REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

JANUARY AND SEPTEMBER TERMS, 1893.

VOLUME XXXVII.

D. A. CAMPBELL,
OFFICIAL REPORTER.

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1894.

THE SUPREME COURT

OF

NEBRASKA.

1893.

CHIEF JUSTICE,

SAMUEL MAXWELL.

JUDGES,

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

COMMISSIONERS,

ROBERT RYAN,
JOHN M. RAGAN,
FRANK IRVINE.

OFFICERS.

ATTORNEY GENERAL,

GEORGE H. HASTINGS.

CLERK AND REPORTER,

D. A. CAMPBELL.

DEPUTY CLERK,

W. B. ROSE.

DISTRICT COURTS OF NEBRASKA.

JUDGES.

First District—

A. H. BABCOCK.....Beatrice.
J. E. BUSH.....Beatrice.

Second District—

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

Third District—

CHARLES L. HALL.....Lincoln.
JESSE B. STRODE.....Lincoln.
A. S. TIBBETS.....Lincoln.

Fourth District—

G. W. AMBROSE.....Omaha.
J. H. BLAIR.....Omaha.
A. N. FERGUSON.....Omaha.
M. R. HOPEWELL.....Tekamah.
W. W. KEYSOR.....Omaha.
C. R. SCOTT.....Omaha.
W. C. WALTON.....Blair.

Fifth District—

EDWARD BATES.....York.
ROBERT WHEELER.....Osceola.

Sixth District—

WM. MARSHALL.....Fremont.
J. J. SULLIVAN.....Columbus.

Seventh District—

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

Eighth District—

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

Ninth District—

J. S. ROBINSON.....Madison.

Tenth District—

F. B. BEALL.....Alma.

Eleventh District—

A. A. KENDALL.....St. Paul.
J. R. THOMPSON.....Grand Island.

Twelfth District—
SILAS A. HOLCOMB.....Broken Bow.

Thirteenth District—
WILLIAM NEVILLE.....North Platte.

Fourteenth District—
D. T. WELTY.....Cambridge.

Fifteenth District—
ALFRED BARTOW.....Chadron.
M. P. KINKAID.....O'Neill.

PRACTICING ATTORNEYS.

ADMITTED SINCE THE PUBLICATION OF VOLUME XXXVI.

THEA. F. ELLIOTT.
JOHN H. EVANS.
E. E. FERRIS.
JOHN B. FOGARTY.
J. A. GARDINER.
W. A. HAMPTON.
EUGENE E. KEMP.
M. W. MCGAN.
FRED N. MORGAN.
JOHN S. MUSSER.
FARINGTON POWER.
J. H. RANDALL.
FRANK M. TYRRELL.

SUPREME COURT COMMISSIONERS.

(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 approval.

Approved March 9, A. D. 1893.

RULES OF COURT.

ADOPTED JANUARY 4, 1894.

1. [SITTINGS OF THE COURT.]—The regular public sessions of this court will be held on the first and third Tuesdays of each month at 9 o'clock A. M., standard time, during each term, which, for the purposes of this rule, shall not extend beyond the period covered by the assignment of causes on the calendar.

2. [MAKING UP DOCKET.]—Immediately after the time expires during which causes may be docketed for trial at a term of court in accordance with section 584 of the Code of Civil Procedure, the clerk shall make out and cause to be printed without delay the docket for the term. All causes from the same judicial district shall be placed together in the numerical order of the several districts, commencing with the first. Copies of printed docket shall be forwarded by the clerk to each judge of the supreme and district courts, and to each attorney having a cause for hearing at the term.

3. [SUBMISSION OF CAUSES.]—Causes will be taken up and heard in their order on the docket. Any cause may, however, be submitted upon a written stipulation of the parties thereto providing for such submission on printed briefs accompanied by or containing an agreed printed abstract of all the evidence upon which the case is to be determined. Whenever a cause is reached and the party having the affirmative fails to appear, and his brief is not on file, the proceeding will be dismissed, the cause remanded, or otherwise disposed of at the discretion of the court. When default has been made by the other party, and there is due proof of service of summons in error, or of notice,

and the briefs of the party holding the affirmative are on file, with proof of service thereof within the time provided by rule 10, he may proceed *ex parte*.

4. [ORDER OF HEARING.]—Until the causes now under advisement are disposed of, only those in which rehearings shall have been allowed, criminal cases, those relating to state revenue, such as the state as a party has a direct interest in having determined, and such as shall be advanced by order of this court, shall be placed on the calendar of assignment for the several districts where they belong; and no case will be taken up out of its order, except upon a satisfactory showing that important public interests require an earlier disposition of the same.

5. [CRIMINAL CASES—SECOND TRANSCRIPT UNNECESSARY.]—Whenever in a criminal case a writ of error shall be issued upon a certified transcript of a record, no further transcript shall be required or allowed to be taxed in the bill of costs, but the same transcript shall be returned with the writ, and shall be deemed sufficient, unless diminution or other objection thereto be suggested.

6. [TIME FOR ORAL ARGUMENT.]—In the oral argument of a cause, the time allowed the parties on each side shall not exceed thirty minutes, unless for special reasons the court shall extend the time. Oral argument on a motion will be limited to five minutes on a side.

7. [NOTICE OF MOTIONS.]—Every application for an order in any case shall be in writing, and except as to motions for rehearing, shall be granted only upon the filing thereof and due proof of service of notice on the adverse party, or his attorneys, at least three days before the hearing, which, in all cases, must be fixed for one of the session days provided for by rule 1. The notice herein provided for shall conform to the provisions of section 574 of the Code of Civil Procedure, and may be served by a bailiff of this court or by any sheriff or constable in this state, or by any disinterested person; in the latter case, however, the return must be under oath. Fees for service of said notice

shall be allowed and taxed as for the service of summons in proper cases.

8. [MOTIONS FOR REHEARING.]—A motion for rehearing may be filed as of course at any time within forty days from the filing of the opinion of the court in the case. Such motion must specify distinctly the grounds upon which it is based, and be accompanied by a separate printed brief.

9. [MANDATES.]—No mandate shall issue in any civil case during the time allowed for the filing of a motion for rehearing, or pending the consideration thereof, unless specially ordered by the court.

10. [BRIEFS.]—Within twenty days after service of summons in error, or of notice of the pendency of an action by appeal or otherwise in this court, and within the same time after a rehearing shall have been allowed, the party holding the affirmative shall furnish a printed brief of his points and citations in support thereof, to the opposite party or his attorney of record, by whom in turn a like brief in reply shall be served within twenty days after service of the first required brief, or, if none such shall have been served, then within twenty days after the expiration of the time allowed for that purpose. Before the submission of any cause, each party shall file with the clerk of this court ten printed copies of the brief which he has furnished the opposite party or his attorney of record, with proof of service thereof. Each brief shall by number designate the several pages of the record containing matter bearing upon the questions discussed in such brief. Every reference to an adjudicated case shall be by the title thereof, as well as by the volume and page where it may be found, and the particular edition of any text book referred to must be given in connection with the cited page or section thereof.

11. [BRIEFS—HOW PRINTED.]—All briefs shall be printed on good book paper, small pica type, leaded lines; the printed page to be four inches wide and seven inches long, with a margin of two inches; but the type in which extracts are printed may be small pica solid or brevier

leaded. The heading of each brief shall show the title of the cause, the court from which the cause is brought, and the names of counsel for both parties.

12. [COSTS.]—When the parties or their attorneys shall furnish their printed briefs in conformity to the rules of this court, or briefs and printed abstract under stipulation for submission as provided for in rule 3, it shall be the duty of the clerk to tax a printer's fee at the rate of one dollar for every five hundred words embraced in a single copy of the same, against the unsuccessful party not furnishing the same, to be collected and paid to the successful party as other costs. When unnecessary costs have been made by either party, the court will, upon application, order the same taxed to the party making them, without reference to the disposition of the case.

13. [SECURITY FOR COSTS.]—In each cause brought to this court the plaintiff in error, appellant, or relator shall, before the entry of the same upon the docket, give security for costs by filing a bond in the sum of $50, with one or more sureties, conditioned for the payment of the costs of this court, which bond, in cases brought on error or appeal, must be approved by the clerk of the district court of the county from which such cause is brought, and in original causes by the clerk of this court. But this provision shall not apply in causes where a bond or undertaking has been filed in the court below, in accordance with the provisions of sections 588 and 677 of the Code of Civil Procedure, but in such causes the transcript filed must show the giving of such bond or undertaking, with the names of the sureties thereon; nor shall it apply in criminal cases where an affidavit of poverty is filed, as allowed by section 508, Criminal Code. The party bringing the cause to this court may, if he sees fit, deposit an amount with the clerk of this court sufficient to cover the probable costs of the action, and if he do so the bond required by this rule need not be given.

14. [APPEAL CASES—NOTICE.]—In every case of appeal the clerk shall, upon a *præcipe* being filed, issue a notice to

the appellee of the filing of such appeal. Such notice shall be served in the same manner as a summons in error, and shall be returned within ten days after the officer receives the same, with the manner and time of service indorsed thereon. The fees for service of such notice shall be the same as allowed by law for serving summons in error, and shall be so taxed.

15. [TRIALS IN ORIGINAL CASES.]—Whenever an issue of fact, which the law requires to be tried by a jury, shall be joined in proceedings in the nature of *quo warranto*, or in *mandamus*, in the supreme court, the clerk shall, at the instance of either of the parties, make out a *venire facias*, directed to a bailiff of this court, commanding him to summon from the state at large sixteen jurors having the qualifications of electors, to appear before this court on the day mentioned therein, which day shall be determined by the court before issuing the *venire*. The *venire* shall be served and returned at least one week before the day named therein for the appearance of the jurors, and the bailiff shall attach to or incorporate in his return a list of the names of the jurors so summoned.

16. [SAME.]—Each party shall be entitled to three peremptory challenges; and challenges for cause may be made by either party, the validity of which shall be determined by the court. If, from challenges or other cause, the panel shall not be full, the court may order the bailiff to fill the same from bystanders or neighboring citizens having the qualifications of electors.

17. [SAME.]—The jurors summoned or called as above provided, or such of them as are not set aside or challenged as will make up the number of twelve, shall constitute the jury for the trial of said issue of fact.

18. [SAME.]—Each juror shall be entitled to the same compensation and mileage as are provided by law for jurors in civil cases in the district court.

19. [SYLLABUS OF THE POINTS DECIDED.]—A syllabus of the points decided in each case shall be stated in

writing by the judge or commissioner preparing the opinion, and such syllabus and opinion shall be examined and approved by the court before the same shall be reported.

20. [RECORDS NOT TO BE REMOVED.]—The clerk of the court is answerable for all records and papers belonging to his office, and they shall not be taken from his custody unless by special order of the court, or a judge or commissioner thereof, but the parties may have copies when desired by paying the clerk therefor.

21. [MANDAMUS—NOTICE.]—In all cases of application to this court for a writ of *mandamus* a reasonable notice must be given to the respondent of the time when it will be made, accompanied by a copy of the affidavit on which it is based, unless for special reasons it is otherwise ordered; and except in urgent cases, the time of the hearing shall be during the week to which the causes from the district in which the respondent resides are assigned.

22. [ADMISSION OF ATTORNEYS—FEES OF CLERK.]—In all cases of the admission of attorneys to the supreme court, the clerk shall be entitled to charge and receive the following fees, and no more: In cases of original admission upon the report of a committee, seventy-five cents; admission on motion, fifty cents. In addition to the above, in all cases where the attorney admitted may desire a certificate, printed or engraved, the clerk may charge and receive an additional fee therefor of one dollar.

23. [QUESTIONS NOT INVOLVED IN LITIGATION.]—Only questions involved in matters of actual litigation before the court will be entertained or judicially determined, and no opinion will be filed in answer to any merely hypothetical question.

24. [CAPITAL CASES—SUSPENSION OF SENTENCE.]—In all criminal cases brought on error to this court, where it appears that the court below has passed sentence of death upon the plaintiff in error, it is ordered that the sentence and judgment be suspended until the further order of this court, and it shall be the duty of the clerk to indorse such

suspension upon the transcript filed in said cause and immediately transmit a certified copy thereof to the officer charged with the execution of said sentence.

25. [ORDERS UNDER BANKING ACT.]—No application for an order under the provisions of the banking act will be entertained, unless the same is accompanied by the recommendation of the state banking board in respect thereto. During vacation all orders necessary under said act shall be made and signed by the chief justice, as each exigency shall demand.

The syllabus in each case was prepared by the judge or commissioner writing the opinion.

See page xxix for table of overruled cases.

A table of statutes and constitutional provisions cited and construed, numerically arranged, will be found on page xlvii.

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CASES MARKED † ARE CRITICISED IN THIS VOLUME.

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STATUTES AND CONSTITUTIONAL PROVISIONS

CITED AND CONSTRUED.

Figures in ( ) indicate corresponding sections in Consolidated Statutes of 1891.

STATE.

SESSION LAWS.

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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.

IRA M. DAWSON ET AL. V. ANSON WILLIAMS ET AL.

FILED MAY 4, 1893. NO. 4522.

1. **Review:** EXHIBITS: EVIDENCE. Exhibits, which the record shows were offered in evidence, will not be presumed to have been withheld from the consideration of the jury, in support of a contention that the verdict was unsupported by the evidence.
2. ———: BILL OF EXCEPTIONS: OMISSION OF TESTIMONY: MISRECITALS. If the bill of exceptions discloses that without doubt important evidence has been therefrom omitted, the settlement and authentication of the bill of exceptions will not control, though therein the recitations are to the contrary, and in such case the verdict will not be disturbed as contrary to the evidence.
3. ———: A PARTY ASKING THE COURT TO GIVE AN INSTRUCTION to the jury cannot complain because this request is complied with, even though such instruction incorrectly states an issue to be tried.

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

Abbott, Selleck & Lane, for plaintiffs in error.

Billingsley & Woodward and *J. E. Philpott, contra.*

RYAN, C.

On the 11th day of August, 1887, Anson Williams, the Valley National Bank of Red Oak, Iowa, and S. M. Melick, sheriff, filed their petition against Ira M. Dawson and William Roggenkamp in the district court of Lancaster county, for the recovery of $341.60, and interest from March 29, 1886. A verdict was returned December 6, 1889, in favor of the above named Anson Williams et al., against Ira M. Dawson et al., for $425.69, upon which judgment was duly rendered, from which the said Dawson and Roggenkamp prosecute error proceedings.

The petition above alluded to alleged that on December 16, 1884, Ira M. Dawson began, in said district court, a suit in replevin against Anson Williams et al., for the possession of certain personal property, giving therein a replevin undertaking in the penal sum of $6,000, conditioned as required by law, the subject-matter to be returned being 190 head of two and three year old cattle, fifty-seven head of hogs, three horses, and some hay. All necessary averments were made to entitle Williams et al. to a recovery, provided such averments were proved.

The answer to the petition was made by Roggenkamp alone, who alleged that when he was solicited to sign said replevin bond he said he was willing to sign the same so far as it concerned the cattle, but not in reference to anything else to be taken on the writ; that it was agreed by Williams et al. with said defendant Roggenkamp that the said bond should not render the said Roggenkamp liable for the value or return of the horses or other property

than the cattle in said bond described; that pursuant to said agreement said parties made a written stipulation that Roggenkamp's liability was to be limited to the cattle or their value; "that said stipulation was made and signed at the same time the said bond was signed, and was filed in and made part of the records in said case;" that said stipulation has been lost or mislaid. The answer then closed in this language: "Defendant further answering says that upon the trial of the right of property in the said cattle the jury found that the right of possession and property were in the said Dawson, plaintiff in said replevin action, and final judgment was rendered thereon in favor of said Dawson therefor, and against plaintiff herein, defendant in said replevin action. Defendant further says that he never signed any replevin bond for the return of the hogs, horses, or hay in said petition described, or for the value thereof, or for any portion thereof. Defendant further answering said petition says he denies each and every allegation in said petition contained not herein before expressly admitted, and demands judgment that he go hence without day, and recover his costs."

To this answer there was, in effect, a general denial by way of reply.

1. The first question discussed in the brief of the plaintiffs in error is in reference to the failure, as said plaintiffs in error claim, to introduce in evidence the original replevin bond upon which the action is brought, from which and the absence of the bond from the bill of exceptions they deduce the conclusion that there was not sufficient evidence to sustain the verdict; therefore that this cause should be reversed.

The bill of exceptions shows that plaintiff offered a bond of replevin in evidence, to which defendant objected on various grounds, which objections were overruled and an exception taken, and that the bond was marked Exhibit C. Plaintiff then moved to strike out the bond because not

accompanied by the stipulation contained in the answer, which motion was withdrawn. That the bond was sufficiently in evidence is apparent.

2. Again plaintiffs in error state the grounds of their next contention thus: "The evidence with reference to the judgment which is alleged in the petition was rendered in said replevin suit is all found on page 3 of the bill of exceptions. We quote it in full.

"Q. What book have you now in your hands?

"A. A district court journal M.

"Q. What page?

"A. The page this case is on is 131.

"Q. What case do you refer to?

"A. The case of Ira M. Dawson versus Anson Williams et al., No. 4010.

"Then follow the reporter's notes as follows: 'The plaintiff offers in evidence page 131, district court journal M, in the case of Ira M. Dawson versus Anson Williams et al., marked Exhibit B.' There is no further reference in the record to the contents of that page. Exhibit B is not in the bill of exceptions."

Explanatory of the above it is proper to remark that the identification of page 131 of court journal M was in the above trial by the clerk of the district court of Lancaster county. The contention of plaintiff in error is that by the above record, considered with the fact that no page 131 is found in the bill of exceptions, it is shown that it was not presented for the consideration of the jury. It is, we believe, of common practice to offer in evidence a document, or other written matter, and having identified it, defer the reading of it till some later stage in the proceedings—possibly the argument to the jury—is reached. There is nothing objectionable in such a practice, and the offer of the page was sufficient to its consideration as evidence. We cannot assume that this page 131 was never in fact read or made known to the jury, hence this argument of plaintiffs in error must fail.

3. But there is another phase in which the contention of plaintiffs in error does become important, though not to their advantage. The bill of exceptions shows the absence of the replevin bond sued upon and of page 131 of district court journal M, notwithstanding these both were, as we have seen, introduced in evidence. Possibly it might be that as to the bond the parol evidence of its purport should be treated as a waiver of all objections as to the failure to incorporate said bond in the bill of exceptions, but there is no such consideration to be urged as to page 131 of the judgment docket. It is true that the bill of exceptions recites that all the evidence given is thereby preserved—there is indubitable evidence presented by the bill of exceptions, too, that these two necessary parts are missing therefrom. In such case it has been held that the certificate that the bill of exceptions contains all the evidence used on the trial will not be taken as conclusive on that point. (*Missouri P. R. Co. v. Hays*, 15 Neb., 224; *Oberfelder v. Kavanaugh*, 29 Id., 427.) Each of these missing exhibits was important, as plaintiffs in error most strenuously and justly insist. It therefore follows that the bill of exceptions cannot be further considered as showing whether or not the verdict was sustained by the evidence.

4. Instruction No. 6 is criticised by the plaintiffs in error as one given by the court upon its own motion. This instruction is open to serious criticism, for by it the jury were told in effect that the execution of the bond in suit was admitted, whereas it clearly appears from the above quoted averments of the defendant's answer that no such admission was in strictness made. It may be that the instruction complained of was given by the court upon its own motion, but we must be guided by the record alone. This instruction is there found under the designation of "Instructions asked for by defendant Roggenkamp," and having asked this instruction, the plaintiffs in error cannot properly complain of it, even if it misstates the issues.

No other error is pointed out or perceived in the instructions given, or in the refusal to give those asked, and the judgment of the district court is

AFFIRMED.

THE other commissioners concur.

WILLIAM F. DEWEY, GUARDIAN, APPELLEE, V. LYMAN W. ALLGIRE ET AL., APPELLANTS.

FILED MAY 4, 1893. No. 4717.

1. **Action to Avoid Deed:** INSANITY: PROOF: THE RECORD OF PROCEEDINGS under chapter 40, Compiled Statutes, whereby a person has been adjudged insane and a fit subject for treatment in the hospital for insane, is not admissible for the purpose of proving insanity in an action brought to avoid a conveyance made by such person.

2. ———: REVIEW. IMMATERIAL TESTIMONY: SUFFICIENCY OF EVIDENCE TO JUSTIFY FINDING. A judgment in a case tried without a jury will not be disturbed because of the admission of immaterial testimony, where the testimony properly admitted justifies the finding.

3. ———: INSANITY. While mere imbecility or weakness of mind in a grantor will not, in the absence of fraud, avoid his deed, insanity will do so if of such a character as to induce the conveyance, although such insanity may not amount to a complete dethronement of reason and understanding upon all subjects.

4. ———: ———: BONA FIDE PURCHASER: RETURN OF CONSIDERATION. The deed of an insane person may be avoided as against a grantee without notice of the grantor's insanity, and against an innocent purchaser from such immediate grantee. In the latter case it is not necessary to restore the consideration paid by such purchaser to the immediate grantee.

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

E. O. Kretsinger and *T. F. Burke*, for appellants.

Hazlett, Bates & Le Hane, contra.

IRVINE, C.

On the 12th day of November, 1889, one John Paulsen, who was then the owner of a farm lying in Gage and Pawnee counties, which had for some years been occupied as a homestead by Paulsen and wife, conveyed said farm to Lyman W. Allgire, Paulsen's wife joining in the conveyance, and received in return certain lots in Blue Springs and in Wymore. On November 20, 1889, Allgire conveyed the undivided one-half of the Paulsen farm to the defendant Mowry. In February, 1890, Paulsen was adjudged insane, and the plaintiff Dewey was appointed his guardian. Dewey, within a few days of his appointment, instituted this action against Allgire, Mowry, and Lena Paulsen, the latter being the wife of John Paulsen, for the purpose of setting aside the conveyance to Allgire upon the ground that Paulsen was insane at the time of its execution. A decree was rendered in accordance with the prayer of the petition, finding all the material facts for the plaintiff, vacating the conveyances from Paulsen and wife to Allgire and from Allgire to Mowry. It appeared in evidence that immediately after the exchange was made Paulsen and wife separated, and conveyances of the Blue Springs and Wymore property were made, whereby what was estimated as one-half in value thereof was conveyed to Lena Paulsen. The decree ordered a reconveyance of all of this property. The case was brought to this court upon appeal by Allgire and Mowry.

The questions involved in the case are discussed in the briefs under a number of heads. For the purposes of this opinion all these questions classify themselves within five topics.

1. Upon the trial, for the purpose of proving the insanity of Paulsen, the records of two proceedings were introduced in evidence, the one in Pawnee county in 1886, and the other in Gage county in 1890. These proceedings were had under sections 17 to 23 of chapter 40 of the Compiled Statutes, and in each case Paulsen was adjudged insane, and a fit subject for custody and treatment in the hospital for the insane. There is considerable discussion in the briefs of the effect of these records as creating presumptions of insanity by reason of the adjudications and commitments, and of sanity by reason of the discharge of Paulsen as recovered. But the appellants raised a broader question by objecting to the introduction of the records in evidence, and in the view we take of that question, all others relating to the records are eliminated from the case. An inspection of the statutes under which these proceedings were had discloses that the sole object of such proceedings is to ascertain whether or not the person alleged to be insane is a fit subject for custody and treatment in the hospital. The proceedings may be *ex parte*. The commissioners are required to take testimony upon the subject, and any citizen of the county, or relative of the person charged, may appear and resist the application, but no notice to any one is required, and the commissioners may, if they see fit, dispense with the presence of the person charged during their proceedings. By section 54 of the same chapter the term "insane" as used in the act is defined to include every species of insanity or mental derangement.

At the common law an inquisition founded upon a commission *de lunatico inquirendo*, resulting in an adjudication of insanity, was held to be in all cases *prima facie* evidence, and sometimes conclusive of the insanity of the person charged. This was upon the ground that such a proceeding was in the nature of one *in rem* to determine the *status* of the party, and was therefore binding upon the

whole world. This proceeding bore a close analogy to the proceedings under our statute whereby guardians are appointed for persons insane. It differs very materially, however, from a proceeding looking toward the custody and treatment of a person in the hospital. In the latter proceeding the examination is more or less *ex parte*, and its object, under the broad definition of insanity before referred to, presents an issue entirely different from that presented in this case, which is, the competency of the party to manage his own affairs and enter into a valid contract. The records of similar proceedings have been held inadmissible in such cases as we are now considering in *Leggate v. Clark*, 111 Mass., 308, and in *Knox v. Haug*, 48 Minn., 58, and we think the reasoning in those cases is sound. In the case of *Wheeler v. State*, 34 O. St., 394, it was held that while such inquisitions were not even *prima facie* evidence of insanity they were admissible as tending to prove the fact; but the authorities cited in the opinion in the latter case are all based upon inquisitions *de lunatico*, and the court seems to have mistaken the distinction between the subjects of inquiry in the two proceedings. We think that these records were improperly admitted in evidence.

This leads us to a consideration of the question whether the evidence, aside from the insanity proceedings, was sufficient to justify the finding of the court, for if it was, the decree should not be disturbed. It has been repeatedly held that error cannot be predicated upon the admission of immaterial testimony in a case tried to the court where the evidence otherwise justifies the finding.

2. Before examining the evidence, however, a question is presented as to the degree of mental incapacity which must exist in order to avoid a conveyance. In the case of *Mulloy v. Ingalls*, 4 Neb., 115, this court held that in the absence of fraud, mere imbecility or weakness of mind in a grantor, however great, will not avoid his deed, unless there be evidence to show a total want of reason or under-

standing. In several other cases this general doctrine has been restated, and it must be taken as the settled law of the state. We think, however, that counsel for the appellants have somewhat mistaken the true import of the language used in these cases. It is very clear that the courts have never meant by such language that a deed will not be set aside unless the grantor, at the time of its execution, showed an absolute want of reason and understanding in every particular. It has been repeatedly held that the deed of one afflicted with monomania may be set aside where the execution of the deed was induced by the disease. The rule, in fact, means this: That one in the possession of his normal faculties, and not afflicted with idiocy or actual insanity, may not in the absence of fraud avoid his deed, even though he be of inferior intellectual capacity; that the law will not undertake to discriminate between strong and weak minds, except to consider weakness of mind in connection with evidence of fraud; that the line is drawn at actual insanity inducing to the conveyance—insanity as distinguished from mere weakness of mind unaccompanied by mental disease overthrowing the reason.

3. Measured by this test the evidence is ample to sustain the finding of the trial court. It appears that Paulsen came to Nebraska a number of years ago, bought the farm in controversy, and for several years conducted it in a profitable and apparently skillful manner. In 1886 he became the victim of a delusion to the effect that he constantly carried about with him a man who rode upon his shoulders and controlled all his actions. This was unmistakably an insane delusion which continued to possess him for years. He became sullen and morose, refusing to speak to his neighbors, and forbidding his wife to visit them. In 1889 he suddenly became a religious enthusiast, going many miles alone to church, and in one instance, at least, persisting in remaining in the church throughout the day after the service was concluded. At times he worked industri-

ously; at others, without apparent reason, he refused to work for long intervals of time, spending such periods in the house reading his bible, while his wife did the necessary work upon the farm, and neighbors marketed his stock for him. These occurrences are brought down by the evidence, to and beyond the time of the execution of the deed. Several neighbors testified that, in their opinion, he was, at the time of the execution of the deed, incompetent to manage his affairs, and incapable of understanding the nature of such transactions. These witnesses, while not experts, stated the facts upon which their opinions were based. Such testimony is competent, and its weight was for the trial court to consider. A number of other facts appear in evidence tending to show a deranged mind. The transaction itself is shown by the preponderance of the testimony to be one manifestly to Paulsen's disadvantage. While an adjudication of insanity in proceedings to appoint a guardian has been held not admissible to prove insanity at a period long prior to the inquisition, still we think that the adjudication, whereby the plaintiff was appointed Paulsen's guardian only three months after the disputed conveyance, was sufficiently near in point of time to have some weight as evidence. We are satisfied that the trial judge was justified by the evidence in finding as he did.

4. It is claimed that no decree can be rendered as against the defendant Mowry, for the reason that he was a *bona fide* purchaser from Allgire without notice of Paulsen's insanity. The trial court found that he was not a *bona fide* purchaser, but whether he was or not the deed should be vacated as against him. It is not a question as to whether the deed of an insane person is void or merely voidable. The cases declaring such a deed voidable are those wherein the question was one of affirmance or ratification. While some authorities hold that an executed contract made fairly, and upon adequate consideration, with an insane person, but without notice of his insanity, cannot be rescinded;

and while other authorities hold that a conveyance from an insane person, upon adequate consideration, will not be avoided as against a grantee taking without notice of the insanity without restoring the consideration, we know of no case holding that mere *bona fides* will protect the grantee of an insane person against a bill to set aside the deed where restitution is made. The decree in this case makes complete restitution to Allgire. While this is equitable we do not think it necessary, and as to Mowry, restitution of the purchase money paid by him to Allgire, if any, must rest between those two. It is well said by Thomas, J., in *Gibson v. Soper*, 6 Gray [Mass.], 279, that "To say that an insane man before he can avoid a voidable deed must first put the grantee in *statu quo* would be to say in effect that in a large majority of cases his deed shall not be avoided at all. The more insane the grantor was when the bargain was made, the less likely will he be to retain the fruits of his bargain so as to make restitution. It would be absurd to annul the bargain for the mental incompetency of a party, and yet to require of him to retain and manage the proceeds of his sale so wisely and discreetly that they shall be forthcoming when with restored intellect he shall seek its annulment." The same doctrine is held in other cases, notably that of *Hovey v. Hobson*, 53 Me., 457, and *Crawford v. Scovell*, 94 Pa. St., 48. In the Maine case it was held that the *bona fide* grantee of the grantee of an insane person must rely on the covenants of his deed for restitution, and that it is not necessary that he should be placed in *statu quo* by the plaintiff in a suit to vacate the conveyance.

5. Some argument is based upon the fact that the farm was a homestead, and that Lena Paulsen joined in the conveyance. It was charged in the petition that she did so under duress from her husband. We think the evidence is not sufficient to show duress, but that question is not material. The homestead can only be conveyed by an instrument executed and acknowledged by both husband and

wife. (Comp. Stats., ch. 36, sec. 4.) The instrument in question was not validly executed by the husband for want of mental capacity; the wife's joining did not validate it. Moreover, she was a party to the action, is bound by the decree, and the decree requires her to reconvey all that she has received.

The decree of the district court is right and is

AFFIRMED.

THE other commissioners concur.

STATE OF NEBRASKA, EX REL. C. D. CASPER ET AL., V. EUGENE MOORE, AUDITOR OF PUBLIC ACCOUNTS.

FILED MAY 9, 1893. No. 6169.

1. **Statutes:** GENERAL APPROPRIATION BILL: ITEM FOR IMPEACHMENT EXPENSES: ERROR OF ENROLLING CLERK. Where a general appropriation bill, carrying an item of $15,000 for a specific purpose, was duly passed by both houses of the legislature, but by a clerical error of an enrolling clerk the $15,000 was afterwards changed to $25,000, and the bill was in this condition presented to and signed by the presiding officers of the two houses, and approved by the governor, *held*, that the bill appropriated $15,000 for the purpose specified therein.

2. ———: ENACTMENT: REGULARITY OF LEGISLATIVE PROCEEDINGS. Where a bill has been attested by the signature of the presiding officers of both branches of the legislature, and signed by the governor, it will not be declared invalid because of irregularities in the proceedings of the legislature where no express provision of the constitution has been violated.

3. ———: ———: ———: ERROR OF ENROLLING CLERK. When the journals of the two houses of the legislature and the acts of the governor clearly manifest the intention of the law-making branches of the government, the courts will not permit the will of the people so manifested to be thwarted by the error or dishonesty of an enrolling clerk.

CONTROVERSY involving the validity of the legislative appropriation of 1893 for impeachment proceedings, submitted to the supreme court under the provisions of section 567 of the Civil Code.

George W. Doane, S. B. Pound, W. L. Greene, and *G. M. Lambertson,* for relators.

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

BY THE COMMISSION.

This case was submitted under section 567 of the Code of Civil Procedure, upon an agreed statement of facts substantially as follows:

"That in the general appropriation bill known as house roll No. 207 of the twenty-third session of the legislature of the state of Nebraska, after the said bill had been sent to the senate and was there amended and returned to the house of representatives, the house of representatives then further amended the bill by including an item therein of $25,000 for the purpose of paying the expenses of impeachment proceedings; that said bill then went to the senate for concurrence in the house amendments, and was referred to a conference committee of the members of both houses and by said conference committee was amended by reducing the amount of said appropriation from $25,000 to $15,000 as shown by its report, which report of said committee of conference was adopted by both houses after various conferences had thereon; that in enrolling said bill the enrolling clerk, by a clerical error, included in said enrolled bill said item to cover the expenses of said impeachment proceedings at the sum of $25,000 instead of $15,000, as reported by said conference committee and adopted by both houses, which bill as enrolled was signed by the presiding officers of both houses with an emergency clause attached thereto, and was

thereupon approved and signed by the governor on April 10, 1893."

It will be observed from the facts set forth in the foregoing stipulation that the general appropriation bill, as passed by both houses of the legislature, carried an appropriation for impeachment proceedings of $15,000, but that when the bill reached the committee on engrossed and enrolled bills, by a clerical error the $15,000 was changed to $25,000, and in this condition it was signed by the presiding officers of the two houses and by the governor.

The question then before us is this: Does this bill appropriate $25,000 for impeachment proceedings, or does it appropriate $15,000 for such proceedings; or does it fail to appropriate anything? Were the question a new one in this state, we would say that a bill duly deposited in the office of the secretary of state, bearing the signatures of the presiding officers of the respective houses of the legislature and of the governor, imports absolute verity, and that the courts could not look beyond the signatures of these officers to ascertain what either house has done as to any items in said bill. There are numerous authorities holding this view; amongst others, the supreme court of the United States. See *Field v. Clark*, 143 U. S., 649, where it is said on page 672: "The signing by the speaker of the house of representatives, and by the president of the senate, in open session, of an enrolled bill is an official attestation by the two houses of such bill as one that has passed congress. It is a declaration by the two houses through their presiding officers, to the president, that a bill, thus attested, has received, in due form, the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass congress shall be presented to him. And when a bill thus attested receives his approval, and is deposited in the public archives, its authentication as a bill that has passed congress should be deemed complete and

unimpeachable. As the president has no authority to approve a bill not passed by congress, an enrolled act in the custody of the secretary of state, and having the official attestations of the speaker of the house of representatives, of the president of the senate, and of the president of the United States, carries on its face a solemn assurance by the legislative and executive departments of the government, charged, respectively, with the duty of enacting and executing the laws, that it was passed by congress. The respect due to co-equal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed congress, all bills authenticated in the manner stated, leaving the courts to determine, when the question properly arises, whether the act, so authenticated, is in conformity with the constitution."

The supreme court of Nebraska, however, has taken a different view of this subject, as will be seen from an examination of *State, ex rel. Huff, v. McLelland*, 18 Neb., 236, where it is said: "The certificate of the presiding officer of a branch of the legislature, that a bill has duly passed the house over which he presides, is merely *prima facie* evidence of that fact, and evidence may be received to ascertain whether or not the bill actually passed. The journals of the respective houses are records of the proceedings therein, and if it should appear from them that a bill had not actually passed, the presumption in favor of the certificate would be overthrown and the act declared invalid." (See also *State, ex rel. Poole, v. Robinson*, 20 Neb., 96.)

It is now settled that this court will look into the records and journals of the two houses of the legislature to ascertain if they have complied with the constitutional provisions of the state with reference to the enactment of a law. When this is done, it becomes evident that the senate did not at any time, nor did the house of representatives upon the final consideration of the bill, agree to an

appropriation of $25,000, so that the act cannot be construed as an appropriation of this sum for want of concurrence of all the law-making branches. (*State, ex rel. Marlay, v. Liedtke*, 9 Neb., 462.) It is equally clear that both houses did concur in the appropriation of $15,000. This appropriation must also fail, unless approved by the governor, or by the bill's becoming a law in one of the ways provided by the constitution without his approval. The governor, by signing the bill as enrolled, expressed his approval of an appropriation of $25,000. We think that this sum being one greater than that provided by the legislature, his approval thereof included an approval of the lesser sum.

In *State, ex rel. Huff, v. McLelland, supra*, it was held that a bill creating the office of register of deeds for counties having not less than 15,000 inhabitants did not become a law because the enrolled bill as signed by the governor expressed the number of inhabitants as 1,500 instead of 15,000. The error here was in a matter of description, one essential to the merits of the bill, and the enrolled bill as signed was different in character from that passed by the legislature. In this case, the error related to no matter of description, and could not have influenced the governor to approve the bill, when a correct enrollment would lead him to veto it. By giving the law this interpretation, we enforce the clearly expressed will of the people as manifested by their legislative officers. Any other conclusion would permit such clearly expressed will to be thwarted by the carelessness or dishonesty of a clerk in the enrolling rooms. It was to avoid this danger that this court adopted the doctrine that the enrolled act is only *prima facie* evidence of the enactment of a statute.

It was contended in argument that the item in question should not have been incorporated as an item in the general appropriation bill, and that the title of the bill was not broad enough to comprehend it fairly within its terms.

The title of the bill reads as follows: "A bill for an act making an appropriation for the current expenses of the state government for the year ending March 31, 1895, and to pay miscellaneous items of indebtedness owing by the state of Nebraska." This title was comprehensive enough to include any current expenses incident to the due administration of the affairs of the state. The trial upon impeachment charges preferred by the legislature against state officers and ex-officers before the supreme court is most certainly a part of such expenses. In the title of no appropriation bill would it be practicable to set forth in detail the items provided for, and a general statement, such as above occurs, is sufficient for the purposes contemplated. It may further be observed in this connection that, on account of the impracticability of so doing, it is not required that each item of expenditure proposed should be the subject-matter of a separate bill.

It was also insisted that the house of representatives, having passed the original appropriation bill, and sent it to the senate for concurrence, without which it was returned to the house, the house was powerless to amend such portion of the bill as it had previously passed, its right of amendment being confined to such amendments as the senate had engrafted into the bill as to which its concurrence had been asked. There was cited a very respectable array of authorities on this proposition, and as fixing a rule for the government of these bodies, we are not prepared to say that this contention was without merit. We do not understand, however, that as to the mere routine of parliamentary business, courts are required to interfere with legislative procedure, where no substantive requirement of the constitution has been violated. The signature of the officers of the respective branches of the legislature, attesting the due passage of the bill in question, precludes an inquiry in that direction.

It follows, therefore, that house roll No. 207 of the

twenty-third session of the legislature of the state of Nebraska, as the same is now on file in the office of the secretary of state, appropriated $15,000 for impeachment expenses.

CRYSTAL ICE COMPANY V. JOSEPH SHERLOCK.

FILED MAY 9, 1893. NO. 5021.

1. **Master and Servant:** NEGLIGENCE OF FOREMAN: LIABILITY OF MASTER. Where a foreman, having charge of laborers, directs one of them to perform certain work, in such manner and under such circumstances as to subject the said laborer to great danger of injury, the company for whom the said foreman is acting cannot shield itself from liability for damage under such circumstances caused directly to such laborer by the negligent order of such foreman, upon the ground that the only negligence imputable to the foreman consisted in the performance of an act of mere manual labor in setting in motion the agency which caused the injury, and that thereby the foreman, as to such act, was reduced to the grade of a co-servant of the injured party.

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

C. A. Baldwin, for plaintiff in error.

Moriarty & Berka, contra.

RYAN, C.

The defendant in error brought suit in the district court of Douglas county against the Crystal Ice Company for an injury received while in the employ of the said company. The petition alleged that the defendant in error was engaged with some ten or twelve other persons in handling and depositing in said company's ice house blocks of ice,

which were elevated some distance by means of an inclined chute, then by means of a descending chute said blocks were landed in the ice house; that while so engaged one of the blocks of ice stuck fast in the latter chute, whereupon the foreman in charge of the work directed the defendant in error to disengage said block, and that while the defendant in error was engaged in complying with said order, the said foreman, without warning the said defendant in error, and while defendant in error's back was toward said superintendent, carelessly and negligently set free and sent down said chute another piece of ice of the weight of about 140 pounds, which struck defendant in error and severely injured him, without fault on his part. The recovery prayed was for pain, loss of time, medical attendance, etc., the alleged proximate result of said injury. The plaintiff in error took no exception as to the instructions, either given or refused. The questions presented by the brief of the plaintiff in error will be considered in order as presented upon the brief filed on that behalf.

It is insisted that the petition below failed to state a cause of action, for that, as plaintiff in error insists, there was no averment therein charging, or attempting to charge, the ice company with any carelessness or negligence in any respect whatever, either in respect to the employment of a competent foreman, or in the construction of the chute, or in respect to any of the appliances in use about the carrying on of the work of the ice company; nor was there, as plaintiff in error claims, any averment that the employment, the nature of the business, or the place where the accident occurred, was in any degree hazardous or dangerous. Fairly construed, the petition charged the company with negligence and carelessness by reason of the above charged carelessness and negligence of its foreman, which, as the defendant in error alleged, was the proximate cause of the injury which he received.

The next and final contention of the plaintiff in error

is, that the company, while it was concededly responsible for the acts or default of its agent in his capacity as a manager or vice-principal, was not otherwise liable. In other words, as applied to the facts of this case, the plaintiff in error argues that as the injury was caused by setting free the piece of ice which caused the damage sued for, plaintiff in error should not be held liable, though the act was done by its foreman, for such act was not peculiarly within the scope of the foreman's duties, but was rather one the performance of which properly fell within the class of labor properly to be performed by the laborers under the direction of said foreman. The difficulty with this argument is that it loses sight of the fact that the defendant in error was placed in a dangerous place and required to do an act which of necessity forbade his avoidance of injury, should the foreman set in motion a piece of ice from a point above where the foreman's orders required him to go. Suppose now that this piece of ice had been detached by a fellow-servant of the defendant in error, under the orders of the foreman, after the foreman who had so located the defendant in error that he must inevitably suffer if the order was executed, could it with any propriety be claimed that the company was relieved of liability simply because the agency which caused the injury was set in motion by a fellow-servant? In such case, as in the one at bar, the negligence and carelessness pertained not to the mere manual act of releasing the ice which caused the injury, but was rather imputable to the order which placed defendant in error in such situation, under such circumstances that injury to him was unavoidable from the foreman's setting in motion the ice which caused the damage.

The judgment of the district court is

AFFIRMED.

RAGAN, C., concurs.

IRVINE, C., having presided on the trial of this case in the district court, took no part in its present consideration or determination.

JOHN A. HORBACH, APPELLANT, V. WILLIAM W. MARSH ET AL., APPELLEES.

FILED MAY 9, 1893. No. 4843.

1. **Corporations:** PURCHASE OF CORPORATE PROPERTY BY OFFICER AT JUDICIAL SALE. An officer of a corporation for pecuniary profit, who in good faith purchases at judicial sale the property of the corporation, will be protected in such purchase, provided he shows affirmatively that he has, as indicated, paid the full value of the property of which he so became the purchaser.
2. ———: ———: FRAUD: ACTION BY STOCKHOLDERS: LIMITATION OF ACTIONS. A stockholder of a corporation who seeks as such to impress with an express trust the property of such corporation regularly sold at judicial sale to an officer of such corporation should commence proceedings within a reasonable time after such sale, and must, when such proceedings are unreasonably delayed, establish by a preponderance of the evidence the facts upon which such trust is based.
3. ———: ———: ———: ———: ———. The lapse of four years after the discovery of the alleged frauds, or of such facts as were sufficient to demand such investigation by plaintiff as would have disclosed the alleged frauds, bars an action brought for relief upon the ground of such fraud.
4. **Amendment After Trial:** HARMLESS ERROR. After the submission of an equitable action for final determination, there was no prejudicial error in refusing an amendment of plaintiff's petition proposed to meet the alleged proofs, where, upon a full consideration of all the evidence upon appeal in this court, it is found that the relief prayed must in any event be denied.

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

Joseph H. Blair, for appellant.

George E. Pritchett, contra.

RYAN, C.

The petition in this case was filed in the district court of Douglas county on the 16th day of November, 1889, by the plaintiff therein, on behalf of himself and all other stockholders of the Omaha Horse Railway Company of like interest with plaintiff. He alleged that the Omaha Horse Railway Company was created a corporation by an act of the territorial legislature of the then territory of Nebraska, approved February 18, 1867, and that as such corporation it ever since and still exists; that plaintiff is the owner of twenty shares of the first issue of ten thousand shares of the fully paid up stock of said company, and became such owner on January 1, 1879; that on May 19, 1877, the Omaha Horse Railway Company was indebted to Peter E. and Joseph D. Iler in the sum of $700, which was part of the indebtedness of $20,000 of said company, secured by a mortgage and trust deed to Joseph H. Millard, as trustee, upon all the property of the company, of the value of upwards of $100,000; that though the sum so secured was due, yet the said Joseph H. Millard, trustee, although requested, refused to bring suit for the foreclosure of said mortgage, because the property was more than ample security for the debt, and the company could have easily raised the money and paid said debt, and it was its duty so to do; that on May 19, 1877, the defendant Marsh was one of the directors and the president of said Omaha Horse Railway Company, and owned a large number of its shares of stock and had the management of said company, and that it was in his power, as such officer, to raise the money to pay the debts of said company, which he failed to do, and permitted the said Ilers to bring said foreclosure suit, and thereafter procured himself to be made

a party defendant in said action; that a decree of foreclosure was rendered in said suit on January 6, 1879, and that pending said suit said Marsh bought up other shares of the stock of said company, so that when decree was rendered Marsh was owner of a majority of the stock of said company, and assigned to Frank Murphy and W. A. Smith, respectively, five shares of said stock, without consideration; that while said suit was pending an accounting was had, and it was found that the total indebtedness of the company secured by said mortgage was $29,413.01, and that under a second mortgage there was due the further sum of $3,743.59, making the total indebtedness $33,156.60, and in said foreclosure proceedings the decree was that unless the said sum found due was paid within ten days from its rendition the mortgaged property should be sold to pay the debt; that on March 8, 1879, there was a sale, under said decree, of the property of said Omaha Horse Railway Company, at which defendant Marsh, then being a director as well as president and superintendent of said company, bid off said property for $24,500 and took to himself a sheriff's deed therefor.

The petition stated in detail that by resolution the place of meeting of the stockholders of said Omaha Horse Railway Company was fixed at an obscure place; said resolution having been adopted at a meeting of the stockholders of said company, at which only W. W. Marsh, Frank Murphy, and W. A. Smith were present; that meetings were held at such obscure place and without due notice to the stockholders of said company; that a deed to them of three-fifths of the property of the Omaha Horse Railway Company was made by Marsh, Guy C. Barton, Frank Murphy, and S. H. H. Clark; that to wrong, cheat, and defraud said company and its *bona fide* stockholders out of its and their property the said Marsh, Barton, Murphy, and Clark made to the Omaha Horse Railway Company the following proposition:

"*To the Omaha Horse Railway Company:* The undersigned hereby offer and propose to sell and convey to you the franchise of said company and all the lines of street railway now operated by us in the city of Omaha, Nebraska, together with all the horses, harness, street cars, barns, and other property connected therewith and owned and used by us in the operation of said street railway, and also to pay or procure the discharge of all the indebtedness now in judgment against you for and in consideration of the issue to us of the full paid stock of said company of the probable value of $300,600 and the bonds of said company in the sum of $233,000, payable in twenty years, with interest at the rate of six per cent per annum, payable semi-annually, secured by a first mortgage on said property and all property of every kind which may be hereafter acquired by said company.

"Dated at Omaha, February 12, 1884.

"W. W. MARSH.
"GUY C. BARTON.
"FRANK MURPHY.
"S. H. H. CLARK."

That at a meeting of the stockholders of said company a resolution was adopted accepting the above proposition; that at said meeting Clark, Murphy, Barton, Marsh, and W. A. Smith were elected directors of said company; that at said time the said company was not indebted in any sum whatever, its earnings being sufficient to pay all indebtedness, which was correctly stated in the aforesaid decree of date January 6, 1879, and its expenses; that its earnings were largely in excess of what was necessary to pay both its indebtedness and running expenses; that said property when said proposition was made and accepted, was of the value of over $200,000 above all debts, and was free of all judgments and incumbrances, and that there was then a balance in the hands of Marsh and Murphy, as would appear upon an accounting duly had; that pursuant

to said accepted offer Marsh, Clark, Barton, and Murphy by a deed dated May 13, 1884, pretended to convey to said Omaha Horse Railway Company all its own property, the consideration named in said deed being $593,000, or $93,000 more than twice what it was rated at when Marsh deeded three-fifths of it three months before to Murphy, Clark, and Barton. The petition further alleged that on July 11, 1884, the said Clark, Murphy, Barton, and Smith, who were then directors of said company chosen on February 20, 1884, unlawfully, wrongfully, and without any consideration moving therefor, issued and distributed among themselves $300,600 of stock, and $233,000 of the bonds of said company, secured by mortgage upon the property of the company made also by themselves May 30, 1884. What was done with the remaining $67,000 of said bonds the plaintiff alleged that he was unable to state, and demanded an accounting.

The petition further, in substance, stated that by a combination between the parties last named as directors the property of the Omaha Horse Railway Company was taken possession of, and a consolidation of said company, and a transfer of all its property, and a merger of its franchise with that of another company then in existence, was in contemplation, and if not prevented would be consummated; that the several transfers from the said Marsh to the other parties named as directors were simply a part of a scheme to defraud the other stockholders of the Omaha Horse Railway Company of their rights as such in said company. The manner in which this was attempted to be carried on is alleged at great length and considerable detail in the petition, but it would subserve no profitable use to set out these details more fully than has already been done.

The answer admitted the indebtedness to the Ilers, the foreclosure, and the purchase thereunder by Marsh of the property of the Omaha Horse Railway Company, but denied that there was in said purchase, or in any other

transaction, any intent to cheat or defraud any stockholder of said Omaha Horse Railway Company, and alleged that whatever was done was simply done by said Marsh in his own right and for the protection of his own interest. It alleged that at the time the action was brought to foreclose the mortgage executed to Millard, as trustee, the company was hopelessly insolvent; that the property of the company was not worth more than one-half of its indebtedness; that besides the mortgage indebtedness there was a large floating indebtedness, and, in effect, denied the material averments of the petition. The answer also alleged that on the 2d day of April, 1889, the Omaha Street Railway Company was formed by the consolidation of the Omaha Horse Railway Company and the Omaha Cable Tramway Company, and that ever since said 2d day of April, 1889, all the property, rights, and franchises of said two constituent companies have been owned and operated and in the possession of said Omaha Street Railway Company. The defendant also pleaded the statute of limitations in this connection.

Upon these pleadings, the testimony was taken, and in July, 1890, the case was taken under advisement by the court, though no final decision was made until February 11, 1891. In December, 1890, the plaintiff applied for leave to amend his petition so as to conform, as he alleged, to the proofs adduced on the trial. The purpose of this amendment was to allege that Marsh encouraged Ilers to bring the foreclosure suit, and after it was commenced, fraudulently contriving and intending to get control of the stock and property of said company, and to cheat plaintiff and others out of their stock, shares, and interest in said company, procured himself to be made a defendant as hereinbefore stated. It further alleged, in addition to the first averments of the original petition, that upon an accounting, and before the sale under the decree obtained by Ilers against the Omaha Horse Railway Company, it was found

that said company was also indebted under a judgment known as the Doolittle judgment, in the sum of $5,008.28, and under a judgment in favor of the State Bank in the sum of $2,515.58, and that the total indebtedness of said company secured as above stated, that is by first and second mortgage hereinbefore referred to, and under said judgments, all told, amounted to the sum of $40,680.46, and that further than this said company was not indebted in any sum whatever. It also more fully alleged the different schemes set on foot by Marsh, in which he was alleged to have been assisted by Murphy, Smith, and his associates to involve in appearance the title to the paper derived from Marsh by the Omaha Street Railway Company aforesaid, though in fact the same was alleged to have been held by Marsh and his associates for Marsh's sole benefit.

The petition further stated that the plaintiff Horbach, prior to said sale upon foreclosure, and as the date named therefor was drawing nigh, prepared himself with funds sufficient to bid said property off for the sum of $40,000, and intended to bid on the same on the sale to that amount; that said Marsh was apprised of this fact, and came to plaintiff and arranged with plaintiff not to bid at the sale, and that the defendant Marsh then stated to plaintiff that he, the said Marsh, desired and intended to bid the same off at the coming sale in his own name for the benefit of all the stockholders and all persons interested in the property, and that if plaintiff would refrain from bidding, he, the said Marsh, would bid the same off and hold the same in his own name for the benefit of all the stockholders and all parties interested therein. Plaintiff says that in consideration of said promises, offer, and agreement, he promised and agreed not to bid on the same, and refrained from bidding thereon at the sale, and permitted the said defendant Marsh to bid said property off at said sale. The proposed amendment to the petition was further to the effect that but for the aforesaid promises, offer, and agreement of

the said Marsh, the plaintiff would have bid on said property to the amount of the then indebtedness, interest, and costs due thereon, but that he relied upon the promises and agreement of the said defendant Marsh that he would bid in said property in trust for all the stockholders, and hold the same in his own name until such time when the company could earn and pay off its indebtedness, and that relying on said promises and agreement the plaintiff refrained from bidding, and did not bid at said sale, and the said plaintiff said that the said promises, offer, and agreement of the said defendant, made as aforesaid to plaintiff, were designedly made to him with the intent to wrong, cheat, and defraud the plaintiff and the other stockholders out of their stock and out of their interest in and to said stock. The further proposed amendments were simply such as to charge that the promises of Marsh as to bidding in the property for the benefit of the stockholders of the Omaha Horse Railway Company, and his violation of said promises, were each solely for the purpose of cheating and defrauding the stockholders of the Omaha Horse Railway Company as to the property of said company, in respect of which each of said stockholders, as such, were interested.

The court refused to permit amendments to the petition as proposed. The prayer of the said proposed amendments, as well as in the original petition, was that the defendants should be required to show how much stock over and above the original one thousand shares had been issued by them; that they may be required to surrender the same for cancellation; that they be required to return to said company all sums of money they may have received, or that the company has paid out as dividends thereon; that in case they cannot or shall not surrender said stock, that they be required to pay to the company the face values thereof with all dividends the company has paid out thereon; and that said defendants be required to surrender up for cancellation all the bonds of said company issued by

them, and return to the company all sums of money at any time paid out as interest on said bonds; that in case they shall not surrender said bonds for cancellation that they be required to pay said company the full face value thereof, together with all interest the company has at any time paid out thereon. And the plaintiff further prayed that a full accounting might be had of all receipts and expenditures, debts and credits of said company from January 1, 1879, to the present time, and for the appointment of a receiver to take charge of all the books of the company, and papers showing its business since January 1, 1879, and that said defendants be required to pay over, under order of the court, whether for said stock or bonds, or both, the balance of the earnings of the company over and above expenditures, and for general equitable relief.

On the 11th day of February, 1891, a decree was entered in this cause as follows: "This action having been heretofore tried to the court, and the plaintiff having, before the conclusion of the trial, filed his motion for leave to amend his petition to conform to the facts proved and tendered in said proposed petition, and the court having taken the case and said motion under advisement, and being now fully advised in the premises, it is now ordered that said motion be and it hereby is overruled, to which the plaintiff excepts, and thereupon the court finds, upon the issues joined, for the defendants, to which the plaintiff excepts. It is therefore ordered and adjudged that this action be dismissed for want of equity, and that the defendants recover of the plaintiff their costs of this action to be taxed."

Under the petition, as originally filed, the theory of the plaintiff evidently was that by reason of the fiduciary relations sustained by W. W. Marsh to the Omaha Horse Railway Company, whatever purchase was made by him would of necessity inure to the benefit of that company and its stockholders. There is no averment of any irregu-

larities or defects in the foreclosure proceedings at the suit of the Ilers against the Omaha Horse Railway Company, nor is there any allegations of any defect in the sheriff's sale or confirmation such as in any way to impair the title of Marsh under his sheriff's deed.

The question which is presented by these pleadings then is, whether or not Marsh, as director and president of the Omaha Horse Railway Company, would be held as trustee for the benefit of the stockholders of that company in any purchase which he made. The amount of the decree under which the sale was made was, as alleged by the petition, something over $33,000. The proposed amendment to the petition admits the existence of a judgment in favor of Doolittle, and one in favor of the State Bank, which swell the indebtedness of the Omaha Horse Railway Company at the time of the foreclosure to upwards of $40,000. The amount bid at the foreclosure sale by Marsh was $24,500. No claim is made in the petition that he used funds other than his own in making this purchase, except inferentially it is asserted that the earnings were sufficient to pay the indebtedness of the company, and in a general way it is asserted that he had a balance in his hands over and above the indebtedness of the company; but of the fact that he advanced the $24,500 in payment of the bid made by him there can be no question upon the testimony. Under these circumstances the original theory of the plaintiff can only be made available upon the assumption that an officer of a corporation has no right whatever in his individual capacity to advance money for a corporation, or purchase its property at a judicial sale.

In the case of *Gorder v. Plattsmouth Canning Company*, 36 Neb., 548, a somewhat similar question was considered by this court. In the opinion filed by POST, J., the following language occurs: "There is no doubt that the relation of directors of a corporation, of which they are officers, are of a fiduciary character, and their contracts and

dealings with respect to the corporate property will be carefully scrutinized by the court. There are cases to be found in which it is asserted that such contracts are absolutely void and not enforcible either in courts of law or in equity, but the decided weight of authority, as well as the most satisfactory reasoning, sustains the view that they are voidable only. It is frequently stated in the reports and textbooks that contracts between corporations and their directors will be set aside by courts of equity at the election of the stockholders, but such statements are not strictly accurate. Not every purchaser of corporate property by directors of a corporation will be adjudged void in an action by the stockholders, even by courts of equity. On the contrary, the relation of directors to the stockholders of a corporation is not essentially different from that ordinarily existing between trustee and *cestui que trust.* Courts of equity will set aside such contracts on the ground of fraud and generally upon slight showing of fraud or bad faith by the trustee, but where it is clear that the transaction is in good faith and the *cestui que trust,* being under no disability, has received and retains the consideration paid for the trust property by the trustee, it will be upheld when assailed either in law or in equity."

In the case at bar the money paid by Marsh was not paid by him to his *cestui que trust* it is true, and yet it was paid for the *cestui que trust* as completely as though directly so to it or to the stockholders of the Omaha Horse Railway Company. By the most solemn method of proof it had been ascertained that said company was indebted to an amount of over $33,000, and its property was ordered sold for the payment of that indebtedness. The proofs show that Marsh at the sale competed against all purchasers to the extent of running the property from $16,000 up to $24,500; he paid this amount upon his bid, and it was applied to the extinguishment of the indebtedness of the Omaha Horse Railway Company without any objection

and with the acquiescence of every stockholder of that company. Having in view simply his fiduciary relation, therefore, he is entitled to full protection in his purchase under the language of the case just quoted from, unless something more than a mere fiduciary relation is shown to affect his rights. The proposed amendment to the petition, however, was based upon the theory of an expressed rather than an implied trust, possibly in addition thereto. The averments made by way of amendments in the proposed amended petition were to the effect that previous to the sale under the Iler foreclosure plaintiff had a conversation with Marsh, in which he expressed the intention of bidding at the proposed foreclosure sale, and was assured by Marsh that he himself would bid in the property of the Omaha Horse Railway Company for the benefit of the stockholders of that company. The plaintiff, in his amendments to the petition, alleged that he relied upon these assurances, and that by reason of such reliance he was induced to and did refrain from bidding upon the property at said foreclosure sale; that Marsh was thereby enabled to purchase said property, and did so purchase the same in his own name though with plaintiff's expectation and understanding, superinduced by the assurances of Marsh to that effect, that the property would be held by Marsh for the benefit and protection of the stockholders generally. It was afterwards proposed by plaintiff, rather inconsistently with this theory, that he should purchase one-half of this same property of Marsh.

There is abundant testimony that the property at the time of the purchase at the foreclosure sale was of little value, and that the price paid by Marsh was reasonable. It is shown that subsequently, either owing to the growth of the city of Omaha or other circumstances, or perhaps all combined, the property rapidly appreciated in value and earning capacity. It was purchased by Marsh in 1879, and it is claimed by plaintiff was held by Marsh until it became much more valuable, when the trust under which

it was held by Marsh was repudiated, and the property treated as the property of Marsh and his associates alone, without reference to the rights of the stockholders. The preponderance of the evidence shows that Marsh bid in this property without any promise, agreement, or understanding such as would constitute him a trustee in respect thereof, for the benefit of the stockholders of said company; that he afterwards used, operated, and improved the same under great difficulties solely for his own profit and benefit; that the sheriff's deed which he received upon its purchase at the foreclosure sale to himself individually was immediately recorded; that the deed evidencing the conveyance of the three-fifths interest in said property to his co-defendants was also placed on record as soon as executed; that every act and use by him of the property was consistent with his individual ownership thereof; that immediately upon acquiring said property the accounts in relation to the receipts and expenditures of the Omaha Horse Railway Company were changed so as to indicate that there was no intention that they should be binding upon or for the benefit of the Omaha Horse Railway Company. It is true that in the litigation between the Omaha Horse Railway Company, plaintiff, against the Omaha Motor Railway Company and William M. Hewitt, defendants, statements were made under oath by Marsh which apparently should modify this general statement. In this evidence Mr. Marsh testified that he had been a stockholder in the Omaha Horse Railway Company for fifteen years previous to the 1st of July, 1888, and had held stock therein right straight along, and that he had held the property for two or three years as belonging to the Omaha Horse Railway Company, and that finally it was conveyed to the company.

Bearing in mind the apparent value attached to what was claimed by all the parties to this suit as to the exclusive franchise to operate a horse railway in the streets of Omaha under the act of the territorial legislature of Nebraska,

approved February, 18, 1867, it is not difficult to account for the line of conduct pursued by Marsh and his testimony in the case referred to. This exclusive franchise was in terms granted to the Omaha Horse Railway Company. The purchase of the property by Marsh did not of course vest him with that franchise. To avail himself of the benefits in that respect of the act referred to, Marsh reorganized the Omaha Horse Railway Company, after which he and his associates conveyed to said company the property necessary for its operation, for which they received as payment the stock and bonds of said company. Evidently this course was taken to control, on the one hand, the management of the property, and, on the other, to render available a special grant of franchises which were believed to be exclusive in their nature. Though the Omaha Horse Railway Company was reorganized, there seems to have been adopted no amendments in the way of a change in its name or otherwise, and it is therefore not strange that in his dealings with a rival company, calling in question the exclusiveness of the franchises claimed, Marsh should have testified as he did. Indeed, whatever were the property interests which had been held by Marsh and his associates, they were by the deeds, heretofore referred to in plaintiff's petition, conveyed to the Omaha Horse Railway Company, and no act or deed of divestiture has since been shown to have had existence.

While it was true that in the suit where this testimony was taken the Omaha Horse Railway Company's exclusive franchise was asserted for the purpose of preventing the use by a rival company of the streets of the city of Omaha for railway purposes, such issue does not found a substantive basis for plaintiff's present contention. The testimony of Marsh, under consideration, could only have had the tendency or effect to impeach the evidence and claims which he now advances in this case. Giving that testimony the full weight to which it is entitled, however, there was

a preponderance in favor of the claims made by Marsh herein. The testimony fails to show the existence of an express trust as against Marsh, or Marsh and his associates in favor of plaintiff, or any other of the stockholders, created by the alleged promises of Marsh to the plaintiff just before the foreclosure sale. If the evidence had been sufficient to sustain the amendments which were proposed to render the petition conformable to the testimony, it would have been prejudicial error to have refused permission to the plaintiff to make the amendments asked in the district court. Whatever amendments are necessary to enable a party to assert his rights or redress grievances should be permitted at any time, even, under our statute, after judgment. But in a case where there is not sufficient proof to sustain the amendment, even if permitted, and in which the general result must have been the same with as without the amendment, there can result no prejudice in refusing to permit the proposed allegation to be made by way of amendment.

In the consideration of the equities urged and insisted upon by the plaintiff, it is impossible to ignore the fact that the alleged grievances had their origin in 1879, and that this suit was not commenced until November, 1889, a period of more than ten years; nor can it be forgotten that while the plaintiff alleges that the time and place of holding directors' meetings was changed so as to be less generally known, yet that plaintiff himself testifies that he attended none of the meetings on account of the small amount of stock which he held. No other stockholder of the company has intervened or in any other way set up or made objection to the contention in this case, and it cannot be assumed that any others exist or have cause of complaint.

2. In the district court appellees pleaded the statute of limitations in bar of this suit. The action was brought for relief on the ground of alleged fraud, and the statute applicable to such cases provides that an action for relief can

only be commenced within four years after the cause of action shall have accrued, but that it shall not be deemed to have accrued until the discovery of the fraud. The petition in this case was filed November 16, 1889; the sheriff's deed made to Marsh under the decree rendered in the foreclosure suit of Ilers was dated March 15, 1879, and was filed for record March 17, 1879. As has already been noted, Marsh, from the time of said purchase, treated the property purchased as if he had been its absolute, unqualified owner. On the 9th day of February, 1884, for instance, Marsh and his wife by deed sold and conveyed to Silas H. H. Clark, Frank Murphy, and Guy C. Barton an undivided three-fifths of said property for the expressed consideration of $150,000. This deed was filed for record July 11, 1884. On the 30th day of May 1884, Marsh, Clark, and Barton, their wives and Frank Murphy joining therein, made conveyance of this same property to the Omaha Horse Railway Company for the expressed consideration of $593,000, which deed was filed for record July 11, 1884, the same day on which was recorded the deed last above described. The proposition of the last above named grantors for the sale of the property conveyed to the Omaha Horse Railway Company was dated February 12, 1884, and was, by resolution of the stockholders of said company, accepted February 20, 1884. The deed pursuant thereto was executed on May 30, following. There is no charge made that the resolution accepting said proposition was not spread upon the records of the company, and only in very general terms is it alleged that these proceedings were kept concealed. The petition charged that pending the foreclosure proceedings previous to January 6, 1879, Marsh purchased a majority of the stock of the Omaha Horse Railway Company, and that at the date of said foreclosure he was the holder of a majority of all the stock of said company, but nowhere is it alleged that this acquisition of stock was secretly made,

nor that at the time its purchase was unknown to appellant. Under all these circumstances the bare statement of appellant that the knowledge that defendants repudiated the trust under which this property was held was not acquired until June, 1888, is not determinative of the date from which the statute of limitations began to run. Upon this point the language of Mr. Justice Clifford in *Godden v. Kimmell*, 99 U. S., 201, quoted with approval in *Parker v. Kuhn*, 21 Neb., on page 427, is applicable. He said: "Courts of equity acting on their own inherent doctrine of discouraging, for the peace of society, antiquated demands, refuse to interfere in attempts to establish a stale trust, except where the trust is clearly established, or where the facts have been fraudulently and successfully concealed by the trustee from the knowledge of the *cestui que trust*. Relief in such cases may be sought, but the rule is that the *cestui que trust* should set forth in the bill specifically what were the impediments to an earlier prosecution of the claim; and how he or she came to be so long ignorant of their alleged rights and the means used by the respondent to keep him or her in ignorance, and how he or she first came to a knowledge of their rights," citing *Badger v. Badger*, 2 Wall. [U. S.], 87; *White v. Parnther*, 1 Knapp [Eng.], 227. This language is specially applicable to the averments of the petition upon which the cause was tried; that is, to a trust implied from the official relation of Marsh to the Omaha Horse Railway Company at the time of his purchase of its property. In respect to the additional averments embodied in the amended answer, by which an express trust relationship was charged, it is sufficient to repeat that the proofs failed to sustain them, and from this it follows that the operation of the statute of limitations was in no way suspended upon that theory of appellant. This action was, therefore, properly held barred by the statute, more than four years having elapsed from the time when appellant's cause of action, upon any theory

applicable to the evidence, arose. The judgment of the district court is

AFFIRMED.

RAGAN, C., concurs.

IRVINE, C., concurs in the decision upon the ground that the action is barred by the statute of limitations.

JOSEPH M. SPURGIN, APPELLEE, V. HENRY B. THOMPSON, APPELLANT.

FILED MAY 9, 1893. No. 5760.

1. **Election Contest:** APPEAL FROM COUNTY COURT: ISSUES IN APPELLATE COURT. In an election contest the incumbent, having dismissed before judgment a paragraph of his answer alleging the improper refusal to count certain ballots, cannot by an original amendment in the district court, over the contestant's objection, set up the same matters as to which he had entered a dismissal in the county court.
2. **Elections:** MARKED BALLOTS. The indorsement of the name "Eagleham," he not being one of the election judges, upon a ballot, was within the inhibition of the statute forbidding the marking of his ballot by an elector, and vitiates said ballot.
3. ———: AUSTRALIAN BALLOTS: CROSS MADE WITH PENCIL INSTEAD OF INK. While the statute requires that the cross which signifies the preference of the elector shall, in ink, be placed in a space designated for that purpose, a ballot upon which such preference is indicated by a cross made with a lead pencil, outside the space designated, but opposite the name of the choice of the elector, should be counted according to such manifest intention.

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

R. M. Logan and *Reese & Gilkeson*, for appellant.

L. K. Alder, contra.

RYAN, C.

According to the original canvass of Keya Paha county, there were cast 337 votes for Hugh Booth, and 338 votes for H. B. Thompson, for sheriff of said county, and there was accordingly issued to said Thompson a certificate of election. Within the proper time, Joseph M. Spurgin, an elector of said county, as provided in such cases, filed in the county court of said county a complaint accompanied by a bond, with the view of contesting said election of sheriff. The complaint alleged irregularities as to some precincts, of which no notice will be taken, because, whatever may have been the merits of the contest, there was no evidence to show such merits. The complaint alleged that in Simpson precinct there were four ballots regularly cast, which showed clearly the choice of the voter in each case for sheriff, but that said ballots, which were cast for Hugh Booth, were by the judges of election omitted from their canvass and return. The complaint alleged that in Garfield precinct the judges of election omitted from their return of the ballots and votes two ballots which had been cast for said Hugh Booth for sheriff, upon one of which ballots the voter had placed a cross indicating his choice, not upon the margin however, but just opposite and very near the name of Hugh Booth; the other ballot was crossed in the same way as that last mentioned, except that the first described ballot was marked with ink, the other with a lead pencil. The complaint further set forth that in McGuire precinct one ballot was counted for Thompson, upon the back of which the voter had marked the name of "Eagleham," and that said ballot should not have been counted for the incumbent, Thompson.

The incumbent, by an amended answer, denied the averments alleged as reasons for receiving and for rejecting the ballots as aforesaid, in so far as they related to the office of sheriff. There were various irregularities affirmatively al-

leged in said answer, but as there was no evidence in relation to them they will receive no attention. As there was a complication as to the seventh paragraph it is copied *in extenso*. It was as follows:

"7th. The incumbent, for further and other defense to contestant's complaint, alleges that at said election in Norden precinct in said county on the 3d day of November, 1891, the judges of election therein, while canvassing the votes and ballots of said Norden precinct and the ballots cast therein, erred in this: That there were three ballots in the ballot-box cast at said election in said precinct which were regular, legal, and proper ballots and which the said judges of election rejected, and wholly omitted and rejected, from their return and count of the ballots so cast at said election in said precinct, each of which said three votes were cast for the incumbent Henry B. Thompson for sheriff of Keya Paha county, said ballots being regular and legal and official ballots, upon two of which the voters had marked the cross in lead pencil, and the third one the voter had scratched out all the names of all the candidates except the names of the candidates for whom he intended to vote. The incumbent alleges that said three ballots, and each of them, were legal ballots, and that the same were sufficiently plain for the intention of the voter to be gathered therefrom, so far as the vote for the office of sheriff was concerned, and that the said three ballots should have been canvassed, counted, and returned as legal votes, and counted for the said Henry B. Thompson for sheriff of said county as aforesaid. The incumbent further alleges that in said Norden precinct at said election there were cast for said incumbent five other votes which the judges of election refused and neglected to canvass and count for said incumbent for the office of sheriff, but did wrongfully count, canvass, and return said five ballots as having been cast for the said Hugh Booth. Incumbent alleges that said five ballots were legal and proper and offi-

cial ballots and should have been canvassed, counted, and returned for said incumbent, and incumbent asks that the court count the eight ballots herein referred to as having been cast in said Norden precinct for said incumbent, and for the purpose of said count incumbent asks that the ballots cast in said Norden precinct be brought in and inspected by the court."

There was a reply in denial.

During the trial in the county court, the incumbent, with leave of court, dismissed paragraph 7th of his answer above quoted, whereupon contestant as to the same precinct filed the following, omitting formal parts:

"The contestant asks leave to amend his complaint herein to comply with the evidence, in this, that the evidence showed that in Norden precinct in said county at said election held therein on November 3, 1891, there was an error in the canvass, count, and return from said precinct made by the judges in said precinct, in this, the whole number of votes cast as shown by the return of the judges for Hugh Booth for sheriff of said county was forty-one, when in fact there were cast for him in said precinct forty-two legal and official ballots, and this is shown fully by a recount of the ballots returned from said precinct made by the court in this case, and as shown by the records in this case, and incumbent has dismissed paragraph seven of his amended answer herein as to the vote of said precinct, after the returns from said precinct have been examined by the court at incumbent's request, as shown by the record in this case, and contestant asks that forty-two votes and ballots be counted from said precinct as votes for said Hugh Booth for sheriff of said county of Keya Paha, Nebraska, instead of forty-one as shown by the official canvass of said precinct."

Upon a trial had in the county court, it was adjudged that Hugh Booth had received 341 votes, and that H. B. Thompson had received 337 votes for sheriff, and Booth

was accordingly declared elected. From this an appeal was taken to the district court of said county, where, upon trial had, it was adjudged that each candidate had 340 votes, and it was ordered that the right to hold the office in question should be determined by lot. This was done and Hugh Booth was duly designated, in that way, as the candidate entitled to the office. An appeal brings the case into this court.

In the district court the contention as to Norden precinct was considered in determining the rights of the parties to the contest. The result in that precinct was first called in question in the county court, by the incumbent in paragraph seven of his answer. This paragraph was dismissed by the incumbent during the trial in the county court. The contestant thereupon amended his complaint so as to allege that as against Booth's rights there had been a mistake in canvassing the votes in said precinct, whereby Booth had been deprived of one vote. When the appeal was taken to the district court incumbent had, therefore, no averments in the pleadings of anything improper as against his candidacy having transpired in said precinct. On appeal from the county court to the district court the issues to be tried should be confined to those tried in the county court, except that new matter arising in the interim may be pleaded in the district court. (*School District v. McIntie*, 14 Neb., 46; *Baier v. Humpall*, 16 Id., 127; *Union P. R. Co. v. Ogilvy*, 18 Id., 638; *Lamb v. Thompson*, 31 Id., 448; *Bishop v. Stevens*, Id., 786.)

There was no basis for the incumbent to affirmatively claim in favor of himself upon averments of the contestant's complaint as amended, for those averments were only of matters hostile to the incumbent's contention confined to the act of canvassing. At any rate, even this amendment was dismissed by the contestant before the trial in the district court, and there could properly be considered no matters with reference to the vote in Norden precinct, even

though the district court had permitted a new amendment to be filed therein, alleging the same matter pleaded in the seventh paragraph of the answer, and voluntarily stricken out by the incumbent before the conclusion of the trial in the county court. The alleged irregularities as to Norden precinct are, therefore, not properly before this court for determination.

In Simpson precinct the official count gave Booth ten and Thompson twenty-two votes respectively. The ballots brought to this court by the incumbent, as part of the evidence to be considered in this appeal, show that there were cast twenty-one votes for Thompson and eleven for Booth. There were several witnesses in the district court who gave evidence that the ballots when counted showed that there were ten for Booth and twenty-two for Thompson. The ballots themselves were the best evidence upon this point, for the oral testimony amounted simply to an attempt to reinforce the statement of the certificate of the result arrived at by the canvassers. Undoubtedly this result both canvassers and the said witnesses at the time believed to be correct, yet to permit this canvass, no matter how proved, to control our inquiry, based as it must be upon an actual count of the ballots, would be to declare the result reached upon the first canvass conclusive, even in a contest calling such result in question. Neither the return of the canvassers nor oral evidence of it relieves this court of the onerous duty of counting the ballots properly submitted. Upon a careful canvass of the ballots of Simpson precinct we find there should be taken from the footings made by the canvassers one vote for Thompson, and there should be added one to the vote of Booth.

In Garfield precinct there was one ballot, on which, opposite the name of Booth, was a cross made with a lead pencil; for this reason alone this was rejected. This ballot should have been counted in favor of Booth. (*State v. Russel*, 34 Neb., 116.) In this same precinct the canvassers

threw out one vote for Booth because the cross required was placed directly opposite and near the name of Booth and not in the marginal space designated for it in the ballot. By sec. 150, ch. 26, Comp. Stats., it is "*Provided*, That when a ballot is sufficiently plain to gather therefrom a part of the voter's intention, that it shall be the duty of the judges of election to count such part." As to the preference of the voter who cast this ballot there could be no doubt, and the mistake made in rejecting it will be corrected by counting still another vote for Booth, which, with the one already noticed in Garfield precinct, increases the vote of Booth by two in that precinct.

In McGuire precinct there was cast a ballot upon which was indorsed the word "Eagleham," possibly, as suggested on the trial below, the name of an elector. This was cast and counted in favor of Thompson. It is provided in sec. 154, ch. 26, Comp. Stats., that "No elector shall place any mark upon his ballot by which it may afterwards be identified as the one voted by him." Clearly the indorsement of the word "Eagleham" was within the prohibition of this clause of the statute, and the ballot in question should therefore be rejected. This lessens the vote in favor of the incumbent by one vote. This disposes of the contentions of the respective parties, properly presented by the pleadings.

As the vote was canvassed originally, there were cast for Booth 337, and for Thompson 338 votes. As shown in detail, these totals should be varied in the following manner: to the total of 337 for Booth there should be added one vote from Simpson precinct and two from Garfield precinct, making Booth's entire number of votes 340. From Thompson's total of 338 there should be taken one vote counted for him in McGuire precinct, which leaves Thompson's entire number of votes 337. This entitles Booth to the office in question.

The claim was made with earnestness on this contest

that the ballots should not be counted because they had not been kept safely as required by statute. The evidence shows that they were kept in a vault adjoining the office of the county clerk, in which were kept the records of deeds, mortgages, etc. There might possibly have been found an opportunity to remove a part of these ballots during the temporary absence of the clerk and his deputy from the office in the day-time, but they could have been removed at no other time, for at night the vault was secured by a combination lock. Even in the day-time it is shown that the clerk and his deputy kept special watch that nothing should be removed from the safe, and that whenever any one went into said vault it was under the surveillance of one of these officers. It is true that sometimes it happened that both the county clerk and the deputy were absent from the office, when it would be necessary to bring in wood, or for some like purpose, and the evidence shows that at some two or three times parties during such absence entered the vault unnoticed by any one, but we do not think there is any evidence that any vote was tampered with or removed from the vault in question. One ballot was referred to in the district court as missing, but there is nothing to raise the presumption that it was taken from the vault. It might have been lost before it was placed in the envelope, or might have been mislaid in the judicial proceedings afterwards. Under such circumstances it would be unsafe to presume that the ballots were not safely kept as required by law, thereby practically prohibiting a review by contest, or upon appeal in any court, of the returns made by the canvassers.

It follows, therefore, that the judgment of the district court adjudging that Hugh Booth was the duly elected sheriff of Keya Paha county, for two years, from the 7th day of January, 1892, is

AFFIRMED.

THE other commissioners concur.

PETER NILAND ET AL. V. SOLOMON KALISH ET AL.

FILED MAY 9, 1893. No. 4925.

Fraudulent Transfer of Property from Husband to Wife: WIFE AS WITNESS. Under the provision of section 331 of the Code of Civil Procedure, a wife, over her husband's objection, cannot be required to testify as to facts which, it is claimed by the adverse party, would show that a transfer of property from her husband to herself was fraudulent. Neither can the husband under like circumstances be compelled to testify as against his wife.

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

Switzler & McIntosh, for plaintiffs in error.

C. A. Baldwin, contra.

RYAN, C.

This action was brought in the district court of Douglas county to set aside the title of Adalia Kalish to certain real property, and subject the same to the payment of the debts of her husband, Solomon Kalish, evidenced by judgments in favor of the plaintiffs severally, upon each of which judgments execution had issued and been returned *nulla bona*. The petition alleged, in effect, that the property sought to be subjected had been acquired by Solomon Kalish, but that the title was taken in the name of his wife, to enable him to hinder, cheat, and defraud his said creditors, who were remediless except by subjecting said property to the payment of said judgments respectively. The answers of both Solomon Kalish and his wife denied the matters above averred, and alleged that Mrs. Kalish acquired said property through the use of her separate inheritance, earnings, and gifts to herself. A trial was had

upon these issues and judgment rendered in favor of the defendants. In the progress of this trial, in the language of the bill of exceptions, "The plaintiffs called upon Mrs. Kalish, the wife of the defendant, to take the witness stand, and to testify for the plaintiffs. Whereupon the defendant Solomon Kalish objects to the witness and co-defendant Adalia Kalish being examined and giving testimony in this case, for the reason that, she being the wife of the defendant Solomon Kalish, is not a competent witness to testify in this case under the law. Objection sustained, and plaintiffs except. Plaintiffs' counsel said he called the witness last referred to for the purpose, and offers to prove by her, that the property which is held in her name was purchased by her as set forth in plaintiffs' petition with funds belonging to the defendant Solomon Kalish, said funds having been accumulated and used by her through his direction in the purchase of said property, and the placing of the same in her name in fraud of the creditors of the defendant Solomon Kalish." Argumentatively, counsel for plaintiffs, also in that connection, gave reasons why the proposed evidence should be allowed, as, that it would rather be in favor of than against her husband's interest in respect of the said property; that the knowledge of these facts was confined to witness and her husband, etc., but there was no further statement of facts proposed to be proved by Mrs. Kalish. Objections to the proposed evidence was sustained and plaintiffs excepted. In like manner, *mutatis mutandis*, there was an offer to make proof of the same matter by Solomon Kalish's evidence, resulting in the same ruling and exception upon objection of the same nature. There was no question propounded to either of the witnesses, and the testimony proposed to be elicited can only be conjectured from plaintiffs' own offer of proof already quoted from the bill of exceptions.

Having in view the liberal charges of fraud made in the plaintiffs' petition against Solomon Kalish, followed by the

above specific offer of proof of a fraudulent transfer of property, it is difficult to conceive how, as plaintiffs contend, this proposed evidence could be in favor of Solomon Kalish. It might, it is true, tend to show as a remote result that Solomon Kalish was the beneficiary for whom his wife held the title of the property in dispute, and in that narrow, technical view, it might be insisted that the proof of such interest in the property might be of matter in his favor. Such a construction, however, savors too much of casuistry and cannot be accepted as the sense in which the offer was made and insisted upon, for this whole proceeding was on the theory that Solomon had no property whatever, and plaintiffs could hardly be suspected of the inconsistent attempt to establish in Solomon's favor a basis for credits.

Plaintiffs further contend that it was impossible to determine whether or not the evidence would be for or against the party objecting until after it was actually given. It sufficiently answers this to remark that the scope of the evidence proposed was limited by plaintiffs' own statement of what it would be. If the offer of proof does not subserve that purpose it is entirely useless, for it could perform no other function. The sole question then presented is, whether or not the district court erred in excluding the evidence offered for the purposes stated by counsel. While no statute has been found in the exact language of our own there are those which contain substantially the same inhibition. Section 331 of the Code of Civil Procedure is in the following language: "The husband can in no case be a witness against the wife, nor the wife against the husband, except in a criminal proceeding for a crime committed by the one against the other, but they may in all criminal prosecutions be witnesses for each other." In *Wolford v. Farnham*, 44 Minn., 159, there was considered a statute having a similar provision to that just quoted, and it was there held that the district court properly excluded the

evidence of the husband upon the wife's objection thereto. In *Blanchard v. Moors*, 85 Mich., 380, the supreme court of Michigan held, under a similar statute, that the proposed evidence of the husband as to an alleged fraudulent transfer of property by him to his wife was inadmissible over the objection of his wife. No adjudged case has been cited at variance with the conclusions of the courts above reached, and we believe the language of the statute is susceptible of no other construction. The rulings of the district court were right and its judgment is therefore

AFFIRMED.

THE other commissioners concur.

JOHN FITZGERALD V. AXEL MEYER.

FILED MAY 9, 1893. NO. 5072.

1. **Review**: EVIDENCE. Where the burden of proof is upon the plaintiff to establish the *bona fides* of a chattel mortgage whereunder he claims, a verdict in favor of defendant will not be set aside on the ground that the verdict is not sustained by the evidence, unless the evidence offered by plaintiff is of a clear and convincing character.

2. ———: INSTRUCTIONS: ISSUE NOT WITHIN PLEADINGS: HARMLESS ERROR. A judgment will not be disturbed because of an instruction submitting to the jury an issue not within the pleadings, where the only effect of such an instruction must have been in favor of the party complaining.

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

Breckenridge, Breckenridge & Crofoot, for plaintiff in error.

Connell & Ives, contra.

IRVINE, C.

This is an action of replevin for a pair of mules, by the plaintiff in error against the defendant in error. The case has once before been in this court, and is reported in 25 Neb., 77, where a general statement of the case appears. A new trial in the district court resulted in a verdict in favor of the defendant.

One of the assignments of error is the refusal of the court to give certain instructions asked by the plaintiff, but the substance of these instructions was given by the court of its own motion and plaintiff in error in his brief does not urge this assignment.

Under the assignments that the verdict was not sustained by the evidence, that it was contrary to law and contrary to the instructions, plaintiff in error urges the insufficiency of the evidence. No complaint is made of the general effect of the instructions given, and they certainly state the law as favorably to the plaintiff in error as could be asked.

The plaintiff, in his petition, claims the property under a chattel mortgage. This mortgage was given in January, 1885, and in May following the mortgagor executed to the plaintiff a bill of sale covering this and other property. It seems to have been urged by the defendant below that the transfer by the bill of sale abrogated the mortgage by way of merger, and the jury was fully instructed upon the law relating to this issue. No change of possession followed either transfer, and the burden of proof was upon the plaintiff to establish *bona fides*. The only evidence offered for this purpose was that of plaintiff's agent, who testified that the mortgagor was indebted to plaintiff at the time the mortgage was made and that the mortgage was given to secure such indebtedness. The amount of the indebtedness is not disclosed, nor is its source, nor were any of the circumstances attending the execution of the mortgage elicited, or sought to be elicited. Whether this testimony was

sufficient to overcome the presumption of fraud in a chattel mortgage not accompanied by change of possession was for the jury to determine, and we cannot say that upon such meagre evidence it was bound to determine the question in favor of the plaintiff. Moreover, there was absolutely no evidence of the circumstances attending the execution of the bill of sale, and there is evidence that when the controversy first arose between plaintiff and Furay, who bought the mules from the mortgagor and sold them to defendant, Furay and plaintiff's agent consulted Mr. Connell, and the agent, in support of plaintiff's claim, produced and claimed under the bill of sale, and did not produce or mention the mortgage until after Mr. Connell had advised Furay that the bill of sale was insufficient. This evidence warranted the jury in finding that the mortgage had, by the intention of the parties, merged in the bill of sale. Upon either of these points the jury may have based its verdict and was warranted by the evidence in so doing.

The court instructed the jury, in effect, that if it found that after the bill of sale was made the vendor retained possession of the property, the sale would be presumed to be fraudulent as against subsequent purchasers in good faith, but that this presumption might be rebutted by evidence showing that the sale was made in good faith and without any intent to defraud such purchasers. The giving of this instruction is assigned as error upon the ground that plaintiff was not claiming under the bill of sale but under the mortgage alone. Plaintiff contends that an element not in issue was thus injected in the case. Even if this be so, the error was without prejudice to the plaintiff. Had the court withheld this issue altogether from the jury, the plaintiff's case would have rested entirely upon the mortgage. Under the instruction as given, there was still left an opportunity to find for the plaintiff in case the jury found that the mortgage had merged in the sale. It is only where the giving of an instruction foreign to the issues may

mislead the jury to the prejudice of the unsuccessful party that he may complain.

AFFIRMED.

THE other commissioners concur.

ELIAS L. EMERY, APPELLEE, V. SAMUEL R. JOHNSON, APPELLANT.

FILED MAY 16, 1893. No. 3813.

Ejectment: EVIDENCE: REVIEW. Upon appeal, as to equitable issues, the decree of the district court will be reversed when it is clearly against the preponderance of the evidence, upon which such issues were determined.

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

Cavanagh, Atwell & Thomas and *Scott & Scott*, for appellant.

Hall, McCulloch & English, contra.

RYAN, C.

On the 2d day of November, 1887, Elias L. Emery filed in the district court of Douglas county, Nebraska, his petition in ejectment, for the possession of a strip of land which the plaintiff alleged had been wrongfully withheld from him by the defendant Samuel R. Johnson since June 1, 1878.

The said defendant answered December 3, 1887, denying the ownership, right of possession and every other right of plaintiff as to the strip of land in controversy, and admitting that defendant had been in possession thereof since June 1, 1878, but denying that said possession was

wrongful. The answer further alleged that defendant had been in the lawful, peaceful, and uninterrupted possession since November 7, 1877, of the following described premises, situate in the city of Omaha, county of Douglas, state of Nebraska, to-wit: The west part of lot 2 in Capitol addition to the city of Omaha, commencing at the northwest corner of said lot, running thence south on its west line 332 feet to the north line of Douglas street, thence east 83½ feet, thence north 332 feet to the south line of Dodge street, thence west 83½ feet to the place of beginning, said premises including the premises described in the petition of plaintiff; that plaintiff and Mary E. Emery, who is the wife of the plaintiff, claim and pretend to be possessed of an estate or interest in the south fourteen feet, more or less, of said premises, but that said claim and pretense is without any right whatever, and that said Emerys have of right no estate or interest whatever in said property or any part thereof.

The defendant further alleged that on or about November 1, 1877, the said Emerys sold to defendant the premises above described and that on November 7, 1877, the said Emerys executed and delivered to defendant a deed wherein the premises so sold and conveyed were by mistake described as "the west part of lot 2, Capitol addition to Omaha city, commencing at the northwest corner of said lot 2, running thence south to the west line of said lot 318 feet, thence east 83⅓ feet, thence north 318 feet to the south line of Dodge street, thence east 83½ feet to the place of beginning, whereas it was the understanding, contract, and agreement by and between the said parties that the said property so purchased by defendant should include all that part of said lot 2 extending from the northwest corner thereof to such a distance south as that when Douglas street should be opened in front of said premises the south end of the property so conveyed should extend to and constitute the north line of said Douglas street."

The answer further alleged that at the time of the aforesaid purchase the said Douglas street had been opened up to a width of eighty feet to the east line of the property above described, but that immediately in front of said premises said Douglas street has since been opened up to a width of about sixty-six feet; that the defendant and the above named vendors all supposed that when said street was opened up it would be eighty feet in width in front of said premises, but, as above stated, the property conveyed was to extend to the north line of Douglas street, whether the same should be eighty feet, more or less, in width. The answer closed with a prayer for the relief consistent with the above allegations of the answer.

There was a reply denying the above averments upon which the defendant based his claim for the relief prayed in his answer.

On February 23, 1889, a decree was entered in favor of the plaintiff, in which it was ordered and adjudged that the defendant, as against Emerys, had no equitable title to the fourteen feet in the answer described, and that the equitable claim made by defendant thereto be dismissed. An appeal from this decree brings this case before us for review.

The contention is as to a strip of land fourteen feet wide across the front of lot 2 above described. At the time of the conveyance to Johnson, Douglas street had not been laid out in front of lot 2 aforesaid, but for the distance it had been laid out its width was eighty feet. It was subsequently laid out and opened in front of said lot with a width of but sixty-six feet, and the difference between said eighty feet and sixty-six feet, that is fourteen feet, is the subject-matter of this appeal.

The evidence of Johnson was to the effect above set out in his answer; he distinctly stated in his testimony that the plaintiff in express terms represented that Douglas street would be eighty feet in width along the front of said lot 2,

and that he relied upon said representation in his purchase, and that as said purchase was only of a part of said lot 2, it was necessary to describe the tract purchased by metes and bounds, and that the distance southward from the place of beginning was described by such number of feet as would reach the north line of Douglas street when it should be extended from its then terminus. In favor of the reasonableness of this testimony it is impossible to ignore the fact that if the grantor is allowed to retain the fourteen feet in dispute, the property of the defendant will, by that strip, be cut off from Douglas street. The defendant in testifying remarked that he would not have purchased the property with the right of ingress and egress upon Douglas street cut-off, and that seems very probable. The testimony of the defendant was clear, candid, and convincing. On the other hand, the evidence of the plaintiff, as well as his version of the facts, showed nothing but a disposition to rely solely upon the description embodied in the deed of conveyance. For instance, he was asked, "What was the talk, if any, at the time that purchase was made? State to the court the full particulars. Ans. I did not have any talk; I sold him 318 feet of ground long and 83½ feet wide." The court said, "Let him state what was said and done at the time the deal was made." The plaintiff thereupon answered, "I made Mr. Johnson a deed to the piece of ground—described it in the deed. I gave him the numbers." On his cross-examination he admitted that he expected Douglas street would be eighty feet wide, indeed, he favored its being 100 feet in width—supposed it would be 100 feet wide, and that twenty feet would be taken off the 318 he sold to Johnson.

There was no evidence whatever that would tend to show that Johnson did not take possession of the whole tract sold him, inclusive of the fourteen feet in dispute, when the deed was made to him in 1877, until a year or two before the trial, when plaintiff put a fence along the strip in dis-

pute. As plaintiff in his petition alleged that the defendant had been in possession of the strip in dispute since June 1, 1878, and as plaintiff's evidence founds no right upon the existence of this fence, its existence has no significance in favor of the plaintiff. It is not, therefore, an assumption unfounded in the pleadings and evidence, that from the date upon which the deed from Emerys to Johnson was recorded, November 8, 1877, until November 2, 1887, a period of almost ten years, Johnson had been in the occupancy and possession of the strip in dispute. While this lacks six days of the full period necessary by possession to acquire title, and therefore the statute of limitations had not, when this suit was commenced, barred plaintiff's right of action, yet this condition of affairs, unquestioned for so long, militates very seriously against plaintiff's technical assertion of title. Upon full consideration of the evidence and pleadings the judgment of the district court is reversed. A decree will be entered in this court in accordance with the prayer of defendant's answer.

DECREE ACCORDINGLY.

THE other commissioners concur.

MARY E. MCCONNELL, APPELLEE, V. JOHN MCCONNELL, APPELLANT.

FILED MAY 16, 1893. No. 4897.

1. **Review**: CONFLICTING EVIDENCE. When the evidence upon which a decree has been entered is conflicting, the finding of the district court will not be disturbed upon appeal if there is sufficient evidence upon which such decree may be fairly based.

2. **Divorce**: RESIDENCE. In a proceeding for a divorce the statutes of Nebraska recognize the right of each party to reside in a

county different from that in which the other resides; whether or not they so reside, is a question of fact to be determined upon the evidence.

3. ———: CONDONATION: EVIDENCE. A wife may condone the cruelty of her husband, but the husband, to avail himself of such condonation, must establish the same by clear and satisfactory proofs.

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

Chamberlain Bros. & Rood, for appellant.

S. P. Davidson, contra.

RYAN, C.

A petition for divorce was filed in the district court of Johnson county March 14, 1891, wherein the plaintiff alleged that she was then, and for the immediately preceding twenty years had been, a resident of said county; that she was married to the defendant March 10, 1886, since which time she had treated defendant and acted toward him as a chaste and dutiful wife, until by the wrongs of said defendant she was compelled to leave him. The petition further averred that for the three years just preceding the averments thereof the defendant, without provocation, had been guilty of extreme and repeated acts of cruelty toward plaintiff, by assaulting, shaking, and striking her, and seizing her by the throat, throwing her, calling her a damned liar; and that by reason of the cruel treatment of the defendant plaintiff was, at the time of filing said petition, in mortal dread and fear of the defendant, and had thereby been compelled to leave him. The petition further stated that there was born to plaintiff and defendant as the fruit of their marriage a son, who was, at the time this suit was instituted, of the age of seventeen months, and that the defendant was the owner of certain real and personal property. There was a prayer for a divorce, the custody of the child, and alimony.

An answer was filed in due time, in which the defendant admitted the marriage with plaintiff, and the birth of a son at the time stated by the plaintiff. Each other averment of the petition was denied. The defendant by his answer alleged that during all the time mentioned in the petition the plaintiff had resided and cohabited with the defendant, and that any and all acts of alleged cruelty set forth in the petition had been freely condoned by the plaintiff, and that defendant, at all times since, had treated plaintiff with kindness, and had been a faithful and indulgent husband to her. The defendant in his answer prayed that the plaintiff's petition be dismissed, and for the care and custody of the child above referred to, and for general equitable relief. By an amendment to his answer the defendant alleged that the district court of Johnson county had no jurisdiction of the case or the parties thereto, or either of them, for the reason that at the time the action was commenced neither plaintiff nor defendant resided in said county of Johnson. There was filed a reply in denial of each averment of the answer.

On the 24th day of April, 1891, a trial of the issues was had and a decree of divorce entered as prayed in plaintiff's petition, with alimony, and the custody of the child of the parties.

In so far as such questions of fact were in issue there was evidence from which the district court could properly have found that the charges of cruelty were proved. The evidence on plaintiff's behalf was detailed by witnesses orally examined in the presence of the court, and we are, therefore, without the means of considering the appearance of the witnesses, which may have greatly influenced the presiding judge in his consideration of their testimony. Under such circumstances, if the evidence is nearly in equipoise, the decree will not upon appeal be disturbed, because against the weight of the evidence as it might be estimated in the appellate court. For our purpose, therefore, it must

be assumed that the charges of cruelty made in plaintiff's petition were sufficiently proved to sustain these allegations of the defendant's misconduct toward the plaintiff. Upon the record, there then remains only two questions—one jurisdictional in its nature, that is, whether or not at and previous to the filing of plaintiff's petition she was a resident of Johnson county; the other, whether or not defendant's cruel treatment of plaintiff has, since its occurrence, been condoned by her.

1. The evidence shows that the parties to this action resided together in Johnson county from the date of their marriage, in 1886, until January, 1891, when they removed to Lincoln county in this state. There they cohabited together as husband and wife until March 11, 1891. The appellee urges that Mrs. McConnell agreed to accompany her husband in his removal from Johnson county to Lincoln county upon, and influenced by, his assurances that he would treat her kindly and desist from all cruelty and unkindness towards her. It does not seem that these express assurances of future proper conduct ought to cut a great figure in determining whether or not plaintiff was justified in going with her husband to Lincoln county. The marriage relation itself implied just such line of conduct as it is claimed the defendant promised to follow toward his wife. She had a right to expect him to desist from cruelty toward her and to assume that he would treat her with uniform kindness. It was no more than what he had solemnly promised when she became his wife, and a renewed promise thereafter made the obligation no more binding. But his cruel treatment still continued after the removal to Lincoln county, until by a *habeas corpus* proceeding, instituted by her own father, Mrs. McConnell and her son were brought back to Johnson county on March 11, 1891, where plaintiff has, as she alleges, ever since resided. It is impossible to avoid a very strong suspicion that this *habeas corpus* proceeding was a mere ruse to en-

able plaintiff to return to Johnson county, notwithstanding an appeal has been taken from the judgment of dismissal in the county court. There could be little doubt, however, upon the testimony that since March 11, 1891, plaintiff has resided in Johnson county. The residence of the wife is, for some purpose it is true, presumed to be that of her husband. In section 6, chapter 25, of the Compiled Statutes it is provided that a divorce "may be decreed by the district court of the county where the parties, or one of them, resides," thus expressly recognizing the possibility in divorce cases of either party residing in a county different from that in which the other resides. This language overcomes the mere presumption that the wife's residence must be that of her husband. It was therefore possible for Mrs. McConnell to have become a resident of Johnson county, even though her husband at the time resided in Lincoln county. Whether she did become such resident was a question of fact for determination by the district court. Its finding was in her favor, and as there was evidence to sustain it, we are bound to assume that at the time this action was brought Mrs. McConnell was residing in Johnson county, as alleged, and that therefore the district court had jurisdiction to render the decree prayed and granted.

2. The defendant, however, insists that by reason of the cohabitation of plaintiff and defendant in Lincoln county, superinduced by the promises of the defendant of a complete cessation of cruelties, and the substitution therefor of uniformly kind treatment toward his wife, there was a complete condonation of past cruel and unkind treatment. As has already been observed, this promise was simply to do what, from the marriage relation, is implied as the duty of the husband to his wife. The argument of appellant seems to be founded upon the assumption that the consideration to uphold the promise of the husband as a contract must have been a promise on the part of the wife,

in this case, to accompany him to Lincoln county and there live with him as his wife. If we are right in assuming that the duty of the husband was to observe the very commendable course of conduct which he promised to follow towards his wife, an agreement merely to perform that duty would not, in law, constitute a sufficient consideration to sustain a contract solely dependent thereon. It would too much resemble the promise of the maker of an overdue note to pay the amount thereof as constituting a sufficient consideration for an additional extension of the time of payment. In the case under consideration, however, there was proved no express promise of condonation of former cruelty. Whatever condonation there may have been must be implied solely from the cohabitation of Mrs. McConnell with her husband. It is true that under some decisions condonation of cruel treatment may be inferred from the conduct of the wife, but this inference is controlled or modified by the situation of the parties and the circumstances of each particular case. It is held in all cases, however, that the evidence to establish a condonation must be clear and convincing. In the case at bar the evidence shows that the wife was in ill health and under medical treatment; that she was not at all strong, physically, and that owing to nervous prostration it was with great difficulty that she attended to her household duties. It was under such circumstances that she was abused in coarse language, roughly shaken, and even choked and struck by her husband. The welfare of her son, a mere infant, may have strongly impressed the necessity of forbearance on this mother's part, and of one in her nervous, feeble condition it is too much to require the vigorous energy which the abandonment of her husband necessarily would imply. The rule which would in all cases infer the forgiveness of physical violence from the mere fact that the wife chose rather to bear the ills she had than fly to those she knew not of, too much resembles that obsolete relic of barbarism

which recognizes the right of the husband, by corporal punishment, gently to correct his wife. We find the existence of no such facts as would justify a finding or inference of the appellee's condonation of the appellant's misconduct. The judgment of the district court is

AFFIRMED.

THE other commissioners concur.

CARL KRIESEL V. MARTIN EDDY ET AL.

FILED MAY 16, 1893. No. 4595.

1. **Exemptions**: VALIDITY OF CLAIM: INTENTION: A JUDGMENT DEBTOR'S RIGHT to exemption under sections 522 and 523 of the Code of Civil Procedure is in no way dependent upon the mere intent with which the exemption is claimed, provided that in making his claim for exemption the execution debtor complies strictly with the statute conferring his right thereto.
2. ———: CLAIM: AN AFFIDAVIT filed as required by section 522 of the Code of Civil Procedure, which states that the affiant has certain enumerated property of the value therein detailed, which value in the aggregate is less than $500, and that the affiant has no other property, sufficiently complies with the requirements as to enumeration and value of said execution debtor's property to entitle him to the benefit of the said section of the statute.
3. **Execution**: CLAIM OF EXEMPTION: INVENTORY: SALE OF EXEMPT PROPERTY: LIABILITY OF OFFICER Where a sufficient inventory has been filed to entitle an execution debtor to the exemptions provided in sections 522 and 523 of the Code of Civil Procedure, it is the duty of the officer to proceed further only as provided in said sections, and if, notwithstanding the due filing of the inventory, the officer holding an execution, without compliance with the statute in such cases made and provided, sells the property held by him under his execution, he is liable on his bond for the value of the property so sold, at least to the limit of $500.

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

Charles W. Haller, for plaintiff in error.

Charles B. Keller, contra.

RYAN, C.

This action was brought by Carl Kriesel against Martin Eddy, a constable, and said constable's bondsmen, to recover the value of certain goods taken under an execution by said constable, which goods, notwithstanding said Kriesel had in the meantime filed an affidavit claiming his exemptions, the said constable sold for the satisfaction of the execution in his hands. The answer admitted that Eddy, at the time of the occurrence of the transaction complained of, was a constable, and that the sureties on his bond were as alleged in said petition. Defendant also admitted that the goods were levied on and sold under the execution in the hands of said constable. Each other allegation in the petition was denied. The jury returned a verdict for the defendant as directed by the court. There was introduced upon the trial a certified copy of the affidavit for exemption, which was in the following language, omitting the title of the case and the name of the court in which it was filed:

"AFFIDAVIT FOR EXEMPTION.

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

"Carl Kriesel states on oath that he is one of the defendants in the above entitled action; that the said Kriesel is the head of a family, for that he, the said Kriesel, has dependent upon him for support, and the said Kriesel does support, his two minor daughters, Elizabeth Kriesel, aged eleven years, and Margareta Kriesel, aged eight

years; also his, said Kriesel's, aged mother. Said Kriesel owns, besides the tools and instruments kept by him, the said Kriesel, for the purpose of carrying on his trade of shoemaker (said tools and instruments are to be found at 1503 Howard street, Omaha, Nebraska, and are not worth more than $15), and besides his, said Kriesel's, necessary clothing, worth only $75, and to be found at said No. 1503 Howard street, and on said Kriesel's back, nothing besides the goods which have been seized in this action, which are described as follows: Four (4) dozen pairs men's slippers, seven (7) dozen pairs men's shoes, and one (1) dozen pairs boys' shoes; the said shoes are not worth more than $203. None of the said property above named is due or owing for clerks', laborers', or mechanics' wages, or for money due and owing from said Kriesel as attorney at law for money or other valuable considerations received by said Kriesel for any person or persons. Said Kriesel hereby claims all of said property as exempt."

This was subscribed and sworn to by said Carl Kriesel. There was other evidence submitted to the jury to establish the claim made that Kriesel was a citizen of Germany; was not in fact the head of a family; that he had been divorced; that he had corresponded very little with his relatives in Germany, etc. This was met with other evidence of an opposite tendency. The presiding judge, however, seems to have acted upon the theory that the sufficiency of the affidavit filed by Kriesel determined the rights of the parties. He therefore simply instructed the jury to find for the defendant, which was accordingly done.

In argument, the defendants in error insist that the evidence showed that Kriesel had agreed with Hermerdinger & Co. that the avails of his exemptions would be paid to said firm, and that therefore the claim of exemption was simply an attempt on Kriesel's part to take the goods levied upon by one of his creditors and give them to another. It has been held by this court, in *Gillespie v. Brown*,

16 Neb., 457, that the right to sell property exempt from execution is a personal privilege and that such property as the law exempts from execution sale can be mortgaged, and that the right of such mortgagee would prevail over that of a judgment creditor whose execution, after the making of the mortgage, had been levied upon the said mortgaged property. It results, therefore, that the agreement of Kriesel to convey the exempt property, as soon as he obtained dominion over it, to Hermerdinger & Co. would not, even if proved, defeat or qualify his right to such exemption as the statute gave him.

The only other question discussed by defendants in error is the sufficiency of the affidavit filed to entitle Kriesel to the statutory exemption to an amount in value of $500 of the property levied upon. The criticism on this score is thus stated: "This affidavit does not state that he is a citizen or resident of the state of Nebraska; does not state that he owns neither lands, town lots, nor houses subject to exemption under the laws of this state." Let us see how correct this is, as a matter of fact, tested by the affidavit itself. Its language is as follows: "Said Kriesel owns, besides the tools and instruments kept and used by him, said Kriesel, for the purpose of carrying on his trade of shoemaker (said tools and instruments are to be found at No. 1503 Howard street, Omaha, Nebraska, and are not worth more than $15), and besides his, said Kriesel's, necessary clothing, worth only $75, to be found at said No. 1503 Howard street, and on said Kriesel's back, nothing besides the goods which have been seized in this action, which are described as follows, to-wit: Four (4) dozen pairs men's slippers, seven (7) dozen pairs men's shoes, and one (1) dozen pairs boys' shoes; the said shoes are all not worth more than $203." In this excerpt the affiant states that besides his clothing and tools of the aggregate value of $90, the affiant owns nothing but certain shoes and slippers of the value of $203. If the affidavit under the stat-

ute should have shown that the affiant owned neither lands, town lots, nor houses, which we do not now determine, such requirement was fully met by the above language. This statute, providing for exemptions under consideration, does not require the affiant to state whether or not he is a resident or citizen of the state of Nebraska. The evidence adduced on the trial of this case shows that without question Kriesel was a resident of Omaha, even if that was necessary. Such statement in the affidavit for exemption is nowhere required. The affidavit, which contained the inventory, was amply sufficient to meet all the requirements of the statutes, and entitle Kriesel to the exemptions contemplated by sections 522 and 523 of the Code of Civil Procedure. Upon the filing of such an affidavit containing an inventory of all the property owned by Kriesel, the law devolved upon the constable holding the execution but one course of action, and that consisted in his calling three disinterested freeholders of Douglas county to appraise said property levied upon at its cash value, after which the execution debtor was entitled to make selection from the property appraised as provided by statute. In this case, the constable ignored the affidavit containing the inventory, and sold all the property which he held under his execution. This rendered him liable for the fair value of said property, at least to the amount of $500, and there was no issue in the district court properly triable except such value. Officers holding executions should act under the statutes as well to protect the judgment debtor in the enjoyment of the exemption provided by statute, as to collect the judgment upon which the execution issued. Such officers may by arbitrarily overriding the statute, prevent the beneficent operation of the exemption law in favor of the debtor. This is but one species of oppression in office, for which, such officers as are guilty will be held to strict accountability, if their victims are able to apply to the courts for redress. The district court acted upon an erroneous pre-

sumption as to the affidavit for exemption, and its judgment is

REVERSED.

THE other commissioners concur.

OMAHA COAL, COKE & LIME COMPANY V. PATRICK H. FAY ET AL.

FILED MAY 16, 1893. No. 4756.

1. **Appeal from County Court:** ORDER FOR TRANSCRIPT: NEGLECT OF COUNTY JUDGE. A defeated party to an action in the county court, who promptly orders a transcript of the proceedings to be prepared for the purpose of appealing the case, will not be denied the right of appeal because the county judge fails to prepare the transcript within thirty days after the rendition of judgment.

2. ———: DELAY IN FILING TRANSCRIPT: OBJECTION: WAIVER. Where a transcript for the purpose of appealing a case to the district court is filed after the statutory period has elapsed, the appellee by filing pleadings and contesting the case on its merits waives his right to object to the delay, even though this action be taken after the overruling of a motion by him made challenging the validity of the appeal.

3. **Sale of Commodity:** IMPLIED WARRANTY. Where one contracts to supply a commodity in which he deals, to be applied to a particular purpose of which he is aware, under such circumstances that the buyer necessarily trusts to the judgment of the vendor, there is an implied warranty that the commodity shall be reasonably fit for the purpose to which it is to be applied.

4. ———: ———: BREACH OF CONTRACT: MEASURE OF DAMAGES: INSTRUCTIONS. Where the law provides a definite measure of damages the court should instruct the jury specifically how the damages should be assessed, and an instruction stating a general principle in the admeasurement of damages, broader than is applicable to the particular case presented, and not qualified by other instructions, is erroneous.

5. ———: ———: ———: CONSEQUENTIAL DAMAGES: PLEADING: INSTRUCTIONS. Where only consequential damages are claimed they must be specially pleaded, and in such cases the jury should be confined by the instructions in assessing the amount of recovery to the consideration of such damages as are so pleaded.

6. ———: BREACH OF WARRANTY: CONSEQUENTIAL DAMAGES from breach of warranty in the sale of chattels cannot be recovered where the vendee, by exercising ordinary prudence and judgment, could have avoided the consequences complained of.

7. ———: ———: CONSEQUENTIAL DAMAGES: RECOVERY. A sold lime to B for the purpose of plastering a building, the circumstances justifying a finding that A impliedly warranted the lime to be reasonably fit for the purpose intended. The lime was used by B in plastering the building. The work proved defective, and the evidence sustained a finding that the defect was in the quality of the lime. B thereupon papered the side walls and replastered the ceilings with another material. He then brought suit against A to recover the cost of such papering and replastering. *Held*, That in such case this expense could not be recovered unless it was shown: First, that the defect in the lime could not, by a person accustomed to use such materials, have been discovered before it was used in making plaster and applied to the walls, and, secondly, that the mode of remedying the defect was reasonable and did not exceed in cost that of replastering with the same kind of material of good quality.

8. ———: IMPLIED WARRANTY: WHEN BROKEN. In the sale of a special kind of a known general material for a particular purpose, the circumstances implying a warranty that the material is reasonably fit for the purpose intended, if the special material sold requires a different manner of use or treatment in applying it to the purpose intended than that required in the use or treatment of the same general material of other kinds, and this different requirement is known to the vendor and not to the vendee, the warranty is broken if the vendee uses and treats the material as similar material is customarily treated, and if so used it does not prove reasonably fit for the purpose.

9. ———: ———: ———: INSTRUCTIONS. An instruction is erroneous which states the foregoing rule but omits the requirement of a warranty in the sale, the fact of such warranty being in issue, and leaves the jury to infer that there may in such case be a recovery in the absence of a warranty.

10. ———: BREACH OF WARRANTY: TRIAL: EVIDENCE: REVIEW. The trial court may, in its discretion, require that offers of evi-

dence objected to be made in such a manner as not to reach the ears of the jury, and should adopt this course where the offer to be made threatens to prejudice the party objecting if heard by the jury. A verdict will not, however, be disturbed because of the refusal of the trial court to so order, unless it is apparent from the record that there was an abuse of discretion.

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

Howard B. Smith and *Clinton N. Powell*, for plaintiff in error.

Brome, Andrews & Sheean, contra.

IRVINE, C.

The defendants in error sued the plaintiff in error in the county court of Douglas county, asking judgment on account of an alleged breach of warranty in the sale of lime by plaintiff in error to defendants in error. Judgment was rendered December 30, 1889, in favor of defendants in error. An appeal bond was filed and approved within the time limited by law, but no transcript was filed by plaintiff in error until February 3, 1890. Upon the filing of that transcript the defendants in error moved for judgment in the district court. The motion does not appear in the transcript, but from the statements of counsel, and the orders made, it appears to have been a motion made under section 1011 of the Code. This motion was heard upon affidavits which are incorporated in a bill of exceptions, and on March 8, 1890, the motion was by the district court overruled. Thereupon the defendants in error filed their petition in the district court. Issues were joined and the case tried on its merits, resulting in a verdict for defendants in error in the sum of $756.96. The plaintiff in error seeks in this proceeding to reverse that judgment.

The greater part of the argument on behalf of defend-

ants in error is devoted to questions arising out of the state of facts above set forth. While no proceedings in error were instituted by the defendants in error here, the plaintiffs below, for the purpose of reviewing the action of the district court in refusing to enter judgment in their favor on account of the delay in filing the transcript in the district court, they contend that that action of the district court was erroneous, and that inasmuch as it presented a question of jurisdiction the plaintiff in error cannot complain of the final judgment against it, because upon the face of the record the defendants in error were entitled to have entered in the district court a larger judgment.

The question thus raised we do not deem it necessary to consider, and this for two reasons. In the first place we cannot say that the court erred in overruling the motion for judgment. While the affidavits used upon the hearing of the motion were conflicting, the preponderance of the evidence contained therein was to the effect that the attorney for plaintiff in error, immediately upon the rendition of judgment in the county court, ordered a transcript of the proceedings for the purpose of appeal to be prepared for his use; that the clerk having charge of that business overlooked this request and neglected to prepare the transcript until February 3; that on January 28 the attorney referred to was taken ill and was confined to his house until after the expiration of the time limited by law for perfecting his appeal. While we do not decide that the illness of a party or his attorney is sufficient excuse for failing to perfect an appeal within the time limited by law, the case of *Cheney v. Buckmaster*, 29 Neb., 420, is authority for holding that where a transcript was ordered promptly a party intending to appeal is justified in relying upon the presumption that it will be prepared within a proper period, and that he cannot be deprived of his appeal by the failure of the county judge to so prepare it. The plaintiff in error ordered the transcript immediately upon the ren-

dition of judgment, and he was not required by law to procure it and file it in the district court within any shorter time than thirty days after the rendition of judgment. The transcript was not prepared within this time, and even had the attorney not been ill, had he gone to the county judge to request the transcript upon the thirtieth day it would not have been ready. We think, therefore, that the district judge was justified by the evidence in overruling the motion for judgment.

The second reason why the defendants in error cannot now complain of the delay is found in the fact that they did not rest upon their motion but proceeded to file pleadings, and to try the case upon its merits. In so doing they waived their rights to object to the delay. (*Goodrich v. City of Omaha*, 11 Neb., 204; *Steven v. Nebraska & Iowa Ins. Co.*, 29 Id., 187.) It is true that in the cases just cited a general appearance had been entered before any action was asked seeking to dismiss the appellate proceedings; but these cases establish the general proposition that the district courts have jurisdiction of the subject-matter of such appeals, and that a failure to perfect the appeal within the time merely goes to the jurisdiction of the court over the persons of the appellees. Upon this general principle it is clear that a defect in the proceedings requisite to give jurisdiction is cured by a subsequent general appearance. In *Bazzo v. Wallace*, 16 Neb., 290, a motion was filed in this court to dismiss an appeal, and it was held that a stipulation filed subsequently constituted a general appearance and a waiver of rights under the motion.

It is clear from the foregoing considerations that the defendants in error cannot, upon the grounds urged by them, preclude the court from examining the questions raised upon the trial of the case and presented in the petition in error.

In order to properly present the views of the court upon the merits of the case a more specific statement of the facts

will be of assistance. The defendants in error were engaged as partners, under the name of Fay & Byrne, in the business of plastering buildings. The plaintiff in error was a dealer in coal, lime, and other materials. About the 1st of July, 1889, Fay & Byrne contracted with the plaintiff in error for the purchase of lime to be used in plastering a building known as the Merchants' Hotel, making known to the plaintiff in error the purpose for which they desired the lime. The first of this lime was delivered July 5, and the plaintiff in error continued to deliver it at intervals, and Fay & Byrne used it in making mortar with which they placed the "brown coat" on three floors of the hotel. After this brown coat had been applied, and as Fay & Byrne were proceeding to apply the finishing coat, the plastering already applied began to drop from the walls and ceiling. Fay & Byrne finally covered the side walls of these three stories with paper in order to prevent the falling of the plaster, and replastered the ceiling with a material known as adamant. They then brought suit against the plaintiff in error alleging a warranty in the sale of the plaster to the effect that it was of first-class and best quality, and fit and proper for use in plastering hotels. In a second count of the petition they alleged the warranty to be that it was reasonably fit and proper for the purpose aforesaid. They further alleged that the lime was not of the quality warranted, and that by reason thereof the plaster upon the building was not good, and that they were compelled to replaster the ceilings and paper the walls as before stated. They pray damages for the cost of this work.

The answer admits the sale of the lime and denies the other allegations of the petition. It further pleads a set-off which was admitted in the reply and need not be further noticed.

It is urged that there is no evidence at all to show a warranty in the sale of the lime. The evidence offered by

Fay & Byrne lacks much of being conclusive upon this point, but we think there is sufficient to sustain the verdict. Fay testifies that he made the contract for the lime; that Mr. Hill, an officer of the company, asked him (Fay) if his firm was going to do the plastering on the Merchants' Hotel, and being informed that they were, Hill said they had lime that was far superior to anything on the market, and spoke of its good qualities. Fay said he was timid about experimenting on any new lime, and Hill said that it would be no experiment; that the lime was guaranteed to every man they sold it to, and if plaintiffs bought it they would guarantee it to them; that he had not at that time used any of this lime; that after this conversation with Hill he consulted his partner, and some time later told the officers of the company that if they would guarantee the lime plaintiffs would take it, and they said "all right." It appeared on cross-examination that before work began on the Merchants' Hotel, Fay & Byrne had used some of the lime in question upon another building, and plaintiff in error contends that the conversation narrated by Fay referred to this purchase, and not to the lime purchased for the hotel. Fay explains that he had the first conversation with Hill before buying the lime for the other house but did not complete the purchase until the other house was finished.

Mr. Byrne testifies that he talked with Hill before the purchase, and Hill said the lime would do better work than any in the market, and that he would guarantee it to do as he said. It also appears in evidence that a portion, at least, of the lime used in the hotel was not shipped to Omaha until after the contract was made, and as to this portion, at least, Fay & Byrne had no opportunities for inspection.

Whether this testimony is sufficient to establish an express warranty we need not determine. Where there is no opportunity to inspect the commodity, the rule of *caveat*

emptor does not apply. When one contracts to supply an article in which he deals, to be applied to a particular purpose so that the buyer necessarily trusts to the judgment or skill of the vendor, there is an implied warranty that it shall be reasonably fit for the purpose to which it is to be applied, and the better doctrine is that this rule applies to dealers as well as to manufacturers, and not to manufacturers alone, as the plaintiff in error contends. There is certainly sufficient testimony to warrant the jury in finding that Fay & Byrne justifiably relied upon the coal company to furnish lime suitable for the purpose to which they intended to apply it. The second count of the petition seems to have been framed very carefully in order to apply to this view of the case. There were no exceptions taken to the instructions given by the court upon the question of warranty, and the finding of the jury upon the evidence and these instructions cannot be disturbed.

It is also contended that, conceding the existence of a warranty, as claimed, there is no evidence that the lime failed to comply therewith. Without reviewing the evidence, which is very voluminous upon this subject, we will say that we deem it sufficient to sustain the verdict, although the writer, were he called upon to find the facts in the first instance, would very likely have found them for the plaintiff in error.

The court of its own motion instructed the jury as follows:

"If you find for the plaintiffs you will assess such damages as the evidence convinces you is just, deducting therefrom the amount of $298.87, admitted to be due defendant, with interest at seven per cent per annum from February 6, 1890, up to the 9th day of February, 1891."

At the request of the defendants in error the following instruction was given:

"When two parties have made a contract which one of them has broken, the damages which the other party ought

to receive in respect to such a breach of contract should be either such as may fairly and reasonably be considered as arising naturally—that is, according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. And if you find from the evidence in this case that defendant knew the purpose for which the lime sold plaintiffs was to be used, and warranted the same to be good lime, suitable for the purpose for which they knew it was to be used, and you further find from the evidence that the lime in question was not good lime, and was not suitable for the purpose for which defendant knew it was to be used, then your verdict will be for plaintiffs, and you will determine from the evidence what damages plaintiffs have sustained, and allow plaintiffs by your verdict such sum as the evidence shows the damages they have sustained amount to, bearing in mind that plaintiffs are entitled to recover in that event only such damages as may reasonably be supposed to have been contemplated by plaintiffs and defendant at the time the lime in question was sold."

Both of these instructions were excepted to by plaintiff in error, and they are the only instructions given on the measure of damages.

In giving the instruction last quoted the court stated the rule in *Hadley v. Baxendale*, 9 Ex. Rep. [Eng.], 341. This has been approved in *Sycamore Co. v. Sturm*, 13 Neb., 210, and is undoubtedly correct as a statement of a general proposition of law. But we do not think it should have been given in this case without further instructions confining the jury to such damages as under the pleadings and evidence would come within the rule. The damages claimed were consequential in their nature, and only such damages of that character could be recovered as were expressly pleaded; that is, the cost of replastering the ceiling and repapering

the walls. In cases of this character the rule of avoidable consequences applies. The defendants in error could not recover these items of expense if the defects in the lime might, by persons accustomed to the use of such articles, have been discovered before the lime was made into mortar and placed upon the walls. If Fay & Byrne did discover or should have discovered the defect before plastering the walls, they should not have proceeded to use the lime, and they could not hold the plaintiff in error liable for damages consequent upon the use of the lime after such discovery. This rule certainly applies in the case of articles readily purchasable in the market, where the vendee is not by force of circumstances compelled to proceed with the imperfect article delivered.

Furthermore, in cases of this character, where consequential damages are recoverable, the ordinary measure of those damages would be the cost of replacing the defective work with other material of the character and quality which should have been furnished in the first instance—in this case the cost of replastering the walls and ceiling with plaster. Another method was here pursued. The side walls were papered, and it is fairly inferable from the evidence that the cost of papering was less than that of replastering; but the ceilings were replastered with adamant, which is shown by the evidence to be more expensive than plaster. The cost of repairing the damage in this way would be a fair measure of damages, provided the method pursued was a reasonable method, and did not exceed in cost that of replacing the defective work with proper material of like character. These are matters of law which should have been stated to the jury in order that they might ascertain from the evidence whether or not the circumstances existed which would justify the allowance of such damages, and also to give them a definite rule for ascertaining the amount. The instruction given by the court of its own motion was so general that it gave the

jury no rule of damages whatever; that given at the request of the defendants in error did not restrict the jury to the damages pleaded, and did not state with sufficient certainty the rule for assessing the amount thereof or the conditions of recovery.

The errors above referred to require that the case should be reversed, but as a new trial will be necessary it will be proper to consider some of the other questions presented, which will probably recur upon a further hearing.

At the request of defendants in error the following instruction was given:

"You are instructed that plaintiffs were bound only to use the lime in question in the ordinary and usual manner, and the fact, if it be a fact, that the lime in question, in order to be properly prepared for plastering, required a different process, with respect to the slacking and mixing thereof, from the process and method ordinarily and usually used in slacking and mixing lime for such purpose, and you further find from the evidence that plaintiffs did not know of the peculiar quality of such lime, and could not be reasonably supposed to have possessed such knowledge, and you further find from the evidence that defendant did not communicate to plaintiffs the fact that the lime in question was of a peculiar quality, other and different from ordinary lime, and that its successful use for the purpose of plastering required that it be slacked and mixed in a manner other and different from the method usually employed with ordinary lime, and you further find from the evidence that plaintiffs did slack and mix the lime in question in the usual and ordinary manner, and exercised ordinary care and skill in and about the slacking and mixing thereof, then and in that event plaintiffs would be entitled to recover in this action, even though you should believe from the evidence that the lime in question was good lime, if you further find that plaintiffs sustained damage by reason of the use of such lime in the usual and ordinary

manner for the purpose for which it was purchased. Providing you find from the evidence that the defendant knew at the time of sale that the lime required a different process in respect to the slacking and mixing thereof."

It is urged that there was no evidence to which this instruction was applicable. We find, however, in the record evidence tending to show that the lime sold required a great deal of water in the process of slacking, and that when slacked with the amount of water customary with other limes, it became very hot and burned, and that lime used after being so burned impairs the quality of the plaster. We think this evidence justified an instruction of this general character, and that the instruction correctly states the law, except that by omitting all reference to the warranty it might leave the jury to infer that under the state of facts disclosed there might be a recovery in the absence of any warranty expressed or implied.

The plaintiff in error requested the following instruction:

"You are instructed that if you find from the evidence that any lime which slacks well will make good plaster, if properly mixed with other good materials in right proportion, and if you further find that the lime in question slacked well, you must find for the defendant."

This instruction was properly refused. So far as it was a statement of law, it was equivalent to telling the jury that if the lime, when properly used, was fit for the purposes intended there could be no recovery; this had already been covered in the court's instructions. So far as the instruction refers to specific facts, it relates purely to an inference of fact and not of law.

Objection is also made to the court's permitting counsel for defendants in error to make proffers of evidence in the hearing of the jury. By a long line of decisions it is established that the defendants in error, in order to preserve for review the rulings of the court in excluding evidence by them offered, were compelled to make profert of the

evidence. This rule may undoubtedly be used by designing attorneys, for the purpose of making unfair and prejudicial statements in the hearing of the jury. The trial court undoubtedly may, and when such an abuse is threatened should, require the offer to be reduced to writing, or to be made in some manner so as not to reach the jury. Whether the occasion demands this must generally be left to the discretion of the trial court, and we do not find in this record anything to warrant us in determining that the learned judge improperly excercised his discretion in permitting the offers to be made orally.

REVERSED AND REMANDED.

THE other commissioners concur.

STATE OF NEBRASKA V. JOHN E. HILL, EX-TREASURER,

AND

STATE OF NEBRASKA V. THOMAS H. BENTON, EX-AUDITOR OF PUBLIC ACCOUNTS.

FILED JUNE 5, 1893. NOS. 6093, 6094.

1. **Impeachment:** EX-OFFICERS OF STATE. The power of impeachment conferred by the constitution upon the legislature extends only to civil officers of the state, and this power cannot be exercised after the person has gone out of office.
2. **Private citizens** are not amenable to impeachment.
3. **The legislature** has no authority to prefer articles of impeachment against ex-officials.

IMPEACHMENT PROCEEDINGS before the supreme court commenced under the provisions of section 14, article 3, of the constitution. *Dismissed.*

P. H. Barry, C. D. Casper, and *George R. Colton*, managers.

George W. Doane, S. B. Pound, W. L. Greene, and *G. M. Lambertson*, for the state.

J. H. Broady, for defendant Hill.

R. D. Stearns and *John H. Ames*, for defendant Benton.

NORVAL, J.

The above entitled cases present for decision the same question, and, for sake of brevity, will be considered and disposed of together.

The legislature, on the 7th day of April, 1893, adopted articles of impeachment against the respondent Thomas H. Benton, late auditor of public accounts, charging him with having committed certain official misdemeanors while he was discharging the duties of the office aforesaid. On the 6th day of April, 1893, articles of impeachment against the respondent John E. Hill, ex-state treasurer, for misdemeanors in office, alleged to have been committed by him during the time he was treasurer of the state, were adopted by the legislature. The articles of impeachment against each of the respondents were presented to and filed in this court on the 10th day of April, 1893. Subsequently a plea to the jurisdiction was filed by each respondent, the two being substantially alike, which alleges, in effect, that this court should not take further cognizance of the said articles of impeachment exhibited and presented against him, because the respondent, at the time of the adoption of the same, and when the first resolution of impeachment against him was presented to the house of representatives, and at the time of the investigation which led up to said impeachment, as well as at all times since, and for a long time before the first action in relation to said impeachment

was taken and had, was not an officer of this state, but that he then was and ever since has been, and now is, a private citizen of the United States and of this state; that the office to which he had been elected, and which he had filled, expired on the first Thursday after the first Tuesday in January, 1893, and that at the general election in 1892 his successor was duly elected, who qualified, was inaugurated and installed into the office as the successor of the respondent, on the 14th day of January, 1893, and that not until long after the date last aforesaid was the investigation commenced which resulted in said impeachment.

The question presented for our investigation is this: Should the pleas to the jurisdiction be sustained? The proposition stated in a different form is: Has the legislature the power to prefer articles of impeachment against a person after his term of office has expired, he at the time of such impeachment being a private citizen and not an officer of the state? The question is now for the first time submitted to this court for its consideration and judgment.

An examination of the provisions of the constitution of Nebraska on the subject of impeachment is necessary in order to arrive at a correct decision.

By section 14, article 3, of the constitution the exclusive power of impeachment is conferred upon the two houses of the legislature, when in joint convention. The section also declares that "A notice of an impeachment of any officer, other than a justice of the supreme court, shall be forthwith served upon the chief justice by the secretary of the senate, who shall thereupon call a session of the supreme court to meet at the capital within ten days after such notice to try the impeachment. A notice of an impeachment of a justice of the supreme court shall be served by the secretary of the senate upon the judge of the judicial district within which the capital is located, and he thereupon shall notify all the judges of the district court in the state to meet with him within thirty days at the

capital, to sit as a court to try such impeachment, which court shall organize by electing one of its number to preside. No person shall be convicted without the concurrence of two-thirds of the members of the court of impeachment, but judgment in cases of impeachment shall not extend further than removal from office and disqualification to hold and enjoy any office of honor, profit, or trust in this state, but the party impeached, whether convicted or acquitted, shall nevertheless be liable to prosecution and punishment according to law. No officer shall exercise his official duties after he shall have been impeached and notified thereof until he shall have been acquitted."

Section 5, article 5, provides that "All civil officers of this state shall be liable to impeachment for any misdemeanor in office."

Section 3, article 14, reads as follows: "Drunkenness shall be cause of impeachment and removal from office."

The foregoing sections contain every provision to be found in the constitution relating to impeachment. That instrument designates the persons who may be impeached, namely, "All civil officers of this state." It likewise specifies the grounds for impeachment. The constitution does not in express terms say that a private citizen can be impeached, nor does it contain words from which such an inference can be drawn. On the other hand, it is plain that the legislature has no power to impeach a person who has never held any public office in this state. It is civil officers who are amenable to impeachment. Section 5, article 5, so declares. None others were intended to be included by the framers of the constitution. This is clearly manifest from the language of the instrument.

Section 5, article 5, makes any misdemeanor in office an impeachable offense, and section 3, article 14, declares that drunkenness shall be cause for removal from office. These are the only grounds for impeachment enumerated in the constitution. Thus it will be seen that acts committed by a

person while in office are alone impeachable. The provisions of section 14, already quoted, are not only in harmony with this construction, but they give strength to it. That section specifies the tribunals which shall try impeachments and the person upon whom notice of the proceedings shall be served. It requires that "notice of an impeachment of any *officer*, other than a justice of the supreme court, shall be forthwith served upon the chief justice by the secretary of the senate, who shall thereupon call a session of the supreme court to meet at the capital within ten days after such notice to try the impeachment." It is further provided that in case of the impeachment of a justice of the supreme court notice thereof must be served upon a judge of the district court of the county in which the capital is located, and such impeachment is to be tried before all of the judges of the district courts in the state. While the constitution makes ample provision for the trial of articles of impeachment exhibited by the legislature against officers, it neither designates the tribunal which shall try impeachment proceedings against a private citizen, nor does it specify the person to whom notice in such a case shall be given. No power is conferred by the constitution upon this court, nor upon any other tribunal, either in direct terms or by implication, to try an impeachment proceeding against a person who has never held an office. In Great Britain all subjects of the realm, whether in or out of office, are impeachable; but such rule does not prevail in this country. Here none but public officers are subject to impeachment. (Story, Constitution, sec. 790; 9 Am. & Eng. Ency. Law, 953.)

Judge Story in his valuable commentaries on the federal constitution, after quoting section 4, article 2, of that instrument, which reads, "The president, vice president, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery or other high crimes and misdemeanors," says: "From

this clause it appears that the remedy by impeachment is strictly confined to civil officers of the United States, including the president and vice president. In this respect it differs materially from the law and practice of Great Britain. In that kingdom all the king's subjects, whether peers or commoners, are impeachable in parliament; though it is asserted that the commoners cannot now be impeached for capital offenses, but for misdemeanors only. Such kind of misdeeds, however, as peculiarly injure the commonwealth by the abuse of high offices of trust are the most proper, and have been the most usual grounds for this kind of prosecution in parliament. There seems a peculiar propriety, in a republican government, at least, in confining the impeaching power to persons holding office. In such a government all the citizens are equal, and ought to have the same security of a trial by a jury for all crimes and offenses laid to their charge, when not holding any official character. To subject them to impeachment would not only be extremely oppressive and expensive, but would endanger their lives and liberties by exposing them against their wills to persecution for their conduct in exercising their political rights and privileges. Dear as the trial by jury justly is in civil cases, its value as a protection against the resentment and violence of rulers and factions in criminal prosecutions makes it inestimable. It is there, and there only, that a citizen, in the sympathy, the impartiality, the intelligence, and incorruptible integrity of his fellows, impaneled to try the accusation, may indulge a well founded confidence to sustain and cheer him. If he should choose to accept office, he would voluntarily incur all the additional responsibility growing out of it. If impeached for his conduct while in office, he could not justly complain, since he was placed in that predicament by his own choice; and in accepting office he submitted to all the consequences. Indeed, the moment it was decided that the judgment upon impeachments should be limited to removal and disqualifi-

cation from office, it followed, as a natural result, that it ought not to reach any but officers of the United States. It seems to have been the original object of the friends of the national government to confine it to these limits; for in the original resolutions proposed to the convention, and in all the subsequent proceedings, the power was expressly limited to national officers."

The foregoing quotation is now generally accepted as a correct exposition of the law. We see no escape from the conclusion in this state, under the provisions of our constitution, that the power of impeachment extends exclusively to public officials. Where there has been no official guilt, the remedy by impeachment will not lie.

It is urged by counsel for the managers that ex-officers are liable to impeachment for official misdemeanors committed while in office; that jurisdiction attaches immediately upon the commission of an impeachable offense, and that the expiration of the official term does not deprive the legislature of the power to impeach, or the court to try.

It cannot be said that there is any provision of the constitution which expressly confers the authority to impeach a person after he is out of office, while section 5, already quoted, designates the persons who may be impeached as "all civil officers of this state." This language is unambiguous. It means existing officers; persons in office at the time they are impeached. Ex-officials are not civil officers within the meaning of the constitution. Jurisdiction to impeach attaches at the time the offense is committed and continues during the time the offender remains in office, but not longer.

The necessary implication of the provisions in section 14, article 3, of the constitution, that "judgment in cases of impeachment shall not extend further than removal from office and disqualification to hold and enjoy any office of honor, profit, or trust in this state," is that the offending party must be in office at the time the impeachment pro-

ceedings are commenced. In case of impeachment, either one of two judgments can be pronounced, namely, removal from office, or removal and disqualification to hold office. It is obvious that there can be no judgment of removal where the party was not an officer when impeached. It is claimed by counsel for the managers, as we understand their argument, that a judgment of disqualification can be entered without a judgment of removal. All will concede that disqualification to hold office is a punishment much greater than removal; so that if the construction contended for by counsel is the true one, then in case the person impeached is out of office, he is liable to a more severe penalty than might have been inflicted upon him had he been impeached before he went out of office. We cannot believe that the members of the convention who framed the constitution so intended.

Judge Story in discussing the question whether a person can be impeached after he has ceased to hold office, at section 803, says: "As it is declared in one clause of the constitution that 'judgment in cases of impeachment shall not extend further than a removal from office and disqualification to hold any office of honor, trust, or profit under the United States,' and in another clause, that the 'president, vice president, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes or misdemeanors,' it would seem to follow that the senate, on the conviction, were bound in all cases to enter a judgment of removal from office, though it has a discretion as to inflicting the punishment of disqualification. If, then, there must be a judgment of removal from office, it would seem to follow that the constitution contemplated that the party was still in office at the time of impeachment. If he was not, his offense was still liable to be tried and punished in the ordinary tribunals of justice. And it might be argued with some force that it would be a vain exercise of author-

ity to try a delinquent for an impeachable offense when the most important object for which the remedy was given was no longer necessary or attainable. And although a judgment of disqualification might still be pronounced, the language of the constitution may create some doubt whether it can be pronounced without being coupled with a removal from office."

A number of decisions by courts of impeachment, both in England and in this country, have been cited by counsel for the managers to sustain the proposition that a person whose term of office has expired and who is no longer in office, is subject to impeachment. Two English cases have been mentioned, those of *Warren Hastings* and *Lord Melville.* While it is true that each was impeached long after he had ceased to hold the office which he occupied at the time of the commission of the offense charged, yet no plea to the jurisdiction was or could be raised, for the obvious reason that parliament is omnipotent. As all persons in England, those in as well as those out of office, are subject to impeachment, the cases of *Hastings* and *Melville* are not in point.

The next case is that of *William Blount,* who was a United States senator from Tennessee. He was expelled by the senate for official misdemeanor, and was subsequently impeached by the house of representatives for the same act. He pleaded that a senator is not a civil officer within the meaning of the constitution, and also that he was not a senator when the articles of impeachment were adopted. His plea was sustained upon the first ground alone, and therefore the ruling in that case is not an authority either way on the question before us.

Judge Barnard was impeached in the state of New York during his second term, for acts committed in his previous term of office. His plea that he was not liable to impeachment for offenses occurring in the first term was overruled. Precisely the same question was raised in the impeachment

proceedings against *Judge Hubbell*, of Wisconsin, and on the trial of *Governor Butler*, of this state, and in each of which the ruling was the same as in the *Barnard Case*. There was good reason for overruling the plea to the jurisdiction in the three cases just mentioned. Each respondent was a civil officer at the time he was impeached, and had been such uninterruptedly since the alleged misdemeanors in office were committed. The fact that the offense occurred in the previous term was immaterial. The object of impeachment is to remove a corrupt or unworthy officer. If his term has expired and he is no longer in office, that object is attained, and the reason for his impeachment no longer exists. But if the offender is still an officer, he is amenable to impeachment, although the acts charged were committed in his previous term of the same office.

The only other decision to which we have been referred is the *Belknap Case*. The house of representatives impeached William W. Belknap for acts committed while secretary of war. On the day the articles of impeachment were adopted, but prior to their adoption, Mr. Belknap resigned, and his resignation was accepted by the president. Before the trial the respondent interposed a plea to the jurisdiction, on the ground that he had ceased to be an officer before he was impeached. The question was ably argued and the senate of the United States, sitting as a court of impeachment, overruled the plea by a vote of 37 to 29. At the close of the trial Mr. Belknap was acquitted. The senators who voted against conviction, the record shows, did so upon the express ground that the house of representatives had no jurisdiction to impeach him and the senate was without jurisdiction to try him, inasmuch as he had ceased to be a civil officer. So instead of the *Belknap Case* being an authority in favor of jurisdiction in the case at bar, it should be regarded an adjudication against the proposition.

The reason jurisdiction should not be entertained in the cases against Benton and Hill is much stronger than in the *Belknap Case*. There the respondent resigns his office on the very day he was impeached for the sole purpose of escaping impeachment. In objecting to the jurisdiction, he took advantage of his own acts. Here Benton and Hill cease to be officers by reason of the expiration of their official term. They did nothing to defeat jurisdiction.

But independent of authorities or precedents, if we do not misconceive the meaning of the constitution, there is no room for doubt that ex-officials are not impeachable, since civil officers alone are enumerated in that instrument as subject to that remedy. The term officer cannot properly be applied to a person who is not at the time in the holding of an office. When a person ceases to hold an office, he immediately becomes a private citizen.

Reference has been made to certain sections of the Criminal Code which provide for the punishment of sheriffs and other officers for official misconduct, and the question is asked whether the offending officer must be punished while he is in office or not at all? We answer, no. But the same rule does not apply to impeachments, for the reason, stated by another, "the two remedies have totally distinct aims. One remedy is given against a crime, and the other against a position; one is for the punishment of an offender, the other for the purification of the public service; one is meant to reform a criminal, the other is meant to reform an office." Again, the penalty provided in the sections alluded to is entirely different from that in cases of impeachment. In the former, the sentence may be either fine or imprisonment or both, while in the latter the judgment in case of conviction shall not extend further than removal from office and disqualification to hold office. Further, the statute fixes the period in which prosecutions shall be commenced for violations of the criminal laws of the state; therefore, any criminal prosecution can be brought

within that time, even though the accused occupied an official station when the offense was committed, but is no longer in office.

At the argument our attention was called by counsel for the managers to sections 8 and 9 of chapter 19 of the Compiled Statutes of 1891, which read as follows:

"Sec. 8. An impeachment of any state officer shall be tried, notwithstanding such officer may have resigned his office, or his term of office has expired; and if the accused person be found guilty, judgment of removal from office, or disqualifying such officer from holding or enjoying any office of honor, profit, or trust in the state, or both, may be rendered as in other cases.

"Sec. 9. An impeachment against any state officer shall be tried and judgment of removal from office, or of disqualification to hold office, may be rendered, notwithstanding the offense for which said officer is tried occurred during a term of office immediately preceding."

The contention of counsel is that the foregoing provisions not only grant the power to try, but to prefer charges of impeachment against a person who has held office, after the expiration of his term. We are not aware of any rule governing the construction of statutes which would justify such an interpretation. The sections quoted have reference to the trial of an impeachment and the Code defines a trial to be "a judicial examination of the issues, whether of law or of fact, in an action." (Code, sec. 279.) The trial of a criminal case does not include the returning of an indictment by the grand jury or the filing of an information by the county attorney. The trial of a civil suit does not embrace the filing of a petition and other pleadings or the issuance of a summons; so when the statute declares that "an impeachment of any state officer shall be *tried*," it means what it says and nothing else. The meaning of section 8 is that where a state officer has been impeached during his term he shall be tried and, if found guilty, judg-

ment shall be rendered, even though he may have resigned or his term of office has expired after the articles of impeachment were exhibited against him. To hold that it confers power upon the legislature to prefer charges after the resignation of the officer, or the expiration of his term, would be a strained and unnatural construction of the language employed. The statute does not say that a person may be impeached after he has resigned, or his term has expired, nor does it contain words which can reasonably be said to warrant such an interpretation. Section 9 provides for the trial of an impeachment of a state officer for an offense occurring during his term of office immediately preceding. It contemplates that the impeachment proceedings shall be commenced while the offender is yet in office.

The respondents being out of office at the time the proceedings for their impeachment were instituted, the legislature had no power to impeach them, and this court has no jurisdiction to try them. The proceedings are therefore

DISMISSED.

THE other judges concur.

STATE OF NEBRASKA V. WILLIAM LEESE, EX-ATTORNEY GENERAL.

FILED JUNE 5, 1893. No. 6095.

1. **Impeachment.** The constitution of this state confers the sole power of impeachment upon the senate and house of representatives in joint convention, and the legislature cannot delegate that power to others.

2. ———: MANAGERS: AMENDMENT OF ARTICLES. Where the legislature has adopted articles of impeachment, which have been filed in this court, no amendment thereof, in any matter of sub-

stance, can be made by the managers appointed by the legislature to prosecute the impeachment. The authority to adopt and present other or amended articles of impeachment or specifications rests alone with the joint convention of the two houses of the legislature.

3. ———: JURISDICTION. For want of jurisdiction, the proceedings are dismissed.

IMPEACHMENT PROCEEDINGS before the supreme court commenced under the provisions of section 14, article 3, of the constitution. *Dismissed.*

P. H. Barry, C. D. Casper, and *George R. Colton,* managers.

George W. Doane, S. B. Pound, W. L. Greene, and *G. M. Lambertson,* for the state.

William Leese and *John M. Stewart,* for defendant.

NORVAL, J.

The legislature of this state at its last session adopted and presented to this court articles of impeachment against William Leese, ex-attorney general, charging him with misdemeanors in office during the period he was attorney general of the state. Within the time fixed by the court therefor, the respondent answered the articles of impeachment exhibited and presented against him and to each and every specification therewith. Subsequently the managers appointed by the legislature to prosecute the charges asked leave to amend, in matter of substance, certain of the specifications in said articles of impeachment, to which proposed amendments the respondent at the time objected. At the hearing, the application to file amended specifications was denied, and we will now briefly state the reasons for the conclusion then reached.

Section 14, article 3, of the constitution declares that "The senate and house of representatives, in joint conven-

tion, shall have the sole power of impeachment, but a majority of the members elected must concur therein. Upon the entertainment of a resolution to impeach by either house, the other house shall at once be notified thereof, and the two houses shall meet in joint convention for the purpose of acting upon such resolution within three days of such notification," etc.

By the foregoing provision the exclusive power of impeachment is conferred upon the legislature. Both houses of that body are required to meet in joint convention to act upon a resolution to impeach a state officer for any misdemeanor in office, and such a resolution can only be adopted or carried by the affirmative vote of at least a majority of all the members elected to the legislature. The authority thus given carries with it the power of the senate and house of representatives, under like restrictions, to adopt suitable articles and specifications in support of their impeachment, and likewise the authority to adopt and present additional or amended articles or specifications whenever it is deemed proper or expedient so to do. But such power can no more be delegated by the joint convention to a committee or managers of impeachment, appointed by it, than the legislature can confer authority upon a committee composed of members of that body to enact a law, or to change, alter, or amend one which has been duly passed, and in neither case does the right exist.

Impeachment is in the nature of an indictment by a grand jury. The general power which courts have to permit the amendment of pleadings does not extend to either indictments or articles of impeachment. The uniform holding of the courts, except where a different rule is fixed by statute, is that when an indictment has been filed with the court, no amendment of the instrument, in matter of substance, can be made by the court, or by the prosecuting attorney, against the consent of the accused, without the concurrence of the grand jury which returned the indict-

ment. (*People v. Campbell*, 4 Parker's Crim. Rep. [N. Y.], 386; *Gregory v. State*, 46 Ala., 151; *Johnson v. State*, Id., 212; *McGuire v. State*, 35 Miss., 366; *State v. Sexton*, 3 Hawks [N. Car.], 184; *State v. McCarty*, 2 Pinney [Wis.], 513; *Ex parte Bain*, 121 U. S., 1.) We have no hesitancy in holding that the managers have no power or authority to change in any material matter the specifications contained in the articles of impeachment exhibited against the respondent. If they could do that, it necessarily follows that they could exhibit new articles of impeachment or specifications, preferring charges against the respondent, not included in the original accusations made against him, and which the sole impeaching body, the joint convention of the legislature, might have rejected, had they been submitted to it for consideration. To hold that the managers of impeachment have the right to do that would be to disregard both the letter and spirit of the constitution.

In reaching the conclusion stated above we have carefully considered and given due weight to the last paragraph of the articles of impeachment, which reserves to the senate and house of representatives of the state of Nebraska, in joint convention assembled, "the liberty of exhibiting at any time hereafter any further articles or other accusations or impeachments against the said William Leese, late attorney general of the state of Nebraska." All that can be reasonably claimed for this provision is that the joint convention of the two houses of the legislature reserved the right to adopt other and additional articles of impeachment against the respondent. But the legislature has not preferred other or further accusations against him, nor does the clause above mentioned attempt to confer such authority upon the managers of impeachment. If it had done so, as we have already seen, it would be repugnant to the letter and spirit of the constitution.

There is another question disclosed by the record, although not raised by the respondent, which is decisive of

the case, and that is that the legislature had no power to prefer the articles of impeachment against the respondent, and that this court has no jurisdiction to try the accusations made against him. William Leese, when the impeachment articles were adopted, was not an officer of the state. He had ceased to be attorney general more than two years prior to that time, by reason of the expiration of the term for which he had been elected. Therefore, for the reasons stated in the opinion in the cases of *State v. Benton and Hill*, 37 Neb., 80, filed herewith, the respondent was not liable to impeachment for any misdemeanors in office which he may have committed while he was attorney general. The proceedings against him are, for that reason,

DISMISSED.

THE other judges concur.

STATE OF NEBRASKA V. GEORGE H. HASTINGS, ATTORNEY GENERAL, JOHN C. ALLEN, SECRETARY OF STATE, AND AUGUSTINE R. HUMPHREY, COMMISSIONER OF PUBLIC LANDS AND BUILDINGS.

FILED JUNE 5, 1893. NOS. 6090, 6091, 6092.

1. **Constitutional Law:** COURT OF IMPEACHMENT. By the provisions of section 14, article 3, of the constitution of 1875 the supreme court did not succeed to any of the political functions of the senate as a court of impeachment under the prior constitution. The provision for the trial of impeachments before this court was intended to insure a strictly judicial investigation in such cases according to judicial methods.

2. **Impeachment:** MISDEMEANOR IN OFFICE. Where in an impeachment proceeding the act of official delinquency consists in the violation of some positive provision of the constitution or statute which is denounced as a crime or misdemeanor, or

where it is a mere neglect of duty willfully done with a corrupt intention, or where the negligence is so gross and the disregard of duty so flagrant as to warrant the inference that it was willful and corrupt, it is a misdemeanor in office within the meaning of section 5, article 5, of the constitution.

3. ———: ———: NEGLIGENCE OF OFFICERS: ERROR OF JUDGMENT. But where such act results from a mere error of judgment or omission of duty without the element of fraud, or where the alleged negligence is attributable to a misconception of duty rather than a willful disregard thereof, it is not impeachable, although it may be highly prejudicial to the interests of the state. MAXWELL, CH. J., dissenting.

4. ———: DEGREE OF PROOF. Impeachment is, with respect to the production of evidence and *quantum* of proof required to warrant a conviction, essentially a criminal prosecution, hence the guilt of the accused must be established beyond a reasonable doubt.

5. **Board of Public Lands and Buildings:** NATURE OF FUNCTIONS: QUASI-JUDICIAL ACTS. The functions of the board of public lands and buildings, in passing upon claims against the state, and in the selection of subordinate officers and agents authorized by law, are in their nature *quasi*-judicial. (*Brown v. Otoe County*, 6 Neb., 115.) MAXWELL, CH. J., dissenting.

6. **Officers:** LIABILITY FOR JUDICIAL ACTS. An officer is not liable for a judicial act, except where he acts willfully, maliciously, or corruptly. This is a rule of great antiquity, and rests upon the soundest public policy, and in its application is not limited to judges, but extends to all officers and boards charged with the decision of questions *quasi*-judicial in character.

7. **State Officers:** BOARD OF PUBLIC LANDS AND BUILDINGS: ERECTION OF CELL HOUSE: SELECTION OF SUPERINTENDENT OF CONSTRUCTION: ERROR OF JUDGMENT: MISDEMEANOR IN OFFICE. The legislature of 1891 appropriated $40,000 for the building of a cell house at the penitentiary by days' work. The board of public lands and buildings having said building in charge selected for superintendent of construction one D., known to be the agent and manager of M., the lessee of the prison labor, with the understanding that he would have to contract with M., his principal, in behalf of the state for the necessary labor and fix the price to be paid therefor. It does not appear that the labor could have been procured for less than the rate allowed by D., to-wit, $1 per day, and is admitted to have been worth more than that amount. *Held*, That the action of the board in select-

ing D. as the representative of the state, while highly censurable as unbusiness-like and wanting in that intelligent regard for the interest of the public which the state exacts from its officers, was, at most, an error of judgment not amounting to a misdemeanor in office. MAXWELL, CH. J., dissenting.

8. **Legislative Appropriation for Erection of State Building:** STATE OFFICERS: ADVANCES OF MONEY TO DISBURSING AGENT: IMPEACHMENT. It is not a misdemeanor in office to advance money appropriated by the legislature to a disbursing agent to enable him to procure material and labor for the erection of a public building of the state where such advancement is not prohibited by law, especially where the state is protected by a sufficient bond. MAXWELL, CH. J., dissenting.

9. **State Officers:** BOARD OF PUBLIC LANDS AND BUILDINGS: ERECTION OF CELL HOUSE: NEGLIGENCE OF SUPERINTENDENT OF CONSTRUCTION: ALLOWANCE OF FRAUDULENT BILLS: MISDEMEANOR IN OFFICE. Through the negligence, incompetency, or fraud of a superintendent of construction, the state was charged for building material greatly in excess of the reasonable or market value thereof, and for labor which had not been performed. The bills rendered therefor were presented in the usual course of business and allowed by the board of public lands and buildings, acting in good faith and in the belief that such claims were legitimate charges against the state. *Held*, That the allowance of such claims is not a misdemeanor in office for which the members of the board are impeachable. MAXWELL, CH. J., dissenting.

10. ——: ——: IMPEACHMENT: MISUSE OF APPROPRIATION FOR CELL HOUSE: ADVICE OF ATTORNEY GENERAL. The board of public lands and buildings used $500 of money appropriated for the building of a cell house at the penitentiary to defray the cost of visiting prisons in neighboring states, the alleged purpose of such visit being to gain information with respect to the character and quality of cells to be selected for said building, also improved systems of ventilation and other methods of bettering the sanitary condition of the prison. It appears that they were advised by the attorney general that said money could be lawfully used for the purpose named. *Held*, That the test of their liability in this proceeding is not whether such advice was technically correct. If they in good faith construed the law as authorizing them to apply the money to the object named and actually used it for such purpose they cannot be adjudged guilty of a misdemeanor in office solely because this court may differently construe the law. MAXWELL, CH. J., dissenting.

11. ———: ———: ———: ———: EVIDENCE examined, and *held* not sufficient to warrant a finding that the respondents are guilty of converting any part of the sum last above named to their own use. MAXWELL, CH. J., dissenting.

12. ———: ———: ———: ———. The board of public lands and buildings, out of the cell house fund above named, paid the sum of $200 to defray the expenses of the warden and chaplain of the penitentiary as delegates to the National Prison Congress at Pittsburgh, Pennsylvania. While such expenditure was not within the scope of the authority of the board, and the respondents are liable to the state for the money so appropriated, they acted in good faith and from motives of humanity without the possibility of personal gain, and such facts are not sufficient in law to warrant their impeachment. MAXWELL, CH. J., dissenting.

13. ———: ———: ———: CONTRACTS: ALLOWANCE OF FRAUDULENT CLAIMS: FAILURE TO DETECT FRAUD: MISDEMEANOR IN OFFICE. During the year 1891 and the month of February, 1892, extensive frauds were practiced upon the state by contractors for coal at the asylum for the insane at Lincoln, although the amount of such frauds cannot be determined from the proofs. Following the practice which had prevailed for many years the board required all vouchers for supplies to be certified by the superintendent of the asylum as correct. When so certified they were compared with the contracts on file and if found to correspond and the extensions correct they were allowed. During the period mentioned, through the negligence or credulity of the superintendent, he was induced to certify to accounts largely in excess of the coal actually received and which were allowed by the board relying in good faith upon such certificates. The board at that time were required to disburse over $450,000 annually for current expenses and $225,000 for the erection of public buildings, which necessitated the examination of hundreds of vouchers monthly. *Held*, That the failure to detect and prevent the frauds in question is not *per se* a misdemeanor in office. MAXWELL, CH. J., dissenting.

14. ———: ———: ———: EXAMINATION OF CLAIMS AND APPROPRIATION BY LEGISLATURE: ALLOWANCE BY BOARD. Bills for coal amounting to $12,000 on account of the asylum for the last quarter of 1890 and the first quarter of 1891 remained unpaid, the appropriation for that biennial period having been exhausted. Said bills were submitted to the legislature of 1891 and referred to the proper committees for investigation and the sum of $12,000 appropriated with which to pay them. Subse-

quently they were certified to by the superintendent and allowed by the board in the belief that they were proper charges against the state. *Held*, That the action of the legislature is complete justification of the act of the board. MAXWELL, CH. J., dissenting.

IMPEACHMENT TRIAL before the supreme court under the provisions of section 14, article 3, of the constitution. *Judgment for defendants.*

P. H. Barry, *C. D. Casper*, and *George R. Colton*, managers.

George W. Doane, *S. B. Pound*, *W. L. Greene*, and *G. M. Lambertson*, for the state.

George H. Hastings, *J. R. Webster*, and *John L. Webster*, for defendant Hastings.

C. A. Atkinson and *John L. Webster*, for defendant Allen.

M. L. Hayward, *E. J. Murfin*, and *John L. Webster*, for defendant Humphrey.

POST, J.

This is an impeachment proceeding under the provisions of section 14, article 3, of the constitution. The articles of impeachment are three in number, containing in all twenty-one different specifications. However, before the final submission of the case, the first six and the twelfth specifications under article three were abandoned by the managers representing the legislature and do not call for notice in this opinion. The following is a summary of the several articles of impeachment and specifications thereunder:

Article 1. That respondents as members of the board of public lands and buildings did not "faithfully and prop-

erly disburse" the sum of $40,000 appropriated to build a cell house at the penitentiary by the legislature of 1891.

Specification 1. That respondents as members of said board carelessly, negligently, and willfully appointed William H. Dorgan superintendent and agent to buy material and superintend the construction of the cell house, knowing that he was the agent of Mosher, the prison contractor, whereby said Dorgan charged the state $1 per day for convict labor on the said cell house, which could have been procured for forty cents per day, whereby the state was defrauded.

Specification 2. The respondents as members of said board placed in the hands of Dorgan, as agent, large sums of money in advance of payments made by him and without adequate security and without assurance that the same would be expended for the benefit of the state, whereby the state was defrauded.

Specification 3. That Dorgan purchased stone and other material at rates exorbitant and beyond what the same could have been purchased for in open market and that he returned false and fraudulent accounts charging these excessive prices and for excessive quantities and that the respondents as members of the board negligently, willfully, and corruptly accepted and audited said accounts, whereby the state was defrauded.

Specification 4. That Dorgan used about $232 of said money for labor and material, for the use of Mosher, and which did not go into the cell house, and the respondents as members of said board negligently, willfully, and corruptly accepted vouchers therefor, knowing the same had not been used in the cell house, whereby the state was defrauded.

Specification 5. That Dorgan charged for labor of convicts which had not been performed, and respondents as members of the board negligently, willfully, and corruptly audited and allowed his accounts, whereby the state was defrauded.

Specification 6. That in Dorgan's account were various items fraudulently charged and no vouchers therefor, and which respondents as members of said board negligently, willfully, and corruptly audited, and whereby the state was defrauded.

Specification 7. That Dorgan was entrusted with money to expend and disburse according to his own judgment, and that after Dorgan was superseded by Hopkins, his successor, the board and respondents, as members thereof, willfully, carelessly, and negligently failed to require a settlement and accounting with him, Dorgan.

Article 2. That respondents, as members of the board of public lands and buildings, unlawfully, willfully, and corruptly received and misappropriated to their own use moneys of the state which came to them as members of the board.

Specification 1. That respondents as members of said board did so receive and misappropriate $500.

Specification 2. That the respondents as members of said board did unlawfully, willfully, and corruptly misappropriate $200 of said money by paying same to Daniel Hopkins, who was not entitled to same.

Article 3. That respondents as members of said board had supervision and control over the state institutions and were responsible for the disbursements of the funds therefor, and negligently, willfully, and corruptly allowed accounts for coal furnished for the use of the insane asylum at Lincoln without proper examination thereof.

Specification 7. That the contractor the Whitebreast Coal & Lime Company, for the month of October, 1890, furnished 346,000 pounds of coal; for November, 1890, 642,000 pounds; for December, 1890, 662,000 pounds; for January, 1891, 378,700 pounds; for February, 1891, 497,300 pounds, and for March, 1891, 470,000 pounds, and rendered its account to the board for coal delivered for said months as follows: For October, 1890, 400,000 pounds;

November, 1890, 1,244,000 pounds; December, 1890, 1,480,000 pounds; January, 1891, 1,086,000 pounds; February, 1891, 1,240,000 pounds; March, 1891, 1,040,000 pounds, and that on April 10, 1891, the board carelessly, negligently, and willfully approved the account after deducting 80,000 pounds.

Specification 8. That the board let a contract to Betts, Weaver & Co. to furnish supplies for the quarter commencing April 1, 1891, and that said contractors furnished for April, May, and June, 1891, 1,262,800 pounds of coal, but rendered an account for 2,870,700 pounds, and the board carelessly, willfully, and negligently approved said account without proper examination and verification.

Specification 9. That the board let the contract for coal to the Whitebreast Coal & Lime Company for the quarter commencing July 1, 1891, and that said company furnished coal to the asylum as follows: July, 1891, 365,000 pounds; August, 1891, 391,000 pounds; September, 1891, 308,000 pounds; but rendered accounts for July, 1891, 882,000 pounds; August, 1891, 983,000 pounds; September, 1891, 918,000 pounds, and the board carelessly, willfully, and negligently approved said accounts.

Specification 10. That the board let contracts for supplies to Betts, Weaver & Co. for the quarter commencing October 1, 1891, and that said contractors furnished coal as follows: For October, 1891, 501,500 pounds; November, 1891, 673,000 pounds; December, 1891, 761,000 pounds; but rendered account for October, 1,484,000 pounds; November, 1,480,000 pounds; December, 1,495,000 pounds, and the board, without examination and verification, carelessly, willfully, and negligently allowed the same.

Specification 11. That the board let the contract for coal to the Whitebreast Coal & Lime Company for the quarter commencing January 1, 1892, for the asylum. That the said company furnished coal as follows: For February, 1892, 674,000 pounds, but returned an account for 930,600

pounds, and that the board allowed said account, willfully, negligently, and carelessly, and without properly examining and verifying the same.

The answers of the respondents are substantially the same and may be summarized as follows: In addition to the duties of their respective departments, each is a member of numerous boards to which are attached varied and important duties. That the board of public lands and buildings during the years 1891 and 1892 were charged with the construction of ten public buildings, costing in the aggregate over $225,000, and the disbursement of appropriations for current expenses exceeding $800,000, so that it was impossible for said board to more than exercise a general supervision over the various public interests.

Specification 1. That in the construction of the cell house it was necessary to employ a superintendent; that Dorgan was considered a suitable person for that trust and deemed to be honest and capable, and his appointment was the result of their deliberate judgment, acting in good faith for the best interests of the state; that the employment of convict labor was by them deemed expedient; that the men employed were mostly skilled workmen and the rate allowed for their services, $1 per day, was not excessive.

Specification 2. It was necessary for the board to advance to the superintendent sums of money to defray current expenses as the only way to pay for the work without delay, and is the customary way of disbursing money for public work; and the same was advanced in good faith upon estimates made by the said Dorgan and upon the bond given by him in the sum of $10,000; and they deny that the state has been defrauded on account of said transactions in any sum whatever.

Specification 3. They have no knowledge that Dorgan presented any fraudulent or false vouchers, and deny that they willfully, negligently, or corruptly audited accounts without attempting to verify the correctness thereof; that

the settlement of Dorgan's account was postponed for the production of vouchers and awaiting the result of an investigation then in progress, by reason of which said accounts have not been audited and settled, and deny that the state has been defrauded thereby.

Specification 4. Allege that the $232 expended for fire brick and clay was for the setting of a boiler, the property of the state, to be used for heating the cell house in question, which was both lawful and expedient, and deny that the state has been defrauded.

Specification 5. Deny that they negligently, willfully, corruptly, or otherwise allowed any fraudulent or false charge for convict labor, and further say that in all cases they required a verification by the warden of the accounts for convict labor, and deny that the state has been defrauded as therein charged.

Specification 6. A denial of substantially all of the allegations thereof.

Specification 7. Allege that the board delayed final settlement with Dorgan for good and sufficient reasons, as more fully set forth in answer to specification 3.

Article 2. Specification 1. That during the construction of the cell house various questions arose with respect to the kind of cells to be selected therefor, the different systems of ventilation and other questions pertaining to the sanitary condition of the prison; that the lessee of the penitentiary was by law bound to furnish eighty cells at his own expense, and had notified the board of his readiness to construct or furnish them according to any plan adopted by the state; that being entirely without experience in the construction or management of prisons, and desiring to fully discharge their duty to the state they determined to visit and personally inspect certain recently constructed and well regulated institutions in other states; that they, in company with the warden, visited said prisons, some seven in number; also the Pauly Jail & Cell Works, of St. Louis, Missouri,

using the sum of $500 of the cell house fund for the purpose of defraying their expenses, in addition to considerable of their private funds which were required for that purpose; and that the action in question was prompted alone by a conviction of duty to thus obtain the information necessary for their guidance in the discharge of the duties of the state.

Specification 2. In the month of October, 1891, the board used the further sum of $200 out of the cell house fund to defray the expenses of the chaplain and warden of the penitentiary in attending a session of the National Prison Congress organized to encourage humanitarian methods of conducting prisons and the reformation of the criminal classes; that in so applying the money in question to the purpose named their motives were to protect the public interests alone.

Article 3. Specification 7. The items for coal for October, November, and December, 1890, were unpaid by the former administration for want of funds, and these items, with items for coal for January, February, and March, 1891, were by the officers of the asylum presented to the legislature of 1891 and the same allowed and ordered paid by the said legislature and an appropriation made therefor; the respondents are not guilty of misdemeanor relating thereto.

Specifications 8, 9, 10, and 11. When respondents were inducted into office, January 9, 1891, they had no especial knowledge of the amount of coal and other supplies required for the public institutions; that a superintendent, steward, and book-keeper had been appointed by the governor for the Lincoln asylum and who had long held said offices; that said officers had all given bond and taken an oath to faithfully discharge their duties and were by the respondents deemed honest and capable; that in allowing bills for coal, they relied, as they had a right to do, upon the certificate of the superintendent, that said bills were correct and that the coal therein called for had in fact been furnished.

The foregoing is believed to be a fair statement of the issues and which are presented more in detail than would have been deemed necessary or proper in an ordinary action or proceeding. When we have cleared away the rubbish, to use a homely phrase, and stripped this case of the features which are wholly irrelevant, or at most but incidental to the real controversy, we find the questions involved to be few and by no means difficult of solution. In the first place it should be remembered that the purpose of this investigation is to determine whether the respondents have been guilty of misdemeanor in office, and not an action on their official bonds or to state an account between the state of Nebraska and Dorgan or parties furnishing coal for the use of the asylum at Lincoln. It should also be borne in mind that the only charges with respect to the cost or value of the cell house are those contained in the 3d, 5th, and 6th specifications under article 1. But as the proofs are confined to specifications 5 and 6, they alone will be examined.

Volumes might be written on the subject of the cost and value of the different walls as well as the roof and foundation of the cell house, also the amount of labor and material furnished therefor by Dorgan and Hopkins respectively, and in the vain attempt to reconcile the estimates of the many witnesses who have testified on that question. I am satisfied that it was a mistaken sense of duty which prompted us to permit first the state and, afterward, the respondents to introduce evidence of that character. The result is that we have consumed days and even weeks in hearing proofs wholly irrelevant to the real issues of the case. It may be further said that the evidence on that subject is of the most unsatisfactory character even for expert testimony. For instance, according to my recollection, no two of the state's witnesses agree as to the length or height of the exterior walls of the structure, and differ more than $14,000 in their estimate of its present value. With the

foregoing observation I will dismiss the subject of the present value of the cell house and proceed to consider the several charges in their order.

Preliminary to an examination of the charge contained in specification 1 of article 1, it should be observed that on the 22d day of October, 1877, the penitentiary grounds and convict labor were leased by the state to W. H. B. Stout for the period of ten years, and by an act approved March 2, 1887, said contract having been assigned to C. W. Mosher, was extended for ten years from October 1, 1889. It is further provided by said act that Mosher shall receive forty cents per day for each convict as full compensation under said contract. At the time of the appointment of Dorgan to superintend the construction of the cell house he was the agent and manager of Mosher, the lessee of the penitentiary, and charged with the duty of sub-leasing the prison labor. In view of that fact his selection by the board as the representative of the state, knowing, as will hereafter appear, that it would be obliged to depend upon Mosher for labor to carry on the work, is highly censurable and should, to say the least, be characterized as unbusiness-like and utterly wanting in that intelligent regard for the interests of the state which the law demands of public officers under like circumstances. It is true, according to the evidence, that Dorgan was recommended to the board by reputable parties, and previous to his resignation no charges had ever been made within the knowledge of respondents affecting his character or fitness for the position. That fact, while it may to some extent extenuate, will not excuse his selection for so important a trust. But has the state been defrauded thereby as charged? The answer to that question depends upon whether the labor could have been procured for less than the amount allowed. In this connection it is proper to examine the provision for the cell house, which is found in the general appropriation act of 1891, under the title "Peni-

tentiary," and is in the following language: "Building new cell house by days' work, forty thousand dollars." The motives of the legislature are not involved in this controversy, yet the appropriation in question might with equal propriety have been entitled "An act for the relief of C. W. Mosher," since it is a palpable fact that he was beyond the reach of competition. The rules of the prison forbid the employment of free laborers within its walls, hence the contractor was practically able to dictate the wages to be paid by the state. There is, however, no evidence tending to prove that the labor could have been procured on terms more advantageous to the state, or that the amount charged, $1 per day, is excessive. It is true convict labor has been let to some of the subcontractors at the prison as low as forty cents per day, but such employment has been for a term of years, and the employers have in every such case been subjected to the additional expense of costly machinery. It is also shown that the state had on two previous occasions employed convict labor, allowing therefor $1 per day. The state's witnesses who testify on the subject all agree in placing the value of the labor per day at figures largely in excess of the rate charged therefor. The wrong to the state in that regard consists in the charging for labor not rendered, which will be considered hereafter, rather than the rate per day. The charge in that specification is, therefore, not sustained by the proofs.

2. The charge in the second specification is the advancing to Dorgan of money out of the cell house fund before the labor therefor had been performed, or the material furnished, without adequate security. It is not charged that such advancements were made corruptly or even negligently. It should be mentioned in this connection that upon the appointment of Dorgan he was required to give a bond in the sum of $10,000, conditioned that he would faithfully discharge his duties and account for all moneys which might come into his hands. That bond is admitted

to be good and ample security for any amount now due to the state. Nor does it appear that he was at any time entrusted with money in excess of the amount of the bond aforesaid. On the 1st day of June, 1891, Dorgan presented to the board an estimate, of which the following is a copy:

"ESTIMATE No. 1.

"For work done and material furnished during the month of May, 1891, for cell house at penitentiary:

Cut stone	$1,000
Concrete	750
Excavating	350
Material on hand not used	4,000
Balance due contractor	$6,100

"The above estimate was made by me this 1st day of June, 1891, and I hereby certify that the amount of work done and materials furnished by said contractor are true and correctly stated and set forth in the above estimate, and that the said estimate is made in the manner and according to the plans and specifications mentioned in the contract with the said state and said contractor.

"W. H. DORGAN,
"*Superintendent.*"

Accompanying said estimate was a voucher for $6,100, as follows:

"THE STATE OF NEBRASKA,

"To W. H. DORGAN, Dr.

"For material used in building new cell house, per estimate No. 1 hereto attached..... $6,100

"Examined and approved June 1, 1891, by the board of public lands and buildings, and account to be charged to appropriation for penitentiary, new cell house.

"JOHN C. ALLEN, *Secretary.* A. R. HUMPHREY, *President.*"

Upon the approval of the above voucher a warrant was issued in his favor for the amount named therein. In like manner he was allowed $8,000 August 3, 1891; $8,000 October 5, 1891; $5,000 December 7, 1891, and $5,000 March 7, 1892, making a total of $32,100, of which $6,300 was turned over by him to Hopkins on the appointment of the latter. It may be assumed that the sums above enumerated were all advanced by the board before the procuring of the labor or material therefor. But as the charge involves no issue of fraud or negligence the only question necessary to examine is whether the advancing of the money aforesaid is a violation of any positive law. The only provisions to which we have been referred as bearing upon the subject are section 22, article 3, and section 9, article 9, of the constitution which are copied in the order named.

"Sec. 22. No allowance shall be made for the incidental expenses of any state officer except the same be made by general appropriation, and upon an account specifying each item. 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. The auditor shall, within sixty days after the adjournment of each session of the legislature, prepare and publish a full statement of all moneys expended at such session, specifying the amount of each item, and to whom and for what paid."

"Sec. 9. The legislature shall provide by law that all claims upon the treasury shall be examined and adjusted by the auditor, and approved by the secretary of state before any warrant for the amount allowed shall be drawn; *Provided*, That a party aggrieved by the decision of the auditor and secretary of state may appeal to district court."

In my judgment neither of the above provisions are applicable. The provision for the cell house invested the

board with a discretion with respect to the money appropriated therefor, which, in the absence of fraud or mistake, is a sufficient justification of the act charged. The above constitutional restrictions were intended to limit the payment of claims to those for which specific appropriations have been made. But while the advancing of money appropriated, to a disbursing officer or board as in this case, is of doubtful wisdom because liable to abuse, it is not prohibited by any express provision of the constitution or necessary implication therefrom. There are also numerous legislative precedents for the action of the board, a few only of which need be noticed. For instance, by chapter 115, Laws 1885, $15,000 was appropriated for an exhibit at the New Orleans cotton exposition, to be drawn by the governor, who was made the sole disbursing officer, and to be spent at such times and for such purposes as in his own judgment was deemed expedient. By an act approved February 6, 1891, $100,000 was appropriated for the relief of "the people in the drouth-stricken districts" of the state, and a board, designated therein as a "Relief Commission," authorized to draw and disburse the money so appropriated. By an act approved March 27, 1891, $50,000 was appropriated for an exhibit at the Columbian exposition, to be drawn and expended by a commission created by said act upon estimates to be followed in a reasonable time by a detailed statement and vouchers. But a case in point is the *Impeachment of Melville*, in 1806, on the charge of drawing funds as treasurer of the navy before they were needed for public use. In that case the house of lords submitted to the judges of common pleas two questions, viz., 1st, whether it was unlawful to draw public money in advance of the time it was needed for public use but for the purpose of having it for that use; 2d, if such act was an offense. Both questions having been answered in the negative the accused was acquitted. (29 How. State Tr., 1469.)

There exists in my mind a grave doubt as to the consti-

tutional authority of a state board to audit claims against the state, but assuming, as do the managers, that such power exists, I do not doubt that they may lawfully place money in the hands of a superintendent to be used by him for the purpose designated in the appropriation, in the absence of a special provision to the contrary, after adopting proper precautions for the protection of the state.

3. With respect to specification 3, it may be said that the bills rendered for stone are grossly in excess of the reasonable or market value thereof through the negligence, incompetency, or fraud of the superintendent. The latter, it is disclosed, contracted with Atwood & Co. for the necessary stone to be delivered on the cars at Cedar Creek, Cass county, or other points not more remote from Lincoln, agreeing to pay eight cents per 100 pounds for common rubble, sixteen cents per cubic foot for dimension stone, and thirty-five cents per cubic foot for stone "plugged to size"—that is, drilled and blasted according to designated measurements. It also appears that Atwood & Co. purchased all of the dimension stone from J. W. Zook and E. D. Van Court, of Nemaha county, paying therefor ten cents per cubic foot, also a portion of the rubble at four cents per 100 pounds, and which was all billed to the state and paid for at the contract price. The price paid by Atwood & Co., it is shown, is a trifle below the market value of the stone, but the difference does not exceed two cents per cubic foot. Zook testifies also that he received a written inquiry from Dorgan previous to the contract of the latter with Atwood & Co. concerning the price of stone, and in reply quoted the prices above named, but which is denied by Dorgan. There is, however, no evidence that the board, or the respondents individually, or any of them, participated in or had any knowledge of such frauds or overcharges. Nor was such a contention made at any time by the managers during the trial, except perhaps with respect to specification 1 of article 2, which will be noticed here-

after. On the other hand, their conduct is entirely consistent with good faith and honesty of purpose, although, it may be admitted, indicating a lack of judgment and a proper degree of diligence under the circumstances. There was certainly nothing upon the face of the bills rendered by Atwood & Co. calculated to excite suspicions in the minds of persons not familiar with the price of stone, and it is not difficult to conceive how they might easily have borne the scrutiny of more exacting and cautious officers than the state board.

4. By the proofs under this specification are presented the vital question in the case, viz., whether the respondents are impeachable for failing to detect and prevent the alleged frauds against the state, or, as a broader statement of the same proposition, what under our constitution amounts to an impeachable misdemeanor? It is safe to say that no question of greater importance has ever been submitted for the consideration of this court. And in its solution we have endeavored to adopt the rule best sanctioned by authority and which is just, alike to the state and its servants. It is sufficient for our purpose at present to say that we are constrained to reject the views of Professor Dwight, Judge Curtis, and other advocates of the doctrine that an impeachable misdemeanor is necessarily an indictable offense, as too narrow and tending to defeat rather than promote the end for which impeachment as a remedy was designed and not in harmony with the fundamental rules of constitutional construction. On the other hand, the contention of counsel for the state, that the term misdemeanor in office is not susceptible of a legal definition, but that every such proceeding should be determined upon the facts in the particular case, is, to say the least, strikingly illogical. There is one fact which cannot fail to impress the judicial mind from an examination of our constitution, viz., that the provision for the trial of impeachments before the supreme court was to insure a strictly judicial investigation

according to judicial methods. It cannot be successfully maintained that this court has succeeded to any of the political functions of the senate as a court of impeachment under the first constitution. The former practice has been justly condemned on account of its political and, it must be confessed, too frequent partisan character, but the substitution of a judicial oligarchy for the form of democracy is not to be commended as a measure in the interest of reform. As said by Judge Story, "It is so incompatible with the genius of our institutions that no lawyer or statesman would be inclined to countenance so absolute a despotism and practice, which would make that a crime at one time or in one person which would be deemed innocent at another time or in another person;" and Senator Davis, in *Johnson's Impeachment*, vol. 3, 157, said: "But the position that the senate when trying an impeachment is a law to itself, is bound by no law, may decide the case as it wills, is illimitable and absolute in the performance of special, restricted, judicial functions, in a limited government, is revoltingly absurd." The sound rule and the one approved by the most eminent jurists and statesmen of this country lies midway between the two extremes. Judge Lawrence, in his brief for the managers in *Johnson's Impeachment*, 6 Am. Law Reg., 680, states the rule thus: "The result is that an impeachable high crime or misdemeanor is one in its nature or consequences subversive of some fundamental or essential principle of government or highly prejudicial to the public interest, and this may consist of a violation of the constitution, of law, of an official oath, or of duty by an act committed or omitted, or, without violating a positive law, by the abuse of discretionary powers from improper motives or for an improper purpose." Senator Doolittle, in the same case, p. 246, said: "But to say that a high public officer, with good motives and with an honest intent to obey, though he mistake the meaning of the stat-

ute, can be found guilty of a high crime or misdemeanor which shall subject him to the heaviest punishment which can fall upon a public man in high office is to assert a doctrine never before heard in any court of justice." Senator Fessenden, in the same case, p. 29, referring to the argument that the term, misdemeanor in office, could not be accurately defined, said: "Granting, for the sake of argument, that this latter construction is the true one, it must be conceded that the power thus conferred might be liable to very great abuse, especially in times of high party excitement, when the passions of the people are inflamed against a perverse and obnoxious public officer. If so, it is a power to be exercised with extreme caution when you once get beyond the line of specific criminal offenses." And in Pomeroy's Const. Law, 602, it is said: "Wherever the president or vice president, or any civil officer, has knowingly and intentionally violated the express terms of the constitution or of a statute which charged him with an official duty to be performed without a discretion, and wherever a discretion being left, within the bounds of which he has an ample choice, he exercises that discretion in a willful and corrupt manner, or even in a rash and headstrong manner, unmindful of the ruinous consequences which his acts must produce, he is impeachable." It may be safely asserted that where the act of official delinquency consists in the violation of some provision of the constitution or statute which is denounced as a crime or misdemeanor, or where it is a mere neglect of duty willfully done, with a corrupt intention, or where the negligence is so gross and the disregard of duty so flagrant as to warrant the inference that it was willful and corrupt, it is within the definition of a misdemeanor in office. But where it consists of a mere error of judgment or omission of duty without the element of fraud, and where the negligence is attributable to a misconception of duty rather than a willful disregard thereof, it is not impeachable, al-

though it may be highly prejudicial to the interests of the state.

5. Another question closely allied to the one last discussed is the character of the duties imposed upon the board of public lands and buildings, such as the selection of a superintendent of construction for the cell house and in the auditing of accounts against the state. It has been suggested that such duties are analogous to those of ordinary trustees and that the respondents are therefore impeachable for a failure to exercise such a degree of diligence as is required of ordinarily prudent men under like circumstances. That proposition is certainly indefensible, either upon reason or authority. It has been repeatedly decided by this court, and may be regarded as the settled law of the state, that duties of the character enumerated are *quasi*-judicial. For instance, in *Brown v. Otoe County*, 6 Neb., 115, a carefully considered case, LAKE, Ch. J., approves of the following language: "We have, after much reflection and upon due consideration, reached the conclusion that the board of commissioners in passing upon claims act in a judicial capacity." In Bishop on Non-Con. Law, 786, *quasi*-judicial functions are thus defined: "When the law in words or by implication commits to any officer the duty of looking into facts and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is termed *quasi*-judicial."

6. Another rule, so well settled as not to admit of controversy, is that public officers are not liable even in a civil action for judicial acts, however erroneous, unless they are shown to have acted willfully or corruptly. The cases which recognize that rule are so numerous that it is impracticable to cite them at length in this opinion, but they will be found in the notes under sec. 713, Throop, Public Officers, and Mechem, Public Officers, 639, 640. (See also Stephen's Digest Crim. Law, art. 119; Whart.,

Crim. Law [9th ed.], 1572; *Impeachment of Scroggs, Ch. J.*, 8 How. St. Tr., 163, 190; 1 Bishop, Crim. Law, 299, 460.) It follows from what has been said that the action of the board in selecting Dorgan to superintend the construction of the cell house, and in allowing the bills contracted by him, was in character essentially judicial. Their fault was a mere error of judgment not involving either moral turpitude or gross and willful neglect of duty, and does not therefore amount to a misdemeanor in office.

7. Another question which is suggested in this connection is the character of this proceeding, viz., whether it is to be regarded as a civil action or as a criminal prosecution for the purpose of the production and the *quantum* of proof to warrant a conviction. It may be safely asserted that the decided weight of authority in this country and England, if indeed there exists a diversity of opinion on the subject, is that impeachment in that respect must be classed as a criminal prosecution, in which the state is required to establish the essential elements of the charge beyond a reasonable doubt. Blackstone (vol. 2, book 4, p. 259) thus defines the proceeding: "But an impeachment before the lords by the commons of Great Britain in parliament is a prosecution of the already known and established law and has been frequently put in practice, being a presentment to the most high and supreme court of criminal jurisdiction by the most solemn grand inquest of the whole kingdom." In the *Impeachment of Belknap* Senator Wright used the following language: "Because it does not satisfy me upon this point beyond a reasonable doubt, and because it is quite wanting in everything like directness and force, * * * I feel bound to vote not guilty." Language of similar import was used by Senators Christiancy, Booth, Oglesby, and others. But we are fortunately not without judicial authority on the subject. In the *Impeachment of Barnard*, 1872, the judges of the court of appeals of New York sat with the senators and appear

to have been consulted upon all doubtful questions. Chief Justice Church, p. 2070, speaking upon the subject under consideration said: "If I felt warranted in balancing the evidence and in determining that question in a civil action, I might come to the conclusion that the evidence of payment was not reliable, but we are here in a criminal case where the respondent is entitled to the benefit of every reasonable doubt, both upon the facts and the law, and I cannot say that the evidence which has been produced is not sufficient to create some doubt." Judge Andrews, p. 2071, said: "I shall vote not guilty upon this article, upon the principle that this defendant is entitled to every reasonable doubt and that that doubt as to his guilt according to the charge exists in my mind upon the evidence in the case." Like views were expressed by other judges, but there was no dissent from the opinions above quoted. And in *State v. Buckley*, 54 Ala., 599, impeachment is defined as a criminal proceeding without the right of trial by jury. It is not alone in form but also in substance a criminal prosecution. As said by Senator Sargent in *Belknap's Case*, p. 87: "A sentence to disqualification is a humiliating badge affixed to high crimes and misdemeanors in office." While we have in this country no technical attainder working a corruption of blood, the sentence of disqualification to hold or enjoy any office of honor, profit, or trust, which is provided by our constitution in case of conviction by impeachment, is within the primary definition of the term. It is the extinction of civil rights and capacities, a mark of infamy by means of which the offender becomes *attinctus* or *blackened*. (Rap. & Law., Dic., title "Attainder"; Bishop, Crim. Law, 966, 970, and notes.) The allegation that the respondents acted willfully and corruptly being without support, it follows that there is a failure of proof with respect to specification 3.

8. The 6,000 fire brick and six barrels of fire clay de-

scribed in specification 4 were used in the resetting of two boilers belonging to the state and which are to be used in the heating of the new cell house. The contention of the managers is that it was the duty of Mosher, the lessee of the penitentiary, to reset these boilers at his own expense. The provision in the act of 1877 under which the lease was executed is that the lessee shall pay "all penitentiary expenses, including salaries of officers and other help, the heating of buildings, boarding and clothing convicts." The contract is in the following language: "Said Stout agrees to board and clothe all such convicts in the manner prescribed by law, and to pay and defray all expenses necessarily incurred in maintaining said penitentiary, * * * and to restore said buildings, yards, and grounds, at the end of said term, in as good condition as they now are, reasonable wear and tear, loss by fire, etc., excepted." Whether under the above provisions the lessee was at his own expense bound to set boilers for a building not in existence and not contemplated when the contract was executed is to say the least a debatable question. Nor are we now called upon to review the action of the board for the purpose of determining whether their construction is the sound one. It is sufficient that they acted in good faith.

9. It appears that from January 20 to February 1, 1892, inclusive, work on the cell house was suspended for want of material and the convicts assigned to that work remained idle. It appears further that Dorgan, the superintendent, rendered a bill for their labor at $1 per day during all of said time. He attempts to justify his action by reference to a custom to charge subcontractors for the labor of convicts from the time of their assignment unless sick or disabled. This explanation merely proves the wisdom of the scriptural saying that one cannot serve two masters. Dorgan was appointed to employ laborers by the day and not to make time contracts for labor. In other words, the state was not a subcontractor and was liable only for labor actually

performed. But the state board relied upon the time book kept by the warden and his subordinates, who were in the habit of keeping time for the lessee and the several sub-contractors, and in this instance, following the custom above referred to, daily charged to the state all the men who had been assigned to the cell house. The bill therefor was allowed in the belief upon apparently reliable evidence that the services had been rendered as charged and their action is therefore not impeachable.

10. The only specific charge in specification 6 is the crediting of Dorgan for money expended without requiring the production by him of vouchers therefor. The method adopted by the board in dealing with Dorgan was substantially as follows: With each estimate made by the latter he would file with the board the original bills rendered to him for stone and other material, also receipted expense bills for freight, and at the same time exhibit his canceled checks payable to the order of the parties furnishing labor, material, etc. Such checks, after being examined, were returned to Dorgan, but are all in evidence except two which are admitted to have been lost or mislaid. There was in reality no settlement or statement of the account between them, settlement by mutual understanding having been deferred until the termination of Dorgan's employment. While we may not be able to commend the course of the respondents as prudent and sagacious business men, they are not to be convicted because we may differ with them in judgment or because they may fall short of our standard of efficiency and diligence under like circumstances.

11. The only charge in specification 7 is the failure to make final settlement with Dorgan. The respondents all testify that soon after the appointment of Hopkins they received information which led them to question Dorgan's honesty; that they had no means of ascertaining the truth with respect to such charges, and inasmuch as the grand jury of Lancaster county had entered upon an investigation

thereof, they decided to defer action in order to avail themselves of any information derived by that means as well as from other sources. The delay, it is apparent, does not constitute a misdemeanor in office but was for the best interest of the state.

12. We come now to a consideration of the charges under article 2, the first of which is the conversion to their own use by the respondents of $500 of the cell house fund. In this connection it is necessary to again examine the appropriation in question. It is doubtful if the history of the state presents another such an instance of reckless legislation as the appropriation of $40,000 without direction even as to the quality or dimensions of the building provided for, or as to the manner in which the money should be drawn or disbursed. There is no authority in the act for the procuring of material or plans and specifications. As to all matters except labor the board are required to exercise their discretion. In the exercise of that discretion they might lawfully have employed a supervising architect skilled in the construction of prisons and familiar with improved systems of ventilation and other methods of bettering the sanitary condition of such institutions, and for such service they might lawfully have expended several times the amount above named. They were advised by the attorney general that it was lawful to use a part of the cell house fund to defray the cost of visiting other prisons in order that they might better discharge their duty to the public. Whether or not such advice was technically correct is not the test of their liability in this prosecution. If they in good faith construed the law as authorizing them to use a part of that fund for the purpose named, there is no precedent in this country for declaring their offices forfeited because we might in a proper proceeding feel constrained to reverse their ruling, and place a different construction upon the act. It is in evidence that no itemized account of their expenses was ever filed with the board or submitted

to the legislature. But each of the respondents and the warden testify that the money was all expended for traveling expenses and other necessary costs of the trip, and that in addition to the $500 used for that purpose, each expended from $15 to $40 of his private funds. According to their testimony they were absent about two weeks; that the three respondents had free transportation from Lincoln to St. Louis and from Chicago to Lincoln, and that the warden rode on a pass from Chicago to Lincoln. We are on this evidence alone asked to find that their legitimate expenses were less than $500 and draw the inference that they converted a part of that amount; in other words, that they are guilty of embezzlement. It should be remembered in the first place that this is a criminal prosecution and we are not to enter upon the field of conjecture in search of a theory upon which the respondents may be pronounced guilty. Second, they are not contradicted by any evidence whatever. They were not even subjected to a cross-examination regarding the items expended. I must not be understood as holding that upon an accounting they may not be chargeable with a part or all of the $500 in question, but a finding of willful conversion in this case must rest upon suspicion alone, or at most a mere probability and upon evidence insufficient to support a verdict in a civil action.

13. Substantially the same reasoning is applicable to the charge contained in the next specification, viz., the allowance of $200 out of the cell house fund to defray expenses of the chaplain and warden of the penitentiary as delegates to the prison congress at Pittsburgh. In my opinion that expenditure was outside of the scope of the authority of the board and that they are liable to the state for the money so advanced. In other words, they cannot, as to that amount, claim immunity on the ground that their action was in its nature judicial. Such act, however, falls far short of a misdemeanor in office. They acted from motives of humanity, without thought or possibility

of gain or advantage to themselves, which is alone a sufficient defense.

I am convinced that the alleged frauds at the penitentiary and the asylum for the insane were the real inducements for this prosecution, and that the two charges under article 2 are mere incidents, which would not, in the minds of the legislature, have justified the impeachment of the respondents.

14. The specifications under article 3 all relate to overcharges for coal at the asylum, and the questions presented thereby have been fully discussed in the consideration of specification 3, article 1. But in view of the importance of the case it is deemed proper to examine some of the remaining specifications. It should be mentioned in this connection that the superintendent of the asylum had held the position for many years by appointment from the governor. He was a man of high character and standing, and whose integrity was never questioned during the trial. It was his duty to order supplies for the asylum and he was presumed to know what amount thereof had actually been delivered. In allowing bills for coal, the respondents, following the practice which had prevailed for many years, required the superintendent to examine all accounts which were rendered in the form of vouchers and when found correct to "O K" them, that is, to certify that they were correct and that the supplies charged had been delivered. Following is the form of certificate which accompanied each coal voucher:

"Hospital for the Insane, Lincoln. * * * * I certify that the within account is just and correct, and that it is a proper and necessary expense and has not been paid.

"W. M. KNAPP, *Superintendent.*"

At the regular monthly meetings of the board said vouchers were examined and the prices charged therein compared with the contracts in pursuance of which the supplies were furnished. If they were found to corre-

spond and the extensions correct they were allowed, but if they lacked the certificate of the superintendent, or if was discovered therein any substantial error, they were rejected. It was not only impracticable but manifestly impossible for the respondents to scrutinize every item thus certified to them by the heads of the eleven institutions under their charge. It is not seriously denied that the board may within reasonable limits rely upon the statements of the superintendents. It is argued, however, that the excessive amount of the coal bills for the year 1891 was alone sufficient notice to the board of the frauds alleged. It is evident that outrageous frauds were perpetrated upon the state during the period covered by the charges, and that the vouchers certified by the superintendent were, through his negligence or credulity, grossly in excess of the amount of coal actually furnished, although the amount of such overcharges cannot be accurately determined from the proofs. It may be admitted, too, that had the total amount of the coal bills for that year been presented for allowance at any one meeting, the extravagance thereof was such as to have challenged their attention, notwithstanding the certificates of the superintendent and their confidence in his watchfulness and integrity. But the vouchers were presented for allowance at the monthly meetings and in view of the hundreds of bills examined at each meeting, in the disbursement of $450,000 yearly for current expenses and $225,000 for the erection of public buildings, it is not surprising that the excessive charge for coal at the one institution should have escaped detection.

There is another fact which is worthy of notice. Coal bills amounting to over $12,000 for the last quarter of 1890, which was prior to the term of office of either respondent, and the first quarter of 1891 remaining unpaid, the appropriation for that biennial period having been exhausted, were submitted to the legislature of 1891, and by it referred to the proper committees for investigation

and report. And by an act approved April 6, 1891, the sum of $12,000 was appropriated for the payment of said bills, whereupon they were certified to by the superintendent and allowed by the board. In specification 7, relating to the overcharge during said period, it is stated, in substance, that the coal delivered was 2,996,000 pounds only, while the bills rendered by the contractor amounted to 6,886,000 pounds, and which was allowed by the board after deducting 80,000 pounds, leaving a net overcharge of 3,410,000 pounds in six months. The aggregate of the bills rendered during the remaining nine months of that year is 8,113,700 pounds, or 1,627,700 pounds more than the amount approved by the legislature for the six months in question. The overcharge for the first three months of the respondents' term of office which the legislature failed to detect was 2,020,000 pounds, while for the remaining nine months, according to the specification, it is less than twice that amount. It is not contended that negligence of the legislature, however gross, would excuse the willful disregard of duty by the respondents, but there is force in the argument that the appropriation in question is in the nature of a legislative assertion of the reasonableness of the charges, and that since the respondents are admitted to have acted in good faith, they are not chargeable with frauds by the contractor of such character as to escape detection when subjected to the scrutiny of an unfriendly legislature. The appropriation of money for the payment of the bills named was a legislative approval of the accounts under the circumstances of the case, and is a complete justification of the action of the board in ordering them to be paid. So that the legislature of 1893 is placed in the illogical and paradoxical position of impeaching the state board for an act which was expressly authorized, if not in terms commanded, by the legislature of 1891. True, the respondents might have justified a refusal to pay the bills, if tainted with fraud, to their knowledge, but having

in good faith carried out the direction of the legislature it cannot be said that such act amounts to a misdemeanor in office within any modern definition of the term.

The other specifications under article 3 all relate to overcharges for coal at the asylum, and what has been said with reference to the other like charges applies with equal force to them. The vouchers were all presented to the board in the usual course of business, at the regular monthly meetings, bearing the certificates of the superintendent. They were all compared with the contracts on file, and allowed without any knowledge or suspicion on the part of the board that the coal called for had not been delivered.

Every controversy is important to the parties immediately concerned, and this is no exception. But the questions whether these respondents or others shall serve the people, and the effect of a conviction upon them, are of small concern compared with the principle involved. It is useless to indulge in platitudes with regard to public trusts, or the binding obligations of an oath of office. A favorite argument in state trials three hundred years ago was that if the accused should be acquitted of the misdemeanor charged, no one was impeachable, and the fact that it was frequently employed during this trial, proves that history repeats itself. It was then as it is now, the plea of necessity, the argument used when reasons were wanting. According to the definition of official misdemeanors contended for by the state and which must be adopted to warrant a conviction, it will be within the power of an aggressive majority of the legislature at any future time to secure the removal of an obnoxious officer.

It has been truly said that impeachment is an heroic remedy to be resorted to in extreme cases. The only precedents which tend to sustain the position of the managers are early cases in England while the law of impeachment was in a state of evolution, and which have never been

recognized as authority in this country. It may also be asserted as a fact known to every student of English constitutional history that the decadence of impeachment as a remedy in England dates from about the time the house of lords became illustrious for the learning and character of its members, and that it is now practically obsolete in that country.

As said by Prof. Dwight, 6 Am. Law Reg., 282: "The dramatic period of English history has passed away. There have been no impeachments for fifty years and doubtless will be none of special importance unless a revolution takes place." And the words of the late Justice Miller in speaking of Johnson's impeachment are quite as applicable to this: "It may also be said that in view of the invitation which a successful result in that effort to convict and remove him would have held out in future times to exasperated majorities in the legislative body opposed to the president, and his manner of exercising the functions with which he is charged by the constitution, to get rid of a president against whom such personal hostility existed, the country is fortunate in the fact that the great impeachment failed." (Miller, Const. Law, 172.) It is better that the state should be confined to the remedy afforded by the Criminal Code and civil action on the bonds of its officers, than an alternative so dangerous and so liable to abuse as impeachment for technical violations of law, errors of judgment, mistake of fact, or even neglect of duty such as disclosed by the proofs in this case. It follows from the views expressed that the evidence fails to establish the essential facts charged in the several articles of impeachment and that a judgment of not guilty should be entered in favor of each respondent.

JUDGMENT ACCORDINGLY.

NORVAL, J., concurs.

MAXWELL, CH. J., dissenting.

In 1891 one C. W. Mosher was receiving from the state forty cents per day for the board, clothing, care and attention of each convict in the penitentiary. He was also entitled to their labor and the convicts were hired out to various persons at the rate of about forty cents per day for each convict. In 1891 an appropriation was made for building a new cell house by days' work, $40,000. This, like all other appropriations, was for "so much thereof as may be necessary." That is, a sum total of $40,000 was appropriated with the condition that only so much thereof as was necessary should be drawn. This is a condition of all appropriations in this state. The warden seems to have protested against the employment of persons outside of the penitentiary to construct the building on the ground that it had a demoralizing effect on the convicts. The result was that the respondents agreed that the building in the main was to be constructed by convict labor. W. H. Dorgan was Mosher's superintendent at the penitentiary, and had full authority to hire the convicts to any person who desired to employ them. Daniel Hopkins was the warden of the penitentiary from May 5, 1891, to about March 1, 1892. He recommended Dorgan to the respondents as a suitable person on behalf of the state to superintend the construction of the cell house. Dorgan testified as to his relations to Mosher as follows:

"Well, I looked after all the business connected with it —that is, all his interests at the prison. That would include all kinds of supplies, subletting the men, and looking after his business in general."

The order making the appointment is as follows:

"The construction of the cell house for the penitentiary as provided for in the general appropriation bill, wherein $40,000 has been appropriated for that purpose by the twenty-second legislature, to be done by days' labor, being

under consideration, Hill moved that W. H. Dorgan be employed by the board as superintendent of construction with power to purchase material for construction, and employ laborers for building subject to approval of the board. Seconded by Allen. Motion carried.

"Allen moved that Dorgan be required to furnish bond for the faithful performance of duty in the sum of $10,000. Seconded by Hill. Carried.

"On motion of Allen the salary of Dorgan as superindent was fixed at $50 per month, to begin from this day."

Mr. Dorgan gave bond with approved sureties in the sum of $10,000. He was not a builder, and possessed no practical knowledge of building or building-material.

The new cell house is the east wing of the penitentiary and is substantially similar in all respects to the west wing of the main building. The new wing is 220 feet in length by forty-five feet in width, and about thirty-eight feet in height. Being directly east of the main building no wall was necessary at the west end, and there was a wall about twenty-two feet in height on the north and also on the east of the new wing which it was intended to use as the north and east wall and raise the same to the desired height. So that at that time the only walls supposed to be necessary were the south wall, and in addition to raise the east and north walls to the height of the other walls, and put a roof on the building with ceiling preparatory to receiving the cells. This, however, will be discussed later. The board seem to have given Dorgan no directions in regard to the building but left him to do as he pleased. Soon after his appointment Dorgan entered into a contract with S. H. Atwood & Co. for stone for the building, the price being thirty-five cents per cubic foot for dimension stone plugged to size. This was defined by the witnesses as stone split from layers of the proper thickness by drilling holes in the rock and driving wedges therein. Another quality of rock

he paid Atwood & Co. sixteen cents per hundred pounds, and still another eight cents per hundred pounds. The rock to be delivered at Cedar Creek or at other points not more distant from Lincoln, the freight to be paid by the state. Dorgan, according to his statement, made no inquiry of others as to the price of stone. A large part of the stone was in fact purchased by Atwood & Co. of J. W. Zook, of Nemaha county, and delivered on board of the cars at Johnson, in that county, at from three cents per hundred pounds for rubble to ten cents per cubic foot for dimension stone plugged to size. Zook testifies that Dorgan wrote to him about the price of stone some time before he sold to Atwood & Co.; that he had lost the letter. He says:

A. He asked the price of stone delivered at Lancaster.

Q. And what did you tell him?

A. I told him I sold stone delivered on board the cars at the switch at ten cents a foot and if I delivered it on board the cars at Lancaster the freight would be added and that is what the letter contained.

Q. Do you remember about what time that was? Was it before or after the time you sold the stone to Atwood?

A. As near as I can remember that was about a week before Atwood came down there.

He also testifies:

A. I have been in the stone business about ten years.

Q. What has been the uniform market value of this dimension stone free on board the cars at that point?

A. Ten cents a foot and I sold some dimension stone for even less money than that. If I get ten cents I consider I was getting a fair price.

He testifies, in effect, that he wrote to Dorgan to that effect before Atwood & Co. purchased the stone from him and that he enclosed the letter in an envelope, duly stamped, and containing his business card asking for a return of the letter if not called for and that it was never returned. Dorgan, while attempting to deny that he received the let-

ter, does not deny absolutely that he did receive it. On cross-examination he testifies:

Q. My memory is that I asked you if you had received any letters from J. W. Zook, of Nemaha county, relative to stone from that point?

A. No, I don't think that I did.

Q. You don't think that you received any letters?

A. No.

Q. You were subpœnaed to bring them, but you don't think you received any?

A. I have no such letters in my possession, and I don't think I ever had.

This is far short of an unequivocal denial. Atwood & Co. also purchased a quantity of stone from Van Court and Keys, in Nemaha county, for the penitentiary at a slight advance over the price paid Zook. But suppose Dorgan's denial is unequivocal, still the probabilities are that Zook sent the letter to Dorgan as he testifies. Dorgan was anxious to justify his purchases of stone and to shield the respondents. He pleads ignorance of the price of stone as a justification for paying more than twice as much as it could have been purchased for. His ignorance on that point has the appearance of being assumed; and to admit that he had received the letter would, in effect, be a confession that he did know the price. On the other hand, Zook is a disinterested witness, of fair appearance. He was anxious to find a market for his rock. He testifies fully and unequivocally that he sent a letter, duly stamped, to Dorgan, at Lancaster where Dorgan received his mail, offering to furnish stone at ten cents per cubic foot for dimension plugged to size, and three cents per hundred pounds for rubble, all free on board the cars at Johnson, Nemaha county; that this letter had his return card on it and that it never was returned. That this testimony is true there is not a shadow of a doubt and it with other things shows how utterly unreliable is Dorgan's testimony.

The purchases of stone from Atwood & Co. are as follows:

AUBURN STONE.

453.64 ft. at 35c per ft	$158 77
3,145.92 ft. at 35c per ft	1101 07
2,208.27 ft. at 35c per ft	772 90
316,500 lbs. dim., 3,165 ft. at 16c per ft	506 40
	$2,539 14

CEDAR CREEK STONE.

2 cars, no weight or quality	$50 00
958,900 lbs. rubble at 6c	575 34
120,400 lbs. footing at 8c	96 32
111,400 lbs. crushed at $1.10	45 38
85,700 lbs. coping at 16c	137 12
68,500 lbs. dim. at 10c	68 50
124,000 lbs. rubble at 8c	99 20
187,100 lbs. rubble at 8c	149 68
76,000 lbs. dim. at 10c	76 00
29⅓ ft. at 74c.	7 00
197,200 lbs. rubble at 8c	157 76
67,200 lbs. rubble at 8c	53 76
598,700 lbs. rubble at 8c	478 96
318,400 lbs. rubble at 8c	254 72
	$2,249 74

JOHNSON STONE.

281,700 lbs. dim., 2,817 ft. at 16c per ft	$450 72
311,800 lbs. dim., 3,118 ft. at 16c per ft	598 88
90,050 lbs. dim., 990½ ft. at 16c per ft	158 48
34,000 lbs. dim., 340 ft. at 16c per ft	54 40
649,100 lbs. dim., 6,491 ft. at 16c per ft	1,038 56
	$2,201 04
	$6,939 92

Price of stone paid by Hopkins to Atwood & Co.:

Rough ashler, 1,332 ft. at 16c per ft	$213 12
Dimension, 4,640⅘ ft. at 35c per ft	1,624 28
	$1,837 40
Total paid to Atwood for stone	$8,827 32

The amount so paid to Atwood & Co. was about twice as great as the same quality and kind of stone could have been purchased in the open market and the state thereby lost while Dorgan was superintendent more than $3,000, and as Hopkins continued to receive stone under the Dorgan contract the loss to the state exceeded $4,000.

On the 1st day of June, 1891, Mr. Dorgan made what he calls an estimate for $6,100, as follows:

"ESTIMATE No. —.

"For work done and material furnished during the month of May, 1891, for cell house at penitentiary:

Cut stone	$1,000
Concrete	750
Excavating	350
Material on hand not used	4,000
Balance due contractor	100

"The above estimate was made by me this 1st day of June, 1891, and I hereby certify that the amount of work done and materials furnished by said contractor are true and correctly stated and set forth in the above estimate, and that the said estimate is made in the manner and according to the plans and specifications mentioned in the contract with the said state and said contractor.

"W. H. DORGAN, *Superintendent.*

"Signed in my presence and sworn to before me this — day of ——, A. D. 18—.

"Approved by the board of public lands and buildings.

"—— ——, —— ——,

"*Secretary.* *President.*

"General Fund.

"THE STATE OF NEBRASKA,

"To W. H. DORGAN, Dr.

"For material used in building new cell house, per estimate No. 1 hereto attached..... $6,100

"Examined and approved June 1, 1891, by the board of public lands and buildings, and account to be charged to appropriation for penitentiary, new cell house.

"JOHN C. ALLEN, A. R. HUMPHREY,
"*Secretary.* *President.*"

This was approved and warrant drawn for the amount. He also at the same time submitted the following account:

"LINCOLN, NEB., June 1, 1891.

"MR. W. H. DORGAN, *Supt.*,

"In account with PRISON CONTRACT.

To 357 days at $1	$357 00
26 days, team at $3	78 00
lumber for stone shed	100 00
carpenter work	18 00
6 wheelbarrows at $1.50	9 00
nails and mason line	9 95
½ dozen squares	3 00
½ dozen shovels	6 00
2 cars stone	50 00
excavating	350 00
switching and unloading 14 cars	56 00
	$1,036 95

"Received payment, PRISON CONTRACT."

A similar estimate for June, 1891, for $8,000, was made on the 3d day of July, 1891, and similar account filed, which were approved and warrant drawn. The third estimate and account were filed October 5, 1891, for $8,000, and were approved and a warrant issued thereon. The fourth estimate and account for $5,000 were filed and approved December 7, 1891, and warrant drawn. The fifth

estimate and account were filed March 7, 1892, and a warrant issued. It will be seen that he had thus drawn from the treasury upon these various estimates the sum of $32,100, without, so far as appears, a single voucher from the persons who had furnished the labor or material, or their assignees.

Section 19, article 5, of the constitution, provides: "The commissioner of public lands and buildings, the secretary of state, treasurer, and attorney general shall form a board, which shall have general supervision and control of all the buildings, grounds, and lands of the state, the state prison, asylums, and all other institutions thereof, except those for educational purposes; and shall perform such duties and be subject to such rules and regulations as may be prescribed by law."

Section 4, chapter 83, article 7, Compiled Statutes, provides: "The said board shall have power, under the restrictions of this act, to direct the general management of all the said institutions and be responsible for the proper disbursement of the funds appropriated for their maintenance, and shall have reviewing power over the acts of the officers of such institutions, and shall, on the part of the state, at regular meetings as hereinafter directed, audit all accounts of such officers, including the accounts of the commissioner of public lands and buildings, except his salary."

"Sec. 5. At the regular meeting of the board it shall be their duty to examine the accounts of the public officers contemplated in this act and to determine whether the same are entitled to be paid out of the moneys appropriated for the purpose of maintaining the institutions for which they are charged, and if correct, shall approve the same, which approval shall be signed by the president and countersigned by the secretary under the date of such action; and if the accounts be incorrect, exorbitant, or not entitled to payment from such appropriations, the same shall be disapproved and returned to the claimant, such board keeping a record of the same.

"Sec. 6. When the accounts above mentioned have been filed with the board, and shall have been audited and approved by them, the auditor of public accounts is hereby authorized and directed, upon the presentation to him of such accounts so authenticated, to issue his warrant on the treasurer against the proper fund or appropriation, for the amount therein stated, to the claimant or his assignee. And no accounts coming under the provisions of this act shall be entitled to payment until they have been so approved by the said board."

Section 6, chapter 83, article 3 provides: "All persons having claims against the state shall exhibit the same, with the evidence in support thereof, to the auditor, to be audited, settled, and allowed within two years after such claims shall accrue; and in all suits brought in behalf of the state, no debt or claim shall be allowed against the state as a set-off, but such as has been exhibited to the auditor, and by him allowed or disallowed, except only in cases where it shall be proved to the satisfaction of the court that the defendant, at the time of trial, is in possession of vouchers which he could not produce to the auditor, or that he was prevented from exhibiting the claim to the auditor, by absence from the state, sickness, or unavoidable accident; *Provided*, The auditor shall in no case audit a claim or set-off which is not provided by law."

Section 8 requires all warrants, vouchers, etc., to be preserved in the office of the auditor.

Section 2, article 8, of the same chapter requires the auditor to keep an account of all claims presented to him for an examination and adjustment, and provides for appeals by any party aggrieved. All claims against the state are to be presented to him and must have his approval before a warrant can be issued. This means the primary claims—those of persons who furnish the goods, labor, etc. It is true in expenditures contracted by the board of public lands and buildings they must approve—that is, certify all

vouchers for such expenditures before the auditor can be required to act upon them. This is a precaution to prevent frauds by requiring the board that contracted the debt to certify that the claim is correct. It does not change the character of the voucher, however, as that is to be for the original claim. (*State v. Moore*, 36 Neb., 579.)

In the case at bar the respondents, on mere estimates and without vouchers, allowed Dorgan to draw money at his pleasure. The board itself could not draw money from the treasury except upon proper vouchers and it had no authority to authorize Dorgan to do so. Should the mode adopted in this case become the rule, every precaution for the protection of taxpayers would be broken down, the constitution and statutes set at naught, and money unlawfully and in defiance of law taken from the treasury.

The testimony of Hopkins shows that at the time he was appointed superintendent, on March 16, 1892, Dorgan had built the south wall and one-third of the east wall, and that was substantially all that was done. Hopkins testifies on cross-examination:

Q. How far had the cell house progressed at the time you took charge as superintendent?

A. The north wall of the cell house was completed and part of the east.

Q. Do you mean the north or south wall?

A. I should say the south wall of the cell house.

Q. And a part of the east wall?

A. And a part of the east wall; yes, sir.

Q. The north wall had not yet been torn down?

A. No, sir; we hadn't commenced on that. I should have said the south wall.

Q. Was the south wall clear up?

A. Yes, sir.

Q. How far was the east wall?

A. Why it was perhaps one-third.

He also testifies that "the grates were put in the south wall and the door was hung also—the large door."

This testimony does not seem to be denied. The experts called to place values upon the several walls of the building, and the whole as it now stands, differ greatly. The five called from Lincoln all place the values of the several parts, including material, very much lower than the experts called from Omaha. Thus, Mr. Bullock, a builder of Lincoln, placed the value of the south wall at $6,472, while Mr. Coots, a builder of Omaha, estimates the value complete in round numbers at $10,472.35. He also estimates the east wall complete at $2,797.95. It is difficult to reconcile the various estimates of the experts, as it would seem there should not be so much difference in estimated values. Perhaps in arriving at an approximate value it would be well to take the average of the estimates, which would be $8,437.18 for the south wall complete. Coots estimates the value of the east wall complete at $2,797.95, one-third of which would be $910.99. Therefore, all the work performed under Dorgan's superintendence, had it been performed by free labor, would have been worth $9,348.07, but having been almost wholly performed by convict labor the actual cost could not, even at $1 per day for convicts, have exceeded $8,000. It also appears that there were plans and details prepared for which it is claimed $350 were paid. There was some stone on hand, the amount thereof does not clearly appear. It could not have been very large, however, because Hopkins, after he became superintendent, purchased stone of Atwood & Co., as heretofore stated, to the amount of $1,837.35. At the time Dorgan ceased to be superintendent all the stone that was supposed to be necessary was sufficient to complete the east wall and to raise the north wall to the same height as the south wall. But suppose we estimate the stone on hand at $2,000 and the value of the south wall at $10,000, and the aggregate of the work, had it been performed by citizen labor, would be

$13,260, which would include everything, and for this Dorgan had received $32,100, and as there were no funds in the treasury the amounts were drawing interest at seven per cent. But the work on the south and east walls was almost wholly performed by convict labor. The testimony shows that convicts would perform from one-half to two-thirds as much labor as was performed by citizens. So that the actual cost of the wall, including superintendence, must have been very much less than the above estimate.

In March or April, 1892, after Hopkins was appointed superintendent, he removed the cap-stones from the top of the north wall, when it was discovered that there were no binders in the wall and that the mortar possessed no adhesiveness—was worthless, and that it would be unsafe to build on it. The respondents were thereupon consulted and found it necessary to consent to the tearing down of the wall and rebuilding the same, and this was done under Hopkin's direction. Dorgan had nothing to do with this or putting on the roof, and all evidence as to the cost and value of the north wall, roof, etc., are not in issue in this case, nor of the building as it now stands, as there is no charge against Hopkins. Dorgan returned to Hopkins the sum of $6,331.15. Dorgan has received and has retained $25,768.85. The state was charged $1 per day for the convicts, although other contractors paid but forty cents. It was alleged that the state had the choice, and that the men selected for the state were experienced stone masons, and therefore more valuable than the average convict. This is shown to be true of eight or ten of those employed, but not generally.

M. D. Welch, president of the Western Manufacturing Company, testified that he employed ordinarily about one-half of the convicts.

Q. You have practically *carte blanche* as to selection of the men?

A. Yes, I have.

Q. You have your pick of the men in the penitentiary?

A. Well, that is to say, I don't take cripples or diseased men if I can help it, nor short time men.

Q. You take long time men—good, strong, healthy fellows?

A. Yes, in my business I want to pick a man that when he gets familiar with the work he will be worth something. It takes some time to learn them.

He also testifies that he pays forty cents per day for each convict employed, and furnishes them tobacco, candles, chewing gum, etc., in addition. The wages paid by him appear to be the ordinary wages, and the proof fails to show that on any contract that continued for a considerable time were greater wages paid.

There are charges that more days' work were charged to the state than were rendered. That some such were charged there is no doubt, but the extent of such charges cannot be determined, although the amount paid was considerable. There would seem to be no reason why the state should be charged for labor not performed or a greater rate than forty cents per day, and with a capable, intelligent, disinterested superintendent of the work and proper effort of the respondents, fictitious services would not have been charged, and no more would have been paid for the convicts who worked for the state.

The appointment of Dorgan, whose interests were altogether with Mosher, is entirely unjustifiable. If the board was busy, as it claims to have been, there was all the more necessity for the appointment of a capable, disinterested superintendent who could be relied upon to look after the business and interest of the state. No ordinarily prudent man would have appointed Dorgan to fill the position of superintendent nor placed in his hands tens of thousands of dollars; and it is not surprising that the state has suffered serious loss. It seems that Hastings was absent when Dorgan was appointed; that he had selected a disinterested

person named Davey and had promised him the position. But after his return he visited the penitentiary and claims to have found everything satisfactory and right, and concluded to retain Dorgan. No man can serve two masters, and this case has proved no exception to the rule.

That there were frauds in the flour contract there is no doubt, but the extent of such frauds it is difficult to determine. Thus, in January and February, 1892, the flour was weighed, it is claimed, and the only record preserved was the stubs of the weigh checks, and they are lost. There is also proof that the drayman was in the habit of leaving a number of sacks of flour at a designated place on the way to the asylum.

The charges under these heads are fully sustained.

2. It appears that while Dorgan was possessed of the money in question, he, at the request of the respondents, paid to Hopkins $200 to enable him and Elder Howe to visit the prison congress at Pittsburgh, Pennsylvania. Soon afterwards the board received from him $500 of the money belonging to the state to pay the expenses of a visit to various points to enable them to choose the best cells. This was charged to the cell house fund. These appropriations are justified upon the ground that the state would be benefited thereby, and that therefore it was a proper expenditure.

Section 22, article 3, of the constitution, provides: "No allowance shall be made for the incidental expenses of any state officer, except the same be made by general appropriation and upon an account specifying each item. 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. The auditor shall, within sixty days after the adjournment of each session of

the legislature, prepare and publish a full statement of all moneys expended at such session, specifying the amount of each item, and to whom and for what paid." This provision declares 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." The legislature makes appropriations. It is for it, composed as it is of the representatives of the people, to say what is for the interest of the state and requires the expenditure of money. Unless it grants the authority there is none. If an officer, or a number of them, can take $1 without an appropriation and be justified in doing so, he or they may take all that there is in the treasury if in their view the state will be benefited thereby. Money taken without an appropriation is taken not only without law but in defiance of it, and if the principle is once established, would lead to gross frauds and peculations. Suppose trustees having the care of property, and were receiving the rents and profits, should desire to visit distant points to enable them to administer the estate with wisdom and prudence and thereby benefit it, could they charge this expense upon the owner or beneficiaries without their consent lawfully expressed? No more can they do so in this instance. The state, through its legislature, must give its assent to an expenditure, otherwise the party must pay it out of his own pocket. No voucher was filed with any officer showing the amount expended, nor any attempt to comply with the law. In addition, this cell house is not ready for the cells even now; therefore, there was no emergency. But under no view of the case can the expenditure be justified, and the fact that in one or two previous instances such expenditures were made, which do not seem to have been known, but tend to show the lax methods that seem to have prevailed with the board wherever the expenditure of money was concerned. It also appears that the legislature made an appropriation of

$1,000 for the traveling expenses of the board. It is true Mr. Allen testifies that $500 of this sum had been expended. He also testifies that all the members had passes, so their railroad fare was nothing. So far as he stated the visits to the various institutions by the board, the expenditures should not have exceeded $100, and probably did not. If the board desired to travel on official business it would seem that this was the fund for that purpose. It appears also that Dorgan used $234 to reset the boilers in the prison, a charge which properly belonged to Mosher, and should have been paid by him.

In addition to the ordinary provisions in appropriation bills, that of 1891 contained the following:

"Sec. 3. Each state officer and each board entitled to draw against the appropriation provided for in this act shall keep an itemized account of all expenditures made by them and report the same with vouchers to the finance committee of the next legislature, and no officer of institutions and no state officer shall incur any indebtedness beyond the amount appropriated in this bill except to prevent disaster."

The testimony shows that the respondents made no attempt to comply with these provisions. The charges are fully sustained.

3. The testimony tends to show that gross frauds were committed in the delivery of coal at the Lincoln insane asylum. The respondents claim to have been ignorant of these frauds until about September, 1892. It appears that from the 1st day of October, 1890, to the 26th day of March, 1891, the Whitebreast Coal & Lime Company furnished coal for the asylum and was allowed therefor the sum of $11,551.95. To cover this claim an appropriation of $12,000, or so much thereof as might be necessary, was made, and the claim was certified to the auditor by the respondents. The coal was alleged to have been delivered on the cars at asylum switch, but the number and initials

of the cars on which it was alleged the coal was delivered are not given in a single instance.

Dr. Knapp testifies, in effect, that he did not believe the amount of coal charged had been delivered. His bookkeeper testified to substantially the same facts. Neither of them, however, communicated their suspicion to the respondents. Knapp afterwards approved the vouchers and they were approved by the respondents and the warrant issued. The fact that an appropriation had been made to pay for this coal was not an adjudication of the claim, as the legislature cannot adjudicate claims. (*State v. Babcock*, 22 Neb., 38.) The very large amount of coal charged—sufficient to have supplied all the asylums in the state for the time charged—certainly should have put the respondents upon inquiry. The reports for coal from the other public institutions were before them, and unless fraudulent vouchers were sent in from them also, of which there is no claim, a comparison should have shown the fraud. No examination was made, however. A specimen is seen in a voucher for July, 1891, as follows:

"General Fund.

"STATE OF NEBRASKA, HOSPITAL FOR THE INSANE,

"To WHITEBREAST COAL & LIME CO., Dr.

July	4,	32,000 pea, at $1.72	$27 52
	6,	40,000 pea, at $1.72	34 40
	7,	2,050 Canon, at $6.90	7 07
	8,	112,000 pea, at $1.72	96 32
	10,	82,000 lump, at $2.59	106 19
	10,	41,000 pea, at $1.72	35 26
	11,	40,000 lump, at $2.59	51 80
	14,	41,000 lump, at $2.59	53 09
	14,	40,000 pea, at $1.72	34 40
	15,	2,720 Canon, at $6.90	9 38
	16,	40,000 pea, at $1.72	34 40
	20,	86,000 lump, at $2.59	111 37
	22,	2,680 Canon, at $6.90	9 24

July 23,	42,000 lump, at $2.59	$54 39
24,	112,000 pea, at $1.72	96 32
25,	70,000 pea, at $1.72	60 20
28,	104,000 pea, at $1.72	89 44
		$910 79

"I hereby certify that the above account is for supplies actually furnished the above named institution.

"(Sign here.) WHITEBREAST COAL & LIME CO.
"JNO. T. DORGAN.

"Examined and adjusted.
"—— ——
"*Auditor Public Accounts.*
"Per —— ——, *Deputy.*

"Approved:
"—— ——,
"*Secretary of State.*
"Per —— ——, *Deputy.*

"Received of T. H. Benton, auditor of public accounts, warrant No. ——

"(Sign here also.) WHITEBREAST COAL & LIME CO.
"JNO. T. DORGAN.

"DUPLICATE.

"HOSPITAL FOR THE INSANE,
"LINCOLN, 7–31, 1891.

"I certify that the within account is just and correct and that it is a proper and necessary expense and has not been paid. W. M. KNAPP, *Superintendent.*

"Examined and approved August 3, 1891, by the board of public lands and buildings, and account to be charged to appropriation for fuel and lights.

"J. C. ALLEN, —— ——,
"*Secretary.* *President.*"

Indorsed: "Nebraska Hospital for the Insane, Lincoln, Nebraska. Voucher No. ——. $910.79. Warrant issued on account of fuel and lights to Whitebreast Coal & Lime Co. T. H. BENTON,
"*Auditor of Public Accounts.*"

Betts, Weaver & Co. seem to have adopted the Whitebreast style of vouchers in November, 1891. The voucher for December, 1891, is as follows:

"General Fund.

"STATE OF NEBRASKA, HOSPITAL FOR THE INSANE,

"To BETTS, WEAVER & CO., Dr.

To 434,500 tons pea, $1.70	$738 22
313,120 tons lump, $2.70	846 72
14,780 tons Canon, $6	86 33
	$1,671 28

"Approved Jan. 4, 1892."

Other vouchers in that form were approved.

Contracts for coal were let every three months and the Whitebreast Coal & Lime Company and Betts, Weaver & Co. seem to have monopolized the business. From October 1, 1890, to December 31, 1891, and the month of February, 1892, the amount of coal alleged to have been delivered to the asylum at Lincoln was 17,551,907 pounds, and the amount actually received, so far as the evidence shows, was 7,589,600 pounds, leaving a shortage of 9,962,307 pounds, which cost $12,855.47. The proof fails to show that the respondents in any manner profited by these frauds.

The respondents introduced evidence tending to show that last October they submitted the whole matter to the grand jury of Lancaster county, and thereby sought to bring the guilty parties to justice. It is but fair, however, to state that Governor Boyd requested them to lay the matter before the grand jury, and it is evident that the matter had acquired such publicity it could not be avoided. On this trial they in effect deny the frauds, or that, if such existed, they had any notice thereof in any form and therefore are not chargeable therewith. They seem also to exhibit no very friendly sentiments towards the witnesses by whom these frauds were proved, and certainly show no disposition to aid in procuring proof of the same.

Some reliance is placed on the approval of the asylum officers by the governor in his message of January, 1891. This, no doubt, is entitled to considerable weight, but it could not in any manner excuse the respondents from the exercise of reasonable care in the examination of the asylum vouchers. In addition to this, the land commissioner in December, 1890, in his report to the governor, which is in evidence, says (p. 86): "Under the existing system of furnishing supplies the appropriation funds are too frequently used in keeping with that conception of charity which declares that it 'hideth a multitude of sins.' Items for luxuries, privileges, and conveniences that are alone enjoyed by the officials and their friends are too often cloaked in a claim for 'board and clothing, fuel and lights,' or some one of the other necessary funds appropriated for maintenance of the institution."

It is contended by the respondents that the business in their respective offices has so increased that it is impossible to give attention to many of the details of business that come before them and therefore they are excusable. It is true there is a large amount of business in each of the offices named. This is a large and growing state and business in all departments is constantly increasing. In the office of the land commissioner, however, there are ten clerks and one deputy, which with the principal make twelve persons. In the office of the secretary of state, one deputy and two clerks, four persons in all. In the attorney general's office, one deputy and stenographer. If these officers need additional assistance, if they will present their claim to the legislature, through the governor, no doubt the desired increase would be granted. These facts must be known to the respondents, and as no such application was made it must be because it was not considered necessary. The business of the state, however, must be conducted in a reasonably prudent and careful manner, otherwise the result would be chaos. Suppose a merchant or

business man should urge the want of time to look after his business and therefore neglected it, the result would not be uncertain. No defense of this kind can be entertained.

4. Are these acts ground for impeachment? Section 5, article 5, of the constitution provides: "All civil officers of this state shall be liable to impeachment for any misdemeanor in office." It may be well to inquire first what are the duties of public officers? Each one, before entering upon his duties, is required to take an oath that he will "faithfully and impartially perform the duties of his office according to law, and to the best of his ability." An officer is bound to exercise ordinary care; such care as an ordinarily prudent man would exercise in the management of his own affairs. The respondents are, to quite an extent, trustees. They let contracts and certify claims each year to the amount of nearly $1,000,000. Now shall this work be performed faithfully to the best of the ability of each as he has sworn to do, or shall it be neglected and no examination made?

There is considerable conflict in the authorities as to what constitutes an impeachable offense. Under the common law, the grounds of impeachment are "high crimes and misdemeanors." In a number of cases under this law it has been held that the cause of accusation must be a crime punishable under the criminal law. In England, impeachment has been to some extent considered as a mode of trial to punish crime, although a judgment of guilty was no bar to an indictment and conviction for the same offense. In this country, while some of the cases hold that to constitute an impeachable offense it must be such as could be punished under the criminal law, yet in the majority of cases it is held that this requirement is unnecessary, and we are constrained to adopt the latter view. Judge Lawrence, in 6 Am. Law Reg., 649, in discussing the meaning of the word, says: "The word 'misdemeanor' has a common law, a parliamentary, and a popular sense. In a parlia-

mentary sense, as applied to officers, it means maladministration or misconduct, not necessarily indictable." "Demeanor is conduct" and misdemeanor is misconduct in the business of his office. It must be in matters of importance and be of a character to show a willful disregard of duty.

Now do the acts above recited constitute misconduct in office? We are not without authorities in this state on that point. Thus in *Minkler v. State*, 14 Neb., 181, a county surveyor, who acted on the honest belief that he had a right to remove section corners erected by the government to conform to the field notes, was found guilty of maladministration of his office and was removed. In *State v. Oleson*, 15 Neb., 247, the relator was removed from the office of sheriff for official misdemeanors and the judgment was affirmed. It is true the principal question in this court was the jurisdiction of the county commissioners to try the cause, but the character of the offense was also to some extent involved. In *State v. Meeker*, 19 Neb., 444, the respondent was removed from office by the county board of Saline county for certain alleged violations of the law, and while an appeal was pending this court compelled him to deliver over the books of the office to the person appointed in his stead. In these cases there was no hesitancy on the part of this court to hold that these judgments of removal were valid. Among the grounds mentioned in the statute for removal from office are habitual or willful neglect of duty. (Comp. Stats., ch. 18, art. 2, sec. 1.) An examination of the constitutional provisions of a number of the western states will show that misdemeanor is cause for impeachment. Thus:

Section 1, article 7, of the Wisconsin constitution provides for impeaching "all civil officers of this state for corrupt conduct in office, or for crimes and misdemeanors."

Section 7, article 6, of the constitution of Indiana declares that "All state officers shall for crime, incapacity, or negligence be liable to be removed from office either by im-

peachment, * * * or by a joint resolution of the general assembly."

Section 30 of the constitution of Illinois provides that "The general assembly may for cause entered on the journals, upon due notice and opportunity for defense, remove any judge upon concurrence of three-fourths of all the members of each house. All other officers in this article mentioned shall be removed from office on prosecution and final conviction for misdemeanor in office."

Section 197 of the constitution of North Dakota provides for impeachment for "misconduct, malfeasance, crime, or misdemeanor in office, or for habitual drunkenness, or gross incompetency." Section 4, article 16, of the constitution of South Dakota is the same.

Section 28, article 2, of the constitution of Kansas provides for impeachment for any misdemeanor in office.

Section 20, article 3, of the constitution of Iowa provides "for impeachment for any misdemeanor or malfeasance in office."

The constitution of Colorado specifies "high crimes or misdemeanors or malfeasance in office." (Sec. 474.)

Other states provide for substantially the same causes.

The provision in the constitution of this state is broader than that of any of the states named except Kansas. Under our constitution any gross misconduct in office is cause for impeachment. It would be a violation of the oath of office and of the officer's duty. In that respect our constitution is much broader than the common law term "high crimes and misdemeanors." But even at common law the offense need not necessarily be a crime punishable by the criminal law. Alexander Hamilton, in No. 65 of the Federalist, says: "The subjects of its jurisdiction are those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated political, as they relate

chiefly to injuries done immediately to the society itself." Hamilton's views are generally adopted in this country.

In the early part of the present century impeachment was the ordinary mode of removing objectionable officers. Thus, in Massachusetts and some other states, county officers and even justices of the peace were impeached. In many, if not all, of the states at the present time the statutes provide for a simple, direct proceeding in an action in the courts in the nature of impeachment against certain officers who are guilty of misconduct in office; and impeachment is but one of the remedies for that purpose, and in this state, as applied to a state officer, is the sole remedy. The causes, however, which would cause the removal of a county officer on the ground of misconduct in office would seem to be sufficient against a state officer.

The claim that there was no willful disregard of law in the penitentiary cell house is clearly shown to be unfounded. The respondents' duty to the state was, in the first instance, to appoint a capable, efficient superintendent who would protect the rights of the state; second, see that the state received as fair treatment as other contractors in the employment of convicts, and purchase of materials, and to exercise a general supervision over the work; and third, to permit no money to be drawn except on original vouchers of the persons primarily entitled to the money or their assignees. In all these respects there was a failure to discharge their duty. Their claim that they knew nothing against Dorgan is entitled to no weight whatever. They did know that he represented the party who could and probably would profit by his being superintendent. Indeed the argument that they were able to hire him cheaper than a disinterested party is an admission of his unfitness, as it shows that he was drawing full pay for his services from Mosher at the same time. In addition to these facts, each allowance of an estimate without a voucher was a violation of a duty by the respondents by which they wrong-

fully and willfully permitted Dorgan to draw money from the treasury.

Some attempt was made to prove usage as a defense to some or all of these charges. But the authorities are uniform that usage cannot be proved to contradict the expressed terms of a contract or where it would result in violating some positive requirement of statute. (Rogers, Expert Test., 271–272, and cases cited.) It is very clear that proof of usage cannot be considered, otherwise we might be asked to sanction the practice at asylum switch.

Considerable stress is laid upon the good faith of the respondents in committing these acts. This question was before this court in *Cobbey v. Burks*, 11 Neb., 161–162, in an action for taking illegal fees. It is said: "The penalty imposed by this act may be incurred by exacting fees which are supposed at the time to be legally demandable. By the very words of the prohibitory clause the taking is the gist of the offense. Ignorance of the law will not excuse in any case; and this principle is applicable, and with irresistible force, to the case of an officer selected for his capacity and in whom ignorance is unpardonable. The very acceptance of the office carries with it an assertion of a sufficient share of intelligence to enable the party to follow a guide provided for him with an unusual attention, clearness, and precision. On any other principle a conviction would seldom take place even in cases of the most flagrant abuse; for pretexts would never be wanting." It may be said that the people having elected these men, their will should be respected and they should not be ousted for the offenses charged. In every vote I have given in this court I have favored carrying out, as far as possible, the will of the people as expressed through the ballot-box; but the same constitution which provides for the election of officers and for a discharge of the duties of the officers also provides for declaring the office vacant in case of serious, willful misconduct; in other words, where the officer fails to faith-

fully perform the trust committed to his hands. The doctrine has been applied in equity from time immemorial. Thus, if a trustee misbehaves in any way to the detriment of the estate he may be removed. (*Ex parte Reynolds*, 5 Ves., 707.) So if he refuse or neglect to execute the trust it is cause for removal. (*In re Mechanics Bank*, 2 Barb. [N. Y.], 446; *De Peyster v. Clendining*, 8 Paige [N. Y.], 295; Perry, Trusts, sec. 419, and cases cited.) This rule has been applied by this court against inferior officers in a number of instances. Thus, in *Brock v. Hopkins*, 5 Neb., 231, it was held that a clerk of the district court was liable for damages occasioned by his negligently and carelessly taking insufficient security. While if he exercised a reasonable degree of care in the performance of his duty he was not liable. In *Fox v. Meacham*, 6 Neb., 531, it was held that where a justice of the peace violates the law and abuses his authority to the injury and damage of another he and his sureties are liable on his bond for such damages. I know of no reason why the same rule which would hold a county officer liable for damages, or guilty of an offense for which he might be removed should not be applied to the state officers. The charge in both cases is substantially the same, viz., misconduct in office. If a county officer is guilty no one will urge as a reason for condoning the offense that the accused was elected to the office and that the people would be deprived of his services by his removal; and I know of no good reason why the same rule should not be applied where the officer is elected by the entire state.

It is said the respondents acted judicially in approving accounts and therefore are not liable for their acts. The able attorneys for the respondents made no claim of this kind, and, therefore, it is evident that they did not rely upon it. If in approving accounts they act judicially, in order to protect them there are three things which must concur: First, the claim must be one they are authorized to audit; second, it must be presented in the form of a bill

or voucher showing the debt and what it is for, otherwise the board would be like a judge passing upon a matter not before him—such as a matter not put in issue; and third, the statute makes it their duty to investigate every claim. The protection accorded to a judge against a private action does not apply when he is on trial under specific charges of impeachment. Even a judge of this court could not plead protection against such charges. In such case his conduct and general manner of conducting his business may be inquired into, and if he is found guilty of misconduct on any of the charges he may be declared guilty. But no judicial officer is protected when he exceeds his authority, and these respondents very clearly, in all they are charged with, acted either without authority of law or in excess of such authority. But in my view their duties are not judicial. In the proper sense they do not allow accounts. They merely investigate, or should investigate, the vouchers and the several items thereof to see that they conform to the contract. In other words, the duty of the board is to let contracts in a specified manner, and when vouchers are presented under such contracts which, upon examination, are found to be correct, they are to certify the same to the auditor. The certificate is not a final order from which an appeal would lie, and is not a judicial act. It will not be seriously contended that an officer who negligently and improperly certifies a fraudulent account which it was his duty to investigate, or who unlawfully draws money from the treasury, is protected from the consequences of his acts, and, so far as I am aware, no case so holds.

The rule announced in this case, it seems to me, would have protected Tweed from prosecution. Yet we know that he was tried and convicted for obtaining money from the city of New York upon fictitious claims allowed against the city by the proper authorities, and suit was also brought in behalf of the people to recover the money so obtained. In *People v. Tweed*, 63 N. Y., 194, the petition alleged

that Tweed was president of the board of supervisors of the county of New York and * * * "procured various fictitious claims to be made up, purporting to be liabilities, amounting in the aggregate to $6,198,957.85, specified in a schedule annexed, which were presented and by the procurement of said conspirators were certified to by the three auditors named," etc., and it was held that the action could be maintained.

Proof was introduced on behalf of the respondents to show that Dorgan, Knapp, and others had given bonds to the state. It is evident that none of these bonds will cover the actual loss to the state, and even if enforced would be an inadequate remedy. But the giving of a bond by an officer does not exempt him from the performance of his duty, nor relieve those who superintend his acts from a faithful supervision of the same. The law imposes the duty of supervision with "a reasonable degree of care." The duty of an officer is stated by Judge LAKE in *Brock v. Hopkins*, *supra*, that he exercise a reasonable degree of care in the performance of his duty. It seems to me the respondents wholly failed in the performance of their duties in the cases specified in these charges, whereby the state during the ten months that Dorgan was superintendent lost a large sum of money, probably not less than $15,000; and $234 for resetting the boilers which was not a debt of the state, together with the sums drawn by Hopkins and Howe to go to Pittsburgh, and the respondents to go to St. Louis, in all $934. The overpayments for coal, all in sixteen months, exceed $12,000. An ordinarily prudent man would have required the vouchers to be in proper form, giving the numbers and weights of the several cars. There are telephones in all of the public buildings so that it would have taken but a moment to make the proper inquiries in regard to the coal and protect the interest of the state, but so far as the proof shows such inquiries were not made in a single instance. A public officer, like any other

servant, should be faithful to his employer to see that in all matters under his control the master shall not be defrauded; in other words, he shall be faithful to his trust, not as an eye servant, but in the sight of God. That is, in effect, the oath that each officer takes to faithfully perform his duty. Our public institutions should be conducted on business principles and without fear, favor, or favoritism, and no money should be drawn from the treasury except in strict pursuance of law. If the court should approve or even condone the conduct of the respondents in these cases, the influence of the decision will be felt in every department of business in the state as tending to weaken the sense of faithfulness of public officers and employes, and in every way prove detrimental to the best interests of society. There are an abundance of men in the state who can, and if the opportunity is given by their selection to the offices filled by the respondents will, faithfully look after the interests of the state; and as the respondents have failed in that regard, the charges are well taken and should be sustained. I therefore vote guilty as charged. I fear the result of the decision, if adhered to, will be to open a door to the grossest frauds in the public institutions of the state.

A number of the witnesses for the state testified as if under constraint, and there seemed to be powerful influences affecting some of them aside from the immediate friends of the respondents at work in their favor. The respondents, of course, are not responsible for these influences, but it is my duty to mention them.

OTTO LOBECK, ADMINISTRATOR, APPELLANT, V. LEE-CLARKE-ANDREESEN HARDWARE COMPANY ET AL., APPELLEES.

FILED JUNE 6, 1893. No. 4750.

1. **Partnership**: SURVIVING PARTNERS: LIABILITY TO ACCOUNT FOR GOOD-WILL OF FIRM. Upon the dissolution of a partnership firm by the death of one of its members, the surviving partners may carry on the same line of business at the same place as was transacted the firm business, without liability to account to the legal representative of the deceased partner for the good-will of said firm, in the absence of their own agreement to the contrary.

2. ———: SALE BY REPRESENTATIVE OF DECEASED PARTNER'S INTEREST. Where the legal representative of a deceased member of a partnership firm, as such, without words of limitation, joins in the sale of all the stock and fixtures of such firm to the surviving members thereof, such legal representative cannot maintain an action against such survivors for the good-will of said firm or for any portion thereof.

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

Cowin & McHugh and *Gregory, Day & Day*, for appellant:

Good-will is a proper subject of sale or bequest. (Greenwood, Public Policy, p. 729.) The good-will of a business is property and held and treated as independent of either the stock, fixtures or place. (*Sheppard v. Boggs*, 9 Neb., 258; *Wallingford v. Burr*, 15 Id., 204, 17 Id., 137; *Austen v. Boys*, 4 Jurist n. s. [Eng.], 719.) The good-will does not survive, but is partnership property; if not disposed of by consent, it must be sold like other partnership effects. (*Dougherty v. Van Nostrand*, 1 Hoffman Ch. [N.Y.], 68; Lindley, Partnership, p. 443; *Hall v. Barrows*, 4 De Gex, J. & S. [Eng.], 150*.)

John L. Webster, contra:

The good-will of the firm passed to the survivors of the firm on the death of Fried. The plaintiff had no interest therein. (3 Kent, Com., p. 64; *Hammond v. Douglas*, 5 Ves. [Eng.], 539; *Farr v. Pearce*, 3 Mad. [Eng.], 74; *Lewis v. Langdon*, 7 Sim. [Eng.], 421; Parsons, Partnership, pp. 274, 461; *Robertson v. Quiddington*, 28 Beav. [Eng.], 529.)

RYAN, C.

In the month of March, 1881, Henry J. Lee, C. A. Fried, E. M. Andreesen, and H. T. Clarke entered into a written agreement whereby they associated themselves as partners under the firm name of Lee, Fried & Co., for the purpose of dealing at wholesale in nails, hardware, and tinners' stock. This partnership business was to commence in March, 1881, and to expire January 1, 1883, after which it continued probably upon the same terms as provided in said contract, though we find in the record no direct evidence of any agreement as to such continuance. The business was carried on by the firm of Lee, Fried & Co. until the death of C. A. Fried, which occurred August 16, 1887; indeed, even then, matters continued as before, except that Otto Lobeck, having qualified as executor of the estate of C. A. Fried, acted in place of said decedent. On the 30th day of December, 1887, Henry J. Lee, Henry T. Clarke, Edward M. Andreesen, and one John T. Clarke entered into a written contract, to which said executor, as such, was a party, of which contract the following is a copy:

"This contract, made on the 29th day of December, A. D. 1887, by and between the surviving partners of the firm known as Lee, Fried & Co., to-wit, Henry J. Lee, Henry T. Clarke, Edward M. Andreesen, and Otto Lobeck, executor of the estate of C. A. Fried, deceased, parties of the first part, and Henry J. Lee, Henry T. Clarke, Edward M.

Andreesen, and John T. Clarke, parties of the second part, witnesseth, that for and in consideration of the covenants hereinafter contained, to be kept and performed by the respective parties to this contract, the parties of the second part agree to form a corporation prior to January 2, A. D. 1888, to be known as Lee-Clarke-Andreesen Hardware Company, for the purpose of conducting a general hardware business; the said parties of the first part agree to sell to such corporation when formed, and said parties of the second part, as such corporation, agree to buy the stock, fixtures, and good-will of the business owned and conducted by the former firm of Lee, Fried & Co. at the market value thereof, as per inventory taken between December 26 and December 31, A. D. 1887; said stock to be inventoried with freight added. The said parties of the second part, as such corporation, agree to pay, and the said parties of the first part agree to accept therefor, stock in said corporation at par value, or part cash, at the option of said corporation; said transfer to take place January 1 or 2, A. D. 1888. The said parties of the first part agree to pay all outstanding indebtedness of said firm; the said parties of the second part, as such corporation, agree to make collection of all outstanding accounts of said old firm without cost to said parties of the first part, unless for extraordinary expenses, such as attorney's fees, court costs, etc.; said collections, when made, to be turned over to said parties of the first part or an authorized representative, and to be used on paying the liabilities of the old firm of Lee, Fried & Co.; and the parties of the first part agree among themselves that the stock in said corporation received in payment for the stock, fixtures, and good-will of said partnership shall be apportioned and partitioned among the surviving members of said firm and the executor of C. A. Fried, deceased, according to their interest in the partnership, as the same may appear from the books of account of said partnership; provided, however, that if the said Otto

Lobeck, executor of the estate of C. A. Fried, deceased, shall elect to receive money in lieu of said stock for the interest of his decedent in said partnership, then the other members of said partnership, to-wit, Henry J. Lee, Henry T. Clarke, and Edward M. Andreesen, shall purchase from said Lobeck the amount of stock in said corporation to which his decedent would be entitled as a member of said partnership, at its par value, each an equal one-third of said stock, to be paid therefor in money.

"Witness our hands this 30th day of December, A. D. 1887.

LEE, FRIED & CO.,
"HENRY J. LEE,
"LEE, FRIED & CO.,
"HENRY T. CLARKE,
"EDWARD M. ANDREESEN,
"OTTO LOBECK,
"*Administrator with will attached,*
"*Parties of the First Part.*
"HENRY J. LEE,
"HENRY T. CLARKE,
"EDWARD M. ANDREESEN,
"JOHN T. CLARKE,
"*Parties of the Second Part.*"

Consistently with the terms of the above contract the said Henry J. Lee, Henry T. Clarke, Edward M. Andreesen, and John T. Clarke organized a corporation under the name of Lee-Clarke-Andreesen Hardware Company, which took possession of the entire property invoiced as described in the aforesaid written agreement and the bill of sale, executed January 16, 1888, of which the following is a copy:

"Know all men by these presents, that, for a valuable consideration, we, Henry J. Lee, Henry T. Clarke, and Edward M. Andreesen, surviving partners of the late firm of Lee, Fried & Co., have bargained and sold, and by these presents do bargain and sell, unto the Lee-Clarke-

Andreesen Hardware Company the stock of hardware, warehouse, and fixtures of said late firm, according to the inventory taken between December 26 and December 31, 1887, amounting to $198,436.75, together with the good-will of the business of said late firm. To have and to hold the said property and good-will unto the said Lee-Clarke-Andreesen Hardware Company, its successors and assigns, forever. This bill of sale being made in execution of said contract dated December 29, 1887, for the sale of said property.

"Witness our hands this 16th day of January, 1888.

"LEE, FRIED & CO.
"EDWARD M. ANDREESEN.
"H. T. CLARKE.
"H. J. LEE."

It does not satisfactorily appear why the above bill of sale was not signed by Otto Lobeck as the representative of C. A. Fried, for, while it purports to be made to carry into execution the written contract of date December 29, 1887, in which said Lobeck, in his representative capacity, appeared as one of the parties of the first part, he seems by common consent to have been omitted from even mention in the bill of sale. It might be inferable from the draft of date December 31, 1887, made by Otto Lobeck, as administrator of C. A. Fried's estate, upon the firm of Fried & Co. in favor of C. O. Lobeck, for $5,000, that the said administrator had elected to, and had thereby in part consummated his said election to withdraw from said firm. If this satisfactorily appeared, the determination of this appeal would be much simplified. As the evidence does not explain the non-joinder of Lobeck as administrator in the bill of sale, and as it does not point to sufficient certainty of intent to warrant placing great stress upon it, the bill of sale will be assumed to have been made in execution of the contract entered into on December 29, 1887, and upon that assumption the rights of the parties will be considered without reference to said draft.

This action was brought in the district court of Douglas county by Otto Lobeck, as the representative of C. A. Fried, against the Lee-Clarke-Andreesen Hardware Company, Henry J. Lee, Henry T. Clarke, and Edward M. Andreesen. The prayer of the petition was that said defendants be required to make a just and fair inventory and valuation of the good-will acquired as above described, and be required to account for the same, either by the issuance of stock or in money, as to the court should seem equitable and proper, and for such other and further relief as to the court might seem meet.

The answer, in addition to other denials which need not be detailed, denied that the good-will was of any value, but alleged that it passed incidentally with the stock of goods purchased; that the invoice covered such good-will, and that by said executor having accepted payment on account of the interest of the estate of his decedent under the terms of said written agreement, he was estopped to make claim for the value of the good-will of the firm of Lee, Fried & Co. There was a reply, which was in substance a denial of the various affirmative matters pleaded in the answer.

On the 11th day of February, 1891, a trial was had to the court, upon which the court found for the defendants and adjudged that the cause be dismissed for want of equity and that said defendants recover their costs. During the trial of the case plaintiff offered to show the value of the good-will of the firm of Lee, Fried & Co. as a fact independent of, and in addition to, the price paid for the merchandise of said firm purchased by the defendants. This offer of evidence was refused, and in various ways the questions which shall now be considered were properly presented for adjudication. These involve the construction of the contract, between plaintiff and the other parties to the above contract, and the respective rights and remedies of such parties, with reference to the good-will of the firm of Lee, Fried & Co.

Only one member of the firm of Lee, Fried & Co. had died at the date of the above contract, and his executor, with the other members of said firm, constituted the parties of the first part. The parties of the second part were the surviving members of the firm of Lee, Fried & Co., and John T. Clarke. The subject-matter of this contract was "the stock, fixtures, and good-will of the business owned and conducted by the former firm of Lee, Fried & Co." The price to be paid was the market value of the subject-matter of the contract, to be determined as per inventory therein described; said stock to be inventoried with freight added. This contract, however, did not contemplate the purchase by the parties of the second part, as individuals, of the subject-matter thereof, but that such purchase should be made by them as a corporation to be formed thereafter under the name of the Lee-Clarke-Andreesen Hardware Company. Another peculiarity of this contract was in the media of payment. The consideration recited was the keeping and performing of certain conditions, which were payment either wholly or partly in stock of the corporation contemplated at its par value and the balance in cash at the option of said corporation, and the payment of all outstanding debts and the collection of all outstanding accounts of the firm of Lee, Fried & Co. After providing for payments and collections as above, the parties of the first part, Henry J. Lee, Henry T. Clarke, Edward M. Andreesen, and Otto Lobeck, executor of the estate of C. A. Fried, agreed among themselves that such stock as should be issued by the proposed corporation in payment for the stock, fixtures, and good-will of said partnership should be apportioned and partitioned among the surviving members of said firm of Lee, Fried & Co., and the executor of C. A. Fried, deceased, according to the interest of each in the partnership, as such interest appeared by the books thereof; provided that if said executor elected to receive money in lieu of stock for the interest of C. A. Fried, then that

Henry J. Lee, Henry T. Clarke, and Edward M. Andreesen should purchase from said executor the shares of stock to which, as such executor, he would be entitled at its par value.

From this synopsis it is evident (aside from paying the indebtedness of the firm of Lee, Fried & Co., and making collections of its outstanding accounts for that purpose) that each of the said first parties to said contract agreed to accept payment, for the property inventoried, in the stock of the proposed corporation, or partly in stock and the balance in money, at said proposed corporation's option. Among themselves the parties of the first part further agreed that in event payment should be made in the stock of said proposed corporation, it should be divided in a certain manner, with the proviso, however, that if the executor of C. A. Fried should elect to receive money rather than stock, each of the other parties of the first part would pay him in cash one-third of the par value of said stock. This action was brought against the Lee-Clarke-Andreesen Hardware Company, Henry J. Lee, Henry T. Clarke, and Edward M. Andreesen. There is no averment in the petition of any demand for the delivery to plaintiff of stock by the Lee-Clarke-Andreesen Hardware Company nor of a refusal by that corporation to issue stock alone or make payment partly in its stock and partly in money as provided in said agreement. The complaint of violations of the above contract is made solely as against Henry J. Lee, Henry T. Clarke, and Edward M. Andreesen—the said hardware company being only incidentally mentioned as having ratified said contract and assumed all the rights to and secured all the benefits thereof by taking possession of all the property, assets, and estate of the former firm of Lee, Fried & Co., by, through, and under said contract, and appropriating the stock, fixtures, good-will, and certain leasehold interests and estates of said firm of Lee, Fried & Co., for the purpose of specially protecting and securing

the full benefits of the good-will of the last mentioned firm, and as having appropriated the same to their own use and behoof exclusively. As the antecedent portion of the last paragraph had reference solely to the above corporation, it is probable that the closing sentence was intended to be limited in like manner, though it is spoken of in the plural number. However that may be, it is clear that the petition predicated plaintiff's rights upon the primary liability of the surviving members of the firm of Lee, Fried & Co., and as whatever liability may be found to exist as against the Lee-Clarke-Andreesen Hardware Company must in any event, under the averments of the petition, be secondary and only collateral to that of H. J. Lee, Henry T. Clarke, and Edward M. Andreesen, the alleged liability of these three last named parties to the estate of C. A. Fried must necessarily be the test of plaintiff's right of recovery.

As the judgment prayed was for the value of the "good-will" of the firm of Lee, Fried & Co., it may not be without profit to define that term. In *Dougherty v. Van Nostrand*, 1 Hoffman Ch. [N. Y.], 69, it was said: "The good-will of a trade is called by Lord Eldon the probability that the old customers will resort to the old place. (*Curtwell v. Lee*, 17 Vesey [Eng.], 346.)" In Parsons, Partnership, on marginal page 262*, the term "good-will" is thus discussed: "It is a hope or expectation which may be reasonable and strong and may rest upon a state of things that has grown up through a long period and been promoted by large expenditures of money. And it may be worth all the money it has cost and a great deal more, but it is, after all, nothing more than a hope grounded upon a probability."

These definitions have reference to but one, though the generally employed, use of the term "good-will." In 2 Lawson's Rights, Remedies, and Practice, sec. 685, the same form of good-will is defined, in conjunction with which,

however, is found another meaning which must be taken into account as the sense of the term as treated of in one class of adjudicated cases, of which *Smith v. Walker*, 57 Mich., 456, is an example. This language (italicized to challenge attention to the superadded meaning) is employed in the section above referred to. "The good-will of a business is defined as the benefit which arises from its having been carried on for some time in a particular house or by a particular person or firm, or *from the use of a particular trade-mark or trade-name.* Its value consists in the probability that the old customers will continue to be customers, notwithstanding a change in the firm name or place of business. It is a species of personal property." Still, another meaning is sometimes included in the definition of the term "good-will," as illustrated by the following language quoted from Collyer, Partnership, as embodied in section 161: "The term 'good-will' is used in two distinct senses. It is applied either to an advantage arising from the fact of sole ownership simply, without reference to other persons; or as an advantage arising from the fact of sole ownership, to the exclusion of other persons. The latter species of good-will is founded on special contract, and is a commodity upon which a valuation may be fixed. Therefore, the interest of an outgoing partner in such good-will may be valued and assigned, with the rest of the effects, to the remaining partner. A good-will of this kind being a valuable addition to a trade, and arising as it does in contract, must be created by some appropriate words. It cannot be implied from the general words, stock, effects, etc. Therefore, where one partner had agreed to sell to his copartner 'his inheritance in their nursery for £10,000,' and the other partner, in answer to the proposal, wrote as follows: 'I agree to give you £10,000, as you mention, for your moiety of all your partnership premises, stock, business, and concern,' Lord Eldon held that the purchaser had no right, according to his contract, to claim any good-

will in the trade, in addition to the partnership property which was the subject of it, except what was the necessary effect of his acquiring the sole ownership in the property; certainly not such as to preclude the seller from carrying on the same trade, where, and when, and with whom he pleased."

In section 99 of Story, Partnership, the generally employed definition of this term is given, after which occurs the following language: "But the term 'good-will' is sometimes applied to another case, where a retiring partner contracts not to carry on the same trade or business at all, or not within a given distance. This is an interest which may be valued between the parties, and may therefore be assigned with the premises and the rest of the effects to the remaining partner as an accompaniment of the ordinary good-will of the establishment. Good-will, in the former sense, is therefore an advantage arising from the mere fact of sole ownership of the premises, stock, or establishment, without reference to other persons as rivals; and in the latter sense as an advantage arising from the fact of excluding the retiring partner from the same trade or business as a rival."

In the discussion of adjudicated cases there has not always been kept in view, much less stated, what particular form of good-will was under consideration. For instance, where it is the right to use the trade-mark adopted and made valuable by a firm or an individual, it is readily seen that it has something of the nature of tangible personal property, and as such independently might properly be subject to sale. This form of property is frequently protected by injunction, and, in various ways, is treated as one form of good-will having no analogy to that form under consideration in the case at bar. Again, the term is sometimes applied to the contract obligation to refrain from competition by a retiring partner as against the other members of the firm, either as measured by the extent of territory or duration of time. Such an advantage as this

affords may be of great value, and, having its origin in contract, and being founded upon sufficient consideration, the courts recognize, protect, and enforce it.

Of these forms of good-will which imply a monopoly such as the courts will protect, it has been said that good-will may independently be transferred. This distinction as to the use of the term "good-will" is recognized in the above text quoted from Story and from Collyer on Partnership. Speaking generally, it is believed it will be found that whatever confusion has arisen as to the right to transfer good-will specifically and independently, is referable simply to a failure to distinguish these different forms of good-will. As to that form which must alone be considered in determining this case, there is no confusion of interpretation nor conflict of authorities. Treating of it is the following language, quoted from Collyer, Partnership, section 162: "The former species of good-will is clearly not founded in special contract, but in a combination of accidental circumstances; as the existence and celebrity of the house, the skill and affluence of the trader, or the prejudices or necessities of the customers. This, therefore, is not a tangible interest. It is not a commodity on which a specific value can be placed, or for which a definite allowance can be made. Therefore, upon the death of one partner, it is not stock of which the executor of a deceased partner can compel a division, unless he can also compel a sale of the whole premises and stock, as in the case of a partnership at will. Under these latter circumstances, however, the good-will would accompany the rest of the stock, and might create some additional speculative value in the mind of a purchaser. Accordingly, a court of equity, in this and similar cases, would so treat it that its value should be felt and appreciated by all parties interested in the concern; and therefore, in decreeing a sale of the entire partnership, would order the sale to be so adjusted as to give full effect to the value of the good-will."

In the case of *Austen v. Boys*, 4 Jurist n. s. [Eng.], 719, where the plaintiff sought to recover the value of his alleged good-will in a firm of solicitors, the following language was used by Lord Chancellor Chelmsford: "Where a trade is established in a particular place, the good-will of that trade means nothing more than the sum of money which any person would be willing to give for the chance of being able to keep the trade connected with the place where it has been carried on. It was truly said in argument that 'good-will' is something distinct from the profits of the business, although, in determining its value, the profits are necessarily taken into account, and it is usually estimated at so many years' purchase upon the amount of those profits. But the term 'good-will' seems wholly inapplicable to the business of a solicitor, which has no local existence, but is entirely personal, depending upon the trust and confidence which persons may repose in his integrity, and ability to conduct their legal affairs. * * * But this term, however, as used in the agreement of 1846, appears to me to be capable of a definite meaning; and if confined within the limits of the agreement, and as between the parties themselves, it becomes perfectly intelligible. It seems to have been intended to describe that interest which the retiring partner would have had if he had remained in the partnership, and which, by his retirement before its termination he was willing to relinquish to the continuing partner. * * * But it is said that the stipulation as to not practicing within one hundred miles of the post-office, being indefinite, and therefore extending to the whole period of the life of the retiring partner, is inconsistent with the notion of the term 'good-will' having such a narrow and contracted meaning as would be thus assigned to it. But this argument is founded upon an entire disregard of the different offices of the two stipulations. The one is intended to provide for the sale of the interest in the partnership whenever either partner chooses to retire;

the other is a general engagement, the consideration for which is not merely the benefit obtained on retirement, but the whole of the partnership agreement. * * * I am satisfied that the term 'good-will,' associated as it is with the words 'share and interest,' and being a matter of valuation between the partners themselves, must be confined within the limits of the partnership, and that Mr. Austen is not entitled to any supposed value of his share beyond it."

In *Musselman and Clarkson's Appeal*, 62 Pa. St., 81, was considered the term "good-will" as applicable under the following condition of facts: A banking firm had dissolved and appointed a partner to liquidate, who, immediately following the dissolution, commenced banking in the firm house on his own account, under the firm name, at the same time settling the firm business there. Thompson, C. J., for the court, said that there was no doubt that if under these circumstances this partner had sold the "good-will" he would have been obliged to have accounted for the value received. This opinion discussed the liability of this partner in the following language: "Nor at law was there any obligation on him to pay for the good-will. He did not agree to pay for it, and he did not sell it as such. Nor can I comprehend how it existed independently of the property. There was no relinquishment of business by the partners. Their business expired by its own limitation. They had no exclusive right in the business that existed for a moment after the firm dissolved, or any sole ownership of it as against any others; and these are the *criteria* of property in good-will according to the English rule. (*Kennedy v. Lee*, 3 Mer. [Eng.], 441; Coll. on Part., 156; Story on Part., 369.) But supposing the rule to be more extensive by usage with us, and I think it is, how can there be a good-will in favor of the members of a firm, where the firm has ceased by its own limitation and no exclusive right to follow the business in that place belongs to them? In that case as a distinct property it is good.....It

then attaches to and enhances the realty, and the value of it is realized in selling or renting that."

On marginal page 263 of Parsons on Partnership occurs the following language: "The executor of a deceased partner can realize the share of the deceased in the good-will only when he can compel a sale of the stock and premises, and then the good-will goes with them. For, as a general rule, by the conveyance of a shop or store, the good-will of the business carried on in it passes, although nothing is said about the good-will. And if an executor cannot compel a sale of the premises, or, as it seems, if the premises are not in fact sold, the executor gets no advantage from the good-will, for that remains entirely with the surviving partners who carry on the same business in the same place."

To a proper understanding of the language used by Sir John Romilly, M. R., in *Robertson v. Quiddington*, 28 Beavan's Rep. [Eng.], 529, a brief statement of the facts of the case may not be unprofitable. John Morgan and N. A. Quiddington, in 1836, commenced carrying on a business as tailors, under the firm name of Morgan & Co. In this business Morgan had a two-thirds interest, and at his death, which occurred on the 8th day of January, 1860, John Robertson, by the terms of Morgan's will, became entitled to two-thirds of the interest held by the testator in the good-will of the above mentioned business. On the 23d day of June, 1860, Robertson filed a bill praying that said good-will might be sold and that plaintiff might be declared entitled to four ninth parts of the proceeds of such sale, and for an accounting by Quiddington of all profits made or received by him from the good-will of the business of Morgan & Co. since the decease of Morgan. A demurrer to the bill was sustained on the ground of want of equity. In the consideration of this demurrer the following language was employed: "I fully concur in the observations on both sides, not only that the good-will is a valuable and tangible thing in many cases, but it is never a

tangible thing unless it is connected with the business itself, from which it cannot be separated, and I never knew a case in which it has been so treated. I am of opinion that even if the executors have assented to this bequest, which I must assume on demurrer, because it is so stated upon the bill, it is not competent for a legatee of two-thirds of a good-will of a deceased partner to file a bill against the legatee of the remaining one-third and the surviving partner, who is entitled to all the rest of the good-will, to have that bequest specifically made good."

From the above consideration of principles and citations from approved text-writers, as well as adjudicated cases, it seems inevitably to result that the surviving partners of the firm of Lee, Fried & Co., in the absence of a restrictive agreement on their part, were entitled to carry on the same line of business as had been transacted by said firm, and at the same place, without accounting for the value of such of the good-will of said firm as thereby accrued to them. It also seems equally clear that by the purchase of the stock and fixtures of the firm of Lee, Fried & Co. the defendants, in the absence of an express reservation to the contrary, became entitled to whatever good-will attached to the former business of said firm. It results, therefore, that the judgment of the district court is

AFFIRMED.

THE other commissioners concur.

STATE OF NEBRASKA V. COMMERCIAL & SAVINGS BANK OF KEARNEY, NEBRASKA.

FILED JUNE 6, 1893. No. 5218.

1. **Findings of Referee.** The findings of fact in the report of a referee will not be disturbed, unless manifestly contrary to the weight of the evidence.
2. **State Banks:** INSOLVENCY: ASSETS: AUTHORITY OF RECEIVER. In winding up the affairs of an insolvent bank under the statutes of this state, the receiver of such bank, when so authorized by this court, may take such steps as shall be necessary to enable him to secure possession of the assets of such bank, or their value.
3. ———: ———: PROCEEDINGS TO OBTAIN POSSESSION OF ASSETS: FRAUD OF OFFICERS: PARTIES. It is not necessary in proceedings to obtain possession of the assets of an insolvent bank wrongfully withheld by one of its former officers, to join as parties to the proceedings other individuals for whose benefit the misappropriation took place; neither can such bank officer require the allowance of a set-off or counter-claim as a condition precedent to the delivery of the possession of such assets.
4. ———: ———: FRAUD: OFFICERS: LIABILITY FOR VALUE OF ASSETS. Where parties have, by the fraudulent conduct of themselves or their agents, obtained possession of the assets of an insolvent bank, and are unable to return to the receiver of such insolvent bank the said assets in kind, such parties will be held to strict accountability for the value thereof.

ORIGINAL action to wind up the affairs of the Commercial & Savings Bank of Kearney, Nebraska, under the banking law of 1889.

Henry Gibbons, receiver, filed a petition for an order to require the Mutual Loan & Investment Company and S. S. St. John to surrender and deliver to him, as receiver of the Commercial & Savings Bank of Kearney, certain notes and other things of value obtained by them from John Barnd, cashier, and wrongfully withheld. Answers

were filed, and the cause referred to Henry C. Andrews. His findings were against the respondents. *Judgment for receiver.*

George H. Hastings, Attorney General, and *Marston & Nevius,* for the receiver.

Willis L. Hand and *Francis G. Hamer, contra.*

RYAN, C.

The Commercial & Savings Bank of Kearney was organized under the laws of this state in the fall of the year of 1889, and as such bank transacted business until and including January 30, 1892. On this last named date, and for some time previous thereto, Sylvester S. St. John was president of said bank, at the time being secretary of the Mutual Loan & Investment Company of Kearney, while John Barnd, contemporaneously, was cashier of the aforesaid bank. About half past 8 o'clock P. M. of January 30, 1892 (which was Saturday) there was executed between the Mutual Loan & Investment Company, by Sylvester S. St. John, its secretary, and Sylvester S. St. John in his individual capacity, as parties of the first part, and the Commercial & Savings Bank by John Barnd, its cashier, and by John Barnd individually, as parties of the second part, a writing of which the following is a copy:

"KEARNEY, NEB., January 30, 1892.

"Articles of agreement, made and entered into this day by and between the Mutual Loan & Investment Company and Sylvester S. St. John, of the one part, and the Commercial & Savings Bank and John Barnd, of the second part, witnesseth, that the said party of the first part hereby assumes and agrees to pay a certain note of five thousand ($5,000) dollars given by John Barnd to the Mutual Loan & Investment Company, and by them discounted at Essex National Bank, Haverhill, Mass., in consideration of the

said Commercial & Savings Bank paying a certain note of five thousand dollars ($5,000), given by the said Mutual Loan & Investment Company to said Commercial & Savings Bank, and by them discounted at the Union National Bank of Chicago. In consideration of the payment in cash of two thousand ($2,000) dollars, the Commercial & Savings Bank hereby agrees to pay a certain note given by the Mutual Loan & Investment Company to said bank, and by them discounted at the Lincoln National Bank, Lincoln, Neb., and they hereby agree to return certain notes for three thousand ($3,000) dollars put up by the said the Mutual Loan & Investment Company as collateral to said note of two thousand ($2,000) dollars.

"The Commercial & Savings Bank also agrees to pay a certain draft to the Citizens Savings & Trust Company of Iowa City, Iowa, given in payment of a certain certificate of deposit issued by the said the Commercial & Savings Bank to A. C. Hinman and by him discounted at the Citizens Savings & Trust Company of Iowa City, Iowa.

"Also, Syl. S. St. John agrees to turn over to said John Barnd stock number one (1), two (2), and four (4), and thirty-eight (38) of the Commercial & Savings Bank, being two hundred (200) shares, this day sold to said John Barnd, cashier, and the said John Barnd agrees to turn over to Syl. S. St. John number sixteen (16) and seventeen (17) of the Mutual Loan & Investment Company's stock, being seventy-five (75) shares this day sold to said Sylvester S. St. John.

"The Commercial & Savings Bank also agrees to return to the Mutual Loan & Investment Company first mortgages on real estate amounting to forty-nine hundred fifty ($4950) dollars held by the Union National Bank of Chicago as collateral security; also five thousand dollars ($5,000), more or less, of first mortgages on real estate held by F. D. Updyke as collateral to the said Commercial & Savings Bank's note of five thousand ($5,000) dollars,

which the said Commercial & Savings Bank agrees to pay.

"In witness whereof, we have set our hands and seals this 30th day of January, 1892.

"THE MUTUAL LOAN & INV. CO.,
"By SYL. S. ST. JOHN, *Sec'y.* [SEAL.]
"SYLVESTER S. ST. JOHN. [SEAL.]

"Witness:
"A. H. BERTRAND.
"L. H. ST. JOHN.

"THE COMMERCIAL & SAVINGS BANK,
"By JOHN BARND, *Cashier.* [SEAL.]
"JOHN BARND. [SEAL.]"

On Monday, February 1, 1892, a special meeting of the directors of said bank was held at 8 o'clock A. M., as shown by the bank records, at which meeting the following proceedings were had:

"SPECIAL MEETING OF DIRECTORS HELD AT 8 A. M. FEBRUARY 1, 1892.

"Meeting called to order by S. S. St. John, president. Present, S. S. St. John, John Barnd, John Scott, O. P. Pearson, W. F. Pickering, T. N. Hartzell, and A. H. Bertrand. The following letter was read:

"'KEARNEY, NEB., January 30, 1892.

"'*To the Board of Directors of the Commercial & Savings Bank:*

"'GENTLEMEN: Having sold my stock, and disposed of all my interest in the bank, I necessarily cease all of my connection with the same, and tender my resignation as director and president.

"'Yours most truly, SYLVESTER S. ST. JOHN.'

"The resignation of Mr. St. John was moved and carried as director and president.

"On motion, the resignation of John Barnd, cashier of the bank, was carried and accepted.

"On motion, John Barnd was elected president of the bank. Carried.

"On motion, it was seconded and carried that the board of directors confirm the transfer of stock, notes, etc., made between S. S. St. John and the Mutual Loan & Investment Company, of the first part, and John Barnd and the Commercial & Savings Bank, of the second part, as appears on the records of the bank as having taken place January 30, 1892.

"A statement was made by John Barnd, that owing to conditions and circumstances over which the bank had no control, the bank would possibly be compelled to close its doors and business for want of funds; that this state of affairs was brought about by the general depression of financial matters for the last eighteen months, causing a shrinkage in the deposits of the bank, and inability to collect and realize upon its resources.

"On motion, the resignation of O. P. Pearson, John Scott, T. N. Hartzell, and W. F. Pickering as directors of the bank were accepted, and their stock in said bank was purchased by the Commercial & Savings Bank. Moved and carried that the above transfer of bank stocks be recorded on the stock ledger of the bank.

"On motion, adjourned.

"A. H. BERTRAND,
"*Ass't Cashier, and Actg. Secy.*"

As developed by subsequent events, the bank was at that time hopelessly insolvent; its stock had no value whatever. Under these circumstances, if there is charged against the Mutual Loan & Investment Company and Sylvester S. St. John, the parties of the first part to the above agreement, what they were to receive thereunder, and to the Commercial & Savings Bank and John Barnd, as parties of the second part, the items that said agreement entitled them to receive, such statement would stand as follows:

The Mutual Loan & Investment Company, and Sylvester S. St. John, Dr.

To agreement of Commercial & Savings Bank and John Barnd to pay note Mutual Loan & Investment Company	$5,000
To agreement of Commercial & Savings Bank to pay note of above company to said bank, afterward discounted at Lincoln National Bank	2,000
To collaterals to above to be returned	3,000
To 75 shares, $100 each, of stock Mutual Loan & Investment Company, at par value	7,500
To first mortgages on real estate to be returned, held by Union National Bank, Chicago	4,950
To first mortgages held by Updyke as collateral	5,000
Total	$27,450

The Commercial & Savings Bank and John Barnd, Dr.

To Mutual Loan & Investment Company and S. S. St. John agreement to pay John Barnd's note to said Mutual Loan & Investment Company	$5,000
To cash paid to first parties to agreement	2,000
To 200 shares stock of said bank, worthless	0,000
Total	$7,000

The terms of this agreement, as above shown, entitled the parties of the first part to $27,450, while the Commercial & Savings Bank and John Barnd, parties of the second part, received, in all, a consideration of $7,000. Of this $7,000 the note of John Barnd to the Mutual Loan & Investment Company for $5,000 had been discounted by the Essex National Bank of Haverhill, Massachusetts, presumably with the guaranty of said Mutual Loan & Investment Company, as the evidence for the defendant clearly shows that that was its usual course as to notes discounted by said loan and investment company. As to

this note for $5,000, this company assumed no new or independent liability, for, in the light of subsequent events, it is quite clear that Sylvester S. St. John then well knew that neither the Commercial & Savings Bank nor John Barnd would be able to pay this note after becoming a party to this arrangement. It is, therefore, not unfair to charge upon this statement, compiled from said written contract, as having been received from the Mutual Loan & Investment Company and Sylvester S. St. John $27,450, and as received by the bank and its cashier, but $2,000 being the cash recited as paid. This would leave a balance in favor of the Mutual Loan & Investment Company and its secretary, Sylvester S. St. John, parties of the first part, of $25,450. As there was found in this bank but $20.70 in cash, according to the evidence of John Barnd, its partner as party of the first part in the above transaction, it would seem that the bank got nothing out of this deal which, with something of grim irony, its president and cashier call an exchange. When in considering this "exchange" it is remembered that the Commercial & Savings Bank was represented by its cashier, whose judgment was impaired by an insane delusion, and by a president whose interests were that the opposite party, whose controlling officer he then was, should profit at the bank's expense, there is nothing marvelous in the result. On behalf of the secretary of the Mutual Loan & Investment Company, who held the office of president of the insolvent bank, until its utter ruin and the robbery of its patrons was an accomplished fact, nothing in extenuation can be urged. When he tendered his resignation as president of the bank at the meeting of the directors held at 8 o'clock in the forenoon of Monday, February 1, 1892, he was aware that the bank was insolvent, rendered hopelessly so by his own betrayal of his trust. It is now urged on his behalf that there can be no order made in respect to the stock of the defunct bank, held by the sons

and brother of this perfidious president, because they are not made parties to this proceeding. Under the facts in this case it is hoped that no necessity will exist for making these relatives such parties. The misconduct of Sylvester S. St. John, as president of the Commercial & Savings Bank, in becoming a party to the misappropriation of the assets of that bank subjected him to a personal liability for the full value of those assets to the bank's creditors. It cannot be too strongly or too frequently impressed upon the minds of officers and managers of banks and other corporations that they are but agents, and that as such they must loyally serve their principals. Banks are necessary concomitants of civilization; to them are entrusted the earnings of honest toil, the accumulations of intelligent enterprise, the trust funds of charity, orphanage, and helpless old age, and as managers of such institutions, bank presidents, cashiers, and directors cannot be too strongly impressed with the responsibility of their official positions. As to this trust relation the law will especially tolerate no violation of the eighth commandment.

Sylvester S. St. John and the Mutual Loan & Investment Company question the powers of the receiver to institute this sort of proceedings as to them. A sufficient answer to this will be found by a reference to *State v. Commercial State Bank*, 28 Neb., 677, and *State v. Exchange Bank*, 34 Id., 198. The order in this case appointing Henry Gibbons receiver required the officers of the Commercial & Savings Bank to deliver to him all the property and effects of said bank of what description soever of which they had possession. In view of the fact that the evidence upon which the referee predicated his findings fully sustains each of said findings, the matters for which the Mutual Loan & Investment Company and Sylvester S. St. John shall be held accountable to the receiver aforesaid will be stated in accordance with said findings. It is alleged, however, that these findings fail to state the value of the sepa-

rate items with which we must of necessity deal. Possibly it would have been better that the report had been a little fuller, so as to cover this suggestion, but as no motion was made for such change by the defendants, this criticism can avail nothing. (*State v. Lancaster County*, 20 Neb., 419.) The report of the referee, however, with the evidence, to which reference will be briefly made, is amply sufficient for our purposes. By the testimony of Sylvester S. St. John it is established that in the so-called exchange the stock of the Mutual Loan & Investment Company was treated as of par value, and we shall act upon the same estimate. The evidence shows that the bank stock held by the Mutual Loan & Investment Company on January 30, 1892, was utterly worthless, as were also the notes of John Barnd. The finding of the referee as to the property received by Sylvester S. St. John and the Mutual Loan & Investment Company was as follows:

Capital stock Mutual Loan & Investment Company	$27,500 00
Capital stock Mutual Loan & Investment Company, of Barnd	7,500 00
Notes of Mutual Loan & Investment Company	2,000 00
Notes Mutual Loan & Investment Company	5,000 00
Cash deposited to company	3,761 00
Note of S. S. St. John, and interest $69	1,025 63
Note of S. S. St. John	4,434 00
Note of L. N. St. John	2,087 24
Note of T. E. St. John	400 00
Total received by St. John and M. L. & I. Co	$53,707 87

Against this there was turned over to the bank and John Barnd the aforesaid worthless bank stock and equally worthless notes of John Barnd, with the following items: Cash, check, $2,780.40; notes of Mutual Loan &

Investment Company, $9,239, in all $12,019.40. From the statement of the property received by St. John and the Mutual Loan & Investment Company, as shown by the finding of the referee, there should be deducted the item of capital stock Mutual Loan & Investment Company, of Barnd, $7,500, which leaves on that score a total of $46,-207.87. Deducting from this the value of the property received by the bank and John Barnd, $12,019.40, the difference of $34,188.47 represents the value of the property for which Sylvester S. St. John and the Mutual Loan & Investment Company should be held liable to account to the receiver of the aforesaid bank, with whatever interest and earnings since January 30, 1892, have accrued thereon. As this court has original jurisdiction to wind up the affairs of insolvent state banks, and as it has already assumed jurisdiction of this bank's affairs, it is not deemed advisable to subject the parties to the inconvenience and expense of unnecessary litigation.

The Mutual Loan & Investment Company, aforesaid, and Sylvester S. St. John are, therefore, required to deliver to the receiver of the Commercial & Savings Bank, aforesaid, the value of the stock of the Mutual Loan & Investment Company of $27,500 canceled by said Mutual Loan & Investment Company, and all the notes and other property received as aforesaid, being in all of the aggregate amount of $34,188.47, with seven per cent interest thereon from January 30, 1892, within thirty days from the date on which this opinion is filed with the clerk of this court. If this requirement is not complied with, such further proceedings will be taken by this court as shall be found necessary to enforce such compliance.

JUDGMENT ACCORDINGLY.

THE other commissioners concur.

SUN FIRE OFFICE, OF LONDON, ENGLAND, V. EDWARD A. AYERST.

FILED JUNE 6, 1893. No. 4851.

1. **Review:** THE VERDICT of the jury will not be disturbed unless clearly against the preponderance of the evidence upon which the cause was tried.
2. **Fire Insurance:** ACTION ON POLICY: VALUE OF FURNITURE AND WEARING APPAREL: INSTRUCTIONS. In an action upon an insurance policy to recover damages caused by fire to insured household furniture and wearing apparel in actual use it was not error to instruct the jury that of the property destroyed they should, if possible, find the fair market value, otherwise that they should find the fair value from the evidence, and that such value was not what a junk shop or second-hand dealer would give for them or what they would bring under extraordinary circumstances or at a forced sale.
3. **Special Findings:** REVIEW. Where averments of the answer are met in the reply by matter in avoidance conjointly with a denial of such averments, the special finding of a jury, sustaining such denial, will not be set aside as foreign to the issues joined.
4. **Witnesses:** EVIDENCE OF REPUTATION: IMPEACHMENT. Evidence of the general reputation of a witness for truth and veracity, to be available for the impeachment of such witness, must have reference to such reputation at his present or recent place of residence. It should not relate to a residence which had ceased two and a half years before such witness testified.

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

John L. Webster and *Brome, Andrews & Sheean*, for plaintiff in error.

Frank T. Ransom and *Gurley & Marple, contra.*

RYAN, C.

The petition wherein Edward A. Ayerst was plaintiff and the Sun Fire Office of London, England, was defend-

ant was filed in the office of the clerk of the district court of Douglas county on December 31, 1889. The averments thereof were in substance that on September 4, 1888, the said plaintiff was the owner of the personal property in Sioux Falls, Dakota, upon which on that day he effected an insurance with said defendant for the premium of $19.50, at the time duly paid. The policy issued by the defendant to plaintiff aforesaid insured against loss or damage by fire in the sum of $3,000, on plaintiff's household furniture, useful and ornamental, kitchen furniture and utensils, family wearing apparel and family jewelry, printed books, plate and plated ware, pictures, paintings, and engravings, and their frames (not to exceed cost price), piano or organ, sewing machine, family supplies, and fuel. The defendant, by this policy, agreed that if said property, or any part thereof, should be destroyed or damaged by fire, at any time between noon of September 4, 1888, and the same hour of September 4, 1889, the said defendant would pay or make good all such immediate loss or damage, not exceeding, in respect to the several matters in the policy specified, the sum set opposite thereto respectively, not exceeding in the whole the sum of three thousand dollars. There were contained in said policy the minute details as to conditions avoiding the policy, proof of loss, etc., usually found in such instruments, of which those discussed in argument will alone be considered, and these will, as necessary, be fully described in that connection. The petition further alleged that on January 10, 1889, plaintiff therein removed the said insured property from Sioux Falls, Dakota, to Omaha, Nebraska, and placed it in a dwelling house and barn situated at 2119 Binney street, lot 10, block 8, Kountze Place addition to Omaha, and that thereupon said defendant, by its duly authorized agent at Omaha, transferred and indorsed said policy in writing, and by said writing made said policy cover and insure the said property where it had been placed in Omaha. This alleged removal indorsement was as follows:

"REMOVAL INDORSEMENT.

"Sun Fire Office Insurance Company, London, England.

"No. of policy, 3,710,250.

"No. of renewal, ——. Indorsement dated 1–11, 1889.

"Amount insured, $3,000.00. Name of assured, E. A. Ayerst.

"Old rate, 65.

"New rate, —.

"Expires Sept. 4–89.

"Old location, Sioux Falls, Dak.

"This policy is hereby transferred to cover on the same property while contained in the two-story frame shingle roof building occupied as dwelling and in barn adjacent situated as follows: 2119 Binney street, lot 10, block 8, Kountze Place addition to Omaha, Neb. The insurance as originally effected being discontinued and all liability in the former location to cease from this date.

"Additional premium, $——.

"Return premium, $——.

"COMSTOCK, MARTIN & PERFECT,

"*Agents at Omaha, Neb.*"

The petition alleged that, on January 12, 1889, all of the insured property situated in the said barn was burned and wholly destroyed by fire, the property so burned being of the value of five thousand dollars; that on February 2, 1889, the aforesaid plaintiff gave to said defendant due notice and proof of said fire and loss, and that on February 25, 1889, this, at defendant's request, was supplemented by further proof by the delivery to defendant of an inventory of the destroyed property aforesaid, giving a description of the quality, quantity, and cost of each piece thereof as required by the said defendant; after which, on April 2, following, upon defendant's requirement to that effect, plaintiff submitted fully to an examination on oath as provided for in said policy. The plaintiff in his petition claimed that notwithstanding the objections

made as to the sufficiency of proof of loss, the above recited proceedings constituted sufficient proof in that behalf, and having alleged damage to the amount of three thousand dollars, the plaintiff prayed judgment against defendant for that amount with seven per cent interest per annum from February 2, 1889, and costs of suit. In the record is contained a copy of the summons and of an alias summons with the indorsements on each. These, in this case, are of no use whatever, and only serve to cumber the record; they should therefore have been omitted therefrom. The defendant answered in the district court, denying each allegation of plaintiff's petition not specifically admitted in said answer. The execution of the policy and payment of the premium, as stated in the petition, were admitted, as was also the destruction of a portion of the insured property on January 12, 1889. Specifically, the answer denied that on January 11, 1889, the defendant, by its duly authorized agents at Omaha, transferred and indorsed said policy in writing and thereby made said policy cover and insure said property, or become responsible for loss or damage to the same in any manner whatever, or at any place except at the place and upon the premises where said property was located at the time of the issuance of the original policy. The answer denied that Comstock, Martin & Perfect were the duly authorized agents of defendant at Omaha on January 11, 1889, or at any other time, and denied that said Comstock, Martin & Perfect had any authority at any time or in any manner whatever to make the so-called "removal indorsement" alleged in plaintiff's petition, but the said defendant averred and charged the fact to be that said Comstock, Martin & Perfect were not authorized on said January 11, 1889, or at any other time, to make any indorsement upon said policy, or to bind said defendant in any manner in respect thereto. The answer further charged that plaintiff had been guilty of fraud and misrepresentation, and omitted to make known facts material to the risk

in and about procuring to be made by Comstock, Martin & Perfect on January 11, 1889, a pretended "removal indorsement," for that on or about December 7, 1888, and at divers times prior thereto after October 18, 1888, plaintiff was notified and advised by defendant through its agents at Sioux Falls, who had issued said policy, that defendant was unwilling longer to carry said risk and desired to terminate the same and refund the ratable proportion of the premium for the unexpired term of the policy, and on said date requested plaintiff to return said policy to said agents with the cancellation recited thereon, properly signed as received from said agents for the ratable proportion of the premium for the unexpired term of the policy. The answer alleged further the complete failure of the plaintiff to comply with these requirements, and the procuring from Comstock, Martin & Perfect of said "removal indorsement" to be made by them while they were in total ignorance of said facts, as was well known to the plaintiff at the time. The defendant, in the fifth paragraph of its answer, further alleged that the plaintiff ought not to recover, for that by the above policy it was provided that "This policy shall become void unless consent in writing is indorsed thereon by and on behalf of the society (defendant) in each of the following cases: If the insured have or shall hereafter obtain any other policy or agreement for insurance, whether valid or not, on the property above mentioned or any part thereof," whereas, as the defendant averred at the time the above policy was issued to plaintiff, said plaintiff had another policy of insurance covering the same property; the said prior policy, being for $2,000, was issued by the Insurance Company of Dakota, and by its own provisions not terminating until November 1, 1888, and, as the defendant alleged, the existence of this prior insurance was fraudulently concealed from defendant's agents when they issued the policy sued on.

The reply averred that Comstock, Martin & Perfect

were the duly authorized agents of defendant on January 11, 1889, and both before and after that date; that the acts of said agents in respect to the policy sued on were well known to defendant, by whom no objection was made to said acts until the answer was made in this cause. The reply alleged the various matters stated in the petition as to the proofs required and the examination to which plaintiff was subjected, and stated that in each of these the object of defendant was solely to ascertain the value of the property insured, and that no question of the authority of the agents of defendant was touched upon in said examination, neither was the validity of said policy questioned by defendant, nor was any objection made to the "removal indorsement" placed upon said policy by the said Comstock, Martin & Perfect, whereby plaintiff insisted that all such objections were waived. The reply originally denied each averment made in the answer as to the existence of another policy of insurance and the fraudulent concealment thereof from the defendant's agent who issued the policy sued on at the time of its issuance. After the argument, but before the final submission of the case to the jury, plaintiff withdrew the denials contained in the last sentence and substituted the following amendment:

"Replying to the 5th paragraph of defendant's answer, plaintiff alleges that the defendant at the time of the issuing of the policy mentioned in the petition knew of the prior insurance mentioned in defendant's answer, and knew that said prior insurance existed, and knowing such fact at the time plaintiff applied for the policy mentioned in the petition, defendant issued the same notwithstanding said prior insurance; and replying further to said paragraph, plaintiff denies each and every allegation therein contained."

On April 16, 1891, the trial having been concluded, the jury returned a general verdict in favor of plaintiff for $3,369.25, at the same time returning answers to the special interrogatories submitted, as follows:

"First—At the time the policy of insurance sued upon in this action was issued, did the plaintiff have a policy of insurance covering the same property by the Insurance Company of Dakota? Answer yes or no. Answer: No.

"Second—Where were the goods claimed to have been destroyed at the time the removal indorsement was made upon the policy in suit by Comstock, Martin & Perfect? Answer: Omaha, Neb., at the depot.

"Third—At the time plaintiff applied to Comstock, Martin & Perfect, and asked that the removal indorsement be placed upon the policy in suit, had he been advised or did he know that the defendant had instructed its local agents at Sioux Falls to cancel the policy of insurance in suit? Answer yes or no. Answer: No."

A motion for a new trial having been overruled, judgment was rendered for the amount found due by the general verdict. To reverse this judgment the cause is brought into this court by petition in error, in which the Sun Fire Office, of London, is plaintiff.

1. The errors alleged will be considered in the order in which they were presented in the brief of plaintiff in error. The matter first and at most length complained of is, that the damages are excessive, the quality, quantity, and value of the insured property being out of all proportion to the circumstances of plaintiff, and indeed of any one else, and not capable of being crowded into the space where they were stowed, and because, from the length of time many of the articles had been in use, they must have been worn out and therefore of little or no value. These considerations, however, are only addressed to the credibility of the testimony of defendant in error. His evidence was full and explicit as to the description and price of each article, though to plaintiff in error it was intrinsically improbable. He was not contradicted as to these matters, neither was any effort made in that direction, though F. W. Harrington, the agent who wrote the policy sued on, testified that

when said policy was issued he examined the property insured. Under these circumstances the argument as to the inherent improbabilities of the testimony of the defendant in error are not sufficiently controlling to overcome the presumptions which exist in favor of the correctness of the verdict of a jury.

2. The second matter argued is as to the refusal of the court to give instruction eighth, requested by the plaintiff in error. It was as follows:

"No. 8. The plaintiff, in an action of this kind, is entitled to recover, if entitled to recover at all, only the fair market value of the property actually destroyed, and the burden of proof is upon plaintiff under the issues in this case to establish such fair market value by a fair preponderance of the evidence."

In the same connection, however, plaintiff in error insists that the court erred in giving instruction numbered 14½, which is in the following language:

"No. 14½. The plaintiff, in an action of this kind, is entitled to recover, if entitled to recover at all, only the fair market value of the property destroyed, and the burden of the proof is on the plaintiff under the issues in this case to establish such fair market value by a fair preponderance of evidence. The fair market value is not what a junk shop or a second-hand dealer would give, but it means a fair, reasonable market value of said property in this city, and not what the property would bring under extraordinary circumstances or by a forced sale. You must ascertain their value from a fair and impartial consideration of all the evidence in this case."

The first sentence in the instruction last copied is identical with the 8th instruction asked by the plaintiff in error. The matter added in the last two sentences in the last quoted instruction (14½), to the effect that the true value must be ascertained, not from what a junk shop or second-hand dealer would give, nor from what the property

would bring under extraordinary circumstances or a forced sale, was correct. The terms of the policy were, that the insurance company "will pay or make good all such immediate loss or damage," if the property during the term for which it was insured should be damaged or destroyed by fire. In the policy there is no reference to payment of the market value of the goods, or any other special description of value. The contract was to pay or make good the immediate loss or damage caused. The agent of the insurance company had very properly examined the property when it was insured. The policy clearly described the class of property upon which thereby the insurance was effected. The parties could have had in contemplation no such standard of valuation as would obtain if the contract had been for the sale of merchandise. It was not a contract in that nature, but was one to indemnify the insured for whatever loss should be caused to the insured property by fire during the time fixed in the policy. This policy provided that in case of damage to personal property the insured should forthwith cause it to be put in order, assorting and arranging the various articles according to their kinds, separating the damaged from the undamaged, etc. It would hardly be claimed in view of these provisions that if clothing was damaged by fire the inquiries upon a trial would be, first, what would have been the market value of the property before it was damaged, as fixed by a junk shop or a dealer in second-hand clothing; and then, what was the market value of such clothing after it was damaged, as fixed by the same class of authority, upon prices current, the damage to be ascertained by subtracting one of these items from the other. The policy itself discloses that the subject-matter was not marketable commodities, and it is not believed that in estimating the damage for which the insurer should answer the element of value as fixed in the market ought alone to control. There is no necessity of resort to such a

valuation to ascertain the immediate loss suffered. If the insured articles of clothing, furniture, bedding, etc., have been destroyed, the question for determination in finding the amount of the recovery is what was the fair value of the property before it was destroyed. In this it is not to be understood that any fanciful notions of the value entertained by the owner of such articles are properly to be considered, but rather what would the destroyed goods have been worth for the use of such people as ordinarily use goods of that class, provided they were in need of them; this value, on the one hand, not to be swelled by a sentimental partiality of its owner, and, on the other, not to be subjected to the odium and suspicion generally incident to second-hand clothing or furniture. If any of the insured property was a marketable commodity, its value might by the jury be found from the prevailing market price, otherwise the simple fair value should govern. These suggestions embody the principle upon which the jury was instructed upon this subject, and fairly consider the objections and arguments made in criticism thereof by the plaintiff in error.

The views above expressed are not without support in other adjudicated cases involving the same question. In *Gere v. Council Bluffs Ins. Co.*, 67 Ia., on page 276, Adams, J., delivering the opinion of the court, said: "The court instructed the jury to allow the fair value of the property. The defendant assigns as error the giving of this instruction. In our opinion there is no error in the instruction. If there had been evidence that the property had a distinctly recognized market value, it might have been better to have instructed the jury to allow the market value; but there was no such evidence, and the instruction to allow the fair value appears to us to be unobjectionable."

In *Joy v. Security Fire Ins. Co.*, 48 N. W. Rep. [Ia.], 1049, the supreme court of Iowa said: "The property in question consisted of old or second-hand furniture, the

market price of which it is usually very difficult to establish. It cannot be said to have a fixed market value, and we think that the price for which it was offered by the owner is at least competent evidence to be considered by the jury. If such an offer is accepted, it would seem quite conclusive that the property was worth the amount of the offer. If not accepted, it would be evidence tending to show that the property was not worth more than that for which it was offered. It is not to be assumed, in the absence of proof, that the offer was 'dictated by pressing circumstances' or for other reasons that might render the proof of such an offer of no avail; but if such 'circumstances' exist they may be shown and thus give to the testimony the weight to which it is entitled."

This subject is thus discussed in Sutherland, Damages, vol. 2, on page 387: "If the article in question has no market value, its value may be shown by proof of such elements of facts affecting the question as exist. Recourse may be had to the items of cost and its utility and use. And opinions of witnesses properly informed on the subject may also be given in respect to its value."

Under the circumstances of this case it is believed that there was sufficient evidence of a proper character upon which to submit to the jury the question of the amount of loss sustained, and that the rules to be observed in the consideration of that question were correctly stated by the court to the jury.

3. The plaintiff in error insists that the fifth paragraph of its answer, setting up the existence of an existing concealed insurance upon the same goods covered by the policy sued upon, was confessed by defendant in error's reply in respect thereto. The paragraph of the reply referred to has hereinbefore been copied in full, and by an inspection will be found to consist, first, of an averment of knowledge of the existence of said prior insurance when the policy sued upon was made; and second, a denial of each and

every allegation of the aforesaid fifth paragraph of the answer. Section 121 of the Code of Civil Procedure provides as follows: "In the construction of any pleading, for the purpose of determining its effects, its allegations shall be liberally construed with a view to substantial justice between the parties." Thus, considering the two parts of the reply, there is no difficulty in harmonizing them, each with the other, for, regarding one as a denial of the facts charged, the other may well be treated as though, contingently upon the plaintiff in error successfully establishing the existence of the prior insurance, the defendant had alleged a knowledge of such policy and waiver of objection thereto by the plaintiff in error. If these matters rendered this part of the reply so indefinite and uncertain that the precise nature of the charge or defense was not apparent, the court, upon motion, would undoubtedly have required it to be made more definite and certain. (Sec. 125, Code of Civil Procedure.) No objection was made for this reason, and it would manifestly be very unjust to deprive defendant in error of the benefit of his denial of the existence of a prior insurance, especially in view of the fact that the jury specially found that no such prior insurance existed.

4. There was refused the offer to prove the general reputation for truth and veracity of Mr. Ayerst, in Sioux Falls. The residence of Mr. Ayerst in the place last mentioned was from 1884 to October, 1888, at which time he removed to Omaha, where he resided during the interim between said last mentioned date and April, 1890, at which time he removed to Seattle, where he continued to reside until the date of the trial, which was in April, 1891. Between the termination of his residence at Sioux Falls and the date of the trial there was an interval of two years and six months. The decisions are not uniform as to the rule applicable to this form of impeachment, it is true, but in this state no doubt can well exist.

In *Long v. State*, 23 Neb., 34, the following language of

Judge Brewer in *Fisher v. Conway*, 21 Kansas, 25, was quoted with approval: "Impeaching testimony is for the purpose of discrediting a witness by showing that the community in which he lives do not believe what he says; that he is such a notorious liar that he is generally disbelieved. It is his present credibility that is to be attacked; is he now to be believed? What do his neighbors think and say of him at the present time; not what did they think and say months or years ago?"

In *Marion v. State*, 20 Neb., 242, it was held that the general reputation to be proved must be confined to a time very near the date when the witness testified. From the above statement as to the residence of Mr. Ayerst, it appears that of the two and one-half years which had elapsed since his residence in Sioux Falls ceased, he had resided one and one-half years in Omaha where the trial was then in progress. He certainly must have established a reputation for truthfulness or the contrary within that time, and proof of his reputation anterior, at least, to his residence in Omaha was too remote for the purpose of impeachment. The evidence offered for that purpose was, therefore, properly excluded. While some other propositions of fact were put in issue by the pleadings, none have been argued except such as have already received consideration and determination. The judgment of the district court is

AFFIRMED.

THE other commissioners concur.

BANK OF COMMERCE v. J. T. HART.

FILED JUNE 6, 1893. NO. 4892.

1. **Banks and Banking**: POWERS OF OFFICERS. The cashier of a banking corporation has, by virtue of his office, no authority to accept, in payment and discharge of a debt due the bank, certificates of the capital stock of an insurance company.
2. ——: ——: INVESTING IN STOCKS OF ANOTHER CORPORATION. A banking corporation, organized under the laws of this state, has no power to become a stockholder in an insurance company.
3. ——: ——. The acts of the directory of a banking corporation, in dealing with and investing the funds of the stockholders, to bind the bank, must be confined to the expressed purposes for which the bank was incorporated, and to purposes necessarily incidental thereto in the successful conduct of its legitimate business.

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

John L. Webster, for plaintiff in error:

The cashier of the bank had no authority to buy shares of stock in the insurance company and pay for the same with funds of the bank, or to accept the same in payment of a note not due. (*Sandy River Bank v. Merchants & Mechanics Bank*, 1 Bissell [U. S.], 146; *Lamb v. Cecil*, 25 W. Va., 288; *United States v. City Bank of Columbus*, 21 How. [U. S.], 356.) One corporation cannot buy stock in another corporation unless the power to do so is clearly conferred by statute. (*Franklin Bank v. Commercial Bank*, 36 O. St., 355; *Franklin Company v. Lewiston Institution for Savings*, 68 Me., 43; *Mechanics & Workingmen's Bank v. Meriden Agency Co.*, 24 Conn., 159*; *Milbank v. New York, L. E. & W. R. Co.*, 64 How. Pr. [N. Y.], 20–29; *Central R. Co. v. Pennsylvania R. Co.*, 31 N. J. Eq., 475; *Sumner*

v. Marcy, 3 Woodb. & M. [U. S.], 105; *Central R. Co. v. Collins*, 40 Ga., 582; *Hazelhurst v. Savannah, G. & N. A. R. Co.*, 43 Ga., 13; *People v. Chicago Gas Trust Co.*, 130 Ill., 268; Morawetz, Private Corp., sec. 431; Cook, Stockholders, sec. 316.)

J. M. Woolworth, contra.

RAGAN, C.

The Bank of Commerce sued Hart on a note for $20,000, executed and delivered by him to the bank. The defense of Hart, so far as the same is material here, was, that on March 30, 1888, he paid on said note $14,105.46, with which payment the bank has not credited him. Hart claims to have made this payment by the sale of certain shares of stock in an insurance company to the bank through one Johnson, its cashier, who promised at the time to credit the note when it should be returned from New York, where it then was. The bank claims that the sale of said stock, if made, was to Johnson individually, and not to the bank; that it had no interest or part in said sale; that the same, if made, was without its knowledge or consent; and the purchase of the stock by its cashier, if made for the bank, was in excess of his authority, and void. The jury, by its verdict, allowed Hart the credit he claimed, thus, in effect, finding that the purchase of the insurance stock was made by the bank. Assuming for the purposes of this opinion that the evidence in the record supports this finding, we then proceed to inquire whether the cashier exceeded his authority in using funds of the bank in the purchase of this stock.

In *Sandy River Bank v. Merchants & Mechanics Bank*, 1 Bissell [U. S.], 146, the facts were: The cashier of the Mechanics Bank settled an account of $22,000 with the cashier of the Sandy River Bank by paying $10,000 cash and giving $12,000 private paper, which the cashier of the

Sandy River Bank accepted in payment, and gave a receipt in full. The Sandy River Bank brought its action against the Merchants & Mechanics Bank on the account. The latter pleaded payment by the contract with the cashier. The question in the case was whether the cashier had authority to receive in payment anything but money. In the course of the opinion delivered the judge said: "A cashier of a bank is ordinarily the executive officer of the bank. He is the agent through whom third persons transact their business with the bank. The bank generally holds him out to the world as having authority to act according to the general usage, practice, and course of business, and all acts done by him within the scope of such usage, practice, and course of business bind the bank as to third persons who transact business with him on the faith of his official character; and perhaps it may be presumed without proof, and merely from his office, that he is authorized to receipt and discharge debts, and deliver up securities on payment or discharge of the debt for which they are held. * * * But still his authority is a *limited authority*, and when a party claims a discharge from a debt due the bank, not by payment, but by giving other or different notes, bills, or securities, which the cashier has agreed to take and release the debt, his authority, like that of any other agent, must be shown by proof. As a general rule, a jury have not a right to infer that the cashier of a bank, as such, has the authority to compromise and discharge debts without payment or by taking other securities, but the authority from the bank must be shown expressly or by necessary implication, or it must * * * be established by the particular usage, or practice, or mode of doing business of the bank; or it must be ratified or acquiesced in by the bank in order to be binding."

In *United States v. City Bank of Columbus*, 21 How. [U. S.], 356, the facts were: The cashier of the Columbus bank gave to one of its directors, Miner, a letter to the secre-

tary of the treasury of the United States, to the effect that Miner had authority to contract in behalf of the bank for the transfer of money for the government. Relying upon this letter, the secretary of the treasury made a contract with Miner for him to transfer $100,000 of the government's money from New York to New Orleans. Miner received the money, but never delivered it. The United States brought suit against the Columbus bank to recover the money. The supreme court of the United States decided that the action could not be successfully maintained, as the cashier of the Columbus bank had no authority to make such a contract, and there was no proof that the board of directors had authorized it. In the course of the opinion Justice Swayne said: "The court defines a cashier of a bank to be an executive officer by whom its debts are received and paid, and its securites taken and transferred, and that his acts, to be binding upon a bank, must be done within the ordinary course of his duties. * * * The term 'ordinary business,' with direct reference to the duties of cashiers of banks, occurs frequently in * * * reports of the decisions of our state courts, and in no one of them has it been judicially allowed to comprehend a contract made by cashier, without an express delegation of power from a board of directors to do so, which involves the payment of money, unless it be such as has been loaned in the usual and customary way. Nor has it ever been decided that a cashier could purchase or sell the property, or create an agency of any kind for a bank which he had not been authorized to make by those to whom has been confided the power to manage its business, both ordinary and extraordinary."

The power of this bank to purchase stock in an insurance company, if it exists at all, is an extraordinary power and one not confided to the cashier, but belonging to the directory.

In the *Bank of Healdsburg v. Bailhache*, 65 Cal., 329,

it is said, that the power to make a settlement of defalcation to a bank, and accept a deed of real estate in satisfaction and release, is the function of the board of directors and not of any individual director or officer.

It has also been decided that, in the absence of special authority, the cashier of a bank could not release the surety from a note owned by the bank. (*Merchants Bank v. Rudolf*, 5 Neb., 527; *Conchecho National Bank v. Haskell*, 51 N. H., 116.) That in the absence of special authority or established usage the cashier has no power to compromise claims due his bank. (*Chemical National Bank v. Kohner*, 8 Daly [N. Y.], 530.) That he had no authority to bind his bank by issuing a certificate of deposit to himself. (*Lee v. Smith*, 84 Mo., 304.) Nor bind the bank by an official indorsement of his own note. (*West St. Louis Savings Bank v. Shawnee County Bank*, 95 U. S., 557.)

The cashier of the Bank of Commerce, then, as the executive officer of the bank, was clothed with authority to collect all debts due the bank, but this means collections in money. If a cashier may discharge the debts due his bank by exchanging the evidences of them for stocks of an insurance company or a gas company, then he can, under the name and charter of the bank, conduct an entirely different business, and use the funds of his stockholders for a purpose for which they were never subscribed and in violation of the law of the bank's creation. The purposes for which the Bank of Commerce was organized, as expressed in its articles of incorporation, were to receive deposits of money and pay the same out on proper vouchers; to loan money on personal security; to issue drafts or letters of credit; to buy and sell securities of every kind, and do a general banking business. Had this charter expressly provided that the corporation might invest its funds in stocks of insurance companies and deal generally in stocks of other corporations, such a provision would have been

contrary to the laws of the state and void. But there is no provision in the bank's charter which, by any reasonable construction, can be construed into an authority to purchase and hold the stocks of any other corporation. True, it says "to purchase securities of every kind," but certificates of stock are not securities within the meaning of this provision, nor such as the word imports in commercial or banking phraseology. "Securities," as here used, mean notes, bills of exchange, and bonds; in other words, evidences of debt, promises to pay money. We conclude, therefore, that the cashier, by virtue of his office, had not the power to accept the stock of the insurance company in payment of the debt due the bank, but that power, if it existed, was lodged in the directory, and as it had not expressly authorized the cashier thereto, he exceeded his powers in agreeing to accept, on behalf of his principal, the insurance company stock in payment of the debt due from Hart to the bank, and that the latter is not bound thereby.

The next inquiry is as to the powers of the directory to ratify the purchase of the insurance company's stock and bind the bank thereby.

In the *Mechanics & Workingmen's Mutual Savings Bank & Building Association v. Meriden Agency Company*, 24 Conn., 159, it is said: "The first question is, whether the defendants, being a joint stock corporation, organized for a specific purpose, had power to become a stockholder in the association of the plaintiffs. The purpose for which the agency company united, as expressed in their articles of association, was to do a general insurance agency, commission, and brokerage business, and such other things as were incidental to, and necessary in, the management of that business. So far as that business was concerned, the proper officers of the company had power to act, and bind the company; but if they departed from that business, and entered into contracts not authorized by

the company, such contracts would not be binding. A subscription to the stock of a building association, has no legitimate connection with the business of an insurance agent, commission merchant, or broker, and was not therefore authorized by the defendants' articles of association. * * * But when the directors of the company subscribed for stock in a building association, whatever may have been their motive, * * * they transcended the powers conferred upon them, and departed from the legitimate business of the company."

In *Franklin Co. v. Lewiston Institution for Savings*, 68 Me., 43, it is said: "If a corporation can purchase any portion of the capital stock of another corporation, it can purchase the whole and invest all its funds in that way, and thus be enabled to engage exclusively in a business entirely foreign to the purposes for which it was created. A banking corporation could become a manufacturing corporation, and a manufacturing corporation could become a banking corporation. This the law will not allow, and it has been held that notes given by a manufacturing corporation for the purchase of shares in a bank are not collectible."

In Cook, Stockholders, sec. 316, it is said: "A banking corporation has, at common law, no power to purchase or invest in the stock of another corporation, whether that other corporation be itself a bank or of a different business. The bank is organized for the purpose of receiving deposits and loaning money, not for the purpose of dealing in stocks. Any attempt to engage in such transaction is a violation of its charter rights and of its duty towards the stockholders and the public."

In *Nassau Bank v. Jones*, 95 N. Y., 115, Chief Justice Ruger said: "The question involved in this case * * * is the right of a banking corporation, chartered under the laws of this state, to subscribe for the stock of a railroad corporation. * * * It is clear that a banking corporation cannot enter into a contract of this character, unless it

has authority under its charter to become a subscriber for the stock of railroad corporations, and thereby assume the obligations to which such stockholders are subject. * * The plaintiff is a moneyed corporation organized under chapter 260 of the Laws of 1838, and authorized by that statute 'to carry on the business of banking, by discounting bills, notes, and other evidences of debts; by receiving deposits; by buying and selling gold and silver bullion, foreign coins and bills of exchange, and by loaning money on real and personal property.' The legislature intended by the act in question to inaugurate in this state an entirely new system of banking, and thereby undertook to provide for the establishment of moneyed corporations which should furnish to the public a safe and reliable circulating medium for the transaction of its business, and secure and solvent depositaries for the custody of such moneys as were needed for current use by the business public. * * * The language employed in the act * * * excludes, by necessary implication, the capacity to carry on any other business than that of banking, and the adoption of any other methods for the prosecution of such business than those especially pointed out by the statute. * * * The spirit of the law, as well as a sound public policy, forbid these institutions from risking moneys entrusted to their care in doubtful speculations or enterprises. * * * For these reasons, we are of the opinion that the plaintiff was not only precluded by public policy, but was not authorized by the statute under which it was organized, to enter into any engagement as a stockholder in a railroad corporation."

The learned judge who presided at the trial below charged the jury as follows:

"*a.* In investigating the question as to how far, if at all, the bank was bound by the acts of Johnson in the premises, you will be governed entirely by the testimony which has been adduced before you on the trial. If you shall

find from the testimony either that Johnson, in his negotiations with Hart, and his final agreement with him for the purchase of the shares of stock in the insurance company, was acting under authority conferred upon him in that behalf by the board of directors of the bank, or that, subsequently to the transaction, the directors approved and ratified what had been done by Johnson, acting in his capacity as cashier of the bank, if you shall find that in such transaction he did act as such cashier, and accepted the fruits of such transaction, then, and in that case, the bank would be estopped to deny the authority of Johnson in the premises, and would be bound by his acts in that behalf.

"*b*. If, on the other hand, you shall find from the testimony that Johnson did not have authority from the board of directors of the bank to negotiate for and purchase the shares of stock in the insurance company referred to in the testimony, and that the directors did not subsequently approve and ratify the acts of Johnson relating thereto, nor accept and retain the fruits of such negotiation and purchase, then, and in that case, the bank would not be bound by what Johnson did relating to such negotiation and purchase, and in such case the plaintiff would be entitled to your verdict for the amount of the note sued on and interest."

This charge proceeded upon the theory that though the purchase of the insurance company's stock by the cashier was unauthorized, yet the board of directors could have afterwards ratified and adopted it and bound the bank by it. We do not assent to this doctrine as applied to this case. It is doubtless true that the bank could legally take the stock of another corporation as security for a debt previously contracted. Possibly it might make a loan on the strength of the stock as security at the time. On this point the authorities are not in harmony, and as it is not material here we do not decide it. An emergency might arise when a bank's board of directors would be justified in taking the

stock of another corporation in settlement, adjustment, or compromise of a doubtful claim or debt, acting in the honest belief that only by so doing could a serious loss to the bank be averted. None of these reasons, however, existed in the case at bar, or if they did the record before us does not disclose them. The cashier had no authority to bind the bank by buying the insurance company's stock. The board of directors had no authority to authorize him to do so; and, if the cashier bought such stock in behalf of the bank, the directory had no authority to ratify the purchase and thus bind the bank. But assuming the charge states the law correctly, there is no evidence in the record that the board of directors ever authorized the cashier to purchase the insurance stock, and none that the board of directors ever ratified such a purchase, if made, or that the bank accepted the fruits of the transaction, and the jury could not, from the evidence, so find either. We conclude, then, that the powers of a directory of a bank in dealing with and in investing the funds of the stockholders are limited to the purposes for which the bank was incorporated and to purposes necessarily incidental thereto in the successful conduct of its legitimate business.

We are constrained to say that the verdict of the jury is not supported by the evidence, and that the judgment of the court is contrary to the law of the case. The judgment of the district court is therefore reversed and the case remanded for further proceedings.

REVERSED AND REMANDED.

THE other commissioners concur.

HENRY & COATSWORTH COMPANY, APPELLEE, V. CYRUS W. FISHERDICK, ADMINISTRATOR OF THE ESTATE OF M. ISABEL BOND, DECEASED, ET AL., APPELLEES, IMPLEADED WITH CHARLES H. BRALEY ET AL., APPELLANTS.

FILED JUNE 6, 1893. No. 5189.

1. **Mortgages**: RELEASE WITHOUT PAYMENT AT REQUEST OF MECHANICS' LIENHOLDERS: PRIORITIES: ESTOPPEL. M. held a mortgage on certain city lots, on which the owner desired to negotiate a large loan for the purpose of building thereon a hotel, contracts for furnishing the material for which were held by H. & C., who promised M. in writing if he would release his mortgage they would pay him the amount thereof out of the payments made to them for material from time to time as the building progressed. M. released. Payments for material were made to H. & C., but they paid nothing to M. In a suit by H. & C. to foreclose mechanics' liens on the lots and hotel, *held*, that the release by M. of his mortgage was a sufficient consideration for the promises of H. & C.; that they were estopped from claiming liens on the property prior to M., and that their liens should be charged with the amount due M. on his mortgage.

2. **Mechanics' Liens**: PRIORITIES. Under the law of this state the lien of a mechanic or laborer attaches at the commencement of the furnishing of material, or at the commencement of the performance of labor by him, and not from the beginning of the construction of the improvement on which he labors or for which he furnishes material.

3. ———: ———: INTEREST TO WHICH LIEN ATTACHES. A person commencing to furnish material for, or commencing to labor on, an improvement on real estate must at the time take notice of the interest and title in the premises of the person with whom he contracted, as shown by the public records, as his lien for labor or material, aside from the improvement itself, attaches only to such interest.

4. **Mortgages**: MECHANICS' LIENS: PRIORITIES. A party taking a mortgage on real estate is bound, at the time, to know whether material has been furnished or labor performed in the erection,

reparation, or removal of improvements on the premises within the four prior months.

5. ———: ———: ———. The lien of a mortgage on real estate, taken while a building is in process of erection thereon, is subject to the claims of material-men and laborers for material already and thereafter furnished, and for labor already and thereafter performed in the erection of such building, when the commencement of such furnishing of material, or the commencement of the performance of such labor, was prior to the record of said mortgage.

6. **Mechanics' Liens:** INTERVENING MORTGAGES: PRIORITIES: CLASSIFICATION OF LIENS. Under the Nebraska statute there are no priorities amongst liens for material furnished or labor performed; but this rule of equality applies only to those lienors who commenced the furnishing of material, or commenced the performance of labor on the faith of the same estate; as, if A, B, and C commence the furnishing of material for an improvement on certain real estate, and afterwards the owner mortgages to D, and thereafter E, F, and G commence the performance of labor on the improvement; here the liens of A, B, and C are prior to D's mortgage and prorate amongst themselves, being of the same class and attaching to the same estate; while the liens of E, F, and G would be subject to D's mortgage but would prorate amongst themselves, being of the same class and attaching to the same estate.

7. ———: PROCEEDINGS TO PERFECT: AFFIDAVIT. The oath attached to the "account of the items" for material furnished and for which a lien was claimed, was as follows: "J. A. B., being first duly sworn, * * * says, * * * is a * * * correct * * * of material furnished by this affiant. * * * Signed, Capital City Planing Mills, per J. A. B., Sec'y." The account of the items was headed, "M. I. B., To Capital City Planing Mills, Dr." *Held*, To show that the lien was claimed by the Capital City Planing Mills and not by J. A. B., and a substantial compliance with the statute.

8. ———: ———: ———. The oath required by section 3, chapter 54, Compiled Statutes, may be made by the agent of the claimant of a lien, whether a person or corporation.

9. ———: ———: LIMITATION: EVIDENCE. When more than four months intervene between items of an account for material furnished a mechanic's lien will not attach for the items preceding the hiatus, unless it is made to appear by competent evidence that all the items were furnished pursuant to one contract; and

the affidavit attached to the "account of the items" is not competent evidence to prove that fact.

10. ———: MATERIAL-MAN'S RIGHT TO LIEN: CONDITIONS OF SALE CONTRACT: WAIVER. A vendor of an elevator, furnished for and put up in a hotel in process of erection, by contract with the owner retained in himself the title until the fixture should be paid for, and reserved the right to retake possession thereof if default should be made in the payment for the same. *Held*, Not a waiver of the vendor's right to a material-man's lien on the hotel and the land occupied by it.

11. ———: ASSIGNMENT: TAKING MORTGAGE SECURITY: MERGER. The assignee of a mechanic's lien is subrogated to all the rights of his assignor; and the taking of a mortgage by the assignee on the property affected by the lien, the consideration of which mortgage was used in the purchase of the lien, will not merge the latter in the mortgage, unless it appears such was the intention of the parties and justice requires it. That intention may be established not only from the acts and declarations of the assignee but from a view of the situation as affecting his interests.

12. **Indemnity Bond**: PRINCIPAL AND SURETY: RIGHTS OF SURETY: UNAUTHORIZED DELIVERY: RATIFICATION. The agent of the obligee in an indemnity bond against mechanics' liens presented the obligation to H. and D. and requested them to sign it as sureties; promising them that A., S., and one Hughes, whose names were printed in the body of the bond as sureties, would also sign it. H. and D. signed on the agreement with the agent that if the others named as sureties did not sign, the bond should be "invalid." None of the others named as sureties signed, and the agent, without the knowledge of H. or D., erased the other sureties' names by drawing an ink line across them and delivered the bond in this condition to her principal. *Held*, The delivery of the bond was unauthorized and H. and D. were not liable thereon; *and held further*, that H. and D., by afterwards taking security to protect themselves from loss (being then ignorant of the fact that the other sureties had not signed), did not thereby ratify the delivery of the bond, as the knowledge of the existence of a right or defense and the intention to relinquish it must concur in order to estop a party by waiver.

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

Trimble & Braley, E. E. Brown, Robert Ryan, and *Marquett, Deweese & Hall,* for appellants.

Samuel J. Tuttle, Holmes, Cornish & Lamb, Talbot & Bryan, Webster, Rose & Fisherdick, F. I. Foss, A. G. Wolfenbarger, Clark & Allen, and *Leese & Stewart,* for appellees.

RAGAN, C.

In June, 1889, M. Isabel Bond owned lots C, D, E, and F of Bigelow's subdivision of lots 11 and 12, block 27, in the city of Lincoln. On the 29th of this month she entered into an agreement with the appellee Holmes, in and by which he was to furnish the brick and perform the labor for the erection for Mrs. Bond of a four-story brick hotel on said property. At that time the appellant Marquett, held a mortgage on these lots to secure a debt of $2,200 and interest owing to him by Mrs. Bond. On the 18th day of July, this year, Mrs. Bond made application to the appellant the Missouri, Kansas & Texas Trust Company (hereinafter called the Trust Company), for a loan of $34,000, to be secured by a mortgage on the above described property, or, as the application expressed it, Mrs. Bond appointed the Trust Company her agent for procuring such loan. The appellant Drexel made a loan through the said Trust Company to Mrs. Bond on said property for $30,000, and to secure the same took a mortgage on said real estate, bearing date August 1, 1889, but not recorded until the 26th day of that month and was not executed until about that date. The payment of this mortgage was guaranteed to Drexel by the Trust Company. On the date of the mortgage, Mrs. Bond and the Trust Company, as agent of Drexel, entered into an agreement in writing, in and by which, after reciting that Mrs. Bond had executed her obligation to Drexel for $30,000 and secured the same by a mortgage on said property, it was pro-

vided that Mrs. Bond should at once erect a five-story stone and brick building on said lots and that the Trust Company, as the agent of Drexel, should pay the proceeds of said loan to Mrs. Bond as the erection of said building progressed. These payments were to be made upon the delivery to the Trust Company, or its agents, receipted bills of an equal amount as the payments due for labor and materials entering into the construction of the building.

Before the recording of the Drexel mortgage, Mrs. Bond and the appellees Holmes and the Henry & Coatsworth Company (hereinafter called the Coatsworth Company) agreed in writing with the appellant Marquett if he would release his mortgage on said lots, that Holmes would pay him thirty (30) and the Coatsworth Company forty (40) per cent of the estimates or money that might become payable to them for materials furnished in the erection of the building on said lots, and relying on said promises the appellant Marquett did release his mortgage.

Mrs. Bond, as principal, and the appellees Holmes and Doolittle, as sureties, executed to the appellant Drexel, on the 1st day of August, 1889, a bond in the sum of $25,000 to protect and indemnify Drexel and his agents against all liens for labor or materials that might be filed against said lots and building. This bond recited that the time allowed by statute for filing mechanics' liens had not expired; that Mrs. Bond should pay for all work done and all material furnished for said building, and keep the same clear from all liens on account therefor; that in case she failed to perform her contract, Drexel, or his agent, the Trust Company, might take possession of the building and complete the same and pay for the labor and materials from the funds remaining from the Drexel loan.

On the 28th day of December, 1889, Mrs. Bond executed a mortgage to the appellees Holmes and Doolittle, sureties on her indemnity bond, the conditions of which mortgage

were as follows: "This mortgage is given to indemnify said Doolittle and Holmes against loss that may accrue to them by reason of their having become sureties for said bond in a certain indemnity to the Trust Company and Drexel for the completion and payment for material and labor in the construction of a building on said lots above described."

On February 17, 1890, Mrs. Bond and the appellant the Trust Company entered into a written agreement which, after reciting the ownership of the lots by Mrs. Bond, that she had begun the erection thereon of a hotel, that Drexel had a mortgage on the same for $30,000 which was unpaid, that the appellees Doolittle and Holmes had executed a bond to Drexel to hold him harmless against any liens that might be filed against said hotel, that there were large sums of money owing and unpaid to certain persons who claimed to have performed labor and furnished material for said building, provided that for the purpose of giving additional security for the fulfillment of said bond of indemnity, and for the purpose of raising money to pay for such labor and materials furnished, and to complete said building, Mrs. Bond should at once execute to the appellant Braley a mortgage upon the property to secure a note of $30,000, due one year from February 17, 1890, and that said appellant should at once take possession of said hotel and complete the same, and should from the proceeds of the new mortgage pay for such of the work done and material furnished as he should deem best. Braley was the agent of the Trust Company and the Trust Company was the agent of Drexel. In pursuance of this agreement, and on the same date, Mrs. Bond executed and delivered to Braley a mortgage on all the above described real estate and other property for $30,000, due in one year, and surrendered possession of the hotel and lots on which the same is situate.

The appellant Holmes began the furnishing of material and performing of labor under his contract on the 5th day

of August, 1889. The Coatsworth Company began the furnishing of material under its contract on August 21, 1889. All the other lien claimants commenced the furnishing of material or the performance of labor after the 26th day of August, 1889.

A large number of mechanics' liens were filed against the property by various parties to this suit. All of said liens were duly assigned to the Trust Company, except the following: Holmes, the Coatsworth Company, Baird Bros., the Capital City Planing Mill Company, H. B. Dodge & Co., the Crane Elevator Company, and the Reliance Wire Works Company. Thus matters stood when the appellee the Coatsworth Company brought this action to foreclose its lien against the hotel and lots for material furnished by it in the erection of the hotel. A large number of persons were made defendants or intervened, all of whom, except four, filed answers or cross-petitions, claiming liens on the building and lots. The appellants Drexel, the Trust Company, and Braley filed their answer and cross-petition setting out the Drexel mortgage, the mortgage made by Mrs. Bond to Braley, the indemnity bond given to Drexel by Mrs. Bond, Holmes and Doolittle, and the failure of Mrs. Bond to keep the building free from mechanics' liens. Appellant Marquett intervened in said action, and filed a cross-petition setting out the mortgage he held upon said premises and the release of the same at the request and on the strength of the promises made to him by Bond, Holmes, and the Coatsworth Company, and prayed to be subrogated to the rights of Holmes and the Coatsworth Company. The district court rendered a decree in and by which it divided the liens into five classes, as follows:

a. The first lien was given to Holmes and the Coatsworth Company, prorating.

b. The second lien was given to Drexel on his mortgage.

c. The third lien was given to Baird Bros., the Capital

City Planing Mill Company, H. B. Dodge & Co., the Crane Elevator Company, and the Reliance Wire Works Company, prorating.

d. The fourth lien to the appellant Marquett.

e. The fifth lien was given to the Trust Company on the mortgage executed to Braley, February 17, 1890. This lien was made up of the amount of various mechanics' liens purchased by and assigned to the Trust Company.

f. The court found and decreed that the appellants Holmes and Doolittle were not liable as sureties on their indemnity bond.

All parties to the suit appeal except Holmes, Bond, Doolittle, and the Coatsworth Company.

We will first dispose of Marquett's appeal. The appellants Holmes and the Coatsworth Company promised Marquett in writing that if he would release his mortgage upon the property of Mrs. Bond, Holmes would pay Marquett thirty (30) per cent, and the Coatsworth Company forty (40) per cent of their estimates on each story of the hotel until the full payment of Marquett's claim. Marquett relied upon these promises and released his mortgage, and his debt remains wholly unpaid. Holmes and the Coatsworth Company received a valuable consideration for these promises and they must be held to their performance. They are now estopped from claiming liens on this property prior to Marquett. To permit this would be unfair, inequitable, and unjust. Marquett is entitled to be subrogated to the extent of his claim to whatever lien Holmes and the Coatsworth Company may have upon this property, and their liens should have been charged with the amount due Marquett. The decree of the district court, in that it did not do this, was in that respect erroneous.

It is claimed by the appellants, and especially by the Trust Company, that the finding of the district court that Holmes had a balance of $8,250 and interest, due him

from Mrs. Bond, is incorrect. Holmes' entire claim amounted to $12,100, which he had credited with $3,850.

On the trial there were put in evidence receipts signed by Holmes amounting to $6,900, and it is contended that he should be bound by them and thus increase his credits the difference of $6,900 and $3,850. It appears from the record that the method by which this part of the business was conducted was as follows: As before stated, the Trust Company was to disburse the $30,000 of the Drexel mortgage, as the work on the hotel progressed, on orders from Mrs. Bond. Mrs. Bond would give Holmes an order for, say, $2,000; he would take this to the Trust Company's agents, leave it with them with his receipt for $2,000 and procure from the agents $1,400 in money; and in this way Holmes receipted for $6,900, when, as a matter of fact, he only received $3,850 in money. The Trust Company's agents and Mrs. Bond were witnesses at the trial, and none of them claim that Holmes had actually received more money than $3,850. We do not think that the district court was wrong in its finding as to the amount due Holmes.

The same objection is urged by the appellants against the amount found due the Coatsworth Company; but as this claim is based on the same theory as the objection to Holmes' claim, and the method of conducting the business of the Coatsworth Company was substantially the same, the answer to the objection must be like the one to the objection of the Holmes claim, and the finding of the court as to the amount of the Coatsworth Company's claim approved.

The Trust Company, however, insists that the credits acknowledged by Holmes and the Coatsworth Company should be increased so as to equal the amount of their receipts, and this contention appears to be based on the assumption that the Trust Company was, by the orders and receipts, led into paying out, on the orders of Mrs.

Bond, a greater sum of money to her than the work done amounted to. Now, whether or not the value of the work done at a given date was equal in amount to the orders given was a question of fact; perhaps the burden was on the Trust Company to establish that it was not; and whether the Trust Company or its agents paid these orders in full without knowing the orders exceeded the work are questions of fact. We cannot say that the evidence is insufficient to sustain the court's finding in this respect.

It is also insisted by the appellant Drexel that his mortgage should have been made a first lien.

Holmes and the Coatsworth Company both began the furnishing of materials for the building prior to August 26, the date of the record of Drexel's mortgage, and by the statute a lien of a mechanic or laborer dates from the commencement of the furnishing of materials or from the commencement of performing labor. The appellants Holmes and the Coatsworth Company are therefore entitled to liens on this property prior to Drexel.

A party taking a mortgage on real estate is bound to know whether material has been furnished or labor performed in the erection of improvements on the real estate within the four immediate prior months. Drexel's mortgage was a lien only on the interest of Mrs. Bond in the mortgaged property. Her interest was the estate she conveyed to Drexel, less the amount due and to become due Holmes and the Coatsworth Company for labor or material, the commencement of the doing or the furnishing which was prior to the date of the record of Drexel's mortgage.

On the other hand, some of the appellants claim that Drexel's mortgage should have been postponed to the liens of all parties who furnished material or performed labor in the erection of the hotel. To sustain this it is argued: (1) that there are no priorities amongst mechanics' liens for labor or material on the same improvement; (2) that the

true meaning of our statute is that all parties performing labor or furnishing material for an improvement on real estate have a lien therefor from the commencement of the improvement; or, to state the second argument differently, after an improvement has been begun, a mortgage placed thereon is subject to a lien for labor done or material furnished, the commencement of which was subsequent to the record of the mortgage. In support of this counsel cite Phillips, Mechanics' Liens, sec. 216; *Neilson v. Iowa Eastern R. Co.*, 44 Iowa, 71. An examination of the first authority shows that the statute on which the author is commenting provided that the building should be subject to the payment of debts of the mechanics, etc., "before any other lien which originated subsequent to the commencement of said house or other building." In the Iowa case the syllabus is as follows: "A mechanic's lien attaches from the commencement of the building and takes precedence over a mortgage executed after that time, although the particular work for which the lien is claimed was not commenced until after the execution of the mortgage." But it will be seen from an examination of the opinion that the conclusion reached was based upon the revision of the Iowa statute, which, the court say, "provides in substance that mechanics' liens shall have priority over a mortgage executed upon the land and building after the commencement of the building or improvement." These authorities, then, are not in point.

Section 3, chapter 54, Compiled Statutes of Nebraska, provides: "And shall from the commencement of such labor or the furnishing such materials * * * operate as a lien." While this court has held that this statute is remedial and should be liberally construed, it has never arrogated to itself the right, if it had the disposition, to put a construction on the law that would, to all intents and purposes, amount to an amendment of it. By the Nebraska statute a person who performs labor or furnishes material

for an improvement on real estate is given a lien thereon from the date he commences such labor or commences furnishing of materials; but this lien attaches only to the interest of the contractee in the property on which the improvement is to be erected, at the date of the commencement of the labor or the commencement of furnishing material. The material-man or laborer, furnishing material or performing labor for an improvement on real estate, must then take notice of his contractee's title and interest in the property as shown by the public records at that date.

In *Choteau v. Thompson*, 2 O. St., 114, it is said: "If A. and B. commence work or the furnishing of materials and afterwards the owner mortgage the premises to C., and after this D. and E. begin to work or to furnish materials, here A. and B. have priority over C. and C. has priority over D. and E. In such case A. and B. must receive what they would be entitled to if C.'s mortgage had no existence; the residue must be applied next to the satisfaction of the mortgage; and whatever may remain after that must be distributed to D. and E. *pro rata*." The statute considered in that case appears to have been substantially like the Nebraska statute.

In *Crowell v. Gilmore*, 18 Cal., 370, it is said: "The mechanic making the first contract, or first commencing work on a building, has no priority over others commencing work subsequently. The statute places all claimants on an equality and directs the property to be sold and the proceeds applied to all without preference. This rule of equality would not apply if some mechanics began work before a mortgage was executed, by the owner of the property, and some afterwards. In such case the first lienholders would have priority over the mortgagee, while the latter would not. The first class would be paid in full before the mortgage; then the mortgage; then the last class, each lienholder having equal claims with the others of his

class." An examination of the opinion in this case leads to the conclusion that the California statute on which the opinion is based is very similar to the Nebraska statute.

In the case at bar all liens, except those of Holmes and the Coatsworth Company, were for labor performed or material furnished, the commencement of the doing and the furnishing which was after the recording of the Drexel mortgage. This mortgage was then, correctly decreed by the court below, a lien on the property prior to all liens except those of Holmes and the Coatsworth Company.

The district court gave the third lien to only a part of those who claimed liens for material furnished for the improvement, the commencement of which was after the Drexel mortgage, viz., Baird Bros., the Capital City Planing Mill Company, H. B. Dodge & Co., the Crane Elevator Company, and the Reliance Wire Works Company. These were, by the decree, to prorate each with the other, but the court postponed to these liens the following, also for material furnished in the erection of the improvement, the commencement of which furnishing was after the Drexel mortgage, viz.: Korsmeyer & Co.; Pomeroy Coal Company; W. H. Tyler; C. N. Deitz; Nicholls Roofing Company; S. E. Moore; the Adamant Wall Plaster Company; C. E. Hedges; Rudge & Morris; the Lincoln Glass Company; G. Andrew; the Midland Electric Company; F. A. Nason & Co.; William Gaiser; William Robinson; A. T. Leming; R. S. Young, and J. H. O'Neill. All these postponed liens had been assigned to the appellant Trust Company, and it claimed, and claims now, it stood in the same situation as its assignors.

It is clear from the authorities that all the liens for materials furnished or labor performed, the commencement of the doing or the furnishing which was after the recording of the Drexel mortgage, belonged to the same class, and are entitled to and do prorate with each other. Why, then, should not the assignee of some of these claims be allowed

to prorate if his assignor could? "Under our law, the assignee (of a mechanic's lien) is subrogated to all the rights of the assignor." (Chief Justice MAXWELL in *Rogers v. Omaha Hotel Co.*, 4 Neb., 59.) The district court appears to have postponed these assigned liens on the theory that they were merged in the mortgage given by Mrs. Bond to the appellant Braley, agent of the Trust Company, on February 17, 1890, as the consideration for this mortgage was used in buying up these liens for and in the name of the Trust Company. But did the liens merge in the mortgage?

In *Smith v. Roberts*, 91 N. Y., 470, it is said (I quote from the syllabus): "While a merger at law follows upon a union of a greater and a lesser estate in the same ownership, it does not follow in equity, and estates will be kept separate where such is the intention of the parties and justice requires it. That intention may be gathered not only from the acts and declarations of the party, but from a view of the situation as affecting his interests."

Now there is no direct evidence in the record that either the assignors or the assignee of these liens intended they should merge in the mortgage; and if we turn our attention to the situation of the assignee, the Trust Company, it certainly was against its interests they should merge. We can almost say that had the Trust Company expected them to merge, it would never have advanced the money for the purchase of the liens; and, to apply the doctrine of merger here, would be manifestly unfair and unjust. Had the Trust Company not bought these liens, they would have prorated with the others of their class, so that the others are not in the least prejudiced by their not merging, but the Trust Company is prejudiced if they are. We adopt the rule in the above case as both sensible and just, and conclude that the decree of the district court, postponing the liens assigned to the Trust Company, was erroneous.

Complaint is made by some of the numerous appellants

of the allowance by the court below of liens to certain parties, viz., the Capital City Planing Mill Company. The objection to this lien is that the affidavit filed is not sufficient to entitle the claimant to a lien. The affidavit (omitting the formal parts) was as follows: "John A. Buckstaff, being first duly sworn, on his oath says: * * * is a true and correct account * * * of materials * * * furnished by this affiant." * * * It is signed "Capital City Planing Mills, Badger Lumber Company, owners, per J. A. Buckstaff, Sec'y." The heading of the itemized statement, to which the affidavit for a lien is attached, is as follows: "Lincoln, Nebraska, Apr. 15, 1890. Mrs. M. Isabelle Bond, To Capital City Planing Mills, Badger Lumber Company, Owners, Dr." Section 3, chapter 54, Compiled Statutes, provides: "Any person entitled to a lien under this chapter shall make an account in writing of the items * * * and after making oath thereto," etc. This affidavit is not within the letter of the statute. Is it within the spirit of the law?

In *Rogers v. Omaha Hotel Co.*, 4 Neb., 58, Chief Justice MAXWELL, speaking for this court, said: "The object of the law under consideration (mechanic's lien law) being to secure the claim of those who have contributed to the erection of a building, it should receive the most liberal construction to give full effect to its provisions." This case is cited with approval in *White Lake Lumber Co. v. Russell*, 22 Neb., 126.

In *Delahay v. Goldie*, 17 Kan., 263, it is said: "Under the mechanic's lien law * * * the statement required to be filed may be verified by an agent of the claimant."

This affidavit and account as filed sufficiently show that the Capital City Planing Mill Company had furnished material to Mrs. Bond for the erection of the hotel, and while the affidavit bears on its face the evidence of carelessness, it sufficiently shows that Buckstaff was the agent of the claimant. We hold, therefore, that it sufficiently

complied with the statute. (See also Phillips, Mechanics' Liens, sec. 366, and cases there cited.)

The Crane Elevator Company.—The objection to this lien is that by the contract between the elevator company and Mrs. Bond, under which the fixture was delivered to her, it was provided: "The title and possession of the elevator shall remain in the Crane Elevator Company until the final payment shall be made, and they shall have the right at all times, on the failure on your part to make all payments as provided, to remove the elevator and retain possession of it, and also to retain all payments that have been made, as liquidated damages for non-fulfillment of the contract."

Section 1, chapter 54, Compiled Statutes, provides: "Any person who shall * * * furnish any fixture." * * * The elevator, within the meaning of this law, is a fixture; and, uninfluenced by authority and looking only to this statute, we would say that to entitle a party to a lien for this fixture he must part with the possession, the right to the possession, and with the title to it. The contract between the elevator company and Mrs. Bond was and is good as between them, and as to all other persons except purchasers without notice and judgment creditors of Mrs. Bond. (*Aultman v. Mallory*, 5 Neb., 178; *McCormick v. Stevenson*, 13 Id., 70.)

In *Clark v. Moore*, 64 Ill., 279, one of the questions was whether the retention by the vendor of the right to the possession and title was a waiver of the vendor's right to a mechanic's lien, the court say: "It is also insisted that appellees waived their lien when they sold the property by reserving a lien upon it in the written contract; that they thereby received and held additional security that operated to destroy any lien that would otherwise have attached. * * * In their effort to retain a lien on the machinery furnished by appellees they took no collateral or independent security. * * * The lien attaches to and incumbers

the property to improve which the material is furnished, and the efforts to acquire a more specific and exclusive lien thereon in nowise manifests an intention to release the property from all lien and to look to other security for payment, but it shows the very opposite intention, an intention to hold, if possible, the property furnished liable for the payment of their claim."

In *Case Mfg. Co. v. Smith*, 40 Fed. Rep., 339, it is said: "Retention by a seller of title to machinery placed on land until the price is paid, with a reservation of the right in case of default in payment, to take possession of and remove such machinery without process, is not a waiver of the lien given by the code." (Tenn., sec. 2739.) The opinion cites enough of the Tennessee code to show that it is not materially different from the Nebraska law. It also cites *Anthony v. Smith*, 9 Humph. [Tenn.], 508, and *Fogg v. Rogers*, 2 Cold. [Tenn.], 290, as sustaining the doctrine laid down in the trial case.

Following these authorities, which we do with reluctance, we have reached the conclusion that the finding and decree of the district court giving the Crane Elevator Company a lien must be sustained.

H. B. Dodge & Co.—There are two objections to this claim. The first is that the affidavit filed with the itemized account was made by H. B. Dodge and that it recited that the materials were furnished by the affiant; the affidavit was signed by H. B. Dodge. An examination of the account attached to the affidavit, however, discloses the fact that the account was between H. B. Dodge & Co. and Mrs. Bond, and it sufficiently appears that the material was furnished by H. B. Dodge & Co. In view of what has been said above in reference to the affidavit of the Capital City Planing Mill Company, we think this affidavit sufficiently complies with the statute, and that the finding and decree of the district court giving Dodge & Co. a lien was not erroneous so far as the affidavit is concerned.

Second objection.—The account attached to the lien in this case consisted of two items, as follows: May 9, 1890, to bill Venetian blinds, as per contract, $540; Oct. 1, 1890, to bill Venetian blinds, as per contract, $12.96. It is here claimed that as more than four months elapsed between the date of the furnishing of these two items, that Dodge & Co. can have a lien for nothing more than the last item. The language of the affidavit attached to this lien is, "that said materials were furnished by said affiant to the said M. Isabel Bond at the time stated in said account." Now if we are limited to the date the account shows on its face, and to the affidavit in this case, then the contention of the appellants is correct. The solution of the question depends upon whether these two items are parts of one running account, or, in other words, whether they were both furnished under one contract made prior to furnishing the first item. On looking into the evidence we find that the two items were furnished pursuant to one contract made prior to the date of the first item, and that the second item was a completion of the contract.

In *Fulton Iron Works v. North Center Creek Mining & Smelting Co.*, 80 Mo., 265, a question precisely like the one we are considering arose, and the court said: "A mechanic's lien is enforceable for all the items of an account furnished by the original contract * * * in the construction of the building, * * * where it is inferable from the evidence that they were furnished under one contract." We approve the doctrine laid down in this case. It follows, therefore, that the decree of the district court in allowing the claim of H. B. Dodge & Co. was correct.

The finding and decree of the district court that Holmes and Doolittle, sureties on the undertaking given by Mrs. Bond to Drexel to indemnify him against liens on the property, were not liable on the bond is assailed as erroneous.

It appears from the evidence that an agent of the Trust

Company, or Drexel, came to Lincoln and informed Mrs. Bond that she would have to give Drexel an undertaking to protect him against mechanics' liens on the property on which he was about to lend her the $30,000 represented by his mortgage, and inquired what sureties she could furnish. She named to him E. D. Appleget, George B. Skinner, L. K. Holmes, and William B. Hughes. The agent then investigated through a commercial agency the financial standing of these gentlemen and found it satisfactory. He returned to Kansas City and there had a bond prepared on a type-writing machine with "M. Isabel Bond, as principal, E. D. Appleget, George B. Skinner, L. K. Holmes, and William B. Hughes, as sureties." At the foot of the bond were left five spaces for signatures, opposite each of which the word "Seal" was printed. The agent then sent this prepared undertaking to Mrs. Bond for execution by her and the parties named as sureties. Holmes signed the bond on the last space for signatures and Doolittle signed below that. Appleget, Skinner, and Hughes neither signed the bond, and across their names an ink line with a pen was drawn, and the name of Doolittle was written above in the same line. In this condition the bond was returned by Mrs. Bond to the obligee thereof. There was evidence on the trial that Mrs. Bond promised Holmes that Appleget, Skinner, and Hughes would all sign, and that Holmes and Doolittle signed on the condition and understanding and agreement with her that if Appleget, Skinner, and Hughes did not sign, the bond was to be invalid and returned to them, Holmes and Doolittle. That the names of Appleget, Skinner, and Hughes were not erased when Holmes and Doolittle signed.

In *Cutler v. Roberts*, 7 Neb., 5, the present chief justice, speaking for this court, said: "Where a bond contains in the obligatory part the names of several persons as sureties, if a part sign the same with an understanding and on the condition that it is not to be delivered to the obligee

until it is signed by all whose names appear in the obligatory part thereof as sureties, it will not be valid as to those that do sign until the condition is complied with."

In *Hagler v. State*, 31 Neb., 144, Justice NORVAL, speaking for this court, said: "Where an official bond is altered after the same has been signed, but before its delivery and approval, by an erasure of the name of one of the sureties thereon, and the alteration is plainly noticeable, all the sureties are released who had no knowledge of or did not consent to the alteration or ratify it."

The finding and decree of the district court were within the principles of these cases. This undertaking was void from the beginning. It had never been valid so far as these sureties were concerned, and Mrs. Bond's delivery of it to her principal was unauthorized. Appellants, however, insist that Holmes and Doolittle were liable on this bond because Mrs. Bond executed to them a mortgage on the property to indemnify them from loss by reason of having signed it. In other words, the taking of the indemnity mortgage was a ratification by Holmes and Doolittle of the unauthorized delivery of the mechanics' lien bond. To this it is answered by the sureties: "That at the time they took the indemnity mortgage they had no knowledge that the mechanics' lien bond had not been signed by Appleget, Skinner, and Hughes; that on the 17th day of February, 1890, Drexel's agent, Braley, procured them to deliver to him the indemnity mortgage (it had never been recorded) on the promise that another loan would be made to Mrs. Bond by the Trust Company, and secured by a second mortgage on the property, and out of the proceeds of this mortgage all of the mechanics' lien claims against the property would be paid." To sustain these allegations there is abundant evidence. Certain it is that Drexel and the Trust Company's agent, Braley, did get possession of the indemnity mortgage made to Holmes and Doolittle; that at about that date Mrs. Bond made a

second mortgage to Braley for $30,000 on this and other property and surrendered possession of the hotel. Another significant circumstance is that across the face of this indemnity mortgage is written "Canceled: M. Isabel Bond, February 17, 1890." This, it will be remembered, is the date of the second mortgage to Braley for the Trust Company.

In *Livesey v. Omaha Hotel Co.*, 5 Neb., 50, the late and lamented Justice GANTT, speaking for this court, said: "Waiver is an intentional relinquishment of a known right, and there must be both knowledge of the existence of the right and an intention to relinquish it."

The sureties brought themselves within the doctrine of this case, and the finding and decree of the district court that they had not waived their right to object to the unauthorized delivery of the mechanics' lien bond is supported by the evidence.

There are in the arguments and proofs of counsel other grounds which answer the claim of ratification by the sureties—grounds fully supported by the record, but the foregoing are sufficient, and they will not be further noticed. The decree of the district court is reversed and judgment and decree rendered here as follows, the amounts of judgments to draw interest from June 17, 1891:

1. In favor of Turner M. Marquett, against the estate of M. Isabel Bond, Leonidas K. Holmes, and the Henry & Coatsworth Company, for $2,560, with seven per cent interest; the same to be a first lien on lots C, D, E, and F, Bigelow's subdivision of lots 11 and 12, block 27, in the city of Lincoln, Lancaster county, Nebraska.

2. In favor of Leonidas K. Holmes, against the estate of M. Isabel Bond, for $7,867.35, with interest at seven per cent; and in favor of the Henry & Coatsworth Company, against the estate of M. Isabel Bond, for $4,654.65, with seven per cent interest; the last two to be second liens on the above described real estate and to prorate one with the other.

3. In favor of Anthony J. Drexel, against the estate of M. Isabel Bond, for $33,777, with six per cent interest; the same to be a third lien on said real estate.

4. In favor of Baird Bros. for $91; in favor of Capital City Planing Mill Company for $740; in favor of H. B. Dodge & Co. for $585; in favor of Crane Elevator Company for $3,212; in favor of Reliance Wire Works Company for $358; in favor of Missouri, Kansas & Texas Trust Company for $21,905. Each of these judgments to be rendered against the estate of M. Isabel Bond, each to draw interest at the rate of seven per cent, and to be fourth liens on the above described real estate and prorate each with the other.

5. Judgment in favor of Leonidas K. Holmes for $1,392.65. Judgment in favor of the Henry & Coatsworth Company for $1,167.35. Both these judgments to be rendered against the estate of M. Isabel Bond; both to draw interest at the rate of seven per cent, and to be fifth liens against the real estate above described and to prorate one with the other.

6. Judgment releasing and discharging Leonidas K. Holmes and John Doolittle from liability as sureties on the mechanics' lien bond given by them to Anthony J. Drexel.

IRVINE, C., concurs.

RYAN, C., having been of counsel in the case, took no part in the argument or the decision here.

STATE OF NEBRASKA, EX REL. NELSON C. BROCK, V. EUGENE MOORE, AUDITOR OF PUBLIC ACCOUNTS.

FILED JUNE 6, 1893. No. 6171.

Appropriations for Current Expenses of State: ACT CONSTRUED. The title of house roll No. 207, passed and approved April 10, 1893, is as follows: "An act making appropriation for the current expenses of the state government for the years ending March 31, 1894, and March 31, 1895, and to pay miscellaneous items of indebtedness owing by the state of Nebraska." Section 1 of said act provided: "That the following sums of money, or so much thereof as may be necessary, are hereby appropriated out of any money in the treasury not otherwise appropriated, for the payment of the current expenses of the state government for the years ending March 31, 1894, and March 31, 1895, and to pay miscellaneous items of indebtedness owing by the state of Nebraska. * * * Miscellaneous: * * * Arrest and return of fugitives from justice, rewards offered, officers' fees and mileage for conveying prisoners to and from the penitentiary, and juvenile offenders to the industrial schools at Kearney and Geneva, $20,000." *Held*, That no part of this sum was appropriated for the payment of indebtedness owing by the state for "arrest and return of fugitives or for officers' fees and mileage for conveying prisoners to and from the penitentiary," unless such indebtedness was incurred after March 31, 1893.

ORIGINAL application for *mandamus*.

Field & Holmes, for relator.

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

RAGAN, C.

This is an application for a writ of *mandamus*. The petition alleges:

1. That one Boyd, the sheriff of Otoe county, on the 4th day of July, 1892, conveyed from Nebraska City certain named persons (who had been tried, convicted, and

sentenced by the district court of said county) to the penitentiary at Lincoln; that in so doing said Boyd incurred $53.30 expenses.

2. That one Eugene A. Hall was duly appointed to arrest and return one Peterson, a fugitive from justice, charged with a crime in Box Butte county, and that said Hall did arrest said Peterson in the state of South Dakota, and return him to said Box Butte county, and in performing said arrest incurred expense in the sum of $49.75, the account for which had been duly presented to, approved, and allowed by the governor, and ordered paid out of the funds for the return of fugitives; that both said claims have been assigned to and are now owned by the relator; that the accounts had been presented to the auditor, the respondent, and the demand made that he draw warrants for the same on the treasury and his refusal so to do; that by an act of the legislature approved on the 8th day of April, 1893, there was appropriated by the legislature the sum of $20,000 for the purpose of meeting and paying the claims of relator and others similarly situated; and that there is now in the hands of the state treasurer ample and sufficient funds to pay all claims held by the relator.

The act referred to is house roll No. 207, the title of which is as follows: "An act making appropriation for the current expenses of the state goverment for the years ending March 31, 1894, and March 31, 1895, and to pay miscellaneous items of indebtedness owing by the state of Nebraska." Section 1 of said act is as follows: "That the following sums of money, or so much thereof as may be necessary, are hereby appropriated out of any money in the treasury not otherwise appropriated, for the payment of the current expenses of the state government for the years ending March 31, 1894, and March 31, 1895, and to pay miscellaneous items of indebtedness owing by the state of Nebraska." * * * The purposes of this act, as expressed in its title, are, first, to pay the current expenses

of the state government for the years ending March 31, 1894, and March 31, 1895; second, to pay miscellaneous items of indebtedness owing by the state.

It will be observed that the claim of relator is for indebtedness of the state contracted prior to April 1, 1893. The question then is whether the claim of relator is one of the miscellaneous items of indebtedness provided for in the act. In said section 1, under the title "miscellaneous" occurs this: "Arrest and return of fugitives from justice, rewards offered, officers' fees, and mileage for conveying prisoners to and from the penitentiary, and juvenile offenders to the industrial schools at Kearney and Geneva, $20,000." It is claimed by the relator that this clause appropriates $20,000 for the payment of any indebtedness owing by the state for the purposes therein mentioned, whether the same was incurred before or after April 1, 1893. We are unable to agree to this. Our construction is that no money was appropriated by this law to pay any items of miscellaneous indebtedness contracted prior to April 1, 1893, except such items as are specifically mentioned in the act.

It is not claimed that there is any other appropriation in this act from which the claims of the relator can be paid, and as the claim of relator is not one of the miscellaneous items specifically named for payment out of the appropriation the writ must be denied.

WRIT DENIED.

THE other commissioners concur.

LEE, FRIED & COMPANY V. HENRY BRUGMANN ET AL.

FILED JUNE 29, 1893. No. 4162.

1. **Promissory Notes:** PRINCIPAL AND SURETY: RELEASE OF SURETY. The extension of time of payment of a note to the principal, by the payee, upon sufficient consideration, without the knowledge of the surety, releases the surety; and evidence clearly directed to proof of such facts properly pleaded is competent.
2. **Trial:** ADMISSIBILITY OF EVIDENCE: MOTION TO STRIKE OUT: REVIEW. Where the admissibility of evidence is for the first time called in question by a motion to strike it out of the record, it is very questionable whether, under any circumstances, a review can be had of the ruling of the district court upon such motion.
3. **Review:** WEIGHT OF EVIDENCE. A verdict will not be disturbed because unsupported by the evidence, unless it is clearly so.

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

Cornish & Tibbets, for plaintiffs in error.

J. C. Johnston, contra.

RYAN, C.

This action was brought by the firm of Lee, Fried & Co. to recover judgment on a note made to said firm by Henry Brugmann and Jacob Rocke for $300. As a verdict was returned against Brugmann, upon which judgment was rendered, to which he has made no objection, his answer need not be mentioned. Mr. Rocke answered that he signed said note only as surety for Brugmann, which fact was well known to plaintiffs at the time; that afterward, without the knowledge or consent of said surety, Brugmann entered into an agreement with all his creditors to

sell out the entire stock then owned by Brugmann, and that the same should be divided among Brugmann's creditors, upon which said Brugmann was to be discharged as to all liability on said note. The defendant Rocke further averred that said stock was accordingly so sold, and the proceeds to the amount of $500 were applied upon the indebtedness of Brugmann to the plaintiffs, and the time of payment of said note was extended, to the damage of said Rocke, wholly without his knowledge or consent. Defendant Rocke further answered that after said note had been signed by him as surety, plaintiffs entered into an agreement with the principal, Henry Brugmann, without Rocke's knowledge or consent, in consideration of the extension of the time of payment of all the indebtedness of Brugmann for five years (a period much greater than that for which the note was originally to run), that Brugmann would execute to plaintiffs for the indebtedness evidenced by said note, as well as other indebtedness likewise due between the said parties, a mortgage upon his stock of goods, which was done as agreed, and said time of payment was so extended without said Rocke's knowledge or consent; and Rocke further alleged, that a part of said agreement was that said note should be delivered to Brugmann, which plaintiffs wrongfully failed to perform. The reply denied in detail the several affirmative matters which by answer had been alleged as sufficient to operate as a discharge of said Rocke as surety. Upon these issues there was a verdict and judgment in favor of the defendant Rocke.

The petition in error and motion for a new trial present the same grounds for review in as nearly the same language as the nature of the two documents will permit.

The first assignment of error, that the verdict is contrary to law, must fail, for the defense pleaded by Mr. Rocke was, if sustained by the evidence, amply sufficient to discharge him from liability for Brugmann's debt.

It is claimed, next, that the verdict is contrary to the evi-

dence, and there are addressed to us some cogent arguments to sustain this claim. After all, however, it was merely a question of preponderance with sufficient, either way, to sustain a verdict. It cannot, therefore, avail to insist upon this objection.

Another error is assigned in the following language: "The court erred in admitting testimony or evidence of defendant Brugmann's arrangements with his creditors to sell his stock and prorate the amount received among his creditors, the admission of which evidence was objected to by plaintiffs and exceptions properly taken." Referring to the evidence of Brugmann and other witnesses, it is found that the testimony called in question was relevant to the issues presented by Rocke's answer, in which, as already has appeared, there was pleaded a good defense. This objection is therefore without merit. Aside from this, it is questionable whether exceptions were properly taken. For instance, as to questions asked Brugmann upon this head it is found that the record shows only that plaintiff objected as irrelevant and incompetent, following which was no ruling or exception. Apparently about the time Mr. Brugmann's deposition was offered in evidence the following action was had, as shown by the record: "Cornish: I move that the testimony in the deposition of Mr. Brugmann contained in answers to questions 38 up to 85 inclusive be striken out as irrelevant and immaterial, the testimony showing that the agreement to prorate was not carried out, it not appearing that there was any consideration for the agreement, and for the further reason that an agreement to sell out at once and divide the money prorate amongst all of one's creditors is not an agreement to give time, but is a payment to all his creditors. Motion overruled and plaintiff excepted." Within these forty-seven interrogatories and answers sought to be striken out *in solido* by an oral motion, there was much evidence that should have been submitted to the jury, possibly some

that should not. Under this motion, however, the court could not be required to select and strike out that which might be objectionable. A motion of this kind is of rather doubtful utility, at best, as to evidence which has been admitted without objection. To extend it as sought in this instance is out of the question.

The only other errors assigned are based upon the giving, or refusal to give, the several instructions set out in the record. These cannot be reviewed for the reason that to the ruling upon no one of them was an exception taken.

The judgment of the district court is

AFFIRMED.

THE other commissioners concur.

MISSOURI PACIFIC RAILWAY COMPANY v. OSWALD BAIER, ADMINISTRATOR.

FILED JUNE 29, 1893. No. 5271.

1. **Evidence:** A COPY OF LETTERS OF ADMINISTRATION, when duly certified to be true and correct copies of such letters as appear from the original on file in the county court, wherein such letters of administration were granted, is admissible in evidence with the same effect as the original.

2. ——: RES GESTÆ: A DECLARATION, to be a part of the *res gestæ*, need not necessarily be coincident in point of time with the main fact proved. It is enough that the two are so clearly connected that the declaration can, in the ordinary course of affairs, be said to be a spontaneous explanation of the real cause.

3. **Carriers:** DEATH BY WRONGFUL ACT: MEASURE OF DAMAGES. In an action by an administrator under the provisions of chapter 21, Compiled Statutes, to recover damages for the death of his intestate, it is proper to prove the value of the services of the deceased which the next of kin of the deceased could reasonably expect but for the injury would have been rendered

in their behalf, the natural expectancy of life of the deceased just previous to receiving the injury which resulted in her death having been duly shown.

4. ———: ———: NEGLIGENCE: EVIDENCE: INSTRUCTIONS. The existence of negligence should be proved and passed upon by the jury as any other fact. It is improper to state to the jury a circumstance or group of circumstances as to which there has been evidence on the trial, and instruct that such fact or group of facts amount to negligence *per se*. At most, the jury should duly be instructed that such circumstances, if established by a preponderance of the evidence, are properly to be considered in determining the existence of negligence.

5. **Railroad Companies**: INJURY TO PASSENGERS: RIGHT OF RECOVERY: PRESUMPTION OF NEGLIGENCE. Under the provisions of section 3, article 1, chapter 72, Compiled Statutes of Nebraska, it is only necessary to a right of recovery against a railroad company, to show that the person injured was at the time being transported as a passenger over the defendant's line of railroad, and that the injury resulted from the management or operation of said railroad, a presumption thereupon arises that such management or operation was negligent, and it can be met only by showing that the injury arose from the criminal negligence of the party injured, or, that the injury complained of was the result of the violation of some express rule or regulation of said railroad company actually brought to the notice of the party injured.

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

B. P. Waggener and *C. W. Seymour*, for plaintiff in error.

John C. Watson, *E. H. Wooley*, and *H. D. Travis*, *contra*.

RYAN, C.

The defendant in error filed his petition in the district court of Otoe county, Nebraska, alleging, in substance, that on the 26th day of December, 1889, the Missouri Pacific Railway Company received one Katharine Baier as a pas-

senger on its said railroad from Nehawka to Lincoln; that at Weeping Water, to continue her journey, it was necessary for her to change from one of defendant's cars to another, and said railway company was thereby bound to furnish her suitable means, time, and instructions to make said change; that it failed and neglected to do its duty in these matters, and carelessly, negligently, and wrongfully performed its duty towards her in making said change; that the defendant furnished no platform for that purpose; that the ground was three or four feet below the lowest step on said car, and that the defendant then and there gave her wrong instructions about making said change, and did not give her time to make said change; in consequence whereof, when the said train stopped at the defendant's water-tank before reaching the depot at Weeping Water, the conductor of said train having wrongfully, carelessly, and negligently instructed her to get off said train, she did get off at said place, and the conductor finding that he had made a mistake immediately instructed her to get on again, and further instructed her to get off of said train when the next stop should be made; that afterwards said train of cars pulled by and at some distance beyond said station at Weeping Water, and the said Katharine Baier, in accordance with the instructions given her by said conductor upon the stoppage of said train of cars, attempted to get off, but by reason of said train making a sudden jerk while she was in the act of leaving said train to change to the other which should take her to Lincoln, she was without fault on her part seriously injured, from the effects of which injury on the 3d day of January, 1890, she died; that she left eight minor children, naming them, which were her only children and next of kin, and that they were dependent upon her for a mother's care and attention, and had been otherwise injured by the death of said Katharine Baier to the amount of $5,000.

The plaintiff in error filed a general denial, and further

pleaded the defense of contributory negligence of Katharine Baier, to which answer the defendant in error filed a reply in denial.

Upon a trial of the issues had to a jury a verdict was rendered for the full amount prayed, and a motion for a new trial being overruled, judgment was entered on the verdict; to reverse which plaintiff in error filed its petition in this court.

On the trial of the case in the district court the plaintiff in error requested the court to give forty-nine instructions, and asked that the jury be required to answer twenty-nine interrogatories submitted for that purpose. The petition in error in this court assigns seventy-nine alleged errors. In view of these facts no attempt will be made to consider *seriatim* the several matters complained of in detail, or in the order in which they occur.

Upon the trial there was offered in evidence and admitted over the objection of the defendant, the railroad company, a duly authenticated copy of the letters of administration upon the estate of Katharine Baier, issued in the usual form by the county court of Cass county, Nebraska, to Oswald Baier. It is insisted that the admission in evidence of this copy was error, for that it did not fall within the description of documents of which copies may be introduced under the provisions of section 408 of the Code of Civil Procedure. This section reads as follows: "Duly certified copies of all records and entries or papers belonging to any public office, or by authority of law filed to be kept therein, shall be evidence in all cases of equal credibility with the original records or papers so filed." The certificate of the county judge by whom was issued the aforesaid letters of administration, and by whom a copy thereof under his seal was authenticated, recited that the said copy was a true and correct one of the letters of administration of the estate of Katharine Baier, deceased, as appeared from the original on file in said judge's office. This was sufficient

to entitle said copy to consideration under the strictest construction of said section.

In argument it is insisted that it was error to permit the following question to be answered by the witness Johnson. His testimony had reference to the accident on account of which this suit was brought; following which evidence was this question and answer:

Q. Has there been any change since that time that you know of in making up trains?

Objected to, as incompetent, irrelevant, and immaterial and not a proper issue in this case. Overruled and exception.

A. I don't know whether there is or not of my personal observation. I heard there had been a change.

There might be imagined circumstances under which a question of this character, followed by evidence of a certain kind, would be prejudicial to the railroad company. Upon what ground the existence of such prejudice is founded in this case is not apparent, for the argument of the plaintiff in error is simply that the only effect of this evidence was to prejudice the defendant. We can observe no such necessary or even natural result of that kind which could arise upon either the question or answer of this witness.

It is insisted, on argument, that the district court should have sustained the motion of the railroad company to strike out all of the statements in the witness's testimony relative to what Mrs. Baier told him of the accident, because it was hearsay, no part of the *res gestæ*, and was very prejudicial to said company. The evidence complained of was given by James Johnson. It is as follows:

Q. State how you came to be there at the depot that morning.

A. I brought some people down there from my house to take the train.

Q. Go on and state to the jury what you saw there in connection with this accident.

A. I was standing on the platform in front of the depot—I think it was in front of the depot—when the train pulled in. They stopped a few minutes in front of the depot; when they uncoupled the Lincoln car they pulled out and a few minutes after I heard a scream; I started to run in the direction from which the scream came and run a little over a hundred feet I think, and I found a lady laying across the platform. I picked her up, lifted her partly up, and then there was a gentleman, I think it was Fenstermaker, came with a lantern, and I saw her legs were cut off, and I think I told him he had better run for a doctor. While I was helping her up I asked her who she was and she told me.

Q. I will ask you if while you were helping her up there if the conductor came down there?

A. Yes, sir.

Q. Now I will ask you to state what Mrs. Baier stated at that time as to how the accident occurred.

Objected to, as incompetent, irrelevant, immaterial, hearsay, and no proper foundation laid. Overruled and exception.

(Examined by Waggener, attorney for railroad company:)

Q. Had the train gone at the time she made this statement:

A. No, sir; the train had pulled up to the platform and stopped.

Q. How long had the train been away from the spot where she was injured?

A. I don't think the train had come to a stop when I got there.

Q. How long after the scream until you heard this conversation?

A. Could not have been, I think, two minutes.

Q. First place Fenstermaker came with a lantern?

A. Yes, sir.

Q. You saw how badly she was injured?
A. Yes, sir.
Q. You told him to go for a doctor?
A. Yes, sir.
Q. He did go?
A. Yes, sir.
Q. You had the conversation with her after that?
A. Yes, sir.
(Question by court:)
Q. Was the conversation at that time?
A. Yes, sir.
(Examination resumed by Wooley, attorney for defendant in error:)
Q. She told where she came from and who she was?
A. Yes, I asked her how she came to get off of the train and she told me her name was Baier and that she was from Nehawka, and she said the conductor had told her—had come into the car when they got to Weeping Water and told them to get out at Weeping Water and change cars for Lincoln. When the train stopped at the tank she supposed it was the place, and they got off, then the conductor told them it was not the station and they had better get back on the train and ride to the depot; she said she got on, but when she got on the steps the train pulled out and her husband and children had not got on the train, and then she said when the train stopped in front of the depot she supposed it was the place to get off; she got out of the car and got on the steps, but just as she was in the act of getting off the steps the train made a jerk and she fell off.

It was of the ruling upon a motion to strike out this evidence as to what Mrs. Baier said that complaint is made in argument of the plaintiff in error. It might not be improper to observe at this point that the testimony shows without question that Mrs. Baier was immediately, after the above detailed circumstance, taken to a vacant storeroom in the town of Weeping Water, and that there both

her legs were amputated, and that from the effects of the injury she died one week after the date of the accident, of which the last witness has testified.

From the above testimony it is apparent that the statements of Mrs. Baier were made immediately after she had received her injuries and before she had been removed from the place where she had sustained them, and were explanatory of the occurrence of the accident.

In the brief of the plaintiff in error is cited *Waldele v. New York C. & H. R. R. Co.*, 95 N. Y., 274, in which are grouped the holdings in several decisions bearing upon the question of evidence admissible as part of the *res gestæ*. In respect to those most analogous in facts the following language was used in said opinion, to-wit: "In *Lund v. Tyngsborough*, 9 Cush., 36, in view of the frequent recurrence of questions in regard to the admission of declarations claimed to be part of some *res gestæ*, the court undertook to set forth and illustrate with some particularity the principles and tests by which such questions must be determined, and among other things said: 'When the act of a party may be given in evidence, his declarations made at the time, and calculated to elucidate and explain the character and quality of the act, and so connected with it as to constitute one transaction, and so as to derive credit from the act itself, are admissible in evidence. The credit which the act or fact gives to the accompanying declarations as a part of the transaction, and the tendency of the contemporary declarations as a part of the transaction to explain the particular fact, distinguish this class of declarations from mere hearsay.' And further: 'Such a declaration derives credit and importance as forming a part of the transaction itself, and is included in the surrounding circumstances, which may always be given in evidence to the jury with the principal fact. There must be a main and principal fact or transaction, and only such declarations are admissible as grow out of the principal transaction, illustrate its character, are

contemporary with it, and derive some degree of credit from it.'"

In *Commonwealth v. Hackett*, 2 Allen [Mass.], 136, upon a trial for murder, a witness testified that at the moment the fatal stabs were given he heard the victim cry out "I am stabbed," and he at once went to him and reached him within twenty seconds after that and then heard him say, "I am stabbed; I am gone; Dan Hackett has stabbed me." This evidence was held competent as part of the *res gestæ*, Bigelow, Ch. J., speaking of this evidence, said: "If it was a narrative statement, wholly unconnected with any transaction or principal fact, it would be clearly inadmissible. But such was not its character; it was uttered immediately after the homicidal act, in the hearing of the person who was present when the mortal stroke was given, who heard the first words uttered by the deceased, and who went to him after so brief an interval of time that the declaration or exclamation of the deceased may fairly be deemed a part of the same sentence as that which followed instantly after the stab with the knife was inflicted. It was not, therefore, an abstract or narrative statement of a past occurrence, depending for its force and effect solely on the credit of the deceased, unsupported by any principal fact, and receiving no credit or significance from the accompanying circumstances. But it was an exclamation or statement, contemporaneous with the same transaction, forming a natural and material part of it, and competent as being original evidence in the nature of *res gestæ*."

In *Rockwell v. Taylor*, 41 Conn., 55, the rule was laid down thus: "To make declarations admissible on this ground, they must not have been mere narratives of past occurrences, but must have been made at the time of the act done which they are supposed to characterize and have been well calculated to unfold the nature and quality of the acts they were intended to explain; and so harmonize with them as to constitute a single transaction."

In *Hanover R. Co. v. Coyle*, 55 Pa. St., 396, the action was against the railroad company for injury to plaintiff by negligence, and the trial court admitted the declarations of the engineer, by whose negligence the plaintiff was injured, made at the time of the injury, as a part of the *res gestæ*, and it was held they were properly admitted. Agnew, J., writing the opinion, and speaking of the declaration of the engineer, said: "It was made at the time of the accident in view of goods strewn along the road by the breaking up of the boxes, and seems to have grown directly out of and immediately after the happening of the fact. The negligence complained of being that of the engineer himself, we cannot say that his declarations made upon the spot at the time, and in view of the effects of his conduct, are not evidence against the company as a part of the very transaction itself."

In *Tilson v. Terwilliger*, 56 N. Y., 273, Folger, J., lays down the rule as to *res gestæ* declarations as follows: "To be a part of the *res gestæ* they must be made at the time of the act done which they are supposed to characterize; they must be calculated to unfold the nature and quality of the facts which they are intended to explain; they must so harmonize with those facts as to form one transaction. There must be a transaction of which they are considered a part; they must be concomitant with the principal act and so connected with it as to be regarded as the result and consequence of co-existing motives."

In *Chicago W. D. R. Co. v. Becker*, 128 Ill., on page 548, the rule is thus stated: "The true inquiry according to all the authorities, is whether the declaration is a verbal act, illustrating, explaining, or interpreting other parts of the transaction of which it is itself a part, or is merely a history or a part of a history of a completed past affair. In the one case it is competent, in the other it is not;" citing *Mayes v. State*, 64 Miss., 329; *Waldele v. New York C. & H. R. R. Co.*, 95 N. Y., 274; *Lander v. People*, 104 Ill., 248.

Greenleaf says: "The principal points of attention are whether the circumstances and declaration offered in proof were contemporaneous with the main fact under consideration, and whether they were so connected with it as to illustrate its character." (1 Greenleaf, Ev., sec. 108.)

Taylor says: "In all these cases the principal points of attention are whether the circumstances and declarations offered in proof were so connected with the main fact under consideration as to illustrate its character, to further its object, or to form, in conjunction with it, one continuous transaction." (1 Taylor, Evidence [7th ed.], sec. 588.) The same author, after speaking of the change in the old rule, where there are connecting circumstances, goes on to say: "Still an act cannot be varied, qualified, or explained either by a declaration which amounts to no more than a mere narrative of a past occurrence, or by an isolated conversation held or an isolated act done at a later period." There is not so much difficulty in the enunciation of the rule as in its application to the facts in each case under consideration. The consensus of the authorities seem to be, that a declaration to be a part of the *res gestæ* need not be coincident in point of time with the main fact proved. It is enough that the two are so clearly connected that the declaration can, in the ordinary course of affairs, be said to be a spontaneous explanation of the real cause. The declaration is then a verbal act, and may well be said to be a part of the main fact or transaction. Again, if the subsequent declaration and the main fact at issue taken together from a continuous transaction, then the declaration is admissible. Applying these principles to the fact of the case at bar, there would seem to be no room for doubt that the declarations of Mrs. Baier, made under circumstances so nearly coincident in point of time with the accident itself, explanatory of its cause and history, were admissible as part of the *res gestæ*.

There appears in the bill of exceptions the following evi-

dence given by Oswald Baier, administrator, in whose name this action was brought:

Q. What was the condition of your wife's health that morning when you left Nehawka?

A. She was in good health.

Q. State what was her condition from the time she was injured up to the time of her death.

A. She had both legs amputated, and it caused her death.

(On motion of defendant the words "it caused her death" were stricken out.) * * *

Q. I will ask you what was the reasonable value of her work as housekeeper and the work she did?

Objected to, as incompetent, irrelevant, immaterial, and no proper foundation laid; no allegation in the petition of any damages of that character. Overruled. Exception.

A. I would not miss her for $25 a week for these children.

(On motion this answer was stricken out.)

Q. What I mean, what was the work she did there in the way of saving you from having to hire a girl to do the work; what was the actual value of the work that was performed by her?

Objected to, as incompetent, irrelevant, immaterial, and not within the issues in this case, and not a proper item of damages. Overruled. Exception.

A. I do not think I could get anybody to do the work for less than $5 per week, the work that she did.

The defendant moves to strike out the answer as not responsive to the question, incompetent, irrelevant, and immaterial, not within the issues in this case. Overruled. Exception.

It is argued that the court erred in admitting this evidence: First, because no special damages having been alleged specifically, none such could be proved; second, because the loss of services of the wife and mother was not

a proper element of damage to be considered in cases of this class.

The suit was brought by Oswald Baier as administrator of his deceased wife's estate. The petition alleged that Mrs. Baier left surviving her eight children, ranging from two to seventeen years of age, who were her only children and next of kin, and that said children were dependent upon her for a mother's care and attention, and that said children had been otherwise injured by the death of Katharine Baier to the amount of $5,000. This action was brought under chapter 21, Compiled Statutes of Nebraska, of which the following is a copy:

"Section 1. That whenever the death of a person shall be caused by the wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, in respect thereof, then and in every such case the person who, or company or corporation which, would have been liable had death not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

"Sec. 2. That every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries, resulting from such death, to the wife and next of kin of such deceased person, not exceeding the sum of five thousand dollars; *Provided*, That every such action shall be commenced within two years after the death of such person."

The case specially relied upon by counsel for plaintiff in error to support the contention that damages must be specially alleged is *Hurst v. Detroit City R. Co.*, 48 N. W. Rep. [Mich.], 44. In that case the injuries resulting in death were inflicted upon a child of the age of one year and eleven months, and the only damages alleged were the pain, agony, and suffering endured by the said child in the interim of two hours between the injury and the death. This was under a statute much the same in terms as that above quoted, and the decision was not so much because of the failure to allege special damages, as to allege no pecuniary damages whatever to the next of kin.

Another case cited for the same purpose is *Pennsylvania Co. v. Lilly*, 73 Ind., 252, in which the victim was at the time of her death five years of age. The averment in the complaint was that "By reason of the said negligent, reckless, and willful killing of the said Emma, the plaintiff had been made to suffer great mental pain and anguish, had been deprived of the happiness and comfort of her society, and thereby has suffered great damage." It was held that the recovery by a parent for the death of his child could only be for the pecuniary damage he had sustained, the proper measure of which was the value of the child's services from the time of the injury until majority attained, taken in connection with such child's prospect of life, less the cost of support and maintenance. In a proper case a recovery could be had of the expenses for the care and maintenance of a child, funeral expenses, and medical services made necessary by the injury. This case was not merely one of a failure to properly allege special damages. It was one where no recoverable damages whatever had been stated.

To the same end counsel for plaintiff in error cites *Cooper v. Lake Shore & M. S. R. Co.*, 66 Mich., 261. For the purposes of the case under consideration, the seventh syllabus of the case cited states with sufficient fullness the

facts and views of the court. This syllabus is as follows: "In an action brought under How. Sts., sec. 8314, to recover damages for the negligent killing of a child of eleven years of age, the court instructed the jury that in assessing damages they might allow for the value of the services of the deceased to her parents until she arrived at the age of twenty-one years, and might further take into consideration such other pecuniary benefits as the parents might reasonably be expected to realize had she lived for the balance of her probable duration of life, not exceeding theirs, to the latter portion of which charge exception was taken, defendant's counsel insisting that the damages should be limited to the minority of the child; *held*, that the exception was well taken, and that any estimate or value placed upon events so uncertain must be without any satisfactory basis to rest upon." Notwithstanding this criticism the supreme court of Michigan held in that case that as the jury might properly have found that the value of services which were properly recoverable were equal to or in excess of the verdict ($1,550) the judgment was affirmed. At best, the quoted syllabus is wholly directed rather against an indefinite instruction than a faulty pleading.

In *Regan, Admr., v. Chicago, M. & St. P. R. Co.*, 51 Wis., 599, there was a general averment of damages which was properly held insufficient, for there should have been alleged a state of facts from which pecuniary damages were inferable. The statute under which the case at bar was brought made this requirement, so that the case last cited aids but little in this inquiry.

In Ohio there is a statute almost exactly the same in terms as chapter 21, Compiled Statutes of Nebraska. Under that statute it was held that a recovery might be had of an amount which it might reasonably be expected that the next of kin would have received from the deceased had he lived, the expectancy of life being a proper subject of proof to that end. (*Lyon's Admr. v. Cleveland & T. R. Co.*, 7

O. St., 336.) The allegations of the petition upon which judgment was rendered in the case at bar more fully state the grounds of damages than was done under the same statute in *Lyon's Admr. v. Cleveland & T. R. Co., supra*, where the petition was set out at length.

In *Steele, Admr., v. Kurtz*, 28 O. St., 191, Ashburn, J., delivering the opinion of the court, said: "The phrase 'next of kin' is a comprehensive one. Bouvier in defining it says: 'This term is used to signify the relations of a party who has died intestate.' 'In general, no one comes within this term who is not included in the provisions of the statutes of distribution,' etc. As used in the statute it comprehends all those persons who are entitled to stand in the order of inheritance under the statute of distributions in the case of personalty—1, children; 2, husband or wife; 3, brothers and sisters, and so on." Under the statute of Nebraska regulating the distribution of personalty the same persons would be entitled to shares of the personal property of the deceased as those above stated, though not in the same order. (Comp. Stats., ch. 23, secs. 30 and 176.)

In *Wilson v. Bumstead*, 12 Neb., 1, it was held that an action should be brought by the administrator; MAXWELL, Ch. J., who delivered the opinion of the court, saying: "The object doubtless was to prevent a multiplicity of suits in cases where the next of kin were numerous, and to make an equitable distribution of the amount recovered among all those entitled to the same."

In *Johnson v. Missouri P. R. Co.*, 18 Neb., on pages 699 and 700, occurs the following language in reference to a recovery had under this statute: "If it should appear upon trial that the father suffered no damage in the death of the son, it is probable there could be a recovery only for nominal damages. But it is said that the word 'pecuniary,' as used in our statute, is not construed in a strict sense. The damages are largely prospective and their determination committed to the discretion of juries upon very

meager and uncertain data. A parent may recover for loss of expected services of children, not only during minority, but afterwards on evidence justifying a reasonable expectation of pecuniary benefit therefrom. Neither is it essential that this expectation of pecuniary benefit should be based on a legal or moral obligation on the part of the deceased to confer it, but it may be proved by any circumstances which render it probable that such benefit would in fact be realized."

Necessarily in the above review of authorities there could be no separate examination of the two points urged on behalf of the plaintiff in error on this branch of the case—first, of the necessity of more special pleading of damages, and, second, of the right to recover for loss of prospective services. Upon the last of these propositions, before a full examination of the authorities, the writer hereof at least entertained some doubts which have now been dispelled. The petition, especially in the absence of a motion to make more specific and certain, stated with sufficient particularity a cause of action under chapter 21, Compiled Statutes of Nebraska, to admit evidence of damages of the character above set out. It was competent under the averments of the petition to prove any facts which would show any pecuniary loss to the next of kin of the deceased, resulting from her death. There was no error therefore in admitting evidence of the value of the services of the deceased in connection as it was given with proof of her expectancy of life at the time she was injured.

In the instructions requested on behalf of the railroad company it was insisted that the court should instruct the jury that if they found the existence of certain facts as indicated by the instructions, their verdict should be for the railroad company. This the court very properly refused to do. The existence of negligence, whether as a cause of action pleaded by the plaintiff or as a defense set up by the defendant, is a question of fact to be submitted to the jury;

for determination, as should be any other essential fact. (*Atchison & N. R. Co. v. Bailey*, 11 Neb., 332; *Johnson v. Missouri P. R. Co.*, 18 Id., 690; *City of Lincoln v. Gillilan*, Id., 114; *Powers v. Craig*, 22 Id., 621; *Omaha & R. V. R. Co. v. Chollette*, 33 Id., 143; *Stevens v. Howe*, 28 Id., 547; *City of Plattsmouth v. Mitchell*, 20 Id., 228; *Huff v. Ames*, 16 Id., 139; *Union P. R. Co. v. Lee Sue*, 25 Id., 772; *Orleans Village v. Perry*, 24 Id., 831.) It is doubtless proper for the court in any case to instruct the jury that certain facts, if proved, may be considered in arriving at conclusions upon the propositions involved, but in no case should there be an effort to impress upon the jury the convictions of the presiding judge as to the weight of the evidence under consideration. To single out and state a fact or group of facts and inform the jury that if such is found to exist it establishes the existence of negligence, is to comment improperly upon questions of fact to the jury and the learned judge properly refused to lend sanction to such procedure. For instance, the 40th instruction requested on behalf of the railroad company was in the following language: "40th. If the jury believe from the evidence that Katharine Baier attempted to get off after the train was in motion in disregard of the warning of passengers not to do so, she was guilty of negligence and plaintiff cannot recover herein." The theory of the railroad company upon the trial was, that, after the train left the water tank where the conductor had directed Mrs. Baier to resume her place in the car, it had not stopped at all, but that Mrs. Baier, observing that she had been conveyed past the depot, and being apprehensive that she would be carried to Omaha, alighted from the moving train and so was injured. Upon this theory the above instruction could have no other meaning than that if after the train left the water tank Mrs. Baier got off in disregard of the warning of passengers, she was guilty of negligence, regardless of whether or not there

was a halt such as she might well mistake for the stop according to her statement indicated by the conductor as the proper time for her to leave the train. Aside from this, the instruction requested gave a certain positive weight to the warning of the passengers to which such warning might or might not be entitled. If these passengers were agents of the railroad company in the management of its trains, they could of course speak with authority. They were not, however; they were in this matter mere volunteers, not necessarily presumed to possess better means of knowledge than Mrs. Baier herself, especially if, as she said, she had received directions from the conductor as to the course she was to pursue. The unfairness of such an instruction is apparent without comment; it is referred to simply as illustrative of the danger there is in attempting to state to the jury what fact or facts constitute negligence. The jury may with propriety be instructed that certain facts are proper for consideration in determining whether or not there has been negligence. Whether such facts as are in evidence establish negligence, is solely a question for the jury. If there is insufficient evidence to sustain a verdict, the remedy is as in other cases; no exceptional course of procedure should be adopted because the existence of negligence is involved in the facts to be determined.

The record shows that the plaintiff in error specially excepted to that portion of instruction number four, given by the court, which makes the defendant liable to passengers for damage sustained through accident, and to each and every other part of said instruction. The instruction complained of is as follows: "As a matter of law you are instructed that the defendant railroad company is bound to carry its passengers without injury, and that said company is liable for damages suffered by passengers through accident while upon its trains which is not contributed to by the gross negligence of the parties injured. By gross neg-

ligence, as used in the foregoing instruction, is meant such negligence on the part of a passenger as would amount to a disregard of his or her own safety when in the presence of danger, and which would amount to willful indifference to the injury liable to follow or result from such carelessness and negligence."

Section 3, article 1, chapter 72, Compiled Statutes, reads as follows: "Every railroad company as aforesaid shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the persons injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice."

In *Omaha & R. V. R. Co. v. Chollette*, 33 Neb., 143, the following instruction was approved by this court: "The term 'criminal negligence,' as it is used in the statute above quoted, is defined to be gross negligence. It is such negligence as would amount to a flagrant and reckless disregard of her own safety and amount to a willful indifference to the injury liable to follow." In his definition of the term "criminal negligence" the district judge in the case at bar only followed that adopted by this court. Counsel for plaintiff in error insist, however, that a rigid application of the terms of the above statutory provision was discountenanced in the opinion written by MAXWELL, J., in *McClary v. Sioux City & P. R. Co.*, 3 Neb., 44. That case was brought to recover damages caused by a sudden gust of wind blowing from the track the train upon which plaintiff was riding, the theory of plaintiff being that if the train had run on its schedule time it would have safely crossed the narrow strip devastated before the wind struck that part of the track where the wreck occurred. In the opinion it was properly said therefore that "Common carriers are liable only where the injury has arisen from their own neglect," and as it was shown affirmatively and without question

that the company was entirely free from responsibility for the injury, it was held not liable in damages. The purpose of the statute was not to fasten upon a common carrier of passengers a liability as insurers against any and all injuries while being transported upon the trains of such carriers, but it was rather intended to establish a presumption from the passenger receiving injury under the circumstances contemplated. Under this statute it is necessary to prove only that the injured person was a passenger being transported over the line of railroad of the defendant when damages are inflicted upon the person of such passenger, to entitle a recovery of whatever amount of damages may be established by the evidence. In other words, these facts being shown, any damage resulting from the operation or management of the train, is, without more, presumed to be entirely attributable to the negligence of the railroad company, and to avoid liability it then devolves upon such company to show that the injury was imputable to the criminal negligence of the party injured, or to his violation of some express rule or regulation of said road actually brought to his or her notice. As applied to the facts of this case, the 4th instruction given by the court fairly stated the correct rule as embodied in the section of the statute above quoted, and the assignment of error predicated upon the giving of that instruction must therefore fail.

These considerations of the 40th instruction requested by the plaintiff in error, and of the 4th instruction given by the court, fully meet the contentions urged against the instructions given, as well as upon those refused, so that a more extended examination of either class is rendered unnecessary.

The judgment of the district court is

AFFIRMED.

THE other commissioners concur.

DAVID BROWN ET AL. V. LEONARD B. FEAGINS.

FILED JUNE 29, 1893. No. 5171.

1. **Forcible Entry and Detainer:** WRONGFUL ENTRY UNDER CLAIM OF TITLE. An action for the forcible detention of real property may be maintained by one whose complete possession thereof has been ended by the wrongful entry of another, even though such entry was made under claim of a paramount title.
2. ———: ———. A person who claims the paramount title to real property in the undisputed possession of another cannot, by surreptitiously obtaining possession thereof, place such former possessor at any disadvantage as to the assertion of his rights or the enforcement of his remedies in respect thereto.

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

C. A. Baldwin, for plaintiffs in error.

John Q. Burgner and *Connell & Ives, contra.*

RYAN, C.

This action was begun before a justice of the peace of Douglas county, by Leonard B. Feagins, against David and Frank Brown, the complaint reciting that on or about January 23, 1889, the said Browns unlawfully, forcibly, and with strong hand did enter, and thenceforward have held possession of the southeast quarter of the northeast quarter of section 31, town 15 north, range 10 east, 6th P. M., and that the said Feagins at the time of said entry, and ever since, had the right of possession of the said premises. Service of notice to quit was also duly averred in said complaint. A trial of this action for the forcible entry and detention of the aforesaid real property resulted in a verdict and judgment in favor of Feagins; whereupon the defendants appealed to the district court of said county. A trial in that court re-

sulted as before, and the Browns bring the case into this court for review upon petition in error.

The evidence presented the facts with but little dispute —certainly none of serious importance. For some three years immediately preceding January 24, 1889, George Hill had claimed the ownership of the property in dispute, and, incident to such claim, had maintained about the said premises a fence of rather doubtful efficiency. During the pasturing season of the year 1888, Feagins, as Hill's tenant, used the said real property for grazing purposes, for which alone it was suitable, removing the cattle when the grass became unfit for use. About Christmas of the year 1888 a gap was made in the enclosure by the falling of a portion of the fence. The posts and wires of which this portion had been constructed were afterwards covered by snow so that any person, so disposed, could easily drive a team through the gap into the enclosure. The plaintiffs in error having previously procured a quitclaim deed from the holder of a tax deed upon said premises, drove into the enclosure over the fallen portion of the fence above mentioned on January 24, 1889, and with the help of two other persons, on the same day erected a shanty, which said Browns at once occupied as a place of residence. Based upon this possession, reinforced by the claim that their quitclaim deed raised such a question of title as could not be investigated in this form of action, the plaintiffs in error resist Feagins' contention for restoration to his former possession of the property above described.

This form of action involves merely the present right of possession of the property described in the complaint. This action may be maintained by any person who is entitled to possession as against another who has unlawfully and forcibly obtained possession, or whose possession, originally rightful and peaceable, is afterward forcibly and unlawfully held. (Sec. 1019, Code of Civil Procedure.) Under this section this court has held that this action being

a civil remedy to recover the possession of premises unlawfully and with force withheld from the plaintiff, it will be sufficient to charge the forcible detainer that the party unlawfully in possession refuses to vacate the premises on lawful notice so to do. (*Estabrook v. Hateroth*, 22 Neb., 281.) In the case under consideration lawful notice to quit possession was served upon both Browns, who refused to vacate the premises. Their right to retain possession is, therefore, to be considered solely with reference to the nature of their possession as against the defendant in error. There is no ground for dispute that, by reason of occupancy of the premises and the continued enclosure thereof, Hill, and under him his tenant, had exclusive possession previous to January 24, 1889. In respect to this property the assertion of such possession was all that in the condition of the disputed property it was capable of, and as against all the world, the complete possession was held by Feagins. With full knowledge of all the facts in this matter plaintiffs in error, at the time last mentioned, taking advantage of an accidental breach in the enclosure, entered and took possesssion which, upon due notice, they refused to surrender to the party dispossessed. The defendant in error, upon such refusal, had the right to be reinstated in his possession for whatever that possession may have been worth. If plaintiffs in error, out of possession, desired to test the right of the defendant in error as to the disputed property, an action of ejectment offered the proper remedy. That form of action in which only the right of possession can be tested cannot be made available for such purpose. And, having obtained possession in the manner above indicated, the interlopers cannot oust the jurisdiction of a justice of the peace of the proper county to re-establish the interrupted rightful possession by the assertion of a superior title.

Upon this theory the cause was tried in the district court, where, upon the facts, the verdict was in favor of

the defendant in error. This verdict was right, and the judgment thereon is, therefore,

AFFIRMED.

THE other commissioners concur.

PHILIP LIKES ET AL., APPELLEES, V. HOWARD M. KELLOGG, ADMINISTRATOR OF THE ESTATE OF DAVID STONE, DECEASED, ET AL., APPELLANTS.

FILED JUNE 29, 1893. No. 4647.

Establishment of Streets: ACQUIESCENCE OF PROPERTY OWNERS: ESTOPPEL: REPRESENTATIONS. The owners of a tract of land, having platted it as an addition to an adjacent town, so as to show what appeared to be the prolongation of its streets, though not so designated, and having for the period of eight years acquiesced in the grading and public use of such apparent streets, the erection of sidewalks thereon, and the construction of costly improvements upon adjacent private property in such manner that if the existence of such streets is denied these improvements will be rendered comparatively useless; and having represented to one party, who, on the faith thereof, purchased a portion of said addition adjoining said apparent streets that such portion would abut upon the same as streets, are estopped to deny the existence of the streets through such addition of which they have thus superinduced such belief, and the reliance thereon of the parties who have acted upon the faith of such appearances, acts, and representations.

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

Howard M. Kellogg, for appellants.

Hainer & Smith, contra.

RYAN, C.

The south half of the north half of the northeast quarter of section 4, township 10 north, range 6 west, of the 6th P. M., lies along and constitutes the northern front of the original town of Aurora, Nebraska. This forty-acre strip was divided into blocks numbered consecutively, from east to west, from 1 to 7 inclusive, alternating at regular intervals with north and south streets. By some mistake there was left adjacent to the north line of said strip a triangular piece, having its base of about 140 feet across, a short distance west of the northwest corner of said block 7, the two other lines of said triangle becoming coincident at the northeast corner of said forty-acre strip. Afterward the defendants, who owned a part of the north half of the north half of said quarter section, on the 6th day of June, 1881, duly filed a plat of such part as Stone's addition to the said town of Aurora. The written statement of the defendants, which was filed contemporaneously with said plat and constituted a part of the dedication of the land described, was, so far as it is at all useful, as follows:

"Stone's addition is situated on the north half of the north half of the northeast quarter of section four (4), town ten (10), range six (6) west, of the 6th P. M., in Hamilton county, Nebraska; commencing at a point seven hundred and forty-eight (748) feet west of the northeast corner of the aforesaid section four (4), and thirty-three feet south of said north line of said section four (4). The size of the blocks is given in figures in feet on said blocks of the plat. Each block is numbered on the plat. The width of the streets is given on the margin of the plat in figures in feet and named. Stakes are driven at the corners of each block. A mound with pits is made at the commencement of the town or addition."

The east line of this tract platted by defendants was formed by the prolongation northward of the east boun-

dary line of block 3 of that part of the original town to which reference has heretofore been made. The plat divided that portion of the north half of the north half of said quarter section lying west of the east line of block 3 of the original town of Aurora prolonged northward through said forty-acre strip by a street running east and west through the same, designated as "Seventh street," "Sixth" street lying along the south side of said forty-acre strip last referred to. The point of intersection of the north line of said section 4 with the aforesaid east line of block 3 of the original town of Aurora, prolonged, constituted the northeast corner of the block designated as (block) "1" on the recorded plat of Stone's addition. Thence the north tier of blocks were numbered consecutively westward to and including (block) "5," directly south of which, and across Seventh street, was located (block) "6," from whence eastward the blocks were numbered consecutively, so that (block) "10" was located just north of block 3 aforesaid of the original town of Aurora. Between said block 3 and block 4 of said original town of Aurora, Grand avenue, as a street, was prolonged northward by said plat between blocks 9 and 10, and 2 and 1 of Stone's addition aforesaid. In the original town of Aurora, Central avenue was located between blocks 4 and 5; Washington avenue between blocks 5 and 6, and Hamilton avenue between blocks 6 and 7. North of, and so as to constitute with uniformity a prolongation of Central avenue, the plat of Stone's addition showed between (blocks) 8 and 9 and between (blocks) 2 and 3 of Stone's addition, respectively, a strip which, from its appearance, might well be taken for a street. It was 100 feet wide, and between (blocks) 8 and 9 of Stone's addition it was designated as "16"; between (blocks) "2" and "3" of the same addition it was designated as "11." What resembled the prolongation of Washington avenue aforesaid extended northward between (blocks) "7" and "8" of Stone's ad-

dition under the designation of "15," and between (blocks) "3" and "4" of that same addition as "12." In like manner, opposite the northern end of Hamilton avenue aforesaid, there was a parallelogram of uniform width with Hamilton avenue, between (blocks) "6" and "7" of Stone's addition receiving the designation of "14," and between (blocks) "5" and "4" of the same addition receiving the designation of "13."

It will not escape careful observation that the blocks corresponding with blocks in the original town plat lay in two tiers running east and west; that beginning with (block) "1" at the northeast corner of the platted tract the blocks were numbered westward consecutively to and inclusive of "5"; that just south of "5" was located (block) "6," from which eastward the blocks were consecutively numbered to include "10"; that Grand avenue as found in the original plat aforesaid was prolonged northward through Stone's addition; that just west of (block) "2" of Stone's addition the strip which would naturally be taken for a street was numbered "11"; the like strip next found proceeding westward was numbered "12," the next "13"; that dropping into the southern tier of blocks in Stone's addition, what would naturally be taken as prolongations of streets of the original plat, were numbered, as progress is made eastward, respectively "14," "15," and "16." Their designations by numbers from "11" to "16," inclusive, are not described as streets, indeed, if we are to be governed solely by the language quoted as accompanying the plat filed, it would seem that each number not placed in what is expressly noted as a street stands for a block in every instance. Though David Stone testified in this case, there is nowhere to be found any attempt to explain why these strips, strongly suggestive of streets, were not designated as such, nor what purpose was to be subserved by giving each the very suggestive location and outline which it possessed.

The petition of nineteen plaintiffs alleged, in substance, that each of them resided and owned property in Stone's addition; that said addition was platted as above described by the defendants; that when said addition was platted the county surveyor, who surveyed the land for that purpose, was directed by defendants to lay out the said addition so as to extend Grand avenue, Central avenue, Washington avenue, and Hamilton avenue above referred to, through said addition, and be continuous in direction and width with such streets; that in accordance with such instructions said county surveyor did so lay out said streets through said proposed addition. The petition further stated the facts above set forth in the statement of this case descriptive of the manner in which said addition was platted, and the relation of the blocks and parts of said addition to the original town of Aurora, particularly describing the property interest of each plaintiff in said addition, as bearing upon the right of such plaintiff to relief as against the defendants in respect to said property interests. These plaintiffs alleged that the parts of Stone's addition designated as "11," "12," "13," "14," "15," and "16" have since the filing of said plat been used and graded as streets, and upon the same have been constructed and maintained sidewalks by the city of Aurora; that the defendants have sold the blocks laid off in said addition designated 1, 2, 4, 5, 7, 8, 9, and 10; that there have been erected upon said blocks a large number of houses, the only access to which is by the use of the strips 11, 12, 13, 14, 15, and 16 as streets; that upon the block designated as 6 is located the public school in said city of Aurora; that defendants have sold said blocks 1, 2, 4, 5, 6, 7, 8, 9, and 10 as blocks, and have represented that the streets heretofore mentioned and described were public streets; that said plaintiffs relied upon said representations and were induced thereby to purchase said premises owned by each of them severally, and

to make said improvements thereon, of each of which facts the defendants had special notice; that the defendants are non-residents of Nebraska, but that their agent, under defendants' instructions, is about to plow up and fence the tracts designated as 11, 12, 13, 14, 15, and 16, so that they shall not be used for streets as prolongations of Central, Washington, and Hamilton avenues respectively; that if such plowing and fencing are done each plaintiff will have no means of access to his home, and that by such plowing and fencing the value and use of the property of each plaintiff will be seriously impaired. The prayer was that defendants be perpetually enjoined from plowing and fencing the strips numbered 11, 12, 13, 14, 15, 16, and 17 (the latter, as alleged, being a prolongation of Seventh street), and that each of said tracts be declared a part of the public streets of the city of Aurora.

The answer admitted the filing of the plat of Stone's addition and the statement in connection therewith. There was a denial of the other allegations of the petition.

On August 16, 1890, a trial was had and the issues joined were found in favor of plaintiffs, and a decree rendered as prayed in the petition.

It would subserve no useful purpose to enter into a detailed review of the evidence of each witness. A general summary of the facts will be sufficient. In relation to direct representations of the nature charged in the petition, as to the intention of the defendants to prolong Central, Washington, and Hamilton avenues through Stone's addition, there was the testimony of Mr. Giltner, who testified, in addition to this, that upon the faith of these representations he purchased, before the filing of the plat of Stone's addition, a tract of land now embraced therein, which was upon the plat afterward designated as block "1"; that in reliance upon said representations said Giltner had built a large and expensive house and had made his other improvements upon said tract with reference to the streets as it was repre-

sented they should be laid out, which he otherwise would not have done. County Surveyor Parks, who laid out the addition, testified that David Stone, one of the defendants, directed him in so doing to set only the corners of the blocks, the streets to coincide with the north and south streets in Aurora; the blocks were to occupy a like size. This witness further testified that as far as he went he followed the above instructions, and that the parts of the tract which would be portions of the streets of Aurora extended have ever since been used as such, precisely as though such extensions existed, and that on them have been done grading and the erection of sidewalks thereon, consistently with such use, and that the improvement of their property by the residents of this addition, in the erection of houses and fences, has been with reference to the use of streets as contemplated in the above instructions to said witness with reference to laying out said addition. As to the general use of said property for streets in the manner detailed, and the making of permanent and valuable improvements upon their property by plaintiffs respectively with reference to said avenues being extended as contemplated, there was abundant uncontradicted evidence. There was also evidence of the occasional visits to Aurora, of no great duration, by the defendants during the period intervening between the platting of said premises (June 6, 1881,) and the commencement of this suit, during which defendants could not but have been aware of the above condition of affairs as to the improvements of private property, and the making of sidewalks, as well as of the grading and use of streets, though knowledge of these facts and the making of above representations were, by deposition, denied by Mr. Stone. There was also evidence that the agents of Mr. Stone for the sale and management of his property had at times represented that the strips in said addition opposite to said avenues were in reality streets, and that such representations were made to induce the sales of lots in said

addition. This evidence, however, is not very clear or satisfactory. The other evidence, however, is sufficient to satisfy us that while technically by the plat which they filed the defendants did not dedicate the strips designated as 11, 12, 13, 14, 15, 16, and 17 as portions of the public street, yet the positions occupied by these strips with reference to already existing streets naturally suggested that they were integral parts of the public highway. This inference was encouraged by defendants' silence while permanent improvements of these strips were being made as parts of the streets, and thereby plaintiffs were induced in good faith, relying upon appearances, to improve their private property; misled without doubt by this acquiescence and silence of the defendants. Not only so, but there was evidence of statements made by defendant David Stone inconsistent with the claim of exclusive private property now made by him in said tracts 11, 12, 13, 14, 15, 16, and 17, and of one party at least acting upon the faith of such representations to his injury, if Stone's present claim is now upheld. The contentions of plaintiffs further find great support in the improbability that any sane person would purchase and improve for a home property to which there is no means of access, as is the case with some of the lots in this addition if defendants' theory is correct. An examination of block 7, in said addition, shows that there are eight lots, which, under these circumstances, would be in this isolated condition, upon three of which are residences. These considerations lead us to the conclusion that by the representations and statements of David Stone made on behalf of both defendants with reference to the existence of the streets as by plaintiffs now claimed, and the acquiescence of the defendants in the improvement, use, and occupation of them for that purpose, considered in connection with the prejudice which will result to plaintiffs if such representations and acquiescence are not held binding, the defendants are, and should be, held estopped to

dispute the right of the public to control and use said tracts 11, 12, 13, 14, 15, 16, and 17 as parts of the public streets of the city of Aurora. The defendants seek to avoid this result by calling attention to the fact that if said avenues are prolonged, it must be by passing across the triangle referred to in the early part of the statement of facts in this case. Whatever obstacle this may hereafter present is no concern of the defendants. The plat which they filed does not show a triangle between Stone's addition and the original town of Aurora, and from the evidence it is clear that by the general public its existence has ever been equally ignored. The judgment of the district court is

AFFIRMED.

THE other commissioners concur.

PATRICK W. O'CONNOR v. FRED WALTER.

FILED JUNE 29, 1893. No. 5082.

1. **Exemptions:** LABORERS' WAGES: GARNISHMENT: CONFLICT OF LAWS. Where there were due a resident of Nebraska from a railroad company operating a line of railroad through Iowa and Nebraska, wages, which, in Nebraska, were exempt from execution and attachment process, but which nevertheless, by means of an assignment of the claim against the party entitled to such exemption, to a resident of Iowa, were procured, by the garnishment of said railroad company in Iowa, to be applied to the payment of said claim, the assignor of such claim is liable to such debtor for the amount so appropriated without his consent.

2. ———: ———: ———: ———: RES ADJUDICATA. As between said assignor and the party entitled to the benefits of such exemption in Nebraska the proceedings in Iowa were in no sense *res adjudicata*.

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

Sawyer & Snell, for plaintiff in error.

A. G. Greenlee, contra.

RYAN, C.

The petition of Fred Walter, plaintiff, alleged, as against Patrick W. O'Connor, as defendant, that for a long time prior to the 5th day of March, 1889, the said plaintiff was, and ever since had been, a married man, the head of a family, and a resident of Cass county, Nebraska, and that during the whole of said time the said plaintiff had lived with and provided for his family by day labor, in the employ of the Chicago, Burlington & Quincy Railroad Company, and that said plaintiff's sole income and means of support for himself and his family were the wages by plaintiff earned in said employment; that on March 5, 1889, one D. M. West filed a petition in the court of N. Schurz, a justice of the peace in the city of Council Bluffs, Iowa, claiming to be the assignee of said O'Connor of a claim against plaintiff for the sum of $13.50 and costs; that said West caused the Chicago, Burlington & Quincy Railroad Company to be garnished, and requiring said railroad company to answer as to the indebtedness of the said company to plaintiff; that on March 11, 1889, the said railroad company accordingly answered that it was indebted to said Walter in the sum of $55, whereupon said cause was continued and service was obtained by publication upon Walter, and the day for hearing was set for May 10, 1889; that in April, 1889, the said railroad company filed an affidavit of the said Walter that he was the head of a family, and that his wages were exempt from execution, and asking that said proceedings be dissolved; that nevertheless the said justice of the peace entered judgment

against plaintiff Walter for the sum of $13.50 damages and costs taxed at $8.60, and requiring said railroad company to pay into court the sum of $22.10 out of plaintiff's wages, which said railroad company thereupon did; and that said $22.10 was deducted by said railroad company from the sum of $55 due plaintiff, and that plaintiff has never received said sum so deducted; that said sum of $55 was due plaintiff for labor performed as a brakeman by plaintiff for said railroad company within the sixty days immediately preceding said date of garnishment, and that the wages so garnished were exempt from seizure by attachment, execution, or garnishee process in this state, which facts the said West and O'Connor also well knew; that said West was not the owner of the account of the said O'Connor (if any such he had), but held it simply for collection for O'Connor, who was the real party in interest, though a pretended assignment thereof had been made by O'Connor to said West. For a second cause of action plaintiff claimed to be entitled to $27.50 as damages indirectly resulting from said garnishment, which he alleged was simply a conspiracy between West and O'Connor to deprive plaintiff of his exemptions under the laws of Nebraska. There was an answer in denial of each of the above averments.

The allegations of the petition are set out at great length and with considerable particularity, for the reason that with the exception of the averments in respect to the second cause of action, each allegation of said petition was upon the trial fully sustained by the proofs. These allegations, therefore, fairly state the facts in this case, wherefore it is needless that they be repeated. It was stipulated between the parties in the district court that by the laws of the state of Iowa the wages of a non-resident of that state are not exempt from attachment, execution, or garnishment. Upon a trial of the issues the jury returned a verdict in favor of Walter, against Patrick W. O'Connor,

for $24.50, for which, with costs, judgment was duly rendered. For the reversal of this judgment O'Connor brings this cause to this court by his petition in error, with the necessary record and bill of exceptions.

In *Albrecht v. Treitschke*, 17 Neb., 205, this court held that "where a judgment creditor procures the exempt wages due to a laborer to be taken by garnishee process and applied to the payment of his judgment, a cause of action arises in favor of the judgment debtor against the creditor for the amount of such wages wrongfully appropriated, unless the right of exemption is waived by the debtor." The statute exempting from seizure by judicial process such earnings of a laboring man as have accrued within the period of sixty days immediately preceding service of garnishment process was intended for the support of the family of which such laborer is the head and stay. In extending credit, every one dealing with the head of a family must take into account this right of exemption, and presumably in every extension of credit this right is recognized. It therefore in no way operates to the injury of the law-abiding creditor. The rapacity which respects neither implied contract obligations nor statutory enactments must, in damages, respond for this, as for any other act of misappropriation.

From the facts which we have under consideration it appears that O'Connor assigned his claim to West solely for the purpose of collection. In his evidence O'Connor admitted this, at the same time stating that the arrangement was that West was to receive for making the collection twenty per cent of the amount thereof. It is true the court in which suit was brought by West had jurisdiction of the garnishee, which operated its line of railroad as well in Iowa as Nebraska, and that therefore the amount was lost to Walter beyond recovery as against the garnishee. (*Chicago, B. & Q. R. Co. v. Moore*, 31 Neb., 629.) But why should this operate in favor of O'Connor who was the

prime mover in this garnishment proceeding? In all respects the deprivation of this exemption was as harsh and effectual as in the case of *Albrecht v. Treitschke, supra.* Let us suppose the exemption was of a specific article of personal property. It would be unquestioned that if he appropriated it to his own use in this state, O'Connor would be liable to Walter for its value. Instead of its being appropriated in this state, let us suppose that this property was found and appropriated by O'Connor in Iowa, would his liability for its value in the courts of Nebraska be in any way modified by that fact? Would it at all relieve of liability for him to show that his duly authorized agent in Iowa converted the property to the use of O'Connor? Certainly not, and there is no appreciable difference in principle between the cases supposed and that at bar. If the judgment creditor, directly or indirectly, no matter where or by what process, appropriates to the payment of a debt due him the exempt wages of the debtor, without such debtor's consent, such creditor is liable to the debtor entitled to such exemption to the full amount of the misappropriation. In this case, however, it was urged that the judgment of the Iowa court was *res adjudicata*, and therefore unassailable. An estoppel of that, as well as of any other nature, requires mutuality between the parties to render it effective. If O'Connor is entitled to the benefit of the judgment pleaded, it must appear that a judgment against him would have been likewise binding. This could not have been, for, purposely, he was not a party to the Iowa proceeding in any way. Under the proofs, no other verdict could properly have been returned than that which was rendered, and the judgment of the district court is

AFFIRMED.

THE other commissioners concur.

WILLIAM H. PICKENS, APPELLEE V. PLATTSMOUTH INVESTMENT COMPANY, PLATTSMOUTH LAND & IMPROVEMENT COMPANY ET AL., APPELLANTS.

FILED JUNE 29, 1893. NO. 3901.

1. **Mechanics' Liens**: VENDOR CONTRACTING FOR IMPROVEMENT: PRIORITIES. The vendor in an executory contract for the sale of land will subject his rights in the property to be conveyed to a mechanic's lien by directly, though in conjunction with the vendee, contracting for those improvements for the construction of which such mechanic's lien is sought to be enforced.

2. ———: ———: ———. If a vendee in possession of real property by virtue of an executory contract for the purchase of the same, erects improvements thereon, the rights of the vendor in said property are not thereby, of necessity, postponed to the lien of the mechanic or material-man under the mechanics' lien law. Such postponement can only be predicated upon a contract of the mechanic or material-man with the vendor directly, or through his agent, and such essential contract must be proved as must any other necessary proposition of fact.

REHEARING of case reported in 31 Neb., 585.

O. H. Ballou and *W. L. Browne*, for appellants.

J. B. Strode and *Matthew Gering*, *contra*.

RYAN, C.

This appeal has already received the consideration of this court, as will appear by a reference to 31 Neb., 585, where will be found the opinion of COBB, J., reversing the decree of the district court of Cass county. A rehearing having been granted, it is necessary that the decree appealed from be examined anew in the light of the evidence upon which the cause was originally heard. In the transactions to be considered there are two corporations, co-defendants, the names of which are so similar that, without

great care, one is liable to be mistaken for the other. One of these corporations was the Plattsmouth Land & Improvement Company; the other was the Plattsmouth Investment Company. The liability to confusion in the use of these designations is well illustrated in the opinion above referred to as reported in 31 Neb., 585; for there this case is entitled "*William H. Pickens v. Plattsmouth Land & Investment Company et al.*" That these appellant corporations may not be confounded, more than usual care is necessary in stating the facts. The Plattsmouth Land & Improvement Company originally owned the land upon which was built the Park House, for the erection of which the enforcement of a mechanic's lien was had in this case. Before any steps were taken for the construction of this building, the Plattsmouth Land & Improvement Company made an executory contract with the Plattsmouth Investment Company to convey to it the real property upon which was erected the Park House. The terms of this contract have not been put in evidence; indeed, from the testimony, it is somewhat doubtful whether this contract was oral or written. In the former opinion it was described as a parol contract, which designation we are inclined to regard as a misnomer for the following reasons: It is nowhere so spoken of by any witness; the only mention of it and of the status of matters under it are found in the record in the language of Dr. Hertzman, whose relation to such company will hereafter appear. He testified as follows:

Q. The Plattsmouth Land & Improvement Company sold a portion of this ground out there known as the Livingston Heights to the Plattsmouth Land & Investment Company?

A. No, sir; the Plattsmouth Investment Company had a contract.

Q. When was that done?

A. I could not tell you without referring to the contract.

Q. Do you remember about the date?

A. No, sir, I don't.

Q. Was that done prior to the time of the building of the Park House?

A. Yes, sir.

Q. How long prior?

A. As far as dates is concerned I could not give it to you exactly, but it seems to me it was some little while previous to that time; the contract will, of course, show, but I don't remember the dates. * * *

Q. They (the investment company) have no interest in the real estate at present?

A. Nothing, only that they hold a contract, and the payment they made they have an equity in it.

Q. Do you know what interest they have in it?

A. I could not say at present; I know I could not tell you at present, it would be impossible. If you will allow me I can explain possibly so you can understand it; the fact of the matter is they have no interest in it.

Q. These improvements done by the investment company were done with the knowledge and consent of the improvement company?

A. No, sir; they had nothing whatever to do with it.

Q. Did they know of it?

A. I suppose they knew we had bought the ground of them by contract. I expect they knew we were trying to boom the property, and they knew we were going to build.

Q. Have their interests in this contract ever been closed out in any way, the improvement company's interest under the contract?

A. No, sir.

Q. It just stands under contract still?

A. Yes, sir.

Q. You do not know how much the Plattsmouth Investment Company paid under that contract?

A. I could not say exactly; no, sir.

Q. Was the contract made a matter of record between

the Plattsmouth Investment Company and the Plattsmouth Improvement Company?

A. Yes, sir; and it is in the record in the office of the company; of course we can record a contract, as I understand it, without being acknowledged.

Q. You mean of record in the county clerk's office?

A. No, sir.

Question by the court: Do you know about how much they paid the investment (improvement ?) company on that contract?

A. It seems to me it is in the neighborhood of $1,100; I don't know exactly. The company has never paid any interest to the Plattsmouth Land & Improvement Company; they have never been able to, because the stockholders refused to pay.

Q. What was the contract price?

A. I don't know that without referring to the contract.

From this testimony it seems established that at the time when the contract was made to build the Park House the Plattsmouth Investment Company held a written executory contract for the purchase of the real property upon which the Park House was to be built; that it had possession and control of said real property and has paid on its purchase price about the sum of $1,100; though at what date is entirely left to conjecture. It seems probable also that the Plattsmouth Land & Improvement Company had knowledge of the design of the investment company to boom the property, and with that view the Park House was to be built. Whether or not the Plattsmouth Land & Improvement Company was more directly interested than above in the promotion of this enterprise is the question essential to the determination of this appeal.

The foregoing evidence of Dr. Hertzman was presented with a promise to define his relation to the two Plattsmouth companies above referred to, which, as it will now appear, is a matter of some little difficulty. Testifying, he said,

in substance, that in July, 1887, he was a stockholder in the Plattsmouth Investment Company; was not a stockholder in the Plattsmouth Land & Improvement Company; was at that time its secretary and so continues until this day. When shown a letter (which is not found in the bill of exceptions) and asked what meeting he referred to in it, Dr. Hertzman said: "I have referred to the meeting of the Plattsmouth Investment Company of which I was elected secretary after Mr. Gratton resigned, not the Plattsmouth Land & Improvement Company, but the Plattsmouth Investment Company, that is signed by me personally and not as secretary." When this resignation of Gratton and induction of Dr. Hertzman into the vacant office took place there is no means of determining. It would seem, however, that the doctor was, for a portion of the time covered by the history of this case, secretary of both these Plattsmouth companies, as well as a stockholder in the investment company.

Another personage who conspicuously figures is Dr. Samuel D. Mercer, who in July, 1887, when the contract was made with Pickens for the erection of the Park House, was president of the Plattsmouth Land & Improvement Company, and was originally its treasurer. The contract which Mr. Pickens entered into for the erection of the Park House was in writing, and in terms was with the Plattsmouth Investment Company. In relation to its inception, Mr. Pickens testified, in substance, that the first notice he had that the building was going up was in the early part of June, 1887, when Dr. Mercer sent for witness and gave him the plans and specifications for the Park House to be erected on Livingston Heights. The evidence of this witness continued thus:

Q. Is this property described and known as Livingston Heights the property I have read?

A. That is what he told me—Livingston Heights or Rural Park. I took the plans and specifications and looked

them over that day and he asked me if I could not give him a bid on it that day before I left Omaha, and I said no, that it would require me a couple of days anyhow, and I had some business to do that day and could not give it my full attention, but I gave him my idea of what I thought would be the actual cost of the Park House, so I brought the plans and specifications with me and he told me that as soon as I got my figures ready to forward them to him, which I done—my figures for the building of the Park House on or about July—I don't know the date of that dispatch. I received a telegram from Mr. Hertzman sometime in the forepart of July, 1887, to come up and sign contract for Park House. I went up there that evening and we talked the matter over and he added some porch—some extra porch on the Park House, which amounted to about $1,000; then Mr. Hertzman and me had some talk; he told me that Mr. Gratton and Mr. Heimrod would be down next day to locate the building and at that time I did not know just exactly who I was contracting with, or anything. I know that Mr. Hertzman was in Dr. Mercer's office all the time; they were in partnership there together and I supposed it was all the same. Mr. Mercer received my bid and handed it over to Mr. Hertzman, so the following day those gentlemen came down and laid out the buildings and numbered them where the buildings were to stand and was to let me know the next day by telegram the number of the knolls where to put the buildings; they numbered them; when they came down that day they contracted for a dancing pavilion.

Lest it might be understood that Dr. Mercer was one of the parties who came down, it is only fair to state that such was not the case.

Mr. Pickens also testified as follows:

Q. Now, have you demanded payment?

A. Yes, sir.

Q. From whom?

A. I have demanded payment from the parties with which I contracted, Dr. Mercer, Mr. Heimrod, and Mr. Gratton. I went and saw him about it; he was secretary, he claimed to be at that time, of some company.

Q. Who, Mr. Gratton?

A. Yes, sir.

Q. Which company, do you know?

A. I don't know; I think he signed it the Plattsmouth Land & Investment Company.

Continuing further the witness Pickens testified as follows:

Q. State whether you did contract with Dr. Hertzman and these other men.

A. Dr. Mercer was the man who gave me the plans and specifications in the first place to figure on the Park House plans and specifications which I brought down here and he told me to send them back just as soon as possible, that he needed them. He proposed to get some other figures.

Q. Who was you building this building for? Did you know at that time?

A. Yes, sir; I presumed it was for Dr. Mercer and the Plattsmouth Land & Improvement Company or Investment Company, or whatever they call themselves. I did not know what they were.

Q. Was Dr. Mercer down there while you was putting these improvements on there?

A. No, sir.

Q. Did you see him at any time after he gave you these plans?

A. Yes, sir.

Q. Did you talk to him about what you were doing?

A. Yes, sir.

Q. Did he know you were putting those improvements there?

A. Yes, sir; he knew they had went there; I did not see him while we were putting them there but he knew they

were there because he sent down for me just about the time I was going to file my lien and tried to compromise the thing with me in some way.

The confusion which existed in the mind of Mr. Pickens as to the name of the exact party for whom he was erecting this building, from the foregoing evidence, will seem pardonable. In the first place, the Plattsmouth Land & Improvement Company, the holder of the legal title, contracted to sell a portion of the real property to the Plattsmouth Investment Company, which latter company having taken possession of the property with a view of erecting improvements thereon and booming it, contracted with Pickens to erect the Park House. Dr. Hertzman and Dr. Mercer occupied the same office. When Mr. Pickens visited this office, Dr. Mercer, who at that time was president of the Plattsmouth Land & Improvement Company, handed to Mr. Pickens the plans and specifications for the erection of the Park House, and seems to have spoken of the building about to be erected in such terms as would naturally lead Mr. Pickens to infer that the work was to be performed for the Plattsmouth Land & Improvement Company. It is true the written contract, when formulated for the signature of Mr. Pickens, recognizes only the Plattsmouth Investment Company as the party with whom he was to contract. This company had possession of the property; has advanced at some time $1,100 for the purchase of it. Its interest has not yet been foreclosed, though the testimony of Dr. Hertzman, its secretary, is that the rights of the investment company have been forfeited. It seems to us upon a review of all the facts in this case, that the conclusion is unavoidable, that these companies were engaged in a joint enterprise, to-wit: the booming of this property; that in furtherance of the interest of both parties this contract was made for the erection of the Park House by the Plattsmouth Investment Company, as well as by the Plattsmouth Land & Improve-

ment Company. Just who the written contract was made with is not determinative of these facts. Both these companies interested in the ownership of the property were parties to the contract, at least by their conduct led Mr. Pickens to believe that such was the fact. The principle governing in such cases is stated and enforced by NORVAL, J., in *Bohn Mfg. Co. v. Kountze*, 30 Neb., 719. The syllabus of that case which was prepared by the writer of the opinion was as follows: "In a contract for the sale of land it was stipulated that the purchaser should erect a dwelling upon the premises within a stated time. The building was erected but the labor performed and material furnished were not fully paid for. Held, in an action to foreclose a mechanic's lien, that the liens of the mechanic and material-man have priority over the lien of the vendor for unpaid purchase money." Discussing the facts of that case as governed by the statute giving a mechanic's lien, Judge NORVAL in his opinion said: "The contract of sale in the case at bar not only authorized but made it obligatory upon the purchaser to erect a dwelling on the premises, of a certain value, within a fixed time. Further than that Kountze stipulated to furnish not to exceed $2,200 towards the erection of the building. The proof shows that Kountze advanced that amount and more, and that he approved the expenditure of the money. This is additional proof of the authority of the vendee to contract for the erection of the house. Kountze having in the contract of sale authorized his vendee to make the improvements, and in pursuance of that authority, Berlin procured the labor to be performed and the materials to be furnished, the vendor thereby subjected his lien for the unpaid purchase money to the liens that might be acquired by the laborer and material-man for making the improvement. Where a vendee, owning the equitable title, contracts for the erection of a building upon the express authority of the owner of the legal title, it is but just that the lien of the mechanic should attach to the interest

of both vendor and vendee in the premises, and be paramount to the lien of the vendor. And this rule does not in any manner contravene any statutory provision." In other words, section 1 of the mechanics' lien law, having provided that any person who shall perform any labor or furnish any material for the erection of any house by virtue of a contract, express or implied, with the owner thereof, or his agent, shall have a lien to secure the payment upon such house and the lot of land upon which the same stands, is to be liberally and fairly construed.

The owner of the lot, Kountze, having stipulated that improvements of a certain kind should be made thereon, by one who held his agreement upon certain payments being fully made to convey, constituted the vendee his agent for the erection of the building required by said contract. The sale of the material and furnishing of the labor were under a contract with the agent of the owner whose authority was to make the improvement required. Kountze did not actually assist in making a contract for the purchase of the material, and for securing performance of the necessary labor. He entered into such a contract as required another to do this, however, whereby that other was in fact his agent, either for the improvement of the property legitimately, or by overreaching the material-man and laborer through misleading appearances. The law imputes the more honorable motive and holds the implied agency an honorable one. Wherefore it results from the statute that the right to a mechanic's lien arose as against the interest, not only of the vendor, but of the vendee as well. By this it was not held that where the owner of the land sells it and simply takes back a mortgage for the purchase price without in any way becoming a party to a contract for the erection of improvements, that one who furnishes materials or labor upon a contract with the vendee alone can assert thereon a lien superior to that of the said mortgage duly recorded. Quite to the contrary it has been recently held by

this court in *Henry & Coatsworth Co. v. Fisherdick*, 37 Neb., 207, where one furnished money to build a house for which he took a mortgage upon the premises whereon the erection was to be made, that the record of such mortgage gave a priority to the rights of material-men and mechanics who began to confer value upon the mortgaged property after the record of the mortgage. To subject a vendor's rights in the subject-matter of the sale to the claim of mechanic's lienor, it must appear that, with respect to the value conferred by the labor or material of such lienor, there was a privity of contract through the vendee between the vendor and such lienor. This privity will not be implied from the mere fact that the mechanic's lienor, upon the faith of a contract between himself and such vendee, furnished labor or material. It must be established by the proofs, or as fairly inferable from the facts as any other independent fact or proposition.. As between the appellee Pickens and the Plattsmouth Land & Improvement Company there were sufficient proofs to justify the district court in finding that the Plattsmouth Investment Company was the agent of its vendor for procuring the erection of the Park House upon the premises; or that court might properly have found from the evidence that the Plattsmouth Land & Improvement Company was a party to the contract for the erection of said house, and on either theory the decree should stand. The judgment of the district court is

AFFIRMED.

THE other commissioners concur.

JAMES H. BALDWIN v. DOUGLAS COUNTY.

FILED JUNE 29, 1893. No. 5013.

Constitutional Law: LIABILITY OF HUSBAND TO COUNTY FOR SUPPORT OF INSANE WIFE. The provision of the statute authorizing suit to be maintained against the party legally bound for the support of an insane person, by the county which has paid for the care, board, and treatment of such insane person at the insane hospital of this state, upon the finding of such insanity by the commissioners of said county, is in conflict with section 1, article 9, of the constitution of Nebraska, and is therefore inoperative and void.

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

Connell & Ives and *John Q. Burgner*, for plaintiff in error.

T. J. Mahoney, contra.

RYAN, C.

The defendant in error, as plaintiff in the district court of Douglas county, filed its petition against the plaintiff in error, as defendant, on the 23d day of July, 1889, containing, in addition to proper allegations of its own corporate existence, the following material averments: That on May 26, 1876, and ever since, the defendant was, and has been, the husband of Mary M. Baldwin and legally liable for her support and maintenance; that on said last named date Mary M. Baldwin, having a legal settlement in said Douglas county, Nebraska, and being adjudged insane by the board of commissioners of insanity of said county, was committed to the Nebraska state insane asylum, and that ever since said date she has been insane and continued an inmate of said asylum at the cost and expense of said Douglas county; that said county has been compelled to

pay for her support and maintenance for the period beginning at the above date and ending with May 31, 1889, the sum of $2,220.94; that said support, maintenance, and care in said asylum was necessary for such insane person, and should have been provided by Douglas county aforesaid, by reason whereof the said defendant James H. Baldwin became justly indebted to said plaintiff in the sum of $2,220.94. There was a prayer for judgment for said sum with seven per cent per annum interest thereon from May 31, 1889.

The defendant demurred to this petition on the ground that it did not contain facts sufficient to constitute a cause of action. This demurrer was overruled and defendant duly excepted. Afterward there was filed an answer, by which was admitted the truth of the allegations that Mary M. Baldwin was the wife of the defendant, and that she was insane. Every other allegation of the petition was denied by this answer. Defendant also pleaded the statute of limitations as against plaintiff's claim. By reply, plaintiff denied each allegation in the defendant's answer.

On the 12th day of November, 1890, a trial of the above issues was had, in which, by instructions, the court withdrew from the consideration of the jury all items which had accrued anterior to July 23, 1885, being four years before this suit was begun, on account of the bar of the statute of limitations. The jury were instructed that the husband is liable for the support of his wife, and that the statute of Nebraska authorizes the bringing of an action against the husband for any sums plaintiff had been required to pay out for the wife's support in the insane hospital; that if defendant's wife became insane and was committed to said insane hospital where the plaintiff Douglas county had been compelled to pay for her support and treatment, said plaintiff could recover from said defendant said amount so expended. The defendant requested the giving of certain instructions submitted on his behalf,

whereby the jury would have been informed that if defendant at all times was ready and willing to provide for his said wife's maintenance and care, plaintiff could not recover, and that upon the proofs the defendant was not liable to plaintiff for the care, maintenance, and treatment of Mrs. Baldwin. These instructions asked by defendant were refused, and due exceptions were taken to such refusal. The jury found a verdict against the defendant for $628.60, upon which judgment was rendered. To reverse this judgment the defendant, against whom it was rendered, filed his petition in error in this court, in which he of course appears as plaintiff in error.

The evidence was introduced by the contending parties upon the respective theories indicated by the pleadings, and thus by demurrer, the evidence, and the instructions given and refused there is presented unequivocally for determination the proposition whether or not the statute of this state authorizes the bringing of an action against a husband for any sums the county may have been required to pay out for the support of his wife in an insane hospital of the state. The defendant in error attempts to modify the sharp outlines of this proposition by calling attention to the fact that the information of insanity, as it is called, was signed and sworn to by plaintiff in error. This, however, as its name imports, was simply a sworn statement that Mary M. Baldwin was a fit subject for custody and treatment in the hospital for the insane, as affiant verily believed, and that she had a legal settlement in said Douglas county, and asking that the necessary steps should be taken to investigate her condition as the law in such cases required. This was only a request that the board investigate her condition and ascertain whether or not such derangement of the mind existed as that the patient should be sent to the insane hospital for care and treatment, her maintenance being simply incident thereto. Upon a like showing by another person the same steps would have fol-

lowed as did in this case, and it would then hardly have been contended that thereby the informant rendered himself liable in the same measure as it is sought to hold the plaintiff in error for in this case. Not only so, but the petition failed to declare upon this information of insanity as a contract, and from all these reasons it follows that in the determination of this case we are confined solely to the question above stated.

The statute under which the liability of the plaintiff in error is claimed to have arisen is chapter 40, Compiled Statutes of Nebraska; particularly section 48, which is in the language following:

"Sec. 48. The provisions herein made for the support of the insane at public charge shall not be construed to release the estates of such persons, nor their relatives, from liability for their support, except from the cost of board, care, and treatment while in the hospitals of the state, which cost of board, care, and treatment shall be borne by the state; and the commissioners of the several counties are authorized and empowered to collect from the property of such patients, or from any person or persons legally bound for their support, any sum paid by the county in their behalf, as herein provided; and the certificate from the superintendent, and the notice from the auditor of state, stating the sums charged in such cases, shall be presumptive evidence of the correctness of the sum so stated. If the board of county commissioners, in the case of any insane person who has been supported at the expense of the county, shall deem it a hardship to compel the relatives of such patient to bear the burden of his or her support, they may relieve such relatives from any part or all of such burden, as may seem to them reasonable and just."

Under the provisions of the section just quoted, the cost of the board and treatment of the inmates of the insane hospital must be borne by the state. Let us now consider the manner and extent to which the state is entitled to reim-

bursement for these outlays. Section 19 of article 3 of the constitution of Nebraska requires the legislature to make needful appropriations for the expenses of the government of the state. Section 19, article 5, creates and gives to a board so created general supervision and control of the public lands and grounds of the state, the state prison, asylums, and all other institutions thereof, except those for educational purposes. These duties of this board are more fully defined by statute. (See art. 7, ch. 83, Comp. Stats.) The governor, auditor of public accounts, and treasurer are, by sections 74 *et seq.*, chapter 77, Compiled Statutes, constituted the state board of equalization, which decides each year upon the rate of state tax, and equalizes and makes the levy thereof throughout the state. By these state authorities the levy of taxes for the support of the insane hospital is required in the same general mode as obtains in the levy of taxes for other state purposes. Section 47, chapter 40, Compiled Statutes, however, requires the superintendent of the insane hospital to certify to the auditor of state, at fixed times, the amount due to said hospital from the several counties having patients chargeable thereto, and upon notice given by the said auditor to the county clerks respectively of each of said counties, the county commissioners must add such amount to the next state tax to be levied on each county, and payment of the amount so levied must be made into the state treasury. To enforce the performance of this duty a *mandamus* proceeding was prosecuted in this court against the defendant in error herein, resulting in an order granting the writ as prayed. (*State, ex rel. Att'y Gen'l, v. Douglas County*, 18 Neb., 601. There was filed in that case a dissenting opinion by Chief Justice MAXWELL, so that the propositions therein discussed cannot as yet be recognized as settled beyond question; indeed, having regard simply to the weight of argument, we believe the views of the chief justice should have prevailed.

The defendant in error insists that the liability fixed upon it by section 47, chapter 40, Compiled Statutes, and enforced in the above case, logically countenances the provisions of section 48 of the last mentioned chapter. As has already been suggested, the annual cost of maintaining the insane hospital is provided for by a general tax, levied with reference to the assessed valuations of the respective counties; again, by virtue of section 47, *supra*, the amount due the hospital for the care, board, and treatment of the insane must be paid by the several counties, reference being had to the amount expended in that behalf for the insane properly chargeable to each county. Thus it would seem that the taxpayer has twice paid taxes for this one purpose. The proposition involved in this proceeding is, whether or not a taxpayer of Douglas county, who has already, in common with other taxpayers, twice met the burden of taxation for the support of the insane, shall again be required to contribute to the same end because of insanity within his family circle.

In *Richardson County v. Frederick*, 24 Neb., 596, the relation of brother or sister to the afflicted was held not to justify this special exaction, and in *Richardson County v. Smith*, 25 Neb., 767, the same freedom from liability was adjudged as to the children of the insane. In the case at bar, the liability is charged by reason of the marital relation existing between the patient and the plaintiff in error. It is insisted that this liability exists because the husband is legally bound for the maintenance and care of his wife. The evidence in this case shows that the husband never failed to meet these requirements. It was upon an inquisition of insanity duly held by proper county authorities that Mrs. Baldwin was adjudged insane and a proper subject for treatment in the insane hospital. In the language of REESE, Ch. J., in *Richardson County v. Frederick*, *supra*, "The insane person is not consulted as to whether he shall be deprived of his liberty or not, nor indeed are

his friends or relatives. As is said in the *County of Delaware v. McDonald*, 46 Ia., 171, the state reaches out its strong arm and makes the insane its wards, regardless of the care which they may receive at home or the wishes of those upon whom they are dependent for their support. * * * The state asserts its rights for the reason an insane person may often need more than a mere maintenance. He often needs restraint, confinement, medical attendance, and peculiar care and treatment. Society is entitled to be protected and relieved against him, and when this is so, the state very properly takes charge of him and makes him its ward."

We know of no principle of equity or justice that under these circumstances would imply a contract by the husband to answer for the treatment of his wife, furnished by the state in the interest of the general public. It would seem that the public thus benefited should defray all expenses incurred for its protection. Certainly, the husband is not liable therefor unless by virtue of the statute already quoted. As has already been intimated, perhaps, we more than doubt the existence of an enforcible statutory liability. The husband has already twice paid for the maintenance of the insane hospital. This was upon his property. If he is required to pay for the treatment of his wife, this payment is just as much a compulsory contribution to the maintenance of the insane hospital as was either of the others. It is in fact another form of taxation for the same purpose. The right to levy taxes can only be justified as being necessary for the performance of its functions by the state. No tax can be legally levied for any purposes foreign to those functions, and, even that far, taxation is tolerated only from the necessities of the case. The collection of unnecessary revenue by the state is not taxation. It is robbery. The plaintiff in error has already paid his full proportion toward the maintenance of the insane hospital. More than that the authorities cannot constitutionally exact. Suppose

the taxes under consideration had been levied for school purposes, could any principle be found that would justify a statutory requirement that a certain class of taxpayers should, in addition to the common burden, be required to pay a special tax *per capita?* Manifestly such a procedure would be wholly unjustifiable, even where the common tax is unequal to the requirement for school purposes; how much more glaring the injustice where the taxpayer has already contributed his full, fair proportion of all that is necessary. Again, suppose the state constructs a work of internal improvement, which of necessity adds value to neighboring property, could the owner of such benefited property, with any justice, be required to pay a special tax on account of this increment, in addition to his payment of assessments common to all property within the state? No one would justify such a system of assessments, and yet in principle it differs little from that under consideration. The statute which purports to authorize the recovery from the persons legally bound for the support of an insane person, of the sum paid by the county for the care and treatment of such insane person at the insane hospital of this state, when such care and treatment have been furnished upon the finding of the proper commissioners of the county, for the reasons stated, is in conflict with section 1, article 9, of the constitution, and is therefore inoperative in so far as it purports to confer said right of action upon the county. The judgment of the district court is

REVERSED.

THE other commissioners concur.

JONES NATIONAL BANK ET AL. v. ALLEN PRICE ET AL.

FILED JUNE 29, 1893. No. 4956.

Statute of Frauds: PAROL CONTRACT FOR PAYMENT OF MONEY ON RESALE OF LAND. A parol contract between a plaintiff and defendant provided: That the plaintiff should enter his voluntary appearance to a suit then pending, to foreclose a mortgage on real estate owned by him and waive the nine months' stay of sale of the premises allowed him by law; in consideration of which, defendant should bid in said premises at the sale under the foreclosure proceedings at the amount of the decree, interest, and costs, resell the same at private sale, and pay to plaintiff the amount realized in excess of the bid. *Held*, A valid contract and not within the statute of frauds, sec. 3, ch. 32, Comp. Stats.

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

E. P. Smith, for plaintiffs in error.

George H. Terwilliger and *R. P. Anderson, contra.*

RAGAN, C.

Allen and Louisa Price sued the Jones National Bank, H. T. Jones, its cashier, and M. A. Butler in the district court of Seward county, and in their petition alleged: That on the 18th day of September, 1886, the plaintiffs were the owners of certain real estate in the city of Seward, Nebraska, and occupied the premises as a residence; that they were at that time incumbered by a mortgage given by the plaintiffs to the defendant Butler to secure the payment of $2,000, with interest at the rate of ten per cent from September 23, 1885, and due six months afterwards; that although the note and mortgage were made payable to Butler, they were in fact given to secure the payment of money borrowed of or through the defendant, the Jones National Bank; that the plaintiffs had paid the defendants interest

on the loan at the rate of fifteen per cent; that the defendants had represented to plaintiffs that the money due on the note and mortgage was due to the Jones National Bank, and that plaintiffs should have additional time for the payment of said note and mortgage, provided the interest thereon was promptly and fully paid; that on the 23d of September, 1886, Butler assigned the note and mortgage to one Samuel Grey, and on the 18th day of September, 1886, a petition was filed in the name of said Grey in the United States circuit court in the city of Omaha, Nebraska, against the plaintiffs for the purpose of obtaining a judgment against plaintiffs on said note and mortgage and a decree of foreclosure and sale of said mortgaged premises; that at that time interest on said mortgage had been fully paid; that subsequent to the filing of the said petition in the United States court the defendant Jones made a verbal agreement with the plaintiffs that if they would acknowledge service of summons and waive their right to a stay of order of sale in the proceedings in the federal court that the plaintiffs should be held exempt from the payment of any fees whatsoever for the service of said summons; that no attorney's fees should be taxed against said plaintiffs or paid out of the proceeds of the sale of the aforesaid property under said foreclosure suit; and that he, Jones, would buy in said premises at the sale thereof, for the actual amount necessary to satisfy the amounts due on said note and mortgage and necessary costs of suit in said court, and that he, the said defendant Jones, would then sell said premises at private sale and pay the plaintiffs the excess of the proceeds received at such private sale over and above the amount of decree, interest, and costs that might be rendered in said suit in said federal court; that in pursuance of this agreement, plaintiffs acknowledged service of summons and entered their voluntary appearance in said suit in the federal court and agreed with the defendant Jones to waive their stay of the order of sale in said case; that on the 5th day of November, 1886, a de-

cree was rendered in the federal court in said case for the sum of $2,050 and costs of suit, with a decree of foreclosure and order of sale; that the plaintiffs, in pursuance of their agreement with Jones, waived their stay of the order of sale, and on the 15th day of January, 1887, said premises were duly sold under the decree of the said federal court, and bid in by the said defendant Jones at the sum of $2,391.31, and by officers of said court said premises were duly conveyed to the said defendant Jones; that out of the purchase price of said real estate said Jones paid out an attorney's fee of $205, taxed as part of the costs in said suit; that on the 4th day of May, 1887, Jones sold and conveyed the said premises to another party and received for said premises the sum of $2,700 in cash; that the rental value of the premises at the time plaintiffs waived their stay of order of sale under said decree, was $20 per month, and that at the time of the bringing of the suit in the federal court, the said defendant, the Jones National Bank, and H. T. Jones were the true owners of the note and mortgage foreclosed in the name of said Grey, and that the assignment to said Grey was then intended to place the same under the jurisdiction of the federal court, and with intent to defraud the plaintiffs; and that the agreement made between the plaintiffs and the said Jones was not made in good faith on the part of defendants, but with intent to mislead and defraud the plaintiffs out of their right to the possession and use of said premises pending the stay of the order of sale; that there was due to the plaintiffs from the defendants the sum of $513.69 and interest thereon from the 4th day of May, 1887. This sum, the plaintiffs alleged, was composed of the $205 attorney's fees, paid by Jones out of the proceeds of the sale of said land, contrary to his agreement with plaintiffs, and the further sum of $308.69, the difference between the proceeds of the sale received by Jones, and the amount of the decree, interest and costs, including the attorney's fee in

the case in the federal court. The prayer was for judgment against the defendants for $513.69 and seven per cent interest from the 4th day of May, 1887, and costs of suit.

The verdict and judgment were for the plaintiffs, and the defendants bring the case here for review.

The first error assigned is that the petition does not state a cause of action; and this error is predicated on the theory that the contract alleged in the petition is void under the statute of frauds.

Section 3, chapter 32, Compiled Statutes, provides: "No estate or interest in land, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, or surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same." The question then is whether the contract set out in the petition is within this statute.

In *Byers v. Locke*, 93 Cal., 493, it is said, an agreement that the defendant should provide the necessary money to redeem the property of the plaintiff which had been sold under a foreclosure, and that for the purpose of enabling defendant to do so, plaintiff would convey the premises to the defendant, to be held by him until such time as they might be sold, is not an agreement for the sale of land or any interest therein.

In *Miller v. Kendig*, 55 Ia., 174, it is said: "A parol agreement by the grantee of land that in case he sells the land for more than the price paid, one-half the excess shall be paid to the grantor, does not create an interest in real estate, and is not within the statute of frauds."

In *Hess v. Fox*, 10 Wend. [N. Y.], 437, it is said: "An agreement by a mortgagee to sell mortgaged premises, the equity of redemption in which is released by the mortgagor, and after deducting the amount due to himself to

pay the surplus of such sale to the mortgagor, is not void as within the statute of frauds, and after sale of the premises for more than enough to satisfy the debt due to the mortgagee, the mortgagor may maintain assumpsit for the surplus."

In *Price v. Sturgis*, 44 Cal., 591, it is said: "A verbal agreement made by grantee when he buys land and receives a deed therefor, to pay the grantor a further sum of money as a part of the price, out of the proceeds of the sale of the land when he sells it, is valid, and the statute of frauds does not require it to be in writing. Such a contract is not for the conveyance of land, but for the payment of a certain sum of money upon the happening of a certain event."

In *McOuat v. Cathcart*, 84 Ind., 567, it is said: "A contract whereby a mortgagee agrees that in consideration that the mortgagor will permit a foreclosure and pay the costs and attorney's fees, he will bid in the land for the full amount of the debt, is not within the statute of frauds and will be enforced."

The contract upon which this action is based is not one for the sale of land or for the creation of any interest therein. To enforce it would not be to create a trust or power over or concerning lands, or relating thereto. This action is merely for the payment of the money agreed upon as a consideration for which the plaintiffs entered their voluntary appearance and waived their defense to the foreclosure suit in the federal court, and surrendered their possession of the premises for nine months by not asking a stay of sale for the time allowed them to redeem from decree. It is not every agreement relating to the sale of lands that is within the statute of frauds; only such agreements are within the statute as are intended to create an interest in lands. In the case at bar the plaintiffs did not actually convey the land to the defendants, but it is alleged in the petition that the defendants were, in fact, the

owners of the mortgage being foreclosed; that it was tainted with usury, and that in consideration of the promises of the defendants, plaintiffs entered their appearance to the foreclosure suit, and consented that decree might be taken as prayed for. We do not see that this case is different in principle from those cited above. The petition states a cause of action and the contract set out therein is not within the statute of frauds.

The second error alleged is that the court erred in permitting the evidence to go to the jury that the mortgage foreclosed in the federal court was tainted with usury; that neither Butler nor Grey was ever in fact the owner of the mortgage, but that the same was at all times owned by the Jones National Bank. The ground of the objection to this testimony is that it assailed the findings and decree of the federal court in the foreclosure suit. We do not so regard the effect of the testimony. No effort was made either in the pleadings or evidence by the plaintiffs below to contest the jurisdiction of the federal court or to in any manner, impeach the decree rendered by it. In fact, the bringing of this action by the plaintiffs is a ratification by them of everything done by that decree. It was competent for the parties to show that the original note and mortgage foreclosed in the federal court were tainted with usury; that they were in fact owned by the defendants and not by Grey, the man in whose name the foreclosure suit was brought. These facts tended to corroborate the claim of the plaintiffs that the contract was made with them by the defendants as pleaded. This evidence tended to show a consideration and a reason for the making of the contract on the part of the defendants.

The third error assigned is that the plaintiff Mrs. Price was permitted to testify that her husband had told her of the agreement he had made with the defendant Jones. If this evidence was hearsay it remains to be said that Mrs. Price was examined in chief by her counsel and nothing

was asked her in that examination as to what, if anything, her husband had told her as to the contract he had made with Jones. On her cross-examination the counsel for plaintiffs in error asked her these questions:

Q. Harry (Jones) told you, as I understand, that he wanted his money back, and that was all he wanted and you should have the balance?

A. Yes, sir.

Q. That is, the money he wanted back and the interest?

A. I believe so.

Q. You was to have the balance?

A. Yes, sir.

Q. Mr. Price told you that same thing?

A. It was talked over.

Q. Did he tell you that same thing before that, that all Harry wanted was to get their money back?

A. That was what I understood all the time.

Q. The overplus you were to have?

A. Yes, sir.

On redirect examination of this witness she was then asked:

Q. Your husband had told you about this agreement?

A. He had told me; yes, sir.

Q. Mr. Price did and transacted all this business for you?

A. Yes, sir, as my husband.

Q. State to the jury what Mr. Price told you, if anything, as to the agreement between him and Harry Jones as to you receiving any balance that might be remaining out of the money received from the sale of the property after his debt was paid.

A. He told me that the place should go to sale and sell it, and all over and above the mortgage that the place brought would be ours.

This is the substance of the testimony, to the introduction of which objection was made by the plaintiffs in error;

and inasmuch as they called out this matter themselves in their cross-examination of the witness, they are in no position to object to it now as incompetent. Furthermore, the evidence excepted to under the circumstances was not prejudicial to the plaintiffs in error, if hearsay.

The final contention of the plaintiffs in error is that the verdict is contrary to the evidence. The evidence satisfies us that the mortgage foreclosed in the federal court was at the time in fact owned by the defendants; that it was assigned to Grey and foreclosed in his name without his knowledge and for the purpose of cutting off the defense of usury with which the mortgage was tainted, and which defense the plaintiffs in error feared would be introduced if suit were brought in the state court; that the money paid into the federal court for the purchase of the land, except the costs of the case, was returned to plaintiffs in error. As to whether the contract set out in the petition was actually entered into between plaintiffs in error and defendants in error the evidence is conflicting. It was a question fairly submitted to the jury. They have found in their verdict that such a contract was made and the evidence supports that finding, and we cannot disturb it.

The verdict, however, is too large by $205 and interest, the amount of the attorney's fee taxed by the federal court as part of the costs in the foreclosure case. Defendants in error have permission to file in this court in twenty days a remittitur of $285.86, as of date of the judgment in the district court, and thereupon the judgment of the district court will be affirmed. Should such remittitur not be filed the judgment will be reversed and the case remanded.

JUDGMENT ACCORDINGLY.

THE other commissioners concur.

STATE OF NEBRASKA, EX REL. J. C. CRAWFORD, V. W. F. NORRIS.

FILED JUNE 29, 1893. No. 5202.

1. **Constitutional Law:** INDIANS: NATURALIZATION. The act of congress approved February 8, 1887, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations and to extend the protection of the laws of the United States and the territories over the Indians, and for other purposes," is not in conflict with article 1, section 8, of the constitution of the United States, which provides that congress shall have power "to establish an uniform rule of naturalization."

2. **Indians:** ALLOTMENTS OF LAND UNDER FEDERAL LAW: CITIZENSHIP. By the provisions of said act all Indians born within the territorial limits of the United States to whom allotments of land in severalty have been made under the provisions of said law, or other law or treaty, and all Indians, born as aforesaid, who have voluntarily taken up their residence in the United States separate and apart from any tribe of Indians therein, and adopted the habits of civilized life, are made citizens of the United States, and such Indians residing in this state are citizens thereof.

3. ———: ———: ———. The actual issuance or receipt by an Indian of a patent for lands allotted to him under the act is not necessary to constitute him a citizen of the United States. When he has accepted the land allotted, taken possession thereof and otherwise complied with the law, he becomes entitled to his patent and his citizenship attaches.

4. **Elections:** AUSTRALIAN BALLOT LAW: NOMINATIONS: REGULARITY OF CERTIFICATE. An objection that the "convention," "primary meeting," "committee," or "electors" nominating a candidate for a public office had not the legal authority to make such nomination, must be made before the election and in the manner provided by section 136, chapter 26, of the Compiled Statutes; and if not so made, the legal authority of such "convention," etc., to make such nomination—the certificate thereof being in an apparent conformity with the provisions of the election law—will, in the absence of fraud, be conclusively presumed.

5. ———: ———: ———: ———: OBJECTIONS TO FORM OF OFFI-

CIAL BALLOT. By the provisions of section 141, chapter 26, of the Compiled Statutes a candidate may make objections to the ballots as printed by the county clerk, and invoke the power of the courts to correct any error or omission in the name or description of his competitor; but if such candidate neglects to make such objection until after the election, he cannot then object to the result because of any error in the political designation of his competitor on said ballots, without a showing of fraud and that the error by deceiving the electors prevented a full and fair expression of the voters' will.

6. ———: ———: STATUTORY CONSTRUCTION. Such a construction of an election law as would result in the disfranchisement of large bodies of voters because of an error of some public officer should not be adopted where the language of the statute is susceptible of any other.

7. ———: ———: ———. Innocent irregularities of election officers which are free of fraud and have not prevented a free and fair expression of the popular choice will not vitiate the result of an election unless the legislature has expressly so declared.

ORIGINAL proceeding in nature of *que warranto*.

George H. Hastings, Attorney General, M. McLaughlin, W. E. Gantt, Barnes & Eames, W. F. Bryant, and *J. C. Crawford,* for relator.

Barnes & Tyler, Uriah Bruner, C. C. McNish, and *Jay & Beck, contra.*

RAGAN, C.

This is an action of *quo warranto* brought by the relator J. C. Crawford against W. F. Norris, the present judge of the eighth judicial district. The material allegations of the information are: That at the general election held on the 3d day of November, 1891, in the eighth judicial district of the state of Nebraska, the whole number of votes cast for judge of the district court, as canvassed and returned by the board of canvassers, was 7,468, of which the defendant is alleged to have received 3,775 and the relator 3,693, and that upon the canvass of said votes said

defendant had an apparent majority of 82 votes and was thereupon declared duly elected to said office and received a certificate of election to the same; that the county clerks of the counties of Cuming, Cedar, and Stanton caused the name of the defendant to be printed on the sample and official ballots as follows: "W. F. Norris, independent and republican," without authority and in direct violation of the law, as the said Norris had not been nominated by any convention or primary meeting representing a political party which at the last election before such convention cast one per centum of the vote polled in said judicial district; that at the last election held prior to said nomination there was no candidate voted for for any office in said judicial district representing the political party and designated on the ballots as "independent;" that 500 ballots were cast in said counties at the November election, 1891, for the said defendant, on which ballots he was designated as candidate for the "independent" party, which said 500 votes are part of the total of 3,775 votes cast and canvassed for the said defendant; that at the time of the holding of the convention aforesaid there was no party in said judicial district by the name of "independent," and the printing of the defendant's name on the ticket representing him as "independent" was calculated to and did deceive a large number of voters; that the county clerk of Thurston county caused the name of the defendant to be designated on the sample and official ballots as candidate for judge of said district as follows: "W. F. Norris, republican and independent," without the said defendant having been nominated by any convention representing any political party known or designated as "republican-independent;" that 293 of such ballots were cast in said Thurston county for the said defendant, and were canvassed and counted as a part of the said 3,775 votes alleged to have been received by said defendant; that the printing of the defendant's name on the ballots as aforesaid was calculated to deceive

the voters by making it appear that the defendant was the candidate and nominee of the "republican independent" party, when in fact he was not; that the county clerk of Dakota county caused the name of the defendant to be printed on the sample and official ballots as follows: "W. F. Norris, people's independent and republican," notwithstanding there was no certificate on file in the office of said clerk certifying that said Norris had been nominated by any convention representing a political party by the name of "people's independent;" that the printing of the defendant's name on the ballots as aforesaid was calculated to and did deceive the voters in said county by representing that he was the candidate of the "people's independent" party, when in fact he was not, and that 200 such votes were cast, counted, and canvassed for said defendant in said county as a part of said 3,775 votes alleged to have been received by said defendant; that at said election there were cast in Omaha precinct and Blackbird precinct in Thurston county 127 illegal votes, and that in Perry precinct and in Winnebago precinct, in said Thurston county, there were cast 206 illegal votes; that said illegal votes so cast in said four precincts were cast by persons members of the Omaha and Winnebago tribes of Indians, who were then under the charge of, and in the care, custody, and control of, an Indian agent, and that none of said Indians who voted at said election in said four precincts were citizens of the United States or this state, and were not qualified electors on the 3d day of November, 1891; that said Omaha and Blackbird precincts, in said Thurston county, are a part and parcel of the Omaha Indian reservation, and that the polling places where the said Omaha Indians voted were located on said reservation; that said Perry and Winnebago precincts are a part and parcel of the Winnebago reservation, and that the polling places where said Winnebago Indians voted were located on said Winnebago Indian reservation.

The answer of the defendant, so far as we notice it, alleges: The defendant denied that the persons named in the relator's information as Indians were, at the time of the election, members of the Omaha and Winnebago tribes of Indians and averred the fact to be that there were then no such tribes of Indians, and that their tribal relations had been dissolved and that all of said persons so named in said information as Indians, and who voted in said Perry, Winnebago, Omaha, and Blackbird precincts in said Thurston county, were, on the 3d day of November, 1891, citizens of the United States and qualified voters of the state of Nebraska; that all of said Indians were born within the territorial limits of the United States, and on the 3d day of November, 1891, were male persons more than twenty-one years of age, and before said election each and every of said persons had severed his tribal relations and had adopted the habits of civilized life and lived separate and apart from any tribe of Indians, and each of said Indians before such election had applied for and had received his allotment of land in severalty, in accordance with an act of congress approved February 8, 1887, commonly known and called the "Dawes Bill;" that said defendant was duly nominated for district judge of the eighth judicial district of the state of Nebraska by the republican judicial convention of said district, as candidate for district judge at the election to be held November 3, 1891; that he was also nominated by the "independent judicial convention" of said district held at Wakefield, Nebraska, as candidate for judge of said district at said election; that certificates of each of said nominations, in due form of law, were duly filed in the office of the clerks of the several counties composing said judicial district, at the proper time before the election; that the clerks of the several counties embraced in said judicial district caused the official and sample ballots for said election to be printed and published in due form and at the proper time before the holding of said

election; that said clerks, without fraud, and to the best of their knowledge and information placed the name of this defendant on said official and sample ballots as a candidate for office of district judge for both of said parties by which he was nominated; that said "independent judicial convention" and the persons who composed the same were the same persons and was the same party that, in the year 1890, under the name and style of "people's independent party" cast in said state of Nebraska some 68,000 votes, and in said eighth judicial district more than one per centum of the votes polled therein at the general election in said year; that all of these facts were well known to the said relator at the time and long before the said election held November 3, 1891; yet the said relator made no objection to the said certificates of nomination, or said official or sample ballots, but acquiesced in all of said proceedings with full knowledge thereof, and is now estopped to question the regularity or good faith of said proceedings. Defendant further averred that he received a large majority of the legal votes cast in said district for the office of district judge at the November election, 1891; that said election was lawfully and fairly conducted; that no voter in said district was deceived by anything which occurred in relation thereto, either before or at the holding of said election; that he lawfully and rightfully received the certificate of election and in due time entered upon his duties as judge.

We then have the following issues:

a. Whether the Indians of Omaha and Blackbird precincts, in Thurston county, who voted were electors.

b. Whether the Indians of Winnebago and Perry precincts, in said Thurston county, who voted were electors.

c. If these Indians were voters, should the ballots cast by them be rejected because the polling places at which they were cast were on lands in said Thurston county known as the Omaha and Winnebago Indian reservations?

d. Shall the ballots cast for the defendant on which he

was designated "W. F. Norris, republican-independent," be counted?

e. Shall the ballots cast for the defendant on which he was designated "W. F. Norris, republican, W. F. Norris, independent," be counted?

f. Shall the ballots cast for the defendant on which he was designated "W. F. Norris, republican, W. F. Norris, people's independent," be counted?

This cause was sent to a referee to take the evidence and report his findings of fact. He has done so, faithfully and carefully, but as both parties to this proceeding have filed exceptions to the referee's report, we have been compelled to read the entire testimony, and shall construe it without reference to the report of the referee, while cheerfully acknowledging the assistance the report has afforded us.

Were the Indians of Omaha and Blackbird precincts, in Thurston county, electors?

The record shows that the Indians who voted at the election in Omaha and Blackbird precincts in November, 1891, were male persons over twenty-one years of age, all born within the territorial limits of the United States and territories, and were born members of the Omaha tribe or nation of Indians; that each of said persons so voting had, before said election, taken his land in severalty; had taken possession thereof and received his patent therefor, in accordance with the terms of the act of congress approved February 8, 1887.

Article 7, section 1, of the constitution of this state provides that all male persons of the age of twenty-one years, or upwards, who have resided in the state six months, and who are citizens of the United States, shall be electors.

Section 6 of the act of congress approved February 8, 1887, provides: "And every Indian born within the territorial limits of the United States, to whom allotments (of land) shall have been made under the provisions of this

act, or under any law or treaty, * * * is hereby declared to be a citizen of the United States, and entitled to all the rights, privileges and immunities of such citizen."

In *State, ex rel. Fair, v. Frazier*, 28 Neb., 438, it is said, in substance, that in order to establish an Indian's right to citizenship, and hence to vote at an election in this state, it must be proved that such Indian was born within the territorial limits of the United States, and that an allotment of land had in fact been made to such Indian by the government of the United States in pursuance of the act of congress above mentioned, or some other law or treaty.

The Indians, then, of Omaha and Blackbird precincts who voted at the election of November 3, 1891, were electors within the meaning of the constitution of the state, and the act of congress quoted above.

Were the Indians of Winnebago and Perry precincts, in Thurston county, voters?

The evidence in this record shows that the Indians who voted at the election held November 3, 1891, in Winnebago and Perry precincts were, at the time of said election, male persons over twenty-one years of age; that they were born within the territorial limits of the United States, and were born members of the Winnebago tribe of Indians; that each and every one of said Indians who voted had, before the election, selected and applied for his allotment of land in severalty under the terms of said act of congress; that each of the Indians so voting had taken possession of his land; that the special agent, appointed by the government for the allotting of lands to Indians, had allotted to each of said Indians, so voting, his land in severalty; had issued certificates to said Indians for such allotments and transmitted the schedules of said allotments to the secretary of the interior for his approval, but that at the date of the election the selection of land in severalty made by the Indians, and the allotment thereof made by the government, had not been formally approved, nor the patent issued

therefor. The evidence further shows that these Indians had voluntarily taken up their residences separate and apart from their tribes; that they had adopted the habits of civilized life; that they had severed their tribal relations.

Now, it is contended by the relator that these Winnebago Indians, although born within the territorial limits of the United States, and although they had selected their lands in severalty in compliance with the provisions of said act of congress, taken possession of said lands, and such selections had been approved by the agent of the United States appointed to make the allotments, the certificates of allotments had been issued to the beneficiaries, and such allotments certified to the secretary of the interior, yet because at the date of the election that officer had not formally approved of the allotments made, and the allottees had not actually received their patents for the lands allotted, they were therefore not entitled to vote. We do not so construe the act. By section 6 thereof it is provided: "And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act," etc., and section 3 of said act provides that the United States shall make the allotments through a special agent appointed by the president for the purpose, and when such allotments are made, certify the fact to the secretary of the interior, and upon his approval of the allotments made by the govenment, patents shall issue therefor. The part to be taken by the Indian in this proceeding is much like that taken by a man "taking up a homestead." He selects the land he wishes, and the local authorities of the government confirm or reject his selection. Now, these Winnebago Indians selected each his allotment of land in severalty under the terms of the act of congress and took possession of said lands. The special agent of the government made the allotments, issued the certificates therefor, reported his action to the

secretary of the interior, and recommended that patents should issue for the lands so allotted. These Indians had done all required of them by law to entitle them to the lands and to the right of citizenship. It is undoubted that if they possessed the qualifications required by the act as to birth, etc., and complied on their part with the other requirements of law, that the secretary of the interior has no discretion in the matter, but must approve the allotments made and the patents must issue therefor. The presumption is that the special agent made no allotments to any one not entitled thereto, and we will presume that all Indians holding the certificates of allotment under the act are entitled to their patents and therefore citizens and entitled to vote. An Indian to whom an allotment has been made under this act, and who possesses the other qualifications required by the constitution and laws of this state, is *prima facie* a voter. But the evidence in this record shows, as before stated, that at the election held November 3, 1891, these Winnebago Indians who voted at such election had severed their tribal relations, voluntarily taken up their residences separate and apart from their tribes and had adopted the habits of civilized life, and this brought them within the last clause of section 6 of the aforesaid act of congress.

The learned counsel for relator very truly say "that the government of the United States is one of enumerated powers, the national constitution being the instrument which specifies them, and in which authority should be found for the exercise of any power which the national government assumes to possess," and then proceed to argue that the act of congress known as the "Dawes bill" is unconstitutional. The claim is that it violates section 8, article 1, of the constitution of the United States, which provides that congress shall have power "to establish an uniform rule of naturalization;" that the rule prescribed by the law is not uniform. The argument is very able and

very interesting, but we do not think that the act in question is in conflict with the constitution of the United States. Section 19, article 6, of the constitution of this state provides: "All laws relating to courts shall be general and have uniform operation." In the examination of a law passed by the legislature which was alleged to be in conflict with the above clause the supreme court of this state in *State, ex rel. Selden, v. Berka*, 20 Neb., 375, said: The constitutional provision last above quoted "is not violated by an enactment of a law limiting the number of justices of the peace in cities of the first-class to three, to be elected in districts to be created by the board of county commissioners of the counties in which such cities are situated. A law which is general and uniform throughout the state, operating alike upon all persons and localities of a class, or who are brought within the relations and circumstances provided for, is not objectionable as wanting uniformity of operation." The rule as thus announced was adhered to by this court in the *County of Lancaster v. Trimble*, 33 Neb., 121.

An analysis of the "Dawes bill" discloses that it prescribes a rule of naturalization only for Indians born within the territorial limits of the United States and for such of those, 1, to whom lands have been allotted in severalty, and 2, such as have voluntarily taken up their residence in the United States separate and apart from any tribe of Indians therein and adopted the habits of civilized life.

c. Are the votes cast by these Indians to be rejected because the polling places at which they were cast were located on their reservations?

Relator insists that neither the state of Nebraska nor the county of Thurston had any jurisdiction over these reservations; that the establishing of election precincts and holding elections thereon were illegal and the votes cast thereat should be thrown out.

In *Painter v. Ives*, 4 Neb., 128, it was said by Chief Justice LAKE: "It would seem clear that at the date of the state's admission into the Union every portion of the territory within the prescribed boundaries thereof, the Indian reservations included, became subject to its laws." We think this is correct. The county of Thurston, in which these reservations lie, is one of the duly organized political subdivisions of the state. The county authorities were invested by law with the duty of establishing voting places therein and of holding elections. The fact that one or more of the places of voting happened to be on an Indian reservation in the county, should not disfranchise the voters. That the title to these reservations is in the United States and the lands occupied by the Indians, sometimes denominated "wards of the nation," does not give the United States exclusive jurisdiction of the territory. The jurisdiction of the nation over the Indian in his tribal relation is supreme and exclusive; but when an Indian becomes a citizen of the United States within the provisions of the acts of congress, he becomes subject to the laws of the state of which he is a resident and entitled to the benefits of the laws of such state. The state also has jurisdiction over all the territory within its boundaries for the government and protection of its citizens and their property, and the enforcement of its laws.

d. Shall the ballots cast for the defendant on which he was designated "W. F. Norris, republican-independent," be counted?

e. Shall the ballots cast for the defendant on which he was designated "W. F. Norris, republican, W. F. Norris, independent," be counted?

f. Shall the ballots cast for the defendant on which he was designated "W. F. Norris, republican, W. F. Norris, people's independent," be counted?

We answer that all of said ballots were rightfully counted for the defendant and for the following reasons:

The record shows that the defendant was duly nominated by the republican convention as its candidate for the office of judge for the eighth judicial district; that he was also nominated by the independent convention held at Wakefield; that certificates of these nominations, in due form, were filed in the office of the county clerk for each of the counties composing said district for the length of time required by law before the election.

It was the duty of the county clerks in preparing the official ballots to place the defendant's name thereon as a candidate for each of the parties by which he was nominated. The clerks prepared the ballots without suggestions from either party to this proceeding and did so without fraud and with the most honest of intentions. The evidence also shows that there was no party by the name of "independent" which polled in said district one per centum of the votes cast therein at the election of 1890, but the evidence does show, if that is material, that the "people's independent" party and the "independent" party were one and the same. This court will also take judicial notice of the fact that the republican party and the people's independent party at the general election of 1890 each cast more than one per centum of the votes polled. The defendant was entitled to have his name appear on the ballots as candidate of each party nominating him. (*State, ex rel. Christy, v. Stein*, 35 Neb., 848; *Fisher v. Dudley*, 22 Atl. Rep. [Md.], 2; Wigmore's Australian Ballot Sys., 190; *Behrensmeyer v. Kreitz*, 26 N. E. Rep. [Ill.], 704; *State, ex rel. Hawes, v. Pierce*, 35 Wis., 93; *State, ex rel. Palmer, v. Stein*, 35 Neb., 866.) And all such ballots should be counted unless it appears the candidate was voted for more than once by the same elector.

By section 136, chapter 26, Compiled Statutes, it is provided that all certificates of nomination which are in apparent conformity with the provisions of the election law shall be deemed valid, unless objection is made thereto in

three days after their being filed. And section 141 of the same act provides that whenever it shall be made to appear by affidavit that an error or omission has occurred in the name or description of a candidate nominated for office, or in the printing of the sample or official ballots, the county judge, or any judge of the district court at chambers, may, upon application of any voter, require the clerk to correct the error complained of, or show cause why it should not be corrected. Now, the certificates of the nomination of the defendant apparently conformed with the law, and the record before us does not disclose that the relator or any other elector, made any objection to such certificates. When these certificates were filed it was the duty of the county clerks in preparing the sample and official ballots, to designate the candidate on the same according to the certificates of nomination. It is conceded the clerks prepared the ballots without suggestion from either party; that there was no fraud practiced or intended. This record does not show, nor is the attempt made, that any elector was deceived by anything on the ballots, and the ballots show plainly that there were but two candidates for judge, the relator and the defendant. And for aught that appears every man voted for the candidate of his choice. Neither does the record show that the relator or any one else made any objection to the party designation, that is the description of the defendant as printed on the ballots before the election, and yet he asks us to disfranchise a thousand voters of the state because of an error, if it was an error, in the political description of the defendant.

The relator and defendant had a right to be voted for for an office and have the votes counted, even if the clerk had left off the ballot entirely the names of the political parties of which they were members and by which they were nominated. The statute requiring that the ballot shall contain the name of the party or principle which the candidate represents is directory and is intended as a help

and a guide to the voter, and it should be complied with, and the law denounces severe penalties against an officer who should unlawfully or fraudulently violate it; yet, as the voter has nothing to do with the preparation of the ballot, he cannot be deprived of the right to have his vote counted for the candidate of his choice because the ballot omits the candidate's correct political affiliation. (*Smith v. Harris*, 32 Pac. Rep. [Col.], 616; *Montgomery v. O'Dell*, 22 N. Y. S., 412; *State v. Saxon*, 12 So. Rep. [Fla.], 218; *Miller v. Pennoyer*, 31 Pac. Rep. [Ore.], 830; *State v. Barber*, 32 Pac. Rep. [Wyo.], 14; *State v. Van Camp*, 36 Neb., 91.)

"Innocent irregularities of election officers, which are free of fraud and have not prevented the free and fair expression of the popular choice, will not vitiate the result of an election unless the legislature has so expressly declared." (*Bowers v. Smith*, 17 S. W. Rep. [Mo.], 761.)

If the relator was dissatisfied with the political or other description of the defendant on the ballots as printed, he should have proceeded under section 141 of the election law, to have had the ballots corrected. Not having done this, his objection to these ballots, at this time, comes too late. (*Bowers v. Smith*, 17 S. W. Rep. [Mo.], 761; Id., 20 S. W. Rep. [Mo.], 101; *Allen v. Glynn*, 29 Pac. Rep. [Col.], 670.)

In the last case the supreme court of Colorado, through Chief Justice Hayt, say: "By other sections (of the Australian ballot law) it is provided that the name of every candidate whose name has been properly certified shall be on one and the same ballot; that sample ballots shall be in the county clerk's possession seven days before election, subject to public inspection, and official ballots four days before election. It is also provided for posting of sample ballots, etc. An examination of these sections will show that the legislature has made ample provision for the correction of ballots prior to the election; and it would

seem to be the duty of the candidate to make such objection in seasonable time. It is believed that it would not be in the interests of a fair expression of the will of the people to allow a candidate to lie by and not point out such objections as he may have to the form of the ballot until after the election has been held. If this be true, contestor should have spoken before the election. The fundamental object of all election laws is the freedom and purity of the ballot. It is to be observed that the voter has no control whatever over the publication of the names of candidates or the form of the ballots. If, for some defect in these particulars, the ballot must be rejected, the door would be open to fraud. To defeat the will of the people, it would only be necessary to have the county clerk furnish the electors, or some of them, with tickets slightly variant from those prescribed by law. It would seem to be the purpose of this section to give the opposing candidate ample opportunity to see that his opponent's name was not upon an unauthorized ticket, or under a device to the use of which he was not entitled. We do not think that those decisions which have been cited, holding that all provisions of the statutes are mandatory, and that ballots should be rejected that are not in all particulars in conformity to the requirements of the act, are entitled to much weight, in view of the provisions of this act. In order to make such decisions controlling, it should appear that the provision for objection and amendment was equally as liberal in those states as under our statute. It may be said that all provisions of such laws are mandatory in the same sense that they place a duty upon those who come within their terms. But it does not follow that an election should be invalidated because of every departure on the part of public officers from the terms of the act. We do not feel at liberty to place a narrow construction upon this act. To overthrow the expressed will of a large number of voters for no fault of theirs, as we are asked to do, would be to defeat the purpose

of all election laws, which is to obtain a full and fair expression of the wishes of the voters."

The application of the relator is denied and the suit dismissed at his cost, including fees of the referee herein, taxed at $100.

DISMISSED.

THE other commissioners concur.

PACIFIC TELEGRAPH COMPANY v. JOHN I. UNDERWOOD.

FILED JUNE 29, 1893. No. 4682.

1. **Telegraph Companies:** COMMON CARRIERS: LIMITING LIABILITY. The legal status of a telegraph company is practically that of a common carrier of intelligence for hire, and such company is bound to correctly and promptly transmit and deliver messages entrusted to it, and cannot by contract relieve itself, either in whole or in part, from liability for injury or loss resulting from its own negligence.

2. ——: ——: ——: PRINTED STIPULATIONS IN MESSAGE BLANKS. A telegraph company had printed on its message blanks: "The company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message." *Held*, An attempt on the part of the telegraph company to limit its liability; that this clause, if regarded as a contract, was without consideration, unjust, unreasonable, and violative of section 12, chapter 89*a*, Compiled Statutes.

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

Marquett, Deweese & Hall, for plaintiff in error.

Charles E. Magoon, contra.

RAGAN, C.

John I. Underwood sued the Pacific Telegraph Company in the district court of Lancaster county. The facts involved in the case are substantially: Underwood lived in Lincoln, Nebraska. He had some household goods in Richmond, Indiana. He desired these shipped to Lincoln, and wrote to one Lawrence at Richmond, asking the rate on goods. Lawrence delivered to a telegraph company at Richmond the following dispatch:

"RICHMOND, INDIANA, July 2, 1886.

"*To John I. Underwood, Lincoln, Nebraska:* Rate seventy-six dollars per car; $1.09 per hundred, local.

"L. L. LAWRENCE."

This telegram when delivered to Underwood read:

"RICHMOND, INDIANA, July 2, 1886.

"*To John I. Underwood, Lincoln, Nebraska:* Rate twenty-six dollars per car; $1.09 per hundred, local.

"L. L. LAWRENCE."

Underwood, relying upon the correctness of this telegram as delivered, ordered his goods shipped as a car lot, and on their arrival at Lincoln was obliged to pay seventy-six dollars freight. He brought this suit to recover the difference between the seventy-six dollars and twenty-six dollars.

The telegraph company defended on three grounds:

1st. That the mistake in the telegram was made on another line.

2d. That Underwood did not present his claim for damages to the telegraph company within sixty days after the date of the telegram.

3d. That Underwood was not damaged by the mistake.

There was a verdict and judgment for Underwood and the telegraph company brings the case here for review.

The first error assigned is that the court erred in admitting in evidence the telegram as it originally started from

Richmond, for the reason that it is a different one from that set out in the petition. On looking into the record we find that Underwood claims that the telegraph company delivered to him a telegram which read "twenty-six dollars per car," but he avers that this telegram, as originally sent, read "seventy-six dollars per car," and that through the negligence of the telegraph company it was altered. The principal objection, however, is that Underwood, on the trial to the jury, put in evidence only the written part of the telegram without putting in the printed matter on the blank. The printed matter alluded to was that usually found on all telegraph blanks and contains, amongst other conditions and terms, this: "This company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message." The telegraph company did not undertake that the printed conditions on the telegraph blank should be transmitted. These conditions were no part of the message sent. The evidence corresponded with the pleadings, was competent, and there was no error in its admission.

The second error alleged is the refusal of the court to give the jury this instruction: "If the jury find from the evidence that the telegraphic blank on which was written the message received by the plaintiff from the defendant, contained a clause or a provision to the effect that the company will not hold itself liable for errors or delay in transmission or delivery of unrepeated messages in any case where the claim is not presented in writing within sixty days after the sending of the message, then, before the plaintiff can recover, he must show that he presented his claim to the defendant in writing within sixty days after receiving the message, and if the jury find from the evidence that the plaintiff did not so present his claim in writing within sixty days after the sending of the telegram, then the defendant is not liable and the plaintiff cannot recover, and your verdict should be for the defendant."

There are four reasons why the refusal of the court to give this instruction was correct:

a. This suit is not based on a contract, but is grounded in tort.

b. A telegraph company is a common carrier of intelligence for hire, bound to promptly and correctly transmit and deliver all messages entrusted to it, and cannot by contract exempt itself from liability for its own negligence.

c. The clause printed on the telegraph blank, to the effect that the telegraph company would not be liable for damages in any case unless the claim was presented in writing in sixty days, was and is unreasonable and wholly without consideration if viewed as a contract between the telegraph company and the sender of the message, and an attempt on the part of the telegraph company to enact for itself a statute of limitations. If it can make its liability for negligence depend on notice of claim being given in sixty days, it may make it six days. If liability can be made to depend upon the notice being in writing it can limit it to pen and ink. The laws of this commonwealth are for the protection and government of corporations and individuals alike, and all citizens should transact their business with reference to these laws. The attempt so often indulged in by insurance and telegraph companies, to prescribe for themselves a law, is not one that appeals to the judgment or commends itself to the conscience of this court. See on this subject: *Tyler, Ullman & Co. v. Western Union Telegraph Co.*, 60 Ill., 421; *Western Union Telegraph Co. v. Crall*, 21 Am. & Eng. Corp. Cas. [Kan.], 95; *Gillis v. Western Union Telegraph Co.*, 25 Id. [Vt.], 568, and cases there cited; *Johnston v. Western Union Telegraph Co.*, 21 Id. [Ga.], 114; *Western Union Telegraph Co. v. Longwill*, 25 Id. [N. M.], 559.

d. The instruction asked was violative of the statute of the state, section 12, chapter 89*a*, Compiled Statutes: "Any telegraph company engaged in the transmission of tele-

graphic dispatches is hereby declared to be liable for the non-delivery of dispatches entrusted to its care, and for all mistakes in transmitting messages made by any person in its employ, and for all damages resulting from a failure to perform any other duty required by law; and any such telegraph company shall not be exempted from any such liability by reason of any clause, condition, or agreement contained in its printed blanks."

The third contention of the plaintiff in error is that the mistake in the telegram was made by the Pacific Mutual Telegraph Company, and the jury erred in not so finding. Whether this was so was entirely a question of fact for the jury and was properly submitted to them, and at the request of the plaintiff in error they were instructed on the subject as follows: "The jury are instructed that the defendant in this case is not liable for any errors or mistakes made on their connecting telegraph lines, and if the jury find from the evidence that the error or mistake complained of in the telegram was made on other lines before it came onto the line of the defendant, and you find that the message was transmitted by the defendant from the point where the message came to the defendant to its place of destination in the same form that it was received, then the defendant has not been guilty of negligence, is not liable, and you should find for the defendant." The jury said by their verdict that the defense was not made out. They were clothed by law with the duty of weighing the evidence and determining, and we cannot say they came to a wrong conclusion.

Finally, it is insisted that Underwood suffered no damage by reason of the mistake made in the dispatch. On looking into the record we find that the evidence is that Underwood's goods weighed about two thousand pounds; at $1.09 per hundred, local, the freight would have been $21.80. The testimony further shows that he would not have shipped them as a car load had he known that the

rate was $76 instead of $26. It would thus appear that in any event Underwood was damaged $54.20. There is no error in the judgment of the district court and the same is

AFFIRMED.

THE other commissioners concur.

OSCAR F. JANES ET AL., APPELLEES, V. SAMUEL J. HOWELL ET AL., APPELLANTS.

FILED JUNE 29, 1893. NO. 4868.

Judgments: ACTION IN EQUITY TO VACATE: PLEADING. A court of equity will not vacate a judgment at law merely on the ground that the officer's return, that he had served the summons on the defendant to the judgment by leaving a copy of the process at his usual place of residence, was false. It must also be averred and proved that the defendant to the judgment has a meritorious defense to the same.

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

Cornish & Robertson, for appellants.

Brown & Talbott, contra.

RAGAN, C.

On January 8, 1889, the appellants recovered judgment against the appellees in the county court of Douglas county. The return of the summons in the case is as follows: "On December 27, 1888, I received this writ, and on December 27, 1888, I served it by leaving a certified copy of this writ and endorsements thereon at the usual place of residence of O. F. Janes and M. E. Janes, the defendants, in

Douglas county, Nebraska. George Karll, constable." The record of the judgment in the county court recites: "This cause came on for trial to the court; * * * defendants did not appear. It appearing to the court that said defendants had been duly served with summons and came not, default was made," etc. On June 3, 1889, the appellees filed in the district court of Douglas county their petition in which they alleged the recovery against them in the county court of the aforesaid judgment; that during the month of January, 1889, and for some time previous thereto, they resided in said Douglas county, and that they had no knowledge of the commencement by the said Howell of an action against them, nor of the rendition of a judgment therein, until after the same was rendered. They further aver that no summons issued in the case was served upon them in any way or form known to the law; nor was there any notice of any kind given them, or served on them, or either of them, of the commencement of Howell's action; that they had a good and valid defense thereto; that they had no adequate remedy at law, and prayed that said judgment in favor of said Howell might be set aside and held for naught, and that all the proceedings had thereunder might be set aside and annulled. The district court by its decree vacated the judgment and the appellants bring the case here.

The decree will have to be reversed for the reason that there is neither pleading nor proof on the part of the appellees that they have any valid defense to the claim on which appellants' judgment is based. The petition does state that they, the appellees, "have a valid defense," but this is a mere conclusion. The plea, to be good in this respect, must set out what the defense is, state the facts, so that the court can determine whether the facts constitute a defense.

While there is some conflict the weight of authority undoubtedly is that a court of equity will not enjoin a

judgment at law merely on the ground that the process in the suit in which the judgment was rendered was not served on the defendant, or, in other words, that the return of the officer as to service is, in fact, false. To justify the interposition of a court of equity in such a case it must be further shown that if the relief sought be granted, a different result will be obtained from that already adjudged by the judgment alleged to be void. (*Colson v. Leitch*, 110 Ill., 504, and cases there cited; 3 Pomeroy, Equity Jurisprudence, sec. 154, and cases there cited.) It is, however, the settled law of this state that a court of equity will not set aside a judgment at law regular on its face, when it is not shown that the judgment was rendered when no cause of action existed. (*Osborn v. Gehr*, 29 Neb., 661.) The decree of the district court is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

THE other commissioners concur.

IOWA SAVINGS BANK V. DUNNING & HARTSON.

FILED JUNE 29, 1893. No. 4430.

1. **Chattel Mortgages**: DESCRIPTION OF PROPERTY: BONA FIDE PURCHASERS: CONSTRUCTIVE NOTICE. A description of property covered by a chattel mortgage which will not enable third persons, aided by inquiries which the mortgage itself suggests, to identify the mortgaged property is not constructive notice to good faith purchasers thereof for a valuable consideration.

2. ———: ———: IDENTIFICATION: QUESTION FOR JURY. Whether the description of property in a chattel mortgage and the other inquiries which the mortgage itself suggests are sufficient to enable third persons to identify the mortgaged property is a question of fact for the jury.

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

Jay Bros. and *Simpson & Sornborger*, for plaintiff in error.

George I. Wright, contra.

RAGAN, C.

This is a suit brought by the Iowa Savings Bank against Dunning & Hartson in the district court of Saunders county for "possession of one hundred and seventy-eight two and three year old steers, marked with an inverted 'V' cut in the ear." The bank claims these steers by virtue of two chattel mortgages made by one Jackson to one Wheeler, and by the latter assigned, together with the evidences of debt which they were given to secure, to the bank. There was a verdict and judgment for Dunning & Hartson, and the bank brings the case here and assigns for error that the verdict is not supported by the evidence, and that the court erred in certain instructions given to the jury.

As to whether the verdict is supported by the evidence, it appears in September, 1889, Wheeler sold two lots of cattle to Jackson and to secure a part of the purchase money, took from him notes and the mortgages above mentioned on the cattle sold. The cattle were described in the mortgages as follows: (*a.*) "Ninety head two and three-year-old steers in spring of 1880, marked <> (diamond) hole in right ear; branded 'C' on right hip." (*b.*) "Ninety-eight head three-year-old steers, marked <> (diamond) hole in the left ear; also branded 'C' on right hip." The mortgages were duly recorded in Stanton county, one on the 20th day of March and the other on the 30th day of April, 1889. It is not pretended that any of the cattle replevied in this suit were branded with the letter "C." The cattle

sold by Wheeler to Jackson were not thus branded, but the evidence shows that Jackson promised at the time of their purchase that he would so brand them. There was evidence on the part of the bank that the steers sold by Wheeler to Jackson were at the time marked with a diamond-shaped hole in the ear; and there was evidence at the trial to the effect that the ears of some of the cattle replevied still had this diamond-shaped mark, though partly obliterated by a cut made in the ear, and some of the witnesses for the bank identified some of the cattle replevied as the same cattle covered by the mortgages. On the other hand, there was evidence for Dunning & Hartson that they bought the cattle in controversy out of a herd of some six hundred from a man named Abrams, in whose possession they were; that the purchase was in good faith for a valuable consideration, without any knowledge, either actual or constructive, of the existence of the mortgages, and without knowledge or notice of any fact or circumstance to put them on inquiry as to the mortgages; that the cattle in suit were none of them marked with a diamond-shaped hole in the ear; none of them branded with the letter "C," and all distinctly marked by a "swallowfork" in the ear, and that they were not the cattle sold by Wheeler to Jackson. Abrams, the vendor of the defendants, was a witness and testified that all of the cattle replevied were cattle he sold to the defendants and that he purchased some of these cattle from the Sioux City stock yards, some from a cattle dealer named Hall in Minnesota, and some of them from Jackson, and that none of the cattle bought by him of Jackson, or of the other parties, or sold by him to Dunning & Hartson had any diamond or other mark in their ears, but that all his herd, some six hundred, except one hundred and seventy-five big cattle, were marked by a "swallowfork" in the ear. Dunning, who bought the cattle, swears all the cattle bought by him of Abrams were "swallowforked" and "not a critter in the bunch" that

had a diamond hole in its ear, or any indication of there ever having been one.

There were some sixteen witnesses in the case and all of equal credibility so far as we know. The important question in the case was whether the cattle replevied were the ones covered by the mortgages, a question of identity. The bank claimed and made a vigorous effort to show they were. The defendants as vigorously protested they were not. There is sufficient evidence in the record to sustain a finding either way. This is a case that demonstrates the wisdom of our fathers in providing a jury for the determining of disputed questions of fact. The men of that tribunal heard all these witnesses; had the opportunity to observe them and their conduct while on the stand, and after several and careful readings of all the evidence, we certainly cannot say that the verdict was wrong.

The instructions given by the trial court and excepted to by the bank are as follows:

"1. If you find that the steers found in defendants' pasture are the steers mortgaged to Wheeler in Pender, as already explained, you will proceed to consider the other questions submitted to you. If you do not so find, or if the preponderance is with the defendants, or if the testimony is evenly balanced upon that question, you will return a verdict for the defendants, and need not, in that case, consider the other questions submitted.

"2. The mortgages introduced in evidence are both in due form of law, and were filed in due form, and are sufficient to entitle plaintiff to the possession of the steers in controversy, as against said Jackson. It does not follow, however, that plaintiff is entitled to the possession of said steers, as against the defendants Dunning & Hartson, even should you find that they are the identical steers sold by Wheeler to said Jackson.

"3. If you find that the description in the mortgage is sufficient to put the defendants on inquiry, and put them in

the way of learning the truth about plaintiff's mortgage, you will have to find for the plaintiff. If you do not so find, and if you further find that defendants are purchasers in good faith, as explained hereafter, you will find for the defendants.

"4. If you find that the description of the steers in the mortgage is not sufficient to put a purchaser upon his guard, and to lead him to a knowledge of the rights of the plaintiff, as already explained, and that the defendants bought and paid for the said steers in good faith, without any knowledge or information that they had been mortgaged to Wheeler, then you are charged that they would acquire a complete title to said steers and should recover in this action."

These instructions were applicable to the evidence and stated the law correctly.

The authorities cited by the learned counsel for plaintiff in error are not to the point. The cattle in question were not obtained from Wheeler by fraud. If the cattle replevied were the ones covered by the mortgages, the question still remained whether the defendants were innocent purchasers of them.

The contention of the plaintiff in error is that, conceding the cattle replevied to be the same cattle covered by the mortgages, any further inquiry was immaterial. This is not the law as applied to the facts of this case. The cattle were described in the mortgages "steers marked <> (diamond) hole in the left ear; also branded 'C' on the right hip." It was conceded the cattle covered by the mortgages were not branded at all. There were two defenses made on the trial, one that the cattle replevied were not the cattle mortgaged; and the other that if they were, defendants were innocent purchasers for a valuable consideration without actual or constructive notice of the mortgage; that when they purchased they were in possession of no fact or circumstance which, aided by all the *indices* afforded

by the mortgages, were sufficient to put them on inquiry or enable them to identify the cattle as the ones covered by these mortgages.

The defendants introduced much evidence, as above stated, in support of both their defenses. The charge of the trial judge, which included the instructions complained of, was not only correct, but a model statement of the law applicable to all the phases of the case.

The logical result of counsel's proposition is that no description of the subject-matter of a chattel mortgage is necessary; that is to say, no one can acquire title to a mortgaged chattel as against the mortgagee thereof, no matter under what circumstances he may purchase the chattel, or what its description may be in the mortgage. The description of the cattle in these mortgages was not only not constructive notice to a purchaser of the cattle that they were covered by these mortgages, but evidence that the cattle purchased were not the ones mortgaged. The description of the property covered by a chattel mortgage which will not enable third persons, aided by inquiries which the mortgage itself affords to identify the mortgaged property, is not constructive notice to a good faith purchaser thereof for a valuable consideration. (*Smith v. McLean*, 24 Ia., 322; *Rowley v. Bartholemew*, 37 Id., 374.)

There is no error in the proceedings of the district court, either in the instructions or in the admission of testimony, and the judgment is in all things

AFFIRMED.

THE other commissioners concur.

LANCASTER COUNTY v. EDGAR L. HOLYOKE.

FILED JUNE 29, 1893. No. 5129.

1. **Coroner's Inquest:** DEFINITION OF VIEWING. The word "viewing," as found in section 7, chapter 28, Compiled Statutes, means something more than looking, seeing, beholding; it means inspection and investigation, an inquiry by a coroner and a jury.
2. ———: A CORONER can lawfully hold an inquest upon the dead bodies of only such persons as are supposed to have died by unlawful means.
3. ———: FEES: A CORONER, without the impaneling of a jury as provided by the statute, is not entitled to any fees for inspection and examination of the body of a person found dead in his county.

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

N. Z. Snell, for plaintiff in error.

Thomas C. Munger, *contra*.

RAGAN, C.

This suit was brought in the district court of Lancaster county on a petition substantially as follows:

1. The plaintiff complains of the defendant and says that the plaintiff is the duly elected, qualified, and acting coroner of Lancaster county, Nebraska, and has been such officer since January, 1890.

2. That on the 12th day of February, 1891, plaintiff, as such coroner of said county, was duly notified that the dead body of a man, one Harry Campbell, supposed to have died by unlawful means, was found, and then was in the city of Lincoln, Lancaster county, Nebraska.

3. Immediately upon such notification, the plaintiff, as such coroner, went to the place where said body was lying, a distance of three miles, and then and there found the

dead body of the said Harry Campbell lying in the yards of the Chicago, Burlington & Quincy Railroad Company in said county; and the plaintiff, as such coroner, then and there took charge of said body and made a personal inspection and examination of said body and of the surroundings, and found, upon examination thus made, that the said body was crushed and mangled, and from the heat of the body and pools of blood and other evidences, that the death was recent and from violence. The plaintiff also made an examination into the cause of said death without impaneling a jury and investigated the probable causes of said death, and as to what persons or machinery had contributed thereto, or caused the same. The plaintiff also, as such coroner, then and there took charge of said body and caused it to be removed to a place where it should be unexposed, and to be cared for. The plaintiff also took charge of the papers, valuables, and personal effects on and about the body, a watch, his money, some jewelry and private papers, and sent them to the parents of the deceased. The plaintiff had the body of the deceased removed from the ground where he was lying on a rail of the railroad track with his one leg crushed flat, and his abdomen crushed also, and had the same removed to an undertaker's and washed and dressed and cared for, and to be delivered to the parents of said Harry Campbell.

On the 16th day of February, 1891, the plaintiff filed with the county clerk of Lancaster county a claim for viewing the body of said Campbell, $10; for mileage, 30 cents; which claim was by the board of commissioners of said county disallowed, whereupon the plaintiff appealed the case to the district court.

To this petition the defendant Lancaster county filed a general demurrer, which the court overruled, and the county electing to stand on said demurrer, the court rendered judgment against the county for the claim sued for, and the county brings the case here on error.

It will be observed that the examination made by the plaintiff of the dead body was without a jury and for this he claims to be allowed a fee of $10, as provided by section 7, chapter 28, Compiled Statutes. The language of this section applicable to this case is "for viewing the dead body, $10."

The office of a coroner is a very ancient one and came with the common law to this country from England. The powers and duties of a coroner here are what they were at common law, except in so far as they have been modified by our statutes or institutions. At common law the coroner was required to hold an inquest over the body of a person who had died from visitation of God; by chance or accident; by his own hand; by the hand of another. (2 Hale's Criminal Law, 62.) But at common law suicide was a crime and the goods of the deceased were forfeited to the king, and if any animal killed a person, or if a cart ran over him, this animal or instrument was forfeited. It is perhaps for this reason that the coroner at common law was obliged to investigate a death, although known to have been a suicide, or known to have been caused by some casualty. Our statute, however, in section 97, chapter 18, Compiled Statutes, provides: "The coroner shall hold an inquest upon the dead bodies of such persons only as are supposed to have died by unlawful means." Under this the coroner has nothing to do with investigating the death of any person unless such person is supposed to have come to his death by unlawful means. If a person was known to have committed suicide, or if he was known to have come to his death from a stroke of lightning, or known to have received his death by a fall from a building, the coroner would have nothing to do with holding an inquest over the body of such person.

The statute last above quoted, when the coroner shall have been notified of the finding of the dead body of a person supposed to have died by unlawful means, requires

the coroner to summon, forthwith, six lawful men of the county to appear before him at a time and place named in the warrant. This statute is mandatory, and if the coroner has received notice of the finding in his county of someone dead, and that person is supposed to have died by unlawful means, then it is the duty of the coroner to forthwith summon a jury and proceed to hold an inquest and ascertain the cause of the death of the person. Section 105 of the same chapter provides that this jury, having inspected the body, heard the testimony, and made all needful inquiries, shall return to the coroner their inquisition in writing. It appears from this statute, then, that in order for a coroner to act at all—that is, in order for him to view the body of a person found dead in his county—he must have reached the conclusion that the person came to his death by unlawful means; otherwise, he has nothing to do with the dead body. The statute does not provide on what notice or information the coroner may act, or what notice or information is sufficient to authorize him to hold an inquest; but doubtless that is a matter to be exercised by him in an honest and faithful manner, and he is invested, by virtue of his office, with the discretion to determine for himself whether he should or should not hold an inquest. Of course he must not act from mercenary motives and unnecessarily hold an inquest for the purpose of obtaining fees. But when he does act he can only act in the manner provided by the law; that is to say, the coroner, by virtue of his office, has no right to hold an inquest alone. When a person has been found dead and is supposed to have died by unlawful means, the statute provides that the facts as to the manner or means by which the deceased came to his death shall be ascertained by a jury.

The contention of the plaintiff here is that the word "viewing," found in section 7 of said chapter 28, is used in its ordinary sense, and that when the coroner has been informed that some one has been found dead in his

county, and it is supposed the person came to his death by unlawful means, then if the coroner goes and views this body, he has become entitled to the fee of $10 mentioned in said section. The word "viewing," as here used, means something more than looking, seeing, beholding; it means inspection, investigation, and inquiry into the cause of the death of the person, and the coroner cannot alone make this inquiry, and he is not entitled to this fee unless he has, with a jury, held an inquest as provided by law. The judgment of the district court is therefore reversed and this cause is remanded with instructions to sustain the demurrer to the plaintiff's petition.

REVERSED AND REMANDED.

THE other commissioners concur.

LINCOLN RAPID TRANSIT COMPANY V. JOANNA NICHOLS.

FILED JUNE 29, 1893. No. 5073.

1. **Street Railways:** FRANCHISE: EXEMPTION FROM LIABILITY. The granting of a franchise by the electors of a city to a corporation to build and operate a street railway in the streets of the city does not exempt the street railway company from liability for injuries caused by its negligence, whether such negligence consists in the improper and careless management of its property or in the character of the motive power employed in propelling its cars.

2. **Personal Injuries:** CONTRIBUTORY NEGLIGENCE: ATTEMPT TO ESCAPE DANGER. When one is placed by the negligence of another in a situation of peril, his attempt to escape danger, even by doing an act which is also dangerous and from which injury results, is not contributory negligence such as will prevent him from recovering for an injury, if the attempt was one such as a person acting with ordinary prudence might, under the circumstances, make.

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

Webster, Rose & Fisherdick, for plaintiff in error.

Adams & Scott and *I. W. Lansing, contra.*

RAGAN, C.

Mrs. Nichols sued the Lincoln Rapid Transit Company in the district court of Lancaster county, and in her petition alleged: That the transit company was a corporation and owned and operated a street railway in the city of Lincoln; that said street railway was operated by running a steam engine on and along its track with coaches attached; that said engine is frightful to horses and teams coming in view of or passing near it, all of which was well known to the transit company; that there was a large and almost constant travel in wagons, buggies, carriages, and other vehicles drawn by horses on the streets used by the transit company, which was well known to it; that on the 5th day of July, 1890, and prior thereto, the transit company wrongfully and without right, and negligently and carelessly ran said engine and cars along certain streets of said city of Lincoln, on which streets there was constant travel as above stated; that on said date, while she was driving along Twelfth street in said city, in a buggy drawn by a gentle and quiet horse, the transit company wrongfully, negligently, and carelessly, and without warning, ran said engine to and within the immediate vicinity of the place where she was driving said horse; that he became suddenly frightened and unmanageable, and in said fright upset said buggy and threw her upon the track and ground and greatly injured her.

The transit company pleaded to this petition three defenses:

1. A denial of negligence on its part.

2. A franchise from the electors of the city of Lincoln to operate its street railway.

3. Contributory negligence on the part of Mrs. Nichols.

There was a trial to a jury, with a verdict and judgment for Mrs. Nichols, and the transit company brings the case here, and assigns as errors the refusing of instructions requested by it; the giving of instructions objected to by it, and that the evidence does not sustain the verdict.

The instructions requested by the transit company and refused are as follows:

"4. If the jury find that the plaintiff had a fractious or skittish horse, or that the plaintiff was not a proper driver of the horse that was hitched to her vehicle, they will find for the defendant.

"5. If the jury find that plaintiff, by her incompetence as a driver, or by carelessness in any way, contributed to the accident, the jury will find for the defendant.

"6. If the jury find that horses generally are not frightened by the motor engine of the defendant, and that the machine was operated with ordinary and usual care at the time of the accident, they will find for defendant.

"If the jury find that the plaintiff's horse, while yet a considerable distance from the motor, evinced alarm and a tendency to be frightened, or become unmanageable, then it was the duty of the plaintiff to have turned about and to have done all she could to have avoided the accident; and if the jury find that the plaintiff did not do so, they will find for the defendant."

The fourth was correctly refused. Whether Mrs. Nichols' horse was fractious or skittish, or whether she was a proper driver, were proper questions for the jury to consider in determining whether Mrs. Nichols was guilty of contributory negligence. This instruction leaves out entirely the element of negligence on the part of the transit company. If the negligence of the transit company was the proximate cause of Mrs. Nichols' injury, the fact of her

horse being fractious or skittish, or she a poor driver, would not relieve the transit company from liability.

Again, the trial judge in the tenth paragraph of his charge to the jury told them: "If you should find from the evidence that the horse driven by plaintiff was a fractious or skittish horse, or that the plaintiff was not a proper driver of said horse, then plaintiff would be guilty of negligence in driving the horse in the vicinity of the motor and could not recover." So it appears that the transit company has had the benefit of the instruction which it claims was erroneously refused. Certainly the transit company was not entitled to an instruction so broad as the one that was given.

As to instruction No. 5, asked by the transit company and refused, this was also substantially given in paragraph No. 10 of the court's charge, and it was also covered by instruction No. 7, given to the jury at the request of the transit company. That instruction reads as follows: "If the jury find that plaintiff, after she found that her horse was alarmed at the motor, used her whip or otherwise endeavored to force her horse forward towards the motor and compelled him to approach the object that frightened him, such conduct is negligence on plaintiff's part, and they will find for the defendant."

As to instruction No. 6, requested by the transit company and refused, it was substantially given by the trial judge in the latter part of paragraph No. 10 of his charge to the jury, as follows: "And further, if you should find from the evidence that plaintiff's horse, while yet a considerable distance from the motor, evinced alarm and a tendency to be frightened and threatened accident, then it was the duty of the plaintiff to turn about, if she could have done so, and to have done all she could to avoid accident, or all that a reasonably prudent person would have done under the circumstances; and if you should find from the evidence that the plaintiff did not do so, then she would be guilty of such contributory negligence as would prevent her recovery."

Complaint is also made because the court gave to the jury the following instruction: "Whether or not horses are generally frightened by motor engine of the defendant is a matter that you may take into consideration in determining the negligence of the defendant in causing the accident complained of, or the contributory negligence of the plaintiff as to her actions in the vicinity of the motor." Suffice it to say, that there was no error in the giving of this instruction.

The transit company also claims that the court erred in giving to the jury the following instruction: "3. When a plaintiff through the negligence of defendant is placed in a situation where he must adopt a perilous alternative, or where in the terror of an emergency for which he is not responsible he acts wildly or negligently and suffers in consequence, such negligent conduct under the circumstances is not contributory negligence, for the reason that persons in great peril are not to be required to exercise all that presence of mind and carefulness that are justly required of a careful and prudent man under ordinary circumstances." This instruction told the jury, in effect, that if they found that Mrs. Nichols, while placed in a dangerous situation through the transit company's negligence, was frightened and in terror, and acted carelessly and was injured, her conduct under such circumstances was not contributory negligence; as a person in great peril is not required to exercise the care demanded of a careful person under ordinary circumstances.

"A choice of evils may often be all that is left to a man and he is not to blame if he chooses one, nor if he chooses the greater, if he is in circumstances of difficulty and danger at the time and compelled to decide hurriedly." (*Gumz v. Chicago, St. P. & M. R. Co.*, 52 Wis., 672; *Siegrist v. Arnot*, 10 Mo. App., 197; *Wilson v. Northern P. R. Co.*, 26 Minn., 278; *Cuyler v. Decker*, 20 Hun [N. Y.], 173.)

"When one is placed by the negligence of another in a

situation of peril, his attempt to escape danger, even by doing an act which is also dangerous, and from which injury results, is not contributory negligence such as will prevent him from recovering for an injury, if the attempt was one such as a person acting with ordinary prudence might, under the circumstances, make." (*Cook v. Parham*, 24 Ala., 21; *Karr v. Parks*, 40 Cal., 188; *Wesley City Coal Co. v. Healer*, 84 Ill., 126; *Chicago & A. R. Co. v. Becker*, 76 Id., 25; *Frink v. Potter*, 17 Id., 406; *Linnehan v. Sampson*, 126 Mass., 506; *Pennsylvania R. Co. v. Werner*, 89 Pa. St., 59; *Wilson v. Northern P. R. Co.*, 26 Minn., 278; *Stokes v. Saltonstall*, 13 Pet. [U. S.], 181; *Stickney v. Maidstone*, 30 Vt., 738; *Page v. Bucksport*, 64 Me., 51.) And this is the rule, though a person would not have been injured had he not made an attempt to escape the threatened danger. (*Iron R. Co. v. Mowery*, 36 O. St., 418; *Wilson v. Northern P. R. Co.*, 26 Minn., 278; *Schultz v. Chicago & N. W. R. Co.*, 44 Wis., 638; *Gumz v. Chicago, St. P. & M. R. Co.*, 52 Id., 672.)

When the accident occurred Mrs. Nichols and the transit company's engine were approaching one another, and the contention of the transit company is that Mrs. Nichols should have turned about and made an effort to escape, and in not doing so she was guilty of contributory negligence. The evidence is that on one side of the street stones were piled up for curbing purposes, and she could not turn on that side. To turn the other way she would have to cross the street railway track in front of the coming locomotive; that she was frightened; her horse terrified and practically unmanageable; had she attempted to cross the track and been struck when crossing, that would have been alleged here as contributory negligence. She may not have chosen the wiser or safer course. The trial judge told the jury, "if you should find that plaintiff's horse, while yet a considerable distance from the motor, evinced alarm and a tendency to be frightened and threatened accident, then it was the

duty of the plaintiff to turn about, if she could have done so, and to have done all she could to avoid accident, or all that a reasonably prudent person would have done under the circumstances; and if you should find from the evidence that the plaintiff did not do so, then she would be guilty of such contributory negligence as would prevent her recovery." The instruction complained of then, while not very happily expressed, stated the law correctly, and was properly given, in view of paragraph No. 10 of the charge of the trial judge.

The transit company insists that the verdict of the jury is not supported by the evidence, and this assumption is based on the contention that the evidence shows no negligence on the part of the company. The grounds of negligence charged to the transit company by Mrs. Nichols in her petition were that it operated its street railway by running a steam engine on its tracks through a populous part of the city of Lincoln, and on the streets in which there was constant travel of vehicles drawn by horses, and that said steam engine was of itself frightful to horses, and that on the day of the accident the transit company negligently and carelessly, and without warning, ran the engine in the immediate vicinity of herself and horse, and so frightened the latter that he became unmanageable, upset her buggy, and injured her. The transit company in its answer said: "Denies that its character of machinery is frightful to horses; denies that on July 5, 1890, it negligently or carelessly ran its motor, and denies that it wrongfully, negligently, or carelessly, and without warning, ran its engine to the vicinity where plaintiff was driving, or that her horse became frightened, scared, or unmanageable."

Here, then, we have made these issues: Whether the transit company's steam engine was frightful to horses; whether it was negligent to use said steam engine on its tracks through a populous city, and on much traveled

streets, and whether the transit company's servants in charge of the engine and cars at the time of the accident, were guilty of negligence in their management of the locomotive. There is evidence in the record tending to support the allegations that the engine, with its smoke and steam and noise, was frightful to horses. There was evidence that at the time of the accident the engine was running fast and puffing smoke; that the persons on the engine saw Mrs. Nichols when some distance away; saw that her horse was frightened; that the engine ran within ten feet of her horse before the buggy was upset; that the engine ran so close to her she could not turn and get away. Of course, the evidence on nearly all these points was conflicting. It was a question for the jury to determine. The law has not clothed this court with authority to find conclusions of fact in cases of this character. It is not necessary to the support of the judgment in this case that we should decide that the using of steam engines by the transit company in the operation of its street railway was negligence of itself, but we have an abiding conviction that it was. Here was a large and populous commercial city whose streets were constantly filled with persons on horseback, in buggies, wagons, and carriages; men, women, and even little children were using these streets for business, pleasure, or recreation. A corporation or individual who would put a steam engine on a street railway in such streets must have done so with a reckless disregard and an utter contempt for the lives and limbs of human beings. An examination of the charter of the transit company does not disclose any authority for propelling its street cars by steam, and it is doubtful if any such authority was conferred by that instrument, and if it was, the company's franchise would not excuse it from liability for injuries caused by its negligence, whether such negligence consisted in the mismanagement of its roads and cars, or in the character of the motive power employed.

The judgment of the district court was right and the same is

AFFIRMED.

THE other commissioners concur.

HENRY TRUMBLE ET AL. V. MARTHA TRUMBLE ET AL.

FILED JUNE 29, 1893. No. 6120.

1. **Constitutional Law**: DESCENT: STATUTES: ACTS CONTAINING MORE THAN ONE SUBJECT. Chapter 57, Session Laws of 1889, providing for the descent of real property and the distribution of personal property of intestates, the disposition of homesteads of intestates, the barring of an insane wife's interest in the lands of her husband by deed of her guardian, and the abolition of the estates of dower and curtesy, is void, because it contains more than one subject.
2. ———: STATUTES: TITLE. It is also void because its object is not expressed in its title, and because it is in effect amendatory of other acts which it does not contain.
3. ———: ———: AMENDMENT. Under the title of an act to amend a certain other act no amendment can be enacted which is not germane to the subject of the original act.
4. ———: ———: WHEN PARTIAL INVALIDITY RENDERS WHOLE ACT VOID. When portions of an act are invalid because not within the title, the whole act must be declared void if it is apparent from an inspection of the act itself that the invalid portions formed an inducement to its passage.

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

Reese & Gilkeson, for plaintiffs in error:

When an act is valid in part and invalid in part, and it appears that the invalid part was the inducement for the enactment of the valid part, the whole enactment must be treated as void. (Cooley, Constitutional Limitations, 147;

State v. Lancaster County, 6 Neb., 485; *Ex parte Thomason*, 16 Id., 238; *State v. Lancaster County*, 17 Id., 85.) The act contains more than one subject, and is invalid under the constitutional provision that no bill shall contain more than one subject. (Constitution Nebraska, art. 3, sec. 11; *White v. City of Lincoln*, 5 Neb., 505; *People v. Mahaney*, 13 Mich., 494.) Dower and estates derived by inheritance are each distinct subjects. (*Sutherland v. Sutherland*, 69 Ill., 481; *Rawson v. Rawson*, 52 Id., 69.) The act is broader than its title, and is therefore invalid under the constitutional provision that the subject of every bill shall be clearly expressed in its title. (Constitution Nebraska, art. 3, sec. 11; *State v. Lancaster County*, 6 Neb., 485; *Burlington & M. R. R. Co. v. Saunders County*, 9 Id., 511; *City of Tecumseh v. Phillips*, 5 Id., 305; *Miller v. Hurford*, 11 Id., 381; *State v. Pierce County*, 10 Id., 477; *State v. Lancaster County*, 17 Id., 87; *Touzalin v. Omaha*, 25 Id., 817; *Messenger v. State*, 25 Id., 676; Cooley, Constitutional Limitations, 147.) The act, both directly and by implication, amends several sections of the acts relating to wills, dower, curtesy, and married women, without repealing said sections and re-enacting them entire, and is therefore invalid under the constitutional provision "that no law shall be amended unless the new act contains the section or sections so amended, and the section or sections so amended shall be repealed." (Constitution Nebraska, art. 3, sec. 11; *People v. McCallum*, 1 Neb., 182; *Smails v. White*, 4 Id., 353; *Hale v. Christy*, 8 Id., 264; *Sovereign v. State*, 7 Id., 412; *State v. Corner*, 22 Id., 266; *Stricklett v. State*, 31 Id., 674).

J. E. Philpott, contra.

IRVINE, C.

Martha Trumble filed her petition in the county court of Lancaster county setting forth that she was the widow of

William Trumble, deceased, and that the other parties to this action were his children and grandchildren; that he died seized of certain real estate, one tract whereof was a homestead; that he left a will to the terms of which she never at any time consented, and praying that there might be set off to her one-third of all said real estate, and her homestead interest in the particular tract referred to. Upon the hearing of the case a decree was rendered in accordance with the prayer of the petition. An appeal was taken to the district court where a similar decree was rendered. To reverse this decree certain of the children bring these proceedings in error.

Under the pleadings and proof the decrees of the county and district courts were right if the act of the legislature approved March 29, 1889, Session Laws of 1889, chapter 57, is a valid legislative enactment. The plaintiffs in error urge that the act in question violates article 3, section 11, of the constitution, which provides that "No bill shall contain more than one subject and the same shall be clearly expressed in its title, and no law shall be amended unless the new act contains the section or sections so amended, and the section or sections so amended shall be repealed." They further contend that the act violates section 3 of the bill of rights, providing that "No person shall be deprived of life, liberty, or property without due process of law." The title of the act is as follows: "An act to amend section thirty (30) and one hundred and seventy-six (176) of chapter twenty-three (23) of the Compiled Statutes of the state of Nebraska of 1887, entitled 'Decedents,' and to repeal said original sections, and to repeal sections one (1), two (2), three (3), four (4), five (5), six (6), seven (7), eight (8), nine (9), ten (10), eleven (11), twelve (12), thirteen (13), fourteen (14), fifteen (15), sixteen (16), seventeen (17), eighteen (18), nineteen (19), twenty (20), twenty-one (21), twenty-two (22), twenty-three (23), twenty-four (24), twenty-five (25), twenty-six (26), twenty-seven (27), twenty-eight (28), twenty-nine (29)

of chapter twenty-three (23) of the Compiled Statutes of Nebraska of 1887, and section seventeen (17) of chapter thirty-six (36) of the Compiled Statutes of Nebraska of 1887, entitled 'Homesteads,' and all acts and parts of acts in conflict herewith." The third section of the act repeals the sections named in the title. Of these, sections 1 to 28 inclusive of chapter 23 provided for dower, the barring and assignment thereof, and various details connected therewith; section 29 provided for estates by curtesy; section 30 provided for the descent of real estate of intestates; section 176 provided for the distribution of personal property; while section 17 of chapter 36 related to the succession of homesteads, providing that on the death of the person from whose property it was selected it should vest in the survivor for life with remainder to the heirs of the decedent, subject to his power of disposing of such remainder by will, and further exempted such homestead from the payment of debts contracted by the decedent. The first section of the act of 1889 provides that section 30 shall be "Amended to read as follows." Then follows section 30, as amended, which in its first portion enacts a new order of descent of real estate of intestates. It then proceeds to provide an entirely new law for the disposition of homesteads, containing among other things provisions whereby the homestead shall be appraised upon proceedings instituted by the county judge, and that after deducting incumbrances, if the residue do not exceed one thousand dollars, the homestead shall descend to the widow subject to the incumbrances. If there be a residue after deducting incumbrances and the one thousand dollars it shall descend as provided in the act. The widow may elect to retain the homestead by paying the shares descending to other heirs, and if she do not so elect, the property shall be sold in a peculiar manner provided by the act, and the proceeds of the sale distributed. The section then proceeds to declare that the widow's share cannot be affected by any will of her husband unless she consent

thereto in writing within thirty days after his will has been left with the county judge for probate, and she advised of its contents by a certified copy served on her by personal service and her consent filed with the county judge. The section next provides that all provisions made in the act in regard to a widow of a deceased husband shall be applicable to the surviving husband of a deceased wife; then that the widow shall be entitled to her "distributive shares" of all lands whereof the husband was seized of an estate of inheritance at any time during the marriage, unless she join in a deed of conveyance or is otherwise lawfully barred. Next follows a provision that if the wife be insane she may be barred of her interest in her husband's real estate at any time during the life of the husband by deed of her guardian. The section concludes with a sentence abolishing the estates of dower and curtesy.

Section 2 of the act amends section 176 of chapter 23, Compiled Statutes, by providing a new order of distribution of personal property.

Is this act within the inhibition of that clause of the constitution providing that no bill shall contain more than one subject? This question is in most cases surrounded with difficulty. As was said in *Kansas City & O. R. Co. v. Frey*, 30 Neb., 790, this clause of the constitution "was never designed to place the legislature in a straight jacket and prevent it from passing laws having but one object under an appropriate title." Provided the object of the law be single the whole law may be embraced in a single enactment, although it may require any number of details to accomplish the object. The purpose of the constitutional inhibition upon the other hand was to require each proposed measure to stand upon its own merits, and to apprise the members of the legislature of the purpose of the act when called upon to support or oppose it, and perhaps a still stronger purpose was to prohibit the joining of several measures in one act in order to combine the friends

of each measure and pass the bill as a whole, where probably a majority could not be procured in favor of any one of its different objects. (*Kansas City & O. R. Co. v. Frey, supra.*) Examining the act in the light of this purpose we think that it is within the constitutional inhibition. While all of its provisions are connected in some sense with one another, the connection is in some cases very remote. The descent of real property and the distribution of personalty of an intestate might perhaps well be provided for by a single statute under an appropriate title. The disposition of an intestate's homestead might, in the same way, be connected with the descent of his other realty. Perhaps even the subjects of dower and curtesy might fall within the same legislative object as the descent of lands. By a somewhat chain-like process it might be argued that provisions for barring dower during the lifetime of the husband might be embraced in any act relating to dower, and that in an act relating to barring dower the guardian of an insane wife might be authorized to convey such wife's inchoate estate of dower. But the affairs of mankind are so interwoven that by similar reasoning a single statute proceeding step by step might be made to embrace the whole body of the law. We cannot conceive how the descent of an intestate's land can, under the constitution, be properly coupled with provisions granting to the guardian of an insane wife the power to convey her prospective interest during her husband's lifetime, nor can we see how such a statute of descents and a law attaching new requisites to the validity of a will can be said to embrace a single legislative object. These subjects, while remotely related, are not necessarily interdependent, and cannot be said to combine into a single subject of legislation.

In *Smails v. White*, 4 Neb., 353, it is plainly intimated that the court considered a law fixing the time of taking appeals and also providing for the filing of pleadings in the appellate court as embracing two subjects. So in *State, ex*

rel. Jones, v. Lancaster County, 6 Neb., 474, an act providing for township organization was held void *in toto* because embracing in addition to that subject provisions for county government. In *State v. Lancaster County*, 17 Neb., 85, a provision in an amendatory act repealing an act not connected with the subject of the amendment was declared void. The whole matter was as closely connected as in the case at bar.

We are even more clearly convinced that the subject, or rather subjects, of the act are not clearly expressed in its title as the constitution requires. So far as that portion of the title which designates the sections repealed is concerned it simply indicates the intention of the legislature to repeal the existing laws upon the subjects treated in those sections and not to enact new laws in their stead. So far as the title designates sections amended it indicates merely an intention to amend the law relating to the descent of real estate, and the distribution of personal estate of intestates, those being the only subjects treated in the amended sections.

In *City of Tecumseh v. Phillips*, 5 Neb., 305, and in *White v. Lincoln*, 5 Neb., 505, an act was declared unconstitutional which by its title purported to amend the law incorporating cities of the second class and also to legalize certain taxes. The offensive provision purported to legalize and confirm the expenditure of certain license moneys already collected. This was held not to be within the title.

In *Burlington & M. R. R. Co. v. Saunders County*, 9 Neb., 507, this court held unconstitutional a provision in an act making it the duty of commissioners to levy taxes to pay certain bonds because the title to the act was "An act to amend an act to provide for the registration of precinct or township, and school district bonds." The act amended contained nothing in regard to the payment of the bonds, and the provision on that subject in the amending act was declared void because not germane to the act amended, and so not within the title.

The following cases also establish the rule that under the title of "acts to amend" other acts no matter can be introduced by the amendment which is not germane to the original act: *Miller v. Hurford*, 11 Neb., 377; *State v. Pierce County*, 10 Id., 476. The act in question violates this rule by introducing provisions in the nature of substitutes for nearly every one of the repealed sections, under color of an amendment of section 30, which before the amendment related to but one of those subjects. Nor can the legislature in an act purporting to merely amend one law enact measures which in effect amend or repeal other laws not referred to in the title or in the act itself. To do so violates the constitutional provision that the amending act shall "contain" the section or sections amended. (*Smails v. White*, 4 Neb., 353; *Sovereign v. State*, 7 Id., 409; *State v. Lancaster County*, 17 Id., 85; *Touzalin v. Omaha*, 25 Id., 817; *Holmberg v. Hauck*, 16 Id., 337; *Foxworthy v. City of Hastings*, 23 Id., 772; *Stricklett v. State*, 31 Id., 674.) This act violates this rule by affecting the law in regard to wills, that regulating the powers and duties of guardians, and probably also the married woman's act.

The law being unconstitutional for the reasons above stated, the next question presented is whether it must be declared void altogether, or whether, by eliminating the objectionable provisions, it may be allowed to stand, in so far as it is single in its purpose and germane to its title. The rule upon this subject is stated in *State v. Lancaster County*, 6 Neb., 474, and in a case of the same title, 17 Neb., 85. In the latter case the court says, in an opinion by the present chief justice, that where the act itself includes two distinct subjects the whole act must be treated as void, from the manifest impossibility of choosing between the two; but that this rule applies only in those cases where it is impossible from an inspection of the act itself to determine which part is void and which valid. When this can be done the rule does not apply, unless it shall appear that the

invalid portion was designed as an inducement to pass the valid, so that the whole, taken together, will warrant the belief that the legislature would not have passed the valid part alone. Applying this rule to the case at bar we cannot see how it is possible to sustain any portion of the act. Some of the subjects treated are so different in their nature that we cannot say which operated upon the minds of the legislators to induce the passage of the act. The nature of the provisions in regard to the descent of real property is such that the legislature would certainly not have approved them in the absence of an amendment of the laws relating to dower and curtesy. That portion of the act which provides for the distribution of personal property is manifestly framed with the view of supplementing the provisions in regard to descent and the disposition of homesteads.

We are fully conscious of the importance of the principle which forbids the courts to declare a statute unconstitutional where any substantial doubt exists; but we have no doubts in this case. The act is upon its face clearly violative of several constitutional provisions. To sustain it would be to invite their disregard in the future, if not to countenance the practice suggestively designated as "log-rolling." In such a case the duty of the court to set aside an act is as clear as its duty generally to presume the validity of statutes, and no considerations based upon the importance of interests affected can discharge the courts from performing such duty. In this connection, however, it may be well to call attention to the fact that this is a direct proceeding to administer an open estate, and that we are not deciding that titles heretofore derived under decrees made in pursuance of the act in question can be disturbed by any collateral proceedings.

A learned and able argument was made upon the proposition that the act provided for a taking of property without due process of law, first, because of its provisions au-

thorizing the sale of homesteads without providing for notice to or a hearing of parties interested, and, secondly, because it undertook to abolish existing inchoate estates of dower and curtesy. The conclusions reached upon other aspects of the case render a decision of this question unnecessary.

The judgment of the district court is reversed and the case remanded with directions to proceed in accordance with the law as it existed prior to the passage of the act of 1889.

REVERSED AND REMANDED.

THE other commissioners concur.

BURTON BARNETT V. THOMAS H. PRATT.

FILED JUNE 29, 1893. No. 5128.

1. **Action by Third Person on Promise to Another for His Benefit:** PLEADING. A brought suit against B, alleging that C was indebted to A for wages; that B purchased C's business, out of which the debt arose, and in part consideration agreed to pay C's debt to A; that this agreement was omitted from an instrument in the form of a receipt set out in the petition, and containing other terms of the transfer, and that the omission was to prevent a third person from learning of the promise. *Held*, That the petition stated a cause of action.

2. ———: PAROL EVIDENCE: STIPULATION OMITTED FROM WRITING BY AGREEMENT. Such a promise, omitted from a written agreement, may be proved by parol where the promisee was induced to execute the writing on the faith of the oral promise.

3. ———: ———: ———: STATUTE OF FRAUDS. Such a promise is not within the statute of frauds.

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

Thomas C. Munger, for plaintiff in error.

J. A. Marshall and *J. L. Caldwell, contra.*

IRVINE, C.

This action was begun by the plaintiff in error against the defendant in error in the district court of Lancaster county. The petition alleges, in substance, that the plaintiff had been in the employ of one William J. Pratt, as a laborer in his livery stable, and that about September 26, 1890, William J. Pratt was indebted to plaintiff for wages in the sum of $125.93; that about that date William J. Pratt sold said livery stable to the defendant, who, in part consideration of said purchase, agreed with William J. Pratt that he would pay to the plaintiff said debt; that at the time of the sale there was executed by William J. Pratt an instrument in writing as follows:

"Received from Thomas Pratt three hundred and fifty dollars, cash in hand, and said Pratt also agrees to pay C. L. Hooper one hundred and fifty dollars on note, and ac., also $1,450 per mem. of mortgages now on file, in all making $1,950, for the following property, to-wit: Fourteen head of horses, six buggies, two carriages, two hacks, two sleighs, four single harnesses, six sets double harnesses, all whips and robes, one farm wagon, all hay now in barn, everything belonging to me now in livery barn, No. 1624 O street, in city of Lincoln; also all leases and insurance that I hereby assign to said Pratt; also all hay in said barn, this being a receipt in full for all the above property.

"W. J. PRATT."

The petition further alleges that at the time of the execution of the writing the defendant called William J. Pratt aside and requested that no mention should be made in said writing about the payment by defendant of said amount to plaintiff, because one Hooper, who was present and who furnished the defendant with the purchase money,

was unwilling and objected to such a bargain, and it was then and therefore agreed by and between said William J. Pratt and Thomas H. Pratt that this portion of the agreement should not be stated in this writing. The petition asked judgment against the defendant in the sum named.

Upon the trial the plaintiff called William J. Pratt as a witness, whereupon the defendant objected to the introduction of any evidence to vary, change, or contradict the terms of the written contract pleaded, and also objected to the introduction of any evidence, for the reason that the petition did not state facts sufficient to constitute a cause of action. The plaintiff then offered to prove by the witness, substantially, the matters set out in the petition; with the additional offer to prove that witness agreed to sign the written instrument, only upon condition that defendant should pay plaintiff. The objections were sustained and a verdict directed for defendant.

By the case of *Shamp v. Meyer*, 20 Neb., 223, it is settled that where one makes a promise to another for the benefit of a third person, such third person may maintain an action upon the promise, though the consideration does not move directly from him. That case is in line with the great weight of American authority to the effect that the person for whose benefit a promise is made may sue upon that promise, although not a party to the consideration. The purpose of the American rule seems to have been largely to avoid circuity of action. It may probably be assumed that in order to permit such third person to sue, the contract must be one which might be enforced between the immediate parties thereto; in fact, many of the cases state the rule in these terms.

Upon this theory the defendant contends that the plaintiff cannot maintain this action because of the rule forbidding parol evidence to change, add to, or contradict the terms of a written agreement. We cannot regard the instrument referred to in the petition as a contract complete

in itself. It purports only to be a receipt. It is signed only by W. J. Pratt, and not by the party assuming these obligations, and its whole effect is that of an informal memorandum, and not the expression of a complete contract. Further, it is settled by a considerable line of authority that where the execution of a written agreement has been induced upon the faith of an oral stipulation made at the time, but omitted from the written agreement, though not by accident or mistake, parol evidence of the oral stipulation is admissible, although it may add to or contradict the terms of the written instrument. Among the cases establishing this principle are: *Chapin v. Dobson*, 78 N. Y., 74; *Ferguson v. Rafferty*, 128 Pa. St., 337. The same doctrine substantially has been adopted by this court. (*Norman v. Waite*, 30 Neb., 302.) It will be observed that the allegations of the petition and the evidence offered brought the case strictly within this rule.

While the point is not urged in the briefs, it might be, with considerable force, argued that the promise sued on is within the statute of frauds, as being a promise to answer for the debt of another. The case of *Shamp v. Meyer*, already cited, does not settle this question, for in that case the promise was for the benefit of the debtor and not the creditor. While a great many cases hold that such a promise cannot be sued upon by the creditor, for the reason that it is a promise to answer for the debt of another, and within the statute, authorities to the contrary are about equally numerous, and, except in a very few cases, it has always been held that a promise is not within the statute when made in consideration of the transfer of property or funds out of which the debt should equitably be paid, and that in such case the creditor may sue. Without determining whether this distinction is well founded in reason, it suffices to say that the construction of the statute of frauds is so largely a matter of precedent that the doctrine thus established should be followed.

We think the judge erred in excluding the evidence and the judgment is therefore reversed and case remanded.

REVERSED AND REMANDED.

THE other commissioners concur.

VICTOR G. LANTRY, APPELLANT, v. JAMES M. PARKER, APPELLEE.

FILED JUNE 29, 1893. No. 5116.

1. **Adverse Possession.** Where land is especially adapted to the purposes of grazing and hay growing, and one claiming ownership thereto has every year for a period of more than ten years cut the grass, and harvested and disposed of the hay from such portions of the land as its character permitted, so using the land in connection with, and in the same manner as he used other tracts owned or claimed by him and adjacent thereto, there being at different periods fences or plowed strips not entirely enclosing the whole, but of such a character as to indicate a connection between the tracts, and where the person so using the land paid all the taxes thereon, and at intervals warned off trespassers and distrained cattle thereon found grazing, *held*, that such acts constituted actual, continuous, notorious, and adverse possession for the statutory period.

2. ———: COLOR OF TITLE: STATUTE OF LIMITATIONS. A tax deed purporting on its face to convey title to land, although void for failure to comply with the statute, affords color of title under the general statute of limitations.

3. ———: CLAIM BY NON-RESIDENT: POSSESSION BY AGENT. One may plead adverse possession and is entitled to the benefit of the statute relating thereto, although he was a non-resident and absent from the state during a portion or all of the period covered by his possession.

4. ———: ———: THE POSSESSION OF ONE'S AGENTS is, for the purpose of the statute of limitations, the possession of the principal.

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

Joseph H. Blair, for appellant.

Lake, Hamilton & Maxwell, contra.

IRVINE, C.

Victor G. Lantry brought this suit in the district court of Douglas county against James M. Parker, to quiet his title to a tract of land designated as outlot 215 in the city of Florence. In his petition plaintiff alleged title and possession in himself, and averred that the defendant claimed under a tax deed, which was void and conveyed no title. The defendant, by a counter-claim, alleged title in himself by adverse possession, and alleged that shortly before the commencement of the suit his possession was forcibly invaded by agents of the plaintiff. The prayer was for an injunction restraining the plaintiff from molesting defendant in his possession of said tract, and for general relief. The district court found all the issues for the defendant, dismissed plaintiff's petition, quieted title in defendant, and enjoined plaintiff from asserting any interest in the property, and from interfering with defendant's possession.

Several questions are presented as to the admissibility of the evidence offered by plaintiff to establish his paper title. These questions it will not be necessary to determine.

In Nebraska the law is settled that the operation of the statute of limitations is to vest absolute title in the occupant, when he has maintained an actual, continued, notorious, and adverse possession under claim of ownership for the statutory period. (*Horbach v. Miller*, 4 Neb., 31; *Gatling v. Lane*, 17 Id., 77.) And the operation of the statute being to vest title in the occupant, a title so acquired may be made the basis of an affirmative claim for relief, as well as it may be interposed as a defense. (*Gregory v.*

Langdon, 11 Neb., 166.) If, therefore, the trial court was justified in finding the issue of adverse possession for the defendant, the nature of plaintiff's title was immaterial and the decree was right.

The evidence is in some respects conflicting—so much so that a finding either way upon this issue would probably have to be sustained. Upon the part of the defendant the evidence tended to show that defendant commenced to use the land in 1862 as a pasture and continued such use until about 1870; that from that year he had used it continuously as hay land. In 1874 the defendant bought the land at tax sale, and in 1876 a tax deed was issued to him, the deed being void because of several defects admitted to be fatal. Since obtaining this deed, the evidence tends to show that every year the grass has been cut by Parker's agents upon so much of the land as permitted this use; that the land is high and somewhat rough; that it is partially surrounded by other land of Parker's, and that all this land is best adapted to the purposes of grazing and growing hay; that the particular tract in controversy has been so used by Parker continuously in the same manner that he has used the other land owned or claimed by him adjacent thereto; that while the particular tract has never been entirely enclosed by defendant, Parker has at different periods erected fences and plowed strips in such a manner as to clearly indicate that he was treating the land in connection with his other property, and as forming a portion of a more extended tract. The evidence also tends to show that Parker has paid all the taxes, and has at times warned herders to keep off the land, and has distrained cattle of others grazing thereon. This evidence is, we think, sufficient to justify the trial court in finding that defendant had the notorious, continuous, and adverse possession of the land for the statutory period. The law does not require that possession shall be evidenced by a complete enclosure, nor

by persons remaining continuously upon the land, and constantly from day to day performing acts of ownership thereon. It is sufficient if the land is used continuously for the purposes to which it may be in its nature adapted. In the case of arable land it is not necessary, in order to hold possession, that one should continuously have a crop in the ground. It is sufficient if, during the seasons of the year when crops are grown, the land be used for that purpose; and from harvest to seed-time one's possession is not interrupted, although during that period no acts of ownership may be exercised. So here, we think, that the protection of the grass during the growing season, the cutting, curing, and disposal of the hay at the proper periods, constitute actual possession in the defendant, especially when taken in connection with his using it in like manner as the surrounding land, and his acts to prevent its use by others.

It is said that the evidence does not show that hay was cut from all of the land, and that the actual possession exercised cannot be extended by construction to the unused portion, because the tax deed void on its face was insufficient to afford color of title. This question has already been settled. The case of *Sutton v. Stone*, 4 Neb., 319, merely holds that a void tax deed will not support the special limitation provided by the revenue law, and to the same effect is the case cited by plaintiff of *Redfield v. Parks*, 132 U. S., 239. In *Gatling v. Lane*, 17 Neb., 77, and in the same case on rehearing, 17 Neb., 80, it is distinctly held that a tax deed, although void, does constitute color of title under the general statutes of limitation.

It is also contended that the defendant cannot claim the benefit of the statute because he has resided without the state during nearly the whole of the period since the tax deed was obtained. The proof shows such to be the fact, the possession being through defendant's agents. This contention is founded upon section 20 of the Code of Civil Procedure, providing that if, when a cause of action

accrues against a person, he be out of the state, the period limited for the commencement of the action shall not begin to run until he come into the state; and if, after the cause of the action accrues, he depart from the state, the time of his absence shall not be computed as any part of the period within which the action must be brought. Section 17 of the Code provides that the absence from the state, death, or other disability of a non-resident shall not operate to extend the period within which actions *in rem* shall be commenced by and against such non-resident, or his representatives. Section 20 therefore applies and excludes the defendant from the benefit of the statute, unless this be an action *in rem* within the meaning of section 17. Section 77 of the Code of Civil Procedure provides that service may be made by publication 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. The validity of this statute, as sustaining decrees in suits to quiet title, was affirmed in *Watson v. Ulbrich*, 18 Neb., 186. It has also been affirmed by the supreme court of the United States in *Arndt v. Griggs*, 134 U. S., 316. In the latter case and in *Perkins v. Wakeham*, 86 Cal., 580, the jurisdiction of the courts in such cases to proceed against non-residents upon service by publication is based upon the power of a sovereign state to exercise jurisdiction over all property within its limits, and to adopt such reasonable legislation as will effectually enable the courts to reach out and adjudicate titles to such property. In the California case it is said, "while a decree quieting title is not *in rem*, strictly speaking, it fixes and settles the title to real estate, and to that extent certainly partakes of the nature of a judgment *in rem*." Mr. Justice Brewer, in *Arndt v. Griggs*, says, that a state has

control over property within its limits. "It cannot bring the person of the non-resident within its limits. Its process goes not out beyond its borders. But it may determine the extent of his title to real estate within its limits."

Upon a similar question the supreme court of Indiana says, in *Essig v. Lower*, 120 Ind., 239: "While the decree is not *in rem* strictly speaking, yet it must be conceded that it fixed and settled the title to the land then in controversy, and to that extent partakes of the nature of a judgment *in rem*." So the supreme court of the United States, in *Boswell's Lessee v. Otis*, 9 How. [U. S.], 336*, said: "A bill for the specific execution of a contract to convey real estate is not strictly a proceeding *in rem*, in ordinary cases; but where such a procedure is authorized by statute, on publication, without personal service of process, it is, substantially, of that character."

In *Pennoyer v. Neff*, 95 U. S., 734, Mr. Justice Field says: "It is true that in a strict sense a proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property without reference to the title of individual claimants; but in a larger and a more general sense the terms are applied to actions between parties where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the state, they are substantially proceedings *in rem*, in the broader sense which we have mentioned."

Under sections 51 and 77 of the Code our statutory action of ejectment may be brought against a non-resident and service obtained by publication. These statutes are based upon the same principle as that relating to suits to quiet title. They are valid for the same reasons, and the nature of the action, when service by publication is resorted to, is, so far as this discussion is concerned, the same. In

both cases they must be regarded, so far as the adjudication of title is concerned, as actions *in rem*. The object of the exception to the statute of limitations contained in section 20 of the Code is to prevent the running of the statute in cases where, by the defendant's absence from the state, the plaintiff is prevented from bringing his suit. He is not so prevented by the defendant's absence from beginning suit either to quiet title or in ejectment, and the reason of the exception does not apply in such cases. The object of the proviso quoted from section 17 was to prevent a too general application of section 20, and to permit the statute to run in those cases where by constructive service the plaintiff might proceed, notwithstanding defendant's absence. The term "actions *in rem*" was evidently used in section 17 in the same sense in which the courts have said that suits to quiet title upon constructive service are actions *in rem*. We think, therefore, that the defendant was entitled to the benefit of the statute, and the trial court having found, upon evidence sufficient to sustain the finding, that he had the actual, continuous, notorious, and adverse possession for the statutory period, the judgment is

AFFIRMED.

THE other commissioners concur.

CHARLES M. CADWALLADER, APPELLEE, V. SAMUEL MCCLAY, SHERIFF, ET AL., IMPLEADED WITH D. L. LOVE, APPELLANT.

FILED JUNE 29, 1893. No. 5107.

1. **Judgment by Default After Settlement: PROMISE TO DISMISS.** A judgment will be set aside where it was taken after a settlement between the parties, and contrary to plaintiff's promise to dismiss the action, the defendant having relied upon the promise and so suffered default.

2. ———: PROMISE OF INFANT. The defendant was justified in relying upon such promise, although the plaintiff was an infant, he possessing apparently good judgment and discretion and having been, by his father who appeared in the action as his next friend, permitted to transact the business out of which the action arose.

3. ———: INJUNCTION: CANCELLATION. Where none of the special proceedings provided by the Code is in such a case available an action in equity will lie to enjoin against the enforcement of such a judgment and to declare its cancellation.

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

J. S. Bishop and *Pound & Burr*, for appellant.

Reese & Gilkeson, contra.

IRVINE, C.

Charles T. Weber, an infant, by his father as next friend, recovered a judgment before a justice of the peace in Lancaster county for $107 and costs. A transcript of this judgment was filed in the office of the clerk of the district court, and after certain proceedings in aid of execution, an execution was levied upon real property of Cadwallader occupied by him and his family as a homestead. Before the sale this suit was begun by Cadwallader against the sheriff of Lancaster county and Weber for the purpose of vacating the judgment and enjoining the enforcement thereof. D. L. Love was permitted to intervene as assignee of Weber's judgment.

The plaintiff claimed first that the property levied upon was exempt from execution as a homestead. The defendants met this by showing that the judgment upon which the execution was issued was for wages owed by Cadwallader to Weber, and claimed that a homestead was not exempt from execution upon such a judgment. This question we need not determine in view of the conclusions reached on the other branch of the case.

The plaintiff contended, in support of his application to have the judgment canceled, that pending the action before the justice of the peace, and before judgment was rendered, he had a conference with Weber in which their accounts were looked over and a settlement reached, by which it was ascertained that Weber's account was overdrawn and that a small balance was due from Weber to plaintiff; that thereupon Weber promised that the suit should be dismissed; that Cadwallader relied upon that promise and did not attend at the time appointed for the hearing, when Weber, in fraud of his agreement, took judgment by default, and this fact was concealed from Cadwallader until too late to open up the judgment or appeal therefrom. The evidence upon this subject was conflicting, and the trial judge was justified in finding the facts for the plaintiff. There can be no doubt that a judgment taken contrary to an agreement of this character, relied upon by the defendant, would be vacated, if taken in the district court, under section 602 of the Code. That section does not apply to justices of the peace, and the plaintiff is therefore entitled to proceed in equity to avoid such judgment. (See Black, Judgments, sec. 373, and numerous cases there cited.) We do not think that the fact that Weber was an infant affects the case. His next friend was his father, and his father had emancipated him, as is clear from the fact that he had been permitted to engage in a contract with the plaintiff on his own behalf, and that his father undertook as his next friend to prosecute an action to recover his wages for him. He was apparently a young man approaching his majority and accustomed to transacting his own business. Under these facts we think Cadwallader was justified in relying upon Weber's representations and promises. An infant is responsible for frauds committed by him as well as for torts. (*Savage v. Foster*, 9 Mod. [Eng.], 35*; 1 Story, Eq. Jurisprudence, 385.) As was said in *Binsse v. Barker*, 13 N. J. L., 363, a similar case: "The defendant has been

injured by the want of good faith on the part of the plaintiff, and this court will not sustain a judgment under such circumstances." Love, as Weber's assignee, took only Weber's rights.

The briefs discuss a question as to whether the defendants were misled by a statement of the trial judge whereby they were induced to forbear putting upon the stand certain witnesses upon the question of fraud; but the record does not disclose any facts founding this argument, and the affidavit filed in this court cannot take the place of a transcript of the record or bill of exceptions.

AFFIRMED.

THE other commissioners concur.

STATE OF NEBRASKA, EX REL. JOHN L. CHEEVER, v. RODNEY K. JOHNSON ET AL.

FILED JUNE 29, 1893. No. 4389.

Intoxicating Liquors: LICENSE TO SELL: MANDAMUS TO REVOKE: VILLAGE BOARD. A board upon which is imposed the duty of hearing and determining applications for licenses to sell liquors will be compelled by *mandamus* to convene and revoke a license granted, where the essential proceedings requisite to the granting of a lawful license have not been complied with.

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

George I. Wright, for plaintiff in error.

N. H. Bell, contra.

IRVINE, C.

The plaintiff in error instituted this action in the district court of Saunders county against the defendants in error, one of whom is Martin Tighe, who was an applicant for a liquor license, and the others of whom constituted the board of trustees of the village of Valparaiso. The object of the suit was to obtain a *mandamus* compelling the board of trustees to convene and revoke a license by them issued to Tighe, and to set a day for the hearing of a remonstrance filed against the granting of such a license. The relator alleges that no notice of an application for a license was given except by publication in a certain newspaper, averred not to be the newspaper published in the county having the largest circulation therein; that the notice was published April 25, 1889, and that no application for a license was filed until May 10, and that upon May 11 a remonstrance was filed on the part of the relator and sixteen other residents of the village; that the board set a day for hearing said remonstrance, and that before action was taken thereon, Tighe withdrew his application, and on December 3, at a regular session of the board of trustees, upon motion for that purpose, an application of Tighe for a license was granted, without any other proceedings than those above set forth. A general demurrer was filed to this petition and sustained by the court, and judgment rendered against the relator for costs.

There can be no doubt that under the allegations of the petition admitted by the demurrer, the board had no authority to grant the license, and the demurrer seems to have been sustained upon the ground that *mandamus* was not the proper remedy. We do not regard this as any longer an open question in this state. *Mandamus* will lie in such case. (*Vanderlip v. Derby*, 19 Neb., 165; *State v. Hanlon*, 24 Id., 608; *State v. Kaso*, 25 Id., 607; *State v. Barton*, 27 Id., 476.) The judgment of the district court is re-

versed, but as the year for which the license was granted has expired, no writ of *mandamus* will be issued, but judgment will be entered against the respondents for costs.

JUDGMENT ACCORDINGLY.

THE other commissioners concur.

JOHN RABEN V. FIRST NATIONAL BANK OF AURORA.

FILED JUNE 29, 1893. No. 4653.

Promissory Notes: COLLATERAL SECURITIES: EXTINGUISHMENT OF PLEDGOR'S RIGHT BY FORECLOSURE SALE: ATTORNEY AND CLIENT. A, the owner of a note secured by mortgage, pledged the note to a bank to secure an indebtedness from A to the bank. A senior mortgagee brought a foreclosure suit in which A appeared by his own attorney and filed a cross-bill. A decree foreclosing both mortgages was rendered and the land was sold to a stranger. Thereafter the bank bought the land from the purchaser, A's attorney in the foreclosure case negotiating the purchase and receiving a bonus. Later the bank resold at a profit. *Held*, That A could not recover from the bank the amount of the note out of such profits.

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

Sedgwick & Power, for plaintiff in error.

A. W. Agee and *E. J. Hainer*, *contra*.

IRVINE, C.

The plaintiff in error, who was also plaintiff below, was the owner of a promissory note drawn to his order and executed by one Sparks for the sum of $374.70. This

note was secured by a mortgage upon land in Hamilton county, upon which there was a prior mortgage to the New England Mortgage Security Company for $400. Raben was indebted to the defendant bank and pledged the Sparks note and mortgage to the bank as collateral security for his indebtedness. The New England Mortgage Security Company began suit in the United States circuit court to foreclose its mortgage, making Sparks a party defendant. Mr. Alfred W. Agee held a third mortgage upon the same land. He was an attorney at law, and in that capacity represented the bank in many matters. He had also for some time acted as the attorney of Raben under an annual retainer. Mr. Agee appeared in the foreclosure case, filed an answer and cross-bill for Raben, and a decree of foreclosure was ultimately rendered, establishing the mortgages in the order above stated, and directing a sale of the premises. A request for stay was filed, and a short time after the expiration of the stay the premises were sold by the master to one John Sutton for $790, the proceeds not being quite sufficient to satisfy the costs and the New England company's mortgage. Neither Agee, Raben, nor the bank seems to have known of the issuance of an order of sale, nor to have been aware of these proceedings until after the sale had been confirmed and a master's deed made to Sutton. Agee then learned that the sale had been so made and obtained an interview with Sutton, who was until that time an entire stranger to all the parties. Sutton offered to convey the property to Agee for $200 more than the amount of his bid. Agee went to the bank for the purpose of borrowing $1,000, with which to purchase the land. Upon making his object known, one Delevan Bates, a stockholder in the bank and book-keeper thereof, suggested that if the bank was to advance the money it might buy the land for itself. Agee then proposed to give the bank the benefit of his bargain provided the bank would pay him $100. This proposition was accepted, and ultimately a deed was

executed from Sutton to Bates, Sutton receiving $990 and Agee $100, the bank advancing the money. Sometime afterwards the land was conveyed by Bates to one Larson for $1,600, the bank receiving the purchase money. Before Bates received his deed, and while negotiations were pending between Agee and Sutton, Raben and the bank effected a settlement of their accounts; Raben transferring certain property to the bank in satisfaction of all his indebtedness thereto. Raben claims that this settlement was made without any knowledge on his part of the pending negotiations between Sutton, Agee, and the bank, and there is no evidence to show the contrary. Raben brought this suit seeking to recover from the bank the amount of the Sparks note with interest. There was a general finding and judgment for the defendant.

In addition to the foregoing facts, which are very clearly established, Raben claims that Agee was, in the foreclosure case, acting as the bank's solicitor, and that both Agee and the bank assured Raben that the bank would collect the Sparks note out of the security and that Raben need pay no attention to the matter. The bank denies this. The clear preponderance of the evidence is that the bank undertook no obligations in the foreclosure case; that Agee's employment was on behalf of Raben alone, and that the note and mortgage were delivered to him by the bank only to permit him to enforce Raben's rights. On the part of Raben his testimony is that officers of the bank told him he need pay no attention to the sale; that they would attend the sale. His testimony goes no farther than this. The officers of the bank on the contrary testify that they made no promises and assumed no duties whatsoever, but left the whole matter of protecting the mortgage to Raben himself. The findings of the trial judge are clearly sustained by the evidence. Upon this state of facts and these findings the only question is whether the bank could purchase the property for itself without accounting to Raben

for the amount of the note out of the profits realized by it. It may be that had the bank purchased the property at the foreclosure sale it would be held to treat the property merely as collateral to the debt under the same terms that it had before held the mortgage, but that state of affairs does not exist. The bank was not bound to bid on the property at the sale. The property was sold to a stranger whose title to it was perfected, and the whole interest of both Raben and the bank had become completely divested before Agee's negotiations with Sutton took place. The question of the bank's power to invest its funds in real estate in this manner has no bearing upon this case. It does not appear that the purchase was made with any reference to the relations between the bank and Raben; on the contrary it appears that the officers of the bank considered it as an entirely independent transaction, and were moved only by the consideration that it would be more profitable for them to buy the land themselves, paying Agee his bonus, than to lend Agee the money wherewith to make the purchase. We know of no principle of law holding even a trustee to accountability for profits realized by him through the purchase and sale of property, once held by him in trust, where the trust had been completely terminated and the interest of the *cestui que trust* been divested by a prior sale to a stranger, without any collusion of the trustee.

The difficulty seems to have grown out of the conflicting relations between Agee and the parties. The rights existing between him and his client are not before us for determination. We do not wish to say that Mr. Agee's course was improper, but the fact that he not only was interested in the property himself, but also undertook to act for Raben in a matter where Raben's interests might not prove identical with those of the bank with which he was also closely associated, presents a situation which is unfortunate at least. The case shows what extreme caution should be

observed by an attorney in dealing in any manner with property in which his clients are interested. Judgment

AFFIRMED.

THE other commissioners concur.

L. H. LAFLIN v. F. B. SVOBODA.

FILED JUNE 29, 1893. No. 4863.

1. **Animals: DAMAGE UPON CULTIVATED LANDS: LIABILITY OF AGISTER.** Under the herd law, Compiled Statutes, chapter 2, article 3, a person having the custody of cattle for the purpose of depasturing the same, although without compensation from the general owner, is liable for damage done by them upon the cultivated lands of another.

2. ———: ———: ———: **REMEDIES.** In such case the person injured is not confined to the lien provided by statute, but may maintain an action for damages.

ERROR from the district court of Johnson county. Tried below before APPELGET, J.

Daniel F. Osgood, for plaintiff in error.

Chamberlain Bros. & Rood, contra.

IRVINE, C.

The defendant in error brought this action against the plaintiff in error to recover damages for injury to crops growing on land of the defendant in error, committed by cattle alleged in the petition to be those of plaintiff in error, and cattle of which he had the possession. There was a verdict and judgment in favor of the defendant in error, the plaintiff below. The errors assigned relate to the giving of certain instructions by the court and to the refusal

of instructions asked by the plaintiff in error. The instructions given by the court were based upon the theory that the plaintiff in error was liable for injuries committed not only by his own cattle, but by cattle of others in his custody. The question presented is the construction of the herd law, chapter 2, article 3, Compiled Statutes. By section 1 of this article it is provided, "That the owners of cattle, horses, mules, swine, and sheep in this state shall hereafter be liable for all damage done by such stock upon the cultivated lands in this state as herein provided by this act."

It appears from the evidence that a portion, if not all, of the cattle which committed the trespass complained of were not owned by the plaintiff in error, but were permitted to be pastured upon his land without compensation to him. Under this state of facts the plaintiff in error contends that the rule of liability as between bailor and bailee applies; and that the bailment of the cattle to the plaintiff in error being gratuitous, he would not in any event be liable except for gross negligence on his own part. In urging this point the plaintiff in error confuses the relations existing between bailor and bailee with those existing between the bailee and third persons, and the doctrine referred to has no application to this case. It is also urged that the defendant in error, by surrendering possession of the cattle, and so waiving the lien created by section 2 of the herd law, lost his remedy. This is not true, because by section 11 of the herd law it is provided that nothing in that law contained shall be so construed as to prevent the person injured from maintaining an action for damages. (*Keith v. Tilford*, 12 Neb., 271.)

The most serious question in the case is, whether the word "owner" in the statute is to be construed by restricting the term to the general owner, or by extending it to persons in possession under some special title and having the custody of the stock. It was held in *Delaney v. Errickson*, 10 Neb.,

492, that as to trespasses by cattle upon open uncultivated lands the common law of England is not applicable to Nebraska. But in *Keith v. Tilford, supra*, this case was explained, and restricted to uncultivated lands, and it was said that where growing or standing cultivated crops are injured the owner has his remedy, and that the first section of the herd law conferred no right upon the people of the state which they did not possess before its enactment. That section must therefore be deemed declaratory of the common law in regard to trespasses upon cultivated lands. Indeed, the common law is stated almost in the words of the herd law, except that it was not restricted to cultivated lands, and at common law the same double remedy existed, to-wit, by distress or by action. (3 Bl., Com., 211.) Under the common law it was frequently held that an agister or depasturer is liable for trespasses committed by cattle in his possession, and in such case many authorities hold that the owner is not liable, especially in trespass. (*Rossell v. Cottom*, 31 Pa. St., 525; *Tewksbury v. Bucklin*, 7 N. H., 518; *Kennett v. Durgin*, 59 Id., 560; *Marsh v. Jones*, 21 Vt., 378; *Ward v. Brown*, 64 Ill., 307.) In *Weymouth v. Gile*, 72 Me., 446, it was contended, as here, that there was no contract of agistment, but that the owners took the cattle from defendant's close at night, and returned them in the morning. Nevertheless it was held that the depasturer was liable. In *Smith v. Jaques*, 6 Conn., 530, in *Barnum v. Vandusen*, 16 Id., 200, and in *Sheridan v. Bean*, 8 Met. [Mass.], 284, statutes very similar to ours were construed, and the word "owner" held to include depasturers having the custody of cattle. The instructions given by the court were correct, and those asked by the plaintiff in error were properly refused. Judgment

AFFIRMED.

THE other commissioners concur.

STATE OF NEBRASKA, EX REL. W. S. SUMMERS, DEPUTY AND ACTING ATTORNEY GENERAL, V. V. J. URIDIL ET AL.

FILED JUNE 29, 1893. No. 6102.

1. **Incorporation of Villages: ORDER FRAUDULENTLY OBTAINED.** An order incorporating a village is void when it is obtained from the county board by means of a paper purporting to be a petition signed by a majority of the taxable inhabitants of the territory sought to be incorporated, but the signatures attached to which were not by the signers thereto appended, but were given for some other purpose and fraudulently thereto attached.

2. **Wrongful Exercise of Corporate Powers: QUO WARRANTO: OUSTER.** *Quo warranto* is the proper remedy to oust persons who are exercising the powers of corporate offices when the corporation has no legal existence.

ORIGINAL proceeding in nature of *quo warranto*.

W. S. Summers, Deputy and Acting Attorney General, Frick & Dolezal, and *S. H. Steele,* for relator.

IRVINE, C.

This is an information in the nature of *quo warranto*, alleging that the respondents, conspiring to usurp the franchise and power to license the traffic in intoxicating liquors, and enjoy its revenue in a place in Butler county known as Abie, procured upon a piece of paper the signatures of certain persons, and thereafter made a writing in the form of a petition, praying for the incorporation, as a village, of said place of Abie, and fraudulently attached said signatures to said writing, making the same falsely to appear as a petition in due form by a majority of the taxable inhabitants of said Abie for incorporation as a village; that they presented that paper to the board of supervisors of Butler county, and that certain of the respondents ap-

peared before said board and falsely swore that said place of Abie contained more than two hundred and less than fifteen hundred inhabitants, whereas in fact said place contained in all not more than seventy inhabitants. The information further alleges that by such means the respondents fraudulently procured the county board to make an order pretending to incorporate said place of Abie as a village, and appointing the respondents as a board of trustees of said village; and that the respondents have, ever since said proceedings, unlawfully and fraudulently usurped and exercised the franchise and corporate powers and duties of a village. The prayer is for a writ of *quo warranto* and judgment of ouster against said defendants and for costs. No answer has been filed and the allegations of the information must be taken as confessed.

It is clear under these facts that the territory designated as Abie was not entitled to incorporation as a village; that no proper petition was filed before the board of supervisors, and that, on the contrary, a grave fraud was practiced upon the board to procure the order of incorporation, whereby the board was induced to act upon a forged petition which conferred no jurisdiction upon the board. Under the common law *quo warranto* would not lie in such a case. (*Rex v. Saunders*, 3 East [Eng.], 119.) And there are decisions in the United States to the same effect. Section 704 of the Code of Civil Procedure provides, however, that an information may be filed against any person unlawfully holding or exercising any public office or franchise, or when any persons act as a corporation without being authorized by law. Under very similar statutes it has been held in several states, and we think rightly, that in such proceedings against the persons unlawfully exercising the powers of an office the legal existence of that office may be determined. (*People v. Carpenter*, 24 N. Y., 86; *State v. Parker*, 25 Minn., 215; *State v. Gladwin*, 41 Mich., 647; *State v. Coffee*, 59 Mo., 59.) Indeed it would seem that to

institute proceedings against the village itself would be to recognize its existence as a corporation, and that if the incorporation is void the only proceedings must be against the persons undertaking to exercise its franchises. There will be a judgment of ouster and for costs against the respondents.

WRIT ALLOWED.

THE other commissioners concur.

AMERICAN WATER-WORKS COMPANY V. FRANK DOUGHERTY.

FILED JUNE 29, 1893. No. 4905.

1. **Personal Injuries:** NEGLIGENCE: CONTRIBUTORY NEGLIGENCE: QUESTIONS FOR JURY. Issues as to the existence of negligence and contributory negligence, and as to the proximate cause of an injury, are for the jury to determine, when the evidence as to the facts is conflicting, and where different minds might reasonably draw different inferences as to these questions from the facts established.
2. ———: ELEMENTS OF DAMAGE: MENTAL SUFFERING. In an action for personal injuries, mental suffering and anxiety caused by a physical injury is an element of damage whether or not the injury was due to the willful act of the defendant.

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

John L. Webster, for plaintiff in error.

Isaac Adams, contra.

IRVINE, C.

The defendant in error Frank Dougherty recovered judgment against the plaintiff in error in the sum of $500

for injuries sustained by defendant in error by being thrown into a trench excavated by plaintiff in error in Sherman avenue in the city of Omaha, and alleged to have been left without proper guards or precautions against accident. To reverse this judgment the plaintiff in error brings these proceedings.

The plaintiff in error was operating a system of waterworks in the city of Omaha, and possessed by ordinance the right to occupy streets in that city with its mains, and to make openings and excavations in such streets for the purpose of laying and repairing such mains. A general ordinance of the city in relation to the laying and repairing of water, sewer, and gas pipes provided as follows: "Red lights shall be kept around all unfinished work at night, and fences or other suitable and sufficient barricades against accidents shall be placed around excavations at all times." On the day preceding the accident the plaintiff in error had opened a trench on Sherman avenue running lengthwise of the street, which was north and south, some six or eight feet from the west curb. This trench was from sixteen to twenty feet long, about four feet wide and seven feet deep. About 7 o'clock, and after it had grown dark, Dougherty started from a point on Sherman avenue about a mile north of the excavation, driving two horses attached to a wagon. He was seated upon a board laid across the side boards of the wagon. He started from a saloon, and the evidence shows that he had been there some time, and had partaken of intoxicating beverages, but upon this point it is very doubtful whether the evidence would have been sufficient to have sustained a finding that he was intoxicated. He was accompanied by two men driving one horse attached to a buggy. Dougherty drove down the west side of the street, the two men referred to upon the east side. They were driving at a somewhat rapid rate, and remained so close together that they were enabled to converse as they drove along. When the excavation was

reached, the two men in the buggy being a short distance ahead, Dougherty's horses both plunged into the excavation and Dougherty was thrown either into the trench or upon the ground at the side thereof, sustaining the injuries to recover for which the action was brought.

The principal error assigned is that the verdict is not supported by sufficient evidence, and it is argued upon this assignment in the first place that there is no evidence of negligence on the part of the water-works company causing the accident, and, secondly, that the evidence discloses contributory negligence on the part of Dougherty.

The evidence in regard to the condition of the excavation is conflicting. That introduced on behalf of the company tends to show that when work ceased, about 6 o'clock, the earth removed from the excavation had been piled up along each side and across each end of the ditch to a height varying from one and a half to three feet; that at each end there had been thrust into the loose earth a stick from three to five feet in length, and to the top of each stick was fastened a lantern having a wire guard a short distance from the glass, and a jacket of red flannel drawn tightly over the guard. The evidence on behalf of Dougherty tends to show that when the accident occurred only one red light was visible, and that at the south end of the trench, and that there was no earth, or, if any, a very small quantity across the north end. There is evidence to the effect that Dougherty's horses struck a lantern at the north end, shattering it, and that the fragments were found after the accident. But the two men in the buggy observed but one lantern, and this only when they were within about twenty-five feet of it. As to the existence of the embankment of earth across the north end of the trench the evidence of the defendant's witnesses, Vickery and Dr. Brown, is conflicting and both cannot be believed. The jury was justified in accepting the testimony offered on behalf of Dougherty, and it is in the light of that testi-

mony that the case must be considered. By the ordinance referred to the company was required to provide fences or other suitable and sufficient barricades against accidents. The term barricade imports an obstruction—not merely a warning, but an actual impediment to travel. If the ordinance had only contemplated the throwing out of the earth necessary in making the excavation, it would be a useless piece of legislation, for that much of a barricade would be necessarily made. The general term "suitable and sufficient barricade" must also be construed with reference to the special term "fence," and these considerations lead us to the conclusion that the ordinance contemplates a barricade more marked than even the evidence of the water company shows to have been in existence about this trench. As to the lights erected, while the testimony of the superintendent of the water company is to the effect that he has seen such lights at the distance of a mile, the testimony of both Russell and Yubel, the men in the buggy, is that they saw but one light, and that at the south end. Yubel did not see it until he was within about twenty-five feet of it, while Russell does not seem to have noticed it until after the accident. The light of a common lantern passing through a piece of red flannel cannot be very brilliant, and whether or not it afforded a sufficient warning was clearly a question for the jury. We think the jury was clearly justified in finding that the trench had been left without proper barricades or cautionary signals, and we think it was clearly justified in inferring that the negligence of the company in this regard caused the accident.

Much that has already been said applies to the question of contributory negligence. We cannot say that the jury was bound to find that Dougherty was intoxicated; that he was driving with undue speed, or that in failing to observe the red light and avoid the trench he failed to use ordinary care. There is some general complaint of the instructions

upon these subjects, but when taken together they state the law fairly, and no specific exceptions were taken.

It is assigned as error that the court erred in giving instruction No. 1 asked by Dougherty. This instruction is as follows: "The jury are instructed that the leaving of an excavation in the street without fencing or suitable and sufficient barricades against accident contrary to the provisions of the city ordinance is evidence of negligence. If you shall find that the earth thrown out from the trench on either side did not constitute a suitable and sufficient barricade against accidents, and that the accident occurred through want of a suitable and sufficient barricade while the plaintiff was in the exercise of ordinary care, then you will find for the plaintiff, notwithstanding that you may find that the excavation was at the time guarded by red lights." The first objection urged to this instruction is that its first sentence omits the element of the necessity of proving that the want of a suitable and sufficient barricade contributed to the happening of the accident. The remainder of the instruction states this in clear terms, and is applicable to the evidence. It is also urged that the instruction is erroneous in not telling the jury what would be sufficient and suitable barricades. This point is covered by the second instruction given by the court of its own motion, where the jury is told that it is its duty to inquire whether the company did or did not use such precautions as a person in the exercise of ordinary prudence would have used to warn and protect persons traveling along the streets from the danger to which they might be exposed by reason of the trench. That instruction was at least as favorable to the company as the law would permit. The remaining objections to this instruction seem to rest upon the proposition that the court should have itself determined that the plaintiff was guilty of contributory negligence. This question has already been discussed.

The plaintiff in error also contends that the court erred

in instructing the jury that they might consider mental suffering and anxiety in estimating the damages. This instruction was correct. Owing to the nature of things there can be no precise scale for weighing damages in such cases. Physical suffering caused by such injuries is in its nature inseparable from mental suffering and anxiety from the same cause. Whatever may be the rule as to the recovery of such damages where there has been no physical injury, where such physical injury has been sustained, mental suffering and anxiety are, as much as physical, an element for which the plaintiff should be compensated. Judgment

AFFIRMED.

THE other commissioners concur.

MCKINLEY & LANNING ET AL. V. JOHN T. CHAPMAN.

FILED JUNE 30, 1893. No. 4765.

1. **County Courts:** APPEAL. In a civil action in the county court an appeal is to be taken in the same manner as if before a justice of the peace.
2. ———: ———: BONDS: TIME FOR FILING. An undertaking for an appeal delivered to the county judge at 9:30 P. M. of the tenth day after the judgment is rendered is within ten days, and the appeal is taken within the time fixed by statute.

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

Thomas Darnall and *John P. Arnott*, for plaintiffs in error:

An appeal undertaking is filed in time when it is delivered to the county judge at 9:30 P. M. of the tenth day

after judgment. (*Dale v. Doddridge*, 9 Neb., 143; *McGavock v. Pollack*, 13 Id., 537; *Helphenstine v. Vincennes National Bank*, 65 Ind., 589.) A paper is said to be filed when it is delivered to the proper officer and by him received to be kept on file. (*Sutton v. McCoy*, Wright [O.], 95; *Peterson v. Taylor*, 15 Ga., 484; *Perkins v. Strong*, 22 Neb., 731.)

Fowler & McNamara and *W. M. Iodence, contra.*

MAXWELL, CH. J.

A trial was had in this case in the county court on the 8th day of July, 1890, and judgment rendered against the plaintiffs in error for the sum of $450. On the 18th of the same month the plaintiffs placed their undertaking for an appeal in the hands of the county judge, whereupon the next day he made the following record of such filing:

"In the County Court Box Butte County, State of Nebraska.

"JOHN T. CHAPMAN
v.
MCKINLEY & LANNING, JOB HATHAWAY, AND H. B. AUSTIN.

"I, D. K. Spacht, county judge within and for the county of Box Butte, state of Nebraska, hereby certify that the appeal undertaking in this case was handed to me by Daniel Roberts and left with me on the 18th day of July, 1890, at 9:30 P. M., at my residence, in Box Butte county, Nebraska; that the said undertaking in appeal was entered of record in said case and securities thereon approved by me the 19th day of July, 1890.

"Witness my hand and official seal this 26th day of July, A. D. 1890.

"[SEAL.] D. K. SPACHT,
"*County Judge.*"

A transcript was thereupon duly filed in the district court. The defendant in error in that court moved to dismiss the appeal because the undertaking was not filed in ten days from the date of the rendition of the judgment. The motion was sustained and the appeal dismissed, from which order the cause is brought into this court.

Section 26, chapter 20, Compiled Statutes, provides: "In civil actions brought under the provisions of this chapter either party may appeal from the judgment of the probate court, or prosecute a petition in error, in the same manner as provided by law in cases tried and determined by justices of the peace. The amount of the bond or undertaking taken shall be double the amount of the judgment and costs, and shall be approved by the probate judge."

Section 7 of the same chapter provides: "It shall be the duty of the probate judge, in each county, to hold a regular term of the probate court at his office at the county seat, commencing at 9 o'clock A. M. on the first Monday of each calendar month, for the trial of such civil actions brought before such court as are not cognizable before a justice of the peace. Such regular term shall be deemed to be open without any formal adjournment thereof until the third Monday of the same month, when all causes not then finally determined shall be continued by such court to the next regular term; but such courts shall be deemed to be always open for the filing of papers and issuance of process in civil actions, and for the purpose of taking and entering judgment by confession."

Section 1007 of the Code provides: "The party appealing shall, within ten days from the rendition of judgment, enter into an undertaking to the adverse party, with at least one good and sufficient surety to be approved by such justice, in a sum not less than $50 in any case, nor less than double the amount of judgment and costs, conditioned: First—That the appellant will prosecute his ap-

peal to effect and without unnecessary delay. Second—That if judgment be adjudged against him on the appeal, he will satisfy such judgment and costs. Such undertaking need not be signed by the appellant."

Had the county judge in this case been a justice of the peace and the appeal undertaking delivered to him, as in this case, no question, I think, would have been raised against it on the ground that it was not filed in time. The Code gives the appellant ten days after the day on which the judgment is rendered in which to file the undertaking. There is no provision that it shall be filed during business hours. The undertaking must be delivered to the officer, and if the sureties are deemed sufficient, it his duty to approve the undertaking.

In *State v. Clark*, 24 Neb., 318, where the justice had received and retained the undertaking for an appeal without objection, it was held to be his duty to approve the same, and the appeal was sustained. It is said: "The particular objection to a bond presented to a justice for his approval must be made at or soon after the time of receiving the same, and an opportunity given the appellant to correct the alleged defect. An appeal is a valuable right, and being in furtherance of justice, the laws relating to it are to be liberally construed. The justice, therefore, is to aid as far as possible in perfecting an appeal. The fact that the appeal is from his judgment is no reflection either upon his integrity or ability."

It is very clear that the undertaking in this case was filed within the proper time, and dates from the time of delivery. The judgment is therefore reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

CLARKE BANKING COMPANY V. ISAAC K. WRIGHT.

FILED JUNE 30, 1893. No. 4812.

Attachment: MOTION TO QUASH: AMENDMENT OF AFFIDAVIT. An affidavit for the issuance of an attachment may be amended by leave of the court, even after a motion to quash the proceedings is filed, because of that particular defect.

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

J. M. Easterling, H. M. Sinclair, and *Sinclair & Brown,* for plaintiff in error.

Gid E. Newman, contra.

MAXWELL, CH. J.

On the 1st day of April, 1891, the plaintiff commenced an action in the district court of Buffalo county against the defendant to recover money alleged to be loaned to the defendant by the plaintiff. On the same day the plaintiff, by J. M. Easterling, filed an affidavit for an order of attachment in said cause, as follows:

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

"In the District Court of Buffalo County, Nebraska.

"THE CLARKE BANKING COMPANY }
v. }
ISAAC K. WRIGHT. }

"J. M. Easterling, being first duly sworn, upon his oath deposes and says that he is the duly authorized attorney for the Clarke Banking Company, a corporation duly organized under the laws of the state of Nebraska and doing business in Buffalo county, Nebraska, with office and place of business at Sartoria, in said county and state; that plaintiff has commenced an action against Isaac K. Wright

in the district court of Buffalo county to recover the sum of $250, with ten per cent interest from March 4, 1891, now due and payable to the plaintiff from defendant for money loaned the defendant at his special instance and request.

"Affiant further says that plaintiff's claim is just, and that plaintiff ought, as he believes, to recover thereon the sum of $250; and that the defendant is a non-resident of the state of Nebraska, as he verily believes.

"J. M. EASTERLING.

"Subscribed in my presence and sworn to before me this 1st day of April, 1891.

"[SEAL.] WILL G. NYE,

"*Clerk of the District Court of Buffalo County, Neb.*"

On the filing of said affidavit an order of attachment was issued and certain property of the defendant attached. Afterwards the defendant appeared and filed the following motion:

"Now comes the defendant, by his attorney, Gid E. Newman, and making a special appearance, objects to the jurisdiction of the court over the subject-matter of this suit for the reason that the affidavit filed herein, preliminary to the issuing of the attachment, is insufficient in law, because it states that the defendant is a non-resident, upon information, as he verily believes, and not in positive terms."

On the 13th day of June, 1891, and while the motion to dissolve the attachment was pending, the plaintiff made application to the court for leave to amend the affidavit for attachment as follows:

"Now comes the plaintiff and asks leave of the court to amend the affidavit of attachment in the above entitled cause, so that said affidavit may positively state that said defendant is a non-resident of this state."

The application to amend was overruled and the attachment discharged, and that is the error complained of. In this we think the court erred.

In *Struthers v. McDowell*, 5 Neb., 491, this court held that "An affidavit for the issuance of an attachment may be amended by leave of the court, even after a motion to quash the proceedings is filed, because of that particular defect." In delivering the opinion of the court Chief Justice LAKE says (pp. 493-4): "Under our statute of amendments great latitude is given to the court in permitting even material defects to be remedied, especially where they were occasioned by mistake or are the result of oversight, and it can be seen that by so doing substantial justice will be done. And this rule is not limited to pleading merely, but is applicable to all proceedings in civil actions. (*Irwin v. Bank of Bellefontaine*, 6 O. St., 81; *Campbell v. Whetstone*, 3 Scam. [Ill.], 361; *Langworthy v. Waters*, 11 Ia., 432; *O'Dea v. Washington County*, 3 Neb., 118.)" The decision in that case conforms to the spirit of the Code, and is right and will be adhered to. The court, therefore, should have permitted the amendment to be made. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

CHRISTIAN RATHMAN, APPELLANT, V. EDMUND PEYCKE, APPELLEE, ET AL.

FILED JUNE 30, 1893. No. 3931.

Equity: CONTRACTS: FRAUD: RESCISSION. *Held*, That as between the plaintiff and Peycke the proof failed to show fraud, and that as the plaintiff had refused the offer to redeem the cheese company's stock by paying the amount for which it was taken as security with interest thereon, the judgment would be affirmed.

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

Charles B. Keller, for appellant.

Charles Ogden, contra.

MAXWELL, CH. J.

This action was brought in the district court of Douglas county on the 10th day of March, 1886, to require Peycke—

First—To surrender up certain school leases left by Dorn with his wife for Christian Rathman, and which were gotten possession of by Edmund Peycke and retained by him.

Second—To require Edmund Peycke to account for and to repay to the said appellant certain moneys obtained from Rathman by fraud and false representations.

Third—To cancel certain notes obtained from Rathman through fraud, and on account of the failure of the consideration thereon, and

Fourth—To cancel a certain contract entered into on the 2d day of January, 1885, assigning certain stock in the Blair Cheese Company from Rathman to Peycke, and to require the said Peycke to account for the value of said stock, in the meantime enjoining the transfer of said shares by said Peycke.

While the action was pending the plaintiff filed a supplemental petition setting forth that Peycke had borrowed large sums of money upon the shares of stock in the Blair Cheese Company assigned to him by the plaintiff, by reason of which the stock had become worthless, and praying for an accounting.

On the trial of the cause the court granted the plaintiff leave to redeem the Blair Cheese Company's stock by paying the amount with interest, for which it was given as security. This offer the plaintiff declined, whereupon the

court found the issues in favor of the defendants and dismissed the action. The plaintiff appeals.

It appears from the record that for sometime prior to March, 1886, one Rudolph Dorn held prominent positions in at least two companies in the state, and was receiving salaries the aggregate of which seems to have exceeded $400 per month. Dorn seems to have stood well as a business man, and the business relations between him and the plaintiff were of the most friendly character. The same is true of the business relations between the plaintiff and Peycke. Dorn suggested to both the plaintiff and Peycke that money could be made by leasing school lands in Keith county from the state. The result was that the plaintiff gave his note to Dorn for $1,280, and procured the notes of two or more of his brothers, each for a like amount, in favor of Dorn. These notes Dorn and Peycke indorsed, and Dorn obtained the money thereon. Peycke and three or four persons in Omaha were also induced to give their notes to Dorn for $1,280 each. The proof in regard to the amount of school land leased is quite meager. That some land was leased there is no doubt, but the quantity is left in doubt. It seems to be conceded, however, that the scheme was practically a failure, and that the contributors to the fund received but little for their investments. In the meantime the plaintiff's note and those of his brothers, which he had indorsed, and had also been indorsed by Dorn and Peycke, had become due at a bank and were paid by Peycke. Thereupon the plaintiff gave him security upon his cheese company stock, and it is claimed that Peycke used unfair means to supplant the plaintiff in said company and instate himself therein.

There is testimony in the record tending to show that Dorn was dishonest and deceived both the plaintiff, Peycke, and a number of others, and inveigled them into the school land scheme by reason of which he obtained possession of a large amount of money without any effort on his part to

procure school lands, and that soon afterwards he absconded from the state. The proof fails to show that Peycke acted in bad faith with the plaintiff, or others, but seems, like the plaintiff, to have placed full reliance in Dorn. The charge of fraud against Peycke, therefore, is not sustained. The plaintiff was offered the right to redeem the cheese company's stock upon the payment of the amount for which it was taken as security and refused to accept of the same. That was the proper relief under the proof in the case. There is no error in the record and the judgment is

AFFIRMED.

THE other judges concur.

CHARLES H. BOYD, ADMINISTRATOR, APPELLEE, V. ROBERT W. FURNAS, APPELLANT, ET AL.

FILED JUNE 30, 1893. No. 4685.

1. **Judgments:** REVIVOR: LIMITATIONS: JURISDICTION. *Held*, That the court had jurisdiction of the subject-matters and the parties served.
2. ———: ———: PROOF. That the proof fully sustained the order of the court reviving the judgment.
3. ———: ———: LIMITATIONS. The limitation of one year in which to revive an action on motion does not apply to a proceeding to revive a judgment.
4. ———: ———: ACTION BY ADMINISTRATOR: PARTIES. *Held*, That the action was properly brought in the name of the administrator.

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

Charles E. Magoon, for appellant.

J. C. Johnston and *H. H. Blodgett, contra.*

MAXWELL, CH. J.

This proceeding was brought in the district court of Lancaster county to revive a judgment in the district court of that county. The conditional order of revival is as follows:

"And now comes Adelia Boyd, formerly Adelia Frankman, and suggests to the court that the plaintiff Adolphus G. Frankman has died since the judgment was recovered in this action, and that Charles H. Boyd has been appointed administrator of his estate, and that there still remains due and unpaid on said judgment the sum of $579.92, and the sum of $81.52 costs, and interest thereon from September 14, 1889, and the court being fully advised in the premises, on motion of the plaintiff it is ordered that the defendants Robert W. Furnas and Orsamus H. Irish show cause, within twenty days from the service of this order, why judgment for the sum of $579.92 should not be revived against them, the said Robert W. Furnas and Orsamus H. Irish, and in favor of Charles H. Boyd, the administrator of the estate of the deceased, Adolphus G. Frankman."

This order was duly served on the defendant Furnas and he, through his attorney, filed his answer as follows:

"Comes now the defendant Robert W. Furnas, and objects to the revivor of the judgment heretofore rendered herein for the reasons following:

"1. The court has no jurisdiction of the subject-matter.

"2. The relief asked in the application herein is contrary to the law.

"3. There is no authority in law for granting the application herein.

"4. That said application was not made within the time fixed by law.

"5. That the said Boyd has no right to the relief prayed for in said application, and has not the right in law to make said application.

"6. That said A. G. Frankman on the 1st day of April, 1875, assigned said judgment to one A. N. Goldwood, and that said Frankman was not the owner of said judgment at the time of his death."

On the hearing the court made the following order:

"This cause having been heretofore, on a former day of this term of court, to-wit, December 20, 1890, submitted to the court upon the motion of Charles H. Boyd, administrator of the estate of the said Adolphus G. Frankman, now deceased, to revive the judgment heretofore entered in this court in the above entitled cause, in favor of the said plaintiff and against the said defendants, which judgment has become dormant by lapse of time, and because of the death of the said plaintiff, and it appearing to the court that the order heretofore entered herein commanding the said defendants to show cause, if any there be, why said judgment should not stand revived has been duly served upon the defendant Robert W. Furnas, and that no sufficient cause has been shown by him why said judgment should not be revived, the court doth sustain said motion.

"It is therefore considered and adjudged by the court that the judgment entered herein on the 21st day of April, A. D. 1875, for the sum of $237.52, with interest on said sum from the said 21st day of April, 1875, at the rate of ten per cent per annum until paid, and costs of suit, taxed at $45.98, be, and the same hereby is, revived in the name of the said Charles H. Boyd, administrator of the estate of Adolphus G. Frankman, deceased, together with the costs of increase, taxed at $46.39, and the costs in this behalf expended, taxed at $10.30, and for all of which sums execution is hereby awarded."

The errors assigned are the same as in the answer.

It will be observed that the answer is exceedingly vague

and indefinite. Take the first assignment, that "the court has no jurisdiction of the subject-matter." It is not denied that the court has authority to revive a judgment which by lapse of time has become dormant. Such power is clearly conferred by statute and has been exercised by the courts wherever the facts justified the revival. (*Eaton v. Hasty*, 6 Neb., 419; *Gillette v. Morrison*, 7 Id., 263; *Hunter v. Leahy*, 18 Id., 80; *Dennis v. Omaha National Bank*, 19 Id., 675; *Garrison v. C. Aultman & Co.*, 20 Id., 311; *Creighton v. Gorum*, 23 Id., 502.) In the case last cited a judgment was recovered in the county court, a transcript thereof filed in the district court, on which an execution was issued and returned unsatisfied. No other proceedings were had for more than nine years, when steps were taken to revive the judgment, and it was held that the plaintiff was entitled to an order of revivor. The court therefore had jurisdiction of the subject-matter and the first objection is overruled.

The second, third, and fourth assignments may be considered together. In substance they allege a want of authority to grant the relief sought. As stated in the first proposition, such authority does exist.

The fifth assignment, that Boyd has no right to relief prayed for, fails to assign any reason which would bar the right. The answer does not deny that he is administrator of Frankman's estate, and even if it did, the proof tends to show that he is such administrator and is entitled to have the judgment revived.

The testimony tends to show that in 1875 Frankman assigned the judgment to Goldwood as security; that Frankman was appointed subagent of Goldwood for the sale of sewing machines, and being unable to give a bond, he assigned $200 of the judgment in lieu thereof for the faithful performance of his duty; that he faithfully performed his duty and therefore the assignment did not become absolute. Goldwood is not here complaining nor claiming any

rights in the premises, and in our view the proof is sufficient to entitle the plaintiff to recover.

Some objection is made to the form of the action, in effect that the action is brought in the name of the estate and not the administrator. It does appear that the action is brought by Boyd as administrator of the estate of Frankman, and that he is such administrator. There is no merit in the defense and the judgment is

AFFIRMED.

THE other judges concur.

REED BROS. & COMPANY v. R. T. DAVIS MILLING COMPANY.

FILED JUNE 30, 1893. No. 5081.

Assumpsit: EVIDENCE: REVIEW. In an action on account for flour sold and delivered, a number of defenses were set up which the proof failed to sustain, and the jury having found for the plaintiff, *held*, that the judgment was right and no error in the record.

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

H. D. Travis, for plaintiff in error.

A. N. Sullivan and *Gregory, Day & Day, contra.*

MAXWELL, CH. J.

This is an action upon an account for flour sold and delivered to recover the sum of $261, with interest from September 1, 1890.

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

"Comes now the defendant herein and for answer to plaintiff's petition admits that the plaintiff is a corporation duly organized under the laws of the state of Missouri; admits that the defendant is a corporation organized under the laws of the state of Nebraska and doing a general merchandise business at Weeping Water, Nebraska.

"2. Defendant admits that on or about the 1st of September, 1890, the defendant purchased of and from the plaintiff a bill of goods, to-wit, flour; that the said flour was sold to defendant by plaintiff, the price of which was $633.20. But at the time of said sale and before the same was consummated the plaintiff, by its agent, stated and represented and warranted to the defendant that the aforesaid flour was first-class and equal to the brand of flour which defendant was selling at that time, and which said brand of flour was first-class. That defendant, relying on the aforesaid statements and representation so made by plaintiff, purchased the aforesaid flour, and agreed to pay the sum of $633.40 therefor in case flour was as represented; and by reason of the aforesaid warranty of plaintiff, defendant was induced to accept said flour, and place it upon the market, and to retail the same to its customers.

"3. That the aforesaid representations made by plaintiff as to the quality of the said flour purchased were not true, but that said flour was of an inferior grade or quality and of entirely different quality from that which defendant agreed to purchase from plaintiff, and of but little value, and which plaintiff agreed to furnish defendant, and that said flour purchased from plaintiff was wholly unfit for use.

"4. That it notified plaintiff that said flour was not flour as plaintiff represented it to be, and returned the same to plaintiff, whereupon the plaintiff represented to defendant that it had changed said flour for a better quality, and re-

turned to defendant; but defendant represents the fact to be that plaintiff did not change all of said flour, whereupon defendant returned said flour to plaintiff.

"5. That at the time of the purchase of said flour from plaintiff it had a large and valuable trade in flour and had the confidence of all its customers in that line of trade, but that by reason of the bad quality of the flour purchased from the plaintiff, and believing the representations of plaintiff to be true, and having sold some of said flour and recommended it to be as good quality as the brand of flour which it had been selling heretofore, defendant lost its retail flour trade, to the very great damage of defendant in the sum of $500.

"6. Defendant further represents that plaintiff is indebted to the defendant in the sum of $43.60, money paid out for use and benefit of plaintiff by defendant in connection with the transaction aforesaid.

"7. Defendant denies each and every allegation in plaintiff's petition contained not herein specifically admitted.

"Wherefore, by reason of the breach of warranty of plaintiff of the flour aforesaid, and the misrepresentation and fraud of plaintiff, the defendant has been damaged in the amount of $500; and plaintiff is indebted to the defendant for money paid out for plaintiff in the sum of $43.60. Defendant therefore prays judgment for $543.60 and the costs of this suit."

The reply need not be noticed.

On the trial of the cause the jury returned a verdict in favor of the defendant in error for the sum of $231, upon which judgment was rendered.

No objection to the instructions is made in the plaintiff in error's brief. It is true the rule as to the measure of damages as contended for is stated. Whether the rule contended for is correct or not we need not determine, as it is not alleged that the jury disregarded the instructions given by the court.

It is contended that one Underwood, an agent of the defendant in error, was permitted to testify as to the quality of the flour sold without showing any qualification in that line. The proof clearly shows that Underwood was engaged in selling flour in the different markets of Nebraska and knew what flour was worth at Weeping Water. It is apparent that there is no real defense to the action and that the judgment is right. It is therefore

AFFIRMED.

THE other judges concur.

SARAH A. DIMICK, APPELLANT, V. GRAND ISLAND BANKING COMPANY, APPELLEE, ET AL.

FILED JUNE 30, 1893. No. 5117.

1. **Land Contracts:** MORTGAGES: SALE: ASSIGNMENT: FORECLOSURE: EQUITY. In 1881 one N. purchased from the U. P. Ry. Co. a certain tract of land on credit. This land was sold to various persons prior to 1887. In that year, the contracts being the property of one S., he mortgaged the same for a large amount to one D. He also conveyed the land to the G. I. Bank, and soon afterwards assigned the contracts to the bank. D. began an action to foreclose the mortgage in his favor and made the bank a party. After the answer of the bank was filed, the bank, at D.'s request, paid $212 to the U. P. Ry. Co., then due on the land contracts. No claim was made for this in the foreclosure proceedings. In an action by the devisee of D. to have the bank deliver up the contracts and quiet the plaintiff's title in the land, *held*, that the bank was entitled to $212 and interest thereon, and a decree of foreclosure to that effect was right.
2. **Mortgage Foreclosure:** EQUITY: LIENS: PLEADING. The provision of the Code, that the plaintiff shall state in his petition whether any proceedings had been had at law for the recovery of the debt, or any part thereof, applies alone to formal mortgages, and not to mortgages or liens arising out of the equities between the parties.

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

E. J. Hainer and *E. L. King*, for appellant.

Abbott & Caldwell, contra.

MAXWELL, CH. J.

This is an action to quiet title to real estate. On the trial of the cause in the court below judgment was rendered in favor of the banking company, from which the plaintiff appeals. The facts are correctly stated in the appellant's brief and the statement will be taken from that.

"The pleadings show that on February 11, 1881, the Union Pacific Railway Company sold to Christian Needham the north half of the northwest quarter section 19, township 13, range 5, in Hamilton county, Nebraska, on its usual terms: one-tenth cash, balance on ten yearly deferred payments, and as evidence of the sale and its terms made and delivered to the purchaser its sale contracts numbers 46,868–9 in the form usually employed by it. These contracts were assigned by Needham to one Putnam, and by Putnam to John W. Smith, mentioned in the pleadings. On August 27, 1885, Smith and wife mortgaged these lands, with other tracts, to Chauncey S. Dimick for a large amount. The mortgage was immediately and properly recorded. Thereafter, on October 6, 1885, Smith and wife conveyed the same premises by quitclaim deed to the defendant banking company, which deed was also duly recorded. Three days later, October 9, 1885, Smith and wife assigned and delivered said Union Pacific railway contracts of sale to the banking company. This assignment was approved by the railway company on October 14, 1885, and the bank has ever since retained possession of the contracts.

"It is admitted in its answer that the banking company

had actual knowledge of the Dimick mortgage and that its rights under the deed and assignment were subsequent to the Dimick mortgage. After the maturity of his mortgage Dimick commenced foreclosure in the Hamilton county district court, making the banking company defendant. This cause was removed to the federal court and was consolidated with other foreclosure cases affecting the same property. Under date November 23, 1886, all the parties to these consolidated cases, including Dimick and the banking company, entered into a stipulation declaring the amounts due each, fixing their respective priorities and rights, and for a foreclosure of their several liens. On this stipulalation decree was rendered in the federal court on April 11, 1887. A copy of this stipulation, and also of the decree rendered thereunder, is attached to plaintiff's petition and were introduced in evidence.

"Paragraph 2 of the stipulation declares the amount due Chauncey S. Dimick on his mortgage to be $3,771.45, with ten per cent interest from November 8, 1886.

"Paragraph 3 provides that Chauncey S. Dimick has a first and best lien on the land above described, and being the property in dispute in this action, and that he has subsequent liens on other tracts described in the stipulation.

"Paragraph 10 is in the following language: 'That any surplus that may arise after the satisfaction of the liens above stated, with the costs, shall be paid into court to await its further order in the premises, and that the Grand Island Banking Company shall have the right to redeem all and any of several said tracts or parcels of land from this decree or from any sale thereunder at any time prior to the confirmation of such sale upon payment of the amounts hereinbefore declared to be a lien thereon with its *pro rata* share of the costs, said costs to be apportioned proportionally to the amount of the liens on the several tracts hereinbefore described.'

"The decree follows the stipulation. It declares that

'Grand Island Banking Company is the present owner of the equity of redemption' in and to all the lands mentioned, and contains the usual provisions of such decrees, among them being that the Grand Island Banking Company 'being forever barred and foreclosed of all equity of redemption and claim in and to the premises.' The banking company did not in that case set up or claim anything for the $212. Under this decree the sale was had on June 6, 1889, and the land in question sold to Chauncey S. Dimick, mortgagee, for $800. On June 10, 1889, this sale was confirmed by the court, and on the same date deed was made thereunder to Chauncey S. Dimick by the special master in chancery making the sale.

"Pending these proceedings, on November 30, 1886, being seven days after the date of the stipulation to which reference has been made, but more than four months before the date of the decree, and more than two years and a half before the sale and confirmation, the bank paid on these contracts to the Union Pacific Railway Company, $212, being delinquent payments and interest due thereon. Immediately after receiving his deed from the master in chancery, Chauncey S. Dimick entered into possession of the premises, and soon thereafter died, leaving a will whereby he devised to his widow, the plaintiff, the land in question. She made the remaining payments to the railway company, and when the last payment became due, tendered the sum and demanded the deed. The railway company insisted upon a surrender of the contracts before making a deed, and the bank refused to deliver the contracts except upon payment of the $212 paid by it on the contracts, insisting that while the assignments of the contracts upon their face were absolute, yet it took them as security for a large sum of money due it from Smith at the time the assignments were made and it made such payments at the request of plaintiff's testator; that it did this to protect its security, and that the payment was necessary

to protect the interest of Chauncey S. Dimick as well as of the bank. That the claim of the railway company was prior to the claim either of Chauncey S. Dimick or the bank, and that by making the payment the bank became subrogated to the claim of the railway company and has a lien on the contracts and on the land for its repayment. The railway company was not a party to the foreclosure proceedings and the bank did not set up its payment, nor any claim based thereon by way of supplemental pleadings or otherwise, but suffered a decree to be taken, the sale to be had, confirmation made, and deed issued without taking any steps whatever to protect or recover the payment so made by it. In its answer the bank makes no reference whatever to the deed made it by Smith and wife. It offers no explanation of the deed having been made or recorded, neither does the bank make any averment or showing, either by pleading or proof, that anything remains due it from Smith, nor does the answer allege any breach of the alleged implied contract to repay the $212 paid by it on the contracts; nor yet does it allege that no proceedings have been had at law to recover the amount due.

"This suit was brought by plaintiff, as devisee of Chauncey S. Dimick, to compel the bank to surrender the contract, and the railway company to make deed to her for the lands in question. The railway company, by their answer and stipulation filed in the case, offer to make a deed to the party adjudged by the court to be entitled thereto. The district court adjudged that the bank had a lien on the contracts to the land in question for said sum of $212 with interest, and gave a decree of foreclosure for the same."

It will be observed that payments were made by the bank at the request of Dimick, the mortgagee. Unless such payments had been made by some one the contracts would have been subject to forfeiture, and if forfeited the entire security of the mortgagee would have been lost. The payment of this money was an independent transaction and, so

far as appears, entirely disconnected with the mortgage in that case. The bank held the contracts, which were duly assigned to it as security, and were also security in favor of Dimick. He became the purchaser under the decree of foreclosure. The $212 in question was one of the payments for the land. The plaintiff, as devisee of Dimick, seeks to have the lien of the bank canceled without making payment of the same. It is a fundamental rule of equity that he who seeks equity must do equity, and that rule applies in this case. In order to divest the lien of the bank on the premises the plaintiff must pay the amount due thereon.

Objection is made that the defendant's answer does not allege that no proceedings have been had at law for the recovery of the debt or any part thereof. This provision of our statute is intended for formal mortgages and not for liens arising out of the equities between the parties. Thus at common law the mortgagee, after default, could maintain ejectment to recover the possession, an action on the note, and to foreclose the mortgage, all at the same time. The hardship and expense to the mortgagor were very burdensome, and not unfrequently stripped him of all his property. To avoid these the statute in question was passed. But ejectment cannot be had in favor of the mortgagee in any case, nor on an equitable lien to recover the possession. Neither can an action at law, as a rule, be maintained to enforce the claim which usually can be enforced only in equity. There is no error in the record and the judgment is

AFFIRMED.

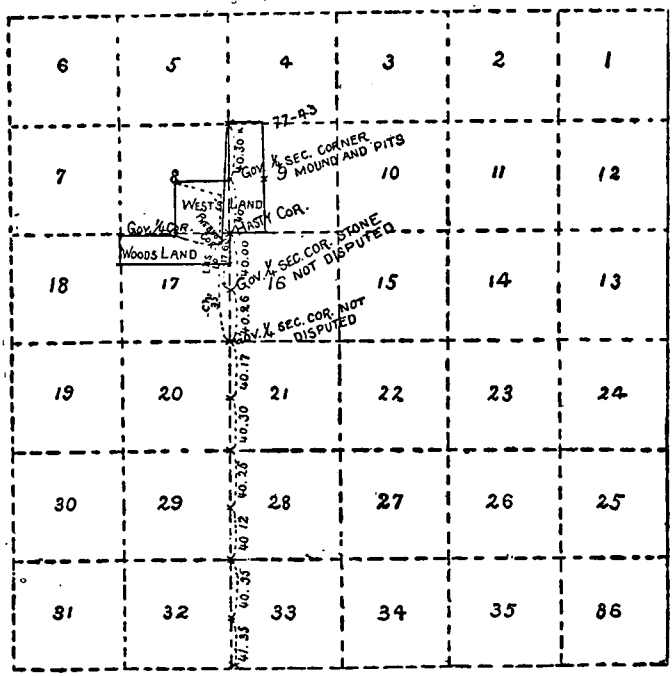
THE other judges concur.

MARY C. WOODS v. DANIEL P. WEST.

FILED JUNE 30, 1893. No. 4181.

Ejectment: BOUNDARIES: ESTABLISHMENT OF LOST CORNERS. The question involved was the location of a government corner when the original corner had been tampered with, and there were three points alleged to be the true corner. There being no one to identify positively any point as the correct corner established by the government, *held*, that surveys from known government corners both north and south and east and west of the corner in dispute, by which it was located on a line with other corners on both of said lines, and each land-owner would thereby be given the full amount of land called for by his patent, would be preferred to a survey which was not begun at a known government corner and lacked many of the elements of certainty, and which gave one of the land-owners much more than he was entitled to under his patent, and the other less.

T. 1 N., R. 21 West, of 6th Pr. Mer.



PLAT OF D. S. HASTY.

Length of Woods' east line by Hasty's survey, 20 chains; by Phoebus' survey, 17-60.

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

L. W. Colby, J. P. Lindsay, and *Pemberton & Bush,* for plaintiff in error.

McClure & Anderson, John T. McClure, and *W. S. Morlan, contra.*

MAXWELL, CH. J.

This is an action of ejectment brought by the defendant in error against the plaintiff in error to recover the possession of about ten acres of land. There is an evident mistake in the description in the petition, and on the trial the parties stipulated as follows:

"It is hereby stipulated by and between the parties plaintiff and defendant in this action that the title to the southeast quarter of section 8, town 1, range 21, is in the plaintiff Daniel P. West, and that the north half of the northeast quarter of section 17, town 1, range 21, is in the defendant Mary C. Woods. That if the jury find the original government corner to be at the corner known as 'The Phœbus Corner,' that they shall find for the plaintiff; if they find that the corner is at or near the corner known as 'The Hasty Corner or Worthington Corner,' they shall then find for the defendant; and that if they find for the plaintiff, the amount of the damages shall be one dollar."

The right of the defendant in error to the land in question rests upon the accuracy of a survey made by one Phœbus, and of the plaintiff in error on the surveys of Hasty and Worthington. Phœbus, on cross-examination, testifies as follows:

Q. You say you surveyed to this corner three times only?

A. Yes, sir.

Q. What were you surveying the first time.

A. Section 4.

Q. You run a line from the southwest corner of section 4 to this corner in dispute at that time, did you?

A. Yes, sir.

Q. Survey any part of section 8 or 9 at that time?

A. Not until after I was done with section 4.

Q. For what purpose did you run the line between sections 8 and 9 to the corner in dispute?

A. At the corner of 4, 5, 8, and 9 there were two corners. I run a mile north and a mile south to determine which was the correct corner.

Q. Did you locate the corner at that time—at the corner of 4, 5, 8, and 9?

A. I did not.

Q. Did you locate one of these corners as the correct corner?

A. Yes, sir; I took the south corner as being the correct corner.

Q. How far from this corner of 4, 5, 8, and 9 is this south corner of 4, 5, 8, and 9 to the corner in dispute, the one you recognized as the government corner?

A. I haven't the first measurement, but I afterwards measured it on the survey of section 9.

Q. What was the distance at that time, if you recollect?

A. Eighty-one chains and thirty-one links.

Q. How far was the corner you recognized to 4, 5, 8, and 9 south of the corner marked there?

A. About four chains.

Q. You had started at the north one of these two corners and run south the distance that you made from the south corner to the corner of 16, 17, 8, and 9, you would have come nearer the corner you recognized there or the corner known as "The Hasty Corner"?

A. I measured in both directions from the corner of 4, 5, 8, and 9—both north and south.

Q. I will ask the question in a different form. Is not the distance between the two corners at the corner of 4, 5, 8, and 9 north and south about the same as the distance between the corner you recognized to 16, 17, 8, and 9 and the Hasty corner?

A. It is not quite so much.

Q. About how much does it lack of being the same?

A. I think about a chain less.

Q. How much?

A. About a chain.

Q. The second time you were there, what were you surveying?

A. Section 9.

Q. When was that?

A. 1887.

Q. When did you survey section 8 or the southeast quarter of section 8?

A. 1888.

Q. Where did you begin at the time you surveyed that?

A. At the southeast corner.

Q. Then where did you run?

A. I ran west.

Q. How far?

A. A mile.

Q. Did you run directly a mile?

A. I closed on the quarter section corner and then ran west another half mile.

Q. Did you run on the variations given in the government field notes?

A. I did not; I ran a straight line from corner to corner.

Q. Then where did you run from the quarter corner between 8 and 17?

A. I ran west.

Q. How far—to what point?

A. To the section corner.

Q. Then you run north to the first quarter corner?

A. Yes, sir; between 7 and 8.

Q. Then east?

A. East across section 8.

Q. Did you close there?

A. Yes, sir.

Q. Then you closed at the quarter corner between 8 and 9?

A. Yes, sir.

Q. Then where did you commence?

A. I began at the quarter section corner between 8 and 17 and ran north across the section.

Q. Is that all the survey you made at that time of the lines you run?

A. Yes, sir; excepting to locate these three corners; there are three corners set for the corner of 8, 9, 16, and 17. I measured between the corners.

Q. You measured between these corners?

A. Yes, sir.

Q. Then you didn't at that time run from the quarter corner between 8 and 9 to this corner in dispute?

A. No.

Q. What part of section 8 were you surveying at that time?

A. I set the corner for the center of 8. The southeast corner was what was required.

Q. Did you attempt to found any corners there at the corner of 16, 17, 8, and 9?

A. No, sir; I found three marks and I thought I hadn't better locate any more.

Q. Which one did you recognize?

A. The south one.

Q. You didn't attempt to locate a corner there, did you?

A. I did not.

Q. Did you run south at that time from the corner in dispute a mile?

A. I did not.

Q. Were you ever at or did you ever attempt to find the corner of sections 17, 16, 20, and 21?

A. No, sir.

Mr. Worthington testifies as follows:

Well I commenced at the state line on the south side of the township at the southwest corner of section 33 and chained north clear across the township, the chaining—our chaining didn't agree exactly with the government field notes, although it was very close until we got up there to the southwest corner of section 16.

Q. How far is that south of the disputed corner?

A. One mile. From there I ran a straight line two miles north and struck the section corner.

Q. Well, what did you do then?

A. Well, I found that there were two rods over the two miles in the two sections. Then I commenced at the township line on the east side and ran west across the township; our chainings did not agree with the government field notes. I ran to the southwest corner of section 10 and then I ran a straight line two miles west through to the southwest corner of section 8. These two miles overrun six rods. I didn't chain across the township then. I went back there and divided up the distance between the southwest corner of 10 and the southwest corner of 8, and the southwest corner of 16 and 4, and put a stone in there.

Q. You may state whether you found any corner one mile south of this disputed corner.

A. Well, I could not say that it was a government corner; I found a stone set in the gound.

Q. As compared with the government field notes in distance from the Kansas line, how was it set?

A. Well, it was very close.

Q. The first mile you run from the Kansas line, how much was that?

A. I don't think I found a stone at the first mile.

Q. How was it with the second section?

A. The second section, I found a stone there, but I didn't put down the distance.

Q. Had you the field notes with you at the time you made this survey?

A. I had copies.

Q. State just how you located the corner in dispute.

A. Well, after I chained to the southwest corner of section 16 I found it did correspond very closely with the government field notes. From there I ran a straight line to the southwest corner of section 4 due north; then I put in a stake and divided that distance up equally; I divided the excess up equally between the two sections. From the county line I ran west to the southwest corner of section 10. Then I ran a straight line two miles west to the southwest corner of section 8; then I divided the distance up equally and put a stone there.

Q. That was the corner finally located?

A. Yes, sir.

Q. Did you see the Phœbus corner while you were there?

A. Yes, sir.

Q. How far is the Phœbus corner from the corner you located?

A. It is four chains and sixty-eight links south and two chains and eighty-two links west.

Q. That is the Phœbus corner?

A. Yes, sir.

Q. Do you know the corner known as the Hasty corner?

A. Yes, sir.

Q. How did that corner correspond with the corner—with your survey?

A. It was a very little west and about a rod south.

Q. Did you take either the Hasty corner or the Phœbus corner in consideration in locating that corner?

A. No, sir.

Mr. Hasty testifies:

Q. Well, you may state what you did in making the survey to locate that corner.

A. Well, I can state it as well without the plat as I can with the plat, without you want me to give the measurements.

Q. I want you to give the measurements and point them out to the jury as you testify.

A. It was ten years ago and I only have my recollection and my notes to go by. As I recollect it, I was called there to survey, and I think I commenced on the north boundary of the section first, but at the northwest corner of the section, if I recollect right, there was a government corner, but there was some dispute about it.

Q. The northwest corner of what section?

A. Section 8. I commenced at the northwest corner and ran south to the southwest corner, and I found that that corner had been obliterated and plowed up and destroyed at the southwest corner of the section. I think that in looking at my notes I found some signs, enough so I considered that I found the place where the government corner was—the right government corner was, and so I put a stone where I thought it was; then I ran the north line of the section and when I came to the northeast corner of the section—I had been told something about several corners there at the northwest corner—and when I came there I found two plain government corners apparently, and a third one that was not so plain, but some man called my attention to it and he said he thought that it looked like a government corner—I don't know who it was now—I was unable to tell which was the government corner, but it looked very much like a government corner; one of them had two pits and a trench dug on the south side of it—that is, two pits dug together. There were three corners and I was at a loss to know what to do in the matter, and I think I se-

lected one that apparently looked most like a corner and run south from that. A half mile south I discovered a quarter section with a mound and two pits, and that is what represents a quarter section. I kept on that direction south another half mile and came out into a plowed field; anyhow I had been told or seen this corner. I went the next day, I think it was. I went back to the southwest corner of section 8 (I am talking about section 8 now entirely). I went back to the southwest corner of section 8 and ran east to see if I could find anything appearing like a corner, and somewhere in the neighborhood of half a mile I found a government corner, two pits and a mound. I ran east from that and missed this corner. I think the chainmen, myself, and the flagmen were all present. I could not get any advice from anybody or understand anything about it. I worked until night and I didn't satisfy myself. I think the next day I went south. I think I went to the state line, but I didn't keep the minutes of it so I could tell the time, but I went south to a plain government corner that no one disputed, and then I ran north and found a corner, I think half a mile south of this disputed corner, that any one could see, but they didn't seem to know where it was. In going up on that line from the south I came to a corner marked ¼ S. a half a mile from the corner south of it at a proper distance on a true line. I made up my mind that that was a government corner, and I proceeded to the line up there and connected it with the line I run before, out at the same point in the plowed field. I then took the measurements from the two pits north of the disputed corner at the quarter corner. I studied the matter over and I thought the missing corner had been plowed up or something, and I set my corner half way between these two corners north and south.

Q. That was half way between what corners—the quarter corner north of the disputed corner and the quarter corner south of the disputed corner, and as I understand you

the quarter corner south of the disputed was marked with a stone that had government marks on it?

A. It was marked ¼ S.

Q. What kind of a mark—what kind of a government corner did you find a mile north of this disputed corner?

A. I found two pits and a mound. There should have been a stake, but I didn't find any stake.

Q. Then you set your corner at an equal distance between these two quarter sections?

A. Yes, sir; that is what I tried to do.

Q. I will ask you if this corner still stands there as the Hasty corner?

A. Yes, sir; the measurements come to the same point to-day again.

Q. Then your measurement establishing this corner was made in '79, wasn't it?

A. It was.

Q. Now what measurements did you make the last time you were there?

A. Simply run over these lines, part of them that I had run before. I commenced on the state line, Kansas state line, and I took a corner on that line and ran north past this disputed corner across the township.

Q. How did you find the measurement from the Kansas line out as far as one-half mile south of this disputed corner as to the distance shown by the field notes?

A. I can't recollect the figures, I would have to get that from the chainmen. The first half mile I found to be forty-one chains and thirty-five links, and the next half mile was forty chains and thirty-five links, the next half mile forty chains and twelve links, the next half mile forty chains and twenty-five links, the next half mile forty chains and thirty links, the next half mile forty chains and seventeen links, the next forty chains and twenty-six links, which runs to the next corner south of the disputed corner.

Q. Now I will ask you if in '79, when you made this

survey, you found a government corner one mile south—or the first government section corner one mile south of the disputed corner?

A. I found what I supposed to be a government corner stone answering the description of the government field notes set in the ground that I took to be the government corner—supposed it to be. No one disputed it, at the time that I measured it, to be the disputed corner.

Q. This stone that you found half mile south of the disputed corner, is that stone there yet?

A. Yes, sir.

Q. Is it the same stone?

A. It is the same stone.

Q. In running on a general direct line with all the corners north and south on which you run a line could you strike the corner known as the Phœbus corner?

A. Not very close.

Q. On which side would it run of it—what side and about how far?

A. Most of the corners across the township would run a little east of where I set the corner.

Q. That would be still further east then than your corner is, or the Phœbus corner?

A. All the corners, I believe, but one or two, set east from that line.

Q What is the distance between the stone that is half mile south—that is, the government corner—what is the distance between that corner and the Phœbus corner?

A. Thirty-five chains and ten links.

Q. What is the distance between that stone and your corner?

A. In the survey that I made in '79 it was forty, and in the survey the other day the chainmen made it, as they returned it to me, thirty-five links over forty chains—forty chains and thirty-five links.

We thus see that there are three alleged corners at the

corner of sections 8, 9, 16, and 17—the one in dispute. That the government corner had been tampered with was apparent to any person who examined the matter. Mr. Phœbus in making his survey does not say that he sought by starting from the established corners to arrive at the correct location of the corner in dispute. He seems to have taken the word of the man who employed him as to the location of the corners, and adopted the one most favorable to him. The value of such a survey in settling the exact line between land-owners is but little. On the other hand, both Worthington and Hasty, finding that the corner in dispute had been tampered with, started from clearly defined and recognized corners and found no difficulty in following the lines, and found both the section and quarter section corners both substantially on the lines running north and south, and also on those running east and west. It will be seen from the plat that the other lines are substantially straight and cross at right angles, while, if the corner in question as located by Phœbus is correct, the corner is out of the line more than twenty rods. This is not very probable, and the proof fails to show in a satisfactory manner the location of the government corner at that point. In addition to this the corner as fixed by Worthington and Hasty gives to both the plaintiff and defendant the full amount of land to which they are entitled under their patents, while under the Phœbus survey the defendant in error would have at least ten acres more than the patent calls for, while the plaintiff in error would be that much short. Upon the whole case it is apparent that the verdict and judgment are against the clear weight of testimony and the judgment is therefore reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

ROLLIN L. DOWNING V. GEORGE W. OVERMIRE ET AL.

FILED JUNE 30, 1893. No. 4453.

Attachment: PROPERTY IN HANDS OF GARNISHEE: SUBSEQUENT LEVY AND SALE: LIABILITY OF OFFICER. In an action by attachment a garnishee was ordered to hold sufficient property of the debtor to satisfy the debt, which he failed to do. After the garnishment another creditor levied an attachment on a part of the property in the garnishee's hands, and upon satisfaction of the garnishee's claim sold the remainder under the second attachment, neither the officer nor his attorney having notice of the garnishment. *Held*, That under the testimony the officer under the second attachment was not liable to the attaching creditor under the first attachment for the amount of his claim.

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

Calkins & Pratt, for plaintiff in error.

John Hoge, contra.

MAXWELL, CH. J.

The plaintiff in error on the 20th day of March, 1888, filed his bill of particulars before William R. Learn, justice of the peace for the city of Kearney, against one T. B. Early, claiming the sum of $95.84 upon an account. Afterwards, on the 14th day of April, judgment was rendered in that case in that court against Early for $95.84 and costs, taxed at $3.90. An execution was issued upon said judgment on the 6th day of April, 1888, and delivered to the sheriff of Buffalo county, who afterwards, and on the next day, returned the same wholly unsatisfied. After the return of the execution an affidavit was filed in said justice court in garnishment, and thereupon summons was issued commanding the Buffalo County National Bank

to appear in said court on the 10th day of April thereafter, and answer under oath all questions concerning the property of the said Early in its hands. The bank appeared by its cashier, A. T. Gamble, and after being duly sworn he testified as follows:

Q. State what office you occupy as a member of the Buffalo County National Nank.

A. I am cashier.

Q. State if the Buffalo County National Bank has any property, rights, or choses in action, or any other credits of T. B. Early, and if so, what such consist of.

A. We hold two chattel mortgages against the following property belonging to T. B. Early, to-wit: cattle, horses, mules, hogs, corn, oats, and hay, and farming utensils, wagons, harness, carriages, etc. These have been seized under the mortgage, and I am unable to state whether there will be any surplus after the mortgages and expenses are paid.

Thereupon the said justice made the following order: "I thereupon ordered the said garnishee to pay into this court any surplus there may be after paying off said mortgages and expenses."

After the foregoing proceedings were had and order made, viz., on the 21st day of April, 1888, an action was commenced in the county court of Buffalo county, Nebraska, by one L. E. Zimmerman against said T. B. Early, and an order of attachment was issued in that case out of the county court, and delivered to Geo. W. Overmire, who was constable in and for the city of Kearney, in said county. The defendant Overmire, in pursuance of the command of said writ of attachment, did afterwards, on the 21st of April, 1888, make a levy, the return of which on the said order of attachment is as follows:

"Received this order of attachment April 21, 1888, and by the command thereof I levied upon the following property of the said T. B. Early, to-wit: A double-barreled, breech-loading shot gun and reloading fixtures, for which

I caused the same to be valued by two responsible citizens of Buffalo county. GEO. W. OVERMIRE,

"*Constable.*"

And defendant Overmire afterwards, on the 24th day of April, 1888, made a further levy, as shown by the return of said writ of attachment, and is as follows:

"And on the 24th day of April, 1888, according to the command thereof, I made a second levy, for which I took all the stock, cattle, horses, hogs, and machinery of the said T. B. Early, and caused the same to be appraised by two responsible persons of Buffalo county, Nebraska.

"GEO. W. OVERMIRE,

"*Constable.*"

And said writ was returned on the 26th day of April, 1888, to said county court. The appraisement shows that the value of the property taken and covered by the mortgage held by the Buffalo County National Bank to be of the value of $1,303.15 over and above the value of the bank's claim against the same. At the time of the answer of the garnishee the property was being advertised to be sold by the garnishee, and which sale took place on the 4th day of May, 1888, and it was during this time that the defendant Overmire, as such constable, without any knowledge on the part of the plaintiff, made the foregoing levies. On the day of the sale the defendant Overmire, together with the plaintiff's attorneys, attended the sale as advertised by the bank, and, as shown by the testimony, the property was sold and the proceeds applied on the debt in the case brought by the said L. E. Zimmerman. Afterwards the said plaintiff commenced this action in the county court of Buffalo county against Overmire, as constable, and his bondsmen, to recover the amount of his debt, with interest and costs, and the county court dismissed the action for the want of jurisdiction, from which judgment the plaintiff prosecuted error to the district court, where the judgment of the county court was reversed and the case was there

tried and verdict returned in favor of the defendant. A motion for a new trial was filed by the plaintiff, which was overruled and in which the following errors are assigned:

"1. The court erred in refusing to give instruction No. 1 as requested by the plaintiff, and in giving such instruction modified.

"2. The court erred in giving instruction No. 2 as requested by the plaintiff, and in giving such instruction modified.

"3. The court erred in refusing to give instruction No. 3 as requested by the plaintiff, and in giving such instruction modified.

"4. The verdict is contrary to law.

"5. Errors of law occurring at the trial duly excepted to by the plaintiff.

"6. The verdict is not sustained by sufficient evidence.

"7. The court erred in admitting evidence objected to at the time by the plaintiff."

The following are the instructions asked by the plaintiff and given by the court as modified and are all the instructions given:

"1. If you find from the evidence that one T. B. Early executed and delivered certain chattel mortgages upon his personal property, and that afterwards, and before said mortgages had been paid and released, the owners thereof had been ordered to account to the court of William R. Learn, justice of the peace, for said property or the proceeds therefrom, after having paid said mortgages, and you further find that while said personal property was held by the owners of said mortgages under said mortgages, the defendant George W. Overmire, as constable, levied an order of attachment upon said personal property or any part thereof, you will find for the plaintiff. Modified as follows: Provided the said Overmire took and appropriated the said property to any purpose other than for the benefit of garnishees in said garnishee proceedings wherein Down-

ing was plaintiff. If you find the said constable only levied on the property covered by the mortgage to the bank, having no knowledge of the prior garnishee proceedings, and never took the property into his possession actually, but left it in the hands of the parties when he first took it and never had any further to do with the property in question, he will not be liable in this case. In other words, if the surplus, after the satisfaction of the mortgage, never came into the hands of the constable, and he had no order of sale to dispose of same and took no part in sale of same, but it was sold by others, and said constable took no part therein, you will find for the defendants.

"2. If you should find the taking of the possession of said property in accordance with instruction No. 1, as requested by the plaintiff, then you will further inquire as to the value of the property taken from the owners of said mortgages, remaining after said mortgages were satisfied, and you will find for the plaintiff the full amount claimed, unless the value of said property remaining after the satisfaction of said mortgages is less than the amount claimed by the plaintiff, then you will find for the plaintiff in that amount. Modified as follows: Provided the said constable had anything to do with the sale or of the surplus after satisfaction of the mortgage to the bank, or exercised any control over same, or participated in said sale.

"3. If you find from the evidence that the defendant George W. Overmire, as such constable, made a return of the levy made in pursuance of the command contained in said writ of attachment, this is sufficient proof that he took possession of the property upon which the levy was made and by which he is bound and cannot be allowed to dispute the taking of the property named therein. Modified as follows: But the said constable can show after the making of said return he never removed or took actual possession thereof, or sold, or participated in the sale of same, and that no proceeds of sale of same ever came into his hands."

In our view there was no error in refusing the instructions as asked. The testimony shows that the officer took no part in the sale of the goods and that the proceeds thereof did not come into his hands. This may have been a trick on the part of the second attaching creditor, for which he may be liable, but the proof fails in any manner to implicate the officer. The garnishee was ordered to hold sufficient of the proceeds of sale to satisfy the debt, but did not attempt to do so. Whether the bank thereby became liable for the amount of the plaintiff's debt does not arise in this case, but it is very clear that there is no error in the instructions and the judgment is

AFFIRMED.

THE other judges concur.

FARMERS & MERCHANTS BANK OF AINSWORTH V. CLINTON UPHAM ET AL.

FILED JUNE 30, 1893. No. 4269.

1. **Promissory Note:** FAILURE OF CONSIDERATION: BREACH OF WARRANTY: INSTRUCTIONS. In an action upon a promissory note the defense was that the note was given for a flock of sheep which were warranted to be sound, but which were diseased, by reason of which the consideration failed and the warranty was broken. The court, at the request of the defendants, gave three instructions consecutively, in which it is said "that a failure of consideration, breach of warranty, or fraud constitutes a valid defense," etc. *Held*, That the element of fraud was not in issue in the case and the instructions were erroneous and prejudicial.
2. **Instructions** must be applicable to the issue made by the pleadings.

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

Thomas Darnall, for plaintiff in error:

When the court gives a prejudicial instruction on a proposition not before the jury, the judgment in such a case should be reversed. (*Holmes v. Boydston*, 1 Neb., 358; *Dunbier v. Day*, 12 Id., 604; *Newton Wagon Co. v. Diers*, 10 Id., 292; *Turner v. O'Brien*, 11 Id., 108; *Steele v. Russell*, 5 Id., 216; *Smith v. Evans*, 13 Id., 316.)

E. M. Coffin, also for plaintiff in error.

E. J. Clements and *C. A. Munn, contra.*

MAXWELL, CH. J.

This is an action upon a promissory note for the sum of $1,225 payable to the order of D. Collins. The note was duly indorsed and transferred to the plaintiff. The defendants' answer is as follows:

"Come now the defendants and for answer to the petition of the plaintiff herein admit that they made, executed, and delivered to Dennis Collins & Co. the notes described in plaintiff's petition, and that said notes are now past due and unpaid."

"2. The defendants deny that the plaintiff is the owner of said notes, or ever has been, and allege that said notes are now and ever have been the property of Dennis Collins & Co., the payees of said notes, and that the plaintiff did not purchase said notes before they were due.

"3. The defendants further allege that said notes were given for a flock of sheep purchased by the defendant Clinton Upham of Dennis Collins & Co., and that said Dennis Collins & Co., in making said sale, represented to the defendant Clinton Upham that they were well acquainted with the diseases of sheep, and that all of said sheep so purchased were entirely free from disease, and the defendant, being unacquainted with the diseases of sheep

and relying on said representations of Dennis Collins & Co., purchased said sheep.

"4. Said sheep were not free from disease at the time Clinton Upham purchased the same, but were diseased with 'scab' and other diseases, the names of which defendants do not know, but that all of said diseases were contagious and that all of said sheep died of said diseases, and that therefore the defendants never received any consideration whatever for said notes, and that said sheep were absolutely worthless, to defendants' damage $2,500.

"5. That defendant Upham spent in time and money in doctoring and caring for said sheep the sum of $500.

"6. Wherefore the defendants pray judgment that the plaintiff take nothing in this action, that the same may be dismissed, and for costs."

The reply admits that the note was given for a flock of sheep, but denies all other allegations of the answer.

On the trial of the cause the jury returned a verdict of $100 in favor of the defendants. This, however, was remitted and the action dismissed.

The court, at the request of the defendants, instructed the jury as follows:

"No. 5. You are instructed that a failure of consideration, breach of warranty, or fraud constitutes a valid defense to a suit on a promissory note, when brought by the original holder or payee thereof, to the extent of the injury resulting from said failure of consideration, or to the extent of the damages arising from said breach of warranty, or growing out of said fraud.

"No. 6. A *bona fide* holder of collateral notes can recover only the amount of his interest therein in action brought by said holder where there is a failure of consideration, breach of warranty, or fraud of the original holder or payee, which would avoid all of said notes over and above the interest of said *bona fide* holder.

"No. 7. Where no defense is established the holder of

negotiable promissory notes, as collateral security, may sue the makers thereof and recover a judgment for the full amount due on said collateral notes, and he will hold the amount recovered on said judgment over and above the interest of said holder as trustee for the party who deposited said notes as collateral security. But failure of consideration, breach of warranty, or fraud of the original payee is a good defense to the amount due on said notes over and above the interest of said holder, even when the plaintiff is a *bona fide* holder."

These instructions, given consecutively, make fraud a prominent cause of defense in the case, although it was not in issue. We cannot tell what influence such instructions would have on the jury. They cannot be said to be harmless. The instructions were calculated to lead the jury to believe that in the view taken by the court there might be fraud in the transaction. The instructions must be applicable to the issue made by the pleadings. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

JOSEPH WALTHER V. WALTER KNUTZEN.

FILED JUNE 30, 1893. NO. 4465.

Replevin: EVIDENCE: REVIEW. In an action of replevin the proof failed to show any right of the defendant to the possession of the goods. The judgment was therefore set aside and a new trial granted.

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

R. A. Moore, for plaintiff in error.

Calkins & Pratt, contra.

MAXWELL, CH. J.

This is an action of replevin brought by the plaintiff against the defendant to recover the possession of "1 radiator (72 tubes), 2 radiators (24 tubes), 1 radiator (20 tubes); 5 feet soil pipe; 3 pk. 4-inch quarter burds; 2 4x2 ys, 1 2x2 ys; 2 2-inch hubs; 53 inch tees, 22 2½-inch tees; 38 2-inch tees, 12 1½-inch tees, 14 1¼-inch tees, 10 1-inch tees, 8 ¾-inch tees, 11 1-inch tees, 15 ¾ inch tees; 34 inch ells, 3 2½-inch ells, 2 3-inch ells, 2 2-inch ells, 11 1½-inch ells, 4 1¼-inch ells, 12 1½-inch ells, 4 1-inch ells, 4 ¾-inch ells; 6 2-inch bends; 25 1 ½-inch ¼ ells, 2 1-inch ells, 4 ¾-inch ells; 1 3x4 bushing, 2 2x2½-inch bushing; 1 2½-inch plug; 19 2-inch lock nuts, 4 1½-inch lock nuts; 1 2½-inch flange union, 1 1¼-inch union, 2 1-inch unions; 23 pins; 1 inch ceiling plate; 15 inch floor plates, 3 1¼ inch floor plates, 2 2-inch floor plates; 11 1¼-inch pipe hangers, 3 1½-inch pipe hangers, 3 2-inch pipe hangers; 4 1½-inch pipe hooks; 2 3-inch nipples, 2 2½-inch nipples, 8 2-inch nipples, 3 1½-inch nipples; 9 1-inch nipples, 8 ¾-inch nipples; 1 job lot of couplings; 1 6-inch ventilator cap; 2 12x12 slop sinks; radiator tops; 1 11x11 soot door; 1 lot of scrap pipe; 448 pounds of mineral wool; 3 2-inch ells, 4 1½-inch ells, 6 1¼-inch ells, 2 1-inch ells; 2¾-inch ells, 3 1½-inch ells (cast), 3 1½-inch ells (malleable); 9 2-inch lock nuts, 5 1½-inch lock nuts, 3 1¼-inch lock nuts; 1 1¼-inch union, 1 1½-inch T, 1 1¼-inch T; 4 2-inch R. & L. couplings, 7 1¼-inch R. & L. couplings, 4 1-inch R. & L. couplings, 6 ¾-inch couplings; 4 2 inch reducers; 4 bath wastes; 20 1-inch gate valves, 2 ¾-inch gate valves; 1 sewer and gas trap; 2 ¾-inch cut-offs; 2 1-inch handles, 1 1¼-inch T handle; 80 lbs. scrap lead; 70 lbs. lead tacks; 533 lbs. lead pipe; 250 lbs. sheet lead; 123 lbs.

2-inch lead pipe, 54½ ft. 4-inch black pipe, 40½ ft. 3-inch pipe, 29 ft. 2-inch galvanized pipe, 15 ft. 1½-inch galvanized pipe, 41 ft. 1¼-inch pipe (gal.), 24 ft. 1-inch pipe (gal.), 62 ft. 2-inch black pipe, 31 ft. 1½-inch black pipe, 37 ft. 1-inch black pipe, 15 ft. ¾-inch black pipe; 225 joints soil pipe; 29 ¼-inch bends; 5 ½-inch traps; 2 tees; of the value of $250."

The answer is a general denial.

On the trial of the cause the jury returned a verdict for the defendant and found the value of the property to be $250, and the damages $1, and judgment was rendered on the verdict.

The testimony tends to show that in the year 1887 the defendant had a contract for the erection of certain buildings pertaining to the industrial school near Kearney; that the plaintiff was a subcontractor under him to perform certain plumbing required in the building; that the contract price for this plumbing was between $5,000 and $6,000; that the plaintiff gave a bond for the faithful performance of the work, duly signed by a number of sureties; that the plaintiff was unable to purchase plumbing material on credit, and the defendant guaranteed the payment of the same and deducted the amount paid for such material as each payment was made. It also appears that the state made payment of eighty per cent of the amount due to the contractor every two weeks, and the contractor seems to have paid the subcontractors at the same time. There was a provision in the plaintiff's contract that the contractor for certain causes might declare the contract at an end, and thereupon the plaintiff's contract should cease and determine. Under this provision the defendant in June, 1887, declared the plaintiff's contract annulled, and thereafter refused to permit him to perform his contract. The material in controversy, the plaintiff claims, was in the building when the defendant took possession, and that it belonged to the plaintiff, and he was entitled to the imme-

diate possession of the same. The testimony shows that after the defendant excluded the plaintiff from the building in question and prevented him from performing his contract that he presented a bill to the plaintiff and his bondsmen, wherein he claimed that he had paid out for the plaintiff, for material for said building, the sum of $3,415, and that included the property in controversy, and that he had brought suit on the bond to recover the balance due for said material. This is nowhere denied. This being so, it is difficult to understand why the defendant also claims the right to the possession of the goods that, according to his own showing, were the property of the plaintiff and he and his sureties were liable for. It is claimed that the defendant had a lien upon the goods until they were fully paid for, and that, therefore, he was entitled to the possession under the lien, but the proof fails to show such lien or any arrangement that can be construed in that light. In no view of the case, therefore, can the judgment be sustained. The judgment is therefore reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

PHENIX INSURANCE COMPANY OF BROOKLYN V. JAMES T. REAMS.

FILED JUNE 30, 1893. No. 5099.

Review: ERROR: BRIEFS: PRACTICE. Where no briefs are filed by either party in a case brought into this court on error the court will examine the pleadings and evidence, and if the judgment conforms thereto the judgment will be affirmed. Particular errors in a record must be pointed out in a brief of the party complaining.

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

A. F. Moore, for plaintiff in error.

E. A. Fletcher, *contra*.

MAXWELL, CH. J.

This is an action upon a policy of insurance against loss or damage to live stock by lightning to recover the value of a mule, which it is alleged was killed by lightning. The insurance company makes three defenses to the action: First, that the action was not brought within six months, as required by the terms of the policy; second, that the defendant in error has never furnished proofs of loss at the Chicago office of the company; and third, that the mule alleged to have been killed was but three months old, and was not covered by the policy.

There is a reply which need not be noticed.

On the trial of the cause the jury returned a verdict in favor of the defendant in error for the sum of $60, with interest at seven per cent from the time the mule is alleged to have been killed, $74.91 in all, upon which judgment was rendered.

No briefs were filed by either party, nor are any alleged errors pointed out, except in the assignments of error in the petition. Such being the case, we will examine the pleadings and evidence, and if the judgment is in conformity therewith it will be affirmed. Particular errors in a record must be pointed out in the briefs of the party complaining. An examination of the record in this case fails to disclose any material error, and the judgment is

AFFIRMED.

THE other judges concur.

IN RE BOARD OF PUBLIC LANDS AND BUILDINGS, AND BOARD OF PURCHASE AND SUPPLIES.

FILED JUNE 30, 1893. No. 6306.

Statutes: REPEAL BY IMPLICATION: BOARD OF PUBLIC LANDS AND BUILDINGS. The title of the act of February 15, 1877, "to regulate the purchase of supplies for the public institutions and executive offices of the state," is not broad enough to include a repeal by implication of the provisions of the act of February 13, 1877, for the auditing by the board of public lands and buildings of accounts for money disbursed for the support of the public institutions of the state. NORVAL J., dissenting.

QUESTIONS submitted to the supreme court by the board of public lands and buildings.

MAXWELL, CH. J.

The board of public lands and buildings has submitted to this court certain questions relating to a seeming conflict in the statutes relating to their duties and those of the board of purchase and supplies. After referring to and setting out portions of the statutes in question, they submit the following:

"1. What bills, if any, do the board of purchase and supplies examine and approve?

"2. What bills, if any, do the board of public lands and buildings examine and approve under the existing laws of this state?

"3. Does the act of 1877 (Laws of 1877, p. 199), creating a board of purchase and supplies, supersede the act of 1877 (Laws of 1877, p. 188), establishing a board of public lands and buildings and defining their duties, in so far as the latter act provides that the board of public lands and buildings shall examine and approve the account of the various state institutions therein mentioned?"

Section 19, article 5, of the constitution provides: "The commissioner of public lands and buildings, the secretary of state, treasurer, and attorney general shall form a board which shall have general supervision and control of all the buildings, grounds, and lands of the state, the state prison, asylums, and all other institutions thereof, except those for educational purposes, and shall perform such duties and be subject to such rules and regulations as may be prescribed by law."

In 1877 the legislature passed an act creating the board of public lands and buildings. The powers of the board as declared in that act are as follows:

"Section 1. That the board created by section 19 of article 5 of the constitution of the state of Nebraska, consisting of the commissioner of public lands and buildings, the secretary of state, treasurer, and attorney general of the state, shall hereafter be known in law as 'the board of public lands and buildings of the state of Nebraska,' and shall have general supervision and control of all the public lands, lots, and grounds, and all institutions, buildings, and the grounds thereto, now owned, or that may hereafter be acquired, by the state, including the saline lands, together with all salt springs, the penitentiary lands, internal improvement lands and lots, as well as the state capitol building and grounds, the state penitentiary and grounds, the state hospital for the insane and grounds, the asylum for the deaf and dumb and grounds, the asylum for the blind and grounds, and all other lands, lots, grounds, and buildings now belonging or hereafter acquired by the state; *Provided, however,* That all lands, lots, grounds, and buildings, or institutions set aside for and devoted to educational purposes, be and hereby are excepted from the provisions of this act.

"Sec. 2. The board of public lands and buildings shall have the power to make general direction, according to law, for the sale, leasing, or other disposition of the lands, lots,

and grounds belonging to the state as aforesaid, and shall give warrant by their proceedings as such board to the commissioner of public lands and buildings for his action in the sale or leasing of such lands, lots, and grounds, and shall require of the said commissioner a full and detailed report of all such sales, leases, and the funds thereby acquired, as hereinafter directed.

"Sec. 3. The board shall have general custody and charge of all buildings and institutions and the grounds thereto coming under the provisions of this act, and shall be responsible for the proper keeping and repair of the same, and shall require from the commissioner of public lands and buildings, who shall be direct custodian of such institutions, buildings, and grounds, a report, at least once in every three months, as to the condition of the same; *Provided*, That no additions shall be made to any public buildings without special appropriation of the legislature.

"Sec. 4. The said board shall have power, under the restrictions of this act, to direct the general management of all the said institutions and be responsible for the proper disbursement of the funds appropriated for their maintenance, and shall have reviewing power over the acts of the officers of such institutions, and shall, on the part of the state, at regular meetings as hereinafter directed, audit all accounts of such officers, including the accounts of the commissioner of public lands and buildings, except his salary.

"Sec. 5. At the regular meeting of the board it shall be their duty to examine the accounts of the public officers contemplated in this act and to determine whether the same are entitled to be paid out of the moneys appropriated for the purpose of maintaining the institutions for which they are charged, and, if correct, shall approve the same, which approval shall be signed by the president and countersigned by the secretary under date of such action, and if the accounts be incorrect, exorbitant, or not entitled to payment from such appropriations, the same shall be dis-

approved and returned to the claimant, such board keeping a record of the same.

"Sec. 6. When the accounts above mentioned have been filed with the board, and shall have been audited and approved by them, the auditor of public accounts is hereby authorized and directed, upon the presentation to him of such accounts so authenticated, to issue his warrant on the treasurer against the proper fund or appropriation, for the amount therein stated, to the claimant or his assignee. And no accounts coming under the provisions of this act shall be entitled to payment until they have been so approved by the said board.

"Sec. 7. It shall be the duty of the board to take cognizance of all charges or complaints made against the said public officers, and at a regular meeting, to give an impartial hearing to such charges, and the defense against them, if any, and report the charges, evidence, and their conclusions in the matter, to the governor, within six days after the determination of such investigation.

"Sec. 8. The said board shall meet at least once in each month, on the first Monday thereof, for the transaction of business; the commissioner of public lands and buildings shall be *ex-officio* president of the board, and shall preside at all meetings and execute all other duties prescribed for him in this act, and shall sign all papers and instruments or documents that shall be approved, made, or directed by the board.

"Sec. 9. The secretary of state shall be *ex-officio* secretary of the board, and shall keep a careful record of all the proceedings of the board in a substantial and well bound book, to be kept for that purpose, and which shall be known as the 'Record of the proceedings of the board of public lands and buildings of the state of Nebraska,' and the said secretary shall countersign all papers, instruments, or documents approved, made, or directed by the board.

"Sec. 10. It shall be necessary for at least three members of said board to be present at any meeting for the transaction of business, and in absence of the president, or secretary, the place shall be filled by election, *pro tempore; Provided,* That no meeting for business shall be held without the presence of one or the other of them.

"Sec. 11. The president shall have the power to call the board together in special meeting, if in his judgment the public good requires the same to be done for any purpose contemplated in this act; and such call shall be by written notice, stating the purpose of meeting, which notice shall be delivered to each member of the board."

This act was passed and took effect February 13, 1877. Two days thereafter the legislature passed "An act to regulate the purchase of supplies for the public institutions, and the executive departments of the state." The act is as follows:

"Section 1. That all purchases and contracts for supplies for any of the departments and public institutions of the state, where the public exigencies do not require the immediate delivery of the articles, shall be by advertising a sufficient time previously for proposals for supplying the same.

"Sec. 2. At least one month previous to the first day of January, April, July, and October, respectively in each year, a board consisting of the governor, commissioner of public lands and buildings, secretary of state, treasurer, and attorney general, shall meet with the warden of the state prison, and the superintendent of each of the asylums or other institutions furnished by the state, and determine the supplies that may be necessary for three months, except articles as may be perishable and cannot be kept. Said board shall designate clearly the quantity and quality of the articles, and shall then advertise for ten days in some newspaper published at the capital, having general circulation in the state, before the first day of January, April,

July, and October respectively, for proposals for furnishing said articles, and for each institution separately, to be delivered at the institution within ten days after the first day of the months aforesaid; *Provided*, That the board may permit the delivery of the goods monthly, if in their judgment it be deemed best. And the bids which propose to furnish the supplies for either institution at the lowest rate shall be received for such institution; *Provided further*, That no proposal shall be considered by said board unless the same is accompanied by a bond with such security as the board shall determine, with condition to furnish said articles as proposed in said bid.

"Sec. 3. All supplies for such institutions, not purchased as provided by this act, shall be purchased in such manner as shall be directed by said board by written instruction.

"Sec. 4. The head of each of the executive departments respectively shall advertise for proposals for supplying the departments in accordance with the provisions of this act.

"Sec. 5. All vouchers for supplies having been examined and approved by said board or the head of the department, as the case may be, shall be approved by the secretary of state, and thereupon the auditor of state shall draw his warrant upon the treasurer for the amount."

It will be observed that the title of the act is not to create a board to purchase supplies but to regulate the purchase. This is to be done by public advertisement for ten days before the first day of January, April, July, and October in each year. The board is required to designate clearly the quantity and quality of the articles desired, that is, the different articles desired shall be specified and described in such a manner that all bidders will know just what is intended. In many respects the same rules apply as in the letting of contracts for supplies for a county.

In *State v. York County*, 13 Neb., 65, in speaking of

advertisements for supplies, it is said: "These propositions should distinctly specify the kind and quality desired, and if possible the commissioners should provide samples as a basis on which to make the bids, so that all be made on the same basis. The object of the law is to invite competition and prevent favoritism and fraud." That language is quoted with approval in *State v. Saline County*, 19 Neb., 252, and is applicable in the case at bar.

The utmost publicity possible should be given of the proposed purchase so that competition may be invited. It is not intended that any goods shall be purchased at private sale except in case of emergency and which will not arise once in a thousand times. The fifth section provides that all vouchers for supplies having been examined and approved by the board or the head of the department, as the case may be, shall be approved by the secretary of state; that is, the board may examine the vouchers and approve the same, but it is not essential that it should do so. It is sufficient if the head of the particular department certify to their correctness. Nor do these provisions supersede the provisions of the act creating the board of public lands and buildings, in which it is the duty of that board to examine the accounts of the public officers, and makes the board responsible for the proper disbursements of the funds, etc. It will be seen from the title that it does not purport to supersede the act which took effect February 13, 1877. That remains in full force, but the act of the 15th of the same month regulates the mode of purchase of supplies. There is no conflict between the acts and both may stand. It is unnecessary in this connection to refer to the rule that to justify a repeal by implication there must be such a repugnancy between the acts that both cannot stand, therefore the latest act will supersede the former. That rule, however, is not applicable here. The board of purchase and supplies need not approve the vouchers for supplies, but the board of public lands and buildings must do so before a warrant can

be drawn in favor of the persons holding such vouchers, and the act of February 15 does not supersede that of February 13, 1877.

POST, J., concurs.

NORVAL, J., dissenting.

I dissent from the decision of my associates on the ground that this court has no jurisdiction to pronounce the same. The constitution divides the powers of the state government into three distinct departments, the legislative, executive, and judicial, and defines the powers and duties of each. Section 2 of article 6 of the state constitution reads as follows:

"Sec. 2. The supreme court shall consist of three judges, a majority of whom shall be necessary to form a quorum or to pronounce a decision. It shall have original jurisdiction in cases relating to revenue, civil cases in which the state shall be a party, *mandamus*, *quo warranto*, *habeas corpus*, and such appellate jurisdiction as may be provided by law."

It is to the quoted section above that we must look for the jurisdiction of the supreme court. There is no other provision of the constitution relating to the subject. In *Miller v. Wheeler*, 33 Neb., 765, it was held that the legislature has no power to increase the original jurisdiction of this court conferred by the constitution. That was an action brought in this court under the statute, to contest the office of district judge. The present chief justice, in delivering the opinion of the court, says: "A more careful examination of the statute and the constitution, however, convinces the writer that the original jurisdiction of the supreme court is confined to the cases specified in the constitution, and that under another name no additional jurisdiction can be conferred. This is a court, the primary object of which is to review cases tried in the district courts. It is an ap-

pellate tribunal and is given original jurisdiction in a few limited cases, most of which are extraordinary remedies for the purpose of preventing a failure of justice."

It is plain that the section of the constitution to which reference has been made confers no jurisdiction upon the supreme court to answer queries submitted by either the legislature or the officers of the executive department of the state government, and no such duty is imposed upon the court of last resort by any other provision of the constitution or by legislative enactment. It is the duty of the court, in a litigated case, where the question arises, to construe a statute, or determine whether a law is constitutional or not; but it is proper to do so only in the determination of a real controversy between individuals in a proper action brought for that purpose. Courts should refrain from construing a statute or passing upon its constitutionality in advance of actual litigation, for the obvious reason that the parties who may be interested are not before the court, and the decision would not be binding upon them. Here, upon an *ex parte* proceeding, without the assistance of either a brief or oral argument, we are asked to pass upon important questions. To undertake to answer such questions we must act both as court and counsel.

But seven of the states of the Union contain constitutional provisions making it the duty of the supreme court to act as the legal adviser of the executive and legislative departments of the state government. The constitution of Colorado declares that "the supreme court shall give its opinion upon important questions upon solemn occasions when required by the governor, the senate, or the house of representatives; and all such opinions shall be published in connection with the reported decisions of the court." The legislature of that state submitted to the supreme court whether a bill proposing to increase the fees of district attorneys, then pending before the legislature, would apply to the district attorneys then in office. The court in *Re Con-*

stitutionality of Senate Bill No. 65, 12 Col., 466, decided that the constitutional provision of that state above quoted applies solely to cases involving questions of public right, and that such questions should rarely be thus presented or considered. It was held that the question submitted in that case was not one requiring in advance the opinion of the court, and it declined to answer the same. Chief Justice Helm in the opinion says: "It is a principle declared by our constitution (section 25, article 2) and of universal recognition, that no person shall be deprived of life, liberty, or property without due process of law; but there cannot be due process of law unless the party to be affected has his day in court. Yet a careless construction and application of this constitutional provision might lead to the *ex parte* adjudication of private rights by means of a legislative or executive question, without giving the party interested a day or voice in court. When this tribunal exercises its original jurisdiction by entertaining any of the other proceedings specified in the constitution, process must issue, the parties to be affected must have notice, and they must be given an opportunity to appear and be heard both in person and by counsel, so that, even though the primary and principal purpose of the proceeding be to adjudicate a matter *publici juris*, yet there is a compliance with the fundamental requirement relating to due process of law. This consideration greatly re-inforces the proposition that it could not have been the purpose of those who framed the amendment to permit such *ex parte* adjudications in legislative questions. We have no hesitancy in re-affirming what we have already declared, that 'parties must still adjudicate in the ordinary and regular course of judicial proceedings.'" (See *In re Senate Resolution on Irrigation*, 9 Col., 620; *In re Construction of Constitution*, 54 N. W. Rep. [S. Dak.], 650; *Opinion of the Justices*, 21 N. E. Rep. [Mass.], 439; *Opinion of the Justices*, 24 N. E. Rep. [Mass.], 1086; *Opinion of the Court*, 49 Mo., 216.)

In Nebraska the attorney general, and not the supreme court, is the legal adviser of the executive and legislative departments. We are aware that this court has, in some instances, assumed to answer questions submitted by the other branches of the state government, although but twice since the writer has been a member of the court, and then I, with much reluctance, assented. This court is now burdened with business. The number of suits annually brought to this court had so increased that the last legislature created a supreme court commission to assist in the disposal of the numerous cases on the docket, and it seems to me, in justice to the litigants who have actions pending, it is time for the court to call a halt, and entertain jurisdiction solely in causes where the same is conferred by the constitution. The courts of last resort of most of the states decline to take jurisdiction in a proceeding like this, and a different practice prevails almost alone in the few states having a constitutional provision similar to that of the state of Colorado.

Entertaining this view upon the subject of jurisdiction, it would be improper for me at this time to express an opinion upon the questions propounded by the board of public lands and buildings, although I would willingly do so were the matters before the court in a legal manner.

OMAHA & REPUBLICAN VALLEY RAILROAD COMPANY v. MARY COOK.

FILED JUNE 30, 1893. No. 5101.

1. **Jury**: CHALLENGE: QUALIFICATIONS. In a personal damage case against a railway a juror stated in his examination on his *voir dire*, in substance, that he had an elevator on the line of railway and was engaged in the business of buying and shipping grain over the railroad; that he had received favors from the

railway company and desired to retain the favorable consideration of the company; that he had no personal feeling in the matter and could render a fair and impartial verdict. *Held*, That a challenge for cause was properly sustained; that a fair trial can only be had where the jurors are absolutely free, impartial, and independent.

2. ———: ———: ———: EXAMINATION: REVIEW. Where the examination of a juror raises a doubt as to his being an elector of the county where the action is brought, there is no error in sustaining a challenge for cause.

3. ———: ———: ———: ———: DISCRETION OF TRIAL COURT. Even where by his formal answers the juror brings himself within the letter of the statutory qualification, if the court should discover the least symptom of unfairness or prejudice he should be rejected. So that a fair and impartial jury is secured, error cannot be predicated on the rejection of persons who may have been qualified. Some discretion must be allowed to the trial court in the selection of jurors.

4. **Railroad Companies**: NEGLIGENCE: PERSONAL INJURIES: EVIDENCE: TRIAL. Evidence, being conflicting, was properly submitted to the jury.

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

The facts are stated in the opinion.

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

The court erred in sustaining the challenge for cause made by plaintiff below to the juryman Salter. He was examined by counsel and the court. The evidence disclosed no circumstance from which a suspicion of bias in the mind of the juror for or against either party could arise. The juror declares that he has no feeling favoring the railroad company as a suitor in the case, and that his verdict would nor could in no way be affected by his business relations. The ruling of the court disregards the law that in the absence of any evidence to the contrary the

juror must be presumed competent, and that the court has no right to disregard undisputed evidence. Mere friendliness for the company is not ground for suspicion of bias. (*Engmann v. Immel*, 59 Wis., 252; *Burlington & M. R. R. Co. v. Westover*, 4 Neb., 273; Code, sec. 669*l*; *Hart v. State*, 14 Neb., 572; *Ensign v. Harney*, 15 Id., 331; *People v. McQuade*, 110 N. Y., 284; *Burlington & M. R. R. Co. v. Beebee*, 14 Neb., 464; *Heuke v. Milwaukee C. R. Co.*, 69 Wis., 401; *Strawn v. Cogswell*, 28 Ill., 457; *Hutchison v. State*, 19 Neb., 262; *Commonwealth v. Webster*, 5 Cush. [Mass.], 295.) The challenge to the juror Spangler should not have been sustained. He had heard from some one what purported to be the facts in the case, but formed or expressed no opinion as to the rights of the parties and was under no obligation to the company. (*Reynolds v. United States*, 98 U. S., 155.) The mere fact of past business relations with the company is not sufficient cause for sustaining a challenge to a juror. (*Central R. Co. v. Mitchell*, 63 Ga., 173.) The challenge to the juror Jackson should not have been sustained on the ground that he was not a resident of Howard county. It appeared that he had been a resident of that county for six months, and testified that he came with the intention of making it his home. The place where a person lives is taken to be his domicile until facts adduced establish the contrary, and when once acquired the domicile is presumed to continue until it is shown to be changed. (*Case v. Clarke*, 5 Mason [U. S.], 70; *Ennis v. Smith*, 14 How. [U. S.], 400; *Morris v. Gilmer*, 129 U. S., 328; *Sears v. City of Boston*, 1 Met. [Mass.], 250; Wharton, Conflict of Law, sec. 43; Story, Conflict of Law, sec. 46; *Anderson v. Watt*, 138 U. S., 694; *Burlen v. Shannon*, 115 Mass., 438; *Cheely v. Clayton*, 110 U. S., 705.) The challenge to the juror Salter was overruled. The jury was impaneled and sworn. After the commencement of the trial, without any further evidence or reason, the court, of its own motion,

excused Salter from the jury and sustained the challenge. There was no evidence showing his incompetency. No fact was shown which rendered it probable that the verdict would be set aside if he were retained upon the jury. The ruling sustaining the challenge was erroneous. (*Thorp v. Deming*, 43 N. W. Rep. [Mich.], 1097; *Rex v. Edwards*, 4 Taunt. [Eng.], 309; *Stewart v. State*, 15 O. St., 155; *Stone v. People*, 2 Scam. [Ill.], 326; Thomp. & M., Juries, sec. 273; *Hildreth v. City of Troy*, 4 N. E. Rep. [N. Y.], 559; *Black v. State*, 9 Tex. App., 328.)

A. A. Kendall, contra, cited: *Ensign v. Harney*, 15 Neb., 330; *Marion v. State*, 20 Id., 238; *Collins v. People*, 103 Ill., 23; *Holt v. State*, 9 Tex. App., 571; *State v. Jones*, 97 N. Car., 469; 12 Am. & Eng. Encyl. Law, p. 366.

MAXWELL, CH. J.

The amended petition of the plaintiff below, after stating the corporate existence of the defendant company and the operation of its road running northwesterly through the counties of Hall, Howard, Greeley, and Valley to Ord, Nebraska, avers, in substance, that on the 8th day of September, 1884, the plaintiff, being then a child of the age of thirteen years, while walking upon the track of the said railroad company, in the county of Greeley, in said state, was run into and against and violently struck and thrown from the track of the said railroad company by a locomotive attached to a passenger train then in use upon the said track of the said railroad company; that by reason of being struck and thrown from said track by the said locomotive, this plaintiff was frightfully mangled and permanently injured; that this plaintiff's right leg and hip were broken, and the plaintiff's left foot was terribly mangled and crushed and bruised, and the flesh torn thereform, and the heel severed from the said foot, and the use of said foot

was thereby permanently injured and destroyed, and plaintiff has suffered, and still suffers, greatly with bodily pain by reason of said injury, and that the injury to the said foot was so great that said foot has never been healed up and still remains an open sore; that said foot is of an ill-shape in consequence thereof, and plaintiff is unable to wear a shoe upon it owing to its ill-shape and its unhealed condition; that plaintiff, in consequence, is unable to stand or walk upon said foot, and is unable to work and maintain herself in any way, and has, in consequence of said injury, become a helpless cripple for life.

The petition further alleges that plaintiff was struck and run against by said locomotive through the gross neglect and carelessness of the said Omaha & Republican Valley Railroad Company, said neglect and carelessness being in not providing its locomotive and cars thereto attached with the latest improved and best appliances for the operating, controlling and stopping of said locomotive and train of cars; and through the gross negligence and carelessness of its agents, employes, and servants in charge of the said train, and not through any act of carelessness on the part of this plaintiff.

It also avers that said locomotive and train of cars attached thereto were not supplied with air brakes, they being the latest improved and best appliances then in use upon all carefully equipped trains for speedily controlling and stopping them; that said locomotive and cars thereto attached were running off from the schedule time stated by said railroad company, a fact at that time unknown to plaintiff; that they were running at a greater rate of speed than allowed by the rules of said company, to-wit, at a rate of forty miles an hour; that the defendant's operators, agents, and servants in charge of said train of cars, carelesssly neglected to sound the whistle and ring the bell of the said locomotive to apprise the plaintiff of its approach although they were able to see the plaintiff more than

seventy rods in front of the said locomotive and train, and they carelessly and negligently failed to slacken or stop the said locomotive and train of cars, although the said agents, servants, operators, and engineer in charge thereof had ample opportunity to stop said train of cars before injuring the plaintiff, had said train of cars been properly supplied with air brakes and had said operators, agents, servants and engineer applied all means within their power to stop said locomotive and train after discovering the perilous situation of the plaintiff.

And the petition alleges that by reason of the carelessness and negligence of the said Omaha & Republican Valley Railroad Company as above set forth, and the gross negligence of its agents, employes, operators, and engineer, as above set forth, and the injury sustained by this plaintiff in consequence thereof, this plaintiff has been damaged and injured in the sum of $25,000, no part of which has been paid by the said Omaha & Republican Valley Railroad Company, nor by any other person or corporation.

Wherefore, plaintiff prays judgment against it for the sum of $25,000, with interest thereon from the 8th day of September, 1884, and for the cost of this action.

To this petition the railway company filed an answer:

"The above named defendant, for answer to the plaintiff's amended petition herein, admits all and singular the allegations contained in the first paragraph of said petition, and that it is successor to the Omaha & Republican Valley Railroad Company as averred in said petition.

"Defendant admits and alleges that on the 8th day of September, 1884, while plaintiff was walking on the track on defendant's ground in the county and state therein stated, she was run against and struck by defendant's locomotive attached to one of its passenger trains and thrown from the track, but alleges that the same was unavoidable by defendant, its agents or employes, and without fault of defendant, its agents or employes.

"Defendant avers that the said plaintiff, at the time aforesaid was, wholly without authority or license, walking without any precaution between the rails of the defendant's track, and was a trespasser thereon.

"Defendant has no knowledge or information, except from the statements of the plaintiff's petition and statements given above on the part of the defendant in the trial of the said action, as to the plaintiff's age at the time of the accident, and leaves the plaintiff to make her proofs as she may be advised are material.

"Further answering, defendant admits that the plaintiff was injured at the time aforesaid at the time of said collision, but as to the extent of said injuries the defendant has no knowledge or information except from averments of the said petition and the testimony given on the part of the defendant on said trial; and it leaves the plaintiff to make her proof thereof as she may be advised is material.

"The defendant alleges that whatever injuries, if any, which the plaintiff so then and there sustained at the time of said collision, the said injuries were by said plaintiff received and sustained by and through her own fault, carelessness, and negligence contributing thereto, and in no respect by or through any fault, wrong, or negligence of the said defendant, its employes, agents, servants, operators, or engineers.

"The defendant denies each and every other allegation of the said petition not herein answered or denied."

On the trial of the cause the jury made special findings and returned a general verdict as follows:

"You will, in addition to your general verdict return answers to each of the following questions:

Q. Was the plaintiff at the time of the injury of the age of thirteen and a half years?

A. Yes.

Q. Was she then apparently a girl of ordinary discretion?

A. Yes.

Q. Was she then at that time deaf to any considerable extent?

A. No.

Q. Had she just before the happening of the accident left her brother's house to return to her father?

A. Yes.

Q. If you answer the last question in the affirmative, then did she voluntarily and for her own convenience go upon the defendant's premises and right of way?

A. Yes.

Q. Was the plaintiff then and there trespassing upon the defendant's premises; that is, was she there without right or authority?

A. Yes.

Q. Was she at the same time walking in the same direction the train was going?

A. Yes.

Q. Was she then between the rails or outside of them?

A. Yes, between the rails.

Q. Did she step from the outside of the rails into the space between them after the engineer saw her?

A. No.

Q. Was she walking beween the rails when the engine struck her?

A. Yes, in the act of jumping.

Q. Was the engine whistle sounded more than once before she was struck?

A. No.

Q. Did the engineer cause the whistle to be sounded as the train approached the plaintiff.

A. Yes.

Q. Did the trainmen in response to the danger whistle promptly apply the brakes on the train and use such appliances as they had thereon to stop the train?

A. Yes.

Q. Could the defendant's agents, by the appliances then at their command, after it became apparent that plaintiff was walking between the rails, unaware of the coming of the train, have stopped the train before it reached her?

A. Yes.

Q. Did the plaintiff, after she went upon defendant's premises, either look or listen to satisfy herself whether or no any train was approaching?

A. No."

The jury also returned a general verdict for $11,500, upon which judgment was rendered.

The first error relied upon for a reversal is the exclusion of Mr. Salter from serving on the jury. His examination on his *voir dire* is as follows:

Q. You have no feeling in a case of this sort in favor of or against either party to the suit, have you?

A. Well, it is certainly to my interests to keep in favor of the railroad company, for I am an extensive shipper of grain.

Q. And you are also interested in buying the grain from the farmer?

A. Yes, sir.

Q. Taking into consideration all your circumstances are you in such a position that you could fairly and impartially render a verdict in this case without any feeling or prejudice in one way or the other.

A. Yes, sir.

Q. Mr. Salter, if you are conscious of anything that would prevent you from sitting fairly and impartially on this case, you may state it.

A. Well, I have received considerable favors from the railroad.

Q. Have you from any one else?

A. No, sir.

Q. Would these favors in any way affect your verdict?

A. No, I think not. At the same time I would prefer to be relieved from service in this case.

Q. I presume so. But your situation is such that you could, so far as you know, fairly and impartially render a verdict in this case?

A. Yes, sir.

Further examination by Mr. Kendall:

Q. I believe you stated that you had received some favors from the railroad company?

A. Yes, sir.

Q. And by reason of receiving these favors you feel somewhat under obligation to the company, do you?

A. I do.

Q. And that is this same Omaha & Republican Valley Railroad Company?

A. Yes, sir. It is certainly to my interest to stand in well with the railroad company.

Q. Think you would have a kind of a feeling that if all other things were equal, if you could return the favor you would like to do it, would you?

A. Yes, sir.

Mr. Kendall challenges the juror for cause.

By the court:

Q. That is a general opinion or prejudice that way, is it? Just a general opinion in favor of the company?

A. Yes, sir, the same as I would have for any person else that has shown me a favor. That is all.

Q. Supposing it to have been a person or a railroad company, or what not, that person being a party to a suit such as we have here this morniug, would past favors and any desire that you might have to do them a favor, have any bearing upon your consideration of the evidence in the case?

A. No, sir; decidedly no.

Q. Would it in any manner influence your verdict for or against either party?

A. No, sir.

Q. You could enter into it perfectly free from any bias in either direction?

A. Yes, sir.

Q. Laying that all aside and trying it entirely upon the evidence and the law?

A. Yes, sir.

Afterwards, and before the jury was completed, the plaintiff below renewed his challenge to Mr. Salter, and the record shows the following:

Court: Mr. Salter, is there any reason, or are you sensible of any reason why you should not sit upon this jury?

A. I am not, sir.

The court excuses Mr. Salter and the defendant excepts.

Court: I will allow each of you a peremptory challenge to any one that may be called in Mr. Salter's stead, and also allow the defendant to withdraw its waiver of the last peremptory challenge.

It is evident that the court erred in overruling the challenge in the first instance, and no doubt on reflection became convinced of that fact and hence sustained the challenge.

A fair trial before an impartial jury means one where the jurors are entirely indifferent between the parties. In *Curry v. State*, 4 Neb., 545, it was held that to justify the retention of a juror on the panel he must be entirely indifferent between the parties. It is said: "If he (the juror) express the least doubt of his ability to do so he should not, in the face of a challenge for cause, be retained. And even where by his formal answers the juror brings himself within the letter of the statutory qualification, if the court should discover the least symptom of prejudice or unfairness, or an evident desire to sit in the case, he should, in justice both to the state and the accused, be rejected."

This court, from the first, has held that jurors could accept no favors from either party, as the effect might, and probably would, be to affect its verdict. (*Ensign v. Harney*, 15 Neb., 330; *Vose v. Muller*, 23 Id., 171; *Johnson v. Greim*, 17 Id., 447.) It is very clear that the relations between the railway company and the juror were too

intimate to secure impartiality on the part of the juror named, and the court did not err in discharging him.

The juror W. B. Spangler, a former employe of the company, was also excused, which it is claimed is erroneous; and the same is true of the juror Jackson. He testifies:

Q. Mr. Jackson, does your family reside here?

A. No, sir.

Q. Where is your family?

A. Grand Island.

Q. How long has your family resided in Grand Island?

A. Seven or eight years. Eight years, I guess.

Q. Then you are over here temporarily running the hotel are you?

A. Yes, sir.

Q. Have you exercised the right of the ballot here?

A. No, sir; I do not vote.

Q. Where is your voting place?

A. Well, I don't know whether I would be a voter here or not. I did not try to vote.

Q. You were here for the temporary purpose of conducting the hotel?

A. Yes, sir.

Q. How long does your lease run for the hotel?

A. Until to-morrow night.

Q. Where are you going then?

A. I haven't hardly made up my mind where I shall go.

Q. Return to your family for the present?

A. For the present, yes, sir.

By Mr. Kelly:

Q. Do you consider yourself a resident of this county?

A. Well, I don't know whether I would be or not.

Q. I am asking you what you consider yourself?

A. Why, yes, sir; so long as I stay here, I suppose I am. They came around and assessed me the other day. Personal tax, I suppose they call it.

It is very clear that Mr. Jackson was not an elector of

Howard county and therefore the challenge was properly sustained. In addition to this, the excusing of a person called as a juror from serving on the jury where there is any doubt of his fairness or qualifications is not ground of error. (*Richards v. State*, 36 Neb., 18; *State v. Miller*, 29 Kan., 43; Maxw., Cr. Proc., 581.)

In the case cited from Kansas it is said: "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; *Atchinson, 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 any harm, while to retain him, if his competency is doubtful, may do immense injury to one party or the other."

There was no error, therefore, in discharging these jurors as there is no complaint that a fair jury was not obtained.

There is no objection made to the instructions, so that the only remaining question is in regard to the evidence. There is testimony in the record that the engineer and fireman saw the plaintiff below on the track for at least seventy rods; that she was walking in the same direction that the train was going. There is also testimony that tends to show that her mind seemed to be absorbed; that the whistle was not sounded until within about a car's length, when the plaintiff below attempted to get off the track but was caught while attempting to do so, and sustained the injuries in question. There is also testimony that had the whistle been blown at the proper time to enable her to be apprised of the danger she could and in all probability would have left the track and the accident been avoided. In effect the issue is that although the plaintiff below was a trespasser on the railway track still the employes of the company could not inflict the injuries charged upon her

if by the exercise of ordinary care they would have been prevented. (2 Thompson, Neg., 1157; *Barker v. Savage*, 45 N. Y., 191, 194; *Brown v. Lynn*, 31 Pa. St., 510; *Northern C. R. Co. v. Price*, 29 Md., 420; *Locke v. First Division St. Paul & P. R. Co.*, 15 Minn., 283; *Nelson v. Atlantic & P. R. Co.*, 68 Mo., 593; *O'Keefe v. Chicago, R. I. & P. R. Co.*, 32 Ia., 467; *Morris v. Chicago, B. & Q. R. Co.*, 45 Id., 29.) Compare *Lannen v. Albany Gas Light Co.*, 44 N. Y., 459, affirming 46 Barb. [N. Y.], 264. The rule is very clearly stated by Judge Thompson in his valuable work on Negligence, pp. 1105, 1157. In *McKean v. Burlington, C. R. & N. R. Co.*, 55 Ia., 192 [7 N. W. Rep., 505], it is said the rule is required by humanity and reason, citing *Morris v. Chicago, B. & Q. R. Co.*, 45 Ia., 29. To the same effect: *Brown v. Hannibal & St. J. R. Co.*, 50 Mo., 461; *Omaha H. R. Co. v. Doolittle*, 7 Neb., 481; *Burnett v. Burlington & M. R. R. Co.*, 16 Neb., 332 [20 N. W. Rep., 280]; *Cook v. Pickrel*, 20 Neb., 433 [30 N. W. Rep., 421]; *Union P. R. Co. v. Sue*, 25 Neb., 772 [41 N. W. Rep., 801]. Even if it be conceded that the plaintiff below was unlawfully on the track, and did not look back to see if a train was approaching, still there is testimony in the record from which the jury would be warranted in finding that, after the engineer became aware of the perilous condition of the plaintiff below, he could, by the exercise of ordinary care, have stopped the engine. This was proper to submit to the jury, and as it was fairly submitted there is no valid ground on which to set the verdict aside. The judgment is therefore

AFFIRMED.

THE other judges concur.

IN RE ROBERT DOBSON.

FILED JUNE 30, 1893. No. 6024.

1. **Criminal Law:** COSTS. Where a person is convicted of a criminal offense it is the duty of the court in which the conviction was had to render judgment against the prisoner for the costs of prosecution, and the court may make it a part of the sentence that the party be imprisoned in jail until the costs are paid, or secured to be paid, or he is otherwise legally discharged. (Criminal Code, secs. 500, 501.)

2. ———: ———: IMPRISONMENT FOR NON-PAYMENT. A defendant in a criminal case confined in jail for the non-payment of the costs assessed against him, and who is unable to pay the same, is not entitled to be discharged from further imprisonment for such costs, under sec. 528 of the Crimtnal Code, where it appears he has not been imprisoned at least one day for each three dollars of the costs.

ORIGINAL application for writ of *habeas corpus.*

A. Hardy, for petitioner, cited: *Estep v. Lacy*, 35 Ia., 419; *State v. Mooney*, 74 N. Car. 98.

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

NORVAL, J.

This is an application for a writ of *habeas corpus.* On the 24th day of February, 1893, the petitioner, Robert Dobson, was convicted in the district court of Gage county of an assault and battery, and on the 27th day of the same month he was sentenced by the court to pay a fine of $50, and the costs of prosecution, and that he be committed to the county jail until said fine and costs are fully paid. In compliance with said judgment he was committed to the jail of said county, where he is still confined. Subsequently, petitioner paid the fine imposed upon him, but no part of the costs of prosecution. It also appears that he

is possessed of no estate, either personal or real, wherewith to meet this demand.

But one point is presented for decision, and that is, whether the imprisonment of the petitioner because of his non-payment of the costs adjudged against him in the criminal case is illegal. The statutory provisions bearing upon the question are sections 500, 501, and 528 of the Criminal Code, which are as follows:

"Sec. 500. In all cases wherein courts or magistrates have now or may hereafter have the power to punish offenses, either in whole or in part, by requiring the offender to pay a fine or costs, or both, the said courts or magistrates may make it a part of the sentence that the party stand committed and be imprisoned in the jail of the proper county until the same be paid, or secured to be paid, or the defendant is otherwise discharged according to law.

"Sec. 501. In every case of conviction of any person for felony or misdemeanor, it shall be the duty of the court or magistrate to render judgment for the costs of prosecution against the person convicted.

"Sec. 528. Whenever it shall be made satisfactorily to appear to the district court, or to the probate judge of the proper county, after all legal means have been exhausted, that any person who is confined in jail for any fine or costs of prosecution, for any criminal offense, hath no estate wherewith to pay such fine and costs, or costs only, it shall be the duty of said court or judge to discharge such person from further imprisonment for such fine and costs, which discharge shall operate as a complete release of such fine and costs; *Provided*, That nothing herein shall authorize any person to be discharged from imprisonment before the expiration of the time for which he or she may be sentenced to be imprisoned, as part of his or her punishment, nor until the convict shall have been imprisoned at least one day for every three dollars of the amount adjudged against him."

An examination of the foregoing sections satisfies us that the proposition contended for by counsel for the petitioner is not tenable. Where a person is convicted of a crime, section 501 makes it the imperative duty of the court, in which the conviction is had, to render judgment against the prisoner for the costs of prosecution, and the next preceding section confers authority upon such court to include in the sentence that the party be committed to the county jail until such costs are paid, or security is given for their payment, or he is otherwise legally discharged. Under section 528, a defendant in a criminal case, confined in jail for the non-payment of the costs assessed against him, who is unable to pay the same, upon proper showing to the district court, or the county judge, may be discharged from further imprisonment for such costs, provided all legal means for their collection have been employed without success, and he has been confined at least one day for each three dollars of the costs. The petitioner is not entitled to be released on the ground of his poverty, since it does not appear that he has been in custody for the length of time specified in section 528.

We have examined and considered the two cases cited by the petitioner's counsel. In *Estep v. Lacy*, 35 Ia., 419, s. c., 14 Am. Rep , 498, it was decided that a general pardon issued by the governor does not operate to release a judgment rendered for the costs of prosecution. To the same effect is *State v. Mooney*, 74 N. Car., 98, s. c., 21 Am. Rep., 487. These decisions cannot be regarded as in conflict with the views stated by us. The demurrer to the petition is sustained and

WRIT DENIED.

THE other judges concur.

EDEN MUSEE COMPANY V. WILLIAM YOHE.

FILED JUNE 30, 1893. No. 4866.

1. **Appeal from Justice Court: DISMISSAL IN APPELLATE COURT: CONSENT OF APPELLEE.** A party appealing from a judgment of a justice of the peace to the district court may dismiss his appeal, without the consent of the appellee, at any time before the cause is submitted to the court or jury.

2. ———: ———: ———. The cases of *Berggren v. Fremont, E. & M. V. R. Co.*, 23 Neb., 620, and *Robbins v. Omaha & N. P. R. Co.*, 27 Id., 73, distinguished.

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

Hall, McCulloch & English, for plaintiff in error.

James W. Carr, contra.

NORVAL, J.

William Yohe brought an action before a justice of the peace against the Eden Musee Company, on an account for work and labor, and recovered a judgment therein for $50 and costs of suit. The defendant prosecuted an appeal to the district court, where, after the issues were made up, but before the cause was reached for trial, the appellant, plaintiff in error here, filed a motion for leave to dismiss its appeal, which motion was overruled by the district court. Afterwards, judgment was rendered against the appellant, and in favor of the appellee, for the sum of $112.80.

A single question is presented for our consideration, and that is, Did the district court err in refusing to permit the plaintiff in error to dismiss its appeal? Our answer is in the affirmative. It is clear on principle and authority that an appellant has a perfect right, in an ordinary action, to

dismiss his appeal at any time before the cause is submitted to the court or jury, even though his adversary does not consent thereto. Had the appeal been dismissed, the rights of the appellee would not have been in the least prejudiced thereby, inasmuch as such a dismissal would have left the case precisely the same as though no appeal had been taken. The appellee could then have enforced his judgment obtained before the justice. If he was dissatisfied with the amount of the judgment there entered, he should have taken and perfected an appeal. Not having done so, he cannot be heard to urge as an objection to the right of the appellant to dismiss his appeal that the recovery was too small. The motion to dismiss the appeal should have been sustained. (Elliot, Appellate Procedure, sec. 534; *Bacon v. Lawrence*, 26 Ill., 53; *Adkinson v. Gahan*, 114 Id., 21; *State v. Moriarty*, 20 Ia., 595; *Latham's Appeal*, 9 Wall. [U. S.], 145.)

Counsel for defendant in error in his brief argues that plaintiff in error did not ask proper relief; that the motion should have prayed for an affirmance of the judgment of the justice, instead of the dismissal of the appeal. The cases of *Berggren v. Fremont, E. & M. V. R. Co.*, 23 Neb., 620, and *Robbins v. Omaha & N. P. R. Co.*, 27 Id., 73, are cited to sustain the contention. Both cases were appeals from the awards of commissioners in condemnation proceedings. The doctrine there laid down was that when a railroad company appeals from an award of damages for real estate appropriated for right of way purposes, it cannot dismiss its appeal in the appellate court, but that the proper motion is to affirm the award; that the land-owner, by the dismissal of the appeal, would lose interest on the award, while the sustaining of a motion to affirm the award would carry interest and costs. The land-owner, having been deprived of the use of the money by the appeal, is entitled to interest thereon. To allow the railroad company to dismiss its appeal would be prejudicial to the rights of the

appellee, as it would deprive him of interest on the amount of the award. No such consequences could result in the case before us by a dismissal of the appeal, since the judgment of the justice would bear interest at the legal rate from the date of its rendition until paid.

Plaintiff in error did not waive the error in overruling of its motion by afterwards contesting the case on the merits. The judgment of the district court is reversed and the cause remanded with directions to dismiss the appeal at the costs of the appellant.

REVERSED AND REMANDED.

THE other judges concur.

IN RE FRED WALSH.

FILED JUNE 30, 1893. No. 6035.

1. **Criminal Law**: CONVICTION OF SEVERAL OFFENSES: SEPARATE SENTENCE. Where a person has been convicted at the same term of court of several distinct offenses, each punishable by imprisonment in the penitentiary, whether charged in separate informations or in separate counts of the same information, the court may impose a separate sentence for each offense of which the prisoner has been found guilty.

2. ———: ———: ———. In such case the judgment should not fix the day on which each successive term of imprisonment should begin, but should simply direct that each successive term should commence at the expiration of the one imposed by the previous sentence.

3. ———: SEPARATE SENTENCE. If the same offense is charged in different counts of an information, and there is a conviction on each count, but a single sentence should be pronounced upon all the counts for the one entire offense.

4. ———: FORGERY: INFORMATION. An information which charges the forgery of an instrument and the fraudulently uttering of

the same instrument by the same person charges but one crime, and in case of conviction but one penalty can be inflicted.

5. ——: SEPARATE SENTENCE: HABEAS CORPUS. To an information containing two counts, one charging the petitioner with the forgery of a certain bank check, and the other with the uttering of the same instrument, a general plea of guilty was entered. Thereupon the court sentenced him upon the first count to imprisonment in the penitentiary for the period of one year from the 9th day of May, 1892, and upon the other count a like imprisonment was imposed for the term of one year from May 9, 1893. By good conduct the petitioner saved two months of his first sentence, and having served out the term under such sentence, he applied for his release on *habeas corpus*. *Held*, That the second sentence was illegal and void, and that he was entitled to be discharged from further imprisonment.

ORIGINAL application for writ of *habeas corpus*.

Walter A. Leese, for petitioner.

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

NORVAL, J.

At the May term, 1892, of the district court of Douglas county, the county attorney filed in said court an information against the petitioner, Fred Walsh, which contained two counts; the first of which charges that the petitioner on the 12th day of April, 1892, at the county of Douglas, unlawfully and feloniously did falsely make, forge, and counterfeit a certain bank check calling for the sum of $45.60, with intent to defraud. A copy of the instrument is set out in the information. The second count charges the petitioner with feloniously uttering and publishing as true and genuine the said false, forged, and counterfeit bank check described and set out in the first count, he at the time knowing the same to be false, forged, and counterfeited. Subsequently, at the same term, the petitioner was arraigned on the information and he entered a general plea of guilty. He was thereupon sentenced by the court upon

the first count to confinement in the penitentiary at hard labor for the period of one year from and after the 9th day of May, 1892, and upon the second count a like imprisonment was imposed for the term of one year from May 9, 1893. By good conduct the petitioner has saved two months of his first sentence, and having served out the term under the first sentence, he, on the 10th day of March, 1893, presented to this court his petition for discharge on *habeas corpus*, on the ground that the second sentence is illegal and void. At the hearing the writ was allowed.

The contention of counsel for the petitioner is that the power to inflict cumulative sentences does not exist, unless expressly conferred by statute, and as there is no legislative enactment in this state authorizing cumulative sentences, such sentences in felony cases are illegal. The following authorities are cited to sustain the doctrine: *People, ex rel. Tweed, v. Liscomb*, 60 N. Y., 559; *Miller v. Allen*, 11 Ind., 389; *Kennedy v. Howard*, 74 Id., 87; *Prince v. State*, 44 Tex., 480; *James v. Ward*, 2 Met. [Ky.], 271; *Lamphere's Case*, 61 Mich., 105; *Bloom's Case*, 19 N. W. Rep. [Mich.], 200. But in our opinion the great weight of authority is in favor of the proposition that upon conviction of several offenses charged in separate indictments, or in separate counts of the same indictment, the court has power to impose cumulative sentences. See Wharton, Crim. Pl. & Pr., sec. 910; Bishop, Crim. L., sec. 953; *Kite v. Commonwealth*, 11 Met. [Mass.], 581; *Mims v. State*, 26 Minn., 498; s. c., 5 N. W. Rep., 355; *State v. Smith*, 5 Day [Conn.], 175; *Petition of McCormick*, 24 Wis. 492; *In re Fry*, 12 Wash. Law Rep. [D. C.], 388; *Ex parte Hibbs*, 26 Fed. Rep., 421; *State v. Robinson*, 40 La. Ann., 730; *Parker v. People*, 21 Pac. Rep. [Col.], 1120; *Mills v. Commonwealth*, 13 Pa. St., 631; *Brown v. Commonwealth*, 3 S. & R. [Pa.], 273*; *Russell v. Commonwealth*, 7 S. & R. [Pa.], 489*; *Williams v. State*, 18 O. St., 46; *Eldredge v. State*, 37 Id., 191; *Bolun v. People*, 73 Ill.

488; *Stack v. People*, 80 Id., 32; *Johnson v. People*, 83 Id., 431; *Fitzpatrick v. People*, 98 Id., 269.

The leading case sustaining the position that cumulative sentences are void, is *People, ex rel. Tweed, v. Liscomb*, 60 N. Y., 559, cited by counsel for the petitioner, and the doctrine there enunciated has been frequently criticised by law writers and jurists, and the courts generally have refused to follow it as a precedent. Although there is no statutory provision in this state which authorizes a court to sentence a person convicted of a crime to imprisonment for a term to commence at the expiration of another term specified in a previous sentence, yet, inasmuch as the statute does not in terms require sentences of imprisonment to commence *in præsenti*, we are persuaded that the power necessarily exists to make the term of imprisonment imposed by a sentence commence at the expiration of another, else where a person is convicted at the same term of court for several distinct offenses charged in the same or in different informations or indictments, the court could pronounce a sentence of imprisonment upon one conviction only, and judgments in the other convictions would have to be postponed until the expiration of the sentence in the other case. We are unwilling to adopt the construction contended for by the petitioner's counsel.

The supreme court of Ohio, in *Williams v. State, supra*, in passing upon a similar question, say, "To hold that where there are two convictions and judgments of imprisonment at the same term both must commence immediately, and be executed concurrently, would clearly be to nullify one of them. To postpone the judgment in one case until the termination of the sentence in the other would, if allowable, be attended with obvious inconvenience and expense, without any correspondent benefit to the convict. There is nothing in the statute requiring this, and it is not to be construed so as to defeat or impede the execution of its own provisions as to the punishment of

crimes. We think, both upon principle and the weight of authority, that we are required to hold that it is not error, upon a conviction in a criminal case, to make one term of imprisonment commence when another terminates."

This court has held that, where a person has been convicted of several distinct misdemeanors, it is proper for the court to impose a separate sentence upon each offense of which the defendant is found guilty (*Burrell v. State*, 25 Neb., 581); and we know of no reason why the same rule should not apply in convictions for felonies.

Where a cumulative sentence is imposed in case a person is convicted of several distinct offenses, the judgment should not fix the day on which each successive term of imprisonment should commence, but should direct that each successive term should begin at the expiration of the previous one (*Johnson v. People*, 83 Ill., 431); and this for the obvious reason that the prior term of imprisonment may be shortened by the good behavior of the defendant, by executive clemency, or by a reversal of the judgment. In which event, the succeeding sentence would then take effect, in case it provided that the term of imprisonment should commence at the termination of the previous one. It will be observed that the second sentence in the case we are considering did not so provide, but specified that the term of imprisonment should begin on May 9, 1893. By the good conduct of the petitioner his first term of imprisonment was, under the statute, cut down to ten months, so that his first term had ended, and his second term had not commenced when the writ of *habeas corpus* was granted in this case, or when the prisoner was ordered discharged on the writ issued herein.

There is another reason why the imprisonment of the petitioner was illegal. The information, although it contains two counts, charges but a single offense, yet the accused has been sentenced to two separate terms of imprisonment, one term for falsely making a bank check, and another term for

fraudulently uttering the same instrument. From the information itself it appears that the check described in the second count as having been fraudulently uttered by the petitioner was the same instrument as that described in the first count as having been forged by him. Both acts were parts of the same transaction, and constituted but one crime, and the court had no power to impose separate sentences upon each count. Wharton, Criminal Pl. & Pr. [9th ed.], sec. 251, states the rule thus: "Where a statute makes two or more distinct acts, connected with the same transaction, indictable, each one of which may be considered as representing a phase in the same offense, it has in many cases been ruled that they may be coupled in one count. Thus, setting up a gaming table, it has been said, may be an entire offense; keeping a gaming table, and inducing others to bet upon it, may also constitute a distinct offense; for either, unconnected with the other, an indictment will lie. Yet, when both are perpetrated by the same person at the same time, they constitute but one offense, for which one count is sufficient, and for which but one penalty can be inflicted." The above doctrine is abundantly sustained by the authorities. (*Johnston v. Commonwealth*, 85 Pa. St., 54; *In re Snow*, 120 U. S., 274; *Woodford v. State*, 1 O. St., 427; *Hinkle v. Commonwealth*, 4 Dana [Ky.], 513; *Commonwealth v. Eaton*, 15 Pick. [Mass.], 273; *Devere v. State*, 5 O. Ct. Court, 509; *State v. Egglesht*, 41 Ia., 574.) In the last case the supreme court of Iowa decided that where a person at the same time and as part of the same transaction passed four forged checks, he was guilty of but one offense, and that there could not be a separate conviction for uttering each instrument. (See *State v. Hennesy*, 23 O. St., 339; *State v. Benham*, 7 Conn., 414.)

The precise question we are considering was passed upon in the case of *Devere v. State, supra.* That was a prosecution for forgery before the court of common pleas, the indictment containing two counts, one charging the defendant

with the forgery of a promissory note, and the other with the uttering of the same instrument. A verdict of guilty was rendered on both counts, and she was sentenced by the court to confinement in the penitentiary for five years under the first count, and a like term under the second count, the last term to commence at the expiration of the first. She prosecuted error to the circuit court, where it was held under a statute relating to forgery, almost like our own, that the falsely making and the fraudulent uttering of the same instrument by the same person constitute a single offense and subject the guilty party to but one penalty. Bentley, J., in delivering the opinion of the court, says: "Upon a careful consideration of the authorities our conclusion is, that it satisfactorily appears from the record that in falsely making and fraudulently uttering the instrument set out in the indictment, the accused committed but one offense; that the 'making and uttering' of the same instrument by the same party were, in contemplation of law, connected and consecutive parts of but one transaction, and became and were so merged as to render the accused guilty of the crime of forgery, but not of having committed a double crime under the statute. It results that this double sentence, imposed as before stated, was without authority of law, and the judgment pronouncing such sentence must be reversed, and the cause remanded to the court of common pleas for judgment and sentence upon the verdict of the jury as for a single offense pursuant to law."

There can be no doubt of the soundness of the doctrine stated in the foregoing quotation. Where the different counts in an information charge the same offense, in case of a conviction on each count the rule is to render a single sentence upon all the counts for the one entire offense. It follows from these views that the imprisonment of the prisoner was unlawful, and that he should be discharged.

PRISONER DISCHARGED.

THE other judges concur.

GERMAN INSURANCE COMPANY OF FREEPORT ET AL. V. AMBROSE EDDY.

FILED JUNE 30, 1893. No. 5014.

1. **Attorneys' Fees:** ALLOWANCE UNDER VALUED POLICY ACT. Upon the rendition of a judgment in favor of the plaintiff in an action on a fire insurance policy issued since the taking effect of the valued policy act of 1889, where the insured building has been wholly destroyed, the court rendering the judgment is, under said act, authorized to allow a reasonable attorney's fee in favor of the plaintiff and against the insurer, to be taxed as costs in the case. Such allowance can be made only upon proof as to what constitutes a reasonable fee.
2. ——: ——: REVIEW. The question of the allowance of attorney's fee in such a case cannot be raised in the first instance in the supreme court, but the plaintiff must first demand such fee in his petition and present the question to the trial court, and if disallowed, the decision may be reviewed in the appellate court.

MOTION in supreme court by defendant in error to allow a reasonable attorney's fee, under the valued policy act of 1889. *Motion overruled.*

Abbott, Selleck & Lane, for the motion.

Adams & Scott, contra.

NORVAL, J.

The defendant in error, Ambrose Eddy, brought three actions in the district court, each on a fire insurance policy issued, respectively, by the German Fire Insurance Company of Peoria, the Queen Insurance Company, and the German Insurance Company of Freeport. The cases were tried as one, and judgment was rendered for the plaintiff. The companies prosecuted error to this court, and the judgment of the trial court was affirmed. It was held that the insured building was "wholly destroyed" within the meaning of that term as used in the valued policy law of 1889

(36 Neb., 461). Subsequently, the defendant in error filed a motion in this court to allow a reasonable attorney fee for services of counsel rendered in both courts.

Section 3 of the said act of 1889 (sec. 45, ch. 43, Comp. Stats., 1891) provides that "the court upon rendering judgment against an insurance company upon any such policy of insurance shall allow the plaintiff a reasonable sum as an attorney's fee, to be taxed as a part of the costs." Under the foregoing provision the trial court, upon the rendition of the judgment against the insurance companies upon the policies in suit, was authorized to allow a reasonable attorney's fee in favor of the plaintiff and against the companies, to be taxed and collected with other costs in the case. Proofs should have been adduced before the trial court as to what sum would constitute a reasonable fee. No proof was offered upon that question in the court below, so far as the record before us discloses. Whether the question of the allowance of a sum for attorney's fee in such cases should be submitted at the same time the cause is tried upon its merits, and to the same trier or triers of fact, it is unnecessary now to determine. Although the plaintiff in his petition prayed for the allowance of a reasonable attorney's fee, yet the record fails to show that the question was ever called to the attention of the district court. Had that been done, and a ruling adverse to the plaintiff below been made, then we could have reviewed the decision. But, as already stated, the matter of attorney's fee was not submitted to the court below, but the question is now raised for the first time, after the affirmance of the case on the merits. The jurisdiction of the supreme court to review, reverse, or correct the proceedings of a district court is appellate merely. The question of the allowance of attorney's fee cannot be raised in the first instance in this court. The motion therefore must be overruled.

MOTION OVERRULED.

THE other judges concur.