upon it been vacant, unenclosed, unimproved, and unoccupied?

A. Yes.

Q. 4. Up to the time of commencing this action was said land still vacant, unenclosed, unimproved, and unoccupied, except by the location, construction, and operation of the defendant's railway?

A. Yes.

Q. 5. At the time of the location of the defendant's railway upon said quarter section was the land lying in a state of nature, with nothing growing on it but the grass and herbage common to our open prairie?

A. Yes.

Q. 6. Up to the time of commencing this action was said land lying in a state of nature, except by the construction and operation of the defendant's railway, with nothing growing on it but the grass common to our open prairies?

A. It was.

The jury returned a general verdict in favor of the de-

fendant in error for the sum of $18, upon which the judgment was rendered.

The principal contention of the defendant in error is that the defendant in error was a non-resident within the meaning of the statute.

Sec. 100, ch. 16, Comp. Stats., provides: "If, upon the location of said railroad, it shall be found to run through the lands of any non-resident owner, the said corporation may give four weeks' notice to such proprietor, if known, and if not known, by a description of such real estate, by publication four consecutive weeks in some newspaper published in the county where such lands may lie, if there be any, and if not, in one nearest thereto on the line of their said road, that said railroad has been located through his or her lands; and if such owner shall not, within thirty days thereafter, apply to said probate judge to have the damages assessed in the mode prescribed in the preceding sections, said company may proceed, as herein set forth, to have damages assessed, subject to the same right of appeal as in case of resident owners; and upon the payment of the damages assessed to the probate judge of the proper county for such owner, the corporation shall acquire all rights and privileges mentioned in this subdivision."

Sec. 97 of the same chapter also provides: "If the owner of any real estate over which said railroad corporation may desire to locate their road shall refuse to grant the right of way through his or her premises, the county judge of the county in which such real estate may be situated, as provided in this subdivision, shall, upon the application of either party, direct the sheriff of said county to summon six disinterested freeholders of said county, to be selected by said county judge, and not interested in a like question, unless a smaller number shall be agreed upon by said parties, whose duty it shall be to carefully inspect and view said real estate, and assess the damages which said owner shall sustain by the appropriation of his or her land to the

use of said railroad corporation, and make report in writing to the county judge of said county, who, after certifying the same under his seal of office, shall transmit the same to the county clerk of said county for record, and said county clerk shall file, record, and index the same in the same manner as is provided for the record of deeds in this state, and such record shall have the like force and effect as the record of deeds in pursuance of the statute in such case made and provided. And if said corporation shall at any time before they enter upon said real estate, for the purpose of constructing said road, pay to said county judge for the use of said owner the sum so assessed and returned to him as aforesaid, they shall thereby be authorized to construct and maintain their said road over and across said premises; *Provided*, That either party may have the right to appeal from such assessment of damages to the district court of the county in which such lands are situated, within sixty days after such assessment, and in case of such appeal the decision and finding of the district court shall be transmitted by the clerk thereof, duly certified to the county clerk, to be filed and recorded as hereinbefore provided, in his office. But such appeal shall not delay the prosecution of the work on said railroad if such corporation shall first pay or deposit with such county judge the amount so assessed by said freeholders. Such railroad company shall in all cases pay the costs of the first assessment; *Provided*, That if, on appeal, the appellant shall not obtain a more favorable judgment and award than was given by said freeholders, then such appellant shall be adjudged to pay all the costs made on such appeal; *Provided further*, That either party may appeal from the decision of the district court to the supreme court of the state, and the money so deposited shall remain in the hands of the county judge until a final decision be had, subject to the order of the supreme court."

It seems to be conceded that the defendant in error was

a resident of the state, although he did not reside on the land in question or even in Nuckolls county. Was he, therefore, a non-resident within the meaning of the statute? The word "non-resident" is ordinarily used in connection with certain rights of creditors and property owners. Thus, a person who does not reside in a school district in which he has property is a non-resident of such district. So, if he owns property in any village, city, or county in which he does not reside he is a non-resident of such county, city, or village. In the broad sense, it is applicable to every one who does not reside at a particular place named. The word, however, when applied to the bringing of an action, is used in a more limited sense. Thus, the Code requires an action to be brought in the county where the defendant resides or may be served with summons. If the action affects the title or possession of real estate, then the action is to be brought in the county where the lands lie and the summons may be sent to any county in the state and be there served on the defendant. The Code also provides for service by publication where it appears from the oath of a plaintiff, his agent or attorney, that the defendant cannot be served with summons within the state. One of the grounds of attachment is, that a defendant is a non-resident. In these cases the term is used to signify one who does not reside within the state. In such case, as personal service cannot be had within the boundaries of the state, constructive service by publication is permitted. This results from the necessity of the case, the duty of the courts to enforce the rights of a plaintiff upon property of the defendant within the jurisdiction of the court, and the inability to obtain personal service on him within the jurisdiction of the court. If personal service can be had upon a defendant within the state, then service by publication cannot be made. In the general acceptation of the term it means one who resides out of the state. (*Frost v. Brisbin*, 19 Wend. [N.Y.], 11, 32 Am. Dec., 423; *Pooler v. Maples*, 1 Wend. [N.Y.], 65; 16 Am. & Eng. Ency.

of Law, 718.) In the matter of *Thompson*, 1 Wend. [N. Y.], 43, it was held that an attachment might issue against the property of a debtor notoriously residing abroad whether he was absent temporarily or permanently. In either case he was a non-resident within the meaning of the statute. Considerable stress is laid by the plaintiff in error upon the power of the legislature to declare service by publication in regard to public roads, etc., sufficient. In answer to this statement it is sufficent to say that the question involved in this case is not one of power of the legislature, or the want of it, but the meaning of the word "non-resident"; but even in regard to such cases this court recently held that where the land-owner had no actual notice of the proceedings till it was too late to appeal, he could recover damages for injury to his land by the location of the road. (*Pawnee County v. Storm*, 34 Neb., 735.) The judgment is right and is

AFFIRMED.

THE other judges concur.

GERMAN INSURANCE COMPANY OF FREEPORT V. AMBROSE EDDY,

QUEEN INSURANCE COMPANY OF LIVERPOOL V. AMBROSE EDDY,

AND

GERMAN FIRE INSURANCE COMPANY OF PEORIA V. AMBROSE EDDY.

FILED MARCH 29, 1893. NOS. 5014, 5015, 5016.

1. **Fire Insurance: VALUED POLICY ACT: PROVISION OF POLICY FOR APPOINTMENT OF ARBITRATORS.** Under the valued policy act of 1889, stipulations in a policy of insurance in conflict with any of the provisions of that act are inoperative, and

this applies to a provision in case of loss for the appointment of arbitrators. If the property is "totally destroyed" there is nothing to arbitrate.

2. ———: ———: DEFINITION OF "TOTALLY DESTROYED." Where all the combustible material in a building is destroyed by fire, although portions of the brick walls are left standing, but are so injured by the fire that they must be torn down, for the purpose of insurance the property is totally destroyed; but if the person insured should use the brick, or other material not destroyed, to rebuild, the company would be entitled to the value of such brick or material.

3. ———: ———: INSTRUCTIONS. Under the issues made by the pleadings the principal question was whether or not the property had been "totally destroyed," and this question was fairly submitted to the jury and the verdict is supported by the evidence.

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

Lawrence Heiskell, J. R. Wash, Adams & Scott, I. W. Lansing, and *Charles Offutt*, for plaintiffs in error.

Abbott, Selleck & Lane, contra.

MAXWELL, CH. J.

The above cases were tried together in the court below and a verdict rendered in favor of the defendant in error against the German Fire Insurance Company of Peoria for $1,824.46, against the Queen Insurance Company for $1,037.23, and German Insurance Company of Freeport for $912.22, all of said verdicts with interest from date of loss. The petition in each case alleges a total loss. The answers admitted the execution of the policies and the liability of the companies thereon, but alleged in avoidance that the policies provided that "in the event of disagreement as to the amount of loss the same shall be ascertained by two competent and disinterested appraisers, the assured and this company each selecting one and the

two so chosen shall first select a competent and disinterested umpire; and the award in writing of any two shall determine the amount of such loss." And the said policies each further provided that "No suit or action on this policy shall be sustainable in any court of law or equity until after full compliance by the assured with all the foregoing requirements." That there was "disagreement as to the amount of loss" and a demand by the insurance companies in due time that the question as to the amount of loss be submitted to arbitrators; that the demand was acceded to on July 3, 1890, and an arbitrator selected by each party on that day, and that therefore the actions were prematurely brought, they having been instituted while the arbitrators were acting and before they made an award; and that on September 12, 1890, two of the arbitrators made an award fixing the amount of the loss at $1,500 and no more.

The reply is as follows: "That he denies each and every allegation in said answer contained except as hereinafter specifically admitted. He admits that on the 3d day of July, 1890, there was an agreement by and between the parties hereto that the amount of the loss sustained by the plaintiff in the said fire should be submitted to arbitration as provided in the policy herein sued on; that the plaintiff chose the said Royer and the defendant chose the said Harte to act in the said arbitration.

"Plaintiff further alleges that from that time he and the one he so chose, the said Royer, used their best efforts to have the said appraisal and arbitration made as provided in the said policy, but alleges that they were not able to get the said Harte to act with them, and alleges that the said Harte neglected and refused to act in said arbitration for more than the space of thirty days thereafter, although often requested so to do. That by reason of the refusal of the said Harte to act in said arbitration and the failure of the said Harte and the said Royer to make any appraisal of the said loss in said fire for more than the space of

thirty days the said loss was never arbitrated and determined under the said policy and in accordance with provisions therein contained. And that after having waited for more than thirty days after the said Harte and Royer had been chosen as herein set forth, and they having failed in any way to act upon said loss or to set a time when they would act thereon, plaintiff commenced this suit. That after the suit herein was begun the said defendant came to the plaintiff and requested that the whole of the matters in dispute involved in said loss and in the suit might be submitted to the said Harte and the said Royer and to one to be selected by them who should act in case of their disagreement; that at that time, to-wit, on the 21st day of August, 1890, it was agreed by and between the parties herein that said arbitration should take place on that day, to-wit, on the 21st day of August, 1890; that in pursuance of the said agreement, and not under the stipulations of the policy, the said Harte and the said Royer agreed upon the said Gray to act with them in the said arbitration; that after the said Gray had been so chosen, then the said Harte refused to act with the said Royer and appraise the said loss in accordance with the said agreement, and the said Harte neglected, failed, and refused to in any way go on with the said appraisal and arbitration, and said Harte never did act or try to act with said Royer under said agreement; that afterwards he learned, and now alleges the fact to be, that the said Harte was not a disinterested party, but that he was in the employment of the defendant, and was, and is prejudiced in its favor and against this plaintiff, and was not a proper person to choose for an arbitrator under the said policy, whereby and because of the failure of the said Harte, Royer, and Gray to act in accordance with the terms of the said agreement under which they were chosen, and because plaintiff had learned of the prejudice of the said Harte as herein alleged, the said last mentioned agreement became null and void, and the plaintiff thereafter

notified the defendant that he withdrew from all further attempts at an arbitration of the said loss, and that he should proceed at once to clear away the rubbish and ruins of the said fire and to rebuild his house; that it was long after the said notice to the defendant, and after he had proceeded and cleared away the ruins from the said fire, that the said Harte and the said Gray made their pretended appraisal and award of the loss incurred by the said fire, and that when the said Harte and the said Gray made their pretended award there was no property there for them to view; that said loss has never been arbitrated or in any manner settled either under and by virtue of the terms of the said policy or by virtue of any agreement by and between the parties herein."

1. The first error relied upon is that the verdict is not sustained by sufficient evidence. The ground upon which this claim is made is that the proof fails to show a total loss of the property. In 1889 an act was passed as follows (sec. 43, ch. 43, Comp. Stats.): "Whenever any policy of insurance shall be written to insure any real property in this state against loss by fire, tornado, or lightning, and the property insured shall be wholly destroyed, without criminal fault on the part of the insured or his assigns, the amount of the insurance written in such policy shall be taken conclusively to be the true value of the property insured and the true amount of loss and measure of damages.

"Sec. 44. This act shall apply to all policies of insurance hereafter made or written upon real property in this state, and also to the renewal which shall hereafter be made of all policies heretofore written in this state, and the contracts made by such policies and renewals shall be construed to be contracts made under the laws of this state."

What is the meaning of the words "wholly destroyed" when applied to a building? If the building was constructed of brick or other non-combustible material fire

could not destroy that. Therefore the brick or other material not destroyed would have some value which the party retaining should pay for. From the nature of the case, therefore, the words referred to do not mean the *debris* from a building destroyed. This may have some value, and if so, the insurance company, if it pays the loss, is entitled to compensation for. The words when applied to a building mean totally destroyed as a building; that is, that the walls, although standing, are unsafe to use for the purpose of rebuilding and must be torn down and a new building erected throughout. (*Seyk v. Millers Nat. Ins. Co.*, 41 N. W. Rep. [Wis.], 443.) In the case cited it is said: "The evidence is that all the combustible material in the structures was destroyed, and although portions of the brick walls were left standing, yet they were useless as walls, and many, perhaps most, of the bricks therein were spoiled by the heat. It cannot be doubted that the identity and specific character of the insured buildings were destroyed by the fire, although there was not an absolute extinction of all the parts thereof. This was an entire destruction of the buildings, within the meaning of the statute. (1 Wood, Ins., sec. 107.)" There is abundant proof in the record that such was the situation of the building in the case at bar after the fire.

2. Where there is a total loss the provision for arbitration—except it may be to ascertain the value of the *debris*—does not apply. The provisions of the statute override any stipulations in the policy to that effect, as an insurance company can only do business in the state on the conditions provided by law. If the property was totally destroyed, therefore, stipulations in the policy as to arbitration must yield to the statute. (*Queen Ins. Co. v. Leslie*, 24 N. E. Rep. [O.], 1072; *Seyk v. Millers Nat. Ins. Co.*, 41 N. W. Rep. [Wis.], 443.) The jury brought in a verdict for a small sum, less than the amount of the policy, in each case, having evidently deducted the value of the brick and other

material left from the burned building. Of this the companies have no cause to complain.

3. The question whether or not the building was wholly destroyed is one of fact and it seems to have been fairly submitted to the jury. It is unnecessary to review the instructions. There is no material error in the record and the judgment is

AFFIRMED.

THE other judges concur.

HANSEN WISEMAN v. HENRY C. BRUNS.

FILED MARCH 29, 1893. No. 5067.

Jurors: ATTENDANCE AT COURT WITHIN TWO YEARS: CHALLENGE. It is sufficient cause of challenge to any person called as a juror in the district court that he has been summoned and attended that court as a juror at any term held within two years prior to the time of such challenge, and this rule applies to talesmen who were summoned and served as jurymen.

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

Wilbur F. Bryant, for plaintiff in error.

A. M. Gooding, contra.

MAXWELL, CH. J.

This action was brought by Bruns against Wiseman on account, the answer being a general denial. On the trial a verdict was returned in favor of Bruns, upon which judgment was rendered. While the jury was being impaneled one Jenal was called as a juror and in his exam-

ination on his *voir dire* stated that he had been a talesman in that court a little more than one year prior to that time. He was thereupon challenged for cause by Wiseman and the challenge was overruled, to which exceptions were taken. Wiseman then exhausted his peremptory challenges and now brings the case into this court on error. Sections 658 to section 662 of the Code provide the mode of drawing and summoning a petit jury.

Section 664 provides, "Whenever the proper officers fail to summon a grand or petit jury, or when all persons summoned as grand or petit jurors do not appear before the district courts, or whenever at any general or special term, or at any period of a term for any cause there is no panel of grand jurors or petit jurors, or the panel is not complete, said court may order the sheriff, deputy sheriff, or coroner to summon without delay good and lawful men, having the qualifications of jurors, and each person summoned shall forthwith appear before the court, and if competent, shall serve on the grand jury or petit jury as the case may be, unless such person may be excused from serving or lawfully challenged."

Section 665 provides that "No person shall be summoned as a juror in any district court of this state more than once in two years, and it shall be sufficient cause of challenge to any juror called to be sworn in any cause that he has been summoned and attended said court as a juror, at any term of said court held within two years prior to the time of such challenge; *Provided*, No finding, verdict or inquest returned by any jury shall be invalidated, or set aside, because a member of such jury served as a grand or petit juror within the two years immediately preceding such verdict or inquest."

It will be observed that the word "summon" or "summoned" is used whether the names of jurors are drawn from the box or they are called in by the sheriff, and the same words are used by this court in *Dodge v. People*, 4

Neb., 220, in speaking of talesmen brought in by the sheriff to serve as jurors. The statute has no exceptions in favor of talesmen and we do not feel justified in making exceptions. The purpose of the statute seems to be to exclude professional jurymen, but whether so or not the language is plain and unambiguous. It is therefore a good cause of challenge to one called as a juror that he has been summoned and attended the district court as a juror at any term of court held within two years prior to the time of challenge, and this rule applies to those summoned as talesmen. The judgment is therefore reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

STATE OF NEBRASKA, EX REL. MARK LEVY, V. J. H. SPICER, CLERK OF THE DISTRICT COURT.

FILED MARCH 29, 1893. No. 4979.

1. **Mandamus:** A RELATOR having a personal right to be enforced by *mandamus* may bring an action in the name of the state on his relation.
2. ———: TRUST FUNDS HELD BY CLERK OF DISTRICT COURT. On the facts stated in the petition, the defendant held the money and notes in controversy as trustee, and it was his duty to pay and deliver the same to the parties entitled thereto.
3. ———: DEMURRER OVERRULED and leave given to answer in five days.

ORIGINAL application for *mandamus.*

Capps & Stevens, for relator.

Tibbets, Morey & Ferris, contra.

MAXWELL, CH. J.

The defendant is the clerk of the district court of Adams county, and this is an application for a *mandamus* to compel him to pay over certain moneys in his hands claimed to be due the relator. He has demurred to the petition upon two grounds: First, that the action is improperly brought in the name of the state, and second, that the facts stated in the petition are not sufficient to constitute a cause of action. The petition is as follows:

"Comes now the relator, Mark Levy, and respectfully represents unto this honorable court that on May 24, 1888, Loeb and Emile Lindner commenced in the district court of Adams county, Nebraska, by the filing of their petition, an action for partition of divers and sundry descriptions of real estate mentioned in their said petition; that Rosa Hirsch, Harry Hirsch, Benjamin Hirsch, and Jacob Hirsch were defendants in said action; that Rosa Hirsch was the wife, and the said Harry, Benjamin, and Jacob Hirsch were the only heirs and children of Samuel Hirsch, deceased, who died intestate in the city of Hastings, Adams county, Nebraska, on the 18th day of April, 1888; that on the 16th day of June, 1888, John M. Ragan was duly appointed by said court as guardian *ad litem* for the said Harry, Benjamin, and Jacob Hirsch, the minor heirs of said Samuel Hirsch, deceased; that on the 18th day of June, 1888, said action came on to be heard upon the said petition and the answer by Rosa Hirsch in her own proper person, and the answer of John M. Ragan, the duly appointed guardian *ad litem* of said minors, and the evidence presented in open court, and the same was submitted to said court. On consideration whereof the court found that the plaintiff Abraham Loeb was the owner in fee-simple of an undivided one-half ($\frac{1}{2}$) part and interest to the real estate described in said petition, and that said Harry, Benjamin, and Jacob Hirsch were the children of Samuel Hirsch, late

of said county, deceased, and as his heirs are each the owner in fee-simple of one-sixth ($\frac{1}{6}$) part of the real estate described in said petition; that it was further ordered and adjudged by the said court at said time that said shares of each of said parties interested in the real estate described in said petition and said decree be and the same was thereby confirmed, and it was adjudged therein that said partition be made accordingly, if an equitable division thereof could be effected without detriment to the persons interested therein.

"It was further ordered and adjudged in said district court that J. H. Graham, William M. Lowman, and J. D. Croswaith be, and they were thereby, appointed referees to make partition of said real estate into the requisite number of shares, and report the same at that term of court if possible, and if not, that they make due report at the following term of said court.

"That on the 19th day of June, 1888, a commission authorizing and requiring the referees to carry into effect the terms and requirements of said decree was issued out of the district court of Adams county, Nebraska, authorizing and commanding them to make partition of said real estate as follows:

"To Abraham Loeb one-half ($\frac{1}{2}$) in value of said real estate; to Harry, Benjamin, and Jacob Hirsch, severally, one-sixth ($\frac{1}{6}$) each in value of said real estate, in manner as provided by law.

"That on said day said referees took the oath prescribed by law, as fully appears upon said commission; that on the 20th day of June, 1888, said referees, having first took the oath required by law as hereinbefore related, carefully examined the condition of all the real estate described in said petition with a view to making partition thereof among the persons hereinbefore named, and said referees reported and found that the partition of said premises could not be made without great prejudice to the owners thereof, for the rea-

son that it would divide the land and town lots therein specified into small parts which would be worthless, and further, that said partition could not be made on account of incumbrances thereon; that on the 22d day of June, 1888, said cause came on to be heard upon the report of the referees in said action and a motion to confirm the same and it appearing to said court that said partition of the real estate mentioned in said petition could not be made without prejudice to the owners thereof, and said court being satisfied of the truth thereof, said report was by the order of the said court entered upon the records thereof; and it was further ordered and adjudged by the court at said time and in said order that said referees should proceed to sell said premises described in said petition at public sale after giving due and legal notice thereto as required upon sales under execution. Said sales of said real estate were ordered to be held after the giving of legal notice thereof: The Adams county land, at the front door of the court house in Adams county, Nebraska; the Kearney county land, at the front door of the court house in Kearney county, Nebraska; the Red Willow county real estate, at the front door of the court house in Indianola; and the land situated in Brown county, at the front door of the court house in the town of Ainsworth therein. It was further ordered in said decree that said sales should be for one-third cash in hand, one-third in one year, and one-third in two years, with approved security upon all deferred payments, with interest at the rate of eight per cent per annum until the same be paid. Said referees were further ordered to report their doings relative to the sale of said real estate.

"That thereupon said referees proceeded to the procurement of certificates to all liens upon the real estate described in said petition and caused all of the same to be duly advertised according to the terms of the decree of the said court; and said referees made report of all of their doings at stated periods; that all of the reports of sales made by

said referees were presented to said court for examination and the same were in each and every instance, upon careful examination and consideration of said court, found to be in all respects conducted according to law, and said sales were by said court in each and every instance confirmed, and said referees were ordered to execute and deliver to the purchasers at the said sales deeds for the real estate so purchased by them; that all of the real estate described in said petition was sold by said referees and deeds conveying said premises to the purchasers thereof in fee-simple were duly executed by them and delivered to the purchasers thereof; that the proceedings and confirmation of all said sales were duly certified to and placed of record in the county where said real estate so sold is situated.

"That in said action in said district court of Adams county, after the sale and disposition of said real estate by the referees as hereinbefore mentioned, said cause came on to be finally heard on the application of the parties to said action for the purpose of having the proceeds of the sales of the property distributed; it was found by said court that Abraham Loeb was entitled to a one-half interest in the moneys and note in the hands of said referees appointed in said case, the proceeds of said sales; that Harry, Benjamin, and Jacob Hirsch, the heirs of Samuel Hirsch, deceased, were entitled to an undivided one-half interest, that is, one-sixth interest each, in and to the moneys and notes in the hands of said referees, the proceeds of the sales of real estate in said partition suit; that at said time the reports of the referees were correct; that the referees appointed in said action distributed the proceeds arising from the partition sale of lands in said action as follows: One-half of said proceeds to Abraham Loeb, and the remaining one-half, share and share alike, to Harry Hirsch and Benjamin Hirsch and Jacob Hirsch; that the supplemental and final report of the referees be and the same is confirmed.

"Your relator further represents unto the court that on December 19, 1890, William M. Lowman, one of the referees appointed by the court in said action, filed his petition in said court in said action showing unto the district court in the action where Abraham Loeb and Emile Lindner were plaintiffs, and Rosa Hirsch, Harry Hirsch, Benjamin Hirsch, and Jacob Hirsch were defendants, he was duly appointed by said court as referee to make partition of certain real property and to pay the proceeds of said sale in compliance with the order of said court; that the said referee had complied with the directions and decrees of said court and had sold said lands in fulfillment of the orders of said court, and that all of the said sales had been duly reported to the court, approved by the court; that said William Lowman, referee, then held as such officer in said action, the same being proceeds of sales, the following amounts of money and notes, to-wit: $475.52 in cash, being one-half of net proceeds of last payment of sale Adams county, Kearney county, and Red Willow county lands, and the Ainsworth town property, as described in the petition filed in said action; that the other one-half ($475.52) of the net proceeds of said payment had been paid to Abraham Loeb, according to the order of said court; that said William M. Lowman had on hand also the following notes to-wit: one for $359, dated February 16, 1889, due December 1, 1889, eight per cent interest from date until paid; one for $221.64, dated April 1, 1889, due April 1, 1890, eight per cent interest; one for $221.64, dated April 1, 1889, due April 1, 1891, eight per cent interest from date until paid; one for $637.10, dated November 15, 1889, due November 15, 1890, eight per cent from date until paid; one note for $637.10, dated November 15, 1889, due November 15, 1891, eight per cent interest from date until paid; that said notes and money were taken and received as proceeds of sales of the real estate described in said petition for partition, and that the same

were received and taken in pursuance of the orders and decrees of said court; that said William M. Lowman, referee, had business of such a nature that it would require his removal from the jurisdiction of the said court, and that he had no interest in the above described moneys or notes, and thereby offered to bring said moneys and notes into court and ask that he be discharged from further liability therefor, and that he be discharged as referee in said action.

"That afterwards, to-wit, on the 24th day of December, 1890, said cause came on to be heard on the petition and showing filed by said referee, William M. Lowman, and from the facts stated therein and the report of said referee and the evidence produced in court the said court found that under the previous order entered in said action said referee had paid to Abraham Loeb $475.15; that there was then in the hands of said referee the sum of $475.15 in cash, and the further sum of $2,076.48 in notes taken as part payment for the sale of the real estate described in the petition for partition; said court then and there further found that said referees had complied fully and completely with the orders of said court appointing them and that said referee, William M. Lowman, should be discharged; that the report of said referees had been theretofore made in said action be by said court confirmed. The court therein ordered said William M. Lowman, referee, to pay the money, notes, and property then in his possession to the clerk of the said court, this respondent; it was then and there adjudged by said court that said William M. Lowman should pay to the clerk of said court, this respondent, the said sum of money and notes found to be in his hands for the use and benefit of the persons and parties entitled thereto, and it was further ordered and adjudged by the said court that the said William M. Lowman be and he was thereby discharged from further liability. That on the 19th day of December, 1890, said William M.

Lowman paid to the clerk of the said court, J. H. Spicer this respondent, the said sum of $475.52 in cash, and notes and securities amounting to the sum of $2,076.48, and that said respondent still has and holds said cash and notes so delivered to him at said time by said William M. Lowman, referee; that on the 5th day of March, 1891, he had a settlement and adjustment of his business with one Abraham Loeb, who was plaintiff in said partition suit and adjudged therein to be the owner and holder of a half interest in the proceeds of the sales of said real estate, and the persons to whom it was by said district court adjudged that one-half of said proceeds should be paid and delivered to; that in said settlement had by this relator with said Abraham Loeb said Abraham Loeb assigned, transferred, and set over to this relator, for value received, all of his interest in and to the property adjudged to belong to him in said partition suit; that on said 2d day of July, 1891, your relator filed said assignment of record in the office of the district clerk of Adams county, Nebraska, the said assignment executed by the said Loeb to this relator; and your relator then demanded that said respondent pay over to him the entire interest adjudged to be the property of said Abraham Loeb so assigned to your relator, and that said respondent then and there refused, and still refuses, to pay over and deliver to your relator the interest in said property so assigned to him by said Abraham Loeb; that your relator is still the owner and holder of the entire interest of said Abraham Loeb found and adjudged to belong to him in said partition proceedings. That the decrees, orders, and judgments hereinbefore mentioned are in full force and effect in the district court of Adams county, Nebraska; that the same and all of them are unappealed from; that no proceedings in error have ever been prosecuted or taken therefrom, and that the same and all of them are final and irrevocable, and that said partition suit has been finally disposed of; that there is no just reason, either

legal or equitable, why the respondent should not comply with the orders and decrees of the district court rendered in said action and pay and deliver over to your relator all of the notes and moneys and property which were therein found and adjudged by the said court to be the property of Abraham Loeb, and of which your relator is now, and ever has been since March 5, 1891, the sole and only owner by assignment as hereinbefore stated; that he has no other adequate remedy to secure his rights in the premises other than those sought to be exercised by this information in this action.

"Wherefore your relator respectfully prays this honorable court that in the exercise of its original jurisdiction the court may grant a peremptory writ of *mandamus*, commanding J. H. Spicer, clerk of the district court of Adams county, Nebraska, the respondent herein, immediately upon the receipt of said writ, to deliver and pay over to your relator all notes, moneys, and property adjudged and decreed to the said Abraham Loeb in the partition suit mentioned in this information as having been assigned to your relator, and your relator prays for such other order and general relief as may be lawfully required in the securement of his rights in this proceeding."

If the facts stated in the petition are true, the real estate in question has been sold under proceedings in partition, the sale confirmed, deeds made to the purchasers, and the proceeds of said sales are now in the hands of the defendant. This court, therefore, in this proceeding has nothing to do with the partition case. For the purpose of this demurrer the proceedings in that case are supposed to be regular and unobjectionable. The right of the relator to bring an action by *mandamus* in the name of the state has been recognized from the earliest period of our history as a state, and may be regarded as a settled rule which, if changed, it should be done by the legislature. The first point of the demurrer, therefore, is not well taken.

So far as the petition shows, the defendant holds the money and notes in question as a mere trustee and not strictly as clerk of the court. The court in relieving Mr. Lowman from his trusteeship was not required to appoint the defendant. Any other person within the jurisdiction of the court, if deemed suitable, might with equal propriety have been appointed, and received the money and property of the relator. The petition shows that the money is due to the relator, and that it is the duty of the defendant to pay the same and to deliver to him his share of the notes. If the defendant has a defense to the action he must set it up by answer. The demurrer is overruled and the defendant has leave to answer in five days.

DEMURRER OVERRULED.

THE other judges concur.

MARY E. L. WILLIAMS v. JAMES C. EIKENBARY.

FILED MARCH 29, 1893. No. 4990.

1. **Action of Replevin: ADMINISTRATION: REVIVOR: PLEADING BY ADMINISTRATRIX.** An action was brought by one J. W. W. against J. C. E., as sheriff, and was twice reversed in the supreme court. Before the third trial J. W. W. died and the cause was revived in the name of M. E. L. W., who states in her petition that she sues as executrix. *Held*, Sufficient to show that she brought the action in her representative capacity.

2. ———: ———: ———: **DEFECTIVE ANSWER: HARMLESS ERROR.** In such action an answer was filed by J. C. E., but the name of the plaintiff was stated to be J. W. W. instead of M. E. L. W. Sufficient appeared in the answer to show to what petition it applied, and it was in fact filed in the proper case. No motion was made and filed to strike it from the files. *Held*, Error without prejudice.

3. ——: ——: ——: PLEADING EVIDENCE. On the trial the plaintiff sought to disprove the allegations of her petition by showing that her duties as executrix had ceased and she had been discharged. *Held*, That she should have pleaded the facts by supplemental petition, and not having done so the testimony was properly excluded.

4. **Evidence** *held* to sustain the verdict.

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

J. H. Haldeman, for plaintiff in error.

H. D. Travis, E. H. Wooley, and *Byron Clark, contra.*

MAXWELL, CH. J.

This is an action of replevin. It was tried the first time in 1886, the judgment of the district court being reversed. The case is reported in 22 Neb., 210.

In 1889 the cause was again brought into this court and the judgment again reversed. In May, 1889, James W. Williams, the original plaintiff, died, and the present plaintiff, as executrix, filed a petition on June 11, 1890. It is claimed on behalf of the plaintiff in error that she brought the action in her individual capacity and not as executrix. The commencement of the petition is as follows:

"MARY E. L. WILLIAMS, PLFF.,
v.
J. C. EIKENBARY, SHERIFF OF CASS COUNTY, DEFT. } Petition.

"Plaintiff complains of the defendant and says that James W. Williams was her husband and departed this life about May 1, 1889, and plaintiff was shortly thereafter appointed executrix of his estate by the county court of Douglas county, Nebraska. That at the time of his death he was plaintiff in above action."

There follows a statement of the matter in controversy between the defendant in error, as sheriff, and the deceased James W. Williams. In our view this sufficiently shows the capacity in which the plaintiff sues. The objection, therefore, is overruled. The second objection is that no answer was filed to the petition, and therefore all proof contradicting it was improperly admitted. The record shows that the answer is entitled in the proper court and purports to be an answer to the petition of the plaintiff, but in the title James W. Williams is designated as the plaintiff instead of the executrix. This is not a fatal defect. Enough appears in the answer to show that it was intended to apply to the petition in question. Therefore, if the plaintiff desired to object to the same, she should have done so by motion to strike it from the files, when the plaintiff would have had leave to amend. Having failed to do so, the objection is overruled.

It is claimed that the court erred in refusing to permit the plaintiff to deny that she was executrix; that her power had ceased and she was discharged. In this there was no error. If the plaintiff desired to prove her discharge as such executrix, she should have pleaded the same in a supplemental petition. It would be trifling with the court to make up the issues upon the theory that the plaintiff was executrix and then permit her to disprove that fact on the trial. The court did right in excluding the testimony.

It is claimed that the court erred in admitting in evidence the petition, affidavit, order of attachment, and undertaking in attachment, because the papers in question are entitled the Commercial Bank, plaintiff, v. Lawrence Holland & Tewksberry and Cooper, defendants, while the order of attachment and undertaking in that case show that they were issued in a case where the bank was plaintiff and Lawrence Holland, *alone*, defendant. In other words, that an attachment was issued against one of the de-

fendants in that case and not against all. The answer to this is that so far as appears there was no cause of attachment against the other defendants, and hence none was sought. The objection is untenable and is overruled.

It is alleged that the verdict is not sustained by sufficient evidence. We think differently, however. The value of the property taken seems to have been agreed upon at $1,706.35, and the damages allowed for the detention are $502.58, which seems to be the interest on the principal sum, from the time of the taking to the date of the trial, at seven per cent. There is no error in the record and the judgment is

AFFIRMED.

THE other judges concur.

JOHN CARTER V. STATE OF NEBRASKA.

FILED MARCH 29, 1893. No. 5012.

1. **Conviction for Larceny:** EVIDENCE HELD INSUFFICIENT to sustain the verdict.
2. **Criminal Law:** LARCENY: EXAMINATION OF WITNESSES. To justify the proving of contradictory statements of a witness for the purpose of impeaching him, the answer of the witness on cross-examination must be material so that the cross-examining party would be allowed to give it in evidence. (*Smith v. State*, 5 Neb., 181.)
3. ———: CHARACTER OF ACCUSED: IMPEACHMENT OF WITNESSES. Where a person on trial for a crime has not himself put his general character in issue, the state cannot do so on the pretext of impeaching a witness by disproving the statements of the witness.

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

Jesse T. Davis, for plaintiff in error.

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

MAXWELL, CH. J.

The plaintiff in error was convicted of stealing certain live hogs of the value of more than $35, and was sentenced to imprisonment in the penitentiary for the period of four years. The first objection is that the verdict is not supported by the evidence. The testimony of Mr. Russell, the owner of the hogs, as to the number and kind of hogs taken, is as follows:

Q. When did you see them last before that?

A. It was along perhaps the 4th or 5th; the 5th maybe, along there. It was after the 1st, several days, that I looked them over again to see if they were there, all of them, as I often did once in a week or two.

Q. When was it you missed them?

A. About the 9th, maybe the 10th.

Q. How many did you miss?

A. Nine; that is what I think it was. I cannot count correctly not to a hog, but it was not less than eight nor more than ten.

Q. And they were taken in this time, between the 5th and 9th?

A. Yes, sir.

Q. How large hogs were they?

A. There was two of them—well, one I would call a large brood sow, and then a medium sized—good size—and the balance of them with the 200 there together, a part of them spring pigs and a part older. Understand that I could not guess—that is to within maybe fifty pounds—but I thought if they took an average, it would be a little under 200, and if they took better than an average it would be a little over 200.

Q. About what time did you know, and do you know now, what the price of hogs was? That can be answered by yes or no. State whether or not you did or did not know.

A. I did at the time but have forgotten now. I did know at the time, but I have forgotten what it was at that time.

Q. Are you able to state what the value of those hogs were at that time?

A. Well, taking that except those two—those two, I know about what they were worth. They were worth, the smallest ones, about twelve dollars, and the others about fifteen for those two brood sows I speak of, and the shoats that I called them, I would think from my recollection of the price, six or seven dollars would be enough for them.

Q. Seven dollars apiece?

A. Seven dollars a head; yes, sir.

Q. What would you put the total value of the nine that were taken?

A. It would be a little over sixty dollars.

It will be observed that his testimony is but little better than a guess either as to the number or value of the hogs, and his is all the testimony upon that point. He also testifies in regard to finding one of the hogs as follows:

Q. Did you see any of them after that?

A. Yes, sir.

Q. How long afterwards?

A. I think it was the 25th. It was either the 25th or the 26th of January of the same month, that I saw them. Either the 25th or the 26th.

Q. Where?

A. I saw them at Bill Taylor's.

Q. Where is that from your place?

A. About three miles and three-quarters north and half a mile east.

Q. That is in what county?

A. That is in Washington county, state of Nebraska.

Q. That Bill lives?

A. Taylor lived there; yes, sir.

Q. How came you to see this animal?

A. Well, I had got on a little track of what we call the gang there. We termed it that way. That is what we call them, and we got a little help and had a man looking there; that is the truth of it, and then he told me there was a hog there. I went there looking for this hog and found it there.

Q. Where was the hog?

A. It was in a pen between two corn cribs. I would say the cribs were ten feet apart facing south. Around here back of the corn crib it was fenced a hog pen, and between these two cribs there was boards laid across and hay, etc., laid over, and after looking every place else about the place, I got into that hog pen and I crawled back two or three feet maybe and the hog could not turn around. There was a little partition cut off there, and there was that hog.

Q. Could the hog get out itself?

A. No, sir; not without breaking the fence. Certainly not.

Q. Was the hog at that time permitted to pass out to view so that people generally could see it?

A. No, sir; it was planked up, the back part of it, and it could not get out. It was shut up.

Q. Did you ascertain how it came there?

A. Well, I did by Bill Taylor.

Q. He was the man that lived there?

A. Yes, sir.

Q. When he told you anything about it was the defendant present?

A. No, sir.

Q. Did you look after this same hog again?

A. Yes, sir.

Q. How long afterwards?

A. The next day.

Q. Was it there?

A. No, sir.

Q. Where was it; where did you find it?

A. I did not find it the next day: it was not there.

And this is all the testimony as to finding any of the hogs. The plaintiff in error is a son of a neighbor of Mr. Russell and the only direct testimony to connect the plaintiff in error with the transaction, is the testimony of Mrs. Taylor. She testifies that between the 6th and 10th of January, 1891, the plaintiff and one Spence came to their residence.

Q. Where was your husband's team the next day?

A. I do not know where it was.

Q. Was it at home?

A. No, sir.

Q. When did it return?

A. I think it returned the next evening. I am not positive.

Q. Who came with it?

A. I do not know who came with the team. I saw Carter and Mr. Spence there.

Q. What did they do there that evening?

A. Well, they were out of doors. I did not see them.

Q. Didn't they come in the house?

A. They were in the house, but I was in another room. I had gone to bed.

Q. What did they say or do there?

A. I did not hear all they said.

Q. Did you see them do anything?

A. No, sir.

Q. Did you see them have any money there?

A. The door was open and seen one of them pay my husband some money.

Q. How much money?

A. I think about seven dollars.

Q. The morning before that, or that morning, state if you had discovered a hog at your place?

A. Yes, sir; there was a hog there.

Q. What kind of a hog; just describe it?

A. It was black and white spotted.

Q. The size, give that the best you can.

A. It would weigh 250 or 300 pounds.

Q. What was said between Mr. Carter, Mr. Spence, and your husband in reference to this sow?

A. I did not hear their conversation about the sow?

Q. It was a sow?

A. Yes, sir.

Q. You did not hear any about the sow?

A. No, sir.

Q. How long after that did the sow remain there?

A. It was about two weeks I think.

The hogs were kept by Mr. Russell in a large inclosure, the fence being composed of seven barbed wires. It appears from other testimony that some of them broke out at times, but whether or not they strayed at such times is not stated. For aught that appears this money may have been derived from a perfectly legitimate transaction, and in the absence of proof to the contrary this is the presumption. The testimony shows that the plaintiff is known to have been at home the first six days in January, 1891, and if testimony in his behalf is to be relied upon, his whereabouts is accounted for up to the 10th instant. In the latter part of January, 1891, the plaintiff in error went to Sioux City, and from there to Missouri, and hired out to a man near Lathrop, and had been there about five weeks when he was arrested and came voluntarily back to this state. There is testimony tending to show that the plaintiff in error, for some time before the larceny in question, had frequented saloons and seemed to be starting in the road to ruin, and these facts seem to have induced the jury to convict. It also appears that a son of Mr. Russell

went to Lathrop and called on the village marshal to assist him in arresting the plaintiff in error. From the scene that followed it is apparent that either the marshal or young Mr. Russell stated to certain persons that they were about to arrest a thief. The result was that when young Mr. Russell and the marshal had arrested the accused at the residence of a Mr. Brown and were about to take him to the village for examination they were met by a mob of fifteen or more persons, who took the accused to a tree and hung him to make him confess being connected with a larceny in Missouri. Having failed in obtaining a confession for the alleged crime the mob undertook to make him confess the stealing of the hogs in question. In this also they failed, whereupon the prisoner was surrendered to the custody of the marshal and volunteered to return to this state without a requisition. While the trial was in progress this hanging in Missouri was stated by the prosecuting officer to the court and jury, although up to that point no evidence in regard to the matter had been offered. Afterwards testimony was introduced in regard to the matter. The testimony was clearly irrelevant and was highly prejudicial. The crime, if one had been committed, of which there is absolutely no proof, had no connection with the charge in this case, and all reference to it should have been excluded. There are also some alleged admissions of the plaintiff in error which he denies absolutely, and in any event are not sufficient to show him guilty of the crime. The most damaging testimony is the alleged cross examination of his father as follows:

Q. Didn't you meet W. H. Russell on the county road west of Herman about the last days of January, 1891, the exact day I cannot state, and did not W. H. Russell say to you at that time, "I suppose you know what I have been doing with hog thieves and was afraid you would take exceptions," and you said at that time and place to W. H. Russell, "you are doing right in prosecuting these men;

I have talked to John, my son, about his way of doing, time and again, and he tells me it is none of my damned business; he is hardly ever at home, and when he comes he only stays an hour or two; he is not at home nights at all and is off again, and it is nearly killing his mother; she don't sleep nights at all; I will do nothing more for him; I have helped him out of one scrape which took some money and I will not interfere in any way hereafter." Didn't you say those words to that effect?

This is repeated in about a dozen different forms on the part of the state and brought the general character of the accused directly before the jury, as well as being collateral to the issue.

The rule is thus stated by Bishop (Cr. Proc., sec. 1112) as follows: "Bad character is never admissible in evidence against a defendant as foundation for presuming guilt. Not even on a charge of stealing a horse can it be shown that he is an associate of horse thieves. On the other hand as a branch of the general presumption of innocence, his character is presumed to be at least of ordinary goodness. But when this presumption has been met by *prima facie* evidence of guilt he may bring forward in defense his good character, in rebuttal whereof the prosecuting state may show that his character is bad. (*People v. White*, 14 Wend. [N. Y.], 111; *State v. Jackson*, 17 Mo., 544; *Thompson v. Church*, 1 Root [Conn.], 312; *State v. Merrill*, 2 Dev. [N. Car.], 269; *Dowling v. State*, 5 Sm. & M. [Miss.], 664; *State v. Lapage*, 57 N. H., 245; *State v. Hare*, 74 N. Car., 591; *Harrison v. State*, 37 Ala., 154; *People v. Fair*, 43 Cal., 137; *Cheny v. State*, 7 Ohio, 222; *Ante*, secs. 1103–1106; *Ackley v. People*, 9 Barb. [N. Y.], 609. See *The State v. Ford*, 3 Strob. [S. Car.], 517, note; 3 Greenl., Ev., sec. 25; *Schaller v. State*, 14 Mo., 502; *Dupree v. State*, 33 Ala., 380; *State v. Wells*, Coxe [N. J.], 424; *McDaniel v. State*, 8 Sm. & M. [Miss.], 401; *Carter v. Commonwealth*, 2 Va. Cas., 169; *Reg. v. Rowton*, Leigh

& C. [Eng.], 520, 10 Cox C. C., 25; *Young v. Commonwealth*, 6 Bush [Ky.], 312.)"

In regard to the impeachment of a witness by proving contradictory statements made by him the rule is this: If the answer of a witness is of a nature that the cross-examining party would be allowed to give it in evidence, then it is a matter in which the witness may be contradicted and is deemed material. (Maxw. Cr. Proc., 608; 2 Phillips, Ev., 959; *Smith v. State*, 5 Neb., 183.) In the case last cited an attempt was made, as in this case, to impeach a witness by showing that on a former trial he had testified that he was only ten or fifteen rods away from the scene of the crime, but the court held the question was collateral to the main issue and not material. Now no one will contend that the answer of the father, made in the absence of the son, which, at most, is a mere opinion, could be given in evidence to show the guilt of the son. Yet this is the kind of testimony resorted to in this case, although he swears positively that he had no knowledge of such guilt. The case of *People v. Cox*, 21 Hun [N. Y.], 47, is somewhat similar in this respect to the case at bar. In that case the mother of the accused testified that he was at home when a certain letter was delivered, and on cross-examination she was asked if she had not stated to certain persons, naming them, that he had written such letter. These persons were then called to prove the fact, but the testimony was held to be improper and was excluded. (*State v. Patterson*, 74 N. Car., 157; *State v. Patterson*, 2 Ired. Law [N. Car.], 346; *Wilder v. Peabody*, 21 Hun [N. Y.], 376; *Kaler v. Builders' Mut. Fire Ins. Co.*, 120 Mass., 333.)

There is some proof that the plaintiff in error was advised that a warrant had been issued for his arrest; that being so informed he went to Sioux City, and from there to Lathrop, Missouri; that a family was residing near there who were former neighbors of his father; that he was

employed by a farmer at that point, and was working for him when arrested. It also appears that when arrested he gave the name of J. W. Baxter. Considerable stress is laid by the prosecution upon this change of name. The accused himself denies having changed his name, but had the check for his wages when arrested filled out in that name, as it was his mother's maiden name. A change of name is always a strong circumstance tending to show an anxiety of the party to hide his identity, but it does not establish a party's guilt. It at the most is a mere circumstance to be considered with others in the case. In regard to the alleged confessions of the accused to young Mr. Russell it is sufficient to say that, at the most, they show an anxiety on the part of the plaintiff in error to be relieved from the charge. We must consider his youth, his inexperience, and the confidence he reposed in young Mr. Russell. He made no confession of guilt, but expressed an anxiety to have the matter settled, etc. Throughout he showed a lack of knowledge, or disregard of his rights, that fall far short of showing guilt. It is doubtful if the prosecution was conducted with that regard for the rights of the accused which the constitution and the laws of the state guarantee to every person accused of crime. The testimony consists largely of guesses and inferences, and the one party who is clearly shown to be guilty is not even charged with crime. The testimony is wholly insufficient to sustain the verdict, and the judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.