REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

SEPTEMBER TERM, 1893—JANUARY TERM, 1894.

VOLUME XXXVIII.

D. A. CAMPBELL,
OFFICIAL REPORTER.

LINCOLN, NEB.:
STATE JOURNAL COMPANY, LAW PUBLISHERS.
1894.

THE SUPREME COURT

OF

NEBRASKA.

1893–4.

CHIEF JUSTICES,

SAMUEL MAXWELL,*
T. L. NORVAL.

JUDGES,

T. L. NORVAL,†
A. M. POST,
T. O. C. HARRISON.

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.

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*Term expired January 3, 1894.
†Became Chief Justice January 4, 1894.

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 XXXVII.

GRANT F. AHLBERG.
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DOUGLAS A. BAXTER.
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C. M. MILLER.
D. E. PIEPER.
H. H. SCHELL.
C. Y. SMITH.
CLENCY ST. CLAIR.
VIRGIL H. STONE.
E. E. THOMPSON.
T. F. A. WILLIAMS.
OWSLEY WILSON.
WM. F. WOLFE, JR.
FRED WOODWARD.

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.

See page xxiii for table of cases overruled.

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

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

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CASES MARKED * ARE OVERRULED IN THIS VOLUME.
CASES MARKED † ARE CRITICISED IN THIS VOLUME.

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B.

C.

D.

E.

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G.

H.

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Y.

STATUTES AND CONSTITUTIONAL PROVISIONS

CITED AND CONSTRUED.

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STATE.

SESSION LAWS.

CONSOLIDATED STATUTES.

COMPILED STATUTES.

1891.

CONSTITUTION.

FEDERAL.

STATUTES AT LARGE.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

SEPTEMBER TERM, A. D. 1893.

PRESENT:

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

DAVID FURBUSH, APPELLEE, V. HIRAM H. BARKER ET AL., APPELLANTS.

FILED OCTOBER 17, 1893. NO. 4542.

1. **Equitable Actions:** RES ADJUDICATA AS DEFENSE: DEPOSITION IN FORMER ACTION: WITNESSES: EVIDENCE CONCERNING TRANSACTIONS WITH DECEASED PERSONS. When one of the defenses pleaded in an equitable action was that the matters in controversy had previously been tried and determined adversely to plaintiff in an action brought by him against the decedent, of whom the defendants in the action pending were the heirs and personal representatives, and where the deposition of the decedent, taken in the case already determined, was introduced in evidence in the pending case merely to show the identity of the subject-matter of the two suits, the plaintiff in such suits claiming and testifying that they were not identical, the

admission in evidence of said deposition, merely for the purpose aforesaid, did not justify the court in allowing in evidence in the pending action the testimony of plaintiff as to personal transactions or conversations between plaintiff and said deceased person as decedent's admissions relative to material matters in the action pending.

2. **Pleading:** FINDING FOREIGN TO ISSUES: REVIEW. Where a finding of fact embodied in a decree is entirely foreign to the issues made by the pleadings, it has no weight in this court, except that if such finding is essential to the decree, such decree must be set aside.

3. **Decree Unsupported by Evidence:** REVIEW UPON APPEAL: PRACTICE. Upon appeal from a decree the findings of fact which are wholly unsustained by the evidence will be set aside, and thereupon such decree directed or entered as the facts proved clearly warrant.

APPEAL from the district court of Sherman county. Heard below before HAMER, J.

Wall & Bradley and *Abbott & Caldwell,* for appellants.

Calkins & Pratt and *Nightingale Bros., contra.*

RYAN, C.

On the 3d day of May, 1879, William Benschoter and Eugenie E. Benschoter, his wife, for the expressed consideration of $700, conveyed by warranty deed to David Furbush certain real estate situated in Loup City, Sherman county, Nebraska, to-wit: all of block 8; all of block 9; all of block 10 except lots 13, 14, 15, and 16; all of blocks 11, 12, 13, and 14 except lots 5, 6, 7, and 8 in the last named block; all of block 15 except lots 4 and 5; all of blocks 30 and 31, and all of block 32 except lots 4, 5, 7, and 8; all of block 33, and all of lots numbered from 44 to 93, inclusive, in block 34. On the same day Eugenie E. Benschoter aforesaid, for the expressed consideration of $800, conveyed by warranty deed to the said David Furbush all of block 27 except lots 7 and 8. On the same day Will-

iam Benschoter and Eugenie E. Benschoter, his wife, for the expressed consideration of $500, conveyed by warranty deed to David Furbush the northwest quarter of the northwest quarter of section 18, township 15 north, range 14. These deeds were filed for record in the office of the clerk of said county on the same day and were therein duly recorded. Contemporaneously with the execution of the above deeds David Furbush and wife executed to William Benschoter a mortgage on said lands to secure the payment of the entire consideration recited, one-fourth of which was payable on July 3, 1879, one-fourth on November 3, 1879, and the other half one year from the date of said mortgage. On September 17, 1887, David Furbush commenced this action in the district court of Sherman county, Nebraska, against Hiram H. Barker, Ella M. Barker, Clara Barker, James B. Edgerly, Charles W. Talpey, Hosea B. Edgerly, Charles W. Wingate, Henry R. Parker, Nathaniel Stevens as trustees of the last will and testament of Hiram Barker, deceased, Charles W. Talpey, Alonzo Nute, and John F. Hall as special administrators of the estate of Hiram Barker, deceased. This petition set forth the above conveyances and mortgage, and alleged that on the 2d day of January, 1880, the plaintiff was the owner in fee-simple, and in possession of the lands heretofore described.

The petition alleged that before the purchase of said lands by the plaintiff one Hiram Barker, late of Farmington, New Hampshire, had promised and agreed to and with the plaintiff to loan to the plaintiff sufficient money to pay for said lands when the plaintiff should need the same for that purpose. The petition further alleged that on the 2d of January, 1880, the said Hiram Barker, deceased, by his authorized agent, Noah H. Roberts, with the said William Benschoter, conspiring together to obtain the title to said lands without any just or adequate consideration, and without the consent of plaintiff, demanded of plaintiff that he should deed said lands to said Hiram

Barker, and represented and promised to plaintiff that if he would deed said lands, that the said Barker would pay said mortgage and hold said lands as security for the amount advanced, giving the plaintiff the right to redeem the same by payment of the sum so advanced, with ten per cent interest, at such further time as the plaintiff might be able to raise said sum of money; that plaintiff, desiring to keep said lands, and believing that he would be able to pay said mortgage before the whole became due, and that said land was worth a much greater sum than the amount required to be paid by said mortgage, refused to make said deed. The petition alleged that at that time Loup City had a population of only about 200, and was suffering commercial and industrial depression, which rendered the residents of said city anxious for public improvements to overcome such depression, and that they were peculiarly disposed to listen to any one who would promise such improvement, and that said William Benschoter, Hiram Barker, and Noah H. Roberts, for himself and as agent for Hiram Barker, conspiring against this plaintiff and intending and contriving to obtain the title to said lands without any just compensation, and without plaintiff's consent, represented to the people of Loup City that the said Hiram Barker was a person of great wealth, who desired to purchase said land to construct a canal and develop the water power of the Loup river, and to build and establish factories and mills and thereby make the village of Loup City an important manufacturing town, and that said Furbush was, by refusing to deed said lands, standing in the way of the future prosperity of said town and its inhabitants and preventing the development of the water power and the establishing of the mills and factories aforesaid, and that said parties, by the aforesaid means, had created a great prejudice against the plaintiff in the minds of the citizens of Loup City, who thereupon, and under the direction and incitement of said Benschoter,

Barker, and Roberts, prepared an agreement to boycott the plaintiff, and did prepare and circulate a writing pledging the signers not to allow the plaintiff or his family to enter their homes or places of business, and not to hold any social or business intercourse with plaintiff, nor to sell or give plaintiff or his family any article of food, clothing, fuel, or other necessaries of life, unless he would sell said lands, and that the writing, being so prepared and circulated, was signed by all but six of the citizens of Loup City, whereupon the boycott was established and enforced against this plaintiff; that plaintiff still refusing to make said deed, the said conspirators threatened personal violence and to tar and feather plaintiff, and that plaintiff's wife, being in feeble health by reason of the fear of injury and the hardships undergone under said boycott, became sick and feeble, and that while plaintiff's said wife was so sick and feeble, some of the said conspirators, to plaintiff unknown, attacked plaintiff's house and smashed in the windows; that said Benschoter, Barker, and Roberts, and others in collusion with them, by reason of the means aforesaid did put plaintiff and his family in great fear, and that plaintiff, through force and restraint of said wrongful acts, and not otherwise, did, on the 2d day of January, 1880, execute and deliver to said William Benschoter and Noah H. Roberts, as agent of said Hiram Barker, a quitclaim deed for said property, which was duly filed in the county clerk's office of said Sherman county, Nebraska; that at the time of the signing of said deed the said Benschoter and Roberts represented that the grantee named in said deed was the said Hiram Barker, who it was promised would hold the same as security for the amount necessary to pay said mortgage, but that said Benschoter and Roberts wrongfully and fraudulently inserted in said deed the name of William Benschoter instead of the name of Hiram Barker; that the substitution of the name of said Benschoter for that of Barker was without the knowledge or

consent of the plaintiff, which plaintiff did not discover until long afterwards; that during the time aforesaid, Noah H. Roberts was the agent of said Hiram Barker and acting under his authority and direction in each of the steps by him taken to acquire the title to said lands; that William Benschoter, about January 3, 1880, executed a certain deed whereby he pretended to convey said lands to said Noah H. Roberts, Hiram Barker, and one Stephen Nutter in equal undivided shares, which deed was duly recorded in the county clerk's office of Sherman county, Nebraska; that on May 31, 1880, said Roberts conveyed his interest in said lands to Hiram Barker, and on the same date the said Stephen Nutter conveyed his pretended interest in said lands to said Barker; that as between said Benschoter, Roberts, and Nutter on the one part, and Hiram Barker on the other, the said first parties never had any real interest in said premises, but held them in trust for said Barker and not otherwise; that the rents and profits of said lands received by Barker equaled and exceeded the amount advanced by the said Barker to pay said mortgage, with ten per cent interest thereon; that said Hiram Barker afterwards ratified the promises of his agent that said deed should stand as security for the amount advanced, and agreed to account for said lands and reconvey them to plaintiff, but that before said arrangements could be consummated, and in the month of January, 1887, the said Hiram Barker died.

The petition then alleged the appointment by will of the trustees hereinbefore named for Hiram Barker, deceased; that pending the probating of the will, Talpey, Nutter, and Hall were appointed special administrators of the estate of Hiram Barker. The petition then described the relationship of each of the Barkers named in the title of the petition to Hiram Barker, deceased, and their consequent interest in the subject-matter of this litigation. The plaintiff in his petition averred that he submitted, under advice of

counsel, that the deed as made to Benschoter was and is void and of no effect, for the reason that plaintiff executed the same under duress, and that the said deed, had it been freely and voluntarily executed, was at most but a mortgage, and that neither plaintiff nor defendant is in possession of the premises aforesaid. The prayer of the petition was that the amount paid by said Barker to redeem said mortgage and for taxes on said land might be ascertained, and that the amount received by Barker for rents and profits on said lands should also be ascertained; and what lands, if any, which had been conveyed by said Barker, deceased, and by Hiram H. Barker and Clara Barker, and the value of the same, might be ascertained; and that the deed executed January 2, 1880, might be declared void and of no effect, and a reconveyance of the property therein described be decreed; and that the defendants be required to pay the plaintiff the amount of the value of any lands sold by Hiram Barker and by Hiram H. and Clara Barker, and of the rents and profits of said lands, less the amount advanced thereon by the said Hiram Barker to redeem and pay said mortgage. The petition closes with a general prayer for equitable relief.

Stephen Nutter, on August 20, 1888, filed a petition in intervention in this case, claiming an undivided one-sixth interest in the lands which are the subject of this controversy. This claim is not controverted by the defendants, and as a determination of the matters in controversy, if in favor of the defendants, would entitle the said Nutter, upon the admissions of his co-defendants, to a one-sixth interest in the property, this branch of the case will receive no further notice.

On the 3d day of September, 1888, the defendants filed an amended answer, in which they alleged that the plaintiff falsely represented himself to be a man of large means and the agent of other men of great wealth—among whom were the said Hiram Barker, deceased, and Stephen Nutter

and others—and that he was authorized to purchase for Barker and Nutter a large amount of real estate in the village of Loup City and vicinity, and falsely represented that he desired to purchase for himself, and was able to purchase and pay for a large amount of real and other property in the locality aforesaid; that he had but little money with him, but would soon be in possession of ample means, and desired but to secure a temporary credit on his purchase; these representations were made to William Benschoter, J. Wood Smith, —— Hartley, and other residents of the village of Loup City; that on the 3d day of May, 1879, the plaintiff contracted with William Benschoter to purchase all the property described in the plaintiff's petition for the sum of $2,000, which at that time was the full value thereof, and Benschoter, relying on the false representations made as aforesaid, sold to plaintiff the said premises on credit and took his notes therefor; and that at or about the same time J. Woods Smith, relying on said false representations, sold to the plaintiff a stove and other goods; and the said Hartley, also deceived by said false representations, sold to the plaintiff a span of mules on credit; and divers other persons in the village of Loup City, relying on said false representations, sold to plaintiff large quantities of merchandise on credit; that plaintiff made contracts with divers other persons living in and near said village for the purchase of large tracts of real estate, and took bonds from said persons to convey their lands to said plaintiff and others, the said persons so giving bonds to convey relying on the false representations of the plaintiff made as aforesaid, and that said parties were induced to extend time of payment for said premises on like false representations made by the plaintiff.

Defendants further alleged that about August 10, 1879, plaintiff sold and conveyed to George H. Gibson and William T. Gibson a portion of the premises so purchased, for the sum of $50, and by falsely representing to William

Benschoter that it was necessary for plaintiff to return to his home in Vermont in order to procure the money then due him, and that upon his return he could and would pay all his debts, the said Benschoter was induced to release the mortgage covering a portion of the premises sold to Gibson and Gibson. The defendants alleged that plaintiff did not bring back money with him on his return from Vermont, and did not pay the debts so contracted, or any of them; that this fact became generally known in the month of November, in the village of Loup City, as was also the fact that plaintiff was not a person of means, and that he had no wealth in Vermont, but, on the contrary, was indebted to numerous persons in said state, and was wholly insolvent and unable to pay his debts, and that he was not the agent of Hiram Barker or Stephen Nutter, or any other person, nor authorized to purchase lands for any other person.

The defendants also alleged that in the latter part of November, or the first of December, 1879, a meeting was called in the village of Loup City by persons who had been induced, by the false representations so made, to extend credit to the plaintiff, to which meeting plaintiff was invited to come and explain why he had made such statements, and at said meeting plaintiff was requested to reconvey to William Benschoter all the lands which had been purchased and which then remained unsold, and to reconvey the mules and other property procured on credit by himself by means of said false representations, which demands were refused by the plaintiff. At said meeting it was agreed among the parties present that said plaintiff was not a person entitled to credit, and that said persons did then and there agree among themselves, as they lawfully might do, to refuse and deny to said plaintiff any further credit. The defendants, however, denied that Noah H. Roberts was present at said meeting, and denied that Hiram Barker, deceased, was instrumental in calling the

same; denied that the defendants or Roberts conspired with Benschoter or any other person to have said meeting called or to induce any person to refuse to sell plaintiff goods on credit; denied that it was agreed among the citizens present at said meeting to boycott the plaintiff or refuse to sell him goods and merchandise for cash; denied that the citizens of Loup City did refuse to sell plaintiff goods or merchandise for cash; denied that the citizens of that village conspired to boycott the plaintiff or refuse social intercourse with him or his family, and alleged the fact to be that if any person did so refuse to visit or hold social intercourse with the plaintiff, such refusal was based solely on his character and standing as a man and citizen, and for no other cause whatever; denied that any threat was made against the life of plaintiff, or to tar and feather him, or to do him any bodily injury.

The answer further alleged that if the goods of plaintiff were taken from him, it was under chattel mortgages giving the mortgagee the lawful right to take and dispose of said property, and that such taking, if any there was, was without any suggestion from Noah H. Roberts or other of the defendants, or Hiram Barker. The conveyance by deed of date January 2, 1880, was admitted in the answer, and it was alleged that it was upon full consideration, and only for the purpose of avoiding the necessary litigation incident to a foreclosure of the mortgage. The answer further denied, in detail, each of the averments of plaintiff's petition, and further alleged that if any agreement was ever made binding upon Hiram Barker for the reconveyance of the property, it should not be enforced on account of the lapse of eight years before this action was brought, in which time, by the building of railroads into Loup City, the value of the property had greatly increased. To this amended answer there was a reply, which was in effect a denial of each of the affirmative allegations therein contained.

It is probably necessary to a full understanding of the history of this case to state that on March 21, 1882, David Furbush filed his petition in the district court of Sherman county, Nebraska, in which he claimed of Hiram Barker the sum of $5,747, and interest thereon, as compensation for services by Furbush rendered on behalf of Barker in the purchase of lands in Sherman county, Nebraska. There was service by publication. Issue was duly joined, and a judgment was rendered in favor of Barker against Furbush. The testimony in this case would seem to show that the original papers in that action were not accessible at the time of the trial of this one, and, therefore, that evidence *aliunde* was given of the contents of the pleadings and as to the issues upon which that case was tried. It would seem, however, that the sole question there tried was whether or not Furbush was the agent of Barker in the purchases as to which he claimed a commission. It was, however, testified in this trial that the lands involved in this action were not a part of those for the purchase of which plaintiff claimed a commission in the former action, and it was testified by Mr. Furbush and two of his attorneys in this case that the former action had no reference to the lands purchased by Furbush of Benschoter.

In the trial of this action the plaintiff David Furbush testified that he was eighty years old on November 6, 1887; that he came to Loup City about April 20, 1879; that he purchased of William Benschoter the land in controversy in this action about May 21, immediately following the above date, and remained in Sherman county about four months, and then returned to New Hampshire, from whence he had come to Nebraska; that from New Hampshire he returned to Loup City the very last of October, 1879; that when he bought the land of Benschoter he gave him thereon a mortgage to secure payment, and when about to return to New Hampshire that he gave Benschoter another mortgage, which subsequent evidence shows was one of the chattel

mortgages hereinafter referred to. Plaintiff further testified that he never represented himself as the agent of Hiram Barker until his return from New Hampshire, and that then he represented himself as the agent to order the bonding (that is, as a stipulation made in the trial shows, taking bonds for deeds). Plaintiff testified that he, after his visit to New Hampshire, took bonds upon the lands of David French and others, not including Benschoter; that he received a letter from Hiram Barker saying that Noah H. Roberts would be at Kearney on a Friday or Saturday named; that Roberts came and together with witness looked over the French land where the water was to be taken out of the Middle Loup river to be used for running mills; that Roberts commended the plan to witness, and told witness he had written Mr. Barker to the same effect, and that Roberts said he could bring in that water $500 cheaper than witness had recommended it to Barker. Roberts promised that as soon as French had proved up, which he had not yet done, he would take the property.

Plaintiff's evidence as to the William Benschoter land was, that about two weeks after Roberts came, Roberts said to plaintiff: "Your title is no good; you did not pay anything down; if you had paid $500 down, the title would have been good, but now it is good for nothing." Plaintiff testified that in answer to this he said to Roberts that Judge Wall had written Mr. Barker that his title was perfect and requesting Barker to send to plaintiff the $2,000 that he had promised plaintiff. Roberts made fun of this and lit out, and plaintiff saw him no more. Mr. Furbush then gave an extended history of conversations between himself and Roberts with reference to "bonded lands" as he called them, on which lands the bonds having been taken to Furbush and Barker, Roberts refused to make payments unless he could get the Benschoter land also, and finally that Roberts threatened to take the money back to New Hampshire and not take any lands if his condition was not com-

plied with, but did not go back at the time he threatened to, but remained over another week, and that the people refused to let plaintiff have anything to eat or drink for money, and one night his window was broken, this course being taken, as witness said, with a view to "freezing him out" and compelling him to sell the Benschoter property. To accomplish this result this witness testified that the people of Loup City threatened to tar and feather him and to ride him on a rail and otherwise to injure him, and even to kill him, and that 104 people of Loup City signed a petition (which seems to have been also for a called meeting at the court house) for the purpose of compelling plaintiff to sell the Benschoter land which by reason of its situation was necessary for the construction of the aforesaid canal; that at this meeting, which was largely attended, Benschoter came in and demanded that plaintiff deed him back the land; that at this meeting Judge Wall advised that if Benschoter and Furbush had any trouble that the law should settle it, and that the people should go no further; that the people went home and so did plaintiff, and that that was the last of it. [This meeting was characterized as the "indignation meeting" all through the testimony of such of the witnesses for Furbush as referred to it in their evidence.]

Plaintiff further testified that he arranged to buy a stove of J. Woods Smith and agreed to pay him $15 per month on it, with the understanding that he could pay $25 at the end of the month; that when this stove was being delivered at the house of plaintiff, Smith came along and after some conversation between Woods and Benschoter the stove was carried back; that to secure payment for this stove plaintiff had at first given a chattel mortgage on the stove and it had been taken from plaintiff and was being returned to him when Smith ordered it taken away again. Plaintiff testified that Roberts told him that Benschoter had said "If you put that stove up we can never get the deed to the old man's land. We cannot freeze him out if he has a stove."

Plaintiff further said in his testimony that Bill Benschoter had, previous to this, taken away plaintiff's other furniture on a chattel mortgage and that the weather was very cold; witness thought the thermometer indicated 21 degrees; that they left what belonged to plaintiff's wife, to-wit, one feather bed, three husk beds, six pairs of sheets, and carpets which were put on the bed, but as they were too heavy Mrs. Furbush borrowed a feather bed of Mrs. Straw, which was used for a covering for the bed; that Mrs. Furbush remained in the house without fire for about twelve days or two weeks, while plaintiff stayed three weeks; that to keep Mrs. Furbush warm, flat irons were heated at Mr. Gordon's, but that the next morning Mr. Gordon's boy came over crying and said, "If you come in here to heat your irons or to heat your coffee, they will tear father's house down and drive you away from there;" that witness promised not to trouble them further and did not; that after this plaintiff went to Shields', taking a big wool blanket with the coffee pot and flat irons in it so that no one would know what he was carrying. Subsequently, noticing the failing health of his wife, witness said that he took his wife to the house of John Probasci, and while on the way thither that his wife fell down, though the distance was short; that she staid there two days, and then went to live with her nephew Alonzo Straw; that thereupon Mr. Hartley (and witness thought Mr. Benschoter and others) went to Straw, and Hartley told Straw that if he let plaintiff come in there, they would take the stove away and turn her out of doors (he owed ten dollars on the stove he bought) if he gave Mrs. Furbush anything to eat or drink until she signed that deed.

Plaintiff testified further that after his wife went to Straw's to live, plaintiff's wife's son came back and plaintiff lived with him for about twelve days; that Perkins staid with plaintiff because plaintiff was afraid of his life because they had threatened it; that Bill Benschoter

came into Probasci's with a club in one hand and two in the other, a foot and a half long, and said that Barker and plaintiff had bonded land in part of the city, and the grocery man had refused plaintiff anything to eat; that they could get nothing to eat unless plaintiff gave up so that Barker could get that land and pay the money over; that Benschoter challenged plaintiff to fight a duel; that upon plaintiff's refusal to fight a duel Benschoter swung a club over plaintiff's head; that plaintiff had been struck at more than fifty times before, but had never been hit; that plaintiff's temper being wrought up very high by the conduct of Benschoter, plaintiff brought down upon Benchoter's head a seven pound weight, but that Mrs. Probasci grasped plaintiff's arm, or, as plaintiff's expressed opinion was, there would at the time of the trial been no Benschoter; that at this time Benschoter was, as they call it in the east, "three sheets in the wind and one a fluttering;" that Benschoter threatened witness if he did not deed over the land he (Benschoter) would kill plaintiff; that Mr. and Mrs. Straw told plaintiff that "they were going to throw Mrs. Furbush out of doors if the deed was not made."

Plaintiff testified as to the making of the deed to Benschoter; that while Mrs. Furbush was at the house of Mr. Straw, Blackburn (whom extrinsic evidence shows to have been the attorney of Benschoter) went and made some bargain with Mrs. Furbush to sign that deed; that witness did not know what that bargain was, nor what was paid Mrs. Furbush; that John Probasci, a justice of the peace, was over frequently and said to plaintiff that he had better sign the deed, that it would not be worth the paper it was written on; that the Congregational minister advised plaintiff to do it, and plaintiff finally went up and signed it by his advice under protest; that before signing the deed plaintiff had not been permitted to see his wife for eight or nine days; that Taylor refused to sell plaintiff beans,

though offered cash for them; that Benschoter procured Taylor to refuse plaintiff food because his furnishing food would prevent Benschoter getting his deed from plaintiff. Plaintiff said in his testimony that when goods were refused him he had seen Roberts at the back part of the store, but that Roberts never said anything. Plaintiff further testified that he agreed with John Probasci to make the deed to Hiram Barker; that there was some paper made out, and this deed put in the hands of D. D. Grow to be delivered to plaintiff's wife; that she said: "Mr. Grow, will you give me what they put in your hands if I sign that deed?" to which Grow answered: "I will unless they kill me;" that she signed the deed and plaintiff signed it; that you can see that her hand trembled, she was sick and should have been in bed; that plaintiff supposed the deed was made to Hiram Barker; after a week or so heard that it was in Nightingale's office, and went over there and forbade them recording it; that Mr. Grow said it was recorded an hour after it was made; that plaintiff asked Roberts why he had practiced the deception on plaintiff, and Roberts said it was to save $500; that he, Roberts, had offered Benschoter $5,500, but that he wanted $6,000, and that if he took the deed in his own name William Benschoter would know that he, Roberts, would want to take all the other land and he would have to have that $500; that plaintiff, when he joined in the deed, supposed it was only a lease or privilege of bringing water over the land; that he executed it to save the life of his wife and himself.

Plaintiff further testified that they sent a bill of sale for the stove to his wife and set it up that same day, and from thence forward there was peace; that the usage she had sustained greatly impaired the health of plaintiff's wife and ultimately caused her death. The deed was signed January 2, 1880. When asked what his wife got for signing the deed plaintiff answered: "You ask her or somebody that

knows better than I do. I think there was a report that she got a horse which she gave to Mr. Perkins. I heard she got $250 and a horse for signing the deed. I never asked her what she got for signing it." The property was worth, in plaintiff's judgment, $10,000.

On his cross-examination plaintiff said: "I heard that Blackburn drew the deed; I don't think I saw it; the paper was put into Grow's hands and the deed, or whatever it was, laid down and a blotter over it, and then D. D. Grow, in presence of Probasci, justice of the peace, took the acknowledgment. My wife and I did not know what was under the blotter. I protested to Mr. Grow and all that were there against signing the deed. When I protested I said: 'I sign this deed not on my account, but on my wife's account.'"

On being recalled as a witness on rebuttal plaintiff testified that he was never the agent of Barker until the 15th or 20th of October, 1879, and was not authorized to buy land for Barker until that time; that he had been in partnership and company with Barker and had worked with him in New Hampshire.

The paper spoken of as having been delivered contemporaneously with the deed was a lease, the consideration of which was $50, which was recited as paid up, upon lots 1 and 2, in block 27, in Loup City, for the term intervening between January 2, 1880, and April 1, 1880; also a lease of all the breaking on the northwest quarter of section 18, township 15 north, range 14 west, from January 2 till November 1, 1880, consideration $10, acknowledged as paid. The lessor was William Benschoter, and the lessee was Martha A. Furbush.

In respect to the evidence given by Mr. Furbush it is proper to observe that upon it alone his right of recovery, if any there was, must be based, and that he was directly contradicted on many points, and but slightly corroborated in any respect by his own witnesses. It is true that his

step-son gave a statement of what he testified transpired at Farmington, New Hampshire, between Hiram Barker and several of his neighbors on the one hand, and David Furbush on the other, but as the subject-matter of that conversation was the lands "bonded" subsequently to October 13, 1879, it is not deemed important in this case.

Upon the final hearing before his honor, Francis G. Hamer, presiding judge of the district court of Sherman county, the following decree was rendered:

"And now on this 7th day of December, 1889, this cause came on to be heard before the court upon the petition, answer, and reply, the petition of intervention of Stephen Nutter, and the answer of plaintiff thereto, whereupon the court finds from the evidence that long prior to the purchase of the land in controversy by the plaintiff from William Benschoter and extending over a long period of years, the deceased Hiram Barker, and the plaintiff David Furbush, have been accustomed to take contracts of various kinds together and were doing business together at or near the town of Farmington, New Hampshire; that in these transactions the said Barker furnished the capital required and the said Furbush represented the business, or performed the labor required, and that the profits of these transactions were divided between them; that in pursuance of their long established business as set forth, the plaintiff came from Farmington, New Hampshire, to Loup City in Sherman county, Nebraska, in quest of joint investments in land and water powers for the benefit of said Hiram Barker and himself; that said plaintiff was to examine and select the lands and report to said Hiram Barker on the advisability of making each proposed purchase and investments, and the said Barker was to furnish the money required for such investment, and the profits from each transaction were to be separately ascertained and divided between said Hiram Barker and plaintiff; that in pursuance of this relation the plaintiff came to Loup City, Ne-

braska, from Farmington, New Hampshire, and selected for himself and the said Hiram Barker many tracts of land in and about said Loup City aforesaid, including the lands in controversy in this case, and valuable mill site and water power; that said David Furbush, in pursuance of said arrangement, obtained tracts from the said owners of said lands and property, whereby they separately agreed with the said Furbush and Barker to receive from the said Furbush and Barker certain specified sums of money as the purchase price of said lands and property and consideration thereof to convey and transfer the same to said Furbush and Barker; that among the lands so selected and contracted for were the lands in controversy in this case, for which said Furbush received deeds of conveyance as mentioned in the pleadings, and the said Furbush and wife secured the payment of the purchase price thereof by the execution and delivery of their notes and mortgages by and with the understanding and agreement aforesaid that the said sums of money necessary to purchase said land would be furnished by the said Hiram Barker, and the said notes and mortgages taken up and canceled; that said land was purchased by said Furbush on joint account for himself and said Hiram Barker; that the said Furbush, after obtaining the legal title to said land, being the land in controversy in this action, and the possession thereof, did desire to retain the same for his own exclusive use and benefit and not to share the profit of the purchase and sales thereof with the said Barker, and did make known the said desire to the said Barker; that the said Barker then proceeded by his own efforts and the efforts of one Roberts, who acted as his agent, and by the efforts and conduct of many persons in Loup City, who were incited thereto by the said Barker and his agent Roberts, to boycott, coerce, terrify, and force the said Furbush and his wife by duress to release and surrender their possession and title to said land, to-wit:

(Here follows the description of the real property as set forth in the petition.)

"To that end the plaintiff's only stove was removed from his dwelling house in the winter season of the year that he might be deprived of fire, and the windows of his dwelling house were destroyed and the bed-clothing removed from the house, so that the plaintiff, then of the age of seventy-five (75) years, and his aged and invalid wife, might be compelled to suffer with the cold of winter; that the plaintiff was threatened with personal violence, with being tarred and feathered; that he was denied the privilege of purchasing food; that by duress, against his will, and because of hunger and cold, lack of bed-clothing, lack of shelter, because of physical suffering, and threats of violence, did with his wife surrender, they said, to the said Barker, and to cancel the said purpose thereof the said Furbush was compelled to convey said land to the said William Benschoter, who thereupon, as a part of said system and plan of duress and in pursuance of an arrangement entered into between him and the said Barker through said Barker's agent, Roberts, did convey the same, directly or indirectly, to the said Barker; and the court further finds that the lands in controversy were purchased by the said David Furbush on joint account for himself and the said Hiram Barker, and to be paid for by money to be furnished by the said Hiram Barker, and that the title thereto has been held by the said Barker in trust for the said David Furbush and himself; that the intervenor Stephen Nutter has no interest whatsoever in the lands in controversy; that the profits derived from the transactions arising from the said purchase and sale of said lands and premises should be equally divided between the said Furbush on the one hand and the defendant on the other. It is ordered that an accounting be had showing the purchase and sale of all the said lands and all expenses and taxes, and that further evidence be taken by George E. Evans, of

Kearney, Nebraska, in the matter of accounting and to establish the present value of the property undisposed of with the view to the rendition of a judgment and decree upon this finding, and the making of such further orders and decrees in the premises as the court shall seem meet and proper, the referee to report the facts and evidence at the next term; to all of which several findings and the orders of the court the defendants and Stephen Nutter severally except; the plaintiff excepts to that part of the court's finding which finds that the said lands were bought on joint account of the plaintiff and Hiram Barker, deceased, and that said defendants have a joint interest in said premises with plaintiff."

Pursuant to the requirements of the above decree, a referee was appointed, who made due report upon the matters as to which his investigation and report were required. He found that the total amount paid out by the deceased Hiram Barker in his lifetime, and the defendants since his death, for the purchase of lands and all expenses, including commission of George Bickford, the agent by whom sales of real property were made, was $6,253.50, for which amount the defendants were entitled to a credit. The referee found that there had been received of rents and profits of the property in controversy, and insurance paid upon a loss sustained, the sum of $11,695.25. The referee further found that the deceased, during his lifetime, and the defendants since his death, had sold and conveyed a large part of the lands in controversy. The report of the referee was confirmed on the 16th day of June, 1890, and it was in pursuance thereof adjudged and decreed as follows:

"1. That the plaintiff is the owner in fee-simple of an undivided one-half interest in the unsold described lands and lots, and that the defendants be, and are hereby, ordered and directed to convey to plaintiff, by good and sufficient deed of conveyance, such undivided one-half interest in said lots and lands; and in case of a failure to ex-

ecute and deliver such conveyance within twenty days from the date of this decree, it is further ordered and decreed that this decree operate as, and have the effect of, such conveyance, and it shall vest in the said David Furbush and in his heirs forever an undivided one-half interest in the above lands and lots.

"2. That the plaintiff have and recover of the defendants the sum of $2,720.87, that being one-half of the excess received by the deceased and defendants from said lands over and above the amount paid by them in relation thereto, and that the plaintiff has a valid and subsisting lien upon the undivided one-half held by the defendants for said sum with interest thereon at the rate of seven per cent interest per annum from the 5th day of March, 1890."

This language of the decree was followed by a judgment for costs and specific directions as to the sale of the defendants' interest in the property for the satisfaction of said costs. The penal sum of the supersedeas bond was fixed at $20,444.

Perhaps it is unnecessary to call attention to the obvious variance between the averments of the petition, the statement of facts of the witness Furbush, and the findings of the court. One state of facts which the petition recited was that Furbush, having purchased the lands of Benschoter and given to Benschoter a mortgage to secure the payment of the purchase price, found himself unable so to do, and that Hiram Barker, by his authorized agent, Roberts, with Benschoter, conspiring to obtain the title, demanded that plaintiff should deed the land to Barker, and as an inducement promised that if he would deed the land as requested, Barker would assume the payment of the mortgage, giving the plaintiff the right to redeem upon the payment of the amount with ten per cent interest thereon. There was no evidence to support this averment, neither did the court find that it was sustained.

Another ground upon which the conveyance was sought

to be avoided in the petition was because of the alleged duress under which the plaintiff and his wife were compelled to convey the lands on January 2, 1880, to William Benschoter, under the representation that it was to Hiram Barker, who thereunder would assume and pay the mortgage as aforesaid. The most critical examination of the testimony adduced by plaintiff fails to disclose that Hiram Barker was in any way connected with any ill usage of or threats toward either plaintiff or his wife. Moreover, there was no testimony given on behalf of Mr. Furbush which would connect Noah H. Roberts with the ill treatment of which the plaintiff complains. The evidence of the plaintiff in that regard was simply, that at some time when he was refused goods of some character Noah H. Roberts was in the back part of the store. Plaintiff does not pretend to say that he was near enough to hear what transpired on that occasion. Roberts himself testified, on the contrary, that he took no part in anything of the kind, and in so far as he was able dissuaded others from any maltreatment of the plaintiff and his wife. The evidence of the plaintiff himself quite clearly discloses that the deprivation of the stove, bed and bedding, and other articles of furniture, by which the plaintiff and his wife were compelled to suffer from the inclement weather, was due wholly to the several chattel mortgages which the plaintiff had made upon the property taken, and which he had been unable to pay. It might be inferred from the testimony of the plaintiff that Benschoter and Hartley made such use of these chattel mortgages as would bring about the reconveyance to Benschoter of the property which he had previously deeded to plaintiff, but neither Noah H. Roberts nor Hiram Barker was a party either to said mortgages, nor did either of them appear to be in any way connected with their foreclosure. The several merchants, as to whose refusal to sell him goods for cash the plaintiff testified, were sworn and each gave other reasons than a desire to oppress plaintiff for the

refusal to sell him goods. In one case the subject-matter which the plaintiff desired to purchase was beans, and in respect to them the merchant testified that he wanted them for seed; that they were not for sale. In most instances, however, the merchants in interest testified that the reason they refused to sell was that the plaintiff did not tender them the money, and they regarded his credit as bad.

We cannot forbear comment upon the findings of the learned judge. One of the facts which he found as existing was, that Furbush and Hirman Barker had been together doing business back in New Hampshire for a long time, and that Barker furnished the capital and Furbush represented the business and performed the labor required, and that the profits of these transactions were divided between them; that in pursuance of this long established practice plaintiff came from New Hampshire to Loup City in search of joint investments for himself and Barker, and that plaintiff was to examine and select lands and report to Barker the advisability of making the proposed purchase and investment, and Barker was to furnish the money required therefor, the profits were to be separately ascertained and divided between Barker and the plaintiff; and that in pursuance of this arrangement plaintiff came to Loup City and selected and contracted for a large amount of land, including that in controversy, and contracted with the several owners for the conveyance to himself and Barker of the tracts so selected, and agreed with said owners for payment out of funds to be advanced by Barker. The finding was, further, that the tracts of land in dispute were purchased in this way, and that Furbush and his wife secured the payment of the purchase price thereof by the execution and delivery of the notes and mortgages, with the understanding and agreement aforesaid that said sums of money necessary to such purchase of said lands would be furnished by Hirman Barker, and that the notes and mortgage would be taken up and can-

celed, and that said land was purchased by said Furbush on the joint account of himself and the said Barker. It is unnecessary to greatly amplify remarks upon this finding, viewed in the light of the petition or even of the evidence of Mr. Furbush himself. There was no arrangement, either pleaded or sworn to, whereby Barker agreed in any way, or whereby it appeared that Furbush understood that there was an agreement that this purchase of Benschoter was for the joint account of the plaintiff and Barker. His evidence is quite to the contrary. It is that Furbush bought this land in April, 1879; and he directly testified, upon being recalled to the stand, that he was never the agent of Barker for any purpose until after his return to New Hampshire in October, 1879. This finding, therefore, was not only foreign to the issues tendered by the petition, but was wholly unsupported by the evidence.

In respect to the finding that Barker proceeded by his own efforts, and the efforts of Roberts, and by the efforts and conduct of many persons in Loup City, who were incited thereto by said Barker and his agent, Roberts, to boycott and terrify and force said Furbush and wife under duress by deed to surrender their title to said lands, it is proper to remark that Barker was never outside of New Hampshire, so far as the evidence shows; certainly no one testified that he was ever in Loup City. The testimony fails entirely to connect either Barker or his agent with the boycott of which the plaintiff complains. Furthermore, a fair consideration of the testimony of Furbush himself shows that the conveyance of January 2, 1880, was made in pursuance of an agreement entered into between Mrs. Furbush and counsel for William Benschoter. Very awkwardly Mr. Furbush attempts to deny knowledge of the payment to his wife of the sum of $250, and the giving to her of a stove and horse and lease of property in Loup City, and also of lands broken out on the forty acres by him purchased of Benschoter, as a consideration for the conveyance

executed on January 2, 1880. Moreover, the testimony of this witness is, that the deed he gave was given under protest. When asked how he protested, he said that he told the parties that he made the conveyance not on his own account, but on account of his wife. The conclusion deducible from all the evidence is very clear, however, that his wife received the consideration above named for the execution of the deed to this property, and if, as the protest implied, the plaintiff conveyed on her account, it would seem that, when she had received a valuable consideration for the conveyance, this protest was rather unseasonable. Again, he says that the reason he made the conveyance was that he supposed it was a lease to Hiram Barker, by whom the mortgage was to be paid, and he himself entitled to redeem upon reimbursement to Barker of the principal and interest expended in discharging the mortgage. It will be remembered that the land in dispute was purchased in May, 1879; that Furbush had no authority upon his own evidence to act as the agent of Barker until October of the same year. There is no competent testimony that when Furbush returned to New Hampshire in October, 1879, Barker made any such agreement as is claimed in respect to taking up and holding the mortgage made in May by Furbush to Benschoter. It is true that there was admitted in evidence statements of Furbush as to a conversation of that character had between himself and Barker upon the occasion of his visit in October, 1879. This was a conversation, however, between this plaintiff and a person since deceased, whose representatives are made defendants in this action, and was in respect to a personal transaction had between the plaintiff and said Hiram Barker. It was admitted in evidence apparently because the deposition of Hiram Barker, taken in a case commenced against him in 1882 by Furbush, was introduced in evidence in this case for the purpose of showing what matters were in controversy in the former case. The plaint-

iff himself had sworn, however, that the subject-matter of the second action was entirely different; that the agency in respect of which he claimed compensation was created in October, 1879, and authorized him to procure bonds for deeds for lands which thereafter he might select, and to avoid the claim that the cause of action set up in this case was not adjudicated in the former case, both the plaintiff and two of his attorneys testified to the difference in the subject-matter of the two suits. It seems to us that this was not a sufficient reason for overruling the objection to the testimony offered predicated upon the provision of section 329 of the Code of Civil Procedure. The exception to the admission of the statements of a person having a direct legal interest in the result of a civil action or proceeding, when the adverse party is the representative of a deceased person, to-wit, "unless the evidence of the deceased person shall have been taken and read in evidence by the adverse party in regard to such transaction or conversation," did not authorize the introduction of the testimony of Furbush in this case upon the point now under consideration. There was therefore no competent evidence to establish the existence of an arrangement whereby Hiram Barker undertook to hold this mortgage, as found in the decree of the district court.

This completes a review of the essential facts upon which the decree of the district court is predicated. After a full and careful consideration of all the evidence used in the trial of this cause in the district court, the belief engendered upon the testimony of Furbush is rendered an absolute certainty.

As to the general reputation of Furbush for truth and veracity, a great deal of evidence was introduced upon impeachment. It is unnecessary to weigh this evidence to the detriment of Mr. Furbush, though it may be remarked that where a man has lived in a neighborhood for fifty or sixty years, and a large number of his neighbors will tes-

tify that his reputation for truth and veracity is bad, it might be safe, in a close case, to reject his evidence. There is, however, no necessity for resorting to such impeachment. There is, aside from the matters already reviewed, an intrinsic improbability in other facts stated by Furbush in his testimony. In New Hampshire for many years he was harassed by trustee processes, and some of his own witnesses testified that in relation to promises to pay his debts he was "rather shaky." From 1870, at least, up to the time of his coming to Nebraska, the records show that he was every year giving chattel mortgages, or real estate mortgages, for the security of his creditors. Finally, it is shown that the real property of which he was possessed was transferred to two grantees in consideration of their assuming the incumbrance upon the property. Mr. Furbush in New Hampshire took small contracts to do stone-work in the building of cellars, and construction of chimneys and dams and other like improvements, but in none did he have large means or much backing. It is inconceivable that, under these circumstances, he could induce the making of a loan to himself for the purchase of 10,000 acres of land, even at the current price in Sherman county, Nebraska, as early as 1879. The correspondence which has been introduced in evidence in no way justifies, or tends to justify, such confidence in him on the part of Barker. Added to all these considerations is the acquiescence in the title of Barker from May, 1880, until the commencement of this suit on the 17th of September, 1887, a period of almost eight years. Under the issues, and upon a full consideration of all the testimony introduced as sustaining the averments of the petition, the conclusion is irresistible that in many respects the findings of the decree are foreign to the pleadings, and that in no material respect does the evidence sustain the conclusions reached on the former trial. No attempt has been made to review this evidence in detail, for it would be impossible, requiring, as it does, five bound volumes to present it in this court.

The judgment of the district court is reversed, and a decree will be entered in this court conformably to the prayer of the amended answer of the defendants as to the undivided five-sixths of the land in controversy, and as to the other undivided one-sixth, a like decree will be entered in favor of Stephen Nutter.

DECREE ACCORDINGLY.

DENNIS CUNNINGHAM ET AL., APPELLEES, V. SAMUEL KATZ, APPELLANT, ET AL.

FILED OCTOBER 17, 1893. No. 4738.

Judgment Based on Conflicting Evidence: REVIEW. As the appeals by both parties present only questions of fact, as to each of which there was evidence sufficient to sustain the findings of the district court, its judgment is affirmed.

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

Hall, McCulloch & English, for appellant.

Cowin & McHugh, contra.

RYAN, C.

On June 7, 1887, Samuel Katz entered into a contract in writing with the firm of Ryan & Walsh for the construction by them of four tenement houses upon certain real property owned by Katz in Omaha. This written contract contemplated as a level for these buildings a line twelve feet and nine inches below the level of Dodge street, upon which the erection was to face. The surface, however, was at its highest point seven feet and six inches below the plane

adopted as that upon which the plans required the block of buildings to be erected. Originally this surface had been created by filling up a slough or creek bed from an irregular surface lying many feet below the surface made by filling in earth. As much of the projected superincumbent buildings required a solid foundation, it was necessary to extend the foundation down to the original surface of solid earth. This part of the work was not covered by the plans and specifications with reference to which the written contract was made. It was therefore necessary at the very threshold of the work to provide for the excavations for, and the erection therein of, solid foundation walls, upon which the block of buildings described in the plans and specifications and written contract was to be built. The evidence is not very satisfactory upon this point, but from it we are satisfied that there was made a memorandum in the writing which was entrusted to the architect who drew the plans and specifications. For some inscrutable reason the subsequent history of this memorandum has been shown neither by Mr. Katz nor his agent, the architect. The parol evidence of the members of the firm of Ryan & Walsh is, therefore, entitled to special consideration as to the terms of this memorandum, and was, we have no doubt, sufficient to establish such terms, as well as the fact testified to by them that it was originally attached to the written agreement above referred to, and became a part of the same. This memorandum provided that for the construction of the foundation below the plane above mentioned the brick work necessary should be paid for at the rate of $16 per thousand. These foundation walls were, of course, made in ditches excavated for the purpose, of which, after the walls had been built, the unoccupied parts were filled with dirt. Upon the completion of the buildings a dispute arose as to the measurements of the foundation walls above referred to, because of a disagreement of the parties as to the depths to which the foundation walls

extended at different parts thereof. This necessitated digging wells, as they were called, at different points down along the foundation walls, that actual measurements might be made, and thus that the depths to which these walls extended could be accurately fixed. As to the results desired, even this did not establish data from which the number of bricks laid in the foundation walls could be computed with any certainty, and the disagreement still existing, this action was begun to enforce a mechanic's lien for the amount which Ryan & Walsh claim is due upon the entire erection by them made. Though the field of contention was thus necessarily very broad, the conflict was really only as to the number of bricks, the laying of which constituted "extras."

The contractors, Ryan & Walsh, introduced evidence showing the result of the measurements of the foundations to have demonstrated that there were laid 331,000 bricks, for which they were entitled to payment at the rate of $16 per thousand. On behalf of Mr. Katz, the evidence was that there were but 179,000 bricks laid in said foundation walls. There was other conflicting evidence as to whether or not the footings had been correctly estimated and properly considered.

Upon consideration of these several contentions, and the evidence in support of each, the district court made an equitable average that the number of bricks really laid in the foundation walls, and for which Ryan & Walsh were entitled to pay as extras, under the memorandum above referred to, was 225,000. There was sufficient testimony to sustain this finding, and it will not, therefore, be disturbed, either by increasing the number as asked by Ryan & Walsh, or lessening it as demanded by Mr. Katz. There is presented no other question for determination and the judgment of the district court is

AFFIRMED.

JOSEPH P. MANNING V. JAMES P. VIERS.

FILED OCTOBER 17, 1893. No. 5052.

1. **Pleading**: CORRECTION OF NAME OF PARTY: DISCRETION OF TRIAL COURT. It is within the discretion of the trial court, in furtherance of justice, upon such terms as shall be proper, to allow the amendment of any pleading and process by correcting the name of a party thereto.
2. ———: ———: PREJUDICE. Where an amendment has been permitted by which the given name of the plaintiff is changed, no prejudice will be presumed from the mere fact of the change. Resulting prejudice, if any there was, must be made affirmatively to appear.

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

Andrew Bevins, for plaintiff in error.

G. A. Rutherford, contra.

RYAN, C.

This case was originally commenced in the court of a justice of the peace, wherein it was docketed, and entitled "Joseph C. Viers v. Joseph P. Manning." In the summons the plaintiff was described as Joseph C. Viers. The title of the case in the verdict was given as J. P. Viers, to whom the appeal bond ran as obligee. On appeal the case was docketed in the name of Joseph C. Viers as plaintiff. The petition, however, was filed in the name of James P. Viers, and the answer was entitled "James P. Viers v. Joseph P. Manning." On motion the title of the case was amended so that James P. Viers was the plaintiff named.

The only question of importance in this case is whether or not the district court erred in permitting this amendment of the name of the plaintiff. Section 144 of the Code of Civil Procedure provides that "The court may, either be-

fore or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party," etc. This language expressly authorized the court to amend the title of the case in the respect in which it was amended, and, therefore, no error can be predicated on the order of the court in that respect. If any prejudice resulted from the discretion exercised by the court in the allowance of the amendment complained of, such prejudice should have been made to appear in some manner. Without averment or proof we cannot presume its existence. The judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA, EX REL. HERPOLSHEIMER & COMPANY, V. LINCOLN GAS COMPANY.

FILED OCTOBER 17, 1893. No. 6145.

1. **Trial Upon Pleadings.** Where a case is submitted solely upon the pleadings, the party seeking affirmative relief must, by the pleadings alone, show himself entitled to the relief sought. In such case the question is not, upon whom rests the burden of proof; but who, upon the facts established by the pleadings themselves, is entitled to judgment?

2. **Mandamus:** APPLICATIONS: WHERE MADE. An application for a *mandamus* as between private persons or corporations, as to matters involving only private rights and liabilities, should be made, in the first instance, in the district court of the proper county; the accumulation of appeal and error cases in this court rendering it improper for it to exercise jurisdiction in any class of cases wherein it has not exclusive jurisdiction.

MAXWELL, C. J., dissenting. As I understand the point here decided, it is proposed to refuse to hear an application for *mandamus* in any case between private persons. To this I cannot give my assent, as it is liable to work injustice.

State, ex rel. Herpolsheimer, v. Lincoln Gas Co.

ORIGINAL application for *mandamus*.

Field & Holmes, for relators

G. M. Lambertson and *H. J. Whitmore, contra.*

RYAN, C.

H. Herpolsheimer & Co., as relators, filed their petition alleging that such relators were a partnership composed of certain individuals named, and that said relators were engaged in mercantile business at a designated place in Lincoln, Nebraska; that the Lincoln Gas Company, defendant, was a corporation engaged in the manufacture and sale of gas for illuminating and heating purposes, and that said gas company had received from the city of Lincoln the right to enter upon and occupy the streets of said city of Lincoln for the purpose of laying gas pipes to conduct gas to different parts of the aforesaid city, which franchise said company had made extensive use of in its business, whereby it became and was under obligations, upon equal and reasonable terms, to furnish gas, make proper connections, and place meters for the relators and all other citizens of said city applying for the same. The relators averred that they had tendered to defendant the customary fee of one dollar for putting in a meter for relators, and demanded that such meter be connected with the pipes of the defendant, and that gas be furnished the relators as relators' necessities should demand. The petition contained other averments which, in the view taken in this case, are not deemed material and are, therefore, omitted, except as a mere reference to a portion of them hereafter becomes necessary. The prayer was for a *mandamus* to compel the respondent to put a meter in the relators' place of business, connect the same properly, and furnish relators gas for illuminating purposes.

The answer of the defendant contained the following averments:

"9. Respondent further shows that a plant for generating electricity sufficient for lighting a single building can be procured, and that in several cases the owners and occupants of buildings in the city of Lincoln have procured the necessary boilers, engines, dynamos, and appliances for generating and distributing electricity, and have been and now are operating the same and lighting their said buildings with electricity and are no longer dependent upon gas as an illuminant, and have ceased to use the same as a means of illuminating their said buildings.

"10. That some of the persons who have thus established private electric lighting plants have desired to maintain a connection between the gas fixtures in their said buildings and the mains and pipes of this repondent, not for the purpose of regularly and continuously using gas to illuminate their said buildings, but only for the purpose of procuring a supply of gas at such times as the private electrical plants of such persons might be disabled or injured, and until repairs could be effected.

"11. Respondent shows that it would not be profitable to, and this respondent could not afford to, maintain gas connections for such purpose and under such circumstances upon the terms upon which gas is ordinarily furnished by respondents to consumers, viz., 'at the usual and customary price for each thousand feet of gas actually consumed, and this respondent has accordingly adopted the following rule to govern and control in such cases, viz.:

"'All concerned: Commencing the 1st of November, 1892, the rule of the Lincoln Gas Company will be to charge twenty-five ($25) dollars per month for either gas or electric light connections and their maintenance to those who have a lighting plant of their own and who use the lights of the Lincoln Gas Company simply as emergency lights. In such establishments as an isolated lighting

plant could be operated with any degree of profit, the service connections of the Lincoln Gas Company are of necessity large and expensive to establish and maintain, and for this reason this rule is adopted.

"'D. E. THOMPSON, *President.*'

"12. That during the months of September, October, and November, 1892, the relator procured to be placed in his said building all the necessary boilers, engines, dynamos, machinery, apparatus, and appliances for generating and distributing electricity for lighting all the parts of his said building and announced his intention of furnishing his own light, and further declared that he would no longer be dependent upon the respondent for lighting his said building, and that he should no longer use, desire, or require the gas of respondent for illuminating his said building; that this respondent was at said time maintaining connection with said building and its gas mains and pipes and had eight meters in place in said building, and said connection was maintained at great expense to respondent; that on the completion of relator's said private lighting plant, and when the same had been for some time in successful operation, respondent (after duly informing the relator of its intention so to do, and after bringing the rule set forth in the preceding paragraph to relator's attention, and the relator having refused to accept gas connections on the terms fixed in said rule) caused the said connection to be broken and the said meters to be removed.

"13. That the relator has ever since said time, to-wit, on or about November 29, 1892, lighted his said building with electricity, and has conducted his said business during all of said time without the use of gas, and solely by the aid of electric light; that his said private electric plant is still in operation and use and amply sufficient for relator's use and necessities, and that relator neither requires nor desires gas for illuminating his said building or the successful conduct of his said business.

"14. Respondent avers that after the receipt by it of the written demand set out in relator's petition, and on the 17th day of April, 1893, this respondent notified relator in writing that the connection desired by relator would be furnished on the terms mentioned in the rule of said respondent heretofore set out in this answer, and desired relator to inform respondent of his acceptance of the terms established in said rule; that said relator has made no reply to the said communication of this respondent, but shortly thereafter commenced this suit.

"15. Respondent avers that the said rule is just and reasonable, and that it is ready and willing, and has at all times been ready and willing to furnish relator with meters and to make and maintain connections between its mains and service pipes and the gas fixtures and pipes of the relator in said building upon the terms fixed in said rule."

The parties stipulated that a reply might be filed within three days of the date upon which the stipulation itself was filed, but as this otherwise unwarranted pleading for the most part argumentatively asserted that the requirement of payment of $25 per month was an unreasonable discrimination against the relators, only such part as is necessary to notice will be set out; and that, when reached in the course of this discussion.

The case was submitted upon the pleadings without any evidence. This presents a question of difficulty as to which we have been able to find no adjudication in point. It is this: The petition should, of course, state the tender of performance of all reasonable conditions precedent upon which the gas company may insist before making gas connections. There is pleaded in the answer a rule of the gas company whereby there is required the payment of $25 per month by proposed customers situated as are the relators. The reply, using its own language, "admits that defendant company claims to have established a rule set forth in the defendant's answer, whereby it should charge these

plaintiffs the sum of $25 per month for the use of its gas meter, but denies that such company has ever made or established any such rule and applied it to the general public or to the other customers of the defendant company similarly situated and having a private electric plant for lighting as have these plaintiffs." This language, as we understand it, admits that the company claims to have established the rule set out in defendant's answer, but asserts that it has never made, established, or enforced such rule as against the general public or other customers situated as are the relators. It is not a denial, but rather an admission of the existence of the rule. Its uniform application and reasonableness are, however, called in question by the above quoted language, and that immediately following it, in which the charges made for supplying the Lindell hotel, having an electric light similar to that of the relators, are instanced as establishing this lack of uniformity and reasonableness as against the relators. The existence of the rule not being challenged, the relators' only avoidance of it is on the grounds that it should not be enforced against the relators, first, because it has not been applied to others, and second, because it is an unreasonable rule. If these propositions were under consideration upon a trial in the light of evidence, it would be proper to inquire upon whom was the burden of proof, and possibly by resort to our own observation, one species of evidence incompetent though it might be, we might say that this charge was unreasonable, or we might say that proof of its reasonableness devolved upon the defendant. Submitted as the case is, upon the pleadings alone, a resort to our own experience or observation to test the reasonableness of this requirement is not permissible. What might be our private judgment upon this question of fact is of no consequence, for we can now only consider the averments, admissions, and denials of the pleadings. Without doubt there should be evidence as to what charges have

been made to others for like service to those sought to be compelled by this action. From these considerations it results that solely upon the pleadings as they stand the relief demanded cannot be granted. There must be evidence, at least, as to the matters above indicated to entitle the relators to a *mandamus* as prayed; and as it is desirable that no mere technical obstacles shall bar the right of relators to whatever relief they may show themselves entitled, this application will not be absolutely denied.

In view of the accumulation of business in this court, however, and of the imperative necessity of devoting all available time and efforts to the disposition of the cases already submitted on error proceedings and appeal, we must insist that all original applications in the nature of that made in this case, involving, as they do, only the private rights and liabilities of private parties *inter sese*, shall be made in the district court of the proper county. It is therefore ordered that this application be dismissed without prejudice to the right of the relators to begin and maintain such proceedings as shall be deemed advisable in another court.

RAGAN, C., concurs.

IRVINE, C.: I concur in the disposition made of this case, upon the ground stated in the second paragraph of the syllabus.

A. MARGARET SCHARMAN, APPELLEE, v. CONRAD A. SCHARMAN ET AL., APPELLANTS.

FILED OCTOBER 17, 1893. No. 5093.

1. **Land Contracts:** ASSIGNMENT AS SECURITY: LIEN OF ASSIGNEE. A contract for lands, absolutely and formally assigned to another in writing, but designed as a security for a debt, is

but a mortgage, and when the debt is paid the lien of the assignee will cease. *Lipp v. South Omaha Land Syndicate*, 24 Neb., 692, followed.

2. **Possession of land is notice** to all the world, not only of the possession itself, but of the right, title, and interest, whatever it may be, of the possessor. *Uhl v. May*, 5 Neb., 157, followed.

3. **To sustain an estoppel because of the omission to speak** there must be both the specific opportunity and the apparent duty to speak. The party maintaining silence must have known that some one was relying thereon, and was either acting, or about to act, as he would not have done had the truth been told. *Viele v. Judson*, 82 N. Y., 32, approved.

APPEAL from the district court of Lincoln county. Heard below before CHURCH, J.

Fawcett, Churchill & Sturdevant, for appellants:

Even if there was not a *bona fide* sale from the plaintiff to the defendant Scharman of the lands described in the land contracts in controversy, still the plaintiff, by her conduct in clothing the defendant Scharman with the *indicia* of ownership of the lands in controversy, and in permitting him to hold himself out to the world as the owner of the lands, and thus gaining a credit in the commercial world, and particularly with the defendants Rector & Wilhelmy Company, which he would not otherwise have had, and the defendants Rector & Wilhelmy Company having relied upon the truthfulness of his claim of ownership and given credit on the strength of the same, the plaintiff is now estopped to assert any claim, right, title, or ownership to the lands in controversy as against the defendants Rector & Wilhelmy Company. (*Root v. French*, 13 Wend. [N. Y.], 570; *Saltus v. Everett*, 20 Wend. [N. Y.], 267; *Selser v. Brock*, 3 O. St., 308; *Resor v. Ohio & M. R. R. Co.*, 17 O. St., 140; *Combes v. Chandler*, 33 O. St., 183; *Anderson v. Armstead*, 69 Ill., 452; *Forbes v. McCoy*, 24 Neb., 703; *Blais v. Wait*, 69 N. Y., 113; *Gillespie v. Sawyer*, 15 Neb., 541; *Dinsmore v. Stimbert*, 12 Neb., 437; *Putman v. Sul-*

livan, 4 Mass., 45; *Roy v. McPherson*, 11 Neb., 199; *Hansen v. Berthelson*, 19 Neb., 433; *Bartlett v. Cheesbrough*, 23 Neb., 767; *Fisher v. Herron*, 22 Neb., 183; Herman, Estoppel, pp. 1063, 1069, 1099, 1100.)

The plaintiff is estopped, by the terms and covenants of her assignment, from alleging or proving that there was no consideration paid for the assignment by her to her son Conrad. (Secs. 50, 53, ch. 73, Comp. Stats.; *Dailey v. Kinsler*, 31 Neb., 340; 1 Perry, Trusts, sec. 162; *Wait v. Day*, 4 Den. [N. Y.], 439; *Blodgett v. Hildreth*, 103 Mass., 486; *Randall v. Phillips*, 3 Mason [U. S.], 388; *Allison v. Kurtz*, 2 Watts [Pa.], 185; *Graves v. Graves*, 29 N. H., 129; *Philbrook v. Delano*, 29 Me., 410; *Groff v. Roher*, 35 Md., 333; *Hogan v. Jaques*, 19 N. J. Eq., 123; *Farington v. Barr*, 36 N. H., 86; *Walker v. Locke*, 5 Cush. [Mass.], 90; *Bragg v. Geddes*, 93 Ill., 39; *McDonald v. Stow*, 109 Ill., 44; *Whiting v. Gould*, 2 Wis., 552*; *Jackson v. Cleveland*, 15 Mich., 94; *Van Der Volgen v. Yates*, 5 Selden [N. Y.], 219; 2 Herman, Estoppel, sec. 642; 2 Devlin, Deeds, secs. 834, 921; *Van Rensselaer v. Kearney*, 11 How. [U. S.], 297; *Bank of United States v. Housman*, 6 Paige Ch. [N. Y.], 535; *Squire v. Harder*, 1 Paige Ch. [N. Y.], 493; *Smith v. Williams*, 44 Mich., 240.).

T. Fulton Gantt, contra:

The assignment was intended as security, and if it were as absolute on its face as a warranty deed, it might be shown by parol that it was intended as security only. (*McHugh v. Smiley*, 17 Neb., 622; *Eiseman v. Gallagher*, 24 Neb., 81; *Thompson v. Thompson*, 30 Neb., 489; *Turner v. McDonald*, 9 Am. St. Rep. [Cal.], 189; *Raynor v. Drew*, 72 Cal., 307; *Helm v. Boyd*, 124 Ill., 370; *Robinsons v. Lincoln Savings Bank*, 85 Tenn., 365; *McMillan & Son v. Jewett*, 85 Ala., 476; *Morris v. Nixon*, 1 How. [U. S.], 126; *Russell v. Southard*, 12 How. [U. S.], 154; *Edrington v. Harper*, 3 J. J. Marshall [Ky.], 355;

Jenkins v. Eldredge, 3 Story [U. S.], 293; *Taylor v. Luther*, 2 Sumner [U. S.], 228; *Newman v. Edwards*, 22 Neb., 248; *Conway v. Alexander*, 7 Cranch [U. S.], 238; *Sprigg v. Bank of Mount Pleasant*, 14 Pet. [U. S.], 201*; *Babcock v. Wyman*, 19 How. [U. S.], 299; *Case v. McCabe*, 35 Mich., 100; *Flagg v. Mann*, 2 Sumner [U. S.], 533; *Dunman v. Coleman*, 59 Tex., 199; *Fisk v. Stewart*, 24 Minn., 97; *Anthony v. Anthony*, 23 Ark.. 479; *Moore v. Lackey*, 53 Miss., 91; *Carpenter v. Black Hawk Gold Mining Co.*, 65 N. Y., 43; *Jackson v. Parkhurst*, 4 Wend. [N. Y.], 369; *Jolly v. Single*, 16 Wis., 308; *Griffin v. Griffin*, 18 N. J. Eq., 104; *McNamara v. Culver*, 22 Kan., 661; *Davis v. Stonestreet*, 4 Ind., 101.)

One who buys an equitable title takes it subject to all prior equities, is put upon inquiry and takes his chances. An attaching creditor has no greater rights. (*Hibbard v. Weil*, 5 Neb., 45; *Mansfield v. Gregory*, 8 Neb., 433; *Westheimer v. Reed*, 15 Neb., 664; Drake, Attachment, 223; *Linnell v. Battey*, 2 Chicago L. J., n. s. [R. I.], 315.)

Defendants made no claims, as to reliances upon the lands, in plaintiff's presence. Plaintiff knew nothing of such claims, had no opportunity to speak, and is not estopped by her silence. (Bispham, Prin. of Eq., 352, 355; 1 Greenleaf, Evidence, sec. 202, note 2; *Holdane v. Trustees of the Village of Cold Spring*, 21 N. Y., 474; *Mayenborg v. Haynes*, 50 N. Y., 675.)

Rector & Wilhelmy Company are strangers to the assignment, and cannot take advantage of the statute of frauds as an estoppel. (*Eiseley v. Malchow*, 9 Neb., 180; *McCormick v. Drummett*, 9 Neb., 389; *Rickards v. Cunningham*, 10 Neb., 420; *Kemp v. Small*, 32 Neb., 318; High, Injunctions, sec. 251; *Treadwell v. Payne*, 15 Cal., 496; *Walrath v. Redfield*, 18 N. Y., 457; *Pope v. O'Hara*, 48 N. Y., 446.)

William Neville, also for appellee.

RAGAN, C.

A. Margaret Scharman sued Conrad A. Scharman, Rector & Wilhelmy Company, and D. A. Baker, sheriff of Lincoln county, Nebraska, in the district court of that county, and in her petition alleged that on the 12th day of June, 1889, she was the owner of certain Union Pacific land contracts, calling for three quarter sections of land in Lincoln county, Nebraska; some of the lands represented by these contracts she had purchased from the Union Pacific Railway company direct, and others she had purchased from purchasers from the Union Pacific Railway Company; that on the 12th day of June, 1889, she borrowed of the North Platte National Bank $550, and gave a note therefor, signed by her husband and her son, Conrad A. Scharman, and that on said date, for the purpose of securing the payment of said note to said bank, she made an absolute formal assignment, in writing, of all of said land contracts to her son, Conrad A. Scharman, and that he deposited said contracts with said bank to secure the payment of said note; that the assignment of said land contracts to her said son was for the purpose only of securing the payment of the note given to said bank, and not for the purpose or with the intent of placing the title or ownership of said lands, or any of them, in her said son, Conrad A. Scharman; and that he agreed, when she repaid him the money borrowed, that he would reassign to her said contracts; that during the year 1889 her son, Conrad A. Scharman, was a member of the copartnership of Stewart & Scharman, a firm doing a hardware business in North Platte, Nebraska; that she had paid all the money borrowed by her and for which she had pledged or assigned said land contracts, and that her son, Conrad A. Scharman, had neglected and refused to reassign to her said contracts; that the defendants Rector & Wilhelmy Company had brought a suit against the copartnership of Stewart & Scharman, and had caused

an attachment to be levied upon all the lands represented by said contracts, claiming said lands were the individual property of said Conrad A. Scharman; that the lands were in fact hers, and hers only; that Conrad A. Scharman had no interest in them, nor any lien upon them; that the proceedings in attachment were a cloud upon the title to the same, and she prayed that Conrad A. Scharman should be decreed to reassign to her said land contracts; that Rector & Wilhelmy Company should be perpetually enjoined from proceeding any further with the attachments levied on said land; that the title to the same might be quieted and confirmed in her.

Conrad A. Scharman did not answer the petition. The sheriff answered, justifying under the attachment. Rector & Wilhelmy Company defended on two grounds:

1. That the assignment of the land contracts by Mrs. Scharman to her son, Conrad A. Scharman, was not intended as security, but made in pursuance of an actual sale of the lands represented by them to Conrad.

2. That Rector & Wilhelmy Company, by reason of the assignment of said land contracts, being in the name of Conrad A. Scharman, were led to believe him the owner of the lands, and, relying on such assignment, they sold the copartnership of which he was a member merchandise on credit, and that Mrs. Scharman was estopped from now claiming the ownership of the lands as against them.

The court found all the issues in favor of Mrs. Scharman, and decreed that Conrad A. Scharman should reassign to her the land contracts; quieted and confirmed the title to the lands in her, and perpetually enjoined their sale under the attachment levied thereon by Rector & Wilhelmy Company, and from this decree the latter parties appeal.

The pleadings, and appellants' argument as well, present two questions, which we notice in their order.

Did Mrs. Scharman assign the land contracts to her son Conrad as security for the payment of money, or in pur-

suance of an absolute sale of the lands to him? The court found that the contracts were assigned by Mrs. Scharman to her son Conrad to secure the payment of $500 in money loaned by Conrad to his mother June 12, 1889. The evidence supports this finding. Any other finding would be unsupported by the testimony. This $500 was borrowed from the North Platte National Bank. Conrad and his father gave the bank their note for it, and Conrad deposited with the bank, to secure the payment of the note, these land contracts assigned to him by his mother on that day, June 12, 1889, for that very purpose, and Mrs. Scharman received this money. When this note matured Conrad borrowed the amount of it and interest, $561, from the First National Bank of North Platte, and with this money paid off the first note, and deposited the land contracts with the First National Bank to secure the $561 note. Finally, Mrs. Scharman and her husband mortgaged their homestead, and with the money borrowed, paid off the $561 note. During all this time Mrs. Scharman remained in possession of these lands, on which she had horses and cattle, and other property. She kept up the payments to the Union Pacific Railway Company, the owners of the legal title, and there is no evidence in the record to sustain the contention of appellants that Mrs. Scharman sold or intended to sell these lands to her son on June 12, 1889, or at any other time. It is true the contracts were absolutely and formally assigned to the son, but it was competent to show by parol that they were intended as security in the nature of a mortgage for money loaned. (*McHugh v. Smiley*, 17 Neb., 620; *Eiseman v. Gallagher*, 24 Neb., 79; *Lipp v. South Omaha Land Syndicate*, 24 Neb., 692; *Tower v. Fetz*, 26 Neb., 707; *Thompson v. Thompson*, 30 Neb., 489; *Kemp v. Small*, 32 Neb., 318.)

We come now to the second question in this case, put by the able and ingenious counsel for appellants in their brief as follows: "Even if there was not a *bona fide* sale from the

plaintiff to the defendant Scharman of the lands described in the land contracts in controversy, still the plaintiffs by her conduct in clothing the defendant Scharman with the *indicia* of ownership of the lands in controversy, and in permitting him to hold himself out to the world as the owner of the lands, and thus gaining a credit in the commercial world, and particularly with the defendants Rector & Wilhelmy Company, which he would not otherwise have had, and the defendants Rector & Wilhelmy Company having relied upon the truthfulness of this claim of ownership and given credit upon the strength of the same, the plaintiff is now estopped to assert any claim, right, title, or ownership to the lands in controversy as against the defendants Rector & Wilhelmy Company."

What conduct of Mrs. Scharman is it claimed by appellants estops her? Is it the assignment and delivery to Conrad of the land contracts as security? She did this, but she retained possession of the lands. This was, of itself, notice to all the world of her equities. See *Uhl v. May*, 5 Neb., 157, where this court say: "Possession of land is notice to all the world, not only of the possession itself, but of the right, title, and interest, whatever it may be, of the possessor." To the same effect see *Filley v. Duncan*, 1 Neb., 134; *Lipp v. Hunt*, 25 Neb., 91; *Smith v. Gibson*, 25 Neb., 511; *Hansen v. Berthelsen*, 19 Neb., 433.

The legal title to the lands was in the Union Pacific Railway Company, and the assigned contracts were not recorded in the office of the register of deeds of Lincoln county. Appellants had then no notice from that quarter that Conrad held the assignment. Appellants argue that they gave Conrad credit by reason of his having in his name the assignment of these land contracts. The evidence, however, of appellants' own witnesses refutes this contention. Neither appellants, nor any of their agents, ever knew that Conrad held the assignment until after he had become indebted to appellants, and had failed in business.

Harberg, appellants' traveling salesman, says he was an intimate friend of Conrad Scharman; that Conrad went into business March 1, 1889, and that appellants began from that time to sell him goods on credit; and that prior to March 1, 1889, he visited the Scharman ranch—Mrs. Scharman's home—in company with Conrad and some others; that at that time "he, Conrad, represented to me that he was interested in these as part owner; that it gave him better credit with the house—it would with me, at least. He represented that he had property. If he had nothing, of course his credit did not amount to anything. He spoke of the lands a number of times; just referred to them, and what they would be worth in the course of time. I visited North Platte about every three weeks; remember the circumstance of Mrs. Scharman's going east." (Mrs. Scharman went east to New Jersey on June 12, 1889, and remained about four months.) He had a conversation with Conrad Scharman after his mother had gone east and Conrad told him: "he told me that his mother had gone east, and had left for good, and that he was the owner of the land; that he paid her one thousand dollars, and the land was now his." He said further, he believed the statements, and communicated them to Rector & Wilhelmy Company, and that the statements gave him better credit; that after that statement he issued him a larger amount of credit than he did before; that "he pointed out to me the land where the section lines ran. He made a motion with his hand; I didn't know how far out it extended." He further testified on cross-examination as follows:

Q. If he represented to you prior to March, 1889, that he owned a part interest out there in these lands, and he, as a matter of fact, did not get any assignment of them from anybody until long after that time, you were deceived by him, were you not?

A. Certainly; yes, sir.

Q. Mrs. Scharman did not tell you that he owned any of these lands?

A. No, sir.

Q. Nor any part of them?

A. No, sir.

Q. Did you make any investigation to see if he owned part of the ranch?

A. No, sir.

Q. You took his word?

A. Yes, sir; I took his word for it.

Q. You had perfect confidence in him, did you?

A. Yes, sir; I took his word for it.

Q. When you went out there to the ranch you went up to the building at the homestead?

A. Yes, sir.

Q. Mrs. Scharman lived there, did she?

A. Yes, sir.

Q. You were in the house where she was, were you not?

A. Yes, sir.

Q. Conrad told you that he was part owner out there?

A. Yes, sir.

Q. And you did not ask her whether that was true or not?

A. No, sir.

Q. Still, you gave him credit on the strength of that?

A. Yes, sir.

Q. You sold him goods on the strength of that?

A. Yes, sir; partly on the strength of that, and partly because—

Q. And partly because he was a good friend of yours, and you thought he was a good business man?

A. Partly that, and other reasons.

Q. And partly because you knew he owned some other property?

A. He had a home here; yes, sir.

Q. Did not you and he ever buy any together?

A. Yes, sir; that was very small, though.

Q. In partnership?

A. Yes, sir.

Q. You were quite friendly, were you not?

A. Yes, sir; we were.

Q. This land that you have testified that you and Con. owned together, what land was that?

A. That was a five-acre tract just west of Grand Island, probably three or four miles from the post-office.

The substance of this evidence is that Conrad Scharman took his friend Harberg out to his, Conrad's, mother's home. Conrad, on the way, says: "I am part owner here." Mrs. Scharman was in possession. The legal title was in the Union Pacific Railway Company. This was some months before Mrs. Scharman assigned the contracts to Scharman. Mrs. Scharman was not present when Conrad pointed out to Harberg the land of which he claimed he was part owner. No inquiries were made of Mrs. Scharman by Harberg as to Conrad's interest in these lands.

It appears, then, that appellants credited Conrad, relying on the latter's claim of part ownership of his mother's lands. She, however, said nothing to appellants on the subject. She did nothing from which appellants might infer that Conrad's story was true. She kept silent when Conrad made his claim, because she did not hear it made. The fact that Conrad while his mother was east, during the months of June, July, August, and September, 1889, claimed ownership of all the lands, did not change Mrs. Scharman's relation to appellants. At no part of this time was Conrad in possession of the lands. Mrs. Scharman did not know that Conrad was asserting such a claim, nor did she learn, after her return, that he had done so. She knew he was in business, but did not know anything about his financial condition, nor did she know appellants were crediting him, or the firm of which he was a member. Her silence did not operate as a fraud upon, nor did it mislead, appellants. She did not have the opportunity to speak, and

being ignorant of the claims of her son, it was not her duty to speak. While she was silent, she did not know that appellants were relying upon her silence, nor that they were relying upon the claims of ownership asserted by her son; nor did she know that they were giving him credit, which they would not have given him had they known the truth. Mrs. Scharman is neither estopped to claim these lands, so far as the evidence shows, either from her silence, or from any act of hers. During her absence in the east, the contracts, though duly and formally assigned to Conrad, were not in his possession or under his control, but were in the bank as security only for the money on which Mrs. Scharman was traveling. Appellants made no inquiries about the assignment for the very good reason that they did not know of its existence. If appellants extended credit to Conrad after June, 1889, relying on his ownership of these lands, they did it on the strength of the statements made to Harberg by Conrad prior to March, 1889. How, then, can it be said that the evidence in this record shows that Mrs. Scharman clothed Conrad with the apparent ownership of her lands, and held him out to the commercial world as owner, and that he thereby obtained credit?

Counsel for appellants cite Herman on Estoppel, page 1099, where it is said: "In order to create an estoppel by which an owner is prevented from asserting title to and is deprived of his property by the act of a third person without his assent, the owner must have clothed the person assuming to dispose of the property with the apparent title to, or authority to, dispose of it. The person alleging the estoppel must have acted, and parted with value, upon the faith of such apparent ownership, or authority, so that he will be the loser, if the appearances to which he trusted are not real." But appellants' case is not within the rule here laid down. There is no evidence in this case that appellants gave Conrad Scharman credit upon the faith of his

apparent ownership of his mother's lands. When appellants gave Conrad credit he was not in possession of any part of these lands. He did not have the legal title, or a deed to any of them, and appellants did not know he held the assignment of the contracts.

Counsel also cite *Anderson v. Armstead*, 69 Ill., 452, where it is said: "The law is familiar, that where the owner of property holds out another, or allows him to appear as the owner of, or as having full power of disposition over, the property, and innocent parties are thus led into dealing with such apparent owner or person having the apparent power of disposition, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they have directly dealt, but they are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power he caused or allowed to appear to be vested in the party upon the faith of whose title or power they dealt." We approve of the doctrine of that case; but after repeated searches of the record we have been unable to find any evidence that Mrs. Scharman held out her son to appellants as the owner of her lands, or allowed him to appear to appellants as owner of, or having any control or power of disposition over, her lands; and we are unable to find any evidence that appellants in giving the son credit, did so relying on any apparent title, control, or ownership of these lands by him.

Appellants also cite *Hansen v. Berthelsen*, 19 Neb., 433, but that case is not in point here. In that case Hansen made to Berthelsen, without consideration, an absolute warranty deed of his farm, and himself placed the deed on record. While Berthelsen held this title she exercised acts of ownership over the land. She conveyed a part of it to a school district and accepted from the school district a deed for another part of it. Both these deeds were recorded. Love, in good faith, for a valuable consideration,

and relying on Berthelsen's title as disclosed by the records, purchased this land. This court held that Love was entitled to a lien on the land for the amount he paid for it, the court saying: "The rule in equity is that where one of two innocent parties must suffer by the wrong of a third, he, who, by his negligence or undue confidence, has been the means by which the other has been deceived, must bear the loss." Rector & Wilhelmy Company do not come within this rule. They did not innocently give credit to Conrad A. Scharman and they were not induced to give him credit by any negligence of Mrs. Scharman, nor by any undue confidence which she placed in Conrad. The decree of the district court is right and the same is in all things

AFFIRMED.

W. J. BROWN v. FRANK L. DUNN.

FILED OCTOBER 17, 1893. No. 4865.

Review: BRIEFS: PRACTICE. Where no briefs are filed by either party in a case brought here on error, this court will examine the pleadings and evidence, and if they support the judgment rendered, it will be affirmed. To obtain a review of specific errors they must be pointed out in the brief of the party complaining. *Phœnix Ins. Co. v. Reams*, 37 Neb., 423, followed.

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

Harwood, Ames & Kelly, for plaintiff in error.

Adams & Scott, contra.

RAGAN, C.

This is an action of forcible detainer brought by Frank L. Dunn against W. J. Brown. The district court of Lan-

caster county, after a trial to a jury and a finding by them that the defendant was guilty, rendered judgment of restitution against Brown and he brings the case here on error.

No briefs have been filed by either party. The judgment of the district court is supported by both the pleadings and the evidence. The case appears to have been brought here simply for delay. We will not examine errors alleged in a petition in error unless such errors are specifically pointed out and relied upon in the briefs filed in the case, under the rules of this court. (*Phœnix Ins. Co. v. Reams*, 37 Neb., 423.) The judgment of the district court is

AFFIRMED.

JAMES LANGLEY V. BERNARD ASHE ET AL.

FILED OCTOBER 17, 1893. No. 4804.

Injunction to Prevent Execution of Judgment: PLEADING. A petition in equity to enjoin the enforcement of a judgment of a justice of the peace, which does not aver facts from which it appears (1) that the plaintiff has a meritorious defense to the cause of action on which the judgment is based, and (2) that his failure to interpose such defense in the justice court, and to avail himself of an appeal or proceeding in error, was not due to any neglect or default on his part, does not state a cause of action.

ERROR from the district court of Colfax county. Tried below before POST, J.

J. A. Grimison, for plaintiff in error.

George H. Thomas, contra, cited: 1 High, Injunctions [2d ed.], secs. 125, 126, and cases cited; 7 Lawson, Rights, Rem. & Pr., 3702, and cases cited; *Scofield v. State National Bank of Lincoln*, 9 Neb., 316; *Young v. Morgan*, 9 Neb., 169.

RAGAN, C.

Bernard Ashe sued Charles Cooper and James Langley before a justice of the peace in Colfax county, on a promissory note. The summons was made returnable January 23, 1889, and was duly served. On January 21 Ashe and Cooper appeared before the justice and he, by their consent, continued the case until March 1, 1889. Langley made no appearance whatever in the case, and had no knowledge of this continuance. On March 1, 1889, the justice rendered judgment against Cooper and Langley on said note. April 18, 1889, an execution was issued and placed in the hands of the sheriff, who levied upon a span of horses belonging to Langley, to satisfy the judgment. Langley then brought this suit in the district court against Ashe, the judgment creditor, Bohman, the justice of the peace, and Kuderna, the sheriff, alleging the facts above stated; that said judgment of said justice was null and void as against him, Langley; and that he had a good defense to said action before said justice of the peace. To this petition the defendant in error filed a general demurrer, which was sustained by the court, and the suit dismissed. Langley excepted, and brings the case here on error.

The only question in the case is, does the petition state sufficient facts to constitute a cause of action? The contention of the plaintiff in error is, that as the summons was returnable January 23, 1889, the order of the justice of the peace, on January 21, 1889, adjourning the cause to a future date was a nullity; that the justice of the peace had no jurisdiction at that time to make any order in the case; and that, therefore, the judgment rendered on March 1, 1889 is void. The summons was in all respects in due form of law; was duly served on Langley, and notified him to appear before the justice of the peace on January 23; and if he failed to do so, that judgment would be rendered against him for $——. He failed to appear then or at any other time.

Did the adjournment of the case, on the request of Ashe and Cooper, to March 1, render the judgment against Langley void? We think not. The justice had jurisdiction of the subject-matter and of Langley on January 23. He did not lose it by failing to enter his default and render judgment against him on that day. His continuance of the case until March 1 was good against Ashe and Cooper, and was, at most, an error of law, voidable only as against Langley. Had Langley appeared on the 23d and demanded a hearing, he was entitled to it; but he did not appear, and the fact that the justice postponed the writing up, or entry, of the judgment until the date to which the cause was set for trial against the other parties to the suit, did not divest the justice of his jurisdiction, either of the subject-matter or of Langley, nor render the judgment absolutely void. The justice should have defaulted Langley on January 23, and rendered judgment against him then; but his failure to do so, at the most, rendered his acts voidable. Langley had a plain and adequate remedy at law for the review and reversal, if erroneous, of this judgment, both by appeal and proceeding in error to the district court; and, until he had exhausted his legal remedies, or, without his fault been deprived of them, he cannot be heard in a court of equity. So far as the record shows, he made no effort to defend himself before the justice. He took no steps to review in law courts the errors alleged. In other words, he has slighted the tribunals and remedies provided by law for him, and now says to allow the judgment to be enforced would be contrary to equity and good conscience. Let us see what he says about the defense he has to the note sued before the justice: "The plaintiff further alleges that he had a good and lawful defense in said action before said justice of the peace in this, to-wit: That he would then have alleged, and does now allege, that he did not sign the promissory note sued upon in said action." This will not do. The question is not

what he would have alleged before the justice of the peace, but what were the facts. This averment would not entitle him to equitable relief from the judgment had it been rendered against him without any service upon him whatever. (*Janes v. Howell*, 37 Neb., 320.) If he did not sign this note, why did he not appear before the justice on January 23, and say so? If he was prevented from making his defense, if he had one, by accident, surprise, mistake, or fraud, his petition should so state. (*Scofield v. State National Bank*, 9 Neb., 316.) The facts stated in the petition do not constitute a cause of action. The judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA, EX REL. SIOUX COUNTY, V. JOHN S. TUCKER, ASSESSOR, ET AL.

FILED OCTOBER 17, 1893. No. 4781.

1. **Taxation**: IMPROVEMENTS ON LAND held under the pre-emption, homestead, and timber culture laws of the United States, on which final proof has not been made, are subject to taxation against the persons owning such improvements.
2. ———: SCHOOL LANDS: THE LEASEHOLD interest of a tenant of school lands belonging to the state is subject to taxation.
3. ———: ———: IMPROVEMENTS: PURCHASERS. School lands sold by the state, but to which the equitable title of the purchaser has not been completed by full payment of the purchase money, are subject to taxation to the extent of the purchaser's interest therein, such interest to be determined by the amount paid and invested in improvements on such lands.

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

Hugh T. Conley, for plaintiff in error:

Improvements owned by claimants on public lands held

by virtue of filings made under the pre-emption, homestead, and timber culture laws of the United States are property subject to taxation. (*Mc Williams v. Bridges*, 7 Neb., 423; *Brooks v. Hiatt*, 13 Neb., 503; *Carkins v. Anderson*, 21 Neb., 364; *Paxton Cattle Co. v. First Nat. Bank*, 21 Neb., 646.)

Improvements owned by individuals, companies, and corporations on the school lands of the state of Nebraska, while the title to said lands remains in the state, are property. (Secs. 1, 3, ch. 77, Comp. Stats., 1889.)

All property is taxable unless specifically exempted from taxation by law. (*Turner v. Althaus*, 6 Neb., 75; *Crawford v. Burrell Township*, 53 Pa. St., 219; *Bellinger v. White*, 5 Neb., 401; *Miller v. Hurford*, 13 Neb., 24; *Finch v. York County*, 19 Neb., 57; *Morrill v. Taylor*, 6 Neb., 242; *Wood v. Helmer*, 10 Neb., 75; *Roe v. St. John*, 7 Neb., 141.)

No counsel for defendants.

IRVINE, C.

This action was begun in the district court for Sioux county, for the purpose of requiring the respondents, who were the assessors of the different precincts of that county, to include in their assessment all improvements on land held by individuals under the pre-emption, homestead, and timber culture laws of the United States on which final proof had not been made, and also all other improvements on government land within their precincts; and also to include in their assessment the interests of lessees and purchasers of school lands. The case was submitted by stipulation upon the petition. The district court refused the writ, and the relator seeks to reverse the judgment.

Two questions are involved: First—Are improvements upon government lands, upon which final proof has not been made, subject to taxation? Second—Are the interests of purchasers and lessees of school lands subject to taxation?

1. By section 4 of the enabling act the federal government laid upon the state the obligation that no taxes should be imposed "on lands or property therein belonging to or which may hereafter be purchased by the United States." The object of this provision was to protect the federal government itself from the imposition of such taxes, and not to discharge government lands from taxation after they should cease to belong to the government. It is only the interest of the government which, by the enabling act, is exempt from taxation, and there can be no doubt that the state has power to subject improvements of others upon such lands to taxation. (*People v. Shearer*, 30 Cal., 645.) The question is, has the state exercised that power?

The constitution, article 9, section 1, provides that "the legislature shall provide such revenue as may be needful by levying a tax by valuation so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property and franchises, the value to be ascertained in such manner as the legislature shall direct." Here we have the policy of our revenue laws declared by a command to the legislature to so enact that every person shall pay a tax in proportion to the value of his property. Section 2 provides that the property of the state, counties, and municipal corporations shall be exempt from taxation, and that property used exclusively for agricultural and horticultural societies, for school, religious, cemetery, and charitable purposes, may be exempted. It also provides for deduction in the valuation of lands incumbered by public easements, of the depreciation caused by such easements, and the legislature is given power to exempt the increased value of land by live fences, fruit and forest trees. The general direction in section 1 for the payment of taxes in proportion to the value of all property, together with the expressed power of exempting certain property, found in section 2, implies very clearly an inhibition against the exemption of any property not so specified.

Chapter 38, Compiled Statutes, makes all contracts, promises, assumpsits, or undertakings in good faith, and without fraud, collusion, or circumvention, for the sale, purchase, or payment of improvements made on lands owned by the government of the United States, valid in law and equity and the subject of action. The validity and force of this statute have been often declared by this court. As said by the present chief justice in *Brooks v. Hiatt*, 13 Neb., 503: "Improvements on the public lands are property and a sufficient consideration to sustain a promise to pay for the same." (See also *McWilliams v. Bridges*, 7 Neb., 419; *Paxton Cattle Co. v. First Nat. Bank of Arapahoe*, 21 Neb., 621.) The occupying claimant's act, Compiled Statutes, chapter 63, section 2, expressly recognizes such improvements as property and subject to taxation, by providing that any person in possession of, or claiming any real estate under, a certificate of entry, or under the homestead or preemption laws of the United States, shall be considered as having sufficient title to demand the value of improvements and to demand the amount of all taxes and assessments paid by such claimant or those under whom he claims. As stated by this court in *Bellinger v. White*, 5 Neb., 399, quoting from *Crawford v. Burrell Township*, 53 Pa. St., 219: "Exemptions, no matter how meritorious, are of grace, and must be strictly construed." We hold, therefore, that improvements, placed by individuals upon government land, are, before final proof, the property of such individuals; that the constitution and the statutes passed thereunder contemplate the taxation of all property not specifically exempted, and that such improvements have not been exempted and are subject to taxation. There is a marked distinction between the power to tax improvements and the power to tax the land itself. The relator seeks only to compel a taxation of the improvements.

2. Are the interests of lessees and purchasers of school lands subject to taxation? The principles already dis-

cussed go far towards settling this question. The statutes, we think, settle it beyond question. As to lessees, section 5 of the revenue law provides that "leasehold estates, including leases of school and other lands of the state, shall be valued at such a price as they would bring at a fair voluntary sale for cash." This provision demonstrates that leasehold estates in school lands were deemed by the legislature to fall within the designation of taxable property in section 1 of the revenue law, "all real and personal property in this state." The act nowhere exempts such property, and it is at least doubtful whether under the constitution there could be any such exemption. As to purchasers of school land, section 3 of the revenue law provides expressly that "school lands sold under any provisions of any law of this state, or such as have heretofore been sold, shall not be taxable until the right to a deed shall have become absolute, except the value of the interest of such purchasers shall be taxable, which interest shall be determined by the amount paid and invested in improvements on such lands." Even in the absence of this specific provision, section 12 of the revenue law would be broad enough to cover the case. That section provides: "When real estate is exempt in the hands of the holder of the fee, and the same is contracted to be sold, the amount paid thereon by the purchaser, with the enhanced value of the investment and improvement thereon until the fee is conveyed, shall be held to be personal property and listed and assessed as such, in the place where the land is situated."

In *Hagenbuck v. Reed*, 3 Neb., 17, the court held that, under the law as it then stood, school lands sold on credit were subject to taxation. In 1879 an act was passed reciting that such lands "have not been and are not now taxable," and then providing for the repayment of taxes theretofore paid on such lands. This court held in *Washington County v. Fletcher*, 12 Neb., 356, that this act was constitutional, and that its effect was to relieve such lands

from taxation, or rather to nullify past taxation. From this decision Judge LAKE dissented in a very vigorous opinion. The case related to the repayment of taxes levied before the revenue law of 1879 was passed, and the provisions quoted from that act were not referred to and were not applicable to the case adjudicated. The decisions of this court are not in conflict with the construction we place upon the revenue law.

We think the district court erred in refusing the writ of *mandamus* prayed.

REVERSED AND REMANDED.

SIMEON FARWELL & COMPANY ET AL. V. CHRISTINA A. CRAMER.

FILED OCTOBER 17, 1893. No. 4178.

1. **Trial:** MISCONDUCT OF PARTY: GROUND FOR NEW TRIAL. For a party to object to a question not (standing by itself) material, and then to withdraw the objection when the other party promises to supply the link in the evidence which would make it material, is not misconduct entitling the defeated party to a new trial.
2. ———: ———. Nor is it misconduct for the defeated party to move, upon the close of the evidence, that the jury be permitted to take all the documents offered in evidence with them to the jury room, the record not disclosing that the motion was made in such language, or under such circumstances, as to warrant the inference that it was made for effect upon the jury, and not in good faith.
3. **A married woman** may in this state bargain for and purchase personal property, sell the same, and do all acts in relation to such property as though she were single.
4. **Husband and Wife:** TITLE TO PERSONALTY. There is no presumption of law that personal property in the possession of the wife, while living with her husband, belongs to the husband. *Oberfelder v. Kavanaugh*, 29 Neb., 427, followed.

5. **Harmless Error:** TWO CONFLICTING INSTRUCTIONS in regard to the burden of proof are not prejudicially erroneous where the verdict was against the party upon whom the burden was properly imposed.

6. **Rulings on Admissibility of Evidence:** ASSIGNMENTS OF ERROR: REVIEW. This court will not review upon error the rulings of the district court excluding or admitting testimony, unless the error complained of is specifically assigned in the petition in error with such certainty as to enable the court, upon examination of the record, to ascertain the particular error complained of.

ERROR from the district court of Holt county. Tried below before NORRIS, J.

H. M. Uttley, for plaintiffs in error:

It is improper for the court to require counsel to prejudge the facts he expects to develop by a certain class of testimony, or for the court in any manner to indicate his idea of certain evidence proposed or offered. (Thompson, Trials, secs. 218, 219; *State v. Tickel*, 13 Nev., 502; *People v. Bonds*, 1 Nev., 33; *McMinn v. Whelan*, 27 Cal., 300; *State v. Harkin*, 7 Nev., 381.)

Instructions which have a tendency to single out isolated facts and confine the attention of the jury to them to the exclusion of all other facts, are not only a misdirection, but are an infringement on the province of the jury as triers of the facts. (*Chappell v. Allen*, 38 Mo., 213; *Grube v. Nichols*, 36 Ill., 93; *Raysdon v. Trumbo*, 52 Mo., 35; *Ellis v. McPike*, 50 Mo., 574; *Reese v. Beck*, 24 Ala., 651.)

The twelfth instruction is erroneous because it misstates the rule that the courts will look with scrutiny, if not suspicion, upon sales or transfers of the property of a debtor in failing circumstances to members of his own family. (*Lipscomb v. Lyon*, 19 Neb., 515; *Koch v. Rhodes*, 10 Neb., 447.)

Evidence that the husband and wife, or either of them separately, were in possession of property, without other

indication of ownership, is presumptive evidence of the title in the husband. (*Keeney v. Good*, 21 Pa. St., 349; *Turner v. Brown*, 6 Hun [N. Y.], 331; *Block v. Nease*, 37 Pa. St., 436; 2 Bishop, Married Women, secs. 128–140; *Glann v. Younglove*, 27 Barb. [N. Y.], 480.)

M. F. Harrington, contra.

IRVINE, C.

D. L. Cramer was engaged in the mercantile business in Ewing. He seems to have failed, and his stock of goods was seized and sold upon attachments or executions. The defendant in error, the wife of D. L. Cramer, was at that time conducting a millinery establishment, and some time after the sale of Mr. Cramer's stock she moved her millinery goods into the store-room formerly occupied by Mr. Cramer, and shortly after began to add other lines of merchandise thereto until in the course of a few weeks she seems to have established what is termed a "general store." The plaintiffs in error, who were judgment creditors of Mr. Cramer, caused executions to be levied upon all of the goods except the millinery stock, upon the theory that the goods in fact belonged to Mr. Cramer, while the business was being conducted in the name of his wife for the purpose of defeating his creditors. Mrs. Cramer instituted the present action in replevin against the sheriff, for whom the judgment creditors were substituted as defendants. There was a verdict and judgment in favor of Mrs. Cramer, which the creditors seek to reverse.

1. Numerous errors are assigned. The first is misconduct of plaintiff's counsel. In support of this assignment attention is first called to the following circumstance: It was a part of the creditors' theory that when Mr. Cramer failed he in some way secreted from his creditors certain notes and accounts, and that the goods in question were purchased with the proceeds of these assets. A witness was interro-

gated in regard to these notes and accounts, and upon objection made, an offer was made to prove that notes and accounts to the amount of $10,000 had been by Cramer "taken out of his business," and that he had them in his possession after the attachments were levied. The court then stated that the objection was sustained unless the defendants "could trace the accounts or connect them." Thereupon counsel stated that he would agree to attempt, and believed he could connect these accounts and their proceeds with the plaintiff as having passed directly into her hands for his use and benefit. Opposing counsel then waived their objection, and the questions were answered. In what way this transaction can be construed as misconduct on the part of counsel is beyond our comprehension. The evidence offered was immaterial, unless the accounts or their proceeds were in some way traced into the goods. It was quite proper for the court to require an offer to so trace them before admitting the evidence, and when that offer was made it was the proper course for plaintiff's counsel to withdraw their objections.

The bill of exceptions shows that at the close of the testimony the plaintiff asked that all the books, exhibits, and records be taken by the jury to their jury room to be considered by them. Counsel moved to strike out this remark as incompetent and an unfair way of trying a case. This motion was overruled. It does not appear that the jury was permitted to take these documents, or that plaintiff's motion was ever acted upon. It was not misconduct entitling a party to a new trial for the adverse counsel to make a motion which should not be sustained. The record does not show that the language of counsel was unbecoming or unfair, and the remark having been made, the court was right in refusing to strike it from the record. It is claimed that throughout the trial counsel for plaintiff, in side remarks to the jury, insinuated that they were anxious that the jury should examine the books during their re-

tirement. Nothing of this kind appears in the bill of exceptions. It is, however, intimated in the brief that the court refused to permit the reporter to take down these remarks. There is nothing in the record to show that there was any such refusal, and we must be governed by the record and not by statements in the brief, unsupported by the record.

2. Certain instructions are complained of. Of these, the first is as follows: "By the laws of this state a married woman, while the marriage relation subsists, may bargain for and purchase personal property such as the stock of goods in controversy, and sell the same and do all acts in relation to said property as though she were unmarried." As to this instruction it is complained, first, that under the married woman's act a *feme-covert* may only carry on a settled course of business on her sole and separate account, and that the instruction ignored these limitations. We think that the act in question was intended to give her the same dominion over her separate property that the husband has over his; to permit her to buy and sell and deal with her own in the same manner that a married man may do.

It is urged that the instruction conflicted with the sixteenth and eighteenth, given at request of defendants. In the sixteenth instruction the jury was told that where the wife claims ownership of property taken from the possession of her husband upon execution against the husband, the burden is upon the wife to show her title to the goods, and how, when, and where she acquired the funds with which she purchased them; and by the eighteenth instruction, that the burden was upon her to show that her possession was for her own, and not for her husband's benefit. We can see no conflict between these instructions and the first, and taking the three together they state the law more favorably to the defendants than could be asked.

The second instruction was practically the same as section 4 of the married woman's act, and the third was a

paraphrase of section 1. It is claimed these instructions are not applicable to the evidence, but the whole theory of plaintiff's evidence was that the goods were hers, bought with her own money, and used by her in conducting her own business; and it was right for the court to tell the jury that the law permitted her to do so.

The seventh, eighth, ninth, and tenth instructions are objected to, first, as reiterative; second, as laying special stress upon some circumstances, and third, as assuming facts not proved. We shall not quote these instructions at length. Each one submitted to the jury a certain hypothesis which, if sustained by the evidence, would render the goods exempt from execution against the husband. They state the law correctly. We cannot see that they give undue emphasis to any portion of the testimony by repetition or otherwise, nor that they assume any facts as established. By each instruction the jury is left to determine whether the facts existed.

Certain other instructions are grouped, and the same objections made against them. The same remarks are applicable.

In the twelfth instruction the jury was told that possession of personal property was *prima facie* evidence of ownership, and that if possession had been shown by the evidence to have been in plaintiff at the time the goods were levied upon by the sheriff, plaintiff's possession was then *prima facie* evidence that the plaintiff was the owner of the goods. It is claimed that this instruction ignores the law in regard to contests between the wife and the creditors of her husband. We think counsel, in his argument, confuses the case of property acquired by the wife from a stranger with that of property transferred to her by her husband. In the latter case the transfer is *prima facie* fraudulent against creditors. To hold the same rule in the former case would be in effect to declare that there is a legal presumption that all property in the possession of a

wife belongs in fact to the husband. Such a rule would not be in harmony with the policy of the married woman's act. (*Oberfelder v. Kavanaugh*, 29 Neb., 427.) The instruction was in direct conflict with the eighteenth instruction given at the defendants' request, and already quoted. We think, however, that the eighteenth instruction misstated the law to the prejudice of the plaintiff, and the conflict between the two instructions could not have misled the jury to defendant's prejudice.

3. It is claimed that the court erred in refusing to admit certain testimony. The plaintiff and one Miller were called as witnesses by both sides. They had already given their depositions on behalf of defendants. These depositions were excluded. Mrs. Cramer's deposition could only be admissible for the purpose of contradicting her testimony or showing admissions made by her. We find nothing in the deposition tending to do either. The deposition of Miller could only be admissible for the purpose of showing contradictory statements made by him. The only matter in the deposition tending to contradict any statements made by him in evidence is upon a point of doubtful materiality, and the questions asked Miller for the purpose of laying a foundation on this point were objected to, the objection sustained, and the sustaining of that objection is not assigned as error.

Complaint is made of the exclusion of certain other evidence sought to be elicited from the witness Cortelyou; but the assignment of error upon this point was that the court erred in refusing to allow the defendants to show by Cortelyou when on the witness stand "according to the offer made by defendants in the record." This assignment is too general. By force of the statute a general assignment of "errors occurring upon the trial" is sufficient in a motion for a new trial, but in a petition in error the assignment should be with sufficient certainty to direct the attention of the court to the particular error complained of. (*Lyman*

v. McMillan, 8 Neb., 135; *Graham v. Hartnett*, 10 Neb., 518.)

4. It is alleged that the verdict is not sustained by the evidence. We have examined the evidence carefully and think it sufficient to justify the verdict. As counsel in his brief naively remarks, "There are some things which we may know absolutely, and yet, owing to the peculiar condition of things and the perversity of human nature, we are unable to prove the same, either to the satisfaction of the jury or to the satisfaction of ourselves." This case may be one of that class, but the jury must be governed by the evidence, and their verdict was clearly in accordance with the weight thereof.

JUDGMENT AFFIRMED.

HARVEY B. HEADLEY v. VICTOR H. COFFMAN.

FILED OCTOBER 17, 1893. No. 5009.

1. **Ejectment:** PRE-EMPTOR'S TITLE: CANCELLATION OF ENTRY AFTER ISSUANCE OF FINAL RECEIPT. The holder of a receiver's certificate cannot, after the entry upon which the paper was issued has been canceled, maintain an action of ejectment against a party claiming under the United States, for he has only an equitable title, and this notwithstanding section 411 of the Code of Civil Procedure, making such certificate proof of title equivalent to a patent against all but the holder of an actual patent. *Morton v. Green*, 2 Neb., 441, followed.

2. ——: ——: ——: REFUSAL OF GOVERNMENT TO ISSUE PATENT. In such case, the authority of the commissioner of the land office to cancel the entry is not material. The refusal of the government, whether rightful or wrongful, to convey the legal title to the entryman, prevents him from maintaining ejectment against one in possession under a subsequent entry.

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

The opinion contains a statement of the case.

Harry E. O'Neill and *Alpha Morgan*, for plaintiff in error:

Until the patent is issued the fee of the land remains in the United States. After payment of the purchase money by the entryman, and the receipt of it by the officers of the United States, the government may still decline, on various grounds, to perfect his title by the execution of a patent. Nothing but the patent passes the fee, and before its issue, the entryman has but a qualified and contingent estate in the lands. Ejectment cannot be maintained upon an equitable title. (*Bagnell v. Broderick*, 13 Pet. [U. S.], 436*; *Stringer v. Young*, 3 Pet. [U. S.], 320*; *Boardman v. Reed*, 6 Pet. [U. S.], 328; *Stoddard v. Chambers*, 2 How. [U. S.], 284; *Wilcox v. Jackson*, 13 Pet. [U. S.], 516; *Darcy v. McCarthy*, 12 Pac. Rep. [Kan.], 104; *Morton v. Green*, 2 Neb., 456; *Hooper v. Scheimer*, 23 How. [U. S.], 235; *Fenn v. Holme*, 21 How. [U. S.], 482; *Vantongeren v. Heffernan*, 38 N. W. Rep. [Dak.], 52; *American Mortgage Co. v. Hopper*, 56 Fed. Rep., 67; *United States v. Steenerson*, 50 Fed. Rep., 504; *Swigart v. Walker*, 30 Pac. Rep. [Kan.], 162; *Fernald v. Winch*, 31 Pac. Rep. [Kan.], 665; *Pierce v. Frace*, 26 Pac. Rep. [Wash.], 192; *Jones v. Meyers*, 26 Pac. Rep. [Idaho], 215; *Ferry v. Street*, 11 Pac. Rep. [Utah], 571; *Randall v. Edert*, 7 Minn., 359; *Gray v. Stockton*, 8 Minn., 472; *Smith v. Custer*, 8 Dec. Dep. Int., 269.)

Phelps & Sabin, contra:

A certificate of purchase issued in due form, in favor of a pre-emptor, for land subject to entry under the pre-emption law, cannot be canceled or set aside by the land department for alleged fraud in obtaining it; but in such case the government must seek redress in the courts,

where the matter may be heard and determined according to the law applicable to the rights of individuals in like circumstances. A purchaser in good faith, and for a valuable consideration, from a pre-emptor of the land included in the latter's certificate of purchase takes the same purged of any fraud which might have been committed in obtaining said certificate. (*Smith v. Ewing*, 23 Fed. Rep., 741; *Moore v. Robbins*, 96 U. S., 538; *Perry v. O'Hanlon*, 11 Mo., 585; *Brill v. Stiles*, 35 Ill., 309; *Cornelius v. Kessel*, 58 Wis., 241; *Lindsey v. Hawes*, 2 Black [U. S.], 554; *Groom v. Hill*, 9 Mo., 324; *Deffeback v. Hawke*, 115 U. S., 392; *Carroll v. Safford*, 3 How. [U. S.], 441; *United States v. Freyberg*, 32 Fed. Rep., 195; *Wirth v. Branson*, 98 U. S., 118; *Wilson v. Fine*, 40 Fed. Rep., 52; *Stimson v. Clarke*, 45 Fed. Rep., 760; *Cornelius v. Kessel*, 128 U. S., 461; *Simmons v. Wagner*, 101 U. S., 260; *Sanford v. Sanford*, 139 U. S., 642; *Witherspoon v. Duncan*, 4 Wall. [U. S.], 210; *Hardin v. Jordan*, 140 U. S., 371; *United States v. Budd*, 43 Fed. Rep., 630; *Franklin v. Kelley*, 2 Neb., 89; *Jones v. Yoakam*, 5 Neb., 265; *Bellinger v. White*, 5 Neb., 399; *Donovan v. Kloke*, 6 Neb., 124; *Carroll v. Patrick*, 23 Neb., 846; *Colorado Coal & Iron Co. v. United States*, 123 U. S., 308.)

IRVINE, C.

We are met at the outset of this case by a question as to the jurisdiction of this court to review the judgment rendered in the district court. A transcript was filed as for an appeal more than six months after the rendition of judgment in the district court. There was a motion to dismiss the appeal, which was overruled by this court, and the appellant given leave to file a petition in error. We are cited to the recent decision of *Fitzgerald v. Brandt*, 36 Neb., 683, as sustaining the position that the case is not now properly before this court for review. We regard the order of the court permitting the appellant to file a petition in

error as the law of this case and sustaining the jurisdiction of the court to review the judgment as upon error. The action was one in ejectment instituted by Coffman against Headley to recover a quarter section of land in Custer county. It was submitted to the district court upon the pleadings and an agreed statement of facts, which has been incorporated into a bill of exceptions. On the 25th of August, 1884, William T. Hughes made proof of settlement and cultivation of the land in question, and made payment to the government of the purchase price under the pre-emption laws of the United States, and received the receiver's final receipt therefor. On September 2, 1884, Hughes conveyed by warranty deed to the Brighton Ranch Company, which on May 25, 1887, conveyed by quitclaim to one Hungate, who later conveyed to the plaintiff. On December 15, 1886, Headley filed in the United States land office at North Platte an affidavit of contest of the entry of Hughes upon the ground that at the time of making proof Hughes did not reside on the land as required by law; that he had not cultivated and improved it as required, and that his entry and proof were not made in good faith for his own use and benefit, but were made in fraud of the United States, and for the use and benefit of others. A hearing was ordered upon notice to Hughes, the result being that the general land office ordered Hughes' entry to be canceled, and permitted Headley to make a homestead entry under which Headley entered into possession of the land. No patent has been issued. Coffman claims under Hughes' entry, and the final receipt issued to him. Headley, to defeat the action, contends that under the circumstances ejectment will not lie and that the cancellation of Hughes' receipt divested him and his grantees of all interest in the land.

We have been cited to a vast volume of authorities bearing more or less upon the questions at issue. These authorities seem at first reading to be so divergent as to confuse, rather than to assist in forming a conclusion.

Even the cases in the supreme court of the United States seem at first to conflict with one another. A closer examination does not entirely reconcile all the cases, but where the conflict remains, it is due rather to general language in the opinions than to any conflict in the decisions themselves. General expressions have been made use of in the opinions, correct enough when applied to the case under discussion, but which, segregated from the facts of the case, have given rise to an unfortunate effort to apply them to other cases, and other facts. To attempt a review of the authorities sufficiently complete to be of value would prolong this opinion to a length not justified by the object sought. A number of the cases relate to the right of states to tax land which has been purchased from the government, and full payment made, before the issuance of the patent. The leading case upon this subject seems to be *Carroll v. Safford*, 3 How. [U. S.], 441. This line of cases goes upon the ground that upon final payment the land becomes in equity the property of the purchaser. In no such case had the question of conflicting claims been determined. Other cases, such as that of the *Colorado Coal & Iron Co. v. United States*, 123 U. S., 307, have been direct proceedings in equity by the United States to cancel a patent already issued. Others again, like *Stoddard v. Chambers*, 2 How. [U. S.], 284, have related to conflicting patents to the same lands. Others again, like *Lindsey v. Hawes*, 2 Black [U. S.], 554, have been suits in equity to compel a conveyance by the patentee to one having a prior right. These cases depend upon principles so different from those involved in the present case that general language used in the opinions must be considered with great caution.

Fenn v. Holme, 21 How. [U. S.], 481, and *Hooper v. Scheimer*, 23 How. [U. S.], 235, represent a class more nearly applicable. Those cases were in ejectment, no patent having yet been issued for the land. There the plaintiffs relied on the certificate re-enforced by state statutes some-

thing similar to section 411 of our Code, and it was held that the plaintiff could not recover, because, until patent issued, the title remained in the United States, and the state statutes referred to were not binding upon the federal courts. *Bagnell v. Broderick*, 13 Pet. [U. S.], 436, differed from these cases in the fact that the certificate upon which one party relied was met by a patent to the adverse party. In that case the following forcible and significant language was used: "Congress has the sole power to declare the dignity and effect of titles emanating from the United States; * * * until the issuance of a patent the fee is in the government. * * * Nor do we doubt the power of the states to pass laws authorizing purchasers of lands from the United States to prosecute actions of ejectment upon certificates of purchase against trespassers on the lands purchased; but we deny that the states have any power to declare certificates of purchase of equal dignity with a patent."

Wirth v. Branson, 98 U. S., 118, and other cases of the same class, establish the doctrine that after the right to a patent becomes complete, a subsequent sale, the first remaining in force and not vacated, is absolutely void.

Cornelius v. Kessel, 128 U. S., 456, fixes certain limitations upon the power of the land department to revoke and cancel entries, but recognizes its right to cancel on account of disqualification of the party, or on account of the lands not being subject to entry.

We think it may be safely said that all the cases treat the subject upon the principle that the purchaser's rights are the same as they would be had the purchase been made from an individual under similar contractual relations. This principle is over and over again announced. If we accept it as a starting point, the solution of the present case is not difficult. Coffman had, by his acts and entry, entered into a contract with the United States, whereby the land was to be eventually conveyed to him. One of the

terms of that contract was that he should make proof at a certain time and in a certain manner that he had complied with certain of the conditions imposed. This proof was made. Headley thereafter brought to the attention of the proper officers the charge that the proof so made was false and fraudulent. The officer charged with the general supervision of the sale of public lands and issuance of patents, upon an investigation determined such charges to be well founded, and refused to issue the patent. This action is ejectment, and the plaintiff must recover upon the strength of his own title, and that title must be legal in its character. All the cases hold that, as between the United States and the purchaser, while the equitable title is complete in the purchaser when he has done everything upon his part to entitle him to a patent, yet the legal title passes only by the patent itself. The vendor then in this contract of sale, learning, or at least believing, that the conditions of the contract had not been performed, and that fraud had been perpetrated against it, refused to complete the sale by the conveyance of the legal title. It matters not in this case whether the commissioner of the land office had authority to cancel the entry, or whether the proceedings resulting in that act were *coram judice*. The important fact is that he did refuse to issue a patent, and the legal title did not pass out of the United States. Had the transaction been one between individuals, the vendor might, in a suit for specific performance, rely for defense upon the very matters which led the commissioner to refuse a conveyance, and upon proof of those facts defeat the case. The vendee could not recover in ejectment against the vendor, nor against the vendor's subsequent grantee. If he can do so here, it must be by virtue of section 411 of the Code, which provides that "the usual duplicate receipt of the receiver of any land office, or, if that be lost or destroyed, or beyond the reach of the party, the certificate of such receiver, that the books of his office show the sale of a tract

of land to a certain individual, is proof of title equivalent to a patent against all but the holder of an actual patent."

There can be no doubt that a state has power to protect the possessory rights of purchasers of government land against trespassers by means of such a statute. The state cannot, however, provide by law for the disposition of lands of the United States. It cannot enact that as against the United States, or persons claiming under the United States, the United States has parted with the legal title to lands when, by statutes and repeated decisions, the United States, in the exercise of its exclusive authority to dispose of the public lands, has declared that title shall not pass except by other conveyance. Were this a case between the holder of a final receipt, not resisted by the United States, and some one claiming under an independent title, the statute could be given force and effect; but we have here a contest between the holder of a receipt which the United States has repudiated, and one who claims under a subsequent contract of purchase from the United States itself. For this court to declare that by force of the statute the United States had divested itself of the title in such a manner as to permit the plaintiff to maintain ejectment against the subsequent vendee, would be in effect to wrest from the federal government its power of control over the disposition of its own lands, and to permit the state to nullify federal laws relating to a subject wholly within the powers of the federal government.

In *Morton v. Green*, 2 Neb., 441, the same view was taken by the majority of the court under very similar facts. The reasoning of Judge CROUNSE in that case seems to us conclusive. In fact we might very shortly have disposed of the present action by a reference to that opinion, had it not been contended that the dissenting opinion of Chief Justice MASON had been approved in later cases. The only case giving color to that theory is *Carroll v. Patrick*, 23 Neb., 834. It was there held that the statute of limitations

began to run against the entryman from the date of entry. That was a case, however, where the plaintiff relied upon adverse possession, and that alone, as proof of title. The entryman might have maintained ejectment against him from the time of receiving his certificate, the case being one of the class to which we have held that section 411 of the Code applies. The language of Chief Justice MASON was cited in *Carroll v. Patrick* with approval, and it was a correct statement of the law as applied to the case there under discussion, which was not a case like *Morton v. Green*. We think, therefore, that the plaintiff did not show title in himself to sustain an action of ejectment.

REVERSED AND REMANDED.

S. H. HOOPS, APPELLANT, V. STEPHEN R. MCNICHOLS ET AL., APPELLEES.

FILED OCTOBER 17, 1893. NO. 5036.

Decree: APPEAL: REVIEW. Where, upon appeal, it appears that the decree in the district court granted to the appellant all the relief by him sought, the judgment will be affirmed without regard to the merits of the decree.

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

Uttley & Benedict and *H. M. Uttley*, for appellant.

G. M. Cleveland, contra.

IRVINE, C.

This suit was begun by Hoops against McNichols, C. C. Clark, Libby Cullumber, and the Farmers Loan & Trust

Company, to foreclose a mortgage upon certain land in Holt county. A mortgage had been executed by McNichols in favor of the Farmers Loan & Trust Company, and by that company assigned to the plaintiff. The only allegation in regard to the defendant Cullumber was that she "has or claims to have some right, title, or interest in and to said premises," and that whatever interest she has is junior to the lien of the plaintiff.

The defendant Cullumber answered setting up that she was the owner and in possession of the premises; that the interest of McNichols was created by a receiver's receipt made to him March 28, 1887, and that afterwards, upon charges preferred, and upon notice to McNichols, the receipt and entry were canceled for false testimony in making proof; and that no patent had ever been issued. Hoops demurred to this answer. The demurrer was overruled, and a reply was filed denying all the allegations in regard to the contest and cancellation of McNichols' entry, and denying the authority of the commissioner of the land office to cancel such entry, and alleging the interest of Cullumber was derived through an entry made upon the land by force and in fraud of the laws of the United States. The answer above referred to closes with a prayer for the dismissal of the action.

The decree establishes plaintiff's mortgage, determines the amount due, and declares the mortgage to be "the first lien on said described land and paramount and superior to any right, title, lien, or interest in, to, or against the same, of any of the defendants in this action," and in default of payment within twenty days, orders a sale of the premises. The decree also contains the following paragraph:

"The court further finds that the title of defendant, Stephen R. McNichols, in and to said premises was based solely on a receiver's final receipt issued to him by the officers of the local United States land office on the 28th day of March, 1887, and that on the 15th day of January, 1889, a receiver's final receipt was issued by the officers of said

local United States land office to defendant Libby Cullumber of the whole tract of land; and that no patent for said land has yet issued to either party, and the legal title to said land is still in the government of the United States, and this court has no jurisdiction to decide the respective rights of the claimants, Stephen R. McNichols and Libby Cullumber."

McNichols had not appeared in the action and there were no issues between McNichols and Cullumber to try. The plaintiff appeals.

We cannot see what there is in the decree of which he can complain. The court simply declined to determine the conflicting claims of McNichols and Libby Cullumber, but did find distinctly that the plaintiff's mortgage was paramount and superior to any right or title of any of the defendants. Libby Cullumber has not complained of the decree. The plaintiff is not prejudiced by the refusal of the court to adjudicate between McNichols and Cullumber an issue not presented by the pleadings. The decree does adjudicate the conflicting claims of plaintiff and Libby Cullumber, and adjudicates them in favor of appellant. The judgment should be

AFFIRMED.

MATILDA HUEBNER, APPELLEE, V. EMMA SESSEMAN, ADMINISTRATRIX, ET AL., APPELLANTS.

FILED OCTOBER 18, 1893. No. 5060.

1. **Executors and Administrators:** FINAL ACCOUNT: PAYMENT OF CLAIMS NOT PRESENTED FOR ALLOWANCE. In the final settlement of an estate of a decedent, whether originally in the county court or upon appeal in the district court, the administrator is entitled to no credit for payment of provable claims against the estate of his decedent, which, originating before his death, have not been presented or allowed as provided by law.

2. ———: FINDING UPON CONFLICTING EVIDENCE: REVIEW. The finding of the district court, upon conflicting evidence that the services of an attorney for which his bill had been rendered against the estate of a decedent were in fact rendered for another than the decedent, will not be reviewed by this court.

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

The facts are stated in the opinion.

B. G. Burbank, for appellants:

The administrators should be allowed in their final account for money paid out of the funds of the estate to discharge debts legally due and owing from said estate, notwithstanding said claims were not filed and allowed by the probate judge before the final account of the administrators had been filed. (*Sims v. Sims*, 30 Miss., 341; *Haralson v. White*, 38 Miss., 178; *Hill v. Buford*, 9 Mo., 505; *Terrell v. Rowland*, 86 Ky., 79.)

Congdon & Clarkson, contra:

The evidence offered by the administrators and rejected by the court, under the exceptions to the allowance in their final account of such claims as had not been filed and allowed by the probate court, was properly rejected. (Secs. 214, 217, 223–226, ch. 23, Comp. Stats., 1887; *Millett v. Early*, 16 Neb., 268; Schouler, Administrators and Executors, sec. 420.)

Such claims not having been filed within the time originally fixed by the court, or within the one extension, were barred. (Schouler, Administrators and Executors, sec. 390, note 4, and cases; 2 Wood, Limitations, sec. 188, note 5, and cases; *Bunnell v. Post*, 25 Minn., 376.)

Neither the courts nor administrators have authority to allow claims against an estate after time fixed expires, unless time is extended in manner provided by statute. (*Mc-*

Gee v. Atkinson, 33 N. W. Rep. [Mich.], 737; *Nichols v. Shearon*, 4 S. W. Rep. [Ark.], 169.)

Administrators are not entitled to credit in their final accounts for debts paid which were not filed as claims and allowed by the probate court. (*Jacobs v. Morrow*, 21 Neb., 233.)

RYAN, C.

The final report of the administrators of the estate of Carl Sesseman, deceased, was filed in the probate court of Douglas county, Nebraska, on the 21st day of November, 1889, from which it appears that the assets of the estate just equaled the liabilities; that is, each was $10,745.78. The deceased, Carl Sesseman, left a will whereby he bequeathed to Matilda Huebner, appellee, $1,000, which will was duly probated and allowed in the said county court. The administrators appointed under said will (the executor named therein having failed to qualify) were William G. Bohn and Emma Sesseman, wife of the deceased, who gave bond as required by law, and entered upon the administration of the estate. To the above mentioned final report of the administrators of said estate there were filed exceptions by Matilda Huebner, and certain of said exceptions were sustained by the county judge, and a decree was entered in accordance with the finding by him made. Thereafter an appeal was taken to the district court of Douglas county from said decree. On the 22d day of May, 1891, said cause came on for hearing and a decree was entered therein, refusing the allowance of the sum of $5,544.43 claimed by the administrators aforesaid. To this finding exception was duly taken, and the case is now before this court for a settlement of the account of the administrators in the execution of their trust.

The main contention in this case resulted in the following finding: "4th. That said administrators have paid out of the assets of said estate, and claim credit therefor in said

account the several sums set opposite the names of the respective parties given below, whereas no such claims had been allowed against said estate nor were due therefrom." These claims were twenty-nine in number and for different amounts, the aggregate of which was $5,176.46. It was thereupon ordered and adjudged by the court that the payments made by said administrators, amounting to the sum of $5,176.46, be disallowed in their said account, and that said sum be deducted from the total credit asked for by them in said account. The rejection of this sum of $5,176.46 was for the reason as stated in the exception and in the decree, that no such claims shown in said final report to have been paid by said administrators had ever been filed in the county court or allowed by the judge thereof. Upon the trial in the district court the record disclosed the following proceeding:

"The plaintiff offers the order limiting the time within which the creditors should present their claims, which was fixed at six months, and the order limiting the time in which the estate should be settled, which was fixed at a year, which order was made on the 24th day of February, 1888, which is admitted as correct by both parties. It is admitted by both parties that due notice of the time and place of presenting claims of creditors under this order was given."

This was agreed to by counsel for the administrators, except as to the time in which the creditors were finally to file their claims, the said counsel claiming there was a subsequent order. It was conceded by the opposite counsel that if there ever was any such subsequent order it might be considered in proof. This devolved upon the administrators the burden of showing the order extending the time for filing claims, and as no proof was made of any such extension, it may fairly be presumed that none was made.

Upon the trial of the case, W. G. Bohn, one of the administrators, was called and sworn on the part of the

defendants. Thereupon there was made an offer as follows:

"The defendants now offer to prove by the witness on the stand that each of the claims against the estate of Carl Sesseman, as shown by the vouchers filed in the probate court of Douglas county, Nebraska, are valid, legal, and lawful claims or accounts against Carl Sesseman's estate, and they were such valid, legal, and lawful claims at the time of his death and at the time they were paid by the administrators of his estate, as shown by the vouchers on file in said court, and that no part or portion of the debt or debts as shown by the several vouchers had been paid, and all were due and payable. The vouchers referred to are for all the claims credited to the administrators in their final report, except those claims allowed by the county court under date April 24, August 23, and November 23, 1888; said claims being rejected by the county court upon the hearing of the final account of the administrators.

"By the court: If you propose to show by the proofs that any of these claims which you now offer have been, any of them, presented and allowed by the county judge, or by the commissioners, you may do so.

"By Mr. Burbank: With reference to none of those which I now make the offer do I so contend.

"To each and every one of the vouchers offered, with the exception of such as may possibly be for legitimate expenses of the estate, such as funeral expenses or expenses properly paid to attorneys, or anything connected with the last sickness of the deceased, there is no objection, and to every and each of said vouchers which represent claims filed against the estate as due from Carl Sesseman in his lifetime, which said claims were not presented and allowed by the county judge, the plaintiff objects, as irrelevant and incompetent.

"By the court: The objection is sustained to those claims as against the estate, and which were not presented and allowed by the county judge.

"To which the defendants except."

The above offer of the vouchers and receipts for money paid out by the administrators, together with the offer to prove that they were legitimate claims against the estate at the time they were paid, and were then due and owing, and that no part thereof had been paid, raises the only question of importance in this case, and that question is, whether or not it is an indispensable prerequisite that the judge of the county court allow such claims upon the hearing upon the administrators' final report.

Section 214, chapter 23, Compiled Statutes, is in the following language: "When letters testamentary or of administration shall be granted by any probate court, it shall be the duty of the probate judge to receive, examine, adjust, and allow all claims and demands of all persons against the deceased, giving the same notice as is required to be given by commissioners in this subdivision."

Section 217 provides that "The probate court shall allow such time as the circumstances of the case shall require for the creditors to present their claims to the commissioners for examination and allowance, which time shall not in the first instance exceed eighteen months nor be less than six months, and the time allowed shall be stated in the commission."

It is provided by section 226 of the same chapter, that "Every person having a claim against a deceased person proper to be allowed by the judge or commissioners, who shall not, after the giving of notice as required in the 214th section of this chapter, exhibit his claim to the judge or commissioners within the time limited by the court for that purpose, shall be forever barred from recovering such demand, or from setting off the same in any action whatever."

The appellants contend that notwithstanding the provisions of section 226, just quoted, the probate court in the first instance, and the district court on appeal, should have permitted the testimony offered to establish, as credits in

favor of the administrators, the several claims of which they had made payment without probate or allowance.

In support of this contention there is cited the case of *Sims v. Sims*, 30 Miss., 333. As the reference to this case seems to be with considerable confidence, it will be considered carefully, with the view to ascertaining whether or not it sustains the position contended for. The following language is quoted from the opinion itself: "The first question arose upon the rejection by the court below of certain claims against the estate which the executor had paid, and which had not been probated and allowed in due and usual form, and which were not proved to be valid claims, upon exceptions taken to them. It is clear that the court acted properly in refusing to allow these claims in the executor's final statement. The rule to be adduced from the provisions of the statutes in relation to the establishment of claims against the estate of deceased persons is plainly this: If the executor or administrator, having sufficient funds in his hands, pay a claim which is duly probated and allowed, *prima facie* he is entitled to an allowance for the same in his final account; but, if he pay a claim not probated and allowed, *prima facie* he acts in his own wrong, and he will not be entitled to an allowance for it, unless he adduces competent evidence before the court that the claim was just and valid, and that it remains unpaid at the time it was paid by him. Under this rule the claims numbers 20, 22, and 28, in the bill of exceptions, were properly rejected."

By reference to the several claims numbers 20, 22, and 28, it will be found that the first in order was for the payment of a note due one Underwood, and that the note was not paid by the executor at all. The testator was a member of the firm of Sims & Redus. After his death, Redus became a partner of the firm of Gates & Redus, to whom the business of the old firm was transferred. This house paid to the executor such portions of the effects of the old

firm as at various times came into its hands. This note was paid by this firm for the testator, and the receipt shows it. The executor only charges himself with such sums as his survivor may pay him, and in their settlements with him they doubtless deducted the sums thus paid in the discharge of this note. The executor never paid it, and the allowance to him of that amount would be a loss of that sum to the estate. There is not a particle of proof or reason why this note should be allowed. The language just used is, for the most part, a quotation from the brief of counsel, which purports to state the facts as to the separate vouchers. This also describes voucher number 22 as of the same nature as 20, which is described. As to voucher 28, referred to in the opinion, it seems that there was no evidence that it was ever paid. This condition of the claims under consideration by the court would manifestly render of little force the language quoted, to-wit: "That if he pay a claim not probated and allowed, *prima facie* he acts in his own wrong, and he will not be entitled to an allowance for it, unless he adduce competent evidence before the court that the claim was just and valid, and that it remained unpaid at the time it was paid by him." Obviously this language was not necessary in the disposition of the three claims which were under consideration by the court. This language was therefore *obiter dictum*, not at all necessary in the adjudication of the case under consideration. The only other question in that case decided was, whether or not the administrator was entitled to an allowance of certain indebtedness which was due from the decedent to himself during the decedent's lifetime. The opinion shows that the administrator had done all he could legally do to assert and adjust these claims by having them probated and allowed, and registered in the records of the probate court as claims against the estate, and they were therefore held provable. In this lies the distinction between that case and the one which we have under consideration.

The appellants also cite the case of *Haralson v. White, Executor*, 38 Miss., 178. The credit which the executor sought to have allowed him in that case was because of the seizure and sale, upon execution on a judgment against the testator, of a slave, with which of course the executor had been charged in his original account. The court held that it was proper to show the sale aforesaid upon execution, and that it was unnecessary to introduce in evidence the record leading up to and including the judgment upon which the execution was founded. In our view, this case is not a warrant in any respect for the contention of the appellants.

The only other citation made by appellants is that of *Hill v. Buford*, 9 Mo., 869. The syllabus fully states all that was decided in that case, and is, therefore, quoted at length. It is as follows: "A, being bound as indorser for B on a note in bank, B executed an obligation with C as security, binding themselves to 'secure and keep safe the said A from all loss or damage which he might sustain' on account of such indorsement. A died, and the note becoming due, E and F, his executors, renewed the note in their name, and had to pay the last note. E had the amount paid by him allowed against A's estate. It was not shown that F had had his claim allowed. *Held*, That E and F, as executors of A, might recover for the whole amount paid by them, and the jury might infer that the payment by F was made for the estate of A." While there is some language in the opinion that, isolated and alone, seems to favor the contention of the appellants, yet, taken in connection with the facts, it is clear that they afford but little countenance to the administrators in this case as to the allowance of their claims.

We think that the authorities to which we will now refer correctly state the law applicable to the facts of the case at bar.

In *Nichols v. Shearon*, 4 S. W. Rep. [Ark.], page 169, the following language occurs: "It is true the administrator's

settlements and the testimony taken show that he had paid several other debts which Shearon owed to wards for whom he had been guardian in his lifetime. These payments were doubtless made in good faith, but the administrator had no right to pay them as they were never proved up against the estate. The administrator seems to have acted upon the idea that the debts were incurred in a fiduciary capacity, and that this dispensed with the necessity of their being regularly probated. Shearon was a trustee for his wards as long as he lived, but when he died his indebtedness to the trust became a simple demand against his estate, which required to be sworn to, to be presented to the administrator within two years from the date of his letters, to be allowed, classified, and paid like any other debt he owed."

In *Bunnell v. Post*, 25 Minn., on page 380, is reported the following language of Berry, J., delivering the opinion of the court: "The appellant Bunnell is an executrix of the last will of Russell Post. Commissioners were duly appointed to receive, examine, and adjust all claims against the testator's estate. Proceeding duly and regularly in all respects they completed and filed a report. The appellant, while executrix, paid out of funds not belonging to the estate claims against the same to the amount of $5,000. These claims were valid against the estate and would have been properly allowable by the commissioners had they been presented. They never were presented and, of course, were never allowed. The appellant asks that her payments of the claims mentioned may be allowed to her in the settlement of her account as executrix. The general rule prescribed by statute is, that all claims against the estate of a deceased person must be presented to commissioners; otherwise they are barred. (Gen. Stats., ch. 53, sec. 14; *Commercial Bank of Kentucky v. Slater*, 21 Minn., 174.) To this rule some exceptions are made by statute, but none of the exceptions apply to this case. If an executor pays

claims against the estate of his testator, such as are required to be submitted to commissioners, there is certainly no reason why he should stand in any better position, as respects such claims, than the creditors to whom he paid them would have stood if he had not paid them. Before they can be allowed against the estate, either upon the settlement of the executor's account or otherwise, they must have been presented to and allowed by commissioners, or if disallowed by them, they must have been allowed upon the appeal provided by law. To hold otherwise would be to hold that the inflexible rule of law prescribed by the statute may be wholly disregarded at the pleasure of an executor. The reason for upholding the rule is just as strong where a claim has been paid by an executor as where it is retained by the original creditor. In both cases there is the same necessity that the claim shall be examined and adjusted by the authorized tribunal, and that it should be barred if not so examined and adjusted in the manner provided by law."

The language of our statute, sec. 226, ch. 23, Comp. Stats., imperatively provides that if there is a failure to exhibit a claim within the time limited by the court for that purpose, it shall be forever barred, either as a demand or as being used as a set-off in any action whatever. There is no matter of construction left by this statute enabling any one having a claim to establish it against an estate after the time fixed for that purpose. It is necessary to the speedy settlement of estates that claims should be filed within a reasonable time, and there exists in the probate court the right to fix that time. In the case at bar the time was fixed, and had long passed before any attempt was made to present the claims now in controversy. When such an attempt was made, it was by the administrators acting under a will of the decedent, of whom the law required a speedy and strict compliance with its provisions. In favor of such claimants there exists no equity which will not more strongly operate in favor of others who are charged with

no duty in respect to the speedy administration of the estate. To the administrators, therefore, it was proper that the statute should be applied with full force according to the very letter. The administrators having paid these claims without warrant of the court, and in violation of the provisions of the statute, were, after the time for filing and allowing claims, wholly without remedy, and the district court properly rejected the items aggregating a total of $5,176.46.

There was another contention as to the refusal of the court to allow an item of attorney's fees and for the attorney's expenses, amounting in the aggregate to $316. As to these items, the court found that they "are charges made for services rendered in various cases and matters which the court finds from the testimony that this estate was not a party to nor interested in; that said charges were not therefore proper to be made against this estate; and that the payments so made by said administrators were unauthorized and should not be allowed in their account." An examination of the evidence discloses that some of the items involved in this attorney's bill were services rendered before the death of the decedent; others were apparently rendered afterwards. In respect to the first class, of course, the observations already made would apply. In respect to all the items in this bill, it may be observed that the testimony leaves it in doubt whether the services were rendered for the decedent and his estate, or for the Bohn Manufacturing Company. They were in respect of certain claims which had existed in favor of the decedent, and which he had assigned to the Bohn Manufacturing Company as collateral security for items of a running account with said company. It was testified to by the attorney who filed the bill, that it was understood that the decedent was to pay all these expenses, and hold the Bohn Manufacturing Company harmless in respect thereof, and, in fact, that the decedent had so informed the attorney. As has already been

observed, the testimony is not clear whether the proper party chargeable with this indebtedness is the Bohn Manufacturing Company or the estate of the decedent. In this condition of the evidence the findings of fact quoted settle this proposition that the charges were made for services rendered in various cases and matters which the court finds, from the testimony, that this estate was not a party to, nor interested in. If the estate was not a party to, nor interested in, the litigation in respect of which these services were rendered for which these charges were made, of course the estate cannot be chargeable therewith; and on this consideration, as well as on account of the failure to file and probate the claims for services rendered before the death of the decedent, the district court properly rejected the amount of this bill, which the administrators claim they had already paid.

These observations dispose of the only contentions which arose upon the trial of this case, and as we fully concur with the views entertained by the district court, its judgment is

AFFIRMED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY v. STANISLAUS GRABLIN, ADMINISTRATOR.

FILED OCTOBER 18, 1893. No. 4355.

1. **Railroad Companies:** CHILD ON TRACK: DEATH BY WRONGFUL ACT: NEGLIGENCE: PLEADING: EVIDENCE. An administrator sued a railroad company for damages for negligently killing his intestate, a boy nine years old, by running an engine against him while he was on the railroad track. The grounds of negligence averred in the petition were (*a*) the failure of the railroad company to fence its track; (*b*) the neglect of those in charge of the engine to signal its approach by bell or whistle; (*c*) that the train was not on schedule time; (*d*) that it was run at a high rate of speed; and (*e*) that it was not equipped with

air-brakes. *Held*, That under these allegations evidence that the engineer, had he been exercising a careful and vigilant lookout, could have seen the boy in time to have stopped the train, was inadmissible.

2. ———: ———: ———: CONTRIBUTORY NEGLIGENCE: INSTRUCTIONS. In such an action, where it is claimed by the defense that the injury resulted from the contributory negligence of the deceased infant, it is proper for the court to instruct the jury that in determining whether or not he was guilty of negligence they should take into consideration his age and discretion, and that the same degree of caution and care should not be required of him as in the case of an adult under similar circumstances. *Huff v. Ames*, 16 Neb., 139, followed.

3. ———: ———: ———: FAILURE TO FENCE TRACK: LIABILITY FOR DAMAGES. Where a child, to whom negligence is not imputable by reason of his tender years and lack of discretion, goes upon a railroad track in consequence of the failure of the railroad company to fence the same as required by statute, and is killed by an engine, the parents of the child exercising at the time ordinary care in the premises, the railroad company is liable.

4. ———: RATE OF SPEED: NEGLIGENCE. Outside the limits of cities, villages, and towns negligence cannot be imputed to a railroad company solely by reason of the speed of its train, however great. Whether under the circumstances the rate of speed is negligence is a question of fact.

5. ———: NEGLIGENCE: FAILURE TO EQUIP TRAIN WITH AIR-BRAKE. It is the duty of railroad corporations to adopt and use tried and proved modern machinery and appliances in the operation of their roads and in the management and control of their trains. The air-brake is among the modern tried and proved appliances that have become a necessity for the safe operation and management of railroad engines and trains, and the neglect of a railroad company to equip its trains with such brake may be negligence.

6. ———: ———: CHILD KILLED ON TRACK: LIABILITY OF COMPANY FOR DAMAGES. Where a child, no contributory negligence appearing, while trespassing on a railroad company's track, is struck by an engine and killed, the railroad company is liable for damages, if the engineer in charge of the engine, by the exercise of such careful and vigilant lookout as was consistent with his other duties, could have seen the child in time to have prevented the accident.

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

The facts are stated in the opinion.

O. A. Abbott, for plaintiff in error:

The company owes trespassers upon its tracks for right of way but one duty, to-wit, to use all possible efforts to avoid injury to them after they are discovered upon its tracks or right of way. If it has performed that duty, it is not liable to them for any injury they may sustain. Neglect by the company to perform duties it may have owed to others, as, for instance, its neglect to keep a vigilant outlook for obstructions, is a duty it owes to its passengers; but trespassers have no right to complain of any failure of duty toward passengers. Some duty owed to them must have been neglected to give them a standing in court. (*St. Louis, I. M. & S. R. Co. v. Freeman*, 36 Ark., 41, 4 Am. & Eng. R. Cases, 608; *Chicago & A. R. Co. v. Becker*, 76 Ill., 30; *Morrissey v. Eastern R. Co.*, 126 Mass., 380; *Johnson v. Boston & M. R. Co.*, 125 Mass., 79; Sherman & Redfield, Negligence [4th ed.], secs. 5, 8, 15; *Central Branch U. P. R. Co. v. Henigh*, 23 Kan., 358; *Meyer v. Midland P. R. Co.*, 2 Neb., 339.)

John H. Ames and *Marquett & Deweese*, also for plaintiff in error:

The plaintiff's intestate, at the time of the accident, was a trespasser upon the railway company's right of way and railroad track. The place of the casualty was nearly eight hundred feet from any lawful crossing. The intestate was not invited to the place, either especially or generally, as one of the public for the purpose of the transaction of business. It does not appear that he had any occasion of his own, or of his parents, to visit the place, except for his own

amusement. The company is not liable under such circumstances in the absence of wanton and reckless conduct on its part. (*Hargreaves v. Deacon*, 25 Mich., 1; *Brown v. European & N. A. R. Co.*, 58 Me., 384; *Gillespie v. McGowan*, 100 Pa. St., 144; *Baltimore & O. R. Co. v. Schwindling*, 101 Pa. St., 258; *Nolan v. New York, N. H. & H. R. Co.*, 53 Conn., 461; *Frost v. Eastern Railroad*, 64 N. H., 220; *Clark v. Manchester*, 62 N. H., 577; *State v. Manchester & L. R.*, 52 N. H., 528; *Sweeny v. Old Colony & N. R. Co.*, 10 Allen [Mass.], 368; *Severy v. Nickerson*, 120 Mass., 306; *Morgan v. Hallowell*, 57 Me., 375; *Pierce v. Whitcomb*, 48 Vt., 127; *McAlpin v. Powell*, 70 N. Y., 126; *St. Louis, V. & T. H. R. Co. v. Bell*, 81 Ill., 76; *Gavin v. City of Chicago*, 97 Ill., 66; *Wood v. Independent S. D. of Mitchell*, 44 Ia., 27; *Gramlich v. Wurst*, 86 Pa. St., 74; *Cauley v. Pittsburgh, C. & St. R. Co.*, 95 Pa. St., 398; *Mangan v. Atterton*, 1 Ex. L. R. [Eng.], 239*; *Knight v. Abert*, 6 Pa. St., 472; *Savannah & W. R. Co. v. Meadows*, 10 So. Rep. [Ala.], 141; *Woodruff v. Northern P. R. Co.*, 47 Fed. Rep., 689; 1 Thompson, Negligence, 448; *Saldana v. Galveston, H. & S. A. R. Co.*, 43 Fed. Rep., 862; *Ross v. Texas & P. R. Co.*, 44 Fed. Rep., 44; *Carrico v. West Virginia C. & P. R. Co.*, 14 S. E. Rep. [W. Va.], 12; *Spicer v. Chesapeake & O. R. Co.*, 45 Am. & Eng. R. Cases [W. Va.], 28; *Blight v. Camden & A. R. Co.*, 21 Atl. Rep. [Pa.], 995; *Dlauhi v. St. Louis, I. M. & S. R. Co.*, 16 S. W. Rep. [Mo.], 281; *Hargreaves v. Deacon*, 25 Mich., 5; *Ross v. Texas & P. R. Co.*, 44 Fed. Rep., 44; *Woodruff v. Northern P. R. Co.*, 47 Fed. Rep., 689; *Palmer v. Chicago, St. L. & P. R. Co.*, 14 N. E. Rep. [Ind.], 70; *Tennis v. Interstate Consolidated R. T. R. Co.*, 25 Pac. Rep. [Kan.], 876; *Toomey v. Southern P. R. Co.*, 24 Pac. Rep. [Cal.], 1074; *Masser v. Chicago, R. I. & P. R. Co.*, 27 N. W. Rep. [Ia.], 776; *Bouwmeester v. Grand Rapids & I. R. Co.*, 34 N. W. Rep. [Mich.], 414; *Scheffler v. Minneapolis & St. L. R. Co.*, 21 N. W. Rep. [Minn.], 711; *Philadelphia*

& R. R. Co. v. Hummell, 44 Pa. St., 378; *Mason v. Missouri P. R. Co.*, 27 Kan., 83.)

Henry Nunn and *Thummel & Platt, contra:*

A child is held to no greater care than is usually possessed by children of the same age. (Beach, Contributory Negligence, sec. 46; *Sioux City & P. R. Co. v. Stout*, 17 Wall. [U. S.], 657; Whitaker's Smith on Negligence, sec. 411; *Washington & G. R. Co. v. Gladman*, 15 Wall. [U. S.], 401; *Baltimore & O. R. Co. v. State*, 30 Md., 47; 2 Thompson, Negligence, p. 1140; *Ewen v. Chicago & N. W. R. Co.*, 38 Wis., 613; *McGovern v. New York C. & H. R. R. Co.*, 67 N. Y., 417; *City of Chicago v. Hesing*, 83 Ill., 205; *Ostertag v. Pacific R. Co.*, 64 Mo., 421, and cases cited.)

When the statute imposes upon all railroad companies of this state the duty of erecting and maintaining fences on both sides of their roads, and they fail to do this, they owe a greater degree of carefulness and watchfulness to the general public than if they had complied with the law; and when they run their trains through the country without fencing, they do so at their own peril. (*Schmidt v. Milwaukee & St. P. R. Co.*, 23 Wis., 186; *Blair v. Milwaukee & Prairie Du Chien R. Co.*, 20 Wis., 254*; *Singleton v. Eastern Counties R. Co.*, 97 Eng. Com. L., 287.)

The evidence shows the track to have been perfectly clear and unobstructed for nearly half a mile, and that the smallest object of a similar color to the child's clothes could be readily seen for over twelve hundred feet by a person standing on the track. The testimony of the engineer is that he did not see the child until within thirty-five feet of him. It is the duty of an engineer to keep a lookout. Not to discover the child under such circumstances is negligence, and that negligence is the proximate cause of the injury, whilst the negligence of the child in going on the track is only a remote cause. Under his own evidence

the engineer was running his train in a wanton and reckless manner. (*Houston & T. C. R. Co. v. Sympkins*, 54 Tex., 615; *Baltimore & O. R. Co. v. State*, 33 Md., 554; *Brandon v. Gulf City Cotton Press & Mfg. Co.*, 51 Tex., 121; *Meeks v. Southern P. R. Co.*, 56 Cal., 513; *Ostertag v. Pacific R. Co.*, 64 Mo., 425; *Donahoe v. Wabash, St. L. & P. R. Co.*, 83 Mo., 543; *Isabel v. Hannibal & St. J. R. Co.*, 60 Mo., 475; *Isbell v. New York & N. H. R. Co.*, 27 Conn., 404; *Deans v. Wilmington & W. R. Co.*, 12 S. E. Rep. [N. Car.], 77; *Wilson v. Norfolk & S. R. Co.*, 90 N. Car., 69.)

RAGAN, C.

On July 12, 1888, Samuel Grablin, a boy about nine years old, while trespassing on the track of the Chicago, Burlington & Quincy Railroad Company—hereinafter called the "railroad company"—was struck and killed by engine of said railroad company.

This is a suit for damages brought against the railroad company by the boy's administrator. There was a verdict and judgment for the administrator, and the railroad company prosecutes error.

The averments of negligence in the petition are as follows: That plaintiff is the father of the deceased, and at the time of his death lived on a farm near the railroad company's track; that no part of the line of road at the time of the accident was fenced; that the deceased was about nine years of age, and was sent by his father to look after some stock, shortly before he was killed; that the train causing the accident to the deceased consisted of a locomotive and some freight cars, and that said train was not equipped with air-brakes; that the train was an irregular one and out of its usual time, and was running at a great rate of speed, and omitted to give any signal, by bell or whistle, of its approach, and was not on the time of any trains passing at that point, and was so negligently and

carelessly run without air-brakes, and without proper care, and without proper signal or alarm of its approach, by reason whereof the deceased was unaware of its approach, etc. There are here, then, pleaded as negligence which caused or contributed to the casualty: (*a*) the train was not equipped with air-brakes; (*b*) the train was not on schedule time; (*c*) the train was run with great speed; (*d*) on signal by bell or whistle was given of its approach; and (*e*) that the railroad track was not fenced.

The answer of the railroad company was a general denial of the averments of the petition, and a plea of contributory negligence on the part of the deceased.

On the trial the administrator was permitted, against the objection and exception of the railroad company, to prove by several witnesses, and certain facts and circumstances, that if the engineer in charge of the locomotive had been observing a proper and careful lookout ahead he could have seen the boy in time to have brought the train to a stop before it reached the point where the boy was; or, stated differently, the administrator was permitted to introduce evidence showing a ground of negligence not alleged in the petition as causing or contributing to the accident. This ruling of the trial court is assigned as error. The rule everywhere is that the pleadings and proof must agree. This action was for damages alleged to have been caused by the negligent acts and omissions of the railroad company. The neglect or failure of the engineer to keep a proper lookout ahead is not alleged in the petition as one of these acts or omissions of negligence. Pleadings should be liberally and fairly construed, but such a construction of this petition would not advise the railroad company that on the trial it would have to meet this ground of negligence. No such ground of negligence was alleged in the petition, nor fairly inferable from the language thereof. The allegations in the petition that the train "was so negligently and carelessly run without air-brakes, and without

proper care, and without proper signal or alarm of its approach," by every fair construction of the language, had reference to the running of the train without air-brakes, without giving the signal of its approach by bell or whistle, and by running it at a great rate of speed and out of schedule time. The admission then of the evidence tending to show that the engineer could, by the exercise of a careful and vigilant lookout, have seen the boy in time to have saved him, was error.

It remains to be ascertained whether the admission of this evidence was prejudicial to the railroad company as well as erroneous. The undisputed evidence in the record is that the deceased, at the time he was struck by the engine, was a trespasser on the railroad company's track; that he was not on or nearer than 200 feet of any public or private crossing; that the engine was within thirty-five or forty feet of the boy when he was first seen by the engineer; that the boy was then lying on the track between the rails; that the servants of the railroad company, after their discovery of the boy, made every reasonable and proper effort to stop the train and prevent the accident; that the railroad company's track was not fenced; and that the engine and tender were equipped with an air-brake, but the other cars in the train were not. There was evidence also that the boy had been wallowing in a pool of water in a "borrow-pit" near the track, and had probably lain down in the sun on the track to dry himself and fallen asleep; that the speed of the train was seventeen to thirty-five miles an hour; that the boy when struck was at a point about 700 feet east of a private crossing and 1,200 feet east of a public crossing; that the train, until within 300 feet of the boy, was, for some distance, running on a curved track; that the accident occurred about 5 o'clock P. M. on a bright, sunny day; and that the boy had been sent out by his father that afternoon to look for some stock. It is the duty of railroad companies to signal the approach of their trains to cross-

ings by bell or whistle, and their failure to do so is negligence for which, in case of injury, they will be responsible. But as the boy was not on or near a crossing or attempting or about to use a crossing when struck, and the train was too far away from the nearest crossing to render a signal of its approach availing, the rule stated above has no application to this particular case. If this verdict rested alone on the alleged negligence of the railroad company in not giving signals for the crossings, it could not stand.

The fact, if it was a fact, that the train was not on schedule time, of itself was not a statement of any negligence, and there is nothing in the record tending to show that the unfortunate casualty was caused or contributed to by that circumstance. This verdict does not depend on that fact in any degree for its support.

It is doubtless the duty of railroad companies to adopt, apply, and use the latest and best tried and proved machinery and appliances in the operation of their roads and for the management and control of their trains and engines. It is a duty they owe especially to their patrons and to the general public, and results from the nature of the business for which they exist and in which they are engaged, viz., the carrying of freight and passengers. The air-brake is among the modern tried and proved appliances that have become a necessity in the operation and management of railroad engines and trains; and the neglect of a railroad company to keep its trains equipped with such brake is doubtless negligence for which, in case of injury resulting therefrom, it would be liable. But in the case at bar the evidence—and all the evidence—shows that the boy, when first seen by the engineer, was only thirty-five or forty feet away. No train running seventeen to thirty-five miles an hour, if fully equipped with an air-brake, could have been stopped in that distance. Unless, then, the speed of the train was negligence, the default of the railroad

company in not equipping the entire train with air-brakes in no manner contributed to this boy's death. We are not prepared to say that ordinarily any rate of speed of a train, however high, outside of the limits of cities, towns, and villages is of itself negligence. The verdict in this case does not rest on the alleged negligence of the railroad company in not equipping its train with air-brakes, nor running it at a high rate of speed, nor on both together.

By the statutes of this state railroad companies are required to fence their tracks, and while the main objects of this law are to protect stock running at large and increase the safety of passengers on railway trains, yet the fencing of their tracks by railroad companies is a positive duty enjoined upon them by law. It is in the nature of a police regulation, and their failure to obey the statute is negligence. In the case at bar the administrator, to recover by reason of the failure of the railroad company to erect fences, must have proved that his intestate's death was caused by such negligent omission of the railroad company. The administrator, on the trial, offered to prove the failure of the railroad company to fence its tracks as required by the statute, and the trial court refused to admit the evidence. The evidence was competent and should have been admitted.

The verdict in this case rests almost entirely upon the evidence that the engineer, had he been keeping a proper and vigilant lookout ahead, could have seen the boy in time to have saved him. The admission of the evidence to prove such negligence was, therefore, prejudicial error.

We might close this opinion here, but as the case must be tried again we deem it best to notice some other points.

Exception is taken by the plaintiff in error to the giving by the trial court of an instruction as follows: "You are instructed that if you believe from the evidence that the deceased, Samuel Grablin, at the time he was killed was about eight years of age, and that he went upon the

track of the defendant company, and that the engineer running or having in charge the engine, through the want of ordinary or reasonable care, skill, or attention, ran the engine against Samuel Grablin and killed him, in the manner and form as alleged in plaintiff's petition, then the plaintiff has a right to recover in this case; provided, you further believe from the evidence that Samuel Grablin, by reason of his being so young, was incapable of exercising any more care or discretion than he did show or exercise at the time of the accident." This instruction left to the jury the question whether or not the boy, his age and discretion considered, was guilty of contributory negligence in trespassing on the railroad track.

In *Huff v. Ames*, 16 Neb., 139, this court thus announces the rule in such cases: "In an action by an infant for damages, caused by the alleged negligence of the defendant, where it is claimed by the defense that the injury resulted from contributory negligence of the infant plaintiff, it is proper for the court to instruct the jury that in determining whether or not the plaintiff was guilty of negligence they should take into consideration his age and discretion in determining that fact, and that the same degree of caution and care should not be required of him as in case of an adult under similar circumstances." This is undoubtedly the correct rule. It would be manifestly unreasonable, if not inhuman, to judge the conduct of an infant of tender years by the same standard which governs the conduct of an adult. All that the law requires of such an infant is that he exercise that care, discretion, and prudence which may reasonably be expected from children of like age. (Beach, Contributory Neg., sec. 46; Sherman & Redfield, Neg., sec. 73; Whittaker, Neg., p. 411; *Sioux City & P. R. Co. v. Stout*, 17 Wall. [U. S.], 657.) In the abstract the instruction was correct.

The trial court refused to instruct the jury as follows: "You are instructed that although you may find from the

evidence that the engineer was negligent in not seeing the boy upon the track in time to avoid the injury to him, or that the train was not properly equipped, still, if you find that the negligence of the boy in going upon the track caused or contributed to the injury, you must find a verdict for the defendant, unless you further find that the company or its servants were willfully or recklessly negligent after the boy was discovered, or that the engineer willfully avoided seeing the boy on the track sooner than he did see him." This refusal of the court is here assigned as error by the railroad company. This instruction is based on the doctrine that as the boy was a trespasser on the railroad company's track, the engineer's failure to see him in time to avoid the accident was not actionable negligence, even though the engineer could have seen him had he been exercising a vigilant lookout; that a railroad engineer is under no obligation to keep a lookout for intruders on the track; and that the railroad company can only be held liable for the boy's death if its servants were guilty of negligence towards him after they discovered him on the track. This doctrine has found advocates in some courts of eminent respectability. But we cannot adopt it. It is the duty of an engineer in charge of a locomotive and train to exercise a careful and vigilant lookout ahead for any and all kinds of obstructions on the track. This duty the corporation he serves owes both to passengers on the train he is hauling and to the public. True, the engineer is not enjoined with the duty of keeping an especial lookout for sleeping children on the track; nor is he ordinarily enjoined with the duty of keeping such lookout for a burning culvert, because it is not likely to be on fire, but if it is, and he fails to see it by reason of neglecting to exercise a vigilant lookout, he is guilty of negligence. And in the case at bar, if the engineer could, by exercising such vigilant and careful lookout as was consistent with his other duties as engineer, have seen the boy in time to

save him, then his neglect to exercise such careful and vigilant lookout was negligence.

Virginia M. R. Co. v. White's Administrator, 34 Am. & Eng. R. Cases [Va.], 22, was a suit for damages for killing an adult trespasser. The trial court refused to instruct the jury as follows: "If the jury believe from the evidence that plaintiff's intestate was killed by the engine of the defendant company while he was walking on one of the tracks of the defendant in its yards, * * * the plaintiff cannot recover for such injury unless he proves to the satisfaction of the jury that the engineer, * * * after he discovered the danger in which the deceased was placed, could, by the use of ordinary care, have prevented the accident." On appeal the supreme court of Virginia say: "This instruction was properly refused. Its vice is that it ignores the duty of the engineer * * * to have exercised ordinary care and diligence in keeping a lookout to avoid injuries to the deceased. * * * It was the duty of the engineer to use ordinary care not only after discovering the dangerous position of the deceased, but in keeping a lookout to warn him of approaching danger." To the same effect see *Guenther v. St. Louis, I. M. & S. R. Co.*, 34 Am. & Eng. R. Cases [Mo.], 47; *Reilly v. Hannibal & St. J. R. Co.*, 34 Am. & Eng. R. Cases [Mo.], 81.

In *Texas & P. R. Co. v. O'Donnell*, 58 Tex., 27, it is said: "A railroad company is responsible for an injury to a child trespassing on its track, where the injury might have been prevented had the employes of the company used ordinary care, in keeping an outlook." To the same effect see *Isabel v. Hannibal & St. J. R. Co.*, 60 Mo., 475; *Atchison, T. & S. F. R. Co. v. Smith*, 28 Kan., 541; *Keyser v. Chicago & G. T. R. Co.*, 66 Mich., 390; *Meeks v. Southern P. R. Co.*, 56 Cal., 513; *Frick v. St. Louis, K. C. & N. R. Co.*, 75 Mo., 542.)

The refusal of the court to give the instruction referred to was correct. For the error committed in the admission

of testimony, as stated above, the judgment of the district court is reversed, the cause is remanded, with instructions to the court below to grant the plaintiff in error a new trial, and to permit the plaintiff below, if he so desires, to amend his petition.

REVERSED AND REMANDED.

MAXWELL, C. J., dissenting.*

I am unable to give my assent to the opinion in this case for the following reasons:

The syllabus does not present the point actually decided. In the petition, as set out in the opinion, it is alleged that the train "was so negligently and carelessly run without air-brakes, and without proper care, and without proper signals or alarm of its approach, by reason whereof the deceased was unaware of its approach." The evidence objected to as set forth in the opinion was "that if the engineer in charge of the locomotive had been observing a proper and careful lookout ahead he could have seen the boy in time to have brought the train to a stop before it reached the point where the boy was," and it was held in the above opinion that this proof was not admissible under the pleadings, and the case on that ground reversed. To this I cannot give my assent. The allegation that the train was run without proper care at the place where the death occurred would admit any evidence tending to show negligence or want of due care. Negligence is the ultimate fact to be pleaded, and it forms part of the act from which injury arises. An allegation of negligence or carelessness, as applied to the conduct of a party, is not a mere conclusion of law, but a statement of an ultimate fact. (*Rolseth v. Smith*, 35 N. W. Rep. [Minn.], 565; *Clark v. Chicago & W. M. R. Co.*, 28 N. W. Rep. [Mich.],

* The opinion in this case at the time it was filed was concurred in by all the members of the court. Subsequently the chief justice furnished the reporter the above dissenting opinion.

914; Maxw. Code Pl., 252, and cases cited.) Any proof tending to show a want of due and proper care is admissible under the allegations of the petition, and the court cannot, without a forced construction, limit these words to the want of air-brakes or the failure to blow the whistle or ring the bell. The charge is general that the train was run "without proper care." The language evidently refers to the running of the train. Under the Code, language is to be given its ordinary and natural meaning, the same as it would have in a contract or other instrument. In my view great injustice is done by the reversal upon the ground stated. The judgment should be affirmed.

CHARITY SMITH V. GILBERT M. HITCHCOCK.

FILED OCTOBER 18, 1893. No. 5338.

1. **Ejectment**: TITLE BY PRESCRIPTION: NOTICE TO OWNER OF LEGAL TITLE: PROOF. A plaintiff in ejectment, claiming title to the lands sued for by reason of ten years' adverse possession thereof, to prevail, must prove a continuous possession of said property under a claim of ownership in himself, and that such possession was actual, visible, notorious, exclusive, and adverse to the owner of the legal title.

2. ———: TO CONSTITUTE AN ADVERSE POSSESSION of land, such as, if it continued for ten years, would establish title in the occupant, it is necessary that he should actually hold the land as his own during that period, in opposition to the constructive possession of the legal proprietor.

3. ———: CONCURRENT POSSESSION: PERMISSIVE ENTRY UPON PREMISES. Where the owner of the legal title to real estate occupies the same concurrently with one who entered by his permission without color of title, such possession of the owner negatives any presumption that the other occupied adversely to him.

4. ———: ADVERSE POSSESSION: NOTICE: ENTRY BY PERMISSION OF LEGAL OWNER. Where possession of real estate is the result of an entry upon the premises by permission of the legal

owner, such possession will not become adverse until some act is committed by the occupant rendering it so, and notice thereof is brought home to the owner of the legal title.

5. **Trial**: RULING ON ADMISSIBILITY OF EVIDENCE: REVIEW. In order to predicate error upon the sustaining by the trial court of an objection to a question propounded to a party's own witness, the party must make an offer to prove the fact sought to be elicited by the question. *Masters v. Marsh*, 19 Neb., 458, followed.

6. **New Trial**: NEWLY DISCOVERED EVIDENCE. To entitle a party to a new trial on account of newly discovered evidence, it is not enough that the evidence is material and not cumulative. It must further appear that the applicant for the new trial could not, by the exercise of reasonable diligence, have discovered and produced such evidence at the trial. *Fitzgerald v. Brandt*, 36 Neb., 683, followed.

7. ———: ———. A new trial should not be granted on the grounds of newly discovered evidence, when such testimony would not change the result of the first trial. *Keiser v. Baker*, 29 Neb., 92, followed.

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

David Van Etten, for plaintiff in error:

The word "hostile," when applied to the possession of an occupant of real estate holding adversely, is not to be construed as showing ill will, or that he is an enemy of the person holding the legal title, but means an occupant who holds and is in possession as owner, and, therefore, against all other claimants of the land. (*Ballard v. Hansen*, 51 N. W. Rep. [Neb.], 295.)

A party in possession and cultivating a tract of land will be presumed to have some interest therein. Such notice may be as effectually communicated by the open and notorious possession of the occupant as by information personally communicated. (*Filley v. Duncan*, 1 Neb., 134; *Jones v. Johnson Harvester Co.*, 8 Neb., 446.)

The entering upon land and making improvements thereon is one of the presumptive evidences evincive of

intention to assert ownership. So is possession made out by placing on the premises buildings. (*Horbach v. Miller*, 4 Neb., 47; *Gregory v. Langdon*, 11 Neb., 169.)

Possession is sufficient. (*Keith v. Tilford*, 12 Neb., 272; *Trussel v. Lewis*, 13 Neb., 415; *Yetzer v. Thoman*, 17 O. St., 130.)

Adverse possession for ten years will vest a valid title in the occupant. Color of title is not essential to adverse possession. Claim of title need not be valid. (*Gatling v. Lane*, 17 Neb., 77; *Haywood v. Thomas*, 17 Neb., 237; *Warren v. Bowdran*, 31 N. E. Rep. [Mass.], 300.)

The law presumes he has title who has possession. (*Stettnische v. Lamb*, 18 Neb., 619; *Baldwin v. City of Buffalo*, 35 N. Y., 375.)

Equity protects a parol gift of land occupied by donee. (*Dawson v. McFaddin*, 22 Neb., 737; *McKesson v. Hawley*, 22 Neb., 693.)

Adverse possession by mistake will work a disseisin, and possessor's title will be perfect. (*Tex v. Pflug*, 24 Neb., 667; *Levey v. Yerga*, 25 Neb., 764; *Obernalte v. Edgar*, 28 Neb., 70.)

Where limitations by adverse possession have begun to run against father in his lifetime, where title is claimed through him, his death and the minority of the children will not arrest it, and if it has run the full statutory period, such possession from the beginning bars recovery. (*Hardy v. Riddle*, 24 Neb., 670.)

Chas. E. Clapp, contra:

Possession which is permissive and entirely consistent with the title of another cannot silently bar that title. (*Kirk v. Smith*, 9 Wheat. [Pa.], 288*.)

RAGAN, C.

This is a suit in ejectment brought on November 9, 1889, in the district court of Douglas county by Mrs. Charity

Smith against Gilbert M. Hitchcock, for a part of lot 1, in Capitol Addition to the city of Omaha. The case was tried to a jury, who, under instructions of the court, rendered a verdict for Hitchcock, and Mrs. Smith brings the case here for review.

Mrs. Smith has no paper title of any kind for any part of the property. Her claim is based wholly on possession. The record shows that on and prior to 1869 this lot, No. 1, being 668 feet in length north and south, and 218 feet in width east and west, was owned by Mrs. Annie M. Hitchcock. She died in 1887, and the lot by her will passed to her husband, the late Senator Hitchcock. He died in 1881, and the lot descended to his son, the defendant in error. About 1870, by permission of Mrs. Hitchcock and her husband, Mrs. Smith moved a small cottage she owned upon this lot 1, near the east line thereof, and lived in this cottage at that place until 1880. Mrs. Smith did laundry work from time to time during these years for the Hitchcock family and others. She also planted part of the ground near her cottage to a garden. During all these years the Hitchcock family, consisting of Mrs. Hitchcock, her husband, and the defendant in error, and others, lived upon the lot; had on it their barn, horses, cattle, and garden, and exercised exclusive ownership and control of the whole lot. During all this time it was all under one inclosure, built and maintained by the Hitchcocks; and that part occupied by Mrs. Smith's cottage was in no other manner, than by the cottage itself, separated or severed from the remainder of the lot. Mrs. Smith, during this period, by the permission and consent of Mrs. Hitchcock and her husband, and as a kind of nonrentpaying tenant at will, or sufferance, also occupied her cottage on the lot. She paid no taxes. She exercised no act of ownership over the lot or any definite portion of it. Thus matters continued until 1880, when Mrs. Smith, by the permission of Senator Hitchcock, who then owned the title to the lot as devisee

of his deceased wife, and who still continued to occupy the lot with his family, removed her cottage to a point nearer the west line of said lot and some 250 feet southwest of its original location. This is the present location of the cottage. The usual occupation and control of the lot by the Hitchcocks continued as before this removal, and Mrs. Smith continued to live on uninterruptedly in her cottage. The senator died in 1881, and the defendant in error became the owner of the lot, and has since continued to reside upon it in the family homestead. In 1883 defendant in error erected three houses on a portion of the lot now claimed by Mrs. Smith, which houses have since been occupied by tenants of the defendant in error.

In 1886 Douglas street, 66 feet wide, was extended west across the entire lot, leaving the first location of Mrs. Smith's cottage north of said street. After the extension of Douglas street, the defendant in error built fences on both the north and south lines of the street, thus dividing said lot into two separate inclosed portions; one being that part of said lot lying north of said Douglas street, and on which Mrs. Smith's cottage was first located, and on which the Hitchcock homestead and the three tenant houses aforesaid are situate; the other portion being all of said lot 1 south of Douglas street, and on which portion is now Mrs. Smith's cottage. No claim for damages was made by Mrs. Smith at the time of the extension of this Douglas street, nor did she assert or claim any ownership over the land taken for such extension, though now she claims that the land used for such extension was her property. She asserted no claim of ownership or title to any of the property at the time of the building of the tenement houses by the defendant in error.

Mrs. Smith, to recover here, must prove either a paper title or prove ten years' open, notorious, exclusive, and adverse possession. She has no paper title. She occupied, by living in her cottage, a part of this lot openly and no-

toriously for ten years, but no specific or definite part of the lot other than the *situs* of the cottage itself. Her possession of the lot was also concurrent with that of the owner of the legal title. It was a mixed possession; not an exclusive one. The defendant in error, the holder of the legal title, has never been out of possession of the property claimed by Mrs. Smith, and this negatives any legal presumption that her possession was adverse to his title or possession. (*Green v. Liter*, 12 U. S., 229; *Proprietors Kennebeck Purchase v. Springer*, 4 Mass., 415.)

But as a matter of fact or law, was Mrs. Smith's possession of this property adverse? She entered by permission of the owner, and in 1880, by his permission, moved her cottage to another part of the same premises, not involved in this case. To constitute her possession or occupancy adverse, she must have actually held and occupied the property as her own, and in opposition and hostility to the concurrent and constructive possession of the owner of the legal title. (*French v. Pearce*, 8 Conn., 439; Newell, Ejectment, p. 697, sec. 1.) There is no evidence in the record that establishes, or tends to establish, the fact that Mrs. Smith's possession was an adverse one; nor that she entered into possession of these premises with the intention of claiming them as her own, or that she ever held after her entry in hostility to the defendant in error. Mrs. Smith's entry on this lot was by permission of the owner of the legal title, and her possession thereafter was permissive and not adverse; nor could it become so until such time as she began to occupy under a claim of right, with notice of such claim brought home to the owner. (*Harvey v. Tyler*, 2 Wall. [U. S.], 328; *Allen v. Allen*, 58 Wis., 202–209; *Perkins v. Nugent*, 45 Mich., 156; *Davenport v. Sebring*, 52 Ia., 364; *Pease v. Lawson*, 33 Mo., 35; *Smith v. Stevens*, 82 Ill., 554; Angell, Limitations, sec. 354.) The court did not err in instructing the jury to find for the defendant.

Complaint is made because of the refusal of the trial court to permit witnesses of the plaintiff in error to answer certain questions propounded to them on the trial. No tender or offer of the evidence sought to be elicited by these questions was made, and these assignments cannot now be considered. (*Masters v. Marsh*, 19 Neb., 458; *Connelly v. Edgerton*, 22 Neb., 82; *Yates v. Kinney*, 25 Neb., 120; *Burns v. City of Fairmont*, 28 Neb., 866.)

Another error assigned is the overruling of the motion for a new trial on the ground of newly discovered evidence. To entitle the plaintiff to a new trial on account of newly discovered evidence, it is not enough that the evidence is material. It must further appear that the applicant for a new trial could not, by the exercise of reasonable diligence, have discovered and produced such evidence at the trial. (*Fitzgerald v. Brandt*, 36 Neb., 683.) The proof fails to disclose such diligence on the part of the plaintiff in error as entitled her to a new trial on the ground of newly discovered evidence; but if it did, and the evidence now claimed to be newly discovered was put into the record, it would not change the result. A new trial should not be granted on account of newly discovered evidence when such evidence, if admitted, could not change the result of the first trial. (*Keiser v. Decker*, 29 Neb., 92.)

The judgment of the district court is

AFFIRMED.

RYAN, C., concurs.

IRVINE, C., having been of counsel in the case below, took no part in the consideration or decision here.

CHARITY SMITH, APPELLANT, V. DAVID T. MOUNT ET AL., APPELLEES.

FILED OCTOBER 18, 1893. No. 5022.

Ejectment: TITLE BY PRESCRIPTION: PERMISSIVE OCCUPANCY. The decree in this case is affirmed, the facts and law being essentially the same as in the case of *Smith v. Hitchcock*, 38 Neb., 104, decided at the present term.

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

David Van Etten and *Joseph T. Patch*, for appellant.

Montgomery, Charlton & Hall, contra.

RAGAN, C.

This is a suit in equity brought in the district court of Douglas county by Charity Smith against David T. Mount, in which she alleges that she is the owner and in possession of a part of lot 1 in Capitol Addition to the city of Omaha, and has been for about twenty-two years; that Mount had interfered, and was threatening to interfere, with her possession. She has no paper title to the property, but bases her title on adverse possession. The prayer of the petition is for an injunction restraining Mount from interfering with her possession, and to quiet and confirm the title to the property in her.

The answer of Mount was a general denial, and setting out his possession of the real estate described in plaintiff's petition; that he had been in possession of it since 1886, and had erected a brick residence thereon in which he was living; that he derived his title from one Gilbert M. Hitchcock, who derived his title from the late Senator Hitchcock, and his title came from his wife, Annie M. Hitchcock, who

owned the land as far back as 1869. The prayer of Mount's answer was that the title to the real estate might be quieted and confirmed in him, and that the petition of Mrs. Smith might be dismissed.

There was a trial to the court, who rendered a decree dismissing the plaintiff's suit, and quieting the title to the property in controversy in Mount, and Mrs. Smith appeals to this court.

All the essential points in this case, and the law applicable thereto, are stated in the case of *Smith v. Hitchcock*, 38 Neb., 104, decided at this term of court, and following the conclusion reached in that case, the decree of the district court in the case at bar is

AFFIRMED.

RYAN, C., concurs.

IRVINE, C., having been of counsel in the case of *Smith v. Hitchcock*, 38 Neb., 104, took no part in the consideration and decision of this case.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY v. NIELS ANDERSON.

FILED OCTOBER 18, 1893. No. 4803.

1. **Review:** JOURNAL ENTRIES: REMEDY FOR DEFECT: TRANSCRIPTS. The entries upon the journal of the district court are conclusive evidence of its proceedings. If the clerk has not made such entries in conformity with the facts or the rulings of the judge, the remedy is by a correction of the journal by order of the district court. This court will not substitute a paper certified to be a memorandum of journal entry prepared by the judge for the journal entry itself, as it appears in the transcript filed in this court and certified to be a true transcript of the record.
2. **Trial:** INSTRUCTIONS: REVIEW. An instruction is erroneous which assumes a fact as established which is material to the case and as to the existence of which the evidence is conflicting.

3. ——: ——: ——. The giving of instructions which are vague and conflicting, and which probably had the effect of confusing and misleading the jury, is erroneous, and the fact that the general tenor of the instructions is more favorable to the unsuccessful party than to the successful one does not cure the error.

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

The opinion contains a statement of the facts.

Marquett & Deweese, for plaintiff in error:

Where several persons are employed in the same general service, and one is injured by the carelessness of another, the employer is not responsible, though the negligent servant is a superior in grade of employment to the one injured (Deering, Negligence, sec. 204), and this rule includes foreman, superintendent, and boss. (*McLean v. Blue Point Gravel Mining Co.*, 51 Cal., 255; *Chicago & T. R. Co. v. Simmons*, 11 Ill. App., 147; *Floyd v. Sugden*, 134 Mass., 563; *Malone v. Hathaway*, 64 N. Y., 5; *Keystone Bridge Co. v. Newberry*, 96 Pa. St., 246; *Hoth v. Peters*, 55 Wis., 405; *Ell v. Northern P. R. Co.*, 48 N. W. Rep. [N. Dak.], 222.)

An instruction assuming as a material fact that which is not established by the evidence is erroneous. (*Union P. R. Co. v. Ogilvy*, 18 Neb., 643; *Housel v. Thrall*, 18 Neb., 487; *Smith v. Evans*, 13 Neb., 316; *Woodruff v. White*, 25 Neb., 749; *Herron v. Cole*, 25 Neb., 704.)

Conflicting and misleading instructions are erroneous, and the error committed in giving such instructions is not cured by giving others which state the law correctly. (*Vanslyck v. Mills*, 34 Ia., 375; *Davis v. Strohm*, 17 Ia., 421; *Toledo, W. & W. R. Co. v. Morgan*, 72 Ill., 155; *Steinmeyer v. People*, 95 Ill., 383; *Fitzgerald v. Meyer*, 25 Neb., 82; *Wasson v. Palmer*, 13 Neb., 376; *McPherson v. Wiswell*, 19 Neb., 12, 126.)

J. S. Kirkpatrick, also for plaintiff in error.

R. A. Moore and *Henry M. Kidder, contra:*

The company is liable for the acts of the section boss. (*Sioux City & P. R. Co. v. Smith*, 22 Neb., 775; *Chicago, St. P., M. & O. R. Co. v. Lundstrom*, 16 Neb., 254.)

IRVINE, C.

The defendant in error was a section man in the employ of the plaintiff in error, and on the evening of November 21, 1890, was engaged, together with one Bingham, the "section boss," and one Dunlap, a road master, in loading three railroad rails upon a flat car at the station of Mason, in Custer county. While loading the rails, one of them, while being lifted upon the car, fell back in some manner and struck the hand of defendant in error, injuring it quite severely. This action was begun by defendant in error to recover damages for the injuries so sustained, and resulted in a verdict and judgment in his favor for $1,490.

The facts are, for the most part, undisputed. Bingham was the "section boss," with authority to employ and discharge section men, and the plaintiff below had, in fact, been employed by him and was under his direction and subject to his orders. Dunlap was the road master, but his authority and powers do not appear from the evidence. During the day three rails had been placed upon the platform in front of the station for the purpose of loading them upon a freight train due in the course of the afternoon. The train was late, and did not arrive until after dark. Anderson, by Bingham's orders, had remained at the station after the usual working hours had passed, for the purpose of assisting in loading the rails. The car upon which the rails were to be loaded was next to the caboose at the west end of the train. It stopped opposite to the platform upon which, at some point not clearly shown, but

near the car, was placed a brakeman's lantern. There is evidence tending to show that there was a light in the window of the station at some distance from the car. A stake was placed in a socket near the east end of the flat car. Anderson, Bingham, and Dunlap proceeded to load the rails by first raising the east end of each upon the car, and then shoving the rail so that the end would be guarded by the stake. They would then go to the west end of the rail, lift up that end, and upon a given signal, throw that end of the rail upon the car. Dunlap directed that the rails should be loaded. Bingham had supervision of the process of loading. It seems that two rails had been loaded in this manner, the east end of the third rail placed upon the car and shoved past the stake, and the three men proceeded to raise the west end. In doing so Anderson stood farthest east, and both Bingham and Dunlap were nearer the west end and the caboose. The rail was raised, the signal given, and the rail thrown toward the car. In some manner it rebounded, striking Anderson's hand. Plaintiff's theory was that the rail had not been pushed far enough so as to permit the west end to pass upon the flat car without striking the caboose; that it was Bingham's duty to see that it was in a safe position to throw; that he was so situated that he could see whether or not the rail, when thrown, would pass free of the caboose; that he failed to do so and that the rail when thrown did strike the caboose, and the accident was thereby caused. The plaintiff swears that the west end of the rail did strike the caboose, but in cross-examination it is shown that his only reason for saying so is that it is only upon that theory he can account for the accident, and that the statement was not based upon actual observation. There is testimony on the part of the railroad company in regard to the length of the car, the position of the stake and the rail, and the length of the rail itself, which, if believed by the jury, would render it impossible for them to find that the rail did strike the caboo e.

In this state of the evidence the court gave the following instruction:

"If you find from the evidence that, when the plaintiff was loading the iron complained of in the petition, he was acting under the instructions of the section boss or road master, and was directed by him the way in which said iron should be loaded, and after one end had been placed upon the car told him to stop and go to the other end; and if at that time they were *nearer the end of the rail that struck the caboose* or freight train than he was, and had a better opportunity of seeing whether the rail would pass the other car, and instructed him to go from one end to the other and throw it on the car, and if such injury was sustained while following out such instructions of the road master or section boss, the defendant would be liable for the same. Modified as follows: Provided you find the said plaintiff was under the control and absolutely subject to orders of the section boss or road master who was employed by defendant to control the plaintiff while engaged in the work said plaintiff was doing at time he was injured, and you find by acting under said orders said plaintiff was injured by the carelessness and negligence of defendant and its representatives while in charge of the authority placed in him by defendant. You will find for plaintiff if he was in the use of ordinary care when he was injured."

The object of this instruction seems to have been to give the whole law to the jury upon this theory of the case. It will be observed that in it the court assumes as an established fact that the rail did strike the caboose, the language being: "If at the time they were nearer the end of the rail that struck the caboose or freight train than he was, and had a better opportunity of seeing whether the rail would pass the car." The word "if" had the effect of submitting to the jury the question of the position of the men and their powers of observation, but did not qualify the clause in regard to the rail striking the caboose, leaving that question

of fact, upon which the evidence was conflicting, as assumed by the court and nowhere by the instructions left to the determination of the jury. The instruction was erroneous in this particular. It was objectionable also as being vague in its expression, and ambiguous. The last sentence, "You will find for the plaintiff if he was in the use of ordinary care when he was injured," standing as it does alone, might lead the jury to infer, in connection with the assumption in regard to the fact of the rail striking the caboose, that the question of plaintiff's contributory negligence was the only one left for their consideration.

It is said by the defendant in error that the general effect and tenor of the instructions were very favorable to the plaintiff in error. This is true, but an erroneous instruction is not cured by giving another stating the law correctly, nor by stating it too strongly for the other party. A review of the instructions discloses a very peculiar state of affairs. Under the rule as laid down in *Chicago, St. P., M. & O. R. Co. v. Lundstrom*, 16 Neb., 254, and *Sioux City & P. R. Co. v. Smith*, 22 Neb., 775, Bingham certainly occupied towards Anderson the relation of a vice-principal. By the first instruction given at the request of the plaintiff that question was left to the jury under the instruction that to hold the defendant responsible the jury must find that the section boss had control of and charge over the men, and authority to employ and discharge men. By the modification of the second instruction the jury was told that the plaintiff must be under the control of, and absolutely subject to the orders of, the section boss or road master.

By the first instruction given by the court of its own motion the jury was told that to sustain the action it must find that plaintiff was acting under proper and legitimate orders of the section boss and road master who were the regularly constituted representative agents of the defendant company, provided they had power to control and direct plaintiff's movements; and later on, in the same in-

struction, that the plaintiff must be absolutely under the direction and control of the boss. Then, at the request of the defendant, the jury was told point blank that the evidence showed Bingham and Dunlap to be fellow-servants; and again, that a section foreman is a fellow-servant where he works with the laborers, and his business was not entirely that of direction and supervision.

It was also urged that the railroad company was negligent in not providing sufficient lights and in not having on hand a sufficient force of men to safely load the rails. By the second and third instructions given by request of the railroad company the jury was told that there could be no recovery upon that ground, because there was no evidence that Anderson made any objection to proceeding with the work under the circumstances; yet by other instructions the jury is told again and again that if the plaintiff was injured while carrying out the orders of his superiors it should find for the plaintiff, provided the injury was caused by negligence of the defendant or defendant's representatives. The rule in regard to negligence was nowhere defined, except by the fifth and sixth instructions given by the court of its own motion. By these instructions the jury was told that it must find for the defendant, if it found that the defendant was in the exercise of ordinary care at the time. Nowhere, except in the absolute instructions, given at the request of the defendant, was the jury limited as to the acts which it might consider as negligent.

Again, the jury was told in the fourth instruction that if it found the injury the result of an accident plaintiff could not recover. The term "accident" was not defined.

We quite agree with the defendant in error, that instructions were given greatly to his prejudice. The trouble is that the verdict was absolutely contrary to such instructions, and taking the whole of the charge, the instructions were so conflicting, so vague, and so confusing that they

must have embarrassed rather than aided the jury. It would be a travesty upon justice to permit a verdict in favor of either party to stand when based upon such crude and conflicting statements and misstatements of the law.

REVERSED AND REMANDED.

GEORGE B. HOVLAND V. C. B. BURROWS.

FILED OCTOBER 24, 1893. No. 5096.

Pleading: ORDER STRIKING OUT PORTION OF DEFENSE. A defendant has a right to set up his entire defense, and where such defense consists of a series of acts, which together constitute one transaction, a portion of the same cannot be stricken out against his objections.

ERROR from the district court of Madison county. Tried below before NORRIS, J.

The court below sustained a motion to strike out, as redundant, scandalous, and irrelevant, certain portions of the answer. The ruling is assigned as error. The answer and motion are set out in the opinion. *Reversed.*

Allen, Robinson & Reed, for plaintiff in error:

Fraud may always be alleged where it exists and cannot be proved without being alleged, where it is germane to the issue and forms one of the cardinal facts constituting the defense. (*Tepoel v. Saunders Co. Nat. Bank,* 24 Neb., 816; 8 Am. & Eng. Ency. Law, p. 653.)

While it is competent to strike out redundant, scandalous, or irrelevant matter from a pleading, the party who makes the motion must be prejudiced thereby. (Sec. 125, Code; *Cate v. Gilman,* 41 Ia., 530; *Martin v. Swearengen,* 17 Ia., 346; *Molony v. Davis,* 15 How. Pr. [N. Y.], 261.)

It was claimed in the court below that the matter stricken out under the first assignment of Burrows' motion was rendered improper because it was alleged that in consideration of the fraud the parties had entered into a new contract which superseded the one induced by the fraud. The motion does not deny that this is proper defensive matter, but assails it as unnecessary to show or establish that defense. These objections are not grounds of a motion to strike. (*Specht v. Spangenberg*, 70 Ia., 488; *Walker v. Pumphrey*, 48 N. W. Rep. [Ia.], 928.)

Reese & Gilkeson and *Wigton & Whitham, contra:*

A settlement by the parties after full knowledge of the alleged fraud is a complete bar to relief on the ground of the fraud. (*Parsons v. Hughes*, 9 Paige Ch. [N. Y.], 591; *O'Dell v. Rogers*, 44 Wis., 136, 181; *Rogers v. Higgins*, 57 Ill., 244, 250; *Adams v. Sage*, 28 N. Y., 103, 109.)

Testimony would, therefore, be inadmissible to impeach the note alleged in the answer to have been given as a renewal of the notes claimed to have been obtained by fraud, because given with a full knowledge of all the facts constituting the alleged fraud. The allegations of fraud were, therefore, wholly unnecessary and redundant, and if allowed to remain would have been highly prejudicial to Burrows. But whether prejudicial or not, as such allegations were not necessary as the foundation of pertinent and proper testimony, they were rightly stricken out. (*Hale v. Wigton*, 20 Neb., 83; *Coquillard v. Hovey*, 23 Neb., 622; *Columbus, H. & G. R. Co. v. Braden*, 11 N. E. Rep. [Ind.], 357; *Davis v. Davis*, 21 N. E. Rep. [Ind.], 1112, 1114; *Petree v. Fielder*, 29 N. E. Rep. [Ind.], 272.)

MAXWELL, C. J.

This is an action to foreclose a mortgage on real estate. The petition is in the ordinary form. To this petition the defendant filed an answer as follows:

"And now comes the defendant and by way of amended answer to the petition of the plaintiff in this case says:

"1. This defendant admits the making and delivery of the notes and mortgage sued on in this case and the recording of the latter.

"2. That on and prior to the 14th day of July, 1887, the plaintiff was the owner and possessed, at Newman Grove, Nebraska, of a miscellaneous stock of second-hand merchandise, consisting of dry goods, boots, shoes, hats, caps, clothing, notions, groceries, and such other goods and general merchandise as are generally kept for sale and sold in a retail country store, and which was worth at wholesale prices at said time not to exceed the sum of $2,787, as the said plaintiff then and there well knew. Said stock of merchandise was at said time stored in a store-room, securely boxed and packed, and secure from examination or inspection by this defendant, except a few hundred dollars' worth of the best part thereof, which was displayed on the shelves of said store-room and could be examined. Said stock of merchandise had been traded for by the plaintiff at Rising City, Nebraska, in the month of May, 1887, and at said time a pretended invoice of them had been made at their alleged wholesale value by some one to this defendant unknown, at the instance and request of the plaintiff, which pretended invoice was wholly false, fraudulent, and untrue, and greatly in excess of the actual wholesale value of said merchandise, as the said plaintiff, at the time of the transactions hereinafter stated and alleged, well knew. That on or about the said 14th day of July, 1887, the said plaintiff began negotiating with this defendant for the sale to him of the said stock of merchandise, and then and there, for that purpose and to that end, falsely, fraudulently, and well knowing the same to be untrue, represented and stated to this defendant that said stock of merchandise was a first-class, fresh, A No. 1 stock of merchandise, free in all respects from any defects or impairments; that it had been

purchased at wholesale less than a year prior to that time and that he, the said plaintiff, would warrant the same in all respects as being a good fresh, A No. 1 stock of merchandise; that all of said merchandise in boxes was as good as that displayed on the shelves, and that the latter was a fair sample of the former, and that he would warrant and guarantee to this defendant the correctness in all respects of said pretended invoice of said stock of merchandise, which said invoice he then exhibited to this defendant, showing said stock of merchandise to be of the wholesale value of $8,808.84, and stating and representing at the time to this defendant, fraudulently and falsely, and well knowing the same to be false and untrue, for the purpose of inducing this defendant to purchase said stock of merchandise; that said invoice was in all respects true and correct, and genuine, and fairly represented the wholesale value of said stock of merchandise; that at said time that part of said stock of merchandise which was displayed on the shelves of said store building was the best part thereof, and was so displayed by the procurement of the plaintiff to mislead this defendant, and induce him to believe that the part thereof in boxes was of the same quality and value; that relying upon the truthfulness of the said several representations, statements, warranties, and guaranties so made to him as aforesaid by the plaintiff, and believing them to be true, and believing said part of merchandise in boxes was of the same quality and value as that part thereof displayed in the shelves of said store building, this defendant was induced thereby to purchase and did purchase of said plaintiff said stock of merchandise at the agreed sum of $8,808.84, the sum which the said plaintiff had so falsely and fraudulently represented and stated to this defendant that said stock of merchandise was worth at wholesale value. This defendant paid the plaintiff for said stock of merchandise as follows: 'discount of twenty-five per cent off of said sum pursuant to contract, $2,202.21; conveyance of real

estate at the agreed sum of $1,300; and credit for goods previously sold from said stock, $503; and for the remainder this defendant gave the plaintiff his negotiable promissory note, payable at a future date.' That this defendant would not have purchased of said plaintiff said stock of merchandise, or made said payments, or given said promissory note, but for said false and fraudulent representations, statements, warranties, and guaranties of said plaintiff so made to him, which he relied on and believed to be true at the time. This defendant alleges and charges the fact to be that each and all of said representations, statements, warranties, and guaranties so made to him by plaintiff were, when made, and are now wholly false and untrue and fraudulent, and were known by the plaintiff to be false, fraudulent, and untrue when so made; and they were made by him for the sole purpose of misleading and defrauding this defendant into purchasing said stock of merchandise; and he was thereby induced to make such purchase and payments and give said promissory notes by reason thereof; that in truth and in fact the said stock was not a first-class, fresh, A No. 1 stock of merchandise, and was not free in all respects or in any respect from defects or impairment; but on the contrary the same was rotten, old, shelf-worn, unsalable, and a condemned stock of merchandise and did not have merchantable value to exceed the sum of $2,787, as the plaintiff then and there well knew; that said stock had been purchased many years prior to the said 14th day of July, 1887, and consisted of condemned, impaired, defective, and unsalable remnants and refuse articles of merchandise, as said plaintiff at the time well knew; that said pretended invoice was not a true, correct, or honest invoice of said stock, or of the wholesale value thereof, and the goods in boxes were not of the quality or value of those displayed on the shelves, but were much inferior and of but little value, all of which was to the plaintiff well known and to this defendant unknown at the time of making said contract of

purchase; that in drawing the notes given to secure the deferred payments of said stock of merchandise the said plaintiff designedly and fraudulently neglected to deduct therefrom the said twenty-five per cent discount as aforesaid and fraudulently and designedly included the same in said notes; that the sole and only consideration of the note and mortgage sued on in this case are said notes above mentioned, of which the note in suit is a renewal, and given under the circumstances and for the purpose hereinafter stated; that shortly after the purchase of said stock of merchandise of the plaintiff, this defendant discovered the said fraud that had been practiced on him by the plaintiff and annulled the said contract of purchase of said stock of merchandise, and he and the said plaintiff then and there, and in consideration thereof, made and entered into a new and different contract with reference to said stock of merchandise, whereby they annulled, canceled, and set aside said contract of purchase of said stock of merchandise by this defendant, agreed that said stock of merchandise did not exceed in value the sum of $3,000 at any time, and that this defendant should thereafter hold said stock of merchandise for the plaintiff and as his property until an opportunity presented itself for the plaintiff to trade said stock to some third person in conjunction with another stock then owned by this defendant separately for other property; that some time in the month of April, 1888, the exact time this defendant cannot state, the plaintiff represented and stated to this defendant that they, the plaintiff and this defendant, could trade their respective stocks together, one of which was the stock of merchandise aforesaid, to one Isaac Peed, of Pierce county, Nebraska, for land and live stock, and at the solicitation of the plaintiff, this defendant went with the plaintiff to Pierce county to consummate said trade with the said Isaac Peed; while there the plaintiff traded said stock of merchandise referred to to said Isaac Peed for real estate, and

this defendant traded his stock of merchandise, previously and separately owned by him, to said Isaac Peed for real estate and live stock, and at the plaintiff's request this defendant delivered both of said stocks to said Isaac Peed. Thereafter and some time in the month of April or May, 1888, the exact time this defendant cannot state, the said Isaac Peed having failed to execute his conveyances of said real estate to the plaintiff and defendant respectively, as he had agreed to do, this defendant, at the request of the plaintiff, went to the residence of said Isaac Peed, in said Pierce county, Nebraska, to procure said conveyances, and he then and there ascertained that said conveyances had, at the instance of the plaintiff, been made and executed to this defendant, as grantee, and not in severalty to the plaintiff and defendant, as they should have been executed. This defendant took said conveyances to the plaintiff at Norfolk, Nebraska, and called the plaintiff's attention to the fact that he, this defendant, had been made the sole grantee therein, and the plaintiff then stated to him, as the fact was and is, that he, the said plaintiff, had caused the said Isaac Peed to make said conveyances of said real estate to this defendant as sole grantee thereof because he, the plaintiff, desired this defendant to hold the nominal title to all of said real estate procured of said Isaac Peed by the plaintiff and this defendant as aforesaid, and to execute to the plaintiff the note and mortgage sued on as an accommodation to him for short time in business; and this defendant alleges that then and there the said plaintiff stated and represented to this defendant that he desired this defendant to make and deliver to him, the plaintiff, the note and mortgage sued on in this case as a matter of business accommodation, to the end that he, the plaintiff, might use said note and mortgage as collateral security in obtaining money to start a bank with, and they should be returned to this defendant before maturity by the said plaintiff, at which time the plaintiff would take a conveyance for his part of said real estate; and the defend-

ant says that same were executed and delivered by him to the plaintiff wholly without any consideration whatever, and as a mere matter of temporary business accomdation as aforesaid.

"3. This defendant alleges that said note and mortgage sued on are, and ever have been, wholly without any consideration whatever; that no consideration therefor ever moved from the plaintiff to the defendant therefor.

"4. That on or about the 27th day of November, 1888, the said plaintiff received of this defendant ten promissory notes made by third parties to this defendant for collection, agreeing with this defendant at the time to account to him therefor and for the preceeds thereof, which said promissory notes and the interest thereon now amount to fully $1,000; and that the said plaintiff, before the commencement of this case, collected said promissory notes, and wrongfully and unlawfully converted the proceeds thereof to his own use and benefit, and now refuses, and at the beginning of this case did refuse, to account for or pay over the proceeds of said promissory notes to this defendant, although this defendant has frequently demanded of him to do so. Wherefore this defendant says there is, and was at the commencement of this case, due and owing to him from said plaintiff on account of said notes and their proceeds by collections the sum of $1,000, with ten per cent interest thereon from said last named date, for which, with interest, he prays judgment against the plaintiff.

"5. That on or about the 15th day of April, 1889, he sold and conveyed to one Richard Colgraves a tract of real estate in Nebraska for the sum of $1,200, the said plaintiff transacting the business for him, and took in payment therefor the promissory note of said Richard Colgraves; that the said plaintiff, in transacting the business, wrongfully and without authority, took said note payable to himself and not to this defendant, with ten per cent interest per annum thereon, and has collected the same and applied

it to his own use and benefit, whereby he became and was indebted to this defendant in the sum of $1,500, which is, and was at the commencement of this suit, due and unpaid, and for which sum, with interest thereon, this defendant prays judgment against the plaintiff.

"6. That the plaintiff is indebted to him in the sum of $1,300, with seven per cent interest thereon from the 14th day of July, 1887, for and on account of certain real estate situate in the old town of Newman Grove, Shell Creek precinct, Madison county, Nebraska, sold and conveyed by this defendant unto the plaintiff on or about the 14th day of July, 1887, at the instance and request of the plaintiff, which said real estate was then and is now of the actual value of $1,300, and which sum, with interest aforesaid, the said plaintiff then and there undertook and promised to pay to this defendant, but has hitherto wholly failed and neglected, and still fails and neglects, to pay, though the same is long past due, and is still the property of this defendant.

"7. That each and all the matters and things herein pleaded arise out of the contract and transactions pleaded and set forth in the petition in this case, and are connected with the subject of this action.

"8. Wherefore this defendant prays judgment against the plaintiff for the sum of $3,800, with interest and costs of suit."

Whereupon the plaintiff moved to strike out of the answer the following:

1. "And which was worth at wholesale prices at said time not to exceed the sum of $2,787, as the said plaintiff then and there well knew. Said stock of merchandise was at said time stored in a store-room, securely boxed and packed, and secure from examination or inspection by this defendant, except a few hundred dollars' worth of the best part thereof, which was displayed on the shelves of said store-room, and could be examined. Said stock of merchandise had been traded for by the plaintiff at Rising City, Ne-

braska, in the month of May, 1887, and at said time a pretended invoice of them had been made at their alleged wholesale value by some one to this defendant unknown, at the instance and request of the said plaintiff, which pretended invoice was wholly false, fraudulent, and untrue, and greatly in excess of the actual wholesale value of said merchandise, as the said plaintiff at the time of the transactions hereinafter stated and alleged well knew. That on or about the said 14th day of July, 1887, the said plaintiff began negotiating with this defendant for the sale to him of the said stock of merchandise, and then and there, for that purpose and to that end, falsely, fraudulently, and well knowing the same to be untrue, represented and stated to this defendant that said stock of merchandise was a first-class, fresh, A No. 1 stock of merchandise, free in all respects from any defects or impairments; that it had been purchased at wholesale less than a year prior to that time, and that he, the said plaintiff, would warrant the same in all respects as being a good, fresh, A No. 1 stock of merchandise; that all of said merchandise in boxes was as good as that displayed on the shelves, and that the latter was a fair sample of the former; and that he would warrant and guaranty to this defendant the correctness in all respects of said pretended invoice of said stock of merchandise, which said invoice he then exhibited to this defendant, showing said stock of merchandise to be of the wholesale value of $8,808.84, and stating and representing at the time to this defendant, fraudulently and falsely, and well knowing the same to be false and untrue, for the purpose of inducing this defendant to purchase said stock of merchandise, that said invoice was in all respects true and correct and genuine, and fairly represented the wholesale value of said stock of merchandise; that at said time that part of said stock of merchandise which was displayed on the shelves of said store building was the best part thereof, and was so displayed by the procurement of the plaintiff

to mislead this defendant, and induce him to believe that the part thereof in boxes was of the same quality and value; that, relying upon the truthfulness of the said several representations, statements, warranties, and guaranties so made to him as aforesaid by the plaintiff, and believing them to be true, and believing said part of merchandise in boxes was of the same quality and value as that part thereof displayed on the shelves of said store building," beginning in line 14 and ending in line 61 of said answer.

2. "Was induced thereby to purchase and," in line 62.

3. "The sum which the plaintiff had so falsely and fraudulently represented and stated to this defendant that said stock of merchandise was worth at wholesale value," in lines 64 to 66.

4. "That this defendant would not have purchased of said plaintiff said stock of merchandise, or made said payments or given said promissory notes, but for said false and fraudulent representations, statements, warranties, and guaranties of said plaintiff so made to him by said plaintiff as aforesaid, which he relied on and believed to be true at the time. This defendant alleges and charges the fact to be that each and all of said representations, statements, warranties, and guaranties so made to him by the plaintiff as aforesaid were when made and are now wholly false and untrue and fraudulent, and were known by the said plaintiff to be false, fraudulent, and untrue when so made, and they were made by the plaintiff for the sole purpose of misleading and defrauding this defendant into purchasing said stock of merchandise, and he was thereby induced to make such purchase and payments and give said promissory notes by reason thereof; that in truth and in fact the said stock of merchandise was not a first-class, fresh, A No. 1 stock of merchandise, and was not free in all respects from defects or impairments; but on the contrary the same was rotten, old, shelf-worn, unsalable, and a condemned stock of merchandise, and did not have mer-

chantable value to exceed the sum of $2,787, as the plaintiff then and there well knew. That said stock of merchandise had been purchased many years prior to the 14th day of July, 1887, and consisted of condemned, defective, and unsalable remnants and refuse articles of merchandise, as said plaintiff at the time well knew; that said pretended invoice was not a true, correct, or honest invoice of said stock of merchandise, or the wholesale value thereof, as said plaintiff then and there well knew, and the goods in boxes were not of the quality or the value of those displayed on the shelves, but were much inferior and of but little value, all of which was to the plaintiff well known and to this defendant unknown at the time of the making of said contract of purchase," in lines 72 to 104.

5. "Designedly and fraudulently," in line 107.

6. "Fraudulently and designedly," in line 109.

7. "Discovered the said fraud that had been practiced on him as aforesaid by the plaintiff, and annulled the said contract of purchase of said stock of merchandise, and he," in lines 116, 117, and 118.

8. "And in consideration thereof," in line 119.

Because the same are redundant, scandalous, and irrelevant. Which motion was sustained, and this is the first error assigned.

We think the court erred in sustaining the motion. The matter set forth in the answer is a part of the transaction set up as a defense. Under the Code system of pleading it is not necessary to state a cause of action or defense in any particular form. The facts are to be stated. All that the law requires is that there shall be a cause of action or defense. It looks at the real rights of the parties and aims at the protection and enforcement of such rights. In the case at bar the defendant set up the whole transaction by which he claims that he was defrauded. This he had a right to do, and the court should not have stricken out a part of his defense. By doing so it

destroyed the whole. The court also erred in withdrawing certain matters from the jury; but it is unnecessary to discuss that branch of the case. As the defendant below was deprived of his defense, there must be a new trial. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

ROBERT KYD, SHERIFF, V. GAGE COUNTY.

FILED OCTOBER 24, 1893. No. 6434.

Sheriffs: COMPENSATION OF JAILER: COUNTIES. The sheriff is *ex officio* jailer of his county. He may, if he so elect, appoint a jailer who shall be a deputy, and take the oath required by law. The jailer is not paid a salary, but is allowed for the board and care of prisoners actually confined in the jail, and "where there are prisoners confined in the county jail, one dollar and fifty cents per day," to be paid by the county.

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

Alfred Hazlett and *L. M. Pemberton*, for plaintiff in error.

R. W. Sabin, contra.

MAXWELL, C. J.

This is an action upon an account. The plaintiff alleges in his petition that he is now and has been the duly elected and qualified sheriff of said defendant since January 7, 1892, and that the said defendant is a corporation under the laws of Nebraska, having a population of over 25,000 people; that the defendant is indebted to plaintiff in the

sum of $3,096.93, with interest thereon at the rate of — per cent per annum from the —— day of ———, A. D. 1893, as money due and unpaid on a certain account, a true copy of which said account is attached, the said itemized account being for moneys due this plaintiff from said defendant for fees due him as sheriff of Gage county, Nebraska, for moneys advanced for transporting prisoners, and for board of prisoners at the request of the defendant; that said account sued on in this action was disallowed in part, as shown by the county clerk's transcript, from which disallowance the plaintiff has appealed according to law. No part of said account has been paid, and there is now due thereon from defendant to plaintiff the said sum of $3,096.93, with interest as above set forth, for which, with costs of suit, plaintiff asks judgment against said defendant.

To this petition the county filed an answer as follows:

"Now comes the said defendant, and for answer to plaintiff's petition herein alleges:

"1. It admits that the plaintiff is the duly elected sheriff of said defendant since January 7, 1892, and that said defendant is a corporation having a population of over 25,000 people.

"2. Defendant admits that that portion of plaintiff's bill, as shown by the petition and the bills and record of the proceedings of the board of supervisors attached thereto, marked 'Custody of Prisoner,' was wholly disallowed and rejected by the board of supervisors at their regular session, as shown in plaintiff's petition, amounting to the sum of $538.50.

"3. Defendant alleges that the sum of $538.50 was allowed to Robert R. Kyd, the son of plaintiff, for the same period of time as jailer of said county, with plaintiff's knowledge and consent, and that said plaintiff is estopped from claiming the same thing for himself.

"Wherefore defendant asks that said action be dismissed at plaintiff's costs."

There is also a transcript of the record containing itemized accounts and the report of the board of supervisors, as follows:

"The committee on settlement with county officers reported and recommended the allowance of certain claims, among which were the following:

16. Robert Kyd, sheriff's fees and charges, third quarter '92 ..... $297 90
17. Robert Kyd, sheriff's fees and charges, fourth quarter '92..... 715 35
18. Robert Kyd, sheriff's fees and charges, first quarter '93 ..... 1,174 76
19. Robert Kyd, sheriff's fees and charges, second quarter '93 ..... 908 92

"It was moved by Supervisor Cully to adopt the report of the committee. It was moved by Supervisor Brown to amend by adopting the report with the exception of certain claims for discount. The amendment carried, and the question as amended carried.

"FRIDAY, July 14, 1893.

"It was moved by Supervisor Spencer that the county attorney be instructed to look over the bills allowed yesterday by the committee on settlement with county officers, and that he ascertain and report to this board if he finds, in his judgment, that there are any claims allowed which are not proper and legal. Carried.

"It was moved by Supervisor McClun that that part of the report of the committee on settlement with county officers relating to fees and salaries of county officers, deputies, and clerks, which were adopted yesterday, be reconsidered. Carried.

"It was moved by Supervisor McClun to refer those claims back to the committee on settlement with county officers for correction in accordance with the opinion of the county attorney. Carried.

"The committee on settlement with county officers made the following supplemental report:

"'We have examined the claims of officers, deputies, and clerks referred to us, and would recommend as follows: That the charge by Robert Kyd, sheriff, in his several bills for the custody of prisoners be disallowed, as follows: For custody of prisoners third quarter of 1892, $129; for same in fourth quarter of 1892, $138; for same in first quarter of 1893, $135; for same in second quarter of 1893, $136.50; and we further recommend that his bills be allowed at the following amounts: No. 16, at $168.90; No. 17, at $577.35; No. 18, at $1,039.76; No. 19, at $772.42.'

"On motion the report of the committee was adopted."

The principal question involved is the right of the plaintiff in error to recover as jailer.

Section 42, chapter 28, Compiled Statutes provides: "That in counties having over 25,000 inhabitants the county treasurer shall receive the sum of three thousand ($3,000) per annum, and shall be furnished by the county commissioners, the necessary clerks or assistants, whose combined salary shall not exceed the sum of two thousand four hundred ($2,400) dollars per annum. The sheriff shall receive the sum of two thousand five hundred ($2,500) dollars per annum, also the necessary jail guard and one deputy, and the salary of such deputy shall be nine hundred ($900) dollars per annum."

The sheriff is invested with the general control of the jail of his county, and is required by statute to visit it and examine into the condition of each prisoner at least once in each month and once during each term of district court. He is not required to act as jailer, however, unless he elect to act as such in person. He may appoint a deputy, who is required to take the necessary oath before entering upon the duties of his office. The county board of each county is invested with the general supervision of the jails, subject, however, to the rules and regulations prescribed by the

district court. Taking these several provisions together, we find no authority for the allowance of a salary to either the sheriff or the deputy as jailer. The jailer is allowed compensation for boarding and care of prisoners and for fuel, lights, washing, and clothing necessary for the comfort of state prisoners. The county board of each county is required to provide suitable means for warming the jail and its cells or apartments, frames and sacks for beds, night buckets, and permanent fixtures and repairs as may be prescribed by the district judge. The sheriff or jailer is to be paid a reasonable compensation for the board of prisoners committed to the county jail, and no discrimination is to be made between those committed for violation of the criminal laws of the state and the penal ordinances of the city, except that the city will be liable to the county for persons imprisoned under its ordinances. (*County of Douglas v. Coburn*, 34 Neb., 351.) Where there are prisoners confined in the county jail he is entitled to one dollar and fifty cents per day, to be paid by the county. As no allowance was made for this service in the court below, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

GERMAN-AMERICAN INSURANCE COMPANY OF NEW YORK V. JOHN A. BUCKSTAFF.

FILED OCTOBER 24, 1893. No. 4146.

1. **Oral Agreements of Attorneys: ARBITRATION: EVIDENCE: PRACTICE.** Oral agreements of attorneys, entered into out of court, to submit matters in suit to arbitration will not be enforced when objection is made thereto. The only competent proof to establish an agreement made by an attorney in regard

to the disposition of a cause is the evidence of the attorney himself, his written agreement signed and filed with the clerk, or an entry thereof upon the records of the court.

MAXWELL, C.J., dissenting. The policy contains a provision for the appointment of arbitrators to determine the amount of the loss. Under this provision arbitrators were appointed by each of the parties, who examined the property and made a report as to the amount of the loss. The appointment was authorized by the policy, and did not depend for its validity on the oral agreement of the attorneys. In my view, therefore, the point decided is not applicable to the facts.

2. **Insurance**: TRIAL: EVIDENCE OF ARBITRATION: INSTRUCTIONS. Where there is no competent evidence of an agreement of the parties to an action to submit their matters of difference to arbitrators, it is error to submit the question of an award to the jury.

3. ———: BUILDING VACANT OR UNOCCUPIED: QUESTION OF FACT: INSTRUCTIONS. Whether a building covered by a policy of insurance is, or is not, vacant and unoccupied is a question of fact to be determined by the jury under proper instructions of the court.

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

The opinion contains a statement of facts.

Harwood, Ames & Kelly, for plaintiff in error:

There was no competent proof of submission to arbitrators. Evidence of the oral agreement entered into by counsel was incompetent. (Sec. 7, ch. 7, Comp. Stats., 1889.)

Chas. O. Whedon, contra, to sustain the proposition that the oral stipulation of the attorneys is binding, cited *Burnham v. Smith*, 11 Wis., 270.

Where parties have submitted matters of difference to arbitrators of their own selection, and an award has been made in pursuance of such submission, the award will be deemed binding until set aside. (*Tynan v. Tate*, 3 Neb., 388.)

NORVAL, J.

The defendant in error on and prior to the 21st day of October, 1887, was the owner of the Metropolitan Hotel building, situated on lots 16, 17, and 18, in block 45, in the city of Lincoln, upon which there were in force policies of insurance against loss by fire in the following named companies and amounts: The German-American Insurance Company, $1,500; The Liverpool & London & Globe Insurance Company, $3,000, and the Fireman's Fund Insurance Company, $1,500. On the night of October 21st a fire occurred, and the building covered by the policies was partially destroyed. Proofs of loss were duly made by the insured, and the damages not being paid, the defendant in error brought suit against each of the companies. The policy in suit contained the following stipulations:

"1. No liability shall exist under this policy for loss or damage in or on any vacant or unoccupied building, unless consent for such vacancy or non-occupancy be indorsed hereon.

"2. If the risk be increased by any means without the consent of this company written hereon, this policy shall be void.

"3. In no case shall the claim be for a greater sum than the actual damage to, or cash value of, the property at the time of the fire, nor shall the assured be entitled to recover of this company any greater proportion of the loss or damage than the amount hereby insured bears to the whole sum insured on said property, whether such other insurance be by specific or by general or floating policies, and without reference to the solvency or liability of other insurers."

The defendant answered, setting up the above conditions of the policy, and alleged, in substance, that at and prior to the time of the fire the building was vacant and unoccupied without the knowledge and consent of the defendant;

that when the policy was issued the building was used as a hotel, and that shortly before the loss it ceased to be used for that purpose, and without the knowledge or consent of the company was used for the purpose of storing furniture and articles of personal property, including bedticks containing straw, hay, and other combustible materials, thereby increasing the risk. The answer further avers that the total damage to the building by reason of the fire did not exceed $1,500, and sets up the existence, at the time of the fire, of a policy on this building for $1,500 issued by the Fireman's Fund Insurance Company, and also a policy for $3,000 issued by the Liverpool & London & Globe Insurance Company.

The plaintiff for reply admits the existence of the two policies mentioned in the answer, and denies all other allegations contained in the answer.

Subsequently the plaintiff filed a supplemental petition alleging, in effect, that since the commencement of the action the matters in controversy had been, by agreement of parties, submitted to John Fraas and James Tyler, as arbitrators, to ascertain and adjust the loss, who thereupon adjusted the damages and made their report in writing, a copy of which is set out in the answer as follows:

"LINCOLN, NEB., March 7, 1889.

"The undersigned, being appointed arbitrators to adjust the loss caused by fire on the veneered building on the corner of O and Eighth streets, owned by J. A. Buckstaff, find the following amount of damages: $2,981.50.

"JOHN FRAAS.
"JAMES TYLER."

The plaintiff alleges that the defendant has not paid the amount of the award, nor any part thereof.

The defendant answered the supplemental petition by a general denial.

There was a trial to a jury, with verdict for the plaintiff in the sum of $847.41.

On the trial the plaintiff put in evidence the so-called award. The defendant objected to its being received in evidence for the reason that the same is incompetent and irrelevant, which objection was overruled, and an exception taken.

Counsel for plaintiff in error contend that there was no arbitration, and no competent evidence was introduced on the trial to establish an agreement to arbitrate. The only proof tending to show a submission to arbitration was the testimony of the plaintiff Buckstaff, and that of Mr. Whedon, one of his attorneys. The testimony of Mr. Whedon is to the effect that, during the pendency of the suit, he entered into an oral agreement with Mr. Ames, one of the attorneys for the defendant, for the submission of the matters in dispute to arbitrators, by the terms of which each party was to select an arbitrator, and the two thus chosen were to ascertain the amount of damages done to the building by the fire, and if unable to agree they were authorized to choose a third person to act with them; that pursuant to such agreement the cause was continued over a term of court; and that John Fraas and James Tyler were selected as arbitrators, who made report as above set forth.

Mr. Buckstaff's testimony touching the matter of arbitration is as follows:

Q. Now what occurred? What did you do in respect to adjusting this loss, the arbitration?

A. Mr. Ames and I had a conversation with regard to that. He said he didn't want any lawsuit.

Q. State the facts. What was done about submitting this to arbitration?

A. The case was to be tried. Mr. Ames and I had a talk over the matter, and he said he thought we could settle it without a lawsuit, and they would appoint a man and I could appoint a man, and they could go down there and see what the damage was, and he thought we could fix it up without a lawsuit; get the facts in the case, how much

the damage was. I selected Mr. Fraas, and Mr. Ames selected Mr. Tyler, an architect here. They went down there and figured on the loss and reported it to Mr. Whedon and Mr. Ames.

The testimony of Mr. Whedon and the plaintiff was objected to, as incompetent, immaterial, and irrelevant, and not the best evidence, and not the method of proof prescribed by the statute. Exception was taken by the defendant to the overruling of the objection.

It will be observed that the alleged agreement to arbitrate was not reduced to writing, nor was such an agreement entered upon the records of the court. The question is, therefore, squarely presented, whether the oral promise of the attorney of the plaintiff in error to arbitrate the matters in litigation could be proved by the testimony of the person who heard the attorney make the agreement.

Section 7, chapter 7, Compiled Statutes, provides that "An attorney or counselor has power: I. To execute, in the name of his client, a bond for an appeal, certiorari, writ of error, or any other paper necessary and proper for the prosecution of a suit already commenced. II. To bind his client by his agreement in respect to any proceeding within the scope of his proper duties and powers; but no evidence of any such agreement is receivable, except the statement of the attorney himself, his written agreement signed and filed with the clerk, or an entry thereof upon the records of the court," etc. The language of this section is unambiguous, and its meaning is too plain to admit of more than one construction. A client is only bound by the oral stipulations of his attorney made out of court, when the same are established by the testimony of the attorney making the same. The purpose and object of the legislature in adopting the above section was to relieve the courts from enforcing oral agreements of attorneys entered into out of court, in regard to a matter pending in court, in all cases except where the contract is established by the evidence of the attorney of the

client against whom it is sought to be enforced. The language used by the legislature is: "No evidence of any such agreement is receivable except the statements of the attorney himself." Without doing violence to the language employed it cannot be construed to mean that an agreement made by an attorney can be established by the testimony of others who were present and heard it. To hold that it can would be contrary to the spirit as well as the letter of the statute. This court has more than once decided that verbal agreements entered into between attorneys out of court relating to matters in litigation will not be recognized nor enforced. (*Rich v. State National Bank*, 7 Neb., 201; *Haylen v. Missouri P. R. Co.*, 28 Neb., 660.)

The testimony referred to was incompetent to establish an agreement to arbitrate, and the alleged award should not have been received in evidence. Its admission could not have been otherwise than prejudicial to the defendant on the question of the amount of damages that plaintiff sustained. The defendant introduced on the trial the proofs of loss, made, signed, and sworn to by the plaintiff recently after the fire, in which the total loss or damage was stated to be $2,500, and apportioned between the different companies carrying the risk as follows: Fireman's Fund, $625; Liverpool & London & Globe, $1,250; and German-American, $625. The defendant further put in evidence a letter written by Buckstaff to the company, transmitting the proof of loss, as well as his sworn statement furnished to an agent of the company shortly after the fire, in each of which the total loss was placed at $2,500. The plaintiff at the trial testified that the entire damage to the building was $3,500. He called other persons as witnesses who estimated the total damages at $3,000. It is doubtless true that Mr. Buckstaff was not precluded from proving that his loss was greater than he had stated it to be in his letter, proofs of loss, and sworn statement. It was the province of the jury to determine from the entire testimony before

them the amount of damages to the building. In view of the conflicting character of the evidence upon this issue, the introduction of the report of the arbitrators, in which the damages were placed at $2,981.50, may have led the jury to adopt the amount stated by plaintiff's witnesses, rather than the sum admitted by Mr. Buckstaff to be his loss before suit was commenced.

Where parties, by agreement, submit their matters of difference to arbitrators selected by themselves, the award made within the range of their appointment is binding upon the parties. The validity of an award rests upon an agreement to arbitrate, and the selection of arbitrators in pursuance of said agreement. The validity of the alleged award introduced in evidence depends upon an alleged oral agreement entered into out of court between the attorneys of the respective parties, and such agreement, as we have already shown, at least to our own satisfaction, has no binding force.

We have not failed to observe the provisions in the policy in suit relating to arbitration. The policy stipulates, in effect, that in case the amount of loss is not agreed to, upon the written request of either party, the loss shall be appraised by disinterested and competent persons, one to be selected by the company, and the other by the assured, and in case of their failure to agree, at the request of either party, the two so chosen may select a third person to act with them, and the award of any two in writing to be conclusive as to the amount of damages, but that neither the appraisal nor agreement to arbitrate should be construed as evidence of the validity of the policy, or of the company's liability thereon. The policy contains the further clause "that no suit or action against the company for the recovery of any claim, by virtue of the policy, shall be sustained in any court of law or chancery until after an award shall have been obtained, fixing the amount of such claim in the manner above provided," etc. With no degree of success

can it be maintained that the above terms of the policy give validity or force to the award in question. No arbitrators were chosen, nor has there ever been any submission of the question of damages to arbitration under the conditions of the policy. This is manifest from both the pleadings and evidence. The supplemental petition sets up that about the last of February, or the first of March, 1889, an agreement was entered into between the plaintiff and defendant whereby the case was continued over the February, 1889, term of court, and that each party should select one person as arbitrator, and that the person so chosen should ascertain, determine and state the amount of loss sustained by reason of the fire, and that in pursuance of said agreement the cause was continued, arbitrators were selected, and they made their award in writing. There is no allegation in the pleadings that the submission to arbitrators was by virtue of the conditions of the policy. All the evidence shows that the right to arbitrate depends solely upon the oral agreement of the attorneys heretofore mentioned.

Upon the subject of arbitration the court gave the following instruction, to which the defendant excepted at the time:

"In this case, evidence having been admitted before you touching the alleged award made by the persons selected by the plaintiff's and defendant's counsel to ascertain the extent of plaintiff's damage, you are instructed as a matter of law that an award made in pursuance of an agreement between parties touching their differences in litigation, where the parties have submitted their matters of difference to arbitrators of their own selection, and when the arbitrators act within the scope of their authority, becomes the act of the parties, and is decisive of their rights; and if you find from the evidence in this case that the defendant insurance company authorized its attorneys to select James Tyler as an arbitrator to act on behalf of defendant in appraising the damage done to the plaintiff's building, and

that said arbitrator proceeded to act in pursuance of such appointment and selection, in conjunction with the person selected by the plaintiff to perform a like service and duty, and made with such person a fair estimate of plaintiff's damage, that defendant will be estopped thereby from disputing the correctness of such award, or the authority of such arbitrators to make and return the same; and that said award, when regularly made and returned, will be binding upon the parties to this action touching all matters embraced therein."

There being no competent evidence that the defendant agreed to submit the matters in litigation to arbitration, that question should not have been submitted to the jury to pass upon. In view of the evidence before the jury, no verdict, other than the one returned, could have been found without disregarding this instruction.

Complaint is made of the giving of the third paragraph of the court's charge to the jury, which reads as follows:

"3. If you find from the evidence that plaintiff did not abandon the property covered by said policy of insurance, and that the same was not vacant at the time of said fire, your verdict will be in favor of plaintiff for such damage as you may find from the evidence he is entitled to recover."

The defendant submitted a request to charge, which embraced the converse of the proposition stated in the foregoing, which request was refused. It is contended that the third instruction is faulty, in that it omitted to define the meaning of the term "vacant and unoccupied" as used in the policy. The interpretation of the provisions of a policy of insurance, like those of other contracts, is for the court, and not for the jury. So it was a question of law for the court to determine what was meant by the above term "vacant and unoccupied" in the policy in suit; and whether or not the building was vacant and unoccupied was a question of fact for the jury to pass upon under

proper instructions of the court. If the instruction objected to was the only one given by the court upon that subject, then its giving would be reversible error.

The fourth instruction is as follows:

"4. You are instructed that the policy of insurance provides that if the premises insured become unoccupied without the assent of the defendant company indorsed thereon, then the policy should become void; and if you believe from the evidence that, at the time of the fire, the premises were wholly unoccupied without the assent of the defendant, the policy had become invalid, and you should find for the defendant. In determining, under the evidence, whether the premises became unoccupied before the fire and were vacant at the time of the fire, you are instructed as a matter of law that, when the property insured is a hotel, the occupancy required under such a policy as this is such occupancy as ordinarily attends a hotel. The word 'unoccupied' is to be construed in its ordinary and popular sense, and if you believe, from the evidence, that, after the making of the policy, the insured or his tenant had moved from the building in controversy, and entirely ceased to occupy the same at the time of the fire, then the policy became void. However, if you believe from the evidence that such vacancy was temporary only, and was occasioned by the fact that plaintiff's tenant was, at the time of the fire, or a short time before, moving from said plaintiff's building, and had not removed all his goods and furniture when the fire occurred, such removal would not render the premises vacant and unoccupied within the meaning of the policy of insurance, and your verdict in such case should be in favor of the plaintiff."

We are of the opinion that the third and fourth instructions, construed together, as they should be, fairly submitted to the jury the question whether the plaintiff had violated the terms of the policy.

As there must be a new trial, it will not be necessary to discuss the evidence, or to pass upon its sufficiency to sustain the verdict. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY v. JOHN A. BUCKSTAFF.

FILED OCTOBER 24, 1893. No. 4145.

1. **Review:** TRIAL TO COURT: ADMISSION OF INCOMPETENT TESTIMONY. A cause tried without a jury will not be reversed for the admission of incompetent testimony.
2. **Insurance:** BUILDING VACANT OR UNOCCUPIED. A policy of insurance provided that it should be void if the premises became vacant or unoccupied without the written consent of the company should be indorsed. The tenant occupying the insured building partially moved out the day before the fire, leaving in the building a portion of his furniture. *Held*, That the premises were not vacant or unoccupied within the meaning of the policy.

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

The facts are stated in the opinion.

Harwood, Ames & Kelly, for plaintiff in error, contending the building was vacant or unoccupied within the meaning of the policy and that the company is not liable, cited: *Farmers Ins. Co. v. Wells*, 42 O. St., 519; *American Ins. Co. v. Padfield*, 78 Ill., 167; *Ashworth v. Builders Mutual Fire Co.*, 112 Mass., 422; *Corrigan v. Connecticut Fire Ins. Co.*, 122 Mass., 298; *Ætna Ins. Co. v. Meyers*, 63 Ind., 238; *Cook v. Continental Ins. Co.*, 70 Mo., 610;

Dennison v. Phœnix Ins. Co., 52 Ia., 457; *McClure v. Watertown Fire Ins. Co.*, 90 Pa. St., 277; *Keith v. Quincy Mutual Fire Ins. Co.*, 10 Allen [Mass.], 228.

Chas. O. Whedon, contra.

NORVAL, J.

This is an action upon a fire insurance policy issued by the plaintiff in error upon the same building covered by the policy sued on in the case of *German-American Insurance Co. v. Buckstaff*, 38 Neb., 135, decided herewith. The stipulations in the policies are substantially alike, and the issues presented by the pleadings in the two cases are the same. By agreement of parties this cause was submitted to the trial court on the evidence taken in that suit. There was judgment for plaintiff in the sum of $1,694.82.

What is said in the opinion in the case above referred to bearing upon the charge of the court does not apply to the case before us, nor will a cause tried to the court be reversed for the admission of incompetent testimony. (*Enyeart v. Davis*, 17 Neb., 228; *Willard v. Foster*, 24 Neb., 213.)

It is claimed that the building was vacant and unoccupied without the consent of the company. The proof shows that when the policy was written, and from thence until about the time of the loss, the building was occupied and used as a hotel by one William Splain, a tenant of the plaintiff. The hotel was closed to the public on October 20th, and the tenant moved out on that day or the following, and the building thereby became unoccupied, except a portion of the furniture and other personal property remained therein at the time of the fire, which occurred on the night of October 21st. As to just what amount of property was in the building when it burned the evidence is conflicting. That introduced by the plaintiff tends to prove that a considerable portion yet remained, while there is other evidence

which goes to show that all the personal effects belonging to the tenant were removed, except a table, some broken bedsteads, a few dishes, and a lot of broken crockery. There was also evidence to the effect that the tenant had paid up his rent to November 1st, while there is to be found other testimony contradicting this, and tending to show that Mr. Splain was in default in the payment of rent, and that a few days before the loss he was notified by the plaintiff to quit the premises. The plaintiff had not taken possession of the building, nor had he received the keys therefor from the tenant. Of course it was competent for the trial court to pass upon the conflicting evidence and determine what should be believed and what rejected. The finding being in favor of the plaintiff, we must regard as established every fact which the testimony in his favor tends to prove.

Is the company relieved from liability for the loss by reason of the condition in the policy declaring the policy void if the insured premises, during the term of the insurance, should become vacant or unoccupied without notice to, and consent of, the company in writing?

In *Springfield Fire & Marine Ins. Co. v. McLimans*, 28 Neb., 846, it was held that a temporary vacancy of a building will not defeat a recovery upon a policy. And there can be no doubt, both upon reason and authority, that such is the rule. Some of the authorities hold that the vacancy of a building during the time necessary for the changing of tenants of the assured will be fatal under the ordinary terms and conditions in a fire insurance policy. But we are unwilling to go that far. It seems to the writer that such a temporary vacancy was a contingency contemplated by the parties, and against which the provision was not intended to apply. Many recent authorities so hold.

In *Hotchkiss v. Phœnix Insurance Co.*, 76 Wis., 269, Lyon, J., in construing the term "vacant or unoccupied" in an insurance policy, observes: "Under certain circumstances

premises may be vacant or unoccupied, when under other circumstances premises in like situation may not be so within the meaning of that term in insurance policies. Thus, if one insures his dwelling house, described in the policy as occupied by himself as his residence, and moves out of it, leaving no person in the occupation thereof, it thereby becomes vacant or unoccupied. But if he insures it as a tenement house, or as occupied by a tenant, it may fairly be presumed, nothing appearing to the contrary, that the parties to the contract of insurance contemplated that the tenant was liable to leave the premises, and that more or less time might elapse before the owner could procure another tenant to occupy them, and hence that the parties did not understand that the house should be considered vacant and the policy forfeited or suspended, according to its terms, immediately upon the tenant's leaving it. This distinction is made in some of the cases,—in *Lockwood v. Middlesex Mutual Assurance Co.*, 47 Conn., 561; *Whitney v. Black River Ins. Co.*, 9 Hun [N. Y.], 39; 1 Wood, Ins., sec. 91, pp. 208–10, and cases cited."

The following sustain the above doctrine: *Traders Ins. Co. v. Race*, 29 N. E. Rep. [Ill.], 846; *Home Ins. Co. v. Wood*, 47 Kan., 521; *Doud v. Citizens Ins. Co.*, 21 Atl. Rep., 505; *Roe v. Dwelling House Ins. Co.*, 23 Atl., Rep. [Pa.], 718; *American Central Ins. Co. v. Clarey*, 28 Ill. App., 195; *City Planing & Shingle Mill Co. v. Merchants, Manufacturers & Citizens Mutual Ins. Co.*, 40 N. W. Rep. [Mich.], 777.

We are satisfied that the trial court was justified in finding that the premises were not "vacant and unoccupied" within the meaning of that term in the policy. The judgment is

AFFIRMED.

FIREMAN'S FUND INSURANCE COMPANY OF CALIFORNIA v. JOHN A. BUCKSTAFF.

FILED OCTOBER 24, 1893. No. 4147.

1. **Insurance: PROVISION OF POLICY LIMITING TIME TO COMMENCE ACTION.** An insurance policy contained a condition that no action thereon should be maintained unless brought within six months after the occurrence of the fire, and by another clause it was stipulated that the loss should not become payable until sixty days after the proofs of loss are received by the company. *Held*, That a suit upon the policy may be brought within six months from the expiration of the sixty days.
2. **Sufficiency of Evidence.** *Held*, That the evidence is sufficient to sustain the judgment.

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

Harwood, Ames & Kelly, for plaintiff in error.

Chas. O. Whedon, contra:

The clause in the policy limiting the time to six months from date of fire within which suit should be commenced is not binding under the facts disclosed by the record. By the terms of the policy the loss was not payable until sixty days after the proofs of loss were received at Chicago, and as such proofs were not received until November 1, after the fire, the company was not bound to pay until after the expiration of the sixty days, and an action commenced before January 1 would have been prematurely brought, and the assured had until July in which to commence action. The action was commenced May 4, and was within the time limited by the policy. (2 Wood, Fire Insurance, sec. 436; *Mayor of New York v. Hamilton Fire Ins. Co.*, 39 N. Y., 45.)

NORVAL, J.

This record presents one question not raised, nor considered in the cases of the *German-American Ins. Co. v. Buckstaff*, 38 Neb., 135, and *Liverpool & London & Globe Ins. Co. v. Buckstaff*, 38 Neb., 146, and that is, whether the action is barred by the terms of the policy. One of the stipulations in the policy is as follows:

"It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustained in any court of law or chancery * * * unless such suit or action shall be commenced within six months after the occurrence of the fire by reason of which the claim for loss or damage is made; and should any suit or action be commenced against this company after the expiration of the aforesaid six months, lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitations to the contrary notwithstanding."

The policy also provides that the loss is not payable until sixty days after the proofs of loss have been received by the company at its office in Chicago, Illinois. It appears that such proofs were furnished November 3, 1887; that the fire occurred on the 21st day of October of the same year, and this action was begun on the 4th day of May, 1888.

When did the period of limitation commence to run? The identical question was before the court in *German Ins. Co. v. Fairbank*, 32 Neb., 750. It was there held that the limitation commenced to run from the time the loss is due and payable. Following that case, and the numerous authorities cited in the opinion, we must hold that the plaintiff's cause of action did not accrue until the expiration of sixty days after the proofs of loss were received by the company, and the action having been instituted within six

months after the expiration of this sixty days, the suit was not barred.

This case was decided in the district court upon the evidence adduced on the trial of the German-American Insurance Company against this defendant in error, and upon which the decision was based in the Liverpool & London & Globe Insurance Company case. For the reasons stated in the opinion filed herewith in the latter case, the same judgment will be entered in this.

JUDGMENT AFFIRMED.

FIRST NATIONAL BANK OF WYMORE, APPELLANT, V. JAMES D. MYERS ET AL., APPELLEES.

FILED NOVEMBER 8, 1893. No. 5250.

Fraudulent Conveyances: CONSIDERATION. In a creditor's bill to subject certain real estate of a debtor conveyed to third parties to the payment of a judgment upon the ground that there was no consideration, *held*, that a sufficient consideration was proved, and the deed would be sustained.

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

A. D. McCandless and *Samuel J. Tuttle*, for appellant.

Griggs, Rinaker & Bibb and *R. W. Sabin*, *contra*.

MAXWELL, C. J.

This is an action in the nature of a creditor's bill, to set aside certain deeds made by Myers and wife to Charles B. Holt. The allegations of the petition as ground for relief are as follows:

"That on the 17th day of April, A. D. 1890, and before the levy of the attachment and the rendition of a judgment in this case, the said James D. Myers and —— Myers, his wife, defendants, conveyed the following of the said above described property to one Charles B. Holt, to-wit: lot 9, in block 7, in the town of Odell; lot 7, in block 10, in first addition to the town of Odell; lot 7, in block 11, in first addition to the town of Odell; lots 5 and 6, in block 5, in second addition to the town of Odell; lots 4, 5, 6, and 7, in block 6, in the second addition to the town of Odell; and the west one-half of the northwest quarter and the northeast quarter of the northwest quarter of section 19, in town 1, range 6, except one acre in the southeast corner of the forty acres described above, sold to Frank J. Truxaw; that on the 27th day of November, 1889, and before the levy of the attachment and the rendition of the judgment in this case, said James D. Myers, and —— Myers, his wife, defendants, conveyed lot 4, in block 2, in the town of Odell, to August Hein without consideration; that on the 21st day of April, 1890, and before the levy of the attachment, and the rendition of the judgment in this case, said James D. Myers, and —— Myers, his wife, defendants, conveyed lot 8, in block 10, of the first addition to the town of Odell to the defendant John E. Armstrong without consideration." And the following is the prayer: "The plaintiff therefore prays that said conveyances from James D. Myers and wife to Charles B. Holt, and from James D. Myers and wife to John E. Armstrong, and James D. Myers and wife to Mrs. Anna Synovic, and from James D. Myers and wife to August Hein may be canceled, set aside, and held for naught, and said property, free from said incumbrances, be declared to be the property of the defendant James D. Myers; and the sheriff of said county may sell the same under said order of sale as upon execution, and apply the proceeds thereof in satisfaction of plaintiff's said judgment, interest,

and costs; that the priority of liens of this plaintiff and the defendants McKinney, Hundley & Walker and Sprague, Warner & Co. may be determined, and the plaintiff asks for such other and further relief as justice may require."

It is unnecessary to set forth the answers.

On the trial of the cause the court found the issues in favor of the defendants and dismissed the action, from which the plaintiff appeals.

The testimony tends to show that Myers and Holt had been quite intimately acquainted for fifty years or more, and seem to have been friends. Holt resides in Tioga county, New York, and Myers at Odell, in this state. In the year 1886, Holt sent to Myers the sum of $4,600 to invest for him, at eight per cent. A part of this money was loaned out in various sums, and a part seems to have been used by Myers himself. This seems to have been known to Holt, and was perfectly satisfactory to him. He seems to have had the utmost confidence in Myers, and there is nothing in this record tending to show that this confidence was misplaced. A son of Myers was a member of a mercantile firm, and the defendant guarantied certain debts of his son, and the attachments in this case were issued on such guarantied debts. Under the issues made by the pleadings the only question presented is, was there a consideration for the deeds in question? Upon this ground there is practically no dispute. The deeds were made in good faith to secure *bona fide* debts of Myers, and will be sustained. The case is argued in the appellant's brief upon points not involved in the issues, and they will not be considered. The judgment is right and it is

AFFIRMED.

CORDELIA A. BENSON v. JOHN DALY.

FILED NOVEMBER 8, 1893. No. 5223.

Boundary Lines: ACQUIESCENCE IN SURVEY: COMPROMISE AND SETTLEMENT. Where there is a dispute as to the exact boundary between the owners of adjoining lands, and a county surveyor establishes a line upon an actual survey of the lands, and both claimants participated in making and paying the expenses of the survey, which survey was acquiesced in for a considerable time afterwards, it will not be disturbed because a new survey, made some years afterwards, tends to show a mistake in the establishment of such line.

ERROR from the district court of Gage county. Tried below before APPELGET, J.

Griggs, Rinaker & Bibb, for plaintiff in error.

Hardy & Wasson, contra:

The parties having agreed that the corners were lost and to have the line surveyed, and acquiesced in the survey at the time and for two years thereafter, they are estopped from disputing the line thus agreed upon. The court will sustain an agreement that has been fully executed. (*Trussel v. Lewis*, 13 Neb., 418, 419; *Brown v. Caldwell*, 13 Am. Dec. [Pa.], 660; *McAfferty v. Conover*, 7 O. St., 99; *Joyce v. Williams*, 26 Mich., 332; *Smith v. Hamilton*, 20 Mich., 438; 2 Herman, Estoppel, sec. 1135.)

MAXWELL, C. J.

This action was brought in the district court of Gage county on a cause of action which is set forth in the petition as follows: "Defendants wrongfully, and with force, broke and entered upon the plaintiff's land, of which the plaintiff was then in possession, described as follows: 'The north half of the southeast quarter of section 33, town 2

north, range 8 east, in Gage county, Nebraska,' and then tore down a fence belonging to plaintiff, standing upon said land as a line fence, of the value of $50, and carried the same away, and converted it to their [defendants'] own use, and thereby prevented plaintiff from enjoying the use of said fence and adjoining lands." The answer is a general denial. On the trial of the cause the jury returned a verdict in favor of the defendant in error, plaintiff below, upon which judgment was rendered.

The testimony tends to show that the land in question is a part of the Otoe Indian reservation; that one Green, in the year 1883, entered the land now owned by the defendant in error, and that the plaintiff in error purchased the land owned by her about the same time. The testimony tends to show that the government surveys on the reservation are far from accurate, the lines being somewhat irregular and the corners frequently lost. Some time after the parties had purchased the land Green desired to construct a fence along the line between his land and the plaintiff in error. It was understood that this was temporarily erected until the county surveyor could be obtained to establish the true line. Some months afterwards the county surveyor was employed to establish the line between the parties. This he did, the husband of the plaintiff in error being present at the survey, and employed a chain carrier to assist in making the survey. He made some complaint about the line as established by the surveyor, but said if he had the quantity of land that his deed called for that he would be satisfied. The surveyor then ran a line across his land, and it was found that he had nearly an acre more than his deed called for. He then paid the surveyor his proportion of the expense of making the survey, although he claims that a portion of this money was paid for running a line across his land. One of the government corners of the land had been plowed up and destroyed, and there seemed to be great uncertainty as to its

actual location. Upon the survey being made, Green moved his fence onto the line as established by the surveyor, and a year or two afterwards sold and conveyed the land to the defendant in error, when a second surveyor was obtained on behalf of the plaintiff in error, and a new line established taking a portion of the defendant in error's land and the fence in dispute. In these matters it is shown that the husband acted as the agent of his wife, and the parties for a long while acquiesced in the line established by the first survey made by the county surveyor. We are satisfied that this survey, acquiesced in as it was for a considerable time, the exact boundary being unknown, was in effect a compromise and settlement of the controversy. There is no material dispute upon the question that that settlement was accepted by the parties for a time as the end of a controversy, and will be so regarded by the court. No injustice has been done to the plaintiff in error. She has more land than she purchased, and it is desirable that the controversy should be terminated. In our view, the verdict is the only one justified by the testimony and the judgment is

AFFIRMED.

W. C. POWELL v. G. F. BECKLEY.

FILED NOVEMBER 8, 1893. NO. 4802.

Landlord and Tenant: REPAIRS ON PREMISES: CONTRACTS. In an action by a tenant against his landlord for repairs made by him upon the leased premises he must show a contract of the landlord, express or implied, to pay for the same to entitle him to recover.

ERROR from the district court of Gage county. Tried below before APPELGET, J.

L. W. Colby and *L. M. Pemberton*, for plaintiff in error:

In the absence of an agreement to repair on the part of the landlord, the premises are hired in the condition in which they are at the time of the demise, and the rent is supposed to be arranged with reference to such condition. In such case, the landlord is under no obligation to repair, and the lessee, if he wishes any repairs, must make them at his own expense. (*McAlpin v. Powell*, 70 N. Y., 126; *Witte v. Matthews*, 52 N. Y., 512; *Foster v. Peyser*, 9 Cush. [Mass.], 242, 57 Am. Dec., 43; *Cole v. McKey*, 66 Wis., 500; *Wilkinson v. Clauson*, 29 Minn., 91, 93; *Krueger v. Ferrant*, 29 Minn., 385, 387; *Lynch v. Speed*, 15 Daly [N. Y.], 207, 4 N. Y. Sup., 556; *Mumford v. Brown*, 6 Cow. [N. Y.], 475, 16 Am. Dec., 440, and note.)

Hazlett & Le Hane, contra.

MAXWELL, C. J.

This is an action upon an account for repairs made by a tenant:

G. F. Beckley, Dr., Proprietor of the Pacific House.

Sept. 26,	To Thistlewait bill, fixing W. closet....	$7 00
Sept. 11,	To Hall's bill for painting.....	16 40
Sept. 11,	To material on garret	16 40
Sept. 11,	To labor on garret.....	6 00
Nov. 10,	To Hall's bill for painting.....	21 90
Nov. 10,	To Hall's bill, glass and putty.....	83
Nov. 19,	To fixing doors, 8, and hall.....	75
May 1, '89,	To railing on porch.....	28 00
May 1,	To railing on steps	2 00
Apr. 19,	To papering dining room	20 00
Apr. 4,	To wall paper, room 6.....	5 45
Apr. 4,	To hanging paper, room 6.....	6 00
Apr. 19,	To wall paper	8 25
Jan. 3,	To sewer pipe and plumber's bill.....	1 65

Jan. 3, To labor on sewer			$6 00
Nov. 10, To ceiling water closet			3 00
Nov. 10, To plastering			6 00
			$165 63
Jan. 3, Brought over, Dr			$165 63
Nov. 12, By cash, rent	$7 00		
Nov. 12, By cash, rent	16 52		
Nov. 12, By cash, rent	21 90		
Nov. 12, By cash, rent	83—		46 13
			$119 50

The defendant below sets up a defense as follows: "The defendant for answer to plaintiff's petition admits that on September 26 he was indebted to plaintiff for Thistlewait bill, fixing water closet, $7; for Hall's bill for painting, $16.40; on November 10 Hall's bill for painting, $21.90; and for glass and putty, 83 cents; but he avers that on November 12, 1888, the defendant paid said several sums in full, amounting to $43.13, and the same was settled between the plaintiff and defendant, and satisfied in full, by mutual agreement, by deducting from the rental then due and owing from plaintiff to defendant said sum of $46.13. The defendant further answering denies each and every other allegation in said petition contained."

On the trial of the cause the jury returned a verdict in favor of the defendant in error for $108.05, upon which judgment was rendered.

The testimony on behalf of the defendant in error tends to show that he leased the Pacific House in Gage county from the plaintiff in error by written lease for a term of years; that there was a collateral parol agreement that Powell should make repairs upon the house. Mr. Hazlett testifies:

Q. Now you may state if you know anything about the drawing up of the lease marked Exhibit "A" in this tes-

timony and what was said by and between the parties to said lease at the time of the signing of said written instrument, if you know, and state fully.

A. The parties were in my office prior to the date of this lease with reference thereto, but on the day it was signed Mr. Powell came into my office to have the lease executed and turned over, so they said. I had written the lease previous to this time for them, but for some reason it was not signed. They had taken it away with them, but brought it back the day it was executed into my office. It may be possible that at that time there were some insertions and interlineations made, but that I don't remember. There was considerable talk between these parties in my office the day this lease was executed, about the time Mr. Powell was going to sign the lease. I remember very distinctly of Mr. Beckley saying, "Well, I believe that this repair business should be set forth in that lease or ought to be in there," and Mr. Powell said to him at that time, it was not necessary. He says, "You go on and take that house, and if you do as you say you are going to do in the running of the house, and if you keep up your part and retain the house and pay the rent, I will see that the house is kept in good repair," or in substance that; and he says furthermore, at that time, "It is as much to my interest to keep up the house in repairs and for you to quit and turn the house over to me with a good trade that I could lease to some other person than to have the house run down; and at the end of two or three years it is worth more to me to keep the house in repair than if it wasn't." And the lease was signed.

The testimony of the defendant in error is to the same effect. The testimony on behalf of Mr. Powell conforms to his answer.

The court instructed the jury as follows:

"1. The court instructs you that this is an action brought by a tenant against his landlord for improvements and re-

pairs put upon and about the building while occupied by the tenant under the lease.

"2. The court further instructs you that the law of this case is that in the absence of contract to the contrary the law presumes that when one rents a building for a specific purpose that it shall be in proper condition and repair for the uses for which it is rented."

The second instruction is clearly wrong. In the absence of a contract, express or implied, to repair, the tenant takes the premises in the condition in which they are rented. For this error the judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

JOHN P. WAGNER V. JAMES G. LADD.

FILED NOVEMBER 8, 1893. No. 5040.

1. **Negotiable Instruments:** COUNTER-CLAIM AND SET-OFF: CONFLICTING EVIDENCE: REVIEW. In an action on a promissory note, a counter-claim and set-off consisting of several items were set out in the answer, which on the trial the jury disallowed. The testimony being conflicting, it is impossible for this court to say with accuracy what, if any, one of the items should be allowed.

2. ———: ———: INSTRUCTIONS. An instruction, "When a settlement is made, and a promissory note is given as a result of the settlement, the giving of the note is *prima facie* evidence that all matters in difference between the parties at the time of the settlement were settled in the settlement; and this presumption must prevail until a preponderance of the evidence shows that there were matters in the difference at the time between the parties that were not included in such settlement," *held*, applicable to the testimony and not erroneous.

ERROR from the district court of Gage county. Tried below before BROADY, J.

Griggs, Rinaker & Bibb, for plaintiff in error.

Hugh J. Dobbs, contra:

The second instruction correctly states the law as applicable to this case. (*McKinster v. Hitchcock*, 19 Neb., 100; *Bull v. Harris*, 31 Ill., 487; *Straubher v. Mohler*, 80 Ill., 21; *Chubbuck v. Vernam*, 42 N. Y., 432; *Sulphen v. Cushman*, 35 Ill., 186; *Kronenberger v. Binz*, 56 Mo., 121; *Chatham v. Niles*, 36 Conn., 403.)

MAXWELL, C. J.

This is an action upon a promissory note made by Wagner in favor of Ladd. The execution of the note is admitted, but Wagner pleads a counter-claim and set-off as follows:

Fall, 1888, To one service of the stallion "Counsellor"	$100 00
Fall, 1888, To one service of the stallion "Plutus"	25 00
June, 1888, To one bridle bit	3 00
June, 1888, To one lock	1 25
Summer, 1889, To sheeting manger and feed boxes	4 50
Summer, 1889, To one pane of glass	50
Summer, 1889, To use of stall six months at $1.50	9 00
Nov., 1886, To amount due defendant and retained by plaintiff from the wages of J. W. Andrews to apply on note given by Andrews to this defendant	50 00
To interest	15 00
	$208 25

On the trial of the cause the jury found a verdict in favor of Ladd for the full amount of the note and interest, and judgment was rendered on the verdict.

Two grounds of error are assigned in this court: First, that the verdict is contrary to the evidence; and second, that the court erred in giving the second instruction.

1. The testimony is conflicting upon the contested points, and it is impossible for this court to say with accuracy what items, if any, should be allowed and what rejected. The questions were properly submitted to a jury and the verdict will be sustained.

2. The second instruction is as follows: "When a settlement is made, and a promissory note is given as a result of the settlement, the giving of the note is *prima facie* evidence that all matters in difference between the parties at the time of the settlement were settled in the settlement; and this presumption must prevail until a preponderance of the evidence shows that there were matters in the difference at the time between the parties that were not included in such settlement."

In *McKinster v. Hitchcock*, 19 Neb., 100, this court held that "An account stated is an agreement between persons who have had previous transactions, fixing the amount due in respect to such transactions. As distinguished from a mere admission or acknowledgment, it is a new cause of action. It is not a contract upon a new consideration, and does not create an estoppel, but establishes *prima facie* the accuracy of the items charged without further proof." In our view the instruction comes within the rule there stated, and, as applied to the testimony in the case, is not erroneous. There is no error in the record and the judgment is

AFFIRMED.

GAGE COUNTY V. ROBERT R. KYD.

FILED NOVEMBER 8, 1893. NO. 6425.

1. **Counties:** LIABILITY FOR COMPENSATION OF JAIL GUARD. An account was filed with the county clerk by one K. as jailer of G. county. From this account the county board deducted $179.50, from which K. appealed to the district court. Pleadings were filed in the district court in which K. claimed as jail guard, and that the account as jailer was a mistake. The court found the issues in favor of K., in effect that he was jail guard and not jailer.

2. ———: ———. A jail guard, when actually necessary for guarding prisoners, is entitled to $2 per day, to be paid by the county.

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

R. W. Sabin, for plaintiff in error.

Alfred Hazlett, contra.

MAXWELL, C. J.

The defendant in error filed a claim with the county clerk of Gage county for services as jailer of that county, the sum claimed being $718. The county board allowed him $538.50 and disallowed $179.50. From the order thus made the defendant in error appealed to the district court. In the district court the claim is made for services as jail guard, and upon this issue the action was tried, and the court rendered judgment in favor of the defendant in error for the amount sued for, $179.50 and costs. From this judgment the plaintiff in error brings the case into this court.

Section 5, chapter 28, Compiled Statutes, provides: "For guarding prisoners, when it is actually necessary, $2 per day, to be paid by the county." The action in the district

court was for guarding prisoners, it being alleged on behalf of the defendant in error that the account as jailer was a mistake. However that may be, the only question that can be considered in this court is the right of the defendant in error to compensation as jail guard. If he was such guard, he is entitled to recover for the number of days charged in the account, and he is entitled to compensation at the rate fixed by statute. The court below found that he was jail guard and not jailer, and this finding seems to conform to the proof. He was, therefore, entitled to $2 per day for the time actually employed as such guard. The judgment of the district court is right and is

AFFIRMED.

GAGE COUNTY v. THOMAS E. WILSON, DEPUTY COUNTY CLERK.

FILED NOVEMBER 8, 1893. No. 6426.

Counties: LIABILITY FOR SALARY OF DEPUTY COUNTY CLERK. A deputy county clerk is to be paid his salary out of the fees received by the county clerk in excess of the amount which he is authorized to retain. The county is not liable for such salary.

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

R. W. Sabin, for plaintiff in error.

Alfred Hazlett and *L. M. Pemberton, contra.*

MAXWELL, C. J.

The defendant in error is deputy county clerk of Gage county, and filed an account against said county for the

sum of $833.33, for salary as such deputy county clerk from October 7, 1892, to August 7, 1893. The account was disallowed by the county board of Gage county, from which order the defendant in error appealed to the district court of that county. In the district court judgment was rendered in his favor against said county for the sum of $833.33, from which judgment the county brings the case into this court.

The case depends upon a proper construction of section 3043 of Cobbey's Statutes, which is as follows: "That every county judge, county clerk, county treasurer, and sheriff of each county, whose fees shall in the aggregate exceed the sum of $1,500 each for the county judge and county clerk, and $2,000 each for sheriffs and county treasurers, per annum, shall pay such excess into the treasury of the county of which they hold their respective offices; *Provided, however,* That in counties having over 25,000 inhabitants, the county treasurer shall receive the sum of $3,000 per annum, and shall be furnished by the county commissioners the necessary clerks or assistants, whose combined salary shall not exceed the sum of $2,400 per annum. The sheriff shall receive the sum of $2,500 per annum, also the necessary jail guard and one deputy, and the salary of such deputy shall be $900 per annum. The county clerks of such county shall receive the sum of $2,500 per annum, and he shall have one deputy whose salary shall be $1,000 per annum. The county judges of such counties shall receive the fees of such office not to exceed the sum of $2,000 per annum, and shall be provided by the county commissioners with the necessary clerks or assistants, whose combined salaries shall not exceed the sum of $1,000 per annum; *And provided further,* That if the duties of any of the officers above named in any county of this state shall be such as to require one or more assistants or deputies, then such officers may retain an amount necessary to pay for such assistants or deputies not

exceeding the sum of $700 per year for each of such deputies or assistants, except in counties having over 70,000 inhabitants, in which case such officer may retain such amount as may be necessary to pay the salaries of such deputies or assistants as the same shall be fixed by the board; but in no instance shall such officers receive more than the fees by them respectively and actually collected, nor shall any money be retained for deputy service unless the same be actually paid to such deputy for his services; *And provided further*, That neither of the officers above named shall have any deputy or assistants unless the board of county commissioners shall, upon application, have found the same to be necessary, and the board of county commissioners shall in all cases prescribe the number of deputies or assistants, the time for which they may be employed, and the compensation they are to receive."

The object of this statute was not to make the office of county clerk, and other offices named, a salaried office, but to fix a limit in the amount received and retained, and require the excess to be paid into the county treasury. It provides for the appointment of certain deputies for each of the officers named and that the county board shall determine the number of deputies and amount of salary of each, not to exceed the sum specified in the statute. The deputies, however, are to be paid out of the fees of the office, and not from the county treasury. The claim in this case is against the county, and in our view the county is not liable, as the salary of the deputy is to be paid by the principal out of the fees received by him in excess of the amount which he is to retain. The judgment of the district court, therefore, is erroneous and is reversed and the order of the county board reinstated.

JUDGMENT ACCORDINGLY.

GAGE COUNTY v. ED. J. WILSON, DEPUTY SHERIFF.

FILED NOVEMBER 8, 1893. No. 6427.

Counties: LIABILITY FOR PAYMENT OF SALARY OF DEPUTY SHERIFF. The county judge, clerk, treasurer, and sheriff, where the fees exceed the amount fixed by statute, and are authorized to appoint a deputy or deputies, may, in addition to their own salary, retain from the fees of their respective office "such amount as may be necessary to pay the salaries of such deputies or assistants as the same shall be fixed by the county board; but in no instance shall such officers receive more than the fees by them respectively and actually collected, nor shall any money be retained for deputy service unless the same be actually paid to such deputy for his services." The county is not liable for the deputy's salary. It is to be paid out of the fees of the particular office.

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

R. W. Sabin, for plaintiff in error, cited: *Albertson v. State*, 9 Neb., 430; *Ryan v. State*, 5 Neb., 276; *State v. Ream*, 16 Neb., 684; *Ragoss v. Cuming County*, 36 Neb., 375.

Alfred Hazlett, contra.

MAXWELL, C. J.

This action was brought by the defendant in error against Gage county for salary as deputy sheriff from September 7, 1892, to July 7, 1893, a period of ten months, at $75 per month. The claim was rejected by the county board, but on appeal to the district court was allowed and judgment rendered accordingly. The right of defendant in error to recover depends upon the construction given to section 3043, Cobbey's Statutes. It is there provided that the officer "may retain such amount as may be necessary to pay

the salaries of such deputies or assistants as the same shall be fixed by the board; but in no instance shall such officers receive more than the fees by them respectively and actually collected, nor shall any money be retained for deputy service unless the same be actually paid to such deputy for his services." Under this statute the principal is to pay the salary of the deputy. He collects the fees pertaining to his office, and is authorized to retain a certain amount in payment of his own salary, a certain other amount for the payment of the salary of each of his deputies, and the surplus, if any there be, is to be paid into the county treasury. The county is not liable to the deputy for his salary. The judgment of the district court is reversed and the order of the county board rejecting the claim

AFFIRMED.

JOHN C. GREER V. JOHN CANFIELD.

FILED NOVEMBER 8, 1893. No. 4655.

1. **Arbitration and Award:** A VERBAL SUBMISSION of the matters in controversy between parties, who appear voluntarily, and testify themselves, and produce witnesses in support of their respective claims, will, if fairly conducted, be sustained after the making of the award.
2. ——: FAILURE TO SWEAR ARBITRATORS AND WITNESSES. The fact that neither the witnesses nor the arbitrators were sworn, when no objection is made on that ground, will not invalidate the award.
3. **Review.** The claim that the award was made on Sunday, *held* not sustained by the proof.
4. **Action on Award:** DEFENSE. Where matters in controversy are submitted to arbitrators, proof taken, and an award made, and an action brought thereon, an answer which fails to show that the arbitrators exceeded their powers, or did not consider some of the matters submitted, or did an injustice to the defendant, fails to state a defense.

ERROR from the district court of Johnson county. Tried below before BROADY, J.

S. P. Davidson, for plaintiff in error.

D. F. Osgood, contra.

MAXWELL, C. J.

This is an action upon an award. There are three defenses set up in the answer: First, a denial that arbitrators were appointed, or that the submission was in writing; second, that the award was made on Sunday; third, that an uncle of the defendant was officious in conference with the arbitrators. On the trial of the cause the jury returned a verdict in favor of the plaintiff below in the sum of $468.67, on which judgment was rendered. It is doubtful if the answer states any defense, but as no question is raised upon it, the court, on its own motion, will treat it as sufficient. The mode of submission is stated by O'Connell, one of the arbitrators, as follows:

Q. Did they state, or did any one state, in their presence at that time, that you were to decide all matters of difference between them?

A. Why, I don't know that those words were used, but that is the way I understood it.

Q. As a matter of fact you did not undertake to go through their whole business transactions?

A. We undertook everything they laid before us.

Q. Their whole business transactions you did not go through?

A. I suppose they laid all before us that they wanted us to settle, and we passed on all, except a few things spoken of in this Exhibit "A."

Q. No articles mentioned that you were to settle?

A. Not at that meeting. After we began, Hedrick wrote down notes, and goods, and horses, etc., and he wrote them

down on a piece of paper. We got to work; took the first item,—such a note. If they both agreed on that, we took that. Then there were several articles they could not agree on, and one said one thing and another another, and we would have to have evidence. We took off everything they agreed on, and there were things they didn't agree on, and we decided them.

Q. You never gave a written decision other than that?

A. That is all the decision we ever made. I believe we wrote two, one for each party.

Q. You never decided each one of these items and notified them?

A. No, sir; but we did settle each item. There would be such a note they agreed on—for instance, the price of a horse they could not agree on; and then there were several other things. We decided these things separately and then added up the amount, and that is the way we arrived at the conclusion.

Q. You never notified Greer?

A. No, sir; we didn't.

Q. Now, as a matter of fact, didn't Greer ask you for an itemized list of them?

A. Yes; I met him Sunday afternoon, and there was one account he asked me how we arrived at. I said, "If there is any particular thing, I think I can remember it." There were some $2,000 John collected, and he asked what commission we allowed. I said, we allowed him five per cent. He wanted fifteen per cent and had that charged up; and he found a good deal of fault with that, and appeared wrathy, and he wanted an itemized statement.

Q. You got pretty wrathy yourself?

A. Well, slightly. I says, "If there is any made, Hedrick will make it." I told Hedrick, and he didn't make it; at least he told me he didn't.

Q. Greer asked an itemized account of your decision?

A. Yes, he did.

Q. And you refused to furnish it?

A. Well, I didn't furnish it.

Q. And Hedrick didn't furnish it?

A. I think not, at least he told me he hadn't.

Q. By the court: You have been county judge in this county, have you?

A. Yes.

Q. That was back in roller-skate time, was it?

A. Yes.

Q. By Mr. Davidson: When you began this first session of this arbitration did you and Mr. Hedrick take any oath?

A. No, it was all irregular as far as that was concerned. I spoke about that. We went over as friends, just as a court and jury, friendly until the thing was over.

Q. You never took any oath?

A. No, sir; we never administered an oath to the witnesses; we just heard their story and tried to use common sense in deciding it.

Mr. Greer testifies on the same subject:

Q. You say at the time you first met it was agreed that all the difference between you and Canfield should be settled by the arbitrators?

A. Yes.

Q. Were you present at the time of this debtor and credit business?

A. Yes.

Q. That was especially spoken of at that time as to being settled?

A. Yes.

Q. Were there any items spoken of at that time especially to be settled by them?

A. If anything come up I had not credited Canfield with, I told them if he would bring evidence there I would allow on the statement. I thought there were some items I had not credited him with, as I didn't keep a correct account. I would allow all these accounts, and if I owed him anything I would pay it, that was not on the statement.

Q. That was said there at that time, was it?

A. Yes.

Q. They were to consider these when they come up at that time?

A. Yes.

Q. Any other items you had not credited him with or debited him with were to be considered in arbitration in addition to the list or itemized account you had furnished him?

A. Yes.

Q. Now you agreed that O'Connell and Hedrick should be arbitrators?

A. Well, I did, for there was no other chance to get a settlement out of him. I simply did it. I was more than anxious to get it settled, and that is the only way they wanted to settle.

Q. You thought they were good men, didn't you?

A. Yes; I had no reason—well, I knew one was a friend to me and the other was not an enemy, and I didn't think they would do me injustice.

Q. You don't think they would, do you?

A. I don't know whether they would or not.

Q. You say when Canfield came out he simply asked you how you liked the award?

A. Yes.

Q. And you told him you didn't know how it was yet?

A. Yes.

Q. That you had not the items that were settled?

A. Yes.

Q. He didn't ask you to pay it?

A. No, sir.

Q. When was it he was out there?

A. I think about three days after Sunday, probably two or three days.

Q. Probably Tuesday or Wednesday, probably about March 5?

A. Yes, I think about March 5.

Q. How long was he in the bank?

A. Probably a minute or two minutes.

Q. Any one else present?

A. Yes.

Q. Who?

A. Mr. Russell.

Q. That is your father-in-law?

A. Yes, and I think some one else.

Q. Did he say anything to him about the award?

A. He and I had all the talk there was about it.

Q. They discussed it, did they?

A. Yes, a few words were spoken about it. I don't remember what they were.

Q. You submitted all the matters you wanted to to the arbitrators, didn't you? They didn't refuse to hear anything you wanted them to?

A. No; I don't think they refused to hear; but they refused to render their decision to things I wanted them to.

Q. What was it?

A. One note.

Q. The Sharrett note, was that?

A. Yes.

Q. Didn't you and Canfield finally agree that they should not decide that?

A. We did about that. They said they would not decide that.

Q. You and Canfield then agreed they should not decide that?

A. Yes.

Q. Also the tank?

A. Yes.

Q. You agreed they should not pass upon these two items?

A. I agreed to that, for they would not; didn't seem to want to.

Q. All the other matters you submitted they passed upon?

A. Yes.

This was a good common law arbitration. The matters in dispute between the parties, except the two items withdrawn by consent, were submitted to the arbitrators and a settlement made. The account seems to have been very much complicated and carelessly kept, so that the mode adopted by the arbitrators to do justice between the parties was proper and calculated to elicit the truth. The fact that the witnesses were not sworn is not sufficient to justify the setting aside of the award. Other testimony was taken without objection and treated by the parties and the arbitrators as truthful, and no objection even now is made that any witness testified to what was untrue. The defense that the arbitration was made on Sunday is not borne out by the testimony. It is true the arbitrators, on Sunday, to accommodate the plaintiff in error, heard some explanations in his behalf in regard to some part of his claim; but he cannot very well insist that the arbitration is void for that cause. It may well be doubted whether, if all that is claimed in the answer is true, the award will be void; and no sufficient cause is either pleaded or proved for setting the award aside. This is a common law award, and a submission made by either party, either by word or deed, is sufficient. If the submission is by word, there is no remedy to recover on the award except by action; but the award, if fairly made within the scope of the matters submitted, will be valid and binding. (*Tynan v. Tate*, 3 Neb., 388.) There is no error in the record and the judgment is

AFFIRMED.

JOHN S. HARRINGTON V. BENJAMIN BIRDSALL.

FILED NOVEMBER 8, 1893. NO. 4873.

1. **Land Contracts: DEFAULT IN PAYMENT OF PURCHASE MONEY: FORECLOSURE: TENDER OF DEED.** In an action by a vendor of real estate to foreclose a land contract, or bond for a deed, on account of the failure and refusal of the vendee to pay the purchase money according to the contract, a tender of a deed by the plaintiff before bringing the suit need not be shown.
2. ———: ———: ———: ———: **COSTS.** The failure to tender a deed could, at most, only affect the question of costs.
3. ———: ———: ———: ———. Courts of equity will decree a strict foreclosure of land contracts only under peculiar and special circumstances. Applications of that character are addressed to the sound legal discretion of the court, and they will be granted in cases where it would be inequitable and unjust to refuse them. Rule applied.
4. **The statute providing for stay of execution** and orders of sale does not apply to decrees of strict foreclosure.

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

W. L. Hand, for plaintiff in error:

A tender of a deed by a vendor in a land contract must be made before an action can be maintained in equity for a foreclosure. (*Willard v. Tayloe*, 8 Wall. [U. S.], 557; *Cole v. Wright*, 50 Ind., 296; *McCaslin v. State*, 44 Ind., 151; *Turner v. Lassiter*, 27 Ark., 662; *Wakefield v. Johnson*, 26 Ark., 506; *Klyce v. Broyles*, 37 Miss., 524; *Wyvel v. Jones*, 33 N. W. Rep. [Minn.], 43.)

One who claims a forfeiture must show a readiness and willingness on his part to perform the contract. (*Post v. Garrow*, 18 Neb., 682.)

No agreement for a forfeiture is contained in the contract. No forfeiture will be declared when the parties have

not stipulated for one. (*Schunck v. Gegenseitiger Wittwen und Waisen Fond*, 44 Wis., 372; *Hull v. Northwestern Mutual Life Ins. Co.*, 39 Wis., 405; *Hall v. Delaplaine*, 5 Wis., 206; *Ewald v. Northwestern Mutual Life Ins. Co.*, 60 Wis., 431; *Jacoby v. Stetler*, 4 Atl. Rep. [Pa.], 342.)

Equity does not lend its aid to enforce a forfeiture. (*Marshall v. Vicksburg*, 15 Wall. [U. S.], 146.)

Under a land contract an equitable interest passes to the vendee. (*Shaw v. Foster*, 5 L. R. H. L. [Eng.], 321; *Rose v. Watson*, 10 H. L. Cas. [Eng.], 672*; *Wall v. Bright*, 1 J. & W. Rep. [Eng.], 494; *Lysaght v. Edwards*, L. R., 2 Ch. D. [Eng.], 499; *Vail v. Drexel*, 9 Ill. App., 439; *Moore v. Burrows*, 34 Barb. [N. Y.], 173; *McKechnie v. Sterling*, 48 Barb. [N. Y.], 330; *Jennisons v. Leonard*, 21 Wall. [U. S.], 302; *Bissell v. Heyward*, 96 U. S., 580.)

There is no sensible distinction between the cases of a legal title conveyed to secure the payment of a debt and a legal title retained to secure the payment of a debt. In both cases courts of equity consider the estate only as a security for the payment of the debt. (*Graham v. McCampbell*, Meigs [Tenn.], 56; *Lewis v. Boskins*, 27 Ark., 63; *Moore v. Anders*, 14 Ark., 628; *Curtis v. Buckley*, 14 Kan., 449; *Connor v. Banks*, 18 Ala., 42; *Sparks v. Hess*, 15 Cal., 186; *Lewis v. Hawkins*, 23 Wall. [U. S.], 119; *Relfe v. Relfe*, 34 Ala., 504.)

In the foreclosure of a title bond the purchaser is treated as a mortgagor, for all purposes of the suit. The rights of the parties are the same as those of the parties to a formal mortgage. (2 Jones, Mortgages, sec. 1449.)

The vendor has an equitable lien upon the land for the unpaid purchase money. (*Rhea v. Reynolds*, 12 Neb., 128; *Dorsey v. Hall*, 7 Neb., 465; *Whitehorn v. Cranz*, 20 Neb., 392; *Birdsall v. Cropsey*, 29 Neb., 672.)

Whenever property is transferred, no matter in what form, or by what conveyance or contrivance for the trans-

fer thereof, if in reality it is security for a debt or the performance of some condition, equity will treat the transfer, in effect, as a mortgage, and it is not material that the person in whom the right of redemption is recognized has only an equitable title. (*Marshall v. Thompson*, 39 N. W. Rep. [Minn.], 311; *Niggeler v. Maurin*, 24 N. W. Rep. [Minn.], 369; *Fisk v. Stewart*, 24 Minn., 97; *King v. Remington*, 29 N. W. Rep. [Minn.], 352; *Livingston v. Ives*, 27 N. W. Rep. [Minn.], 74; *Hoile v. Bailey*, 17 N. W. Rep. [Wis.], 322; *Starks v. Redfield*, 9 N. W. Rep. [Wis.], 168; *Russell v. Southard*, 12 How. [U. S.], 152; *Carr v. Carr*, 52 N. Y., 258; *Morris v. Budlong*, 78 N. Y., 553; *Bowery Nat. Bank v. Duncan*, 12 Hun [N. Y.], 405; *Church v. Kidd*, 3 Hun [N. Y.], 265; *Wilson v. Richards*, 1 Neb., 343; *Omaha Book Co. v. Sutherland*, 10 Neb., 336; *Schade v. Bessinger*, 3 Neb., 145, and cases cited.)

When once the rule is established that a land contract is a security, and therefore a mortgage, the statutory requirements in regard to foreclosure and sale apply and must be followed. (*Gregory v. Hartley*, 6 Neb., 362.)

In all foreclosures a sale must be had. Strict foreclosures are prohibited. (*Kyger v. Ryley*, 2 Neb., 22.)

In all cases of foreclosure and sale defendant has the statutory right to a stay of the order of sale. (*Spencer v. Moyer*, 29 Neb., 305.)

F. L. Huston, also for plaintiff in error.

Hamer, Sinclair & Brown, contra:

A tender of the deed before bringing suit was not necessary. (*Winton v. Sherman*, 20 Ia., 295; *Rutherford v. Haven*, 11 Ia., 587; Pomeroy, Specific Performance, sec. 363; *Bruce v. Tilson*, 25 N. Y., 197; *Freeson v. Bissell*, 63 N. Y., 168; *Hawk v. Greensweig*, 2 Pa. St., 295; *Woodson v. Scott*, 1 Dana [Ky.], 470; *Seeley v. Howard*, 13 Wis., 375;

St. Paul Division No. 1 Sons of Temperance v. Brown, 9 Minn., 157; *Morris v. Hoyt*, 11 Mich., 9; *Smoot v. Rea*, 19 Md., 398; *Maughlin v. Perry*, 35 Md., 352.)

A judgment of strict foreclosure may be properly rendered upon a land contract for failure of the vendee to make the payment stipulated for. As to the form of the decree it should be that the money due on the contract be paid within such reasonable time as the court shall direct, and that in case of failure to make payment the vendee be foreclosed of his equity of redemption. (Jones, Mortgages, sec. 1541; *Kirby v. Harrison*, 2 O. St., 333; *Alley v. Deschamps*, 13 Ves. [Eng.], 224; *Foster v. Ley*, 32 Neb., 404; Pomeroy, Eq. Jur., sec. 1262; *Landon v. Burke*, 36 Wis., 378; *Button v. Schroyer*, 5 Wis., 598; *McMillan v. Richards*, 9 Cal., 412; *Jefferson v. Coleman*, 11 N. E. Rep. [Ind.], 465; *Hayward v. Judd*, 4 Minn., 375; *Benedict v. Mortimer*, 8 Atl. Rep. [N. J.], 515.)

NORVAL, J.

This action was brought by defendant in error in the court below for the strict foreclosure of a land contract, or bond for a deed, on account of the failure of the vendee to pay the purchase money according to contract. The following is a copy of the instrument declared on:

"Know all men by these presents, that we, Benjamin Birdsall and Hannah Birdsall, husband and wife, of Kearney, Nebraska, are held and firmly bound unto Daniel A. Dorsey in the penal sum of three thousand dollars, for the payment of which we bind ourselves firmly by these premises, upon condition as follows: Whereas, the said Benjamin Birdsall and Hannah Birdsall have agreed to sell and convey unto the said Daniel A. Dorsey by deed of quitclaim, for the consideration of two thousand five hundred dollars, the following described property, to-wit: Lot number forty-nine (49), in the northwest quarter of School Section Addition to the city of Kearney, formerly

Kearney Junction, in the county of Buffalo and state of Nebraska, and the said Daniel A. Dorsey has agreed to purchase said premises and to make payment as follows: Two hundred and fifty dollars cash in hand, the receipt of which is hereby acknowledged, and twenty-one hundred and fifty dollars on or before the 20th day of October, 1889, with interest thereon at ten per cent per annum, according to one certain promissory note of even date herewith, made by said Daniel A. Dorsey, payable to said Benjamin Birdsall, said Dorsey to pay interest according to the state of Nebraska after this date on said lot:

"Therefore, the condition of this obligation is such, that if the above bounden Benjamin Birdsall and Hannah Birdsall will convey said premises by deed of quitclaim, and clear of all incumbrances, except $247.50, balance due the state of Nebraska upon the unpaid part of the purchase money on said lot, to said Daniel A. Dorsey, upon payment of said consideration at the times above stipulated, then this obligation to be void, otherwise to be and remain in full force and effect."

"Witness our signatures hereto subscribed this twentieth day of October, A. D. 1888.

"(Signed) BENJAMIN BIRDSALL.
"HANNAH BIRDSALL.

"In presence of
"A. T. GAMBLE."

Duly acknowledged before A. T. Gamble, notary public, on the twentieth day of October, 1888.

The petition alleges the execution of the said instrument and the recording thereof in the office of the county clerk of Buffalo county on the 20th day of October, 1888; that on November 14, 1889, said Daniel Dorsey assigned all his rights under said contract to the defendant, John S. Harrington, who then assumed and agreed to pay the obligations of Dorsey thereunder; that said Dorsey and Harrington failed, neglected, and refused to pay the balance

due the state of the purchase price of said real estate, and plaintiff, in order to protect his title, was compelled to, and did, pay the state the sum of $247.50; that at the time of entering into said agreement Dorsey gave to plaintiff the promissory note, mentioned therein, for the balance of the purchase price, calling for $2,150, payable on October 20, 1889, bearing interest at ten per cent from date thereof; that at the maturity of said note plaintiff requested the payment of the same, which was refused; that no part of said note has been paid, and the entire sum, principal and interest, is due and unpaid; that Hannah Birdsall, who signed said contract and bond in conjunction with the plaintiff, is the wife of said plaintiff, and has otherwise no interest in said instrument, nor in the real estate therein described.

On December 10, 1890, the defendant filed an answer admitting the allegations of the petition as to said D. A. Dorsey and alleging that on the 15th day of November, 1889, for a valuable consideration, Dorsey transferred to him all his rights in and to said premises, which transfer was in writing, duly witnessed, acknowledged, and recorded; with prayer that, upon paying into court the amount ascertained to be due, the plaintiff be required to execute a deed to the defendant of said premises.

On February 2, 1891, plaintiff filed a motion for judgment upon the pleadings, and upon the next day the defendant filed an amended answer, alleging a sale of the said premises by plaintiff to Dorsey substantially as averred in the petition; that for the purpose of securing the payment of the sum of $2,150 and interest, still unpaid, plaintiff, instead of executing a deed to Dorsey and taking a mortgage back, retained the legal title to the premises, and executed a bond for a deed, agreeing therein to convey said real estate on payment to him of the balance of the purchase price; that Dorsey took possession of the premises and remained in possession thereof until he transferred the

same to the defendant; that at no time has plaintiff offered to deliver either to Dorsey or defendant the said note for $2,150.

The prayer is that the court adjudge that the note and bond for a deed are a note and mortgage, and for such other and further relief as provided by law.

The case was submitted to the district court upon the petition, answer, and amended answer, and there was found due the plaintiff, on account of the note and contract set forth in the petition, the sum of $2,912.50. It was decreed that the defendant, within sixty days, pay said sum with ten per cent interest from the date of the decree, to plaintiff, and upon said payment being made plaintiff shall convey said premises by quitclaim deed to defendant; but in case of failure to pay the same within said time, then said defendant, and all persons claiming under him, shall be forever barred and foreclosed of all equity of redemption, and of all right to or interest in said premises. It was further decreed that plaintiff bring the said note into court and surrender the same to the clerk of the court for cancellation; and that the bond mentioned in the pleadings be canceled and held for naught.

On February 6, 1891, three days after the date of said decree, the defendant below filed a written request for a stay for a period of nine months, which application was denied by the court, and the defendant's exception was entered.

The first error assigned is that the petition does not state a cause of action for the reason it fails to allege the tender of a deed of the premises by the plaintiff before the bringing of the suit. Under the stipulations of the parties contained in the contract or bond for a deed in question, the execution and delivery of the deed by the defendant in error was conditional that the vendee should pay the unpaid part of the purchase price, together with the amount due the state. The payment of the balance of the considera-

tion and the delivery of the deed to the premises were to be simultaneous and concurrent, and the vendor was not in default until the remainder of the purchase money was paid or tendered. The rights of the plaintiff in error were fully protected by the decree. Birdsall was ordered to make a deed to Harrington on his paying the amount found due by a day named by the court, and it was also decreed that the note mentioned in the petition should be surrendered for cancellation. It was unnecessary for the plaintiff below to allege in his petition, or prove on the trial, that he tendered to the defendant a deed of the land prior to the bringing of the action. (*Stevenson v. Maxwell*, 2 N. Y., 408; *Bruce v. Tilson*, 25 N. Y., 194; *Freeson v. Bissell*, 63 N. Y., 168; *Daily v. Litchfield*, 10 Mich., 29; *Morris v. Hoyt*, 11 Mich., 9; *Seeley v. Howard*, 13 Wis., 375; *Wasson v. Palmer*, 17 Neb., 330; *Stevenson v. Polk*, 71 Ia., 278; s. c., 32 N. W. Rep., 340; *Hawk v. Greensweig*, 2 Pa. St., 295; *Smoot v. Rea*, 19 Md., 398; *Rutherford v. Haven*, 11 Ia., 587; *Winton v. Sherman*, 20 Ia., 295.)

The last case was an action by the vendor upon a contract for the sale of land, to foreclose the defendants' interest therein. The defense was that no deed had been tendered. Cole, J., in delivering the opinion of the court, says: "In an action at law to recover the consideration agreed to be paid for real estate not yet conveyed, but which, by the contract of purchase, was to be conveyed at the time of the payment of the consideration, it has been held a sufficient defense to aver and show that the deed had not been delivered and tendered. * * * But this rule does not obtain in equity cases, where the court, upon a final decree, can grant just such relief as the plaintiff may show himself entitled to, upon such conditions as shall fully protect the rights of the defendants, not only as to the subject-matter, but as to costs. A delivery or tender of deed, before bringing suit in equity for the pur-

chase money and foreclosure of lien therefor, or other equitable relief, is not necessary." We have no doubt of the correctness of the rule above stated, and it is sustained by the great weight of the authorities.

The case of *Post v. Garrow*, 18 Neb., 682, cited by plaintiff in error, is not authority to the contrary. Unlike this, that was an action at law. In that case the plaintiffs purchased a quantity of cattle of defendant, paying $300 cash and agreeing to pay the balance on the date named for the delivery of the cattle. Plaintiffs appeared at the time and place agreed upon, with the money, for the purpose of receiving the cattle, but defendant failed and refused to deliver the stock. In an action on the contract by the buyer for damages for the non-delivery of the cattle, and to recover the money advanced, it was held that it was not incumbent on the plaintiffs to prove a tender of the balance of the purchase price, and that the defendant could not claim a forfeiture of the $300 without showing that he was ready and willing to perform on his part the contract in every particular. The authorities draw a distinction between an equitable action to enforce a contract and a suit at law for damages for non-performance. As stated by the court in *Bruce v. Tilson*, 25 N. Y., 198, *supra*, "In the latter, the right of action grows out of a breach of the contract, and a breach must exist before the commencement of the action, while in the former, the contract itself, and not a breach of it, gives the action." In the case at bar, the failure of the plaintiff to tender a deed does not affect the merits or rights of the parties. At most it could only bear upon the question of costs.

Counsel for plaintiff in error insist that the plaintiff below cannot have a strict foreclosure, and urge that the decree should have been for a sale of the premises as in ordinary foreclosure cases. This question, it seems to the writer, has been set at rest by the decisions of this court in *Foster v. Ley*, 32 Neb., 404, and *Gallagher v. Giddings*, 33

Neb., 222. The former was an action by the vendor for the specific execution of a land contract which contained no express condition of forfeiture. The plaintiff tendered his deed and demanded payment of the purchase money, which was refused. The defendant contended that, as the contract made no provision of forfeiture in default of the vendee's complying with the terms of payment, the contract must be regarded in the nature of a mortgage, and that the vendee was entitled to the benefit of sale, as under ordinary mortgage foreclosure proceedings. The district court rendered a decree that the defendant comply with his contract within thirty days by making the payments and executing the notes and mortgage according to the contract, and upon failure to pay the money and execute the notes and mortgage, and received from plaintiff a deed to the premises within said time, that defendant forfeit all right, title, and interest to and in the premises. On appeal to this court the decree of the trial court was affirmed. It was held that plaintiff might have brought an action to foreclose the contract, but that was not his only remedy.

In the opinion in *Gallagher v. Giddings*, 33 Neb., 222, *supra*, it is said that "the warranty deed of April 22, 1885, executed by Giddings and wife and Eiseman, although absolute in form, being given as security for a loan of money, in equity is regarded as a mortgage. Although the grantor, E. F. Gallagher, is considered only a mortgagee, the deed conveyed the legal title to the premises to him, and nothing remained in the grantors except the equity of redemption. This case is different from an ordinary mortgage, in which the title does not pass to the mortgagee but remains in the mortgagor until foreclosure and sale. (*Baird v. Kirtland*, 8 O., 21; *Kemper v. Campbell*, 44 O. St., 210; *Hughes v. Davis*, 40 Cal., 117; 1 Jones, Mortgages, sec. 339.) * * * Eiseman and Giddings brought their action to redeem from the equitable mortgage and for a reconveyance, alleging in their petition that they were ready and willing

to pay the debt, and a decree was entered that the land be reconveyed to them upon the payment, within a specified time, of the amount found due the grantee. The payment not having been made, subsequently the petition to redeem was dismissed by the court, and the right or privilege to take further legal proceedings on the subject was not given by the decree.

"In argument it is claimed by the defendant in error that the judgment of dismissal of the petition to redeem is not a bar to the equity of redemption. In ordinary mortgages the right of the mortgagor to redeem is cut off by foreclosure and sale. The legal title in such case being in the mortgagor, in order to divest him of his title there must be a foreclosure of the mortgage, a sale under the decree, and deed to the purchaser at the sale; and when a deed, although absolute in form, is intended as a mortgage, the equity of redemption of the grantor may be barred by foreclosure proceedings. But the legal title in such an equitable mortgage being in the grantee, where the grantor brings an action to redeem the premises, and his petition is dismissed by reason of his default in making payments by the day set in the decree for redemption, and no privilege is given to bring another action, the grantor's right of redemption is thereby extinguished." (See 36 Cent. L. J., 471.)

The case at bar falls within the principle laid down in the decisions just cited. The remedy by strict foreclosure of land contracts cannot be resorted to in all cases. The remedy being a harsh one, courts of equity will decree a strict foreclosure only under peculiar and special circumstances. Applications of that character are addressed to the sound legal discretion of the court, and they will be granted in cases where it would be inequitable to refuse them. If the vendee or purchaser has not been guilty of gross laches, nor unreasonably negligent in performing the contract, a strict foreclosure should be refused on the ground

that it would be unjust, even though the vendee may have been slightly in default in making of a payment. So, for the same reason, a strict foreclosure will be denied where the premises have greatly increased in value since the sale, or where the amount of unpaid purchase money is much less than the value of the property. On the other hand, if the vendee, without sufficient excuse, fails to make his payments according to the stipulations of his contract, and for an unreasonable time remains in default, the vendor may have a strict foreclosure of the contract for the sale and purchase of the land, unless some principle of equity would be thereby violated.

Applying the foregoing observations to the facts of the case at bar, we are forced to the conclusion that the plaintiff below was entitled to the relief demanded, and the court did not err in rendering a decree of strict foreclosure. But one payment has ever been made upon the land, and that was the $250 paid when the contract was entered into. The purchaser had neglected to pay the amount due the state, and the vendor was compelled to do so to protect the title. At the commencement of the action the vendee was in default more than fifteen months, and no excuse has been given for the delay, nor has it been shown that the land has increased in value, or that it is now worth more than the unpaid purchase price. Manifestly it would be unjust, under the circumstances disclosed by this record, to render a decree of foreclosure and sale, as in ordinary mortgage foreclosure proceedings.

The only remaining objection to be noticed is, the overruling of plaintiff in error's motion for a stay of an order of sale. Had a decree of foreclosure and sale been entered, then, under the decision in *Spencer v. Moyer*, 29 Neb., 305, the defendant would have been entitled to a stay of the decree for the period of nine months, by merely filing a written request therefor within the time fixed by statute. But the statute providing for the stay of executions and orders

of sale has no application to decrees of strict foreclosure. The decree of the district court is

AFFIRMED.

DANIEL EGGLESTON, APPELLANT, V. SAMUEL POLLOCK ET AL., APPELLEES.

FILED NOVEMBER 8, 1893. No. 5003.

Deeds: ESCROW: DELIVERY BEFORE COMPLIANCE WITH CONDITIONS: EVIDENCE OF AUTHORITY: REVIEW. The finding of the trial court that the deed executed by the plaintiff and deposited in escrow with a third person, to be delivered to the vendee on the performance by the latter of certain conditions, was delivered by the depository in escrow by instructions of the vendor before the conditions of the holding had been complied with, considered to be sustained by the evidence in the case.

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

C. A. Woosley, Higgins & Garlow, and *M. Whitmoyer*, for appellant.

Sullivan & Reeder and *I. L. Albert, contra.*

NORVAL, J.

This action was brought by appellant to set aside and cancel certain deeds covering lots 5 and 6, in block 95, known as the "Lindell hotel property," situated in the city of Columbus, and to quiet the title to said real estate in the plaintiff. From a decree in favor of defendants, plaintiff appeals.

But a single question is presented, which is one of fact, and that is, did the plaintiff authorize the delivery of his

deed to Samuel Pollock to the property in controversy? It is undisputed that on and prior to October 31, 1890, plaintiff was the owner of the property in controversy, and against which were incumbrances aggregating about $2,300. Samuel Pollock at the same time was the owner of a quarter section of land in Holt county, Nebraska, and a like quantity of real estate situated in Kingman county, Kansas. The lien upon the two tracts, including taxes, amounted to more than $2,100. Negotiations were entered into between plaintiff and Samuel Pollock for the exchange of their said properties, and on the said 31st day of October an agreement therefor was entered into between them, by the terms of which plaintiff was to execute a deed to the said hotel property, conveying the same to Pollock subject to incumbrances, and said Pollock was to execute a warranty deed for the said lands in Holt and Kingman counties conveying the same to Eggleston, subject to these mortgages and taxes, which Pollock represented did not exceed $2,100, and which plaintiff agreed to assume and pay. As the deeds were made and executed in accordance with the contract, it was also stipulated by the parties that said deeds should be left with one P. W. Henrich, in escrow, until said Pollock should furnish abstracts of title showing a perfect chain of title in himself to the said two quarter sections of land, and that the total incumbrances thereon were not more than $2,100, and, upon such abstracts being furnished, the deeds were to be delivered to the respective parties. The conveyances were so deposited with Henrich on the date above stated, and on November 4, 1890, the deed to the hotel property was turned over by him to Pollock and placed on record. A few days thereafter the deeds to the Holt and Kingman county lands were likewise recorded. It further appears that Samuel Pollock conveyed the lots in Columbus to John G. Pollock, who together with his wife executed and delivered to one C. J. McCoy a warranty deed to said premises.

The contention of appellant is, and that is the substance of his testimony in the court below, that said Henrich, without plaintiff's knowledge or consent, and before the conditions under which the deeds were held by him had been complied with, delivered the deed to the hotel property to Samuel Pollock. It is well settled that when a deed is wrongfully delivered by an escrow to the grantee, without the knowledge or consent of the grantor and without compliance with the stipulated conditions on the part of the grantee to be performed, no title passes to the latter, and if plaintiff's testimony stood alone there would be no room for doubt that he would be entitled to the relief demanded. But there is in the record testimony which justified the trial judge in finding that plaintiff authorized the delivery of his deed to the property in dispute. P. W. Henrich testified positively and without equivocation that within a week after the deeds were placed in his hands plaintiff called upon witness, and instructed him to deliver the deed to the hotel property at any time to the grantee, and to place the other two deeds upon record, all of which witness did as directed. Appellant denied under oath that he ever authorized the delivery of the deed executed by him, but Henrich is corroborated by other testimony found in the record. C. J. McCoy testified that about the 8th or 9th of November, 1890, he informed plaintiff that he was about to trade with Pollock for the Lindell hotel property, to which Eggleston neither made any objection nor claimed any interest in the property, but stated to witness that "I traded the hotel off to an old fellow by the name of Pollock, and I guess the old fellow has got it onto me, but if he has I will have to stand by it." McCoy further testified that after the transfer of the property to him plaintiff went with him to the agent of the insurance company for the purpose of having the policies transferred to McCoy. We are persuaded that the plaintiff authorized the delivery of the deed, at least that the finding of the trial court is

not so clearly against the weight of the evidence as to justify a reversal. The judgment must be

AFFIRMED.

STATE OF NEBRASKA, EX REL. FRED W. MILLER, V. E. O. LEWIS, COUNTY CLERK.

FILED NOVEMBER 8, 1893. No. 6540.

1. **Counties**: POPULATION: OFFICE OF REGISTER OF DEEDS. Each county in this state having a population of 18,003 or more, as shown by the last national census, was entitled to elect a register of deeds at the last general election.

2. ———: ———: ———. A county having less than 18,003 inhabitants at the national census of 1890 was not entitled to elect such an officer, even though the state census of 1885 shows it possessed more than the above number of inhabitants.

ORIGINAL application for *mandamus*.

Isham Reavis and *C. F. Reavis*, for relator.

Edwin Falloon, contra.

NORVAL, J.

This was an original application for a peremptory writ of *mandamus* to compel the respondent, as county clerk of Richardson county, to include the office of register of deeds in the notices of election to be issued by him for the general election holden in said county in November, 1893. The cause was submitted upon a general demurrer to the petition.

The facts alleged are substantially as follows: Relator is a citizen of the United States and of this state, and is a resident and elector of Richardson county, and eligible to the

office of register of deeds. Respondent is the duly elected, qualified, and acting county clerk of said county. On the 2d day of October, 1893, relator was nominated by the republican county convention of Richardson county as a candidate for the office of register of deeds in said county, to be voted for at the general election in November 1893. On the 3d day of October, 1893, by the joint action of the democratic and people's independent political parties, one W. S. McGowan was nominated as a candidate for the same office. According to the census of 1885, Richardson county contained a population of 18,688, which was sufficient, under the provisions of the act of the legislature establishing and creating the office of register of deeds, to entitle the county to that office, and in pursuance of which a register of deeds therein was elected at the general election in 1889, and the person thus elected, qualified and entered upon the discharge of the duties thereof. The national census of 1890 shows the population of said county to be 17,573. The respondent, although requested so to do, refused to include in his notices of election the office of register of deeds, on the ground that the population of the county in 1890 was less than 18,003, the number required by law to entitle the county to the office in question.

The state legislature, in 1887, passed an act creating and establishing the office of register of deeds. (Session Laws, 1887, ch. 30.) Section 1 of this act was amended by the legislature of 1889, by extending the term from two to four years. (Comp. Stats., 1889, ch. 18, sec. 77*a*.) The amended section provides that "at the general election in the year 1889, and every four years thereafter, a register of deeds shall be elected in and for each county having a population of eighteen thousand and three (18,003) inhabitants or more, to be ascertained by the census of 1885, and each state and national census thereafter, who shall give bond, with sufficient sureties thereon, to be approved by the county board, in the penal sum of ten thousand ($10,000)

dollars, conditioned for the faithful performance of his duties, and such register of deeds shall have all the power and perform all the duties relative to all papers, writings and instruments pertaining to real estate heretofore enjoined by law upon county clerks, and shall receive the compensation allowed by law therefor," etc.

It will be seen that, by the census of 1885, Richardson county had a population sufficient to entitle it, under the law, to a register of deeds, but that by the last national census the population of the county fell below 18,003, the minimum number necessary to authorize a county to elect a register of deeds. The contention of the relator is that, inasmuch as the office became established in said county in 1885, it was not abolished by reason of the population of the county, according to the national census of 1890, being less than 18,003. We cannot adopt the construction contended for by the relator. The section above quoted authorizes each county having a population of 18,003 or over to elect a register of deeds; and it was not the intention of the legislature to limit the operation of the section to counties possessing the requisite number of inhabitants at the time the act in question took effect; but the provision was intended to apply only to counties possessing a sufficient population at the period designated in the act for the election of a register of deeds, as shown by the preceding state or national census, to entitle the same to such officer. The lawmakers, whether wisely or not is no concern of ours, fixed the minimum number of inhabitants which would authorize a county to choose a register of deeds, and a county whose population, ascertained in the manner indicated by the act, does not reach such limit, has no power to elect such officer, even though it may have possessed, at some time in the past, the prescribed population. Manifestly this is the meaning of the provision under consideration. This construction not only gives effect to the clause "to be ascertained by the census of 1885, and each state and national census

thereafter," but harmonizes with sections 2 and 3 of the act creating the office of register of deeds. Section 2 declares, in effect, that in each county containing a population of 18,003, or more, and where the offices of register of deeds and county clerk are separate, the county board shall provide office room, fire proof vaults, and necessary books, blanks, stationery, and office furniture for the use of the register of deeds; and by the next section it is provided that in each county having less than 18,003 inhabitants, and until such officers shall be elected and qualified, the county clerk shall be *ex officio* register of deeds. Our conclusion is that Richardson county, according to the census of 1890, did not possess sufficient population to entitle the electors therein to elect a register of deeds at the last general election. The demurrer to the application is sustained and the action

DISMISSED.

MARTIN DEPRIEST, SHERIFF, v. CHAS. B. MCKINSTRY.

FILED NOVEMBER 8, 1893. No. 4096.

Replevin: DEFENDANT NOT IN POSSESSION OF PROPERTY. An action of replevin will not lie against one who, at the time the action was instituted, was neither in the actual nor constructive possession or control of the property, unless he has concealed, removed, or disposed of the same for the purpose of avoiding the writ.

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

J. J. Halligan and *Short & Brotherton*, for plaintiff in error.

F. Q. Feltz, contra.

NORVAL, J.

The action below was replevin. It was brought by Charles B. McKinstry to recover the possession of a pony. There was a trial to a jury, with verdict for the plaintiff. The defendant's motion for a new trial was overruled, and judgment was entered against him for $7, that being the amount of damages assessed by the verdict for the illegal detention of the property, and for costs of suit taxed at $65.68.

The petition in error contains five assignments of error, but one of which is relied upon in the brief of counsel, and that is, the verdict is not sustained by the evidence. The pony in dispute was owned originally by one H. R. Jackett, who sold it to one Frank R. Peale, who in turn sold the same to McKinstry. The evidence is clear that Peale was indebted to McKinstry, a minor, in the sum of $65 for work and labor; and being unable to pay the claim, McKinstry induced him to purchase the pony of Jackett for him, agreeing to take the same in full payment of his demand against Peale. Jackett at the time knew that Peale was buying the pony for McKinstry. Peale gave Jackett a mortgage on the pony, on November 18, 1888, for $65 to secure the purchase price. There is some dispute in the testimony as to the time the sale was made by Jackett to Peale, and by the latter to plaintiff below. The testimony of McKinstry and his witnesses goes to show that both sales were made, and possession of the pony delivered to McKinstry, prior to November 14, 1888. Jackett and Peale, also one or two other witnesses, testified that the sale was made to Peale on November 18, the day the chattel mortgage was given.

On the trial Peale was pretty successfully impeached by numerous witnesses who testified that his general reputation, in the community in which he lived, for truth and veracity was bad. A fair preponderance of the testimony

establishes that McKinstry had been the owner of the pony at least four days before the chattel mortage was given to Jackett. It is certain that at the time the mortgage was executed the pony was in plaintiff's possession, and so remained, without even a suggestion by Jackett that he held a mortgage thereon, until just before this action was commenced in the spring of 1889, when the pony was taken from McKinstry under the mortgage, and thereupon replevin was brought to regain possession. The evidence satisfies us that plaintiff below is entitled to the possession of the property as against Jackett, inasmuch as Peale had no title or interest in the pony when the mortgage was executed.

Counsel for plaintiff in error in the brief say that the case in this court turns largely upon whether the defendant below had possession of the property at the time this action was instituted. This is doubtless true. Upon this branch of the case we agree with counsel that the evidence fails to sustain the verdict. There is not a scintilla of evidence in the bill of exceptions to show that the property at any time was in the possession of Depriest. On the contrary, the undisputed testimony is to the effect that he never had possession of the pony. The mortgage was placed in J. R. Kiser's hands to foreclose, who took the pony from McKinstry and put the same in Jackett's pasture, where it remained until taken under the replevin writ.

It is evident that the suit was brought against the wrong party. Replevin will not lie against one who, at the commencement of the action, was neither in the actual nor constructive possession or control of the property, unless he has concealed, removed, or disposed of the same for the purpose of avoiding the writ. (Cobbey, Replevin, secs. 61, 63, 64; *Kittridge v. Miller*, 45 Mich., 478; *Burt v. Burt*, 41 Mich., 83; *Bacon v. Davis*, 30 Mich., 157; *Hinchman v. Doak*, 12 N. W. Rep. [Mich.], 39; *Johnson v. Garlick*, 25 Wis.,

705; *Grace v. Mitchell*, 31 Wis., 539; *Moses v. Morris*, 20 Kan., 208.)

The petition in the case was in the usual form, and, among other things, averred that the defendant unlawfully detained the property. The answer was a general denial, which cast upon the plaintiff the burden of proving not only that the property was in the defendant's possession or control when the suit was instituted, but that he wrongfully withheld possession of the same from the plaintiff. He wholly failed to prove either. The fact that Kiser, who took the pony from the plaintiff below under the chattel mortgage, was a deputy sheriff, was no justification for bringing this action against Depriest, the sheriff. There is no claim that the deputy acted under the directions of the sheriff, so as to make the latter in any manner responsible for his acts. Kiser did not procure the property by virtue of a legal writ, but in what he did he was merely the agent of the mortgagee.

It is certain that this action will not lie against Depriest, and it being established by uncontradicted testimony that the pony was not in his possession when the replevin writ was issued and served, the court below should have dismissed the action at the costs of the plaintiff. It was error to render judgment against the defendant for damages. As the property was not taken from him under the writ, and as he claimed on the trial no right or title to the same, the defendant was not entitled to a judgment for a return of the property, but was simply entitled to a judgment of dismissal, and for costs. The judgment of the district court is reversed, and the action is dismissed at the costs of the defendant in error in both courts.

REVERSED AND DISMISSED.

J. L. ROBERSON v. JOHN P. REITER.

FILED NOVEMBER 8, 1893. NO. 4936.

1. **Mortgages**: ESCROW: DELIVERY. Where a mortgage is executed and deposited in escrow with a third person to be delivered to the mortgagee on the performance by the latter of certain conditions, the delivery thereof by the custodian to the mortgagee, without the knowledge or consent of the mortgagor, before the fulfillment of the conditions by the mortgagee, will not have the effect to confer any interest in the mortgaged property upon the latter, or upon an assignee with notice. A mortgage delivered to a third party in escrow, to be by him delivered upon the happening of some contingency, or upon the performance of some condition, does not become effectual as a delivered instrument until such second delivery.
2. **Rulings on Admission of Evidence**: REVIEW. The assignments of error, based upon the rulings of the trial court on the admission of testimony, considered and overruled.
3. **Negotiable Instruments**: RIGHTS OF ASSIGNEE AFTER MATURITY. The assignee of a promissory note and chattel mortgage, who purchased them after maturity, holds them subject to all the defenses which could have been made by the maker had they remained in the hands of the original payee or holder.
4. **Replevin**: FORM OF JUDGMENT. In an action of replevin, where the property replevied has been delivered to the plaintiff under the writ, in case the verdict finds for the defendant, the judgment must be in the alternative for a return of the property, or the value thereof, or the value of the possession of the same, and for damages.
5. ———: ———: REVIEW: PRACTICE. Where the judgment is not in the alternative form, a new trial will not be granted by the supreme court for that reason, but the cause will be remanded to the trial court to render the proper judgment upon the verdict.

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

The facts are stated in the opinion.

J. L. Roberson and *H. J. Whitmore*, for plaintiff in error:

The note and mortgage are admitted, and also default in the payment thereof. The plaintiff is therefore entitled to the possession of the property, unless the defendant can establish payment or satisfaction of the mortgage in some way. (*Case Threshing Machine Co. v. Campbell*, 14 Ore., 460; Jones, Chattel Mortgages, sec. 706, and cases cited; *Holland v. Griffith*, 13 Neb., 473; *Lathrop v. Cheney*, 29 Neb., 456.)

The court erred in not rendering an alternative judgment. (*Lee v. Hastings*, 13 Neb., 511; *Hooker v. Hammill*, 7 Neb., 236; *Frey v. Drahos*, 7 Neb., 201.)

W. S. Morlan, and *W. R. Starr*, *contra:*

The irregularity in the form of the judgment was not called to the attention of the trial court. No motion was made to correct the same. In this case, if there was error, it was error without prejudice. (*Armstrong v. Lynch*, 29 Neb., 91.)

NORVAL, J.

This was an action of replevin by J. L. Roberson against John P. Reiter to recover the possession of certain personal property. From a verdict and judgment in favor of defendant, plaintiff prosecutes error.

Plaintiff claims the right to the possession of the property by virtue of a chattel mortgage given by the defendant to one Henry Schneider, and by the latter assigned to the plaintiff. It appears from the record that on December 19, 1888, defendant, being the owner of the property in dispute, executed a chattel mortgage thereon to Henry Schneider, to secure the payment of a promissory note calling for $500, payable September 1, 1889. The execution of the note and mortgage is admitted. The defendant,

however, insists that he never delivered them, or authorized their delivery, to the payee and mortgagee, but the same were placed in the hands of one George H. Grubb, to be held by him as escrow; and that subsequently, without the knowledge or consent of the defendant, the note and mortgage were turned over by Grubb to Schneider, without the terms and conditions upon which they were held having been complied with. This is disputed by the plaintiff. After the maturity of the note, it, with the mortgage securing the same, was assigned to the plaintiff, without the delivery of either the note or mortgage, for the consideration of $100. Defendant refusing to surrender the mortgaged property, this action was instituted to recover the possession thereof.

Plaintiff contends that the verdict should have been in his favor, and that the trial court erred in not so directing the jury. We are unable to adopt this view of the case. It is undisputed that one Henry Schneider was the owner of an undivided one-half interest in a brewery, situated near the town of Indianola, which was incumbered by mortgage to the amount of $1,500. He entered into a contract for the sale of his interest in the brewery, and the personal property contained therein, to the defendant, and the note and chattel mortgage involved in this suit were executed to secure the payment of the purchase price, and the same were deposited in escrow with George H. Grubb, an attorney of Indianola, to be delivered to Schneider on the performance by the latter of certain conditions as specified in such contract. There is a direct conflict in the testimony as to the terms under which the note and mortgage were held by Mr. Grubb, and whether the same were delivered to Schneider by the custodian in violation of the stipulations of the agreement.

The defendant testified unequivocally that the agreement between all the parties was that the note and mortgage were to be placed in the possession of Mr. Grubb, to be

held until Mr. Schneider should procure a release of the incumbrance upon the brewery, and that likewise the latter execute to defendant a warranty deed covering the brewery property, which conveyance was to be left with Mr. Grubb, who was to retain all the papers until both parties were satisfied that the conditions of the sale had been complied with, when the deed was to be delivered to the defendant, and the note and chattel mortgage to Mr. Schneider; that shortly after the execution and delivery of the note and mortgage to Mr. Grubb, the latter, on the execution and delivery to him of said deed, unknown to defendant, surrendered the note and mortgage to Mr. Schneider, without the fulfillment by him of the said stipulations of the contract. That the incumbrance upon the brewery has never been paid or released of record, is conceded.

The defendant is fully corroborated as to the terms of the sale by the testimony of one Charles H. Oman, who was called by the parties to witness the verbal agreement. The evidence of the defendant and Oman is disputed by the testimony of Henry Schneider, who denies under oath that he agreed to lift the mortgage on the brewery, but testifies that Reiter, as a part of the consideration, assumed and agreed to pay the same. This evidence is weakened by the deed executed by him, the same containing full covenants of warranty, without any mention therein that the grantee assumed the payment of the mortgage on the property, as it doubtless would have stipulated if such had been the understanding of the parties. The jury were the judges of the weight to be given to the conflicting testimony, and after a careful perusal of the evidence contained in the bill of exceptions, we are satisfied that they were justified in finding that the contract was as testified by the defendant and his witnesses, and that the note and chattel mortgage were delivered to Schneider by the custodian without authority and in violation of the conditions of the contract. They, therefore, have no validity.

The rule is that where a mortgage is signed and deposited in escrow with a third person to be delivered to the mortgagee on the performance by the latter of certain conditions, the delivery by the custodian to the mortgagee, without the knowledge or consent of the mortgagor, and without the fulfillment of the conditions precedent by the mortgagee, will not have the effect to confer any interest in the mortgaged property upon the latter or his assignee with notice. The proposition is too well sustained by the adjudicated cases to require the citation of authorities to sustain it.

Plaintiff lays considerable stress upon the fact that the defendant wrote Schneider in the latter part of July, 1889, that he would pay $250 on the note on August 1, and the balance when due, requesting that the latter send the note to the bank or some person in Indianola that he might see the credit indorsed thereon when the payment was made. This letter, unexplained, would be held to be a recognition by the defendant of Schneider's possession of the note as valid, but in view of other testimony in the record it should not be so regarded. The defendant explains why the letter was sent. He testifies that he wrote it under the advice of counsel in order to prevent the payee from transferring the note to an innocent party before the maturity thereof. There is evidence in the record tending to show that the defendant never recognized the validity of the deed to the brewery, and that he never took possession of the property. Plaintiff was in no way deceived by this letter. It does not appear that he had any knowledge of its contents until after the bringing of the suit. Nor is plaintiff an innocent purchaser, he having taken an assignment of the note and mortgage long after the same fell due, with notice that the defendant disputed their validity. He was aware at the time he was purchasing a lawsuit.

Plaintiff in his brief cites authorities in support of the proposition that where the existence of a chattel mortgage is admitted, and there is a default in payment of the debt

which it was given to secure, the mortgagee is entitled to the possession of the property, unless the defendant establishes payment or satisfaction of the mortgage debt. The decisions have no application to this case. If the delivery of the note and mortgage was unauthorized, as the proofs tend to establish, and the jury by their verdict so found, then the instruments never had any legal existence, which is a complete defense to an action for the recovery of the possession of the property.

We observe no error in the admission of the testimony regarding the incumbrance on the brewery, since the payment thereof was one of the conditions to be performed by Schneider before the note and mortgage were to be delivered to him. It was certainly competent to prove that this was one of the terms upon which the papers were left in the hands of Grubb, and that the grantee in the deed never paid the incumbrance upon the real estate therein described. The evidence was pertinent and proper for the purpose of showing that the delivery of the note and chattel mortgage by the depository in escrow was fraudulent and void. Plaintiff is mistaken in supposing that the defense in the case at bar is in the nature of a set-off or counter-claim. No such a defense was raised or attempted to be interposed here. If the chattel mortgage ever had any legal existence, and the defendant had paid the incumbrance on the brewery, and set up the breach of the covenants in the deed against incumbrances to defeat plaintiff's action, then there would be some ground for plaintiff's contention that neither offset nor counter-claim is available in an action of replevin. The defense interposed goes to the right of the plaintiff to maintain his suit. If the note and mortgage were invalid, plaintiff was not entitled to the possession of the property. That is plain.

Error is assigned in admitting the testimony of the witness Oman. This is the person who was called by the parties for the purpose of being a witness to the bargain.

The conversation between Schneider and Reiter in the presence of Oman was part in English and part in German. The witness did not understand what they said in German. He testified to what was spoken in English. The objection to his testimony is that, as the witness did not know what was said in German, it was error to permit him to state any part of the conversation. The rule that a witness must give the whole of a conversation, and not a part, should not apply here, as there is not a particle of evidence to show that any portion of the contract was made in a foreign language; while, on the other hand, the presumption is strong that it was not so made, inasmuch as Mr. Oman was called for the express purpose of being a witness to the contract, and it was known to both parties that he had no knowledge of the German language.

There was no error in admitting the testimony of Henry Crabtree as to the value of the property taken under the replevin writ. He showed himself acquainted with the value of the property, and competent to testify upon that subject.

Objection is made to the giving of the following instruction asked by the defendant:

"4. An assignee of a promissory note and chattel mortgage, who takes them after maturity, is supposed to have notice of any defense that exists against them, and such defense may be made as effectually against the note and mortgage in the hands of such assignee or holder as if the suit had been brought by the original payee or holder of said note and mortgage."

The foregoing correctly stated the law, and was applicable to the case made by the evidence. The court did not err in giving the same, or in refusing to instruct the jury as requested by the plaintiff. The most of the instructions asked by the plaintiff were, in effect, that the jury should return a verdict in his favor, and the others were not based upon any issue in the case.

The judgment is erroneous in that it was not in the alternative, for a return of the property, or its value in case it cannot be returned, but was rendered for money absolutely. It has been repeatedly held by this court that where, in an action of replevin, the property has been taken under the writ and delivered to the plaintiff, in case of a verdict in the defendant's favor, the judgment must be in the alternative form. (*Hooker v. Hammill*, 7 Neb., 231; *Lee v. Hastings*, 13 Neb., 508; *Singer Mfg. Co. v. Dunham*, 33 Neb., 686; *Manker v. Sine*, 35 Neb., 746.)

Defendant insists that there is no error in not rendering an alternative judgment, for the reason that the record shows that the plaintiff could not return the property to the defendant if he so desired. It does appear that one of the mules died before the trial in the court below, but it is not shown that the rest of the property replevied cannot be returned. It was advertised and sold under the mortgage, but who became the purchaser is not disclosed by the record.

Again, it is urged that the error in the form of the judgment cannot avail the plaintiff because the attention of the court below was not called to the defect in the motion for a new trial. We are unwilling to adopt that view. A defect in judgment need not be pointed out in a motion for a new trial. Indeed, the filing of such a motion usually, and very properly, precedes the rendition of the judgment, and it could not be known in advance, at the time the motion is presented, that there will be errors, irregularities, or defects made in the rendition of the judgment. The decision in *Armstrong v. Lynch*, 29 Neb., 87, has no application to the question under consideration. In that case there was a defect in the form of the verdict in replevin, the jury having found the value of the property taken by the sheriff under writs of attachment, but not the special interest of the officer. No objection was made as to the form of the verdict in the motion for a new trial, and judgment having been rendered in favor of the sheriff for the actual

amount due upon the writs, it was held that the judgment would not be reversed for such defect in the verdict.

In *Manker v. Sine, supra,* it was held, in a case similar to the one at bar, that where a judgment in favor of the defendant in an action of replevin is not in the alternative form, a new trial will not be granted for that reason, but that the cause will be remanded to the trial court to render the proper judgment upon the verdict of the jury; and this case will take that course. The judgment is reversed and remanded, with instructions to the district court to enter judgment in the alternative for a return of the property or the value thereof, in case no return can be had.

REVERSED AND REMANDED.

MORRIS WILSON, APPELLEE, V. JOHN ROBERTS, APPELLANT.

FILED NOVEMBER 8, 1893. No. 5891.

Review in Trial Court: WAIVER OF RIGHT TO APPEAL. Where, in an equitable proceeding, the unsuccessful party secures a re-examination by the district court of the questions at issue, upon an application in the nature of a bill of review, although by motion, instead of a petition, he will be held to have waived his right to appeal from such decree.

MOTION by appellee to dismiss appeal from the district court of Lancaster county. Heard below before TIBBETS, J. *Motion sustained.*

Halleck F. Rose, for the motion.

Samuel J. Tuttle, contra.

POST, J.

This was a proceeding in equity for the purpose of stating an account between the parties who had been engaged as partners under a contract with the state in removing the boilers and heating apparatus from the basement of the capitol building, and resetting them in the building now used as an engine house. A decree was entered by the district court on the 23d day of November, 1891, in which an account was stated between the parties, and a judgment entered for the plaintiff in the sum of $385 and costs, being the balance found in his favor.

On the 9th day of December following, the defendant filed a motion to modify the judgment aforesaid, of which the following is a copy:

"Comes now the said defendant, John Roberts, and moves the court herein to vacate and modify the judgment heretofore entered in the above entitled cause, to correct and allow defendant for the several matters and things hereinafter particularly specified, as shown by the several items and vouchers hereto attached and made a part hereof."

The items and vouchers referred to in the motion do not appear from the transcript, but it is asserted by the defendant that they relate exclusively to matters within the issues presented by the pleadings and considered by the court on the former hearing of the case. On the 18th day of June, 1892, an order was made sustaining the above motion, the record thereof being as follows:

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"Now on this day came the parties hereto with their attorneys, and this cause now comes on to be heard upon the motion of the defendant to modify the decree heretofore entered herein, and the court on due consideration whereof does sustain said motion to modify the judgment and de-

cree heretofore entered herein, and it is by the court ordered that the judgment and decree entered herein on the 23d day of November, 1891, and of record at page 549 of Court Journal X of the records of this court, be and the same is hereby modified to the extent that a judgment be entered herein as of this date, in favor of the plaintiff and against the defendant, for the sum of $362.25, instead of the sum of $385, as in said former decree so modified to stand. To all of which the plaintiff and defendant duly and severally except, and forty days from the rising of the court are hereby given each of them to reduce their exceptions to writing."

The appeal was taken December 19, 1892. The plaintiff now moves to dismiss the appeal on the ground that it was not taken within the time prescribed by law, and that this court is without jurisdiction of the action. It is evident that the appeal should be dismissed unless, as contended by defendant, the six months allowed therefor should be reckoned from the modification of the judgment instead of the date of the original decree.

It should be remarked in this connection that the plaintiff objected to the consideration of the motion to modify because it was in effect a proceeding to review the original decree and to correct errors occurring at the trial. It is apparent from the record that the object of the motion was to secure a review of the original decree by the district court.

By his election to review the decree in the district court the defendant must be held to have waived his right to an appeal therefrom. Such is the settled and salutary rule, and one sanctioned by abundant authority. (See *Indiana Mutual Fire Ins. Co. v. Routledge*, 7 Ind., 25; *Harvey v. Fink*, 111 Ind., 249; *Commonwealth v. Masonic Temple Co.*, 87 Ky., 349; Elliott, App. Proc., sec. 149.)

The question of the right of appeal from the order modifying the decree is not presented by the record, since the

judgment complained of is evidently the one rendered November 23, 1891, as subsequently modified. The modification thereof was in the defendant's interest, and made upon his motion, and of which he will not now be heard to complain. The question of the regularity of the proceeding to review upon motion of the defendant is not material in view of the conclusion announced above. The motion to dismiss is sustained.

APPEAL DISMISSED.

MAY A. UPTON V. HENRY J. CADY ET AL.

FILED NOVEMBER 8, 1893. No. 5950.

1. **Review on Error:** MOTION FOR NEW TRIAL: ASSIGNMENTS OF ERROR. One who desires to have reviewed, upon petition in error in this court, alleged errors occurring at the trial, is required to assign the rulings complained of to the trial court in a motion for a new trial.
2. **Error Proceedings:** FAILURE TO ASSIGN ERRORS: DISMISSAL. The failure to assign alleged errors as grounds for a new trial is not of itself sufficient reason for the dismissing of a petition in error by this court.
3. ——: ——: ——: PRACTICE. But whenever it appears, from an inspection of the record in any cause, that the petition in error presents no question of law or fact for review by this court, such cause will be considered as submitted on its merits and the judgment or decree affirmed.

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

De France & Richardson, for plaintiff in error.

Wharton & Baird, contra.

POST, J.

On the 15th day of May, 1891, the defendants in error commenced an action in the district court of Douglas county against the plaintiff in error, May A. Upton, and husband, to foreclose a mechanic's lien. The Patrick Land Company, which claimed an interest in the property described in the petition, was also made a defendant.

The plaintiff herein, Mrs. Upton, answered alleging ownership of the property and denying the other allegations of the petition. The Patrick Land Company filed an answer, in which it put in issue the cause of action alleged in the petition, set up a mortgage on the property executed by Mrs. Upton and husband, and prayed for a decree of foreclosure. On the 23d day of January, 1892, a final decree was entered directing the sale of the property in controversy for the satisfaction, first, of the lien of the plaintiffs below; and, second, the mortgage of the Patrick Land Company. On the 20th day of January, 1893, Mrs. Upton filed a petition in error in this court by which she seeks a reversal of the decree of the district court on the following grounds:

1. The court erred in admitting the evidence of C. P. Simmons to which plaintiffs at the time objected.

2. The finding and decree are not sustained by the evidence.

3. The judgment and decree are contrary to the law and the evidence.

We are now asked to dismiss the petition in error for the reason that the alleged errors were not called to the attention of the district court by means of a motion for a new trial. It has been repeatedly held that where the unsuccessful party desires to have reviewed, by petition in error in this court, alleged errors occurring at the trial, he is required to assign the rulings complained of in a motion for a new trial. (See *Hosford v. Stone*, 6 Neb., 380; *Cruts v. Wray*, 19 Neb.,

581; *Gaughran v. Crosby*, 33 Neb., 33.) In the last named case it was held that the failure to file a motion for a new trial is not of itself sufficient reason for dismissing a petition in error. While we adhere to that rule we will not willingly apply it where the natural and only effect thereof will be to delay the disposition of a cause which from an inspection of the record we have seen to be without merit. It is apparent, from a careful examination of the record upon the consideration of the motion to dismiss, that the decree of the district court must be affirmed for the reasons stated. We have therefore regarded the cause as submitted upon its merits and the decree is

AFFIRMED.

MARK MAY V. STATE OF NEBRASKA.

FILED NOVEMBER 8, 1893. NO. 5836.

1. **Criminal Law:** REVIEW. Where it is apparent that the plaintiff in error has not been prejudiced by the ruling complained of, the judgment will be affirmed, and this court will not examine the record for the purpose of determining whether or not such ruling is technically correct.

2. ———: CONTINUANCE: FAILURE TO NOTIFY DEFENDANT'S ATTORNEY OF TRIAL. A motion for continuance in a criminal case on the ground that the attorney for the accused had not been notified of the trial a sufficient length of time to properly prepare therefor, but which fails to show want of notice by the accused himself, is insufficient.

3. ———: LARCENY: CONFESSIONS EXTORTED BY THREATS: ADMISSIBILITY. Confessions of the accused in a criminal prosecution are inadmissible where there is reasonable ground for the presumption that they were extorted by threats or induced by means of promises.

4. ———: ———: EVIDENCE examined, and *held* sufficient to sustain the judgment of the district court.

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

Silas Cobb, for plaintiff in error.

George H. Hastings, Attorney General, and *T. J. Mahoney*, for the state.

POST, J.

This is a petition in error from the district court of Douglas county, and brings up for review the judgment of that court, whereby the plaintiff in error was convicted of the crime of larceny, and sentenced to a term in the penitentiary.

1. The first of the alleged errors necessary to notice is the overruling of the motion for a continuance. The grounds upon which the continuance was asked by the prisoner are: First. Absence of witnesses by whom he could prove that William Hayden, a member of the firm of Hayden Bros., who are named in the information as owners of the property alleged to have been stolen, had admitted that he, the prisoner, was the representative of said firm, and authorized to purchase goods in their name. It is sufficient to say that on the trial the prisoner testified that he was, at the time of the alleged larceny, employed as superintendent or foreman of the notion department of Hayden Bros.' store, in the city of Omaha, and was in the habit of purchasing goods when required by the business of the firm. On that point he was not contradicted by William Hayden, who testified as a witness for the state. On the other hand, the testimony of the witness named is strongly corroborative of the prisoner. It is clear that the statements imputed to Hayden, and which could have been proved by the absent witnesses, were in no sense contradictory of his evidence at the trial, and would, for that reason, have been inadmissible if offered. Second. That the prisoner's attor-

ney had not been notified when the case would be reached, until a few hours before it was called for trial. On that point the affidavit is insufficient, since it fails to show that the prisoner himself was not aware of the date set for the trial a sufficient length of time to make preparation therefor. Nor is it apparent, from an examination of the bill of exceptions, that he has been prejudiced by being required to go to trial without sufficient notice, since he had the benefit of a very able and skillful defense. It is doubtful, in fact, if a better presentation of the case in his favor could have been made under any circumstances. There was, therefore, no error in the overruling of the motion for a continuance of which the prisoner can now complain.

2. The next day, and after the selection of a jury had been begun, time was asked to prepare a second motion for a continuance, which was refused. Said application, according to the transcript, was based upon the information contained in a telegram sent by the prisoner's sister from Chicago the day previous. The telegram does not appear in the record; hence we are unable to say that there was an abuse of discretion by the court in denying the application.

3. The next assignment relates to the admission in evidence of certain confessions by the prisoner, claimed to have been made to William and Joseph Hayden. The ground of the objection stated is that said confessions were not voluntary, and appear from the record to have been made to persons in authority over the prisoner. This contention is not sustained by the record. The prisoner, according to the testimony of the witnesses named, on being confronted with proof of guilt in the form of letters indicating that he had for some time been engaged in disposing of goods from the store, on his own account, to parties in Chicago and New York, also with the property described in the information, to-wit, a quantity of silk elastic web belonging to his employers, which he had recently delivered to

the American Express Company consigned to a party in Chicago, broke down and confessed the theft charged, as well as others, and offered to make restitution. Although the witnesses were not asked either on direct or cross-examination whether any threats or promises were made as an inducement to the confession, it is clear that the statement of the accused was entirely voluntary. It is true that he testifies on his direct examination that on the Saturday preceding his arrest, which was on the following Monday, in a conversation with William Hayden concerning the larceny charged, the latter said to him: "This is crooked work. I want you to tell the truth about it. It will be better for you, for we know you are doing crooked work. I will have you arrested and have an officer ready outside the door." But he explicitly denies the confession proved. It is also in evidence that he voluntarily returned to the store the next day, where he had a further conversation with the proprietors on the subject, and again on Monday, where he remained until late in the afternoon when he was taken into custody. The rule which excludes evidence of confessions whenever there is reasonable ground for the presumption that they were extorted by threats or induced by promise of immunity, is one of great antiquity, and rests upon the soundest reasons. But in determining whether the confession offered is admissible, the test is whether the threat or promise shown is in any degree calculated to influence the accused. (See 3 Russell, Crimes [9th ed.], 367.) Tested by that rule the confession in this case was admissible, and the district court did not err in receiving it in evidence.

4. Exception is taken to the refusing of instruction No. 1 requested by the prisoner, which correctly states the rule with respect to the presumption of innocence in his favor, and the facts which the state was required to establish in order to be entitled to a conviction. The court had, however, given the same proposition in substance; hence the refusal of the request was not error.

5. It is urged finally that the evidence is insufficient to sustain the judgment. In that view we cannot concur. The proof clearly establishes the fact that the prisoner at the time charged, while employed by the firm above named, packed in a box a large quantity of silk elastic web, the property of his employers, and caused it to be delivered to the express company, consigned to A. Stein & Co., Chicago, from whence it was recovered by the owners. That his intention was to dispose of the property in question on his own account, will, under the circumstances of the case, scarcely admit of a doubt. Among other things which indicate a felonious intention on the part of the prisoner, is the fact that the explanation given by him of the transaction is unreasonable and apparently false, while there is evidence strongly tending to prove the conversion of property at other times by disposing of it in like manner, on his own account, to parties in Chicago and New York. We can see no ground for interference with the verdict of the jury, as the evidence is clearly sufficient to sustain the judgment.

There are other questions discussed in the brief of plaintiff in error, but as they were not presented by the motion for a new trial, they do not call for notice at this time. The judgment of the district court is

AFFIRMED.

HANS P. LAU v. W. B. GRIMES DRY GOODS COMPANY ET AL.

FILED NOVEMBER 8, 1893. No. 4870.

1. **Briefs:** MISCONDUCT OF ATTORNEYS: INSINUATIONS AND IMPUTATIONS OF UNFAIRNESS and improper motives to the trial judge are highly improper and prejudicial to the party making them.

2. **Instructions**: AUTHORITY OF ATTORNEY TO BIND HIS CLIENT. Where the question at issue was whether an alleged agreement had been made in a case pending, by an attorney of record for one of the parties, there being no controversy with respect to the extent of his authority, it is not error to refuse an instruction defining the power of an attorney to contract in the name of his principal.

3. ———. The trial court is not required to charge the jury in the exact language requested. It is sufficient if the substance of an instruction be given.

4. **Review**: HARMLESS ERROR. A judgment will not be reversed on account of errors not prejudicial to the complaining party.

5. **Evidence of value** examined, and *held* sufficient to sustain the judgment of the district court.

6. **Attachment**: LIABILITY OF GARNISHEE: UNSATISFACTORY DISCLOSURE. In an attachment suit it was stipulated that L., a garnishee, who had taken possession of a stock of goods to satisfy a mortgage executed by the defendant, should answer by affidavit "showing fully the amount of money remaining in his hands from sale of stock formerly belonging to the defendant," and that upon the payment of said money into court, less the amount of his mortgage and expenses, the garnishee should be discharged. *Held*, No defense in an action by the plaintiff against the garnishee after answer for an unsatisfactory disclosure, the cause of action alleged being the conversion of the stock of goods while in his possession.

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

E. P. Holmes, for plaintiff in error.

Edgar C. Ellis, M. H. Weiss, and *Chas. P. Schwer, contra.*

POST, J.

This was an action in the district court of Fillmore county by the defendant in error, The W. B. Grimes Dry Goods Company, against the plaintiff in error under the provisions of section 225 of the Code, for an unsatisfactory disclosure as garnishee.

The other defendants in error, thirteen in number, were intervenors who each claimed an interest in the property adverse to the defendant below. It appears from the record of the case that for some time prior to October 15, 1888, Wm. Schultz & Son had been doing business as general merchants in the village of Strang in said county. That on the day named said parties executed in favor of Lau, the plaintiff in error, a mortgage on their entire stock of merchandise to secure a note of that date of $1,086.89, and suffered the mortgagee to take immediate possession of the property so conveyed. Shortly thereafter The Grimes Dry Goods Company commenced an action against Schultz & Son in the district court of said county, and caused an order of attachment to issue therein, by virtue of which the property in controversy was seized while in possession of the plaintiff in error. The latter subsequently recovered possession of the property by means of an action of replevin against the sheriff, and proceeded to sell it in order to satisfy his mortgage. Some time after he had recovered possession of the property by his action against the sheriff, The Grimes Dry Goods Company and other creditors of Schultz & Son instituted garnishment proceedings against him as a supposed debtor of the latter. The several attachment suits were consolidated to the extent that by agreement a single answer was filed by the garnishee, in which he says: "There is now in his hands belonging to said defendants (Schultz & Son), subject to the liens by mortgages and orders of garnishment, the sum of $2,812.68; and that with this answer affiant hands into this court the said sum of $2,812.68, subject to the orders of said court hereafter to be made. Affiant further says that said amount is all of the property, moneys, or credits of any nature whatsoever now in his hands belonging to the said defendants, and that since the orders of garnishment were served upon this affiant he has not in any manner paid to the said Schultz & Son any part of the money in his hands, and that the amount

of money in his hands, and that the amount of money now handed to the court is all of the money belonging to the defendants."

In the petition below, after stating its cause of action against Schultz & Son, which had in the meantime been reduced to judgment, The Grimes Dry Goods Company alleges the filing of the answer set out above, and charges that said answer is not true, and is not a full disclosure of the indebtedness of the garnishee to Schultz & Son. It is further charged that at the time he was served with notice said garnishee had in his possession belonging to Schultz & Son money to the amount of $4,000 and the stock of merchandise above mentioned of the value of $9,000, all of which he has converted to his own use.

In his answer the plaintiff in error admits that he had in his possession when served as garnishee the stock of goods belonging to Schultz & Son, and that he at said time held the property in controversy by virtue of the aforesaid mortgage in his favor, but denies that said property was of the value of $9,000, and avers that the value thereof was $4,533.91, and no more. He admits that said property had been disposed of by him at private sale, and avers that it was so disposed of under and by virtue of an agreement with the plaintiff below and the several garnishees. He alleges that the stock of goods in controversy was sold to the best possible advantage, and in such manner as would insure the largest and best price, but that they were old and shop-worn, and worth only the sum above named; and that after paying the amount due by virtue of the mortgage in his favor and his actual and necessary expenses in the premises, he had paid into court the balance remaining, to-wit, $2,812.68. He also alleges that previous to the filing of his answer as garnishee he entered into a written stipulation with the plaintiff by which it was agreed that he should be discharged upon paying into court the money then remaining in his hands after satisfying his

mortgage and costs of sale. The stipulation referred to above is as follows:

"In District Court of Fillmore county.

"BARBE BROS.
v.
SHULTZ & SON.

"PAXTON & GALLAGHER
v.
SHULTZ & SON.

"W. B. GRIMES DRY GOODS CO.
v.
SHULTZ & SON.

"ROBERT KRAUS
v.
SHULTZ & SON.

"It is hereby stipulated and agreed by and between the parties to the above entitled causes, and each of them, that answer of garnishee, Hans P. Lau, in open court is waived and consent given him to answer by June 4, 1889, by affidavit, showing fully the amount of money remaining in his hands from sale of stock of goods formerly belonging to Shultz & Son.

"2. That the amount of said sums of money, less the amount of Lau's note and mortgage thereon and expenses of foreclosure, be by him paid into court to await the further order.

"3. That upon the payment of said money into court, the garnishee be dismissed. H. F. ROSE,

"For H. P. Lau, garnishee.

"W. C. SLOAN,

"Att'y for all the above plaintiffs."

The issues presented by the petition of the intervenors and answers thereto are substantially the same as above. At the trial it was stipulated as follows:

"It is stipulated by the parties that the issues, so far as this trial is concerned, to be submitted to the jury here, are the following questions:

"1. Was the sale of the merchandise made prior to the advertised day of such sale of goods and merchandise held by the defendant Lau under his mortgage, made under an agreement with the plaintiff?

"2. Was the sale of the merchandise, made prior to the advertised day of such sale of the goods and merchandise held by defendant Lau under his mortgage, made under any agreement with the intervenors herein?

"3. What was the fair and reasonable value of the stock of merchandise of Shultz & Son at the time the same was taken possession of by the defendant Lau, to-wit, October 19, 1888?

"The finding of these facts is to be taken in no way as intended to admit the claims of any of these defendants, but for the purpose of this trial, of the facts submitted to the jury, these claims will be taken to be admitted as represented in their pleadings. This agreement is not intended in any way to hamper or interfere with the parties in this action which they may find arise under the pleadings which shall be submitted to the court in this case, if any such there be.

"As to any other questions of fact other than these submitted to the jury here, a jury is waived and they will be submitted to the court."

The first and second of the above interrogatories were answered by the jury in the negative, and in response to the third, the stock of merchandise was found to have been worth $6,650 at the time the defendant below took possession thereof.

The first errors assigned relate to the overruling of the motion to set aside the above findings. The general charge of the court is violently assailed by the plaintiff in error as "meaningless," "unintelligible," and evidence of prejudice in the mind of the trial judge, etc. This practice has been frequently commented upon and always condemned. Criticisms and insinuations of the character un-

der consideration are always out of place in the argument of a lawyer, and, as said in a recent case in this court, are in the nature of an admission that the party making them, for reasons best known to himself, is not willing to rely upon the merits of his case. (See *Flannagan v. Elton*, 34 Neb., 355.) But as much as such a practice is to be deplored as a rule, it is doubly censurable in a case like this, where, after carefully considering the lengthy charge copied in plaintiff in error's brief, we discover, on examining the record, that no exception was taken thereto, either at the time or in the motion for a new trial. We certainly have a right to expect fairness and candor on the part of attorneys who practice in this court, and to assume when considering the questions argued in their briefs that the discussion therein is pertinent to some question presented by the record. In this case we have failed to discover in the charge of the court any prejudicial error; but suppose it to be justly subject to criticism, it was evidently satisfactory to the plaintiff in error when given, and he will not now be heard to complain.

The court refused to give the following instruction asked by the plaintiff in error, to which exception was taken:

"You are further instructed that if you find from the evidence that the plaintiff in this case, together with the intervenors, entered into an agreement with the defendant, by and through their duly employed attorneys, then, and in that case, you are instructed that the attorneys for said parties had the authority, by virtue of their employment as such, to do in behalf of their clients all acts in or out of court necessary or identical to the prosecution and management of the matter of the business entrusted to said attorneys by such clients, and they will be bound thereby; and you are further instructed that it is a general rule of law, that in the absence of fraud a client is bound by the acts of his attorney in all matters pertaining to the business entrusted to his care or management."

There is no error in the ruling complained of. No issue was involved with respect to the power of an attorney to bind his client by agreements within the scope of his authority. The request, it may be assumed, embodies a sound proposition of law and might have been given without prejudice to the rights of the adverse party, although it is a rule well settled in this jurisdiction that instructions should have special reference to the evidence, and that it is error to leave the jury at liberty to infer a fact of which there is no proof. (*Cropsey v. Averill*, 8 Neb., 152; *City of York v. Spellman*, 19 Neb., 357.) Had there been a controversy with respect to the authority of the attorney to stipulate for the disposal of the stock of goods at private sale, the refusal of the instruction would have presented a different question. But since the question at issue was the execution of the agreement rather than the authority to make it, we are unable to perceive wherein the plaintiff in error is prejudiced.

It is next argued that the court erred in refusing the following instruction:

"You are further instructed that in arriving at the value of said stock here in controversy you will not go out of the evidence to ascertain the same, or speculate as to what the value of the same might have been, but your answer to such question, fixing the value thereof, must be based upon the evidence now before you; and in arriving at such value from the evidence in this case, you are instructed that it is your duty to find what the fair and reasonable value of such stock was at the time of its passing into the hands of said defendant, to-wit, on the 19th day of October, 1888, in the market in which said stock was located, to-wit, Strang, Nebraska, and you will not allow yourself to be misled or confused with any testimony that may have been introduced in this case concerning a market value, or invoice price, that might have been at some time attached to or made of said stock."

This paragraph, so far as it states the general rule, had been given in substance in the general charge of the court. The last clause is apparently intended to disparage the testimony of the witnesses for the defendant in error, Stewart and Houchin, who participated in the appraisement of the goods at the time they were taken from the sheriff in the replevin suit. Each of these witnesses on direct examination testified that the value of the goods was a little less than $8,000, about $7,800. On their cross-examination it was disclosed that four persons participated in the inventory and appraisement, each of whom listed different parts of the stock with the value of the items thereof, upon which all agreed; that the separate lists were copied the next day, making the complete inventory, and the values footed up showing a total of $7,800. The inventory was not offered in evidence by the plaintiff below, nor is it claimed to be independent evidence of the value of the stock of goods. It would probably have been inadmissible if offered for that purpose, but was a proper subject of inquiry on cross-examination as tending to show the witnesses' means of knowledge. The fact that the value given by the witnesses corresponds substantially with the appraisement is at most a corroborating circumstance not liable to "confuse" or "mislead" the jury or obscure the real question at issue. The ruling of the court in refusing the instruction, therefore, if erroneous, is error without prejudice.

The next assignment in the motion is that the third finding is contrary to the evidence. The evidence is conflicting. The witnesses for defendant in error, who are shown to be experienced merchants and salesmen, testify that the stock of goods was worth $7,800, while some of the witnesses for the plaintiff in error place their value as low as $4,500. The value as found, $6,600, is not so clearly against the weight of the evidence as to call for reversal in this proceeding. The jury were as capable of weighing

the evidence and determining therefrom the value of the property as we are, and their finding should not be disturbed.

The district court having refused to set aside the special findings, proceeded in accordance with the stipulation to receive evidence offered by the intervenors tending to prove their respective claims as against Shultz & Son, and to establish their rights to share in the proceeds of the property in controversy. That hearing resulted in a finding and judgment for the plaintiff below in the sum of $3,404.35, being the value of the stock of goods less the amount of the mortgage, $1,086.89, and the amount of money paid into court by the plaintiff in error, $2,812.68, with interest.

Subsequently a formal motion for a new trial was made by the plaintiff in error which presents certain questions in addition to those already considered. It is contended that the stipulation first set out amounts to a waiver by the defendant in error of his right to proceed against the garnishee under the Code, and is a complete defense to this action. It will be observed that the stipulation relied upon was made with reference to, and filed in, the attachment suit before this action was commenced, and before this cause of action had accrued. The garnishee was thereby authorized to answer by affidavit "showing fully" the amount of money remaining in his hands, etc., and not otherwise. There is nothing therein to warrant the inference that the parties contemplated a disposition of the goods otherwise than at public auction, after due and legal notice. And when it is read in the light of the facts found by the jury it is certain that in disposing of the greater part of them at private sale he acted without authority. It is clear, too, that such act amounted to a conversion of the property so disposed of. He was required to make true disclosure under oath (sec. 221 of the Code), and this obligation was neither restricted nor enlarged by the stipulation. The proceeding against the plaintiff in error as garnishee was in

the nature of an action by Shultz & Son for the use of the plaintiff therein, The Grimes Dry Goods Company. That he is liable to them or others who have succeeded to their rights for the value of the goods will not be seriously questioned. Nor is there any sound reason for holding that the defendant in error is now estopped by the terms of the agreement in question to controvert his answer and disclosure as garnishee.

There is a further contention, viz., that the judgment is excessive. It is true the judgment of the defendant in error against Shultz & Son is but $1,040, and costs taxed at $42.63. But it is true that it had previously been agreed between the several intervenors that they should share *pro rata* in the proceeds of the stock of goods. It is also true that they were all before the court, and are concluded by the judgment with which they are satisfied. Had objection been interposed by them the district court would have determined the rights, as between themselves, of the several parties claiming adversely to the plaintiff in error. According to the record the plaintiff below has a judgment for the exact amount due from the defendant therein to the creditors of Shultz and Son on account of the conversion of the property in controversy. That the proceeds of the judgment remain to be distributed among the beneficiaries thereof in accordance with an agreement between themselves is a fact of which the judgment defendant should not complain. There is no material error in the record and the judgment is

AFFIRMED.

UNION PACIFIC RAILWAY COMPANY v. J. J. PORTER.

FILED NOVEMBER 8, 1893. No. 4948.

1. **Negligence** as ground of recovery or defense is a question of fact to be submitted to the jury upon the evidence as is any other question of fact.
2. **Railroad Companies**: PASSENGERS: PERSONAL INJURIES: PRESUMPTION OF NEGLIGENCE: NOTICE OF RULES. Under the provisions of sec. 3, art. 1, ch. 72, Comp. Stats., 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 Buffalo county. Tried below before HAMER, J.

The opinion contains a statement of the case.

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

The plaintiff below was negligent in not getting off the car while he could safely do so. (*Raben v. Central Ia. R. Co.*, 35 N. W. Rep. [Ia.], 64, and cases cited.)

Plaintiff below was negligent in that, finding the train in motion and going faster than he expected, he stepped from the car onto the platform. Such negligence must bar his recovery in this action. (*Thomas v. Chicago & G. T. R. Co.*, 49 N. W. Rep. [Mich.], 547; *Lake Shore & M. S. R. Co. v. Bangs*, 47 Mich., 470; Shearman & Redfield, Negligence [4th ed.], secs. 87, 91; *Filer v. New York C. R.*

Co., 49 N. Y., 55; *Lindsey v. Chicago, R. I. & P. R. Co.*, 20 N. W. Rep. [Ia.], 737; *Kilpatrick v. Pennsylvania R. Co.*, 21 Atl. Rep. [Pa.], 408; Patterson, Railroad Accident Law, p. 72; 2 Am. & Eng. Ency. Law, pp. 762, 763; *Burrows v. Erie R. Co.*, 63 N. Y., 556; *Secor v. Toledo, P. & W. R. Co.*, 10 Fed. Rep., 15; *Ohio & M. R. Co. v. Stratton*, 78 Ill., 88; *Illinois C. R. Co. v. Slatton*, 54 Ill., 137; *Chicago & A. R. Co. v. Randolph*, 53 Ill., 510; *Chicago & N. W. R. Co. v. Scates*, 90 Ill., 586; *Jewell v. Chicago, St. P. & M. R. Co.*, 54 Wis., 610; *Pennsylvania R. Co. v. Aspell*, 23 Pa. St., 147; *Hickey v. Boston & L. R. Co.*, 14 Allen [Mass.], 429; *Davis v. Chicago & N. W. R. Co.*, 18 Wis., 185; *Houston & T. C. R. Co. v. Leslie*, 57 Tex., 83–87; *Reibel v. Cincinnati, I. & St. L. & C. R. Co.*, 17 N. E. Rep. [Ind.], 107; *Illinois C. R. Co. v. Chambers*, 71 Ill., 521; *Illinois C. R. Co. v. Lutz*, 84 Ill., 598; *Morrison v. Erie R. Co.*, 56 N. Y., 302.)

The first instruction given by the court upon its own motion was erroneous. The court assumed that it was sustained by sec. 3, art. 1, ch. 72, Comp. Stats. This statute was originally passed and took effect June 22, 1867. The Union Pacific charter was passed and approved July 1, 1862. Upon the organization and creation of this corporation in 1862, its rights became vested. One cannot conceive of a more important right than that of being protected against any negligence of passengers, when the injury has arisen in a case where the law will not pronounce the corporation itself negligent, or in a case where the negligence of the plaintiff himself contributed to the injury which has, in part, resulted from the negligence of the corporation. The legislature cannot deprive a person or a corporation of a vested right to an existing, material defense. (*Maguiar v. Henry*, 84 Ky., 1; Cooley, Constitutional Limitations [4th ed.], 458; Wharton, Law of Negligence, sec. 421; *Parrot v. Wells, Fargo & Co.*, 15 Wall. [U. S.], 524–538; *Harvey v. Dunlop*, Hill & Denio Supp. [N. Y.], 193.)

Said section 3 is capable of a construction which will harmonize with the well-established rules of common law. The words "as at common law" should be interpolated so that the section would read, "Every railroad company as aforesaid shall be liable as at common law for all damages inflicted upon the person of passengers." Otherwise the legislature must be considered as seeking by adverse legislation to control rights vested in the railroad company under its charter from the government in 1862. (Cooley, Constitutional Law, pp. 74, 76; *Shreveport v. Cole*, 129 U. S., 36; Wharton, Law of Negligence, sec. 44; Sutherland, Statutory Construction, secs. 237, 241; Sedgwick, Statutory & Constitutional Law, p. 50; *Nazro v. Merchants Mutual Ins. Co.*, 14 Wis., 319.)

But if the statute is to be construed as making the company the insurer and the passenger the insured under a non-lapsing policy, premium paid in advance, against almost any injury, though wholly resulting from his own non-criminal negligence, it is in violation of that principle which lies outside of and beyond all written constitutions, and was passed in disregard of fundamental principles of law and justice which it has been held no legislative body can override, even though not prohibited by the written constitution. (*Durkee v. Janesville*, 28 Wis., 464–467; *Calder v. Bull*, 3 Dallas [U. S.], 387–8; *Fletcher v. Peck*, 6 Cranch [U. S.], 143; *Wilkinson v. Leland*, 2 Pet. [U. S.], 656–8; *Terrett v. Taylor*, 9 Cranch [U. S.], 50; *Varick v. Smith*, 5 Paige [N. Y.], 159; *Cincinnati W. & Z. R. Co. v. Commissioners of Clinton County*, 1 O. St., 86; *Cass v. Dillon*, 2 O. St., 628; *Bank of the State v. Cooper*, 2 Yerg. [Tenn.], 603; *Lewis v. Webb*, 3 Greenl. [Me.], 336; *Hughes v. Fond du Lac*, 73 Wis., 382; Tiedeman, Limitations of Police Powers, 598–9; *Ohio & M. R. Co. v. Lackey*, 78 Ill., 55; *Savings Bank v. Ward*, 100 U. S., 204.)

Said statute is in violation of sec. 13, art. 1, of the con-

stitution, providing that "all courts shall be open, and every person, for any injury done him in his lands, goods, person, or reputation, shall have a remedy by due course of law, and justice administered without denial or delay." It discriminates as to both plaintiff and defendant. (*Hincks v. City of Milwaukee*, 46 Wis., 559; *Hughes v. Fond du Lac*, 73 Wis., 380; *Park v. Detroit Free Press Co.*, 40 N. W. Rep. [Mich.], 731; *Potter v. Chicago & N. W. R. Co.*, 21 Wis., 377; *City of Lincoln v. Gillilan*, 18 Neb., 114; *Bull v. Conroe*, 13 Wis., 260; *Holden v. James*, 11 Mass., 396; *Picquet, Appellant*, 5 Pick. [Mass.], 65; *Durham v. Lewiston*, 4 Greenl. [Me.], 140; *Budd v. State*, 3 Humph. [Tenn.], 483; *Wally v. Kennedy*, 2 Yerg. [Tenn.], 554; *Bank of the State v. Cooper*, 2 Yerg. [Tenn.], 599; *Tate v. Bell*, 4 Yerg. [Tenn.], 202; *Officer v. Young*, 5 Yerg. [Tenn.], 320; *Jones v. Perry*, 10 Yerg. [Tenn.], 59; *Simonds v. Simonds*, 103 Mass., 572; *State v. Bartlett*, 35 Wis., 287; *Johnson v. Waukesha County*, 64 Wis., 281; *Daly v. State*, 13 Lea [Tenn.], 228; *In re Frazie*, 63 Mich., 396; *Waite v. Garston*, L. R., 3 Q. B. [Eng.], 5; *Mayor of Alexandria v. Dearmon*, 2 Sneed [Tenn.], 121; *Burkholtz v. State*, 16 Lea [Tenn.], 71; *Woodard v. Brien*, 14 Lea [Tenn.], 520; *City of Memphis v. Fisher*, 9 Bax. [Tenn.], 229; *State v. Duffy*, 7 Nev., 349; *Griffin v. Cunningham*, 20 Gratt. [Va.], 31; *Dorsey v. Dorsey*, 37 Md., 64; *Lawson v. Jeffries*, 47 Miss., 686; *Wilder v. Chicago & W. M. R. Co.*, 70 Mich., 382; *Trustees of Internal Improvement Fund v. Bailey*, 10 Fla., 238; *Arnold v. Kelley*, 5 W. Va., 446; *Atchison & N. R. Co. v. Baty*, 6 Neb., 37.)

The statute is also in violation of sec. 3, art. 1, of the constitution, providing: "No person shall be deprived of life, liberty, or property without due process of law." (*Chaddock v. Day*, 42 N. W. Rep. [Mich.], 977; *Murray v. Hoboken Land & Imp. Co.*, 18 How. [U. S.], 276; *Davidson v. New Orleans*, 96 U. S., 97; *Hurtado v. California*, 110 U. S., 516; *Loan Association v. Topeka*, 20 Wall.

[U. S.], 622; *Turner v. Althaus*, 6 Neb., 54; *Good v. Zercher*, 12 O., 367; *Norman v. Heist*, 5 W. & S. [Pa.], 171; *Denny v. Mattoon*, 2 Allen [Mass.], 361; *Greenough v. Greenough*, 11 Pa. St., 494; *In re Albany Street*, 11 Wend. [N. Y.], 149; *Zeigler v. South & N. A. R. R. Co.*, 58 Ala., 595; *New Orleans & N. E. R. Co. v. Borgeois*, 66 Miss., 3; *Cottrel v. Union P. R. Co.*, 21 Pac. Rep. [Idaho], 416; *Minneapolis & St. L. R. Co. v. Beckwith*, 9 Sup. Ct. Rep. [U. S.], 207; *Cairo & F. R. Co. v. Parks*, 32 Ark., 131; *Bielenberg v. Montana U. R. Co.*, 20 Pac. Rep. [Mont.], 314; *Jensen v. Union P. R. Co.*, 21 Pac. Rep. [Utah], 994; *East Kingston v. Towle*, 48 N. H., 57; *Oregon R. & N. Co. v. Smalley*, 23 Pac. Rep. [Wash.], 1008; *Sullivan v. Oregon R. & M. Co.*, 24 Pac. Rep., [Ore.], 408; Rorer, Railroads, 575; *Alabama G. S. R. Co. v. McAlpine*, 75 Ala., 113; *In re City of Buffalo*, 68 N. Y., 173; *Nashville C. & St. L. R. Co. v. Hembree*, 5 So. Rep. [Ala.], 175.)

Thompson & Oldham, contra:

If a railroad train stops at a place where there is no platform for the use of passengers in getting on and off trains, the company's employes should assist them in getting off and on or should notify them to alight, and in not so doing they are guilty of negligence. (*Memphis & C. R. Co. v. Whitfield*, 44 Miss., 466.)

The instructions were not erroneous. (Sec. 3, art. 1, ch. 72, Comp. Stats.; *Omaha & R. V. R. Co. v. Chollette*, 33 Neb., 143.)

RYAN, C.

The amended petition in this case alleged the corporate existence of the Union Pacific Railway Company, and that it was operating a line of railroad through Kearney, Nebraska, at the time of the injuries complained of; that on April 29, 1890, plaintiff in said petition purchased a ticket entitling him as a passenger to be transported upon

one of the trains of said railroad company from Grand Island, Nebraska, to the aforesaid station of Kearney on said railway company's line of railroad; that when the train upon which plaintiff had ridden from Grand Island reached Kearney, it was stopped before the car on which plaintiff was located, or any part of the train, had reached the station house or platform of said railway company; that thereupon plaintiff passed out of said car to the platform thereof to alight, thinking he was at the station and platform of the defendant, but finding that said train and coach on which plaintiff stood had not yet arrived at said station and platform, but that said coach was over 300 feet from said platform of the station, and the engine of the defendant was taking water, as plaintiff believed, and there being no platform or place to alight from said car opposite the same, and it being in the night-time and dark, and there being a wind-mill, engine-house, mail catcher, and water tank between where plaintiff then was and the east end of the platform, and plaintiff not being notified by defendant's servants to alight there, plaintiff, standing on the lower step of the car, waited for defendant to pull its train up to said platform and station house so that he might with safety alight from said coach; that said train moved up to the platform but did not stop thereat, and when the coach on which plaintiff stood was opposite said platform, and while said train was moving slowly by said platform, plaintiff believing it was safe to alight therefrom, and being suddenly convinced that defendant was not going to stop its train at said platform, stepped from the lower step of said car upon said platform, and in doing so plaintiff fell on said platform, and in so doing two bones of his leg were broken as a result of said accident. Plaintiff by further averments negatived the existence of any negligence on his own part causing or conducing to the accident and injury aforesaid, and having alleged pain and suffering and disability to practice his vocation as a physician for a

long time, and that permanent disability had been caused him by the aforesaid accident and injury, the plaintiff prayed judgment for $1,999.99 and costs.

The answer admitted the corporate existence of the defendant, and that at the time of the alleged injury it was operating a railroad, and *seriatim* denied each averment in the plaintiff's petition contained, and alleged that whatever injury plaintiff had suffered was due wholly to his own negligence. There was a reply in denial of all allegations of the answer inconsistent with the averments of the petition.

Upon a trial a verdict was returned in favor of the plaintiff for the sum of $1,314.49; and, a motion for a new trial having been overruled, judgment was duly rendered for the amount of said verdict.

There was but little evidence as to the manner of the accident, except such as was given by the plaintiff himself. Such evidence as there was, however, is found fully epitomized in the petition above described, and therefore requires no repetition. There was evidence, furthermore, that the railroad train which carried plaintiff from Grand Island to Kearney made no stop at the water tank at the latter place, but that the stop which plaintiff believed was at the water tank was, in fact, made so as to allow the baggage to be unloaded from the baggage car in said train, directly opposite the baggage room of Kearney station. There was undisputed evidence also that the train extended from the baggage coach aforesaid to quite a distance east of the east end of the platform at the Kearney depot, and that the car step upon which plaintiff was standing during the halt of the train was some distance east of the platform and incline at said station. There was a cinder walk along the track opposite to where plaintiff stood during the halt made by the train, upon which walk it would have been possible and safe for plaintiff to have walked to the Kearney depot, had he so chosen to have done. The time at which the

train reached Kearney was about 3 o'clock in the morning, and the sky was clear. There were no lights nearer where plaintiff found himself when the train halted than the depot, where there was a lantern opposite the passenger waiting-room door. The railway company, as plaintiff in error, insists that the defendant in error was negligent in not availing himself of the cinder walk as a means of reaching the depot platform, and that his alighting upon said platform from a moving train was negligence of itself, such as should avoid the verdict. The existence of negligence, as justifying or defeating a right of recovery, is for the jury to determine as it determines any other question of fact. If the jury find negligence as against the defendant, such as to justify a recovery, or find contributory negligence such that a recovery cannot be had, such finding must stand, unless it has no support in the evidence considered, just as must any other essential finding of fact. It is useless, therefore, to urge that the presiding judge is the proper trier of questions of this kind, and that as to such he should find the presence or absence of negligence upon the weight of the testimony, or instruct the jury to find its presence or absence according as a given fact or group of facts shall be proved or disproved. The court can but state to the jury the law applicable to the facts in respect to which evidence has been introduced. It thereupon remains with the jury to determine the existence of the essential facts. If there is no evidence such as the jury should act upon in its province, the court should instruct accordingly, or set aside the verdict as unsupported by the proofs. The court, therefore, properly refused to instruct as requested by the defendant.

The facts were submitted for the determination of the jury solely upon the following instructions:

"First—The defendant company undertook to carry the plaintiff from Grand Island to Kearney. If the plaintiff was injured during the journey the defendant company is

liable for the actual damages which he sustained, unless the injury done arose from the negligence of the plaintiff.

"Second—It was the duty of the company to notify the plaintiff that he was approaching his destination. It is claimed by the plaintiff that the train stopped before it reached the platform at the depot. This is denied by the defendant. The court charges the jury that it was the duty of the company to cause its train to be pulled up to the depot platform, so that the passengers might alight upon said platform with convenience and safety; but it was not incumbent upon the company to build a platform as long as its train, nor to pull up each car so that it was abreast of the platform. If the railway company furnished to the plaintiff at Kearney such facilities as it had for leaving the train, and the length of the platform available for that purpose was used by the company in unloading its passengers, and the same was reasonably adequate for that purpose, it ought not in that particular be required to do more.

"Third—If the plaintiff, without fully realizing what he did and without time or opportunity to consider the natural consequences of his act, suddenly jumped from the train, and he was caused to do so by haste and a confusion of ideas as to what was right and proper under the circumstances, and such haste and confusion were the direct results of the conduct of the defendant's agent in not sufficiently notifying the plaintiff as to his whereabouts when the train stopped, you will inquire and determine whether the company was negligent, and whether the injury resulted from the company's negligence; and if you further find that the plaintiff in jumping from the train exercised the care, prudence, and intelligence of an ordinary person placed in like circumstances, and was excusable for leaving the train in the manner shown, you will find for the plaintiff. At the same time, if it was not the fault of the company that the plaintiff was mistaken as to the location of the train, if he was mistaken, or if the plaintiff, exercising

ordinary care and prudence, could not have been so mistaken, if he was mistaken, or if plaintiff's haste and confusion, if any, were not due to the misconduct of defendant's agent in running the train, then plaintiff cannot recover.

"Fourth—If you find for the plaintiff, you will be careful to allow him only the actual damage which he has sustained, and no more; and you will remember that the burden of proof is upon the plaintiff, and unless he establishes his case by a preponderance of evidence, you will find for the defendant."

The greater part of the argument of plaintiff in error is devoted to the first instruction, which was, in effect, that as the defendant company had undertaken to carry plaintiff from Grand Island to Kearney, if plaintiff was injured during the journey the defendant company was liable for the actual damages which he sustained, unless the injury done arose from the negligence of the plaintiff. Plaintiff in error insists that this requires the railroad company in all cases to become an insurer of the safety of its passengers. Perhaps there is some hidden meaning in this term, and that by conceding the position claimed, we might admit more than we would be willing to, if the same proposition was stated in other language. We desire that there shall be no uncertainty as to our views. Section 3, art. 1, ch. 72, Comp. Stats., is in the following language: "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 railroad, actually brought to his or her notice."

In the case of the *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 our own safety, and amount to a willful indifference to the injury liable to follow." Counsel for plaintiff in error insist that this provision is unconstitutional and violative of the rights of railroad companies in actions such as the one at bar. It is not believed that this statute is unconstitutional; and, as to its being unjust in its operation, the remedy lies with the legislature. We find it existing as a statute, and know of no reason why by judicial legislation or consideration it should be abrogated or modified. The rule laid down by the court in the first instruction was correct, as far as it went, for the statute makes liable a railroad company for any injury sustained by a passenger being transported over its line of road, which injury results from the operation or management of the train, unless the railroad company can show that the injury complained of was one which resulted from a violation of some express rule or regulation of the railroad company, actually brought home to the notice of the passenger; or, that the passenger was guilty of such negligence as would amount to a flagrant and reckless disregard of his own safety, and a willful indifference to the injury liable to follow his conduct. (*Missouri P. R. Co. v. Baier*, 37 Neb., 235.)

In the second instruction quoted we cannot find that the plaintiff in error had any ground of complaint. If the verdict had been for the railroad company it might admit of grave doubt whether, as stated in the last sentence of the second instruction, the railroad company had done enough to exonerate itself from liability in that respect by showing it had furnished for the plaintiff all the facilities it had for leaving the train, and a platform reasonably adequate for the purpose of unloading passengers at said depot. A question might arise as to whether or not its facilities were all it should have had for unloading passen-

gers. The fact that it did not have them might be such negligence as would render the company liable for an injury caused by a failure of the company to provide proper facilities.

The third instruction was confusing in its statements as to facts as to which it was assumed there was evidence. This confusion, however, was in its tendency rather hostile than otherwise to plaintiff's right of recovery.

The judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA, EX REL. WILLIAM M. CLARK & COMPANY, V. SCHOOL DISTRICT NO. 24, CHASE COUNTY, NEBRASKA, ET AL.

FILED NOVEMBER 8, 1893. No. 5481.

Mandamus: FORUM OF JURISDICTION. This proceeding being simply one for the collection of a debt, of which the district court of Chase county has ample jurisdiction, a writ of *mandamus* is denied, and the action dismissed. *State, ex rel. Herpolsheimer, v. Lincoln Gas Co.*, 38 Neb., 33, followed.

ORIGINAL application for *mandamus*.

Samuel J. Tuttle, for relator.

RYAN, C.

This is an original application for a *mandamus* brought against school district No. 24 of Chase county, Nebraska, and its treasurer, H. H. Waggener. The petition alleges the existence of an indebtedness on various accounts on the part of said school district, and that the several evidences of indebtedness have been duly assigned to the relator, and that the school district refuses to pay the same. The

prayer is that a writ of *mandamus* issue commanding the treasurer to pay the said orders, and that if it be shown by the answer and return of said treasurer and by proof that there are no funds in his hands for the payment of the same, said school district be compelled by *mandamus* to levy and collect a sufficient amount of taxes to pay said orders.

This petition was filed June 30, 1892; and it is probable that the present status of affairs in that school district would require in this petition an amendment for the purpose of submitting the case properly. There has been no brief served or filed, so far as the record shows, and no answer made. In view of these facts, and the further fact that this *mandamus* proceeding is brought simply for the collection of a debt due from the school district to private individuals, we are compelled to follow the rule laid down in *State, ex rel. Herpolsheimer, v. Lincoln Gas Co.*, 38 Neb., 33. The application is therefore dismissed without prejudice.

DISMISSED.

FIRST NATIONAL BANK OF MOUNT PLEASANT, IOWA, APPELLANT, V. WILLIAM DAVIS, APPELLANT, IMPLEADED WITH ROBERT W. BUCHANAN ET AL., APPELLEES.

FILED NOVEMBER 8, 1893. NO. 5058.

Chattel Mortgages: LIENS: IDENTITY OF PROPERTY. The question in this case being merely whether or not two certain chattel mortgages covered property sold, and the evidence being insufficient to establish the identity claimed, the mortgagee's claim of a lien upon the property is denied.

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

Saunders & Macfarland, for appellant First National Bank.

A. C. Wakeley, for appellant William Davis.

Holmes & Macomber, for appellees.

RYAN, C.

The First National Bank of Mount Pleasant, Iowa, based its right to recovery in the district court of Douglas county, Nebraska, upon the alleged fact that as mortgagee it held a lien upon certain cattle sold by Robert W. Buchanan to divers and sundry persons through the commission firm of Byers, Patterson & Company at South Omaha, Nebraska. One mortgage was made by William Davis on January 18, 1888, to plaintiff's cashier, to secure payment by Davis of his note for $1,000 of even date with said mortgage, due in six months, and was filed for record December 21, 1888; an agreement for an extension of the time of payment of said note of six months having, meantime, been entered into between the maker and payee. Another mortgage between same parties as the first was of date August 9, 1888, to secure payment of a promissory note made by the mortgagor to the mortgagee, for the sum of $500, with ten per centum per annum interest, due in six months from its date, August 9, 1888. This mortgage was also filed for record December 21, 1888. The plaintiff alleged in its petition that Robert W. Buchanan, on or about December 19, 1888, being employed as a servant and agent of said mortgagor, obtained possession, or at least temporary control, of the mortgaged property, and having wrongfully transported the same to South Omaha, Nebraska, did sell that part of the same in respect of which relief was prayed in this action, and that as proceeds of such sale of the property last above referred to, Byers, Patterson & Company, the firm of commission merchants

through whom this sale was made, had received and were in possession of the sum of $742.38, which plaintiff claimed should be applied to the notes secured by the above mortgages. From the averments of the petition it appears that on December 21, 1888, the very day upon which the mortgages were filed in the proper office in Henry county, Iowa, plaintiff commenced an action in the district court of Douglas county, Nebraska, against Robert W. Buchanan and William Davis, to recover the value of the property mortgaged, and in that action procured the garnishment of Byers, Patterson & Company, with the hope of reaching the money held by them. This firm of commission merchants, to relieve themselves of liability, paid said money into the hands of the clerk of said district court. Subsequently the attachment was dissolved, and this action was commenced to restrain the clerk aforesaid from paying said money to said Buchanan, and for the enforcement of the mortgagee's lien as against the proceeds of the sale of the mortgaged property in the hands of said clerk.

The answer of William Davis admitted the facts to be as set forth in plaintiff's petition, and its prayer was that plaintiff should be decreed the relief prayed in its said petition. The answers of the other defendants, except that of Buchanan, simply pleaded the interest in the subject-matter of the controversy above indicated as being held by each of said defendants. Robert W. Buchanan answered, admitting the indebtedness of William Davis to plaintiff, but denying every other averment of plaintiff's petition. Buchanan further alleged that he was, previous to the sale, in the lawful possession of, and had the right to sell, the property which he did sell at South Omaha; that about March 17, 1884, he, the said Buchanan, entered into partnership with William Davis, his father-in-law, and that by the terms of the partnership agreement said Davis was to furnish stock to be placed upon the farm of William Davis' wife in Henry county, Iowa, and that said Bu-

chanan was to move upon and cultivate said farm, and raise and fatten stock thereon; that said Buchanan and Davis were equal copartners and owners of all the stock and crops raised on said farm; and that he was in the active charge and management of the business incident to the operation of said farm, and raising and fattening stock thereon, and had the power and authority to sell the same. Defendant Buchanan further alleged that the firm of which he was a member was never indebted to plaintiff, and that if William Davis executed a mortgage as claimed, it was to secure his own private debt and not that of the partnership, and that said defendant never consented to the making of said mortgages. This defendant averred that on December 20, 1888, he sold the property aforesaid as of right he had authority to do; that he was not insolvent; and admitted that Byers, Patterson & Company had paid into the hands of the district clerk aforesaid the proceeds of the sale of the aforesaid property, but denied that plaintiff had any claim or right thereto, and pleaded the order dissolving the attachment as an adjudication of the matters in controversy.

There was a reply in denial of the averments of the answer of Robert W. Buchanan. As between the defendants themselves there were other pleadings, the nature of which is not of importance in this controversy, as the issues are mere collateral incidents thereto. On the final hearing a judgment was rendered against the plaintiff, and therein it was ordered that the money in the hands of the clerk should be paid to Robert W. Buchanan, in whose favor the equities were, by the decree, found to exist.

The evidence was mainly directed to two questions of fact: First, the identity of the property sold in South Omaha with that mortgaged; second, the authority of Robert W. Buchanan to make the said sale. The cattle sold were thirteen two-year-old steers, three long yearlings, nine two-year-old heifers, and one cow. The mortgage

first made was of date January 18, 1888, and the cattle thereby mortgaged were described as fifteen head of two-year-old steers and five head of two-year-old heifers, while in the second mortgage made on August 9, 1888, the cattle were described as fourteen two-year-old steers and eight three-year-old steers. The sale at South Omaha was about, probably on, December 20, 1888. It is quite probable that cattle which were two years old in January of 1888 would ordinarily in the following December be classified as three-year-olds instead of two-year-olds. The testimony outside the mortgage itself does not help us to any conclusion whatever upon this point. In the mortgage of date August 9, 1888, there were cattle described as eight three-year-old steers. These of course could by no means be made to answer in December following to two-year-old steers. There were described in the last named mortgage fourteen two-year-old steers; but as to these which might meet the description of part of the cattle sold in South Omaha there arise other considerations just as troublesome to deal with as those just discussed.

The evidence of William Davis is that he sold Geesecke twenty two-year-old steers, but he said that he did not suppose he sold all the two-year-olds included in the mortgage to secure payment of the $500 note, because he did not sell enough cattle to cover those mortgaged, which amounted in value to over a thousand dollars. Robert W. Buchanan testified that these cattle were sold August 28, 1888; that they were brought to the farm something like twenty or twenty-one days before the date last named. As it was, according to his own evidence, the general custom for Mr. Davis to mortgage stock as soon as he bought it to secure the bank for the money used in making the purchase, it seems reasonable, in the conspicuous absence of proof to the contrary, that the mortgage of August 9 was executed to secure such part of the purchase price of these cattle as Mr. Davis borrowed of the bank for that purpose. At

any rate, this mortgage as clearly covered part of those sold Geesecke as any other cattle. If, as contended on behalf of the bank, there were upon the farm August 9, the fourteen two-year-old steers covered by the mortgage made in January, and the twenty two-year-old steers afterward sold Geesecke, another difficulty would be presented, and that is, that the mortgage in no way segregated from the herd any particular cattle. The same difficulty, less only in degree, is presented when it is taken into consideration that this mortgage was of fourteen two-year-old steers, when in fact there were twenty, any fourteen of which, if distinguished properly, would have met this description. The burden of designating the particular cattle mortgaged, was upon the mortgagee; and as the bank failed in this, it was not entitled to the proceeds of the sale made by Robert W. Buchanan, especially as there was evidence fully justifying the court in finding that he was joint owner of all the cattle raised on the farm occupied by him and his wife subsequently to March 17, 1884.

On this last proposition the evidence is conflicting as to the arrangement under which the farm was to be operated. Mr. Buchanan testified that on the date last named it was agreed between Mr. Davis and himself that he was to have one-half the crops and stock raised on the farm subsequently to the above date, in which he is corroborated by the testimony of his wife. There is ample evidence of just such a continuous course of dealings as such an agreement would sanction from March 17, 1884, up to the time when the cattle were sold in South Omaha. This is not, therefore, a case in which a mere stranger had taken away and sold cattle, but it is one in which the party by whom the sale was made was but exercising a contract right so to do. The findings of the district court were fully justified by the evidence, and its judgment is therefore

AFFIRMED.

GEORGE H. HAMMOND COMPANY v. WILLIAM J. JOHNSON.

FILED NOVEMBER 8, 1893. No. 4650.

1. **Master and Servant**: APPLIANCES: NEGLIGENCE OF MASTER: LIABILITY FOR INJURY TO SERVANT. It is the duty of a master to furnish for the use of his servant in the course of his employment, proper and safe appliances and instruments for the performance of the services required. And if the master fail so to do, he is liable for such damages as are the direct result of such negligence, unless the servant himself is guilty of such negligence as contributes directly to the injury; and this rule applies irrespective of whether the appliances and instruments so furnished were animate or inanimate.

2. ———: FURNISHING SERVANT WITH VICIOUS HORSE: KNOWLEDGE: PERSONAL INJURIES: INSTRUCTIONS. Where a master, a corporation, furnished a horse for the use of its servant in the line of his employment, wherein said horse injured the servant, the jury were properly instructed that even if they should find the horse was vicious and dangerous, still that the plaintiff could not recover unless the jury further found from the testimony that the master, through its managers or officers, knew, or by the exercise of proper care and diligence *might have known*, of the vicious and dangerous character of the horse.

3. ———: VICE-PRINCIPAL: EVIDENCE: INSTRUCTIONS. The evidence in this case justified the jury in finding that the agent who, in the employ of a common master with the servant, directed the said servant to use the horse, whereby said servant was injured, was not his mere co-servant, but in giving the instruction aforesaid was a vice-principal, and the master was, therefore, properly held liable for the injuries received by the servant in obeying such instruction.

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

Robert W. Patrick, for plaintiff in error.

A. S. Churchill, contra.

RYAN, C.

This action was brought in the district court of Douglas county, Nebraska, by William J. Johnson against The George H. Hammond Company, a corporation, for compensation in damages in respect to injuries inflicted upon said plaintiff by a vicious, unbroken horse, of which plaintiff alleges that defendant, in whose employ he was, required plaintiff to take charge and drive in the course of his said employment. The petition, after alleging that the horse was vicious and unruly, sets forth that the defendant's manager, who well knew the vicious disposition of said horse, without giving plaintiff any notice of the existence of such disposition, required plaintiff to use the said horse in the course of his employment, and that plaintiff did use him as required, when the aforesaid horse, without any fault on plaintiff's part, began to kick and run, and became unmanageable and thereby inflicted the injury complained of, from which it resulted that plaintiff was for a long time confined to his bed, and suffered intense and long continued pain, and that at the commencement of this suit plaintiff was still suffering from his said injuries. There was also alleged the loss of a month's time, the expenditure of large sums of money for medical and surgical treatment rendered necessary by said injuries, which, with such other incidental results as followed from the injuries complained of, amounted to $10,550, for which plaintiff prayed that he might have judgment.

The answer admitted that plaintiff, while in defendant's employ, was furnished the horse of which complaint is made in plaintiff's petition, and alleged that said horse was not in any way vicious or unbroken, but that the plaintiff was not a skillful or careful driver of horses as alleged in his petition, and that it was owing to such lack of skill and want of care on his part that the alleged runaway of the horse and consequent injury to plaintiff was wholly due. There was in this answer the averment that defend-

ant had paid all expenses arising from the accident during the time that plaintiff was thereby incapacitated for work, and that the defendant had paid the surgeon's bill rendered necessary by the injury complained of, as well as for all loss of time which resulted from the injury to the plaintiff. Furthermore, the defendant answered that the injuries received by plaintiff were rendered serious by the misconduct of the plaintiff himself, in that, contrary to the advice of his attending surgeon, the said plaintiff persistently indulged in the use of intoxicating liquors.

There was a reply in denial of these matters affirmatively set up by way of defense to the petition of the plaintiff. Of the issues joined there was had a jury trial, which resulted in a verdict in favor of the plaintiff for $4,750. Upon hearing the motion for a new trial the plaintiff was required to enter a remittitur (as the condition upon which said motion would be overruled) of the excess of the verdict over $3,500; which remittitur was accordingly entered, and judgment thereupon rendered for the sum last named. To reverse this judgment the defendant files its petition in error in this court.

The evidence in this case showed without question that the horse of which complaint is made was a young, awkward, green horse, as some of the witnesses expressed it. That he was a large, powerful animal, there seems to have been no dispute, and it seems quite clear from the evidence that he was not naturally of a very vicious disposition, as that term is generally understood. He was not, however, a well broken animal when he was purchased by defendant in error's agent a short time before the accident, and his shortcomings in that direction seem to have been aggravated, rather than overcome, by the unskillful management of him by some of the employes of plaintiff in error, to whose care he was entrusted to be broken and handled. This was the condition of matters when this horse was intrusted to the defendant in error to be used upon the streets

of the city of Omaha, as part of a team which handled and delivered to the regular customers of plaintiff in error, butcher's meat, the preparing of which for market in that condition was in plaintiff in error's line of business. The agents of plaintiff in error were aware of the above described untrustworthy character of the horse in question at the time the defendant in error was required to drive him, yet in no way imparted that information to the defendant in error. The evidence shows that the defendant in error was a careful and skillful driver of horses, and, notwithstanding the averments of the answer, no witness questioned his qualification in that respect. There was no trouble with the horse the first day he was driven by the defendant in error. On the day following, the horse by kicking got one hind foot over the tongue of the wagon, but without further accident was gotten to rights. This was on Saturday, and the horse was not again hitched up until the following Monday, April 7, 1890. He then became unmanageable, and again kicking while attempting to run away, struck the plaintiff on the left leg below the knee, thereby inflicting the injury complained of in this suit. At first there was rapid progress in the healing of the injuries. Subsequently, however, erysipelas developed, causing great suffering and long confinement, as well as greatly augmenting the amount necessary to defray incidental expenses and surgeon's bills. The payments pleaded in the answer seem to have been made up almost to the time of this complication, when they ceased, for the apparent reason that the plaintiff in error regarded this last phase of defendant in error's trouble as not at all attributable to the accident suffered by him.

It is proper to remark in this connection that the jury were fully justified in finding from the evidence that no misconduct of the defendant in error in the forbidden use of intoxicating liquors caused the erysipelas which supervened as above described. The instructions refused and

given very fully considered all aspects of the case, but they are too voluminous for insertion herein at length. Complaint is specially made as to the first and fourth instructions given by the court upon its own motion. They were as follows:

"1. You are instructed that it was the duty of the defendant to furnish for the use of the plaintiff in its service proper and safe appliances and instruments for the performance of the services for which he was employed, and if it failed to do so, it would be liable for such damages as were the direct result of such negligence, unless the plaintiff was himself guilty of negligence which contributed directly to his injury."

"4. Even if you should find that the horse was a vicious and dangerous horse, still the plaintiff could not recover unless you should further find from the testimony that the defendant, through its managers or officers, knew, or by the exercise of proper care and diligence might have known, of the dangerous and vicious character of the horse."

The criticism of the first instruction is because it applies to animals the same rule as is ordinarily applied to inanimate machinery or tools in requiring that such as are furnished for use shall be safe and proper for the purpose for which they are furnished. It is probably true, as claimed by plaintiff in error, that the cases in which the duty of the master towards the servant in this regard have been adjudicated have been where the articles furnished were tools or machinery. No case has been cited holding the distinction claimed, nor can we conceive of any reason why it should exist. In the nature of things it is but right that the master, who may exact obedience to his orders, shall give his servant such information within his knowledge as will enable such servant to guard against injury to himself. If the servant is possessed of such knowledge he is bound at his peril to act accordingly, and it would seem that the

withholding by the master of such information as is necessary to enable the servant to provide for his own safety is correlatively at the peril of the master. It is immunity from injury that must be looked to, and it matters not from what source danger may impend, whether arising from the imperfections of machinery or the vicious and unsubdued propensities of animal nature, it is equally the duty of the master to forewarn, and thereby forearm, his servant against it.

The criticism of the fourth instruction is, that the plaintiff in error was thereby held liable, not only for the knowledge of facts which its officers and managers possessed, but as well for such knowledge of facts as by the exercise of due and proper care they might have known. The contention is, that this corporation should be held only for the actual knowledge of its officers and managers, their failure to possess knowledge not being imputable to the corporation. A corporation, however, can do nothing and be guilty of nothing except by its officers and agents. If the negligence of its officers and managers is not imputable to the corporation, it can be guilty of no negligence whatever. A corporation because of its being but an artificial entity, cannot with impunity neglect the performance of such duties towards its servants as their safety requires. It can see but with the eyes of its officers and agents, and if they refuse or neglect to use their eyesight when occasion demands, this furnishes no reason for a judicial adjudication that the corporation itself is blind. Its liability in this respect is such as would devolve upon a natural person under like circumstances, as to which the rule is laid down in section 349 of Wood's Law of Master and Servant. The following language is quoted from that section: "Where there are latent defects or hazards incident to an occupation, of which the master knows, or *ought* to know, it is his duty to warn the servant of them fully, and failing to do so, he is liable to him for any injury that he may sustain in consequence

of such a neglect; and this rule applies even where the danger or hazard is patent if through youth or inexperience or other cause the servant is incompetent to fully understand and appreciate the nature and extent of the hazard. It is the master's duty to warn him of any danger incident to the business, and if with such knowledge, he chooses to assume the risk and is capable of appreciating the hazards and of choosing and contracting for himself, the master is then absolved from liability for injuries resulting from the ordinary hazards."

There was an attempt to apply in argument the rule deducible from certain cases wherein the liability was sought to be fixed by reason of injuries suffered by strangers from the bites of dogs and kicks of horses. Such cases, however, are not governed by the same rule or reason as the case at bar, for the owner in such cases was not instrumental in placing the injured party in danger, and was therefore held liable only for such knowledge of the evil propensity of the animal complained of as he actually possessed. In the class of cases under consideration, however, the servant is not a mere volunteer. He is required by his master to assume the danger which the existence of vicious and uncurbed propensities implies, and if the master could, by the exercise of reasonable care, know of the existence of such propensities, his actual ignorance of them is no excuse in law.

It is contended that the verdict was excessive in view of the injuries shown by the evidence. As an original question viewed solely in the light of the written record, we might arrive at the same conclusion as contended for by counsel for plaintiff in error. The presiding judge, however, who heard the witnesses, saw and observed their deportment, and was consequently possessed of fuller means of knowledge than can possibly be accorded us, has considered this question, and in the exercise of his enlightened judgment required a considerable reduction of the estimate

of damages made by the jury's verdict. We cannot say he should have required more.

Counsel for plaintiff in error insists that as the knowledge of the vicious and unbroken disposition of the horse was possessed solely by others in the employ of the plaintiff in error, that the defendant in error must be held to the rule which forbids a recovery by one servant based upon the negligence of his co-servant. The evidence, however, is very satisfactory that the person who directed the defendant in error to take charge of and drive the horse which caused his injury was not a mere co-servant of the defendant in error. When he directed the defendant in error to take charge of and drive this horse the evidence shows that the defendant in error hesitated, and rather sought to excuse himself from doing as required. Thereupon he was informed by the person who made this requirement of him that he might either do that or quit the job, and under this kind of suasion he did as directed. The language was the language of one in authority, and the evidence fully satisfies us that he was not a mere co-servant of the defendant in error, but was rather a vice-principal, and that therefore the rule contended for is not applicable.

There was presented in the record, though not argued, the fact that a continuance was applied for by the plaintiff in error on account of the alleged absence of a material witness. The affidavit in support of this application was made by the attorney for the plaintiff in error, and therein was stated the fact that the absence of the witness came to affiant's knowledge only the day before the affidavit was made. This probably accounts for the circumstance that in said affidavit the ultimate facts to be proved by the testimony of the witness were not stated, but that such matters as were stated were conclusions properly deducible from facts, rather than the facts themselves. In this respect the affidavit was faulty, and hence there was no error in refusing the continuance asked.

This disposes of all the questions presented, and it results that the judgment of the district court is

AFFIRMED.

JOHN L. MCCONNELL, APPELLANT, V. FIRST NATIONAL BANK OF LINCOLN ET AL., APPELLEES.

FILED NOVEMBER 8, 1893. No. 5074.

1. **Accounting**: PLEADING: COSTS: EQUITY. Where the answer admits there is due the plaintiff a certain sum, much smaller than claimed in the petition, and all the averments of new matter in the answer are unequivocally denied by the reply, judgment must be for the amount admitted to be due. The allowance of costs being discretionary, none are taxed as incident to the above judgment, because of the confused condition of said issues as presented in the district court.
2. **Special Findings**: CONFLICTING EVIDENCE: REVIEW. Upon the request of the plaintiff therefor, a special finding as to a very material disputed fact was made by the trial court in favor of the defendant. *Held*, In the absence of a clear preponderance of the evidence to the contrary, that such finding conclusively establishes the existence of the fact as found.
3. **Accounting.** A sheriff in possession of a stock of goods, pending their sale for the satisfaction of certain attachments in his hands, having sold a part of said goods, and collected claims due the attachment defendant, paid the proceeds of such sales and collections to the purchaser of the stock, who bought irrespective of such sales and collections. *Held*, In a suit for an accounting between the attachment defendant, who has paid all claims against him, and the recipient of such proceeds and collections, that said attachment defendant is entitled to recover the amount of such proceeds with interest from the time they were received by said purchaser.

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

J. R. Webster, E. P. Holmes, and *Webster, Rose & Fisherdick,* for appellant.

Marquett, Deweese & Hall and *Pound & Burr, contra.*

RYAN, C.

The plaintiff sued the defendants John R. Clark, the First National Bank of Lincoln, Nebraska, and Louie Meyer, in the district court of Lancaster county, claiming that the said Meyer agreed to purchase, for the benefit of the plaintiff, a certain stock of goods, and that the defendant John R. Clark, who was cashier of the First National Bank aforesaid, on behalf of the said bank, agreed to furnish the means for the purchase of said stock, and that the said purchase should be for the benefit of the plaintiff; and that after the purchase aforesaid had been made there was a large profit made upon the sale of the said stock of goods, which, after the payment of all incidental expenses, belonged to the plaintiff. The plaintiff prayed an accounting as to the profits and incidental expenses aforesaid, and that the plaintiff have judgment for such amount as should be found due him upon such accounting. The specific allegations of the pleadings will be noticed more particularly hereafter, as such notice becomes necessary in the consideration of the facts.

1. The above is a very general statement of the relief prayed, and of the facts upon which such relief was claimed. In the commencement of his petition, however, the plaintiff alleged that on the 20th day of December, 1884, he was engaged in the retail dry goods business, and that at that time the plaintiff, in order to secure the sum of $20,000, previously advanced by the said bank, made and executed a chattel mortgage upon his entire stock of merchandise and delivered the possession of said merchandise to the defendant John R. Clark, as cashier, for the First National Bank; that after the execution of said mortgage,

certain creditors of plaintiff sued out writs of attachment against him, and caused the same to be levied upon the merchandise, subject to the aforesaid mortgage.

The petition further alleged "That afterwards said defendants John R. Clark and the First National Bank of Lincoln, Nebraska, having sold a large amount of said merchandise under and by virtue of said mortgage foreclosure, and having realized a much larger amount than was sufficient to satisfy said mortgage, together with all costs and expenses of foreclosure, delivered the remaining part of the said merchandise to the sheriff of Lancaster county, Nebraska, who duly offered said merchandise for sale to satisfy the claims and demands of said attaching creditors on the 11th day of April, 1885." As to the failure of Clark and the First National Bank to render an account with reference to the foreclosure aforesaid, the petition alleged that they had wholly failed and refused to render such an accounting, although the said defendants had sold a large amount of said stock in excess of the amount of plaintiff's indebtedness under said mortgage. The prayer of the petition was broad enough to justify the plaintiff's recovery of whatever relief the facts showed him entitled to in respect to the said foreclosure and failure to account.

In the answer of John R. Clark and the First National Bank there was the following allegation: "Defendants admit that said bank has in its hands the sum of $199.87, which was realized from the sale of said goods under said mortgage, more than was necessary to pay said mortgage with interest thereon and the costs and expenses in connection with the foreclosure of the same; that an account of this amount was rendered by said bank to the said John L. McConnell at the time of the cancellation of his indebtedness to this bank under and by virtue of said chattel mortgage, and that said money has been in said bank with the knowledge of the said plaintiff and subject to his order

since about the first day of March, 1885, but that the said McConnell has failed, refused, and neglected to receive the said money from this defendant; that an account was rendered to said McConnell showing the amount of goods sold under said mortgage, also the amount in excess of said mortgage, and the amount of expenses and costs in connection with the foreclosure of said mortgage, which said account showed a balance in the hands of said bank of $199.87, subject to the order of said John L. McConnell."

This answer was followed by the reply of the plaintiff in the following words: "Comes now the said plaintiff and for reply to the answer of the said defendants filed herein denies each and every allegation of new matter therein contained." It will be observed that this averment of the defendants, that there was due from the bank, on account of the foreclosure, a balance of $199.87, was denied by McConnell in his reply. This anomalous condition of the pleadings probably accounts for the action of the district court in denying relief as to the amount admitted to be due from the bank.

It is claimed, however, in argument, that the proofs show that there was not only this amount, but even a very much larger sum due on this account from the bank to McConnell. Apparently, as merely incidental to the inquiry, which we shall hereafter note, McConnell testified that the sales under the chattel mortgage amounted to $23,866.26. The debt secured was $19,500. The sales, which were private, extended over the interim between December 20, 1884, and March 24, 1885, and the interest which accrued between these dates, at the rate of ten per cent per annum, was $509.17. This would leave a balance due McConnell of $3,857.09, the incidental expenses not being considered. There was evidence, however, that out of this there was paid, with the assent of McConnell, to Harwood, Ames & Kelly, McConnell's attorneys, the sum of $500. There was paid to Mr. Pratt, for superintending the foreclosure,

the sum of $300. The evidence as to the incidental expenses necessary to the foreclosure, carried on by private sales for the period of three months, is not at all direct. On the part of McConnell it was testified by him that, after April 11, succeeding the said foreclosure, the expense of running the store was not to exceed $600 a month. Opposed to this, and given as on the same hypothesis, was the evidence of Louie Meyer that these expenses amounted to from $800 to $1,000 per month. Assuming the highest basis of computation as correct, there would not be due from the bank to McConnell even $199.87, the amount which is admitted by the answer. Reckoned upon the basis afforded by McConnell's testimony, there would be due from the bank to McConnell a balance of $1,577.10. This evidence was given apparently with reference entirely to transactions had after April 11, 1885, and therefore affords very unsatisfactory data for the consideration of transactions which occurred between December 20, 1884, and March 24, 1885. The district court, however, by its general finding, must have concluded that there were no sufficient proofs on which to base a decree in favor of McConnell for any overplus arising from sales on the foreclosure of the mortgage. It would seem, however, that to the extent of $199.87, conceded by the bank in its answer to be due, there should have been a finding in favor of McConnell for that amount. In view of the anomalous condition of the pleadings, however, (that is, the answer admitting this amount to be due and the reply denying it), we are of the opinion that no costs should be taxed in favor of the plaintiff on account of his right to recover from the bank the aforesaid sum of $199.87, conceded by the bank to be due him. The decree of the district court, in this respect, is therefore modified to the extent of allowing the plaintiff, as against the aforesaid bank, a judgment for $199.87, without interest or costs.

2. The next matter which demands our consideration

seems to have been that with reference to which this action was principally brought. In respect to this branch of the case the averments of the petition were that, after the foreclosure to which reference has been made, John R. Clark and the First National Bank of Lincoln delivered the remaining part of the merchandise of the plaintiff to the sheriff of Lancaster county, Nebraska, who duly offered said merchandise for sale, to satisfy the claims and demands of attaching creditors, on the 11th day of April, 1885. It is possible that an attempt to epitomize the statements of the petition in this regard may do injustice either by the omission of some important matter, or in some other respect, wherefore it is that the allegations will be quoted in *hæc verba*. The following averments occur in the petition:

"Fourth—Plaintiff further represents to the court that in order that said stock of goods might sell for the greatest possible amount, and its full value obtained at said sheriff's sale, this plaintiff was desirous of competition with bidders present at said sale, and in order to accomplish the same and purchase said stock without sacrifice to this plaintiff or to his creditors, plaintiff consulted and advised with defendant John R. Clark and procured his consent and agreement to advance this plaintiff from said defendant bank such sum of money as might be necessary to enable plaintiff to purchase said stock at said sheriff's sale. And it was further agreed that all of said business and the purchase of said stock should be in the name of the defendant Clark or the said First National Bank.

"Fifth—That afterwards said Clark, professing friendship for said plaintiff, and advising in this plaintiff's behalf, advised the purchase of said stock in the name of another person other than this plaintiff or the said First National Bank, representing that it would be a more business-like transaction and more consistent with its, the said bank's, method of doing business, this plaintiff's credit

having been previously impaired by reason of said attachments aforesaid. That, acting under the instructions of the said defendant Clark, and confiding in his sincerity, honest purpose, and intention, it was agreed by this plaintiff and defendant Clark that he should procure some person to act on behalf of this plaintiff as in manner aforesaid, and in plaintiff's place, who should, for plaintiff's benefit and use, purchase said stock, defendant Clark agreeing to advance the necessary amount of money as aforesaid; that afterward defendant Clark informed this plaintiff that he had procured the consent of said defendant Meyer to act for this plaintiff, and who should purchase said stock and hold the same under the instructions of this plaintiff and in trust for him. And it was further agreed and understood that in consideration of such services as were agreed to be rendered this plaintiff by the said Meyer, he should receive from plaintiff the sum of $500.

"Sixth—That acting under and by virtue of said arrangement, agreement, and understanding, and relying upon the promises of the said defendants, and upon the terms aforesaid, on the 11th day of April, 1885, at said sheriff's sale, this plaintiff advised and instructed the defendant Meyer to bid at said sale, and said stock was purchased in trust for this plaintiff by the said defendants through and by the said defendant Meyer for the sum of $20,200; that said Meyer, acting for plaintiff and the other defendant, and under plaintiff's instructions and advice, opened said stock of goods so purchased to the general trade and continued the sale of said stock at retail until on or about the month of April, 1886; that during said time said Meyer, upon the advice and instructions of this plaintiff, paid to the defendants Clark and the First National Bank the sum of $20,200, with interest thereon at the rate of ten per cent per annum, previously advanced by the said Clark and the First National Bank in accordance with the agreement and understanding aforesaid; and also paid all costs and ex-

penses of carrying on said business; that in the month of April, 1886, said Meyer, for this plaintiff and under his advice and instructions, sold the entire remaining amount of said stock to one Joseph Shoenberg for the sum of $10,000 in cash, and paid said amount so received to the defendant Clark and the First National Bank."

"Seventh— * * * That said defendants John R. Clark, the First National bank, and Louie Meyer, in violation of all agreements with this plaintiff as aforesaid, ever since said sheriff's sale on April 11, 1885, up to the present time, and in breach of the trust on their part assumed on behalf of this plaintiff, have conspired together to cheat and defraud this plaintiff, and plaintiff alleges the fact to be that said defendants Clark and the First National Bank agreed with plaintiff to purchase said stock and advance the money as aforesaid, and so instructed and advised plaintiff as above set forth, and so procured the said defendant Meyer to purchase said stock in pursuance with the conspiracy previously planned by and between the said defendants to cheat, defraud, and deprive plaintiff of his rights in the premises, and in pursuance with such conspiracy to defraud and cheat plaintiff have failed and refused to render an accounting of the proceeds of said sale as above set forth, and have refused to pay over to this plaintiff the large amount of money in their hands arising from said sale, belonging to this plaintiff by reason of said agreement and trust aforesaid; that during all the times herein mentioned this plaintiff was unable to ascertain from the books of account the true account of the items of receipts and expenditures, as the same were kept by the defendant Meyer, and plaintiff was refused access thereto, so that plaintiff has no knowledge of the true amount owing by said defendants to this plaintiff.

"Eighth—Your petitioner further represents that although he from time to time applied to the said defendants, and requested them to come to a full and fair accounting

with respect to the said transactions, with which just and reasonable request your petitioner still hoped that said defendants would have complied, as in justice and equity they should have done, but said defendants absolutely refused so to do. They have pretended that they have not received and applied to their own use more than their proportion of the proceeds received from said sales, whereas your petitioner charges the contrary thereof to be the truth, and so it would appear if the said defendants would set forth a full and true account and several their receipts and payments in respect of the said transactions heretofore set forth in this petition. Your petitioner charges that said defendants have in fact received the sum of $20,000 and upwards beyond their proportion of the proceeds and profits of said sales. Wherefore this plaintiff prays that an account may be taken of all and every the said dealings and transactions from the time of the commencement thereof, and also an account of the moneys received and paid by the said defendants respectively in regard thereto, and that the said defendants may be decreed to pay to your petitioner what, if anything, shall upon the taking of such accounting appear to be due to him, your petitioner being ready and willing and hereby offering to pay to said defendants, or either of them, what, if anything, shall be due them or appear to be due them, or either of them, by this plaintiff. Plaintiff prays for such other and further relief as plaintiff may in equity be entitled."

In the answer filed these averments were denied, both by Meyer in one answer, and by Clark and the First National Bank jointly in another answer. Just preceding the commencement of the trial the plaintiff dismissed his action as to the representative of the defendant John R. Clark, he having died on or about August 2, 1890. At the conclusion of the trial, but before the rendition of judgment, there was filed in this cause the following request, omitting the formal parts: "Plaintiff requests a special finding of fact

as to whether the purchase made by Louie Meyer of the McConnell stock of goods at the sheriff's sale April 11, 1885, was made under any arrangement between McConnell, Meyer, and Clark, or either two of them; that the said goods were purchased in the interest of or to the use of John L. McConnell."

In the decree which was finally entered, the finding of fact requested is made in the following language: "And thereupon the trial of this cause proceeded, and after hearing the remaining testimony of witnesses adduced and the arguments of counsel is submitted to the court, on due consideration whereof the court finds for the defendants, and *finds specially that the defendant Louie Meyer, at the time he purchased the stock of merchandise at sheriff's sale, April 11, 1885, purchased the same without agreement to hold the same in the interest of or to the use of the plaintiff John L. McConnell,* and finds no equity in the bill. Wherefore it is ordered, adjudged, and decreed that this action be dismissed at the cost of plaintiff."

The evidence as to the matters specially covered in this finding was very conflicting. On behalf of McConnell there was introduced in evidence many statements of Meyer directly substantiating, so far as he was concerned, the claim made in the petition as to the trusteeship of the said Meyer. On the other hand, there were equally convincing and numerous statements of the plaintiff McConnell, that while the goods were in the hands of Mr. Meyer he had no interest therein whatever. In fact, his testimony during the existence of the alleged trusteeship of Meyer with respect to the sale of the goods was upon a creditor's bill brought against McConnell and his wife; that he had no property whatever, and had turned over everything that he had any interest in to his creditors. Between McConnell and Meyer there seems to have been a rivalry as to which should be most successful in creating evidence by admissions contrary to his own interest. There was, however, no

party who relied upon these representations to his own injury, and, therefore, there was simply to be considered the statements of each of these parties as evidence in this respect. Of course, statements made by a party against his own interest are competent evidence in any case. Statements, however, in favor of the party's interest are not of equal competency.

To sustain the contentions of the First National Bank there were introduced in evidence the statements of John R. Clark made during his lifetime to several parties, to the effect that the claim made by McConnell was wholly unfounded, was unjust, false, and fraudulent in every respect. His answer containing averments to the same effect was also introduced in evidence after proof of his signature to the verification thereof. This class of testimony is wholly inadmissible, and has not been at all considered in reaching the conclusions at which we arrive—a course fully justified by the decisions of this court. (*Kennedy v. Otoe County Nat. Bank*, 7 Neb., 65; *Merchants Bank v. Rudolf*, 5 Neb., 527; *Nebraska City v. Lampkin*, 6 Neb., 32; *Mills v. Saunders*, 4 Neb., 190; *Gillette v. Morrison*, 9 Neb., 402.) This incompetent testimony being rejected, however, there still remained an irreconcilable conflict in the evidence, without a clear preponderance in favor of either party.

In view of the finding made upon the request of the plaintiff, the language of section 297 of the Code of Civil Procedure is not wholly without application to this controversy. The section referred to is as follows: "Upon the trial of questions of fact by the court it shall not be necessary for the court to state its finding except generally for the plaintiff or defendant, unless one of the parties request it with the view of excepting to the decision of the court upon the questions of law involved in the trial. In which case the court shall state in writing the conclusions of fact found separately from the conclusions of law." The record shows that an exception was taken to the find-

ing of the court upon the special request made. In the presentation in this court, however, it does not appear that any question of law arises upon this finding. There is simply a question of fact to be determined by a preponderance of the evidence.

In *McLaughlin v. Sandusky*, 17 Neb., on page 112, is the following language: "It is a well established rule of this court that the findings of inferior tribunals * * * will not be interfered with unless clearly wrong. And this rule applies to cases brought into this court upon appeal as well as upon error. (*Armstrong v. Freeman*, 9 Neb., 11; *Richardson v. Steele*, 9 Neb., 483; *Cheney v. Eberhardt*, 8 Neb., 423.)"

In *Worthington v. Worthington*, 32 Neb., on page 338, the language of NORVAL, J., who delivered the opinion of the court, was as follows: "The trial court found the disputed question of fact against the plaintiff. It is impossible to reconcile the testimony, and it is quite evenly balanced. By seeing the witnesses and hearing them testify, the court below is better able than we to judge which witnesses were entitled to credit and who should be disbelieved. It is well settled in this state that a finding of the district court on conflicting evidence is conclusive on appeal to the supreme court, unless there is a clear preponderance of evidence against the finding. (*Brown v. Hurst*, 3 Neb., 353; *Helling v. Mortgage Security Co.*, 10 Neb., 611; *Courtnay v. Price*, 12 Neb., 188; *Jennings v. Simpson*, 12 Neb., 558; *Aultman v. Patterson*, 14 Neb., 58; *McLaughlin v. Sandusky*, 17 Neb., 110.)" Following these authorities the special finding of the district court will not be reversed, but must wholly conclude the contention as to which the said finding was applicable.

3. The averments of the petition, as well as its prayer, were broad enough to cover any transactions between the plaintiff and either of the defendants. There is one branch of this case remaining, as to which the evidence seems to have

been introduced rather incidentally, and yet, in view of the petition, this phase of the case must receive attention, for it is not covered by the special finding. The relief granted might preclude our reviewing the matter upon which we are about to enter, if the evidence left any room for doubt as to the facts. The sheriff's sale, which occurred on April 11, 1885, was conducted by Mr. Melick, the sheriff of Lancaster county. This sheriff was sworn as a witness and testified that he took charge and control of the stock of goods formerly owned by John L. McConnell, about the 24th of March, 1885, and sold the stock on the 11th of April following; that he turned over to Mr. Meyer about $942; that he had had some notes to collect, but whether the proceeds of any were included in this $942 he was not able to remember; that he turned over this amount to Mr. Meyer simply as he turned over the stock to him; that he simply turned over everything that was in his possession; that Mr. Meyer told him that he, Meyer, was representing the bank; that witness simply sold the stock of goods to Louie Meyer and turned the store over to him, and made some collections along out of the sale of the stock, and sold some goods and turned over the proceeds of these collections and the proceeds of the goods to Louie Meyer; that he was in possession of the stock of goods by virtue of writs of attachment, and that the orders of the court were to advertise and sell the stock; that McConnell told witness that whatever Meyer did in the matter was satisfactory to him, and that he turned over the money to Meyer with McConnell's consent. When asked what McConnell said in giving his consent, this witness said: "I don't remember just what transpired at the time; only I remember that McConnell said to me that whatever Louie Meyer did in the matter would be satisfactory to him." Whether any of these conversations were in McConnell's presence the witness said he did not remember, but that he had no hesitancy, when he figured out what amount he had

on hand, in turning it over to Meyer, when he was told it was satisfactory to McConnell, and that he gave Meyer a check in McConnell's store at the desk. The check to which witness refers was in the words and figures following:

"LINCOLN, NEB., 4–12–1885.

"Pay to order of Louie Meyer $942\frac{48}{100}$ dollars.

"$942.48. S. M. MELICK.

"To First National Bank, Lincoln, Nebraska."

Indorsement on back of check: "Louie Meyer." On face of check were the words: "First National Bank, Lincoln, Neb., April 15, 1885. Paid."

In relation to this same transaction Mr. Meyer testified that Mr. Melick told him that the $900 paid was for goods they had sold while invoicing. He was then asked the following questions:

Q. Was there any understanding or agreement or knowledge on the part of John L. McConnell, so far as you know, that you was getting that $900?

A. I don't know about that. I never had any agreement with McConnell in my life, of that kind.

Q. Did you have any understanding or agreement with McConnell that he was paying that $900 to you?

A. No, sir.

Q. Or whether it should belong to him in any way?

A. It was a part of the attachment execution.

Q. Was there any agreement between you and him?

A. No, sir.

Q. That he should have it thereafter in any way?

A. Never.

Mr. Meyer further testified that he knew they did not make an invoice when he bought the stock. There had been an invoice made by the sheriff, he thought. Whether any of the goods had been sold, he learned from Sheriff Melick, who told him so; but that he never checked up the goods on the invoice to know whether what he got was invoiced or not. In relation to this matter John L. McConnell, the

plaintiff, testified that the sheriff took possession the 24th day of March, and that the doors were closed from that time until the day of sale, April 11, so far as general business was concerned; it was not closed but what people came in and out; no sales were made at wholesale or retail that witness McConnell knew of; that the sheriff took an inventory, and that was all that was done; if anybody came around that was supposed to be a party that wanted to buy the stock they were allowed to inspect the stock; that when the sale was made on the 11th of April, the purchaser, Mr. Meyer, took possession of the stock immediately.

Upon payment of his bid Mr. Meyer received from Sheriff Melick a receipt, from which we quote as follows: "Received of Louie Meyer the sum of twenty thousand two hundred dollars, in payment of the goods, wares, merchandise, fixtures, safe, lamps, chandeliers, stove, and all the goods and effects of whatsoever name and nature situate in a certain store building known as the 'McConnell store,' being No. 1031 O street, in the city of Lincoln, Lancaster county, Nebraska, all of which goods and effects were struck off to said Meyer, he being the highest and best bidder under and by virtue of the following orders of sale and writs issued in the following cases, to-wit: 'In the district court of Lancaster county, Nebraska.'" Here follows a list of the titles of cases, sixteen in number, in each of which John L. McConnell was defendant. This receipt was dated April 13, 1885, and was signed "S. M. Melick, sheriff."

There was introduced in evidence no one of the processes under which the sheriff acted in the above matter; nor was there introduced any return of the sheriff as to the sale made April 11, 1885. The only official record or recitation we have as to what was really sold is contained in the receipt above quoted. This is not at all at variance with the testimony of any witness, but rather con-

sonant with all the testimony we have quoted so far as it relates to the sum of $942.48 paid by the sheriff to Louie Meyer. In none of the evidence is there any showing whatever that McConnell or his creditors, or any of them, received any benefit on account of this payment by the check of the sheriff. It is shown by the testimony of McConnell, as to which there is no dispute on this point, that all the judgments against him have been satisfied; that of the firm of Bates, Reed & Cooley being settled last in order of time. In the light of all this testimony there is no room for doubt that the sheriff improperly paid this money to Meyer, and that Meyer has retained the same without the knowledge and acquiescence, so far as the evidence shows, of John L. McConnell. If this was an action against the said sheriff upon his bond for the recovery of this money wrongfully paid to Meyer, the testimony that the sheriff gave that he paid the money to Meyer with the consent of McConnell, might be pertinent. In this action, however, the suit is by McConnell, and Meyer alone, so far as this transaction is concerned, is liable. It matters not whether this money was paid to Meyer with the acquiescence and knowledge of McConnell or not; certain it is that, so far as the record shows, Meyer has never accounted for it. This action was brought for an accounting as between the plaintiff and all or any one of the defendants. The proofs clearly trace this money into the hands of Meyer. He has not shown that he has paid it to McConnell or in any way applied it to his benefit. There is not an intimation in any of this evidence which is quoted —which is in substance all there is in the record on this point—that Meyer bought anything but the stock of merchandise and certain stoves and other necessary furniture in connection therewith. It is not pretended that the goods were offered for sale by the invoice; rather they were offered for sale as they appeared upon the shelves and in the show-cases in the store-room in which they

had formerly been placed by McConnell. The sale of these goods in no way entitled the purchaser to anything except the goods themselves and such furniture as was actually sold in connection therewith. To allow a purchaser at such a sale to bid as against others upon goods which were actually in sight, and then after the purchase to permit the buyer to receive payment of money in the hands of the sheriff, which he should have applied to the satisfaction of claims which he held for collection under the orders of the court, would be to sanction a fraud, not only as against other bidders, but as well against the judgment defendant. This cannot be sanctioned. Nor by this reference to the sales made during invoice do we desire to be understood as sanctioning such a practice. Possibly, however, the sheriff was acting under an order of the court which allowed a private sale of the debtor's goods during invoice. We will not assume that he was without authority. The fact remains, however, that this money was received from the proceeds of the sales of goods and perhaps the collection of accounts due McConnell. In any event the money so received was the money of McConnell, which the sheriff should have devoted to the payment of his indebtedness, with the collection of which he was entrusted. He did not do so. The debts have been paid. Meyer has retained this money, and as no creditor seems, in the light of the evidence, to have an existing claim against this sum of $942.48, it results that it should be paid by Meyer to McConnell. This money was received April 12, 1885, from which time interest at the rate of seven per cent per annum should be reckoned on the amount received. Computing this interest for eight years and a half,—a space of time a little short of what it really was,—the principal and interest amount to $1,503.25, for which amount, with costs, plaintiff is entitled to judgment as against the defendant Louie Meyer.

In addition to the above item, the plaintiff claims that he

should have judgment against the defendant Meyer for the value of the stove, the safe, and other furniture. It will be noted that these were either expressly enumerated in the receipt given by the sheriff to Meyer, or were covered by the comprehensive description of the property which Meyer purchased at the said sheriff's sale.

The judgment of the district court is reversed, and a decree will be entered in this court against the First National Bank of Lincoln, Nebraska, for the sum of $199.87, with interest at seven per cent per annum from the date of the filing hereof, without costs; and against Louie Meyer for the sum of $1,503.25, with interest from the date of the filing hereof at the rate of seven per cent per annum thereon.

DECREE ACCORDINGLY.

J. R. LICHTY V. J. C. MOORE ET AL.

FILED NOVEMBER 8, 1893. No. 4715.

1. **Negotiable Instruments**: RIGHTS OF GUARANTOR: SURETIES. The mere fact that a guarantor of a promissory note, at the request of the principal maker of said note, received the amount loaned thereon and paid it in the discharge of a judgment against said principal maker, whereby the lien of said judgment, paramount to that of a mortgage held by said guarantor upon real property of said principal maker, was released, there being no fraud or circumvention shown, does not affect the right of said guarantor to recover the amount which he has been compelled as such to pay, even though the parties whom he sues as makers of said note were stay sureties on the judgment so paid; and this rule is not qualified by the mere fact that the parties so sued were in fact but sureties on the note with the party who instructed said guarantor to make payment as aforesaid.

2. ——: SURETY ON STAY BOND: SUBROGATION. A stay surety

is not entitled to be subrogated to the rights of the holder of a stayed judgment merely by reason of the fact that such stay surety has signed a note as surety with the judgment debtor, upon which note the money has been loaned with which payment of the stayed judgment was made.

3. ———: ACTION BY GUARANTOR FOR REIMBURSEMENT: DEFENSE: VOLUNTARY ASSIGNMENTS. In a suit by a guarantor for reimbursement of the amount which, by reason of such guaranty, he has been compelled to pay, it is no defense that the original payee of the note, as assignee of the estate of the principal maker thereof (for whom the defendants claim they are but sureties), wasted the estate of said principal maker so that he could not pay as he otherwise could, the said assignee having duly accounted, and been duly discharged by the court which appointed him such assignee.

4. **Trial**: DIRECTING VERDICT. Where the defenses pleaded are wholly unsustained by the evidence, it is error for the trial court to direct a verdict in favor of the defendants.

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

O. H. Scott and *Hambel & Heasty*, for plaintiff in error.

Manford Savage and *S. A. Searle, contra.*

RYAN, C.

In the district court of Thayer county, Nebraska, J. R. Lichty brought suit against J. C. Moore, James M. Moore, John Kinney, and G. Heinrichson, alleging as his cause of action that upon the request of the defendants he had guarantied, and been compelled to pay about eighty-seven per cent of the amount of a promissory note of which the defendants were the makers. The note in respect of which suit was brought was in the words and figures following:

"$285. DAVENPORT, NEB., January 1, 1886.

"Six months after date, I, we, or either of us, promise to pay to Jacob F. Walker, or order, two hundred and eighty-five dollars, for value received, negotiable and payable

without defalcation or discount, with interest at the rate of ten per cent per annum from date until paid.

"If suit is instituted on this note we agree to pay ten per cent of the amount then due, as agreed, assessed, and liquidated damages for non-fulfillment of contract, the same to be allowed by the court and included in the judgment.

J. C. MOORE.
"JAMES MOORE.
"JOHN KINNEY.
"G. HEINRICHSON."

The defendants John Kinney and G. Heinrichson answered, first, admitting their signatures upon the note sued on, but alleging that they signed as sureties only, and that Walker, the payee, was well aware of that fact at the time the note was signed, and that plaintiff well knew it long before he paid said note, if he ever paid the same. There was also a denial by these two defendants of each averment in the petition not admitted by the answer. There were other defenses pleaded, but as there were only two in support of which evidence was adduced, they alone will be considered. In passing, it may be remarked that there was a reply which put in issue each averment of these matters, to which attention will now be directed.

In the answer the two defendants above named made the following averments: "That on March 25, 1886, James Moore and J. C. Moore, who are the principal makers of said note, made an assignment of all their property for the benefit of their creditors in accordance with law; that within ten days after said date the said Jacob Walker was appointed assignee of said estate and took possession of the property belonging thereto. The assets of said estate amounted to the sum of $20,000, and the debts to the sum of $11,000, at the time the said Walker took possession of the same as aforesaid; that within the time provided by law the said Jacob Walker, without the consent

of these defendants, filed said note as a claim against the said estate, and has paid to himself from the assets of said estate two dividends upon the note aforesaid, and at the time said note became due and payable the said Jacob Walker had in his possession money and property largely in excess of the debts of the said principal makers of said note; that said estate yet remains unsettled, and a large amount of assets are in the hands of said Jacob Walker, the amount of which is unknown to these defendants.

"The defendants further allege that they are informed and believe that the said Jacob Walker has so managed the estate of the principal makers of said note that the district court of Nuckolls county refused to confirm the sale of the real estate belonging thereto, and that said Jacob Walker has charged excessive fees, and that while said estate, if properly managed, would have paid the debts of said James Moore and J. C. Moore in full, through the mismanagement of said Jacob Walker, the said estate has paid the creditors only thirteen cents on the dollar, and not to exceed ten cents more on the dollar will be realized therefrom. Defendants were led to believe that when said Walker filed said note against said estate it would be paid in full, and they had no means of knowing the condition of said estate, and that all knowledge of the same was kept from them by the payee of the note, who was the assignee of said estate; that said Walker made no attempt to collect said note from the plaintiff, or any one else, until he had, by mismanagement as aforesaid, exhausted the property of the principal makers of said note."

Perhaps it is unnecessary to remark that the Jacob Walker above referred to was the payee of the original note. The evidence discloses on this head that said Walker was constituted the assignee of the estate of J. C. Moore and James Moore, and that the assets consisted of a large amount of property, both real and personal. There were in evidence certified copies of the reports filed by the assignee

during the progress of the administration of the estate of said insolvent parties, followed by his final report and the approval of the same, together with an order of discharge of the said Walker as such assignee. During the administration of said estate there were two dividends declared, amounting in the aggregate to about thirteen per cent of the claims filed; and for this thirteen per cent due credit was given by plaintiff in his petition, as he only sued for the balance of about eighty-seven per cent due on said note. In this condition of the pleadings we are at a loss to conjecture what defense the averments constituted, in an action brought by Lichty upon a note which he had guarantied at the request of at least one of the makers, though without the express assent of the others, and which, by reason of the failure of the makers so to do, he had been compelled to pay. If Walker mismanaged the estate of the insolvents Moore and Moore, that fact should have appeared in some manner in the county court. In this action there was no malfeasance shown. The testimony simply was that the Mill property, for instance, was of a certain large value, about $14,000; that thereon was a mortgage of $2,000; that the property afterwards sold on a foreclosure in the federal court for about $2,600. If there was any element of misfeasance or malfeasance with respect to this, the great bulk of the property of the Moores, it must have occurred in allowing the foreclosure and sale upon the mortgage. But this was a matter that was within the jurisdiction of the federal court; and if the property was unfairly sold, or had been unnecessarily sacrificed, the proper forum in which to present that matter would have been the circuit court of the United States for the district of Nebraska.

Another defense pleaded by Kinney and Heinrichson was in the following language:

"13. That the plaintiff did not write his alleged guaranty upon said note at the request of either of the makers of the same, nor of the sureties thereto, but the name of the

plaintiff was thereon placed by the plaintiff in order that the plaintiff could procure the money advanced on said note to use for his own benefit; and the plaintiff did use said money, and the same was used to pay off a lien on said property of the principal makers of said note in order that the plaintiff should have the first lien upon the property aforesaid, and the indorsement was made on said note by the plaintiff for the benefit which he was to receive, and which he did receive therefrom."

J. F. Walker testified that Mr. Lichty signed the guaranty in his presence at the request of Mr. Moore. His language is as follows: "Mr. Moore came down twice, and had this note signed with these sureties on. I told him I was not acquainted with the sureties, and he went home and came back the second time with a letter from the bank which said these sureties would be good for a reasonable amount; and I still refused, for I was not acquainted with them, and in our conversation he wanted to secure this note, saying, he could not get the money; and in that conversation he mentioned Lichty and said he was acquainted with Lichty. I believe I asked him if Lichty knew these parties, and he said he did; and I offered if he could get Lichty to guaranty this note I would give him the money on that, and he went out to see Lichty." This witness further said that he told Moore that if he would get Lichty to guaranty the note witness would let him have the money; and that Lichty had paid the note. There is no evidence in conflict with this, and it must, so far as it goes, stand as a verity.

In relation to the use made of the money, there is no question that it was paid to satisfy certain judgments which were liens upon the property of J. C. and James Moore. In fact, the evidence is without contradiction that the money was borrowed for this very purpose. The payment of it to Mr. Weiss, the attorney for the judgment creditors, was made by Mr. Lichty, but his instructions in that regard

allowed him no discretion in the matter. The proceeds of the note were entrusted to him to be paid on these judgments. It is true, perhaps, that if there had been an assignment of these judgements for the benefit of the sureties so that the judgments would not have been discharged it might have inured to the benefit of the defendants who have made this answer. The defendants in error insist that it was the duty of Mr. Lichty to procure such an assignment of the judgments to be made to the answering defendants, because they were sureties on the stay bond in respect to such judgments. But it is obvious that the loan was made by Walker to the principal debtors, both in the note and in the judgments to be satisfied. Upon request of one of the principal defendants, Mr. Lichty made the payments upon such judgments. It might have been that if the sureties upon the stay bond, as well as upon the note, had advanced the money to make these payments, an equity entitling them to subrogation would have arisen in their favor. But such was not the case. They in no manner were instrumental in procuring this money, except as sureties for J. C. and James Moore. Collateral to their liability was also the liability of Lichty, a guarantor; and, so far as the disposition of the money raised upon this note was concerned, there would seem to be fully as much equity in favor of Lichty as in favor of Kinney and Heinrichson. The fact that incidentally, by the payment of the two judgments referred to, there were released liens prior to the mortgage lien held by Lichty upon the same property, would not impair his rights in an action of this kind. If Kinney and Heinrichson are entitled, in equity, to be subrogated to the lien of the judgments extinguished by the payments made by Lichty, their remedy lies in a proper action brought for that purpose. We cannot see, however, that they have any standing in this case to set up the fact of such payments as a defense against the liability attempted to be enforced by Lichty upon the note.

These defenses were the only ones in support of which any evidence was presented. Upon the issues joined the court instructed the jury as follows: "Upon the uncontradicted facts in evidence herein the plaintiff cannot recover against the defendants John Kinney and G. Heinrichson; but defendants J. C. Moore and James Moore, having failed to answer, the plaintiff will be entitled to recover judgment against them for the amount he paid to Jacob Walker on the note in question in this action, and interest on said payments according to the tenor of the promissory note herein, less the amounts, if any, which have been paid on said note, from the time of such payments to the first day of this term of court, to-wit, April 23, 1890." To this instruction there was due exception, and its correctness is sufficiently challenged by a motion for a new trial, overruled in due course, and properly excepted to, followed as this was by a judgment on the verdict in accordance therewith.

A review of the defenses set up in the answer, and of the evidence in support of each, is attended with considerable difficulty, owing to the fact that the instruction complained of does not definitely point out any grounds upon which the trial court acted in withdrawing the cause from the consideration of the jury. It has been necessary, therefore, to consider all the defenses in support of which there was any evidence given. There is no doubt from the testimony that the note was made by the defendants in this action, and that it was guarantied by Lichty, and that he, induced by threats of legal proceedings, paid the same. The matters attempted to be asserted in resistance of contribution by the parties to the note constitute, under the evidence given, no defense.

From the views above expressed it necessarily follows that the judgment of the district court is

REVERSED.

LEWIS S. LOOMER V. SABERT THOMAS.

FILED NOVEMBER 8, 1893. No. 4635.

1. **Breach of Contract:** NEGLIGENCE IN PREVENTING DAMAGES. The law imposes upon a party injured from another's breach of contract or tort the active duty of making reasonable exertions to render the injury as light as possible. If by his negligence or willfulness he allows the damages to be unnecessarily enhanced, the increased loss, which was avoidable by the performance of his duty, falls upon him. *Long v. Clapp*, 15 Neb., 417, followed.

2. ———: ———: SETTLEMENT AND COUNTER-CLAIM: INSTRUCTIONS. This was a suit for balance due on account of pasturing cattle. The defendant pleaded (*a*) settlement; (*b*) counter-claim for damages sustained by loss of and injury to cattle on account of plaintiff's negligence. The instructions of the court to the jury on the subject of the defenses of settlement and counter-claim approved and set out at length in the opinion.

ERROR from the district court of York county. Tried below before SMITH, J.

The opinion contains a statement of the facts.

E. A. Gilbert, for plaintiff in error:

Cross-examination is limited to the facts elicited by the examination in chief. (*Mordhorst v. Nebraska Telephone Co.*, 28 Neb., 610.)

When a cross-examination is carried to an unreasonable length upon new matters, and thereby improper testimony is obtained, it is error. (*Bell v. Prewitt*, 62 Ill., 362.)

The court erred in giving the seventh, eighth, and ninth paragraphs of instructions. (*Brewer v. Wright*, 25 Neb., 305; *Price v. Mahoney*, 24 Ia., 582; *Smith v. Evans*, 13 Neb., 314; *McCleneghan v. Omaha & R. V. R. Co.*, 25 Neb., 523.)

Sedgwick & Power, contra, cited: *Long v. Clapp*, 15 Neb., 420.

RAGAN, C.

Sabert Thomas sued Lewis Loomer in the district court of York county, to recover $562.80, less $200 paid by Loomer, for a balance due on contract for pasturing Loomer's cattle during the summer of 1889, at sixty cents per head per month.

Loomer made four defenses:

1. That the price for pasturage agreed upon was fifty-five cents per head per month, instead of sixty cents.

2. That he had been damaged on account of improper care of the cattle while Thomas had them in pasture, and on account of Thomas allowing some of the cattle to escape and become lost.

3. That there had been a settlement between the parties, and that the amount due Thomas had been agreed upon, which amount should not be paid until the lost cattle had been returned by Thomas.

4. That he had paid Thomas $300 instead of $200.

To these defenses Thomas replied by a general denial of all the allegations of new matter in the answer.

Thomas had a verdict and judgment, and Loomer brings the case here.

The first error assigned is, "The verdict is not sustained by the evidence."

A number of witnesses testified in the case, and the evidence on every issue is more or less conflicting. Thomas' evidence sustains his theory of the case, and Loomer's evidence sustains his defenses. It is not so much a question of the sufficiency of the evidence. The question is largely one of the credit of the witnesses and the weight of the testimony. Now, this court did not hear the witnesses testify; had no opportunity to observe them, or their manner of testifying, or their demeanor while on the stand. The jury heard, saw, and observed the witnesses, and weighed the evidence, and reached a conclusion. For the supreme

court to disturb this verdict because, had we been the triers of the issues of fact, we might have reached a different conclusion, would be for the court to usurp the functions of the jury. It has long been settled in this state that the supreme court has no authority to set aside the verdict of a jury unless the same is clearly wrong. For this court to interfere with a jury's conclusion it must be unsupported by competent evidence. It is not enough to cancel a verdict, that all the evidence on which it rests is conflicting. This court cannot weigh the conflicting testimony of witnesses. The jury alone can do this.

The next error alleged by Loomer is that Thomas was permitted to cross-examine him upon matter not testified to by him, Loomer, in his direct examination. We have carefully examined the record as to this assignment of error, and it must suffice to say that the cross-examination complained of was fairly limited by what Loomer had testified to when on the stand. True, the cross-examination was perhaps longer than necessary, but we do not think that Loomer was deprived of any right thereby.

The remaining errors assigned relate to the giving by the court of instructions 7, 8, and 9. They are as follows:

"7. If you believe from the evidence that the defendant delivered a large number of cattle for pasture to the plaintiff, and there was no definite or certain agreement between the parties as to how long plaintiff should keep said cattle, then defendant had the right to take possession of said cattle at any time; and if you further believe from the evidence that, during the time plaintiff had said cattle in his pasture, the defendant frequently saw said cattle and knew that plaintiff was neglecting to water and properly care for said cattle, and knew that by reason thereof said cattle were being injured, or that the defendant was being damaged thereby, then the law imposes upon the defendant the active duty of making reasonable exertions to prevent the damages and render such injuries or damages, if any,

as light as possible; and if, by his own negligence or carelessness, defendant permitted said damages to be unnecessarily enhanced, the increased loss, if any, must be borne by the defendant.

"8. If you find from a preponderance of the evidence that the defendant is entitled to recover damages on account of negligence of the plaintiff in looking after and caring for defendant's cattle, if any such is proved, then the measure of the defendant's damages would be what said cattle are impaired and depreciated in value, if any such you find, and the value of the cattle lost or that died, if any such you find, on account of the negligence of the plaintiff, provided you further find from the evidence that such loss or damages occurred without any fault or neglect on the part of the defendant.

"9. In order to constitute a settlement it must appear from the evidence that the parties expressly or impliedly agreed upon a balance due, and, although you may believe from the evidence that on or about the 8th day of October, 1889, the parties met together and looked over their accounts and struck a balance, this would not be binding upon the parties as a settlement unless you further find from the evidence that both the parties then agreed or understood that such balance should be regarded as the amount due from the defendant to the plaintiff."

We perceive no error in any of these instructions.

Plaintiff in error's chief complaint, however, is directed to No. 7. In Sutherland on Damages, vol. 1, p. 148, it is said: "The law imposes upon a party injured from another's breach of contract, or tort, the active duty of making reasonable exertions to render the injury as light as possible. If, by his negligence or willfulness, he allows the damages to be unnecessarily enhanced, the increased loss, that was avoidable by the performance of his duty, falls upon him." The instruction complained of is within the rule here laid down. This rule has also received the

approval of this court. (See *Long v. Clapp*, 15 Neb., 417; *Omaha Coal, Coke & Lime Co. v. Fay*, 37 Neb., 68.)

There is no error in the record and the judgment of the district court must be affirmed, and it is so ordered.

AFFIRMED.

OMAHA & REPUBLICAN VALLEY RAILROAD COMPANY v. CHARLES MOSCHEL.

FILED NOVEMBER 8, 1893. NO. 4645.

1. **Amendments to Pleadings:** DISCRETION OF TRIAL COURT. The permitting or refusing amendments to pleadings is a matter within the sound judicial discretion of the trial court; and unless it is made to clearly appear that he has abused this discretion, and a party has thereby been deprived of the opportunity to make his case or defense, the supreme court will not interfere.

2. ———. It is not necessarily a fatal objection to a proposed amendment that it is in fact an additional defense or an additional cause of action.

3. **Railroad Companies:** DAMAGES TO REAL ESTATE BY CONSTRUCTION OF ROAD: LIMITATION OF ACTIONS. An action against a railroad company for damages to plaintiff's real estate, caused by the railroad company's building its tracks and operating its road across the street and on a lot lying next to plaintiff's property, must be brought within four years of the date of the construction of such railroad.

4. ———: NUISANCE: DAMAGES: LIMITATION OF ACTIONS. Where a railroad company, in 1880, built its railroad track and side tracks across a street and on a lot (owned by it) lying next to plaintiff's property, and more than four years thereafter plaintiff brought suit against the railroad company for the depreciation in value of his lot caused by the building of such railroad, and its subsequent operation, and for subsequently building and operating additional tracks across said street and lot, *held*, (1) that plaintiff in no event could recover for any depreciation in the value of his property by reason of any acts of the railroad

company, either in matters of construction or operation, the habitual doing, or the commencement of the doing, of which acts was at a date more than four years prior to the date of suit brought; (2) that the plaintiff could, and if he did or did not, within four years after the date of building of said original railroad on said lot and across said street adjacent to his property, bring suit for damages for the depreciation in value of his premises, caused by such railroad construction and operation, then every element of damages, past and future, that was or would have been properly admissible in that suit, either in matters of construction or operation, must be excluded from the consideration in this case.

ERROR from the district court of Gage county. Tried below before APPELGET, J

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

Rickards & Prout, contra.

RAGAN, C.

On the 5th day of December, 1889, Charles Moschel sued the Omaha & Republican Valley Railroad Company (hereinafter designated as the "railroad company") in the district court of Gage county, alleging his ownership of lot 6, in the city of Beatrice; that said lot had a frontage of fifty feet on Court street, the principal street of said city; that about January 7, 1880, the railroad company constructed, and had since maintained, its line of road upon lot 5, adjacent to said lot 6, and had extended its road and side tracks upon and across said Court street, making a double track upon said lot 5, and said street in front of Moschel's building, situate on said lot 6 (lot 5 is immediately west of lot 6, and both front south on Court street, and the railroads mentioned extend north and south across Court street and upon lot 5); that ever since the building of said railroad, the railroad company had occupied the street in front of said place of business of Moschel and

said lot 5 with its tracks and side tracks, made up its trains thereon, and interfered with the travel on said street; "and that particularly within the four years last past, and immediately preceding the commencement of this action, said railroad company had wilfully, maliciously, and wantonly, with the intent to injure plaintiff in his business and property, caused its engines and cars to be left alongside of said property of Moschel, without reason or necessity therefor, and for the purpose of injuring plaintiff in the full, free, and complete use and enjoyment of his property; that said property of Moschel had been greatly damaged, and the free use and occupation of said property interfered with, and Moschel had been compelled to abandon the doing of business on said lot 6, and at a great expense to purchase other property on which to conduct his business; that said lot 6, by reason of the premises, had been greatly injured and depreciated in value for any purpose whatsoever, and Moschel prayed judgment for damages."

The answer of the railroad company admitted the construction, maintenance, and operation of its double track railway across Court street and upon lot 5 since 1880, and alleged that it had, for due compensation paid, procured the right of way over said lot 5 before occupying it, and specifically denied all other allegations of Moschel's petition.

After the evidence was all in, the railroad company requested permission to file an amendment to its answer, setting up the statute of limitations, which the court granted; and thereupon the railroad company filed the following "amendment," in fact, an additional defense: "The defendant, in further answer to the petition of the plaintiff, * * * alleges that the cause of action stated in the petition did not accrue within four years next before the commencement of this action."

Thereupon Moschel, by leave of the court, amended his

petition by filing what his counsel called an "addenda" thereto, in words and figures as follows: "Comes now the plaintiff, for their 'addenda' to the * * * petition herein filed, * * * and * * * says that on or about the 1st day of October, 1886, the defendant constructed a second or new main line over and across the said lot 5, and only a few feet distant from the line constructed by the defendant in the early part of 1880, so that said new main line, and the operation thereof, extended along the east side and in close proximity to plaintiff's said premises, and over and across Court street, and that by reason of which said new main line of the defendant, the said Court street in front of plaintiff's premises was still blockaded, the full use thereof destroyed, the travel thereon impeded, whereby the value of said plaintiff's premises was still further reduced, so that the same was not worth within $1,200 of what they were immediately preceding the construction and operation of said new main line as herein described."

The railroad company excepted to the ruling of the court allowing this amendment. Moschel had a verdict and judgment, and the railroad company brings the case here.

The first error alleged is the ruling of the court in permitting Moschel to amend his petition by filing the so-called "addenda."

Moschel's petition contained two causes of action, though not separately stated, and numbered:

1. The depreciation in the value of lot 6 by the construction, in 1880, by the railroad company, and its operation and maintenance since, on lot 5, and across Court street, of its railroad and side tracks.

2 That within the four years immediately preceding the bringing of this action the railroad company had willfully, maliciously, and wantonly, with the intent to injure Moschel in his business and property, caused its engines and cars to be left alongside of said property, without reason or necessity therefor, by reason whereof said property

had been greatly damaged, and the plaintiff deprived of his free use and occupation of said property.

The facts stated in the "addenda" are that in October, 1886, the railroad company "constructed a second or new main line over and across said lot 5 * * * and Court street, * * * whereby the value of Moschel's premises was reduced * * * $1,200."

The facts stated in this "addenda" then were not amendatory of either of Moschel's causes of action, but of themselves stated a separate and independent cause of action.

The entire subject of permitting or refusing amendments to be made to pleadings is, by law, left to the sound legal discretion of the trial judge; and unless it is made to clearly appear that the court has abused its discretion, or that by his ruling a party has been deprived of the opportunity to make his case or defense, the supreme court will not interfere with the action of the trial judge. It is not necessarily a fatal objection to a proposed amendment that it is in fact an additional defense, or an additional cause of action. If the trial court in the case before us had refused to permit the railroad company to file its additional defense of the statute of limitations, or had refused to permit Moschel to file his additional cause of action, we could not say that the court had abused its discretion; and we cannot say that the court erred in permitting either of the amendments to be filed.

In all such cases, if a party claims himself prejudiced by the refusal of a trial court to permit an amendment, such prejudice must appear from the record; and if amendments are permitted by the trial judge during the progress of a trial before verdict or decision, and a party is prejudiced by such amendment in the making of his case or defense, he should make such prejudice appear by affidavit or otherwise to the trial judge, and then it would be his duty, on such terms as were reasonable, to either set aside the trial proceedings already had, and continue the case to a

future time, or suspend the trial until such time as the party claiming to be prejudiced might, by the exercise of reasonable diligence, be prepared to make his defense or case.

The next error assigned by the railroad company is the refusal of the trial court to give to the jury this instruction: "The court instructs the jury that if any damages are to be assessed in this case, no damages can be allowed for the depreciation of the value of the property in question, except such depreciation, if any, as is shown by the evidence to have resulted within and during the four years immediately prior to the commencement of this action on the 5th day of December, 1889; but for any depreciation or damage prior to said four years you can make no allowance." The refusal to give this instruction was error for the reasons: (1) The first cause of action in Moschel's petition was the alleged depreciation in the value of his lot 6, by reason of the railroad company having, in 1880, constructed and since operated its railroad on lot 5, adjacent to Moschel's lot. The undisputed evidence in the case is that the railroad company had, prior to building its tracks on lot 5 in 1880, purchased said lot. The railroad company then was in the same situation, so far as concerns the question of damages to Moschel's property, as it would have been had it acquired the right to use and occupy lot 5 by condemnation proceedings; that is to say, the railroad company had not wrongfully occupied and used lot 5. It was not a trespasser; and all the damages done to Moschel's property by the location and proper, usual, ordinary, and necessary operation by the railroad company of its railroad on the lot 5, and across Court street, accrued at the date of the building of the railroad in 1880, and hence were barred by the statute of limitations, and could not be recovered in this action. (Mills, Eminent Domain, sec. 216; *Chicago & E. I. R. Co. v. Loeb*, 118 Ill., 203.) (2) A very large part of Moschel's evidence was directed to the depreciation in the value of his lot, caused by the building of the railroad on

lot 5, and across Court street, in 1880, and its maintenance and operation thereof since. (3) The court, at the request of Moschel, had already instructed the jury as follows: "You are instructed that if you find from the evidence in this case that the defendant constructed and operated the line of road across the lot adjoining that of plaintiff, now in question, and if you further find from such evidence that by said construction and operation of said road the lot of plaintiff was injured and decreased in value, then you should find the damages to the lot to be the amount which you may find that the evidence shows that said lot was decreased in value by reason of such construction and operation." This last instruction left the jury at liberty, if it did not direct them, to take into consideration, in estimating Moschel's damages, the depreciation in value of his lot by the building of the railroad in 1880. The language of this instruction should at least have been limited by such an instruction as the one asked by the railroad company and refused. (4) There was no evidence before the jury that would justify their finding, as Moschel alleged in one of his causes of action that the railroad company had at any time "willfully, maliciously, and wantonly, with the intent of injuring plaintiff in his business and property, * * * caused its engines and cars to be left alongside the property of the plaintiff, without reason or necessity therefor, and for the purpose of injuring plaintiff in the full, free, and complete use and enjoyment of his property."

It is strenuously insisted here by counsel for the railroad company that this case is to be viewed as if Moschel had, within four years after the building of the tracks across Court street and lot 5, in 1880, sued the railroad company for damages for depreciation of his property caused by such building; and that the judgment in such a case, had it been brought, would be a bar to this action, and therefore this suit cannot be maintained.

It is doubtless true, (1) that in this case Moschel cannot

recover for any depreciation in the value of his property by reason of any acts of the railroad company, either in matters of construction or operation, the doing, or commencement of the doing of which acts was at a date more than four years prior to the date of the suit brought; (2) that the owner of said lot 6 could, and if he did or did not, within four years after the date of the building of said railroad on said lot 5, and across said Court street, bring suit for damages for the depreciation in the value of his property, caused by such construction and operation of said railroad, then every element of damages, past and future, that was or would have been properly admissible in such suit, either in matters of construction or operation, must be excluded from consideration in this case.

The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

RICHARDSON & BOYNTON COMPANY V. PHIL E. WINTER.

FILED NOVEMBER 8, 1893. No. 5045.

Review: INSTRUCTIONS: EXCEPTIONS: ASSIGNMENTS OF ERROR. To obtain a review by the supreme court of an alleged erroneous ruling of the district court in the giving or refusing of an instruction, an exception must be taken to such ruling at the trial, and specifically assigned as error here in the petition in error.

ERROR from the district court of Gage county. Tried below before APPELGET, J.

Burke & Prout and *J. N. Rickards*, for plaintiffs in error.

A. D. McCandless and *Winter & Kauffman, contra.*

RAGAN, C.

The Richardson & Boynton Company sued Phil E. Winter in the district court of Gage county on a promissory note for $100. Winter answered, and, after admitting the execution and delivery of the note, alleged that there had been an entire failure of consideration for said note, and that the defendant had received no value whatever for the same; that prior to the giving of said note the plaintiffs had placed a certain hot-air furnace in the defendant's residence on trial, to be accepted and paid for by the defendant only in case it should heat defendant's residence in a manner to meet plaintiffs' guaranty and defendant's requirements after a thorough test in the coldest weather; that said furnace utterly failed to do the work guarantied and the defendant rejected the same and refused to purchase it, and placed it at the disposal of the plaintiffs; that the plaintiffs thereupon acknowledged the complete failure of the furnace, as set and constructed, to meet their guaranty, but represented to this defendant that such failure was owing to certain deficiencies in the furnishings and its defective and improper connections, and faulty constructions of the building of the air-boxes, chambers, and dampers; and said plaintiffs then promised, agreed, and contracted with the defendant that if he would give them the said note * * * they would, within and during the thirty days for which it was drawn, supply all deficiencies fully, remedy all defects, correctly establish all connections, and thoroughly reconstruct the entire setting of said furnace so that it could and would heat all the seven rooms in defendant's residence at the same time, in the coldest weather, in a manner satisfactory to the defendant; time being of the essence of the contract, and the time limited to the time of defendant's note, to-wit, thirty days; and defendant avers that this promise and agreement by the plaintiffs formed and was the sole inducement upon which he gave

the note in question; * * * and defendant avers that plaintiffs did not, within said thirty days, nor at any time, fulfill their said agreement, and did not, in any particular, reconstruct * * * said furnace, and defendant has never since made, and cannot make, any use of said furnace; * * * and defendant avers that to properly reconstruct said furnace would cost him the full amount of said note; that by plaintiffs' false and fraudulent representations as to the value and heating condition of said furnace, defendant was led to incur heavy expense, and to greatly damage his residence by apertures in the walls, floors, and partitions; and by reason of plaintiffs' failure to perform their said contract and to make good the said heating apparatus, the defendant had been damaged in a large sum, to-wit, more than one hundred dollars.

There was a reply denying all the allegations of new matter in the answer. The case was tried to a jury, who found for Winter, and the Richardson & Boynton Company prosecute error.

One error alleged is that the verdict is not supported by the evidence. We think it is. We shall not quote the evidence. It is, of course, more or less conflicting, but abundantly supports the jury's findings. It is now a settled rule of this court that it will not disturb the verdict of a jury if there is competent evidence to support it; nor will this court weigh the conflicting testimony of witnesses. We cannot say that the verdict is clearly wrong, and therefore cannot disturb it on the ground that it is unsupported by the evidence.

Another error alleged is the giving, by the trial court, of an instruction. The giving of this instruction, however, is not assigned as error in the petition in error, and for that reason we cannot examine it.

At the request of plaintiffs in error the court instructed the jury as follows: "The court instructs the jury that although you may find from a preponderance of the evi-

dence in this case that the furnace in question was sold by the plaintiffs, and that said furnace was improperly set, and that the registers and other fixtures and appurtenances belonging to said furnace were improperly arranged and located, and that consequently defendant's house was damaged and not heated, still the jury cannot, under the law, allow the defendant any damages in their verdict because of such defects in the setting, arrangements, and locating of said furnace; provided the jury believe that said furnace, registers, fixtures, and appurtenances were placed where defendant requested them to be placed." To this instruction the court added, "and that such failure was caused by the order of defendant." The addition made by the court is another error assigned here. It is sufficient to say that there was no error in this modification of the instruction.

Complaint is made because of the refusal of the court to give this instruction: "The jury are instructed that if they believe from the evidence that the witness Ham was in the employ of the witness Labell, and that as such employe he ordered the furnace which was afterwards put in the house of the defendant with knowledge of the said Labell, that said furnace was shipped and billed to said Labell and accepted, and the freight thereon paid by him, you are instructed that such acts on the part of the said Labell are a ratification of the purchase of said Ham, and such ordering and purchasing was, in law, the acts of said Labell as much as though he had ordered the same in person." The contention, or one contention of the plaintiffs in error, at the trial below, was that they sold the furnace to one Labell, and not to Winter; that one Ham was in Labell's employ, and gave plaintiffs in error the order for the furnace for Labell. Plaintiffs in error had no pleading on file under which they could prove any such facts, but the evidence was allowed to go in. If this was a suit by the Richardson & Boynton Company against Labell for the price of the furnace, the instruction might have been

proper, but certainly it was not error on the part of the court to decline giving it in this case.

Again, the court fully instructed the jury as to plaintiffs in error's contention that they sold the furnace to Labell, as follows: "The court instructs the jury that if they find from the evidence that the furnace in question was sold by the plaintiffs to one Labell, and that the note in question was received by the plaintiffs in payment of said furnace, then the jury must find a verdict for the plaintiffs for the full amount of the note, interest and principal, unless the jury further find from a clear preponderance of the evidence that said plaintiffs agreed to change said furnace as alleged in defendant's answer, and that such agreement was the consideration for said note, and also that the plaintiffs failed to make the agreed changes in said furnace."

The last error assigned is the refusal of the court to charge the jury as follows: "The court instructs the jury that if you believe from the evidence that the defendant has sworn positively that at the time the note in question was delivered, the witness McPherson represented to the defendant that the plaintiffs would reset, reconstruct, and make alterations in the furnace and heating arrangements placed in defendant's house, and furnish repairs therefor, within thirty days, and before the maturity of said note, as alleged in this answer, and that the witness McPherson has sworn just as positively that he did not make such representations to the defendant, and if you further find from the consideration of all the evidence in the case that the testimony of the witness McPherson is entitled to as much credit as that of the defendant, and corroborated to the same extent, then, so far as the question of said representation is concerned, you should find for the plaintiffs, as the burden of proving said representation is on the defendant." Such an instruction as this should never be given to a jury, and the court was entirely right in refusing to give it. The court, at the request of plaintiffs in error, had

already charged the jury as follows: "The court instructs the jury that in determining the issues in this case you should take into consideration the whole of the evidence and all the facts and circumstances proved on the trial, giving the several parts of the evidence such weight as you think they are entitled to; and, in determining the weight to be given to the several witnesses, you should take into consideration their interest in the event of the suit, if any such is proved, their conduct and demeanor while testifying, their apparent fairness or bias, if any such appears, their appearance on the stand, the reasonableness of the story told by them, and all the evidence and circumstances tending to corroborate such witness, if any such are proved." This instruction correctly and fairly stated the rule and was all plaintiffs in error were entitled to on the subject of the credibility of the witnesses, and the weight of the evidence.

There is no error in the record and the judgment of the district court is

AFFIRMED.

COLUMBUS C. VENNUM ET AL. V. GEORGE HUSTON.

FILED NOVEMBER 8, 1893. No. 5278.

1. **Malicious Prosecution:** ACTION AGAINST JUSTICE, CONSTABLE, AND WITNESS: VENUE. Section 54 of the Code of Civil Procedure provides: "Actions for the following causes must be brought in the county where the cause [of action], or some part thereof, arose: * * * Second—An action against a public officer for an act done by him in virtue or under color of his office, or for neglect of his official duty." Accordingly, where, in a suit for malicious prosecution brought in Webster county against a prosecuting witness, justice of the peace, and constable, it appeared that the complaint was sworn out in Hitchcock county and filed there with the justice of the peace,

who issued a warrant for plaintiff, and deputed the constable to execute it, and he arrested the plaintiff in Webster county, and took him before the justice in Hitchcock county, who examined and committed plaintiff to jail, *held*, (1) that plaintiff's cause of action was his alleged malicious prosecution by the defendants; (2) that, as the plaintiff was arrested in Webster county, a part of his cause of action arose there, and that the suit was rightly brought in that county; and (3) that the court had jurisdiction over the defendants summoned in Hitchcock county, although no defendant to the suit resided in, or was summoned in, Webster county. *McNee v. Sewell*, 14 Neb., 532, followed.

2. ———: ———: THE COMPLAINT AND WARRANT in the criminal prosecution, alleged to have been malicious, examined herein and *held* to state the substance of the charge, and to be sufficient when attacked collaterally.

3. ———: JUSTICES OF THE PEACE: LIABILITY FOR MALICE IN ISSUING WARRANT. A justice of the peace, in deciding upon the sufficiency of a complaint made before him, charging another with a crime, and in issuing a warrant of arrest for the party accused, acts judicially; and if he does so in good faith, with pure motives and without malice, he is not liable therefor if he had jurisdiction of the offense charged, and the complaint was not absolutely void.

4. ———: LIABILITY OF PROSECUTING WITNESS: ALLEGATIONS AND PROOF. To render a prosecuting witness liable in an action for malicious prosecution, it must be alleged and proved that his conduct in the premises was inspired by malicious motives and was without probable cause. *Dreyfus v. Aul*, 29 Neb., 191, followed.

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

The facts are stated in the opinion.

W. S. Morlan, for plaintiffs in error:

The district court of Webster county was without jurisdiction. The action cannot be maintained against N. T. Jones, justice of the peace, outside of Hitchcock county. (Code, sec. 54; *Clay v. Hoysradt*, 8 Kan., 80; *Graham v. Smith*, 62 Mich., 147; *Cobbey v. Wright*, 23 Neb., 250;

Dunn v. Hazlett, 4 O. St., 436; *Lamson Consolidated Store Service Co. v. Hart*, 5 N. Y. Supp., 889; *People v. Kingsley*, 8 Hun [N. Y.], 233; *Wintjen v. Verges*, 10 Hun [N. Y.], 576; *People v. Hayes*, 7 How. Pr. [N. Y.], 248; *Veeder v. Baker*, 83 N. Y., 156; *Dunn v. Haines*, 17 Neb., 563; *Cobbey v. Wright*, 29 Neb., 277; *Birmingham Iron Foundry v. Hatfield*, 43 N. Y., 227.)

The complaint filed with the justice was not void. He had jurisdiction. (Criminal Code, sec. 412; *Miller v. Woods*, 23 Neb., 200; Maxwell, Jus. Pr. [4th ed.], 806–808; *Hunt v. Hunt*, 72 N. Y., 217; *Austin v. Vrooman*, 28 N. E. Rep. [N. Y.], 478.)

For a mere error of judgment in the execution of his office no action can be maintained against a judge of any court. (*State v. Wolever*, 26 N. E. Rep. [Ind.], 765; *Gillett v. Thiebold*, 9 Kan., 427; *Yates v. Lansing*, 9 Johns. [N. Y.], 395; *Stone v. Graves*, 8 Mo., 148; *Lange v. Benedict*, 73 N. Y., 12; *Reid v. Hood*, 2 N. & Mc. [S. Car.], 168; *Brooks v. Mangan*, 49 N. W. Rep. [Mich.], 633; *Jennings v. Thompson*, 22 Atl. Rep. [N. J.], 1008; *Going v. Dinwiddie*, 25 Pac. Rep. [Cal.], 129.)

Judicial officers, acting within the limit of their jurisdiction, are not liable for their acts, though illegal or erroneous, unless they act from corrupt motives. (*Yates v. Lansing*, 5 Johns. [N. Y.], 282; *Hill v. Sellick*, 21 Barb. [N. Y.], 207; *Willis v. Havemeyer*, 5 Duer [N. Y.], 447; *Seaman v. Patten*, 2 Caines Rep. [N. Y.], 312; *Reed v. Conway*, 20 Mo., 22; *Morris v. Reynolds*, 2 Ld. Raym. [Eng.], 857; *Harman v. Brotherson*, 1 Den. [N. Y.], 537; *Kendall v. Stokes*, 3 How. [U. S.], 87; *Craig v. Burnett*, 32 Ala., 728; *Briggs v. Wardwell*, 10 Mass., 356; *Wall v. Trumbull*, 16 Mich., 228; *Hammond v. Howell*, 1 Mod. Rep. [Eng.], 184; *Kemp v. Neville*, 10 C. B. N. S. [Eng.], 523.)

So far as the evidence and pleadings are concerned, the defendant Vennum, under the advice of the county attor-

ney, went before the justice of the peace and filed his complaint in writing, and did no other act connected with said criminal prosecution. To be liable for false imprisonment he must do more than this. (*Steuer v. State*, 59 Wis., 472; *Grinham v. Willey*, 4 Hurl. & Nor. [Eng.], 496; *Eeaty v. Perkins*, 6 Wend. [N. Y.], 382; *Barber v. Rollinson*, 1 Cromp. & Mees. [Eng.], 330; *Von Lotham v. Libby*, 38 Barb. [N. Y.], 345; *Carratt v. Morley*, 1 Q. B. [Eng.], 18; *Murphy v. Walters*, 34 Mich., 180; *West v. Smallwood*, 3 Mees. & Wels. [Eng.], 418.)

J. M. Chaffin and *George R. Chaney, contra:*

The district court of Webster county had jurisdiction of the parties defendant and the subject-matter of the action, under the allegations of the petition. The action is against three persons, jointly and severally, for a joint and several trespass committed upon the person of the defendant in error, and for which they are jointly and severally liable. (*Painter v. Ives*, 4 Neb., 122; *Comfort v. Fulton*, 39 Barb. [N. Y.], 56; *Judson v. Cook*, 11 Barb. [N. Y.], 644; *Forbes v. Hicks*, 27 Neb., 117.)

Jones was a public officer within the meaning of section 54 of the Code, and while he did no act outside of Hitchcock county in person, he put the machinery of the law in motion, so that the trespass was committed, through his instrumentality, in Webster county. But for this pretended warrant, with his official signature affixed thereto, no arrest would have been made. The statute does not contemplate that each one of several joint trespassers, nor the particular public officer through whose instrumentality a cause of action may arise, must appear in person and do some official act in each county where some part of the cause may arise. If by his official act a cause of action arise against him in more than one county, he may be sued in any one of the counties where any part of the cause arose, though he may not have appeared in person in that county to do

any official act. We therefore contend that the district court had jurisdiction over both Jones and Morton by reason of their respective official positions, and the several acts done by each, as set forth in the petition. (*McNee v. Sewell*, 14 Neb., 532; *Clay v. Hoysradt*, 80 Kan., 80; *Fay v. Edmiston*, 28 Kan., 108; *People v. Kingsley*, 8 Hun [N. Y.], 234; *Wintjen v. Verges*, 10 Hun [N. Y.], 576.)

The complaint was absolutely void. (*Smith v. State*, 21 Neb., 556; *Hauss v. Kohlar*, 25 Kan., 644; *Forbes v. Hicks*, 27 Neb., 116.)

The complaint and all proceedings under it were void, and the plaintiffs in error are liable. (*Prell v. McDonald*, 7 Kan., 454; *Bauer v. Clay*, 8 Kan., 583; *Hauss v. Kohlar*, 25 Kan., 644; *Forbes v. Hicks*, 27 Neb., 111.)

The justice acted ministerially in filing the complaint and issuing the warrant, and is liable to the party injured thereby. (*Rouss v. Wright*, 14 Neb., 458; *Wright v. Rouss*, 18 Neb., 234.)

It is urged that the justice had jurisdiction of this class of offenses, as examining magistrate, and, therefore, having jurisdiction of the subject of the criminal action, he is not liable for mistake of official and judicial judgment. His jurisdiction, however, is conferred by a complaint, a jurisdictional paper. Without the filing of a complaint, he could have no jurisdiction of this class of cases. (Criminal Code, sec. 280; *Comfort v. Fulton*, 39 Barb. [N. Y.], 56; *Miller v. Woods*, 23 Neb., 208; *Hauss v. Kohlar*, 25 Kan., 640.)

Neither can he acquire jurisdiction by deciding that he has it. In all such cases he decides at his peril. (Cooley, Torts, sec. 416; *Prosser v. Secur*, 5 Barb. [N. Y.], 607; *Noyes v. Butler*, 6 Barb. [N. Y.], 613.)

The statute prescribes the mode of acquiring jurisdiction, and such mode must be complied with or the proceeding is void. (Criminal Code, sec. 286; *People v. Board of Police*, 26 Barb. [N. Y.], 485; *McDermott v. Board of Police*, 25 Barb. [N. Y.], 635.)

RAGAN, C.

George Huston sued N. T. Jones, Columbus C. Vennum, and T. E. Morton in the district court of Webster county for false imprisonment and malicious prosecution, and in his petition alleged that on the 26th day of August, 1890, Jones was a justice of the peace of Hitchcock county; that Vennum and Morton were residents of said county, and that the plaintiff Huston was a resident of and in said Webster county; that on said day, Vennum, intending to harass, vex, and annoy plaintiff and scare him into giving security on a note, went before the said Jones, as such justice of the peace, and falsely, maliciously, and without any reasonable or probable cause, made a complaint in writing, under oath, in which he charged, or attempted to charge, the plaintiff Huston with the crime of having, in said county, in the year 1890, obtained possession of valuable papers by false pretenses and misrepresentations; that said complaint did not, as a matter of fact, charge plaintiff with any crime or offense known to the law; that thereupon said justice, acting in virtue of his office, issued what he termed and styled a "state warrant," in writing, for the arrest of the plaintiff, and delivered the same to the defendant Morton; that said pretended warrant did not charge said plaintiff Huston with the commission of any crime known to the laws of Nebraska, and was void on its face; that the said Jones, in his official capacity as justice of the peace, proceeded to deputize and appoint said Morton a special constable to serve said warrant, and that said justice had no lawful power or authority to make any such appointment, and that the same was void; that the said Morton accepted said pretended appointment, and with said warrant arrested plaintiff in Webster county and took him before said justice in Hitchcock county, who, acting in his official capacity, arraigned the plaintiff, and, after examination, bound him over to the district court; and plaintiff refusing to give bail,

the said justice committed him to jail, from which he was afterwards released by *habeas corpus* proceedings. There was no service upon, or appearance by, defendant Morton. Summons was issued from the district court of Webster county, and served upon Vennum and Jones in Hitchcock county, where they resided. There was a verdict and judgment against Vennum and Jones, and they bring the case here.

The first error alleged is that the court had no jurisdiction of the action or of the plaintiffs in error. This contention, so far as the justice of the peace Jones is concerned, is based on section 54 of the Code of Civil Procedure, which provides: "Actions for the following causes must be brought in the county where the cause [of action], or some part thereof, arose: * * * Second—An action against a public officer for an act done by him in virtue or under color of his office, or for neglect of his official duty." The defendant Jones, being a justice of the peace, was a public officer. The acts done by him were the issuing of the warrant, the appointment of Morton to serve the same, and the examination and committment of Huston to jail. These acts were all performed in Hitchcock county, and were done in virtue or under color of his office as justice of the peace. Jones contends that, therefore, this action cannot be maintained against him in Webster county, and that the court had no jurisdiction of the subject-matter of the action, or of him personally. What is Huston's cause of action? Evidently his alleged malicious prosecution and false imprisonment by the defendants. The complaint moved the justice to issue the warrant, and that produced the arrest, and this occurred in Webster county. A part, at least, of Huston's cause of action, then, arose in Webster county and a part in Hitchcock county, and the suit can be maintained in either county. The action was properly brought in Webster county, and the court had jurisdiction, both of the subject-matter of the action and of the defendant Jones. (*McNee v. Sewell*, 14 Neb., 532.)

The defendant Vennum's claim of the court's want of

jurisdiction over him is based on the fact that he was a resident of, and summoned in, Hitchcock county, and that no defendant to the action was a resident of, or summoned in, Webster county, and that therefore, by the provisions of section 60 of the Code of Civil Procedure, the district court of Webster county had no jurisdiction over him. But by section 65 of the Code of Civil Procedure it is provided: "Where the action is rightly brought in any county according to the provisions of title 4, a summons shall be issued to any other county against any one or more of the defendants, at the plaintiff's request." Now, this action was rightly brought in Webster county, and by the service of summons on the defendant in Hitchcock county, issued from Webster county, the court obtained jurisdiction over the defendant Vennum. It follows, then, that the court had jurisdiction over both the action and both the plaintiffs in error. (*Pearson v. Kansas Mfg. Co.*, 14 Neb., 211.)

The plaintiff in error Jones requested the court to give to the jury the following instruction: "The complaint, warrant, and mittimus, upon which the arrest of the plaintiff was made and imprisoned, are not void, and you must find for the defendant Jones, unless you find that he acted wantonly and maliciously in accepting said complaint and issuing a warrant for the arrest of the plaintiff; and also in holding him to bail and issuing a mittimus by which the plaintiff was confined in jail." This the court refused, and Jones now assigns such refusal as error.

The complaint and warrant were as follows:

"COMPLAINT.

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

Before N. T. Jones, Justice of the Peace in and for said County.

"STATE OF NEBRASKA }
v. } For False Pretenses.
GEORGE HUSTON. }

"Complaint and information of C. C. Vennum, of Hitch-

cock county, aforesaid, made in the name of the state of Nebraska, before N. T. Jones, justice of the peace within and for said Stratton precinct, in said county, this 26th day of August, A. D. 1890, who, being duly sworn, on his oath says that George Huston, on the 22d day of August, A. D. 1890, in the county aforesaid, then and there being, did then and there violate section 125, chapter 15, of the statutes of the state of Nebraska, by false pretenses and misrepresentations obtained possession of valuable property, to-wit, one note of the value of $110, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the state of Nebraska.

"C. C. VENNUM.

"Subscribed in my presence and sworn to before me this 26th day of August, A. D. 1890.

"N. T. JONES,
"Justice of the Peace."

"WARRANT.

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

"*To the Sheriff or any Constable of said County:*

"T. E. Morton is hereby especially deputized to serve this writ.

"Whereas, C. C. Vennum has made complaint in writing and upon oath before me, one of the justices of the peace in and for said county, that George Huston, late of the county of Hitchcock, did, on or about the 22d day of August, 1890, in said county of Hitchcock, violate section 125, chapter 15, of the statutes of the state of Nebraska, by false pretenses and misrepresentation obtained possession of valuable papers, to-wit, one note of the value of $110, and that George Huston has absconded from said county of Hitchcock to Webster county:

"You are therefore commanded to pursue and arrest the said George Huston, if found in this state, and him convey before me, or any magistrate having cognizance of

the case in said Hitchcock county, there to be dealt with according to law.

"Given under my hand this 26th day of August, A. D. 1890. N. T. JONES, *J. P.*"

The complaint and warrant were informal and defective, but they were not absolutely void. They stated the substance of the criminal charge, and that is sufficient where they are attacked collaterally as they are here. (*Miller v. Woods*, 23 Neb., 200.)

The learned judge below tried the case on the theory that the action was one of false imprisonment, and so it would have been had the complaint and warrant been absolutely void, but as they were not, the facts made the case, if anything, an action for malicious prosecution. (*Wagstaff v. Schippel*, 27 Kan., 450.)

The justice of the peace, in acting upon the complaint and in issuing the warrant, acted judicially, and if he did so in good faith, with pure motives and without malice, he is not liable therefor. (*Gillett v. Thiebold*, 9 Kan., 427; *Dreyfus v. Aul*, 29 Neb., 191.)

The refusal of the court to give the instruction asked was error.

The court also instructed the jury as follows:

"You are instructed that the complaint before you, filed and sworn to before Jones, by Vennum, on the 26th day of August, 1890, and the warrant issued by said Jones for the arrest of Huston are void upon their face, and charge no criminal offense against said Huston.

"If you find from the evidence that the plaintiff was unlawfully restrained of his liberty by the unlawful acts of the defendants, you shall find for the plaintiff and assess his damages at such amount as you, in your judgment, deem fair and reasonable from the evidence before you."

To the giving of each of these instructions the defendant Vennum duly excepted, and now assigns the ruling of the court in giving them as error. By the first instruction

the court told the jury that the complaint sworn out by Vennum was void; and by the second, that if they found that Huston had been restrained of his liberty by the unlawful acts of the defendants, they should find for the plaintiff. The court had already, in other instructions, told the jury that the action was for malicious prosecution and false imprisonment, and that to constitute false imprisonment two things were necessary, viz., the detention of the person, and the unlawfulness of such detention. As already observed, the complaint, though defective, was not void; and for swearing it out, plaintiff's action against Vennum, if anything, is an action for malicious prosecution. These instructions, taken together, left the jury free to conclude that the swearing out of the complaint by Vennum was of itself an unlawful act. To render Vennum liable to plaintiff for swearing out the complaint it must appear that Vennum's conduct in the premises was inspired by malicious motives and was without probable cause. The instructions complained of, when taken in connection with the others quoted above, took from the jury all inquiry as to Vennum's motives in making the complaint, and were erroneous.

Plaintiffs in error took exceptions on the trial to the admission in evidence of an alleged telegram received by the plaintiff. Its admission was error as no foundation was laid for it as evidence. It was not the best evidence. The original telegram sent was not produced or its absence accounted for, nor was the writing put in evidence shown to be identical with the one sent. We cannot review the court's rulings, however, because not specifically assigned as an error in the petition in error filed in this court.

On the trial plaintiff offered to prove certain statements made to him by the officer having him under arrest. These were excluded. What Morton said to plaintiff while he had him under arrest concerning the same, or the causes therefor, and what Morton did, were competent evidence. They were part of the things done.

The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

I. J. BELKNAP v. ASA STEWART.

FILED NOVEMBER 8, 1893. No. 4970.

1. **Husband and Wife:** LIABILITY OF HUSBAND TO THIRD PERSON FOR WIFE'S BOARD AND LODGING: EVIDENCE. The findings and judgment of a court granting a wife a decree of divorce from her husband on the grounds of extreme cruelty are not competent evidence to prove that she was justified in leaving her husband's home and living apart from him, in an action brought by a third person against the husband for boarding and lodging the wife.

2. ——: ——: ——. In the absence of a special promise of the husband to pay for the board and lodging of his wife, living apart from him, he will not be responsible therefor, unless she lived separate from him by his consent, or his conduct was such as to justify her in leaving his bed and board. *Schnuckle v. Bierman*, 89 Ill., 454, approved.

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

The facts are stated in the opinion.

Pound & Burr, for plaintiff in error:

The findings and decree in the divorce suit were conclusive evidence of cruelty of the husband, and competent evidence that the wife had just cause to leave her husband's house and board and lodge with plaintiff. The divorce suit was a proceeding *in rem*, and the findings and decree therein are binding and conclusive upon strangers and third persons as well as upon parties to the suit. (1 Greenleaf, Evidence, secs. 525, 543; Freeman, Judgments, sec.

610; 2 Smith's Leading Cases, 670; 2 Bishop, Marriage, Divorce, and Separation, secs. 20, 23, 27; 2 Black, Judgments, secs. 612, 795, 803, 822, 925; *Burlen v. Shannon*, 3 Gray [Mass.], 387, 389; *Ennis v. Smith*, 14 How. [U. S.], 400, 430; *In re Newman*, 75 Cal., 213; *Gould v. Crow*, 57 Mo., 200; *Monroe v. Douglas*, 4 Sandf. Ch. [N. Y.], 134; *Grant v. M'Lachlin*, 4 Johns. [N. Y.], 34; *State v. Central P. R. Co.*, 10 Nev., 80; *Barrow v. West*, 23 Pick. [Mass.], 270; *McCarthy v. Marsh*, 5 N. Y., 263; *Pennoyer v. Neff*, 95 U. S., 734; *Gelston v. Hoyt*, 16 U. S., 277; *Sturtevant v. Randall*, 53 Me., 149; *Blad v. Bamfield*, 3 Swanst. [Eng.], 604; *Tarleton v. Tarleton*, 4 M. & S. [Eng.], 20; *Robinson v. Jones*, 8 Mass., 536; *Vandenheuvel v. United Ins. Co.*, 2 Caine's Cases [N. Y.], 217.)

A sentence of a matrimonial court is binding as a judgment *in rem*, and as such conclusive upon all persons in all countries. (Freeman, Judgments, sec. 610; 2 Smith's Leading Cases, 670; 2 Black, Judgments, sec. 926.)

Pending divorce suit the husband is liable, the same as though it were not in progress, to any third person who may supply the wife with necessaries, he not having provided them himself. (2 Bishop, Marriage, Divorce, and Separation, sec., 961; *Keegan v. Smith*, 5 B. & C. [Eng.], 375; *Sykes v. Halstead*, 1 Sandf. [N. Y.], 483; *Dowe v. Smith*, 11 Allen [Mass.], 107; *Johnston v. Allen*, 39 How. Pr. [N. Y.], 506.)

Sawyer & Snell, contra:

The decree in the divorce suit was not admissible, because it was not between the same parties. In that case it was the wife against the husband. In the present, it is a person who furnished the wife with necessaries, against the husband. Both parties must be bound by a judgment or neither. The operation must be mutual. (*Burlen v. Shannon*, 3 Gray [Mass.], 387; *Bigelow v. Windsor*, 1 Gray [Mass.], 299; *Helphrey v. Redick*, 21 Neb., 83.)

RAGAN, C.

Belknap sued Stewart in the district court of Lancaster county, alleging in his petition "That on the 17th day of September, 1889, Anna R. Stewart, wife of the defendant, commenced boarding and lodging at plaintiff's house, and continued to board and lodge with plaintiff until the 31st day of December 1889; that said defendant caused the said Anna R. Stewart, his wife, to leave the home of the defendant, and that she was obliged to leave said defendant's home on or about said 17th day of September; that the defendant agreed to pay for said board and lodging what the same was reasonably worth, and that said board and lodging were reasonably worth the sum of $4.50 per week. No part of the same had been paid, and there was due the plaintiff from the defendant the sum of $——." Stewart's answer to this petition, so far as we notice it, was (1) a general denial of all the allegations of the petition; (2) that at all the times mentioned in plaintiff's petition he was the owner of, and in possession of, a comfortable home in the city of Lincoln, which he had provided with suitable provisions and board, all of which were free to the said Anna R. Stewart; and that if she procured board of the plaintiff, she did it without the consent of the defendant, and wholly upon her own responsibility. Stewart had a verdict and judgment, and Belknap brings the case here.

From the record before us it appears that on the 22d of September, 1889, Stewart's wife left his home and began boarding and lodging with Belknap, and so continued until December 31, 1889. Two days after Stewart's wife left him she began a suit against him for devorce on the grounds of extreme cruelty, and some time afterwards obtained a decree of divorce on those grounds. On the trial of this case the pleadings, findings, decree, and all the other proceedings in the divorce case were, without objection,

read in evidence to the jury by Belknap's counsel. When the court came to charge the jury he excluded from their consideration all these pleadings and proceedings in the divorce suit. This action of the court is one of the errors assigned here by Belknap. The court was entirely right in so excluding them from the jury's consideration. They should not have been admitted in the first place. The object of using these divorce proceedings and decree as evidence in this case was to establish, conclusively, the fact that Mrs. Stewart, by reason of her husband's extreme cruelty towards her, had just cause for leaving his home, and that she therefore carried her husband's credit with her. But were the divorce proceedings and decree competent evidence in the case at bar for such purpose? We think not.

Burlen v. Shannon, 3 Gray [Mass.], 388, was a suit by a third party against the husband for necessaries furnished the wife. The court said: "The decree of divorce was not competent evidence, because it was not between the same parties. In that case it was the wife against the husband; in the present, it is a person who has furnished the wife with necessaries and he sues the husband. It has been argued that a direct adjudication of a court having a peculiar jurisdiction on the subject of marriage and divorce, like a decree in a process *in rem*, is conclusive and binding upon all persons having to establish or contest the conclusions of fact determined by it. We have no doubt that this court has a peculiar jurisdiction on the subject of marriage and divorce, and that a decree upon a libel for divorce directly determining the status of the parties, that is, whether two persons are or are not husband and wife; or, if they have been husband and wife, that such a decree divorcing them, *a vinculo* or *a mensa*, would be conclusive of the fact, in all courts and everywhere, that they are so divorced. If it were alleged that a marriage were absolutely void as being within the degrees of consanguinity, a decree of this court, on a libel by

one of the parties against the other, adjudging the marriage to be void or valid, would be conclusive everywhere. * * The legal social relation and condition of the parties as being husband and wife or otherwise, divorced or otherwise, is what we understand by the term 'status.' To this extent the decree in question had its full effect by which every party is bound. * * * Beyond this legal effect in a judgment in a case of divorce,—that of determining the status of the parties,—the law applies as in other judicial proceedings, that a judgment is not evidence in another suit, except in a case in which the same parties or their privies are litigating in regard to the same subject of controversy.

"But it is contended that there was a privity between the party suing for necessaries furnished the wife and the wife herself, so as to make the judgment in a former suit by the wife against the husband evidence in plaintiff's suit against him. But the case is not within any of the definitions of privity, either in law or in fact, known and recognized by the rules of the law. In regard to the rights sued for in this action, this plaintiff does not claim the same right or interest which the wife could claim as privy in contract or in blood, or in estate. The relation of the wife was much more nearly that of an agent having an authority to bind the defendant by a contract. * * * No judgment in a suit between such agent and the defendant can be evidence. One test to decide whether a judgment is admissible as between privies is to inquire whether it would be mutual. Both of the litigants must be alike concluded or the proceedings cannot be set up as conclusive upon either.

"This rule, that a judgment must be between the same parties or their privies, is to be construed strictly to mean parties claiming under the same title. The present plaintiff could not in any form have appeared in the suit for divorce or taken any part in the trial, or put any question to

a witness, or appealed from the judgment. * * * A judgment or judicial determination is conclusive even between the parties as evidence only of what is directly put in issue and tried, not of the collateral and incidental facts which are involved in the discussion, but not embraced in the decree.

"The decree in question does not directly bear upon the fact whether the wife was justified in absenting herself from her husband's house, or whether in fact she did absent herself. * * * She may have suffered extreme cruelty, and yet not absented herself from her husband's house; and so, *vice versa*, she may have been placed in such a condition of suffering or danger as would render it justifiable to leave her husband's house without having suffered extreme cruelty."

This case is directly in point here, and we approve both of the reasoning and the conclusion thereof. It follows that the court did not err in taking the divorce proceedings from the consideration of the jury.

Another error alleged here by Belknap is the refusal of the court to give to the jury the following instruction: "The jury are instructed that if they find from the evidence that said defendant Asa Stewart and his wife, Anna Stewart, had due and regular trial in the action for a divorce in this court before the Honorable Allen W. Field, and that in that action the said court made findings of fact as follows: 'Finds that the plaintiff and defendant were duly married at the city of Keokuk, state of Iowa, on the 7th day of November, 1865, as set forth in said petition, and that ever since said marriage plaintiff has conducted herself towards the defendant as a faithful, chaste, and obedient wife; finds that the defendant has been guilty of extreme cruelty towards the plaintiff as in her petition alleged, and all without just cause or provocation,' then you are instructed that said defendant Asa Stewart is bound and concluded by such findings of the court in said action for a divorce."

What has already been said disposes of this assignment. Had the court permitted the divorce proceedings to remain before the jury, it would have been error to give this instruction.

Another error alleged is: "On the trial of this case, the rules of evidence seem to have been entirely disregarded, as leading questions were allowed to be asked Stewart as a witness." The record discloses that Stewart was afflicted with paralysis, and in order to elicit anything from him it seems to have been necessary to so frame questions that he could answer in monosyllables. The court did not err in permitting leading questions to be propounded to this witness. There were two issues in this case: (1) Did Mrs. Stewart have such cause for leaving her husband's home as to render him liable for her support by Belknap? (2) Did Belknap furnish Mrs. Stewart board and lodging on her own credit or on the credit of her husband? There is evidence in the record to support the finding of the jury in Stewart's favor on both these issues. The correct rule undoubtedly in such cases as the one at bar is, in the absence of any special promise of the husband to pay for the board and lodging of his wife living apart from him, he will not be responsible therefor, unless she was living separate from him by his consent, or his conduct was such as to justify her in leaving his bed and board. (*Schnuckle v. Bierman*, 89 Ill., 454.) There is no evidence in the record that Stewart ever promised to pay his wife's board and lodging, nor is there any evidence that she lived apart from him by his consent.

There is no error in the record and the judgment of the district court is

AFFIRMED.

CHARLES F. BARRAS ET AL. V. POMEROY COAL COMPANY.

FILED NOVEMBER 8, 1893. No. 4928.

Statute of Frauds: ORIGINAL PROMISE TO PAY FOR GOODS DELIVERED TO A THIRD PERSON. B. & C. had a contract for the construction of a school building, and sublet a part of the work to one J. B. & C. and the P. C. Company then entered into a verbal agreement, by the terms of which the P. C. Company was to furnish J. such material as he might need in said work, present the bills therefor to J., for his O. K., and thereupon B. & C. were to pay them. *Held*, An original promise on the part of B. & C., and not a promise to pay J.'s debt. *Waters v. Shafer*, 25 Neb., 225, and *Lindsey v. Heaton*, 27 Neb., 662, followed.

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

The facts are stated in the opinion.

Atkinson & Doty, for plaintiffs in error:

A promise by Chidester & Barras to pay orders given by Mr. Johnson in favor of Pomeroy Coal Company would not take the case out of the statute of frauds; and if made as stated by plaintiff, would only be collateral. (*Manley v. Geagau*, 105 Mass., 445; *Preston v. Young*, 46 Mich., 103; *Foster v. Napier*, 74 Ala., 393; *Wills v. Ross*, 77 Ind., 1; *Langdon v. Richardson*, 58 Ia., 610; *Welch v. Marvin*, 36 Mich., 59; *Cole v. Hutchinson*, 34 Minn., 410; *Vaughn v. Smith*, 22 N. W. Rep. [Ia.], 684.)

So long as the original debt remains payable by the debtor to his creditor, any agreement by which any other party promises to pay the debt is within the very letter of the statute. (*Hooker v. Russell*, 67 Wis., 257; *Clapp v. Webb*, 52 Wis., 638; *Lantz v. Pearce*, 101 Ind., 595; *Langdon v. Richardson*, 58 Ia., 610.)

If the original liability remains and the promise of Chidester & Barras was made as that of sureties, it would be a collateral agreement, whatever the intent of the party at the time of making it. (*Mitchell v. Griffin*, 58 Ind., 559; *Palmer v. Blain*, 55 Ind., 11; *Gill v. Herrick*, 111 Mass., 501.)

Talbot & Bryan, contra:

The evidence is conclusive that no debt or obligation had been created previous to the promise of Chidester & Barras; and therefore the promise of Chidester & Barras was not a collateral, but an original undertaking. (*Lindsey v. Heaton*, 27 Neb., 668; *Waters v. Shafer*, 25 Neb., 225.)

RAGAN, C.

The Pomeroy Coal Company sued Charles F. Barras and William J. Chidester in the district court of Lancaster county, and in their petition alleged: "The plaintiff complains of the defendants and for cause of action alleges that the defendants are indebted to the plaintiff in the sum of $161.77 on account of goods and material sold and delivered by plaintiff to the defendants at their special instance and request."

Barras & Chidester answered as follows: "The said defendants, in answer to the petition of the plaintiff, say that at the time the plaintiff alleges that it sold the certain goods and material to the defendants, the defendants were acting and doing business together as contractors and builders under the firm name of Barras & Chidester. Said defendants deny each and every allegation contained in said petition."

There was a verdict and judgment for the coal company, and Barras & Chidester bring the case here.

It appears from the record that Barras & Chidester were partners and had a contract for building a school house in

the city of Lincoln, and that one Johnson had subcontracted the work from Barras & Chidester. The coal company's evidence was positive to the effect that it refused to credit Johnson, and made an agreement with Barras & Chidester by which the coal company was to furnish Johnson such material as he wished for use in the construction of said school house; have him O. K. the bills, and they, Barras & Chidester, would pay them; that the coal company gave the credit to Barras & Chidester, made out bills from time to time against Johnson for materials furnished, presented them to him, he O. K.'d them, and thereupon Barras & Chidester paid them. The bill sued for here was so presented and O. K.'d, but payment refused. On the other hand, Barras, the only witness for Barras & Chidester, positively denied the making of the contract with the coal company to pay for materials used by Johnson in the building. Barras admitted paying bills to the coal company O. K.'d by Johnson, but claims he did so because Barras & Chidester at the dates of such payments were indebted to Johnson. Barras & Chidester assign here six errors:

First—"The court erred in permitting the coal company to put in evidence on the trial the bills for material made out against Johnson." The bills put in evidence and objected to were the statements for the material sued for in this action, and only so much of them was offered as referred to the O. K. of Johnson, and his order on Barras & Chidester to pay. The objection of counsel for Barras & Chidester was: "Objected to because, in the first place, it assumes that we agreed to pay them, and one of our principal defenses is that we did not agree to pay them; and if there is any agreement to assume the obligations of another, it must be in writing." The coal company's evidence was that it sold the material to Barras & Chidester and was to furnish it to Johnson, procure his O. K. of the bill, and then Barras & Chidester were to pay it. That part of the

statements showing Johnson's O. K. was competent evidence and properly admitted. The fact that the statements show on their face that they were made out against Johnson, was a circumstance in no way prejudicial to Barras & Chidester.

Second—"The court erred in overruling defendant's objection to any testimony being received touching the agreement of Barras & Chidester to pay for material to be furnished James Johnson because the agreement so to do was not in writing." The evidence of the coal company, and all its evidence, was to the effect that Barras & Chidester's promise was not to pay a debt of Johnson's then in existence, nor yet one he might thereafter contract; but whatever material Johnson procured from the coal company for use in the school house, Barras & Chidester were to pay for. The only thing Johnson had to do with it was to certify to the correctness of the amount of material and its price. This evidence did not show, or tend to show, the promise on the part of Barras & Chidester to pay Johnson's debt, but their own. (*Waters v. Shafer*, 25 Neb., 225; *Lindsey v. Heaton*, 27 Neb., 662.)

Third—"The court erred in overruling the defendant's offer to put in evidence a contract between James Johnson and Barras & Chidester, in which the said Johnson agrees to furnish all the brick, mortar, and sand for a certain building known as the 'Cherry Street School Building.'" The record discloses the following reason of counsel for offering to put in evidence this contract: "The defendants offer the contract between James Johnson and Barras & Chidester in evidence to show that the plaintiff, knowing there was a written contract between Johnson and Barras & Chidester, had no legal right, under the terms of said contract, to charge the firm of Barras & Chidester with material furnished Johnson to be used on the school house." This contract did not tend to prove Barras & Chidester's case; nor did it tend to refute the coal com-

pany's case. It was immaterial as evidence and properly excluded.

Fourth—This is the same as the third.

Fifth—"The court erred in admitting that part of Mr. Lemist's evidence as to what Mr. Barras said in regard to paying for material furnished Johnson." After repeated readings of the bill of exceptions, we have been unable to find any objections made at the trial to Lemist's evidence as to what Barras told him.

Sixth—"The verdict is not sustained by the evidence." We cannot better express our own opinion of the merits of this assignment of error than to quote an instruction given to the jury by the learned judge who presided at the trial. It is as follows: "The testimony on behalf of the defendants supports the defendants' theory of the case, and the testimony on behalf of the plaintiff supports the plaintiff's theory of the case; and it reduces itself, so far as you are concerned, to decide upon the reliability of the testimony of each of the parties."

There is no error in the record. The judgment of the district court is

AFFIRMED.

HENRY KAHRE, APPELLEE, V. N. C. RUNDLE, IMPLEADED WITH FRANK N. PROUT, APPELLANT.

FILED NOVEMBER 8, 1893. No. 4994.

1. **Vendor and Vendee:** POSSESSION NOTICE OF TITLE. Possession of land is notice to all the world, not only of the possession itself, but of the right, title, and interest of the possessor.
2. ———: ———: FRAUD: RESCISSION. This rule holds good in favor of a vendor who remains in possession after his conveyance, claiming that the conveyance was procured by fraud, as against a purchaser from the fraudulent vendee, where such purchaser knew of the vendor's possession and made no inquiry respecting it.

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

The facts are stated in the opinion.

Frank T. Ransom and *Rickards & Prout*, for appellant:

Here was a person who, having owned property, had by his own act transferred it to another, and executed a deed therefor. Is he not estopped from relying on his possession as evidence to subsequent purchasers that he claims title to the premises? A large and respectable line of authorities answers this question in the affirmative. (Wade, Notice, sec. 299; *Scott v. Gallagher*, 14 S. & R. [Pa.], 333; *Newhall v. Pierce*, 5 Pick. [Mass.], 450; *New York Life Ins. Co. v. Cutler*, 3 Sandf. Ch. [N. Y.], 193; *Van Keuren v. Central R. Co.*, 38 N. J. Law, 165; *Hafter v. Strange*, 3 So. Rep. [Miss.], 190; *Bloomer v. Henderson*, 8 Mich., 395.)

Prima facie, the possession is of itself sufficient notice, whether it is actually known or not; but this presumption from possession, like that arising from any other fact putting one upon inquiry, is subject to rebuttal by proof showing that an inquiry, duly and seasonably made, failed to disclose any legal or equitable title in the occupant. (*Betts v. Letcher*, 46 N. W. Rep. [So. Dak.], 193; *Riley v. Quigley*, 50 Ill., 304.)

John T. Cathers, contra:

Possession of land is notice to all the world, not only of the possession itself, but of the right, title, and interest of the possessor. (*Uhl v. May*, 5 Neb., 157; *Jones v. Johnson Harvester Co.*, 8 Neb., 446; *Dunn v. Remington*, 9 Neb., 84; *McHugh v. Smiley*, 17 Neb., 620; *Buck v. Holloway's Devisees*, 2 J. J. Marshall [Ky.], 164; *Tuttle v. Jackson*, 6 Wend. [N. Y.], 225; *Colby v. Kenniston*, 4 N. H., 265; *Gouverneur v. Lynch*, 2 Paige Ch. [N. Y.],

300; *Parks v. Jackson*, 11 Wend. [N. Y.], 443; *Pell v. McElroy*, 36 Cal., 268; *Franz v. Orton*, 75 Ill., 100; *Wickes v. Lake*, 25 Wis., 71; *D' Wolf v. Pratt*, 42 Ill., 210; *Warren v. Richmond*, 53 Ill., 52; *Haughwout v. Murphy*, 32 N. J. Eq., 548; *Youngs v. Wilson*, 27 N. Y., 354; *Taylor v. Stibbert*, 2 Ves. Jr. [Eng.], 437*.)

One who purchases land in the actual possession of a third party will be held charged with notice of the latter's equities. (*Harper v. Perry*, 28 Ia., 57; *McKinzie v. Perrill*, 15 O. St., 162; *Krider v. Lafferty*, 1 Whart. [Pa.], 318; *Randall v. Silverthorn*, 4 Pa. St., 173; *Hood v. Fahnestock*, 1 Pa. St., 470; *Lewis v. Bradford*, 10 Watts [Pa.], 79; *Heckerman v. Hummell*, 7 Harris [Pa. St.], 70; *Lipp v. South Omaha Land Syndicate*, 24 Neb., 692; *Hatch v. Bigelow*, 39 Ill., 546; *Killey v. Wilson*, 33 Cal., 690; *Tate v. Hilbert*, 2 Ves. [Eng.], 120; *Daniels v. Davison*, 17 Ves. [Eng.], 433*.)

IRVINE, C.

Henry Kahre brought this action in the district court of Douglas county originally against N. C. Rundle alone, alleging that in January, 1890, Kahre was the owner of lot five in block four in Dupont Place, in the city of Omaha, and that defendant Rundle was the owner of certain land in Chase county; that the parties entered into an agreement to exchange said property, and that deeds in consummation of such exchange were executed and delivered. He further alleged that he was induced to enter into said trade because of false representations, unnecessary to here set out at length, in regard to the character of the Chase county land, and prayed for a rescission of the contract, and that the deed executed by him be set aside. An answer was filed by Rundle denying all allegations in regard to the false representations and alleging an unconditional exchange in good faith. The answer further pleaded that on the 19th day of March, 1890, Rundle had sold and conveyed said

lot to Frank N. Prout, and that Prout had paid a valuable consideration, and was without notice of any dissatisfaction on the part of the plaintiff. Thereafter Prout was allowed to intervene in the case. He alleged that the deed was made by Rundle to him, but that he took the title in trust for himself and his partner, Rickards, and that they were purchasers for value and without notice. A decree was rendered in favor of plaintiff. Prout appeals.

There is practically no question raised as to the sufficiency of the evidence or the propriety of the finding that the conveyance from Kahre to Rundle was procured by fraud, but the intervenor Prout insists that the finding that Prout was not a *bona fide* purchaser for value without notice was erroneous and unsupported by the evidence. The petition in the case of *Kahre v. Rundle* was filed March 3, 1890, which was prior to the conveyance to Prout, but the transcript of the record shows no service of process upon Rundle and no answer filed by him until June 26, 1890. No notice of *lis pendens* was filed. There is therefore no evidence in the record of constructive notice to Prout at the time he took the conveyance. (Code of Civil Procedure, sec. 85.) Nor is there any evidence of actual notice save such as may be derived from Kahre's continued occupancy of the property after his conveyance to Rundle. Upon this point the evidence tends to show that Kahre and his brother remained in possession of the Dupont Place property; that before the trade between Rundle and Prout was consummated Prout came to Omaha and examined the records, and finding title of record in Kahre placed upon record the deed from Kahre to Rundle, which Rundle had given him for that purpose; that he went to the property and inquired for Kahre, from which it would appear that he already knew of Kahre's possession. He made inquiry of Kahre's brother, left his business card with him with the request that he should tell Kahre of the call and have him write to Rickards & Prout in relation to rent; that

Prout then returned to Beatrice, where he lived, and next day completed the trade with Rundle. It quite clearly appears that Rickards & Prout were purchasers for a valuable consideration, and that at the time they took the conveyance from Rundle they knew nothing about the false representations relied upon by Kahre to defeat their title.

It is settled by a considerable line of authority that upon general principles possession of land is notice to all the world, not only of the possession itself, but of the right, title, and interest of the possessor. (*Uhl v. May*, 5 Neb., 157; *Weaver v. Coumbe*, 15 Neb., 167; *McHugh v. Smiley*, 17 Neb., 620; *Scharman v. Scharman*, 38 Neb., 39.) These cases were not, however, cases where the vendor remained in possession after a recent conveyance; and it is contended that in such case the continued possession of the vendor, especially for a short time, is not notice to a purchaser from the vendee of a continued interest or claim of the vendor contrary to his act of conveyance. Upon this question of law the whole case turns. We are cited to a number of cases upon the subject. In some states it is distinctly held that the rule charging a purchaser with notice of the occupant's title from the fact of occupancy does not apply where the occupant has been divested of title by his own deed. (*Bloomer v. Henderson*, 8 Mich., 395; *Van Keuren v. Central R. Co.*, 38 N. J. Law, 165; *Newhall v. Pierce*, 5 Pick. [Mass.], 450; *Scott v. Gallagher*, 14 S. & R. [Pa.], 333.) Elsewhere, however, such a distinction is denied. (*Hopkins v. Garrard*, 7 B. Mon. [Ky.], 312; *Pell v. McElroy*, 36 Cal., 268; *Illinois C. R. Co. v. McCullough*, 59 Ill., 166; *Berryhill v. Kirchner*, 96 Pa. St., 489.) In none of the cases cited on behalf of appellant is there any good reason urged for the distinction claimed, and an exception should not be made to the general rule in the absence of a sound reason therefor. Cases may arise presenting a state of facts grounding

reasons for a departure from the general rule, but we perceive nothing in this case warranting such a departure.

In *Uhl v. May*, 5 Neb., 157, and in *McHugh v. Smiley*, 17 Neb., 620, the general rule was laid down as applicable to this state. In both cases the distinction here contended for might have been drawn, but was not; and in *Hansen v. Berthelsen*, 19 Neb., 433, the point seems to have been urged upon the court, and it was there said: "Some doubt has been expressed as to the application of the rule as to notice where a grantor continues to hold possession after the delivery of his deed, but in our view there is no reason for a distinction. The question in both cases is, by what right is he in possession?"

We think, therefore, that Kahre's possession, a fact known to Prout before he took the conveyance, put Prout upon inquiry as to Kahre's continued claim to the premises. It is not shown that he made such inquiry, but, on the contrary, seems to have assumed that Kahre remained in possession as the tenant of Rundle. The judgment of the district court must be

AFFIRMED.

JOHN P. WAGNER ET AL. V. NORVEL LEWIS.

FILED NOVEMBER 21, 1893. No. 5285.

Vendor and Vendee: FRAUD AND MISREPRESENTATIONS: RESCISSION OF CONTRACT: EQUITY. One L. sold his farm for $4,000 in notes of third persons, the purchaser to assume an incumbrance on the farm for about $2,500. The plaintiff charged that the purchaser of the farm had made representations that the notes were good and that he relied upon the same, which representations were untrue. The notes proving to be nearly worthless, the vendor of the farm tendered them back and asked for a rescission, and that the title of the farm be reconveyed and quieted in him. The court below having found in his favor, *held*, that the judgment was right, and is affirmed.

ERROR from the district court of Gage county. Tried below before BROADY, J.

The opinion contains a statement of the case.

Griggs, Rinaker & Bibb, for plaintiffs in error:

Fraud is never presumed, but must be proved by the party asserting it, by a fair preponderance of evidence (*Miller v. Finn*, 1 Neb., 288; *Clark v. Tennant*, 5 Neb., 557; *Missouri Valley Land Co. v. Bushnell*, 11 Neb., 197; *Clemens v. Brillhart*, 17 Neb., 337; *Western Ins. Co. v. Putnam*, 20 Neb., 334), and the degree of proof necessary to establish it is the same in equity as in law. (*Tootle v. Dunn*, 6 Neb., 93; *Ford v. Chambers*, 19 Cal., 143; *McConihe v. Sawyer*, 12 N. H., 399; *Watkins v. Wallace*, 19 Mich., 57.)

The presumption of law is that the business transactions of every man are done in good faith, and for an honest purpose, and any one who alleges that such acts are done in bad faith or for a dishonest purpose, takes upon himself the burden of showing, by specific acts and circumstances tending to show fraud, that such acts were done in bad faith. (*Ahlman v. Meyer*, 19 Neb., 66.)

While the law abhors fraud, it is also unwilling to impute it on slight and trivial evidence, and thereby cast an unjust reproach upon the character of parties. (*Blow v. Gage*, 44 Ill., 208.)

Such an imputation is grave in its character, and can only be sustained on satisfactory proof. If the evidence is so conflicting that no conclusion can be reached, the transaction must be sustained upon the principle that the burden of proof is upon the party who assails it; and if he does not more than create an equilibrium, he fails to make out his case. (*Kaine v. Weigley*, 22 Pa. St., 179; *Bodine v. Simmons*, 38 Mich., 682.)

Mere suspicion leading to no certain results is not suf-

ficient. A legal title will not be divested upon mere conjectures, or evidence loose and indeterminate in its character. (*Waterman v. Donalson*, 43 Ill., 29; *Darling v. Hurst*, 39 Mich., 765.)

As an allegation of fraud is against the presumption of honesty, it requires stronger proof than if no such presumption existed. (*White v. Bettis*, 9 Heisk. [Tenn.], 645.)

The character of a transaction is not dependent on the peculiar notions of the judge as to what will constitute good or ill faith. (Bump, Fraud. Con., ch. 23; *Wilson v. Lott*, 5 Fla., 305; *Hempstead v. Johnston*, 18 Ark., 123.)

F. B. Sheldon and *Hardy & Wasson, contra:*

In cases tried to the court without a jury a finding on questions of fact is entitled to the same respect in the supreme court as would be accorded to the verdict of a jury under like circumstances. (*Cheney v. Eberhardt*, 8 Neb., 423; *McLaughlin v. Sandusky*, 17 Neb., 112.)

Such unconscionableness and inadequacy in bargain as shock conscience may in equity amount to decisive evidence of fraud. (*Burch v. Smith*, 15 Tex., 219; *Rea v. Missouri*, 17 Wall. [U. S.], 532; *Farmer v. Calvert*, 44 Ind., 209; *Densmore v. Tomer*, 11 Neb., 118.)

Parties about to perpetrate fraud are usually very careful to provide that there shall not be any positive evidence of its commission, and evidence of fraud is not required to be direct and positive, but may be, and in most cases is, proved by circumstantial or presumptive evidence. (*McDaniel v. Baca*, 2 Cal., 326; *Greer v. Caldwell*, 14 Ga., 207; *Strauss v. Kranert*, 56 Ill., 254; *Juzan v. Toulmin*, 9 Ala., 662; *Thomas v. Rembert*, 63 Ala., 561; *Billings v. Billings*, 2 Cal., 107; *Faulkner v. Klamp*, 16 Neb., 175.)

MAXWELL, C. J.

This petition is in equity and sets forth that on March 2, 1891, the plaintiff below was the owner of the southeast quar-

ter of section 32, township 4, range 7, in Gage county, Nebraska, of the value of $6,000; that said land was incumbered in the sum of about $2,500; that on or about March 1, 1891, the defendant John P. Wagner offered to purchase said land from plaintiff, and in payment therefor to assume the incumbrance, except the accrued interest to March 1, 1891, and to give the plaintiff in addition the sum of $4,000 in good notes, which he represented that he then had and owned, which offer the plaintiff then and there accepted; that on or about the 2d day of March, 1891, the defendant John P. Wagner gave plaintiff a large number of notes, ranging in amounts from $10 to $444.48; that the said John P. Wagner represented to plaintiff that said notes amounted to more than $4,000, and that all were good and collectible, and plaintiff, relying on said representations, and knowing nothing of the value of said notes other than the representations of the defendant, took said notes and executed and delivered to said Wagner a deed of the premises, subject to the said incumbrance; that after Wagner had selected said notes and made the representations concerning them, he fraudulently, and without the knowledge and consent of plaintiff, removed a number of said notes and inserted in their place other notes of no value whatever; that plaintiff did not know of the changing of said notes until after the deed had been executed and delivered, and does not know the number of notes so changed; that the notes delivered to plaintiff by Wagner were not good and collectible, but were worthless and uncollectible, and of no value whatever, and a large number of the same were barred by the statute of limitations; that all the said representations made by said Wagner were false and untrue, and were made for the purpose of defrauding this plaintiff out of said premises; that on March 5, 1891, plaintiff tendered said notes back and requested Wagner to reconvey said premises to plaintiff, which he refused to do; that defendant Nettie D. Wagner is the wife of the defendant John

P. Wagner. Plaintiff therefore prays that defendants be required to reconvey said premises to plaintiff, and that the deed to defendant Wagner be annulled and declared fraudulent and void; that the title to said premises may be quieted and confirmed in the plaintiff.

The defendants' answer admits that plaintiff was the owner of the premises described in the petition; that the same were incumbered as alleged; that the defendant John P. Wagner agreed to purchase said land and in payment thereof to assume all of said indebtedness, and did assume the same, and that plaintiff executed and delivered to said John P. Wagner a deed for said premises, subject to said incumbrance; that in addition to assuming the said indebtedness aforesaid the defendant agreed to give the plaintiff $4,000 in notes, which notes were by defendant John P. Wagner shown to said plaintiff, together with a large number of other notes aggregating the sum of about $11,000, out of which plaintiff was allowed to select the sum of $4,000 in notes, which the plaintiff then and there agreed to accept as payment for said farm; denies that John P. Wagner represented that the notes amounted to more than $4,000, and that all of said notes were good and collectible, and denies that plaintiff relied upon any representations made by said defendant, but alleges the fact to be that the said plaintiff himself selected the said notes from the said $11,000 worth of notes, and plaintiff took the same upon his own judgment and after due consideration; and defendants deny that, after plaintiff had selected the said $4,000 worth of notes, the defendant John P. Wagner removed a number of the said notes and inserted in their place other notes of no value whatever; and defendants deny all allegation of fraud in said petition contained, and each and every allegation in said petition contained not specifically admitted or denied. Whereupon defendants ask that plaintiff's action be dismissed.

To this answer the plaintiff in reply filed a general de-

nial, and upon the issues thus made up the case was tried to the court, which found generally for the plaintiff, that all the material allegations set forth in plaintiff's petition are true; that the defendant John P. Wagner obtained the deed of conveyance mentioned in the petition from the plaintiff by fraud and false representations and without consideration. A motion for a new trial was duly filed and overruled, and judgment rendered upon the findings. The defendants bring the case to this court upon error.

A number of assignments of error are relied upon for a reversal of the judgment, great reliance being placed on certain technical points which do not affect the real merits of the controversy. Stripped of all needless verbiage, the case made by the proof is this: Lewis sold his farm to Wagner, who was to assume the incumbrances, except interest to March 1, 1891, and was to give him $4,000 in notes. Now, were these to be collectible notes or the notes of insolvent makers, or barred by the statute of limitations? The farm seems to have been worth the price agreed to be paid for it. Why, then, should the seller accept worthless paper in payment of the same. It is true he may have done so, but it will require very clear proof that he did, and that the record does not furnish. In our view, the proof, although somewhat conflicting, shows that Lewis was to have $4,000 in good notes, and as he did not receive such, but relied upon the representations of Wagner to accept those that were worthless in their stead, he is entitled to a rescission of the contract. The judgment is therefore

AFFIRMED.

LEONIDAS K. HOLMES V. FIRST NATIONAL BANK OF LINCOLN.

FILED NOVEMBER 21, 1893. No. 5629.

1. **Negotiable Instruments:** INDORSEMENTS: COLLATERAL AGREEMENTS AFFECTING LIABILITY OF INDORSERS: PAROL EVIDENCE. A blank indorsement of a negotiable instrument before due, where the transfer is to a *bona fide* holder in the due course of business, establishes a liability which cannot be varied by parol evidence. But between the original parties a blank indorsement may be modified by parol. The entire transaction may be shown by reason of which the indorsement was made, and parol evidence is admissible for the purpose of proving the same.
2. **Directing Verdict.** *Held*, That the court erred in directing a verdict.

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

The action was by the First National Bank of Lincoln to recover $3,400 and interest from Leonidas K. Holmes as indorser of a promissory note of that sum executed by J. G. Hutchins and C. H. Hutchins. The defense pleaded by Holmes is set forth in the opinion. On the trial parol proof was given in defendant's behalf, that at the time of making the indorsement defendant assigned to the bank a mechanic's lien against real estate owned by the makers as a security for payment of the note, and that the officers of the bank agreed, in case the makers made default in payment of the note, that the lien should be foreclosed and the security exhausted before attempting to hold the indorser. Record proof was admitted showing that the security of the mechanic's lien had not been exhausted. On these proofs counsel for the bank moved the court to direct a verdict for plaintiff, on the ground that this oral agreement constituted no defense to the action. This motion was sus-

tained, and a verdict for the bank and against Holmes was directed by the court. A motion for a new trial by Holmes was overruled, and he brings error. *Reversed.*

Webster, Rose & Fisherdick, for plaintiff in error:

On demurrer to evidence the party demurring must be treated as admitting all that the jury might infer from the evidence of his adversary. (*Southwest Improvement Co. v. Smith,* 17 Am. St. Rep. [Va.], 59.)

As between the original parties, a contemporaneous parol agreement may be construed with a note so as to defeat it. So far as concerns the immediate contracting parties, a blank indorsement exhibits, at the best, a contract by implication. It is true that, as to *bona fide* holders of paper regularly negotiated, it establishes a liability indisputable if the signature be genuine; but as to holders with notice, or persons taking paper after maturity, the liability may be modified by parol, on proof of fraud, or of facts which make it inequitable for the plaintiff to recover. An indorsement in blank being but a short-hand expression of a contract, may be expanded and explained by parol between the parties with notice. (Wharton, Law of Evidence, sec. 1059; *Kidson v. Dilworth,* 5 Price [Eng.], 564; *Castrique v. Buttigieg,* 10 Moore P. C. [Eng.], 94; *Susquehanna Bridge & Bank Co. v. Evans,* 4 Wash. C. C. [U. S.], 480; *Smith v. Morrill,* 54 Me., 49; *Brewer v. Woodward,* 54 Vt., 581; *Hamburger v. Miller,* 48 Md., 317; *Bruce v. Wright,* 3 Hun [N. Y.], 548; *Ross v. Epsy,* 66 Pa. St., 481; *Hudson v. Wolcott,* 39 O. St., 618; *Bailey v. Stoneman,* 41 O. St., 148; *Rothchild v. Grix,* 31 Mich., 150; *Greusel v. Hubbard,* 51 Mich., 95; *Hueske v. Broussard,* 55 Tex., 201; *Preston v. Gould,* 64 Ia., 44; *Dye v. Scott,* 35 O. St., 194; *Lormer v. Bain,* 14 Neb., 178.)

A. G. Greenlee and *Marquett, Deweese & Hall, contra:*

The contract which the law implies from the indorse-

ment of a negotiable note is as conclusive against parol testimony as though it were written out in full above the indorser's signature. (*Doolittle v. Ferry*, 20 Kan., 232; *First Nat. Bank of St. Paul v. Nat. Marine Bank of St. Paul*, 20 Minn., 63; 1 Daniel, Neg. Inst., sec. 719; *Knoblauch v. Crossman*, 37 N. W. Rep. [Minn.], 586; *Eaton v. McMahon*, 42 Wis., 484; *Charles v. Denis*, 42 Wis., 57; *Skelton v. Dustin*, 92 Ill., 49; *Jones v. Albee*, 70 Ill., 34; *Courtney v. Hogan*, 93 Ill., 101; *Martin v. Cole*, 104 U. S., 30; *Rodney v. Wilson*, 67 Mo., 123; *Lewis v. Dunlap*, 72 Mo., 178; Tiedeman, Com. Paper, sec. 274.)

MAXWELL, C. J.

On the 22d day of January, 1890, J. G. Hutchins and C. H. Hutchins made and delivered to the plaintiff Holmes a promissory note for the sum of $3,400, due in ninety days from date, with ten per cent interest. Afterwards, but at what time does not clearly appear, Holmes indorsed said note in blank and waived demand and notice, and delivered the note to the defendant, and this action is upon the indorsement. Holmes in his answer alleges:

1. That the note was given by the makers for building material furnished by him for the erection of certain buildings in the city of Lincoln, on which he had taken a mechanic's lien, which had been assigned to sureties on the note.

2. That the sureties would not consent to a renewal of the note unless he would proceed to foreclose his lien; that thereupon John R. Clark, the president of the bank, proposed to take the note in question and an assignment of the lien and permit the makers of the note to pay from $200 to $400 per month thereon, and that the bank would carry said indebtedness and exhaust the property to which the lien attached before bringing an action against Holmes, and he was required to refrain from prosecuting an action

on the lien; that Holmes did refrain from prosecuting said lien and accepted the note in question and indorsed the same to the bank, it being expressly agreed between Holmes and the bank that it should first exhaust its said security before resorting to an action on the indorsement.

3. "That before plaintiff herein brought this action and refusing to foreclose said lien, though then holder thereof, this defendant, for his own protection and for use of said bank, instituted an action thereon in the name of himself and of said plaintiff in this court against said Hutchins and Hutchins and others, and therein expressly alleged that said plaintiff was entitled to receive all the proceeds of said lien to be applied on said note; and said plaintiff in said action fully affirmed and ratified the same and claimed the benefit of said lien under the assignment thereof; and in the trial of said action said plaintiff, by its cashier, produced in this court the said note, and its cashier was sworn and testified on behalf of the said plaintiff and this defendant, and plaintiff in said action recovered a judgment of foreclosure of said mechanic's lien against each of said pieces of real estate and improvements; but said judgment has in part been appealed from, and is in consequence thereof not yet realized or collected; but said judgment is yet unreversed and is in full force and effect, and said action was pending when this suit was commenced, and then undetermined."

The reply is a general denial.

On the trial of the cause the court directed the jury to return a verdict for the bank, which was done.

The proof tends to show the following facts: The note sued on was a renewal of a former note. The indorsers of the original note were J. H. McClay and J. R. Webster. A mechanic's lien was filed and assigned to Webster and McClay as indemnity against their indorsement. When the note became due foreclosure was commenced by Holmes. Then Hutchins proposed to Holmes to borrow at the bank

for Holmes. Clark, the president of the bank, sent for Holmes and said, in substance, that he was willing to let Hutchins have the money if Holmes would assign the lien to the bank, and he would release McClay and Webster as sureties. Holmes' counsel advised him not to risk any further delay in collecting from Hutchins; but, through the importuning of Hutchins and Clark, the suit was stopped and Holmes made a transfer of his mechanic's lien to the bank and delivered the security to Mr. Clark. Hutchins had agreed to pay from $200 to $400 a month until the note was paid, and Clark agreed to take this mechanic's lien as security for the note until such time as it was paid. Clark thought Hutchins would pay the note, and it would get Hutchins out of his embarrassment until he could dispose of his property. There was this agreement, that, in indorsing that note, Clark took the lien as security, and if there should ever be any trouble there would be nothing done until that lien was exhausted. After the note became due the bank, when about to institute foreclosure suit, discovered a discrepancy in the description of one piece of the property, and Mr. Callahan, the cashier, directed Holmes to begin foreclosure, which was done. The petition in the foreclosure suit, founded on the lien and note sued on here, was given in evidence; so also were the original mechanic's lien and assignments thereof and the decree in the foreclosure suit. The suit on the lien was commenced September 19, 1890, more than a month prior to the bringing of this action. The principal question in this case is the right to permit proof of a contemporaneous parol agreement to explain or qualify a blank indorsement of a promissory note in an action between the parties.

In *Dye v. Scott*, 35 O. St., 194, the supreme court of Ohio in an able opinion discusses the question. It is said: "There are authorities which hold that the contract which the law implies or presumes in such cases is as conclusive and certain as if written out in full, and that parol evi-

dence is not admissible to vary or contradict it. The reason given for requiring such strictness, in substance, is that the indorsement adds to the value of the instrument by giving it currency in commercial transactions; and that its value would be impaired and circulation restricted by admitting oral testimony to vary or contradict the terms of the contract which the law presumes or implies from the indorsement, even as between indorser and indorsee. (See *Bank of United States v. Dunn*, 6 Pet. [U. S.], 51; *Dale v. Gear*, 38 Conn., 15; *Barnard v. Gaslin*, 23 Minn., 192; *Bartlett v. Lee*, 33 Ga., 491.) While we sanction the doctrine that upholds the credit and negotiability of commercial paper in the hands of any *bona fide* holder for value, we do not, in order to accomplish this, see the necessity of carrying the doctrine quite so far as it is carried in the cases above cited. As between the indorser and indorsee, we regard the blank indorsement as only *prima facie* evidence of the contract which the law presumes to arise therefrom. If the indorsement is made upon no other, that contract will control the rights of the parties. If there was a contemporaneous contract between the parties upon which the indorsement was made, both reason and justice require that, as between themselves, the actual and not the presumed contract should be enforced; and, as between them, oral testimony should be admissible to prove the contemporaneous contract. This will not be necessary, or even probably impair the currency or credit of the instrument as commercial paper. Prior parties to it will not be affected, nor will the rights of subsequent indorsees without notice be impaired or limited in any degree. As to all the world except the parties to the special contract, and as between themselves only, the character of the instrument as commercial paper will remain unaffected." To the same effect, *Hudson v. Wolcott*, 39 O. St., 618.

In *Bailey v. Stoneman*, 41 O. St., 48, the court held: 'The indorsement being in blank, parol evidence of what

was said by the parties in and about the transfer was properly admitted. *Dye v. Scott*, 35 O. St., 194, followed.

"2. The indorsement *prima facie* implied that the indorser assumed its usual obligations, and upon him rested the burden of proving a different understanding and agreement.

"3. If the evidence justified a finding that the then understanding or agreement was that the indorser assumed the usual obligation, the fulfillment by E. T. B. of his contract to build applied as a consideration to support the transfer of the note as made."

In *Preston v. Gould*, 64 Ia., 44, 19 N. W. Rep., 834, this rule was approved, and undoubtedly is the law of the modern cases. A blank indorsement of a negotiable instrument before due, where the transfer is to a *bona fide* holder in the due course of business, establishes a liability which cannot be varied by parol evidence. But as between the original parties, a blank indorsement may be modified by parol. At most it is only *prima facie* evidence of the contract which the law implies therefrom. Between the parties the entire transaction may be shown, although a part of it is in writing and a part rests in parol; that is, what was the actual contract between the parties? And oral testimony is admissible to prove the actual agreement. This does not affect the paper as to third persons who have no notice of this agreement, where the paper is transferred before due for a valuable consideration. (Wharton, Evidence, sec. 1059; *Kidson v. Dilworth*, 5 Price [Eng.], 564; *Castrique v. Buttigieg*, 10 Moore P. C. [Eng.], 94; *Susquehanna Bridge & Bank Co. v. Evans*, 4 Wash. C. C. [U. S.], 480; *Smith v. Morrill*, 54 Me., 48; *Brewer v. Woodward*, 54 Vt., 581; *Hamburger v. Miller*, 48 Md., 317; *Bruce v. Wright*, 3 Hun [N. Y.], 548; *Ross v. Espy*, 66 Pa. St., 481; *Hudson v. Wolcott*, 39 O. St., 618; *Bailey v. Stoneman*, 41 O. St., 148; *Rothschild v. Grix*, 31 Mich., 150; *Greusel v. Hubbard*, 51 Mich., 95; *Hueske v. Broussard*, 55 Tex., 201; *Preston v. Gould*, 64 Ia., 44.)

In the case at bar the court should have submitted the testimony to the jury, and it erred in directing a verdict. The judgment is therefore reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

VACLAV ROH V. VACLAV VITERA ET AL.

FILED NOVEMBER 21, 1893. No. 6418.

1. **Final Order.** An order of the district court vacating its own judgment rendered by default, and permitting the defendant to answer at the same term at which the judgment is rendered, is not a final order.
2. **A motion to vacate a judgment** must assign reasons for the proposed action of the court, but if the causes are set forth in an accompanying paper and submitted to the court in that form and acted upon by it, a reviewing court will not declare its ruling thereon void, although it may be erroneous.
3. **Final Order: REVIEW.** A mistake in the third point in the syllabus in *Hansen v. Bergquist*, 9 Neb., 269, corrected by substituting the words "an execution and" for "a judgment."

ERROR from the district court of Butler county. Tried below before WHEELER, J.

Motion by defendants in error to dismiss on the ground that the order complained of in the petition in error is not a final order. The order sought to be reviewed vacates a judgment by default and grants defendants leave to answer. *Motion sustained.*

George P. Sheesley, Sheesley & Aldrich, and *Matt Miller*, for the motion:

No judgment or order which does not determine the

rights of the parties in the cause, and preclude further inquiry as to their rights in the premises, is a final judgment. The order in question was not, therefore, a final determination, and is not conclusive. (*Hall v. Vanier*, 7 Neb., 398; Code, sec. 581.)

An order vacating a judgment by default during the same term at which it was rendered, to enable defendant to make a defense, is not a final order. (*Brown v. Edgerton*, 15 Neb., 454.)

The power of the district court over its own judgments during the term at which the judgment is rendered is entirely discretionary, and not subject to review by the supreme court. (*Wise v. Frey*, 9 Neb., 220; *Smith v. Pinney*, 2 Neb., 145; *Huntington v. Finch*, 3 O. St., 445; *Taylor v. Fitch*, 12 O. St. 169; *Volland v. Wilcox*, 17 Neb., 50.)

Evans & Hale and *Frick & Dolezal, contra:*

The order of the court attempting to set aside the judgment rendered by default is null and void, because no ground is set out or claimed for which the court had power to order it to be set aside. (*Spencer v. Thistle*, 13 Neb., 227.)

MAXWELL, C. J.

This action was brought in the district court of Butler county on the 2d day of August, 1892, by the plaintiff against the defendants upon a contract for the erection of a church. It is alleged, in substance, in the petition that the defendants are a voluntary religious association; that in the year 1891 they had a building to be used for a church, partially completed; that they employed the plaintiff to complete the same, and promised to pay him the amount paid by him for labor and material and a reasonable compensation for his own services; that he then completed the building, and it has been accepted by the defendants; that the defendants have paid thereon more than $3,500, and there-

still remains due the sum of $2,028, for which this suit is brought. It seems that after suit was brought there was an effort made by the parties to settle the matter and not permit the case to go to trial, and on August 27, 1892, the plaintiff and the priest of the congregation entered into the following agreement:

"ABIE, September 27, 1892.

"It is hereby agreed between the congregation of Sts. Peter's and Paul's Church of Abie and Vaclav Roh:

"1. That Vaclav Roh will withdraw all lawsuits, liens, and bills of every and any kind which he has at present or ever did have against the congregation of Sts. Peter's and Paul's church for building a church or for labor performed or for material furnished, or for any cause whatever; and he, Vaclav Roh, further agrees to remove all liens, dismiss all lawsuits, and forever quitclaim all bills of every kind which he may have now or ever did hold; and further, that Vaclav Roh will pay all costs for liens and actions at law, sheriff's fees, and every cost caused by an action at law.

"2. The congregation agrees to pay Vaclav Roh the sum of $10 per member, number of members unknown, the payment to be made as follows: On or before January 1, 1893, the sum of $5 is to be paid by each member, the balance, $5, is to be paid by each member on or before January 1, 1894; but this agreement does not bind the aforesaid members of Sts. Peter's and Paul's church individually nor collectively to pay the amounts as above stated, but they may pay the amount at any time, not later than January 1, 1894.

"3. This agreement guaranties to each member paying $10 to Vaclav Roh that he, the member so paying, shall be forever exempt from any further payment to Vaclav Roh; and further, that Vaclav Roh shall bring no action at law against any member so paying at present, nor at any future time.

4. The amounts to be paid as above stated shall bear no interest whatever until January 1, 1894.

"REV. JOSEPH KOUTEK.
"VACLAV ROH.

"Witnesses:
"T. F. MAHONEY.
"V. H. SIMERKA.
"F. F. VOREL."

On the 9th day of March, 1893, a default was entered against the defendants and judgment taken for the sum of $1,374.60. On the 12th of April of the same year a motion was made to set aside the default and for leave to answer. This motion was sustained and leave given the defendants to answer in forty days. From the order setting aside the default and granting leave to answer the plaintiff brings the case into this court by petition in error. The defendants now move to dismiss the action because there is no final judgment. The plaintiff lays considerable stress upon the form of the motion to set aside the default. The motion is as follows:

"Come now the defendants named in the cause above entitled, and move the court that the default and judgment heretofore at this present term of this court taken and rendered, to-wit, on the 9th day of March, 1893, be set aside and that said judgment be vacated for reasons set forth in the affidavit of one of said defendants hereto attached."

The affidavit referred to in the motion is as follows:

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

"Anton Ptacek, being duly sworn, deposes and says that he is one of the defendants in the cause above entitled; that said defendants, on and prior to the 9th day of March, 1893, had not employed any attorney or attorneys to look after the interests of said defendants in this cause, by reason of certain overtures of settlement of this controversy made by the plaintiff; that on account of the mutual desire of

the plaintiff and defendants against whom this action was first instituted that this controversy might be settled without trial, this cause was allowed to remain without any active prosecution for judgment on the part of the plaintiff, and without the preparing and filing an answer on the part of the defendants to the petition of the plaintiff; that the defendants were led to believe by the plaintiff that this cause would not stand for trial before January 1, 1894; that the plaintiff led the defendants to believe that upon their paying a certain amount of money, much less than the sum for which judgment was herein rendered, on or before the 1st day of January, 1894, that the case would be dismissed by reason of such settlement; that a part of the the facts hereinbefore recited appear of record among the files in this cause; that under the inducements held out by the plaintiff for settlement of this controversy, this cause would not stand for trial until after January 1, 1894. For all of which reasons the defendants refrained from interposing a defense to this action, wherefore default against the above named defendants was allowed.

"ANTON PTACEK.

"Subscribed in my presence and sworn to before me this 12th day of April, 1893.

"[SEAL.] ED. G. HALL, *C. D. C.*

A motion should contain within itself all the reasons relied upon for the action of the court, but where that course is not pursued, but the reasons are assigned in a separate paper and acted upon by the trial court without objection, we have simply to consider the reasons assigned, and not the form in which they are presented. The question of the propriety of setting aside the default for the reasons assigned, however, does not arise in this motion.

The plaintiff relies upon the case of *Spencer v. Thistle*, 13 Neb., 227, in which it was held that a new trial can only be granted after judgment for specific causes, which must be assigned in the motion for a new trial. In that

case the motion was: defendant "upon all the pleadings, proceedings, and records herein, moves the court for an order vacating judgment herein and to set aside report of referee and vacate said reference and allow defendant to answer, and that said action may stand for trial before a jury." No particular cause was pointed out, and the court held, properly we think, that some particular cause must be assigned to authorize the court to grant a new trial. It will be seen in the case at bar that causes are assigned in the affidavit which, whether sufficient or not, are not before the court. The case cited, therefore, is not applicable.

In *Hansen v. Bergquist*, 9 Neb., 269, a motion was made in the district court to quash an execution issued on a transcript of judgment from the county court upon the ground that the judgment had been set aside by the county court. The motion was sustained and the execution quashed. From this order the case was taken to the supreme court, where the order was reversed upon the ground that the judgment was valid. Inadvertently, it is stated in the syllabus that an order setting aside a "judgment" may be reviewed on error. It should have been an order setting aside an execution, where it affects a substantial right. That was the point presented to the court, and the syllabus in the case will be so corrected.

In *Brown v. Edgerton*, 14 Neb., 453, it was held that an order made at the same term vacating a judgment was not a final order, and therefore not subject to review by proceedings in error, and such we understand to be the rule. There is no final order, therefore, from which a petition in error will lie, and the motion to dismiss must be sustained.

DISMISSED.

POWDER RIVER LIVE STOCK COMPANY V. CHARLES L. LAMB.

FILED NOVEMBER 21, 1893. No. 4730.

1. **Statute of Frauds:** A VERBAL CONTRACT, to be void under the first clause of section 8 of our statute of frauds, must be one that, by its terms, is not to be performed within one year from the making thereof. The statute does not refer to such contracts as may possibly or probably not be performed within that time.
2. **An oral agreement** entered into in October, 1886, for the sale and delivery by plaintiff to defendant of a quantity of corn of more than $50 in value, by the terms of which the seller was to receive the market price paid for corn in the county on any day between the time of delivery and May, 1888, is not within the 8th section of our statute of frauds, since performance within one year is possible.
3. **Oral Contract of Sale.** Under section 9, chapter 32, Compiled Statutes, an oral contract for the sale and delivery of personal property of over $50 in value, no part of which has been accepted or received by the buyer, is invalid where no part of the purchase money was paid at the time the contract was entered into, and where no note or memorandum of the contract was made in writing, and subscribed by the party to be charged thereby.
4. **A delivery alone by the vendor** is not sufficient to take the contract out of the statute, but there must also be a receipt and acceptance of the thing sold by the vendee, to have that effect.
5. **In an action upon a contract within the statute of frauds,** the petition must state facts taking the contract out of the statute, or the pleading will be demurrable.
6. **Contract of Sale:** STATUTE OF FRAUDS: PLEADING. Under a general denial of the allegations in a petition upon a parol agreement for the sale and delivery of personal property, void under the statute, the defendant may avail himself of the defense that such agreement is invalid under the statute of frauds.
7. **The general agent or manager** of a corporation carrying on the business of raising and feeding of cattle is presumably empowered to purchase feed for the stock belonging to the corporation.

8. **Quantum Meruit**: SPECIAL CONTRACT. A party cannot recover upon a *quantum meruit* where he pleads and relies on the trial solely upon a special contract.

9. **Erroneous Instructions**: HARMLESS ERROR: REVIEW. This court will not reverse a judgment for the giving of an erroneous instruction, where it appears that the party complaining was not prejudiced thereby.

10. **Trial**: REFUSAL TO GIVE PROPER INSTRUCTION: REVIEW. It is reversible error to refuse an instruction containing a correct proposition of law applicable to the issues in the case, the principles of which have not been covered by the charge of the court.

ERROR from the district court of Stanton county. Tried below before POWERS, J.

The opinion contains a statement of the case.

C. C. McNish and *Allen, Robinson & Reed*, for plaintiff in error:

The answer of the defendant denies the several allegations of the petition and presents the question of the statute of frauds as one of the issues in the case. By the general denial the defendant had a right to avail itself of the invalidity of the agreement under the statute of frauds. It was unnecessary to plead the statute as a special defense. (Browne, Statute of Frauds [3d ed.], sec. 511; 8 Am. & Eng. Ency. Law, 747, note 2; *Berrien v. Southack*, 7 N. Y. Supp., 324; *Fountaine v. Bush*, 41 N. W. Rep. [Minn.], 465; *Tatge v. Tatge*, 34 Minn., 272; *Smith v. Theobald*, 5 S. W. Rep. [Ky.], 394; *Wiswell v. Tefft*, 5 Kan., 263; *Bonham v. Craig*, 80 N. Car., 224; *Morrison v. Baker*, 81 N. Car., 76; *Amburger v. Marvin*, 4 E. D. Smith [N. Y.], 393; *Harris v. Knickerbacker*, 5 Wend. [N. Y.], 638.)

A party cannot recover on *quantum meruit* under an allegation setting up a special contract. (*Eyser v. Weissgerber*, 2 Ia., 463; *Freher v. Geeseka*, 5 Ia., 472; *Formholz v. Taylor*, 13 Ia., 500.)

The court erred in giving conflicting instructions. (*Wasson v. Palmer*, 13 Neb., 376.)

The court erred in refusing to give the twelfth instruction asked by the defendant. (*Severance v. Melick*, 15 Neb., 614; *Housel v. Thrall*, 18 Neb., 488.)

W. W. Young, and *John A. Ehrhardt, contra:*

If the court erred in overruling the demurrer to the petition, defendant waived the error by answering over, and going to trial upon the merits. (*Pottinger v. Garrison*, 3 Neb., 223; *Mills v. Miller*, 2 Neb., 308; *Harral v. Gray*, 10 Neb., 188; *Dorrington v. Minnick*, 15 Neb., 400; *Buck v. Reed*, 27 Neb., 70.)

The defense that a contract is within the statute of frauds, to be available to defendant, must be specially pleaded. (*Lawrence v. Chase*, 54 Me., 196; *Graffam v. Pierce*, 143 Mass., 386; *Brigham v. Carlisle*, 78 Ala., 243; *Martin v. Blanchett*, 77 Ala., 288; *Guynn v. McCauley*, 32 Ark., 97; *Trapnall v. Brown*, 19 Ark., 39; *Peet v. O'Brien*, 5 Neb., 362.)

A contract is not void by the statute of frauds, as an agreement not to be performed within a year from the making thereof, if the performance of it depends upon a contingency which may happen within the year, although in fact it does not happen until after the expiration of the year. (*McCormick v. Drummett*, 9 Neb., 388; 8 Am. & Eng. Ency. Law, 690, notes 1, 2.)

NORVAL, J.

This was an action commenced by Charles L. Lamb to recover of plaintiff in error $1,849.15 and interest thereon, as a balance due for a quantity of corn alleged to have been sold and delivered by plaintiff to defendant. The amended petition upon which the case was tried alleges:

"1. That said defendant is a corporation duly organized

and existing under the general laws of the state of Colorado, and doing business in Stanton county, Nebraska.

"2. That some time in the month of October, 1886, the precise date whereof the plaintiff is unable to more specifically state, the plaintiff and defendant entered into a verbal contract, by the terms of which the plaintiff sold to said defendant above named all the corn that he then had on hand, including the crop of corn then standing in the fields of the plaintiff; and in consideration of the sale and delivery of said corn to the defendant, the said defendant agreed to pay the plaintiff the market price per bushel paid for corn in the said county of Stanton, in the state of Nebraska, on any day, to be selected by the plaintiff, between the time of delivery of said corn and the month of May, 1888, and on the day so selected by the plaintiff the amount then due the plaintiff should at once become due and payable.

"3. That in pursuance of said contract the plaintiff delivered to the defendant in the month of November, 1886, 143 bushels and 35 pounds of ear corn; and from the 21st day of December, 1886, to the 5th day of April, 1887, 782 bushels and 30 pounds of ear corn; and on the 30th day of December, 1886, 1,259 bushels of shelled corn; and in the month of January, 1887, 5,090 bushels of shelled corn and 25 pounds; and that the total number of bushels sold and delivered amounted in the aggregate to 7,275 bushels; and the plaintiff states that he is unable to more fully state the time and the amount of the delivery of said corn than in this paragraph stated.

"4. On the 1st day of February, 1888, the plaintiff, in order to fix and establish the price to be paid by the defendant for the corn delivered as aforesaid, served notice on the defendant that he had selected the market price per bushel paid for corn in Stanton county, Nebraska, on that date, to-wit, the 1st day of February, 1888.

"5. That the market price paid for corn on the said 1st

day of February, 1888, in Stanton county, Nebraska, was thirty-five cents per bushel.

"6. That on the 4th day of January, 1887, the defendant advanced to the plaintiff on said corn, the sum of two hundred (200) dollars, and on the 12th day of January, 1887, the further sum of four hundred and fifty (450) dollars, for which money so advanced the plaintiff afterwards agreed to pay the defendant interest thereon until the date of the selection of the market price per bushel to be paid for said corn.

"7. That there is due from the defendant to the plaintiff for the said corn, so delivered under the terms of said contract, the sum of two thousand five hundred and forty-six and twenty-five one-hundredths (2,546.25) dollars, no part of which has been paid, except the said sum of $650, which with the interest thereon, as agreed between plaintiff and defendant, amounts to the sum of $697.10.

"8. That after allowing to the defendant all just credits, there is still due and unpaid from the defendant to the plaintiff the sum of one thousand and eight hundred forty-nine and fifteen one-hundredths (1,849.15) dollars, together with the interest thereon, at the rate of seven per cent from the said 1st day of February, 1888."

The defendant interposed a general demurrer to the amended petition, which was overruled by the court, and an exception was taken to the decision. The defendant then filed an answer alleging:

"1. That on or about the 24th day of December, 1886, L. R. Crosby, as the general manager of the feeding department of said defendant, made an oral agreement with said plaintiff, whereby the said plaintiff was to sell and deliver at the ranch of defendant in Stanton county, Nebraska, all the corn and oats that he then owned near Pilger, and two car loads of corn to be shipped from Stanton, and said defendant agreed to pay said plaintiff for said corn and oats the average market price between the Stanton and

Pilger market on the day that said plaintiff selected and called for his money, between about the 24th day of December, 1886, and the 1st day of May, 1887, and that said plaintiff was to reduce said contract to writing in duplicate and sign them, and forward them to said L. R. Crosby for the same to be signed by said defendant, and one to be returned to said plaintiff.

"2. That said plaintiff failed and neglected to reduce said contract to writing, as agreed, and there is no note or memorandum of said agreement as required by law.

"3. That in accordance with said oral agreement made on or about the 24th day of December, 1886, with said L. R. Crosby for said defendant, the said plaintiff delivered at the ranch of said defendant, in Stanton county, Nebraska, at various dates, a total of nine hundred and twenty-five (925) bushels and sixty-five (65) pounds of ear corn; and six thousand three hundred and forty-nine (6,349) bushels and thirty-five (35) pounds of shelled corn; and nineteen hundred and ninety-four (1994) bushels and twenty-seven (27) pounds of oats.

"4. That on the 25th day of April, 1887, in accordance with the contract made on or about the 24th day of December, 1886, the said plaintiff had a settlement with said defendant as to the oats, and on said date defendant paid said plaintiff for said oats the sum of $359.10.

"5. That on the 4th day of January, 1887, the said defendant loaned to said plaintiff the sum of $200, and on the 12th day of January, 1887, said defendant loaned said plaintiff the further sum of $450; and said plaintiff agreed to pay said defendant interest on said money, and that the same was to be settled and adjusted and deducted from amount that defendant might owe the plaintiff.

"6. The defendant, in further answer to the petition of the plaintiff, admits the allegation contained in paragraph 1 of said petition; but as to all other paragraphs in said petition it denies each and every allegation therein contained."

For reply, the plaintiff admits that he delivered the quantity of oats and corn stated in the answer; denies that the same were delivered under the contract set up by the defendant in its answer; alleges that the oats and corn were sold and delivered under separate and distinct contracts; denies each and every other allegation set forth in the answer.

The action was tried in the court below to a jury, who returned a verdict in favor of the plaintiff for $2,142.38. The plaintiff filed a remittitur of $1.25, and the court overruled the defendant's motion for a new trial, and entered judgment in favor of plaintiff upon the verdict of the jury. The defendant brought the case to this court for review by proceeding in error.

The defendant objected in the district court to the introduction of any evidence in the case, for the reason that the contract stated in the petition is within the statute of frauds, and is therefore void, which objection was overruled by the court. The plaintiff thereupon introduced evidence tending to prove every allegation of the petition, and rested. The testimony on behalf of the defendant tended to establish that the contract entered into between the parties relating to the sale and purchase of the corn, is the one pleaded in the answer; that the corn was delivered by the plaintiff to the defendant under said agreement, and that corn at the time the same was delivered, as well as in May, 1887, was worth on the market in Stanton county twenty cents per bushel. The court, at the request of the defendant, submitted to the jury special findings, which were answered by them and returned with their general verdict. By the third finding they found that the contract between the parties was as claimed by the plaintiff, and that the corn was delivered thereunder.

The most important question presented for our consideration is whether or not the contract set out in the petition is within the statute of frauds.

Section 8 of chapter 32 of the Compiled Statutes declares that "In the following cases every agreement shall be void unless such agreement, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged therewith: First—Every agreement that by its terms is not to be performed within one year from the making thereof. Second—Every special promise to answer for the debt, default, or misdoings of another person. Third—Every agreement, promise, or undertaking made upon consideration of marriage, except mutual promises to marry. Fourth—Every special promise by an executor or administrator to answer damages out of his own estate."

The contention of the plaintiff in error is that the contract declared on is void under the first subdivision of the section above quoted, and that the same is not actionable or enforceable in the courts, for the reason the agreement rested solely in parol, and was not to be performed by either party within the period of one year from the date of the making of the same.

The defendant in error in his argument insists that the agreement in question does not fall within the clause of the section already mentioned; that the statute only applies to executory contracts, and not one which has been fully performed on one side. The authorities upon the question are divided. Some of the courts of the country hold that an action cannot be maintained upon a parol agreement, which by its terms is not to be performed within a year, even though made upon a valuable consideration fully executed, while other courts of equal standing and ability lay down the doctrine that full performance on one side takes the contract out of the statute, and that it is enforceable. We are not now called upon to examine the conflicting decisions, or to determine which is the true doctrine, as the question does not necessarily arise in this case. If we are able to comprehend the force and effect of the agreement in question, it is not within the scope of the statutory

provision set out above. A contract, in order to be within the purview of said section, must be such that, by its terms, cannot be performed within one year from the making thereof. The statute does not include a verbal agreement which may possibly or probably not be performed within a year, nor does it apply to a parol contract, in the terms of which there is nothing inconsistent with a full and complete performance within such period. When a contract, not in writing, by its terms, or by any fair and reasonable construction of its provisions, is capable of being performed within a year, it is not within the statute. This was settled by the adjudications in this court in *McCormick v. Drummett*, 9 Neb., 388; *Connolly v. Giddings*, 24 Neb., 131, and *Kiene v. Shaeffing*, 33 Neb., 21, and it is unnecessary to refer to the decisions of other courts sustaining the doctrine of our own cases.

Let us examine and see whether the agreement alleged and proved was capable of performance within a year from the time the same was entered into. The plaintiff below sold to the defendant all of his corn, including the crop then in the field. The contract contained no stipulation as to the time when the corn should be delivered to the defendant. True, by the terms of the agreement, plaintiff was to receive for the corn the market price paid for such grain in Stanton county on any day that should be thereafter designated by him between the time of delivery and May, 1888, but this provision did not bring the contract within the statute. Although the agreement was not performed within a year from its making, as regards the selection of the date upon which to fix the price the seller should receive for the corn, yet there was nothing in the terms thereof which prevented it from being performed within the year. Under the terms of the agreement, plaintiff had a perfect right, had he so desired, to have selected such date at once, and without delay, even on the next day after the corn was delivered. It was entirely optional with him to

do so or not. The agreement was therefore capable of performance within a year from its making, and is not void by reason of the statute under consideration. No case can be found reported in the books, in the opinion of the writer, of similar facts, where it has been held that such a contract was within the purview of the statute. On the contrary, the doctrine established by the adjudications of this country is that, in order to bring a case within the operation of the statute of frauds, there must be an express and specific stipulation in the contract that it is not to be performed within the year, or it must appear therefrom that it was not the intention of the parties the agreement should be performed within that period. (*Supra; Treat v. Hiles*, 32 N. W. Rep. [Wis.], 517; *Baker v. Lauterback*, 11 Atl. Rep. [Md.], 703; *Aiken v. Nogle*, 47 Kan., 96; *Durham v. Hiatt*, 127 Ind., 514; *Kent v. Kent*, 62 N. Y., 560; *Barton v. Gray*, 57 Mich., 622; *Horner v. Frazier*, 4 Atl. Rep. [Md.], 133; *Smalley v. Greene*, 3 N. W. Rep. [Ia.], 78.)

The next contention of plaintiff in error is that the contract is void under section 9 of said chapter 32, which is in the following language:

"Sec. 9. Every contract for the sale of any goods, chattels, or things in action, for the price of fifty dollars or more, shall be void unless: First—A note or memorandum of such contract be made in writing, and be subscribed by the party to be charged thereby; or, Second—Unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action; or, Third—Unless the buyer shall, at the time, pay some part of the purchase money."

The contract declared upon in the amended petition is a verbal one for the sale of a quantity of corn exceeding in value the sum of $50. No part of the purchase money was paid at the time the contract was entered into. This is conceded; but the plaintiff below insists that the stipulations in the contract have been fully performed on his part;

hence, the statute of frauds does not attach. The delivery of the corn by the plaintiff to the defendant is averred in the petition, but it is nowhere alleged in the pleading that the defendant accepted or received any part thereof. A delivery alone by the vendor of the thing sold is insufficient to take a parol contract for the sale of goods, of the price of $50 or more, out of the statute, but there must also be a receipt and acceptance by the buyer of at least a part of such goods under and in pursuance of the terms of the contract. In Reed on the Statute of Frauds, vol. 1, sec. 262, the author says: "There must be both delivery and acceptance; and both of the parties must partake in the same act. * * * And it has been said that certainly unless accept means no more than received, as surely it must, for otherwise the word 'deliver' would of itself have sufficed, acceptance must mean some act or conduct on the part of the buyer indicating an intention to retain the goods, or such as reasonably to lead the seller to suppose so. To constitute acceptance two acts are necessary: The goods must be accepted and actually received. No act of the seller will amount to acceptance."

The doctrine of the text is amply sustained by numerous judicial decisions. See the following authorities: *Ex parte Parker*, 11 Neb., 309; *Caulkins v. Hellman*, 47 N. Y., 449; *Smith v. Brennan*, 62 Mich., 349, 28 N. W. Rep., 892; *Hansen v. Roter*, 25 N. W. Rep. [Wis.], 530; *Jamison v. Simon*, 8 Pac. Rep. [Cal.], 502; *Fontaine v. Bush*, 40 Minn., 141; *Simmons Hardware Co. v. Mullen*, 33 Minn., 195; *Taylor v. Mueller*, 15 N. W. Rep. [Minn.], 413.

In *Ex parte Parker*, *supra*, this court quoted with approval the following language used by the New York court in the opinion in *Caulkins v. Hellman*, 47 N. Y., 449: "No act of the vendor alone in performance of a contract void by the statute of frauds can give validity to such contract. * * * Where a valid contract of sale is made in writing, a delivery pursuant to such contract will pass the title

at the place agreed upon for delivery, or a shipment of the goods in conformity with the terms of the contract will pass the title to the vendee without any acceptance of the goods by him. But if the contract is oral, and no part of the price is paid by the vendee, there must be not only a delivery of the goods by the vendor, but a receipt and acceptance of them by the vendee to pass the title, or make the vendee liable for the price."

Acceptance is the receipt of a thing with the intention to retain it. In order to constitute a binding acceptance under a contract for the sale of personal property, invalid by the statute of frauds, there must be some equivocal act on the part of the purchaser showing an intention to accept and appropriate the property as owners. (*Stone v. Browning*, 68 N. Y., 601; *Simpson v. Krumdick*, 28 Minn., 355; *Taylor v. Mueller*, 15 N. W. Rep. [Minn.], 413.) In a suit upon a contract within the statute of frauds, the petition must state facts taking the contract out of the statute, or the pleading will be demurrable. (*Babcock v. Meek*, 45 Ia., 137; *Burden v. Knight*, 82 Ia., 584.) The conclusion is irresistible that the allegation of the delivery of the corn is not sufficient to take the contract out of the operation of the statute, and therefore the demurrer to the amended petition should have been sustained.

It is urged that the defendant waived its exception to the ruling on the demurrer by answering to the merits. Conceding this point to be well taken, still the question of the statute of frauds was repeatedly raised during the trial on the introduction of testimony to establish the contract and to show the defendant accepted the corn under the terms of the parol agreement. This evidence was admitted over the objection of the defendant that it is not alleged in the petition that it accepted or received any part of the corn sued for, and that the contract was void under the statute. This evidence was clearly inadmissible, without the pleading was amended. It is a fundamental rule that the *allegata et probata* must agree.

It is claimed that the statute of frauds is not available as a defense in this case for the reason that it is not set up in the answer. The defendant, in its pleading, denies the making of the contract upon which the action was brought; sets up an entirely different agreement for the purchase and sale of the corn. There was no waiver of the statute by the failure to plead it as a special defense. Under the general denial, the defendant had the right to avail itself of the invalidity of the agreement under the statute of frauds. The plaintiff, in order to recover, was obliged to prove his contract substantially as alleged, and a receipt and acceptance of the corn under it. (Browne, Statute of Frauds, sec. 511; *Russell v. Wisconsin, M. & P. R. Co.*, 39 N. W. Rep. [Minn.], 302; *Cosand v. Bunker*, 50 N. W. Rep. [S. Dak.], 84; *Tatge v. Tatge*, 34 Minn., 272; *Taylor v. Allen*, 40 Minn., 433; *Fontaine v. Bush*, 40 Minn., 141; *Berrien v. Southack*, 7 N. Y. Supp., 324; *Smith v. Theobald*, 5 S. W. Rep. [Ky.], 394; *Wiswell v. Tefft*, 5 Kan., 263; *Bonham v. Craig*, 80 N. Car., 224; *Popp v. Swanke*, 68 Wis., 364.)

The last was an action to enforce specifically the performance of an oral agreement for the sale of land. The defendant neither pleaded the statute of frauds, nor objected to the admission of evidence on the trial, because the contract was within the statute, but at the close of the trial requested the court to find as a fact that the contract rested in parol, and, as a conclusion of law, that it was void. It was held that the question of the validity of the agreement was sufficiently raised. There are a few cases which hold that the statute of frauds must be specially pleaded to be available, some of which are cited in the brief of defendant in error, but the decided weight of the decisions, as well as the better reason, is the other way.

We will next notice an assignment of error based upon a ruling of the court on the introduction of the testimony. The plaintiff below was permitted to prove, over objections

of the defendant, that the contract upon which the action was brought was made with the defendant through its general manager, J. A. Brown. It is insisted that this testimony was inadmissible until it had first been shown that Brown had authority to make such a contract. We do not agree with counsel in this proposition. It had been shown, by competent evidence, that Mr. Brown was the general manager of the defendant corporation, before any attempt was made to prove the contract entered into by him for his company for the purchase of the corn. Therefore, it was unnecessary to show that he had authority to make the contract, the presumption being that he was invested with such power.

Complaint is made of the giving of the fourth paragraph of the court's charge to the jury, which is as follows:

"4. The defendant in *his* (its) answer denies the making of the contract sued on, and alleges that the price agreed to be paid for the corn purchased of the plaintiff was the average market price between Stanton and Pilger markets, in said county, on a day to be selected by the plaintiff, between December 24, 1886, and May 1, 1887."

The above was one of several instructions given, stating the issues in the case, and, when taken in connection with the other instructions, was not misleading. It clearly, and in concise language, stated to the jury one of the issues presented by the pleading and the evidence.

Exception was taken to the giving of the following instruction:

"8. But if you find that there was no agreement made as to the price the plaintiff was to receive for said corn, then you should award him for the corn received by the defendant, and unpaid for, the fair market value of the same at the time of its delivery as shown by the evidence, if any such evidence is before you, with interest thereon from the time of its delivery, at the rate of seven per cent per annum."

This instruction should not have been given. The action is grounded upon an express contract. The petition contains no allegation of a *quantum meruit*. Where a contract for the sale of personal property is void under the statute of frauds, and there has been a delivery of the thing sold to the purchaser and an acceptance thereof by him, the plaintiff may recover the reasonable value of the property, if his petition is so framed; but a party cannot recover on a *quantum meruit*, where he pleads and relies solely upon a special contract. (*Eyser v. Weissgerber*, 2 Ia., 463; *Freher v. Geeseka*, 5 Ia., 472; *Formholz v. Taylor*, 13 Ia., 500; *Imhoff v. House*, 36 Neb., 28.)

The instruction under consideration was in direct conflict with instruction No. 5, given by the court, which told the jury that "before the plaintiff is entitled to a verdict for the amount sued for, it is incumbent upon him to prove by a preponderance of the evidence that he made the contract with the defendant as alleged, whereby the defendant agreed to pay the plaintiff the market price of the corn in Stanton county on a day selected by him between the time of delivering the same and the first of May, 1888." By the one instruction the jury were informed that the plaintiff could only recover in case the evidence established a special contract, while by the other they were told he was entitled to the market value of the corn, even though there was no stipulation as to the price he was to receive therefor. These conflicting statements of the law before the jury left them in doubt as to the paragraph upon which they should rely. It should be stated that instruction No. 8 was predicated upon evidence introduced by the defendant and against the objection of the plaintiff below, showing the market value of the corn at the time of its alleged delivery. We are persuaded, however, that the defendant was not in the least prejudiced by the giving of this instruction, since had the jury, in arriving at their verdict, allowed the plaintiff the market value of the corn, the recovery would have been

scarcely one-half the sum stated in the verdict. It is obvious that the recovery was upon the basis of the special contract alleged by the plaintiff.

The defendant asked, and the court refused to give, the following instruction:

"12. If the contract claimed by the plaintiff, in his petition, was wholly oral, that is, by word of mouth, and no part of the purchase money was paid, or no part of the corn was delivered thereunder, then the plaintiff has failed to make out his case, and your verdict must be for the defendant. And there would be no such delivery of the corn to the defendant if the plaintiff simply stored his corn, or a part of it, in the defendant's crib, under an arrangement whereby it was to remain his property until such time as he saw fit to sell it to the defendant."

This request to charge correctly states the law relating to the statute of frauds, which was one of the questions in the case, and should have been submitted to the jury. It was not covered by any instruction given, and it was error to refuse it. (*First Nat. Bank of Madison v. Carson*, 30 Neb., 104.)

There are other errors assigned upon the giving and refusing of instructions, which need not be noticed.

The judgment of the district court is reversed, and the cause remanded for further proceedings, with leave to the plaintiff to amend his petition, if he so desires.

REVERSED AND REMANDED.

STATE OF NEBRASKA, EX REL. THEODORE GALLIGHER, V. GEORGE HOLMES, JR.

FILED NOVEMBER 21, 1893. NO. 5043.

1. **Mandamus**: WRIT NOT PROPER FOR PURPOSE OF CORRECTING ERROR. *Mandamus* cannot be invoked for the purpose of correcting error committed by a court, or other tribunal exercising judicial functions.
2. ——: ——: REMEDY BY PETITION IN ERROR. The appropriate and proper remedy for reviewing a decision of a justice of the peace in granting a new trial on the ground of fraud, partiality, or undue means, is the ordinary one of a petition in error to the district court.

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

David Van Etten, for plaintiff in error:

The motion to grant a new trial was set for hearing before the justice after the expiration of four days from the rendition of the verdict, and the justice was then without authority to entertain the motion. (Compiled Statutes, Code, sec. 983; *Vaughn v. O'Conner*, 12 Neb., 478.)

Ambrose & Duffie, contra:

The remedy sought is not the proper one. The remedy was by direct proceedings to correct the errors complained of. Injunction or *mandamus* will not lie. (*State v. Gillespie*, 9 Neb., 505; *Shelby v. Hoffman*, 7 O. St., 451; *State v. Kinkaid*, 23 Neb., 641; *Gould v. Loughran*, 19 Neb., 392.)

NORVAL, J.

Relator and plaintiff in error brought his action in the court below for a *mandamus* to require the respondent, a

justice of the peace of Douglas county, to issue an execution upon a judgment for costs, recovered before the respondent in a case wherein one Frank Jones was plaintiff, and the relator and one Elizabeth Galligher were defendants. An alternative writ was issued, and the respondent filed an answer thereto. The cause was heard on the alternative writ and answer, and the district court dismissed the action.

The record shows that the above mentioned case of *Jones v. Galligher and Galligher* was tried before the relator and a jury, and on the 14th day of September, 1891, the jury returned a verdict for the defendants. Thereupon, on said day, the justice rendered judgment upon the verdict, and that plaintiff pay the costs of the action. On the 17th day of the same month said plaintiff Jones filed a motion with the justice to set aside the verdict and judgment and for a new trial of the case on the ground, among others, that the verdict was rendered by reason of the prejudice of the jury against the plaintiff. Hearing on the motion was set for September 19th, and notice was duly served upon the defendants, on which date counsel for the respective parties appeared before the justice, and by consent the hearing was continued until September 26th. On said last mentioned date the motion was submitted to the justice, who took the same under advisement until September 29th, upon which date the motion was sustained, the verdict and judgment were set aside, and the cause set for trial on October 5, 1891. Prior to the last named date this application for a *mandamus* was made to the district court.

The contention of the plaintiff in error is that the respondent had no power or authority to vacate the judgment in question and grant a new trial; therefore his action in the premises is a nullity. Section 983 of the Civil Code confers jurisdiction upon justice courts to grant a new trial in cases where it is shown "that the verdict was obtained by

fraud, partiality, or undue means, at any time within four days after the entering of judgment." (*Cox v. Tyler*, 6 Neb., 297; *Templin v. Synder*, 6 Neb., 491.) As heretofore stated, one of the grounds in the motion on which the respondent assumed to act was the partiality of the jury, which is one of the causes enumerated in the section of the statute referred to above for granting a new trial by a justice of the peace.

But it is said the respondent had no authority to vacate the judgment, since the order granting a new trial was made more than four days after the return of the verdict and the entry of judgment thereon. *Vaughn v. O'Conner*, 12 Neb., 478, was tried in the county court, and the plaintiff obtained a verdict. Defendant immediately gave notice of a motion for a new trial, and within three days a motion to that effect was filed, under the provisions of section 983 of the Code of Civil Procedure, which motion was granted on the 8th day of March. This court, after quoting the above section of the statute, say: "The new trial is to be granted within four days, if at all. The authority of a justice of the peace or county judge to grant a new trial is derived wholly from the statute, and it must be exercised in the manner and within the time limited therein. (*Cox v. Tyler*, 6 Neb., 297; *Fox v. Meacham*, 6 Neb., 530.) The county court had no authority, therefore, on the 8th day of March, to set aside a verdict rendered on the 14th day of February." In the light of that decision it must be conceded that the respondent in this case erred in granting a new trial, and, in a proper proceeding brought for that purpose, his ruling would have to be overruled. It is, however, clear that relator has mistaken his remedy. The appropriate and proper remedy is the ordinary one of a petition in error to the district court. (*State v. Powell*, 10 Neb., 48.)

The case cited was an application for a *mandamus* to compel a justice of the peace to reinstate a judgment, where,

on the trial to a jury of the rights of property levied on by a constable, a verdict had been rendered in favor of the judgment creditors, which, on motion, the justice set aside on the ground of partiality and undue means. This court ruled that the alleged error in vacating the verdict and judgment could not be reviewed in a proceeding for *mandamus*. (See *Gould v. Loughran*, 19 Neb., 392.) It is well settled that *mandamus* cannot be resorted to for the purpose of correcting errors committed by a court or other tribunal exercising judicial functions. (*State v. Nemaha County*, 10 Neb., 32; *State v. Kinkaid*, 23 Neb., 641; *McGee v. State*, 32 Neb., 149.)

The judgment of the district court is right and is

AFFIRMED.

OMAHA FIRE INSURANCE COMPANY V. MAXWELL, SHARP & ROSS COMPANY.

FILED NOVEMBER 21, 1893. No. 5989.

1. **Motion to Dismiss Error Proceeding:** TIME: NOTICE. A motion to dismiss a petition in error on the ground that the record shows the order sought to be reviewed was entered by consent of parties, will not be entertained by this court, when notice of the motion has not been served prior to the expiration of the time fixed by rule 8 for serving briefs in the case.
2. **Orders Made by Consent of Parties:** REVIEW. A party cannot predicate error upon the overruling of a motion for a new trial by the district court, where such order was made in pursuance of the written stipulation of all the parties.
3. ———: ———. An order or judgment which is entered by agreement of parties, and not as the decision of the trial court, will not be reviewed by this court.

ERROR from the district court of Madison county. Tried below before POWERS, J.

John R. Hays, for plaintiff in error.

Mapes & Licey and *H. C. Brome, contra.*

NORVAL, J.

This action was instituted by defendant in error, a corporation, on a policy of insurance. A verdict was returned for the plaintiff, upon which a judgment was rendered, and on February 11, 1892, the insurance company brought the cause to this court for review by petition in error. Defendant in error has filed a motion to dismiss on the ground that the motion for a new trial in the court below was overruled, and final judgment was entered in the cause by consent of parties. This motion comes too late. Rule 8 of this court provides that "neither motions to dismiss, unless for want of prosecution, nor to strike a bill of exceptions, will be heard, unless notice thereof shall be served upon the opposite party or his attorneys, or the attorney who tried the cause for him in the trial court, at or before the expiration of the time for serving briefs in the case."

Rule 9 reads as follows: "In all cases brought into this court upon error or appeal, the plaintiff in error or appellant shall, at least twenty days prior to the week in which the case shall be entered for hearing, furnish to the opposite party, or to his attorney of record, a printed copy of his brief of points and authorities relied on; and within fifteen days thereafter the defendant in error, or appellee, shall furnish the plaintiff in error or appellant, as the case may be, a printed copy of his brief of points and authorities relied on; and each party shall, before the argument of the cause, file with the clerk of this court six copies of his brief aforesaid, one for each judge of the court and the others for the reporter, and the party bringing the case into this court shall hold the affirmative," etc.

This cause was entered upon the docket with cases from the ninth district, which were set for hearing October 25th. The motion to dismiss was not made until October 24th. Briefs of plaintiff in error on the merits were served and filed long prior to the time they were due by the rule of this court. The motion to dismiss in this case is based upon a matter appearing upon the face of the record, and no notice of the motion having been served prior to the expiration of the time stated in the rule above quoted for serving briefs, the motion to dismiss is therefore overruled.

The record shows that after the filing of the motion for a new trial in this cause in the court below, the parties entered into and filed in that court the following stipulation: "It is hereby stipulated and agreed by and between the plaintiff and the defendant that the motion for a new trial in the above entitled case be taken up by Hon. W. V. Allen, judge, at the June term of the district court of Madison county, Nebraska, and by him overruled."

It also appears that, in pursuance of the terms of the foregoing agreement, the court on the 6th day of June, 1892, overruled the defendant's motion for a new trial of the cause, and judgment was entered upon the verdict of the jury. The ruling or decision complained of was made at the request of the plaintiff in error, and to now permit it to assign the same for error would be a violation of the plainest principles of law. A party is not entitled to prosecute error upon the granting of an order or the rendition of a judgment when the same was made with his consent, or upon his own application. A judgment rendered by consent of all the parties to the suit will not be reviewed on error or appeal. (*Hughes v. Feeter*, 23 Ia., 547; *Chapin v. Perrin*, 46 Mich., 130; *Brick v. Brick*, 65 Mich., 230; *In re Pemberton*, 4 Atl. Rep. [N. J.], 770; *Pemberton v. Pemberton*, 7 Atl. Rep. [N. J.], 642; *Bailey v. Scott*, 47 N. W. Rep. [S. Dak.], 286; *Varn v. Varn*, 32 S. Car., 77; *Conniff v. Kahn*, 54 Cal., 283; *Jackson v. Brown*, 82 Cal.,

275; *Peterson v. Swan*, 119 N. Y., 662; *Lee v. Hassett*, 39 Mo. App., 67; *Herman v. Owen*, 42 Mo. App., 387.)

Chapin v. Perrin, 46 Mich., 130, was an appeal from a decree rendered in pursuance of a stipulation of the parties. Cooley, J., in the opinion says: "Appeals bring up for review some action of the court below which is complained of as erroneous. In this case there has been no such action. The chancery court has performed no judicial act whatever, except what is implied in permitting a consent order to be entered. But neither party can complain of a consent order, for the error in it, if there is any, is their own, and not the error of the court."

In the case at bar the plaintiff in error, by stipulating that its motion for a new trial should be overruled, was thereby placed in such a position as to preclude itself from taking advantage of the ruling, although erroneous. It cannot now be heard to say that the judgment was erroneous. In reaching this conclusion we have not overlooked, nor failed to give due weight to, the affidavit of counsel for plaintiff in error filed in resistance of the motion to dismiss. The affidavit states, in substance, that Judge Powers presided at the trial, and before the motion for a new trial was passed upon, his term of office expired; that Hon. W. V. Allen, who had been counsel for defendant in error in the trial of the cause, succeeded Judge Powers as judge of the ninth judicial district, and, as Judge Allen was disqualified to rule upon the motion for a new trial, the stipulation was entered into authorizing him to overrule the motion for the sole purpose, thereby the sooner getting the case into this court for decision, and it was so understood at the time by counsel for the respective parties. Doubtless counsel for plaintiff in error did not suppose the signing of the stipulation in question would prevent a review of the case in this court; yet, nevertheless, under the decisions already mentioned, such is the legal effect of the stipulation. It contains no provisions saving

the right to prosecute error. Had the parties not stipulated what the decision of the court should be upon the motion, but simply authorized Judge Allen to pass upon it, then we grant that the ruling might be assigned for error; but since the order was entered by consent, the error, if any, is waived. It follows that the judgment of the district court must be

AFFIRMED.

ROCKFORD INSURANCE COMPANY v. MAXWELL, SHARP & ROSS COMPANY.

FILED NOVEMBER 21, 1893. No. 5990.

ERROR from the district court of Madison county. Tried below before POWERS, J.

John R. Hays, for plaintiff in error.

Mapes & Licey and *H. C. Brome, contra.*

NORVAL, J.

This case presents the same questions as in the case of *Omaha Fire Ins. Co. v. Maxwell, Sharp & Ross Co.*, 38 Neb., 358, decided herewith. For the reasons stated in the opinion filed in that case, the motion to dismiss the proceeding in error is overruled and the judgment of the district court is

AFFIRMED.

CHARLES LUNDGREN V. JOHN ERIK ET AL.

FILED NOVEMBER 21, 1893. No. 4964.

Motion to Vacate Order of Dismissal: SUFFICIENCY OF SHOWING: REVIEW: PRACTICE. In the district court, on motion of defendants, and in absence of plaintiff and his attorney, the suit was dismissed for want of prosecution. On the same day, counsel for plaintiff, as soon as he learned of the order of dismissal, moved to set the same aside and reinstate the suit, supported by affidavit, which is uncontradicted, showing that he was not guilty of laches in failing to appear and prosecute the cause when called for trial, and that plaintiff had a meritorious case. *Held*, That the showing was sufficient to entitle plaintiff to have the judgment of dismissal vacated and the case reinstated.

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

C. P. Halligan, for plaintiff in error, cited: *Eaton v. Hasty*, 6 Neb., 427; *Thrailkill v. Daily*, 16 Neb., 116; *Berggren v. Berggren*, 24 Neb., 764; *O'Dea v. Washington County*, 3 Neb., 122; *State v. Gaslin*, 25 Neb., 72; *Brusa v. Sandwich Mfg. Co.*, 28 Neb., 827.

A. S. Ritchie, contra.

NORVAL, J.

Plaintiff in error was plaintiff in the court below. When the cause was reached for trial, on motion of the defendants, the action was dismissed for want of prosecution. Subsequently, on the same day, plaintiff filed a motion to vacate the order of dismissal and to reinstate, which was denied; and to review said ruling the cause was brought to this court.

The bill of exceptions states that the following affidavit was filed and read in support of the motion to reinstate the case:

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

"Charles P. Halligan, being first duly sworn, deposes and says that he is attorney for the plaintiff in the above entitled action; that said action has been pending for a long time, and that said plaintiff has, ever since the institution of said action, been ready and anxious to have said cause tried, and is now ready and anxious to have the same tried; and that, as affiant verily believes, said plaintiff has a good cause of action against said defendants.

"Affiant further says that at the time the order of dismissal was made herein affiant was engaged in the trial of the case of *Johnston v. Erickson* before his honor, Judge Davis.

"Affiant further says that he has not been negligent in watching said cause, but that at all times he has been ready, since said cause was put upon the call, to try the same, except when actually engaged in the trial of said cause of *Johnston v. Erickson* before Judge Davis.

"C. P. HALLIGAN.

"Subscribed in my presence and sworn to before me this 26th day of June, A. D. 1891.

"GUSTAVE ANDERSON,
"*Justice of the Peace.*"

Under the facts stated in the foregoing affidavit, and others disclosed by the record before us, we are of the opinion that the motion to vacate the judgment of dismissal, and to reinstate the action, should have been sustained. It appears from the affidavit that plaintiff has a good and meritorious cause of action. It is further disclosed that plaintiff was not guilty of such negligence, or laches, in failing to appear when the case was regularly called for trial and when the order of dismissal was made, as to preclude him from having the relief demanded. Plaintiff had employed Mr. Halligan to bring the suit and to look after and try the same for him. The cause stood upon the cal-

endar for trial on June 26th, and was the last of ten cases on the call for that day before the same judge. When it was regularly reached on said day, plaintiff's attorney was engaged in the trial of another suit before one of the other judges of said court; therefore he was unable to be present. Neither plaintiff nor his attorney had endeavored to hinder or delay the trial of this case, but they have at all times been ready and willing to have the same heard upon the merits.

It is important that progress be made with the calendar of cases; but it is of vastly more importance that justice be done, and that cases be disposed of on their substantial merits. We are aware that it is difficult to lay down a general rule for determining when an order dismissing an action on account of the failure of the plaintiff to appear should be vacated, and the cause reinstated, and we shall not now attempt to do so. Each case must necessarily be decided upon its own peculiar facts. Under the showing contained in the bill of exceptions, we are all agreed the court should have set the order of dismissal aside and reinstated the cause upon the docket.

It is proper to state that the transcript of the case prepared by the clerk of the district court contains a certified copy of the affidavit of plaintiff's attorney filed in support of the motion to reinstate, and which copy differs from the one incorporated in the bill of exceptions, in that it does not contain any allegation as to plaintiff having a meritorious cause of action. Of course such an allegation was necessary; and it is not improbable that the motion was overruled for want of a showing of merit; but, as a reviewing court, we must base our decision upon the evidence disclosed by the bill of exceptions.

The judgment of the district court is reversed, the judgment of dismissal vacated and set aside, and the cause remanded for further proceedings.

JUDGMENT ACCORDINGLY.

STATE OF NEBRASKA V. WILLIAM HUGHES.

FILED NOVEMBER 21, 1893. No. 4981.

1. **Indictment and Information:** UNLAWFUL SALE OF MORTGAGED PROPERTY. In an indictment for selling or transferring mortgaged personal property, it is necessary to allege the name of the person or corporation to whom such sale or transfer was made.
2. ———: ———. It is not sufficient in such an indictment to allege that the sale was made without the consent of the mortgagee, naming him. To constitute the offense, the sale of the property must have been made by the mortgagor during the existence of the mortgage lien, without the written consent of the owner and holder of the debt secured by the mortgage, and the indictment must so charge.

EXCEPTIONS to the decision of the district court for Gage county, APPELGET, J., presiding. Filed by leave of the supreme court under the provisions of section 515 of the Criminal Code.

Alfred Hazlett, County Attorney, for the state.

A. Hardy and *Rickards & Prout, contra.*

NORVAL, J.

At the March term, 1891, of the district court of Gage county, the grand jury in and for said county returned into court an indictment charging the defendant with selling chattel mortgage property. The indictment, omitting the formal parts, alleges "that one William Hughes, late of the county aforesaid, on the 28th day of May, in the year of our Lord one thousand eight hundred and ninety, in the county of Gage and state of Nebraska, aforesaid, in due form of law did mortgage to W. J. Harris, Louis Werner, and Ebright the following personal property, to-wit: * * That afterwards, on, to-wit, the first day of Septem-

ber, 1890, in said county of Gage, and during the existence of the lien of said mortgage, said William Hughes, then and there being, unlawfully, fraudulently, and feloniously did sell, transfer, and dispose of a part of the said personal property described in said mortgage, to-wit, all of said oats and all of said millet; and the said William Hughes, then and there being, on, to-wit, the 15th day of November, 1890, in said county of Gage, and during the existence of the lien of said mortgage, did unlawfully, fraudulently, and feloniously sell, transfer, and dispose of a portion of said personal property, described in said mortgage, to-wit, about twenty-five bushels of corn, all of said sales, transfers, and disposals being without first procuring the consent of said W. J. Harris, Louis Werner, and Ebright, mortgagees, or either of said mortgagees; contrary to the form of the statute," etc.

On the trial the defendant, after the introduction of some testimony, objected to the reception of any further testimony in the case, on the ground that the indictment does not state facts sufficient to constitute a crime, which objection was sustained; and thereupon the court instructed the jury "that there is not sufficient evidence in this case to sustain a conviction. You will therefore find the defendant not guilty; that the introduction of the mortgage in controversy shows that there can be no offense under the laws of this state, before the mortgagees have been in some way injured by its breach." The jury returned a verdict of not guilty, and the defendant was discharged. The county attorney excepted to the decision of the district court, and he has brought the cause to this court under the provisions of section 515 of the Criminal Code, to settle the law.

This prosecution was brought under section 315 of the Consolidated Statutes, which declares "That any person who, after having conveyed any article of personal property to another by mortgage, shall, during the existence of the lien or title created by such mortgage, sell, transfer, or in

any manner dispose of the said personal property, or any part thereof, so mortgaged, to any person or body corporate, without first procuring the consent, in writing, of the owner and holder of the debt secured by said mortgage to any such sale, transfer, or disposal, shall be deemed guilty of a felony, and, upon conviction thereof, shall be fined in any sum not less than one hundred dollars, or imprisoned in the penitentiary for a term not less than one year nor more than ten years, or both fine and imprisonment, at the discretion of the court."

Complaint is made in the brief of the county attorney to the last portion of the court's charge to the jury. Whether, in a prosecution under the above section, it is necessary for the state, in order to make out its case, to establish that the mortgagee has been injured by the sale and disposal of the mortgaged property, it is unnecessary to decide in this case, for, if the charge erroneously stated the law upon that question, it was error without prejudice to the state, unless the indictment charges an offense. But the indictment is fatally defective in at least two important particulars. It fails to allege to whom the sale, transfer, or disposal of the mortgaged property was made. The statute reads: "Sell, transfer, or in any manner dispose of said personal property, or any part thereof, so mortgaged, to any person or body corporate." In a prosecution for violation of the section under consideration it is necessary to aver in the information or indictment the name of the person or corporation to whom the sale or transfer of the property was made, and the same must be proved as alleged. (*State v. Ruhnke*, 27 Minn., 309; Maxwell, Criminal Procedure, 496, note 1.) Again, the indictment fails to allege that the sale, transfer, or disposal of the property was made by the defendant without the consent of the owner and holder of the debt secured by the mortgage, and for this reason no crime was stated. The indictment charges, in substance, that the mortgagees, or either of them, did not consent to

the sale. This was not sufficient. To constitute an offense the transfer or sale must be without the written consent of the owner and holder of the debt secured by the mortgage. It is nowhere stated in the indictment that the mortgagees, or either of them, at the time the sales or transfers were made, owned the debt for which the mortgage was given to secure. An indictment should charge explicitly all that is necessary to constitute the crime. It cannot be aided by intendments. (*Smith v. State*, 21 Neb., 552.) The indictment fails to negative the innocence of the defendant. For the reasons stated, the indictment fails to charge an offense, and the exceptions to the decision of the district court are overruled.

EXCEPTIONS OVERRULED.

CITY OF LINCOLN V. PATRICK J. GRANT.

FILED NOVEMBER 21, 1893. No. 5379.

1. **Municipal Corporations:** CITIES OF THE FIRST CLASS: UNLIQUIDATED CLAIMS. Although the right to recover for damage to private property is reserved by the constitution, it is within the power of the legislature to regulate the remedy and prescribe the forms to be observed in order to enforce that right. The only limitation upon the power of the legislature in that respect is that the regulation must be reasonable, and provided by general laws of uniform application.

2. ———: ———: ———. The provision of section 36 of the charter of the city of Lincoln, that in order to maintain an action against said city for an unliquidated demand, the claimant shall, within three months from the time such right of action accrued, file with the city clerk a statement of the time, place, and circumstance of the injury or damage, is a reasonable exercise of the legislative powers.

3. ———: ———: ———. The filing of the required statement is in the nature of a condition precedent, and must be alleged and proved in order to maintain an action in such cases.

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

The opinion contains a statement of the case.

N. C. Abbott, City Attorney, and *Abbott, Selleck & Lane,* for plaintiff in error:

It was incumbent on defendant in error to prove that he had filed his claim in the office of the city clerk. (Comp. Stats. Neb., sec. 36, ch. 13*a*.)

The statute is valid. Such provisions are uniformly enforced in other states. (*Nichols v. Minneapolis*, 16 N. W. Rep. [Minn.], 410; *Clark v. City of Austin*, 38 N. W. Rep. [Minn.], 615; *Sheel v. City of Appleton*, 5 N. W. Rep. [Wis.], 27; *Vogel v. City of Antigo*, 51 N. W. Rep. [Wis.], 1008; *Hiner v. City of Fond du Lac*, 36 N. W. Rep. [Wis.], 632; *Crittenden v. City of Mt. Clemens*, 49 N. W. Rep. [Mich.], 144; *Mead v. City of Lansing*, 56 Mich., 601; *City of Detroit v. Michigan Paving Co.*, 38 Mich., 358; *Yolo County v. City of Sacramento*, 36 Cal., 193; *City of Atchison v. King*, 9 Kan., 550; *Reinig v. City of Buffalo*, 6 N. E. Rep. [N. Y.], 792; *Jones v. City of Minneapolis*, 31 Minn., 230; *Benware v. Town of Pine Valley*, 53 Wis., 527; *Maddox v. Randolph County*, 65 Ga., 216; *Marshall County v. Jackson County*, 36 Ala., 613; *May v. City of Boston*, 23 N. E. Rep. [Mass.], 220; *Greenleaf v. Norridgwock*, 19 Atl. Rep. [Me.], 91; *Low v. Windham*, 75 Me., 113.)

Richard Cunningham, contra, cited: *Foxworthy v. City of Hastings*, 23 Neb., 772.

POST, J.

This was an action by the defendant in error in the district court of Lancaster county against the plaintiff in error, the city of Lincoln. In the petition below it is al-

leged that the plaintiff therein is the owner of lots 14 and 15, in block 69, in said city; that in the year 1886 the city changed the grade of Ninth and M streets adjacent to said lots, by reason of which said streets were lowered from two to seven feet below the grade which had previously been established; that in the year 1889 the city, by its agents and servants, actually lowered said streets so as to conform to the grade so established in 1886, to the damage of the plaintiff in the sum of $1,200. It is further alleged that in the month of February, 1890, the plaintiff presented to the city council a claim in writing, duly verified, for the sum of $1,200 on account of the lowering of the streets above named adjacent to his said property, which is the amount of damage actually sustained by him, but that his said claim was wholly rejected and disallowed.

The city filed an answer in which it challenged the jurisdiction of the district court on the ground that the plaintiff's only remedy was by appeal from the order disallowing his claim. It admits that it caused Ninth and M streets to be graded, curbed, and paved in the year 1889, but denies that the plaintiff has been damaged thereby, and alleges that said improvement is of special benefit to his said property, which has increased in value by reason thereof $2,000; and denies the other allegations of the petition.

A trial resulted in a verdict and judgment for the plaintiff below in the sum of $500, whereupon the cause was removed to this court by petition in error.

The first proposition of the plaintiff in error is that, under the provisions of the charter of 1889 of the city, all claims, whether arising *ex contractu* or *ex delicto*, must be presented to the city council, and when disallowed, the remedy by appeal is exclusive. That proposition we will not consider at this time, since the judgment must be reversed on other grounds.

The second proposition upon which reliance is placed by the city is that the failure of the plaintiff below to file

with the city council a statement in writing showing the the time, place, and circumstance of the damage complained of, etc., is fatal, and a complete defense to his action. Section 36 of the city's charter, as amended in 1889 (sec. 36, ch. 13*a*, Comp. Stats., 1889), concludes as follows: "And to maintain an action against said city for any unliquidated claim it shall be necessary that the party file in the office of the city clerk, within three months from the time such right of action accrued, a statement giving full name and the time, place, nature, circumstance, and cause of the injury or damage complained of. No appeal bond shall be required of the city by any court in any case of appeal by said city."

On the part of the defendant in error it is contended that the provision above quoted is not mandatory; that it is applicable to the subject of costs only, and that the filing of the statement therein contemplated need not be alleged or proved in actions for damages against the city. In support of that contention he cites *Foxworthy v. Hastings*, 23 Neb., 772, in which it is said: "While it is proper to present the names of such witnesses to the city authorities in order that the validity of the claim may be investigated, yet it is believed that the failure to do so will not defeat a recovery, although it may affect the question of costs." It is true the act involved in that case contains substantially the same provision as the one now under consideration, but the question presented and decided was the validity of the provision requiring actions against the city to be brought within six months after the sustaining of the injury or damage complained of. That the observations with reference to the question here presented are mere *dicta*, and were intended as such, is clear, since it is stated in the opinion that the provision for the filing of the statement referred to was not necessary to a determination of that controversy. Regarding the question as an open one, we have examined it in the light of authority;

and our conclusion is that the filing of the statement contemplated by the charter of the city is in the nature of a condition precedent to the right to prosecute an action for damages, and is a material allegation in order to state a cause of action. The following may be cited in support of the view here stated, while we have in our examination observed no case in which a different rule is announced: *Susenguth v. Rantoul*, 48 Wis., 334; *Benware v. Pine Valley*, 53 Wis., 527; *Sheel v. Appleton*, 49 Wis., 125; *Nichols v. Minneapolis*, 30 Minn., 545; *Ray v. St. Paul*, 44 Minn., 340; *Low v. Windham*, 75 Me., 113; *Greenleaf v. Norridgwock*, 82 Me., 62; *Reining v. Buffalo*, 102 N. Y., 308; *May v. Boston*, 150 Mass., 517.

It is true the right to recover for damage to private property in like cases is reserved by the constitution, but there is no doubt that the legislature may regulate the remedy and prescribe the forms to be observed in order to enforce that right. The only limitation upon the legislative authority is that the regulation must be reasonable and provided by general laws of uniform operation.

Objection is made to the provision under consideration on the ground that it is an unreasonable restriction upon private rights, although there is no apparent ground for such an objection. In *Plum v. Fond du Lac*, 51 Wis., 393, the act requiring notice of the injury to be given within ninety days thereafter became a law twelve days after the injury was received, yet it was held applicable, and that the action would not lie, it not appearing that notice had been given. It was said that although the plaintiff did not have the full statutory time within which to give notice, the ninety days allowed therefor did not expire until long after the act had become a law; hence he could have complied with all of the conditions imposed thereby. It is said in the opinion that the act relates to the remedy merely and "should be upheld and made operative in all cases where it would not affect the subject-mat-

ter of the action, or interfere with vested rights either in suits or property;" while in *Greenleaf v. Norridgwock, supra*, the statute required notice to be given within fourteen days after the injury was received. It is said by Dixon, C. J., in *Von Baumbach v. Bade*, 9 Wis., 577*: "All the authorities agree that it is within the power of the legislature to repeal, amend, change, or modify the laws governing proceedings in courts, both as to past and future contracts, so that they leave the parties a substantial remedy according to the course of justice as it existed at the time the contract was made." And in *State v. Hundhausen*, 24 Wis., 199, it was held that an act requiring the holder of a tax certificate to give notice sixty days prior to his application for a deed was valid as to sales made before its passage, provided there was reasonable time after the law took effect within which to comply with its requirements. In the opinion it is said by Paine, J.: "The legislature, upon grounds of public policy, and for the purpose of better protecting the interests of those having rights of redemption, required the holder of the certificate to notify the person in possession of the land, if any, of his intention to apply for the deed. This does not interfere at all with his rights under the contract. They are in nowise diminished. The rights of the owner of the land are in nowise enlarged. It is merely a new formality imposed upon grounds of public policy, and by observing which he secures all his rights unimpaired. This we do not think can be held to impair the obligation of the contract."

In our opinion the provision under consideration is a reasonable exercise of the legislative power, and consistent with the soundest public policy. It follows that the judgment should be reversed and the case remanded for further proceedings in the district court.

REVERSED AND REMANDED.

MATILDA DREESSEN V. STATE OF NEBRASKA.

FILED NOVEMBER 21, 1893. No. 5156.

1. Homicide: SUFFICIENCY OF EVIDENCE. In order to sustain a conviction for a felony on purely circumstantial evidence the circumstances pointing to the guilt of the accused must be of so conclusive a character as to exclude every other reasonable hypothesis.
2. ———: ———. It is not sufficient that the circumstances when considered together create a probability, although a strong one, of the guilt of the accused.
3. ———: ———. To sustain a conviction for murder or manslaughter the *corpus delicti* must be established beyond a reasonable doubt; and where the circumstances relied on to prove that death was caused by the criminal act of a person other than the deceased are consistent with the theory that death was produced by natural causes, there is failure of proof.
4. ———: ———. Evidence examined, and *held* not sufficient to exclude the hypothesis that death was produced by natural causes.

ERROR to the district court for Cherry county. Tried below before CRITES, J.

J. Wesley Tucker, for plaintiff in error.

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

POST, J.

This was a prosecution against the plaintiff in error and her husband, George Dreessen, in the district court of Cherry county, for the murder of their son, Theodore Dreessen. A trial was had resulting in the acquittal of George Dreessen and a conviction of the plaintiff in error of the crime of manslaughter, which she now seeks to reverse by a petition in error addressed to this court. The information, omitting formal and introductory parts thereof, is as follows:

"And that they, the said George Dreessen and Matilda

Dreessen, then and there unlawfully, purposely, feloniously, and of their deliberate and premeditated malice, did strike, beat, and kick the said Theodore Dreessen with their hands and feet in and upon the head, breast, back, neck, belly, and sides, and other parts of him, the said Theodore Dreessen, and did then and there unlawfully, purposely, and of their deliberate and premeditated malice, cast and throw the said Theodore Dreessen down into and upon the floor and pound with great force and violence, with the intent aforesaid, thereby then and there giving to the said Theodore Dreessen then and there, as well by the beating, striking and kicking of him, the said Theodore Dreessen, in manner and form as aforesaid, as by the casting and throwing of him, the said Theodore Dreessen, down as aforesaid, one mortal wound and fracture in and upon the neck of him, the said Theodore Dreessen, to-wit, one fracture and separation of the fourth and fifth cervical vertebræ, of which said mortal wound and fracture he, the said Theodore Dreessen, then and there died."

In view of the conclusion reached with respect to the sufficiency of the evidence to sustain the conviction, it is deemed unnecessary to examine in detail the several questions discussed by counsel. It is sufficient to say that we find no error in the rulings of the district court during the trial, but we think the verdict should have been set aside on the ground that there was a failure of proof of the essential allegation of the information. The facts disclosed by the evidence of the state are substantially as follows: The plaintiff in error and her husband, George Dreessen, with their family of several children, resided at the time of the alleged killing on a farm, "or ranch," as it is described by the witnesses, in Cherry county. They are evidently foreigners, apparently ignorant, and, judged by their treatment of the deceased, wanting in the regard and affection commonly felt by parents for their children. So far as the record discloses, the other children, including an elder

son and daughter, were humanely treated, but Theodore, the deceased, who was twelve years of age at the time of his death, was treated with unusual severity, and even cruelty, by both parents, and especially by the accused, his mother. It is in evidence that he was seldom permitted to eat with the family and was required to sleep during the severest weather in a sod addition to the family dwelling, in a box filled with straw; and his clothing was of the scantiest kind. According to the testimony of some of the witnesses, he was never known to have had a hat or other covering for his head, and is shown to have been the drudge of the family. On one occasion in the month of July, 1889, the deceased came into the house with some fuel, when his mother struck him a blow upon the head which felled him to the floor; at another time she kicked him so violently as to knock him down; and at other times she is shown to have slapped him in the face and on the head while he was engaged in carrying two buckets of water. At the time of his death both of his ears were deformed, which was caused, according to the contention of the state, by freezing, on account of unnecessary exposure. On the 30th day of December, Mr. Corbett, who resides two miles distant, was sent for by the father, but arrived after the death of the deceased. At that time the body, which was still warm, was on a bed in the main part of the house, covered with a feather bed and blanket, and between the legs and at the feet were jugs of water. Referring to the condition of the body at that time the witness testified:

Q. Did you pay any attention to his neck when he was moved?

A. Why, Mr. Dreessen took the pillow out from under his head when I was crossing his hands. I noticed his head went down.

Q. What do you mean by his head went down?

A. They were spreading him out. Mr. Dreessen took the

pillow out from under his head, and I noticed that his head dropped rather quick. I think—I recollect he had a——

Q. Whereabouts did you notice the drop in his head,—in the neck?

A. Yes, sir.

Q. Can you tell the jury what part of the neck the drop was?

A. No, sir.

Q. You noticed it drop very quick.

A. Yes, sir.

Q. Describe it to the jury. Can you by motion?

A. I don't know that I could. It went down something like that. (Indicating.)

Q. That was when you moved his legs down a little?

A. No, sir; that was after we straightened his legs. His father was at the head mostly.

Q. Did you notice the condition of his neck and face?

A. It was swollen.

Q. Did you notice anything about the head? Was it covered or uncovered?

A. He had a towel tied around the head to keep the jaws up.

Q. Tell the jury what it was.

Witness: What the cloth was?

Harrington: Yes.

A. I couldn't say what it was. I don't know whether it was a towel or a piece of cotton cloth.

Q. Can you tell the jury about how it was tied on, Mr. Corbett?

A. Drawn up here and tied on the back of his head.

* * * * * * *

Q. Did you notice his body and face and head?

A. Yes, sir; some. I didn't see his body; that is, his extremity,—his limbs.

Q. Tell the jury anything you noticed about them.

A. I noticed he had some bruises on his face and hands.

Q. Describe these bruises, one by one, now.

A. He had a bruise across his nose, and he had one on his leg. I don't know which leg it was, but there were three or four on his face.

Q. What color had they?

A. They had a scab on them, probably three or four days old, possibly older. I didn't see any fresh scabs on him at all.

Q. Probably three or four days old, or something more, in your opinion?

A. Yes, sir.

Q. Did you notice his hands?

A. Yes, sir.

Q. Well, describe them.

A. He had some bruises on his hands and fingers that looked a good deal like the bruises on his face.

Q. What was their appearance? Were they small or considerable size?

A. They appeared to be bruises where he had struck himself or had been struck by some instrument, as a boy would very often have on his hands.

Q. Well, now, how about the face?

A. Well, as I stated before, he had some bruises on his face. He had one across the bridge of his nose about a half an inch square.

Q. About half an inch square?

A. I should judge it was.

On cross-examination the same witness testifies:

Q. There was nothing unnatural about that, was there—about his head dropping?

A. It arrested my attention at the time, and I concluded that his neck being so much smaller than his head, it would naturally drop quick.

Q. A dead body, warm like that, his head naturally would drop down, wouldn't it, if you take anything out from under it?

A. Be likely.

Q. You didn't observe anything about that head dropping or reeling around, anything more than would be common while the body was warm, did you?

A. No, sir; I think not.

Q. Mr. Corbett, you said in fixing this child, in straightening him out, his neck had swollen?

A. Yes, sir.

Q. Where was the swelling?

A. Around the neck, around his throat, and, as far as I saw, on his neck, and extended up to his cheek bones.

Q. The swelling was here and on the sides, and extended up to the cheek bones?

A. Yes, sir.

Q. Did you look on the back part?

A. No, sir.

Q. Did you see any bruises or purple ring around his neck?

A. No, sir.

Q. Nothing of the kind?

A. No, sir.

Mr. Zeller, another neighbor, saw the body the following morning and noticed the swollen condition of the neck. He also assisted to put the body in the coffin two days later, at which time it was rigid, but observed nothing peculiar about the neck or head, except the swelling above mentioned.

Some three months after the body was buried it was exhumed and carried twenty-five miles in a farm wagon, when it was removed from the coffin and an autopsy held under the direction of Dr. Holsclaw, one of the witnesses for the state. This witness testifies that he found on the body numerous scars, particularly on the back, face, and hands, extravasation of blood in the muscles of the neck, and a dislocation of the neck between the fourth and fifth cervical vertebræ; and states, as his opinion, that death was

caused by such dislocation. He states that decomposition had set in at the time of the examination; that the skin seemed to have suffered from decay, and the body was very offensive. He also testifies as follows:

Q. What, in your judgment, was the cause of death?

A. In my judgment the cause of death was the dislocation of those vertebræs.

Q. Would the moving of the body in the coffin produce the dislocation of those vertebræs.

A. Yes, sir; it is possible.

And on cross-examination he testifies as follows:

Q. You said in your judgment the dislocation of those joints was caused by some violence?

A. Yes, sir.

Q. Might it not have been done in some other way?

A. It is possible hauling the body all that distance. It is possible that it might have occurred after death.

Q. Taking a body in a decomposed condition and such a condition as this body was?

A. Yes, sir.

Q. Hauling it over that country, rough as it was, is it not possible?

A. I will say it is possible. I would not say it is probable.

Q. Such a thing could be done—might be done?

A. Yes, sir.

George Dreessen, the father, testifies that the deceased was taken sick three days previous to his death with a swelling on the side of his neck; that the first day it was not painful, but that he was advised by the witness to remain in bed. The next day he again advised the deceased to stay in bed, which the latter did for a part of the time, but retired for the night without taking any nourishment. The next morning the witness went to the bed of the deceased, who, in response to an inquiry as to his condition, said he felt better, and soon afterward arose and dressed, and was

engaged as usual during the day attending to the fire and bringing water from the pump, but complaining of pain in his neck, and retired before supper. That evening the witness carried food to him after he had retired, but did not observe whether he ate of it or not. The witness' version of what transpired the next day is best shown by his own language: "Well, the next morning when I got up, I went into where we sleep. I waken first Christian, and I waken Mrs. Dreessen, and I waken Margaret. Then I built the fire, and after I built the fire I went to his bed, and when I came to his bed I said, 'Theodore.' He, perhaps like all the boys, you had to call him three or four times; but he made a move, and after I called him three or four times he opened his eyes and kind of stretched himself, and he turned over this way. He laid on his side, and he turned over this way. Well, I said, 'Theodore, are you awake?' Well, he didn't say anything, and, of course, I thought that because he opened his eyes and turned over, I went out into the kitchen again; and I went to make the breakfast and help Mrs. Dreessen; and Christian went out and done the outside work; and after breakfast was ready I says, 'Is Theodore up yet?' and they says, 'nobody has seen him.' Well, I went to his bed then, and he laid just the way he turned over. He laid on his side and turned over this way; and I took my hand and touched his forehead, and his forehead was cold; and I went into the house and I says, 'I believe Theodore is seriously sick,' and I says to Mrs. Dreessen and Margaret, and I and Mrs. Dreessen went up to his bed, and then I took the cover off. He was covered up then. He had three blankets to cover up with, and a big wagon sheet, twelve feet wide and sixteen feet long; then we lay him on top of these blankets, and after I had done that I felt under that. I seen that the skin of his body was cold all over. I felt down his limbs, and after that I placed this cover back, and we carried out some more heavy blankets laid in bed with him, and I

says, 'Christian, you had better eat, and saddle the pony,' and Ayers down there, I think he is kind of a doctor; 'and you had better go down to Ayers and ask him if he won't be so kind to come; Theodore was sick; he was cold where his skin was;' and he eat a bite and took the pony and went away to Ayers, and I says, 'Christian, we are running back and forth, and we keep the door open and every once in a while,' I says, 'we had better take him upstairs;' and we take the blankets hold of here by the feet, and I at the head, and we take him upstairs, and Mrs. Dreessen came up, and we laid him there in the bed, and I says, 'you had better get some warm water and jugs of hot water, and we will lay them, one at his head and one at his feet; and we will warm some blankets and wrap them around him;' and he laid there, and I staid with him part of the time, and Mrs. Dreessen warmed blankets and we kept warm blankets around him for quite a while, until we look out of the window. The boy had to come back from the southwest way, that was the way towards Ayers. I looked down and the boy didn't come back, and nobody was coming. At last I see the boy coming across lots in the valley, perhaps eighty rods away. This valley is about half a mile away. Margaret, my daughter, was upstairs with me tending the boy, and I went down stairs to meet Christian coming back from Ayers; and I says to Margaret to see to Theodore, and I went down stairs, and the boy don't come to the house; and I says, 'where is Ayers?' and he says, 'Ayers don't have time to come, but he gave me a bottle of medicine.' It was a patent medicine. I told him if Ayers couldn't come to stop at Mr. Corbett's to request Mr. and Mrs. Corbett to come over; and I says, 'what did Mr. Corbett say?' Well, the boy answered me, Mr. Corbett didn't know anything about sickness, and I says, 'you just start back as quick as possible and tell Mr. Corbett he has to come.' He started off on horseback on the run and I went back in the house, and that time I got in the house

Margaret came down stairs and says, 'papa, Theodore got blisters before his mouth,' and I run upstairs. I listened with my ears this way a little while, and his breath was gone."

Q. Who is Margaret that you speak of?

A. That is my daughter.

Q. Where had she been?

A. Upstairs with Theodore.

Q. How came she to be there?

A. I left her there.

Q. What directions did you give her?

A. To stay with Theodore there while I go down to meet Christian.

Q. And she come down running, telling you that something was wrong with his mouth?

A. Yes, sir; some blisters was running out of his mouth.

Q. What condition did you find him in?

A. He was dead.

Q. About his mouth, how was that?

A. There was some matter and blood mixed running out of his mouth; and when I got up I put my hand under his neck and cheek to rest him up.

Q. That was the night before?

A. No; that morning when he died.

Q. What time was it in the morning when he died?

A. We have no clock running at that time. I judge it must have been between 12 and 1 o'clock. It might have been 1 o'clock.

His explanation of the scar on the nose of the deceased is that two or three months previous, while the latter was assisting to clean the room in which he slept, he was struck by a hoe which fell from overhead and inflicted a wound, which had not healed. His explanation of the other scars and sores upon the body is that they were caused by disease of the skin. He admits that the deceased was scantily and sometimes insufficiently clad, but says he was unable to

better provide for him, and that, taking into consideration the services required of him, he was as well provided for as the other children. He is in the main corroborated by the plaintiff in error, and also by Margaret, the daughter to whom he refers. The last named witness, after testifying that she was with her brother when he died, proceeds:

Q. What direction did your father give you just before he did die?

A. You mean what he told me to do?

Q. Yes.

A. He told me to warm blankets and see to him.

Q. To see to him?

A. Yes, sir.

Q. Where did your father go just then?

A. He was up there too.

Q. Did he not go away from there and leave you there alone?

A. Yes; when they sent Christian to Ayres he come back.

Q. Then when Christian returned from some place, what did your father do or say?

A. He was going out to see if that man was come.

Q. What did he tell you when he started out?

A. He told me to stay by there?

Q. To do what?

A. He didn't tell me to do anything.

Q. Just to stay in the room with Theodore?

A. Yes, sir.

Q. Was Theodore living at that time?

A. Yes, sir.

Q. Now, tell those men there whether, at the time your father started down to meet your brother Christian, and left that room in which Theodore was—now you tell them whether or not Theodore was living.

A. Yes, sir.

Q. He was alive?

A. Yes, sir.

Q. How long was it until your father came back again?

A. It was about a few minutes.

Q. How many, ten or twelve?

A. No, I don't think. I guess five or six.

A. What caused him to go back?

A. I told him Theodore died.

Q. You come and told him your brother Theodore had died and he run back; is that right?

A. Yes, sir.

Q. Was you there during that day?

A. At home, I was all day.

Q. Do you remember when Theodore was brought out from the sod building and put in the bed upstairs?

A. Yes, I remember that.

Q. Now, at that time was he dead or alive?

A. He was alive.

Q. Did you see your father and mother on that day? Was you up in the room pretty nearly all the time?

A. Yes, sir.

Q. Did you see them on that day beat, kick, and hit Theodore on the head, and on the arms, and on his back and on his belly, and take him up and throw him on the floor and on the ground?

A. No.

Q. Did they do such a thing that day?

A. No.

Q. What time in the morning did they bring him up from that sod building?

A. It was before breakfast.

Q. What time was breakfast? Seven or eight o'clock?

A. I guess so.

Q. Was Theodore ever down from upstairs until after he was dead, after he had been taken up that morning? From the time that Theodore was taken up on the morning that he died, was he down stairs until after he died?

A. No.

For the purpose of impeaching this witness the state produced the sheriff, who testified that she had stated on her examination before him, while conducting an inquest as acting coroner, that she did not see the deceased upstairs the day of his death until after her father had gone away.

Mr. Marsh testifies that he dressed the body of the deceased before it was entirely cold, and afterwards assisted in placing it in the coffin; that the left side of the neck was swollen and discolored, but he did not observe that it was discolored elsewhere, nor was there anything peculiar about the neck or head. An attempt was made to impeach this witness, which was not entirely successful, in view of the fact that as to all material facts he is strongly corroborated by the state's witnesses, Corbett and Zeller.

In determining the effect of the foregoing evidence it should be borne in mind that the information contains a specific charge of murder, as it is therein alleged that death was caused by the dislocation of cervical vertebræ, or, rejecting the technical terms, by the breaking of the neck of the deceased. In the brief of the state it is said: "No testimony was offered at the trial directly bearing upon the matter of the injury to the neck. The conclusion as to that matter must be drawn from the facts and circumstances surrounding the case." And we may add that the only evidence tending to prove that death was produced by the alleged fracture is the testimony of Dr. Holsclaw. It may be admitted that his testimony is sufficient to create a strong probability of the correctness of the theory of the state; but it is certainly not of that convincing character which may be said to exclude every other hypothesis, and which is required to sustain a conviction upon purely circumstantial evidence. (See *Casey v. State*, 20 Neb., 138, and authorities cited.) Assuming that the witness discovered a dislocation of the bones of the neck, the theory that it may have been caused by the removal of the body in a wagon twenty-five miles, when so decomposed as to be dis-

colored and exceedingly offensive, is, to say the least, a reasonable one. If we reject all of the evidence for the accused, still his conclusion that the discolored condition of the neck was produced by extravasation of blood before death is insufficient to exclude the theory that it was produced by natural causes; and that theory is strongly supported by the fact that the body remained in the house of the accused three days after death, and was during that time inspected by at least three of the neighbors, who failed to note any circumstance tending to sustain the contention of the state. The claim of the accused is that the appearance of the neck of the deceased was caused by inflammation before death, which interfered with the circulation and produced the swelling and discoloration of the skin. That contention is sustained by the testimony of Corbett and Marsh, who observed the swollen condition of the neck and extending up to the cheek bone while the body was still warm, and also by Zeller, who observed the same thing after *rigor mortis* had set in. No attempt was made by the state to explain that condition by showing that it occurred after death or that it might have been caused by dislocation of the neck.

We are satisfied, after a careful examination of the entire record, that the state has failed to establish the *corpus delicti*, and that the judgment of the district court should be reversed. It must be confessed that the conclusion reached upon the reading of the record for the first time was that the verdict of manslaughter was fully justified by the evidence, on the ground that the death of the deceased boy was the proximate result of long continued neglect, deprivation, and exposure by the accused, which is barely outlined in the statement given above, and in character so unlike that of a mother as to almost challenge belief. Had the charge been manslaughter, and in the form contemplated by statute (Criminal Code, sec. 425), it is probable that the judgment might be sustained. It is apparent,

however, from a careful reading of the information, that evidence of cruelty toward the deceased was received for the purpose of proving malice only, and is therefore immaterial, except so far as it tends to establish the charge of killing by the particular means alleged. For the reason that there is a fatal variance between the proofs and the information the judgment of conviction is

REVERSED.

DIXON COUNTY V. HUGH BEARDSHEAR.

FILED NOVEMBER 21, 1893. No. 5323.

Voluntary Payment of Illegal Taxes: RECOVERY. Where one pays an illegal demand for taxes with full knowledge of the facts which render such demand illegal, without any urgent necessity therefor, such as the threatened immediate seizure or sale of his property, such payment will be deemed voluntary and cannot be recovered in an action at law.

ERROR from the district court of Dixon county. Tried below before NORRIS, J.

J. J. McCarthy, for plaintiff in error.

A. G. Kingsbury, contra.

POST, J.

The defendant in error recovered judgment against Dixon county, in the district court for said county, on the 24th day of November, 1891, for the sum of $140.18 and costs, which we are asked to reverse for reasons which will be hereafter noticed.

In the petition of the plaintiff below it is alleged that he was, on the 2d day of December, 1885, the owner of eighty

acres of land in said county, which is fully described, and had paid and satisfied all taxes previously assessed against the same; that on the day last named he learned that his said land had been sold for taxes claimed to be delinquent for previous years, and offered to redeem the same from such sale, when he was informed by the county treasurer that one forty-acre tract thereof only had been sold, whereupon he paid to said treasurer the sum of $8.77 to redeem said land from such pretended sale; that on the 4th day of January, 1886, the said treasurer, in fraud of the rights of the plaintiff, executed and delivered to one Jones a deed for all of said land, including the forty acres previously redeemed by him; that on the 24th day of August, 1886, in order to remove the cloud upon his title by reason of the aforesaid treasurer's deed, he was compelled to, and did, pay to said Jones, the grantee named therein, the sum of $67, and on the 12th day of March, 1887, he was compelled to bring an action against said Jones in the district court of the defendant county to remove said cloud from his title, in which it was found that he had fully paid all taxes for the years named in the said deed, and a decree entered in accordance with the proofs of his petition, except that he was taxed with the costs of said action, amounting to $3.35, which he has paid in full; and that in addition thereto he was compelled to pay the sum of $15 as attorney's fees. It is further alleged "that on the 29th day of December, 1891, he paid to the treasurer of said county for said defendant a personal tax for that year amounting to $1.90 when paid; that he had before that time paid the said tax to the treasurer of said county, but the treasurer thereof illegally and wrongfully claimed that said tax had not been paid and compelled him to pay the same a second time, as before said." He asks judgment for the amount of the above payments, with interest. His claim more fully appears from the following statement attached to the petition:

THE COUNTY OF DIXON,

In account with H. BEARDSHEAR, Dr.

December 2, 1885, paid county treasurer for redemption certificate	$8 77
Interest to July 12, 1889	3 17
August 24, 1886, give H. B. Dewitt, for J. W. Jones' tax title	67 00
Interest to July 12, 1889	19 39
March 12, 1887, paid docket fee, $2; March 19, sheriff's fee, 85 cents	2 85
Interest to July 12, 1889	66
April 4, 1888, paid attorney fee	15 00
Interest to July 12, 1889	1 91
December 5, 1888, paid for copy of district court decision	50
December 29, 1881, paid personal property tax that I had paid the same year	1 90
Interest to July 12, 1889	1 33
Total	$122 58

To the petition a demurrer was interposed and overruled; to which ruling the county excepted and refused to plead further, whereupon judgment was entered for the plaintiff therein for the full amount claimed. The ground of the demurrer is that the payments alleged were voluntary and made without threat of seizure or sale of the property of the defendant in error to satisfy the taxes in question. That position of the county is certainly in accord with decisions in this state. (See *Foster v. Pierce County*, 15 Neb., 48; *Welton v. Merrick County*, 16 Neb., 83; *Baker v. City of Fairbury*, 33 Neb., 674.) And we understand the rulings of this court to be in harmony with the great majority of cases in the state and federal courts. For instance, in *Union P. R. Co. v. Dodge County*, 98 U. S., 541, which involved a construction of the revenue law of this state, Chief Justice Waite observes that the law is correctly stated in the following quotations from *Wabaunsee County*

v. Walker, 8 Kan., 431: "Where a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary and cannot be recovered back; and the fact that the party at the time of making the payment files a written protest does not make the payment involuntary." (See also *Ligonier v. Ackerman*, 46 Ind., 552; *Morris v. Mayor*, 5 Gill [Md.], 244; *Goddard v. Seymour*, 30 Conn., 394; *Garrigan v. Knight*, 47 Ia., 525; *Powell v. St. Croix County*, 46 Wis., 210.) The money sued for having been voluntarily paid, within the meaning of the authorities cited, it follows that it cannot be recovered from the county, and that the judgment of the district court should be

REVERSED.

JOHN P. WAGNER V. WILLIAM STEFFIN ET AL.

FILED NOVEMBER 21, 1893. NO. 5039.

1. **Sale:** LIEN OF UNRECORDED CHATTEL MORTGAGE: NOTICE. One who purchases personal property with knowledge of a prior, unrecorded mortgage thereon, takes subject to the lien created by such mortgage.
2. **Evidence** examined, and *held* to sustain the finding that the plaintiff, who claims under a bill of sale of personal property, had actual notice of a prior, unrecorded mortgage thereon.

ERROR from the district court of Gage county. Tried below before APPELGET, J.

Griggs, Rinaker & Bibb, for plaintiff in error.

George A. Murphy, contra.

POST, J.

The controversy in this case involves the proceeds of a crop of corn raised in the year 1888 by Eckel, a tenant of one Charles Stoll, on a farm owned by the latter in Gage county. The plaintiff claims under a bill of sale executed by Eckel October 30, 1888, and filed for record November 10, following, while the defendants rely on the title of Stoll through an unrecorded written lease executed by the latter and Eckel May 15, 1888, in which it is provided that he, Stoll, shall have a lien on all crops grown on said premises to secure the stipulated rental, viz., $250, on or before December 1, 1888, with power "to enforce the same as though he had a chattel mortgage with power of sale." Subsequent to the execution of the mortgage above described Eckel gathered the corn and delivered it to the defendants, with the consent of the plaintiff. After the delivery of the corn payment therefor was demanded by both the plaintiff and Stoll. Defendants elected to pay the money to Stoll on the ground that the latter was entitled to priority by virtue of his contract with Eckel, and accordingly refused to account to the plaintiff.

The first contention of the plaintiff is that he is entitled to priority as against the unrecorded lien of Stoll without regard to the question of notice. In that view we cannot concur. Prior decisions of this court have been uniformly to the effect that the provision relied upon (sec. 14, ch. 32, Comp. Stats.) does not apply where the party seeking its protection is shown to have purchased with actual notice of a prior unrecorded mortgage. (See *Conchman v. Wright*, 8 Neb., 1; *Gillespie v. Brown*, 16 Neb., 461; *Earle v. Burch*, 21 Neb., 702; *Railsback v. Patton*, 34 Neb., 490.) As said in *Gillespie v. Brown*, the provision for the filing of a chattel mortgage was designed to give notice to the world of the liens thus created, together with the amount, terms, and conditions thereof, and not for the protection of

purchasers who took with actual notice of all that the record would impart.

The only other question is the sufficiency of the evidence to show actual notice by plaintiff of Stoll's lien. There is a sharp conflict in the proof on that point. The agent for Mr. Stoll testifies positively that he personally notified plaintiff of the prior lien on the corn, while the latter as positively denies the notice. That issue was fairly submitted to the jury, and its finding is conclusive upon us. The judgment of the district court is

AFFIRMED.

EMIL SCHRIDER V. WILLIAM TIGHE, SHERIFF.

FILED NOVEMBER 21, 1893. NO. 5299.

Fraudulent Conveyances: CHATTEL MORTGAGES: QUESTION FOR JURY. The sole question presented in this case is, whether or not, as against existing creditors, a chattel mortgage made by a judgment defendant to plaintiff in error was fraudulent. The verdict of the jury, supported by competent evidence, is conclusive of that question as one of fact.

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

The opinion contains a statement of the case.

H. D. Travis, for plaintiff in error:

Though a chattel mortgage, absolute in form and given for a definite sum as being due from the mortgagor, was in fact given only to indemnify the mortgagee against liability as joint maker with the mortgagor on certain notes, yet this would not invalidate the mortgage, if in fact a *bona fide*

liability existed upon such notes. (*Warren v. His Creditors*, 28 Pac. Rep. [Wash.], 257.)

The evidence of fraud given upon the trial cannot be taken to affect or impair the title of the grantee, Schrider. (*Sloan v. Coburn*, 26 Neb., 609; *Williams v. Eikenberry*, 25 Neb., 721.)

A pre-existing debt already due is a good consideration for a chattel mortgage, and protects the mortgagee to the same extent as a new consideration. (*Turner v. Killian*, 12 Neb., 580.)

There is no presumption in this case that there was no consideration for the mortgage. (*Forbes v. McCoy*, 15 Neb., 632; *Grimes v. Sherman*, 25 Neb., 843.)

John A. Davies, contra:

Fraud in such cases is a question of fact for the jury, and its verdict will not be disturbed unless clearly wrong. (Sec. 1802, Con. Stats.; *Sycamore Marsh Harvester Co. v. Grundrad*, 16 Neb., 537, and cases cited.)

RYAN, C.

All essential facts and the sole question involved in this case are stated in the brief of plaintiff in error in the following language: "This is an action in replevin brought by Emil Schrider to obtain the possession of a quantity of ice, upon which he held a subsisting mortgage at the time the property was replevied, which mortgage was dated the 16th day of May, 1891, and filed in the county clerk's office on the 20th day of May, 1891. This mortgage was given by Charles F. Grothe and Etta S. Grothe to secure two notes to the First National Bank of Weeping Water; one for $225, another for $250; the one payable June 26, 1891, and the other payable July 24, 1891, and to secure the sum of $15 due said Schrider from the Grothes. Mr. Schrider had signed the aforesaid notes as surety to the bank, and at the time of the trial of this case in the dis-

trict court had paid both of these notes. The jury found in favor of the sheriff, the defendant, but found the value of the property to be only $100, thus finding that the mortgage was void. There is only one proposition in this case, that is, was the mortgage executed by Etta S. Grothe and Charles F. Grothe on the 16th day of May, 1891, covering the ice in question and delivered to Emil Schrider, a valid mortgage?" Consistently with the above statement, no question, other than as stated, is urged in this court by the plaintiff in error.

Section 20, chapter 32, Compiled Statutes, provides that "the question of fraudulent intent in all cases arising under the provisions of this chapter shall be deemed a question of fact, and not of law," etc. The existence of facts showing a fraudulent intent in respect of conveyances alleged to be fraudulent must be determined by the jury. (*Fitzgerald v. Meyer*, 25 Neb., 77; *Connelly v. Edgerton*, 22 Neb., 82; *Davis v. Scott*, 22 Neb., 154; *Sonnenschein v. Bartels*, 37 Neb., 592, filed this term.) The verdict of the jury in this case, therefore, settles as a fact the only controversy in respect of which argument has been made; and the evidence, upon examination, being found ample to justify such verdict, the judgment of the district court is

AFFIRMED.

HIRAM A. WATERMAN ET AL., APPELLEES, V. HARRY B. STOUT, IMPLEADED WITH GEORGE W. HOLDREGE ET AL., APPELLANTS.

FILED NOVEMBER 21, 1893. No. 5216.

1. **Mechanics' Liens:** CONTRACT BY TENANT FOR LABOR AND MATERIAL. The mechanic's lien law requires that a contract for material, labor, etc., for the improvement of real property,

shall be made with the owner thereof or his agent. A tenant, as such, has no power to contract for labor or material so as to affect with a mechanic's lien the real property leased to him.

2. ———: TITLE TO PROPERTY: NOTICE. A person furnishing material for an improvement on real estate must take notice of the interest and title in the premises of the person with whom he contracted as shown by the public record, as his lien for labor and material, aside from the improvement itself, attaches only to such interest. *Henry & Coatsworth Co. v. Fisherdick, Admr.*, 37 Neb., 207.)

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

The facts are stated in the opinion.

Beeson & Root, for appellants:

It is not claimed the owner of the fee ever authorized the building of the structures, or even knew they were constructed. No lien, therefore, attached. (Sec. 1, ch. 54, Comp. Stats.; *Stevens v. Lincoln*, 114 Mass., 478.)

The lien could not attach to a greater interest than the lessee had in the premises. (*Breed v. Nagle*, 46 Ga., 112; *Harman v. Allen*, 11 Ga., 45; *Ombony v. Jones*, 19 N. Y., 234; *Knapp v. Brown*, 45 N. Y., 207.)

There being no privity of contract between the landlord and his tenant, no agency between them claimed or proved, and nothing pleaded or proved to create an estoppel, any lien plaintiffs might have would expire as against the premises or any fixtures thereon with the expiration of the tenant's term. The tenant could not, after the expiration of his tenancy, have removed any out-buildings from the premises, and plaintiffs would be in no better position than the tenant with whom alone they made a contract, and against whom they claim judgment. (*Bradford v. Higgins*, 31 Neb., 192; *Friedlander v. Ryder*, 30 Neb., 783.)

J. H. Haldeman, contra.

RYAN, C.

On January 30, 1889, H. A. Waterman & Son filed in the district court of Cass county, Nebraska, their petition, in which they made the following allegations:

"1. The plaintiffs complain and allege that on or about the 1st day of November, 1887, the plaintiffs entered into an oral contract with the defendant Harry B. Stout to furnish him lumber of different kinds and boards, lime and building materials, which lumber and materials are fully described in the schedule hereto attached, marked Exhibit 'A,' and is made a part hereof, for the erection of a granary and stable and out-buildings on the west half, southeast quarter of section thirteen (13), township twelve (12), range eleven (11), in Cass county, Nebraska.

"2. In pursuance of said contract the plaintiff furnished said lumber and materials described herein for the erection of said buildings above and herein described on or between the said 1st day of November and the 1st day of December, 1887, for the total sum of $168.28.

"3. The defendant, at the time the plaintiffs furnished said lumber and material, was in possession and occupying said lands and tenements above described, and had some interest and right of possession by lease or otherwise, by, from, and through his co-defendant William H. B. Stout, who was then the owner in fee-simple of said premises.

"4. On the 23d day of February, 1888, and within four months from the time of furnishing said material, the plaintiffs made an account in writing of the items of said materials furnished the defendant under said contract, and after making oath thereto as required by law, filed the same in the clerk's office of Cass county, and thereby claimed and have a mechanic's lien therefor upon said lands and appurtenances and improvements thereon to secure the debt by said contract made.

"5. The sum of $168.28 with interest from the 30th

day of November, 1887, now remains due and unpaid on said account. * * *

"7. That there appears of record in the office of the register of deeds of the county of Cass and state of Nebraska, a deed dated the 27th day of December, 1888, purporting to sell and convey said real estate to R. C. Cushing, George W. Holdrege, and L. H. Tower, which deed appears to have been signed and acknowledged by said defendant William H. B. Stout and Laura A. Stout, his wife."

In the ninth paragraph of their petition the plaintiffs alleged that R. C. Cushing, George W. Holdrege, and L. H. Tower, if they did purchase said premises from their co-defendant Stout, held the same subject to the rights, equities, and lien of the plaintiffs herein. The prayer of the petition was for judgment against the defendants for the sum of $168.28, with interest from November 30, 1887, and that said premises might be sold to pay and satisfy the lien and debt due plaintiffs; and that if the same should not be sold as upon execution, or if the title should be defective, then that said premises be leased as provided by law, and the proceeds of the rent applied to the payment of plaintiffs' lien; that Harry B. Stout be adjudged to have had, when the debt was contracted and the contract made to furnish the material, an equitable right, title, and interest in and to the lands; that said R. C. Cushing, George W. Holdrege, and L. H. Tower be adjudged to have no title or interest in said lands superior to the plaintiffs. Following this there was a general prayer for equitable relief.

To this petition there was filed on March 11, 1889, the demurrer of William H. B. Stout on the following grounds, as therein stated: "Comes now the defendant William H. B. Stout, separately for himself only, and demurs to the petition filed by the plaintiffs herein, for the reason that said petition does not on its face state facts sufficient to consti-

tute a cause of action against this defendant and in favor of plaintiffs." This demurrer was sustained, and thereupon, as to William H. B. Stout, the plaintiffs dismissed their action.

In due time Harry B. Stout answered, denying the alleged sale and the furnishing of the material to him, as well as the alleged contract with him in respect thereof. He also denied the alleged filing of the claim for a lien, as well as the existence of the balance due from him to the plaintiffs. R. C. Cushing, George W. Holdrege, and L. H. Tower by their answer, in effect, denied each averment of the petition above recited, and alleged that plaintiffs never at any time filed a mechanic's lien upon the land in question, and averred that these last named answering defendants purchased said land without any notice of any mechanic's lien upon said premises, for a good and valuable consideration, long before the commencement of the suit. This answer ended with a prayer that the cause be dismissed, and that the therein answering defendants might have proper equitable relief. The averments of new matter in the several answers were denied by reply of plaintiffs.

On the trial there was offered in evidence the sworn statement for a mechanic's lien, the indorsement upon which showed it to have been filed February 23, 1888. This, as well as the itemized statement of account by which it was accompanied, showed the material therein described to have been furnished defendant Harry B. Stout; and the lien claimed in respect of the land described in the petition was also as against Harry B. Stout. The material, as shown by the statement of account filed for the purpose of obtaining a lien, was furnished in the month of November, 1887. There was oral evidence that H. B. Stout had admitted after the commencement of the action that the aforesaid account was all right and had promised to pay it. There was then offered in evidence the following stipulation, the title being omitted: "The defendants George W.

Holdrege, R. C. Cushing, and L. H. Tower admit that their co-defendant, Harry B. Stout, purchased the material of plaintiffs as set out in their petition, and for the purpose therein stated; that there is due from their co-defendant, Harry B. Stout, to the plaintiffs the sum of $168.28, with interest thereon from the 30th day of November, 1887; that at the time said indebtedness was contracted with the said Harry B. Stout, he was occupying the premises described in the above entitled cause as the tenant of William H. B. Stout, who at that time, and during said occupancy by said Harry B. Stout, was the owner in fee of said premises; and that said William H. B. Stout was the owner of said premises from the 1st day of November, 1887, until the month of December, 1888. The defendant Harry B. Stout admits that he purchased the materials set out in plaintiffs' petition as therein alleged and for the purposes therein stated, and that the amount claimed in plaintiffs' petition against him is correct and a just debt by him owing to said plaintiffs, and that the same is wholly unpaid." This stipulation was signed by the parties defendant therein named. Following this there was introduced this stipulation: "The plaintiffs admit that the defendants R. C. Cushing, George W. Holdrege, and L. H. Tower are *bona fide* purchasers, for a valuable consideration, of the premises described in the petition of plaintiffs; that they purchased the same in December, 1888, and that they purchased the same without any actual notice of the mechanic's lien claimed on said premises by plaintiffs other than such constructive notice as the records of the register of deeds of Cass county would impart to them." This stipulation was signed by the plaintiffs by their attorney. There was no other evidence offered than that above described.

The petition alleged that the material furnished for making the improvements on the premises therein described was furnished pursuant to an oral contract with Harry B. Stout, who, as the petition alleged, was, at the time the material

was furnished, in possession of and occupying said lands and tenements, and had some interest and right of possession as to the same by virtue of a lease or otherwise by, from, or through William H. B. Stout, who was the owner in fee of said premises.

Section 1, chapter 54, Compiled Statutes, requires that a contract for material, to entitle to a lien, shall be made with the owner of the land whereon the improvement is to be made, or with his agent. It in no way countenances the right to base a lien upon a contract with a tenant, though he may be in possession of the premises. To allow a mere tenant to incumber land for its improvement would be extremely dangerous to the rights of the landlord, and in case of a long-time lease, would place it within the power of the tenant to make his holding extremely valuable. A party who furnishes material or labor for improvements to be made upon real property can only have a lien declared effective as against such interest in the property improved as the person purchasing the material is vested with. (*Henry & Coatsworth Co. v. Fisherdick, Admr.*, 37 Neb., 207.) While the stipulation afforded evidence that the material was furnished to Harry B. Stout for the purposes stated in the petition, there is no evidence whatever that any erection or improvement was ever made therewith upon the real property of William H. B. Stout, of which Harry B. Stout was in possession. There was no warrant, therefore, neither in the averments of the petition, nor the proofs adduced, for enforcing a lien against the real property described in said petition as against the owner or his grantees. In so far as there was a personal judgment against Harry B. Stout, the decree was supported by the evidence, and will not be disturbed, but in other respects the judgment of the district court is reversed, and in this court a decree will accordingly be entered.

DECREE ACCORDINGLY.

DAVID R. BUSH ET AL. v. BANK OF COMMERCE.

FILED NOVEMBER 21, 1893. No. 5175.

1. **An amendment of an answer** to meet the proofs was properly refused when such amendment, taken in connection with the other averments of the answer, even if clearly proved, constituted no defense.
2. **Motion for New Trial:** PREJUDICE OF JUDGE: EVIDENCE. Where a motion for a new trial was predicated upon the alleged prejudice of the judge to whom a trial of the cause had been had, it was not error to overrule said motion when there was no proof to support its allegations.
3. **Trial in County Court:** WITHHOLDING JUDGMENT: HARMLESS ERROR: REVIEW. After introduction of the evidence, the case was taken under advisement for four days by the county judge to whom it had been tried, and on the fourth day the defendants appeared and moved for leave to amend their answer to conform to the proofs; and it appearing that the note upon which the suit had been brought could not be found, the parties stipulated that a copy should be used in evidence. *Held*, That even if it was error to withhold judgment for four days, the above facts show that the case was not finally submitted for judgment until the fourth day, being that upon which judgment was rendered.

ERROR from the district court of Johnson county. Tried below before BROADY, J.

The opinion contains a statement of the case.

A. M. Appelget, for plaintiffs in error:

It was error to overrule the motion for leave to amend defendants' answer. (Sec. 14, ch. 32, Comp. Stats.; *Loeb v. Millner*, 21 Neb., 392.)

The county court is controlled by the same law in the entering of judgments as is a justice of the peace, and must render judgment within four days from the time of trial.

(Sec. 1002, Code; *Cox v. Tyler*, 6 Neb., 297; *State v. Smith*, 11 Neb., 239; *Vaughn v. O'Conner*, 12 Neb., 478.)

L. C. Chapman and *B. F. Perkins, contra.*

RYAN, C.

On the 7th day of December, 1889, Ross & Bush executed and delivered to the Bank of Commerce, of Hemingford, Nebraska, their promissory note for $1,596.41, payable January 7, 1890. To secure payment of this note the makers thereof made a chattel mortgage contemporaneously with the making of the note. Default was made in the payment of the note, and the mortgage was foreclosed, leaving unpaid after the sale of the mortgaged chattels a large balance, for which judgment was subsequently rendered in the sum of $858.39, on April 15, 1891, in the county court of Johnson county, Nebraska.

1. It is argued that the county court erred in refusing to permit an amendment of defendants' answer in conformity with the proofs. It is insisted that these proofs were, that the mortgage was not filed in the county wherein the mortgagors had their residence. The filing, however, was not necessary to the validity of the mortgage as between the original parties thereto; hence the proposed amendment presented no defense, even if supported by the proofs, and the court did not err in refusing to allow it to be filed. (*Horbach v. Marsh*, 37 Neb., 22.)

2. The petition of the plaintiffs in error stated the next ground of complaint in the following language: "That the court erred in overruling the motion of the defendants [plaintiffs in error] asking for a new trial on the ground of the partiality of the judge trying said cause, and undue means used in obtaining said judgment." This assignment might be disposed of upon other grounds, but it is deemed but fair to the county judge, who tried this cause, to say that this imputation of unfairness is unsupported by any

proof, even if the affidavit of S. D. Porter, found in the record, should be considered for all that it contains. The language thereby imputed to the county judge was only that if he decided in favor of the defendants the public would assume that it was for such defendants solely because one of the defendants was a county officer, and outside parties could not get justice against a county officer. The affiant, however, expressly stated that he did not understand the county judge to say that the outside opinion referred to would influence his judgment in deciding the case. Upon this sort of a showing the county judge very properly ignored the imputation of bias or prejudice. The verdict of a jury could not be impeached by such a showing as applying to one or more jurors. It was little if anything short of impertinence to make it to the judge to impeach his judgment. No matter what this affidavit disclosed, however, it cannot be considered in this court for the very sufficient reason that it was never incorporated in a bill of exceptions.

3. The last error argued is, that the county court rendered judgment four days after the case was taken under advisement. It seems, however, that on the said fourth day defendants filed a motion for leave to amend their answer, which the court passed upon, after which the record recites that "the note being mislaid, the court issued judgment on the copy pending an agreement of attorneys to stipulate. Wherefore it is by me this 15th day of April, 1891, considered and adjudged," etc. If a conjecture could safely be hazarded as to the meaning of the above language, it would be that the note being lost, the attorneys stipulated that a copy might be used as evidence, and in all probability that is what was really done. If this assumption is correct, the final submission did not actually take place until the date of the judgment. This is not a matter of great moment, however, for if there was, as plaintiffs in error claim, no valid judgment rendered on the 15th day of

April, 1891, this proceeding would of necessity be dismissed because of that fact. The judgment of the district court is

AFFIRMED.

EDWARD MORRISSEY V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

FILED NOVEMBER 21, 1893. NO. 5653.

1. **Surface Water:** EMBANKMENT FOR RAILWAY PURPOSES. Where the gravamen of plaintiff's action was the alleged negligent, improper, and careless construction of an embankment, from which resulted the overflow of plaintiff's land, it is proper to presume, in the absence of proof on the subject, that said embankment was, for railway purposes, properly constructed.
2. **A water-course** must be a stream in fact as distinguished from mere surface drainage, rendered necessary by freshets or other extraordinary causes, though the flow of water need not be constant. Following definition by MAXWELL, J., in *Pyle v. Richards*, 17 Neb., 180.
3. **Surface Water:** OBSTRUCTION BY RAILROAD EMBANKMENT: DAMAGES: LIABILITY OF COMPANY. The term "surface water" includes such as is carried off by surface drainage,—that is, drainage independently of a water-course,—and for the construction of an embankment proper for railroad purposes, which deflects such surface water from its normal course, a railroad company is not liable in damages to the proprietor of neighboring lands thereby incidentally overflowed and injured.

ERROR from the district court of Johnson county. Tried below before BROADY, J.

The opinion contains a statement of the case.

Daniel F. Osgood and *Talbot & Bryan*, for plaintiff in error:

Where waters of a stream disperse themselves over low

ground, without any well marked course, but gather up lower down into a defined channel, they are not surface water while in the dispersed state, and interference with them gives the injured party a right of action. (*O'Connell v. East Tennessee, V. & G. R. Co.*, 13 S. E. Rep. [Ga.], 489; *Macomber v. Godfrey*, 108 Mass., 219; *Gillett v. Johnson*, 30 Conn., 180; *Briscoe v. Drought*, 2 Ir. C. L., 250; *West v. Taylor*, 16 Ore., 165; *Sullens v. Chicago, R. I. & P. R. Co.*, 74 Ia., 659; *Moore v. Chicago, B. & Q. R. Co.*, 75 Ia., 263.)

A person through whose land a stream of water flows may construct embankments to prevent overflow; but in doing this must so construct them as not to throw the water upon his neighbor's lands, where it would not otherwise go. (*Wallace v. Drew*, 59 Barb. [N. Y.], 413; *Montgomery v. Locke*, 11 Pac. Rep. [Cal.], 874; *Burwell v. Hobson*, 12 Gratt. [Va.], 322; *Crawford v. Rambo*, 44 O. St., 279; *Byrne v. Minneapolis & St. L. R. Co.*, 36 N. W. Rep. [Minn.], 339; *Rau v. Minnesota V. R. Co.*, 13 Minn., 442; *Gerrish v. Clough*, 48 N. H., 9; *Carriger v. East Tennesee, V. & G. R. Co.*, 7 Lea [Tenn.], 338.)

A railroad company, in constructing an embankment which affects the flow of surface water, must provide sufficient culverts and outlets for the surface water, so that its ordinary flow will not be affected by reason of building such embankment, and the embankment must be constructed in a careful and skillful manner, and if done carelessly and negligently, and without sufficient passage-ways, the company will be liable. (*Philadelphia, W. & B. R. Co. v. Davis*, 6 Am. St. Rep. [Md.], 440; *Ohio & M. R. Co. v. Wachter*, 123 Ill., 440; *Austin & N. W. R. Co. v. Anderson*, 23 Am. St. Rep. [Tex.], 351; *Rowe v. St. Paul, M. & M. R. Co.*, 41 Minn., 384; *Emery v. Raleigh & G. R. Co.*, 102 N. Car., 209; *Chicago, B. & Q. R. Co. v. Schaffer*, 124 Ill., 112.)

The owner of a dam is liable to his neighbor for injury done to his land by overflows occasioned by the dam, not

only in ordinary stages of the water, but in times of ordinarily recurring freshets. (*Casebeer v. Mowry*, 55 Pa. St., 419; *McCoy v. Danley*, 20 Pa. St., 85; *Bristol Hydraulic Co. v. Boyer*, 67 Ind., 236.)

The superior proprietor of land inundated by a stream breaking away from its channel may turn the water back, but cannot discharge it from his own on the lands of another by any but its own channel. (*Tuthill v. Scott*, 43 Vt., 525; *Armenlaiz v. Stillman*, 67 Tex., 459; *Farris v. Dudley*, 78 Ala., 124; *Gibbs v. Williams*, 36 Am. Rep. [Kan.], 242.)

J. S. Harris, also, for plaintiff in error.

Isham Reavis, amicus curiæ, on the same points made by plaintiff in error, cited: 1 Addison, Torts, 106; *Louisville & N. R. Co. v. Hays*, 47 Am. Rep. [Tenn.], 291; *Little Rock & F. S. R. Co. v. Chapman*, 43 Am. Rep. [Ark.], 280; *Gillham v. Madison County R. Co.*, 49 Ill., 484; *Drake v. Chicago, R. I. & P. R. Co.*, 19 N. W. Rep. [Ia.], 215; *Davis v. Londgreen*, 8 Neb., 43; *Pyle v. Richards*, 17 Neb., 180; *Omaha & R. V. R. Co. v. Standen*, 22 Neb., 343.

J. A. Kilroy, T. M. Marquett, and *J. W. Deweese, contra:*

The common law is adopted by statute and declared to be law in this state. (Con. Stats., ch. 26, sec. 2088; *Wilson v. Bumstead*, 12 Neb., 4.)

The case containing the generally accepted statement of the common law rule, as to right of the proprietor to obstruct or change the direction and flow of surface waters fully sustains the view expressed by the trial judge in the instructions given to the jury in this case. (*Gannon v. Hargadon*, 92 Mass., 106.)

The contrary rule is that of the civil law. (*Martin v. Riddle*, 26 Pa. St., 415; *Kauffman v. Griesemer*, 26 Pa. St., 407.)

The confusion in the decisions of the courts on surface water questions arises almost wholly in states that have undertaken to enforce the civil law rule. The civil law in its application to surface water has been adopted in the following cases: *Nininger v. Norwood*, 72 Ala., 277; *Osburn v. Connor*, 46 Cal., 346; *Gillham v. Madison County R. Co.*, 49 Ill., 484; *Livingston v. McDonald*, 21 Ia., 160; *Lattimore v. Davis*, 14 La., 161; *Philadelphia, W. & B. R. Co. v. Davis*, 34 Am. & Eng. R. R. Cas. [Md.], 143; *Porter v. Durham*, 74 N. Car., 767; *Butler v. Peck*, 16 O. St., 334; *Tootle v. Clifton*, 22 O. St., 247; *Crawford v. Rambo*, 44 O. St., 279; *Kauffman v. Griesemer*, 26 Pa. St., 407; *Louisville & N. R. Co. v. Hays*, 11 Lea [Tenn.], 382; *Boyd v. Conklin*, 20 N. W. Rep. [Mich.], 595; *Little Rock & F. S. R. Co. v. Chapman*, 39 Ark., 463; *Gillison v. Charleston*, 16 W. Va., 284.

The instructions given by the court to the jury in this case are sustained by the well established decisions of all the states adhering to the common law rule. (*Taylor v. Fickas*, 64 Ind., 173; *Cairo & V. R. Co. v. Stevens*, 73 Ind., 281; *Shelbyville & Brandywine Turnpike Co. v. Green*, 99 Ind., 215; *Cairo & V. R. Co. v. Houry*, 77 Ind., 364; *Morrison v. Bucksport & B. R. Co.*, 67 Me., 355; *Bowlsby v. Speer*, 31 N. J. Law, 352; *Chadeayne v. Robinson*, 55 Conn., 350; *Grant v. Allen*, 41 Conn., 156; *Gannon v. Hargadon*, 10 Allen [Mass.], 106; *Sweet v. Cutts*, 50 N. H., 439; *Buffum v. Harris*, 5 R. I., 253.)

The following cases hold that surface water can be treated as a common enemy, and fought against by embankments, ditches, or other obstructions, by any land-owner or railroad company in the construction of its road, without legal damage arising in favor of any party who is injured thereby: *Morrison v. Bucksport & B. R. Co.*, 67 Me., 356; *Greely v. Maine C. R. Co.*, 53 Me., 200; *Bangor v. Lansil*, 51 Me., 521; *Murphy v. Kelley*, 68 Me., 521; *Union v. Durkes*, 38 N. J. Law, 21; *Bowlsby v. Speer*, 31

N. J. Law, 351; *Grant v. Allen*, 41 Conn., 156; *Chadeayne v. Robinson*, 55 Conn., 349; *Bates v. Smith*, 100 Mass., 181; *Turner v. Dartmouth*, 13 Allen [Mass.], 291; *Flagg v. Worcester*, 13 Gray [Mass.], 601; *Gannon v. Hargadon*, 10 Allen [Mass.], 106; *Parks v. Newburyport*, 10 Gray [Mass.], 28; *Sweet v. Cutts*, 50 N. H., 439; *Jones v. St. Louis, I. M. & S. R. Co.*, 29 Am. & Eng. R. Cas. [Mo.], 523.

In this case the railroad company did not interfere with any natural water-course. Water which once escapes from the banks of a natural channel, or a stream of water, by reason of a flood in the stream, occasioned by heavy rains or melting of snow upon the surrounding country, is surface water. (*McCormick v. Kansas City, St. J. & C. B. R. Co.*, 57 Mo., 438; *Benson v. Chicago & A. R. Co.*, 78 Mo., 504; *Abbott v. Kansas City, St. J. & C. B. R. Co.*, 83 Mo., 271; *Taylor v. Fickas*, 64 Ind., 168; *Cairo & V. R. Co. v. Stevens*, 73 Ind., 278; *Lessard v. Stram*, 62 Wis., 112; *Johnson v. Chicago, St. P., M. & O. R. Co.*, 80 Wis., 641; *Kansas City & E. R. Co. v. Riley*, 33 Kan., 374; *Jordan v. St. Paul, M. & M. R. Co.*, 42 Minn., 172; *Rowe v. St. Paul, M. & M. R. Co.*, 41 Minn., 384; *Moyer v. New York C. & H. R. R. Co.*, 88 N. Y., 351; *Bell's Exrs. v. Norfolk S. R. Co.*, 36 Am. & Eng. R. Cas. [N. Car.], 651; *Shane v. Kansas City, St. J. & C. B. R. Co.*, 5 Am. & Eng. R. Cas. [Mo.], 71.)

The railroad company was not obliged to make culverts through its embankments, but had the right to build obstructions and fight off surface water in the proper construction of a railroad track with the necessary embankments. Still it would not be permitted to collect and concentrate surface waters by reason of its embankments, and then pour them through an artificial ditch or culvert in unusual quantities upon the land of adjacent proprietors. (*Fremont, E. & M. V. R. Co. v. Marley*, 25 Neb., 147; *Pyle v. Richards*, 17 Neb., 180; *Shane v. Kansas City*,

St. J. & C. B. R. Co., 71 Mo., 237; *Cairo & V. R. Co. v. Stevens*, 73 Ind., 278; *Hoganon v. St. Paul, M. & M. R. Co.*, 17 N. W. Rep. [Minn.], 374; *Chicago & A. R. Co. v. Benson*, 20 Am. & Eng. R. Cas. [Mo.], 101; *McCormick v. Kansas City St. J. & C. B. R. Co.*, 70 Mo., 359.)

RYAN, C.

Plaintiff sued the defendant in the district court of Johnson county, Nebraska, for damages which plaintiff alleged had been caused him by the defendant's improper, negligent, and careless construction of a portion of its railroad, whereby the normal flowage of water over the land of plaintiff was greatly increased, causing the destruction, in 1888 and 1889, of crops and personal property thereon situated. Issue was duly joined and a trial resulted in a verdict for the defendant in accordance with the direct instructions of the court so to find.

The line of railroad of the defendant, running in an almost due westerly direction, crosses Yankee creek at a point about a quarter of a mile north and a little eastward of the northwest corner of the plaintiff's eighty-acre tract on which the alleged damage accrued. The Nemaha river is about one and a half or two miles north of above mentioned railroad crossing of Yankee creek, which empties its waters into said river. From the above crossing the line of railroad, continuing still in a westerly direction, touches the said creek at one of its numerous bends, from whence, pursuing the same westerly course for about one-fourth of a mile over bottom lands bordering on said creek, it reaches higher ground. There is no question made as to the necessity of putting in an embankment or other structure of the height of about eighteen feet between the point of contact of the railroad with Yankee creek and the higher ground, of which mention has just been made. An embankment was made without an opening through it, however, from which it resulted that the water which in former

freshets had been discharged over the bottom land now crossed by the embankment was arrested in its course towards the Nemaha river and diverted to Yankee creek, causing thereby an increased volume of water to seek an outlet by way of that creek and the bottom lands beyond it, including those of plaintiff. To this increased flowage of water plaintiff attributed his injuries complained of, and for those injuries sought to hold the defendant liable.

The defendant proved that along its eighteen foot fill it had dug borrow pits and caused them to connect by a ditch with Yankee creek, into which creek all the water which, but for the fill, would have flowed across defendant's right of way, was emptied into Yankee creek by way of said line of borrow pits and ditch. While the evidence showed that the ground occupied by the fill was not level, but rather that there was a slight elevation along the bank of the creek on one skirting side, and toward the bluffs on the other skirting side, yet the whole was tilled or grass land, and was in no respect the bed of a stream. No present mention is made of the elements of damage or other matters in evidence, for, as the decision of this court depends so largely upon the correctness of the district court's conception of the law applicable to such facts as have been already stated, that comment upon these matters should logically follow the instructions given the jury, which were as follows:

"1. A long time ago there was a difference in the law of surface waters between the law of continental Europe, called the civil law, and the law of England, called the common law, which difference has come down through the states of this union. The law of this state is with the common law, which is that upon the boundaries of his own land, not interfering with any natural or prescriptive water-course, the owner may erect such barriers as he may deem necessary to keep off surface water or overflowing floods coming from or across adjacent lands, and from any consequent repulsion

turning aside or heaping up these waters to the injury of other lands, he will not be responsible; but such waters as fall in rain and snow on his land, or come thereon by surface drainage from or over contiguous lands, he must keep within his boundaries or permit them to flow off without artificial interference, unless within the limits of his own land he can turn them into a natural water-course, which he has a right to do.

"2. A railroad company, by its right of way, has the same right as a farm owner has to his farm, or any other land proprietor within the law of the above instruction, as to surface water.

"3. When and after water escapes from a natural stream by reason of a flood and spreads over the low lands, it is then surface water, and continues so until it gets back into some natural stream.

"4. The jury are instructed that a water-course may exist without a perpetual or constant flow of water; but there must be a channel in the ground showing the location of the stream, and it must be a stream in fact as distinguished from mere surface drainage caused by freshets or overflows of creeks or streams of water.

"5. Under the law as above given the undisputed testimony shows that the defendant obstructed only surface water, and not any water-course, and that defendant is not liable on the case made by the evidence in this case. You will therefore find for defendant."

The petition claims damages resulting from improper, negligent, and careless construction of the railroad embankment. There was no evidence of such improper construction as is alleged, except inferentially from proof, first, that the former course of a part of the surface water was over ground subsequently occupied by defendant's embankment; second, that before the embankment was made plaintiff's land had never been overflowed; third, that since the embankment had existed plaintiff's land had been overflowed

once in 1888 and once in 1889, the embankment having been made in 1882.

Plaintiff contends that if, by proper caution, the defendant might have avoided or prevented the injury to plaintiff's premises, the want of such caution is sufficient to justify a verdict for the necessarily resulting damages. (*Rau v. Minnesota V. R. Co.*, 13 Minn., 407; *Bellinger v. New York C. R. Co.*, 23 N. Y., 42; *Radcliff's Exrs. v. Mayor of Brooklyn*, 4 N. Y., 195; *Lawrence v. Great Northern R. Co.*, 16 Q. B. [Eng.], 643; *Crawford v. Rambo*, 44 O. St., 279.) In the case of *Gillham v. Madison County R. Co.*, 49 Ill., 484, Breese, C. J., delivering the opinion of the court, said: "The case was this: Plaintiff in error was the owner of a tract of land less elevated than the land in the neighborhood, from which all the water that fell upon it from rains or otherwise, flowed onto the land of the plaintiff, and which, by means of a depression in his land, ran off his land to adjoining land and thence into a natural lake. The defendant, the railroad company, made a large embankment on the line of plaintiff's land, entirely filling up this channel, thereby throwing the water back on plaintiff's land. Negligence in so doing, without leaving an opening in the embankment for the water to flow on and escape, was alleged in the declaration. A demurrer was sustained to the declaration." For error in sustaining such demurrer the judgment was reversed. These citations seem to establish quite satisfactorily the proposition that the defendant is liable for whatever damage results from a failure on its part to exercise proper care in the construction of its embankment. There was no evidence as to whether or not the embankment was the safest means by which the railroad company could have crossed that part of the bottom land over which its embankment was made, having reference solely to the construction and operation of its line of railroad. In the absence of any proof on that subject it is, perhaps, not going too far to assume that the railroad com-

pany, in so far as concerns its safety and efficiency in the operation of its line of railroad, adopted the most approved course in constructing this embankment. As to its liability for injury which that course is alleged to have caused, the question in this case arises. Before the action was begun the statute of limitations had barred any right to recovery which plaintiff might have had for injuries directly resulting from the proper construction of the defendant's embankment. This eliminates that class of questions from our consideration. (See *Carriger v. East Tennessee V. & G. R. Co.*, 7 Lea [Tenn.], 388; *Omaha & R. V. R. Co. v. Moschel*, 38 Neb., 281.)

The questions left for our inquiry are: First, was the water which was diverted by the embankment mere surface water as assumed in the third, fourth, and fifth instructions of the court above quoted? And, second, had the railroad company the right, if required by the proper construction and operation of its road, to divert such water into Yankee creek without liability for the consequent increase in flowage on plaintiff's land across said creek?

1. Under the first of these propositions let us consider the cases cited by plaintiff.

In *Crawford v. Rambo*, 44 O. St., on page 282, the court said: "It is difficult to see upon what principle the flood waters of a river can be likened to surface water. When it is said that a river is out of its banks no more is implied than that its volume then exceeds what it ordinarily is. Whether high or low, the entire volume at any one time constitutes the water of the river at such time, and the land over which its current flows must be regarded as its channel, so that when swollen by rains and melting snows it extends and flows over the bottoms along its course, that is its flood channel, as when by droughts it is reduced to its minimum, that is its low water channel. Surface water is that which is diffused over the surface of the ground, derived from falling rains or melting snows, and continues to

be such until it reaches some well defined channel in which it is accustomed to and does flow with other waters, whether derived from the surface or springs, and it then becomes the running water of a stream, and ceases to be surface water."

In *Byrne v. Minneapolis & St. L. R. Co.*, 38 Minn., on page 214, Dickinson, J., delivering the opinion of the court, said: "When in times of ordinary high water the stream extending beyond its banks, is accustomed to flow down over the adjacent low lands in a broader but still definable stream, it has still the character of a water-course, and the law relating to water-courses is applicable rather than that relating to mere surface water. (*Crawford v. Rambo*, 44 O. St., 279.)"

O'Connell v. East Tennessee V. & G. R. Co., on page 449 of American Railroad and Corporation Reports, annotated, vol. 4, seems quite strongly to countenance plaintiff's contention. Lumpkin, J., delivering the opinion of the supreme court of Georgia in this case, uses the following language: "Thus it is material to consider whether the overflow as above stated is properly classed with surface water. This depends upon the configuration of the country and the relative position of the water after it has gone beyond the usual channel. If the flood water becomes severed from the main current or leaves the stream never to return, and spreads out over the lower ground, it has become surface water; but if it forms a continuous body, with the water flowing in the ordinary channel, or if it departs from such channel *animo revertendi*, presently to return, as by the recession of the waters, it is to be regarded as still a part of the river. The identity of a river does not depend upon the volume of water which may happen to flow down its course at any particular season. The authorities hold that a stream may be wholly dry at times without losing the character of a water-course. So, on the other hand, it may have a 'flood channel,' to retain the surplus waters until they can be discharged by the

natural flow. The low places on a river act as natural safety valves in times of freshet; and the defendant claims the right to stop up one of these without liability for ensuing damage." The last sentence quoted comprehensively states the subject of contention in that case. Throughout its entire discussion the distinction above stated is observed and enforced by the citation of numerous adjudications. It was not argued that the same result would follow if the water should be properly classified as mere surface water that would follow under the circumstances above indicated. The opinion is quite lengthy, and very ably considered. It is introduced with the following statement of the propositions under consideration: "The precise question in this case is, whether the owner of land on the bank of a river can, without liability, erect on his own land an embankment which increases the overflow in times of flood upon the lands of the opposite proprietor to the injury thereof; or is there any duty for each owner to receive upon his land the share allotted it by nature of the flood waters of the river? It is contended by defendant's counsel that the overflow from a river in time of flood or freshet is surface water, against which, by the common law, a man might protect himself, without regard to the consequences to his neighbor. Many cases cited by him make a distinction between the common law and the civil law as to surface water, the former allowing the land-owner to dispose of it in any way, the latter restraining him from so using it as to injure his neighbor's tenement. There is authority to show that there is no difference between the common and the civil law in this respect, but that the common follows the civil law. (*Gillham v. Madison County R. Co.*, 49 Ill., 484; *Gormley v. Sanford*, 52 Ill., 158, and the able opinion in *Boyd v. Conklin*, 54 Mich., 583.)"

From the line of argument pursued in the above cases cited by plaintiff, it would seem that the mooted question is not so much as to the principles properly applicable to

surface water as to the difficulty of defining what is surface water. The defendant has cited several cases which we will now consider, for it is believed that from them it will also appear that the difficulty is not so much as to the law applicable to surface water as in defining that term.

In *Morrison v. Bucksport & B. R. Co.*, 67 Me., on page 356, occurs the following language: "But there must be a boundary to this proprietary right somewhere. Therefore it is that the principle is limited to the control of surface water and cannot be extended to a water-course or brook. A water-course cannot be stopped up or diverted to the injury of other proprietors. There is a public or natural easement in such a stream belonging to all persons whose lands are benefited by it. The two things, surface water and water-course, however, are not to be confounded. To constitute a water-course it must appear that the water usually flows in a particular direction and by a regular channel, having a bed with banks and sides and (usually) discharging itself into some other body or stream of water. It may sometimes be dry. It need not flow continuously, but it must have a well defined and substantial existence. It is contended in some cases that there may be an exception to this description of a water-course in the case of gorges or narrow passages in hills or mountainous regions; but there is a broad distinction between a stream or a brook constituting a water-course, and occasional and temporary outbursts of water occasioned by unusual rains or the melting of snows flowing over the entire face of the tract of land and filling up low and marshy places and running over adjoining lands and into hollows and ravines which are in ordinary seasons destitute of water and dry. (*Luther v. Winnisimmet Co.*, 9 Cush. [Mass.], 171; *Ashley v. Wolcott*, 11 Cush. [Mass.], 192–195; *Hoyt v. City of Hudson*, 27 Wis., 656; *Bowlsby v. Speer*, 31 N. J. Law, 351; Angell, Water Courses, sec. 1, *et seq.*; Wash., Easements, c. 3, sec. 1, *et passim.*)"

In *Taylor, Admr., v. Fickas*, 64 Ind., on page 172, is the following discussion of this subject: "The property in water that passes along and through a water-course which has a bed, channel, and banks, where it usually flows, is a mere usufruct interest, continuing only while the water is passing over the lands of the owner. He has the right to receive it where the water-course, in its natural channel, enters his land and to use it while it is passing over his lands, but he is required to return it to its channel when it leaves his land. (2 Bouvier, Law Dic., p. 66; Angell, Water Courses, secs. 94, 135.) The property in the lost water that percolates the soil below the surface of the earth in hidden recesses without known channel or course, and property in the wild water that lies upon the surface of the earth or temporarily flows over it as the natural or artificial elevations or depressions may guide or invite it, but without a channel, and which may be caused by the falling of rain or the melting of snow and ice, or the rising of contiguous streams or rivers, fall within the maxim that a man's land extends to the center of the earth below the surface and to the skies above, and are absolute in the owner of the lands as being a part of the land itself."

A water-course is thus authoritatively considered and defined by MAXWELL, J., in *Pyle v. Richards*, 17 Neb., 180: "The testimony tends to show the following facts: That the lands of the plaintiff and defendant are south of the Nemaha river, in Richardson county, and that the Atchison & Nebraska railway runs nearly on the line between their respective tracts of land; that the plaintiff's land is south of and higher than that of the defendant; that one or more ravines extend some distance above the plaintiff's land, in which are certain springs, from which during a great portion of the year flows a small stream. As stated by one witness, 'in very dry weather once in a while it went dry or partially so. Down at the road it sinks a great deal of the time. In wet weather it runs all of the time.' The

natural course of the stream is northeast through the plaintiff's land. The plaintiff built a dam across this water-course and made a new channel for the stream running north, so that its waters were discharged against the railroad, thence through what is designated in the testimony as the west culvert on the lands of the defendant. The testimony also tends to show that a large amount of surface water from melting snows or heavy rains also flows through said water-course. To constitute a water-course the size of the stream is immaterial. It must be a stream in fact as distinguished from mere surface drainage occasioned by freshets or other extraordinary causes, but the flow of water need not be constant. (*Shields v. Arndt*, 3 Green Ch. [N. J.], 234; *Gillette v. Johnson*, 30 Conn., 180; *Bassett v. Mfg. Co.*, 43 N. H., 569; *Dudden v. Guardians*, 38 Eng. Law & Eq., 526.) In *Shields v. Arndt* it is said: 'There must be water as well as land, and it must be a stream usually flowing in a particular direction. It need not flow continually, as many streams in this country are at times dry.' When water has a definite source, as a spring, and takes a defined channel, it is a water-course, and no person through whose land it flows has a right to divert it from its natural channel so as to cause injury to another land-owner by the diversion."

The evidence in the case under consideration fails to show that the water complained of was a part of Yankee creek before crossing the right of way now occupied by the defendant's embankment, though there is evidence from which it might be inferred. It seems, too, that it was ultimately discharged into the Nemaha river independently of Yankee creek. It therefore seems not to have had an outlet by a water-course within the definition given by MAXWELL, J., in *Pyle v. Richardson, supra.* It does not satisfactorily appear from the evidence that it was a part of the flood water of Yankee creek; neither is it shown that but for the railroad embankment it would have sought an

outlet by way of that creek. This water, therefore, under any of the definitions above given, was but surface water, and any interference therewith must be governed by the law applicable to water of that description.

2. As the distinction between the civil and common law referred to in the instructions of the court is rather curious than necessary, it will not be analyzed or historically considered. The law of surface water had not received the attention of the courts of this country at the time some of the decisions cited were made, which has since been devoted to that subject. It is therefore more profitable to consider rather what is now the recognized law of the country than what was the common law as enunciated by the courts of England.

The first instruction given by the court stated the law as follows: "That upon the boundaries of his own land not interfering with any natural or prescriptive water-course the owner may erect such barriers as he may deem necessary to keep off surface water or overflowing floods coming from or across the adjacent lands, and for any consequent repulsion, turning aside, or heaping up of these waters to the injury of other lands he will not be responsible; but such waters as fall in rain and snow upon his land, or come thereon by surface drainage from or over contiguous lands, he must keep within his boundaries, or permit them to flow off without artificial interference, unless within the limits of his own land he can turn them into a natural water-course, which he has the right to do." In the latter part of this instruction it is barely possible that the court may have erred as against the defendant, in holding that it was the affirmative duty of the proprietor to keep within his boundary, or permit to flow off without interference, such waters as fall in rain or snow on his land or come there by surface drainage, unless within the limits of his own land he can turn them into a natural water-course. It is unnecessary to determine this question,

though it may not be amiss to remark that we know of no law which would require a proprietor to keep within his boundaries water of the description last referred to in this instruction. In no event would he be required to do more than permit the water to take its natural course. He would not be compellable to take affirmative action that it might be prevented from flowing over the lands of some other proprietor. But this part of the instruction is not material in this inquiry. Whether or not the statement of the law outside of that just criticised is correct, is the question with which we have now to deal. Out of the abundance of caution it is perhaps safe to premise that there has been held a clear distinction between the rights of a riparian owner as to the flow of a stream, and rights as to mere surface water; and furthermore, that it has been held that the rights of lot-owners in cities are not regulated by the same rules as obtain in respect of the subject-matter under consideration. The rights and liabilities of urban proprietors as affected by the flow of water in any way, as well as the rights of meddlers with the flow of water within watercourses, are, therefore, expressly excluded from consideration—still more from adjudication—in this case.

In *Gannon v. Hargadon*, 10 Allen [Mass.], 106, the court said: "The obstruction of surface water or an alteration in the flow of it affords no cause of action in behalf of a person who may suffer loss or detriment therefrom, against one who does no act inconsistent with the due exercise of dominion over his own soil. * * * A party may improve any portion of his land, although he may thereby cause the surface water flowing thereon, whencesoever it may come, to pass off in a different direction and in larger quantities than previously. If such act causes damages to adjacent land, it is *damnum absque injuria.*"

The following language was used in *Chadeayne v. Robinson*, 55 Conn., on page 350: "The general common law rule in reference to surface water is that stated in Gould on

Waters, section 267, as follows: 'The right of the owner of land to occupy and improve it in such manner and for such purposes as he may see fit, either by changing the surface or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated with reference to that of adjoining owners that an alteration in the mode of its improvement or occupation in any portion of it will cause water which may accumulate thereon by rains and snows falling on its surface, or flowing onto it over the surface of adjacent lots, either to stand in unusual quantities on other adjacent lands, or pass into and over the same in greater quantities or in other directions than they were accustomed to flow.'"

In *Cairo & V. R. Co. v. Stevens*, 73 Ind., on page 281, this language occurs: "Dillon in his work on Municipal Corporations, speaking of the surface water, says: 'This the law very largely regards (as Lord Tenterden phrases it) as a common enemy which every proprietor may fight or get rid of as best he may. * * * On the one hand, the owner of the property may take such measures as he deems expedient to keep the surface water off from him or turn it away from his premises onto the street; and on the other hand, the municipal authorities may exercise their powers in respect to the graduation, improvement, and repair of streets without being liable for the consequential damages caused by surface water to adjacent property.'"

In *Morrison v. Bucksport & B. R. Co.*, 67 Me., on page 355 *et seq.*, the following language occurs: "It is a fundamental maxim of the law that a man may use his own land for lawful purposes as he pleases. He may make erections or excavations thereon to any extent whatever. Within his own limits he can control not only the face of the earth, but everything under it and over it. Thereby the estate of another man may be injuriously affected, much loss and hardship even might grow out of it, but it is not a legal injury and there is no legal remedy for it. Such results are

necessarily incident to the ownership of land. * * * Among other results from the application of this principle, it is well established that any proprietor of land may control the flow of mere surface water over his own premises according to his own wants and interests without obligation to any proprietor either above or below. There may not be an entire coincidence of view in the cases in this country as to the extent of the right of the upper proprietor in this respect, but in all the cases the principle is admitted. He may prevent surface water from coming upon his land according to its accustomed flow, whether flowing thereon from the highway or any adjoining land. (*Bangor v. Lansil*, 51 Me., 521.) He may prevent its passing from his land in its natural flow. (*Gannon v. Hargadon*, 10 Allen [Mass.], 106.) It was said in *Rawstron v. Taylor*, 11 Exch. [Eng.], 369, that one party cannot insist upon another maintaining his field as a mere water-table for the other's benefit. He may erect structures upon his own land as high as he pleases, without regard to its effect upon surface water, no matter how much others are disturbed by it. (*Flagg v. Worcester*, 13 Gray [Mass.], 601; *Bates v. Smith*, 100 Mass., 181, 182.) And he may dig ever so deep upon his own land for proper purposes, although he thereby deprives his neighbor of the sources of water. (*Chase v. Silverstone*, 62 Me., 175.) If all this were not so, men could not reconstruct and utilize their landed estates without infinite trouble and suits. But there must be a boundary to this proprietary right somewhere. Therefore, it is that the principle is limited to the control of surface water and cannot be extended to a water-course or brook."

In *Bowlsby v. Speer*, 31 N. J. Law, 351, is the following language: "The owner of land may at his pleasure withhold the water falling on his property from passing in its natural course onto that of his neighbor, and in the same manner may prevent the water falling on the land of the latter from coming onto his own. In a word, neither the

right to discharge nor to receive the surface water can have any legal existence except from a grant, express or implied. The wisdom of this doctrine will be apparent to all minds upon very little reflection. If the right to run in its natural channels was annexed to surface water as a legal incident, the difficulties would be infinite indeed. Unless the land should be left idle, it would be impossible to enforce the right in its rigor; for it is obvious every house that is built and every furrow that is made in the field is a disturbance of such right. If such a doctrine prevailed every acclivity would be and remain a water-shed, and most low ground become reservoirs. It is certain that any other doctrine but that which the law has adopted would be altogether impracticable. This subject, until a comparatively recent date, does not appear to have received the attention of the courts. No ancient authority can, therefore, be produced, but the topic has of late been discussed both by the barons of the exchequer and by the courts of Massachusetts, and the doctrine placed upon a footing which, as it seems to me, should receive the assent of all persons. Upon an examination of these cases it will be found that the conclusion is reached that no right of any kind can be claimed in the mere flow of surface water, and that neither its retention, diversion, repulsion, or altered transmission is an actionable injury, even though damage ensues."

The supreme court of Kansas in *Chicago, K. & N. R. Co. v. Steck*, 33 Pac. Rep., on page 602, employed the following language: "It is well settled that as a general rule the doctrine of the common law with respect to the obstruction and flow of surface water prevails in Kansas. (*Kansas City & E. R. Co. v. Riley*, 33 Kan., 374, 6 Pac. Rep., 581.) Under that doctrine an adjoining owner may not without liability obstruct the flow of water through a natural water-course; but to constitute such a water-course 'there must be a channel, a bed to the stream, and not merely low land or a depression in the prairie

over which water flows. It matters not what the width or depth may be. A water-course implies a distinct channel; a way cut and kept open by running water; a passage whose appearance, different from that of the adjacent land, discloses to every eye on a mere casual glance the bed of a constant or frequent stream.' (*Gibbs v. Williams*, 25 Kan., 214.) It has also been held that the mere 'fact that the owner of one tract of land raises an embankment upon it which prevents the surface waters falling and running upon the land of an adjoining owner from running off said land, and causes it to accumulate thereon to its damage, gives to the latter no cause of action against the former.'"

In *Kansas City & E. R. Co. v. Riley*, 20 Am. & Eng. R. R. Cases, 116, a Kansas case, it was held that a railroad company was not liable in damages for obstructing the flow of surface water from its natural course by the construction of an embankment when there was no channel or water-course containing living or running water obstructed.

In *Brown v. Winona & S. W. R. Co.*, 55 N. W. Rep., 123, the supreme court of Minnesota, having first excused the mistake in his understanding of the law, made by the trial judge, resulting from the loose, inartistic statements as to the subject under discussion formerly employed by that appellate court, thus stated its views: "For the sake of precision we will restate the question: When an owner improves his land for the purpose for which such land is ordinarily used, doing only what is necessary for that purpose, and being guilty of no negligence in the manner of doing it, is he liable because, as an incident of so improving, surface waters accumulate and flow in a stream upon the lands of others? A doubt upon this was suggested in the O'Brien case, but on more mature consideration we are of opinion that the owner so improving is not liable. The rule stated in that case has frequently been quoted in other cases in this court, and its correctness has never been questioned; and but for the doubt suggested in that case, we do

not think it would have been questioned that a case like this comes within it. One's land may be incidentally, even seriously, injured in value and usefulness by the proper improving of adjacent land, withdrawing from it surface waters, the presence of which may improve its fertility and value, or shedding upon it surface waters which would not otherwise go there and drowning it or otherwise impairing its value, or causing such waters to remain upon it, although their presence may render it comparatively valueless, and no action will lie. When the injury is incidental to the proper improving of adjacent land, it is impossible to see that the manner in which such improvement operates to cause the injury, whether by drawing off the waters or setting them back so that they cannot flow off, or causing them to run either in a diffused manner or in streams, can make any difference with the liability. If a man's lands be injured to the extent of $500 by surface water coming upon it, it would seem illogical and unreasonable that he may recover if it come in streams, but cannot recover if it come in a diffused manner. The test of liability must be: is the injury incidental to another man doing on his own land what he has a right to do; *i. e.*, improve it for the purpose for which such land is ordinarily used, doing what is necessary for that purpose? It must, however, be understood that one cannot improve his own land by merely transferring waters which would naturally rest upon it to the land of another."

In Missouri there has been some contrariety of opinion, but the law of that state on this subject is now settled, as shown from the following quotation from *Abbott v. Kansas City, St. J. & C. B. R. Co.*, 20 Am. & Eng. R. R. Cases, pp. 110 *et seq.*: "In the recent case of *Benson v. Chicago & A. R. Co.*, 78 Mo., 504–512, s. c. *supra*, this court, speaking through Philips, C., practically reaffirms the common law doctrine of the earlier decisions of this court in respect to surface water. After referring to natural water-courses,

this language is used: 'But as to the right of a dominant proprietor to divert mere surface water and turn its flow upon his neighbor, there is much conflict and confusion. Each case must in large measures depend on its own peculiar facts. The general rule, it is true, applicable to the enjoyment of real estate is expressed in the maxim, *cujus est solum, ejus est usque ad cœlum.* He has, ordinarily, the right to use and improve his real estate by protecting it against water flowing over its surface. In doing so the dominant proprietor may turn it from his land onto the servient or lower land, without liability to damage. Mere surface water, that which does not run in any defined course or confined channel, is regarded as a common enemy against which any land-owner affected by it may fight.'" After referring to the opinions which had been delivered in two Missouri cases, Ray, J., delivering the opinion of the court, continued as follows: "With all due respect for the acknowledged ability of the distinguished jurist who wrote those opinions, we feel constrained to recognize the common law doctrine on this subject, so often and repeatedly approved by this court without division in all its earlier and later decisions, as still the law in this state. The rule of the common law as expounded in the numerous decisions quoted above we think, after all, best promotes and conserves the varied and important interests of both the public and private individuals incident to and growing out of this question. It permits and encourages public and private improvements, and at the same time restrains those engaged in such enterprises from unnecessarily or carelessly injuring another. It may be added, in this connection, that whatever change may have been made in the common law duties and obligations of railroad companies in this particular by sec. 810, Rev. St., 1879, 140, does not arise, and is immaterial in this case, since the suit is not brought for a failure to construct the ditches and drains along the sides of the road-bed required by that act.

but for a failure to provide water-ways or culverts across the road-bed or through its embankments so as to allow the surface water to pass off in that direction. A strict and literal application of the doctrine of the civil law would, we think, in many places and in large districts of country, materially retard, if not utterly destroy, many useful and profitable improvements, pursuits, and enterprises besides railroading. (*Sowers v. Shiff*, 15 La. Ann., 300; *Martin v. Jett*, 12 La., 503.) Numerous decisions in various other states also adopt and adhere to the common law as to surface water to the same extent as do the adjudications in this state. (13 Allen, 293; 27 Wis., 656; 25 Wis., 223; 31 N. J. Law [2 Vroom], 351; 50 N. H., 439; 58 Barb. [N. Y.], 413; 73 Ind., 278; and 24 Albany Law Journal, 453.)"

In the case of *Moyer v. New York C. & H. R. R. Co.*, 88 N. Y., 355, it was held that a railroad corporation was not liable for damages to any person by reason of the overflow of water of a stream caused by the necessary elevation of its road-bed not in the channel of the stream but upon its own land.

The supreme court of South Carolina, with reference to the general subject under consideration as affected by a statutory provision like that found in section 1, chapter 15, Compiled Statutes, made use of the following language in *Edwards v. Charlotte, C. & A. R. Co.*, 18 S. E. Rep., 58: "In view of the express declaration of the law-making power, as embodied in section 2734 of the General Statutes, we feel bound to declare, in the absence of any constitutional provision, statute, or even authoritative decision to the contrary, that the common law rule must still be recognized as controlling here, for that section expressly declares that 'every part of the common law of England, not altered by this act nor inconsistent with the constitution of this state, and the customs and laws thereof, is hereby continued in full force and virtue within this state

in the same manner as before the passage of this act." Under the common law rule, surface water is regarded as a common enemy, and every landed proprietor has a right to take any measures necessary to the protection of his own property from its ravages, even if in doing so he throws it back upon a coterminous proprietor, to his damage, which the law regards as a case of *damnum absque injuria*, and affording no cause of action. This rule was applied in a case very much like the present, *Rowe v. St. Paul, M. & M. R. Co.*, 41 Minn., 384, 43 N. W. Rep. [Minn.], 76; also in *Cairo & V. R. Co. v. Stevens*, 73 Ind., 278; *O'Connor v. Fon du Lac, A. & P. R. Co.*, 52 Wis., 526, 9 N. W. Rep. [Wis.], 287; *Johnson v. Chicago, St. P., M. & O. R. Co.*, 80 Wis., 641, 50 N. W. Rep. [Wis.], 771. See also *Chadeayne v. Robinson*, 55 Conn., 345, 11 Atl. Rep. [Conn.], 592, and *Abbott v. Kansas City, St. J. & C. B. R. Co.*, 83 Mo., 271, in which the case of *Shane v. Kansas City, St. J. & C. B. R. Co.*, 71 Mo., 237, relied upon by appellant, as well as the case of *McCormick v. Kansas City, St. J. & C. B. R. Co.*, 70 Mo., 359, are commented on and practically overruled, so far as the question now under consideration is concerned."

As indicated in some of the quotations above made, there are some states where, perhaps, the civil law or its analogies have been followed, in which the consensus of the above opinions is not approved. Whether influenced by the sources of their inspiration or not, these decisions are clearly in the minority, and we believe are not supported by the better course of reasoning.

Our conclusions are, that the district court correctly concluded from all the evidence adduced on the trial of this case that the water, the flow of which was interfered with by the railroad embankment, was surface water. It flowed in no defined water-course and overflowed only when there were extraordinary freshets. It was not shown that in its undiverted course it originated from or returned to the

channel of Yankee creek. Its existence was directly traceable to falling rains. Its course was along the valley, but not as a part of the stream. The railroad company, in the absence of evidence to the contrary, must be presumed to have constructed its embankment in a manner proper for the operation of its line of railway. If in doing so, surface water was deflected from its course so as to be thrown across Yankee creek and over the land of the plaintiff, no right of action thereby accrued to plaintiff, even though at great expense, by erecting trestle work instead of such embankment, or by piercing the embankment with culverts, which by the discharge of water must of necessity injure other property, the damage to plaintiff might have been avoided or greatly lessened. So far as at all necessary for consideration, the instructions of the court recognized and enforced the principles above stated. It results, therefore, that the judgment of the district court is

AFFIRMED.

MAXWELL, C. J., dissenting.* (December 29, 1893.)

From the statement of the case in the opinion of Commissioner Ryan it seems to me there is vital error in the decision. The constitution of Nebraska requires just compensation to be made to the owner of property taken or *damaged* for public use. The right to take is unquestioned where there is a necessity for the same, but this right is attended with the correlative one, that compensation must be made to the owner. The theory of the law is that the landowner shall be compensated in money for all direct injuries to the land resulting from the taking, unless the incidental damages are diminished by special benefits. These damages are to be computed upon the basis of the proper construction of the railway. (*Fremont, E. & M. V. R. Co. v. Whalen,*

*The opinion in this case, at the time it was filed, was concurred in by all members of the court. Subsequently the chief justice furnished the reporter the above dissenting opinion.

11 Neb., 585.) In the case at bar there were no culverts in the embankment to permit the water to flow in its accustomed course toward the Nemaha river. Had there been, the damage in this case would not have occurred. This, in my view, was actionable negligence on the part of the company.

The case seems to be decided upon the theory that the railroad company has the right to exclude the water from its own land; but the statement shows that in fact the company diverted the water, turned it into artificial channels, and caused it to empty into Yankee creek, and thereby caused it to overflow and spread over the plaintiff's land and destroy his crops. Upon what theory can this be justified? Certainly not upon the ground that it was surface water. In *Fremont, E. & M. V. R. Co. v. Marley*, 25 Neb., 138, this court held that the railroad company had no right to collect surface water in a ditch or drain and permit it to flow upon the land of another without his consent; and the same rule applies to the case at bar. There is no analogy between the case of the owner of land excluding surface water from his premises and that of a railroad company. In the one case, the land-owner merely prevents the water from flowing onto his land; in the other, in the absence of culverts or bridges, a continuous barrier is presented to the flow of water which would thus be dammed upon the land above or thrown in a body upon the land below, in either case causing injury and loss. The projectors of a railway locate a line across a farm on which the surface water has theretofore had a free outlet, so that no injury has resulted from the backing up of the water or from it being collected and thrown in a body upon that farm or the lands below. In constructing the road, however, a solid embankment is made, by which the flow of water is obstructed and thrown in a body upon another part of the same farm or the lands of an adjoining land-owner, by means of which his crops are destroyed, and we

are gravely told that the corporation has a right to do this. In *Boyd v. Conklin*, 20 N. W. Rep., 595, the supreme court of Michigan held that where surface water had been allowed to flow in a certain direction for more than twenty years, an easement was acquired by prescription. This opinion was approved in *Gregory v. Bush*, 31 N. W. Rep. [Mich.], 92. In no event can a party, by artificial drains or ditches, collect the surface waters and cast them in a body upon the proprietor below without being liable for the injury. (*Livingston v. McDonald*, 21 Ia., 160; *Butler v. Peck*, 16 O. St., 334; *Martin v. Riddle*, 26 Pa. St., 415; *Pettigrew v. Evansville*, 25 Wis., 223; *Gregory v. Bush*, 31 N. W. Rep. [Mich], 92.) It is very clear to my mind that the railway company must provide sufficient openings in its road to permit the flow of surface water in its accustomed course and not cast it in a body upon the proprietor below. That system is best which, while protecting the railway company in its just rights, requires it to deal fairly with the persons across whose lands the road is constructed, in order that the public improvement shall not be the means of impoverishing any one. It is very evident that the court below erred in its instructions, and the judgment should be reversed and the cause remanded for a new trial.

MOLINE, MILBURN & STODDARD COMPANY V. WILLIAM NEVILLE.

FILED NOVEMBER 21, 1893. No. 5402.

Liability of Principal for Storage of Goods in Agent's Store-Room After Expiration of Agent's Individual Lease: LANDLORD AND TENANT. After the expiration of a lease to a retail dealer in agricultural implements, some of the implements were permitted for a time to remain in the room wherein the business of said dealer had been carried on, after

which said implements were turned over to the plaintiff in error. *Held*, That these facts did not render liable the plaintiff in error for the storage of said goods after the expiration of the term of the lease, even though in said retail business the lessee had been the agent of the plaintiff in error, no such relation having been disclosed by said lessee or at all acted upon by the lessor.

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

D. O. Dwyer and *Beeson & Root*, for plaintiff in error, cited: *Durrell v. Emery*, 9 Atl. Rep. [N. H.], 97; *Dixon v. Ahern*, 14 Pac. Rep. [Nev.], 598; *Lathrop v. Standard Oil Co.*, 9 S. E. Rep., [Ga.], 1041; *Depere Co. v. Reynen*, 22 N. W. Rep. [Wis.], 761; *United States Mfg. Co. v. Stevens*, 17 N. W. Rep. [Mich.], 934.

A. N. Sullivan, contra.

RYAN, C.

This action was originally commenced before a justice of the peace in Cass county, Nebraska. From a judgment rendered in favor of the plaintiff in that court the defendant appealed to the district court of said county, wherein plaintiff's cause of action, omitting the mere formal parts, was stated in the following language:

"1. And now comes the above named plaintiff, and for cause of action states: At the special instance and request of the defendant, a corporation, plaintiff furnished its storage room for goods, wares, merchandise, and property of said defendant during the year 1891, from April 1, 1891, to June 15, 1891, for which defendant agreed to pay plaintiff what said storage was reasonably worth. The plaintiff alleges that said storage was really worth the sum of $19.50.

"2. No part of said sum has been paid by the defendant to plaintiff, and there is now due and payable thereon

from the defendant to plaintiff the sum of $19.50, for which sum plaintiff prays judgment."

The answer contained a general denial of the averments of the petition, succeeding which were the following allegations: "Defendant, further answering, states that it or none of its officers knew of plaintiff or his agents, or that there were such persons in existence, until the commencement of this suit; that it has no contract whatever, either verbal or written, with plaintiff or any of his agents to store any goods, wares, or merchandise." There were other averments in the answer which are unnecessary to notice.

The reply was in denial of each allegation of new matter contained in the answer.

Upon a trial had to the court judgment was rendered in favor of William Neville, against the Moline, Milburn & Stoddard Company, for the sum of $15 and costs, taxed at $66.43.

The proofs were that F. A. Burke, as lessee, first occupied the room in which it is claimed the goods of plaintiff in error were afterwards stored. The term of his lease began March 1, 1889, and he continued to occupy the room until April 1, 1891, during that time being engaged in business as a retail dealer in wagons and agricultural implements. Some of these implements he obtained in the course of his dealings with the Moline, Milburn & Stoddard Company, of Omaha, Nebraska. After April 1, 1891, some of the agricultural implements remained in the room until June 15, of the same year. On said 1st day of April a Mr. Munroe leased the aforesaid room, and from the 4th of April thereafter occupied the same until long after the date when, by plaintiff's petition, it is claimed that the storage ended. During the occupancy of this room by Mr. Munroe the implements, which had been left therein by Mr. Burke, were permitted to remain undisturbed until June 15, 1891, when those to which the facts of this case have any relation were turned over to the plaintiff in error. On the

same date that these goods were turned over by Mr. Burke to the Moline, Milburn & Stoddard Company suit was begun by the defendant in error against the said company for the storage on said goods between April 1, 1891, and June 15, immediately following that date.

Plaintiff founded his cause of action upon an express contract with the said company for the storage of its goods, wares, and merchandise, the fair compensation for storing which he alleged that said company agreed to pay. There was undisputed evidence, perfectly satisfactory in its nature, that there was never any contract between the defendant in error and the plaintiff in error. The proof is also unquestionable that Mr. Burke received said goods of the plaintiff in error as he required them in his business, at the depot at Plattsmouth, and that for them thenceforward, until such as were not sold were returned to plaintiff in error at Omaha, Mr. Burke was solely responsible. Whether he received them for sale on commission is not quite clear, though that is probable from the evidence. Certain it is, however, he received and handled them in connection with and as he did many other agricultural implements of the same nature. The lease under which Mr. Burke held was made to him individually, the plaintiff in error not being therein known nor in any way recognized by the defendant in error as his agent. Under these circumstances, even if Mr. Burke was the agent of the plaintiff in error for the sale of its implements, this undisclosed principal could not be held liable for his individual contract, which had no reference either to said company or its business. (*Morgan v. Bergen*, 3 Neb., 209.) There was, therefore, no competent evidence to establish the claim for storage against the plaintiff in error, and the judgment of the district court is

REVERSED.

STATE OF NEBRASKA, EX REL. ATTORNEY GENERAL, V. ATCHISON & NEBRASKA RAILROAD COMPANY.

FILED NOVEMBER 21, 1893. No. 3010.

1. **Quo Warranto: RAILROAD COMPANIES: UNLAWFUL EXERCISE OF CORPORATE FRANCHISES: FORFEITURE: SUFFICIENCY OF EVIDENCE.** In *quo warranto* proceedings to declare void the lease by defendant of its line to another railroad company, and to annul a subsequent deed of defendant to said lessee, by which lease and deed it was claimed that a consolidation had been effected of parallel competing lines not forming a continuous line without break of gauge or interruption, it is *held*, upon full consideration of all the proofs upon which was made up the report of the referee, that each of his findings of fact and conclusions of law adversely to the material averments of the information is correct. MAXWELL, C. J., dissenting.
2. **The proofs and the report of the referee being adverse to each material allegation of the information, such information is dismissed.** MAXWELL, C. J., dissenting.

ORIGINAL action in the nature of *quo warranto* to oust defendant of its franchise. *Action dismissed.*

A former opinion in this case upon a demurrer to the information is reported in 24 Neb., 143.

William Leese, C. G. Dawes, and *George H. Hastings, Attorney General,* for the state.

T. M. Marquett, J. M. Woolworth, and *Marquett, Deweese & Hall, contra.*

RYAN, C.

This cause was considered and certain propositions of law applicable to the matters alleged in the information were fully stated in 24 Nebraska, on pages 143 *et seq.* This was upon a demurrer to the said information on the

grounds of a defect of parties, and because the facts alleged did not entitle the state to the relief prayed. Upon the averments of the information, which, for the purposes of the demurrer, were conceded to be true, it was held that the lease of the respondent to the Burlington & Missouri River Railroad Company should be declared void. The respondent was given leave to answer the information, and, in due time, its answer was made, averring the existence of such facts as negatived all infringements of the provisions of the statutes and constitution of the state of Nebraska, charged in the information.

On the 24th day of March, 1891, by consent of the respective parties and their counsel, it was ordered that upon the pleadings, testimony, and exhibits, then ready for final consideration, this cause should be referred to John H. Ames, Esq., by whom, thereon, a report should be made stating his findings of fact and conclusions of law. Accordingly, on October 1, 1891, said referee filed his report, in respect to which were deduced and applied five conclusions of law, the last of which was that the information should be dismissed.

Summarized, the findings of fact relevant and material to the decision of the issues joined were substantially as follows: That the Burlington & Missouri River Railroad Company in Nebraska had, prior to January 15, 1872, constructed and acquired by leases lines of railway extending from Plattsmouth to Lincoln, and from Lincoln, by way of Crete, through the counties of Lancaster, Saline, and Gage, to the city of Beatrice, in the last named county, and from Lincoln, through the counties of Lancaster, Otoe, and Nemaha, to the town of Brownville, in the county last named; that said line from Crete to Beatrice practically constituted a branch from the main line of said Burlington & Missouri River Railroad Company extending to Kearney, and, if treated as a prolongation of said main line, was and is not parallel with, but divergent from the said

line of said defendant at substantially all points; after leaving said city of Lincoln this divergence being so great that the stations of Crete, on the first-named line, and of Hickman, on the defendant's line, the former about twenty miles and the latter about fifteen miles from Lincoln, are geographically more than twenty miles apart; that the line by way of Nebraska City to Brownville is not parallel to, but divergent from the said defendant's line at all points after leaving Lincoln, said divergence being as great as between the two lines above mentioned; all of said lines, however, converging to a common point, which is Lincoln; that from Beatrice to Tecumseh, which is the nearest point on defendant's line, is thirty-five miles, and from Tecumseh to Nemaha City, the nearest point on the Brownville line, is thirty miles; that since January 15, 1872, the lines of the Burlington & Missouri River Railroad Company, of the Chicago, Burlington & Quincy Railroad Company, and of the defendant have, as constructed and maintained, admitted of the continuous passage of cars from one to the other, without detention or break of bulk at Lincoln; that since January 1, 1880, all of said lines have been in the exclusive possession and under the sole control and management of said Chicago, Burlington & Quincy Railroad Company; that defendant's line constitutes a practical continuation and prolongation in nearly a right line southeasterly from Lincoln, Nebraska, to Atchison, Kansas, of the aforesaid line extending from Plattsmouth to Lincoln; and, as such continuation and prolongation, defendant's line, as respects the transportation of freight, has been, and is now, operated by the Chicago, Burlington & Quincy Railroad Company; that, first by lease, and afterwards by deed, the defendant's line of railroad was transferred to the Burlington & Missouri River Railroad Company, by which latter company it was duly, by deed, conveyed to the said Chicago, Burlington & Quincy Railroad Company; that pending the construction of defend-

ant's line of railroad, and in aid thereof, bonds were voted and issued to the defendant to the aggregate amount of $397,700, by the counties of Richardson, Gage, and Lancaster, though upon what inducement the record does not disclose; that previous to January 1, 1880, defendant's line was in very bad repair, and very inadequately equipped with rolling stock, and unable to give a safe or effectual service, and on account of its financial embarrassment the defendant was unable to ameliorate these evils; that since January 1, 1880, the Chicago, Burlington & Quincy Railroad Company has practically reconstructed defendant's line of railroad by putting in new ties and the substitution throughout of new steel rails for the iron rails formerly in use thereon, and has built at Rulo, across the Missouri river, a bridge at a cost of one million dollars, so as to connect with its lines east of the Missouri river, and has placed in repair and furnished with rolling stock the defendant's line, so that now it is safe and efficient for use as a railroad; that within ten miles of Lincoln the Burlington & Missouri River Railroad Company's line and that of defendant were so near each other as to serve on nearly equal terms some of the traffic destined to Lincoln; but with this exception these lines were not competing, and the above exception did not render them within the meaning and effect of the provisions of the constitution of 1875, inhibiting the consolidation of railroad corporations owning parallel and competing lines; that there was no proof of competition for traffic between interstate points, and excepting at Lincoln there was no competition between points within Nebraska and other points outside its limits. The referee further found that such other competition as existed was between shippers stimulated to activity by a system of individual rebates common to the railroad companies previously to the enactment of the interstate commerce law by congress, or arose from occasional fortuitous circumstances, or combinations of circumstances, entirely foreign to the in-

hibitions of the statutes and the constitution of Nebraska. That there was no violation of such provisions by the defendant were substantially the referee's conclusions of law.

To these several findings of fact and conclusions of law there were filed exceptions which challenge the correctness of every conclusion, whether of law or of fact. These exceptions are criticised as inexact, general, and as unavailing as against the findings of the referee, especially as to matters of fact, the contention being that these must stand as the special verdict of a jury. It may be that these points are well taken, and that this case might be disposed of upon the presumption contended for. The magnitude of the interests involved and of the questions presented, as well as the consideration due to an application for a prerogative writ by the state, seemed to require that technicalities should be avoided as far as possible; and the evidence, therefore, has been as carefully read and considered as though no report had been made by the referee, with the same conclusions as had been set forth in his report. As the referee's findings fully and fairly epitomize the evidence as to questions of fact, and as his conclusions of law are in consonance with the principles recognized on the hearing of the cause on demurrer, it would be but a work of supererogation to examine the same matters in detail only to reach the same result. The exceptions to the report of the referee are overruled and the information is

DISMISSED.

MAXWELL, C. J., dissenting.

I am unable to give my assent to the opinion of the commissioners in this case approved by a majority of the court. The case was before this court in 1888, on demurrer to the relation. The demurrer was overruled and leave given to the defendants to answer. It may be well to call attention to the points decided in that case by a unanimous court (*State v. Atchison & N. R. Co.*, 24 Neb., 143), as follows:

"In a proceeding by *quo warranto* against a corporation to forfeit its franchises, and oust it from the same for misuser or non-user thereof, the corporation is the only necessary party defendant. In case of forfeiture the court will take the necessary steps to protect the rights of other parties in the premises.

"Section 89 of chapter 16 of the Compiled Statutes authorizes the consolidation of two lines of railway only in cases where the two roads, when so consolidated, will form a continuous line without break of gauge or interruption.

"Section 94, chapter 16, of the Compiled Statutes authorizes the leasing of a railroad constructed by another company only in cases where the road of the lessee and of the company making the lease will form a continuous line.

"The Atchison & Nebraska railroad, extending from Atchison, Kansas, to Lincoln, Nebraska, was completed to Lincoln in 1871, and leased to the B. & M. railroad in 1880. *Held*, That it did not form a continuous line with the B. & M. railroad, and was not within the provisions of the statute authorizing the making of a lease, and that such lease was unauthorized. The mention in the statute of continuous or connected lines excludes all others.

"The powers of a corporation organized under legislative statutes are such, and such only, as the statutes confer. The charter of a corporation is the measure of its powers, and the enumeration of these powers implies the exclusion of all others.

"Where a railway company without authority of law leases its road to another railway company with all its rights, property, and franchises for a long period of time, it thereby abandons the operation of its road, and is subject to forfeiture.

"Section 3, article 11, of the constitution prohibits any railroad corporation from consolidating its stock, property, franchises, or earnings, in whole or in part, with any other

railroad corporation owning a parallel or competing line. The word 'consolidate' in the constitution is used in the sense of join or unite.

"Section 5, article 11, of the constitution prohibits the issuing by a railway corporation of stock or bonds except for the consideration actually received. One of the objects of this provision is to enable the public to ascertain the actual cost of each railway in the state, and to enable the legislature to pass just laws fixing an equitable rate of taxation, and for the transportation of persons and property, so that justice may be done alike to the railway company, the public, and private individuals."

Many of these points are not referred to in the opinion of the commissioner. Section 3, article 11, of the constitution prohibits any railway company from consolidating its stock, property, franchises or earnings, *in whole or in part*, with any other railroad corporation owning a parallel or competing line. It is admitted in the opinion that "within ten miles of Lincoln the Burlington & Missouri River Railroad Company's line and that of defendant were so near each other as to serve on nearly equal terms some of the traffic destined to Lincoln, but with this exception these lines were not competing, and the above exception did not render them within the meaning and effect of the provisions of the constitution of 1875, inhibiting the consolidation of railroad corporations owning parallel and competing lines."

It will be observed that it is admitted in the opinion, in effect, that at Lincoln, and within ten miles thereof, that the defendant road and the Burlington & Missouri River road were competing lines. If we take ten miles square in every direction from Lincoln, we will have 400 square miles of territory, which at the present time contains more than 50,000 people. This territory is sufficient to form a county, and is the minimum number of miles fixed by the constitution for that purpose. Yet the fact that the de-

fendant is a competing road with the Burlington & Missouri River road is spoken of as though it was a trifling matter, notwithstanding the language of the constitution that there shall be no consolidation, either in the stock, property, franchises, or earnings, or any part thereof, with any other parallel or competing line. The object of the constitutional convention was to prevent one or two corporations from purchasing parallel or competing lines and thus prevent competition. The defendant, if disconnected with the Burlington & Missouri River road, is a competing line for business in the territory named, and might, perhaps, by carrying for lower rates than the Burlington & Missouri River road, benefit every resident of the city of Lincoln and the territory adjacent, and thus induce new enterprises and promote the prosperity, not only of the city, but of the state. It is a well known fact, also, that the road was originally planned to extend to Columbus and there form a competing line with the Union Pacific railway, and the records of this court show that the residents of Platte county donated $100,000 of its county bonds to that road, presumably to obtain a competing line. The majority opinion would allow the Burlington & Missouri River railroad to purchase the Union Pacific Railway as a competing line. It is well known also that the defendant line crosses the Burlington & Missouri River line at Seward, and would be a competing line there. It also crosses two Burlington & Missouri River lines at Lincoln, and a Burlington & Missouri River road at Tecumseh, and would be a competing line there. If competition could affect the rates of transportation for ten miles on each side of Lincoln, it would do the same for Columbus, Seward, and Tecumseh. Thus, if Lincoln, by reason of reduced rates, was enabled to pay an increased price for corn or stock, or to sell goods at a lower rate than without such competition it would be enabled to do, the same benefits would apply to Tecumseh, Seward, and Columbus, and

other towns along the line of the defendant road, and attention being called to these lower rates on that line would cause a reduction of rates on other lines in the state; but it is a narrow view of the law to limit the benefits to be derived from competition to the cities named. The defendant road, crossing or connecting, as it does, every important railway line but one in the state, would, if permitted to remain as when constructed, an open and competing line, greatly benefit the people of the entire state. I am very confident also that this court has no power, if admitting that the defendant is a competing line at the most important point on the road, as is done in the opinion in this case, to declare that such consolidation is not prohibited by the constitution. There stands the constitutional provision, like a wall of rock, prohibiting such consolidation, or any consolidation, in such cases. Stronger language could not be used: "*No* railroad corporation * * * shall consolidate its stock, property, franchises, or earnings, in whole or in *part*, with any parallel or competing railway line." It is not in the power of this court, therefore, to declare the consolidation in this case valid, and the time will come when the majority opinion will be held to be clearly in violation of the provisions of the constitution.

JOHN V. FARWELL COMPANY V. WILLIAM E. WRIGHT ET AL.

FILED NOVEMBER 21, 1893. No. 5033.

1. **Fraudulent Conveyances: PREFERRED CREDITORS.** A debtor in failing circumstances has a right to secure, or pay in full, a portion of his creditors to the exclusion of others, and whether in so doing he is acting with a fraudulent purpose is a question of fact and not of law. (*Kilpatrick-Koch Dry Goods Co. v. McPheely*, 37 Neb., 800.)

2. **An intention on the part of a debtor to defraud** cannot be inferred merely from the fact that he desired to and did prefer certain of his creditors. (*Jones v. Loree*, 37 Neb., 816.)

3. **Attachment:** RIGHT OF ACTION ACQUIRED AFTER ISSUANCE OF WRIT. An attachment must stand on plaintiff's cause of action as it existed when the affidavit for an attachment was filed and the writ issued; and if the plaintiff, at the date of the issuing of the attachment, does not own the claim for which he seizes the defendant's property, he cannot afterwards, by purchasing such claim, assert it by amendment or otherwise as against the property seized under the attachment and by virtue thereof.

4 ———: ———: GROUND TO DISCHARGE. Where a plaintiff brought suit, alleging as a cause of action his ownership of certain notes, then past due, made and delivered to him by the defendant, and at the same time filed an affidavit for attachment in which such notes were made the basis of such claim against the defendant, and caused the property of the defendant to be seized under said attachment, and it afterwards appeared that plaintiff was not the owner of said notes, or any of them, at the time of bringing such suit and instituting such attachment proceeding and seizing said property, *held*, that the attachment should be dissolved, although plaintiff, after the seizure of defendant's property, became the owner of said notes, and owned them at the time of the hearing of the motion to discharge the attachment.

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

The opinion contains a statement of the case.

R. A. Moore and *John T. Wentworth*, for plaintiff in error:

The mortgages were voluntarily made without the knowledge of some of the mortgagees. By the mortgages Wright & Gregg conveyed all their property. The mortgages were, therefore, fraudulent and void, as being against the assignment law of this state. (Ch. 6, Comp. Stats.; *White v. Cotzhausen*, 9 Supreme Ct. Rep., 309; *Kellog v. Richardson*, 19 Fed. Rep., 70; *Kerbs v. Ewing*, 22 Fed.

Rep., 693; *Freund v. Yaegerman*, 26 Fed. Rep., 812; *Liming v. Kyle*, 31 Neb., 649; *Straw v. Jenks*, 43 N. W. Rep. [Dak.], 941; *Harkrader v. Leiby*, 4 O. St., 602; *Dickson v. Rawson*, 5 O. St., 224; *Burrows v. Lehndorff*, 8 Ia., 96; *Lampson v. Arnold*, 19 Ia., 479; *Bonns v. Carter*, 20 Neb., 566.)

The mortgages are void because they are executed upon property in value greatly in excess of the debts secured. (*Thompson v. Richardson Drug Co.*, 33 Neb., 714; *Morse v. Steinrod*, 29 Neb., 108; *Brown v. Work*, 30 Neb., 800.)

Lamb, Ricketts & Wilson and *Marston & Nevius, contra:*

It affirmatively appears from the petition and the amended petition that the plaintiff did not have at the time the attachment was taken out, nor yet at any time before the order dissolving it was entered, any cause of action against the defendants upon the supposed notes attempted to be sued on in this case. The attachment was properly dissolved. The plaintiff, by a subsequent purchase of the notes, cannot assert his claim against property seized under the attachment. (Wade, Attachment, sec. 72; *Bowen v. School District No. 3, Phelps County*, 10 Neb., 266; *Hamilton v. Johnson*, 32 Neb., 730; *Berry v. Hardman*, 12 Ala., 604; *Rick v. Thornton*, 69 Ala., 473; *Estlow v. Hanna*, 75 Mich., 219; *Pope v. Hibernia Ins. Co.*, 24 O. St., 481.)

The plaintiff is estopped to deny the validity of the first chattel mortgage by levying the writ of attachment subject to it; by buying up that chattel mortgage and asserting its validity; and by selling the property under the attachment and bidding it in subject to the mortgage. (*Russell v. Dudley*, 3 Met. [Mass.], 147; *Kellogg v. Secord*, 3 N. W. Rep. [Mich.], 562; *Mandelson v. Paschen*, 37 N. W. Rep. [Wis.], 815; *Delaware & Hudson Canal Co. v. Bonnell*, 46 Conn., 9.)

The trial court having found the issues of fact in favor of the defendants upon the evidence, this court will not re-

verse the decision unless manifestly erroneous. (*Grimes v. Farrington*, 19 Neb., 45; *Britton v. Boyer*, 27 Neb., 522.)

None of the mortgages are open to the objection that they were made without the knowledge or consent of the mortgagees. It appears in the testimony that notice was immediately given to all the parties of the execution of the mortgages, and that such security was ratified and approved by the mortgagees prior to the attachment. In all such cases chattel mortgages are valid. (*First Nat. Bank of Emporia v. Ridenour*, 27 Pac. Rep. [Kan.], 150; *Bierbower v. Polk*, 17 Neb., 276; *Fletcher v. Martin*, 25 N. E. Rep. [Ind.], 886.)

RAGAN, C.

On May 4, 1891, William E. Wright and Charles H. Gregg, under the copartnership name of Wright & Gregg, were engaged in mercantile business in the city of Kearney, Nebraska; and on said date, being largely indebted and in failing circumstances, they executed chattel mortgages on their stock of merchandise as follows: (1) To the Kearney National Bank, $3,575.00; (2) to L. C. Gregg, $1,207.75; (3) to Seigel & Bro., $2,970.95; (4) to Super, Marshall & Co., $635.82. These mortgages were all duly filed on said date in the office of the county clerk of Buffalo county, and possession of the mortgaged property turned over to one Lyon for the mortgagees. The mortgages were made liens on the property covered by them, in the order named above, and were all given for honest debts owing at that time by Wright & Gregg to the mortgagees.

Wright & Gregg had for some time been dealing with the John V. Farwell Company, of Chicago, Illinois, and on the 16th day of February, 1891, owed that company $5,379, for which amount Wright & Gregg at that date gave the Farwell Company several negotiable notes. These notes the Farwell Company soon afterwards sold for cash, guarantying their payment, and on said May 4, 1891. and for some

months thereafter, did not own any of said notes. On said date, however, Wright & Gregg did owe the Farwell Company a balance on account contracted since February, 1891, of $638. On May 5, 1891, the Farwell Company brought suit in the district court of Buffalo county against Wright & Gregg, and claimed in the petition that Wright & Gregg were indebted to it in the sum of $5,379 on the notes mentioned above, and that said notes were still the property of said Farwell Company and due and unpaid. At the same time the Farwell Company sued out an attachment against Wright & Gregg for $6,017, and alleged in its affidavit for attachment the indebtedness of Wright & Gregg to it on the notes mentioned above, and caused a writ of attachment to be issued on said stock of merchandise, covered by said mortgages, to be seized by the sheriff. Said writ of attachment was, however, as appears from the sheriff's return thereon, levied upon said merchandise, subject to the mortgage executed by Wright & Gregg to the Kearney National Bank. On the 16th day of May, 1891, the Farwell Company filed an amended petition and affidavit for attachment. These declared not only on the notes but on the account mentioned above. On May 15, 1891, the attorney for the Farwell Company purchased of the Kearney National Bank the mortgage made to it by Wright & Gregg. This purchase was made ostensibly in behalf of and in the name of J. V. Farwell, Jr. On September 28, 1891, the Farwell Company having, in pursuance of its guaranty of said notes, taken the same up and become the owner thereof, filed another amended affidavit for attachment against Wright & Gregg, substantially the same as the first and second affidavits, but containing the additional allegation that Wright & Gregg had, by false pretenses, procured an extension of time for paying the debt represented by the notes. At this date, September 28, 1891, the cause was heard on the motion of Wright & Gregg to dissolve the attachment, and the court made an

order discharging the same, and from that order the Farwell Company prosecutes error to this court.

The grounds of attachment alleged in the affidavit of May 5, 1891, were that "the said defendants are about to convert their property into money for the purpose of placing it out of the reach of their creditors; that they have property and rights in action which they have concealed; that they have assigned and disposed of their property, or a part thereof, with the intent to defraud their creditors, and that the debt upon which said notes were based was fraudulently contracted by the defendants." There is no evidence in the record that Wright & Gregg, on May 5, or at any other time, "were about to convert their property into money for the purpose of placing it out of the reach of their creditors;" nor does the record contain any evidence that at the date of suing out said attachment, or at any other time, Wright & Gregg "had any property or rights in action which they had concealed;" and furthermore, the record discloses no evidence "that the debt upon which said notes were based was fraudulently contracted."

It remains to be determined, then, whether Wright & Gregg "had assigned and disposed of their property, or a part thereof, with the intent to defraud their creditors." The only claim of a fraudulent disposition made by Wright & Gregg of their property is the giving of the mortgage above mentioned.

The first contention of the plaintiff in error is that the making of these mortgages by Wright & Gregg, and their delivery of the possession of the mortgaged property to the mortgagees, or to Lyon for them, amounted to an assignment for the benefit of Wright & Gregg's creditors, and that the mortgages, not being in conformity with the assignment law of the state, are therefore void.

In *Jones v. Loree*, 37 Neb., 816, it is said: "Several chattel mortgages made and delivered simultaneously to se-

cure different creditors of the mortgagor, the delivery being to one of the mortgagees, who in the transaction acts for himself and on behalf of all the other mortgagees, do not constitute an assignment for the benefit of creditors." The facts in that case were substantially the same as in the one at bar. The rule there laid down is adverse to the claim made by the plaintiff in error here.

The second contention of the plaintiff in error is that the mortgages are void because they are executed upon property the value of which is greatly in excess of the debts secured. The aggregate of the debts secured by the mortgages was $8,389.52. The evidence as to the actual value of the property is conflicting. It was valued by the appraisers when seized on the attachment, at $13,188, and it sold in bulk at public auction for something near $7,000. In *Jones v. Loree, supra*, IRVINE, C., speaking upon this point and for this court, said: "Upon the first branch of this argument it is sufficient to say that the mortgages to Loree, Mrs. Briggs, and the two Higginses are shown conclusively by the evidence to have been given at one time as part of the same transaction, Loree acting, in taking the mortgages, on his own behalf and as agent for the other mortgagees. For the purpose of considering the proportion existing between the property mortgaged and the debts secured the court instructed the jury that they were to be considered as one transaction. The reason of the rule avoiding, as against creditors, conveyances of property in value greatly in excess of a debt secured by such conveyances is that such a conveyance necessarily operates to hinder and delay, if not to defraud, other creditors; that it evinces an intention upon the part of the debtor to do more than secure the creditor preferred, and practically conclusively proves an intent upon his part to deprive other creditors of their remedies. From the nature of the transaction the creditor preferred is chargeable with notice of such design, and is shown by his act of taking grossly disproportionate

security to have participated in the fraudulent intent. But when a number of small debts are secured upon property, not disproportionate to the aggregate amount of these debts, no such effect follows and no such intention can be imputed either to grantor or grantees. This court has repeatedly sustained a series of conveyances of this character. Among such cases are *Hershiser v. Higman*, 31 Neb., 531; *Hamilton v. Isaacs*, 34 Neb., 709." And in *Kilpatrick-Koch Dry Goods Co. v. McPheely*, 37 Neb., 803, it is said: "The contention of the plaintiff in error seems to be that as the value of the property mortgaged was $5,925.41, and the debt secured by the first mortgage was only $2,500, the security was so greatly in excess of the amount of the first mortgage debt as to render the mortgage fraudulent in law, whatever that may mean. But these mortgages were all made and filed on the same day and within a few minutes of each other; in other words, they were one transaction. We are not prepared to say that a mortgage would be fraudulent solely because the value of the property mortgaged was two, or even three, times greater than the debt. Whether it would be, is a question of fact for a jury or trial court and not a question of law." We cannot say that the value of the property mortgaged by Wright & Gregg was so greatly in excess of the debts for which it was pledged as to raise a conclusive presumption of fraud.

Again, it is contended by the plaintiff in error that the mortgages were fraudulent in fact, and so intended by Wright & Gregg. The evidence on which the court below acted was somewhat voluminous. It was conflicting. Some of it was presented by affidavits and some of it appears to have been given by the mouths of witnesses in the presence of the trial court; and unless we can say that the finding of the court is unsupported by competent evidence, we have no authority to disturb it. This has been so often said by the court as to render a citation of authorities superfluous.

The court below heard the witnesses. He observed their manner of testifying, and general demeanor while on the stand. He weighed and scrutinized the testimony, and it does not convince us that Wright & Gregg made these mortgages with any fraudulent purpose; and if it did, the mortgagees would not be affected with such fraudulent intent, unless they participated therein. (*Jones v. Loree, supra.*) The record shows that Wright & Gregg desired to and did prefer the creditors to whom the securities were given; but an intent to defraud cannot be inferred merely from the fact that a preference is given to a certain creditor. (*Jones v. Loree, supra.*) "A debtor has a right to prefer his creditors; to pay part in full to the exclusion of others; and he has a right to secure the debts of a part of his creditors to the exclusion of others; and this is true whether he be insolvent, or in failing circumstances, or not. All the law requires of him is that he should act honestly; that his disposition of his property should not be made for the fraudulent purpose of hindering, delaying, or defrauding his creditors; and whether an act of a debtor in the disposition of his property is fraudulent, is always a question of fact and not a question of law. Section 20, chapter 32, Compiled Statutes, provides: 'The question of fraudulent intent * * * shall be deemed a question of fact and not of law.'" (*Kilpatrick-Koch Dry Goods Co. v. McPheely, supra.*)

But the order of the court discharging this attachment should be sustained on other grounds, which we shall notice briefly. On May 5 the plaintiff in error made an affidavit for an attachment that Wright & Gregg were indebted to it in the sum of $6,017 on the notes mentioned above, and on this affidavit an attachment was issued, by virtue of which the sheriff seized the entire stock of goods of Wright & Gregg. The record discloses that the Farwell Company, at that date, did not own or have possession of any one of these notes; that it had previously sold

them for cash and had the money for them at the very time it caused said goods to be attached. The only debt that Wright & Gregg at that time owed plaintiff in error was the balance on account of some $700, and even this was not included in either the petition, in the suit brought or in the affidavit for attachment under which the goods were seized. The remedy by attachment is a harsh and summary one, a creature of the statute, and before a litigant can invoke it the law requires him not only to give a bond, but to swear to the nature of the claim he has against the defendant, that it is just, and the amount which he ought to recover; and he must own the claim on which he bases his attachment. The seizure of these goods was a wrong, a grievous wrong, and done in utter disregard of all law. To thus use the remedies of the statute is to torture them into engines of oppression. To call this "law" is to mock at justice. The fact that the Farwell Company had guarantied the payment of these notes gave it no cause of action against Wright & Gregg on them until such time as they were compelled to and did make good their guaranty, which was long after the seizure of the goods under attachment.

The amended affidavit for attachment, filed May 16, by the Farwell Company did not help the case. By this the amount due on the account was attempted to be brought in, but the false claim of indebtedness on the notes was still maintained; and the filing of the amended affidavit for attachment on September 26, in which the Farwell Company attempted to base a claim against Wright & Gregg on these notes, which the Farwell Company had at that time again become the owner of, was an attempt to put into this case a cause of action which the Farwell Company did not own on May 5, when it brought its attachment suit and seized these goods; and as it had no cause of action against Wright & Gregg on these notes at the time it brought its original action, and at the time it sued out

its first attachment, it could not after that put into such suit of attachment any cause of action which it subsequently acquired and assert it against the property seized by virtue of the original writ of attachment.

Again, the attachment writ was levied on goods, and the same were sold subject to the mortgage made by Wright & Gregg to the Kearney National Bank, this mortgage having been purchased, doubtless, by the Farwell Company. This mortgage was made at the same time the others were, and for a like purpose and under like circumstances. We will presume that the attachment writ was levied as directed by the Farwell Company, and the evidence shows that the Farwell Company notified purchasers at the time of the sale of the property under the attachment, that the goods would be sold subject to this Kearney National Bank mortgage, and the Farwell Company is now estopped from claiming that any of these mortgages were fraudulent. (*Kellogg v. Secord*, 42 Mich., 318; *Russell v. Dudley*, 44 Mass., 147.)

We must not be understood from anything contained in this opinion as censuring in any manner the learned counsel for the Farwell Company, as the record shows he acted in the utmost good faith throughout, and on information and instruction from his client, and in ignorance of the true state of facts in the case. There is no error in the judgment of the district court and the same is

AFFIRMED.