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REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

JANUARY TERM, 1894.

VOLUME XXXIX.

D. A. CAMPBELL,
OFFICIAL REPORTER.

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

THE SUPREME COURT

OF

NEBRASKA.

1894.

CHIEF JUSTICE,

T. L. NORVAL.

JUDGES,

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.

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.

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.

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ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, A. D. 1894.

PRESENT:

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

FREEMAN P. KIRKENDALL ET AL. V. CITY OF OMAHA.

FILED JANUARY 16, 1894. No. 4813.

1. **Change of Grade of Streets:** DAMAGES: EVIDENCE. After a witness had stated what in his opinion had been the effect of changing the grade of a street upon property adjacent thereto owned by the plaintiffs in error, it was not reversible error to refuse to allow such witness further to testify that in his opinion no cause other than the said change of grade contributed to an asserted decrease in value of said adjacent property, especially in view of the fact that one of the plaintiffs in error had previously given negative testimony of the same character as that sought to be introduced, which negative testimony was in no way questioned or contradicted upon the trial.

2. ——: ——: ——. It was not error to reject evidence offered as to the general tendency of values of other real property than that of plaintiffs in error, in its vicinity, extending over the period during which and immediately following that in which the change of grade complained of was made.

3. **The special benefits which may be properly set off against damages** are such as increase the value of adjacent property, and these benefits are none the less special because an increased value has been thereby added to many adjacent private properties other than that as to which a particular litigation is pending. Common benefits are such as are enjoyed by the public at large without reference to the ownership of private property adjacent to the public improvement out of which arose the benefits under consideration.

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

The opinion contains a statement of the case.

Montgomery, Charlton & Hall, for plaintiffs in error, contending that there was error in the instructions, cited: *Wagner v. Gage County*, 3 Neb., 242; *Fremont, E. & M. V. R. Co. v. Whalen*, 11 Neb., 591; *Schaller v. City of Omaha*, 23 Neb., 332; *Chicago, K. & N. R. Co. v. Wiebe*, 25 Neb., 544.

W. J. Connell and *E. J. Cornish*, for the city:

It was for the jury to determine whether or not the property had been damaged, and if so, whether or not the grade was the cause of the damage; but this must be determined from facts offered in evidence and not as conclusions of witnesses. (*City of Omaha v. Kramer*, 25 Neb., 490; *Burlington & M. R. Co. v. White*, 28 Neb., 167; *Roberts v. New York E. R. Co.*, 28 N. E. Rep. [N. Y.], 486.)

The instructions given were not erroneous. (*City of Omaha v. Schaller*, 26 Neb., 524; *Lowe v. City of Omaha*, 33 Neb., 587; *Bohm v. Metropolitan E. R. Co.*, 29 N. E. Rep. [N. Y.], 802; *Sutro v. Metropolitan E. R. Co.*, 33

N. E. Rep. [N. Y.], 334; *Hanscom v. City of Omaha*, 11 Neb., 37; *Lansing v. City of Lincoln*, 32 Neb., 470; 2 Dillon, Mun. Corp., p. 933; 2 Desty, Taxation, p. 1238.)

A. J. Poppleton, also for defendant in error.

RYAN, C.

The plaintiffs in this action, who are the plaintiffs in error in this court, sought in the district court of Douglas county, Nebraska, a recovery against the defendant on account of alleged injury to their property in blocks 9 and 12, in West Omaha, caused by the grading of Leavenworth street on the south side of block 12, and the streets connecting therewith, to-wit, Thirty-seventh and Thirty-eighth streets, extending along the east and west sides of said blocks. The plaintiffs claim that prior to the establishment and working of said streets to their present grade their property, described and set out in their petition, was on a high and level elevation of considerable extent, and very desirable and valuable for residence purposes; that by reason of the grading complained of, deep cuts had been made along the south side of said block 12, and on the east and west sides thereof, and along the south and west sides of block 9, which rendered the whole of said property much less desirable than it was before, and caused the plaintiffs to be damaged in the amount of $25,000, for which judgment was asked. The defendant admitted that it was a municipal corporation, and that the grades of Thirty-seventh and Thirty-eighth, and Leavenworth, and First and Second streets were established as plaintiffs alleged, but denied each and every other allegation of the petition, and denied that said property was damaged on account of said grading. The defendant furthermore claimed in its answer that plaintiffs' property was specially benefited and improved in a sum equal to, or in excess of, any damage sustained by the plaintiffs on account of the grading com-

plained of. The reply of the plaintiffs was in denial of each matter contained in the answer.

1. The first alleged error complained of arises in respect of the introduction of testimony of witnesses Robert Eason, Robert Nields, and D. V. Sholes. To Robert Eason was proposed the question following: "Q. If the grade had been left as it was before the city commenced grading in 1887, and Leavenworth street had been put to grade there on that basis, what would have been the effect on the market value of the property in general? In other words, was there anything that you know of to cause a depreciation in the market value of the property in question other than the grading of the streets in 1887 and 1888 by the city?" Accompanying this question was a tender of the evidence thereby sought to be elicited, in the following words: "That the only cause of the depreciation in the value of the property in controversy is the grading of the streets complained of, and that in the opinion of the witness there was no other ground for said depreciation." This witness was not required in the course of his evidence to give any estimate as to the value of the property affected, either before or after the grading complained of. The following testimony, however, had been elicited from him previous to the propounding of the question, upon the refusal to allow which error is predicated. This antecedent evidence was as follows:

Q. State what was the general effect of the grading of Leavenworth street as it was graded in 1887 and 1888, and also of the grading of Thirty-seventh and Thirty-eighth streets to conform to the grade of Leavenworth street, upon the market value of blocks 9 and 12, whether valuable or detrimental and injurious.

A. It was particularly detrimental and injurious to block 12. As to the value of the property on block 9, it did not affect it so materially,—only slightly in comparison with block 12.

Q. What would you say as to whether or not that detrimental effect would be of a large and serious character or not?

A. It would be of a large and serious character on block 12.

This evidence, received without objection, was of the same general tendency as was that sought to be elicited by the question as to which an objection was sustained. In the redirect examination of Mr. Coe, one of the plaintiffs, this testimony was given:

Q. Is there any element that you know of, from your experience and knowledge from real estate transactions and the situation of property, that prevented the advancement of your property like other property, other than the fact of this deep cut on Leavenworth street?

A. None that I know of.

The evidence of Nields and Sholes, which was rejected, was directed to the same proposition as was the rejected evidence of Robert Eason. In reference to the rejected evidence sought to be elicited from each of these witnesses, it may not be improper to observe that the same testimony was given by Mr. Coe as was sought to be introduced by the three witnesses named. This evidence was in no part of the record questioned or contradicted; neither was there any evidence contrary to, or in qualification of, that of Mr. Coe. The case was tried upon the theory that damages were properly shown by proving the value of the property before, as compared with its value after, the grading complained of. Possibly it might have been better to have qualified the question by limiting the valuation, under the conditions last referred to, to what it was as affected by the grading complained of; and yet, in effect, the same result was obtained by the general evidence given, as well as by the specific evidence, which has been referred to as having been elicited from Mr. Coe.

2. It is claimed there was error in refusing to allow the

plaintiffs to show by Euclid Martin "that the general tendency of other property in West Omaha, situated like the property in question was before the grading of the streets in question, has been on the increase; that the other property has increased largely in value during the period named in the question, and that such is not the fact respecting the property in controversy, and that to this day it is less in value than it was before the grading of those streets, and that the reason of it is the grading of the streets." It seems to us that this testimony, if not entirely speculative in its nature, was dangerously near the dividing line. The opinion of Mr. Martin as to why the general tendency of the property in question was different from that of other property in West Omaha, could have been nothing but mere speculation on his part; and equally removed must have been his opinion as to the grading of the streets being the sole obstacle to the advancement of this particular property as compared with other property in West Omaha.

3. Counsel for plaintiffs in error insist that the court should not have submitted to the jury the question of special benefits to the plaintiffs in error in respect of benefits of like nature with those which had accrued to owners of other property along and adjacent to Leavenworth street. It is argued that such benefits fall rather within the category of general benefits than special benefits. This construction treats the word "general" as synonymous with the word "common," as applied to a particular neighborhood. Such restrictive force does not of necessity inhere in the use of that word, for, as applied to benefits, they may be either common to the general public, or common to a mere neighborhood, or to a part of a street. The word "common" is ordinarily understood to apply to the general public when not qualified by some word or phrase of limitation. The term "general benefits," when unqualified, should probably be accepted in the same sense as the term "common benefits;" that is to say, when there is no limitation expressed,

it should be deemed applicable to the general public rather than as embracing as general but a limited part of the public. In some respects there obtains between the matter under consideration and the distinction held as to private nuisances a certain analogy, which can best be illustrated by reference to the case of *Francis v. Schoellkopf*, 53 N. Y., 152. This was an action for damages sustained by the plaintiff by reason of the noisome stenches arising from the defendant's tannery, which rendered the enjoyment of plaintiff's dwelling uncomfortable and almost uninhabitable for herself and family, and prevented her renting another dwelling which she owned in that vicinity. It was objected by defendant's counsel that there could be no recovery in the case because the nuisance was public, and that the only remedy was by indictment. Grover, J., in delivering the opinion of the court, said: "The evidence showed that other houses in the vicinity were affected similar to those of the plaintiff. The ground of the motion [for a nonsuit] was, that as the stench injured a large number of houses, the nuisance was common, and therefore no one could maintain an action for his particular injury, the only remedy being an indictment for the common injury to the public. The error of this is obvious both upon principle and authority. The idea that if by a wrongful act a serious injury is inflicted upon a single individual a recovery may be had therefor against the wrong-doer, and that if by the same act numbers are injured no recovery can be had by any one, is absurd."

The term "special benefits" implies benefits such as are conferred specially upon private property by public improvement, as distinguished from such benefits as the general public is entitled to receive therefrom. In common with the general public the owner of adjacent property is entitled to travel upon an improved highway, and although by reason of the improvement such travel may be rendered easier or more pleasant, yet the benefit is general, because it

is enjoyed by the public in common with the owners of adjacent property. If the improvement should result in an increase in the value to adjacent property, which increase is enjoyed by other adjacent property owners as to the property of each exclusively, the benefit is special, and it is none the less so because several adjacent lot owners derive in like manner special benefits each to his own individual property. Such fact, if it exists, in no respect decreases the increment in value enjoyed by any one of the adjacent property owners, and by way of offset such increment should therefore be treated as a special benefit in favor of whomsoever it may arise. The theory followed by the court in the trial of the case, including the instructions to the jury, was correct. The judgment of the district court is

AFFIRMED.

LANDAUER, KAIM & STRENG v. G. H. MACK & COMPANY.

FILED JANUARY 16, 1894. No. 4872.

1. **Fraudulent Conveyances: CHATTEL MORTGAGES: BURDEN OF PROOF: ATTACHMENT.** Where a creditor causes an attachment to be levied upon a stock of goods in the possession of the agent of certain mortgagees, the burden of proof is upon such creditor, on a motion to discharge the attachment, to show that the mortgages were made for the purpose of hindering, delaying, or defrauding creditors.
2. ———. The principles laid down in the first, third, and fifth paragraphs of the syllabus in *Jones v. Loree*, 37 Neb., 816, approved, applied, and followed.

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

The opinion contains a statement of the case.

Charles Offutt, for plaintiffs in error:

All transactions between husband and wife are presumed to be fraudulent, and the burden is upon the wife to show by the clear and indisputable preponderance of the evidence the consideration for the claim which she makes against the estate of her husband when such claim is made as against the rights of creditors. (*Aultman v. Obermeyer*, 6 Neb., 265; *First Nat. Bank of Davenport v. Baker*, 57 Ia., 196.)

Mack had no right to make the claims of some creditors due in advance of the time agreed upon by the creditors, to the prejudice of those whose claims were due. (*Morse v. Steinrod*, 29 Neb., 108; *Brown v. Work*, 30 Neb., 800; *Smith v. Boyer*, 29 Neb., 76.)

A mortgage or deed to a *bona fide* creditor to secure the mortgagor's property against attachment by other creditors is made with intent to cheat, hinder, and delay, and is prohibited by law. (*Johnson v. Steele*, 23 Neb., 83; *Crowninshield v. Kittridge*, 48 Mass., 522; *Johnson v. Whitwell*, 24 Mass., 73; *Harris v. Sumner*, 19 Mass., 136; *Burlingame v. Bell*, 16 Mass., 324.)

When a debtor in failing circumstances executes a mortgage upon all of his property, and transfers thereby to the mortgagee property exceeding in value a sum sufficient to pay the mortgagee, the mortgage is fraudulent as to creditors. (*Morse v. Steinrod*, 29 Neb., 108; *Smith v. Boyer*, 29 Neb., 76; *Brown v. Work*, 30 Neb., 800; *Thompson v. Richardson Drug Co.*, 33 Neb., 715; *McCord v. Weil*, 33 Neb., 868.)

An assignment for the benefit of creditors may be made without following the form prescribed by statute. The transaction operated as, and was in legal effect, an assignment for the benefit of creditors. (*Bonns v. Carter*, 22 Neb., 518; *Morse v. Steinrod*, 29 Neb., 109; *Hershiser v. Higman*, 31 Neb., 531; *Preston v. Spalding*, 10 N. E. Rep.

[Ill.], 903; *Richmond v. Mississippi Mills*, 11 S. W. Rep. [Ark.], 960; *Appeal of Miners Nat. Bank of Pottsville*, 57 Pa. St., 193; *Brashear v. West*, 7 Pet. [U. S.], 608; *Brown v. Minturn*, 2 Gallison [U. S.], 557; *Winner v. Hoyt*, 66 Wis., 234; *Norton v. Kearney*, 10 Wis., 443*; *Gillmann v. Henry*, 53 Wis., 468; *Herbst v. Lowe*, 65 Wis., 316; *Backhaus v. Sleeper*, 66 Wis., 68; *Berry v. Cutts*, 42 Me., 445; *Burrows v. Lehndorff*, 8 Ia., 103; *Van Patten v. Burr*, 52 Ia., 518; *Wilson v. Richards*, 1 Neb., 343; *Omaha Book Co. v. Sutherland*, 10 Neb., 335; *McHugh v. Smiley*, 17 Neb., 629; *Rockwell v. Humphrey*, 57 Wis., 414; *White v. Cotzhausen*, 129 U. S., 329.)

Bartlett, Crane & Baldrige and *E. R. Duffie, contra:*

Mack had the legal right to execute the mortgages, and there was no fraud in so doing. (*Lininger v. Raymond*, 12 Neb., 19; *Grimes v. Farrington*, 19 Neb., 48; *Nelson v. Garey*, 15 Neb., 531; *Bierbower v. Polk*, 17 Neb., 268; *Feder v. Solomon*, 26 Neb., 266; *Morrow v. Reed*, 30 Wis., 81; *Janvrin v. Fogg*, 49 N. H., 340; *Nash v. Norment*, 5 Mo. App., 545; *Seidentopf v. Annabil*, 6 Neb., 524; *People v. McAllister*, 19 Mich., 215; *Wyman v. Wilmarth*, 46 N. W. Rep. [S. Dak.], 190; *Britton v. Boyer*, 27 Neb., 522; *Davis v. Scott*, 27 Neb., 642.)

RYAN, C.

The questions arising in this case are solely incident to an attachment which issued out of the district court of Douglas county against the defendants G. H. Mack & Co., in a certain cause pending in that court, wherein Landauer, Kaim & Streng were plaintiffs. This attachment was levied upon a stock of merchandise which had previously, to-wit, on February 15, 1890, been mortgaged to the several parties hereinafter named, for the security of the payment of the amounts designated as owing to each, to-wit: To the First National Bank of Omaha, $6,908.16; to Eliza-

beth Mack, wife of G. H. Mack, to secure the payment of $5,939.16; to Sebastian Trottner, to secure the payment of $2,160; to Calixto Lopaz & Co., to secure the sum of $1,290.28; to the firm of G. H. Mack & Co., of Cleveland, Ohio (the individual members of which were S. Trottner and H. Lichtenberg of Cleveland, Ohio), to secure payment of the sum of $2,912.56; to D. M. Steele & Co., to secure the payment of $1,200; to Yokum Brothers, of Reading, Pa., to secure the payment of $1,446.60; to Alvin McLeod, of Omaha, Nebraska, to secure the payment of $200; to Meyer & Raapke, of Omaha, Nebraska, to secure payment of $200. Subsequently to February 15, other mortgages, chattel and real, were given by the firm of G. H. Mack & Co., until the number of all was, in the aggregate, sixty. These mortgages, without question, covered all the property owned by the firm of G. H. Mack & Co., of Omaha, at the time the several mortgages were made. Anterior to the 15th day of February it is claimed, and for the purposes of this case it may be conceded, that G. H. Mack, a member of the firm of G. H. Mack & Co., withdrew from the assets of said firm such amounts of money as were out of proportion to his proper individual expenses, for which purpose he testified that the same were withdrawn.

From the testimony it is quite clear that the aggregate amount of the mortgages given on the 15th day of February, 1890, equaled or exceeded the value of the real and personal property mortgaged. It is an established fact upon the evidence that several of the mortgages given on February 15 were given to relatives of G. H. Mack. It is also true that the mortgages to Van Slyke and McLeod were given in excess of the amounts due each of these last two named parties, who were, at the time, employes of the firm of G. H. Mack & Co. These mortgages, given for more than the amounts actually due, seem to have been so given rather from mistake, or want of means of fixing the

amount, than from any intention of giving any undue preference to the mortgagees named respectively.

It is insisted in argument that the fact that many of the mortgages given were to secure payment of sums not due at the date of the mortgages was evidence of bad faith on the part of the mortgagor and mortgagee. We should be loth to infer, as a necessary result from these premises, that such mortgages were fraudulent or invalid, or even that the fact that a mortgage was given for a debt not yet due was evidence of bad faith. Probably, as a matter of fact, mortgages are given oftener to secure sums not due than to secure the payment of claims which have already fully matured.

In respect to the fact that some of these mortgages were given to relatives of G. H. Mack, it is proper to observe that the testimony shows fully and clearly, so as to leave no ground for suspicion, that each relative who received a mortgage only received it for an amount which was actually due and for an indebtedness that was *bona fide* in all respects. Even had there been a mere question of fact in issue, there was as to this proposition testimony sufficient to sustain this affirmative finding of the court, and such finding would not, therefore, be disturbed. It is not necessary to resort to a mere presumption in favor of the correctness of the finding of fact in respect of this matter, for, upon an examination of all the testimony, we are satisfied that, as an original question, the weight of the evidence was with the finding made by the court, perhaps not expressly made, but such as must have incidentally been found to sustain the result reached. In a case like that at bar, where the mortgages have been made and recorded as required by law, and where the mortgagees have taken actual possession, which they are maintaining at the time of the levy of the attachment by a common agent of such mortgagees, the burden of proof devolves upon the attaching creditor to show that the mortgages were made for the purpose of

hindering, delaying, or defrauding creditors, a requirement not met by the proofs in this case. If one of the mortgages is *bona fide* and valid, and possession is held under such mortgage, no attachment could countervail the possession so held. If this was an action of replevin, it would be sufficient to show that the party in possession was in possession under one valid mortgage; and possession so held by the agent of a mortgagee must, as against one who undertakes to disturb that possession, prevail unless the attaching creditor shows that all the mortgages under which possession is held by the agent are invalid.

A full examination of all the pleadings and evidence, upon which the motion to dissolve the attachment was heard, convinces us that the district court was right in sustaining the motion to dissolve the attachment, under the rules laid down in the case of *Jones v. Loree*, 37 Neb., 816, thus stated in the syllabus of said case:

"1. Where several chattel mortgages are executed simultaneously for the purpose of securing debts owing by the mortgagor to the mortgagees, the aggregate of such indebtedness not being unreasonably less than the value of the property mortgaged, such mortgages will not be held void merely because no one of such debts is in itself sufficient to justify so great a security."

"5. An intention to defraud cannot be inferred merely from the fact that a preference was given to a certain creditor."

The argument of plaintiffs in error seems to be based largely upon the theory that the several mortgages in fact constituted an assignment by the firm of G. H. Mack & Co. contrary to the terms of the assignment law of this state. It is true that in *Bonns v. Carter*, 20 Neb., 566, language was employed by a portion of this court which would seem to justify this contention of the plaintiffs in error. It is quite clear that the provisions of the assignment law should not be made to operate more

broadly than its terms express; in other words, its operation should not be extended by implication. The assignment law prohibited assignments made in any other manner than that fixed by its terms, but did not undertake to abrogate the provisions of section 20, chapter 32, Compiled Statutes of Nebraska. The language of this section is as follows: "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 repeal of a statute by implication is not favored, and certainly the force given the assignment law by a portion of this court in *Bonns v. Carter, supra,* necessarily has this operation. Whether an assignment is made in conformity with the provisions of the assignment law, may be properly a question for the court to determine upon its construction of the instrument or instruments creating the assignment. It nevertheless remains true, that whether mortgages or conveyances are fraudulent, is a question of fact to be determined by the jury, or, in cases tried like the one at bar, by the court, solely upon the weight of the evidence adduced. Such questions are questions of fact involving largely the intention of the parties to the transaction, and should not be determined as questions of law arising under the assignment act. The ruling of the district court was correct, and its judgment is

AFFIRMED.

SAMUEL G. OWEN, APPELLEE, V. DELOS A. UDALL ET AL., APPELLANTS.

FILED JANUARY 16, 1894. NO. 4350.

1. **Principal and Surety:** RELEASE OF SURETY. Where a surety signs an obligation upon the condition that another person named shall also sign said obligation as surety before the first

of such signers shall be held liable thereon, the condition named must be known to the obligee to render it effective as against him.

2. **Partnership:** LIABILITY AS SURETY. A partnership firm is not liable as a mere surety upon contracts foreign to the purposes for which the partnership was entered into by the partners. This rule, however, does not necessarily relieve from liability a partnership firm, which, for the purpose of subserving its own interests, has become surety for the performance by a principal contractor of his several undertakings, and which, solely by reason of its said relationship, has secured to itself advantages of a substantial character.

3. **Res Adjudicata.** A decree in favor of a firm of subcontractors, establishing its right to a mechanic's lien and the enforcement thereof as against real property improved by the contribution of such subcontractor firm, cannot properly be invoked as *res adjudicata*, or by way of estoppel in any other respect as against the owner of the property improved when he brings suit for the recovery of damages upon a contract signed, with others, by said subcontractor firm as surety, even though the gravamen of such suit is, in part, the repayment of the amount which, on account of said decree, the aforesaid owner has been compelled to pay to such subcontractor firm.

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

The facts are stated in the opinion.

Charles E. Magoon, for appellants and plaintiffs in error:

A rule never to be lost sight of in determining the liability of a surety or guarantor is that he is a favorite of the law, and has a right to stand upon the strict terms of his obligation when such terms are ascertained. This is a rule universally recognized by the courts, and is applicable to every variety of circumstances. (Brandt, Suretyship & Guaranty, sec. 79; *Law v. East India Co.*, 4 Ves. [Eng.], 824; *Lang v. Pike*, 27 O. St., 498; *Kingsbury v. Westfall*, 61 N. Y., 356; *Ludlow v. Simond*, 2 Caines' Cases [N. Y.], 1; *Winston v. Fenwick*, 4 Stew. & P. [Ala.], 269;

Harrison v. Field, 2 Wash. [Va.], 136; *Pickersgill v. Lahens*, 15 Wall. [U. S.], 140; *Pecker v. Julius*, 2 Browne [Pa.], 31; *Van Derveer v. Wright*, 6 Barb. [N. Y.], 547; *Viele v. Hoag*, 24 Vt., 46; *Heath v. Derry Bank*, 44 N. H., 174; *Baker v. Briggs*, 8 Pick. [Mass.], 122; *Rogers v. Trustees of Schools*, 46 Ill., 428; *Judah v. Zimmerman*, 22 Ind., 389; *Grant v. Smith*, 46 N. Y., 93; *Ryan v. Trustees of Shawneetown*, 14 Ill., 20; *Miller v. Stewart*, 9 Wheat. [U. S.], 702.)

If the surety signs the obligation upon the condition that another shall also sign it as surety before it shall be binding on him, and this condition is agreed to by the creditor, or is known to him when he takes the obligation, the surety is not generally liable unless the condition is complied with. (Brandt, Suretyship & Guaranty, sec. 349; *Crawford v. Foster*, 6 Ga., 202; *United States v. Hammond*, 4 Biss. [U. S.], 283; *King v. Smith*, 2 Leigh [Va.], 157; *Miller v. Stem*, 12 Pa. St., 383; *Smith v. Doak*, 3 Tex., 216; *Jordan v. Loftin*, 13 Ala., 547; *Cowan v. Baird*, 77 N. Car., 201; *Clements v. Cassilly*, 4 La. Ann., 380; *Hill v. Sweetser*, 5 N. H., 168; *Read v. McLemore*, 34 Miss., 110; *Dunn v. Smith*, 12 Smed. & M. [Miss.], 602; *Goff v. Bankston*, 35 Miss., 518; *Bivins v. Helsley*, 4 Met. [Ky.], 78; *Evans v. Bremridge*, 8 De Gex [Eng.], 100; *Coffman v. Wilson*, 2 Met. [Ky.], 542; *Corporation of Huron v. Armstrong*, 27 Up. Can., Q. B., 533; *Pawling v. United States*, 4 Cranch [U. S.], 219; *Cutler v. Roberts*, 7 Neb., 4; *Gregory v. Littlejohn*, 25 Neb., 368.)

One partner cannot by his individual act bind the firm as the guarantor of the debt of another, or as a party to a note or bill made for the accommodation or as the surety for another, without authority specially given him for the purpose, or implied from the common course of business of the firm, or from the previous course of dealings between the parties, unless the act of such partner be afterwards ratified by the others. He who seeks to hold the firm has

the burden of proving authority, consent, or ratification. (Lindley, Partnership, p. 138*, note 21, *Sweetser v. French*, 2 Cush. [Mass.], 309; *Rollins v. Stevens*, 31 Me., 454; *Bank of Rochester v. Bowen*, 7 Wend. [N. Y.], 158; *Mayberry v. Bainton*, 2 Harr. [Del.], 24; *Maudlin v. Branch Bank at Mobile*, 2 Ala., 502; *Selden v. Bank of Commerce*, 3 Minn., 108; *Hamill v. Purvis*, 2 Pen. & W. [Pa.], 177; *Sutton v. Irwine*, 12 S. & R. [Pa.], 13; *McQuewans v. Hamlin*, 35 Pa. St., 517; *Schermerhorn v. Schermerhorn*, 1 Wend. [N. Y.], 119; *Davis v. Blackwell*, 5 Ill. App., 32; *Rolston v. Click*, 1 Stewart [Ala.], 526; *Foot v. Sabin*, 19 Johns. [N. Y.], 154; *Boyd v. Plumb*, 7 Wend. [N. Y.], 309; *Langan v. Hewett*, 13 Smed. & M. [Miss.], 122; *Andrews v. Planters Bank of Mississippi*, 7 Smed. & M. [Miss.], 192; *Moran v. Prather*, 23 Wall. [U. S.], 492; *Duncan v. Lowndes*, 3 Campb. [Eng.], 478; Lindley, Partnership, sec. 143.)

A point once adjudicated by a court of competent jurisdiction may be relied upon as an estoppel in any subsequent collateral suit, in the same or any other court at law or in chancery, or in admiralty when either party or the privies of either party allege anything inconsistent with it; and this, too, whether the subsequent suit is upon the same or a different cause of action. (Wells, Res Adjudicata, sec. 24; *Hackworth v. Zollars*, 30 Ia., 433; *Hites v. Irvine's Adm'r*, 13 O. St., 283; *Gray v. Dougherty*, 25 Cal., 266; *Covington & Cincinnati Bridge Co. v. Sargent*, 27 O. St., 237; *Kelly v. Donlin*, 70 Ill., 385.)

Stearns & Strode, contra:

One who signs a bond as surety and delivers it to another to obtain the signature of a third person before delivering it to the obligee, constitutes the person to whom he delivers it his agent, and is liable on the bond though it is delivered without the signature of the third person. (*Gibbs v. Johnson*, 30 N. W. Rep. [Mich.], 343.)

A partner exceeding his authority in making a contract is personally liable on it. (2 Lawson, Rights, Rem. & Pr., sec. 645; *Skinner v. Dayton*, 10 Am. Dec. [N. Y.], 286.)

A bond, which is perfect on its face, apparently duly executed by all whose names appear therein, which purports to be signed and delivered by the several obligors, and is actually delivered by the principal without stipulation, reservation, or condition, cannot be avoided by the sureties upon the ground that they signed it on the condition that it should be signed by other persons, who did not sign the same, if it appear that the obligee had no notice of such condition, and nothing to put him upon inquiry as to the manner of its execution, provided he has been induced upon the faith of such bond to act to his own prejudice. (*Cutler v. Roberts*, 7 Neb., 12.)

A partner entering into a contract in the name of the firm is estopped to deny his authority. (2 Lawson, Rights, Rem. & Pr., sec. 645; *Trustees of Presbyterian Congregation in Salem v. Williams*, 9 Wend. [N. Y.], 147; *Mann v. Ætna Ins. Co.*, 40 Wis., 552; *Porter v. Curry*, 50 Ill., 319; *Dudley v. Littlefield*, 21 Me., 418.)

The bondsmen are liable. (*Kiewit v. Carter*, 25 Neb., 460.)

RYAN, C.

1. The appellee Samuel G. Owen entered into a written contract with the appellant Delos A. Udall, whereby Udall agreed to erect a certain building for Owen in consideration of the payment to him of $6,200. In this contract Udall was principal, and the defendants McClay, McCall, and the Chicago Lumber Company were sureties. Collateral to this contract a bond was given for the proper performance of its undertakings, which bond was also signed by Udall as principal, and the same parties as sureties who signed the original contract in that capacity. No complaint is made as to the proper construction of the build-

ing. Its cost, however, was greater than was contemplated, and the proprietor was therefore obliged to pay off $1,501.43, the aggregate amount of certain mechanics' liens against the property improved. This suit was on the contract and bond for the amount so paid out, and for damages, which, the appellee claimed, aggregated the sum of $2,347.33. He also stated that, as the building was not completed until sixty days after the time specified in the contract, he had thereby suffered damages in the sum of $600. Udall, in his answer, pleaded a settlement and full payment, which plea was also made by McClay and McCall. The two latter named parties also alleged that at the time they signed the agreement and bond it was expressly agreed that H. P. Foster was to sign with them as surety; that Foster did not sign said bond, but that the same was signed by the Chicago Lumber Company, a copartnership firm, and that the name of the Chicago Lumber Company was signed thereto without authority, and, therefore, is not binding on the said firm; that the Chicago Lumber Company filed a mechanic's lien on said premises and foreclosed the same in the district court of Lancaster county, in a suit wherein the said lumber company was impleaded with the appellee Owen and other defendants, and that judgment was obtained in said suit by the lumber company against Owen, and that Owen paid said judgment, whereby he is estopped from recovering from the defendants the amount of said lien. They also filed a denial of all the allegations of the petition not expressly admitted. The lumber company filed an answer containing the same matters of defense as those pleaded by McCall and McClay, and in addition alleged want of authority for the signing of its name to the agreement and bond sued upon. These allegations were denied by a reply. A reference of these issues was stipulated by the parties, and thereupon ordered by the court. The referee found as facts that the building contemplated by the agreement and bond was to have been

finished on or before November 15, 1885, and that in fact it was not finished for two months thereafter; and, although the agreement provided for the payment of a penalty at the rate of $10 per day for the time covered by such failure, the referee found that Owen was damaged only to the extent of $100, for which judgment was recommended. This finding was supported by the evidence, and was in no sense a penalty, and therefore not open to objection on that score.

2. The referee further found that both the contract and bond "were signed in the presence of one John J. Kouhn by defendants Sam McClay and F. McCall, who said they would each sign, provided defendant H. P. Foster also signed said instruments, and they entrusted said instruments to the said John J. Kouhn, who took them to the defendant H. P. Foster, who signed the name of the defendant, the Chicago Lumber Company, thereto, with the express provision in each instrument, 'provided they furnish the material,' as a condition of liability, which material the said company, so far as they could, did furnish; that said Chicago Lumber Company was and is a copartnership, composed of M. T. Green, of Chicago, and defendant H. P. Foster, managing partner, at Lincoln, Nebraska; that the signing of the name of the Chicago Lumber Company to said instruments was in express violation of the partnership agreement between the said Foster and his partner, Green, and was so expressed by said Foster to said Kouhn; that the plaintiff (Owen) never had any knowledge of the want of authority by said Foster to sign the name of the Chicago Lumber Company to said instruments, but, on the contrary, that plaintiff believed he had authority, and relied upon the signature and instruments as authorized and valid, and relied thereon and acted thereon as if the same were wholly valid and authorized, and in ignorance of the real facts; that neither of defendants McClay nor McCall brought to the knowledge of plaintiff at any time that their signing

was not in good faith and without condition until some time after the buildings were completed, and that the plaintiff relied on the signatures of defendants McClay and McCall, as made in said instruments, as made in good faith and without condition violated or restricted except as by the terms of said agreement." With reference to this finding of fact the referee stated his conclusion of law thus: "I find further that the defendant Chicago Lumber Company is estopped to deny the authority of defendant Foster to sign the obligations herein litigated, having received, in due course of business, benefits therefrom, and that the signing of said obligations was a wrongful act of said Foster as against the defendant Chicago Lumber Company, and that defendant Chicago Lumber Company is entitled to a surety judgment against the defendant H. P. Foster for all sums it shall be compelled to pay in this action."

It is without the possibility of question on the evidence that the Chicago Lumber Company furnished all the lumber that was used in the building, which was the subject-matter of the contract and bond. Within its line of business the Chicago Lumber Company could furnish no other material; hence, the condition upon which the signature of the lumber company was affixed to the agreement and bond was fully met in the transactions wherein the lumber company was concerned. Its relation, therefore, to the bond was not that of a mere surety.

In the case of *Mann v. Ætna Ins. Co.*, 40 Wis., 549, the liability of the firm of Mann Brothers upon bonds was under consideration. Lyon, J., delivering the opinion of the court, used the following language: "The bonds do not seem to have been executed individually by but one of the firm of Mann Brothers, but only in the name of the firm. Whatever objection might have been made by the partners not executing the bonds in their individual capacity, to the form of execution, in case the action were against them on the bonds, there is no doubt of the right of the firm, in

whose name and for whose benefit they were executed, to treat them as valid and binding obligations against it. And the firm did so by paying the judgment recovered against Aldrich, Smith & Co. in the Milwaukee county court. Moreover, the firm having received the consideration for which the bonds were given, will not be heard to deny their validity. For these reasons, we think, the objection to the validity of the bonds because of the fact that each member of the firm did not execute them individually, is not available to the defendant."

In *Porter v. Curry*, 50 Ill., 319, it was held that "If the purchase of property by one copartner was not within the scope or usage of the partnership, yet if the property was in fact purchased on the firm credit, and the other partner afterwards claimed and obtained possession of it as firm property on that ground, the latter thereby ratified the act of his copartner, and cannot claim the benefits of the purchase and deny its obligations."

In the case at bar, one of the partners affixed the signature of the Chicago Lumber Company to the bond, as surety, it is true, and yet that relationship was predicated upon a condition profitable to the lumber company. This condition was that certain benefits should accrue to the lumber company by virtue of its relation to the contracts in question. The lumber company received the benefits stipulated for, as a condition for its becoming surety for the performance by Udall of his undertakings. Having received these benefits, it does not now occupy the relation of a mere surety to said contracts. It has become bound as fully as though no inhibition upon its powers was contained in the partnership articles adopted between Green and Foster, the individuals who constitute the firm known as the Chicago Lumber Company. The referee, therefore, was right in concluding that the lumber company was held as surety upon the contract and bond, notwithstanding the inhibition against its sustaining that relation contained in its partnership articles.

3. It is insisted on behalf of McClay and McCall that the building erected was a much more expensive building than was contemplated by the contract and bond, and that the plans and specifications, with reference to which said contract and bond were made, were radically departed from in the construction of the building, as to the erection of which they had become sureties. As to whether or not these objections were well founded, we are without sufficient data to form an opinion. The specifications do not seem to have been used in evidence, and as they were the only reliable data from which we could determine whether there has been a departure or not, we must assume, in the absence of a showing to the contrary, that there was no such departure as would release the sureties from their undertaking.

4. Again, it is urged by the sureties, McCall and McClay, that their signatures were attached to the contract as well as to the bond, upon the condition that the signature of H. P. Foster should afterwards be attached to the same instruments. The language in which this defense was attempted to be pleaded by the answer of these parties is as follows: "These defendants further say that they signed said contract as sureties only, and that they signed the same with the express understanding and agreement with the plaintiff that the said contract should be of no binding force until the same had been signed in addition to themselves by ——, and that the same was never signed by said parties." In this part of the answer, which is the only one upon the subject under discussion, there was the absence of a very material element, to-wit, the name of the party whose signature was to be obtained in addition to the signatures affixed by McCall and McClay respectively. It is very doubtful whether any finding could supply this deficiency. Should it be conceded, however, that under the proofs we should be justified in assuming that H. P. Foster's name was one to be inserted

in the blank, there would arise another difficulty in respect to the contention of these sureties, and that is, that neither the contract nor bond contained any intimation of such a condition as is now urged in respect to the signature of Foster. The evidence which would logically be necessary to sustain the averments in this respect, construed as liberally as may be, would relate to matters resting in parol previous to the signing by McClay and McCall. The contention urged is, that in addition to the signatures of these parties there should afterwards be obtained the signature of another party, or the signatures of the two parties named would not have any binding force. The condition that the contract and bond should be operative only upon their being signed by Foster, could be made available only by showing that it was assented to by the obligee; or, at least, that he approved of the signatures of McClay and McCall upon the condition named. The evidence upon this point is conflicting, and the finding of the referee is adverse to such condition being known to Owen at the time he received the contract and bond as fully executed, and that Owen never knew of any claim of such condition until the cause of action sued on had almost, if not entirely, accrued in his favor. There is, however, another consideration which militates very strongly against the claim made for the release of the sureties McCall and McClay, and that is, that as a matter of fact the signature of the Chicago Lumber Company affixed by H. P. Foster necessarily rendered him liable, as found by the referee, to the same extent as he would have been liable had he signed his own proper name instead of that of the Chicago Lumber Company. In view of all these considerations, the defendants McCall and McClay should not be heard to assert this defense.

5. As to the matter of settlement, the evidence was conflicting; on the one hand, it being insisted that the settlement referred to embraced simply extras which are not

sued for in this action; on the other hand, the contention was that the settlement was of all matters in dispute. In support of the first, the testimony of Owen was direct and circumstantial; and against it was the testimony of Udall with equal certainty. The referee, however, found the facts consistently with the evidence given by Owen, and, therefore, said finding will not be disturbed.

6. The sureties, McClay and McCall, insisted that they should be released from liability, because they notified Owen not to make payments to Udall, and because Owen made payments without insisting upon there being furnished him a statement from the clerk of the office wherein liens are recorded that such clerk had formally examined the records and found no liens or claims recorded against the work or on account of said contract; and that said Owen, although he had knowledge of the existence of other claims, voluntarily, and against the express protests of said sureties, made payments to Udall of large sums of money on account of his contract. An examination of the record furnishes no evidence in support of these affirmative allegations, and upon this subject the findings of the referee are silent. The payments seem to have been made, so far as the evidence shows, in accordance with the terms of the contract as to the performance of the conditions of which the said McClay and McCall were sureties.

7. It is insisted by the defendants sustaining the relation of sureties to the contract and bond sued upon that Owen is estopped to claim payment of the amounts by him paid to the Chicago Lumber Company upon its enforcement of the mechanic's lien for material furnished for the erection of the building, as to the construction of which the contract and bond were made. This claim is founded upon the fact that anterior to the commencement of this suit there was filed by J. R. Megahan, and another, petitions for the foreclosure of mechanics' liens against the said building, on account of labor done in the erection of the same.

To this suit the Chicago Lumber Company and Samuel G. Owen were made defendants. The Chicago Lumber Company, by answer in the nature of a cross-petition, set forth its claim for the enforcement of a mechanic's lien against the same premises. Samuel G. Owen answered this cross-petition of the Chicago Lumber Company in general denial. A decree was afterwards rendered establishing the liens of the several claimants therefor in that suit. It is insisted that, as between Owen and the Chicago Lumber Company, that decree settled for all purposes the claim of the Chicago Lumber Company adversely to Owen, and from thenceforward he was estopped to afterwards set up that claim as the foundation on his own behalf for a recovery upon the contract and bond sued on herein.

The said contract and bond, it will be observed, created between Owen and Udall the relation of owner of the property to be improved and principal contractor. Whoever else contributed any lumber, material, or labor for the erection of the building contracted for, did so as subcontractor. The action of each of these subcontractors for the enforcement of his lien was necessarily against Owen as owner of the property to be improved, against Udall as principal contractor, and against other parties claiming liens. By no stretch of legal proprieties could McClay, McCall, or the Chicago Lumber Company, as sureties upon the contract and bond sued on herein, be brought in as parties to the foreclosure of the liens of such subcontractors. In a suit by such subcontractors the only matter which could be litigated was the liability of the property for the payment of such amount as such subcontractors had furnished for its betterment. Between the owner and the subcontractors there is not necessarily any direct contract relation. The liability is only that of the property for the payment of such an amount as the contribution of such subcontractors should render it liable to. Under these circumstances it is difficult to conceive how any judgment

rendered in favor of a subcontractor could be an adjudication of the rights of Owen to sue McClay, McCall, and the Chicago Lumber Company, as sureties, for the nonperformance by Udall, their principal, of conditions which they had agreed to be bound that he should perform. It is true that the decree was in favor of the Chicago Lumber Company and against Owen as one of the defendants; and yet that decree was only to the extent that certain property was held liable for the payment for certain materials used in its improvement. The contract and bond signed by the Chicago Lumber Company did not stipulate that the Chicago Lumber Company would file no lien for material furnished; indeed, the provision that the material should be furnished by that company would seem to imply rather the contrary. As no condition contained in the contract or bond signed by the Chicago Lumber Company afforded any ground for pleading a defense against the claim of the Chicago Lumber Company to a lien, it necessarily resulted that no estoppel could be predicated upon the failure of Owen to plead such matter; neither did the decree in favor of the Chicago Lumber Company, as against Owen, amount to an adjudication as to the matters which are in dispute in this action. The judgment of the district court is

AFFIRMED.

OMAHA & REPUBLICAN VALLEY RAILWAY COMPANY v. GEORGE E. BRADY.

FILED JANUARY 16, 1894. No. 4437.

1. **Railroad Companies:** STREET CROSSINGS: NEGLIGENCE. By the statute, railroad companies are given the right to lay their tracks in and across the streets of the municipalities of this state; and this right carries with it the corresponding duty on

their part to construct and maintain at all times proper crossings on the streets intersected at grade by their main and side tracks, and neglect so to do would be evidence of negligence which would render the railroad company liable for an injury occurring by reason thereof.

2. ———: NEGLIGENCE: FLAGMAN: QUESTION FOR JURY. In the absence of a municipal ordinance and of express statutory requirements on the subject, whether a railroad company is guilty of negligence in not maintaining a flagman, or some other equally safe and efficacious instrumentality at a given street crossing, is a question of fact for the jury to determine from the circumstances and evidence in the particular case.

3. ———: NOISE FROM MANAGEMENT OF TRAIN: EVIDENCE OF NEGLIGENCE. Railroads cannot be operated without noise; and if teams are frightened by the usual noise arising from a prudent and proper management of a train or engine, the railroad company is not liable for an injury resulting from such noise; and whether the noise complained of resulted from a prudent operation of the railroad or its appliances, is a question to be determined from the circumstances and other evidence in the case. That the noise complained of was unnecessarily made, is not of itself evidence that its making was negligence. To be evidence of negligence the noise must have been made under such circumstances and surroundings as to time, place, and the situation of the parties, as to show a neglect to exercise that degree of care which a reasonable man would have exercised under the circumstances.

4. **Issues as to the existence of negligence** and contributory negligence, and as to the proximate cause of an injury, are for the jury to determine, when the evidence as to the facts is conflicting and where different minds might reasonably draw different inferences as to these questions from the facts established. *American Water-Works Co. v. Dougherty*, 37 Neb., 373, followed.

5. **The opinion of a medical expert** may be based (1) on his acquaintance with the party whose condition is under investigation; (2) upon a medical examination of him which he has made; or (3) upon a hypothetical case stated to the expert in court.

6. **Examination of Medical Experts:** HYPOTHETICAL QUESTIONS. Some latitude must necessarily be given in an examination of medical experts and in the propounding of hypothetical questions, the better to enable the jury to pass upon the question submitted to them. It is the privilege of counsel in such cases

to assume, within the limits of the evidence, any state of facts which he claims the evidence justifies, and have the opinion of experts upon the facts thus assumed.

7. **The argument of counsel to the jury** should be limited to the facts in evidence and the reasonable inferences deducible therefrom. Counsel charged with the responsibility of the conduct of a case has certain rights as well as duties in the premises. He must use all honorable means to protect his client's interests. He must act honorably and fairly with the court, opposing counsel and the jury; but he may of right in his argument make such comment on the conduct and credibility of witnesses or parties to the suit as the evidence warrants.

8. **In order to constitute champerty** the contract between the attorney and his client must not only provide that the attorney shall have a part of the money or thing recovered in the action, but it must also provide that the attorney shall at his own expense support the suit, be responsible for the costs, and take all the risks of the litigation.

9. **Champerty.** A railroad company sued for damages, alleged to have been sustained by plaintiff through its negligence, cannot interpose as a defense that the suit is being carried on by virtue of a champertous agreement between plaintiff and his counsel; this is a defense available only, if at all, to the plaintiff in a suit against him on the contract.

10. **Negligence:** INSTRUCTIONS. The existence of negligence should be proved and passed upon by the jury as any other fact. It is improper for a trial court to state to the jury a circumstance or group of circumstances as to which there has been evidence on the trial, and instruct that such fact or group of facts amounts to negligence. At most, the jury should be instructed that such circumstances, if established by a preponderance of the evidence, are proper to be considered in determining the existence of negligence. *Missouri P. R. Co. v. Baier*, 37 Neb., 235 followed.

11. **Railroad Companies:** NEGLIGENCE: PERSONAL INJURIES: EVIDENCE: DAMAGES. June 27, 1888, Brady was injured through the negligence of the railroad company. No bones were broken and no injury was visible. He was not confined to his bed until July 1889, and in the meantime worked at hauling brick and dirt and indulged some in athletic sports. In the summer of 1889 he was seriously sick with inflammation of the lining membrane of the chest. In March, 1890, he sued the railroad company for damages, alleging that the injury of June 27, 1888, was permanent. At the time of the trial he was suffering from

a mortal disease, probably consumption. The jury found his condition at the time of the trial was the result of the injury he received June 27, 1888. *Held*, That for this verdict to stand it must have for support competent evidence that Brady's condition at the time of the trial was the probable and reasonable result of the injury received June 27, 1888, and that evidence that his present condition was possibly the result of said injury, was not sufficient.

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

The opinion contains a statement of the case.

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

When the evidence given at the trial, with all the inferences which the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant. (*Schofield v. Chicago & St. P. R. Co.*, 114 U. S., 618; *Parks v. Ross*, 11 How. [U. S.], 372; *Richardson v. Boston*, 19 How. [U. S.], 269; *Randall v. Baltimore & O. R. Co.*, 109 U. S., 478; *Furlong v. Garrett*, 44 Wis., 111; *Jones v. Chicago & N. W. R. Co.*, 49 Wis., 352; *Seefeld v. Chicago, M. & St. P. R. Co.*, 70 Wis., 216; *Atchison & N. R. Co. v. Loree*, 4 Neb., 446; *State Bank of Crete v. Smith*, 29 Neb., 434.)

There is no statute requiring a flagman, and the judiciary cannot establish police regulations on their own judgment where the legislature has apparently considered none essential. (*Hass v. Grand Rapids & I. R. Co.*, 47 Mich., 401; *Peck v. Michigan C. R. Co.*, 19 Am. & Eng. R. Cases [Mich.], 257.)

Slight want of ordinary care on plaintiff's part will defeat his recovery, however gross the defendant's negligence may have been, provided it was not willful and malicious.

Under the testimony the court should have directed a verdict for the defendant. (*Randall v. Northwestern Telegraph Co.*, 54 Wis., 142; Beach, Contributory Negligence, sec. 162; *Louisville & N. R. Co. v. Schmidt*, 8 Am. & Eng. R. Cases [Ind.], 248; *McQuillikin v. Central Pac. R. Co.*, 2 Pac. Rep. [Cal.], 46; *Kelly v. Pennsylvania R. Co.*, 8 Atl. Rep. [Pa.], 856; *Dunning v. Bond*, 38 Fed. Rep., 813; *Freeman v. Duluth, S. S. & A. R. Co.*, 41 N. W. Rep. [Mich.], 875; *Rigler v. Charlotte, C. & A. R. Co.*, 26 Am. & Eng. R. Cases [N. Car.], 386; *Salter v. Utica & B. R. R. Co.*, 75 N. Y., 273; *Weyl v. Chicago, M. & St. P. R. Co.*, 40 Minn., 353; *Rhoades v. Chicago & G. T. R. Co.*, 58 Mich., 266; *Thompson v. New York C. & H. R. R. Co.*, 33 Hun [N. Y.], 16; *Heffinger v. Minneapolis, L. & M. R. Co.*, 45 N. W. Rep. [Minn.], 1131.) It is negligence to unnecessarily drive horses known to be easily frightened in the vicinity of trains emitting steam and making the usual noise incident to their operation. (*Pittsburgh Southern R. Co. v. Taylor*, 104 Pa. St., 306; *Philadelphia, W. & B. R. Co. v. Stinger*, 78 Pa. St., 219; *Cosgrove v. New York C. & H. R. R. Co.*, 6 Am. & Eng. R. Cases [N. Y.], 35; *Rhoades v. Chicago & G. T. R. Co.*, 25 N. W. Rep. [Mich.], 182; *Campbell v. New York C. & H. R. R. Co.*, 51 Hun [N. Y.], 642; *Stringer v. Frost*, 19 N. E. Rep. [Ind.], 331.)

The book should have been admitted in evidence. (*Van Every v. Fitzgerald*, 21 Neb., 41; *Schuyler Nat. Bank v. Bollong*, 24 Neb., 823; *Field v. Farrington*, 10 Wall. [U. S.], 141; *Xenia Bank v. Stewart*, 114 U. S., 230; *Randall v. Northwestern Telegraph Co.*, 54 Wis., 143; *Smith v. Schulenberg*, 34 Wis., 41.)

The jury should in every case distinctly understand what are the exact facts upon which experts base their opinions. The admission of testimony founded partially upon their memory of plaintiff's evidence was erroneous. (*Luning v. State*, 2 Pinney [Wis.], 215; *Bennett v. State*, 57 Wis., 83;

Hunt v. Lowell Gas Light Co., 8 Allen [Mass.], 169; *Kempsey v. McGinniss*, 21 Mich., 123; *Woodbury v. Obear*, 7 Gray [Mass.], 467; *Kreuziger v. Chicago & N. W. R. Co.*, 73 Wis., 164; *Heald v. Thing*, 45 Me., 392; *Cincinnati & Firemen's Mutual Ins. Co. v. May*, 20 O., 224; *O'Leary v. Iskey*, 12 Neb., 136; *Morrill v. Tegarden*, 19 Neb., 536.)

The verdict should be set aside on account of remarks, unsustained by any testimony, made by the plaintiff's attorneys in addressing the jury, and calculated and intended to affect the verdict. (*Brown v. Swineford*, 44 Wis., 292; *Tucker v. Henniker*, 41 N. H., 317; *State v. Smith*, 75 N. Car., 306; *Ferguson v. State*, 49 Ind., 33; *Hennies v. Vogel*, 7 Cent. L. J. [Ill.], 18; *Coble v. Coble*, 79 N. Car., 589; *Long v. State*, 56 Ind., 186; *Rudolph v. Landwerlen*, 92 Ind., 34; *Hall v. Wolf*, 61 Ia., 559; *Whitsett v. Chicago, R. I. & P. R. Co.*, 67 Ia., 130; *Baker v. Madison*, 62 Wis., 137; *Hanawalt v. State*, 64 Wis., 84; *Sasse v. State*, 68 Wis., 530; *Commonwealth v. Scott*, 123 Mass., 239; *Hatch v. State*, 8 Tex. App., 416; *Chicago & A. R. Co. v. Bragonier*, 13 Brad. [Ill.], 467; *Rickabus v. Gott*, 51 Mich., 227; *Bedford v. Penny*, 25 N. W. Rep. [Mich.], 381; *People v. Quick*, 25 N. W. Rep. [Mich.], 302; *Cleveland Paper Co. v. Banks*, 15 Neb., 20; *Bradshaw v. State*, 19 Neb., 644; *Jacques v. Bridgeport Horse R. Co.*, 41 Conn., 61; *Galveston, Harrisburg & S. A. R. Co. v. Kutac*, 37 Am. & Eng. R. Cases [Tex.], 470; *Galveston, H. & H. R. Co. v. Cooper*, 70 Tex., 67; *McCormick v. Chicago, R. I. & P. R. Co.*, 47 Ia., 345; *Moore v. State*, 17 O. St., 526; *Baker v. City of Madison*, 62 Wis., 147; *State v. Balch*, 31 Kan., 465; *Bremer v. Green Bay R. Co.*, 61 Wis., 114; *Henry v. Sioux City & P. R. Co.*, 66 Ia., 52; *Bullis v. Drake*, 20 Neb., 167; *Bullard v. Boston & M. R. Co.*, 5 Atl. Rep. [N. H.], 838; *Dougherty v. Welch*, 53 Conn., 558; *Kreuzinger v. Chicago & N. W. R. Co.*, 73 Wis., 162; *Pennsylvania R. Co. v. Roy*, 102 U. S., 451.)

The agreement between the plaintiff and his counsel for payment by the former to the latter of one-half of the judgment as compensation is champertous and contrary to public policy. Any agreement to pay part of the sum recovered, whether by commission or otherwise, on consideration either of money advanced to maintain a suit, or services rendered, or information given, or evidence furnished, comes within the definition of champerty. (2 Parsons, Contracts [5th ed.], 766; *Stanley v. Jones*, 7 Bing. [Eng.], 369*; *Thurston v. Percival*, 1 Pick. [Mass.], 415; *Boardman v. Thompson*, 25 Ia., 487; *Cord v. Southwell*, 15 Wis., 231.)

When it appears from the evidence that a suit is prosecuted under a champertous agreement the court should at once dismiss it. (*Barker v. Barker*, 14 Wis., 154; *Webb v. Armstrong*, 5 Humph. [Tenn.], 379; *Morrison v. Deadrick*, 10 Humph. [Tenn.], 342; *Hunt v. Lyle*, 8 Yerg. [Tenn.], 142.)

There was no proof that the damage, past or prospective, was the probable result of the accident, but only the possible result. This will not do. There must be facts laid before the jury from which they may say, not that it is the possible, but the probable result. (*White v. Milwaukee City R. Co.*, 61 Wis., 536; *Abbot v. Tolliver*, 71 Wis., 64; *Strohm v. New York, L. E. & W. R. Co.*, 96 N. Y., 305; *Gibbons v. Wisconsin V. R. Co.*, 58 Wis., 341.)

Wigton & Whitham, contra:

The court did not err in overruling the motion to instruct the jury, at the close of plaintiff's testimony, to find for defendant. This the court may do only when plaintiff has failed to introduce evidence tending to sustain each material allegation of his petition; and, in determining whether plaintiff has so failed, let us remember, as this court has repeatedly held, that "by the interposition of the motion the defendant admitted not only the truth of the evidence,

but the existence of all the facts which the evidence conduces to prove as well as inferences to be drawn from it. The only question is whether all the material facts alleged in the petition have been supported by some evidence, however slight. It matters not how slight this evidence may have been, if any was produced the motion should have been overruled, because it is the right of a party to have the weight and sufficiency of his testimony passed upon by the jury." Plaintiff not only produced some evidence, but established, beyond question, that defendant was negligent in not keeping in good repair good and sufficient crossings. That the letting off of steam without warning was the direct cause of plaintiff's team taking fright and running is positively sworn to. The questions of negligence and contributory negligence were for the jury. (*Smith v. Sioux City & P. R. Co.*, 15 Neb., 586; *Johnson v. Missouri P. R. Co.*, 18 Neb., 696; *Byrd v. Blessing*, 11 O. St., 362; 1 Thompson, Negligence, p. 24; *Hart v. Chicago, R. I. & P. R. Co.*, 9 N. W. Rep. [Ia.], 116; *Hart v. Chicago, R. I. & P. R. Co.*, 7 N. W. Rep. [Ia.], 347; *Pennsylvania R. Co. v. Barnett*, 59 Pa. St., 259; *Gordon v. Boston & M. R. Co.*, 58 N. H., 396; *Toledo, W. & W. R. Co. v. Harmon*, 47 Ill., 298; *Manchester, S. J. & A. R. Co. v. Fullarton*, 14 C. B. [Eng.], 53; *Culp v. Atchison & N. R. Co.* 17 Kan., 475; *Andrews v. Mason City & Ft. D. R. Co.*, 42 N. W. Rep. [Ia.], 42; *Walker v. Boston & M. R. Co.*, 13 Atl. Rep. [N. H.], 649; *City of Plattsmouth v. Mitchell*, 20 Neb., 231; *Stringer v. Frost*, 19 N. E. Rep. [Ind.], 331; *Burnett v. Burlington & M. R. R. Co.*, 16 Neb., 336.)

The ruling upon the objections to the testimony of the experts was without error. (*Hunt v. Lowell Gas Light Co.*, 8 Allen [Mass.], 169; *Wright v. Hardy*, 22 Wis., 348; *Getchell v. Hill*, 21 Minn., 464; *Negroes v. Townshend*, 9 Md., 445; *Gates v. Fleischer*, 30 N. W. Rep. [Wis.], 674.)

In the argument of a cause error will lie only from the action of the court, and not from the language of counsel.

(*Bradshaw v. State*, 17 Neb., 152; *McLain v. State*, 18 Neb., 163; *Bohanan v. State*, 18 Neb., 79; *Bullis v. Drake*, 20 Neb., 172.)

The agreement between the plaintiff below and his attorneys is valid and not champertous. (*Blaisdell v. Ahern*, 11 N. E. Rep. [Mass.], 681; *Courtright v. Burnes*, 13 Fed. Rep., 323, note; *Phillips v. South Park Com'rs*, 10 N. E. Rep. [Ill.], 230; *Winslow v. Central I. R. Co.*, 32 N. W. Rep. [Ia.], 330; *Aultman v. Waddle*, 19 Pac. Rep. [Kan.], 730.) Even if it were champertous, the defendant, not being a party to the contract, and this not being an action on the contract, could not raise the question or be relieved of any liability in this action because of it. (*Courtright v. Burnes*, 13 Fed. Rep., 317; *Gage v. Downey*, 19 Pac. Rep. [Cal.], 120.)

RAGAN, C.

George E. Brady sued the Omaha & Republican Valley Railroad Company in the district court of Madison county for damages, for an injury which he alleges he received by reason of the railroad company's negligence on the 27th day of June, 1888, while he was in the act of crossing the railroad company's tracks in the city of Norfolk with his wagon and team. He alleged in his petition that at the time of his injury Norfolk avenue ran east and west through, and was the principal street in, said city, and that the railroad company's main and side tracks crossed said avenue at grade in a northeasterly and southwesterly direction. The grounds of negligence charged against the railroad company, are three: (*a.*) That the railroad company had caused the crossings at the intersection of said avenue and said main and side tracks to become and remain out of repair by removing the planking from between the rails of said tracks at said crossings. (*b.*) That the railroad company had no flagman or other person at said crossing to give warning. (*c.*) That plaintiff was engaged in hauling

dirt with his team of horses and wagon upon said avenue, and while so engaged in driving his said team and wagon along and upon said avenue going west, when about to cross said railroad and side tracks upon said avenue, the railroad company, by its servants and agents, negligently, wrongfully, and unlawfully, suddenly and without warning to plaintiff, caused and permitted steam to discharge in great volume, noise, and with hissing sound while said engine was standing or moving slowly on defendant's said railroad near the north margin of said avenue and public road and near the plaintiff's said team, which took fright thereat, ran away, across and over said railroad and side tracks, and the dirt bed or plank floor of said wagon, upon which plaintiff was riding, became loose and fell to the ground, and plaintiff was struck and thrown by reason thereof from and off of said wagon down under the same and was run over by said wagon and the wheels thereof. The defense of the railroad company—aside from admitting its corporate character, location of Norfolk avenue, and its intersection by the main and side tracks of the railroad—was substantially a general denial of the averments of the petition and a plea of contributory negligence upon the part of Brady. Brady had a verdict and judgment, and the railroad company brings the case here for review, assigning numerous errors, of which we notice eight.

1. That the evidence does not establish any negligence on the part of the railroad company which caused Brady's injury.

(*a.*) The condition of the crossing. The evidence discloses that the railroad company's track and side tracks cross Norfolk avenue as alleged in the petition; that said avenue was one of, if not the main thoroughfare of said city; that it was much used both by the country people and the residents of the city; that some time prior to Brady's accident the railroad company had removed the

planking, or a part of it, from between the rails of their tracks at said crossings, and at the date of the casualty the said crossings were not in good condition; that Brady, on the day of his injury, was engaged in hauling dirt from a point west of these crossings and passed over them with his wagon; that while he was driving west for a load of dirt, sitting on the dirt boards of his wagon, and while about to pass over the crossing of Norfolk avenue and the main track, his horses became frightened at the noise made by escaping steam from the locomotive engine of the railroad company on said main track, ran away and over the crossings of the said tracks; the chucking and striking of the wheels of his wagon against and between said tracks loosened the boards on his wagon, causing an end of one of them to fall to the ground and the other end to strike Brady on his side and to knock him off his wagon, one wheel of which passed over his body. It does not clearly appear whether his hurt was caused by being struck by the board or by the wagon wheel passing over him. I am not aware of any statute in this state which expressly provides that railroad companies shall construct and maintain in good order street crossings at the grade intersections of their railroad and side tracks with the streets of the cities of this state; but railroad companies are by the statutes given the right to lay their tracks in and across the streets of the municipalities of the state, and this right carries with it the corresponding duty on the part of the railroad companies to construct and maintain at all times proper crossings on the streets intersected at grade by their tracks and side tracks; and if an injury is caused by reason of their neglect to do either, they are liable therefor. (2 Wood, Railway Law, p. 958; *Worster v. Forty-second Street & G. S. F. R. Co.*, 50 N. Y., 203.) There is sufficient competent evidence in the record to sustain the jury's verdict to the extent that Brady was injured through the negligence of the railroad company in failing to keep in

good repair the crossings at the intersection of the railroad and side tracks with Norfolk avenue.

(*b.*) The flagman at crossings. The evidence on the trial was conflicting as to whether there was a flagman at the crossing at the time of the accident. For the purposes of this opinion we shall assume there was none. There is no statute in this state which expressly makes it the duty of a railroad company to keep a flagman at the crossings of city streets, nor is there anything in the record showing that such duty was enjoined on the railroad company by the ordinances of the city of Norfolk. No rule can be laid down by the courts in such matters that might not work injustice. It certainly is not the duty of railroad companies to maintain a flagman or watchman or gates at all crossings of all streets; and on the other hand it is their duty to so use their property and franchises as not to unnecessarily injure others. In the absence of a city ordinance and all statutory requirements on the subject, whether a railroad company is guilty of negligence in not maintaining a flagman or some other equally safe and efficacious instrumentality at a particular street crossing, is a question of fact for the jury or trial court to determine from all the circumstances of the particular case; and while there is no doubt it was the duty of the railroad company to maintain a flagman or some other equally safe instrumentality at this crossing to warn persons about to come on said crossing of approaching danger, yet the neglect of this duty by the railroad company in this instance neither produced nor contributed to Brady's injury; and if this verdict depended for its support on such default, it could not stand. The noise of escaping steam which frightened Brady's horses was produced by the engineer opening the cylinder cocks of his engine, at that time north of the avenue and not approaching or about to approach the avenue, but backing or about to back away from the crossing. Counsel for Brady argue, if we understand them, that the railroad company

should have, by a flagman, or otherwise, at the crossing, given notice to Brady that this noise was about to be made, and that the failure of the railroad company to do so was evidence of negligence to go to the jury. The duty of a flagman or watchman at a street crossing is, as we understand it, to warn persons about to go on the crossing of approaching trains, cars, or engines, *i. e.*, danger. How could a flagman at this crossing have known that this engineer was about to open the valves of his engine? And a rule of law that made it evidence of negligence against a railroad company for it not to apprise persons about to come on the crossing that an engine or other machinery on the track was about to cause a noise, usual and incident in the operation of said railroad, would be both unjust and oppressive. We are aware that such a rule was laid down by the supreme court of Iowa in *Hart v. Chicago, R. I. & P. R. Co.*, 56 Ia., 166; but with the highest respect for that tribunal, we cannot follow its conclusions in that case on this point.

(*c.*) The escape of steam. It appears from the evidence that while Brady's team was on or nearly over the crossing of the main track, a locomotive engine headed south on said main track some fifty feet north of Brady's team was either backing slowly or about to back away from the crossing, and while the team and engine were in this situation, the engineer permitted the steam to escape from the cylinder cocks of his engine, the noise of which frightened Brady's team and caused it to run away; that the noise made was not extremely loud, nor was it an unusual, hideous, or frightful one; that the engine had been taken a short time before from the roundhouse, where it had stood the previous night; that the employes of the railroad company had been doing some switching with it in making up a train that was about to go out, and at the time of the "letting off steam" the engine and train were backing or about to back up to the station; that as an engine cools

down the steam condenses in the cylinders, and it is necessary for the protection of the engine to force the water formed by this condensation out of the cylinders before sending the engine out on the road; that this is done by opening the valves in the cylinder; that from the time the engine came out of its stall to the moment of the accident, sufficient time had elapsed for ejecting the condensed steam from the cylinders; that the act of "letting off steam" at the time it was done was not necessary for the proper operation or protection of the engine; that the train had just backed over the crossing from a point south of the avenue; that this avenue was much traveled, and others besides Brady with teams were on it, but not in the immediate vicinity of the crossing at the time the train backed over it. That the engineer, when he passed the crossing, observed Brady or others on the street and near the crossing, and that at the time he opened the valves of his engine he was aware of Brady's presence on or near the crossing, are not established by the testimony. These facts were competent evidence to go to the jury, as they were part of the things done; but they were not, under all the facts and circumstances in this case, evidence that the act of unnecessarily "letting off steam" was a negligent one. If the record disclosed that the engineer in charge of the train, at the time he opened the values of his engine, was aware of the presence of Brady, or other persons with teams, at the crossing, then these facts would have been evidence of negligence for a jury's consideration. If the facts, circumstances, and situation of the parties had been such at the time this steam escaped as to make it the duty of the engineer to be aware of Brady's presence, then the engineer's act of opening the valves would have been evidence of negligence for the jury's consideration. The evidence does not show that the engineer, at the time, was aware of Brady's presence, but that immediately prior to the escaping of this steam the engine had been backing

north towards and across Norfolk avenue. During this time it was the duty of the engineer to keep a lookout in the direction towards which his engine was moving. When his engine passed the Norfolk avenue crossing Brady was a hundred feet away, and the engineer was under no obligations to observe him or his conduct at that distance. If at the time the engine passed the crossing at Norfolk avenue, Brady and his team had been in the immediate vicinity of the crossing, the facts might have been competent for the jury. At the very moment the engineer permitted the escaping of the steam his engine was either moving, or about to move, north away from the crossing, and in either case it was the engineer's duty to be then on the lookout for obstructions on the track in the direction his engine was moving or about to move; and if he was not so engaged, that fact would be evidence of negligence. Suppose at the time the steam escaped, the engineer had been looking toward the crossing he had just passed, and his train had struck and injured a child on the track. Could this company escape liability therefor by saying that the engineer did not see the child in time to stop his train because at the moment of the accident he was looking back toward the point from which his train was receding? We think no lawyer will contend that the railroad company could escape liability on any such grounds. Railroads cannot be operated without noise, and if teams are frightened by the usual noise arising from a prudent and proper management of a train or engine, the railroad company is not liable for an injury resulting from such noise. The making of an unnecessary noise by a railroad company, as, in this case, the escaping of steam, is not of itself evidence of negligence. It may or may not be. To be negligence, the noise must have been made under such circumstances and surroundings as to time, place, and situation of the parties as to establish a neglect to exercise that degree of care which a reasonable man would have exercised

under the circumstances. If this verdict depended for its support on the alleged negligence of the railroad company's engineer in opening the valves of the engine and unnecessarily permitting the escape of the steam therefrom, it could not stand; but the verdict does not rest alone on such alleged act of negligence; and the instruction of the district court by which the jury was permitted to consider the unnecessary escape of steam, and the noise made thereby, as evidence of negligence, though erroneous, was without prejudice to the railroad company, as the proximate cause of Brady's injury, as proved, was the bad condition of the railroad and switch-track crossings of Norfolk avenue; and there is ample evidence to sustain the jury's finding that Brady was injured by the negligence of the railroad company, after excluding all the evidence on the subject of escaping steam.

2. That Brady's injury was the result of his contributory negligence.

The evidence shows that Brady knew the planks had been removed from between the rails and that the crossings were out of repair; that his horses would become frightened if it, the railroad company, "let off steam;" that he saw ahead of him the train backing slowly north across the avenue on which he was driving, while he was 100 feet from the crossing; that he took no special precautions for his safety when approaching the crossing, but sat on the boards on his wagon, with his feet hanging at the side and holding his lines as he ordinarily did when approaching a crossing. In *Foxworthy v. City of Hastings*, 23 Neb., 777, it is said that negligence is doing something which a prudent man under the circumstances would not do. Now, did Brady, in driving on this crossing at the time, in view of the situation of the engine, his knowledge of the disposition of his team, and the condition of the crossings, do something which a prudent and reasonable man would not have done? Different minds might honestly answer the

question differently, and the question is therefore one for the jury. (*City of Lincoln v. Gillilan*, 18 Neb., 114; *Orleans v. Perry*, 24 Neb., 831; *Brown v. Brooks*, 55 N. W. Rep. [Wis.], 395; *Missouri P. R. Co. v. Baier*, 37 Neb., 235; *American Water-Works Co. v. Dougherty*, 37 Neb., 373.)

3. That the court erred in overruling objections made to hypothetical questions propounded to experts by Brady's counsel.

Brady brought this suit some twenty months after he was hurt. During the summer of 1889 he was sick and attended by the physicians examined as experts, and was also examined at the trial by the physicians in the presence of the jury; and it appears from the evidence that Brady was then afflicted with a mortal disease, probably consumption. Dr. Hagey, one of the physicians, after testifying that he visited Brady professionally in the summer of 1889 and had heard his evidence, was asked by Brady's counsel this question: "Q. State whether the condition in which you found him at that time—summer of 1889—might be the result of an injury received in June, 1888." Counsel for the railroad company interposed to this question the following: "Objected to by the defendant, as improper, as it is founded partially upon the memory of the witness as to what testimony was given by the plaintiff to the jury." The trial court overruled the objection and the railroad company excepted. Dr. Salter, one of the physicians who had attended Brady during his sickness in 1889, and examined him at the trial, was asked by Brady's counsel this question: "Q. Now, you may state whether, in your judgment, his present condition may be the result of an injury which the plaintiff received as testified to by him on June 27, 1888, taking into account his entire testimony as to his physical condition since that time, providing such testimony and providing such facts as are testified to by him are true." To this there was the same objection, same ruling of the trial court and exception taken by the railroad company.

It will be observed that the objection is "that the witnesses remembered only part of Brady's evidence." We have no means of knowing how this was. The record is silent on the subject. The expert was not examined, before answering, by objecting counsel as to how much of Brady's evidence he had heard or remembered. The objection itself was not on its face a valid one. The opinion of a medical expert may be based (1) on his acquaintance with the party who is under investigation; (2) on a medical examination of him which he has made; (3) and upon a hypothetical case stated to the expert in court. (Lawson, Expert and Opinion Evidence, 144.) "Some latitude must necessarily be given in the examination of medical experts and in the propounding of hypothetical questions for their opinions, the better to enable the jury to pass upon the questions submitted to them. The opinion is the opinion of the expert, and if the facts are found by the jury as the counsel by his questions assumes them to be, the opinion may have some weight, otherwise not. It is the privilege of the counsel in such cases to assume, within the limits of the evidence, any state of facts which he claims the evidence justifies, and have the opinion of experts upon the facts thus assumed." (*Filer v. New York C. R. Co.*, 49 N. Y., 42.) In *Wright v. Hardy*, 22 Wis., 348, the following hypothetical question was approved: "Suppose his statement relative to the amputation and its subsequent treatment to be truthful, was or was not the amputation well performed? Was the subsequent treatment of the patient proper or improper?" In *Hunt v. Lowell Gas Light Co.*, 8 Allen [Mass.], 169, this hypothetical question was approved: "Having heard the evidence, and assuming the statements made by the plaintiffs to be true, what in your opinion was their sickness, and do you see any adequate cause for the same?" Also in *Getchell v. Hill*, 21 Minn., 464, this hypothetical question was approved: "Supposing all these facts you have heard testified to are

true, what is your opinion?" The hypothetical questions objected to were not very happily framed. They called for the opinions of experts as to possibilities instead of probabilities; but they were not objected to on that ground, and the court did not err in overruling the objections made.

4. That the court erred in refusing to admit in evidence a memorandum book.

Brady testified that from the time of the runaway until the time of the trial he had never been a well man and had done no labor of any consequence. A witness for the railroad company, one Gerecke, the manager of a brick and tile company in Norfolk, testified that from August 20, 1888, to October of the same year, and in April and June of 1889, Brady was engaged in hauling brick from the yard of Gerecke. Witness kept a memorandum book in which he entered Brady's name at the time he received brick and the number of loads hauled. Brady also signed his name in this book as a receipt for the brick received. The exclusion of this book was not prejudicial error. The question at issue was not whether Brady signed his name in this book, but whether he hauled and handled the brick. The book was not the best evidence to prove the fact of Brady's performing labor. That was proved by Gerecke and others, who testified that they saw him loading and hauling brick, and their statements were the best evidence of the facts sought to be proved.

5. That the court erred in ruling that certain statements made by Brady's counsel in his argument were proper deductions from the evidence.

The statement of counsel was as follows: "I say with their wealth and their influence which they possess, and I say that with Ransom and the balance of them looking up and searching for evidence that they have brought against us, that their agents themselves knew they were swearing to a state of facts that never could have existed, never did exist, and could not well have existed." Upon objection

made by counsel for the railroad company to these remarks the trial court said: "I think the gentleman has a right to draw his own conclusions from the evidence." To this ruling of the court counsel for the railroad company took exception. The question is, was this statement a fair deduction or conclusion from the evidence; or, was it so unwarranted by anything in the testimony as to be prejudicial error, and was the trial court wrong in holding that the evidence in the case warranted counsel's conclusions?

The witness Ransom testified that he was in the employ of the railroad company; that his business was to look up evidence for the company in cases like the one on trial; that he spent half his time at this business; and that part of his visits to Norfolk had been for the purpose of looking up evidence in the case on trial.

Joe Flynn, another witness for the railroad company, said his occupation was anything he could get to do; that he had been figuring around at a little of everything the past season; that he could not say he was in the employ of the railroad company; "the way, my understanding is this: Of course I went around, and what time I used for them they agreed to pay me my wages. Of course, I was under no written agreement of employment or anything of the kind. * * * If I happened to meet any one I would go around with him to Mr. Ransom." * * *

Q. They agreed to pay you for whatever you did for them?

A. I will answer it just as I understood it. I was not in their employ at all. If I was under any expense or lost any of my time they were to pay me for it. There was nothing said about my coming to work for them or about being in their employ at all, but in case that I lost a day in running around they were willing to pay me for it. I was not in their employ for any certain time.

Q. Did they not agree to give you $50 for your work in that case? (*Clarke v. Railroad Co.*, tried just before this.)

A. While they did not agree to do it, but my fees and expenses amounted to that; that was what my fees and expenses amounted to.

Q. Is it not true, Joe, that you are now working for them in the same way; that is, in this case?

A. There has nothing been said about it at all.

Q. Not at all?

A. No, sir.

Q. Is it not true that you have been detailed to get their witnesses for them and to talk with them?

A. Yes, sir; I have talked with them.

Q. Is it not true that you have been assisting Mr. Weatherby and the others in getting witnesses for this trial?

A. I cannot say particularly.

Q. Well, you expect to be paid for your work?

A. I do not know that I have done any work.

Q. You expect to get paid for your work, what you have done?

A. I have got my fees.

Q. You have got your fees; you have got your pay?

A. Yes, sir; I demanded them as I went.

We are very clear that counsel's remarks were warranted by the evidence, and that the court was not in error in his ruling. The argument of counsel in addressing the jury should be limited to the facts in evidence and to the fair inferences to be drawn therefrom, and counsel should be allowed in his argument to draw all reasonable and fair deductions from the evidence. A lawyer charged with the responsibility of the conduct of a case has certain rights as well as duties in the premises. On the one hand he must use all honorable means to protect his client's interests. He must act honorably and fairly with the court, opposing counsel, and the jury; but he should not be restrained in his argument from making such comment on the conduct and credibility of witnesses or parties to the suit as is justified by the evidence.

6. That this suit is prosecuted under a champertous agreement between Brady and his counsel, and that the court erred in not so holding and dismissing the suit. The contract referred to is as follows: "It is hereby agreed by and between Geo. E. Brady and Wigton & Whitham that said Wigton & Whitham act as attorneys for said Geo. E. Brady, and shall do and perform such legal work and services as shall be necessary and proper in the prosecution and collection of a claim of said Geo. E. Brady against the Omaha & Republican Valley Railway Company for personal injuries received by said Brady on or about June 27, 1888; and in consideration of said agreement on the part of Wigton & Whitham, said Brady agrees to give the management and trial of the case about to be begun for the collection of said claim to the said Wigton & Whitham as his attorneys, and to pay an amount equal to one-half of the amount recovered from said company, either by compromise or judgment."

The text writers are not entirely agreed in their definitions of the term "champerty." Lord Coke defines the term thus: "To maintain to have part of the land, or anything out of the land, or part of the debt, or other thing in plea or suit." (Coke's Litt., 368*b*.) Sergeant Hawkins defines the term thus: "The unlawful maintenance of a suit in consideration of some bargain to have part of the thing in dispute or some profit out of it." (1 Hawkins, P. C. [6th ed.], 645.) Mr. Chitty defines it thus: "Champerty is the purchasing a suit or right of action of another person; or rather, it is a bargain with a plaintiff or defendant, to divide the land or other matter sued for, between them, if they prevail at law; whereupon the champertee is to carry on the party's suit at his own expense." (2 Chit., Cont. [11th Am. ed.], 996.) Mr. Blackstone defines it thus: "A bargain with the plaintiff or defendant *campum partire*, to divide the land or other matter sued for between them if they prevail at law; whereupon the cham-

pertor is to carry on the party's suit at his own expense." (4 Bl. Com., 135.)

Champerty is not a criminal offense, nor is a champertous contract illegal under our statutes; and if this contract is champertous and voidable, it is because it is contrary to public policy to enforce it. Adopting the definition of champerty given by Mr. Blackstone, and interpreted in the light and language of that definition, is this contract champertous? It will be observed that one of the essential elements of the vice of champerty is that the champertor must carry on the litigation at his own expense. There is no such provision in the contract assailed here as champertous. Another element of the vice of champerty, as defined above, is that the agreement must provide for the division of the subject-matter of the suit, if successful, between the parties to the champertous agreement. This element is also lacking in the contract under consideration. The language is: "To pay an amount equal to one-half of the amount recovered." It is not stipulated that Brady's counsel shall have any certain part of the sum recovered, but their compensation, if they are successful, is to be measured by the amount of the recovery.

The courts are not in complete harmony as to what contracts are champertous. The weight of authority seems to be that contracts between attorney and client by which the attorney agrees, in consideration of having a part of the thing recovered, to support the litigation at his own ex-expense are champertous; but where the attorney does not undertake to support the litigation at his own expense, but simply agrees to render the ordinary services of an attorney in consideration of receiving a part of the thing recovered, then the agreement is not champertous. In *Blaisdell v. Ahern*, 144 Mass., 393, the contract provided: "Said counsel and attorney are to depend upon the contingency of success for the fees for all services rendered in the case, * * * and the counsel so employed shall, in

view of the uncertainty of the result in their payment, be entitled to very large and liberal fees, in no event to exceed fifty per cent of the amount collected by them." The client was to pay all costs. In an action by the attorney against the client to recover for his services the court held that the contract under which services were rendered was not void for champerty. In *Aultman v. Waddle*, 40 Kan., 195, certain judgment creditors assigned judgments which they owned to an attorney, agreeing with him that he should collect the judgments in his own name and retain fifty per cent of the amount realized for his fees, the creditors to pay all costs. The court held that the agreement was not champertous, as it did not relieve the creditors from paying the costs of the proceedings. To the same effect are also the following: *Wright v. Tebbitts*, 91 U. S., 252; *Winslow v. Central Iowa R. Co.*, 71 Ia., 197; *Phillips v. South Park Commissioners*, 119 Ill., 626.

From these authorities we conclude that in order to taint a contract with the vice of champerty, the agreement between the attorney and the client must provide not only that the attorney shall have a part of the money or thing recovered, but that he must also at his own expense support and carry on the suit and take all the risks of the litigation. The contract between Brady and his counsel is not within this rule, and therefore not champertous. It remains to be said on this point, however, that if this contract were champertous, that fact would not be a defense of which the railroad company could avail itself in this case. That would be a defense, if a defense, available only to Brady in a suit against him on the contract. (*Aultman v. Waddle*, 40 Kan., 195; *Courtright v. Burnes*, 13 Fed. Rep., 317.)

7. That the court erred in refusing to charge the jury as follows:

"1. Every person of ordinary intelligence is bound to know that a railroad crossing over a public highway, where

cars are frequently passing, is a place of more than ordinary danger; and the law requires that they must exercise prudence, care, and caution to avoid any accident or collision therefrom; that in approaching such crossings it is their duty to both listen and to look for approaching trains. If plaintiff saw defendant's cars moving slowly over the crossing in time to have stopped his team until there should be no danger of frightening his horses from the noise or escaping steam of the cars, it was his duty to do so; and if, with plaintiff's knowledge, his horses, or either of them, were liable to be startled or become unmanageable on account of such noise or steam, then it would be negligence on his part to attempt to drive them across the track before the moving cars had reached such a distance that no danger therefrom could reasonably be apprehended.

"2. The principle that requires that a man shall use his ears and eyes for his precaution in approaching a railroad crossing equally requires that he shall use his faculties in the management of his team and thus keep out of danger. If you shall find from the evidence that the horses driven by plaintiff were, of his own knowledge, easily frightened by a locomotive or by the operation of cars, and that they were liable, if he attempted to cross the track, to be frightened or startled by the defendant's cars situate as they were, he did so at his own risk. The act becomes one of negligence, and he cannot recover. It makes no difference in such cases whether or not there was a flagman stationed at the crossing, because the only duty of a flagman is to give notice of the situation of the train. The plaintiff could see that for himself, and he had no right to rush into danger.

"3. If you shall find from the evidence that the plaintiff knew the position of the railroad track, the crossing and its condition, if it were out of order, and that trains were running frequently thereon; approached the crossing with full knowledge that the train was moving over the same, as shown by the testimony, but without stopping his team

until they had come so close upon the tracks that he was unable to stop them before getting upon the tracks, and, in consequence thereof, they ran away and he was injured, the plaintiff cannot recover in this action.

"4. If you shall find from the evidence that the plaintiff could have seen and did see the approaching train by looking in the direction of it before he reached the crossing, in time to have stopped his horses and avoided their being frightened by the operation of the locomotive, and omitted so to do, such omission was negligence, and you should find for the defendant; especially is this the case if you shall find from the evidence that the horses, or either of them, were easily frightened and had been frightened and run away at the same crossing prior to the accident, and that to the knowledge of the plaintiff."

These instructions were properly refused, for the reason that they in effect said to the jury that if Brady did thus and so, or if he omitted to do thus and so, then he was guilty of negligence. The court could tell the jury that an act or omission was or was not evidence for their consideration in determining whether Brady was guilty of negligence; but whether the evidence established negligence or no negligence was and is exclusively for the jury. *Orleans Village v. Perry*, 24 Neb., 831, was an action for damages resulting from a fall into an excavation in a sidewalk. The evidence showed that the plaintiff knew of the excavation; that he attempted to pass that way, and, remembering the defect, made an effort to pass around it; but by reason of misjudging the distance, he fell into the excavation and was injured. It was held that the question of his contributory negligence was for the jury to decide in view of the circumstances as shown by the evidence. In *Brown v. Brooks*, 55 N. W. Rep. [Wis.], 395, the defendants, who owned some hay about a mile from the plaintiff's stacks, in order to protect them from prairie fires, burned the stubble around them. The fire escaped and burned plaintiff's hay.

There had been fires raging in the vicinity for days, and plaintiff saw the fire which escaped from defendant's stack more than twenty-four hours before it reached his hay. He apprehended danger, but he did not burn nor mow the stubble around his stacks but attempted to haul his hay away. The court held that the question whether plaintiff used reasonable care to protect his hay was for the jury, and that it was error to charge that his failure to remove the stubble was not negligence. In *Missouri P. R. Co. v. Baier*, 37 Neb., 235, Commissioner RYAN, speaking to this point and for this court, said: "It is improper to state to the jury a circumstance or group of circumstances as to which there has been evidence on the trial, and instruct that such fact or group of facts amounts to negligence *per se*. At most, the jury should duly be instructed that such circumstances * * * are properly to be considered in determining the existence of negligence." In *American Water-Works Co. v. Dougherty*, 37 Neb., 373, IRVINE, C., speaking to this point and for this court, used this language: "Issues as to the existence of negligence and contributory negligence * * * are for the jury to determine, when the evidence as to the facts is conflicting, and where different minds might reasonably draw different inferences as to these questions from the facts established."

8. That the damages awarded Brady by the jury are excessive.

The verdict in this case was for $7,000. Without a doubt it is predicated on the finding of the jury that Brady had sustained a permanent injury. The trial of this cause occurred on the 1st day of May, 1890. At this time Brady's right lung, or the major portion of it, was, to use the language of the physician who testified in the case, "completely dead;" and it is evident from the record that Brady was extremely feeble and slowly dying, probably of consumption. Other than this no disability is shown. Whether this verdict is excessive must then be determined

by an answer to this question: "Was Brady's condition at the time of the trial the result of the hurt received June 27, 1888?" The jury evidently found that it was. It remains, then, to ascertain whether such finding is supported by competent evidence. Brady's evidence and that of the members of his family and his other witnesses was to the effect that when his team ran away he was struck on the side by a dump board, or part of one, and knocked off his wagon, one of its wheels running over his body; that prior to that time he was a sound, healthy man; that he had never been well since; had suffered more or less since with a pain in his side, bowels, and breast; and had since done no work of any consequence, and since the accident had been unable to work. On the other hand, the evidence is to the effect that Brady, from the date of the accident until July, 1889, continued his usual labor; that he worked at loading and hauling brick; hauling dirt for building a dike; that he participated in athletic sports, such as wrestling and handling dumb bells; that in July, 1889, he had a serious sickness; that he then complained of pain in his chest and bowels; that his disease was pleuritic—inflammation of the lining membrane of the chest; that Brady's family then claimed in his presence that his pleuritic trouble began in April, 1889, and that it was caused by Brady's throwing lead bricks; and this statement was not contradicted by any one.

For the purpose of showing that Brady's condition at the time of the trial was the result of his hurt in June, 1888, his counsel called Doctors Hagey, Tashjean, and Salter. Dr. Tashjean had examined Brady immediately after the runaway, and both he and Dr. Hagey had attended him during his illness in the summer of 1889; Dr. Salter had been treating Brady since February, 1890, and with the other two doctors had examined him at the trial. The following is the substance of their evidence to the point under consideration:

Q. State whether the condition in which you found him at the time (July, 1889) might be the result of an injury such as he testified he received in June, 1888.

A. It is possible. I do not say that it was. It is possible to have been from an injury such as he stated he had.

Q. Now you may state whether in your judgment his present condition may be the result of an injury which the plaintiff received, such as testified to by him, on June 27, 1888, taking into account his entire testimony as to his physical condition from that time until this, providing such testimony and such facts as testified to by him are true.

A. Am I to take into consideration the fact that he says that he did not work and the fact the other witnesses say that he did work? The difficulty that I see with the question is that there has been some evidence that he did work since that time, and he says that he did not work to any amount.

Q. No, sir; do not take that into consideration.

A. Then I say that it is possible.

Q. Would you say, in your judgment, that his condition, when you saw him in August, 1889, might be the result of an injury received on the side by something striking the side, or from a fall received about a year previous to that time?

A. It might be, but I do not say that it was.

Q. His condition at the time might be the result of such an injury?

A. I cannot say; it might be.

Q. State whether, in your judgment, his present condition, or the condition you saw him in a few weeks ago, might be the result of an injury received in the side in June, 1888.

A. Why, it might be.

Q. Now then, doctor, providing this patient of yours, Mr. Brady, had continually labored at his usual vocation as a laboring man for three or four years after the acci-

dent occurred in June, 1888, for a number of months, say five or six or seven months almost continually, would you from your diagnosis of the case at that time, in August or July, 1889, say that his condition at that time could result from an accident received in June, 1888?

A. I cannot say. It might be, but I do not know.

Q. From your observation at the time of the examination in July or August, 1889, your first examination after the accident, could you discover any necessary relation between the two?

A. Why, I could not say.

Q. You could not see any necessary connection?

A. I could not conscientiously say what the cause was. I had not the observation to make the connection between 1888 and 1889. Had I had charge of the case right along, I could have told something; but I do not know.

No witness in this case testified that Brady's condition at the time of trial, or his illness in 1889, was the result of the hurt he received in June, 1888. No witness even ventured such an opinion. Brady's own physicians shield themselves behind possibilities and refuse to say that his present condition is even probably the result of his injury in June, 1888. The jury then must have reached their conclusion by inference. In *Fry v. Dubuque & S. W. R. Co.*, 45 Ia., 416, the evidence was that the injured limb was in a fair way to recover permanently after the first injury, and the witness would not say there was no chance for a permanent recovery. The court charged the jury: "You will give her such damages as will fairly compensate her for all past, present, or future physical suffering or anguish which is, has been, or may be caused by said injury." The supreme court, on appeal, held this construction to be erroneous, and laid down the rule as follows: "While future physical suffering is a proper element of damages, yet the damages should be limited to such as would result with reasonable certainty from the injury complained of,

and should not be left to mere conjecture." In *Strohm v. New York, L. E. & W. R. Co.*, 96 N. Y., 305, the rule is thus laid down: "To entitle a plaintiff to recover present damages for apprehended future consequences, there must be such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury. Consequences which are contingent, speculative, or merely possible are not proper to be considered in estimating the damages, and may not be proved." In *Ohio & M. R. Co. v. Cosby*, 107 Ind., 32, it is said: "That an injury may possibly result in permanent disability, will not warrant the assessment of damages for a possible disability unless it is also reasonably certain to follow. That in order to justify the assessment of damages for future or permanent disability, it must appear that continued or permanent disability is reasonably certain to result from the injury complained of." In *Indianapolis, B. & W. R. Co. v. Birney*, 71 Ill., 391, the rule is thus stated: "Where speculation or conjecture has to be resorted to, for the purpose of determining whether the injury results from the wrongful act or from some other cause, damages cannot be allowed for such injury." In *Filer v. New York C. R. Co.*, 49 N. Y., 42, it is said: "The limit in respect to future damages is that they must be such as it is reasonably certain will inevitably and necessarily result from the injury." In *White v. Milwaukee City R. Co.*, 61 Wis., 536, the rule is thus stated: "To justify the jury in assessing damages for future or permanent disability, it must appear by the proofs that continued or permanent disability is reasonably certain to result from the injury complained of." To the same effect are *Curtis v. Rochester & S. R. Co.*, 18 N. Y., 534; *Scheffer v. Washington City, V. M. & G. S. R. Co.*, 105 U. S., 249; *City of Chicago v. Langlass*, 52 Ill., 256; *Lincoln v. Saratoga & S. R. Co.*, 23 Wend. [N. Y.], 425; *Chicago, B. & Q. R. Co. v. Warner*, 108 Ill., 538; *Baltimore City P. R. Co. v. Kemp*, 61 Md., 74.

This is a very unusual case. Here was a man hurt in June, 1888, by being struck on the side by a board falling from a wagon or by one of its wheels passing over his body. No bones are broken; no injury is visible; he is, to quote his own testimony, up and around, driving his horses and hauling brick until July, 1889; at this time he has pleuritic trouble—typhoid. May 1st, his disease, whatever it is, and however caused, is incurable; he is dying, and the jury say as the result of his injury in 1888. Guided by the authorities quoted above, for this verdict to stand it must have for support competent evidence that establishes that Brady's present condition is probably and reasonably the result of the accident of June, 1888. That Brady was well before June, 1888; that he has never been well since, and is now dying, is not enough in this case to authorize the jury to infer that this accident caused his present disability. That physicians say his present condition is possibly the result of an injury received in June, 1888, is not competent evidence to support such a finding. If this verdict was much larger than it is, and if it had for support evidence showing that Brady's condition was probably and reasonably the result of the accident sustained, we would not, because of its amount, disturb it; but we are constrained to say that this verdict, in so far as it awards Brady damages for a permanent injury, is not supported by competent evidence. The judgment of the district court must, therefore, be reversed and the case remanded for a new trial, unless counsel for Brady shall, within twenty days, file with the clerk of this court a remittitur of $5,000 from the judgment rendered herein; and in case of their compliance with this order, the judgment of the district court for $2,000, with seven per cent interest thereon from May 3, 1890, and costs of suit, will be affirmed; and it is so ordered.

JUDGMENT ACCORDINGLY.

IRVINE, C.: I concur in the foregoing opinion throughout, except that I think the instructions submitting to the jury the questions as to escaping steam were, under the evidence, prejudicially erroneous, and that the judgment of reversal should therefore be absolute.

LAWRENCE C. ENEWOLD V. FERDINAND OLSEN.

FILED JANUARY 16, 1894. No. 5385.

1. **Parties**: NAMES. In law, the name of a person consists of one given name and one surname, the two, using the given name first and the surname last, constitute such person's legal name; and to be ignorant of either the given or surname of such a one is to be ignorant of such person's name within the meaning of section 148 of the Code of Civil Procedure.
2. **Summons**: NAME OF DEFENDANT: JURISDICTION. The law requires that a defendant shall be sued by his true name, if the same is known or can be ascertained by the party suing him; and, under section 69 of the Code of Civil Procedure, a court obtains no jurisdiction over the person of a defendant served with summons by leaving a copy thereof at his usual place of residence, unless such defendant is designated by his true name, except in cases brought under section 23 of the Code of Civil Procedure.
3. **Parties**: NAMES: SUMMONS: RETURN: JUDGMENTS. Under section 148 of the Code of Civil Procedure, if a defendant is sued by any name and description other than his true name, except in actions brought under section 23 of the Code of Civil Procedure, a court acquires no jurisdiction over him by the sheriff leaving a copy of the summons at such defendant's usual place of residence. Accordingly, where E. sued "F. Olsen, full name unknown," the sheriff returned that he served the summons on "F. Olsen, full name unknown," by leaving a copy thereof at his usual place of residence. The court defaulted "F. Olsen, full name unknown," and rendered a personal judgment against him. In proceedings by E. against Ferdinand Olsen to show cause why such judgment, the same having become dormant, should not be revived against him, *held*, that the court

acquired no jurisdiction over Ferdinand Olsen by a copy of the summons left at his usual place of residence, and that the judgment rendered against him in the name of "F. Olsen, full name unknown," was a nullity.

4. **Revivor of Judgment: DEFENSE: JURISDICTION.** A person summoned to show cause why a dormant judgment should not be revived against him may interpose the defense that such judgment is void, because the court pronouncing it had no jurisdiction over him, when such lack of jurisdiction appears on the face of the record of such judgment.

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

The opinion contains a statement of the case.

James A. Powers and *Switzler & McIntosh*, for plaintiff in error:

But one Christian name is recognized by the courts. (Maxwell, Pleading & Practice, p. 87; *Choen v. State*, 52 Ind., 347; *Phillips v. Evans*, 64 Mo., 17.)

Where parties are known by different names, either one may constitute the Christian name in contemplation of law. (*Goodenow v. Tappan*, 1 O., 63.) Service by one name or the other is good, and judgment based upon such service is valid. (Bliss, Code Pleading, sec. 146.)

Where names are spelled differently, but substantially alike in sound, the proceeding is not vitiated thereby. (*Commonwealth v. Stone*, 103 Mass., 421; *Williams v. Hitzie*, 83 Ind., 303; *Miller v. Brenham*, 68 N. Y., 83.)

The judgment under the service was good. (*Johnson v. Jones*, 2 Neb., 131; *Tweedy v. Jarvis*, 27 Conn., 44; *Jones's Estate*, 27 Pa., 336; *Morse v. Engle*, 28 Neb., 545; *Goodenow v. Tappan*, 1 O., 63; *Scott v. White*, 71 Ill., 287; *Miller v. Brenham*, 68 N. Y., 83; *Commonwealth v. Gleason*, 110 Mass., 66; *Kemp v. McCormick*, 1 Mont, 423; *Rosencrantz v. Rogers*, 40 Cal., 491.)

C. P. Halligan, contra.

RAGAN, C.

On the 23d day of December, 1886, Lawrence C. Enewold brought suit on an account in the county court of Douglas county against one Olsen. In the petition filed Olsen was described as "F. Olsen, full name unknown." The sheriff's return of the summons in the case was as follows: "On December 23, 1886, I received this writ, and on December 23, 1886, I served by leaving a certified copy of this writ and indorsements thereon at the usual place of residence of the within named F. Olsen, the defendant, in Douglas county, Nebraska." The further proceedings of the county court in the case were as follows: "January 4, 1887, on the call of the docket, this day, it appearing to the court that the defendant F. Olsen, has been served with a summons and has failed to appear, plead, answer or demur thereto, and is in default: Now, therefore, on motion of plaintiff's attorney, it is ordered that default of the defendant be, and the same is hereby entered against him. The same day the case came on for trial to the court, L. C. Enewold, the plaintiff, was duly sworn and examined in his own behalf. After hearing the evidence, the court finds that said defendant, F. Olsen, real full name unknown, is indebted to the plaintiff in the sum of $433.89. It is therefore considered, adjudged," etc. February 11, 1892, Lawrence C. Enewold filed in said county court a petition against Ferdinand Olsen praying for a revivor of said judgment. On said day the county court made an order that said judgment be revived unless Ferdinand Olsen should show cause why it should not be. On February 18, 1892, a copy of this order was duly served on Ferdinand Olsen, and he appeared in the county court and objected to a revival of said judgment on the ground that the same was void, as he, Olsen, was named in the summons "F. Olsen, full name unknown;" that the court could only acquire jurisdiction over him by the per-

sonal service of summons, and that the leaving a copy of the summons at his usual place of residence was not such service upon him as invested the court with jurisdiction over his person. The county court sustained the objection and dismissed the application to revive the judgment. Enewold took this order to the district court, where the ruling of the county court was affirmed, and Enewold brings the judgment of the district court here for review.

Section 69 of the Code of Civil Procedure provides: "The service [of summons] shall be by delivering a copy of the summons to the defendant personally, or by leaving one at his usual place of residence at any time before the return day." Section 148 of the Code of Civil Procedure provides: "When the plaintiff shall be ignorant of the name of the defendant, such defendant may be designated in any pleading or proceeding by any name and description, and when his true name is discovered, the pleading or proceeding may be amended accordingly. The plaintiff in such case must state, in the verification of his petition, that he could not discover the true name, and the summons must contain the words 'real name unknown,' and a copy thereof must be served personally upon the defendant." The law requires that a defendant shall be sued by his correct name, if known to the plaintiff suing him; and section 69 defines what shall be sufficient notice to him when thus sued. But cases may, and do, arise where the correct name of a party about to be sued is unknown to the plaintiff desiring to bring the action. To meet such cases section 148 was enacted, by which the party sued may be designated by any name and description; but to authorize the suing of a party by a name and description, *i. e.*, by any other than his correct name, the statute not only requires that the plaintiff should be ignorant of the correct name of the party, against whom he desires the law's process under a pseudonym, but to make oath that he has not been able to discover the party's true name. These prerequisites

complied with, the plaintiff may proceed against the party by whatever name and description he chooses, but the summons in such a case must contain the words "real name unknown," and be personally served on the defendant sued, except in cases brought under section 23 of the Code of Civil Procedure. The law presumes that a party will see a summons left at his usual place of residence, and if in such summons he is notified by his true name that he has been sued, he must appear and make a defense if he has one; and if he fails to appear in obedience to the writ's command, he thereby confesses his liability and want of defense to the action, and is concluded by the judgment; but the law does not require Ferdinand Olsen, should he find on his door-step a summons directed to "F. Olsen," to know that such summons was meant for him. In such a case, to require Ferdinand Olsen to appear in obedience to the command of such summons, or be concluded by the judgment, the summons must be delivered to him personally. Ferdinand Olsen may suspect such summons was intended for him,—may even know it; yet, until a copy of it is personally served on him, he is not notified of a suit against him.

The inquiries here are: What, within the meaning of said section 148, constitutes a person's true name; and if Enewold was ignorant that Olsen's given name was "Ferdinand," was Enewold then ignorant of Olsen's true name, within the meaning of said section 148? In *Schofield v. Jennings*, 68 Ind., 223, it is said: "By the common law, since the time of William the Norman, a full name consists of one Christian or given name, and one surname, or patronymic. The two, using the Christian name first and the surname last, constitute the legal name of the person." It follows, then, that a person's legal name is made up of his first or given name and his surname, or patronymic; and, for one to be ignorant of either is to be ignorant of such person's name within the meaning of said section 148;

and that in order to invest the county court with jurisdiction over Ferdinand Olsen in the suit brought by Enewold against him under the name of "F. Olsen, full name unknown," the summons in which Ferdinand Olsen was so designated must have been personally served on him. This not having been done, the judgment rendered by the county court, and which it is here sought to revive, was void. That such summons was left at Ferdinand Olsen's usual place of residence, and that he was aware of it, count for nothing. It might as well have been retained by the sheriff and Olsen notified by mail of its existence. A personal judgment rendered against a defendant without notice to him, or an appearance by him, is without jurisdiction, and is utterly and entirely void. (Black, Judgments, sec. 220.) A statute which allows one party to take a personal judgment against another on proof that notice of suit was left at the defendant's usual place of residence ought not to be extended to cases where the party is sued by any other than his true name.

In this proceeding, one to revive a dormant judgment, Olsen is called on to show cause why the judgment should not be revived, and he alleges as a reason why this should not be done that such judgment is void, and that this appears from the record itself. Can Olsen be heard to make this objection in this proceeding? We think he can. In *Wright v. Sweet*, 10 Neb., 190, it is said: "Upon proceedings to revive a judgment which has become dormant, * * * no objections will be heard which seek to go behind the original judgment." But this case does not decide, nor was it intended to decide, that a person against whom it was sought to revive a judgment might not make the objection that such judgment was void; that is to say, that there was no such judgment; and that such fact appeared on the face of the record. Suppose that Olsen had disregarded the notice served on him to show cause why this judgment should not be revived. The conditional

order of revivor, then, would have become absolute; and there are authorities which hold that such order of revivor would estop Olsen from claiming that the original judgment was void, the proceeding to revive being in the nature of a suit on the judgment, and the order of revivor itself a judgment that the judgment revived was valid and in full force. (*Comparet v. Hanna*, 34 Ind., 74; *Kelly v. Donlin*, 70 Ill., 378; Van Fleet, Collateral Attack, sec. 236, and cases there cited.) This point is not necessary, however, to the decision of the case under consideration. It is not raised by counsel in their briefs, and we do not determine it. Nor must we be understood as deciding that a judgment is void because the defendant is sued or summoned, or described in the judgment rendered against him by a fictitious name, or because he is designated by an initial letter of his given name. What we do decide is that the judgment rendered by the county court in the case of *Enewold v. F. Olsen, "full name unknown,"* was void as a judgment against Ferdinand Olsen, because the summons in the case was not personally served on him. There is no error in the record, and the judgment is

AFFIRMED.

IRVINE, C., having presided at the trial below, took no part in the decision here.

OMAHA & REPUBLICAN VALLEY RAILWAY COMPANY v. BERNARD CLARKE.

FILED JANUARY 16, 1894. No. 4309.

1. **Railroad Companies**: ESCAPING STEAM: NEGLIGENCE: PERSONAL INJURIES: EVIDENCE. In order to render a railroad company liable for injuries caused by horses running away in

consequence of fright caused by steam escaping from the valves of an engine, it must appear not only that the opening of the valves was unnecessary, but also that it was done under such circumstances as to imply a failure to exercise that care which a prudent and reasonable man would exercise under similar circumstances.

2. **While negligence is an inference to be drawn from the facts,** the existence of the facts themselves must not be left to conjecture, but facts must be established by evidence which would warrant a reasonable man in inferring negligence.

3. **The evidence in this case** re-examined, and *held* insufficient to sustain the verdict.

REHEARING of case reported in 35 Neb., 867.

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

The burden of proof was upon the plaintiff. There is no evidence that the defendant's servant, in the management of the engine, unlawfully and unnecessarily opened the valves, and frightened the plaintiff's horses. The motion to direct a verdict for defendant should have been sustained. (*Howard v. Union F. R. Co.*, 30 N. E. Rep. [Mass.], 479; *Favor v. Boston & L. R. Co.*, 114 Mass., 350; *Abbot v. Kalbus*, 74 Wis., 506; *Schuylkill & Dauphin Improvement Co. v. Munson*, 14 Wall. [U. S.], 448; *Morrison v. Phillips & Colby Construction Co.*, 44 Wis., 405; *Toomey v. London, B. & S. C. R. Co.*, 3 C. B., n. s. [Eng.], 146; *Ryder v. Wombwell*, 4 Ex. L. R. [Eng.], 39; *Pennoyer v. Allen*, 56 Wis., 512; *Union P. R. Co. v. Billeter*, 28 Neb., 430; *Brabbits v. Chicago & N. W. R. Co.*, 38 Wis., 290.)

F. P. Wigton and *E. F. Gray, contra:*

There was proof to sustain the allegations of plaintiff's petition. It was properly submitted to the jury. The question of negligence was for the jury. The company,

under the evidence, is liable. (*Atchison & N. R. Co. v. Bailey*, 11 Neb., 332; *Omaha, N. & B. H. R. Co. v. O'Donnell*, 22 Neb., 476; *Smith v. Sioux City & P. R. Co.*, 15 Neb., 583; *Johnson v. Missouri P. R. Co.*, 18 Neb., 690; *Gordon v. Boston & M. R. Co.*, 58 N. H., 396; *Toledo, W. & W. R. Co. v. Harmon*, 47 Ill., 298; *Manchester, S. J. & A. R. Co. v. Fullarton*, 14 C. B., n. s. [Eng.], 53; *Culp v. Atchison & N. R. Co.*, 17 Kan., 475; *Andrews v. Mason City & Ft. D. R. Co.*, 42 N. W. Rep. [Ia.], 513; *Philadelphia & R. R. Co. v. Killips*, 88 Pa. St., 405; *Walker v. Boston & M. R. Co.*, 13 Atl. Rep. [N. H.], 649; *Gulf, C. & S. F. R. Co. v. Box*, 17 S. W. Rep. [Tex.], 375; *Northern P. R. Co. v. Sullivan*, 53 Fed. Rep., 219; *Hill v. Portland R. Co.*, 55 Me., 438; *Nashville & C. R. Co. v. Starnes*, 9 Heisk. [Tenn.], 52; *Stamm v. Southern R. Co.*, 1 Abb. N. C. [N. Y.], 438; *Hart v. Chicago, R. I. & P. R. Co.*, 7 N. W. Rep. [Ia.], 9.)

IRVINE, C.

An opinion in this case affirming the judgment of the district court was filed December 20, 1892, and is reported in 35 Neb., 867. A rehearing has been granted upon the question of the sufficiency of the evidence, the question being raised upon the proof of negligence upon the part of the plaintiff in error. The statement of facts in the former opinion suffices, without much by way of addition, for this.

The facts alleged for the purpose of establishing negligence on the part of the plaintiff in error may be analyzed as follows:

First—That the railroad company negligently permitted its engine to stand for an undue length of time at the north margin of the street. There is absolutely no evidence tending to establish these averments and a further consideration of the point is unnecessary.

Second—That the railroad company unlawfully neglected to have any flagman at the street crossing. The duty of

a flagman is clearly to keep a lookout and warn persons using the street of the approach of trains. Necessarily he cannot have any knowledge of the fact that locomotives receding or standing on the track are about to let off steam, and it is not his duty to warn passers-by of the fact that steam is about to escape. The presence or absence of a flagman could not in any manner affect the case, and there could be no recovery upon these averments. The jury was expressly so instructed and the instruction was correct.

Third—That as the plaintiff below approached the crossing the railroad company, by its servants, negligently, wrongfully, unlawfully, suddenly and without warning, let off and discharged steam from the locomotive and from its cylinders in great volume and noise, whereby plaintiff's horses were frightened, ran away, and threw the plaintiff from his wagon, causing the injuries.

It is upon these averments that the judgment must stand, if at all, and the court so treated the case upon the former hearing. The conclusions reached by the court upon the legal questions thus presented were there stated as follows: "A railway company in the legitimate transaction of its business has the right to use steam and is not liable for the proper and necessary use of the same, even if it result in injury to others, as by frightening horses and causing them to run away. If, however, an engineer within a city, where teams are constantly passing, needlessly and unnecessarily opens the valves of his engine and frightens such horses and causes them to run away and commit injury, the company will be liable, provided the plaintiff is free from contributory negligence." It was also held that the allegation that steam was blown off negligently, wrongfully, and unlawfully, implied that such action was unnecessary. We have no doubt that the petition stated the cause of action correctly. It was held in the former opinion that the railroad company would be liable for an injury sustained by reason of such an accident where the

horses were frightened by an engineer's negligently permitting steam to escape from his engine; but where it is said that the company is liable when such act is done unnecessarily, the term "unnecessary" must not be limited in its application to an absolutely unavoidable escape of steam. As said by the court in the syllabus of the former opinion, a railroad company has the right to use steam and is not liable for the proper and necessary use of the same, even if it results in an injury to others. The railroad company is in such cases liable for injuries caused by its negligence and its negligence alone. Its liability is to be measured by the same rule as that of an individual under similar circumstances. It is not for the consequences of every act not strictly necessary that one is responsible. I may drive along a highway for pleasure, no motive except seeking my own amusement inducing me to do so. The fact that I am so driving may cause an injury, but I am not responsible in damages therefor, simply because it was not necessary for me to be driving at that place and at that time; but if I am to be held responsible, it must be because I failed to exercise reasonable care in the manner of my driving. I may make alterations in my sidewalk and some one passing during the progress of those alterations may be injured, but I cannot be held responsible solely because it was not a matter of necessity for me at that time to make such alterations; but if I am responsible, it must be because I failed to observe reasonable care in making such alterations at the time and under the circumstances. In other words, an act cannot be determined negligent simply from the fact that it was not strictly necessary; but in order to constitute negligence there must either be the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or the doing of something which a prudent and reasonable man would not do. (*Foxworthy v. Hastings*, 31 Neb., 825.)

We think, therefore, that the terms "needless" and "unnecessary," in the former opinion, are not to receive a strict construction but are to be taken in connection with the rule that the railroad company was liable only for negligence, and that in the legitimate conduct of its business it had a right to discharge steam from its locomotive even within the limits of a city and near traveled thoroughfares, provided in so doing it acted as a person of prudence would act under similar circumstances. Numerous authorities have been cited upon this branch of the case. Many of them are from states where the courts undertake to say as a matter of law whether or not a given state of facts constitutes negligence. Where this is done it is equivalent to saying that the circumstances only are questions of fact, and the inference to be drawn from them a question of law. This is not the rule in this state, but upon the contrary the rule here is that even where the facts are undisputed, but where, upon such facts, different reasonable minds may honestly draw different conclusions as to whether or not such facts establish negligence, the inference to be drawn is a question for the jury and not for the court. (*City of Lincoln v. Gillilan*, 18 Neb., 114; *Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb., 642; *American Water-Works Co. v. Dougherty*, 37 Neb., 373.)

Starting, then, from these premises let us examine the evidence. The engine at the time the accident occurred was engaged in switching. It is not absolutely certain whether at the time the team took fright the engine was at a standstill or moving very slowly. It had crossed the street and had either come to a stop or was moving very slowly away from the street and was about to stop. There is much evidence to show that steam was escaping from the pop-valve, and it is within the ordinary experience of men that steam in so escaping makes a loud noise likely to frighten horses. There is also much evidence in regard to these pop-valves. They are necessary appliances for the safety of the engine.

In fact they are safety valves so adjusted as to open automatically when the steam reaches a certain pressure, and so permit the escape of steam before the pressure becomes so great as to endanger lives and property. The evidence shows without contradiction that an engine, especially when engaged in switching, must necessarily be kept at a steam pressure near the limit, and that while engineers endeavor so far as possible to prevent the accumulation of steam to such an extent as to cause the pop-valves to open, exigencies are such that it is impossible to absolutely regulate the accumulation of steam, and an escape from the pop-valve necessarily frequently occurs. Had this engine not been provided with a pop-valve, or had the pop-valve been permitted to get out of repair whereby an explosion occurred, there can be no doubt that negligence might be inferred from such a state of facts. It follows necessarily that negligence cannot be predicated under ordinary circumstances because there was a proper pop-valve, and because it did perform its proper office by permitting steam to escape in order to prevent a dangerous pressure.

Did the evidence show that the engine had been permitted to stand a long time at the crossing with the steam unnecessarily kept at a high pressure, it may be that such facts, followed by an escape of steam at the pop-valve, would justify an inference of negligence. But there is no evidence to show such a state of affairs. On the contrary, the uncontradicted evidence shows that, owing to the varying loads to be hauled by an engine engaged in switching, the steam must be kept at a high pressure; that the quantity of steam to be used from time to time cannot be accurately predetermined, and that the engine upon this occasion had not been allowed to stand with the steam unnecessarily kept up, but that it was then engaged in switching, and had either not yet stopped or had just been brought to a stop when the accident occurred. We are thus brought to a consideration of the averment that steam was unnecessarily allowed to

escape from the cylinders, and that caused the accident. As to whether or not steam was escaping from the cylinders the evidence is conflicting. Several witnesses testify positively that they saw steam escaping from such a part of the engine that it must have come from the cylinder cocks. The weight of this evidence was subject to criticism. In the first place these witnesses were all persons whose attention was casually attracted to the affair, and while it seems it was first drawn to the escaping steam, it was almost instantly diverted to the runaway horses and then to the injured plaintiff. The means of observation of these witnesses were therefore limited and their recollections not entirely to be trusted. In the next place their testimony upon this point met with direct and positive contradiction. These were questions, however, to be considered by the jury, and the evidence was sufficient to permit a finding that steam did escape from the cylinder cocks. It also appears that when steam escapes from the cylinder cocks it is because of a voluntary act on the part of the person in control of the engine in opening the valves. It further appears that these cylinder cocks are provided for the purpose of allowing condensed steam to escape from the cylinders, and that it is necessary to use them for that purpose in order to prevent the cylinder heads from being blown out. When the plaintiff rested his case the evidence upon this point simply showed that steam was escaping from the cylinder cocks. A motion was then made to direct a verdict for the defendant, which was overruled. We think there was nothing at this stage of the case to permit an inference of negligence. Negligence cannot be inferred from the mere fact that an accident happened. Negligence cannot be inferred from the mere fact that an act was done which it is proper, and even necessary, to do at some times and under some circumstances. Some evidence must be given of facts and circumstances from which a reasonable man might infer that in doing the act at that particular time and under

those particular circumstances the defendant failed to exercise due care and prudence. There was no evidence on the part of the plaintiff to show at what times and under what circumstances it was necessary to open the cylinder cocks. The evidence produced by the defendant certainly did not strengthen the plaintiff's case. The engineer testified that the cylinder cocks might have been open at the time; but if they were, there could have been no forcible discharge of steam under the circumstances existing as to the operation of the engine at that moment. He did not see the plaintiff until after the horses were frightened. His train was moving away from the street, or had, practically, at that instant, come to a stop after moving in that direction, and if he were observing his duty his attention would probably be turned away from the street and not towards it. There is no evidence to show that he willfully or wantonly, within the rule set out in Thompson on Negligence, cited in the former opinion, opened the cylinder cocks, and we can find no evidence permitting an inference that a state of facts existed which would have induced a reasonably prudent man to have kept them closed at the time in question. While negligence is an inference to be drawn by the jury from facts established, facts warranting such an inference must be established by evidence, and a jury must not be left to conjecture,—to infer not only negligence but the existence of facts which would constitute negligence. (*Kilpatrick v. Richardson*, 37 Neb., 731.) Where one generally has a right to do an act, in order to predicate negligence upon the doing of it in a particular instance, the burden is upon the plaintiff to show such facts and circumstances as rendered the doing of it in that instance negligent. The burden is not upon the defendant to show that the act was not negligent. Such is the case here. The opening of the cylinder cocks was, in general, a proper and reasonable act to be performed. It could only be negligence to open them in a particular instance,

when there was no necessity of so doing, and when, in addition to that, the circumstances were such that a reasonably prudent man would not do so. The burden was upon the plaintiff to show that such special circumstances existed, and there is a complete and total failure of evidence upon the point.

REVERSED AND REMANDED.

LOUISE P. DAYTON V. CITY OF LINCOLN.

FILED JANUARY 16, 1894. No. 5501.

1. **Instructions Upon Issues Not Controverted.** It is prejudicially erroneous to submit to the jury issues arising from the pleadings in support of which there stands, uncontradicted, sufficient competent evidence, where the effect of submitting such issues may be to mislead the jury and withdraw its attention from the controverted issues.
2. **Damages by Change of Grade of Streets.** In awarding just compensation for property damaged for public use, general benefits to the public at large from the proposed improvements cannot be considered, while special benefits to the property damaged may be. *Schaller v. City of Omaha*, 23 Neb., 325, followed.
3. **An instruction in such a case,** whereby the jury is told that if the premises have not in fact suffered a diminution in their market value and were not damaged, the jury should find for the defendant, is erroneous in not excluding from the consideration of the jury general benefits.
4. **Cities of the First Class:** ALLOWANCE OF CLAIMS: ACTION FOR UNLIQUIDATED DAMAGES. Section 36 of the act relating to cities of the first class does not provide for the allowance or rejection of claims against such cities for unliquidated damages by the city council, or for appeals from the action of the council on claims of that nature. Notwithstanding that section, an original action may be maintained for unliquidated damages in any court of competent jurisdiction.

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

The opinion contains a statement of facts.

J. R. Webster, for plaintiff in error:

In the second instruction there are the following errors: The instruction requires proof of plaintiff's title, proof whereof had been waived in open court, so that it was no longer in controversy. It also left the jury free to find as they saw fit, on the question of whether plaintiff, prior to bringing suit, had filed her claim with the city clerk, a fact which plaintiff had established by record evidence, and which there was no attempt to controvert. The third and fourth instructions contain the same errors. An established fact admitted by the parties ought not to be thrown into controversy again by the court. (*Dunbier v. Day*, 12 Neb., 608; *Frederick v. Kinzer*, 17 Neb., 366.)

The instructions as to measure of damages are in effect that if the change of grade and fill makes no decrease in the vendible market value of the property, then there is no damage. This was error, because it did not distinguish between general and special betterments. General benefits are not proper matter of set-off against damages to property. (*Fremont, E. & M. V. R. Co. v. Whalen*, 11 Neb., 588; *Missouri P. R. Co. v. Hays*, 15 Neb., 229; *Schaller v. City of Omaha*, 23 Neb., 325.)

N. C. Abbott, City Attorney, and *Abbott, Selleck & Lane, contra:*

The second instruction properly presented to the jury the facts in issue under the pleadings. Where an instruction is given by which it is sought to include the whole of the case necessary to a verdict in favor of one of the parties to the action, all elements necessary to the conclusion should be embodied in the instruction. Otherwise it should not

be given. (*Bowie v. Spaids*, 26 Neb., 635; *City of Plattsmouth v. Boeck*, 32 Neb., 297.)

The rule of betterments laid down in the fourth and fifth instructions is the correct rule as established by this court. (*City of Plattsmouth v. Boeck*, 32 Neb., 297.)

Plaintiff's remedy, on disallowance of her claim by the city council, was by appeal to the district court. This is the remedy given by section 36 of the law governing defendant city, and the statute excludes the general remedy by independent suit in court. The district court having had no jurisdiction to try the action, this court has no jurisdiction to hear the case on error. The statute referred to is similar to the law governing the prosecution of claims against the county, and it has been held in a number of cases that the remedy against the county by appeal from the action of the county board is exclusive. (*Richardson County v. Hull*, 24 Neb., 339; *Brown v. Otoe County*, 6 Neb., 111; *State v. Buffalo County*, 6 Neb., 454; *Dixon County v. Barnes*, 13 Neb., 294.)

IRVINE, C.

This action was brought by the plaintiff in error against the city of Lincoln to recover damages sustained by property of plaintiff in error by reason of a change of grade of Ninth and G streets. The action was brought in the county court and appealed to the district court, where there was a trial, and a verdict and judgment in favor of the city. The defendant answered averring that the court had no jurisdiction, for the reason that the law requires all claims of the nature of plaintiff's to be presented to the city council for allowance or rejection, and that the only remedy for erroneous action on the part of the council is by appeal to the district court, and not by original action. This question was before the court in the case of *City of Lincoln v. Grant*, 38 Neb., 369; but that judgment was reversed upon other grounds and the question was not there

decided. The plaintiff in error contends that the lower court being without jurisdiction to try the case, this court is without jurisdiction to review it upon error, and there must be a judgment of dismissal for want of jurisdiction. The contention thus raised calls for a construction of section 36 of the act relating to cities of the first class. By that section it is provided as follows:

"All claims against the city must be presented in writing with a full account of the items, verified by the oath of the claimant, or his agent, that the same is correct, reasonable, and just, and no claim shall be audited or allowed unless presented or verified as provided for in this section and read in open council. The vote of each councilman upon the allowance of any claim shall be entered upon the minutes; *Provided*, That no claim arising either on contract or tort exceeding the sum of twenty-five dollars shall be allowed until the same shall have been read in open council and the name of the claimant and the amount and the nature of the claim published once in a daily newspaper published and of general circulation in said city. Not more than five words shall be used in stating the nature of any such claim. Any taxpayer in such city or the claimant may, after the allowance of any claim required by this section to be published, appeal therefrom to the district court of the county in which such city is situated by giving notice of such appeal to the city clerk within two days after the allowance of the same, and filing, within ten days after such allowance, a bond or obligation in favor of said city with the clerk thereof, and with good and sufficient sureties, to be approved by said clerk, conditioned that said appellant shall prosecute said appeal to effect and without any unnecessary delay, and pay all costs that may be adjudged against said appellant; and in an appeal by a taxpayer, in case the claimant finally recovers judgment for as much or a greater sum, exclusive of interest, as allowed by the council, such appellant shall pay

all costs made by such appellate proceedings; and in an appeal by a claimant, in case such claimant does not recover of said city as large a sum, exclusive of interest, as allowed by such council, said claimant shall pay all costs made by said appeal. The procedure of such appeal shall be in all respects as near as may be like the procedure on appeal from the county board to the district court. In case of appeal no warrant shall issue for the payment of any claim until said appeal is finally determined. 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."

This section requires in the first place that all "claims" against the city must be presented in writing under oath, read in open council, and the vote upon their allowance taken and recorded, and that claims in excess of a certain amount must first be advertised in a daily newspaper. It then provides for an appeal from the order of allowance or rejection either by the claimant or by a taxpayer. After the provision in regard to appeals comes the provision that "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 and circumstance, and cause of the injury or damage complained of." The subject-matter of the section, its arrangement, and its language, all indicate an intention to classify demands against the city in two groups. The first consists of claims certain in amount or of such a nature as to be capable of liquidation with certainty. These are to be passed upon

in the first instance by the council, and the claimant or any taxpayer, if dissatisfied with the council's action, may appeal to the district court. The second group consists of such demands as present causes of action for unliquidated damages, and in regard to such demands the law does not provide for judicial action upon them by the council, but merely requires, as a condition precedent to bringing an action, that the city, by the presentment of a statement, shall be given notice within a reasonable time after the cause of action accrues, and this undoubtedly for the purpose of enabling its officials to investigate the facts before the evidence becomes dissipated. The council is, by reason of its relations to the city government, peculiarly unfitted to pass upon claims for unliquidated damages, and it was not the intention of the legislature to require that such claims should be first submitted to its judgment. The fact that the provision relating to appeals stands between those in regard to liquidated claims and those relating to unliquidated demands lends force to this conclusion, and if a doubt remained, the language would, we think, be conclusive. The first portion of the section expressly requires the council to act upon the claims therein referred to. That portion in regard to unliquidated claims contains no such requirement, but, on the contrary, expressly states that to "maintain an action" the claimant must first present his statement. Finally, to give it the construction contended for would be to permit this section, in an act not relating to judicial procedure, to fix a special and unreasonably short period of limitations to a certain class of actions, when the defendant happens to be a city of the first class. Whether such a special limitation could be sustained is at least doubtful. No valid argument can be based upon the decisions relating to counties. The statute providing for claims against counties differs from this, in that it contains no provision whatever in regard to unliquidated claims.

The court instructed the jury, among other things, as follows:

"Second—The burden of the proof in this action is on the plaintiff to establish by a preponderance of the evidence all the material allegations of her petition. These material allegations are as follows:

"1. That she is the owner of lots 1 and 2, block 162, of the city of Lincoln.

"2. That in the year 1885 the defendant city had an established grade for its streets, and particularly for Ninth and G streets, at their intersection.

"3. That thereafter plaintiff erected dwelling houses and other improvements, permanent in their nature, on her said lots, constructing her improvements in reference to and in conformity with the then established grade on said streets.

"4. That after said improvements were made the defendant city changed the grade of its said streets, Ninth and G, to a higher grade at this intersection, by filling in the street in the front of the plaintiff's premises.

"5. That said change of grade and filling in said streets by defendant, damaged the property of the plaintiff.

"6. That plaintiff filed her claim for damages alleged to be sustained therefrom with the clerk of the defendant city, duly verified according to law, which defendant neglected and refused to pay."

In at least two respects this instruction left to the determination of the jury questions which, although put in issue by the pleadings, stand upon the evidence uncontroverted. One of these questions related to the ownership of the premises alleged to have been injured. Upon this point the defendant upon the trial waived proof. The other was upon the presenting of the statement required by section 36 above referred to. Proof was offered of the presenting of such a statement, received without objection, and no evidence was offered to contradict it. The submission to the jury of these questions was emphasized by the third and fourth instructions given by the court, of which we quote the third alone. The fourth was couched in similar language. The third was as follows:

"If you find from the evidence that plaintiff is the owner of the premises described in the petition, and if you find from the evidence that plaintiff erected on said premises dwelling houses and other improvements of a permanent nature, and if you find from the evidence that said defendant city had an established grade for the streets abutting said premises at the time said improvements, if any, were constructed thereon, and if you find from the evidence that said improvements, if any, were erected by plaintiff in reference to and conformity with said grade, if any, established on said streets, * * * and if you find from the evidence that said change of grade and fill, if any such you find, damaged the said premises of plaintiff, if you find she owned them, then you are instructed that plaintiff is entitled to recover at your hands such a sum as will justly compensate her for the damage, if any done thereto, provided you further find that plaintiff presented a claim for compensation therefor and filed the same at the office of the clerk of defendant city in the manner required by law, and that defendant neglects and refuses to pay the same."

We do not here hold that it is reversible error in every case to so frame instructions as to submit to the jury an issue raised by the pleadings upon which proof has been offered upon one side and not upon the other. But while ownership of the property and the presenting of a statement of the claim were both put in issue by the pleadings and both points essential to a recovery, the state of the evidence sustained only one finding upon these points. By the second instruction these issues were presented to the jury as questions open for its determination upon the evidence. By the third and fourth the conditional statements of these subjects may have led the jury to infer that as a matter of law these issues remained in the case as disputed questions, upon which they were at liberty to find as they saw fit. The instructions were in this respect misleading

and must have tended to confuse the jury and withdraw their attention from the real issues in the case. They were, therefore, prejudicially erroneous. (*Dunbier v. Day*, 12 Neb., 596; *Frederick v. Kinzer*, 17 Neb., 366.)

Upon the question of the measure of damages the court gave the following instruction:

"Both plaintiff and defendant have introduced testimony as to the value of said premises immediately before and immediately after the alleged change of grade and fill were made in the streets fronting on said premises. If from the evidence you find that plaintiff owned said premises, that her improvements, if any, thereon were built upon a grade established by defendant and used on said streets, and if you find that defendant changed said grade, if any, and filled said streets to a higher level, then you are instructed that you should consider the evidence as to value of said premises immediately before and immediately after said change of grade and fill, if any were made, in connection with all other testimony of the case, and from all the testimony before you determine whether or not the premises described in the petition have, by reason of the changed grade and fill, if such you find, been in fact decreased in their pecuniary or market value. If from all the evidence under the instructions of the court you find that said premises were in fact diminished in their market value and damaged by the alleged acts of defendant, then your verdict should be for plaintiff. If from all the evidence under the instructions of the court you find that said premises have not in fact suffered a diminution in their market value and were not damaged as alleged, then you should find in favor of the defendant."

The effect of this instruction was to require the jury to find for the defendant if after the grading complained of the market value of the premises was as much as before. The instruction failed to state to the jury that there could be no deduction from the damages sustained by reason of

general benefits to the property. The plaintiff requested instructions upon this point, which were refused. It is now the settled law of the state that in the case of damages to abutting property special benefits may be set off while general benefits may not. (*Wagner v. Gage County*, 3 Neb., 237; *Schaller v. City of Omaha*, 23 Neb., 325.) The jury having been confined by the instruction to a consideration of the general question as to whether the premises had suffered a diminution in their market value, it was in effect told to consider all benefits, and the instruction was, therefore, erroneous.

REVERSED AND REMANDED.

LINCOLN VITRIFIED PAVING & PRESSED BRICK COMPANY V. CLARISSA BUCKNER.

FILED JANUARY 16, 1894. No. 5609.

1. **While evidence must be confined to the issues, it is** not essential that it should always bear directly upon the precise point in issue, but is admissible if it affords a reasonable inference upon that point,
2. **Negligence:** PERSONAL INJURIES: EVIDENCE. Thus in an action for injuries sustained by a child who stepped into burning ashes deposited in a street, where it was shown that some one had been systematically depositing ashes for a considerable period at that spot, it was not error to permit a witness to testify that it was the defendant who had at other times near that of the accident been so doing.
3. **Review:** HARMLESS ERROR. The court will not reverse a judgment for personal injuries because of improper hypothetical questions put to medical experts for the sole purpose of proving the permanency of the injuries where the verdict is so small as to render it evident that the jury had not found the injuries to be permanent.

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

Charles O. Whedon, for plaintiff in error, cited: *Woodbury v. Obear*, 7 Gray [Mass.], 467; *Williams v. Brown*, 28 O. St., 547.

A. J. Cornish, contra, cited: *Shaber v. St. Paul R. Co.*, 28 Minn., 108; *State v. Manchester & L. R. Co.*, 52 N. H., 528; *Foxworthy v. City of Hastings*, 25 Neb., 133.

IRVINE, C.

Clarissa Buckner, an infant five years of age, brought this suit by her next friend against plaintiff in error, alleging in brief that on or about the 29th day of July, 1889, the brick company unlawfully and negligently deposited on K street, in Lincoln, hot and burning coal, cinders, and ashes dangerous to the traveling public, and that the plaintiff, while walking upon that street, without negligence upon her part, stepped upon said coals, cinders, and ashes, whereby she was severely and dangerously burned in her feet and limbs. The answer was in effect a general denial. There was a verdict and judgment for plaintiff for $300.

The first assignment of error argued is based upon the court's permitting the father of the plaintiff to testify that it was the custom of the defendant during the months of June, July, and August, 1889, to deposit the ashes from its kilns at the spot where the plaintiff was injured. This testimony was followed by proof by the same witness that during the week when the injury was sustained he saw the brick company hauling burning ashes to that spot. If this testimony were improper it is doubtful whether the brick company could avail itself of the error. Practically all the evidence offered by the company upon this issue was of the same character, consisting of testimony to the

effect that it was the custom of the company to throw water upon the ashes before they were hauled from the kilns. Both parties having resorted to this method of proof, it is doubtful if either could complain. (*Howell v. Graff*, 25 Neb., 130.) But we do not think that the admission of this evidence was erroneous. The proof showed that there was, or had been, a low spot at the point in question, and that there had been a more or less continuous depositing of ashes there by some one. Other witnesses testify that the ashes there deposited were brought from the kilns, and there was proof that the defendant's kilns were in close proximity and that there was no other kiln in the neighborhood. While generally the commission of an act cannot be established by proof of the commission of similar acts at other times, we think that here the deposition of the ashes constituted a continuous act, and that proof that it was the defendant company which was making the deposits in question generally, accompanied by proof of the other circumstances complained of, fairly tended to prove the precise issue in this case, which was the depositing of the particular ashes which caused the injury. The evidence cannot always be confined to the precise point in issue, but all evidence is admissible except that which is incapable of affording any reasonable presumption or inference as to the principal fact in dispute. (1 Greenleaf, Evidence, sec. 52.) Facts which, though not in issue, are so connected with the fact in issue as to form a part of the same transaction or subject-matter are deemed relevant to the fact with which they are so connected. (Stephen, Digest of Evidence, art. 3.) The judge may admit as relevant the evidence of all those matters which shed a real, though perhaps indirect and feeble light on the question in issue. (Taylor, Evidence, sec. 316.)

In this connection we should consider the assignments that the verdict was not sustained by the evidence, and that the court erred in giving instructions submitting the ques-

tion of negligence to the jury. These assignments are based upon the argument that there was a failure to prove that the defendant company deposited the ashes which caused the injury. What we have already said largely disposes of these assignments of error. But aside from the testimony above referred to there was that of at least one witness who saw the accident and testified directly that he saw these particular ashes brought from the kiln. It is true that the defendant offered evidence tending to show that all ashes were cooled down by water before they were hauled away, and that unless this were done they would burn the barrows used in hauling them and stifle the men engaged, with their fumes; but we cannot say that the jury was bound to believe this evidence in the face of the direct and positive testimony to the contrary.

Numerous errors are assigned because of the admission of the testimony of physicians in relation to the injury and its effect. These questions related mostly to the permanency of the injury. Without examining the evidence in detail, we think there is in the record sufficient evidence upon which to base the hypotheses of these questions. This is the principal objection urged. But even if the questions were unwarranted, we would not disturb the verdict upon this ground. The evidence shows, without contradiction, that the injury sustained was of a severe nature; that scars remained which would be permanent; that the child suffered excruciating agony; that she was confined to her bed for weeks and was unable for months to wear shoes. The verdict was only for $300, and it is not possible that the jury could have found that the injuries were permanent, otherwise than as inflicting a permanent scar, because if such had been found the verdict would certainly have been much larger. Manifestly upon the permanency of the injuries the jury found for the defendant, and any errors in the admission of testimony directed simply to that point would be without prejudice. The evidence

showed that between the time of the accident and the time of trial the child had been afflicted with eruptions and "running sores" upon the injured leg. One of the witnesses, Dr. Crim, was asked the following question: "In cases of that character, where it is followed by eruptions and you knew of no other cause to attribute those eruptions to except that the child had been burned previously where the eruptions were, what would you attribute those eruptions to?" He answered: "Injury from a burn." Previously general questions had been put to him seeking to elicit the cause of the eruptions, and his answers were, in effect, that in order to ascertain the cause he must have such knowledge as would exclude all sources of eruptions excepting the source suspected. We do not think this testimony was erroneously admitted when examined in connection with the rest of his testimony. It amounted to evidence that an injury from a burn would be a sufficient cause for such eruptions. There is abundant evidence that the general health of the child was good and no evidence whatever of the existence of other causes for eruptions. They had not occurred before the injury. They had occurred frequently since the injury. We find no material error in the record and the judgment must be

AFFIRMED.

JAMES DOYLE, APPELLANT, V. MARY F. HOLLAND ET AL., APPELLEES.

FILED FEBRUARY 6, 1894. No. 5467.

1. **Usury.** On September 17, 1887, plaintiff loaned the defendants $600 for one year at twelve per cent interest, the defendants giving their note secured by mortgage for $672,—the same being the sum borrowed and one year's interest thereon,—payable in one year from date thereof, with eight per cent from maturity. In

an action to foreclose the mortgage it was *held* that the contract was usurious.

2. **Extension of Usurious Loan.** It is a well settled rule that where the original loan is usurious, every subsequent extension of the same, even at a lawful rate of interest, is likewise tainted with the vice of usury.

APPEAL from the district court of Saline county. Heard below before HASTINGS, J.

Abbott & Abbott, for appellant.

Palmer & Hendee, contra:

Where the original contract is tainted with usury, all subsequent renewals or extensions of the same are also tainted with the vice of usury. (*National Bank of Winterset v. Eyre*, 52 Ia., 114; *Exley v. Berryhill*, 33 N. W. Rep. [Minn.], 567; *Cottrell v. Southwick*, 32 N. W. Rep. [Ia.], 22; *Richards v. Kountze*, 4 Neb., 205.)

NORVAL, C. J.

This was an action to foreclose a real estate mortgage. The defendants interposed the defense of usury, which was sustained by the trial court, and a decree of foreclosure and sale was entered for the amount of the loan, less payments which had been made. Plaintiff appeals.

The testimony on both sides agrees that the defendants borrowed of the plaintiff $600 on the 17th day of September, 1887, at twelve per cent interest for one year. To secure the payment of the loan they gave their promissory note, calling for $672, due in one year from date thereof, at eight per cent interest from maturity, also a mortgage upon real estate. The sum of $600, and no more, was received by the defendants on the note and mortgage, and the sum of $72, by agreement of the parties, was included in the note as interest on the $600 for one year. The amount of interest agreed to be paid, being in excess of the maximum rate

allowed by statute, tainted the contract with the vice of usury.

Plaintiff attempts to escape the penalty of usury upon the ground that, at the time the money was borrowed and the note and mortgage were executed, it was orally agreed that should the defendants desire to retain the money for the next year ensuing after the maturity of the note, they could do so by paying eight per cent interest for said year, and that when the loan became due, at the request of the defendants, the payment thereof was extended for another year. There is a conflict in the testimony whether the defendants were charged eight or ten per cent interest for the second year, the plaintiff testifying that he was only paid $48 interest for that time, while the defendant Lawrence Holland testified that he paid $60 as interest. The trial court found that the aforesaid agreement for an extension of the time of payment was not carried out.

But admitting that defendants only paid eight per cent interest on the loan for the second year, the contract was nevertheless usurious. Plaintiff charged, and the defendants paid, twelve per cent on the money for the first year, as all the testimony shows. This made the original contract unlawful, and the fact that but eight per cent was paid for the second year, which with the sum charged for the first year did not exceed ten per cent per annum on the loan for the two years, does not relieve the plaintiff of the penalty imposed by law for taking usurious interest. Neither the note nor mortgage contained any provision that the loan was to run two years from the making thereof. On the contrary the money, by the express terms of the note and mortgage, was payable one year from the making of the contract. It is not claimed that any mistake was made in drawing the papers. The alleged oral contemporaneous agreement that the note should run two years, instead of one, as therein written, was of no validity. Defendants had the right to pay off the loan, if they so desired, in one

year after the same was made, and plaintiff could have enforced payment after the expiration of the year. Whether the contract would be usurious had the note contained a stipulation that it should run two years, with interest at twelve per cent for the first year and eight per cent for the second, it is unnecessary to decide, as that is not the case before us. Here the money was borrowed for one year, and no longer, at an unlawful rate of interest. The original contract being usurious, it is wholly immaterial that the payment of the loan was subsequently extended for another year from the maturity of the note at a lawful rate of interest. It is a rule well settled by the authorities that where the original loan is usurious, every subsequent extension of the same is likewise tainted with the vice of usury. (*Nelson v. Hurford*, 11 Neb., 465.)

The decree appealed from is fully sustained by the evidence and is therefore

AFFIRMED.

FIRST NATIONAL BANK OF DORCHESTER V. BENJAMIN A. SMITH.

FILED FEBRUARY 6, 1894. NO. 4924.

Judgment for Too Small an Amount: EVIDENCE: REVIEW. Where, on the review of a judgment of the district court in an action at law, the uncontradicted evidence shows that the plaintiff in error should have recovered a larger sum, this court will reverse the cause.

REHEARING of case reported in 36 Neb., 199.

F. I. Foss, for plaintiff in error.

Abbott & Abbott, contra.

NORVAL, C. J.

This was an action brought against a national bank, under the provisions of section 5198 of the Revised Statutes of the United States, to recover the penalty for taking usurious interest. At the January term, 1893, of this court an opinion was filed in the case affirming the judgment of the district court. (36 Neb., 199.) Subsequently, a rehearing was granted on the petition of Smith, and the cause was again submitted for our consideration.

In the former opinion it was held that an action like this must be brought within two years from the payment of the usurious interest; that each payment of excessive interest is regarded as a "transaction," within the meaning of that term as used in the section of the statute above mentioned, and that the two years' limitation begins to run as to each payment of unlawful interest from the date the same was made. The soundness of the rule there stated is not now questioned by either party, but the plaintiff below, Smith, insists that on the former hearing we misconceived the facts; in other words, that he should have recovered a larger sum than was given him by the judgment of the lower court. After a careful perusal of the bill of exceptions we are convinced his contention is well founded, and that the writer overlooked some of the payments of interest. The record shows without contradiction that the following payments of usurious interest were made within the two years immediately preceding the institution of the suit in the court below, to-wit: May 27, 1887, $19.80; June 6, 1887, $20.12; August 15, 1887, $10.11; March 3, 1888, $13.27; December 29, 1888, $9.83; February 9, 1889, $69.20,—making a total of $142.33 of excessive or unlawful interest paid by Smith to the bank within the two years' limitation. The judgment, therefore, should have been for double that sum, or $284.66, instead of $207.72.

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

REVERSED AND REMANDED.

JABE DILLON V. STATE OF NEBRASKA.

FILED FEBRUARY 6, 1894. No. 6223.

Criminal Law: REVIEW. In order to secure a review in this court of alleged errors occurring at the trial, such errors must be pointed out in a motion for a new trial, addressed to the district court, and a ruling obtained thereon.

ERROR to the district court for Furnas county. Tried below before WELTY, J.

C. C. Flansburg, for plaintiff in error.

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

POST, J.

At the April, 1893, term of the district court of Furnas county, the plaintiff in error, Jabe Dillon, was convicted of the crime of assault with intent to inflict great bodily injury, and which he now seeks to reverse by means of a petition in error addressed to this court. In his petition numerous errors are alleged, all of which refer to rulings during the trial before the district court. We find accompanying the transcript a paper entitled, "Motion for a New Trial," in which the grounds stated are substantially the same as those assigned in the petition in error. It does not appear, however, to have been filed in the district court, nor is there anything in the record to indicate that it was ever passed upon by that court. The settled rule is, that in order to secure a review in this court of alleged

errors occurring at the trial, such rulings must be assigned in a motion for a new trial, addressed to the trial court, and a ruling obtained thereon. (See *Gibson v. Arnold*, 5 Neb., 186; *Simpson v. Gregg*, 5 Neb., 238; *Harrington v. Latta*, 23 Neb., 84; *Miller v. Antelope County*, 35 Neb., 237.) It follows that the petition in error must be dismissed and the judgment of the district court

AFFIRMED.

NICHOLAS YAGER V. WILLIAM J. LEMP.

FILED FEBRUARY 6, 1894. NO. 5240.

1. **Final order:** RULING ON DEMURRER: REVIEW. The sustaining of a demurrer to a petition or answer is not such a final order as will be reviewed by petition in error in this court.
2. **Ruling on Motion to Docket Counter-Claim:** REVIEW: FINAL ORDER. Where a counter-claim is stricken out for the reason that it is foreign to the subject of the action, an order denying the defendant's motion to docket it as a separate cause of action, under the provision of section 126 of the Code, is not a final order and will not be reviewed in this court by petition in error.

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

Winfield S. Strawn, for plaintiff in error.

Brome, Andrews & Sheean, contra.

POST, J.

This was a foreclosure proceeding in the district court of Douglas county by the defendant in error Lemp against Thomas F. Dupins and others, including the plaintiff in error Yager, whom it was sought to charge as an indorser

of the notes mentioned in the mortgage. Yager filed a separate answer, and subsequently, by leave of court, an amended answer, in which he, first, admitted the indorsement of the notes; second, alleged that such indorsement was made as security for the payment of beer to be shipped by Lemp and sold by him as agent for said plaintiff at Omaha; that in carrying out said contract he purchased from Lemp a large amount of property then in use in connection with said agency, and by purchase from other parties added largely to the property (other than beer) which was necessary to successfully conduct the business of said agency; that he bought from Lemp large quantities of beer and paid largely thereon, and that the notes set out in the petition were a continuing security for the payment thereof; that after he had built up a prosperous business in said agency, Lemp, by fraud and conspiracy, took the same away from him, and also seized and converted all of the property used in the business of said agency, as well as the beer, to secure the payment of which he, Yager, had indorsed and transferred the notes in suit. He claimed judgment for the excess of damages over the amount, if any, he might be found indebted to Lemp. To this answer the latter demurred on the grounds, first and second, that the same constituted no defense to Yager's liability on the notes, and third, that the claim did not arise out of the contract or transactions alleged in the petition, and were not connected with the subject of the action, which demurrer was sustained.

Yager excepted, was defaulted, and the action was left to proceed against the other defendants. Yager also moved the court to docket his claim as a separate cause of action and allow him a jury trial thereon, but on sustaining the demurrer said motion was overruled, to which also an exception was taken. Yager thereupon filed in this court a petition in error in which he in different forms assigns as error the sustaining of the demurrer above mentioned and

the overruling of his said motion, but no final judgment had been entered at the time this proceeding was instituted. Nor is there any competent evidence that the cause has been subsequently disposed of on its merits, and we are not at liberty to assume that it is not now on the docket of the district court awaiting a hearing therein.

The remedy by petition in error under our Code, section 583, is restricted to final orders and decrees. By section 581 a final order is defined as one which in effect determines the action and prevents a judgment. That the sustaining of the demurrer to the counter-claim in this case is not a final order within the meaning of the Code is apparent from numerous decisions of this court. (See *Artman v. West Point Mfg. Co.*, 16 Neb., 572; *Daniels v. Tibbets*, 16 Neb., 666; *Aspinwall v. Aspinwall*, 18 Neb., 463; *Welch v. Calhoun*, 22 Neb., 167.)

It is contended by counsel for plaintiff in error that the provisions of section 126 of the Code are mandatory, and that it was not within the discretion of the district court to deny the motion to docket his counter-claim as a separate action. We think however, that this ruling, like the sustaining of the demurrer, is not a final order, since it in nowise involves the merits of the controversy. The authorities above cited we regard as decisive of the question. It follows that the petition in error must be

DISMISSED.

PHENIX INSURANCE COMPANY v. S. B. BACHELDER.

FILED FEBRUARY 6, 1894. No. 4398.

1. **Pleading: REPLY: CONFESSION AND AVOIDANCE.** A general denial in the reply puts in issue only the truth of allegations of new matter in the answer. Facts in the nature of a confession and avoidance must be specially pleaded.

2. **The conclusion announced on a former hearing of this case, 32 Neb., 490, adhered to.**

REHEARING of case reported in 32 Neb., 490.

Fawcett & Sturdevant and *John P. Davis*, for plaintiff in error.

A. U. Hancock and *Reese & Gilkeson, contra.*

POST, J.

This case was under consideration at the January, 1891, term and a reversal of the judgment of the district court ordered for reasons stated in the opinion, which is reported in 32 Neb., at page 490, and to which reference is made for a statement of the material facts.

A rehearing was subsequently allowed on the application of the defendant in error, and the cause again submitted on its merits. The defendant in error on this hearing practically relies upon one proposition, viz.: That by virtue of an agreement with the insurance company he was entitled to a credit on his note for the value of two surrendered policies of insurance; that he was ready and willing to pay the balance thereof whenever notified of the amount of such credit, and that his default is altogether attributable to the neglect of the company. The petition is in the usual form of action on policies of insurance.

The allegations of the answer necessary to be here noticed are: That in consideration of the five years $1,600 policy of insurance the defendant in error paid in cash the sum of $10 and his note in favor of the company for $22, dated August 9, 1886, and maturing August, 1, 1887; that it was stipulated in both the policy and note that in case the latter was not paid in full at maturity the policy would be null and void during the continuance of such default; that at the time of the loss, to-wit, January 27, 1888, said note was due and wholly unpaid.

There is no controversy with respect to the foregoing allegations, except that defendant in error claims that he should have been credited on said note with the value of the surrendered policies. He makes no claim that such credit was equal to the face of the note, but the difference in favor of the insurance company does not appear from the record. If the stipulation, whereby the policy should be void during the period of default, is a reasonable provision (and under the authorities cited in the former opinion we cannot doubt that it is), it follows that said policy was not in force at the time of the loss, unless the default can be excused on the ground above stated.

Assuming the facts relied on to be, in law, a sufficient justification of the default, are they available for that purpose under the issues presented in this case? The distinct allegation of the answer, that the note was wholly unpaid at the time of the loss, was such new matter as by provision of our Code called for a reply. (*Dillon v. Russell*, 5 Neb., 488; *Payne v. Briggs*, 8 Neb., 78.) The only reply we find in the transcript is a general denial, while the facts relied on as a justification are in the nature of an avoidance, which must be specially pleaded. The only issue presented by the reply was the truth of the allegations of the answer. (*Quick v. Sachsse*, 31 Neb., 312.) It follows that facts tending to excuse the default were not admissible and cannot be relied on in this proceeding.

2. But if the justification had been specially pleaded, we think the judgment could not be sustained on that ground, for the reason that there appears to be a failure of proof on that issue. The defendant in error, who was a witness in his own behalf, was not examined on the subject. The agreement is claimed to have been made by one Weymouth, an agent of the company. Mr. Fox, another agent, who was present a portion of the time, gave the only evidence tending to sustain that contention. He was not present when the contract was made, and does not claim to have

witnessed the agreement relied on, but overheard Weymouth tell defendant in error, just as he was leaving the premises of the latter, that he would figure up the amount due for the canceled policies and credit it on the note. But whether that was one of the conditions of the contract of insurance, or a subsequent voluntary promise for the benefit of the insured, is a matter of conjecture.

It would seem, too, that in order to excuse payment of the balance so as to keep the policy in force, it should appear that the amount of the credit claimed was within the exclusive knowledge of the insurance company. There are, however, no facts disclosed which will warrant the inference that the defendant in error could not readily have computed the value of the policies surrendered, and thus have ascertained the balance due on his note. We are convinced that the conclusion previously announced is right and that the judgment should be

REVERSED.

FREMONT, ELKHORN & MISSOURI VALLEY RAILROAD COMPANY v. CLAUS MATTHEIS.

FILED FEBRUARY 6, 1894. No. 4310.

1. **Eminent Domain**: PETITION: DESCRIPTION OF PROPERTY: AMENDMENT. A county judge, in a proceeding by a railroad company to acquire the right of way by condemnation, may require the petition presented to him to be amended so as to contain a more specific description of the property which it is sought to appropriate.
2. **A condemnation proceeding will not be declared void** in a subsequent action by a land-owner, who had notice thereof in the manner provided by law, on the sole ground that the property described in the petition is the tract through which the road is located and not the particular part thereof appropriated for right of way purposes.

3. **Eminent Domain**: SUFFICIENCY OF DESCRIPTION OF LAND: COLLATERAL ATTACK. Where a petition for appraisers to assess damage on account of the appropriation for right of way purposes of a strip 100 feet wide through a particular tract of land, refers for a more specific description to an accompanying plat, which shows the location of the road through such tract, but without letters or figures to indicate courses and distances, such description will be *held* sufficient when assailed in a collateral proceeding.

4. **The conclusion** announced on a former hearing of this case, 35 Neb., 48, adhered to.

REHEARING of case reported in 35 Neb., 48.

Switzler & McIntosh, for defendant in error:

In condemnation proceedings the court should hold the condemning party to a strict observance of the statute. (*Republican V. R. Co. v. Fink*, 18 Neb., 82; *Omaha & N. W. R. Co. v. Menk*, 4 Neb., 21; *Ray v. Atchison & N. R. Co.*, 4 Neb., 439.)

The description of the land taken, contained in the petition and other papers in the condemnation proceeding, is insufficient to give the county judge jurisdiction. (*Pennsylvania R. Co. v. Porter*, 29 Pa. St., 169; *London v. Sample Lumber Co.*, 8 So. Rep. [Ala.], 281; *Chicago & M. L. S. R. Co. v. Sanford*, 23 Mich., 426; *State v. Armell*, 8 Kan., 294; *Spofford v. Bucksport & B. R. Co.*, 66 Me., 40; *Portland S. & P. R. Co. v. Commissioners of York County*, 65 Me., 292; *Missouri P. R. Co. v. Carter*, 85 Mo., 448; *In re New York C. & H. R. R. Co.*, 70 N. Y., 193; Mills, Eminent Domain, sec. 115; Lewis, Eminent Domain, sec. 350; Pierce, Railroads, p. 180; 1 Rorer, Railroads, 346.)

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

POST, J.

An opinion was filed in this case at the January, 1892, term. (See *Fremont, E. & M. V. R. Co. v. Mattheis*, 35

Neb., 48.) Subsequently the writer, believing that the question of the validity of the condemnation proceeding relied upon by the railroad company, had not received the careful consideration to which it was entitled, suggested a rehearing, which was accordingly ordered. Assisted by able arguments and briefs, we have patiently re-examined that question, and are entirely satisfied with the conclusion reached on the former hearing. There appears, from a casual examination of the authorities, to be an irreconcilable conflict of opinion as to the description essential in order to confer jurisdiction upon the court, or other officers authorized to award damage in this class of cases. But from a careful examination of the cases the apparent conflict is found to be due in a large measure to a diversity of laws regulating the appropriating of private property in the exercise of the right of eminent domain. In the earlier cases it is observable that by the general laws, as well as special charters, the condemnation proceeding had the effect of a deed, and upon payment of the damage awarded the title of the property acquired was vested in the corporation or other agency of the state, and the damage of the owner was limited to compensation for the property actually taken. The reasons upon which those decisions rest are wanting in this state where the damage includes not alone the value of the property taken, but injury to the entire tract. Strictly speaking, the proceeding under our statute is to determine the amount of the injury to the land-owner's property, whatever may be the extent thereof, and of which the value of the property actually taken is but an element. It would seem, therefore, that a petition describing the tract or body of land which is the subject of the controversy is sufficient to give the county judge jurisdiction, although the fraction thereof sought to be appropriated may not be described with technical accuracy.

We are not aware that a description of the character of the one under consideration has ever been held insufficient

in a strictly collateral proceeding. In each of the cases cited by defendant in error, with the single exception, we believe, of *State v. Armell*, 8 Kan., 288, the question arose in a direct proceeding; and in the exception named the controversy involved the extent of the right acquired, and not the validity of the condemnation. It will be conceded that the powers exercised by the county judge in this proceeding are special and limited, and not in accordance with the course of the common law; but it is quite as well settled that his judgments and orders cannot be assailed indirectly on account of mere errors or irregularities (Black, Judgments, 250.)

The property described in the petition is "the right of way one hundred feet wide over, across, and through the * * * northeast quarter of the southeast quarter of section No. thirty-six, township No. fifteen, range No. twelve east; * * * all of the above property being fully described and marked by red lines on the plat hereto attached and marked Exhibit 'B' and made a part thereof. The following named persons have and claim title, ownership, and interest in the above described real estate, to-wit: * * * C. Mattheis." The prayer of the petition is that "the commissioners heretofore summoned be directed to inspect said real estate and assess the damages which the owners or parties interested therein shall sustain by the appropriation thereof to the use of said company as aforesaid." On the 28th day of May, 1887, notice in writing was given the defendant in error that on the 10th day of June following said "commissioners" would assess his damage for the appropriation of the right of way through his premises, as the same was then staked out and located. Assuming the above description to be less specific than contemplated by law, objection on that ground comes too late when made for the first time after the damage has been assessed and the road constructed. It cannot be said that there is not available to the land-owner in such

cases an adequate remedy by direct proceeding. Without doubt the county judge is authorized to exercise the same control over the warrant or commission to the appraisers as over any other process issued by him. If the allegations of the petition are indefinite, an amendment may be allowed; and if there is no authority for the issuing of the writ, it may be quashed and set aside upon the motion of one adversely interested; and although the writ of *certiorari* has been abolished in this state, the district court may still compel the proceedings of an inferior tribunal to be certified up for review.

An instructive case, and one directly in point, is *Cleveland & T. R. Co. v. Prentice*, 13 O. St., 373, which was an action to recover for the value of a strip of land one hundred feet wide across lot 15, in river tract No. 87. The railroad company relied upon a condemnation of the premises for right of way. The description shown by the record introduced in evidence was "fifty feet wide on each side of said railroad, as last surveyed, through * * * lots Nos. 11, 12, 13, 14, and 15 of the subdivision of river tract No. 87." In holding the foregoing description sufficient, Sutliff, C. J., says: "The authorities will be found, I apprehend, less strict in requiring definite description of roads where the question is not made until after the road has been opened and in use, than in those cases where the question as to the *locus in quo* has been raised *in limine*."

In *Lower v. Chicago, B. & Q. R. Co.*, 59 Ia., 563, the land condemned was fifty feet on each side of the center of the railroad track "as the same is located, staked, and marked." This was held a sufficient description in a collateral proceeding, although it did not in all respects correspond to the land described in the notice of condemnation. Our views are supported also by the following cases: *Stephenville v. Overby*, 22 S. W. Rep. [Tex.], 121; *Cory v. Chicago, B. & K. C. R. Co.*, 100 Mo., 288; *Chicago, M. & St. P. R. Co. v. Randolph Townsite Co.*, 103 Mo., 451.

In the case of *Trester v. Missouri P. R. Co.*, 33 Neb., 171, the petition, which was held sufficient, contained the following description: "The N. ½ S. E. ¼ of N. E. ¼, section 24, Tp. 10, R. 6 E., 100 feet wide and through the same." And although no reference is made in the syllabus to the sufficiency of the description that question was presented by the record and was evidently determined, as appears from the following language used by the present chief justice, on page 185: "The petition presented to the county judge in every respect complied with the statute relative to the appropriation of real estate for right of way purposes." Our conclusion is that the petition was sufficient to give the county judge jurisdiction, and that the condemnation proceeding is a sufficient justification of the trespass alleged in this action. The judgment of the district court is therefore

REVERSED.

W. D. NICKOLLS V. E. C. BARNES ET AL.

FILED FEBRUARY 6, 1894. NO. 4085.

1. **Landlord and Tenant:** LEASE. Where an agreement for the lease of a piece of real estate is reduced to writing, and bears the signatures of the lessees but not that of the lessor, and possession taken under such agreement by said lessees, and the payment of rent made by them, and by said lessor accepted, and said lease, had it been properly executed, would have been for the term of one year, though payments of rent under such agreement are to be made monthly, *held*, that said lease is valid as an oral lease for one year, and said lessees are thereby made tenants for one year.
2. Former decision in this case reported in 32 Neb., 195, is overruled.

REHEARING of case reported in 32 Neb., 195.

A. H. Babcock and *E. O. Kretsinger*, for plaintiff in error:

The signing of the lease by the lessees, and taking possession of the leased premises, and paying rent under the lease, which lease was accepted by the lessor and placed upon record, and rent received under it, made it a perfect, binding lease for one year upon both parties, even though it may not have been signed by the lessor. (*Fitton v. Inhabitants of Hamilton City*, 6 Nev., 196; *Finley v. Simpson*, 2 Zab. [N. J.], 311, and cases cited; *McFarlane v. Williams*, 107 Ill., 33; *Catlett v. Catlett*, 55 Mo., 332; *Clason v. Bailey*, 14 Johns. [N. Y.], 486; *Kershaw v. Kershaw*, 102 Ill., 307; *Galbraith v. McLain*, 84 Ill., 379; *Traylor v. Cabanne*, 8 Mo. App., 131; *McConnell v. Brillhart*, 17 Ill., 354; *Barry v. Coombe*, 1 Pet. [U. S.], 650; *Penniman v. Hartshorn*, 13 Mass., 87; *Saunderson v. Jackson*, 3 Esp. [Eng.], 181; *Bluck v. Gompertz*, 7 Exch. [Eng.], 862; *Evans v. Ashley*, 8 Mo., 181; *Lockwood v. Lockwood*, 22 Conn., 425; *Atlantic Dock Co. v. Leavitt*, 54 N. Y., 35; *Reeder v. Sayre*, 70 N. Y., 183; *People v. Rickert*, 8 Cow. [N. Y.], 226; *Pugsley v. Aikin*, 11 N. Y., 494; *Morrill v. Mackman*, 24 Mich., 286; *Koplitz v. Gustavus*, 48 Wis., 48; *Laughran v. Smith*, 75 N. Y., 205; *Friedhoff v. Smith*, 13 Neb., 5; *Doe v. Bell*, 5 Term Rep. [Eng.], 471; *Schuyler v. Leggett*, 2 Cow. [N. Y.], 660; *Greton v. Smith*, 33 N. Y., 245; *Clayton v. Blakey*, 8 Term Rep. [Eng.], 3; *Coan v. Mole*, 39 Mich., 454; *Schneider v. Lord*, 62 Mich., 141; *Walker v. Furbush*, 11 Cush. [Mass.], 366.)

George A. Murphy and *A. G. Whitney*, also for plaintiff in error.

Hugh J. Dobbs, contra:

A lease executed by the lessee alone is void, though followed by possession, and payment and acceptance of rent.

(Wood, Landlord and Tenant, sec. 218; Taylor, Landlord and Tenant [7th ed.], sec. 35; *Soprani v. Skurro*, Yelv. [Eng.], 19; *Pitman v. Woodbury*, 3 Exch. [Eng.], 4; *Swatman v. Ambler*, 8 Exch. [Eng.], 72; *Cammeyer v. United German Lutheran Church*, 2 Sand. Ch. [N. Y.], 186; *Miller v. Pelletier*, 4 Edw. Ch. [N. Y.], 106; *McLeran v. Benton*, 73 Cal., 329; *Carlton v. Williams*, 77 Cal., 89; *Laughran v. Smith*, 75 N. Y., 205; *Coudert v. Cohn*, 118 N. Y., 309; *Gartrell v. Stafford*, 12 Neb., 552; *Robinson v. Cheney*, 17 Neb., 679; *Anderson v. Harold*, 10 O., 399; *Bailey v. Ogden*, 3 Johns. [N. Y.], 399; 3 Parsons, Contracts, p. 5; *Stokes v. Moore*, 1 Cox Ch. [Eng.], 219; *Wade v. City of Newbern*, 77 N. Car., 460.)

A. Hardy, also for defendants in error.

HARRISON, J.

An action of replevin was commenced in the district court of Gage county, Nebraska, by W. D. Nickolls against E. C. Barnes, C. J. Barnes, Smith Y. Hill, Hugh J. Dobbs, Charles Moschell, and John Foster, for the recovery of certain personal property, consisting of furniture and household goods, the action by him being founded upon his rights under an instrument in writing, signed by the Barneses, of defendants, and which was in form a lease with chattel mortgage clause inserted and purporting to secure the payment of the rent. The term of leasing, as set forth in the instrument, was to commence August 25, 1888, and to terminate August 25, 1889, the rental to be the sum of $690 for the year, and paid monthly in advance and in sums as stated in said instrument. A statement of the case was made in the decision of it in this court on June 30, 1891, contained in 32 Neb., 195, 49 N. W. Rep., 342, to which parties are referred for a statement of the case. There was a trial to a jury in the lower court, and verdict against the plaintiff, and judgment on

the verdict. The case was brought here on error and the judgment of the district court affirmed in the opinion of the court filed June 30, 1891. (*Nickolls v. Barnes, supra.*)

A motion for rehearing was filed August 3, 1891, and rehearing granted January 6, 1892, and the case submitted on briefs of the parties. The question decided on the former hearing of the case was in reference to the validity of the instrument of contract of lease, and it was held by this court "that the instrument claimed to be a lease, not having been executed by W. D. Nickolls, vested no estate in the Barneses, they were only liable for rent for the time they actually occupied the building." In the first hearing in the case the counsel in their brief did not call attention of the court to a former decision of this court in *Friedhoff v. Smith,* 13 Neb., 5, and in rendering the decision in the case at bar the court doubtless overlooked this decision of a like or similar question. At least no mention was made of it.

In the case of *Friedhoff v. Smith* appears the following statement: "It appears from the evidence that Smith rented a store-room to the plaintiffs in error for the period of two years from the first day of March, 1880, at the rent of $40 per month, payable monthly; that the plaintiffs entered into possession of the premises and remained in possession until September, 1880, when, during Smith's temporary absence from the state, they abandoned the premises, leaving the keys with Smith's clerk in an adjoining store. Smith kept the store-room, subject to the use and control of the plaintiffs in error, until March 1, 1881, and then demanded the balance of the rent, which the plaintiffs in error refused to pay." The syllabus of the case is as follows: "A parol lease for two years, although void by the statute, yet if the tenant enter into possession, is valid as a lease for one year." MAXWELL, J., in the body of the opinion, says: "A parol contract for the leasing of land for a longer period than one year is void; that

is, there is no authority to make the lease, but a verbal lease for one year is valid; and if the tenant enter into possession under a lease void by the statute because not in writing, and is to pay rent at stated periods within the statute, the lease may be valid for the length of time the parties had authority to enter into the contract. Here was a lease for twenty-four months, under which the tenant took possession. The parties had authority to make a lease for twelve months, and it is only the excess that is void, and it is void only because of the limitation upon the power to make the contract, but to the extent of the authority the lease is valid. The lease, therefore, was valid for one year. The question whether the lease was from month to month or by the year was properly submitted to the jury."

The lease in the case at bar, as to the term and payment, was as follows: "To have and to hold the same to the said parties of the second part from the 25th day of August, 1888, to the 25th day of August, 1889, and the said parties of the second part, in consideration of the leasing of the premises as above set forth, covenant and agree with said party of the first part to pay the party of the first part, as rent for same, the sum of $690, payable as follows, to-wit, $55 cash, and $55 on the 25th day of September next, and $55 on the 25th day of each and every month for the first six months, and to pay $60 on the 25th day of each and every month during the last half of the aforesaid year. Party of the first part agrees to give parties of the second part the first privilege of renting at the expiration of this lease at whatever it will bring in any line of business." The lease was executed by the Barneses September 5, 1888. This was clearly, and without question, an agreement between the parties for a renting of the premises for the term of one year, and the Barneses took possession, held possession, and paid the rent from the execution of the lease to the 25th of December, 1888.

The section of the statute which applies to leases is as

follows: "Every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in lands shall be void unless the contract, or some note or memorandum thereof, be in writing and signed by the party by whom the lease or sale is to be made." (Comp. Stats., ch. 32, sec. 5.)

This was unquestionably a lease for one year, and unobjectionable as an oral lease of the premises, and not void as such, when measured by the terms of the statute above quoted. The case in 13 Neb., before referred to, recognizes and is decided upon the principle or rule that where a lease is executed, or an agreement for lease is entered into, and the parties enter upon the execution of the contract, the one by taking possession of the premises, the subject of the contract, and paying the rent, and the other by receiving the rent, if the lease executed is void or the lease for which the agreement has been made is not executed, and by the terms would have been for one year, or for more than a year at a yearly rental, notwithstanding it may be payable monthly, it will be held a lease by the year, and the tenant a tenant by the year. We are fully satisfied that the decision in 13 Neb. was right and supported by the weight of authority and reason. It follows that the former decision in this case must be overruled, and as this will occasion a new trial of the case in the lower court, we will not examine or discuss it further. The judgment of the lower court is reversed and the case remanded.

REVERSED AND REMANDED.

MILTON BYRD, APPELLEE, v. ELMER G. COCHRAN ET UX., APPELLANTS, AND PHILADELPHIA MORTGAGE & TRUST COMPANY ET AL., APPELLEES.

FILED FEBRUARY 6, 1894. No. 5190.

1. **Affidavit for Mechanic's Lien:** VALIDITY OF JURAT. Where an affidavit, attached to a mechanic's lien, purports to have been sworn to before a notary public and shows upon its face that it was taken or made without the jurisdiction of the notary public it is invalid, insufficient to perfect the lien, and renders it incompetent as evidence.
2. **Mechanics' Liens:** CONTRACTS: MATERIALS USED IN TWO BUILDINGS: SUFFICIENCY OF STATEMENT. When a subcontractor paints two separate houses and furnishes the paint and other materials necessary for use in the painting, contracting for such work and materials with the original contractor, the consideration for such agreement being in one sum for both jobs, in order to recover upon a mechanic's lien filed against one of the houses and the lot upon which it stands, it must be shown that the amount charged against the one house and lot is the value of the labor performed upon, and materials furnished for, such house, or an estimate made by some method or plan which will produce a certain definite result, and mere approximation or guess work will not suffice to establish the lien.
3. ———: REVIEW. THE EVIDENCE examined, and *held* insufficient to establish mechanics' liens or to support a decree for their enforcement.

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

The opinion contains a statement of the case.

B. F. Cochran, for appellants:

The affidavit for a lien shows the venue to be Webster county. The attesting seal is that of a notary public of Douglas county. The affidavit was insufficient, and the filing of the paper did not create a lien. (Secs. 5, 6, ch. 61,

Comp. Stats.; *Blair v. West Point Mfg. Co.*, 7 Neb., 147; *Colman v. Goodnow*, 36 Minn., 9; *Davis v. Rich*, 2 How. Pr. [N. Y.], 86; *Sandland v. Adams*, 2 How. Pr. [N. Y.], 127; *Snyder v. Olmsted*, 2 How. Pr. [N. Y.], 181.)

One who contracts directly with the owner, and for a single contract price, need not itemize his account; yet as to subcontractors the rule is different. (2 Jones, Liens, sec. 1416; *Gray v. Dick*, 97 Pa. St., 142.)

Montgomery, Charlton & Hall, contra, cited: *Manly v. Downing*, 15 Neb., 637; *Ballou v. Black*, 17 Neb., 398, 21 Neb., 146; *Doolittle v. Plenz*, 16 Neb., 153; Phillips, Mechanics' Liens [2d ed.], 373; *Kerbaugh v. Henderson*, 3 Phila. [Pa.], 17; *Davis v. Farr*, 13 Pa. St., 167; *Edwards v. Edwards*, 24 O. St., 402.)

John O. Yeiser, for appellee Byrd.

HARRISON, J.

In this case the plaintiff Milton Byrd commenced an action in the district court of Douglas county to foreclose a mechanic's lien, alleging in his petition that defendant Elmer G. Cochran owned, or was the reputed owner of, a certain lot or small piece of land in said county; that on or about the first of June, 1889, said Elmer G. Cochran, entered into a contract with W. M. Bell and T. J. Hines, whereby they agreed to furnish labor and materials and erect for Cochran a dwelling upon the said land; that on the 29th day of August said contractors employed the plaintiff Byrd to do the plastering and cement the cellar, which work was done by plaintiff, and that the contractor agreed to pay him therefor as follows: For the plastering, nine cents per yard, there being 850 yards, amount due for same, $76.50; cementing cellar, $2.50. That the said contractors gave him an order on Cochran for the above amount, which order is set forth in full in

the petition; that he has not been paid; that he executed in due form, and within the time required by law, lien papers, and filed the same with the recorder of Douglas county, Nebraska, and after the usual allegations of such petitions, asks foreclosure of the lien and judgment against the contractors.

Defendant Elmer G. Cochran answered the plaintiff's petition as follows:

"1. Denies each and every allegation contained in the second paragraph of said petition, except that the particulars of the alleged contract are unknown to the plaintiff.

"2. Denies that he ever employed the plaintiff to do any work whatever.

"3. Denies that he ever agreed to pay the plaintiff for any work; and

"4. Denies that he ever 'agreed upon a settlement of the amount due plaintiff on said work, in a written order' or otherwise.

"5. Said defendant also denies that the plaintiff has acquired any lien on the premises described in his petition."

Gertrude Cochran, wife of Elmer G. Cochran, filed the following answer to plaintiff's petition:

"1. She denies each and every allegation contained in the second paragraph of said petition, except the allegation of want of knowledge of the particulars of the alleged contract.

"2. Defendant has not sufficient knowledge or information to form a belief as to the truth of the allegations in the third paragraph of said petition, and therefore denies each and every allegation contained in said third paragraph.

"3. Defendant further answering alleges that said petition does not state facts sufficient to constitute a cause of action."

The venue of the affidavit to the lien was as follows:

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

And the date: "Omaha, Neb., Oct. 14, 1889."

And the jurat and seal:

"Sworn to by said Milton Byrd before me, and by him subscribed in my presence, this 15th day of Oct., '89.

"B. R. BALL,

"*Notary Public in and for the County and State aforesaid.*"

Seal: "B. R. Ball. Commission expires Jan. 20, 1892. Notarial Seal. Douglas County, Nebraska."

J. A. Fuller & Co. appeared and by leave of the court filed answer and cross-petition. Their claim being a contested one, we will copy the answer and cross-petition below:

"Come now the defendants J. A. Fuller & Co., and by leave of the court, first obtained, file this, their separate answer to the petition of the plaintiff, and allege that the said J. A. Fuller & Co. is a copartnership, of which John A. Fuller and John H. Dumont are the only members.

"As to the truth of the allegations in plaintiff's petition contained, these defendants have no knowledge or information upon which to form a belief, and therefore deny the allegations therein contained.

"For their cause of action herein these defendants allege that on or about the 29th day of June, 1889, the defendant Joe Johnson entered into a contract with the defendant W. M. Bell, whereby he agreed, in consideration of the payment to him of the sum of $380, to furnish the material and to do the work and labor in the painting of two houses then in process of construction, one house on the premises described in plaintiff's petition, to-wit: Commencing with a point thirty-three (33) feet east and thirty-three (33) feet north of the southwest corner of section twenty-one (21), township fifteen (15), range thirteen (13) east, in Douglas county, Nebraska, running thence east one hundred twenty-four (124) feet, thence north fifty (50) feet, thence west one hundred twenty-four (124) feet, thence south fifty (50) feet to the place of beginning; and the other house upon prem-

ises likewise described. A copy of the written proposition of the said W. M. Bell to pay the said Joe Johnson the sum of $380 for the painting of said houses is attached to the mechanic's lien hereinafter referred to, which lien is attached to this answer, marked 'Exhibit A,' and made a part hereof.

"In pursuance of said contract the said Joe Johnson furnished the material and performed the labor and did the painting of said house according to the contract between the owner and said Bell, and the fair value of the work and labor performed and the materials used in the painting of the house upon the premises above described is the sum of $177.50, of which amount affiant has been paid, to apply upon the amount due him for painting the house upon the premises above described, the sum of $115, leaving a balance due thereon of $62.50, no part of which has been paid him, although payment thereof has been demanded, but refused. At the time said Joe Johnson entered into said contract with the said W. M. Bell the said Bell was engaged as a contractor and builder in the city of Omaha, and as such had entered into a contract with the defendant Elmer G. Cochran for the erection and painting of said house upon said above described premises. At the time said Bell entered into said contract with the said Cochran the said Cochran was the owner in fee of said above described premises.

"On the 20th day of November, 1889, the said Joe Johnson made an account in writing of the material furnished and labor performed in the painting of said house, and after making oath thereto as required by law, on the 21st day of November, 1889, and within sixty days of the time of furnishing said material and performing said labor under said contract, filed said account and affidavit in the office of the register of deeds of Douglas county, Nebraska, claiming a mechanic's lien upon the said premises and the building thereon. On the 21st day of November, 1889,

and after the filing of said lien as aforesaid in the register's office, the said Joe Johnson, for a valuable consideration, sold and assigned the said mechanic's lien to these defendants, who are now the owners and holders of the same. The said Joe Johnson paid for recording his said lien in the register's office the sum of $1.25.

"There is now due these defendants, upon the said mechanic's lien, the sum of $62.50, and the sum of $1.25 for recording the same, with interest upon the said amounts at the rate of seven per cent per annum from the 26th day of September, 1889."

Prayer was for judgment against the contractor, and foreclosure of the lien.

The agreement between contractor and subcontractor, the statement of account, affidavit for lien, and assignment of lien to Fuller & Co. were as follows, being Exhibits "C," "E," and "D":

EXHIBIT "C."

"OMAHA, NEB., June 29, 1889.

"I hereby agree to pay to Joe Johnson the sum of three hundred and eighty ($380) dollars for painting two houses at 36 & Pacific, according to plans and specifications; one house for E. G. Cochran, one for H. E. Cochran.

"W. M. BELL."

EXHIBIT "D."

"For value received I hereby sell, assign, and transfer to J. A. Fuller & Co. a certain mechanic's lien for the sum of $62.50, on the following described premises, to-wit: Commencing at a point 33 feet east and 33 feet north of the southwest corner of section 21, township 15, range 13 east, in Douglas county, Nebraska, running thence east 124 feet, thence north 50 feet, thence west 124 feet, thence south 50 feet to the place of beginning; which lien is dated November 20, 1889, and was filed for record on the next day in the office of the register of deeds of Douglas county,

Nebraska, against Elmer G. Cochran, the owner of said premises.

"Witness my hand this 21st day of November, 1889.

"JOE JOHNSON."

EXHIBIT "E."

"JOE JOHNSON
v.
W. M. BELL ET AL. } OMAHA, NEB., Nov. 20, 1889.

"W. M. Bell, To Joe Johnson, Dr.

"To balance due for material furnished and labor performed in the construction of one frame dwelling house, belonging to Elmer G. Cochran, upon the following described property, to-wit: Commencing at a point thirty-three (33) feet east and thirty-three (33) feet north of the south corner of section twenty-one (21), township fifteen (15), range thirteen (13) east, in Douglas county, Nebraska, running thence east one hundred and twenty-four (124) feet, thence north fifty (50) feet, thence west one hundred and twenty-four (124) feet, thence south fifty (50) feet to the place of beginning, $62.50.

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

"Joe Johnson, being first duly sworn according to law, makes oath and says that he has furnished the material and performed the labor necessary for the painting of a certain frame dwelling house upon the following described premises, to-wit: Commencing at a point thirty-three (33) feet east and thirty-three (33) feet north of the southwest corner of section twenty-one (21), township fifteen (15), range thirteen (13) east, in Douglas county, Nebraska, running thence east one hundred and twenty-four (124) feet, thence north fifty (50) feet, thence west one hundred and twenty-four (124) feet, thence south fifty (50) feet to the place of beginning. The said materials were furnished and the said labor performed under and by virtue of a written agreement signed by W. M. Bell, who himself had entered into a con-

tract with the said Elmer G. Cochran, for the erection and construction of said frame dwelling house. A copy of said written agreement between affiant and W. M. Bell is hereto attached, marked Exhibit 'A' and made a part hereof. According to said agreement, said affiant was to furnish all the labor necessary for the painting of the above described house, and of another house owned by Charlotte A. Cochran, which was at the same time being built by W. M. Bell upon premises other than those above described, for all of which affiant was to receive the sum of $380; that the material furnished and labor performed upon the above described dwelling house belonging to the said Elmer G. Cochran amounted in the aggregate to the sum of $177.50, of which amount affiant has been paid the sum of $115, leaving a balance due thereon of $62.50; for which amount, with interest at the rate of seven per cent per annum from the 26th day of September, 1889, at which time the painting of the house was completed, affiant, by virtue of the statutes of Nebraska in such case made and provided, claims a lien upon the above described premises and the building thereon belonging to Elmer G. Cochran."

To this answer and cross-petition Elmer G. Cochran filed answer as follows:

"The defendant Elmer G. Cochran, for his answer to the cross-petition of John A. Fuller & Co., denies each and every allegation contained in said cross-petition, except the description and ownership of the premises and the contract between W. M. Bell and this defendant."

The case was dismissed without prejudice as to W. M. Bell, the contractor. Hines was not served. A trial was had, and findings made, and decree entered, in favor of plaintiff and Fuller & Co., foreclosing their liens and ordering sale of the property, to which the Cochrans excepted, and bring the case here on appeal.

The proceedings at the opening of the trial of the case in the court below, in regard to the lien of plaintiff and the

evidence introduced as to his lien, were very short, and I think it best to give them here in full:

"On motion of plaintiff, the case is dismissed without prejudice as to defendant W. M. Bell.

"Defendants Cochran move to dismiss the action, for the reason that contractor W. M. Bell is not a party. Motion overruled. The defendants except.

"Defendants Cochran and wife object to the introduction of any evidence in the case, for the reason that the plaintiff's petition does not state a cause of action against either of them. Objection overruled. Defendants Cochran except.

"Plaintiff, on motion, is allowed to amend petition, to which defendants Cochran except.

"Byron G. Burbank, sworn for plaintiff and examined by Mr. Yeiser, testified as follows:

"Q. I will ask you if you are acquainted with the signature of William Bell, and if this is his signature (handing witness paper)?

"A. I am acquainted with his signature to this extent: I have seen him write his name, and I believe this to be his signature.

"Plaintiff offers in evidence paper identified by witness, same purporting to be an order given by Mr. W. M. Bell on E. G. Cochran to pay amount due. Paper marked 'Exhibit A.'

"Plaintiff also offers in evidence his original mechanic's lien in this case. Same marked 'Exhibit B.'

"Objected to by defendants Cochran, for the reason that it is not a sworn statement of the amount due. Objections overruled. Defendants Cochran except.

"Plaintiff rests.

"Defendants Cochran move the court to dismiss the case, for the reason that the plaintiff has proved no cause of action. Motion overruled. Defendants Cochran except."

It will be noticed that the affidavit of plaintiff was

made, according to venue, in Webster county, Nebraska, and the notary states in the jurat that the affidavit was sworn to before him as notary public in and for the county and state aforesaid. The seal impression which he attached is apparently the seal of the notary who signed the jurat, or at least has his name upon its face, the words "notarial seal" and "Douglas county, Nebraska." If the affidavit was made and oath taken, as shown by its face, in Webster county, Nebraska, but before a notary public of Douglas county, Nebraska, as the impression of the seal shows, would the filing of such an affidavit fulfill the requirements of the mechanics' lien law that a sworn statement shall be filed? The Compiled Statutes of Nebraska, 1893, page 597, section 5, provide as follows: "Each notary public, before performing any duties of his office, shall provide himself with an official seal, on which shall be engraved the words 'notarial seal,' the name of the county for which he was appointed and commissioned, and the word 'Nebraska,' and in addition, at his option, his name and the date of expiration of his commission or the initial letters of his name, with which seal, by impression, all his official acts as notary public shall be authenticated." The next section (6), on same page, provides: "Every person, during the term of his office, so appointed, commissioned and qualified to the office of notary public, is hereby authorized and empowered, within the county for which he was appointed to such office, to administer oaths and affirmations in all cases." It is clear from the last section that a notary is only authorized and empowered to act in administering oaths and affirmations within the county for which he was appointed and commissioned notary, and from the former section it is just as plain that each official act of such notary, each affidavit made before him, must be authenticated by his official seal. The plaintiff was required by the law, under and by virtue of which he sought to establish and perfect his lien, to file a sworn statement, and I do not

think it can be said that he has done so. His failure to do so was fatal to his claim of lien. If the conclusion is that the notary was of Douglas county, then the recitals of the affidavit show that he was acting in Webster county. His acts would be of no avail and not entitled to recognition, or to be introduced in evidence.

The objection that the affidavit of service of summons has no venue, is well taken. "An affidavit should show on its face that it was taken within the officer's jurisdiction." (*Blair v. West Point Mfg. Co.*, 7 Neb., 147; *Davis v. Rich*, 2 How. Pr. [N. Y.], 86; *Sandland v. Adams*, 2 How. Pr. [N. Y.], 127; *Snyder v. Olmsted*, 2 How. Pr. [N. Y], 181.) In the case at bar, a fair conclusion from the face of the recitals of the affidavit is that it was taken without the notary's jurisdiction, and for this reason it was invalid and was not a verification of the lien. If on the other hand it is claimed, or can be said, that the face of the affidavit shows that the officer was a notary in and for Webster county, then the seal used, not being his proper seal, would leave the affidavit as though no seal had been attached and without the authentication required by law, which would be fatal to it as a sworn statement of a claim for lien. Our statute requires a sworn statement to be filed. "Where a statute declares that the notice to create a lien 'shall be verified' before filing, it is essential to the creation of the lien that it should be sworn to in the manner prescribed. The want of verification, or of a sufficient verification, is a defect which goes to the whole claim and cannot be amended." Phillips, Mechanics' Liens [2d ed.], sec. 336, p. 597; *Colman v. Goodnow*, 36 Minn., 9, 29 N. W. Rep., 338; *Finane v. Las Vegas Hotel & Imp. Co.*, 3 N. M., 256, 5 Pac. Rep., 725; *Minor v. Marshall*, 27 Pac. Rep. [N. M.], 481; *Gates v. Brown*, 25 Pac. Rep. [Wash.], 914; *Stetson & Post Mill Co. v. McDonald*, 32 Pac. Rep. [Wash.], 108.)

The only evidence introduced by plaintiff was contained

in exhibits "A" and "B," "A" being the order given by W. M. Bell to plaintiff on E. G. Cochran, and "B" the lien, or claim of lien, as filed and recorded. Under the issues joined in the case between the plaintiff and principal defendants, Cochran, this was clearly insufficient to entitle the defendant to a decree for the foreclosure of the lien. The account and affidavit filed in the clerk's office were evidence only of the facts that they were filed within the time required by law and of their own contents as touching their sufficiency. (*Hassett v. Curtis*, 20 Neb., 162.) The cross-petitioners, J. A. Fuller & Co., are assignees of the claim or lien of Johnson, who, as appears from the record, was a painter and contractor with Bell & Hines, the original contractors, to paint the house in question in this case, and another one belonging to another person and situated on a different lot and in no way connected with the one in suit. He agreed to paint the two for a lump sum of $380, and apportioned it according to his own judgment or opinion, and filed his claim of lien for what he states therein is a balance due, giving no items. His evidence bearing upon the question of the labor performed and materials used in the painting of this house is as follows:

Q. What did you do, Mr. Johnson, after the execution of that paper?

A. I painted two houses for the sum of $380.

Q. According to the plans and specifications?

A. Yes, sir.

Q. What would be a fair proportion of the charge for these houses, for doing the painting on this house in question?

Objected to, as incompetent, immaterial, and irrelevant. Objection overruled. Defendants Cochran except.

A. $177.50.

Q. When did you finish the painting of this house?

A. The 26th of September, 1889.

Q. On that contract, how much has been paid?

A. There has been $115 paid.

Q. How much were you paid in all of that $380.

A. $230.

Q. Of that $230, one-half was applied on one house and one-half on the other?

A. Yes, sir.

Cross-examination, by Mr. Cochran:

Q. You have stated that the fair valuation of the labor and materials which you put on this house was a certain amount. How do you know that?

A. Well, I can tell very near.

Q. How do you make that estimate? How do you know that it is a fair value for the labor and materials that went into this building?

A. I can tell that by the amount of work there is to a building of that size.

Q. How do you make your estimate as to the value of the labor and materials that were put into this house?

A. I make it this way: This house is not as big as the other one, and there is not as much work or material required on it as the other one. So as near as I can judge, there is that much difference.

Mr. Montgomery: Twenty-five dollars?

A. Yes, sir.

Mr. Cochran: How much painting material did you use on this house? How much oil did you use there?

A. Well, I can't give the exact amount of oil I used there.

Q. What other materials did you use?

A. I used white lead and different colors.

Q. How much white lead did you use in painting this house?

A. I couldn't give any exact amount.

Q. How much of what you call colors did you use as coloring materials in that house?

A. I couldn't say just exactly how much I did use.

Q. How many days' work did you put in on this house?

A. Well, I couldn't say just how many days.

Q. You went back and forth between the two houses, according as the work was done on the two places?

A. Yes, sir.

Q. You sometimes worked part of a day on one and part of a day on the other?

A. Yes, sir.

The Court: How much were you to have for painting both of these houses?

A. I was to get $380.

Q. You think this house in question is not quite so large as the other?

A. Yes, sir.

Q. Have you not charged quite one-half on this?

A. No, sir.

Q. But when you got $230 you credited one-half on each house, without regard to size?

A. Yes, sir.

The contracts for the erection of the two houses were separate agreements with the owners of the lots respectively and had no connection in any manner. Some authorities hold, under a state of facts similar to those in this case, no claim for lien could be filed or enforced. In our state, where houses were erected for one owner upon three adjoining lots under entire contract, it was held that the cost and expense of erecting all the houses would be apportioned among the lots according to the value of the labor and materials expended upon each. (*Doolittle v. Plenz*, 16 Neb., 153.) I am inclined to the opinion that Johnson had the right to file his lien, and it could be enforced against each lot and house for the value of labor performed and materials furnished and used on each house, but in the evidence now given in support of the lien filed by Johnson (now owned by Fuller & Co.) there is no attempt made to show what was the value of either the labor or materials,

except that Johnson says he estimates it by looking at the houses, and as one is smaller than the other, he apportions and charges against it the smaller sum, making an approximation or only a guess. On cross-examination he states that he cannot tell how many days' labor was performed on this house and does not know how much paint and color was used. There is no valuation of any labor or materials shown, and all that is shown is that the price for painting the two houses, agreed upon between the original contractor and the subcontractor, was divided according to an estimate made by the subcontractor in the manner before stated and a claim of lien filed for a balance due on the same. It would have been no hardship for the subcontractor to have kept an account of the labor performed and materials furnished on each house in order to have some certain basis for his claim of lien. The cross-petitioners failed to prove facts necessary to establish their lien or to support the decree in their favor. The agreement between the contractor and subcontractor is not the measure of the owner's responsibility or liability; his building and premises are bound for no more than the value of the work done and materials furnished by the subcontractor. (*Gray v. Dick*, 97 Pa. St., 142; 2 Jones, Liens, sec. 1416.) The decree of the district court is set aside, the decision reversed, and judgment ordered in this court for the principal defendants as to both claims.

DECREE ACCORDINGLY.

CRANE COMPANY V. CHRISTIAN SPECHT.

FILED FEBRUARY 6, 1894. No. 5713.

1. **A contract of guaranty** entered into with one person or corporation cannot be extended to another person or corporation.
2. **A contract of guaranty** will be strictly construed and the

guarantor held bound only according to the terms of the instrument containing his contract, and the terms of the contract will not be extended by implication or otherwise, nor will evidence be received to vary its terms or meaning when it is not in any sense or portion ambiguous or uncertain.

3. **Construction of Contract of Guaranty.** Where S. guarantied the account of L. with the C. Bros. Mfg. Co., a corporation, for goods supplied and to be furnished by it to L., and the corporation afterward changed its name to Crane Company, and after the change furnished goods to L., *held*, in an action by the Crane Company on the guaranty to recover the value of such goods, that S. was not bound.

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

Cavanagh, Thomas & McGilton, for plaintiff in error:

The mere change of the name of a corporation does not affect its rights, property, or credits. (*Rosenthal v. Madison & Indianapolis Plank Road Co.*, 10 Ind., 358; *Town of Reading v. Wedder*, 66 Ill., 80; *Chiles v. Bridges' Heirs*, Litt. Sel. Cas. [Ky.], 420; *Trustees of Northwestern College v. Schwagler*, 37 Ia., 577; *Morris v. St. Paul & C. R. Co.*, 19 Minn., 528; *Trustees of University of Alabama v. Moody*, 62 Ala., 389.)

After change of name, all actions on old obligations must be brought in new name. (*Mayor v. Seaber*, 3 Burr. [Eng.], 1866; *Scarborough v. Butler*, 3 Lev. [Eng.], 237; *Sunapee v. Eastman*, 32 N. H., 470; *Cotton v. Mississippi & Rum River Boom Co.*, 22 Minn., 372; *Pape v. Capitol Bank of Topeka*, 20 Kan., 440.)

Change in name of a corporation does not abate a suit. (*Thomas v. Frederick County School*, 7 Gill & J. [Md.], 369.)

Wharton & Baird, contra:

A contract of guaranty or letter of credit binds the maker only in accordance with the strict letter of the con-

tract, and any variation, no matter whether such variation enlarges or contracts the liability of the guarantor, will be sufficient to release the guarantor from any liability, and courts will not enter into the question as to whether or not the liability of the guarantor has been increased or decreased by reason of the change. (*Birckhead v. Brown*, 5 Hill [N. Y.], 641; *Robbins v. Bingham*, 4 Johns. [N. Y.], 475; *Dobbin v. Bradley*, 17 Wend. [N. Y.], 422; *Sollee v. Meugy*, 1 Bailey Law [S. Car.], 620; *Pemberton v. Oakes*, 4 Russell [Eng.], 154; *Taylor v. McClung*, 2 Houston [Del.], 24.)

HARRISON, J.

In this case, an action in the district court of Douglas county, Nebraska, the plaintiff the Crane Company, plaintiff in the court below and in this court, sought to recover of defendant Christian Specht a certain sum which it claimed due from defendant as guarantor of the account of one A. C. Lichtenberger to the Crane Bros. Manufacturing Company. The petition of plaintiff is as follows:

"The plaintiff in the above entitled cause, complaining of defendant therein, for a cause of action states that said plaintiff is a corporation duly organized under the laws of the state of Illinois; that on and prior to August 23, 1889, Crane Bros. Manufacturing Company was a corporation organized and doing business under the laws of the state of Illinois, and was engaged in the sale of plumbing and other materials in the city of Omaha, Nebraska. That prior to said August 23, 1889, said Crane Bros. Manufacturing Company had sold and furnished to one A. C. Lichtenberger goods and materials; that for said goods said Lichtenberger was indebted to said Crane Bros. Manufacturing Company, and at said date said Crane Bros. Manufacturing Company refused to furnish said Lichtenberger additional goods or material, unless the payment of the bill already incurred by him, and the payment of goods

thereafter delivered, should be guarantied by some responsible party; that in consideration of Crane Bros. Manufacturing Company's selling additional goods to said Lichtenberger, said defendant Christian Specht executed his written guaranty, whereby he agreed to pay the indebtedness already incurred by said Lichtenberger with said Crane Bros. Manufacturing Company and the payment of all materials which said Lichtenberger should thereafter purchase of them; that thereafter said Crane Bros. Manufacturing Company, relying upon said guaranty, continued to sell and deliver to said Lichtenberger goods and materials,—a copy of said guaranty is hereto attached, marked Exhibit 'A,' and made a part of this petition; that afterwards the said plaintiff became incorporated and succeeded to the business and interests of said Crane Bros. Manufacturing Company and continued to carry on said business and to supply the customers of said Crane Bros. Manufacturing Company; that, relying upon said guaranty made by said Christian Specht to said Crane Bros. Manufacturing Company, said plaintiff sold and furnished said Lichtenberger goods and materials; that said sales made by plaintiff to said Lichtenberger were made with the knowledge and consent of said defendant and at his request, and with the knowledge and intention of said plaintiff and said defendant that said defendant should be liable to the said plaintiff for goods sold to said Lichtenberger under said guaranty to said Crane Bros. Manufacturing Company, and that said goods were furnished by said plaintiff relying upon said guaranty and at the request of said defendant that said goods should be so furnished; that a statement of said goods furnished by said Crane Bros. Manufacturing Company, and said plaintiff to said Lichtenberger in pursuance of said guaranty made by said defendant, is hereto attached, marked Exhibit 'B,' and made a part hereof; that on account of goods so furnished there remains now due said plaintiff the sum of eight

hundred eighty-one dollars and ninety-nine cents ($881.99), which amount said Lichtenberger has failed and neglected to pay. Wherefore the plaintiff demands judgment against said defendant in the sum of one thousand dollars ($1,000), and the costs of suit."

The defendant answers the petition as follows:

"First—That he is not advised as to whether or not the plaintiff is a legal corporation, and cannot admit, and therefore denies the same.

"Second—The defendant, further answering, admits that the Crane Bros. Manufacturing Company sold and furnished to the said A. C. Lichtenberger on or about August 23, 1889, some goods and merchandise; and further admits that on the 23d day of August, 1889, he executed the guaranty mentioned in the petition, of which Exhibit 'A' is a copy.

"Third—This defendant, further answering, says that he is not advised as to whether or not the plaintiff succeeded to the business interests of Crane Bros. Manufacturing Company and continued to carry on said business and to supply the customers of said Crane Bros. Manufacturing Company, and cannot admit, and therefore denies the same.

"Fourth—The defendant, further answering, denies that the plaintiff sold and furnished said Lichtenberger goods and materials as alleged in said petition, and denies that said alleged sales were made to said Lichtenberger with the knowledge and consent of the plaintiff and at his request, and denies that the defendant requested the plaintiff to sell any goods whatever to said Lichtenberger, or ever in any manner whatever agreed to become liable for the same, and denies that there is due the plaintiff the sum of $881 from said Lichtenberger, or any part thereof.

"And the said defendant, further answering, denies that he is indebted to the plaintiff in any sum whatever.

"Wherefore the defendant, having fully answered said

petition, prays to be hence dismissed with his reasonable costs."

Exhibit "A," the contract of guaranty, attached to the petition and the foundation of this action, is as follows:

EXHIBIT "A."

"OMAHA, NEB., August 23, 1889.

"*Messrs. Crane Bros. Manufacturing Company, City.*—GENTLEMEN: I will guaranty the payment of your account against A. C. Lichtenberger, and for all materials he may purchase from this date. The above is to hold good until written notice is given you by me.

"Yours truly, C. SPECHT."

A jury was waived and trial had to the court. There was a finding and judgment in favor of defendant. Plaintiff filed a motion for new trial, which was argued and overruled, and the case was brought here by the plaintiff for review.

The evidence in the case discloses that on the 23d day of August, 1889, the defendant executed and delivered unto the Crane Bros. Manufacturing Company the guaranty in question (Exhibit "A"); that on or about January 20, 1890, the corporation, at an annual meeting of its stockholders then held, changed its name from Crane Bros. Manufacturing Company to Crane Company, no change or alteration whatever being at this time made in the officers, management, business, or location of place of business, and after such change continued to furnish goods and materials to Lichtenberger, for which goods and materials Lichtenberger failed to pay; that defendant Specht was requested to make a new guaranty to the Crane Company, but refused to do so, and never did execute such a guaranty; that the action is brought upon the account running through the whole time during which Lichtenberger purchased goods of the corporation, both under the old and the new name, for a balance due upon the account which is due for goods

sold to Lichtenberger after the change in the name of the corporation.

The question raised by the bill of exceptions and strenuously argued by counsel is, can the Crane Company recover upon the contract of guaranty given by defendant to Crane Bros. Manufacturing Company? The attorneys for plaintiff contended that the Crane Company was organized on the 20th day of January, 1890, being the Crane Bros. Manufacturing Company under the new name, Crane Company; that it was composed of the same persons, managed by the same officers, engaged in the same business and at the same location; that there was merely a change in the name, and no other or further change in the composition or operations of the company, and hence it was entitled to recover on this as well as other contracts to which the Crane Bros. Manufacturing Company was a party. The defendant's attorneys claim that the Crane Company cannot recover, by virtue of the guaranty given by defendant to the Crane Bros. Manufacturing Company, any sum due it for goods sold or furnished Lichtenberger after the change of its name to "Crane Company." The contention in the case resolves itself to the question, did the change in the name of the corporation deprive it of the right to recover, upon the contract of guaranty given to it by defendant in its former name, the price of goods furnished after the change in style to the party whose account was guarantied to it under the old name? The answer to this question will be most readily obtained, it seems to me, by an examination of the nature of the contract of guaranty and the construction to be given to it.

In 1 Brandt, Suretyship & Guaranty [2d ed.], pp. 134 and 135, sec. 93, it is said, in discussing such contracts: "A rule never to be lost sight of in determining the liability of a surety or guarantor is, that he is a favorite of the law and has a right to stand upon the strict terms of his obligation, when such terms are ascertained. This is a rule

universally recognized by the courts, and is applicable to every variety of circumstances." Again it is said: "A surety or guarantor usually derives no benefit from his contract. His object generally is to befriend the principal. * * * The guarantor is only liable because he has agreed to become so. He is bound by his agreement and nothing else. * * * It has been repeatedly decided that he is under no moral obligation to pay the debt of his principal. Being, then, bound by his agreement alone and deriving no benefit from the transaction, it is eminently just and proper that he should be a favorite of the law and have a right to stand upon the strict terms of his obligation. To charge him beyond its terms or to permit it to be altered without his consent would be, not to enforce the contract made by him, but to make another for him."

In *Miller v. Stewart*, 9 Wheat. [U. S.], 680, Story, J., says: "Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent and in the manner and under the circumstances pointed out in his obligation he is bound, and no farther. It is not sufficient that he may sustain no injury by a change in the contract, or even that it may be for his benefit. He has a right to stand upon the very terms of his contract, and if he does not assent to any variation of it, and a variation is made, it is fatal."

It being well settled that the foregoing are the rules of law by which such contracts as the one in the case at bar are governed and construed, I will pass now to some of the cases in which these rules have been particularly applied to the facts as developed in the cases, selecting such as are similar to the one under consideration and more or less directly in point.

In the case of *Allison v. Rutlege*, 5 Yerg. [Tenn.], 194, the defendant addressed a letter to "Mr. Allison," by which he became surety for the payment of the purchase price of

some bacon purchased by one Cooper, and was sued on the instrument by John and Joseph Allison, as guarantor, for $100, the price of the bacon. Catron, C. J., in delivering the opinion of the court, says: "Can, under any circumstances, a recovery be had in this action by force of the guaranty? It is addressed in the singular to Mr. Allison. Rutlege undertook for the debt of Cooper, is bound by the writing and this only. The contract cannot be varied or its meaning explained without violating the statute of frauds. He did not address himself to two Allisons, but to one. The paper, from its face, could not be given in evidence to sustain the joint action, and it could not be proved by parol that two were meant."

In the case of *Smith v. Montgomery*, 3 Tex., 199, the defendant Montgomery wrote and forwarded a letter of credit as follows:

"COLORADO, Dec. 27, 1839.

"*Col. Smith & Pilgrim*—GENTLEMEN: Mr. A. W. Tennard wishes to get some dry goods on time. If you will furnish, I will see you paid as far as to the amount of ($3,000) three thousand dollars,

"And much oblige yours, with respect,

"JAMES S. MONTGOMERY."

This letter was addressed on the back to Smith alone. It appears that Smith and Pilgrim had been partners in business, but a very short time prior to the date of the letter had dissolved the partnership. The letter being addressed on the back to Smith alone, was delivered to him and he supplied the goods to Tennard, who failed to pay for them, and Smith instituted the action to recover from Montgomery, as guarantor, the price of the goods to the amount of the guaranty. Mr. Justice Wheeler, in delivering the opinion of the court, says: "Upon consideration, we are all of the opinion that we must look to the address upon the face of the letter, and not to the direction upon the back of it, to ascertain the party to whom its

application and promise were intended, by the writer, to have been made; that, bearing upon its face a direction and address full and complete, and free from ambiguity, we must take that as the certain criterion to determine its application without regard to the discrepancy in the superscription. If the letter did not bear upon its face the proper address, resort might be had to the superscription, or perhaps to other extrinsic evidence, if necessary, to determine its direction and application. (1 How., 169.) But when the contract upon its face is complete and perfect, and certain to every intent, as well in respect to the parties as the subject-matter, we do not think it admissible to resort to anything extrinsic to control the express terms and clear import of the face of the instrument. * * * It is a well settled rule, applicable to this class of cases, that the liability of a guarantor or surety cannot be extended by implication or otherwise beyond the actual terms of his engagement. It does not matter that a proposed alteration would even be for his benefit, for he has a right to stand upon the very terms of his agreement. The case must be brought strictly within the terms of the guaranty, when reasonably interpreted, or the guarantor will not be liable."

In the case of *Evansville National Bank of Evansville, Ind., v. Kaufman,* 93 N. Y., 273, it is said: "It is always competent for a guarantor to limit his liability, either as to time, amount, or parties, by the terms of his contract, and if any such limitation be disregarded by the party who claims under it, the guarantor is not bound. It follows that no one can accept its propositions or acquire any advantage therefrom unless he is expressly referred to or necessarily embraced in the description of the persons to whom the offer of guaranty is addressed."

"Guarantor liable only to person to whom he makes the guaranty." (*Second Nat. Bank of Peoria v. Diefendorf,* 90 Ill., 396.)

A guarantor's engagement does not make him answer-

able for goods furnished by any other person than the one with whom the contract of guaranty is made. He is not answerable beyond the scope of his engagement. (*Walsh v. Bailie*, 10 Johns. [N. Y.], 179; *Penoyer v. Watson*, 16 Johns. [N. Y.], 99.)

"Where a letter of credit is addressed to a particular firm no one else can rely on it as a guaranty." (*Taylor v. Wetmore*, 10 O., 491.)

In *Barnes v. Barrow*, 61 N. Y., 39, it being a case in which, under a written contract of guaranty made with a particular person, a partnership of which that person was a member sought to recover the value of goods furnished the person for whose debt or default the guarantor stood charged to answer, it is said: "On the face of this contract it is plain that no one could act upon it, except the persons named in it." And Burge on Suretyship (ch. 3) is cited as follows: "The contract of suretyship is to be construed strictly; that is, the obligation is not to be extended to any other subject, to any other person, or to any other period of time than is expressed, or necessarily included, in it." And further it is stated: "In the Roman law the rule now under consideration assumes the form of a maxim: 'An agreement of guaranty made with one person cannot be extended to another person.'"

To the same effect as the above cases is that of *Taylor v. McClung's Executor*, 2 Houston [Del.], 24, cited by attorneys for defendant in error in their brief, and which is a case very much in point. Our own court has recognized the same principle in the case of *Lee v. Hastings*, 13 Neb., 508.

The case most directly in point is that of *Grant v. Naylor*, 4 Cranch [U. S.], 205. In this case John and Jeremiah Naylor brought an action against Daniel Grant on a letter or contract of guaranty which was addressed to John and Joseph Naylor. Chief Justice Marshall in the opinion in the case says: "That the letter was really designed for

John and Jeremiah Naylor cannot be doubted, but the principles which require that the promise to pay the debt of another shall be in writing, and which will not permit a written contract to be explained by parol testimony, originate in a general and a wise policy, which this court cannot relax so far as to except from its operation cases within the principles. Already have so many cases been taken out of the statute of frauds, which seem to be within its letter, that it may well be doubted whether the exceptions do not let in many of the mischiefs against which the rule was intended to guard. * * * On examining the cases which have been cited at the bar, it does not appear to the court that they authorize the explanation of the contract which is attempted in this case. This is not a case of ambiguity. It is not an ambiguity patent, for the face of the letter can excite no doubt. It is not a latent ambiguity, for there are not two firms of the name of John & Joseph Naylor & Co., to either of which this letter might have been delivered. * * * In such a case the letter itself is not a written contract between Daniel Grant, the writer, and John and Jeremiah Naylor, the persons to whom it was delivered. To admit parol proof to make such a contract is going further than courts have ever gone, where the writing is itself a contract, not evidence of a contract, and where no pre-existing obligation bound the party to enter into it."

In the case at bar the defendant Specht addressed the letter, or contract of guaranty sued upon, to the Crane Bros. Manufacturing Company, and not to the Crane Company. At the time the contract was entered into there was no such corporation in existence as the Crane Company. The contract of guaranty made by Specht was not in any manner for his own benefit, but to oblige, befriend, or aid Lichtenberger, and was such a contract as authorities uniformly hold will be strictly construed, and when not uncertain, indefinite, or ambiguous, will not be extended in any par-

ticular beyond the scope of its terms. On January 20, 1890, when the change of the name of the corporation from Crane Bros. Manufacturing Company to Crane Company was made there was no notice given defendant that such change had been made. The change could not and did not pass or transfer the right of the Crane Bros. Manufacturing Company to the Crane Company to furnish goods to Lichtenberger and rely upon the guaranty of Specht to answer for the debt or default of Lichtenberger. The goods, the value of which it is sought to recover in this action, were furnished to Lichtenberger after the Crane Bros. Manufacturing Company became the Crane Company, January 20, 1890, and this is not an action for the price of goods furnished by the Crane Bros. Manufacturing Company to Lichtenberger, which, under certain circumstances as to assignment, and possibly without, would be a different case and raise another point or question. The instrument containing the guaranty was plain, clear, and definite in its terms, and not in any particular ambiguous, and certainly not as to the person or corporation to whom or which it was addressed. It was a contract of guaranty to and with the Crane Bros. Manufacturing Company, and not the Crane Company, although the persons composing the first may have been identical with those of the second, and the introduction of the letter, showing as it does the guaranty to the Crane Bros. Manufacturing Company, was not competent to, and does not, support the action on the guaranty by the Crane Company, the plaintiff in this case, nor do I think that evidence could be received to show that the Crane Company had the same officers, and was, under the same management, engaged in the same business and in the same location as the Crane Bros. Manufacturing Company, or that it had the same stockholders and merely changed its name, or, if received, that it would alter or affect in any manner the relations or rights of the parties to the action.

At the time the goods were furnished to Lichtenberger there was no Crane Bros. Manufacturing Company. It had ceased to exist or had become, by change of name, the Crane Company, and Specht could rely upon the exact terms of his contract and demand that his rights and liability be measured by the guaranty as written, signed, and delivered by him, to be bound only for goods furnished to Lichtenberger by the Crane Bros. Manufacturing Company as existing at the time the contract was made and by the name as set forth in his letter. The judgment of the lower court was right and is

AFFIRMED.

LOUIS SCHROEDER, TRUSTEE, APPELLEE, V. PERLIA J. WILCOX ET AL., APPELLANTS.

FILED FEBRUARY 6, 1894. No. 5294.

1. **Administrator's Sale of Realty: JUDGMENTS: COLLATERAL ATTACK.** When an administrator's petition for authority to sell real property of the decedent for the payment of his debts was duly filed in the district court of the proper county and due notice of such application was published as prescribed by the order made upon the presentation of such application, the district court obtained such jurisdiction of the subject-matter for the purposes of the application referred to, as that its judgment or order is not subject to attack or question in a collateral action.

2. ———: ———: ———: **EVIDENCE OF PUBLICATION.** Where the order of the court required publication of notice of an application to sell real property to be made in a newspaper designated by name, it was proper, as against a collateral attack upon the order finally made, to show by competent evidence, independently of the record, that the publication was in fact made in strict accordance with the requirements of the said order of the court.

3. **Wills: POWER OF EXECUTOR TO SELL REAL ESTATE.** Under a will which required payment of the debts of the decedent and the distribution, in a manner designated, of the balance which should remain of the proceeds of the sale of certain described real estate of the testator, without any designation of the person by whom such sale was to be made, the executor had power to sell and make conveyance of the said real estate independently of any order of court authorizing or confirming such sale or deed.

4. **Sales of Realty by Administrator Where Executor Named in Will Fails to Qualify.** A sale and conveyance of real property which might properly have been made by an executor named in the will had he qualified, may be made by an administrator with the will annexed appointed upon the refusal of the party named as executor to qualify as such, where the proceeds of the sale of the real property are directed by the terms of the will to be used in making payment of the indebtedness of the testator, the balance remaining to be distributed equally among legatees clearly designated,—the will indicating no special confidence of the testator in the person therein named as executor.

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

The opinion contains a statement of the case.

Breckenridge, Breckenridge & Crofoot, for appellants:

The word "heirs," as used in the will, was intended to mean, and does mean, children. (*Barton v. Tuttle*, 62 N. H., 558; *Moore v. Lewis*, 4 O. Circuit Court, 284; *Davis v. Davis*, 39 N. J. Eq., 14; *Jarvis v. Quigley*, 10 B. Mon. [Ky.], 106; *Haley v. Boston*, 108 Mass., 579; *Haverstick's Appeal*, 103 Pa. St., 394; *Hinton v. Milburn*, 23 W. Va., 166; *Beatty v. Trustees Cory Universalist Society*, 39 N. J. Eq., 463; *Bailey v. Patterson*, 3 Rich. Eq. [S. Car.], 156; *Williamson v. Williamson*, 18 B. Mon. [Ky.], 370; *Bowers v. Porter*, 4 Pick. [Mass.], 210; *King v. Beck*, 15 O., 559.)

The will does not convey the title to any of the land to the executor. The title could not rest in abeyance. It

must have vested at once upon the death of the testator in the children of J. K. Saunders and Perlia J. Wilcox. (*Nicoll v. Scott*, 99 Ill., 529; *Wilson v. White*, 109 N. Y., 59; Jarman, Wills, pp. 436, 407, 408, note; *Beadle v. Beadle*, 2 McCrary [U. S.], 586; *Herbert v. Smith*, 1 N. J. Eq., 141; *Scott v. Monell*, 1 Redfield [N. Y.], 431; *Romaine v. Hendrickson's Executors*, 24 N. J. Eq., 231; *Hampton v. Shotter*, 8 Adol. & E. [Eng.], 905.)

The will did not give the executor named therein power to sell real estate. To confer power to sell lands under a will, express and unequivocal words are necessary. (*Fell v. Young*, 63 Ill., 106; *Buckner v. Cromie*, 5 Bush [Ky.], 603; *Skinner v. Wood*, 76 N. Car., 109; *Bell's Appeal*, 66 Pa. St., 498; *Gay v. Grant*, 8 S. E. Rep. [N. Car.], 100; *Dill v. Wisner*, 88 N. Y., 154; *In re Fox's Will*, 52 N. Y., 537; *Owen v. Ellis*, 64 Mo., 77; *Hopkins v. Van Valkenburgh*, 16 Hun [N. Y.], 3.)

If the will had given the executor who failed to qualify power to sell real estate, the power would not devolve upon the administrator *cum testamento annexo*. (*Lockwood v. Sturdevant*, 6 Conn., 374; *Warnecke v. Lembca*, 71 Ill., 92; *Tippett v. Mize*, 30 Tex., 362; 2 Williams, Executors [6th Am. ed.], p. 1011; *Berger v. Duff*, 4 Johns. Ch. [N. Y.], 368*; *Naundorf v. Schumann*, 41 N. J. Eq., 14; *Gay v. Grant*, 8 S. E. Rep. [N. Car.], 100; *Wills v. Cowper*, 2 O., 124; *Hodgin v. Toler*, 70 Ia., 21; *Nicoll v. Scott*, 99 Ill., 529; *Dunning v. Ocean Nat. Bank of New York*, 61 N. Y., 497; *Brown v. Hobson*, 3 A. K. Marshall [Ky.], 380; *Vardeman v. Ross*, 36 Tex., 111; *Belcher v. Branch*, 11 R. I., 226; *M'Donald v. King*, 1 N. J. Law, 432; *Conklin v. Egerton's Administrator*, 21 Wend. [N. Y.], 430; *Knight v. Loomis*, 30 Me., 204; *Ross v. Barclay*, 18 Pa. St., 179; *Dominick v. Michael*, 4 Sandf. [N. Y.], 374; *Beekman v. Bonsor*, 23 N. Y., 303; *Hall v. Irwin*, 2 Gil. [Ill.], 176; *In re Besley's Estate*, 18 Wis., 477.)

The granting of license to an administrator to sell real

estate is a special proceeding only authorized by statute, which must be strictly followed. Such proceeding is unknown to the common law. If the statute were not strictly complied with, the proceedings were void. (*Bloom v. Burdick*, 1 Hill [N. Y.], 139; *Striker v. Kelly*, 7 Hill [N. Y.], 25; *Foster v. Glazener*, 27 Ala., 391; *Thatcher v. Powell*, 6 Wheat. [U. S.], 119; *Ludlow v. Johnson*, 3 O., 553; *Knox v. Jenks*, 7 Mass., 488; *Fell v. Young*, 63 Ill., 106; *Wright v. Edwards*, 10 Ore., 298; *Corwin v. Merritt*, 3 Barb. [N. Y.], 341.)

There are no presumptions in favor of the jurisdiction, even in courts of general jurisdiction, where they are acting under a special statute and not according to the course of the common law. (*Morse v. Presby*, 26 N. H., 302; *Carleton v. Washington Ins. Co.*, 35 N. H., 167; *Galpin v. Page*, 18 Wall. [U. S.], 350; *Edmiston v. Edmiston*, 2 O., 251; *Furgeson v. Jones*, 20 Pac. Rep. [Ore.], 843; *Donlin v. Hettinger*, 57 Ill., 348.)

Void judgments may be attacked either directly or collaterally, in any proceeding where any one is claiming anything under them. (*People v. Eggleston*, 13 How. Pr. [N. Y.], 123; *Camden v. Haymond*, 9 W. Va., 680; *Condry v. Cheshire*, 88 N. Car., 375; *Morris v. Hogle*, 37 Ill., 150; *Cain v. Goda*, 84 Ind., 209; *Morris v. Halbert*, 36 Tex., 19; *Martin v. Judd*, 60 Ill., 78; *Edwards v. Whited*, 29 La. Ann., 647; *Lyles v. Bolles*, 8 S. Car., 258; *Borden v. Fitch*, 15 Johns. [N. Y.], 141; *Morse v. Presby*, 26 N. H., 302; *Furgeson v. Jones*, 20 Pac. Rep. [Ore.], 843; *Mills v. Paynter*, 1 Neb., 446.)

The record in the license case shows affirmatively a want of jurisdiction. The record introduced in evidence by the plaintiff showed that the order to show cause was directed to be published in the *Nebraska Watchman*, and the recitals are that it was published in the *Omaha Republican*. If the want of jurisdiction appears affirmatively by the record, it s fatal to the proceedings. (*Blodgett v. Hitt*, 29 Wis., 169.)

In the application for license the heirs and devisees, and all persons interested, must have been served with notice of such application. The service of the order to show cause was jurisdictional, without which all the proceedings were void. (*Smith v. Meyers*, 5 Blackf. [Ind.], 223; *Overstreet v. Davis*, 24 Miss., 393; *North v. Moore*, 8 Kan., 143; *Tyler v. Peatt*, 30 Mich., 63; *In re Mahoney*, 34 Hun [N. Y.], 501; *Hamilton v. Lockhart*, 41 Miss., 460; *Gulley v. Macy*, 81 N. Car., 357; *Marshall v. Rose*, 86 Ill., 374; *Gibbs v. Shaw*, 17 Wis., 204; *White v. Jones*, 38 Ill., 159; *Windsor v. McVeigh*, 93 U. S., 274; *Johns v. Northcutt*, 49 Tex., 444; *Hale v. Finch*, 104 U. S., 261; *Morris v. Hogle*, 37 Ill., 150; *Guy v. Pierson*, 21 Ind., 18; *O'Dell v. Rogers*, 44 Wis., 136; *Wilson v. White*, 109 N. Y., 59; *Mickel v. Hicks*, 19 Kan., 578; *Fell v. Young*, 63 Ill., 106; *Donlin v. Hettinger*, 57 Ill., 348.)

John W. Lytle, also for appellants.

Edward W. Simeral, contra:

The power under the will is sufficient to authorize the executor to sell without first obtaining an order of the court. (*Little v. Giles*, 25 Neb., 331; *Peter v. Beverly*, 10 Pet. [U. S.], 532*; *M'Donald v. Hewett*, 15 Johns. [N. Y.], 349; *Lippincott v. Lippincott*, 19 N. J. Eq., 121; *Rankin v. Rankin*, 36 Ill., 293; *Gray v. Henderson*, 71 Pa. St., 368; *Lindley v. O'Reilly*, 50 N. J. Law, 636.)

The power in the will was ample to vest in the executor the right to sell by virtue of his office. It follows, as a necessary conclusion, that the administrator with the will annexed, under the statutes of this state, will have the same power. (Secs. 169, 173, 190, ch. 23, Comp. Stats.; *Drummond v. Jones*, 44 N. J. Eq., 53; *Vernor v. Coville*, 54 Mich., 281; *Davis v. Hoover*, 112 Ind., 423; *Mott v. Ackerman*, 92 N. Y., 539; *Greenland v. Waddell*, 116 N. Y., 234; *In re Christie*, 59 Hun [N. Y.], 153; *Evans v.*

Chew, 71 Pa. St., 47; *Peebles v. Watts*, 9 Dana [Ky.], 103; *Watson v. Martin*, 75 Ala., 506; *Sandifer v. Grantham*, 62 Miss., 412; *Joralemon v. Van Riper*, 44 N. J. Eq., 299; *Putnam v. Story*, 132 Mass., 205; *Saunders v. Saunders*, 12 S. E. Rep. [N. Car.], 909; *Drayton v. Grimke*, 1 Bailey Eq. [S. Car.], 392.)

The testimony established the fact that the license was published as ordered. The appellee proved that all the prerequisites of jurisdiction were strictly complied with. The district court acquired jurisdiction over the minor children in the license case. (*Stanley v. Noble*, 59 Ia., 666; *Mohr v. Manierre*, 101 U. S., 417; *Equitable Life Assurance Society of the United States v. Laird*, 24 N. J. Eq., 319; *Britton v. Larson*, 23 Neb., 806.)

Proceedings for sale of realty by administrators are actions *in rem*, and every presumption is in favor of the correctness and regularity of judgments of courts of general jurisdiction acting within the powers prescribed by statute. Such judgments are not open to collateral attack. (*Grignon's Lessee v. Astor*, 2 How. [U. S.], 319; *McClay v. Foxworthy*, 18 Neb., 295; *Stack v. Royce*, 34 Neb., 833; *Seward v. Didier*, 16 Neb., 64; *Saxon v. Cain*, 19 Neb., 488; *Miller v. Sullivan*, 4 Dillon [U. S.], 341; *McNitt v. Turner*, 16 Wall. [U. S.], 352; *Bunce v. Bunce*, 59 Ia., 533.)

RYAN, C.

Prior to October 19, 1882, Platt Saunders was the owner of a tract of land south of and near the city of Omaha, known as the "Platt Saunders ten-acre tract." About the 13th of October, 1882, the said Platt Saunders executed a will, and on October 19, 1882, died, leaving no widow and leaving as his only children one son, John K. Saunders, and one daughter, Mrs. Perlia J. Wilcox, both of whom were then married and each had living children, which fact was known to said Platt Saunders when he made

his said will. The following is a copy of the will in question.

"I, Platt Saunders, of Douglas precinct, Douglas county, state of Nebraska, market gardener, make this my last will. I give and devise all my real estate as follows, that is to say: Commencing on the north side at the middle of the Bellevue road of the Platt Saunders ten-acre tract homestead, as recorded in the county treasurer's book of Douglas county, Nebraska, and running due south fifteen rods along the middle of said road; thence in a southwesterly direction twenty rods; thence north, parallel with the Bellevue road, fifteen rods; thence east along the north line of the said Platt Saunders ten-acre homestead to the place of beginning. And this shall be my last will and wish that my son, John K. Saunders, shall have and hold the above described land, together with all the appurtenances and improvements thereon, so long as he shall live, and at his death the said property shall be sold to the best advantage and the proceeds equally divided among his heirs.

"Furthermore, commencing fifteen rods from the north line at the middle of the Bellevue road on the Platt Saunders ten-acre homestead as recorded in the county treasurer's book for Douglas county, Nebraska, and running due south fifteen rods; thence in a southwesterly course ten rods; thence north, parallel with the Bellevue road, fifteen rods; thence east to the place of beginning. And this shall be my last will and wish that my daughter, Perlia J. Wilcox, shall have and hold the above described land, together with all the appurtenances and improvements thereon, so long as she shall live, and at her death the said property shall be sold to the best advantage and the proceeds be divided equally among her heirs.

"And, furthermore, all the residue of the said ten acres shall be sold to the best advantage, and after paying all the lawful debts of the said Platt Saunders, the remaining proceeds shall be divided between the heirs of the said John K. Saunders and Perlia J. Wilcox.

"And, furthermore, I hereby appoint and empower T. J. Torrey, of Valley precinct, Douglas county, Nebraska, to be my executor without bonds, and trust that this my last will shall faithfully and impartially be executed, and that all lands and money shall be given to their legal owners, and all money to be paid over as fast as received by said executor.

"In witness whereof, I have hereunto signed and sealed this instrument, and publish the same, as and for my last will, at Valley precinct, Douglas county, state of Nebraska, this 13th day of October, 1882.

(Duly witnessed.) "PLATT SAUNDERS."

T. J. Torrey, who was named as executor, refused to qualify in accordance with the terms of the will. Afterwards E. V. Smith was appointed administrator with the will annexed, and took upon himself the discharge of the duties imposed by the will. There were sufficient claims filed and allowed as valid debts against the estate of Platt Saunders to more than require in payment all of his personal property. Thereupon the said E. V. Smith, administrator with the will annexed, undertook to, and in so far as he had the power did, sell on July 17, 1883, to John A. McShane that portion of the ten-acre tract designated as "all of the residue." Throughout the presentation of this case the two tracts described in the will by metes and bounds are treated together as constituting the four-acre tract, "the residue," as it is called in the will, of course constituting the six-acre tract, by which distinctions frequent reference will hereinafter be made to the tracts designated. The sale of this latter (the six-acre tract) did not afford means sufficient, together with the personal property, to pay the debts of the decedent. Thereupon, E. V. Smith, the administrator, applied to the district court of Douglas county, Nebraska, for license to sell the remaining four acres for the purpose of paying the balance of said debts. This license was granted and the four acres were sold Oc-

tober 17, 1885, for a considerable sum more than sufficient to pay all the remaining debts and expenses of administration. John A. McShane was also the purchaser of this tract. The plaintiff in this action obtained title as trustee through McShane, and on October 16, 1889, commenced proceedings to quiet title against the defendant. December 5, 1890, John K. Saunders filed in the district court of Douglas county, Nebraska, his petition against Louis Schroeder, who was known as the plaintiff herein, and a large number of other defendants supposed to be making some claim to the property through or under McShane or this plaintiff, the said Saunders by his petition claiming an interest in said property, and asking the court to set aside and cancel the said administrator's deeds, etc. This last action was by order of the court on February 21, 1891, consolidated with the cause now under consideration, and was ordered to be tried with it. At the February term, 1891, of the district court of Douglas county a trial was had, and in November, 1891, a decree was rendered in favor of the plaintiff quieting his title, from which the defendants prosecute their appeal to this court.

The appellants claim that said sales by E. V. Smith, administrator, were without authority, and were, therefore, null and void, and that the defendants have an interest in said property unaffected by the sales referred to. The amount realized upon each of these sales is tendered in court, with the interest thereon accrued up to the time of the commencement of this suit. The appellants very strenuously insist that the word "heirs," as used in the will of Platt Saunders, should be treated as synonymous with the word "children." This contention is supplemented with the further claim that the will by its terms having provided that as to the four-acre tract a life estate should exist in favor of the parties named, and furthermore, that the six-acre tract being simply charged with the payment of debts, and that the proceeds of the residue be-

ing required to be distributed between the heirs, or rather, as the appellants contend, children, of J. K. Saunders and Perlia J. Wilcox, thereupon, subject to the charges named, the title in fee-simple vested in the children aforesaid. This argument derives its countenance from the construction urged that intermediate the death of Platt Saunders and the death of Perlia J. Wilcox and J. K. Saunders, the children of the parties last named must be vested with the title, for, it is insisted, the title cannot remain in abeyance. It is quite possible that the provisions of our statute may have some bearing upon this question of the title remaining in abeyance. Under chapter 23, Compiled Statutes, by virtue of section 280, the executor or administrator is held accountable for the income of real estate while it remains in his possession. Sections 289, 290, 291, and 292 of the same chapter prescribe the procedure and decree necessary in making distribution of real property. In *Doe v. Flanagan*, 1 Ga., 540 and 541, Judge Nesbitt, for that court, employed language which seems applicable to our statute in connection with the title to real property not remaining in abeyance after the death of its owner. The importance of the consideration whether or not it remains in abeyance, however, seems to us to have been rather overestimated by the appellants, for the cases which will hereinafter be cited seem to have been decided without reference to whether the title had vested or was in abeyance.

1. After the sale of the six-acre tract there still remained unpaid quite a balance due the creditors of the estate of Platt Saunders, whereupon application was made by the administrator to the district court of Douglas county for authority to sell the four-acre tract. The petition for this sale was in due form and the required notice thereof was duly published in the *Nebraska Watchman*, the paper designated as that in which publication was to be made. In the order confirming the sale it was recited that publication

had been made in the *Omaha Republican*. There was, however, competent independent evidence submitted on the trial of this case showing that in fact publication was made as required, both as to time and the newspaper designated, and we think this showing was properly considered. (*Britton v. Larson*, 23 Neb., 806.) Proceedings for the sale of real property by an administrator or executor are necessarily *in rem*. (*McClay v. Foxworthy*, 18 Neb., 295.) The jurisdiction having once vested no collateral attack can be tolerated in independent cases on account of mere irregularities alleged to have occurred in the proceedings leading up to or ending in the administrator's sale. No ground of objection is presented which does not fall within the designation just used, except as will be noticed in the further consideration in connection with another branch of this case.

2. As has already been noted, the six-acre tract was sold for the payment of debts against the estate of the said Platt Saunders which the personal property was insufficient to satisfy. The sale of this tract was made by the administrator *cum testamento annexo*, under the authority which the appellee claims existed under the following language of the will: "All the residue of the said ten acres shall be sold to the best advantage, and after paying all the lawful debts of the said Platt Saunders, the remaining proceeds shall be divided between the heirs of the said John K. Saunders and the said Perlia J. Wilcox. And furthermore, I hereby appoint and empower T. J. Torrey, of Valley precinct, Douglas county, Nebraska, to be my executor without bonds, and trust that this my last will shall be faithfully and impartially executed, and that the lands and moneys shall be given to their legal owners, and all moneys paid as fast as received by said executor." It is argued by the appellee that when a testator directs in his will that his estate shall be disposed of for certain purposes without declaring by whom the necessary sale shall be made, the

executor may make the sale if the proceeds thereof are distributable by him. The language in the closing part of the quotation just made indicates that distribution was to be made by the executor; indeed, the same result would have followed in the absence of the express provision just referred to. In resistance of this contention the appellants cite several authorities, a few of which seem in point, though most of them fall short of sustaining the proposition in support of which they are cited. The correct rule is believed to be to sustain the power of an executor to sell under the circumstances indicated. The unqualified and unhesitating manner in which the rule is stated and applied by courts and text writers of acknowledged weight, inspires confidence in their deductions independently of their number, which is not inconsiderable.

In *Peter v. Beverly*, 10 Pet., 532, the supreme court of the United States adopted the following language: "It is a well settled rule in chancery, in the construction of wills as well as other instruments, that when land is directed to be sold and turned into money, or money is directed to be employed in the purchase of land, courts of equity in dealing with the subject will consider it that species of property into which it is directed to be converted. This is the doctrine of this court in the case of *Craig v. Leslie*, 3 Wheat. [U. S.], 577*; and is founded upon the principle that courts of equity, regarding the substance and not the mere form of contracts and other instruments, consider things directed or agreed to be done as having been actually performed. * * * In the American cases there seems to be less confusion and nicety on this point, and the courts have generally applied to the construction of such powers the great and leading principle which applies to the construction of other parts of the will,—to ascertain and carry into execution the intention of the testator. When the power is given to executors to be executed in their official capacity of executors, and there are no words in the will warrant-

ing the conclusion that the testator intended for safety, or some other object, a joint execution of the power, as the office survives, the power ought also to be construed as surviving. And courts of equity will lend their aid to uphold the power, for the purpose of carrying into execution the intention of the testator, and preventing the consequences that might result from an extinction of the power; and where there is a trust charged upon the executors, in the direction given to them in the disposition of the proceeds, it is the settled doctrine of courts of chancery that the trust does not become extinct by the death of one of the trustees. * * * This is the doctrine of Chancellor Kent in the case of *Franklin v. Osgood*, 2 Johns. Ch. [N. Y.], 19, and cases there cited, and is in accordance with the numerous decisions in the English courts (3 Atk. [Eng.], 714; P. Wms. [Eng.], 102), and is adopted and sanctioned by the court of errors in New York, on appeal, in the case of *Franklin v. Osgood*. And Mr. Justice Platt in that case refers to a class of cases in the English courts where it is held that, although from the terms made use of in creating the power, detached from other parts of the will it might be considered a mere naked power to sell; yet if, from its connection with other provisions in the will, it clearly appears to have been the intention of the testator that the land should be sold to execute the trusts in the will, and such sale is necessary for the purpose of executing such trusts, it will be construed as creating a power coupled with an interest, and will survive. This doctrine is fully recognized by the supreme court of Pennsylvania in the case of the *Lessee of Zebach v. Smith*, 3 Binn., 69. * * * The land is to be sold for the purpose of paying the debts, which is a duty devolving upon the executors; and it follows as a matter of course that the testator intended his executors should make the sale, to enable them to discharge the duty and trust of paying the debts. Mr. Sugden, in his treatise on Powers, page 167,

on the authority of a case cited from the Year-Books, lays it down as a general rule that when a testator directs his land to be sold for certain purposes, without declaring by whom the sale shall be made, if the fund is to be distributed by the executors, they shall have by implication the power to sell."

Again, in the case of *Lippincott v. Lippincott*, 19 N. J. Eq., 121, the court made use of the following language: "The appointment of one as executor of a will that directs lands to be sold, does not of itself confer on him the power to sell. (*Patton v. Randall*, 1 Jac. & W., 189.) But if the executor is directed by the will or bound by law to see to the application of the proceeds of the sale, or if the proceeds, in the disposition of them, are mixed up and blended with the personalty, which it is the duty of the executor to dispose of and pay over, then a power of sale is conferred on the executor by implication."

In *Rankin v. Rankin*, 36 Ill., 293, occurs the following language: "No question can be, nor indeed is, made as to the intent of the testator that the land should be sold; but it is urged that the executors had no power to make the sale. It sometimes happens, says Williams on Executors, page 413, 'that a testator directs his estate to be disposed of for certain purposes without declaring by whom the sale shall be made. In the absence of such a declaration, if the proceeds be distributable by the executor, he shall have the power by implication. Thus a power in a will to sell or mortgage without naming a donee will, unless a contrary intention appear, vest in the executor, if the fund is to be distributable by him, either for the payment of debts or legacies.' This principle is well settled and is not controverted by the counsel for the defendant in error, but it is contended that the proceeds of this sale were not distributable by the executor. The same learned author whom we have already quoted, on page 414, uses the following language: 'It is an established doctrine in courts of equity

that things shall be considered as actually done which ought to have been done, and it is with reference to this principle that land is under some circumstances regarded as money and money as land.' It is laid down by Sir Thomas Sewell, in *Fletcher v. Ashburner*, 1 Bro. C. C. [Eng.], 497, 'that nothing was better established than this principle that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted.' It follows, therefore, that every person claiming property under an instrument directing its conversion must take it in the character which that instrument has impressed upon it, and its subsequent devolution and disposition will be governed by the rules applicable to that species of property. This principle is familiar law and has been recognized to the fullest extent by this court in *Baker v. Copenbarger*, 15 Ill., 103, and *January v. Smith*, 29 Ill., 116. This principle is decisive of this case. The land was directed to be sold and its proceeds divided among certain persons named in the will. It was then to be considered as a bequest of money. In the language above quoted, and the accuracy of which was approved in *Wheldale v. Partridge*, 5 Ves. [Eng.], 396, it is to be considered as that species of property into which it was directed to be converted. It is then a fund distributable by the executors to the devisees and as such passes through their hands by virtue of their office. This gave them the power to sell, according to the principle stated above in Williams on Executors."

The same propositions are sustained by the cases of *Gray v. Henderson*, 71 Pa. St., 368, and *Lindley v. O'Reilly*, 50 N. J. Law, 636. Indirectly the same propositions are countenanced in *Little v. Giles*, 25 Neb., 331. The latest decision upon this subject is that of *Hite v. Hite*, 1 Am. Law Register and Review [Ky.], n. s., No. 1, p. 49, the same result being reached as attained upon the cases already cited.

We conclude, therefore, that the will authorized the executor to sell the four-acre tract, charged as he was with the duty of distributing the proceeds of the sale by the will, which failed to designate by whom the necessary sale should be conducted.

3. The executor, however, having refused to qualify, the next question is as to whether or not the duty of selling could be performed by the administrator *cum testamento annexo*. The appellants insist that the power to sell rests upon the special confidence of the testator in the executor named, and that the power delegated to the executor cannot in turn be delegated by him. We do not understand that the powers of an administrator *cum testamento annexo* are powers delegated by the executor. They are such as are conferred by statute alone, the provisions of which, in this state, are found in chapter 23, Compiled Statutes, from which we quote the sections designated:

"Sec. 169. Every person who shall be appointed administrator with the will annexed shall, before entering upon the execution of his trust, give bond to the judge of probate in the same manner and with the same condition as is required of the executor, and shall proceed in all things to execute the trust in the same manner as an executor would be required to do."

"Sec. 173. When an executor appointed in any will shall not be authorized, according to the provisions of this subdivision, to act as such, such as are authorized shall have the same authority to perform every act and discharge every trust required and allowed by the will, and their acts shall be as valid and effectual for every purpose as if all were authorized, and should act together; and administrators with the will annexed shall have the same authority to perform every act and discharge every trust as the executor named in the will would have had, and their acts shall be as valid and effectual for any purpose."

"Sec. 190. An administrator appointed in the place of

any former executor or administrator, for the purpose of administering the estate not already administered, shall have the same powers, and shall proceed in settling the estate in the same manner as the former executor or administrator should have had or done, and may prosecute or defend any action commenced by or against the former executor or administrator, and may have execution on any judgment recovered in the name of such former executor or administrator."

In almost every case cited by the appellants for the purpose of showing that the administrator *cum testamento annexo* did not succeed to the rights of the executor named in the will, it will be found that there was some special confidence reposed by the testator in the executor named. This distinction is stated in 2 Williams, Executors [6th Am. ed.], p. 1011, cited by appellants. The same idea is shown to have had weight in *Naundorf v. Schuman*, 41 N. J. Eq., 14. In *Belcher v. Branch*, 11 R. I., 226, the will required the money to be loaned and the income applied to certain designated purposes, a duty more proper to be devolved upon a guardian than executor. In *M'Donald v. King*, 1 N. J. Law, 432, the bequest to be looked after was the rents, profits, and dividends of the income of real estate of the decedent. We are not to be understood as asserting that all cases cited by the appellants are qualified in the manner or measure stated, but that most of them are thus qualified. In other cases there are involved statutes so dissimilar to our own that the opinions are of little practical value as applied to our statute. Space forbids a detailed analysis of the cases referred to by appellants. The rule established upon the authorities is well stated in the cases from which copious extracts will now be made.

In the case of *Drummond, Adm'r, v. Jones*, 44 N. J. Eq., 53, we find the following language: "Where a power of sale is given to a particular person by words indicating personal confidence or special reliance on the judgment of

that particular person, as that the power shall not be exercised except the donee decides that its exercise is necessary or proper there, it being manifest from the words of the grant that the creator of the power meant to leave the question whether the power should be exercised or not wholly dependent on the judgment of the donee, no one in such a case can exercise it but the donee. (*Chambers v. Tulane*, 1 Stock. [N. J.], 146; *Naundorf v. Schuman*, 41 N. J. Eq., 14.) But where the power is annexed to the office of the executor, and it is created to enable an executor to perform the duties imposed on him by the will, there, although created by words giving the executor a right to exercise a discretion as to the time or the method of sale, the power will be considered impersonal and as a thing incident to the office which may be used by any person who may be charged with the duties of the office. In such cases, said Chief Justice Beasley, in *Weimar v. Fath*, 14 Vr. [N. J.], 1, 'the power is annexed to the office and not to the specified donee of the power.' The chief justice also said, in substance, in the same case, when, instead of there being an express designation of individuals, there is a designation, as recipients of the authority of a class of officers, there it will be understood that the power is intended to be lodged not in any particular individual, but in all persons who may at any time fill such office."

This subject is discussed in *Vernon v. Covell*, 54 Mich., 281, in the construction of a statute of which section 173, hereinbefore quoted, is an exact copy. In the case just cited, Judge Sherwood used the following language: "It is claimed by plaintiff's counsel that the provision of our statute, if the power did not exist at common law, gives full authority to the one executor in this case to make valid sale of the real estate of the deceased, and authorized him to make the contract in question (a contract to sell and convey real estate). I think this provision clearly authorizes the executor in this case to sell the real estate of the

deceased mentioned in the will, and to make the contract for the sale thereof, to secure the performance of which the deposit of the note in question and its indorsement were made. Not only is the sale authorized, but the designation of the person and his power to make it are derived solely from the will. The probate of the will and letters testamentary furnish no more than the evidence of the existence of these things, and not the authority for doing them. I think it may well be doubted whether the provisions of our statute, or that of 21 Hen. 8th, c. 4, so far as it relates to executors, is anything more then confirmatory of the common law upon this subject. (*Bonifaut v. Greenfield*, 1 Cro. [Eng.], 80; Co. Litt., 113*a*.) * * * It would in my judgment be a perversion of the true intention and meaning of the statute, and do violence to what I believe to have been for a long time the accepted interpretation of the law by the profession generally in our state, to hold otherwise. It is possible, and I think quite probable, that were we to give the statute the construction claimed for it by counsel for the defendant, titles to large amounts of real estate, purchased in entire good faith, and now quietly enjoyed, might become unsettled, and all the evil consequences usually accompanying such action by the court would follow. I think the executor in this case had the power to make the sale of the homestead property of the Rumney estate, and the contract made therefor, and that the indorsement and transfer of the note in question were not without consideration, and must be held valid."

The provision of the will under consideration in *Davis v. Hoover*, 112 Ind., 423, was as follows: "It is also my will that the above described real estate be appraised and sold at private sale, * * * and the interest, after deducting necessary expenses, given to my wife as her own property in accordance with item No. 1 of this will." The testator named no executor. Afterwards, one Free was appointed administrator with the will annexed, and sold at private

sale, and without an order of the court, real estate in question to one Miller. Hoover, the appellee, purchased this land from a remote grantee of Miller. In considering this case the court said: "It is insisted that the propriety of selling the real estate described in the will rested with, or rather in, the discretion of the common pleas court of Madison county, and not with Free, and hence, the sale to Miller without an order of that court was void; that, conceding that an order of court was not necessary, the sale ought to have been held void, because it was not affirmatively shown that the real estate was first appraised as required by the will. It was held in the case of *Landers v. Stone*, 45 Ind., 404, that the only practical difference between an executor and an administrator with the will annexed consists in the mode of their respective appointments, the first being named by the testator, and the latter by the court in which the will is proved. That is undoubtedly a correct statement of law as applicable to the duties ordinarily imposed upon an executor by the will. There may be an exception to this general rule where a personal and peculiar trust and confidence is reposed in the executor. (Williams, Executors [7th ed.], 461, and notes; *Farwell v. Jacobs*, 4 Mass., 634; 2 Rev. St., 1876, p. 530, par. 93; Rev. St., 1881, par. 2361.) The case before us falls within that general rule, and Free took all the power under the will which would have devolved upon an executor if one had been named."

In *Mott v. Ackerman*, 92 N. Y., 539, the court made use of the following language: "But we are of the opinion that the administrator with the will annexed has authority to make the necessary deed. The question has been left by the disagreement of the courts in some uncertainty, which should be dispelled, so far as it is possible to do so. The statute provides that administrators with the will annexed 'shall have the same rights and powers and be subjected to the same duties as if they had been

named executors in such will.' (2 R. S., 72, par. 22.) In construing this statute great differences of opinion have arisen. (*De Peyster v. Clendining*, 8 Paige Ch. [N. Y.], 296; *Conklin v. Egerton*, 21 Wend. [N. Y.], 430, 25 Wend. [N. Y.], 224; *Roome v. Philips*, 27 N. Y., 357; *Bain v. Matteson*, 54 N. Y., 663; *Bingham v. Jones*, 25 Hun [N. Y.], 6.) The debate has turned mainly upon the inquiry, what were the distinctive duties of an executor as such, and when they were to be regarded as not appertaining to his office, but as personal to the trustee? Where the will gives a power to the donee in a capacity distinctly different from his duties as executor, so that as to such duties he is to be regarded wholly as trustee and not at all as executor, and where the power granted or the duty involved imply a personal confidence reposed in the individual over and above and beyond that which is ordinarily implied by the selection of an executor, there is no room for doubt or dispute. In such case the power and duty are not those of executors *virtute officii*, and do not pass to the administrator with the will annexed. But outside of such cases the instances are numerous in which, by the operation of a power in trust, authority over the real estate is given to an executor as such, and the better to enable him to perform the requirements of the will. It will not do to say in the present state of the law that whenever a trust or trust power is conferred upon executors relating to real estate, some personal confidence distinct from that reposed in executors is implied. An executor is always a trustee of the personal estate for those interested under the will. We have recently so decided where the trust character could only be derived from the office and its relations to rights claimed through it. (*Wager v. Wager*, 89 N. Y., 161.) And we have held also that where a will devised and bequeathed to the executor the residue of real and personal estate, in trust, to sell and convert the same, to divide the balance into shares, to invest it in bond and mortgage and to pay

over the income for a time, and finally the principal, the proceeds of the land sold became legal assets in the hands of the executor for which he was liable officially, and for which his sureties were responsible, and that an objection that he held the proceeds as trustee and not as executor, and could only be made accountable in equity, was not well taken. (*Hood v. Hood*, 85 N. Y., 571.) We have no doubt, therefore, that where a power of sale is given to executors for the purpose of paying debts and legacies, or either, and especially where there is an equitable conversion of land into money for the purpose of such payment, and for distribution, and the power of sale is imperative and does not grow out of a personal discretion confided to the individual, such power belongs to the office of executor, and under the statute passes to and may be exercised by the administrator with the will annexed. That is the case before us, and the deed of the administrator with the will annexed will be as effectual as would have been that of the executor if he had survived."

The quotations which we have made on this branch of the case clearly express our views upon the subject considered, and fully embrace all the questions remaining for consideration. It follows from these views that the judgment of the district court is

AFFIRMED.

IRVINE, C., took no part in the decision.

GEORGE L. HURLBURT ET AL. V. CLINTON R. PALMER, ET AL.

FILED FEBRUARY 6, 1894. NO. 4832.

1. **Banks and Banking:** DRAFTS: FACTORS AND BROKERS. A shipper of hogs arranged with a firm of commission brokers that all his hogs as purchased should be consigned to said brokers for sale; the said brokers on their part agreeing to pay such drafts as by the shipper should be made on them through a local bank, the proceeds of such drafts to be used by the shipper in making payments for hogs purchased, and to be consigned as the property of the shipper. *Held*, That the mere fact the said bank, without fraud or collusion, though with knowledge that the shipper was procuring funds with which to purchase hogs under this arrangement, induced the shipper to pay to itself a debt justly due it from him, he using for that purpose the proceeds of drafts drawn through the bank as above contemplated, did not render the bank liable to pay to the aforesaid firm of brokers the amount or value of property so received by it, whether in money, or in hogs purchased by the shipper.

2. **Jurisdiction of Courts:** PLEADING: SUMMONS. The plaintiffs in error, who were defendants in the trial court, answered, first, by a general denial qualified by certain admissions; second, that by an abuse of the criminal process of the state, a co-defendant had been taken from the jail of Seward county to Douglas county, wherein he was served with summons, after which he was returned at once to the Seward county jail; that all the defendants were, at the commencement of the action, residents of Seward county, and that the aforesaid abuse of criminal process was resorted to by and on behalf of plaintiff solely to obtain in Douglas county jurisdiction of the persons of the answering defendants, notwithstanding their residence in Seward county. *Held*, (1) That the facts pleaded as to the jurisdiction of the district court of Douglas county, stated a substantive defense properly presented by answer; (2) that the second defense pleaded was not waived by reason of being included in the answer wherein had been stated the first defense; (3) that such objections to the jurisdiction as do not arise upon the summons, the indorsement or service of the summons, or upon the face of the petition, must be raised by answer as a matter of defense.

3. **Objection to Jurisdiction: WAIVER BY APPEAL.** When the district court has not otherwise obtained jurisdiction of the person of a defendant, he does not submit himself to its jurisdiction by appealing or prosecuting error to this court; and the case of *Shawang v. Love*, 15 Neb., 142, holding the contrary doctrine, is overruled, as in contravention of the provisions of section 24, article 1, of the constitution of this state.

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

The facts are stated in the opinion.

R. S. Norval and *E. M. Bartlett*, for plaintiffs in error:

Where a person is taken or inveigled by force, fraud, or other means into the jurisdiction of the court for the purpose of getting service upon him, the service is bad and the court will acquire no jurisdiction. (*In re Robinson*, 29 Neb., 135; *Wyckoff v. Packard*, 20 Abb. N. Cas. [N. Y.], 420; *Compton v. Wilder*, 40 O. St., 130; *Van Horn v. Great Western Mfg. Co.*, 37 Kan., 523.)

An objection to the jurisdiction of the court over a defendant will not be waived, although such defendant answer to the jurisdiction as well as to the merits, when the practice permits a defense to the merits to be united with the plea to the jurisdiction. (*Cobbey v. Wright*, 29 Neb., 274; *Christian v. Williams*, 35 Mo. App., 297; *Allen v. Miller*, 11 O. St., 374.)

Unless the court acquires jurisdiction by reason of the subject-matter being situate within the county where the action is brought, the action must be commenced in the county in which the defendants or some one of them reside, or may be served with a summons. (*Cobbey v. Wright*, 29 Neb., 274; *Dunn v. Haines*, 17 Neb., 560.)

The plaintiffs below failing to take any judgment against the defendant Virgin, who only was served in Douglas county, and he having been taken into that county by force, fraud, and connivance for the purpose of serving the

summons on him there, the court could have no jurisdiction over the plaintiffs in error. (*Cobbey v. Wright*, 23 Neb., 250; *Dunn v. Hazlett*, 4 O. St., 436; *Allen v. Miller*, 11 O. St., 374.)

Charles Offutt and *Colman & Colman, contra:*

A defendant may appear specially to object to the jurisdiction of the court, either over his own person or the subject-matter of the suit, without waiving his right to be heard on the question on appeal or error. But if by motion, or any other form of application to the court, he seeks to bring its powers into action, except on the question of jurisdiction, he will be deemed to have appeared generally. Such an application concedes a cause over which the court has jurisdiction to act. (*Porter v. Chicago & N. W. R. Co.*, 1 Neb., 15; *Cropsey v. Wiggenhorn*, 3 Neb., 116; *Crowell v. Galloway*, 3 Neb., 220; *Aultman v. Steinan*, 8 Neb., 111; *Kane v. Union P. R. Co.*, 5 Neb., 106; *Hilton v. Bachman*, 24 Neb., 505; *Shawang v. Love*, 15 Neb., 142.)

Every dollar which Virgin obtained from Palmer, Richman & Co., which was not invested in stock and which was by him diverted to his personal use, was fraudulently obtained and fraudulently used, so far at least as Virgin was concerned. It is elementary that a person obtaining property by fraud acquires no title to it, but it is held by him, and by all persons claiming under him, with notice, in trust for the original owner. So long as the property can be identified in its original, or in a substituted form, it belongs to the original owner, if he elects to claim it; and if it passes into the hands of an innocent purchaser for value, the title of the defrauded owner, at his option, at once attaches to the avails, so long as their identity is preserved, no matter how many transmutations of form the property has passed through. So long as the trust property can be traced and followed into other property into which it has been converted, that remains subject to the trust. The

product or substitute has the nature of the original imparted to it. The depositing of trust money in a bank, although it creates the relation of debtor and creditor between the bank and the depositor, does not change its character, nor relieve the deposit from the trust. It is not the identity of the form, but the substantial identity of the fund itself, which is the important thing. (*Taylor v. Plumer*, 3 Maule & S. [Eng.], 562; *Pennell v. Deffell*, 4 De Gex, M. & G. [Eng.], 372; *Frith v. Cartland*, 2 Hem. & Mill. [Eng.], 417; *Knatchbull v. Hallett*, 13 Ch. Div. [Eng.], 696; *Overseers of Poor v. Bank of Virginia*, 2 Gratt. [Va.], 544; *Van Alen v. American Nat. Bank*, 52 N. Y., 1; *People v. City Bank of Rochester*, 96 N. Y., 32; *Cragie v. Hadley*, 99 N. Y., 131; *Whitley v. Foy*, 6 Jones Eq. [N. Car.], 34; *Farmers & Mechanics Nat. Bank v. King*, 57 Pa. St., 202; *Peak v. Ellicott*, 30 Kan., 156; *National Bank v. Connecticut Mutual Life Ins. Co.*, 104 U. S., 54; *McLeod v. Evans*, 28 N. W. Rep. [Wis.], 173; *Third Nat. Bank of St. Paul v. Stillwater Gas Co.*, 30 N. W. Rep. [Minn.], 440; *Amer v. Hightower*, 70 Cal., 440; *Sleeper v. Davis*, 64 N. H., 59.)

The interposition of equity is not necessary to a protection of all rights where a trust fund has been perverted. The *cestui que trust* can follow it at law so far as it can be traced. (*United States v. State Bank*, 96 U. S., 35; *May v. Le Claire*, 11 Wall. [U. S.], 217; *Taylor v. Plumer*, 3 Maule & S. [Eng.], 562; Newmark, Deposits, sec. 24; *Union Stock Yards Co. v. Gillespie*, 137 U. S., 411.)

RYAN, C.

During all the time within which the transactions referred to in this case took place, the firm of Palmer, Richman & Co. was engaged in the live stock commission business in South Omaha. At the same time, George L. Hurlburt, George Liggett, and Clifford G. Hurlburt were doing business at Utica, Nebraska, under the name and style of the Merchants Bank. Alexander C. Virgin was

also a resident of the town last named. The first named firm sued the aforesaid banking partners and Alexander C. Virgin, in the district court of Douglas county, Nebraska, for the sum of $2,000, with interest from the 1st day of December, 1888, and costs. Upon a verdict found in favor of Palmer, Richman & Co., judgment was rendered for its amount, being for the sum of $2,023.43. The Hurlburts and Liggett bring the case into this court for review upon petition in error. The petition in the district court, after stating the facts above set forth as to the membership of the above firm, their occupation and location, stated the plaintiffs' cause of action in the following language:

"3. That about the middle of the month of October, 1888, these plaintiffs arranged with the defendant Alexander C. Virgin that these plaintiffs would furnish the said Virgin money with which to pay for cattle and hogs which the said Virgin might thereafter buy, on condition that the said Virgin should consign the same to these plaintiffs at South Omaha for sale on the market, and that these plaintiffs would make sale of the stock so consigned to them and apply the proceeds of such sales, less the commission of these plaintiffs, to the payment of the money and interest thereon so as aforesaid advanced to the said Virgin. And the said Virgin, in consideration thereof, did agree to proceed at once to make purchase of the said stock, and that after he had purchased the same he would draw upon these plaintiffs at sight for the amount of the cost thereof, through the defendant the Merchants Bank aforesaid. These plaintiffs then saying, and it being distinctly understood between them and the said Virgin, that the said Virgin was not to make any drafts upon these plaintiffs for such advances until after he had purchased the stock for shipment to the plaintiffs as aforesaid, and that the said drafts should in no case exceed the amount which the said Virgin had actually contracted to pay for the stock actually purchased by him and arranged for their shipment to these plaintiffs.

"4. Plaintiffs say that the defendant Virgin immediately thereafter acquainted the defendant the Merchants Bank with the nature of the said agreement with these plaintiffs, and that before any payments were made by these plaintiffs on account of said agreement to the defendant Virgin, the defendant the Merchants Bank fully knew and understood the exact nature and extent of the agreement with regard to the advances so to be made by these plaintiffs, and the exact nature and condition of said agreement.

"5. That at that time, that is to say, during the month of October, 1888, the said Virgin was indebted to his co-defendant, the Merchants Bank of Utica, in a large sum of money, the exact amount of which is unknown to these plaintiffs, but the same was more than $2,000, and the said Virgin was then, as these plaintiffs are now informed, insolvent and largely involved, all of which was well known to his co-defendant, the Merchants Bank of Utica; that said Merchants Bank of Utica unlawfully and fraudulently designing to cheat and defraud these plaintiffs out of their money, and fraudulently designing and intending to secure the indebtedness which the said Virgin then owed to the Merchants Bank, by obtaining payment thereof from these plaintiffs, did unlawfully and fraudulently agree and arrange with the said Virgin that said Virgin should draw on these plaintiffs for large sums of money, to-wit, on November 16, 1888, for $1,800, and on November 20, 1888, for $1,000, and that the same should be applied on the indebtedness said Virgin then owed the Merchants Bank as aforesaid, in fraud of the rights of these plaintiffs.

"6. And the plaintiffs say that upon or about the dates aforesaid the defendant Virgin, in pursuance of the arrangements with the defendant the Merchants Bank, as hereinbefore stated, did draw upon these plaintiffs for the said sum of $1,800 and $1,000 through the defendant the Merchants Bank, and the said drafts were, as soon as presented to these plaintiffs, viz., on or about November 19

and 24, respectively, paid by these plaintiffs in full, and the proceeds thereof remitted to and received by the defendant the Merchants Bank; that at the time the said drafts were drawn, as aforesaid, the defendant Virgin had not purchased the stock to be paid for with the aforesaid money, except about $800 thereof, and the said Merchants Bank well knew that fact, and well knew the defendant Virgin had no right or authority to draw upon these plaintiffs for any portion of said money, except so much thereof as was necessary to pay for such stock as said Virgin may have purchased for shipment to these plaintiffs, and received the same in full of these drafts and converted the same to its own use by applying the same wrongfully and fraudulently to the indebtedness which the said Virgin owed it as aforesaid; and that the $800 worth of stock was purchased as aforesaid by the said Virgin, the amount in full thereof was received by the said defendant the Merchants Bank in part discharge of said Virgin's indebtedness to it, well knowing at the time that the said stock and the said money with which the same was paid were the property of these plaintiffs. And plaintiffs say that they have demanded that the defendant should repay the same to these plaintiffs, but they have failed to pay the same, or any part thereof, and that by reason of their said failure these plaintiffs have been damaged by the defendant in the sum of $2,000, no part of which has been paid."

These averments of the petition are set out in full that there may be no misapprehension as to the theory upon which plaintiffs based their right of recovery. The evidence discloses the fact that at the time the two drafts of date November 19 and November 24, respectively, were drawn, the defendant Virgin was indebted to the bank in a sum exceeding the amount of either of said drafts. It is equally clear from the testimony that the title to the property purchased by Virgin for shipment to Palmer, Richman & Co. was not in Palmer, Richman & Co., nor

did the arrangement between these parties and Virgin contemplate that the title should be held by any other than Virgin himself until the several shipments were received at South Omaha. There is no testimony whatever to sustain the averment that there was a conspiracy, or anything in the nature of a conspiracy, between the partners composing the Merchants Bank and Virgin, with respect to a contemplated misappropriation of the proceeds of the drafts drawn by Virgin on Palmer, Richman & Co. in favor of the Merchants Bank.

The plaintiffs' right of action, if a right of action exists in their favor, must be predicated solely upon the facts set out in paragraphs numbered 3 and 4, supplemented with the fact that the proceeds of the drafts so drawn were applied by the Merchants' Bank in payment of an indebtedness to that bank owing by Virgin, the drawer of the drafts, to it, and the taking of a mortgage to the bank upon property, for the payment of which the proceeds of the drafts were designed by the drawer and the drawee to be used. The testimony as to the knowledge of the partners composing the firm known as the Merchants Bank, of the arrangements between Virgin and Palmer, Richman & Co., is not as broad as the allegations of the petition. The only witness who testified as to facts which would charge the members of the firm known as the Merchants Bank with notice was Alexander C. Virgin himself. He says in his evidence that "I told them that I had made arrangements down with Mr. Richman, or Palmer & Co., that I would draw so much for the shipment of hogs that would have to follow, or stock—I don't think I said hogs." This conversation he said was close to the first day on which he drew a draft. The witness further testified that about the last of October, 1888, he had an overdraft in the Merchants Bank, and that Mr. Liggett wanted him to turn over some hogs he had in his possession, and that witness did not think it was right to do it, and that Liggett in-

sisting upon his doing so, witness told him he would not do it; that Mr. Liggett came to witness and said that witness must straighten up with the bank or that he would dishonor witness's checks, and that witness could not handle any more hogs; that witness told him he would do anything that was honorable and right to do; that Liggett said that if witness would give him a mortgage on what stuff witness had there, some cattle and what hogs were in the yard, and some personal property there, and a draft on Palmer, Richman & Co. for the $1,000 or $1,200, something like that, that there would be nothing wrong about it, and that he, Liggett, would see that witness was protected; that witness asked Liggett then if he would not give witness time so that witness could work it out, and that Liggett said he would not; that he would close right up on witness if witness did not do it, and that witness turned right around and gave him a mortgage on the stuff. This witness further stated that he told Liggett that he had promised to draw these drafts and make shipments afterwards; that it was an accommodation to the witness so to do; that such shipments were to be made to Palmer, Richman & Co., and that witness did not think it would be right under the circumstances to do as Liggett required, but that Liggett said it would be perfectly right, and that thereby witness did not lay himself liable, either criminally or in any other mode, and that he, Liggett, would protect witness in every shape, way, and form if witness would do this and turn them over to him. This witness further testified that all of the hogs mortgaged had been paid for with the money witness got from Palmer, Richman & Co.

After the giving of the mortgage and the turning over to the Merchants Bank of the proceeds of the last draft, there is evidence that there was a conversation in the Merchants Bank between the defendants, that is to say, the Hurlburts and Liggett of one part, and Virgin of the other part, from which it was possible for the jury to infer

that the Merchants Bank had promised to hold Virgin harmless as to the indebtedness due from Virgin to the bank, as well as a certain other indebtedness due from Virgin to a school district, if Virgin would comply with the request of Liggett as to giving a mortgage and turning over the $1,000. In our view of the matter, however, this is not specially material. The question then presented upon the petition and the evidence given in support of it is simply whether the Merchants Bank was liable to Palmer, Richman & Co. for the value of the stock mortgaged to it and for the proceeds of the draft paid by Palmer, Richman & Co. upon the arrangement that the proceeds of the drafts should be used by Virgin in the purchase of stock and shipment thereof to the live stock commission firm aforesaid. It is not claimed that there was any privity between the Merchants Bank and Palmer, Richman & Co. The only theory upon which a recovery can be had by the latter named firm against the former is that the sale of the stock mortgaged to the Merchants Bank, and the proceeds of the drafts drawn through that bank, were applied upon an indebtedness conceded to be due from Virgin to the said bank. The conversation between Virgin and Liggett was, according to Virgin's account of it, only such as would advise Liggett of the intention on the part of Virgin to use the money advanced by Palmer, Richman & Co. in making payment for hogs which Virgin had already bought in his own name. As the title was in Virgin, Palmer, Richman & Co. could assert no claim as against the hogs themselves, unless they were entitled to a lien upon them for advances made to be used in paying for them. When the last draft for $1,000 was paid by Palmer, Richman & Co., it was to supply Virgin with money for the purpose above indicated.

Counsel for defendants in error insist that the sole question was this: "Did the Merchants Bank receive the money advanced by Palmer, Richman & Co. *bona fide*

and without notice of the purpose for which it had been advanced to Virgin?" The element of *bona fides* does not enter into the proposition, except in so far as inducing Virgin to pay to the bank money which had been advanced to him for another specific purpose may have been *mala fide*. The money advanced to Virgin was essentially a loan, and the fact that it was designed to be applied to a particular purpose made it none the less so. For illustration, let us suppose the bank had loaned Virgin money with which to buy hogs for himself, and that instead of purchasing hogs he had used the money loaned him to pay his grocery bill. Could the grocer be held liable to the bank for the amount of such payment received by him, even though he knew when he received payment that the bank loaned the money that hogs might be purchased with it? Or, let us suppose that Virgin used the money which he borrowed of the bank, in the hypothetical case just stated, in buying hogs which he afterwards mortgaged to secure his grocer, and the grocer forecloses his said mortgage. On what theory could the bank recover from the grocer the value of the hogs? Upon the evidence in this case a recovery would be a precedent for holding liable the grocer in either of the cases supposed. In respect of this matter, however, the contention of the defendants in error is made in the following language: "Every dollar which Virgin obtained from Palmer, Richman & Co., which was not invested in stock, and which was diverted by him to his personal use, was fraudulently obtained and fraudulently used, so far at least as Virgin was concerned. It is elementary that a person obtaining property by fraud acquires no title to it, but it is held by him, and all persons claiming under him with notice, in trust for the original owner. So long as the property can be identified in its original form, or in a substituted form, it belongs to the original owner, if he elects to claim it; and if it passes into the hands of an innocent purchaser for value, the title of the defrauded owner,

at his option, at once attaches to the avails so long as their identity is preserved, no matter how many transmutations of form the property has passed through. So long as the trust property can be followed and traced into other property into which it had been converted, that remains subject to the trust. The product or substitute has the quality of the original imparted to it," etc. With this statement of principles we have no occasion to quarrel. The difficulty is that there is no trust relation shown other than such as exists ordinarily between a debtor and creditor. The loan was to enable Virgin to pay for hogs purchased by himself, for himself, and to be shipped as his property to Palmer, Richman & Co., by whom they were to be placed on the market, and in the proceeds of the sales alone were they interested, and that only to the extent of obtaining reimbursement for the money previously loaned Virgin. Instructions were given, based on the theory above stated, as the contention of the defendants in error, and as such instructions were propounded upon an erroneous conception of the relations and resulting obligations as between the parties in this litigation, they cannot be sustained. Neither the facts in support of which there was evidence, nor the law applicable to such facts, justified the judgment of the district court.

The petition in this case was filed on May 10, 1889. On the same day a summons was issued directed to the sheriff of Douglas county, commanding him to notify the defendant Virgin (impleaded with George L. Hurlburt, George Liggett, and Clifford G. Hurlburt) that he had been sued by Clinton R. Palmer and others, and requiring him to answer on or before the 10th day of June following. On the same date, to-wit, May 10, 1889, there was issued an alias summons directed to the sheriff of Seward county, commanding him to notify the defendants Hurlburt and Liggett, partners under the firm name and style of the Merchants Bank, that they were required to answer on or

before the 17th day of June immediately following. The summons directed to the sheriff of Douglas county was served on Alexander C. Virgin May 15, 1889, in that county. On the 17th day of May aforesaid, the alias summons was served on the Hurlburts and Liggett in Seward county, Nebraska. On August 21, 1889, a third summons was issued to the sheriff of Douglas county commanding him to notify Alexander C. Virgin, impleaded as above described, that he had been sued by Clinton R. Palmer and others, and requiring him to answer on or before the 23d of September, 1889. This third summons was served on Alexander C. Virgin August 21, the same day upon which the sheriff made return that he received the summons. Still further, on the same day, August 21, 1889, Alexander C. Virgin, in writing, entered his voluntary appearance in the cause and submitted himself to the jurisdiction of the court, as he recited in the paper by which he entered such voluntary appearance. No answer or other pleading was filed by or on behalf of Virgin after the entry of his voluntary appearance above recited. On the 15th day of June, 1889, George L. and Clifford G. Hurlburt and George Liggett filed their answer to the petition of plaintiff, in which they first admitted they were partners doing business as the Merchants Bank, and denied all other allegations therein contained. This admission and denial constitute the first defense, which was separate and distinct from that which followed. The second defense was pleaded as follows:

"2. These defendants allege that at the commencement of this action neither was a resident of, nor within, the county of Douglas, nor was service of summons had on either of them therein; that their co-defendant, Alexander C. Virgin, as well as these defendants, were at the commencement of this action and prior thereto, and are now, *bona fide* residents of Seward county, Nebraska; that prior and subsequent to the commencement of this action the defend-

ant Virgin was confined in the jail of Seward county, Nebraska, in default of bail, and the said Virgin was taken by the deputy sheriff of Seward county, Nebraska, without any authority of law, by and at the request of plaintiffs' attorneys, out of the jail of Seward county, Nebraska, and conveyed to the city of Omaha, Nebraska, by said deputy sheriff, and when he arrived in said city, and while in the custody of said deputy sheriff, he was served with a summons in this action, and said service is the only service had upon him; that said Virgin was taken to the city of Omaha, Nebraska, by the fraud and collusion of plaintiffs' attorneys, for the purpose of serving him with a summons, and as soon as said service of summons was obtained upon him as aforesaid, he was conveyed by said deputy sheriff back to and confined and deposited in said jail of Seward county, Nebraska, aforesaid; and these answering defendants aver that the only service had upon them, or either of them, was in Seward county, Nebraska, and that the service of summons upon said Virgin was a fraud upon him, or in collusion with him was a fraud upon these answering defendants and upon the jurisdiction of this court, and was obtained as aforesaid for the purpose of making these answering defendants contest their cause at Omaha, Nebraska, instead of where they and their co-defendant reside."

Upon the trial of the cause the defendants Hurlburt and Liggett offered to prove by Mr. Murphy that at the time the action was commenced the said Murphy was deputy sheriff of said Seward county, Nebraska, and that at the request of counsel for plaintiffs he brought the defendant Alexander C. Virgin into Douglas county, and that within an hour after he arrived in the city of Omaha, plaintiffs caused the summons which was served upon him to be served in the county of Douglas, and that said Virgin was at the time held upon the charge of embezzlement, and after service as aforesaid was taken immediately back to Seward county, where he remained in confinement to exceed

the period of thirty days; that he was brought into Douglas county, not upon his own request, but by the direction of plaintiff's attorney, Mr. Colman, who paid his railroad fare and the hotel bills, in order to get service upon George L. and Clifford G. Hurlburt, and George Liggett, and to compel them to go to Douglas county to defend this action, and the offer was tendered for the purpose of showing that jurisdiction was obtained upon the defendants Hurlburt and Liggett in fraud of the process of the court in Douglas county. This offer was objected to upon the ground that it was immaterial, irrelevant, and incompetent. The objection was sustained by the court on the ground that defendants having voluntarily appeared and answered in the case, it was too late at the time of the offer to raise the question of jurisdiction. To this ruling due exception was taken.

These facts present for our determination the question whether or not by answering as one defense by way of a general denial (modified perhaps by an admission), the defendant of necessity waived his right to plead as a separate defense such facts as would show that jurisdiction of the person of the defendant had been obtained, if at all, by fraud and abuse of the process of the court—the facts above offered to be proved leaving no room for a milder statement as to the propositions in support of which proof was tendered. It is greatly to be regretted that the adjudications of this court upon the proposition stated furnish apparent authority for the contention of each party.

Counsel for defendants in error cite *Porter v. Chicago & N. W. R. Co.*, 1 Neb., 14, a case in which it was held that the defendant might appear specially to object to the jurisdiction of the court either over the subject-matter of the action or of his person, but that if by motion or other form of application to the court he sought to bring its powers into action, except on the question of jurisdiction, he should be deemed to have appeared generally.

In *Cropsey v. Wiggenhorn*, 3 Neb., 108, it was held that

after the defendant had filed a motion to strike from the files an improperly verified petition, it was too late to raise the question as to the court having properly acquired jurisdiction of the defendant upon a summons insufficiently indorsed.

The facts in the case of *Crowell v. Galloway*, 3 Neb., 215, were that the return day in a summons was fixed for the first Monday instead of the third Monday, as required by section 66 of the Code of Civil Procedure. After judgment by default the defendant filed a motion for its vacation, because there had been indorsed on the summons no amount for which, in case of default, a judgment would be taken, and "because the summons had not been made and issued in conformity to law." No ruling was had upon the motion in the trial court, and this court held that the above assignment made, of irregularity as to the making and issuing of the summons, was too indefinite to be considered. LAKE, C. J., commenting upon the remainder of the motion, said: "It is a general, and we think a wholesome rule of practice, that if the defendant intend to rely upon the want of personal jurisdiction as a defense to a judgment, he must either make no appearance, or if at all, for the single purpose of questioning the right of the court to proceed; and if he do more than this and appear for any other purpose at any stage of the proceedings, he shall be held thereby to have waived all defects in the original process and to have given the court complete jurisdiction over him for all the purposes of the action." As applied to matters appearing upon the face of the record itself, in the case then under consideration, this language is not open to criticism.

In *Aultman v. Steinan*, 8 Neb., 109, it was held that service of summons might not be made by leaving a copy at the defendant's usual place of business, yet that if the defendant wished to avail himself of the defect named, he must confine his motion to that alone.

In *Kane v. Union P. R. Co.*, 5 Neb., 106, it was held, merely where a public officer was sued in a county other than that of his residence for a wrongful act by him done under color of his office, that if he voluntarily appeared and pleaded to the merits of the case, he waived the objection to the jurisdiction of the court. This hardly countenances the proposition that where such a defendant appeared and objected to the jurisdiction he thereby waived his said objections.

In *Hilton v. Bachman*, 24 Neb., 490, the holding was that no collateral attack upon the judgment could be permitted whereby it was sought to show that no proper service of summons had been made when the defendant voluntarily appeared and made a contest upon other matters pending in the suit wherein he had been irregularly summoned.

In *Bucklin v. Strickler*, 32 Neb., 606, it was held that a motion to quash containing a prayer for dismissal was a general appearance of the defendant.

A careful review and consideration of all the cases decided by this court upon the subject under consideration fully satisfies us that the point presented has never yet been settled as contended by the defendants in error, and as perhaps assumed by the learned district judge. Each case claimed to sustain the contention of the defendants in error was where there was a merely defective service, or where the summons was either defective in itself, or by reason of its indorsement. These were matters which the court could determine by an inspection of the summons or by an examination of the return, or of the indorsement criticised. It is very clear that as to these the defendant can raise objections without the necessity of showing facts independently of the record. Sound reasons therefore exist for requiring the defendant to confine himself to pointing out these objections to jurisdiction distinctly from any other matters. The objections urged in this case, if shown to be

founded upon facts, should just as completely deprive the court of jurisdiction as any of the enumerated matters observable of record. Such objections, however meritorious, can only be considered when pleaded and proved as facts. How this is to be done is a question which we must now determine.

In *Cobbey v. Wright*, 29 Neb., 274, MAXWELL, J., delivering the opinion of this court, said: "Unless the court acquires jurisdiction by reason of the subject-matter being situated within the county where the action is brought, the action must be commenced in the county in which the defendant resides or may be served with a summons. (*Dunn v. Haines*, 17 Neb., 560; *Pearson v. Kansas Mfg. Co.*, 14 Neb., 211; *Cobbey v. Wright*, 23 Neb., 250; *Allen v. Miller*, 11 O. St., 374.) Unless there is a general appearance in the case, the court can acquire jurisdiction only in the mode provided by law; and it is not the policy of the law to permit a nominal defendant having no real interest in the result of the action to be joined with the real defendant in order that an action may be brought against such actual defendant in a county other than that in which he resides or may be summoned."

In the case of *Dunn v. Haines*, cited with approval in the quotation just made, MAXWELL, J., for the court, said: "Where it is claimed that the county court has erred by assuming jurisdiction over the person of the defendant in an action pending in that court, the proper mode of reviewing the question of jurisdiction, or the want of it, is by petition in error to the district court. In a court of original jurisdiction a defendant may join all his defenses in one answer; that is, he may plead want of jurisdiction and to the merits, because if any one of his defenses is good and sufficient it will defeat a recovery, and the Code authorizes him to plead any defense, counter-claim, or set-off he may have. As he relies upon the want of jurisdiction over his person that question is in issue, and if

the ruling is against him he may have it reviewed on error."

The right of the defendants, situated as were the plaintiffs in error, to plead want of jurisdiction by way of answer as a defense is recognized in *Allen v. Miller*, 11 O. St., 374, and in *Drea v. Carrington*, 32 O. St., 595. In the latter of the two cases just cited it was held that the questions pertaining to jurisdiction, of necessity raised by answer, could only be tried by the jury unless parties consent that the court might determine them. By the same court proceedings to obtain jurisdiction of the persons of the defendants much like that charged in this case were severely reprehended in *Compton v. Wilder*, 40 O. St., 130.

In reference to a somewhat analogous question to that under consideration, a plea of non-joinder of parties plaintiffs, Sherwood, C. J., thus stated the view of the supreme court of Missouri, in *Little v. Harrington*, 71 Mo., 391: "Under our Code, as the plaintiff sued as the sole owner of the goods, and as the objection could not be taken by demurrer, it only remained for the defendants to interpose such objections by answer; this they did, and in this it is quite clear from the authorities cited that they should have been successful and the plaintiff should have been compelled to amend before proceeding further with his suit; and it was competent for the defendants, in connection with other matters in the same answer, to plead the non-joinder of Winkle as co-plaintiff. The statute expressly says that 'the only pleading on the part of the defendant is either a demurrer or an answer.' (2 Wag. Mo. Stat., p. 1014, sec. 4.) And with the same degree of explicitness it is provided that the defendant may set forth by answer as many defenses and counter-claims as he may have, whether they be such as have heretofore been denominated 'legal or equitable,' or both. (Ib., 1016, sec. 13.) It is evident from these statutory provisions that only one answer is contemplated, and this to contain whatever defense or defenses the defend-

ant may have, thus dispensing with the common law rule that a plea in bar waives all dilatory pleas, or pleas not going to the merits. On this point Judge Bliss in his recent work very justly and pertinently observes 'matter in abatement is as much a defense to the pending action as matter in bar, and to say that the defendant may reserve the latter until a trial shall have been had upon the issues in regard to the former, would interpolate what is not in the statute; would be inconsistent with its plain and simple requirements.' (Bliss, Code Plead., sec. 345.) A different view of this subject was at first taken in New York from the Code of which our own is derived, but subsequent adjudications have overruled former ones and announced and enforced statutory rules. The same course of judicial decision now prevails in Indiana, and prior decisions at variance with it have been held incorrect. (Ibid., and cases cited.)"

The same court in *Byler v. Jones*, 79 Mo., 263, recognized the analogy above referred to, and for our purpose, sufficiently state the essential fact of the case it had under consideration in the following language: "Our practice act provides that suits by summons shall be brought 'when the defendant is a resident of the state, either in the county within which the defendant resides or in the county within which the plaintiff resides and the defendant may be found.' (R. S., sec. 3481.) The motion admitted the facts of the plea, and according to the truth of the plea, the defendant was a resident of Morgan county and while there could not be found in Lynn county. The plaintiff, with the view of rendering it possible for the sheriff of Lynn county to find him there, made use of the criminal process of the state which extends to any county for the purpose of bodily seizure and transportation. After such seizure or arrest and transportation to Lynn county, the defendant is served with process in this proceeding for damages. This method of finding a citizen in the county where the plaint-

iff resides cannot receive the approbation of this court. It was an abuse of the criminal process of the state to employ it for any such a purpose, and the courts of Lynn county could acquire no rightful jurisdiction over the person of the defendant in any civil proceeding by means of such a contrivance and wrong. No rightful jurisdiction of a party can be acquired by fraud or misrepresentation, and if the person so proceeded against brings it properly to the attention of the court assuming jurisdiction over him, as the defendant did in this case, the suit must be dismissed after proof or admission of the facts. (*Capital City Bank v. Knox*, 47 Mo., 334; *Vastine v. Bast*, 41 Mo., 493; *Graham v. Ringo*, 67 Mo., 324.) A demurrer would be the better method of contesting the validity of the answer than a motion to strike it out. I may remark in this connection, that under the recent decisions of this court the defendant could have included in his answer a defense to the merits of the case without foregoing the benefits of his plea to the jurisdiction. (*Little v. Harrington*, 71 Mo., 390.)" The same principle was announced and enforced, under circumstances much like those of the case last cited, in *Christian v. Williams*, 35 Mo. App., 297.

The misapprehension of the scope of former decisions of this court as justifying an inference of waiver as to the question of jurisdiction, by pleading the facts defeating it in connection with other matters of defense by way of answer, required the review by this court of its former opinions on that subject, and having found that this court had not gone to the extreme assumed, it was deemed but proper to notice the holdings of other courts upon the same subject. Our conclusion is, that under section 99 of the Code of Civil Procedure it is proper to plead as a distinct defense such facts as do not appear in the record, whereby it is made known that the court has no jurisdiction either of the person or the subject-matter of the action. As an original question it would seem that there should

have been no doubt as to this proposition, for it is provided in section 94 of the Code of Civil Procedure, among other provisions, that "the defendant may demur to the petition only when it appears on its face either, first, that the court has no jurisdiction of the person of the defendant or the subject of the action," etc. In the same Code it is provided as follows by section 96: "When any of the defects enumerated in section 94 do not appear upon the face of the petition, the objection may be taken by answer, and if no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same," etc. By this section it is expressly provided that the failure to make objection by answer, where the defect does not appear upon the face of the petition, shall be deemed a waiver of such defect; that is to say, the failure to raise by answer the question of jurisdiction, arising as it did in this case, must be deemed a waiver of all objections on that score. It is a harsh and unnatural construction, and one in direct contravention of the provisions of this section, to hold that by taking objections to jurisdiction in the manner provided thereby, the defendant waives the very objections he shall be deemed to have waived unless he proceeds in that very manner. In view of all the considerations to which attention has been challenged, we conclude that the district court erred in sustaining the objections made to the evidence offered for the purpose of showing that the court had no jurisdiction of the persons of the plaintiffs in error.

In the case of *Shawang v. Love*, 15 Neb., 142, COBB, J., said that his understanding of the law as well settled was, that by taking an appeal or suing out a writ of error the defendant waived all errors of want of jurisdiction of the person; in other words, that by appealing or suing out a writ of error the party submitted himself to the jurisdiction of the district court. If this proposition is a correct statement of the law, it necessarily results that where the defendant must specially plead the want of jurisdiction by

answer he can be heard in respect thereto only in the court where he first makes the objection, for, if, as in the case at bar, he, in this court, attempts to have reviewed the errors which he alleges attended the determination of the question of jurisdiction in the district court, he will not be heard, simply and solely because he has brought the question to this court. In this we cannot concur. The statute gives the defendant the right to raise this question by answer, nay, more, in a certain class of cases, requires that at his peril he must so raise it, and this defense should, therefore, be treated with all the consideration any other class of defenses is entitled to receive. Section 24 of article 1 of the constitution of Nebraska provides as follows: "The right to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise, shall not be denied." The language employed in *Shawang v. Love, supra,* to which we have called attention, ignores this provision of the bill of rights, and cannot, therefore be sustained. That part of the opinion in *Shawang v. Love, supra,* therefore, which lays down the rule that by suing out a writ of error, or appealing to this court, the defendant waives all errors of want of jurisdiction and thereby submits himself to the jurisdiction of the district court, is overruled. The judgment of the district court is

REVERSED.

LOUIS P. REYNOLDS, APPELLEE, V. GOULD P. DIETZ ET AL., IMPLEADED WITH HARRISON BOSTWICK, APPELLANT.

FILED FEBRUARY 6, 1894. No. 3968.

1. **Mortgages:** PURCHASE OF PREMISES BY TRUSTEE: DEFICIENCY JUDGMENT. Where several parties purchased real property, the title being taken in the name of one of them as trustee for all the purchasers, and the deed of conveyance to

him recited, as part of the consideration for the conveyance, that the grantee named as trustee agreed and assumed to pay a mortgage in existence upon the premises conveyed, *held*, that upon an averment of the above facts in the petition there should not be inferred of necessity the conclusion that the *cestuis que trust*, for whom the trustee was acting, were individually liable for a deficiency which might remain unsatisfied upon the foreclosure sale of the mortgaged premises. Following *Reeves v. Wilcox*, 35 Neb., 779.

2. **An agreement to pay an existing mortgage,** as part of the consideration for a conveyance of mortgaged premises, need not be inserted in the deed, neither must it necessarily be in writing. Such an agreement is an independent undertaking of the party making it, the conveyance affording sufficient consideration to sustain it when its existence is established by a preponderance of evidence. Following *Rockwell v. Blair Savings Bank*, 31 Neb., 128.

3. **Cestuis Que Trust:** FINDING UPON CONFLICTING EVIDENCE: REVIEW. In the trial court there was evidence that the agreement of the trustee, in whom was vested the title, that he would assume and pay an existing mortgage, was made upon the authority of and to bind the *cestuis que trust*, contradicted by other evidence upon that proposition. *Held*, That the finding of the trial court in favor of said *cestuis que trust* should not be disturbed.

4. **Bill of Exceptions:** SETTLEMENT BY CLERK. A clerk can settle a bill of exceptions upon agreement of parties only when the unanimous consent of all the parties interested is shown by a stipulation to that effect attached to the proposed bill of exceptions, signed either by the parties themselves or their attorney of record in the case wherein the bill is proposed, or by an attorney or agent whose special authority to sign is affirmatively shown.

5. **A bill of exceptions to be settled by the clerk** upon agreement of parties, must be acted upon by such clerk within the time fixed by statute, or within the time allowed by the court or judge for the settlement of such bill of exceptions.

REHEARING of case reported in 34 Neb., 265.

M. A. Hartigan, for appellant.

J. B. Cessna, W. P. McCreary, Capps, McCreary & Stevens, and *Talbot & Bryan*, for appellees.

RYAN, C.

There was filed in this case an opinion which was reported in 34 Neb., 265, *et seq.* Subsequently a rehearing was granted, and the case fully reargued and again submitted for the determination of this court. The history of the transactions out of which it arose is correctly given in the already reported opinion, and need not now be reiterated. Upon a careful examination of the evidence in connection with the pleadings, we are satisfied that some very material, and, indeed, essential, facts have been overlooked. Of this nature is this statement in the opinion referred to: "In the case at bar the proof clearly shows that the *cestuis que trust* named each purchaser and paid for one-tenth portion of the land and agreed to pay the mortgage as a part of the consideration." As to the agreement of the *cestuis que trust* to pay the mortgage as a part of the consideration, the only affirmative evidence was given by H. Bostwick. He said that the receipts given by him to the *cestuis que trust* were uniform each with the other; that the aggregate amount of the receipts was paid as part of the consideration for the deed to himself as trustee; that the property was bought subject to a mortgage of $8,600, and that each party then agreed to assume his part of the existing mortgage; that the property was put in at $20,000, subject to a mortgage of $8,600 and interest, each party paying his share of the balance in cash. On his cross-examination Mr. Bostwick testified as follows:

Q. These receipts were all the written articles you had between these other parties?

A. No, sir; I had a written agreement, and it ought to be in existence to-day, signed by all of them, stating the description of the property, amount of purchase money and the mortgage, and corroborating me as trustee, and everything in it the same as in the receipts, only more fully set out. It was signed by every one here and by Mr. Halter

for the Lincoln parties. I have looked for it but cannot find it. I have looked everywhere it is possible for it to be. It is possible that a contract of that kind was drawn and signed at the time the bill was made.

Q. The receipts therein date from the 10th to the 16th?

A. Yes, sir.

Q. And the deed was recorded on the 20th. Now where was the money paid?

A. Well, it was paid right here, but some of the Lincoln parties held some papers. All payments were made right here and the whole deal was fixed up here. I had never met the Lincoln parties; I think I met Mr. Hyde, and I did it all through Mr. Halter for them. He gave a check for the money for them. I think he gave a check for four of them at the same time.

Q. These receipts stated all agreements as far as it stated anything at the time?

A. Yes, sir.

Q. You are the one that was arranging in getting up the syndicate, were you?

A. Yes, sir.

Q. In this agreement they all agreed to assume their proportionate share of the mortgage?

A. Yes, sir.

Q. The mortgage was part of the purchase money to be paid subsequently?

A. Yes, sir.

Q. If the land was not sold?

A. Yes, sir.

Q. Will you swear that you went into all these details?

A. Yes, sir; it was stated in this way in the contract. Now to refer to another deal, the contract drawn out here (pointing to the east part of the city), it was for each one to pay such a share and then to assume any outstanding incumbrance. This was drawn up in the same way. The article set out that they took the property at so much

and assumed a mortgage for so much, and went on that way.

In contradiction of this evidence James C. Kay testified as follows:

Q. Have you the original memoranda made at the time you purchased your interest in June, 1887?

A. Yes, sir (producing check marked Exhibit J).

Q. What is that?

A. A check on the bank that I gave for the $140.

Q. Who drew that check up?

A. Mr. Bostwick.

Q. Did you sign any other paper?

A. No, sir.

Q. Did you sign any such paper or agreement as has been referred to in the testimony of Mr. Bostwick?

A. I don't remember anything of the kind.

W. H. Fuller testified as follows:

Q. You heard the testimony of Mr. Bostwick?

A. Yes, sir.

Q. State to the court when, if ever, you signed the written agreement giving authority to him as he has testified to.

A. I never signed any.

Joseph Boehmer testified:

Q. You heard the testimony of Mr. Bostwick?

A. Yes, sir.

Q. Did you ever sign any such agreement as he refers to?

A. No, sir.

Q. State if you ever had any conversation about such an agreement.

A. Mr. Halter said he had such an agreement, but that he would not sign it for himself, nor would be for any other.

Q. Where was that conversation?

A. In the bank at Lincoln.

Q. Did you act for Mr. Brotherton?

A. Yes, sir.

Q. Did you ever authorize any one to sign any such instrument for Mr. Brotherton?

A. No, sir.

The receipts referred to by Mr. Bostwick *mutatis mutandis* were in the following language:

"No. ——. JUNE 18, 1887.

"Received of W. H. Fuller, five hundred and seventy dollars, being one-twentieth interest in S. ½ S. E. ¼ section 8-7-9, Adams county, Nebraska, subject to a mortgage for $8,600 and interest thereon from March 29, 1887.

"$570. H. BOSTWICK, *Trustee.*"

So far as any written instrument shows, there was no undertaking on the part of the *cestuis que trust*, personally, to pay the mortgage upon the property purchased. The evidence of Mr. Bostwick of a written agreement having been signed by all the parties, weakened as it was by his failure to produce or account for the absence of that very material writing, moreover, was flatly contradicted upon this very material point. It can scarcely escape notice that the petition made no reference to an express undertaking of the *cestuis que trust* to pay the mortgage, either written or otherwise. The averment nearest approaching this was "that the deed was taken by H. Bostwick for the *cestuis que trust* named and was made to H. Bostwick, and at the special instance and request of the said *cestuis que trust*, the other defendants aforesaid, the said H. Bostwick agreed and assumed to pay this mortgage of $8,600 to the plaintiff aforesaid; that by said deed, and the acceptance thereof, the said H. Bostwick and the *cestuis que trust*, defendants aforesaid, did assume and become personally responsible for the payment of said mortgage," etc. The evidence of Mr. Bostwick was therefore not merely contradicted, but was entirely irrelevant to the averments of the petition; for in the petition no claim was made that the *cestuis que trust* agreed to

pay the mortgage, but only that from their relations with Mr. Bostwick that undertaking should be implied. The proofs which we have noticed had no tendency to support any averment of the petition, and, therefore, should have been disregarded. (See *Lipp v. Horbach*, 12 Neb., 371; *Hobbie v. Zaepffel*, 17 Neb., 548; *Clarke v. Omaha & S. W. R. Co.*, 5 Neb., 314; *Uppfalt v. Nelson*, 18 Neb., 533; *Merchants Bank v. McConiga*, 8 Neb., 245; *German Ins. Co. v. Fairbank*, 32 Neb., 750.)

In *Smith v. Wigton*, 35 Neb., 460, MAXWELL, C. J., delivering the opinion of this court, said: "The issue presented by the amended pleadings is the receipt and retention of more than $3,000 of plaintiff's money by the defendants. The proof clearly shows that they collected more than $10,000 on a judgment in favor of the plaintiff, and that they still retain more than $3,000. If this is retained in pursuance of a contract to that effect, it should be pleaded." As an original question, it might, perhaps, have admitted of doubt whether or not in a suit for the foreclosure of a mortgage the personal liability of purchasers who have assumed and agreed to pay such mortgage upon the premises should be enforced. This proposition, however, is now beyond question, for in *Cooper v. Foss*, 15 Neb., 515, the rule was thus laid down: "The holder of a note and mortgage where a third person has bought the mortgaged premises, and as the whole or a part of the consideration therefor has agreed with the mortgagor to pay the mortgage debt, can sue such third person therefor with or without foreclosure, or, upon foreclosure, if there is a deficiency, can take judgment against him therefor." This doctrine is approved in *Rockwell v. Blair Savings Bank*, 31 Neb., 128. The liability is enforced because the purchaser assumes and agrees to pay a sum certain secured by the mortgage. In the case last cited this liability was enforced, although it depended for proof upon oral evidence alone. This is upon the theory, doubtless,

that, under the circumstances proved, the promise was an original promise, and therefore required no writing to evidence its existence. It is proper to join all grantees subsequent to the recording of a mortgage as defendants in a foreclosure thereof, and having been joined as a defendant the liability of one who has assumed payment of such mortgage may be enforced by a personal or a deficiency judgment, upon the theory that the court having jurisdiction in equity of the subject-matter for one purpose will afford a complete remedy as between all parties to the action. It is unnecessary to determine whether or not if the petition had stated fully the facts which it is claimed rendered liable the *cestuis que trust*, such *cestuis que trust* would have been proper parties against whom a personal or deficiency judgment could, upon proper proofs, have been rendered liable, for such facts were not pleaded, as has already been noted. The relation of these *cestuis que trust* to the purchase and consideration thereof, as stated in the petition, did not render them liable to a personal judgment in this action. Whether or not they might be liable personally for the deficiency is also doubtful, but is not a question which need be discussed, for no such judgment had been rendered at the time this appeal was taken. Indeed, none such has ever been rendered. A deficiency judgment could not be taken until a sale had been had and thereby the amount of the deficiency ascertained. It is true that a sale was had after the judgment appealed from was rendered and before the appeal to this court, but even after that sale there were no proceedings in the district court with a view of ascertaining or enforcing the liability alleged as against the appellees for a deficiency. The appeal was taken from a judgment whereby the court failed to declare a deficiency liability claimed to have been fixed before such ascertainment of liability was possible. On this appeal, therefore, it is impossible to hold the appellees as for a deficiency, for the very good and sufficient reason that that question was

never presented to or passed upon by the district court. As has already been shown, no mere personal judgment could be rendered against the appellees on the averments of the petition. Even had these averments been sufficient to authorize such a judgment, there was a direct conflict in the testimony as to whether or not the *cestuis que trust* assumed the payment of the mortgage upon the premises purchased. This being true, the finding of the district court in favor of the appellees, must be sustained in this court (*Worthington v. Worthington*, 32 Neb., 334), and this case must be governed by the principles enunciated by MAXWELL, C. J., in *Reeves v. Wilcox*, 35 Neb., 779. The pleadings and proof being in the condition which we have stated, the district court very properly held that no judgment could be rendered against the *cestuis que trust* for which they would be held individually liable.

Ordinarily it is unnecessary to consider the manner in which a bill of exceptions has been settled in determining the merits of a case on rehearing. In this case, however, this becomes necessary on account of the facts to which reference will hereinafter be made, and because the service of the proposed bill of exceptions upon H. Bostwick, trustee, was in the reported opinion held sufficient, for the reasons stated in the following language: "The action was brought by the plaintiff against all the defendants to subject the land in suit to the satisfaction of the mortgage. The trustee represented the *cestuis que trust*, and except in a contest between them, service of the bill of exceptions on him will be sufficient." In this case H. Bostwick filed no answer as trustee or otherwise. He filed a demurrer to the petition, which demurrer was overruled, and, as the record recites, there was judgment as to Bostwick on his demurrer. He had therefore no interest in the trial of the case upon the contested facts, for judgment had already been rendered against him upon a trial of questions of law. It is, however, incorrect to assume that the service of the proposed bill of ex-

ceptions was made upon Mr. Bostwick alone. It is true that he was represented by M. A. Hartigan, Esq., but the same attorney appeared for Everett C. Sawyer and Alice E. Sawyer. For Everett C. Sawyer it was averred in his answer "that he, with the other defendants herein, purchased the lands described in the plaintiff's petition, since the making of the note and mortgage set out in plaintiff's petition, and at the time of such purchase this defendant was made trustee for the interest and estate of his co-defendants in said lands, to care for and manage the same, and that as such trustee he entered upon and took charge of the execution thereof, and in all things faithfully, prudently, properly, and in good faith administered the same as was most advantageous and beneficial; that he has laid out, incurred, and expended labor, time, attention, and care in the discharge of said trust, and paid out moneys therefor in the sums and amounts following:

"Services as trustee.....	$500 00
"Defense in present suit	100 00
"Legal counsel and service.....	400 00
"Amount	$1,000 00"

Following this statement is the averment that no part of the $1,000 has been paid, with a prayer for the enforcement of the above claim. The answer of Alice Sawyer consisted of a denial of the averments of the petition upon information and belief, followed by a disclaimer of any interest whatever in the land described in the petition. The so-called "bill of exceptions" itself, on its title page, recites the appearances as follows:

"J. B. Cessna, as counsel for plaintiff."

"M. A. Hartigan, counsel for defendants Sawyer."

"Capps & McCreary, counsel for defendants Kay, Levy, Loeb, and Fuller."

"—— Bryan, Esq., counsel for defendants Halter, Boehmer, Hyde, and Brotherton."

The memoranda upon which the proposed bill of exceptions was settled were as follows:

"HASTINGS, July 11, 1889.

"Received the within bill of exceptions from M. A. Hartigan this day for inspection and amendment, to the end that the same may be settled and filed in said case.

"J. B. CESSNA,
"*Attorney for Plaintiff.*"

"HASTINGS, July 20, 1889.

"Received this bill of exceptions in return from J. B. Cessna, Esq., without suggesting amendments or corrections. M. A. HARTIGAN,
"*Attorney for Defendants, Appellees.*"

"HASTINGS, NEBRASKA, July 31, 1889.

"I enter my appearance in the supreme court and waive service of process; and it is hereby stipulated and agreed between the parties hereto and their attorneys aforesaid, that this bill of exceptions may be signed and settled by the clerk of the district court of Adams county, Nebraska.

"J. B. CESSNA,
"*Attorney for Plff.*
"M. A. HARTIGAN,
"*For Dfts.*"

Upon the alleged bill of exceptions was the following indorsement:

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

"The foregoing bill of exceptions taken and preserved in this action, and the same containing all the evidence offered or given by either party on the trial thereof and upon the stipulation herewith returned, allowing the clerk to settle and sign the same, said bill of exceptions is this day allowed, signed, and filed, and in all things made part of the record in this case.

"Dated July 31, 1889. J. H. SPICER,
"*Clerk District Court.*"

At the date of the decree, May 21, 1889, there was allowed forty days in which to settle a bill of exceptions. The earliest acknowledgment of the receipt of the proposed bill was on July 11, 1889, fifty-one days after May 21 aforesaid, no extension meantime having been allowed beyond the original forty days.

Attention has been called to some of the various anomalies which appeared in the alleged settlement of the bill of exceptions, of which nature is, first, the fact that Mr. Hartigan served it upon the attorney for plaintiff July 11, 1889; second, that Mr. Hartigan acknowledged receipt of the same proposed bill of exceptions on July 20, 1889, for the purpose of settling the same; third, that both these attorneys then in unison agreed that the proposed bill might be settled by the clerk, by whom alone it is authenticated; fourth, that the appellees who most strenuously insist upon the correctness of the judgment of the district court, have never in this case, either in the trial court or in this court, been represented by Mr. M. A. Hartigan; fifth, that notwithstanding this fact, the only consent on behalf of said appellees is the consent evidenced by Mr. Hartigan's signature in their behalf. The power to settle a bill of exceptions is delegated to the clerk (except in the event of the death, sickness, or absence of the trial judge) only in cases where all the parties in interest agree upon the bill of exceptions and when it shall have attached a written stipulation to that effect. (Sec. 311, Code of Civil Procedure.) In this the clerk exercises no judicial function in determining the correctness of the bill itself. Its force is due solely to the agreement assented to by all the parties interested. If this essential element of unanimity is wanting, or if the proposed bill is not assented to on behalf of all parties in interest, it is not binding as a bill of exceptions. Where a proposed bill is presented within proper time to one of the principal adverse parties, it is a sufficient compliance with the statute authorizing the presiding judge to settle

the bill, even though all the adverse parties have not been served therewith. (*Crane Bros. Mfg. Co. v. Keck*, 35 Neb., 683.) In this respect there is a radical difference dependent upon whether the proposed bill is to be authenticated by the clerk or by the presiding judge, for the latter has a certain latitude. The former can only act upon the unanimous consent of all parties in interest. There was lacking this consent on behalf of several parties interested, and the bill of exceptions should therefore have been quashed upon the motion made for that purpose. The judgment of the district court is

AFFIRMED.

CHARLES REDFIELD V. STATE OF NEBRASKA.

FILED FEBRUARY 6, 1894. No. 5895.

Rape: REVIEW OF EVIDENCE. Where the only question presented was as to the sufficiency of the evidence to sustain the verdict, and there is found ample evidence in its support, the judgment of the district court must be affirmed.

ERROR to the district court for Holt county. Tried below before KINKAID, J.

R. R. Dickson, for plaintiff in error.

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

RYAN, C.

The plaintiff in error, a married man, was tried in the district court of Holt county and found guilty of the crime of rape committed upon the person of Minnie Muesch. At the time the crime charged was committed the victim was of the age of fourteen years. The only question ar-

gued in this court is that the evidence did not sustain the verdict. On behalf of the plaintiff in error the testimony was in proof of such a condition of drunkenness at the time of the alleged offense as to render physically impossible the crime charged. Probably owing to a limited knowledge of the English language, the testimony of the prosecuting witness was given in such terms as to preclude its reproduction in print, except, perhaps, in the brief for plaintiff in error, wherein it is given with great apparent gusto. This testimony, however, was straightforward and convincing, was corroborated by other evidence, the aggregate being amply sufficient to sustain the verdict of the jury. The judgment of the district court is

AFFIRMED.

MAGNUS WEBER V. FREEMAN P. KIRKENDALL ET AL.

FILED FEBRUARY 6, 1894. No. 5050.

Involuntary Payment: RECOVERY: INTIMIDATION AND FRAUD. Thursie, Anderson & Flodman owned a shoe store and became indebted to defendants in error in the sum of $840.70, to secure which they held the individual note and mortgage of Thursie. This firm sold out to Johnson & Flodman, and it in turn sold to Flodman & Bruce, and this last firm also became indebted to defendants in error in the sum of $820.71, and while so indebted sold out to plaintiff in error, who assumed their debt. Thursie and his attorney and the defendants in error and their attorney induced plaintiff in error to come to their place of business, when they took him to a room, not their office, on the fifth floor of their business house, and there falsely claimed that he was liable to them for the old debt of Thursie, Anderson & Flodman, and demanded that he pay it then and there, and by their acts and expressions led the plaintiff in error to believe that if he did not pay them the claim demanded, they would attach his shoe store; and, influenced by such fears, plaintiff in error paid defendants in error the debt owing them by Thursie, Anderson

& Flodman. *Held*, That the payment, while not technically made under duress of property, was without consideration, was extorted from plaintiff in error by intimidation and fraud, was not voluntarily made, and might be recovered back.

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

The facts are stated in the opinion.

Charles W. Haller, for plaintiff in error:

Although the facts may not be such as to make this a case of technical duress, it amounts to undue influence, and the plaintiff should recover. (*Spaids v. Barrett*, 57 Ill., 289; *Dykes v. Wyman*, 34 N. W. Rep. [Mich.], 561; *Lafayette & I. R. Co. v. Pattison*, 41 Ind., 312; *Collins v. Westbury*, 2 Bay [S. Car.], 211; *Chandler v. Sanger*, 114 Mass., 364; *Sartwell v. Horton*, 28 Vt., 370; *Munson v. Carter*, 19 Neb., 293; *McLin v. Marshall*, 1 Heisk. [Tenn.], 678.)

Montgomery, Charlton & Hall, contra, cited: *Wolfe v. Marshal*, 52 Mo., 167; *McClair v. Wilson*, 31 Pac. Rep. [Col.], 502; *Murphy v. Creighton*, 45 Ia., 179; *Peckham v. Hendren*, 76 Ind., 47; *Hilborn v. Bucknam*, 78 Me., 482; *Mundy v. Whittemore*, 15 Neb., 651; *Sieber v. Weiden*, 17 Neb., 583; *King v. Williams*, 21 N. W. Rep. [Ia.], 502; *Higgins v. Brown*, 78 Me., 473.

RAGAN, C.

Magnus Weber, on the 3d day of October, 1888, purchased of Flodman & Bruce a retail shoe store in the city of Omaha, and assumed an indebtedness of $820.71 which his vendors then owed Kirkendall, Jones & Co. Flodman & Bruce had purchased this store of Johnson & Flodman, and they purchased the store of Thursie, Anderson & Flodman. While the latter firm owned the store it became indebted to Kirkendall, Jones & Co., and

$848.70 of said debt remained unpaid at the time Weber became the owner of the store. This latter amount, Weber did not assume by the purchase he made of Flodman & Bruce. On the 8th day of October, 1888, Kirkendall, Jones & Co. induced Weber to come to their place of business, and on reaching there he was taken to a room, not their office, on the fifth floor of their business house, where were one of the firm of Kirkendall, Jones & Co. and their attorney, and Mr. Thursie and his attorney. At this time and place Kirkendall, Jones & Co. and their attorney falsely claimed to Weber that he was liable to them for the $848.70, the debt owing them by the old firm of Thursie, Anderson & Flodman, and demanded that he pay the same, which Weber then did by assigning to them a certificate of deposit of an Omaha bank, which certificate was then owned by him. Weber then brought this suit against Kirkendall, Jones & Co. to recover the money represented by said certificate of deposit, alleging that he had surrendered it involuntarily to Kirkendall, Jones & Co. while unlawfully restrained of his liberty by them, and in fear of threats made by them if he did not pay Thursie, Anderson & Flodman's debt, that they Kirkendall, Jones & Co. would seize, by attachment, his shoe store. The case was tried to the court, a jury being waived. The court made certain special findings and found generally for Kirkendall, Jones & Co., and Weber brings the case here on error.

The special findings made by the court, material here, are as follows: That Kirkendall, Jones & Co. made no direct threat to attach Weber's store, but by their acts and expressions they led him to believe that they would attach his stock of goods if he did not pay the $848.70 claimed; that Weber would not have paid this claim had he not believed from the acts and statements made by Kirkendall, Jones & Co. that they intended to attach his shoe store if he did not pay it; that the money paid by Weber was not

for a debt he owed Kirkendall, Jones & Co., but was the debt of another. These special findings of the district court, and the evidence in the record, establish this: That Kirkendall, Jones & Co. knew that Weber was not legally liable for the claim which they induced him to pay, and that Weber made this payment because he feared that if he did not make it that Kirkendall, Jones & Co. would attach his shoe store and ruin his business, and that this fear was fixed in Weber's mind by the acts and statements of Kirkendall, Jones & Co., and their attorney, at the conference above referred to. The precise question then is, was this payment made by Weber voluntarily? In this case the honesty of Weber's claim is not denied. It is defended against here by the defendants in error on technical grounds throughout; the principal ground of defense being that the payment was voluntarily made. It is undoubtedly a general rule that money paid voluntarily, without fraud and with a full knowledge of all the facts, cannot be recovered back by the party who has so paid it. There are, however, many exceptions to this rule, or rather instances in which the payments, having been made under a pressure of an enforced emergency, are not considered voluntary but compulsory in law. (*Cobb v. Charter*, 32 Conn., 358.) In that case the defendant had possession of a chest of tools belonging to the plaintiff, who was a mechanic, and refused to give up the chest unless plaintiff would pay a bill for board which defendant had against the plaintiff's son and for which the plaintiff was in no manner liable. To get possession of his chest of tools, Cobb paid the board bill, and the court held that it was not voluntarily paid and that it might be recovered back.

In *Chandler v. Sanger*, 114 Mass., 364, it is said: "A payment by a person to free his goods from an attachment, put on for the purpose of extorting money by one who knows that he has no cause of action, is a payment under duress, and the money paid can be recovered back."

In *Vyne v. Glenn*, 41 Mich., 112, the defendant compelled plaintiff to make a settlement with him and to forgive certain moneys which the defendant lawfully owed the plaintiff, by informing the plaintiff that he had stopped payments of certain moneys due the plaintiff from third persons, knowing at the time that if plaintiff failed to get these moneys owing him, he would be financially embarrassed or perhaps ruined. It was held that the settlement made was obtained by duress and would be set aside and the defendant compelled to pay the moneys to plaintiff which the plaintiff had forgiven him in the settlement made.

In *Spaids v. Barrett*, 57 Ill., 289, goods were wrongfully taken from the owner thereof by means of a writ of attachment fraudulently obtained, and the party in possession refused to surrender the goods on payment of the sum actually due, but demanded more than twice that amount, as a condition of his releasing the attachment and surrendering possession of the goods. The owner paid the sum demanded, and the court held that it was not voluntarily paid and might be recovered back.

In *Adams v. Schiffer*, 11 Col., 15, Adams agreed to convey to Schiffer an interest in certain mining property by a deed passing a good title. In pursuance of this agreement he gave Schiffer a quitclaim deed, which he accepted. A third party made an unfounded claim to the property, which Schiffer bought up. At the time Adams was a depositor in Schiffer's bank, and Schiffer compelled him, by refusing to pay his checks, to settle for part of the sum paid by Schiffer to such third party. The court held that such a payment was involuntary.

These authorities establish the rule that an illegal payment made by one in order to obtain his property from another who has possession of it, and refuses to surrender it unless such payment is made, is not a voluntary payment and may be recovered back. Counsel for defendants in error admit the correctness of this rule, but say, however,

that it is not applicable to the facts in the case at bar, since defendants in error did not, at the time they compelled Weber to make the payment to them of the debt owing them by Thursie, Anderson & Flodman, have possession of Weber's store; but we cannot appreciate this distinction. What is the difference in principle whether defendants in error unjustly compelled the plaintiff in error to pay a debt which he did not owe them by fixing and inducing in his mind the reasonable fear that if he did not pay it they would attach his store, and going in the first instance and attaching his goods and then refusing to release them unless he would make the payment demanded? Either method of obtaining this money was equally unlawful. It must be borne in mind that this record shows that this claim made by defendants in error on the plaintiff in error was illegal and unjust, and unfounded, and defendants in error knew that. It was an old debt of Thursie, Anderson & Flodman's, and defendants in error, at the time they compelled the plaintiff in error to pay it, had the individual note and mortgage of Thursie to secure this debt. Nowhere is there any pretense or claim made that the sale from Thursie, Anderson & Flodman to Johnson & Flodman, or the sale from Johnson & Flodman to Flodman & Bruce, or the sale from Flodman & Bruce to Weber was fraudulent. When Weber bought this store of Flodman & Bruce he assumed a debt of some eight hundred dollars which that firm owed the defendants in error, and called on them and told them he had bought the store and made a payment upon the debt. Counsel for defendants in error say that no precedent can be found allowing money to be recovered back which has been paid because the party paying it feared that if he did not, the party who demanded the payment would seize his property by legal process. I have no doubt that when the first case arose to recover money back which had been extorted from the owner by one in possession of his property, in order to in-

duce such extortioner to release possession of the property, that counsel who defended in the case made the argument that no precedent could be found allowing such payment to be recovered back, and that it was a voluntary payment, and that in order to entitle such party to recover, he must show that he made the payment by reason of fear of loss of life or irreparable injury to his person. But it seems that the court was equal to the emergency and made a precedent, and from this time forth a precedent will be found in the case of *Weber v. Kirkendall*, 39 Neb., 193, allowing money to be recovered back which a party has paid by reason of fears that if he did not pay it the party who made the demand would attach his goods.

To do anything voluntarily means to do it with one's free will and without fear or compulsion of mind or body. The court will not shut its eyes to the every-day transactions of life. Here was a young man in business. A demand is made upon him that he pay some eight hundred dollars that another owes. He protests that he does not owe it. He asks that he be given time to consider the matter and consult his friends. He is told by defendants in error that he must not leave the building until this matter is settled; that it must be settled here and now. We are now asked to say that he paid this money voluntarily because he did not resist the illegal and unjust demands of defendants in error and allow them to attach his store. But what did the attaching of plaintiff's store mean to him? If he had other creditors it would have alarmed them; it would have closed his place of business; it would stop his trade; it would probably financially ruin him, and it would destroy his financial credit and reputation,—something more valuable to a business man than money itself. If he weighed and considered these matters he would have very reasonably concluded that from a financial standpoint it was not so bad for him to submit to the unjust demand of the defendants in error as to have his business ruined.

It is said by counsel for defendants in error that he should have refused their demand and allowed them to attach his store, then resisted the attachment in the courts, or sued them for a wrongful attachment of his property. But this is a two-edged sword, and the answer to this argument is that the defendants in error, having illegally determined to compel this plaintiff in error to pay them the debt which he did not owe, might, at least, have had consideration enough for plaintiff in error to, in the first instance, bring their attachment suit against the property to establish their unfounded claim. By doing so they would at least have left the plaintiff in error in the possession of his money with which to have resisted the collection of their unfounded claim. But this record discloses not only that defendants in error have in their possession money unlawfully demanded and unlawfully obtained from plaintiff in error, but the conference held in the business house of defendants in error, and the parties at that conference, are not without significance. Why should Mr. Thursie and Mr. Thursie's attorney be there? Was this a conspiracy between Thursie and the defendants in error to compel the plaintiff in error to pay Thursie's debt to them? We do not say that it was, but it looks very like it. This money which defendants in error have extorted from plaintiff in error may not have been obtained by duress of property, technically speaking, but it was obtain d from him involuntarily. It was obtained by a species of intimidation, fraud, and compulsion, and no court of equity will permit them to retain it. If this had been a debt which plaintiff in error owed them, then, had he paid it under the fear that if he did not his goods would have been attached, the case would be entirely different. But the controlling facts in this case are that it was not his debt, and that it was not voluntarily paid.

The decree of the district court is reversed and a judgment will be rendered in this court in favor of the plaintiff

in error against the defendants in error for the sum of $765.25, with seven per cent interest thereon from the 9th day of November, 1888, and costs of suit.

JUDGMENT ACCORDINGLY.

DAVID M. HAVERLY ET AL. V. MARGARET J. ELLIOTT.

FILED FEBRUARY 6, 1894. No. 5065.

1. **Unlawful Sale of Stock of Goods by Receiver: MEASURE OF DAMAGES: INSTRUCTIONS: CONVERSION.** Plaintiff owned and conducted a confectionery store and manufactured and sold ice cream and soda water. She also owned a stock of confections, and a miscellaneous lot of furniture and fixtures, used in her business, such as tables, chairs, shelving, counters, ice cream freezers, tableware, and soda fountain. One Haverly held a lien against this property for about $250, and brought a suit in equity to foreclose it, and obtained the appointment of a receiver, who took possession of plaintiff's property and place of business, and held them for some days and then sold the property to pay Haverly's lien. It having been finally decided that the order appointing the receiver ought not to have been granted, the plaintiff sued Haverly and his sureties on the bond given by them to obtain the appointment of such receiver. *Held*, That the instructions of the district court, that the plaintiff's measure of damages was (1) the value of her interest in the property sold by the receiver at the time he took possession of the same, and (2) the actual loss she sustained by the suspension of her business during the time she was prevented from carrying it on by reason of the possession held by the receiver of her property and place of business, were correct.

2. **A motion for a new trial** in the language of the statute is sufficient, but no error will be considered in this court which is not specifically assigned as such in the petition in error.

3. **Objections to the admission or exclusion of evidence,** to be available, should be made at the time such evidence is offered, and a motion made after the trial closes, to strike out certain evidence, should be overruled.

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

The facts are stated in the opinion.

Holmes & Macomber, for plaintiffs in error, contending that the instructions directing the jury to allow damages for injury to business are erroneous, and that the verdict is not supported by the evidence, cited: *Lawrence v. Hagerman*, 56 Ill., 77; *Campbell v. Chamberlain*, 10 Ia., 337; *Lowenstein v. Monroe*, 55 Ia., 82; *Watson v. Sutherland*, 5 Wall. [U. S.], 74; *North v. Peters*, 138 U. S., 271; *French v. Ramge*, 2 Neb., 257.

Henry D. Estabrook, contra, to sustain the instructions, cited: *Meyer v. Fagan*, 34 Neb., 184; *Bruce v. Coleman*, 1 Handy [O.], 515; *Munnerlyn v. Alexander*, 38 Tex., 125; *Hoge v. Norton*, 22 Kan., 374; *Wood v. State*, 66 Md., 61; *Muller v. Fern*, 35 Ia., 420; *Gear v. Shaw*, 1 Pin. [Wis.], 608; *Chicago City R. Co. v. Howison*, 86 Ill., 215; *Lange v. Wagner*, 52 Md., 310.

RAGAN, C.

In the month of August, 1885, Margaret J. Elliott was engaged, in the city of Omaha, in conducting a confectionery store and in the manufacture and sale of ice cream and soda water. She owned a soda fountain, some tables, chairs, shelving, ice cream freezers, tableware, and other fixtures and furniture necessary to the conduct of such business, and had on hand some confections, fruits, and cream. One Haverly on the 14th of this month had a lien against this property for about $250, and brought a suit in equity in the district court of Douglas county against Mrs. Elliott to foreclose this lien. He made application for, and had appointed, a receiver, who took possession of this property of Mrs. Elliott and also took possession of her place of

business, closed the same up, put the place and property in the care of an attendant, and so kept it for some eleven days. He then sold the property to raise the money due Haverly on his lien. By the decree rendered in the case brought by Haverly it was decided that the order appointing a receiver ought not to have been granted. Mrs. Elliott brought this suit for damages against Haverly and the sureties on his bond, given to obtain the appointment of said receiver. There was trial to a jury and a verdict in favor of Mrs. Elliott for $1,000. The district court overruled a motion for a new trial, rendered judgment on the verdict, and Haverly and his sureties bring the case here on error.

There are three points relied on by plaintiffs in error for a reversal of this judgment:

(1.) Improper admission of evidence on the trial in behalf of the defendant in error.

(2.) Erroneous instructions given by the court to the jury.

(3.) That the verdict is not sustained by sufficient evidence and is contrary to law.

The complaint made by counsel for plaintiffs in error as to the wrongful admission of evidence is thus stated by them in their brief: "Upon the trial to the jury the defendant in error introduced, over the objection of the plaintiffs in error, testimony tending to show the nature and volume of the business, the length of time the business was suspended, and the amount of profit that was made on certain sales. (See record, interrogatories 12, 14, 18, 250, 254, and 268.)" But the only error assigned in the petition in error on the subject of evidence is as follows: "The court erred in overruling the motion to exclude the testimony offered by the defendant Elliott at the trial, tending to establish the good-will of the business in issue." The questions which counsel say, in their brief, the court erred in permitting to be answered are not referred to in their peti-

tion in error, and for that reason we cannot review the ruling of the district court in permitting those questions to be answered. Once more we desire to call the attention of the bar of the state to the oft-repeated rulings of this court, that in order for a litigant to obtain a review of an alleged error made by the district court in the admission or rejection of testimony, such alleged error must be specifically alleged in the petition in error filed here. A motion for a new trial in the language of the statute is sufficient, but no error can be considered in this court which is not assigned as an error in the petition in error.

As to the error which it is alleged the court committed in overruling counsel's motion to exclude evidence offered by the defendant Elliott tending to establish the good-will of the business, there are several things to be said:

Repeated examinations and readings of all the evidence of the defendant in error fail to disclose that the Elliotts, or either of them, gave any testimony on behalf of the defendant in error as to the value of the good-will of Mrs. Elliott's business. It is true that they testified as to the length of time that the place of business was closed; as to the volume of business that was being done at the time the receiver took possession; of the amount of sales per day, and of the expense of conducting the business; but this evidence did not come within the motion made by the plaintiffs in error, the overruling of which is alleged here as error. "Good-will is the advantage or benefit which is acquired by an establishment beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices." (Anderson's Dictionary of Law.) Again, this motion of plaintiffs in error was made

after all the evidence on both sides of the case had been taken and both parties had rested. Now, if one of the Elliotts had testified on the trial as to the value of the good-will of Mrs. Elliott's business, counsel should have objected then and there to such testimony, if they thought it incompetent. It will not do to wait until the evidence is all in and the trial closed, and then, by a general motion, move to exclude testimony on a certain subject; and for that reason the court below did not err in overruling this motion. It remains also to be said that the court specifically instructed the jury that they could not allow Mrs. Elliott anything for the value of the good-will of her business. So that, in any view that we may take of this assignment, the plaintiffs in error have not been prejudiced by the ruling of the court.

Counsel for plaintiffs in error also insist that the trial court erred in giving certain instructions to the jury. The instructions complained of are as follows:

"4. The elements of damage for which plaintiff is entitled to recover consist (1) of the injury to her business during the time she was prevented from carrying the same on, by the possession taken by the sheriff and the receiver subsequently appointed; (2) of the loss which she sustained, if any, in the sale of said property by the receiver.

"5. You are instructed that you cannot, under the evidence, allow the plaintiff anything for the value of the good-will of the business, nor can you allow anything for profits, as such, which she might have made in the business, but you will consider the nature of the business, the amount which was being transacted at the time, from the circumstances shown by the evidence, and determine therefrom the damages which the evidence satisfies you plaintiff sustained during the time her business was interrupted and interfered with, from the time possession was taken by the sheriff up to the time the receiver gave up possession of the place where the business was carried on. Such

damages as plaintiff has shown by satisfactory testimony she has sustained by reason of such interruption of her business, she is entitled to recover for."

The substance of these instructions is that Mrs. Elliott was entitled to recover the value of her interest in the property sold by the receiver at the time he took possession of the same, and the actual loss she had sustained by the suspension of her business during the time she was prevented from carrying it on, by the possession taken and held by the receiver of her property and place of business. We are very clear that plaintiffs in error have no reason to complain of these instructions. The law of the state, and the bond given by Haverly and his sureties as well, provided that if it should be finally decided that this receiver was wrongfully appointed, then that Haverly would pay Mrs. Elliott all damages which she might sustain by reason of the appointing of such receiver. The word "all" does not mean some, nor a part, but means the whole; the entire damage; every item of injury; and if profits which Mrs. Elliott would have made but for the interruption of her business cannot be awarded, it is not because the law would not give them to her, but because no sufficiently certain rule of evidence has been discovered by which such damages can be measured. The judgment of the court that this receiver was wrongfully appointed put Mr. Haverly and the receiver in the position of trespassers. They not only closed up this woman's place of business, but they took her property and converted it. Certainly, then, she was entitled to recover the value of her interest in this property, and if she was prevented from carrying on the business in which she was engaged because this receiver took forcible possession of her place of business and excluded her therefrom, it would be a strange rule of law that would not give her as damages such compensation as would put her in as good position as she would have been in had her property and place of business not been taken from her.

In *Chicago City R. Co. v. Howison*, 86 Ill., 215, it is said: "Where one has an established business and has been prevented from carrying it on by another, damages are recoverable for loss of profits which he would have made had his business not been interfered with." (See also *Munnerlyn v. Alexander*, 38 Tex., 125; *Hoge v. Norton*, 22 Kan., 265; *Muller v. Fern*, 35 Ia., 420.) The last case cited was a suit on an injunction bond, and the court held that the plaintiffs were entitled to recover for the loss of time occasioned by the injunction, at the usual rate of wages, provided they used diligence to secure other employment during the time they were prevented from work by said injunction.

Plaintiffs in error also allege that the court erred in giving the seventh instruction to the jury. It is as follows: "If you find from the evidence that the plaintiff sustained no actual damage by reason of the interruption of her business, and that the value of the property did not exceed the liens, your verdict shall be for the plaintiff only for nominal damages. Nominal damages are given, not as compensation for any actual loss sustained, but merely for a violation of a legal right, and should not be in any substantial amount."

It is urged by counsel that this instruction placed the burden of proof upon the plaintiffs in error. We do not think it did. The court had already told the jury that the burden of proof was on Mrs. Elliott to show by a preponderance or greater weight of the testimony what damage she sustained by reason of the appointment of said receiver and his taking possession of her property.

The next assignment of error made by counsel for plaintiffs in error is that the verdict of the jury is contrary to the law and the evidence. We have not time to quote the evidence, but a careful study of it convinces us that it supports the verdict. Indeed, we think that the verdict might have been much larger and still have been sustained, but for the limitation fixed in the bond.

Finally, it is said by counsel for plaintiffs in error that the petition of Mrs. Elliott contains no sufficient allegation of damages. The allegation in the petition on the subject of damages, after setting forth the facts in the case, is: "And plaintiff avers that by reason of the wrongful appointment of said receiver as aforesaid, that all the property and effects, choses in action, of said business were dissipated and destroyed, and the goods, merchandise and fixtures wasted and consumed by the excessive costs, plaintiff and her children turned out of house and home, and the means of procuring a living, to the damage of plaintiff in the sum of $5,000." If counsel for plaintiffs in error desired a more specific or itemized statement of damages which Mrs. Elliott alleged she had sustained by reason of the wrongful appointment of the receiver, and his actions in the premises, they should have made application to the district court for an order requiring the petition to be made more specific and certain in that respect. There is no error in the record and the judgment of the district court is

AFFIRMED.

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

FIRST NATIONAL BANK OF OMAHA v. JOHN A. KRUG.

FILED FEBRUARY 6, 1894. No. 5276.

Review: SUFFICIENCY OF EVIDENCE. There being no question of law involved in the consideration of this case, the evidence examined, and *held*, to support the verdict.

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

Isaac E. Congdon and *Joseph R. Clarkson*, for plaintiff in error.

Morris & Beekman, contra.

RAGAN, C.

In April, 1889, George Schroeder & Co. were the proprietors and operators of a cold storage warehouse in Omaha, Nebraska. About the 21st day of June of that year John A. Krug stored with Schroeder & Co. four hundred cases of eggs, which Schroeder & Co., for a consideration agreed to be paid by Krug, agreed to keep in a room in said warehouse until the end of the storage season, December 31. The eggs were to be kept in a room the temperature of which should not exceed 38 degrees, and which room was to be kept free from moisture. On the 9th day of September of that year the First National Bank, by virtue of a chattel mortgage given it by Schroeder & Co., took possession of said warehouse and its contents and remained in the possession and operated the same until about the 25th of September. The eggs which Krug had stored in said warehouse were found, about the last of October, 1889, to be in a bad condition and practically unsalable in the Omaha market. About the middle of November following, Krug took the eggs out of the warehouse and shipped them to New York city and there disposed of them at a loss. He then brought this suit against the First National Bank for damages which he alleged he had sustained by reason of the bank's failure, while in possession of said warehouse, to keep the room in which his eggs were stored properly supplied with ice and at a suitable temperature for preserving his eggs, and in not keeping said room in which the eggs were stored free from moisture, by reason of which the eggs became wet, soiled, and mildewed, and injured. There was a trial to a jury and a verdict in favor of Krug, and the bank brings the case here for review.

The only error alleged is that the verdict is not supported by the evidence. We have carefully read and studied the entire record and have been highly interested in the evidence, but certainly cannot say that the verdict is unsupported by the evidence, or contrary thereto, or against the weight of the evidence. The case was admirably managed by counsel on both sides, and the question of fact in the case fairly and in all respects properly submitted to the jury. It would subserve no useful purpose to quote the testimony at length, or to quote any of it. It might be instructive as a lecture on how to properly store and preserve eggs, and afford useful information as to what is meant by "firsts" and "candling," but the docket of the court is too badly crowded for us to thus consume the time that should be devoted to the consideration of other cases. There is no question of law involved in the case, and we are all of the opinion that the judgment of the court below must be affirmed, and it is so ordered.

AFFIRMED.

IRVINE, C., having presided at the trial below, took no part in the consideration here.

HARRISON H. BLODGETT, APPELLANT, V. JAMES H. MCMURTRY ET AL., APPELLEES.

FILED FEBRUARY 6, 1894. No. 4677.

1. **Action Quia Timet.** In an action having for its object the declaration of a trust in land in favor of the plaintiff and the quieting of title in him it is incumbent upon the plaintiff to affirmatively establish an equitable title in himself, and if he fail to do so, the nature of defendant's title, or the existence of any title in defendant, is immaterial.

2. **Pleading.** Under the Code two or more defenses can be inter-

posed to the same cause of action, provided they are not inconsistent with one another; and they are not inconsistent unless the proof of one necessarily disproves the other.

3. **A plea of estoppel** may be joined with a general denial when the averments by way of estoppel are not inconsistent with such denial.

4. **The conclusion of the court in the former opinion in this case, 34 Neb., 782, as to the sufficiency of the evidence, reaffirmed.**

REHEARING of case reported in 34 Neb., 782.

H. H. Blodgett and *Thomas Ryan*, for appellant.

J. R. Webster, *Webster*, *Rose & Fisherdick*, *Harwood*, *Ames & Kelly*, and *Reese & Gilkeson*, *contra*.

IRVINE, C.

An opinion affirming the judgment of the district court was filed June 11, 1892, and is reported in 34 Neb., 782, where a sufficient statement of the issues will be found. The case is now presented upon a rehearing.

The argument of the appellant upon the rehearing is directed chiefly to questions of fact. Nearly all the legal propositions presented require for their application a determination of the facts contrary to the general finding of the district court in favor of the defendants. The evidence has been re-examined carefully with relation to the argument upon the rehearing. A detailed review of the proof would be of no service to the profession or the public and will not be made in this opinion. Upon the subject of the trust we are entirely satisfied with the statement made by MAXWELL, C. J., speaking for the court in the former opinion, that "the testimony fails to establish a trust in a clear, unequivocal manner; that McMurtry denies it *in toto*, both in his pleadings and testimony, and there are matters connected with the testimony introduced on behalf of the plaintiff that are not satisfactorily explained, and left the creation of the alleged trust in doubt. It is suf-

ficient to say that the judgment is not clearly against the weight of the evidence." Upon the issues in regard to the existence of a trust the finding of the district court in favor of the defendants must, therefore, be sustained.

It is argued by appellant that the title proved by McMurtry was not that alleged in his answer. Both by objection made upon the trial to the evidence, and in the argument, appellant claims this as an estoppel against McMurtry's asserting title contrary to the title alleged in his pleadings. The objections and argument really, however, raise a question of variance between the pleading and the proof. But it is not necessary to consider these questions, for the reason that McMurtry asked for no affirmative relief and it was incumbent upon the plaintiff to establish title in himself. This he failed to do, and the proof of McMurtry's title is immaterial. Upon the issues between the plaintiff and the defendants Boggs & Holmes, the failure of proof to establish a trust would be conclusive in favor of these defendants also, irrespective of their plea of estoppel, unless one argument now made by appellant is well founded. That argument is that the plea of estoppel is a confession of the cause of action, and if the estoppel fails, judgment follows in due course against the defendant. In support of this doctrine appellant cites Herman, Estoppel, p. 1415; *Whittemore v. Stephens*, 48 Mich., 574. Herman, at the place cited, is treating of a particular class of pleas by way of estoppel, and the only authority cited by him in support of the doctrine he lays down is the Michigan case cited by appellant. That case is not in point. That was a suit upon a promissory note under the common law practice. At first the general issue was pleaded, then there was a plea *puis darrein continuance* averring a composition under the bankrupt act. The pleadings, taken together, showed a clear departure, and the court was evidently very much perplexed as to how they should be treated. The plea *puis darrein continuance* was said to approach nearer a

plea in estoppel than anything else, but was held bad for that purpose. Then it was held that it amounted to an abandonment of the former plea, and therefore judgment followed. There is no doubt that this conclusion was correct. The plea was in effect one in confession and avoidance and entirely inconsistent with the general issue. The general proposition stated in the syllabus, that a plea of estoppel admits the cause of action, went entirely beyond the facts of the case and the language of the opinion. We have been unable to find any case holding that a plea of estoppel *in pais* cannot be joined with one amounting to a traverse, where the two are not in their natures inconsistent. Here they are not inconsistent. Boggs and Holmes in the first place deny all the allegations of the petition necessary for the establishment of a trust in the land, and then by way of further defense allege that at the time of their purchase of the land, and before the payment of the consideration, they applied to the plaintiff for information concerning the title, and were then told and assured by the plaintiff that E. Mary Gregory had full authority to sell and convey the land, and they received their conveyance in reliance upon such statement. There is no inconsistency between these two defenses. Under the Code it is firmly established that two defenses are inconsistent only when the proof of one necessarily disproves the other. Two statements are not inconsistent when both may be true, and in such case may be joined under the Code. (Maxwell, Code Pleading, 397.) Boggs and Holmes' plea of estoppel did not conflict with their general denial, and no trust was established as against them.

JUDGMENT AFFIRMED.

JOHN SMITH, APPELLEE, V. JEFFERSON H. FOXWORTHY, APPELLANT, ET AL.

FILED FEBRUARY 6, 1894. No. 5097.

1. *Vought v. Foxworthy*, 38 Neb., 790, reaffirmed.
2. **Judicial Sales:** APPRAISEMENT: CONFIRMATION. The provisions of the statute requiring a sheriff to deduct from the real value of the lands levied upon the amount of liens and incumbrances prior to that of the mortgage which the property is ordered sold to satisfy, being for the sole benefit of the plaintiffs, the defendant, owner of the equity, cannot be heard to object to the confirmation of the sale because such liens and incumbrances were not deducted in making the appraisement. *Craig v. Stevenson*, 15 Neb., 362, followed.
3. **Notice of Judicial Sales:** PUBLICATION. The statute providing for notice of sales of land upon execution or foreclosure does not require that the newspaper in which such notice is published shall have a general circulation in any particular city or portion of the county.
4. **Order of Sale:** NOTICE TO DEFENDANT. It is neither fraudulent nor unfair for the plaintiff in a foreclosure case to proceed with all legal dispatch after the time of redemption has expired, nor is he required to give the defendant notice of the issuance of the order of sale.
5. **Excessive Costs:** MOTION TO RETAX. If excessive costs have been taxed in the proceedings incident to the sale, the remedy is by a motion to retax costs, and not by objection to the confirmation of the sale.

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

J. H. Foxworthy, appellant, *pro se.*

Westermann, Low & Gould, contra.

IRVINE, C.

This is an appeal by the defendant Foxworthy from an order confirming a sale of his real estate made under a de-

cree of foreclosure formerly entered in the cause. The grounds upon which confirmation was resisted will be treated in their order:

1. That the appraisement was too low. In *Vought v. Foxworthy*, 38 Neb., 790, it was held that on motion to vacate a sale the value fixed by the appraisers can only be assailed for fraud; that objections upon the ground that the appraised value is too high or too low should be filed with a motion to vacate the appraisement before the sale occurs, and that to justify the setting aside of a sale on the ground that the property was appraised too low the actual value must so greatly exceed the appraised value as to raise a presumption of fraud in the making of the appraisement. We are entirely satisfied with the conclusion reached in that case. There is no allegation here that the appraisers were guilty of fraud, and there is a great deal of evidence to confirm the valuation placed by them upon the property.

2. That there were no certificates of liens and incumbrances obtained, procured, or filed, and that such certificates had not been waived. In *Craig v. Stevenson*, 15 Neb., 362, it was held that the provisions for such certificates and the deduction in making the appraisement from the real value of the property of the amount of prior incumbrances were for the sole benefit of the plaintiff and might be waived by him. The rule laid down in that case is undoubtedly correct. The plaintiff did not object to the failure to procure certificates, but asked for confirmation notwithstanding that fact. This constituted a waiver upon his part. The defendant cannot complain. The "set up" price, if there were incumbrances, being increased by the failure to certify them, the defendant thereby received a benefit rather than suffered a disadvantage.

3. That there was no such notice of sale as is required by law. In support of this objection the defendant contends that the notice was not published in such a newspaper as the law requires. It appears that it was published

in the *Lincoln Weekly News*. The affidavit proving publication contains the averment that the paper was of general circulation in Lancaster county. There is another affidavit in the bill of exceptions that the paper has a circulation in Lancaster county of between nine hundred and one thousand copies per week. This is only met by proof in general terms by affidavit of defendant that the paper is not of general circulation in the city of Lincoln as he believes. Section 497 of the Code requires notice to be published "in some newspaper printed in the county, or in case no newspaper be printed in the county, in some newspaper in general circulation therein." It is not required that the newspaper shall have a general circulation in any particular city or portion of the county. The publication of this notice satisfied the requirements of the statutes, and if those requirements do not insure a proper publicity, the remedy lies with the legislature and not with the courts.

4. Fraud in the proceedings. The allegations in support of this objection are as follows:

(*a.*) That the proceedings were hurried through while the defendant was perfecting a loan with which to pay off the debt. Decrees always provide a reasonable period within which to redeem after decree, and in addition to that period the defendant in this state is entitled to an extended stay of execution without a bond. If he fails to redeem within the time thus given him he cannot complain because the plaintiff proceeds with all the dispatch the law permits.

(*b.*) No notice was served on the defendant of the issuance of the order of sale until within two days of the sale, and the defendant did not know of its issuance. The statute does not require that the defendant should be notified of the issuance of an order of sale. It is a matter of record of which he must take notice.

(*c.*) The third, fourth, and fifth allegations of fraud relate to the publication of the notice and the failure to procure certificates. These subjects have already been treated.

(*d.*) The costs of publication were $6, when they should not have been over $2.75. The remedy for this would be by motion to retax the costs, and not to set aside the sale.

There is no fraud alleged and the proof does not even support such allegations as were made.

The judgment of the district court was right and is

AFFIRMED.

H. M. ROBB v. CLARA HEWITT.

FILED FEBRUARY 6, 1894. No. 5104.

1. **Bastardy**: COMPLAINT. The complaint in a bastardy proceeding, where it charges the date of the birth of the child, need not set out the time or place when or where it was begotten.
2. ———: EVIDENCE. An offer made by the defendant to the father of the prosecutrix to contribute money for the purpose of "sending the prosecutrix away" is not an offer to compromise, and is admissible in evidence.
3. ———: ———. In a bastardy proceeding only a preponderance of the evidence is necessary to a conviction, and a verdict may be sustained upon the uncorroborated testimony of the prosecutrix alone.
4. ———: ———. Certain evidence in rebuttal of evidence of good reputation examined, and its admission *held* not to be error.

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

John C. Watson, for plaintiff in error.

M. L. Hayward, contra.

IRVINE, C.

The defendant in error charged plaintiff in error with bastardy, and upon trial he was found guilty.

1. The complaint, omitting the formal parts, is as follows: "That she is an unmarried woman, resident of Otoe county, in the state of Nebraska; that on the 16th day of October, 1889, she was delivered of a bastard female child, and that Hamilton Montgomery Robb is the father of said child." The defendant moved the court to require the prosecutrix to make the complaint more certain by averring the time and place where the child was begotten. This motion was overruled. The complaint is in a form which has in its support at least the sanction of custom, but its sufficiency has never been directly determined by this court. Were it not for the provisions of chapter 37, section 1, Compiled Statutes, requiring in such cases an examination under oath of the prosecutrix, before the justice of the peace to whom complaint is made, there would be much force in the argument that the defendant should be informed by the complaint of the time and place of the alleged intercourse. But the section cited provides for such an examination, permits the accused to cross-examine, and requires that the examination shall be reduced to writing and certified to the trial court, where it "shall be given in evidence." These provisions furnish the accused with all requisite information, and we do not think the complaint need be more specific than the statute in terms requires.

2. The father of the prosecutrix was permitted to testify that at some time, not very definitely fixed, but apparently not long before the birth of the child, he told the defendant of the girl's condition and asked him what he was going to do about it. Defendant denied the implied charge. In the course of the conversation the father remarked that if he had a little money he would send the girl away. Thereupon defendant asked the father to remain a short time, went away himself and soon returned, saying, "What do you mean,—that you would send her away if you had a little money?" The father answered, "I meant just what I said." Defendant said, "Do you mean if I would pay

half that you would pay half?" This testimony was objected to, and its admission is assigned as error, counsel invoking the rule which excludes, as privileged, offers to compromise. The rule referred to applies to this class of cases. (*Olson v. Peterson*, 33 Neb., 358.) It is a salutary rule and should be rigidly enforced; but this evidence did not fall within it. There was no offer to compromise, but merely a suggestion that defendant would share the expense of sending the girl away. The rule arises from the policy of the law which favors amicable settlements, but does not extend to offers made, which, if accepted, would merely baffle prosecutions or conceal evidence, without effecting a legal compromise.

3. The defendant introduced evidence of good reputation. Plaintiff in rebuttal undertook to meet this with evidence of bad reputation. Several errors are assigned in the admission of such evidence.

Mr. Ames testified that before this case arose he had never heard anything to defendant's discredit; that since this case arose he had "heard some bad talk that I didn't wish to hear. Q. Anything aside from this Hewitt girl? A. Why, yes, sir. In a manner the same." That prior to this trouble he had never heard anything, and that he presumed what he had heard arose from this trouble. He was not permitted to state what he heard. While the examination was somewhat irregular we cannot see how the defendant was prejudiced.

Mr. Brown was asked: "Have you heard anything of his reputation or that affected his reputation prior to this [the Hewitt case]? A. Yes, sir. Q. State what it was. A. Mr. Robb made a slighting remark about a very estimable young lady." The answer was not responsive to the question, and no motion was made to strike it out. The court refused to permit witness to state anything further. Here there was no error, as the court sustained objections to such testimony as soon as they were made.

Mr. Hargus, when asked the general question as to the reputation, said he "had heard some little bad talk about defendant." This testimony was fairly responsive to the inquiry as to the reputation, and was properly received.

4. The court was asked to charge the jury that a verdict of guilty could not be based on the uncorroborated testimony of the prosecutrix. The law is otherwise, and the court correctly refused to charge as requested. (*Olson v. Peterson, supra.*)

Another instruction requested was that proof beyond a reasonable doubt was required. This was correctly refused. A preponderance of the evidence is sufficient. (*Altschuler v. Algaza,* 16 Neb., 631; *Olson v. Peterson, supra.*)

There was a general instruction requested to find for the defendant. An examination of the evidence discloses sufficient to sustain the verdict of guilty, and the court did right in refusing that instruction.

The other instructions requested are open only to the objection of calling too specifically to the attention of the jury certain parts of the testimony, but the principles of law involved were all fairly given to the jury in the court's instructions.

We find no error in the record, and the judgment is

AFFIRMED.

M. E. FREE, APPELLEE, V. STUART & SCHMENSKY, IMPLEADED WITH G. W. SAUTTER ET AL., APPELLANTS.

FILED FEBRUARY 7, 1894. No. 5545.

1. **Landlord and Tenant:** FIXTURES. The right of a tenant to recover trade fixtures must ordinarily be exercised while in possession under his lease; and if he fails to do so it will be lost, unless by some agreement with the landlord the right of removal is preserved.

2. ———: ———: CHATTEL MORTGAGES. Where a tenant gives a chattel mortgage upon a building erected by him upon leased premises, the mortgagee cannot remove the building after the tenant's right of removal expired.

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

The facts are stated in the opinion.

Charles Offutt, for appellants:

The property in dispute constitutes a "fixture" in the proper legal sense of that term. The tenant has never possessed the right to remove it, nor the power to delegate that right. (*Teaff v. Hewitt*, 1 O. St., 511; *Freeman v. Lynch*, 8 Neb., 199; *Hutchins v. Masterson*, 46 Tex., 551; *Elwes v. Maw*, 3 East [Eng.], 38; *Buckland v. Butterfield*, 2 Brod. & Bing. [Eng.], 54; *Philipson v. Mullanphy*, 1 Mo., 620; *Long v. Kee*, 8 So. Rep. [La.], 610; *Merritt v. Judd*, 14 Cal., 60; *Roseville Alta Mining Co. v. Iowa Gulch Mining Co.*, 24 Pac. Rep. [Col.], 920; *Collamore v. Gillis*, 22 N. E. Rep. [Mass.], 46; *Harmon v. Kline*, 12 S. W. Rep. [Ark.], 496.)

Whatever right to remove the tenant may once have possessed could only have been exercised during his tenancy. (*Fitzherbert v. Shaw*, 1 H. Bl. [Eng.], 258; *Lyde v. Russell*, 1 B. & Ad. [Eng.], 394; *Lee v. Risdon*, 7 Taunt. [Eng.], 191; *Thomas v. Crout*, 5 Bush [Ky.], 37; *White v. Arndt*, 1 Whart. [Pa.], 91; *Pemberton v. King*, 2 Dev. [N. Car.], 376; *Gaffield v. Hapgood*, 17 Pick. [Mass.], 192; *Stockwell v. Marks*, 17 Me., 455; *Brooks v. Galster*, 51 Barb. [N. Y.], 196; *Beers v. St. John*, 16 Conn., 322; *Lawrence v. Kemp*, 1 Duer [N. Y.], 363; *Shepard v. Spaulding*, 4 Met. [Mass.], 416; *Preston v. Briggs*, 16 Vt., 124; *Haflick v. Stober*, 11 O. St., 482; *Moore v. Smith*, 24 Ill., 512; *Thropp's Appeal*, 70 Pa. St., 396; *Dingley v. Buffum*, 57 Me., 381; *Whipley v. Dewey*, 8 Cal., 36; *Pugh v. Arton*,

8 L. R. Eq. [Eng.], 626; *Davis v. Eyton*, 7 Bing. [Eng.], 154; *Wceton v. Woodcock*, 7 M. & W. [Eng.], 14; *Minshall v. Lloyd*, 2 M. & W. [Eng.], 450; *Mackintosh v. Trotter*, 3 M. & W. [Eng.], 184; *Josslyn v. McCabe*, 1 N. W. Rep. [Wis.], 134; *Erickson v. Jones*, 35 N. W. Rep. [Minn.], 267; *Carlin v. Ritter*, 13 Atl. Rep. [Md.], 370; *Loughran v. Ross*, 45 N. Y., 792.)

The tenant has no right to remove the buildings and his mortgagee cannot do so. (*Friedlander v. Ryder*, 30 Neb., 783; *Smith v. Park*, 31 Minn., 70; *Talbot v. Whipple*, 14 Allen [Mass.], 177; *Fitzgerald v. Anderson*, 51 N. W. Rep. [Wis.], 554.)

Cavanagh, Thomas & McGilton, contra:

The building was designed for the purpose of trade and can be removed without permanent injury to the realty. The mortgagee of the tenant had, therefore, a perfect and clear right to remove the property covered by the mortgage. (*Capen v. Peckham*, 35 Conn., 95; *Lamphere v. Lowe*, 3 Neb., 136; *Van Ness v. Pacard*, 2 Pet. [U. S.], 143; *Lawton v. Lawton*, 3 Atk. [Eng.], 13; *Penton v. Robart*, 2 East [Eng.], 88; *Poole's Case*, 1 Salk. [Eng.], 368; *Whiting v. Brastow*, 4 Pick. [Mass.], 310; *Smith v. Benson*, 1 Hill [N. Y.], 176; *Ombony v. Jones*, 19 N. Y., 239.)

Where a tenant by the year holds over his term he becomes a tenant for another year. (*Critchfield v. Remaley*, 21 Neb., 178; *Crommelin v. Thiess*, 70 Am. Dec. [Ala.], 501.)

NORVAL, C. J.

This action was brought in the court below by appellee M. E. Free to foreclose a chattel mortgage given by the defendants Stuart & Schmensky on two greenhouses erected by them on leased real estate owned by appellants George W. Sautter and Frank Sautter. The cause was

tried by the district court upon a written agreed statement of facts, signed by the attorneys of the respective parties, of which the following is a copy:

"1. In the spring of 1888 the said George W. and Frank Sautter were the owners in fee of a certain dwelling house, with outbuildings and about ten acres of land surrounding, in the outskirts of the city of Omaha, and within the limits of said city. That at said time said Sautter brothers rented the house and outbuildings only from April 1, 1888, to March 1, 1889, to the defendant C. Schmensky for $100. The rent for this term was paid.

"2. At the end of this term said George W. and Frank Sautter rented the house, barn, orchard, vineyard, and all the land for one year for $200, the lease expiring March 1, 1890, and of this rent the tenant Schmensky paid $93, leaving a balance still unpaid of $107.

"3. At the end of this term, on March 3, 1890, said George W. and Frank Sautter rented the same premises for another year to said Schmensky for $225, the lease expiring March 1, 1891. Of this rent there was paid $13.40.

"4. At the end of the last term the tenant, Schmensky, held over until May 12, 1891, at which time the tenant quit the possession and occupation of the premises, leaving a total of rent unpaid amounting to the sum of $341.60, no part of which has yet been paid.

"5. That in the spring of 1890, said Schmensky requested permission of said George W. and Frank Sautter, owners of said premises, to erect thereon two buildings and a boiler house, and that the same were erected during the spring and early summer of 1890. They were erected by building the same out of planks and posts, with the use of glass and sash, as is usually the case in greenhouses, the said boards or planks being fastened to a number of upright posts that were inserted and fastened into the ground for a distance of about two feet below the surface. The framework was built around said posts.

"6. That there was also constructed in said greenhouses a boiler for the purpose of heating the same, by building a brick foundation down into the ground, and building said brick up over and around said boiler, leaving it stationary, and pipes were attached to and ran from said boiler through the various portions of the house so constructed, and fastened to the said greenhouse in order thereby to conduct the heated water and for the purpose of keeping the temperature in a condition required for greenhouses. The two buildings used as greenhouses were each seventy-five feet long and ten feet wide, and were covered with glass and sash. They were constructed by nailing strips running from post to post, and onto those strips the planks for the sides and ends were nailed securely, and said houses and boiler are still remaining on said premises as when originally constructed.

"7. On January 14, 1891, said Schmensky and one Stuart, who were partners as Stuart & Schmensky, executed to plaintiff a chattel mortgage, a true copy of which is attached and made a part of plaintiff's petition herein, and the same was filed in the office of the county clerk of Douglas county, Nebraska, on said 14th day of January, 1891, at the hour of 3:45 P. M., and duly indexed in said office as required by law in case of chattel mortgages, said chattel mortgage being to secure the amount of money stated therein, and the amount now due thereon and unpaid by said mortgagors to the plaintiff is $182.40.

"8. Said property was leased for the purpose of using the residence as a dwelling house, and the land for the purpose of gardening, raising flowers and shrubs, it having been used for this purpose for several years last past. At the time said houses were constructed there was nothing said by the tenant about removing said greenhouses, boiler, and boiler house at the expiration of the lease, or at any other time.

"9. The plaintiff claims a lien on said houses and boiler

by virtue of the foregoing chattel mortgage, and the defendants George W. and Frank Sautter claim them as fixtures to, and a part of, said land."

The trial court found that Stuart & Schmensky executed and delivered to plaintiff the chattel mortgage, described in the petition, to secure an indebtedness of $163.84; that the buildings described in said mortgage were erected by the mortgagors upon leased premises and were such fixtures as the tenants had a right to remove; and that said houses are subject to the said chattel mortgage. From a decree of foreclosure and sale, the Sautters appeal to this court.

The point in dispute is, which party is entitled to the buildings covered by the mortgage? The mortgagee claims them by virtue of his mortgage, while the appellants insist that, as the improvements were erected by tenants on leased premises, they are a part of the realty, and neither the tenants nor the mortgagee had a right to remove them, at least, after the expiration of the tenancy.

The larger portion of the brief of counsel on either side is devoted to the discussion of the law of fixtures, and what are, and what are not, movable fixtures. The decisions on the subject are at variance and irreconcilable. We have not the time at our disposal now to review the authorities cited in the briefs, or to discuss the question; nor is it essential that we should do so. For the purposes of this case we will assume that the buildings in controversy were trade fixtures, and were erected under such circumstances as to entitle the tenants to remove them, had they exercised that right in time. The authorities are quite uniform to the effect that, in the absence of an agreement or understanding to the contrary, a tenant cannot re-enter and remove his fixtures and improvements after the expiration of his tenancy. By surrendering possession he forfeits his rights to them. The rule on the subject is well stated by Mr. Taylor in his valuable work on Landlord and Tenant thus: "The decisions also agree, that whatever fixtures the ten-

ant has a right to remove must be removed before his term expires, or at least before he quits possession; for if the tenant leaves the premises without removing them, and the landlord takes possession, they become the property of the landlord. The tenant's right to remove is rather considered a privilege allowed him than an absolute right to the things themselves. If he does not exercise the privilege before his interest expires, he cannot do it afterwards, because the right to possess the land and the fixtures as a part of the realty vests immediately in the landlord; and although the landlord has no right to complain if the land be restored to him in the same plight it was before he made the lease, yet if the land is suffered to return to him with additions and improvements, even by forfeiture of notice to quit, he has a right to consider them as part of his property." (Taylor, Landlord and Tenant [8th ed.], sec. 551.) And in the case of *Friedlander v. Ryder*, 30 Neb., 787, in considering the authority of a tenant to remove his fixtures, we said: "Under the lease, as established by the evidence, the tenant had a right, before the surrender of possession, to remove any improvements owned by him which are embraced under the head of tenant's fixtures, but the tenant had no authority to remove such improvements after the termination of the tenancy; in other words, the tenant could not re-enter to remove his fixtures after the surrender of possession to the landlord."

It appears from the stipulation that the lease, under which the tenants occupied the premises, expired on March 1, 1891, and that on the 12th day of May following they quit possession without removing the buildings which they had erected by permission of the owner of the realty. The record fails to disclose that there was any agreement or understanding between the parties about the removal of the improvements at the expiration of the lease, or any other time. In view of these facts there could be no doubt that the tenants have forfeited their right of removal.

Counsel for appellee contend that the tenancy had not expired when the tenants surrendered possession; that they were tenants from year to year, and, although the lease terminated March 1, 1891, they having occupied the premises for several months after that time, the lease was thereby continued in force for another year, or until March, 1892. It is a familiar doctrine that where, in case of a tenancy from year to year, the tenant continues to occupy the property after the expiration of his lease by the consent of the landlord, it will be presumed, in the absence of an express agreement to the contrary, that the lease is extended for another year; but we are unable to see how this rule can aid the appellee, since the tenants voluntarily abandoned possession; and it does not appear that either they or the landlord, after such abandonment, regarded the lease in force. The doctrine that the right of a tenant to remove his improvements must be exercised before the expiration of his lease, applies alike to cases where the tenancy terminates by lapse of time, and to cases where it is determined by his own act. He may forfeit his right to remove his fixtures by voluntarily surrendering the possession to the landlord without reservation. It is quite probable, however, that such surrender would not affect the previously acquired rights of the tenant's vendees or mortgagees. They should have the right to enter and remove the fixtures at any time before the lease would, by its terms, have expired. In the case at bar no attempt has been made to remove the buildings at any time. They were on the premises when the decree of foreclosure was entered, which was long after March 1, 1892, and it is not claimed that the tenancy continued after that date. Upon principle, as well as authority, we are constrained to hold that the mortgagees forfeited their right to the buildings by their failure to exercise it during the tenancy.

It is finally contended that since the tenancy had not expired when the mortgage was given, and inasmuch as the

tenants could have removed the mortgaged fixtures, the appellee's rights vested and became fixed, and were not affected by the subsequent termination of the lease. The mortgage conferred the same rights upon the mortgagee to remove the fixtures that the mortgagors had, and no greater. Appellee was therefore required to exercise the privilege of removal during the tenancy. In principle the case at bar is not distinguishable from *Friedlander v. Ryder, supra.* In that case a creditor caused an execution to be levied upon a tenant's fixtures. It was held that the creditor thereby acquired no greater right to re-enter and remove them than the tenant had. A case precisely in point is *Smith v. Park,* 31 Minn., 70. There a tenant during his term had executed a chattel mortgage upon a frame building upon leased premises. The landlord claimed the building and the mortgagee brought replevin after the lease expired. The court held that the mortgagee's right to remove the building was lost. The court in the opinion say: "The plaintiff stands in no better position than did Burgess [the tenant]. His right to the property, as against the landlord, is only such as the tenant under whom he claimed had. It was for him to see to it that the building was removed within the time which, by the law and terms of the contract, was given to the tenant for such a purpose."

Our conclusion is that the trial court erred in decreeing the foreclosure of the mortgage. The decree is, therefore, reversed and the action

DISMISSED.

STILLMAN S. FLAGG, APPELLANT, V. EVERETT S. FLAGG ET AL., APPELLEES.

FILED FEBRUARY 7, 1894. No. 5508.

1. **Supplemental Answer:** NOTICE. A district court, on motion, may permit a defendant to file a supplemental answer, setting up facts material to his defense which have occurred subsequent to the filing of the original answer. Notice of the motion should be served on the adverse party; but the failure to give notice is not reversible error, where the application is presented in open court in the presence of the other party or his attorney of record, and the order is granted without any objection being urged that notice was not served.
2. **Judgment:** EXPIRATION OF LIEN: EFFECT OF EXECUTION. A judgment becomes dormant and ceases to be a lien on the real estate of the judgment debtor in five years from the date thereof, unless an execution is sued out on such judgment within said period. In case an execution is issued and returned in such time, it will continue the lien of the judgment for five years from the date of such execution.
3. ———: ———. The commencement of an action by a judgment creditor within five years from the date of his judgment to subject real estate of the defendant to the payment of the judgment, and the pendency of such action after such period, will not have the effect to prevent the judgment from becoming dormant or operate to prolong the lien of the judgment.
4. **Dormant Judgments:** LIENS. When a judgment becomes dormant, its lien is lost as against a mortgage executed by the judgment debtor and recorded during the continuance of the judgment lien.

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

Howard B. Smith, for appellant.

Bradley & De Lamatre and *F. A. Brogan, contra.*

NORVAL, C. J.

The facts in the case, so far as necessary to be stated for a proper understanding of the questions presented for de-

cision, are as follows: On the 10th day of September, 1885, the defendants Everett S. Flagg and Ada E. Flagg executed and delivered to plaintiff a mortgage on certain real estate situate in the county of Douglas, to secure the payment of two promissory notes of said Everett S. Flagg for $900 and $1,100, respectively, bearing six per cent interest from date, which mortgage was duly recorded on September 11, 1885. On September 26, 1885, Horst & Riddell recovered a judgment against E. S. Flagg, before a justice of the peace of Douglas county, for the sum of $133.31 debt, and costs of suit, a transcript of which judgment was filed in the district court of said county on October 13, 1885. On the 17th day of November, 1885, W. J. Welschans & Co. obtained a judgment in the county court against Everett S. Flagg for $215.46 and costs, and on the next day a transcript of said judgment was filed in the district court of said Douglas county. On November 16, 1885, H. Westerman & Co. recovered a judgment in the county court against E. S. Flagg in the sum of $109.36 and costs, and three days later a transcript of said judgment was filed in the office of the clerk of the district court of Douglas county. On December 12, 1885, D. M. Steele & Co. recovered a judgment in the district court of Douglas county against Everett S. Flagg for the sum of $441.46 and costs; and on the 13th day of December, 1885, Ernest Peycke *et al.* recovered a judgment in the same court against said Flagg for $355.05 and costs. All of said judgments have been duly assigned to the plaintiff and appellant. No execution has been issued on either of said judgments, nor have the judgments been revived. On the 18th day of April, 1888, the defendants Everett S. Flagg and Ada E. Flagg executed and delivered to the defendant C. W. Conkling a mortgage upon the real estate described in plaintiff's mortgage, to secure the payment of three promissory notes executed by said Everett S. Flagg, aggregating $3,350, all drawing interest at the rate of ten per cent per annum from

date, which mortgage deed was duly filed and recorded the next day. On the 8th day of February, 1890, plaintiff brought this action in the court below, setting up in his petition his mortgage and the aforesaid described judgments, praying a foreclosure of the mortgage, and that the proceeds arising from the sale of the premises, after the payment of the costs of suit, be applied in payment of the amount found due upon the mortgage, and the surplus, if any, in satisfaction of the judgments. On the 22d day of March, 1890, the appellee Conkling filed an answer and cross-petition, setting up his mortgage and praying a foreclosure thereof, and that the lien of his mortgage be decreed to be junior only to the lien created by plaintiff's mortgage. On the 26th day of May, 1891, by leave of court, Conkling filed a supplemental answer, alleging therein that since the filing of his original answer no execution had been issued on either of the judgments set out in plaintiff's petition, and that said judgments were barred and did not constitute a lien upon the lands in controversy, with prayer that Conkling's mortgage be decreed a lien paramount to that of said judgments. Upon the trial in the court below a decree of foreclosure of both mortgages was rendered, establishing plaintiff's mortgage as a first lien, Conkling's mortgage a second lien, and the judgments a third lien. From this decree plaintiff appeals, claiming that the judgments are liens superior to the lien of the mortgage of appellee Conkling.

The first question submitted for our consideration is, did the trial court err in permitting defendant Conkling to file a supplemental answer? Section 149 of the Code of Civil Procedure provides: "Either party may be allowed, on notice, and on such terms as to costs as the court may prescribe, to file a supplemental petition, answer, or reply, alleging facts material to the case, occurring after the former petition, answer, or reply." It is not denied that under the foregoing provision a district court has the power to

permit either party to a cause to file a supplemental pleading, inserting therein material matters which have arisen subsequent to the filing of the original pleading; but it is insisted by counsel for the plaintiff that notice of an application for leave to file such a pleading is a condition precedent; and further, that it was an abuse of discretion in the court allowing a supplemental answer to be filed in this case. The statute seems to contemplate that notice of the filing of a supplemental pleading shall be given. Undoubtedly such is the better practice. In the case under consideration it does not appear whether or not any notice of the application was served upon the plaintiff, but the record does disclose that plaintiff was present in court when the order complained of was made, and that he excepted to the order. It not appearing that any objection was at the time urged on the ground that no notice of the motion for leave of the court to file had been served, we must regard that written notice, if not given, was waived. Plaintiff had actual knowledge of the object of the motion and appeared and resisted the granting thereof. He could not have done more had written notice been served. There was no abuse of discretion in granting the order in question. The matter set up in the supplemental pleading occurred after the original answer was filed, and was material to be considered in determining the case. When the first answer was filed the judgments described in plaintiff's petition were not barred, but having since become dormant it was entirely proper to bring the same to the attention of the court by supplemental pleading. Defendant was not guilty of laches in not filing his supplemental pleading sooner, since the statute of limitations did not run against the last judgment until in December, 1890, and the supplemental answer was filed in May following, or nearly a year before the cause was tried in the court below.

The remaining question in the case is whether appellees' mortgage is a second lien upon the premises and superior

to plaintiff's judgments? At the time the action was brought the judgments described in the petition were valid and subsisting liens upon the real estate in controversy, superior to the lien of the Conkling mortgage, and retained their priority unless the liens of the judgments were lost by reason of the judgments becoming dormant during the pendency of the action. Section 482 of the Code provides: "If execution shall not be sued out within five years from the date of any judgment that now is or may hereafter be rendered in any court of record in this state, or if five years shall have intervened between the date of the last execution issued on such judgment and the time of suing out the writ of execution, such judgment shall become dormant and shall cease to operate as a lien on the estate of the judgment debtor." In construing a statute where the meaning is not clear, the rule is to give it such interpretation as will comport with what is supposed to have been the purpose or intention of the legislature; in other words, where the intention is manifest, it will control, rather than the language employed by the law-givers. In the section quoted, however, there is no ambiguity; no words employed which operate to defeat the clear and manifest intention of the enacting power. In fact, there is no room for construction. We must, therefore, apply the section according to its literal meaning. It is obvious that in case a judgment creditor fails for more than five years after the date of his judgment to sue out an execution, the judgment becomes dormant and ceases to be a lien upon the real estate of the defendant. We see no escaping the conclusion that where a judgment becomes dormant its lien is thereby lost as against a mortgage made by the debtor during the life of the judgment. (Black, Judgments, sec. 458; *Pennsylvania Agricultural & Manufacturing Bank v. Crevor*, 2 Rawle [Pa.], 224; *Ruth's Appeal*, 54 Pa. St., 173; *Duffy v. Houtz*, 105 Pa. St., 96; *Titman v. Rhyne*, 89 N. Car., 64; *McCarty v. Ball*, 82 Va., 872; *Halsey v. Van Vliet*, 27

Kan., 474; *Newell v. Dart*, 28 Minn., 248; *Bish v. Burns*, 7 Ohio Cir. Ct. Rep., 285; *Miner v. Wallace*, 10 O., 403; *Tracy v. Tracy*, 5 McLean [U. S.], 456.)

Tracy v. Tracy was where a judgment debtor executed a mortgage on certain real estate during the continuance of the lien of the judgment. Subsequently the judgment became dormant, which was revived after the mortgage was given. It was held that the revival of the judgment did not affect prior liens, and that the mortgage lien was superior to that of the judgment.

In *Miner v. Wallace, supra*, the court in the syllabus say: "Where real estate is subject to two liens, the elder a judgment and the younger a mortgage, if the judgment lies dormant five years its priority is lost and the mortgage takes the estate."

Counsel for plaintiff does not question that ordinarily a judgment, after the expiration of five years, ceases to be a lien upon the lands of the defendant, unless execution has been issued thereon within that period; but he insists that the rule does not apply here, inasmuch as plaintiff's judgments became dormant during the pendency of this action, and *Dempsey v. Bush*, 18 O. St., 376, is relied on as sustaining the contention. An examination of the decision will disclose that it does not cover the question here presented. The report of the case shows that Salmon W. Bush was the owner of eighty-eight acres of land in Ross county. In November, 1859, the executors of Will Ross obtained a judgment against Bush in the court of common pleas of Ross county for $3,421.49, which became a lien upon said real estate. On February 5, 1861, an execution was sued out on said judgment and levied on said land, and then returned without sale. In April, 1860, Bush executed to Richard Dempsey a mortgage upon the said real estate to secure the payment of $4,000, all the parties to the judgment agreeing that the mortgage should stand as a lien prior to the judgment. Subsequently, on February

18, 1861, Bush executed to James Dean and Aaron Stookey a further mortgage on the eighty-eight acres, which was duly recorded. On September 20, 1865, Dempsey brought suit to foreclose his mortgage and to ascertain and marshal the liens upon the mortgaged premises, all subsequent lienholders being made defendants. The equitable owners of the judgment filed an answer and cross-petition in the action, admitting the priority of Dempsey's mortgage and setting up the Ross judgment. On November 22, 1865, a decree was entered, finding the amount due on plaintiff's mortgage, and the land was ordered sold by the sheriff. Out of the proceeds of the sale his mortgage was to be first paid and the residue of the proceeds to be brought into court to be distributed among the subsequent lienholders, according to priority. An order of sale was issued in January, 1866, and the land sold by the sheriff on February 24, 1866. Dempsey's claim was paid off and the residue of the proceeds was brought into court for distribution among the other lienors. After the order of sale was issued, but before the sale, James Dean, by counsel, filed an answer setting up his mortgage and alleging that the Ross judgment had become dormant, no execution having been issued thereon since February 5, 1861, and no revivor having been had. The supreme court of Ohio held that the owners of the judgment did not lose their right to share in the distribution of the money arising from the sale of the land by reason of the judgment becoming dormant during the pendency of the suit. It will be noticed that the judgment did not become dormant in the case alluded to until after the decree was rendered and the order of sale had been issued. In this important particular that case differs from the one at bar. Here the judgment became dormant long before the decree of foreclosure was rendered. The decree in the Ohio case fixed the status of the parties, and it was quite immaterial that the judgment afterwards became dormant. The fact that the judg-

ment ceased to be a lien after the decree was rendered could not affect the right of the judgment creditor to participate in the distribution of the proceeds of the sale made in pursuance of that decree. The property was ordered sold for the purpose of paying the judgment and other liens on the land.

Day, J., in speaking of the case of *Dempsey v. Bush*, in his opinion in *Bish v. Burns*, 7 Ohio Cir. Ct. Rep., 289, says: "We think the fair inference to be drawn from the case is that the supreme court is of the opinion that the pendency of the action and the actual disposing of the property, by sale, on the court's order, preserved the judgment from dormancy, and maintained its lien and right to be paid from the proceeds of the sale of the property so appropriated for that purpose."

Judgments are liens only by force of statute. A judgment of the district court in this state is a lien upon the real estate of the debtor within the county, from the first day of the term of court at which it was entered; and such lien remains in force for five years from the date of the judgment. In order to continue the lien beyond this period the statute, in express terms, requires that an execution must be issued within the life of the judgment. The issuance of an execution within five years prolongs the judgment and preserves the lien of the judgment for five years longer. The bringing of this action was not equivalent to, nor did it take the place of, the issuing of executions upon the judgments. The pendency of this suit did not prevent plaintiff from suing out executions. (See *Bish v. Burns, supra.*)

Newell v. Dart, 28 Minn., 248, is analogous to the case at bar. That was an action in the nature of a creditor's bill to subject property of the judgment debtor to the payment of a judgment recovered against him. By the statute of Minnesota, a judgment recovered in that state survives, and the lien thereof continues, for the period of ten years, and

no longer. There the action was brought within that period; but before a decree was rendered therein, plaintiff's judgment, which by the suit he was seeking to enforce, became dormant. It was contended in that case, as here, that the pendency of the action had the effect to keep alive the judgment. The court held that the commencement of the suit before the judgment was barred, and the pendency thereof afterwards did not operate to continue the judgment in force beyond the statutory period.

It is argued that the action may be treated as one to recover on the various judgments held by plaintiff, and as they were in full force when this suit was commenced, the statute of limitations ceased to run at the date of the summons which was served on the defendants. In no proper sense can this be regarded as a suit at law to recover a judgment upon plaintiff's judgments. It is merely an equitable action brought to foreclose a mortgage, and for the marshaling of liens upon the mortgaged premises. But if we regard this as an action at law upon domestic judgments, plaintiff would stand in no better position. The commencement of the action would prevent the running of the statute of limitations against the causes of action,—the judgments,—but it would not preserve the liens of the judgments after they became dormant. Had a new judgment been obtained by plaintiff, such judgment would have been a lien only from the first day of the term of court, which would have been subsequent to the recording of Conkling's mortgage; hence, the mortgage would have been the prior lien. Our conclusion is that plaintiff's judgment became barred and ceased to be a lien as against Conkling's mortgage, notwithstanding the pendency of this action. The decree of the court below is

AFFIRMED.

HARLAN P. SHERWIN, APPELLEE, V. LEMUEL L. GAGHAGEN ET AL., APPELLANTS.

FILED FEBRUARY 7, 1894. No. 4753.

1. **Courts of Equity:** JURISDICTION. As a general rule a court of equity will not interpose an objection to its own jurisdiction on the ground that the plaintiff has an adequate remedy at law, but will retain the cause for trial and award the relief to which the parties would have been entitled in a court of law.
2. ———: OBJECTION TO JURISDICTION: REMEDY AT LAW: REVIEW. Objection to the jurisdiction of a court of equity on the ground that the plaintiff has an adequate remedy at law must be made before judgment on the merits of the cause, and will not be entertained when made for the first time in this court on the appeal of the objecting party.
3. **Fraudulent Conveyances:** CHATTEL MORTGAGES: POSSESSION BY MORTGAGOR. A provision in a chattel mortgage for possession and power of sale by the mortgagor raises a conclusive presumption of fraud, and such conveyance will be held void as to creditors.
4. ———: QUESTION OF FACT. But in every case where the conveyance is not fraudulent on its face, the question of fraud is one of fact.
5. ———: ———: RIGHTS OF CREDITORS. Fraud in a chattel mortgage, by reason of a stipulation for possession and power of sale by the mortgagor, is available only to creditors whose executions or attachments are levied before delivery to the mortgagee under the terms of the mortgage.
6. ———: EXCESSIVE SECURITY. A mortgage of personal property for a part of the purchase price thereof will not be declared void as to creditors of the mortgagor on the ground that the value of the property mortgaged is largely in excess of the amount of the debt secured.

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

John D. Pope and *Pound & Burr*, for appellants.

Robert Ryan, contra.

POST, J.

This is an appeal from a decree of the district court of Lancaster county. In the petition it is charged in substance that on the 1st day of August, 1890, the appellant Gaghagen executed in favor of Sherwin, the appellee, three promissory notes, to-wit: One for $150, due September 1, 1890; one for $200, due October 1, 1890; and one for $1,225.36, due November 1, 1890; all bearing interest at eight per cent per annum. In order to secure the notes above described Gaghagen at the same time executed in favor of Sherwin a mortgage upon a stock of drugs and fixtures in the city of Lincoln, including counters, show cases, soda fountain, etc. Immediately following the description of the property mortgaged is this recital: "The intention being to convey to said H. P. Sherwin all the drugs and fixtures heretofore sold by said Sherwin to said Gaghagen, and this mortgage is given to secure a part of the purchase money for the said drugs, fixtures, and toilet articles, said fixtures being in 1124 O street, on east side of building, in Lincoln, Nebraska. The above described chattels are now in my possession, are owned by me, and free from incumbrance in all respects, but said possession immediately is transferred to H. P. Sherwin, and all the money realized from the sale of goods to apply on said notes as same become due, by J. H. Pinkerton, agent for H. P. Sherwin." Said mortgage was filed in the office of the county clerk of Lancaster county, September 22. On the 23d day of September, the note for $150 remaining wholly unpaid, Sherwin demanded possession of the mortgaged property, whereupon it was all surrendered by Gaghagen to him to be sold in accordance with the conditions of the mortgage; but upon the representation of Gaghagen that he would in the meantime procure the means to discharge the several notes, Sherwin agreed that he would not advertise the mortgaged property for sale until September

26. That the representation aforesaid was willfully false, and Gaghagen, instead of trying to secure money with which to pay said notes within the time agreed upon for that purpose, conspired with his co-defendant, Ferguson, to cheat and defraud the plaintiff out of his claim; that in pursuance of such conspiracy said parties procured to be assigned to Ferguson certain claims against Gaghagen, amounting in the aggregate to $1,365.75, most of which were not due and many of which were purchased for fifty per cent of the face thereof; that on the 25th day of September Gaghagen voluntarily appeared before the district court and confessed judgment in favor of Ferguson for the amount of said claims; that an execution was immediately procured and placed in the hands of a deputy sheriff for service, and who within an hour thereafter, under the direction of Ferguson and Gaghagen, levied upon the property in controversy; and the defendant McClay, as sheriff, has advertised said property for sale to satisfy the judgment aforesaid; that the assignment of said claims, as well as the confession of the said judgment, was fraudulent, and designed by the defendants named to defraud the plaintiff, and that McClay, as sheriff, is using his office in order to assist the other defendants in their efforts to deprive the plaintiff of his security. The prayer is for a decree enjoining the several defendants from selling the property to satisfy the execution against Gaghagen and from otherwise interfering with his possession or the foreclosure of the plaintiff's mortgage.

The defendants joined in an answer, in which they admit the execution of the notes and mortgage by Gaghagen, the confession of judgment, the issuing of the execution and levy upon the mortgaged property as alleged, and deny the other allegations of the petition. The answer contains a charge of fraud in the following language: "Said notes were fraudulently obtained from said Gaghagen by said plaintiff through a trade made between said parties, by

which said plaintiff, by misrepresentation and misstatements, and by cheating and defrauding said Gaghagen, obtained said notes set out in said petition, as well as the chattel mortgage made to secure said notes. Defendants further answering say that the chattel mortgage set out in plaintiff's petition was fraudulent as to defendant E. I. Ferguson, who is a judgment creditor of said Lemuel L. Gaghagen; that said chattel mortgage was given to the said plaintiff by the said Lemuel L. Gaghagen, by which the said Gaghagen obtained possession of said stock of goods covered by said chattel mortgage, and allowed the said Gaghagen to retain possession of said goods and chattels and to buy and sell in his own name up to the time the said sheriff of Lancaster county by his deputy levied an execution upon the same under a valid and subsisting judgment, said judgment and execution being mentioned in the petition filed herein." It is further alleged that Gaghagen was at the time of the levy in possession of the mortgaged property, also that the plaintiff has an adequate remedy at law.

The reply is a general denial of the affirmative allegations of the answer.

The cause was sent to a referee with instructions to find the facts, and who accordingly, at the next term of court, submitted the following findings:

"1. I find that on the 16th day of July, 1890, the plaintiff Harlan P. Sherwin was the owner of a certain stock of drugs and fixtures situated in the east half of the room No. 1124 O street, in the city of Lincoln, Nebraska, and that the defendant Lemuel L. Gaghagen was the owner of a farm with certain stock, crops, and farming implements near the town of Friend, in Saline county, Nebraska.

"2. I find that on said 16th day of July, 1890, the said Harlan P. Sherwin and Lemuel L. Gaghagen made and entered into an agreement in writing whereby they agreed

to make an exchange of their respective property as described in the first finding.

"3. I find that said agreement was duly executed and said exchange consummated on or about the 1st day of August, 1890, and each party duly entered into possession of the property so acquired by him.

"4. I find that the said stock of drugs and fixtures was found to exceed in value the said property of L. L. Gaghagen in the sum of $1,570.36.

"5. I find that to secure the payment of said difference in value the said Lemuel L. Gaghagen made, executed, and delivered to said H. P. Sherwin three promissory notes, as follows: One for $150, due September 1, 1890; one for $200, due October 1, 1890; and one for $1,220.36, due November 1, 1890, with eight per cent interest; and to further secure the said promissory notes, said L. L. Gaghagen made, executed, and delivered to the said Harlan P. Sherwin a chattel mortgage upon the said stock of drugs and fixtures so purchased by him of said Harlan P. Sherwin.

"6. I find that said chattel mortgage was duly filed for record in the office of the county clerk of Lancaster county, Nebraska, on the 22d day of September 1890, at 4 o'clock P. M., and has ever since remained of record in said office.

"7. I find that said trade or exchange between said Harlan P. Sherwin and said Lemuel L. Gaghagen was open and fair and without fraud on the part of either party thereto, and that said notes and chattel mortgage were *bona fide*, and for a valuable consideration, and without any intention to defraud creditors or purchasers, and that no portion of the consideration for the same has failed.

"8. I find that possession of said stock of drugs and fixtures was taken by L. L. Gaghagen on or about August 1, 1890, and continued by him until the evening of September 22, 1890, and that up to said time the business was conducted and carried on in the name of said L. L. Gaghagen.

"9. I find that on the 24th day of September, 1890, the

said L. L. Gaghagen was indebted to the following persons in Saline county, Nebraska: Mrs. McDougall, note dated April 30, 1889, due July 30, 1890, for $22.10, ten per cent; T. E. B. Mason, note dated October 23, 1889, due October 23, 1890, $125, ten per cent; J. A. Copperthwaite, note dated November 4, 1889, due November 4, 1890, $210, ten per cent; Merchants & Farmers Bank, note dated May 24, 1889, due August 26, 1890, $99.25, ten per cent; W. C. Thompson, note dated February 6, 1890, due February 6, 1891, $43.00, ten per cent; Bissell & Schmidt, note dated August 9, 1890, due November 9, 1890, $61.32, ten per cent; A. E. Moeller, note dated August 7, 1890, due September 7, 1890, $314.30, ten per cent; J. D. Pope, note dated September 18, 1890, due one day after date, $200, ten per cent; First National Bank, Dorchester, Nebraska, note dated August 6, 1890, due November 6, 1890, $100, ten per cent; W. R. Williams, note dated February 13, 1890, due February 13, 1891, $83, ten per cent; Holland & Co., account, $21.85; Friend Grocery Company, account, $20.50; H. K. & H. A. Johnson, account, $20.27; making a total of $1,320.69, exclusive of interest.

"10. I find that on the 25th day of September, 1890, at about 11 o'clock A. M., the defendant Ephraim I. Ferguson filed his petition in the district court of Lancaster county, Nebraska, against the defendant Lemuel L. Gaghagen, wherein he claimed to be the owner of the notes and accounts described in the ninth finding of fact, and prayed judgment thereon against the said L. L. Gaghagen.

"11. I find that on said 25th day of September, 1890, at about 11 o'clock A. M., and at the time the said petition against him was filed, the said Lemuel L. Gaghagen duly confessed judgment in said district court in favor of said Ephraim I. Ferguson for the sum of $1,365.75.

"12. I find that there were present in the court room when said judgment was confessed, the said Ephraim I.

Ferguson and Lemuel L. Gaghagen, also J. D. Pope and L. W. Billingsley, attorneys in said cause.

"13. I find that said judgment was so confessed by said L. L. Gaghagen for the purpose of placing the creditors, whose claims were included in said judgment, upon an equal footing in respect to securing payment of their said claims, and that said judgment was so confessed under an agreement with J. D. Pope that all of said claims were to be gathered together and included in one judgment; and I further find that such agreement or arrangement was made on the 24th day of September, 1890.

"14. I find that the account of Holland & Co. was transferred to E. I. Ferguson on the evening of September 24, 1890, under an agreement whereby Ferguson was to pay fifty cents on the dollar therefor, and that payment was made by Ferguson to Holland & Co. some time subsequent to the 25th day of September, 1890.

"15. I find that the account of the Friend Grocery Company was transferred to E. I. Ferguson on the evening of September 24, 1890, under an agreement whereby Ferguson was to pay fifty cents on the dollar therefor, and that payment was made by Ferguson to J. J. Holland, agent of the Friend Grocery Company, some time subsequent to the 25th day of September, 1890.

"16. I find that the account of H. K. & H. A. Johnson was transferred to Ferguson on or about the 24th day of September, 1890, under an agreement whereby Ferguson was to pay fifty cents on the dollar therefor, and that Ferguson paid $10 therefor at some time subsequent to September 25, 1890.

"17. I find that the note of W. C. Thompson was transferred to Ferguson on the evening of September 24, 1890, and that Ferguson paid $30 therefor at the time of its delivery.

"18. I find that the note of Bissell & Schmidt was transferred to Ferguson on the evening of September 24, 1890,

and that subsequent to September 25, 1890, Ferguson paid fifty cents on the dollar therefor.

"19. That as to the other claims described in said petition, no evidence was offered by either party, and I am unable to state when the same were transferred to Ferguson, if at all, or the price paid or the time of payment therefor.

"20. I find that immediately upon the entering of said confession of judgment by said L. L. Gaghagen, an execution was ordered issued thereon, and I find that L. W. Billingsley, attorney for L. L. Gaghagen, in company with J. D. Pope, attorney for E. I. Ferguson in said cause, immediately after said execution was ordered issued, proceeded to the office of the sheriff of Lancaster county, Nebraska, and that there L. W. Billingsley, in the presence and hearing of said J. D. Pope, gave Deputy Sheriff H. V. Hoagland instructions to procure said writ of execution as soon as possible, and to levy the same on the stock of goods and fixtures at 1124 O street, and that said L. W. Billingsley informed said deputy sheriff that there were then no chattel mortgages of record against said stock and fixtures, but that there was liable to be one filed soon.

"21. I find that said J. D. Pope and L. W. Billingsley, attorneys for Ferguson and Gaghagen, respectively, had actual notice of the chattel mortgage held by said Harlan P. Sherwin on said stock at the time said judgment was confessed and before said execution was issued.

"22. I find that H. V. Hoagland, deputy sheriff, had actual notice that there was a chattel mortgage on said stock and fixtures before said execution was placed in his hands, and before he gave the same to C. W. Hoxie, deputy sheriff, for service, but I am unable to say from the evidence whether or not he was aware that said chattel mortgage was held by Harlan P. Sherwin.

"23. I find that said chattel mortgage contained a clause as follows: 'But said possession immediately is transferred to H. P. Sherwin, and all the money realized from the sale

of goods to apply on said notes as same become due, by J. H. Pinkerton, agent of H. P. Sherwin;' and I find that J. H. Pinkerton continued in the said store at all times from August 1, 1890, to September 22, 1890, but I find that he was not there in possession of said stock as agent of H. P. Sherwin.

"24. I find that on the evening of September 22, 1890, the plaintiff H. P. Sherwin took possession of the said stock and fixtures for the purpose of securing the payment of the amount due under the chattel mortgage, and to secure the payment of rent due and unpaid, and that such possession was taken under the provisions of said chattel mortgage, and according to an agreement with L. L. Gaghagen.

"25. I find that immediately after said judgment was confessed the said L. L. Gaghagen left the court house and proceeded to the store, 1124 O street, and that about five minutes after his arrival there Deputy Sheriff Hoxie appeared there with said execution and levied the same upon said stock and fixtures.

"26. I find that H. P. Sherwin, plaintiff herein, was in said store when Deputy Sheriff Hoxie entered with said execution, and that said Sherwin informed said Hoxie of his, plaintiff's, claim upon the said stock and fixtures before said Hoxie attempted to assert possession of said stock and fixtures, and immediately after said Hoxie had made minute of the levy on said writ of execution.

"27. I find that said judgment was confessed at about 11 o'clock, execution issued at 11:30, and levy made at 11:50 o'clock A. M. of the 25th day of September, 1890.

"28. I find that J. H. Pinkerton had possession of the stock and fixtures under the terms of the mortgage given by Gaghagen to Sherwin at the time the execution was levied, and that he has not relinquished such possession.

"29. I find that Samuel McClay, defendant herein, was absent from the city of Lincoln on the 25th day of September, 1890, and did not return until noon of September

26, 1890, and that he knew nothing of the confession of said judgment or the issuance and levy of said execution until his said return.

"30. I find that nothing has been paid upon the promissory note given by L. L. Gaghagen to H. P. Sherwin, and that there is now due and unpaid thereon the principal sum of $1,570.36, with $45.35 interest from August 1, to December 10, 1890, at ten per cent; total, $1,615.71.

"31. I find that at the time the said execution was levied the said deputy sheriff, Hoxie, placed F. C. Quinby, a clerk in said store, in charge of said stock and fixtures, as agent for the sheriff, and that said H. P. Sherwin claimed possession of said stock and fixtures at the same time, and I find that it was agreed that said store should be kept open and sales should proceed until the termination of this suit, and that J. H. Pinkerton should take charge of money received to await the termination of this suit, and that neither said Sherwin nor said McClay were to waive any rights thereby; and I further find that F. C. Quinby has remained in said store since said 25th day of September, 1890, as a representative of Sam McClay, sheriff.

"32. I find that the plaintiff herein has not done, or suffered to be done, any act which as a matter of fact, as distinguished from one of law, should postpone plaintiff's rights to those of any of the defendants herein.

"33. I find that there was due Harlan P. Sherwin from L. L. Gaghagen, for rent of the room occupied by the stock of drugs and fixtures, the sum of $200 on September 25, 1890, being for two months, from July 25, 1890, to September 25, 1890, at $100 per month.

"34. I make no finding upon the latter clause of defendants' second request, for the reason that the same is a question of law, to be determined by the court.

"35. I find that said stock of drugs and fixtures occupied the east side of the store-room, 1124 O street, and that there was a stock of boots and shoes on the west side

of said room, and that access to both stocks is gained through the same door.

"36. I find that Harlan P. Sherwin has not made contradictory statements as to the extent and duration of his possession of said stock of drugs and fixtures.

"The above findings are based upon the evidence in the case and are intended to cover all requests made by either party, as well as all the material issues of the case.

"Respectfully submitted, H. J. WHITMORE,
"*Referee.*"

Exceptions were taken to several of the above findings, which were all overruled and a decree entered in accordance with the prayer of the petition.

1. The first proposition of the appellants which calls for notice is that the plaintiff has an adequate remedy by an action of replevin, or for the conversion of the mortgaged property, hence the petition fails to state a cause for equitable interference. We think that the question of jurisdiction is not presented by the record as submitted to this court. Where courts, like ours, are clothed with both common law and equity powers, relief will not always be denied on the ground that the plaintiff has mistaken his remedy. The rule is that where the party, having the right to object, voluntarily submits to the jurisdiction of a court of equity, the cause will be retained for trial on its merits and the proper relief awarded. (*Bank of Utica v. City of Utica*, 4 Paige Ch. [N. Y.], 399; *Tenny v. State Bank*, 20 Wis., 164; *Savery v. Browning*, 18 Ia., 246; *Amis v. Myers*, 16 How. [U. S.], 493; *Niles v. Williams*, 24 Conn., 284; *Dearth v. Hide & Leather Nat. Bank*, 100 Mass., 541; Hawes, Jurisdiction, 66.) The exceptions to that rule are actions *ex delicto*, for damage only, or *ex contractu*, for debt on written instruments, and possibly others which need not be here enumerated, since it is evident that this is a case for the application of the general rule. It is true the question of jurisdiction is presented by the answer,

but it is clear that the objection on that ground was waived by the subsequent acts of the appellants. From the transcript it appears that the petition was filed on the 11th day of October, 1890. On the 24th day of the same month the order of reference was made, in which appellants were allowed ten days to answer. Their answer was filed November 3, and the reply on November 10. The hearing before the referee was commenced November 19, and his report filed December 15. By the exceptions subsequently filed the report is assailed on the sole ground that the findings are not sustained by the proofs. There was no ruling on the subject of jurisdiction; nor does it appear that the attention of the court was ever called to the fact that that question was put in issue by the pleadings. The answer, which was in the nature of a demurrer, distinctly presented the question of the jurisdiction of the court, and appellants were entitled to a ruling thereon. Assuming that the objection was well taken, it was their duty to move for judgment on the pleadings, or in some manner submit that question for determination by the court; but having elected to take the chances of a favorable determination of the cause on its merits, they will not now, after a protracted and costly trial, be heard to call in question the jurisdiction of the court.

2. It is argued that the mortgage is fraudulent as to creditors of Gaghagen, for the reason that there was no change of possession of the mortgaged property, but, on the other hand, the mortgagor continued in possession and carried on the business by buying and selling in the usual course of trade. It is not seriously urged that the mortgage is fraudulent on its face, and it is clear that it is not, since there is no provision therein which can be construed as a power of sale by the mortgagor. On the other hand, it is expressly stipulated that possession shall be immediately given to the mortgagee. The principle which runs through all of the cases in this court is that where a mort-

gage is not fraudulent on its face, the question of fraud is one of fact for the jury, and that such instrument will not be declared void as to creditors unless the fraudulent intent is shared by both the mortgagor and mortgagee. (See *Hedman v. Anderson*, 6 Neb., 393; *Chicago Lumber Co. v. Fisher*, 18 Neb., 334; *Kay v. Noll*, 20 Neb., 380; *Davis v. Scott*, 22 Neb., 154.) The fact that the mortgagor of personal property of the character here involved is permitted to retain possession thereof and sell from the stock in the usual course of business raises a presumption of fraud as to creditors and casts upon the mortgagee the burden of proving good faith. But we have been referred to no case holding that the retention of possession and sale by the mortgagor will *per se* render void a mortgage which is not fraudulent on its face.

3. It is found by the referee (finding No. 24) that Sherwin, on September 22, 1890, took possession of the property in controversy by virtue of his mortgage, according to an agreement with Gaghagen, and also (finding No. 28) that J. H. Pinkerton was in possession of said property by virtue of the mortgage at the time of the levy thereon to satisfy the execution against Gaghagen. Whatever may be the rule elsewhere, it is settled in this state that fraud of the character here charged is available to those creditors only whose attachments or executions are levied before the delivery of possession to the mortgagee under the terms of the mortgage. (See *Fitzgerald v. Andrews*, 15 Neb., 52; *Kay v. Noll, supra.*) But it is contended that we should disregard the findings mentioned on the ground that they are against the clear weight of the evidence. Sherwin testifies that on the evening of the 22d he demanded possession under his mortgage, and that the property was at that time turned over to him by Gaghagen without objection, and that it was immediately placed in the custody of Pinkerton, in which he is fully corroborated by the latter. He is contradicted by Gaghagen, who is to some extent

corroborated by Quinby, a clerk in the store. A finding for the appellee based upon such testimony will not be disturbed by this court on the ground that it is not in accordance with the weight of the evidence. It is needless to cite authority for the rule which governs in such cases and which has been so often applied in this court.

4. Lastly, it is contended that the mortgage is void as to creditors of Gaghagen by reason of the disparity between the value of the property mortgaged and the amount of the debt secured thereby. We might dismiss that claim with the remark that it does not appear to have been made either before the referee or the court on the motion for judgment on the findings. The value of the property is not found, but assuming it to be $5,600, as claimed by appellants, the mortgage will not be declared void on that ground alone: First, because the case is still within the principle of *Fitzgerald v. Andrews* and *Kay v. Noll;* second, the debt secured is a part of the purchase price of the property mortgaged. We are referred to no authority and can conceive of no principle which can be invoked to defeat as fraudulent a mortgage of chattels executed and received in good faith to secure the price thereof on the ground that the security is excessive. *Morse v. Steinrod*, 29 Neb., 108, *Brown v. Work*, 30 Neb., 800, and *Thompson v. Richardson*, 33 Neb., 714, relied upon by appellants, do not conflict with this view. The property in each of these cases was merchandise which had been sold and delivered in the usual course of trade on the credit of the mortgagor. There is some reason for the contention that general creditors have rights in property of that character, and that as to them a so-called "blanket mortgage" is fraudulent and void. But in this case the property was not sold on the credit of Gaghagen and did not, when the mortgage was executed, appear among the assets available for the satisfaction of his general creditors. The reason for the rule stated in the cases named is therefore wanting. But speaking for himself, the

writer understands those cases to hold merely that a mortgage upon property greatly exceeding in value the amount of the debt secured is evidence of fraud, which may be sufficient of itself to sustain a finding of actual fraud, and not that it will, as a matter of law, render the security void. Those cases, it is assumed, were rightly decided upon the facts; but the proposition that a mortgage is fraudulent *per se* because it covers property in excess of the debt secured cannot be sustained either upon reason or authority. We find no error in the record and the judgment of the district court is

AFFIRMED.

RYAN, C., took no part.

CHARLES F. HAMMOND V. STATE OF NEBRASKA.

FILED FEBRUARY 7, 1894. No. 5312.

1. **Criminal Law**: DELAY IN TRIAL: DISCHARGE OF ACCUSED. A defendant in a criminal prosecution who has never been committed to jail, or otherwise detained in custody, is not entitled to be discharged, under the provisions of section 390 of the Criminal Code, on the ground that he has not been brought to trial before the end of the second term after the finding of the indictment or the filing of the information.

2. ———: ———: ———. The provision of section 391 of the Criminal Code, for the discharge of any person indicted who after having given bail shall not be brought to trial before the end of the third term of court held after the finding of such indictment, is held to exclude the term at which the indictment is found.

3. **Rape**: EVIDENCE: INSTRUCTIONS. In a prosecution under section 11 of the Criminal Code, for rape upon the daughter of the accused, fourteen years of age, an instruction that "the amount of struggle and resistance necessary to be shown is not the same in all cases. A strong, able-bodied woman could protect herself when a child could not; and a father could overcome and subdue

the will of his child when a stranger could not," is not objectionable on the ground that it gives undue prominence to the age of the prosecutrix and her relation to the accused.

4. ———: CORROBORATION OF PROSECUTRIX. In a prosecution for rape it is not essential that the prosecutrix be corroborated by other witnesses as to the particular acts which constitute the offense. It is sufficient if she is corroborated as to material facts and circumstances which tend to support her testimony as to the principal fact, provided the jury must be satisfied from a consideration of all of the evidence, beyond a reasonable doubt, of the guilt of the accused. (*Fuger v. State*, 22 Neb., 332.)

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

J. C. Johnston, O. W. Cromwell, and *N. Rummons*, for plaintiff in error.

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

POST, J.

At the September, 1891, term of the district court of Lancaster county the plaintiff in error Charles F. Hammond was convicted of the crime of rape, as defined by section 11 of the Criminal Code, upon his daughter Alta Maud Hammond, and has brought the case into this court for review upon exceptions taken to certain rulings of the trial court. The first of the errors assigned is the overruling of a motion to dismiss, in the following language:

"STATE OF NEBRASKA
v.
CHARLES F. HAMMOND. } Defendant's Motion.

"Now comes the said Hammond, being first duly sworn upon his oath, says that he comes before the court, and moves the court here that he be discharged and released from arrest under the said information, for that the said information was filed in said court on the 15th day of September, 1890, that being the first day of the September

term, A. D. 1890, of our said court; that since said day there has been an October term, 1890, of said court and a January term, A. D. 1891, of said court, and that said cause has been pending longer than to the third term of the said court held after the said information was filed; that the delay of the trial of said cause did not happen upon the application of this defendant and was not occasioned by the want of time to try the same, and through no fault of his; and under and by virtue of section 390 and section 391 of the Code of Criminal Procedure of the state of Nebraska, affiant should be discharged from the offense alleged in said information and be permitted to go hence without day; that this cause has not been legally reinstated and cannot be so without new information and indictment, which same has not been found nor information filed."

Sections 390 and 391, referred to in the motion, are as follows:

"Sec. 390. If any person indicted for any offense and committed to prison shall not be brought to trial before the end of the second term of the court having jurisdiction of the offense, which shall be held after such indictment found, he shall be entitled to be discharged, so far as relates to the offense for which he was committed, unless the delay shall happen on application of the prisoner.

"Sec. 391. If any person indicted for any offense, who has given bail for his appearance, shall not be brought to trial before the end of the third term of the court in which the cause is pending, held after such indictment is found, he shall be entitled to be discharged, so far as relates to such offense, unless the delay happen to be on his application, or be occasioned by the want of time to try such cause at such third term."

It is shown by the transcript that the information was filed on the 15th day of September, 1890, which was the first day of the September term. On the following day the accused was arraigned and entered a plea of not guilty.

On the 9th day of February, 1891, which was the first day of the February term, the case was stricken from the docket on motion of the county attorney, with leave to reinstate upon the showing of sufficient cause therefor, and the sureties on the recognizance of the accused were discharged and released from further liability. On the 12th day of October, 1891, which was the nineteenth day of the September, 1891, term, the following order was entered of record:

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v.
CHARLES F. HAMMOND.

"Now on this day came the county attorney on behalf of the state of Nebraska, and having made proper showing in compliance with the order entered herein on the 9th day of February, 1891, on his motion it is by the court ordered that this cause be, and the same hereby is, reinstated on the docket of this court, and that a *capias* issue for the said defendant in the manner provided by law."

It is evident that the accused was not entitled to be discharged under the provisions of section 390, since it does not appear from the transcript that he was at any time, subsequent to the filing of the information, confined in the jail of the county, or otherwise detained in custody. It is equally clear that he was not entitled to a discharge under the provision of section 391. The expression "before the end of the third term held after indictment," etc., must be construed as excluding the term at which the indictment is found. Any other construction would be a distortion of a statute the provisions of which are in no sense ambiguous. The third term after the filing of the information, according to the foregoing affidavit, was the September, 1891, term, at which the plaintiff in error was convicted. The court did not err, therefore, in overruling the motion to discharge.

2. Exception was taken to paragraph No. 6 of the charge given by the court on its own motion, as follows:

"The degree or amount of struggle and resistance necessary to be shown on the part of the prosecutrix is not the same in all cases. A strong, able-bodied woman could protect herself when a child could not. The father of a child could subdue and overcome the will of his child when a stranger could not. In all cases the jury are to consider the circumstances surrounding the parties, the ability of the woman to resist, her opportunity of getting aid, the comparative strength of the two parties, their relations, as in the case of a father and daughter, his general right to command, and her general duty to obey, and if, from all the circumstances, it appears beyond a reasonable doubt that the father, by force, threats, or putting in fear his daughter, overcame her will, and against her will forcibly and carnally knew her, he should be held criminally responsible for his act."

The vice imputed to this instruction is that undue prominence is therein given to the age and strength of the prosecutrix, who, as shown by the evidence, was under fourteen years of age at the time of the alleged assault, as well as her relation to the accused. This instruction should be read in connection with paragraph No. 5, in which the jury were told that "in order to convict they must find that the prosecutrix resisted to the extent of her ability in view of the circumstances surrounding her at the time." Such undoubtedly is the general rule, but to that rule there are some recognized exceptions, among which is that where the female assaulted is very young and of a mind not enlightened on the subject, the law exacts a less determined resistance than in the case of an older and more enlightened person. (2 Bishop, Criminal Law, 1124; Wharton, Criminal Law, 1143.) Thus, a female under ten years of age was by the common law deemed incapable of consent, and by statute in this state the age of consent has been raised to fifteen years. (Criminal Code, sec. 12.) Another exception to the rule is where the submission of the prosecutrix is induced

by fear or fraud, or through the coercion of one whom she is accustomed to obey, such as a parent or one standing *in loco parentis*. (Wharton, Criminal Law, 1144; *State v. Cross*, 12 Ia., 67; *Strang v. People*, 24 Mich., 1; *Whittaker v. State*, 50 Wis., 518; *Reg. v. Jones*, 4 L. T., n. s. [Eng.], 154.) In view of the evidence adduced in this case, the court, after stating the general rule, was justified in directing the attention of the jury to the qualifications to which reference has been made. There exists a wide difference between consent and submission, particularly in the case of a female of tender years when in the power of a strong man. Mere submission in that case is essentially different from such a consent as the law declares to be a justification of the act. (3 Russell, Crimes, 934.) Coleridge, J., in *Reg. v. Day*, 9 C. & P. [Eng.], 722, thus distinguishes: "Every consent involves a submission; but it by no means follows that a mere submission involves consent. It would be too much to say that an adult submitting quietly to an outrage of this description was not consenting; on the other hand, the mere submission of a child when in the power of a strong man, and most probably acted upon by fear, can by no means be taken as such consent."

3. Exception was taken to paragraph No. 7 of the charge of the court, as follows:

"In case of rape it is not essential that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. And if the jury believe from the testimony of the prosecutrix and the corroborating circumstances and facts testified to by other witnesses, that the defendant did make the assault as charged and did carnally know his daughter, forcibly and against her will, and are so convinced beyond a reasonable doubt, the law would not require that the testimony of the prosecutrix should be corroborated by witnesses as to what transpired in the room when it is alleged the assault was made."

This instruction embodies the rule as stated in *Fager v. State*, 22 Neb., 332, and the exception is therefore without merit.

4. It is contended that the verdict is not supported by the evidence. It is deemed unnecessary to give more than a brief synopsis of the evidence in the opinion. It is sufficient to say that, according to the testimony of the prosecutrix, she was at home on the morning in question with the accused and the younger children of the family; that in obedience to his command she went into the house from the yard where she was engaged at play with the other children; that he committed an assault upon her and finally accomplished his purpose by force and against her will. She describes with particularity the assault, her resistance, the struggle which ensued, in which her underclothing was torn off, and which ended in the violation of her person. It is shown that she immediately made complaint to a neighbor woman, describing the treatment to which she had been subjected. Dr. Gibson, who examined her a few hours later, observed that her private parts were considerably bruised; they were also torn and were then bleeding. She is contradicted, it is true, upon every material point by the testimony of the accused; but all questions of fact were fairly submitted to the jury, and the verdict will not be disturbed on the ground that the evidence is conflicting. That proposition is sustained by numerous decisions of this court and may be regarded as the settled law of this state. We find no error in the record and the judgment of the district court will be

AFFIRMED.

JOHN JOSEPH ET AL. V. CHARLES M. SMITH.

FILED FEBRUARY 7, 1894. No. 5373.

1. **Statute of Frauds.** A party who has cared for and fed certain stock for another, the bill therefor, or a part of it, being unpaid, the stock, with some other chattel property of his debtor, being in his possession under a verbal lien to secure the payment of the balance due on his account, such lien to be valid so long as such property shall remain in said creditor's possession, who is induced by the direct promise of a third party, such third party claiming a prior lien on the live stock so held, by reason of a chattel mortgage, that said third party will pay the account so due said first party if he will release from his possession such stock and chattels, to so release and surrender possession of the property, and this action is an advantage or benefit, or forwards the interests, of the party making such promise, can maintain an action against such promisor, the promise not being within the statute of frauds.
2. **The instructions** given by the court on its own motion, and instructions requested by defendant in error and given, and instructions requested by plaintiff in error and refused examined, and *held* no error in either the giving or refusing.

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

Simpson & Sornborger, for plaintiff in error, cited: *State Bank of Nebraska v. Lowe*, 22 Neb., 68; *Mallory v. Gillett*, 21 N. Y., 412; *Duffy v. Wunsch*, 42 N. Y., 243; *Pfeiffer v. Adler*, 37 N. Y., 164; *Brown v. Weber*, 38 N. Y., 187; *Belknap v. Bender*, 75 N. Y., 446; *Ackley v. Parmenter*, 98 N. Y., 425; *Rintoul v. White*, 15 N. E. Rep. [N. Y.], 318; *Nelson v. Boynton*, 3 Met. [Mass.], 396; *Curtis v. Brown*, 5 Cush. [Mass.], 488; *Furbish v. Goodnow*, 98 Mass., 299; *Dows v. Sweet*, 120 Mass., 322; *Preston v. Young*, 46 Mich., 103; *Cross v. Richardson*, 30 Vt., 649; *Fullam v. Adams*, 37 Vt., 391; *Emerson v. Slater*, 22 How. [U. S.], 28; *Clapp v. Webb*, 9 N. W. Rep.

[Wis.], 798; *Stewart v. Jerome*, 38 N. W. Rep. [Mich.], 895; *Baer v. English*, 11 S. E. Rep. [Ga.], 453.

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

HARRISON, J.

The plaintiff in this action in the lower court (defendant in error here) filed a petition alleging the copartnership of the defendants, and further, that on or about the first day of May, 1887, and for some time prior thereto, this plaintiff was in possession of certain personal property, to-wit, about $750 or $850 worth of personal property, consisting of horses, mules, work harness, wagons, wheel scrapers, etc., said property being held by this plaintiff and in the possession of this plaintiff at the said time for the purpose of securing a claim of $196.30 this plaintiff had against one J. B. O'Connell for feed furnished said horses and mules, for money advanced to said O'Connell by this plaintiff, and for livery furnished said J. B. O'Connell by this plaintiff; that on or about the first day of May, 1887, while said plaintiff was in possession of said property, and while said plaintiff was retaining possession of said property to secure the payment of said $196.30 from said J. B. O'Connell, defendants John Joseph and William Grafe came to plaintiff and represented to plaintiff that these defendants had a claim of $500 against said J. B. O'Connell, and that it would be greatly to the advantage of said defendants if said plaintiff would release his lien on said property and turn the said property over to the said J. B. O'Connell; and said defendant, on condition that said plaintiff would release his lien on said property and turn said property over to said J. B. O'Connell, agreed to assume and pay said amount of $196.30 due and payable from said O'Connell to this plaintiff; that relying on the said agreement and undertaking of said defendants, this plaintiff released said lien on said property, and surrendered his pos-

session of said property, and turned said property over to said J. B. O'Connell, and assigned his claim of $196.30 to the said defendants, and turned the evidence of same over to the said defendants; that on or about January 1, 1891, defendants paid plaintiff $44.25; that there was still due plaintiff the sum of $191.65, and interest at seven per cent per annum from March 4, 1891, for which plaintiff prayed judgment. Defendants Joseph and Grafe answered, admitting the existence of the partnership and denied each and every other allegation of the petition. There was a trial to a jury and a verdict for plaintiff in the sum of $204.13. Motion for a new trial was filed, submitted, and overruled, and judgment was entered on the verdict for plaintiff, and defendants Joseph and Grafe brought the case to this court on error.

The facts, as they appear from the evidence, are substantially as follows: During the fall, winter, and spring of 1886 and 1887, one John B. O'Connell, a railroad contractor, was working on sections of a railroad then being constructed in and through Saunders county, Nebraska, and while there, and so engaged, had bought supplies of Joseph & Grafe, who were running a general store in Wahoo, in said county, and became indebted to them in a considerable sum. He also had dealings with the plaintiff Smith, then proprietor of a livery and feed stable, and became indebted, to the amount of the account in suit, for the care and feeding of some stock, horses, and mules, and for which plaintiff says O'Connell had given him a verbal lien on the stock and other property, wagons, and scrapers as security for the payment of the account. He states that O'Connell told him he could hold the property until he was paid his bill. On the 15th of March, 1887, O'Connell executed a chattel mortgage to Joseph & Grafe in the sum of $500 on the horses of which Smith had possession at the time. He alleges Joseph & Grafe made the promise to him to induce him to surrender the possession of the property. Joseph & Grafe

had, it appears, loaned or advanced to O'Connell some money, indorsed some of his paper, and furnished him supplies, and by May, 1887, O'Connell owed Joseph & Grafe about $800. At the time O'Connell completed his contract on the road he moved all his stock and tools to Wahoo and to the stable of Smith, where they were left and cared for. About this time Smith and O'Connell examined their accounts and determined upon the amount due Smith, and he and Smith, according to the testimony on the part of Smith by himself and witnesses, went to the store of Joseph & Grafe and there, in a conversation between Joseph and Smith, Joseph stated to Smith that if he would release or surrender the "stock" or "stuff," they (Joseph & Grafe) would pay his bill or account against O'Connell. This conversation is disputed by Joseph, but it has been passed upon by the jury, and it is not for us to disturb their finding. There is no complaint on this point in the brief of plaintiff, and we think, from an examination of the evidence, that the weight of the evidence supports the conversation as given in the testimony of the plaintiff. The testimony discloses that at this time the firm of Joseph & Grafe had the largest claim against O'Connell and were very anxious that he should have possession of his stock, scrapers, etc., in order that he might get away, obtain work, and earn money with which to liquidate his indebtedness to the firm; that Smith delivered his account against O'Connell to Joseph & Grafe, and also some time checks which he then held, and released the property or surrendered possession of it. We find O'Connell very soon after with it in Saline county; and that after he moved the property to Saline county, probably some time in June, 1887, he executed and delivered to Joseph & Grafe a mortgage in the sum of $700 on the property surrendered by Smith. There was also evidence showing that O'Connell had assigned and delivered the final estimate for labor performed on the road under his contract to Joseph & Grafe, the same, when received by

them, to be applied to payment of indebtedness of O'Connell to parties in Wahoo. Whether the claim of Smith was included, and one which was to be paid from this fund, is not very clear. It further appears that Joseph & Grafe received this money. There is some other evidence in the case, but we do not think it necessary that it be here quoted or referred to, as it can have no bearing upon the decision of the points raised. Joseph & Grafe have failed and refused to pay Smith, hence the suit.

The first contention in the case is that the promise of Joseph & Grafe to Smith was within the statute of frauds, therefore void. The case of *Rogers v. Empkie Hardware Co.*, 24 Neb., 653, cited in his brief by defendant in error, is, we think, in point. Parties in business at Wahoo turned property over to the Empkie Hardware Company, or its salesman, in payment of the debt due the company; and Rogers' attorney, being sent to collect a claim against the parties who had turned the goods over to the company, in a conversation with the company's salesman then in possession of the goods, was told by him that if he would not interfere with him in the possession of the goods he would pay the plaintiff's claim out of the first money received from the sale of the goods. This was accepted and acted upon, and afterwards the company sold the stock of goods and refused to pay Rogers' claim. It was argued that the promise was within the statute of frauds. The court held on this branch of the case as follows: "A direct promise of an agent of a wholesale mercantile establishment, who is in the possession of the goods of an insolvent firm in satisfaction of a debt of his principal, made to an attorney of another creditor of such insolvent firm, to pay a claim held by said attorney against said firm if he will not disturb him in the possession of the goods, is not a promise to answer for the debt of another, and need not be in writing;" and in the body of the opinion we find the following statement: "The first question presented is whether or not the contract was

a promise to pay the debt of another, and therefore necessary to be in writing. The promise is direct—that the salesman would pay the debt if not disturbed. He had at that time more goods in his hands than were necessary to pay the defendant's claim. His promise was not conditional, but absolute, and for a benefit to be received by the promisor or his principal. In such case, the promise need not be in writing." All the benefit received by the promisor in the above case was that he was not disturbed in his possession by the other party, of more goods than were necessary to pay his debt. In the case at bar Smith had possession, and of property other than that covered by the mortgage to Joseph & Grafe, and in order that O'Connell might have the property to enable him to earn sufficient money to pay the debt of Joseph & Grafe (certainly a benefit to the firm) they induced Smith to surrender such possession. To gain possession of the property held by Smith without the trouble and expense necessary to contest his possession, not only of the stock on which they claimed to hold a prior lien, but other articles to which they had no claim, and turn it over to O'Connell, that he might be able to go to work and earn money to be paid on their claim, they make a promise to Smith not to pay Smith's bill if O'Connell fails to pay it, but a direct and unequivocal promise and undertaking to pay his claim. Their principal aim in it was not so much to further O'Connell's interests but their own. If they could obtain possession of the stock and other articles for O'Connell, or have them surrendered to him, he could work and pay their bill, and if not, the possibility of their ever receiving it was very remote. To secure the possession and to induce Smith to give up the same without trouble and probably litigation and more or less expense, the promise was given. Under the rule established in our state, the consideration was sufficient and the promise was valid.

In *Fitzgerald v. Morrissey*, 14 Neb., 198, the following

rule was announced: "Where the leading object of a party promising to pay the debt of another is to promote his own interests, and not to become guarantor, and the promise is made on sufficient consideration, it will be valid, though not in writing. In such case the promisor assumes the payment of the debt." To the same effect are *Davis v. Patrick*, 12 Sup. Ct. Rep., 58; *Emerson v. Slater*, 22 How. [U. S.], 28, 43; *Mathews v. Seaver*, 34 Neb., 592; *Muller v. Riviere*, 46 Am. Rep., 291, 59 Tex., 640; *Leonard v. Vredenburgh*, 8 Johns. [N. Y.], 29; *Nelson v. Boynton*, 3 Met. [Mass.], 400; *Williams v. Leper*, 3 Burr. [Eng.], 1886; *Conradt v. Sullivan*, 15 Am. Rep., 261, 45 Ind., 180.

The plaintiff in error excepted to the giving of instruction No. 1, as requested by plaintiff in court below, and alleges it for error, and this is one of the errors insisted upon and argued in the brief for him in this court. This instruction is as follows:

"The jury are instructed that a verbal contract of the pledge of personal property to secure a debt, when the party to whom the pledge is given has possession of the property, is valid and legal and will be a lien upon the property so pledged so long as it remains in the possession of the party to whom the lien is given. And if, in this case, you find that the said J. B. O'Connell gave the plaintiff in this case a lien on the property described in the plaintiff's petition, and that the said defendants, while the said property was in the possession of the plaintiff, agreed with the plaintiff that they should pay the plaintiff's claim if he would surrender possession of the said property, and that in consideration of the said agreement of the said defendants, the plaintiff released the said property and surrendered possession thereof, this would be a valid consideration for the agreement of defendants to pay the said plaintiff, and the said agreement would be binding upon the defendants."

This instruction embodies the proposition that the case made in the evidence was not within the statute of frauds, and for this reason is claimed to be erroneous by attorneys for plaintiff in error; but as we have disposed of this question unfavorably or adversely to his contention, it disposes, therefore, of his objection to the above instruction; and we may further add that the court had instructed the jury as to the burden of proof in its instruction No. 3, in connection with which this must be read and construed.

The plaintiff in error offered an instruction numbered 4, which was as follows:

"You are instructed that before the plaintiff can recover in this case, he must show by a preponderance of the evidence not only that the defendant promised to pay the debt of O'Connell, but that, in addition to such promise to pay the same, the defendants obtained an advantage by reason of such promise, which they did not before have."

The court refused to give this instruction, which was excepted to by plaintiffs in error, and the refusal to give the instruction is assigned as error. The subject of this instruction was covered by No. 1, asked by defendant in error, and there was no error in such refusal. It has been frequently held by this court that where an instruction has been given on a point in controversy in a case, it is not error to refuse to give another instruction submitting the same in substance on the same point.

It is also urged that the court erred in giving instruction No. 2, requested by defendant in error, which reads as follows:

"The jury are instructed that if you find by the evidence that the defendant John Joseph was acting for the firm of Joseph & Grafe, then any contract made in reference to the payment of the plaintiff's claim, if you find any was made, would be binding upon said firm, and both of the defendants would be bound by said contract."

We have already disposed of the question, as to whether

or not the promise to pay Smith's bill was founded upon anything which was of benefit, or would forward the interests of Joseph & Grafe, in the affirmative; and the attorneys for the plaintiffs in error in their able brief, on page 9, say on this subject: "Had these acts of one member been such as to advantage the firm, to further its interests, * * * then the act of John Joseph would have been the act of the firm." This, we believe, is correct; and having, as before stated, found that such act benefited the firm, and that the evidence given warranted such a conclusion when construed with the other instructions, especially No. 1, asked by defendant in error and given, we think the instruction was correct.

The court below refused to give instruction No. 3, requested by plaintiffs in error, and this is complained of as error. The instruction was as follows:

"The jury are instructed that the mere delivery of an itemized statement of the account of the plaintiff against the man J. B. O'Connell to the defendants will not be in itself sufficient to prove an assignment from the plaintiff to defendant."

Whether the above is correct or not cannot, we think, affect the result of this case. The court below did not give any instructions in reference to the question of the assignment of the account as alleged in the petition and denied in the answer and the evidence introduced in regard to its delivery to the plaintiff in error. After careful consideration and much deliberation, we are unable to discern any tendency, in the refusal of the court to instruct the jury on this point, prejudicial to the rights of the plaintiffs in error. In order to arrive at the verdict returned by them, the jury, from the very nature and component parts of the case, were forced to conclude first that the conversation occurred and the promise was made to pay Smith's claim on surrender of the possession of the property. This was sufficient to sustain the verdict without any consideration of the as-

signment of the account as one element of the transaction. In other words, the question of the assignment was one of the subordinate or collateral elements of the proof, and amounted to nothing without the main elements, on which it depended or to which it was collateral, being first established. In other words, there must have been sufficient proved, and the jury must have been convinced of such facts that their verdict on such conclusion would be as it was, for plaintiff (defendant in error), before they reached the consideration of the question of assignment or no assignment in their deliberation, and hence if it was error to refuse the instruction, it was error without prejudice, and does not call for a reversal of the case.

The giving of instruction No. 6 by the court on its own motion is also alleged as error. The following is a copy of the instruction:

"If the jury find for plaintiff, you will find for him in the sum of $191.65, with seven per cent per annum from March 4, 1891."

We cannot discover wherein the plaintiffs in error are prejudiced in the giving of this instruction. To make it as favorable for the plaintiffs in error as possible, the defendant in error would be entitled to interest on the account from December 1, 1887, or six months after the date of the last item in the account. Taking the last item in the account to be June 1, 1887, which is probably a few days later than it should be fixed, the verdict is by a small sum in favor of the plaintiffs in error as to amount; and we conclude there was no error in the instruction of which they could complain.

This disposes of all the alleged errors argued in the briefs, and we conclude that the case was fairly submitted to the jury, and the verdict of the jury was right, and the judgment is

AFFIRMED.

OMAHA NATIONAL BANK v. D. E. THOMPSON.

FILED FEBRUARY 7, 1894. No. 5142.

1. **Instructions.** Where the principles embodied in instructions asked on behalf of one of the parties to an action have already been stated to the jury by the court, it is not prejudicial error to refuse the reiteration requested.
2. **An instruction** abstractly correct as to propositions of law is properly refused when inapplicable to any state of facts in support of which evidence has been introduced.
3. **Witnesses:** LIMITATION OF CROSS-EXAMINATION. While great latitude must of necessity be given in the cross-examination of witnesses charged with participation in fraudulent transactions which are the subject-matter of the defense pleaded, yet this latitude is subject to limitation in the sound judicial discretion of the trial judge, and unless it is made to appear in this court that such discretion has been exercised to the injury of the complaining party, the judgment will not be reversed merely because of such limitation.

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

Hall, McCulloch & English, for plaintiff in error.

John D. Howe and *Charles O. Whedon, contra.*

RYAN, C.

1. This action was brought in the district court of Douglas county by the defendant in error to recover of the plaintiff in error the value of a certain stock of jewelry, together with the tools, safe, and furniture used in connection therewith, all of which had been previously mortgaged by Edholm & Akin, the owners thereof, to the defendant in error, to secure the payment of upwards of $37,000, evidenced by certain promissory notes of the said mortgagors given to the defendant in error. This mortgaged property

had been levied upon for the satisfaction of a large claim due from Edholm & Akin to the plaintiff in error, and had been sold for that purpose. No complaint of insufficiency of statement is made as to the petition; hence, its contents need not be given with more particularity than has already been done. There was a verdict upon the issues joined, in favor of the defendant in error, in the sum of $20,000 principal, and $2,041.65 interest due at the time of the trial. There was ample evidence of the value of the property levied upon and sold to now excuse the necessity of an extended examination upon that question; and it is equally without room for question that the notes and mortgage securing the same were duly made to the defendant in error, and that under said mortgage the defendant in error had taken possession of the mortgaged property, and caused his mortgage to be duly filed for record before the levy of which he complains in his petition. As this evidence under the petition was sufficient to entitle the defendant in error to a verdict if no defense was pleaded, it becomes important to consider carefully such matters as were presented by way of defense. The answer began with a denial of each allegation in the petition contained, save and except such as afterwards in said answer should be expressly admitted. The other averments of the answer were as follows:

"The defendant says that all of the acts and instruments under which the said D. E. Thompson pretends and claims to have title are made in pursuance of a corrupt and fraudulent conspiracy, contrived, designed, and plotted between the said D. E. Thompson, plaintiff, and the said Nathan J. Edholm and Arthur M. Akin, to cheat and defraud the creditors of said Edholm & Akin, and especially this said defendant, the Omaha National Bank, who was and is a creditor of said Edholm & Akin in a large sum; and this defendant charges the facts to be that prior to the execution of the pretended mortgage or bill of sale pretended to

be made between the said D. E. Thompson and the said Edholm & Akin, the said D. E. Thompson and the said Edholm & Akin agreed and conspired together that said Edholm & Akin should procure goods on credit and should procure credit at the bank of this defendant and other banks wherever credit could be obtained, and that said Edholm & Akin should sell as much of said goods for cash as could be sold for cash, whether the price should be sufficient to pay the first cost or otherwise, and that the said D. E. Thompson should, in such ways as were possible, aid and abet the said Edholm & Akin in procuring such goods and in making such sales, and that it was understood and agreed by and between the said D. E. Thompson and the said Edholm & Akin that after the said Edholm & Akin should obtain all the goods that they could on credit, and all the credit they could at the banks, that the said Edholm & Akin should fail, and that the said D. E. Thompson should thereupon receive a mortgage which should cover everything that the said Edholm & Akin should have; and that under said mortgage, so contrived and plotted to be given, the said D. E. Thompson should hold the residue of said property, so that the creditors should be deprived of any benefit even of the residue of said property, and that the said Edholm & Akin and the said D. E. Thompson should divide the proceeds so fraudulently obtained by said fraudulent contrivance and design. And defendant charges the facts to be that in pursuance of said conspiracy the said Edholm & Akin, in conjunction with said D. E. Thompson, and aided and abetted by the said Thompson, did procure credit from various firms in large amounts, and from the said Omaha National Bank, and did, without paying the said creditors, sell said goods for cash, which cash sales were divided between the said Edholm & Akin and the said Thompson; and in pursuance of said corrupt and fraudulent conspiracy and design contrived as aforesaid by the said Edholm &

Akin and the said Thompson, the said Edholm & Akin and Thompson having procured all the credit and goods that their combined efforts could procure, and having sold all the goods for cash that they could sell, took from the store of said Edholm & Akin a large quantity of the more precious goods and gave to the said D. E. Thompson a pretended mortgage upon the balance, under which pretended mortgage the said Thompson did claim the balance of said goods, and did claim and withhold from the creditors even the residue, which said goods were such goods as could not be sold by the said Thompson, Nathan J. Edholm, and Arthur M. Akin for cash; all of which said acts and doings were in pursuance of said fraudulent and corrupt conspiracy and design plotted and contrived between the said D. E. Thompson and Edholm & Akin as aforesaid set out.

"And the said D. E. Thompson, under and by means of this corrupt scheme and design, and by means of various instruments, including the pretended chattel mortgage mentioned in the petition herein, has obtained large sums of money, goods, and credits of the value of thirty thousand dollars ($30,000) or more, arising from the proceeds of said stock so obtained by said Thompson and Edholm & Akin, and converted the same to his own use in fraud of the rights of the creditors aforesaid, and in fraud of the rights of the Omaha National Bank as a creditor.

"And this defendant charges the facts to be that said D. E. Thompson paid no consideration whatever for any of the instruments by which he obtained the said goods aforesaid, nor did the said D. E. Thompson pay any consideration or advance any money for the said mortgage under which he claims title to said property; but that all of the said instruments were obtained by the said D. E. Thompson in pursuance of said fraudulent conspiracy and design, and not otherwise; and the said D. E. Thompson was and is a partner of the said Edholm & Akin in their

said conspiracy and business, and was and is liable to the creditors of the said firm for the debts thereof.

"And this defendant avers that there is now due to this defendant from said firm the sum of $20,000, for which said Edholm & Akin and Thompson are liable to this defendant.

"Wherefore the said defendant prays judgment against the said D. E. Thompson for the sum of twenty thousand dollars ($20,000) and its costs in this behalf most wrongfully sustained."

To the quoted averments of the answer there was a reply in denial, except that the reply admitted the execution of the mortgage to which reference is made in the answer. While the averments of this answer, among other things, charged incidentally that D. E. Thompson paid no consideration for the notes and mortgage made to him, yet this allegation of the want of consideration is coupled with, and dependent upon, the further allegation that the execution of the notes and mortgage was in pursuance of a corrupt conspiracy entered into by said Thompson with the firm of Edholm & Akin. Fairly construed, it follows that there is but one defense aside from the general denial in the introductory part of the answer. This defense is, that the firm of Edholm & Akin entered into a fraudulent and corrupt conspiracy with D. E. Thompson, the object of which was the obtaining of as many goods as possible by Edholm & Akin, the sale of said goods without reference to their cost price, and the participation by Thompson in the proceeds of said sales, and the covering up of the residue, after such sales as were possible had fully been made, by means of the chattel mortgage executed by Edholm & Akin to the said D. E. Thompson. The answer does not charge that the mortgage was made by Edholm & Akin to D. E. Thompson for the sole purpose of hindering, delaying and defrauding the creditors of said Edholm & Akin, and that said Thompson either received said mortgage in

furtherance of that intention or with knowledge of the same, actual or implied. The defense was of a conspiracy in which from its inception Thompson was an active participant, and that the mortgage was merely one of the final steps in accomplishing the result attempted by the conspiracy. The district court very liberally construed these averments of the answer however, and allowed the proofs under its averments as though such averments were simply of the ordinary allegations as to a fraudulent conveyance, in respect of which fraudulent intention of the mortgagor the mortgagee had actual or implied notice.

2. The complaints as to the instructions are very numerous and point out in great detail the matters criticised. It would subserve no useful purpose to follow consecutively the comparisons, criticisms, and complaints made by the plaintiff in error in respect to each instruction. It is sufficient to say, in general, that the instructions asked by the plaintiff in error, where not given in the exact language in which they were drawn, were, in effect, given by the judge in the instructions prepared by him. To this proposition there is but one exception, and that is upon the refusal of the court to give the twelfth instruction asked by the plaintiff in error. This instruction was in the following language: "Although the jury may believe from the evidence that there was a good consideration for a portion of the amount mentioned in the mortgage, still if the jury believe from the evidence that there was no consideration for the balance of the amount so mentioned, and that said notes and mortgage were given for a greater amount for the purpose of defrauding, hindering, and delaying the creditors of said mortgagor, then the said mortgage is wholly void and confers no right whatever upon the plaintiff, and your verdict will be for the defendant." This instruction was very properly refused, because there was no evidence whatever from which the jury could find that the notes were given for a less amount than was evidenced by

their terms. It requires no citation of authorities to establish what this court has uniformly held, that the refusal to give an instruction abstractly correct, yet applicable to no theory sustained by any evidence, is not prejudicial error.

3. In this case the testimony was for the most part directed to the value of the property levied upon and sold to satisfy the claim of the bank. In the nature of things it was very conflicting. As to some matters, it was utterly irreconcilable. Very much might profitably have been omitted. None offered, however, was improperly excluded. Counsel for plaintiff in error insists that the cross-examination was improperly restricted, and instances the exclusion by the court of the cross-interrogatory propounded to Edholm, a member of the firm of Edholm & Akin, as to when he commenced to have business relations with D. E. Thompson. After this ruling, counsel asked the same witness this question: "What were your relations with Mr. Thompson, the plaintiff in this case?"—and without a ruling, voluntarily withdrew it before it could be answered. There is no prejudicial error discovered in this assignment.

Again, counsel for plaintiff in error complains that on cross-examination he was not permitted to inquire whether or not Thompson was a partner with Edholm & Akin. As to whether or not this partnership relation might have been proved upon direct examination admits of grave doubt, for in the answer it was only charged that Thompson was a partner in the conspiracy; that is, in effect, a co-conspirator. Proof of an agreement to share profits and losses in a business undertaking, without more, would hardly be admissible to prove a conspiracy. Certainly there was no room for such proof upon cross-examination in this case. On his cross-examination Arthur M. Akin, a member of the firm of Edholm & Akin, testified that he had learned the value of a circular counter in controversy by pricing one like it in Chicago with a dealer in such goods, and that he knew what this particular counter originally

cost. Counsel complained that thereupon the court did not sustain his motion to strike out all the evidence which had been given by this witness as to the market value of the counter. To have sustained this motion would have withdrawn from the consideration of the jury direct, competent evidence upon this point which was clearly involved in this controversy. The motion, therefore, could not be sustained so far as to reach the evidence given on the direct examination, and it would have been equally anomalous to have sustained it to the extent that this cross-examination should have been excluded upon motion of the attorney who conducted it.

Again, counsel for plaintiff in error contends that it was error to limit Akin's cross-examination to the inquiry whether the said Akin had not told a Mr. Bell that Edholm & Akin were going to sell pianos for Mr. Thompson. As the testimony fully discloses the fact that such an arrangement existed as to business conducted in a room separate from that in which were the mortgaged goods, and without the two lines of business being at all confused or mixed with each other, we cannot conjecture what further inquiry would be profitable which would simply tend to elicit testimony of facts as to which there was no controversy. But counsel persisted in his cross-examination of this witness on this line until it was shown that there was a written contract between Thompson and the firm of Edholm & Akin as to the piano business, and that the witness had shown that written contract to Mr. Bell. No attempt was made to compel the production of this writing, and we think the plaintiff in error has no ground of complaint because of the refusal of the court to admit, even on cross-examination, oral evidence of the agreement shown to be in writing.

Complaint is made that the court did not permit counsel to ask Albert Edholm (who was not a member of the firm of Edholm & Akin) whether the ranch in Wyoming was

put in the name of the witness just before the failure of the firm of Edholm & Akin, and it is insisted that such a line of cross-examination was proper, because the witness had been asked on direct examination whether or not none of the credit of the business that he (witness) was doing was derived from Edholm & Akin. On his direct examination he had testified that he was engaged in business on his own account. It was shown that he was never a member of the firm of Edholm & Akin, and he testified that he bought the ranch with his own money, in detail stating from whence it was derived. The ranch consisted of 160 acres. It is difficult to imagine how any cross-examination could have developed anything of importance, even had the court permitted the cross-examination of Albert Edholm as to whether or not the title to the ranch was put in his name. The court very properly excluded further cross-examination on the line proposed.

The final objection made as to the introduction of testimony is difficult to condense. Indeed, it is almost as difficult to understand. It is therefore given by quotation from counsel's brief, in the following language: "So again, Edholm & Akin had told of conversations with Glasburg—conversations under most suspicious circumstances, one of them telling it on reply to a question of Mr. Howe, inserted into our cross-examination, page 780. They tell their side. They deny any attempt to induce him. Yet Glasburg, when he comes on the stand, is not allowed to state his side of those conversations, and when we offer to prove what Edholm & Akin did say in so many words (pages 1228, 1229), an attempt in those very conversations on the part of Arthur Akin and N. J. Edholm to bribe a witness, the court, on the same frivolous objection, says that we have not asked a question which, if asked, would have been leading; refuses our side of this question; protects these parties in the very face of the fact that this offer was before him, and the first question was whether he had had any

such conversations." It is but just to the trial court that the portion of the record complained of should be set out with sufficient fullness to vindicate the ruling made, for, in our view, it can have no other effect. The question propounded to Glasburg was as follows: "Have you had any talk or conversation with any one connected with the opposite side of this case from the bank since this trial begun, with regard to whether or not you were going to testify in the case?" This was objected to as incompetent, immaterial, and calling for the witness' conclusion as to who was connected with the other side of the case. The objection was sustained, and defendant excepted, whereupon counsel for plaintiff in error stated: "We will offer to show by this witness that Nelson J. Edholm and Arthur Akin came to him." At this point counsel for the other side objected to the offer on the ground that the law required that, first, a question should be asked, upon the exclusion of which counsel might make their offer to prove, but not having asked any question it was improper to make tender of proof. This objection was overruled and plaintiff excepted. The court then said that counsel had the right to make the offer, and that the court would rule upon the questions as they arose. Counsel for plaintiff in error then offered to show that Nelson J. Edholm and Arthur M. Akin came to the witness and urged upon him that they were friends of his and that the note which they had heretofore refused to give him of $200 they were ready to give him, which note had already been paid; and also proposed to pay him some money which they were owing him and urged upon him not to be a witness in this case, nor to tell anything he knew; and also that they were to give him a little house on Twenty-fourth and Lake street, or thereabouts, for a nominal price; also, that another party came to this witness and said to him that he should not testify against Edholm & Akin, that they were young men and that he was a young man, and that he should not testify

against them. Upon inquiry by the court as to what the other side had to say to the offer made, counsel for the other side said: "We have been protesting here, and we now protest, that this witness was not asked any question as to any conversation that he had with Edholm & Akin, and the objection we made to the former question was simply because it was not specific in asking with what party the conversation was had, leaving it for the witness to determine who was connected with the case. We have not yet made any objection to their asking this witness any question." At this point counsel for plaintiff in error interrupted, using the following language: "I object to a long-winded statement of this kind. I have made my offer and they have no right to put a stump speech into this record. If they want to object to that, and if your honor rules it out, all right. I object to any stump speech of Mr. Howe being put into this record now." The court remarked: "I think it is proper for Mr. Howe to put in the record his legal points on which he objects to this evidence, and that is sufficient."

Mr. Hall: "I move to strike out that speech."

Mr. Howe: "I had the floor when I was interrupted."

The Court: "I will strike from the record that statement of Mr. Howe. The matter stands on the offer of Mr. Hall. I ask Mr. Howe or Mr. Whedon to state on the record to what point they objected to the offer, their legal objections, and I will pass upon them."

Mr. Howe: "Our sole objection to their making the alleged proof, stated in their last offer, is simply because they have not stated a question asking for any conversation that the witness had with Akin or any other particular party."

The Court: "The objection is sustained."

Mr. Hall: "Give us an exception."

The witness Glasburg was being examined as a witness of plaintiff in error when this colloquy occurred. The only requirement of the court, precedent to the introduc-

tion of statements of the nature called for by the question, was that the interrogatory should be directed to a conversation with some particular person named; that is, either with Edholm or with Akin, or some other party named. It seems to us that this was but a reasonable requirement, and that counsel, by refusing a compliance therewith, did not place himself in such an attitude as that he could complain of the refusal of the court to permit an answer to an interrogatory so general in its nature as that propounded. If there had been a conversation of the nature of that sought to be elicited, it would be proper that the party with whom that conversation was held should be designated in the interrogatory, so as to afford a fair opportunity to make any proper objection which might lie thereto, because of the incompetency of the evidence founded upon a lack of privity between the plaintiff and the party with whom Glasburg might have had the conversation in question. The requirement was but a reasonable one, and the failure to comply with it affords no ground for criticism of the ruling of the court, much less does it justify any intimation of unfairness on the part of the presiding judge.

The above quotation we will supplement with a few excerpts from the bill of exceptions, illustrative not of any particular question which arose, but of the general course of procedure followed in the trial of this cause. Upon the cross-examination of the witness Akin as to a conversation had with Mr. Bell, to which we have heretofore referred, the witness was asked:

Didn't you tell him substantially just as I have given it to you?

The Court: Can you answer the question, Mr. Witness?

A. Why I can say as to what I told him or said to him.

Q. Well, did you say that to him? If you didn't, you can say so, can't you?

A. I might have told him——

Q. No, no; did you say that?

A. I can't answer that question unless you let me explain.

Mr. O'Connor: We ask that the witness be fined for contempt of court for not answering the question. We ask that the rules be enforced, and that he will have to answer. He can do it. He said so, or he did not say so.

After the refusal of the court to fine for contempt, as requested, the examination proceeded as follows:

Q. At that time didn't you state to Mr. Bell that you had completed this contract with Thompson and that you were to have twenty-five per cent of the profits?

The Court: Answer the question, if you can.

Counsel: Will your honor instruct him to confine his answer and not go outside?

The Court: Yes, I will instruct him to confine his answer; but not as to how he should answer, further than to answer the question as propounded by Mr. Hall.

A. That question I cannot answer unless I am allowed to explain.

Q. Well?

Mr. O'Connor: I expect that is not an answer to the question.

Mr. Howe: Don't you want him to explain?

Mr. Hall: I don't propose to allow him to throw in a lot of stuff unless you will agree that I shall cross-examine on it.

Mr. Howe: We will agree to nothing.

The Court: We will stop right here on this line of questions and go on to something else.

Mr. O'Connor: We take exception to the refusal of the court to compel the witness to answer that question, "yes" or "no."

This objection was overruled, and defendant excepted.

A little further on in the cross-examination of this same witness he was asked upon what book the bills payable and receivable of the firm of Edholm & Akin would be entered, and following this was this colloquy:

A. Why, our eastern notes would be entered on the bills payable books; those are the only ones we kept track of.

Q. Your eastern notes?

A. Yes, sir.

Q. I am not asking you about your eastern notes, I am asking you upon what books those entries would be made. I am not asking you to go into the contents, I am expressly trying to keep you from doing it. I want you now just to answer the question. What is the name of the books upon which your bills payable and receivable would be entered?

A. Our eastern bills payable——

Mr. Hall: Never mind now. What is the name of the book? Don't go and slash that into me any more. You are trained too well. Give the name of the book. You know it.

A. Well, we called it the bills payable and bills receivable book.

The witness Farnsworth was asked as to his judgment of the amount of the stock in January, 1890, and answered that it was about forty thousand as he recollected it.

Mr. O'Connor: I move to strike that out as not responsive to the question, incompetent, irrelevant, and immaterial.

During the argument the following exception was taken:

Mr. O'Connor: They have the witnesses drilled here, and I make the charge deliberately.

Mr. Howe: I want that taken down by the reporter, now that the charge is made deliberately.

The Court: I ask that counsel on both sides abstain from these assertions which have no bearing on the question here.

Mr. O'Connor: The witnesses are trained to that, and I have the right to say so. Just the moment, like a parrot, when a word is mentioned they answer right out what they have no right to answer. I say the witnesses are

trained. While I don't charge Mr. Howe with training them, somebody has done it, and they are very apt scholars.

The Court: I don't think it is proper to say these witnesses are trained. This witness seems to me to be a very fair witness.

Mr. Hall: We desire to except to that.

Mr. O'Connor: I wish to note it down. It is certainly error on the part of the court to remark on any evidence.

In the cross-examination of Albert Edholm was the following:

Q. Didn't you know as a matter of fact that you could get the very best jeweler's trunk for $35?

A. No, sir.

Q. You say that is not so?

A. I say I did not know that.

Q. Oh, you did not know that?

A. You asked me if I did not know that, and I said "no."

Q. Oh, yes; we will give you another chance to dodge it in another direction.

Like the trunk just inquired about, these excerpts are but samples of what occurred during the twenty-five days occupied in the trial of this case; but they serve fully to illustrate with what truth to life was given the examination of one witness in the trial of Bardell against Pickwick, any indorsement of the reflections of the reporter of that case, however, being expressly discarded. The portion of the celebrated trial alluded to is reported in the following language:

"'Now, Mr. Winkle,' said Mr. Skimpin, 'attend to me, if you please, sir, and let me recommend you for your own sake to bear in mind his Lordship's injunction to be careful. I believe you are a particular friend of Pickwick, the defendant, are you not?'

"'I have known Mr. Pickwick now, as well as I remember at this moment, nearly——'

"'Pray, Mr. Winkle, do not evade the question. Are you, or are you not, a particular friend of the defendant?'

"'I was just about to say that——'

"'Will you or will you not answer my question, sir? Come, sir,' said Mr. Skimpin, 'yes or no, if you please.'

"'Yes, I am,' replied Mr. Winkle.

"'Yes, you are, and why could you not say that at once, sir? Perhaps you know the plaintiff, too; Eh, Mr. Winkle?'

"'I don't know her. I have seen her.'

"'Oh, you don't know her, but you have seen her? Now, have the goodness to tell the gentlemen of the jury what you mean by that, Mr. Winkle.'

"'I mean that I am not intimate with her, but I have seen her when I went to call on Mr. Pickwick in Goswell street.'

"'How often have you seen her?'

"'How often?'

"'Yes, Mr. Winkle, how often? I will repeat the question for you a dozen times if you require it, sir.' And the learned gentleman, with a firm and steady frown, placed his hands on his hips and smiled suspiciously at the jury. On this question there arose the edifying browbeating customary on such points. First of all, Mr. Winkle said it was impossible for him to say how many times he had seen Mrs. Bardell. Then he was asked if he had seen her twenty times, to which he replied, 'certainly, more than that.' Then he was asked whether he had not seen her a hundred times; whether he could not swear that he had seen her fifty times; whether he did not know that he had seen her at least seventy-five times, and so forth. The satisfactory conclusion which was arrived at at last, being that he had better take care of himself, and mind what he was about. The witness having been by these means reduced to the requisite ebb of nervous perplexity, the examination was continued as follows:

"'Pray, Mr. Winkle, do you remember calling on the defendant Pickwick at these apartments in the plaintiff's house in Goswell street on one particular morning in the month of July last?'

"'Yes, I do.'

"'Were you accompanied on that occasion by a friend of the name of Tupman, and another of the name of Snodgrass?'

"'Yes, I was.'

"'Are they here?'

"'Yes, they are,' replied Mr. Winkle, looking very earnestly towards the spot where his friends were stationed.

"'Pray, attend to me, Mr. Winkle, and never mind your friends,' said Mr. Skimpin, with another expressive look at the jury. 'They must tell their stories without any previous consultation with you, if none has yet taken place'—(another look at the jury)."

For our purpose this quotation is amply sufficient. The judgment of the district court is

AFFIRMED.

JOHN A. WAKEFIELD, APPELLEE, V. WILLIAM LATEY ET AL., IMPLEADED WITH W. B. MILLARD, APPELLANT.

FILED FEBRUARY 7, 1894. No. 4602.

1. **Mechanics' Liens**: ACCOUNT: REGISTRATION. The object of the mechanics' lien statute, which requires a lien claimant to file in the office of the register of deeds "an account in writing of the items" of material for which he claims a lien against real estate, is to apprise persons dealing with it of the claims against the same.

2. ———: ———. Section 3, chapter 54, Compiled Statutes, 1893, mechanics' lien law, requires a lien claimant to make oath to the "account in writing" of the items for which he claims a

lien, but does not require him to state in such oath all the facts which he would be required to plead and prove in order to establish his lien by a decree of a court of equity.

3. **The "account of items" and the oath or affidavit attached thereto should both be looked to and read as one instrument to determine whether a lien claimant has brought himself fairly within the provisions of the mechanics' lien law.**

4. **Mechanics' Liens: STATEMENT OF CLAIM: CONSTRUCTION.** Whether a verified "account of items" filed for record shows on its face sufficient to entitle it to be asserted of record as a lien against the real estate of another, and made the basis of a suit in equity to foreclose such lien, is a question of law to be determined from the instrument itself.

5. ———: ———. Whether a lien claimant has performed such acts, and performed them under and in pursuance of such conditions and in such time and manner as to entitle him to a decree establishing his lien, are mixed questions of law and fact.

6 ———: PROOF. A lien claimant cannot prove his compliance with any of the requirements of the mechanics' lien law by the "lien," so called, itself, save the filing thereof and the oath thereto.

7. ———: SINGLE LIEN AGAINST SEVERAL BUILDINGS. A lumber merchant, in pursuance of a single contract with the owner of two separate lots, furnished him material for the erection of three houses thereon. *Held*, That the lumber merchant was entitled to enforce a single lien against all the houses and lots for the balance due him for material furnished by him under his contract with the owner.

8. ———: ACCOUNT OF ITEMS: FAILURE TO STATE OWNER OF REALTY. In a verified "account of items" of material filed, and for which a lien was claimed against certain real estate under the mechanics' lien law, neither in such account nor the affidavit attached thereto was it stated who was the owner of the real estate, nor that the contract for the material was made with the real estate owner or his agent. *Held*, That such omissions were not fatal to the lien.

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

The facts are stated in the opinion.

Hall, McCulloch & English, for appellant:

The affidavit did not conform to the statute. (*Hays v. Mercier*, 22 Neb., 661.)

A joint lien cannot be had, when, as in this case, the houses are separate and distinct. The statute is not complied with by filing a joint lien, and hence no lien attaches. (Phillips, Mechanics' Liens, sec. 376; *Kezartee v. Marks*, 15 Ore., 529; *Culver v. Elwell*, 73 Ill., 536; *Fitzpatrick v. Thomas*, 61 Mo., 512; *Chapin v. Perssee & Brooks Paper Works*, 30 Conn., 461; *Hill v. Braden*, 54 Ind., 72; *Morris County Bank v. Rockaway Mfg. Co.*, 16 N. J. Eq., 150; *Hill v. Ryan*, 54 Ind., 118; *Goepp v. Gartiser*, 35 Pa. St., 130; *James v. Hambleton*, 42 Ill., 308; *Ballou v. Black*, 17 Neb., 395.)

Montgomery, Charlton & Hall, contra:

The contract for the erection of the buildings was entire. No separate account was kept or required as to any house, or any particular part of the lots. The lien therefore attached. (*Doolittle v. Plenz*, 16 Neb., 156.)

RAGAN, C.

John A. Wakefield brought suit in the district court of Douglas county to foreclose a lien against lots one and two in block six, Denise's addition to the city of Omaha, for material which he alleges he furnished to construct some dwelling houses on said lots. William Latey and William V. Benson were made defendants, as it is alleged the material was furnished to them, they owning the lots at the time, and W. B. Millard was made defendant, as he owned the lots when this suit was brought. The district court by its decree gave Wakefield a lien on the lots, and Millard brings the case here on appeal.

Counsel for appellant, for a reversal of this decree, make the following points:

1. That the affidavit attached to the "account of items," mechanic's lien, is insufficient. The affidavit is as follows:

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

"John A. Wakefield, being first duly sworn, on his oath says that the foregoing itemized account of materials is a true and correct account of materials furnished by this affiant for the said —— under a verbal contract for said materials for the erection of the houses upon said land as dwellings on the following described lots, piece, or parcel of land, viz.: Lots one and two, block six, Denise's addition to the city of Omaha; and this affiant further says that he has, and hereby claims, a lien on said premises for the full amount of his said account, to-wit, the sum of $1,922.93, together with interest thereon at the rate of ten per cent per annum from the 17th day of September, A. D. 1887. And further affiant says not.

"JOHN A. WAKEFIELD."

It will be observed that the lien claimant in this affidavit does not state the name of the person with whom he contracted to furnish the material mentioned in the account, nor does he state the name of the real estate owner; and it is for these reasons that counsel claim the affidavit is insufficient. The "account of items," to which this affidavit is attached, is headed: "Omaha, Nebraska, January 20, 1888. John A. Wakefield, wholesale and retail lumber and building materials. Sold to Latey & Benson. Ten per cent interest charged after maturity." Then follows the dates and items and price of the material. Then the following: "Omaha, Nebraska, January 20, 1888. William Latey *et al.*, Latey & Benson, Esq., To John A. Wakefield, Dr. To merchandise for three houses, bills sold August 17, 1887, as per itemized bill attached."

The "account of items" and affidavit attached to the same should be both looked to and read as one instrument, and when this is done, it appears that in pursuance of a

verbal contract of June 17, 1887, Wakefield sold the material for which he claims a lien to Latey & Benson for the erection of the houses on the real estate described in the affidavit. We think this a sufficient compliance with the statute. It is true that to enable a material-man to have established, by decree of a court of equity, a lien against real estate for material furnished for an improvement thereon, he must plead and prove that he furnished material for the purposes of an improvement on said real estate; that he furnished such material in pursuance of a contract, express or implied, made with the real estate owner or his agent; that within four months of the date of the furnishing of the last item of such material, he made an account in writing of the items thereof, made oath thereto, and filed the same in the office of the register of deeds; but these are matters of pleading and evidence in a suit to establish the lien claimed.

Section 3, chapter 54, Compiled Statutes, 1893, provides: "Any person entitled to a lien under this chapter shall make an account in writing * * * of the material furnished, * * * and after making oath thereto, shall," etc. But this section does not require the lien claimant to state in such oath all the facts he would be required to plead in a suit to foreclose his alleged lien. The object, however, in requiring a lien claimant to file in the office of the register of deeds "an account of the items" of material for which he claims a lien against real estate, is to apprise persons dealing with it of the claims against the same; and this statute is complied with if it appear or is fairly inferable from the "account of items" and oath or affidavit thereto, when read together, that the claimant has brought himself within the provisions of the statute. Whether a verified "account of items" filed shows on its face sufficient facts to entitle it to be asserted of record as a lien against the owners of real estate, and a suit in equity to foreclose the lien claimed to be based thereon, is a juris-

dictional question of law to be determined from an inspection of the instrument itself; but whether the lien claimant has performed such acts, and performed them under and in pursuance of such conditions and in such form and manner as to entitle him to a decree establishing his lien under the statute, are mixed questions of law and fact. The lien claimant cannot, however, prove his compliance with any requirement of the statute by the mechanic's lien (the verified account of items) itself, save the filing thereof and the making oath thereto. The first point made by appellant must be overruled.

2. The verified "account of items" was filed against Latey & Benson, and the evidence shows that the real estate, at the time they purchased the material and made the improvements, stood of record in the name of William Latey and William V. Benson, individuals composing the copartnership of Latey & Benson. Appellant's counsel insist that this state of facts made the firm of Latey & Benson subcontractors, and they have no lien because they did not make and file in the office of the register of deeds a sworn statement of the amount due them from their principals within sixty days, etc. The answer to this is that the evidence shows that the real estate was, at the time Latey & Benson made the contract with Wakefield for the material, and during the erection of the improvements for which the material was purchased, the property of the copartnership of Latey & Benson.

3. The verified "account of items" was filed January 20, 1888, and the last item claimed by Wakefield to have been furnished Latey & Benson under the contract is dated September 27, 1887. This item is made up of eight doors and 250 feet of "4370 lumber" (moulding). Counsel insist somewhat vehemently that there is in the record no competent evidence showing that the material called for by this item of September 22, 1887, was furnished by Wakefield to Latey & Benson under the contract in this case, and

used by them in the erection of the improvements for which Wakefield claims a lien. Counsel are mistaken. There is in the record competent evidence justifying the finding of the trial court that the material mentioned in the item of September 22, 1887, was by Wakefield furnished to Latey & Benson under the contract between them, and there is positive evidence identifying some of the doors in the outhouses or sheds on the premises as the doors mentioned in the item. Counsel say, however, that the contract between Wakefield and Latey & Benson was for lumber for dwellings, and if these doors were used in the outhouses or sheds on the same premises on which the dwellings were erected, they cannot be included in the lien here. The contract was for material for the erection of three dwellings on the two lots, and the evidence shows all this material was delivered under the one contract. It would be a technical and narrow construction of the statute to say that under a contract for material for the construction of a dwelling a part of the lumber delivered under the contract, because used in building an outhouse or shed on the premises instead of the dwelling proper, could not be included in the "account of items." But if the doors be excluded from the 22d of September item, the evidence supports the finding that the moulding, at least, was delivered to Latey & Benson for, and used by them in, the dwelling proper. This disposes of appellant's third point.

4. Latey & Benson erected on the two lots three houses, designated in the evidence as Nos. 25, 26, and 27. These houses were all built at the same time. The material for all was furnished by Wakefield under one contract made with Latey & Benson. The houses were to be alike, and the material for each was to be the same. No separate account of the material furnished by Wakefield under his contract for their erection was kept, and such extra material as was used in the finishing of all three was furnished by Wakefield and charged to the account of Latey & Benson under their

contract for material for the three houses. Counsel for appellant say: "A joint lien cannot be had when, as in this case, the houses are separate and distinct. The statute is not complied with by filing a joint lien, and hence no lien attaches." In *Doolittle v. Plenz*, 16 Neb., 153, it is said: "Where A agreed to erect and did erect three houses for B, one upon each of three adjoining lots, for an entire sum, held, that a mechanic's lien attached to all the lots and the buildings thereon."

5. It appears from the evidence that Latey & Benson, on November 3, 1887, paid Wakefield $2,000, which sum Wakefield gave Latey & Benson credit for on an old account they owed him. Appellant insists that this $2,000 was money he paid to Latey & Benson as purchase price for the real estate in controversy here, and that Wakefield should be compelled to credit his claim here against Latey & Benson with that sum. We cannot say the trial court was wrong in refusing to do this. The evidence shows that at the time Wakefield received the $2,000 from Latey & Benson, they owed him large sums on old accounts and they gave him no directions and made no requests as to the account on which it should be applied. "Money paid by a debtor, without direction as to its application, may be applied by the creditor as he pleases." When appellant purchased these lots from Latey & Benson, the lien in suit was of record; and if he chose to pay over the purchase price and assume the risks of defeating the lien, he has no one to blame but himself and certainly is in no position to ask a court of equity to compel another to bear a loss he might have avoided by the exercise of a little foresight and business sagacity.

The decree appealed from is correct and in all things

AFFIRMED.

AMES C. PENNOCK, APPELLANT, V. DOUGLAS COUNTY ET AL., APPELLEES.

FILED FEBRUARY 7, 1894. No. 5124.

Taxation: SALE OF LAND NOT SUBJECT TO ASSESSMENT: RECOVERY OF PURCHASE MONEY: CITIES. In the absence of an express statutory mandate, a city of the metropolitan class cannot be compelled, either at law or in equity, to refund money received by it from a purchaser of real estate at a sale made thereof by the county treasurer, for the purpose of collecting a special assessment or tax levied against such real estate by said city and for which special assessment or tax said real estate was not liable. The rule *caveat emptor* applies with full force to such a purchaser.

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

Henry W. Pennock, for appellant.

W. J. Connell and *A. J. Poppleton, contra.*

See opinion for authorities cited.

RAGAN, C.

Ames C. Pennock brought this suit in the district court of Douglas county against the city of Omaha, the county of Douglas, and John Rush, the treasurer of Douglas county. The county interposed a demurrer to Pennock's petition on the ground, generally, that it did not state facts sufficient to constitute a cause of action, and, specially, that it appeared from Pennock's petition that the claim sued for therein had been by him presented to the board of supervisors of Douglas county and by them rejected, and that he had not prosecuted an appeal from the order of said supervisors rejecting said claim. The city of Omaha also demurred to Pennock's petition on the ground that the

same did not state a cause of action. There was no appearance by or service upon Rush. The district court sustained the demurrers and dismissed Pennock's case, and he comes here on appeal. His counsel thus states the facts in this case:

"The petition alleges for first cause of action that in the year 1883 the city counsel of the city of Omaha created, by ordinance, paving district No. 6, comprising a portion of St. Mary's avenue in said city; that in the year 1884 said city council passed an ordinance providing for the curbing and guttering of said street in said paving district and levied a tax upon the abutting property to pay for the same; that in the same year said city council passed an ordinance providing for the paving of said avenue in said paving district and levying a paving tax upon the abutting property to pay for the same; that lot eight in block two, in Kountze & Ruth's addition to the city of Omaha, was levied upon for said purpose, and the city treasurer was directed to collect said special assessments as other taxes; that in September, 1885, said city treasurer certified to the county treasurer of Douglas county the amount of said special assessments which were then due and delinquent upon said lot, and said county treasurer, after advertising the same in the manner provided by law, sold said lot to the plaintiff at private tax sale on the 28th day of December, 1885; that the plaintiff received of said treasurer a certificate of tax sale in the usual form; that the plaintiff paid to the county treasurer the full amount of said special assessments and interest, amounting to $45.98.

"Some time after said tax sale to the plaintiff, the owner of said lot, with other adjacent property holders, applied to the city council by written petition for relief against said special assessments, on the ground that the same were illegal and void; that said council refused to grant the relief asked; that on the —— day of September, 1887, and

more than three months before the time of redemption had expired, the plaintiff served the notice required by section 123 of the revenue law for the taking out of a tax deed; that after serving of said notice and before two years from tax sale had expired, the owner of said lot applied to the district court of Douglas county for a perpetual injunction, restraining the collection of said special assessments and any further proceedings under said sale; also praying that said assessments be adjudged illegal and void and no lien upon said lot. On the 20th day of December, 1888, final decree was rendered in said cause granting the request of said plaintiff and perpetually enjoining plaintiff herein from enforcing his tax sale against said property, and declaring that said special assessments were illegal and void and no lien upon said lot; that no appeal has ever been taken from said decree and the same is in full force and effect and that plaintiff's consideration at said tax sale has wholly failed; that afterwards the plaintiff applied to the county commissioners of Douglas county for repayment of the money expended at said sale, which was by said commissioners refused; that afterwards the plaintiff applied to the city council of the city of Omaha likewise for a reimbursement of the money so expended at said tax sale, which was by said city council refused; that plaintiff had used due care and diligence in the purchase of said lot for taxes, and had no means of knowing or reason for suspecting that said lot was not legally and properly assessed for said improvements, and that, through the representations of the city and its officers, he had been induced to purchase at said tax sale; that by reason of the illegal acts of the city in the premises, the consideration for said sale had entirely failed; that the city council has authority, under a special clause of the statute, to make a supplemental assessment and levy upon the property abutting on St. Mary's avenue, to correct any error, omission, or mistake in the first assessment or levy, and that said city may thus fully reimburse itself in the premises.

"Second, third, and fourth causes of action contain similar allegations with reference to adjacent lots bought by the plaintiff for the same special assessments at the same date and under the same conditions.

"Prayer: (1) That the county of Douglas be required to refund to the plaintiff the amount so paid at said void tax sale with interest; (2) that in case said county be held not liable, that John Rush, the then county treasurer of said county, who made said illegal sales, be required to pay said amount with interest; (3) that in case neither the county of Douglas nor John Rush be held liable, the city of Omaha be adjudged to be liable to the plaintiff as for money had and received from the plaintiff; that, in that case, the city be adjudged to pay to the plaintiff the amount so paid by the plaintiff, with interest at the rate of seven per cent per annum, and for such other relief as may be in accordance with equity and justice."

If appellant's claim is one for which Douglas county was liable, then, to entitle him to recover against the county he should have filed such claim with its county clerk, had it passed upon by the county board of supervisors, or commissioners, and appealed from their decision, if the same was unsatisfactory, to the district court. In no other manner could the district court acquire jurisdiction of a suit against the county, founded on such a claim as the one sued on here by the appellant. (Sec. 37, ch. 18, Comp. Stats., 1893; *Brown v. Commissioners of Otoe County*, 6 Neb., 111; *State v. Commissioners of Buffalo County*, 6 Neb., 454; *Commissioners of Dixon County v. Barnes*, 13 Neb., 294; *Richardson County v. Hull*, 24 Neb., 536.) Appellant alleged that he duly filed his claim against Douglas county and that it was rejected by the supervisors, or county commissioners thereof; but it does not appear from the record before us that appellant has ever appealed from the order rejecting his claim, much less that the present suit is a prosecution of such an appeal. The judgment of

the district court, then, dismissing appellant's suit against Douglas county, was right. It may be that Douglas county would have been liable for appellant's claim had he pursued the remedies provided by the statute. (Sec. 131, ch. 77, Comp. Stats., 1893; *Richardson County v. Hull*, 24 Neb., 536; *Roberts v. Adams County*, 18 Neb., 471; *Wilson v. Butler County*, 26 Neb., 676.) But that question is not before us and we express no opinion on the point.

The question presented by this appeal is: In the absence of an express statutory mandate, can a city of the metropolitan class be compelled to refund money received by it from a purchaser of real estate at a sale made thereof by the county treasurer for the purpose of collecting a special assessment or tax levied against such real estate by said city, and for which special assessment or tax said real estate was not liable? The learned counsel for appellant contends that the rule *caveat emptor* does not apply to such a purchaser, and in support of this contention, and that the question stated above should be answered in the affirmative, has furnished us an able and exhaustive brief and argument in which he has cited many authorities. We have carefully examined all the cases cited by him, and it is not to be denied that the contention of counsel is supported by the decisions of courts whose opinions are entitled to much weight.

The rule contended for by appellant seems to be the doctrine of the supreme court of Iowa. In *Corbin v. City of Davenport*, 9 Ia., 239, it is said: "The purchaser at an invalid sale of property by a city for taxes may recover of the city the amount of purchase money paid and interest." It does not appear from the opinion that it was predicated upon a statute making cities liable in such cases. Such, also, seems to be the rule in Wisconsin. In *Norton v. Supervisors*, 13 Wis., 684, it is said: "Where a tax sale is void the county is liable to the holder of certificates issued on such sale for the amount paid with interest.

* * * The statute makes it the duty of the treasurer to refund the money in such case on demand to the purchaser or his assigns; but the liability of the county does not depend upon this statute, and whatever remedy it gives is cumulative to the right of the action for money had and received." This case was cited with approval in *Van Cott v. Board of Supervisors*, 18 Wis., 259.

In *Chapman v. City of Brooklyn*, 40 N. Y., 372, the city of Brooklyn caused an assessment to be levied upon certain lots to pay the expense of grading and paving a certain avenue. The admitted benefits of this improvement to the two lots were assessed against parties who were not the owners of them. By the law in force in such cases, judgment for the amount of the assessment was rendered against the persons so assessed; executions issued on such judgment, and returned unsatisfied. The lots were then put up for sale by the street commissioner, and sold to a purchaser, who paid over the amount of the bid, and received the certificate of sale. The money was transmitted by the street commissioner to the city treasurer. An action was then brought against the city by the assignee of this certificate to recover back the money paid, on the ground "that the assessment proceedings were absolutely void for want of jurisdiction, the assessment not having been made against the owner of the lots." The court held that the assessment was void because not made against the owner of the lots, and, by a divided court, "that the plaintiff could recover on the ground of an entire failure of the consideration."

In *Phillips v. Mayor and Council of City of Hudson*, 31 N. J. Law, 143, the court said: "Where there was a sale [of real estate] to pay for an improvement in the city of Hudson, and a declaration of sale delivered in pursuance of a void ordinance, held, that the purchase money could be recovered back in an action of assumpsit" against the city. This case was also decided by a divided court.

The foregoing are all the authorities cited by counsel for the appellant which can be said to be squarely in point and support his views. Counsel, however, refers us to the following: *Pettit v. Black*, 8 Neb., 52, *Read v. Merriam*, 15 Neb., 323, and *Merriam v. Hemple*, 17 Neb., 345, as authority for the doctrine for which he argues. These cases, however, do not support appellant's contention. In each of these cases, while the tax deeds which the purchaser obtained at the tax sale were wholly void, the taxes for which the property was sold were valid liens on the property, and furthermore, the decisions in these cases were based on a statute. Counsel also cites us to *Wilson v. Butler County*, 26 Neb., 676; but this was a suit by Wilson against the county, and the opinion is predicated on a statute. Another Nebraska case cited by counsel is *Clark v. Board of County Commissioners of Saline County*, 9 Neb., 516. In that case Saline county conveyed a tract of land to one Hunt and paid him $500 in money, in consideration of which Hunt agreed to build a bridge across the Blue river. Hunt assigned his contract to Clark and conveyed him the land. Clark built the bridge and the county accepted it. The title to the lands having failed, Clark sued the county for the value of the bridge, and the court held that he was entitled to recover. But there is a wide distinction between the legal status of a purchaser of property sold at a tax sale and that of one who builds an improvement for a county and receives land or other property in payment for such improvement, the title to which fails. Appellant's case is not within the principles of the case just cited.

Pimental v. City of San Francisco, 21 Cal., 352; *Taylor v. People*, 66 Ill., 322, *Louisiana v. Wood*, 102 U. S., 294, and *Chapman v. County of Douglas*, 107 U. S., 48, also cited by appellant's counsel, are analogous in principle to *Clark v. Board of County Commissioners of Saline County, supra*, and need not be further noticed.

As opposed to the rule contended for by appellant's counsel are *Lynde v. Inhabitants of Melrose*, 92 Mass., 49, where it is said: "If a tax title proves invalid, the purchaser at the collector's sale cannot maintain an action against the town to recover back the money paid by him as the consideration of the purchase. * * * No precedent for maintaining such a suit is found, and the plaintiff's counsel rests his argument solely upon the ground that the defendants have received the amount of the tax without consideration. * * * There is a plain distinction between the right of a person to recover from the town the amount of a tax unlawfully assessed upon him and the claim of the purchaser under a collector's deed whose title proves defective. * * * The purchaser is a mere volunteer in the payment of the tax. He has the same means of knowing whether it is legally assessed as the town has. He buys the title without warranty except such covenants as he takes from the collector, and he must rely only upon them. Beyond those covenants, his deed is in the nature of a mere quitclaim for which he has paid what he thought the chance was worth. His speculation may prove very profitable, or wholly unproductive; but no one has taken his property without his consent or with any contract, expressed or implied, to reimburse him if his bargain proves a losing one."

Such is the rule in the state of Indiana. In *Churchman v. City of Indianapolis*, 110 Ind., 259, it is said: "Money voluntarily paid on a demand in the nature of a tax—and a street improvement assessment is such—cannot be recovered back in the absence of an express statutory provision authorizing such a recovery. The doctrine of *caveat emptor* applies as fully to sales upon assessments for street improvements as to any other analogous class of sales. A recital in a deed executed by a city treasurer upon the sale of lands in satisfaction of an assessment for a street improvement that 'it appearing from the records of the com-

mon council of said city, in the city clerk's office, that the aforesaid lands were legally liable for such assessment,' is not a representation of fact upon which the grantee had a right to rely." To the same effect see *State v. Casteel*, 110 Ind., 174; *Worley v. Town of Cicero*, 110 Ind., 208; *Board of Commissioners v. Armstrong*, 91 Ind., 528; and the *City of Logansport v. Humphrey*, 84 Ind., 467, where it is said: "The purchaser at a city tax sale assumes all risks, and if the sale proves invalid, has no remedy against the municipality."

This also seems to be the rule at present in New Jersey. In *Casselberry v. Piscataway*, 43 N. J. Law, 353, it is said: "A municipality is not bound to refund the purchase money received on a tax sale merely because there has been illegality in the proceedings which defeats the title of the purchaser, * * * the rule of law applicable to such a case is that the municipality is under no obligation to refund the purchase money, because the tax title fails. The purchaser is a volunteer and buys at his own risk."

This also seems to be the doctrine in California. In *Loomis v. Los Angeles County*, 59 Cal., 456, it is said: "In an action against a county to recover purchase money paid by the plaintiff at a void tax sale there is no rule of law authorizing plaintiff to recover." (See also *Harper v. Rowe*, 53 Cal., 233.)

This also seems to be the rule in New York, notwithstanding the case of *Chapman v. City of Brooklyn*, *supra*. (See *Swift v. City of Poughkeepsie*, 37 N. Y., 511; *Phelps v. Mayor of New York City*, 112 N. Y., 216.)

Such is the rule in Kansas. In *Sullivan v. Davis*, 29 Kan., 28, it is said: "The rule *caveat emptor* is, except as limited or qualified by express provisions of statute, universally applicable to all purchasers at tax sales." (See also *Board of Commissioners v. Geis*, 22 Kan., 381; *Sapp v. Commissioners of Brown County*, 20 Kan., 243; *Commissioners of Wabaunsee County v. Walker*, 8 Kan., 431; *Phil-*

lips v. Board of Commissioners of Jefferson County, 5 Kan., 412.)

In *San Francisco & N. R. Co. v. Dinwiddie*, 13 Fed. Rep., 789, it is said: "An assessment made in strict accordance with the provisions of the state constitution relating to the assessment of railroad property, which violates the provisions of the fourteenth amendment to the constitution of the United States, is void. A payment under it is not a payment under duress, but is voluntary and cannot be recovered."

In Cooley, Taxation [1st ed.], 328, it is said: "A tax sale is the culmination of proceedings which are matters of record; and it is a reasonable presumption of law that where one acquires rights which depend upon matters of record, he first makes search of the record in order to ascertain whether anything shown thereby would diminish the value of such rights or tend in any contingency to defeat them. A tax purchaser consequently cannot be, in any strict technical sense, a *bona fide* purchaser, as that term is understood in the law, because a *bona fide* purchaser is one who buys an apparently good title without notice of anything calculated to impair or affect it; but the tax purchaser is always deemed to have such notice when the record shows defects. He cannot shut his eyes to what has been recorded for the information of all concerned and, relying implicitly on the action of the officers, assume what they have done is legal because they have done it. It is, indeed, a presumption of law that official duty is performed; and this presumption stands for evidence in many cases, but the law never assumes the existence of jurisdictional facts; and throughout the tax proceedings the general rule is that the taking of any one important step is a jurisdictional prerequisite to the next; and it cannot therefore be assumed because one is shown to have been taken that the officer performed his duty in taking that which should have preceded it."

In Desty, Taxation, p. 850, it is said: "Except as limited and qualified by express statutory provisions, the rule [*caveat emptor*] applies to all purchasers at tax sales; and if the public has nothing to sell, the purchaser gets nothing. Purchasers are bound to know, at their peril, that the supposed delinquent is in fact delinquent,—that he has been lawfully assessed, and has failed to make payment. * * * The purchaser at a municipal sale for taxes buys at his own risk, and at his peril investigates the proceedings. A county does not guaranty tax titles except as the statute may provide, and cannot refund money upon the failure of such titles."

We are urged by counsel for appellant to hold the city of Omaha liable in this case upon moral grounds, but we cannot do so. The city did not ask appellant to purchase at its tax sales. He was a volunteer, with all that that term implies. He bought without warrant or covenant of any kind and bid what he considered the venture worth; and under these circumstances and in a case like the present, where there was no fraud, no misrepresentation, and no mistake of the facts, it is well settled, as between individuals, that the purchaser is without remedy in case of failure of title. (Rawle, Covenants for Title, sec. 321, and cases there cited.) In this case appellant knew when he made the purchase that in case of redemption he would receive a return on his investment unusually large. If the owners of the property failed to redeem the same, he could, under the statute, foreclose his lien and obtain title to valuable property for a very small part of its actual worth. Appellant claims that he should be given all these advantages for unusual profits, but at the same time he should be fully indemnified against any risk of loss. In no other line of business, under no other circumstances, would such a claim be made. In the interest of the public revenue and as an inducement to buy at tax sales, our law presents tempting offers to the speculator; but until the legislature

shall so expressly declare, the courts will not place the responsibility upon cities of refunding money paid by purchasers for property at sales made thereof for taxes. (*Budge v. City of Grand Forks*, 47 N. W. Rep. [N. Dak.], 390.)

A consideration of the authorities reviewed above leads us to the conclusion that the rule *caveat emptor* applies with full force to purchasers of property at tax sales, and constrains us to the conclusion that in the absence of a statute therefor, no municipality can be compelled, either at law or in equity, to refund money which it has received from the sale of real estate for taxes, even in cases where the property against which such taxes were levied was not liable therefor. The decree appealed from must be

AFFIRMED.

H. A. MERRILL, APPELLANT, V. CITY OF OMAHA, APPELLEE.

FILED FEBRUARY 7, 1894. No. 5123.

Taxation: SALE OF LAND NOT SUBJECT TO ASSESSMENT: RECOVERY OF PURCHASE MONEY FROM CITY. The law applicable to this case was settled by this court at this term in *Pennock v. Douglas County*, 39 Neb., 293, and on the authority of that case the decree appealed from in this case is affirmed.

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

Henry W. Pennock, for appellant.

W. J. Connell and *A. J. Poppleton, contra.*

RAGAN, C.

H. A. Merrill brought this suit in the district court of Douglas county against the city of Omaha to recover certain city taxes which he had paid upon real estate. The

tax levy was void because the property was not taxable. At the time Merrill paid the taxes he was the owner of tax sale certificates against the property, which he had received from the treasurer of Douglas county at a sale of property for taxes for a prior year. The district court sustained a demurrer to Merrill's petition filed thereto, on the ground that it did not state facts sufficient to constitute a cause of action, and dismissed Merrill's case, and he brings it here on appeal.

The law of this case was settled by this court at this term in *Pennock v. Douglas County*, 39 Neb., 293, and on the authority of that case the decree of the district court in the case at bar is

AFFIRMED.

CITY OF LINCOLN V. HENSON CALVERT.

FILED FEBRUARY 7, 1894. No. 5622.

1. **Municipal Corporations:** DEFECTIVE STREETS: REPAIRS. The duty ordinarily resting upon a city to maintain its streets and sidewalks in a reasonably safe condition for travel in the ordinary mode is remitted during the time occupied in making repairs or improvements.

2. ———: ———: ———. But in such case the city is free from liability only for such obstructions or unsafe conditions as are reasonably necessary for the purpose of performing the work and such as are maintained only for the time reasonably required for making such improvements.

3. ———: ———: ———: NEGLIGENCE. And where a street is rendered unsafe for travel in the ordinary modes by improvements in progress thereon the city must exercise reasonable care to protect the public from the consequences of such unsafe condition.

4. ———: ———: NEGLIGENCE: NOTICE: LIABILITY FOR INJURIES. While a city is liable only for injuries resulting from defects

brought to its notice or existing under such circumstances that ignorance of the defect amounts in itself to negligence, still, when the defect is caused by the direct act, order, or authority of the city, notice is necessarily implied.

5. ———: ———: ———: INSTRUCTIONS. In an action for injuries sustained from the defective condition of a street caused by grading operations preparatory to paving, the court instructed the jury that it was the duty of the city to use reasonable care in keeping the sidewalk in a reasonably safe condition, and if the city failed so to do and maintained a dangerous condition for a considerable time it would be liable. *Held*, Erroneous for not stating the rule fixing the city's duty and liability as defined in the first, second, and third of the above paragraphs, and in charging the city for an unsafe condition maintained for a considerable time instead of an unreasonable time.

6. **Review.** The evidence examined, and *held* to conform to the allegations of the petition and to be sufficient to sustain the verdict.

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

N. C. Abbott, City Attorney, and *Abbott, Selleck & Lane*, for plaintiff in error.

Leese & Stewart, contra.

IRVINE, C.

The defendant in error recovered a judgment of $2,000 and costs against the plaintiff in error because of injuries sustained by defendant in error through a fall occasioned, as he alleged, by the defective condition of a street.

1. The first assignment of error to be noticed is that there was a variance between the allegations of the petition and the proof. The allegations of the petition in regard to the manner in which the accident occurred are briefly as follows: That on the west side of Tenth street between S and T streets, and extending beyond T street, there is a sidewalk; that while plaintiff was walking along and upon said sidewalk at the southwest corner of Tenth and T

streets he fell down and into an excavation or cut negligently, willfully, and knowingly made and left by the defendant in the sidewalk at said point and place, causing plaintiff to fall across and upon a large curb or other stone, by defendant negligently, purposely, and willfully left lying at that point and place against the bank of said cut or excavation; that said cut or excavation was knowingly and negligently made and left so as to be dangerous and unsafe to persons walking along said sidewalk a long time prior to the injury, and said sidewalk was knowingly, willfully, and negligently permitted to remain in said condition, and said stone knowingly, willfully, and negligently permitted to remain in a dangerous and unsafe condition to persons walking along said sidewalk; that the place where said sidewalk was defective and dangerous was about the edge and beginning of the crossing of Tenth and T streets, and that the said cut and excavation was in T street, occupying and filling all the space in T street at said point.

The proof offered on the part of the plaintiff was that Tenth street extended north and south, T street crossing it at right angles. Both streets at and near their intersection had been graded, or were in process of grading, preparatory to paving, a cut being made at the intersection estimated by different witnesses at from three to seven feet in depth. A portion of the sidewalk along T street at the southwest corner of the intersection had been removed, and along the sidewalk line a pathway had been cut or worn, inclining from the original surface of the ground towards the bottom of the cut in T street. Curb-stones had been thrown along T street, but had not been placed in position. One of these, of considerable size, was left lying across this pathway. Its precise position seems to have been described by witnesses by some means of illustration probably perfectly clear to the eye but far from appearing clear upon the record. It would seem, however, that this stone lay at or near the bottom of the incline and in a diagonal direction

across the pathway. Upon the day of the accident Calvert, who lived north of T street, walked south along Tenth street to the place of his labor, when rain setting in, work was stopped and he started to return home by the same route. When he reached the place where the sidewalk had been removed he found that the rain had rendered the inclining pathway muddy and slippery. He took a long step or leap to reach the stone, alighted upon it, but the stone itself being wet, he lost his footing and fell, striking the stone in his fall and sustaining an injury.

The city construes the petition as charging that Calvert fell from the brink of the excavation into it and upon the stone and claims that the proof does not conform to those allegations. We think this construction of the petition too narrow and unwarranted. That might be the inference from some of the language of the petition, but when all the allegations in regard to the condition of the street and the manner of the injury are taken together, we think the proof fairly conforms thereto. The language of the petition may be open to criticism for want of precision, but the pleader was not required to state his evidence, and a more precise statement of the facts would probably be difficult. The language used was sufficient to apprise the city with sufficient certainty of the facts claimed to exist.

2. We shall next consider the assignment that the verdict is not sustained by the evidence, and in order to do so it will be necessary to first state the principles of law governing the case, a statement which is also necessitated for the purpose of examining the instructions. It is the established law of this state that a city is required to use all reasonable care to keep its sidewalks and streets in a reasonably safe condition for traveling in the ordinary modes of travel, and for failure to do so it is liable for injuries sustained by one not guilty of contributory negligence. (*City of Lincoln v. Smith*, 28 Neb., 762, and cases there cited.) But the city is liable only for its negligence, and

ordinarily it must have notice of the defect complained of before it can be charged; but notice will be presumed where the facts are such that ignorance of the defect can only arise from a failure to exercise reasonable official care. (*City of Lincoln v. Smith, supra.*) Where, however, the street has been rendered unsafe by the direct act, order, or authority of the city itself, the city necessarily has notice and is liable. (2 Dillon, Municipal Corporations, sec. 1024, and cases cited.) But where a city is charged with the care of streets and the duty of improving them, the duty of keeping them in a reasonably safe condition for travel is remitted during the time occupied in making repairs or improvements. (*James v. City of San Francisco*, 6 Cal., 528; *Williams v. Tripp*, 11 R. I., 447.) In order, however, that the city should be protected from liability upon this ground it must exercise reasonable care to protect the public from the consequences of the unsafe condition of the street. (*City of Covington v. Bryant*, 7 Bush [Ky.], 248.) Therefore, an impassable condition of the street requires that the city should erect guards or barricades to keep the public off. (*City of Omaha v. Randolph*, 30 Neb., 699.) And in any event the city is only protected from liability for such obstructions or unsafe conditions as are reasonably necessary for the purpose of performing the work, and such as are maintained only for the time reasonably required for making such improvements. (*Williams v. Tripp, supra.*)

Applying these rules to the evidence, we find evidence in the record tending to show that the grading had been practically completed for about two months. The curbstones had been delivered about ten days before the accident, and this particular stone had been lying in this spot for that period. There is slight evidence upon the part of the city tending to show that a rainy season had delayed the progress of the work, but such evidence is of a very unsatisfactory character. In order to determine the city's liability these were facts which the jury might properly

consider in determining whether or not by an unreasonable delay the city was guilty of negligence in maintaining the street in such condition. There is also much evidence in regard to the character of the inclined pathway, the degree of its slope, and the position of the stone. For the reason that the witnesses indicated these facts by signs and illustrations, we cannot review this evidence as to its sufficiency, but must presume that there was sufficient evidence to justify the jury in finding that an unreasonable and dangerous crossing had been provided. Upon either of these points the verdict might properly be predicated.

It is urged that the proof shows that the plaintiff was guilty of contributory negligence in attempting to cross. It does appear that a short time before he had passed the spot, going in an opposite direction, and he therefore knew the character of the crossing. It also appears that there were other routes which he might have taken; but it is inferable in this connection that these other routes were less convenient and possibly as unsafe as the one he chose. We cannot say, as a matter of law, that a person knowing that a sidewalk is defective has no right to attempt to travel over it. It has been frequently stated by this court that inferences of negligence or contributory negligence upon a state of facts where reasonable minds might draw different conclusions are exclusively for the jury. It should be unnecessary to repeat that rule. In such a case as this it is for the jury to say, under all the circumstances, whether or not the plaintiff should attempt to pass, and whether or not, if warranted in attempting to do so, he exercised proper care in making the attempt.

3. Many errors are assigned in the giving and refusing of instructions. It will not be necessary to notice all. Some of the instructions asked by the defendant were properly refused if for no other reason because they required as an element necessary to render the city liable that the jury should find that the city had willfully placed

and left the street in a dangerous condition. While the fact that the condition of the street was due to the direct act of the city became important as affecting the question of notice, it would be improper to give the jury any instructions from which it might infer that the city officials must have deliberately placed the street in such condition for the purpose of making it dangerous. Other instructions were properly refused because their substance was given by the court of its own motion.

It is urged that the third instruction given by the court is erroneous in not requiring the jury to find, as a condition necessary to render the city liable, that the city had notice of the defect. A portion of this instruction is as follows: The plaintiff must establish "that said cut and obstruction in said sidewalk were made by defendant and negligently left and allowed to remain by defendant in a condition dangerous and unsafe to persons walking along said street and exercising ordinary and reasonable care therein." This portion of the instruction required that the jury should find, as a condition necessary to establish plaintiff's case, that the cut and obstruction were made by defendant. As already stated, where the defect is caused by the direct act of the defendant, notice is inferred from that fact; and the instruction was correct under the evidence of the case, and more favorable to the city than if it had simply directed the jury in general terms that notice was necessary.

The sixth instruction was as follows:

"If you find from the evidence that the defendant city failed to use reasonable care in keeping its sidewalk on Tenth and T streets in a reasonably safe condition for foot travel, and if you find from the evidence that defendant left and permitted to be left for a considerable length of time a cut in T street where the sidewalk on Tenth street crossed T street, and left or permitted to be left in said crossing a curb-stone for a considerable time, slantingly upon the bank of the cut in the line of the sidewalk travel,

and if you find from the evidence that said cut, if any, and stone, if any, rendered said sidewalk unsafe and dangerous to foot-travelers, and if you find from the evidence that plaintiff, while walking over and upon said sidewalk, without negligence or want of care upon his part, was injured by reason of said cut and curb-stone, if any, and thereby sustained damages, then defendant is liable therefor."

This instruction was erroneous. It correctly charged the jury as to the general duty of the city to keep its sidewalks in a reasonably safe condition for foot travel, but omitted altogether to direct the jury that the duties imposed upon a city in regard to a street undergoing improvements are different from those generally imposed. The true rule in such cases has been stated above. In the next place the jury was told in effect that if the city permitted to be left for a "considerable length of time" a cut in the street, and permitted to be left for a "considerable time" a curb-stone in the crossing, and that the cut and stone rendered the sidewalk unsafe and dangerous, and that plaintiff was thereby injured without negligence upon his own part, the defendant was liable. This practically took the question of negligence away from the jury. The phrase, "a considerable length of time," is indefinite and proposed no proper test to the jury. The periods of ten days and two months might be, in the estimation of the jury, "a considerable length of time," and the condition of the cut and stone was undoubtedly by the jury found to be dangerous. But the city had a right, in grading and paving the street, to create a condition which would be dangerous, provided it was reasonably necessary to do so in order to make the improvements, and provided further that the dangerous condition was not maintained for an unreasonable time. It might reasonably require a much longer time than was shown to exist in this instance to complete the improvements. Whether the time occupied was reasonable or not was for the jury to determine, and the

test was the reasonableness of the time occupied, and not whether or not a "considerable length of time" was occupied. No other instruction was given upon this subject.

It will not be necessary to review the other instructions. They were substantially correct, and enough has been said to guide the trial court in the course of further proceedings.

REVERSED AND REMANDED.

SOREN JONASEN V. GEORGE W. KENNEDY.

FILED FEBRUARY 7, 1894. No. 5153.

1. **Malicious Prosecution:** DEFENSE: ADVICE OF COUNSEL. In an action for malicious prosecution, in order that reliance upon the advice of counsel may operate as a defense, it must be made to appear that before instituting the prosecution the defendant had made a full, fair, and true statement to such counsel of all the information in his possession, and that he instituted the prosecution in good faith, relying upon such advice.

2. ———: ———: ———. The evidence to establish such defense must show what facts, information, and circumstances were communicated to counsel, and it is not competent for a witness to testify that he related all the circumstances without stating what they were; the inference as to what circumstances would constitute a proper disclosure being for the jury and not for the witness to draw.

3. ———: ———: ———. It is not error for the court to refuse an instruction submitting such a defense to the jury where there is no competent evidence tending to show that a true and full statement had been made to counsel.

4. ———: INSTRUCTIONS: EVIDENCE. Where the criminal charge made by defendant against plaintiff was for the larceny of a ring, and the evidence tended to show that a ring, which defendant believed to be the one stolen, was found in plaintiff's possession, but there were no facts or circumstances other than the possession of the ring pointing towards plaintiff's guilt, and it was not shown how long the theft had occurred before the ring

was found in plaintiff's possession, it was not error to charge the jury that the mere fact that the defendant had lost a ring by theft, and that he suspected or believed that the ring found in plaintiff's possession was the ring which he had lost, was not of itself sufficient to constitute probable cause for the arrest of the plaintiff.

5. ———: PROBABLE CAUSE: INSTRUCTIONS. It is not error to charge the jury that probable cause is a reasonable ground for suspicion supported by circumstances sufficiently strong to warrant an impartial and reasonably cautious man in the belief that the person accused is guilty of the crime with which he is charged, where, by other instructions, the jury is told what facts under the evidence in the case, if found by the jury, would constitute probable cause or want thereof.

6. ———: INSTRUCTIONS. Error cannot be predicated upon the giving of an instruction substantially similar to one requested by the party seeking to reverse the judgment.

7. ———: ———. It is not error to refuse an instruction confining the jury, in determining whether or not there was probable cause, to the information in defendant's possession when he instituted the prosecution, and excluding facts subsequently coming to his notice, when there was no evidence tending to show that any of the facts relied upon to establish a want of probable cause were not known when the prosecution was instituted.

8. **Witnesses**: OBJECTIONS: REVIEW. It is not prejudicially erroneous to sustain an objection to a question proper in itself when in the course of the examination of the same witness he is permitted to answer questions substantially similar in their nature.

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

Hall, McCulloch & English, for plaintiff in error.

George S. Smith and *J. S. Miller, contra.*

IRVINE, C.

Kennedy recovered a judgment against Jonasen for $500 and costs for malicious prosecution. This judgment Jonasen seeks to reverse. The action grew out of the follow-

ing state of facts: Jonasen was a jeweler in Omaha. At some time, not definitely appearing from the evidence, a diamond ring had been stolen from the top of a show-case in Jonasen's place of business, where it lay with other jewelry which he was showing to some one, ostensibly a customer. He reported the loss of this ring to the police authorities. The 16th of November, 1889, Kennedy visited two or three jewelry stores in Omaha, seeking to have some jewels reset. His testimony tends to show that his businesss consisted in traveling over the country selling jewels, especially diamonds, generally to individual purchasers, but sometimes to dealers. One of the jewelers whom he visited reported his actions to the police. Two officers went to the store of Mr. Van Cott, which had been one of the places visited, and while they were making inquiries of Van Cott in regard to the transactions reported to them, Kennedy entered, and, overhearing a portion of the conversation, stated to the officers that he was probably the man they were inquiring about. At their request he accompanied them to the police station. Jonasen was sent for. A number of diamonds and a quantity of jewelry were found on Kennedy's person. They were placed upon a table, and when Jonasen entered, he identified a particular ring as that which had been stolen from him. The diamond in this ring had a flaw in it, described by the witnesses as a "small nick." This was called to Jonasen's attention, he stating that his diamond was perfect. Scales were brought and the diamond weighed. The scales showed that it weighed less than Jonasen's. As to the amount of difference there is a conflict in the evidence. The diamond was subsequently weighed upon other scales, all disclosing a weight less than that of Jonasen's diamond. A complaint was sworn to by Jonasen charging Kennedy with the larceny of his ring, and Kennedy was arrested and imprisoned for several hours, when he was released on bail. When the time came for a preliminary examination,

Jonasen refused to testify positively that the ring found in Kennedy's possession was the one which had been stolen from him. The prosecuting officer then dismissed the case. Jonasen testifies that Kennedy was not the man to whom he was showing the jewelry at the time the ring was stolen. Two witnesses, men engaged in business in Omaha, testified that they called at the police station and, before the complaint was made, assured Jonasen that they had known Kennedy for a number of years; that they had reason to believe him honest and that his business was as he claimed it to be. Jonasen contradicts one of these witnesses absolutely, and says that he had no conversation with the other until after the arrest was made. There is also testimony tending to show that when the scales developed the difference in weight of the diamonds, Jonasen remarked, in effect, that he did not believe that Kennedy came by the stone honestly and was going to make him prove how he got it. We think that this statement of the evidence sufficiently answers Jonasen's assignment of error, that the court erred in refusing to direct a verdict for the defendant.

The plaintiff asked the following instruction, which was refused:

"If the jury believe from the evidence that Assistant County Attorney Shea was made acquainted with all of the facts affecting the question of the guilt of the plaintiff in this case which were known by the defendant in this action at the time the complaint was filed, and that after being made so acquainted with the material facts, the assistant county attorney drew the complaint which was afterwards sworn to by the defendant in this action upon the advice of said attorney, the presumption of malice is rebutted and the action for malicious prosecution will fail, and you will find for the defendant."

In order that the defendant in an action for malicious prosecution may be protected from liability because of following the advice of counsel, it must be made to appear

that before instituting the prosecution he made a true, full, and fair statement of all the facts upon which the complaint was based, was thereupon advised that he had grounds for prosecution, and that in good faith he acted solely upon that advice. (*Dreyfus v. Aul*, 29 Neb., 191; *Turner v. O'Brien*, 5 Neb., 542.) The evidence was not sufficient to warrant the jury in finding such a state of facts. Jonasen's testimony fails entirely to show what was said to the prosecuting attorney, except as follows: "What was said in his presence about the circumstances surrounding this case? Ans. I think he was standing by the table when we were discussing the matter. I claimed the difference could be the difference in that nick of the stone, and Mr. Kennedy claimed that it could not. That was the difference; that is the reason I don't have the diamond to-day." The witness Hays, a police officer, states that he saw Shea before the complaint was drawn and told him the circumstances under which Kennedy had been brought to the police station and about Jonasen's identifying the ring, but he does not say what the circumstances were which he related to him. In order to make this defense available the communications with the attorney must be proved. Then it is for the jury to say whether or not the statement was true and full. A witness cannot be permitted to draw that inference for the jury by testifying in general language that he did make a full statement or that he told all the circumstances. The instruction was rightly refused.

The court charged the jury as follows:

"The mere fact that the defendant had lost a diamond ring by theft, and that he suspected or believed that the ring which he found in plaintiff's possession was the ring which he had lost, was not of itself sufficient to constitute probable cause for the arrest of the plaintiff for the theft of the ring, and if he, the defendant, caused the arrest of the plaintiff for the larceny of the ring, based upon such belief only, he, the defendant, assumed the responsibility

of being able to support his belief by proof of the fact that the ring found in plaintiff's possession was the identical ring which was stolen from the defendant, and if he could not produce sufficient testimony to establish that fact, and if, in addition thereto, he had no reasonable ground to believe that the plaintiff was the one who had stolen his (defendant's) ring, then the defendant had no probable cause for the arrest of the plaintiff for the larceny of the ring."

This instruction was correct. The plaintiff in error places too narrow a construction upon it. He construes it as conflicting with the rule that the possession of property shown to have been recently stolen is sufficient evidence to support a charge of larceny against the person having possession. The rule referred to states an inference of fact rather than of law; in other words, that the jury may find a prisoner guilty of larceny upon such evidence, but is not required to do so. And it is only permitted to so base a verdict of guilty where the property is found in the possession of the defendant recently after its theft. (*Thompson v. People*, 4 Neb., 524; *Smith v. State*, 17 Neb., 358.) In this case it was not shown when the ring had been stolen from Jonasen. It was shown affirmatively that Kennedy was not the person in Jonasen's store when the ring was stolen, and the rule referred to is, therefore, not applicable to the case. The instruction was that it was not sufficient, in order to make out a case of probable cause, that Jonasen should have lost the ring by theft and that he should suspect or believe that the ring in the plaintiff's possession was his; and, in effect, the remainder of the instruction was that in order to constitute probable cause defendant must have been able to produce sufficient testimony to identify the ring as his, and also have reasonable ground to believe that Kennedy had stolen it. It was a correct statement of the law. The identity of the ring was a fact particularly within Jonasen's knowledge, and no mere suspicion or

belief upon his part that the ring in Kennedy's possession was his could justify his conduct, unless by his own testimony or otherwise he was prepared to prove such identity. And in addition to establishing the identity of the ring, there being no evidence that it was in Kennedy's possession recently after the theft, and in view of the positive evidence that Kennedy was not the man who probably stole it from its place on Jonasen's show-case, Jonasen should, in order to justify the complaint, have been informed of other facts sufficient in the minds of reasonable men to justify him in believing that Kennedy was the thief.

Another instruction given by the court was as follows:

"'Probable cause' is defined to be a reasonable ground for suspicion supported by circumstances sufficiently strong to warrant an impartial and reasonably cautious person in the belief that the person accused is guilty of the crime with which he is charged. If, therefore, you believe from all the testimony that there was reasonable ground for suspicion against the plaintiff, supported by such facts and circumstances as would have led an impartial and reasonably cautious man to believe that the plaintiff was guilty of the crime with which he was charged by the defendant, then you will be justified in saying that there was probable cause for the arrest of the plaintiff upon the complaint made by the defendant against him; otherwise, not."

It is urged that this instruction left the jury to determine the question of probable cause. There is no doubt that it is the duty of the court to say what facts constitute want of probable cause, and it is for the jury to determine whether such facts exist. But there are two reasons why the judgment should not be reversed on account of this instruction. The first is that at the request of the defendant himself the court gave the following instruction:

"The jury are instructed that if you believe from the evidence that defendant had probable cause for instituting the criminal proceedings, then the plaintiff cannot

recover in this suit. 'Probable cause' is defined to be reasonable ground for suspicion, supported by circumstances sufficiently strong to warrant an impartial and reasonably cautious man in the belief that the person accused is guilty of the offense of which he is charged."

This is substantially like the one of which the defendant complains. A party cannot be heard to urge that an instruction is erroneous when he himself requested the giving of that instruction, or one similar in substance. Another reason is that the instruction was not erroneous. By it the court correctly defined the rule in regard to probable cause. (*Turner v. O'Brien*, 5 Neb., 542; *Ross v. Langworthy*, 13 Neb., 492.) The court in other instructions had told the jury what facts, if found by them to be true upon the evidence in the case, would establish a want of probable cause. In *Dreyfus v. Aul, supra*, relied upon by plaintiff in error upon this point, the court merely told the jury generally that it should find for the plaintiff if it found that the prosecution was commenced without probable cause, and in none of the instructions informed the jury what would constitute probable cause. That case is, therefore, not in point. It was not erroneous to tell the jury in general terms what the law meant by a "want of probable cause" when such instruction was accompanied by other instructions as to what facts would constitute want of probable cause in the case on trial.

The first instruction given by the court is complained of. This instruction was as follows:

"The court instructs the jury that if they believe from the evidence that the defendant maliciously caused the arrest and imprisonment of the plaintiff without probable cause, as alleged in the petition, then the jury should find for the plaintiff and assess his damages at what they think proper from the facts and circumstances proved, not exceeding, however, the amount claimed in the petition."

The same objection is urged to this,—that it left to the

jury the issue of probable cause. The same answer may be made to it. Instructions cannot be taken singly, but all instructions given must be taken together. If this instruction stood alone, it would be open to the objection urged against it. It is not erroneous in view of the other instructions.

The court refused the following instruction asked by defendant:

"The jury are instructed that in determining whether the defendant had probable cause to believe that the plaintiff was guilty they should consider that question in reference to the facts and circumstances relating thereto, and which influenced him in commencing proceedings against the plaintiff, as they were known or as they really appeared to be at the time he made the complaint, and not upon facts and circumstances as they have been developed by the evidence on this trial."

This instruction stated a correct principle of law, and the court might perhaps have given it without error, but there is no evidence in the record tending to show any information coming to Jonasen after he made the complaint which would throw a new light upon the question of Kennedy's guilt or innocence, and all of the instructions given by the court clearly enough confined the jury to a consideration of the facts within Jonasen's knowledge at the time the complaint was made.

During the examination of Jonasen the following question was asked: "Did you swear to that complaint with any malice towards Mr. Kennedy?" This question was objected to and the objection was sustained. It has been held in this state that where the issue is whether a transfer of property was made with intent to hinder, delay, or defraud creditors, it is proper to ask the assignor or vendor whether in making the transfer he did so with such intent. (*Campbell v. Holland*, 22 Neb., 587.) If such an inquiry is proper we see no reason why a direct inquiry as to

whether or not a prosecution was instituted from malicious motives is not also proper, and the inference from *Turner v. O'Brien, supra,* is that such evidence should be admitted. But when we turn to the record we find immediately after this ruling of the court the following:

Q. Had you ever known Mr. Kennedy before?

A. I never saw him.

Q. Had you any other motives in filing that complaint than to charge a crime against a person whom you supposed had committed it?

A. No, sir; I am no hater of the man. I could not have the least object in holding a stranger that I did not know.

Q. You say that you had never seen Mr. Kennedy before that?

A. I never saw him before I saw him at the police station, that I know of.

By this examination the defendant got all the benefit that he could have had from a direct answer to the question, and the exclusion of the particular question objected to was not prejudicial.

JUDGMENT AFFIRMED.

M. O. MAUL, ADMINISTRATOR, APPELLEE, V. MARIA HELLMAN, ADMINISTRATRIX, APPELLANT.

FILED FEBRUARY 8, 1894. No. 5086.

1. **Judicial Sales: SALE BY ADMINISTRATOR OF REAL ESTATE OF DECEDENT.** A sale of real estate of an intestate made by his administrator in pursuance of an order of the district court is a judicial sale.

2. **———: ———: POWER OF COURT TO COMPEL PURCHASER TO PERFORM HIS BID.** A person by becoming a purchaser of property sold at a judicial sale becomes a party to the proceed-

ing under which such sale is made, and may be compelled by the court in which the proceeding is pending to complete his purchase.

3. ———: ———: ———: CAVEAT EMPTOR. Appellant was the highest bidder for real estate sold by an administrator under a license of the district court therefor. His bid was accepted, the sale duly reported to the court and by it confirmed. After personal notice given appellant of the time and place when the hearing of the application for such confirmation would be heard, appellant made no appearance or objection to the proceedings to confirm, and afterwards refused to comply with his bid unless the administrator would apply the proceeds of the sale to the discharge of the incumbrances against the real estate, alleging an agreement with the administrator to that effect. *Held*, (1) That as the order of the court under which the sale was made expressly provided that the real estate should be sold subject to the incumbrances thereon, this order was a matter of public record, and of itself notice to appellant of the administrator's authority in the premises; (2) that under the laws of the state the administrator could only sell the interest his intestate had in the real estate at the date of his death. This law appellant was conclusively presumed to know, and having permitted the sale to be confirmed without objection, he could not then be heard to allege, as a reason why he should be released from his bid, an agreement with the administrator to misapply the proceeds of the sale in violation of law.

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

The opinion contains a statement of the case.

Brome, Andrews & Sheean, for appellant:

The rule that a purchaser may, by order, be compelled to comply with the terms of his bid applies only to proceedings involving the general equity jurisdiction, and do not apply to an administrator's sale. (Rorer, Judicial Sales, sec. 161.)

The court ought not, upon the facts proved, to have made the order, even had it the power. The rule *caveat emptor* has no application until after the sale is closed by delivery

of deed and payment of purchase money. (*Ormsby v. Perry*, 6 Bush [Ky.], 553; *Graham v. Bleakie*, 2 Daly [N. Y.], 55.)

Cowin & McHugh and *Henry E. Maxwell, contra:*

A sale by an administrator under an order of the court, of lands of a decedent, is a judicial sale. The district court had jurisdiction to make and enforce the order appealed from. (Rorer, Judicial Sales, sec. 148; Comp. Stats. Neb., ch. 23, secs. 67–122; *Halleck v. Guy*, 9 Cal., 181, 195; *Vandever v. Baker*, 13 Pa. St., 121, 126; *Grignon's Lessee v. Astor*, 2 How. [U. S.], 319; *Jones v. Read*, 1 La. Ann., 200; *Lynch v. Baxter*, 4 Tex., 437; *Worthington, Adm'r, v. McRoberts*, 9 Ala., 300; *Phillips v. Dawley*, 1 Neb., 320, 321.)

A purchaser at a judicial sale may be attached or committed as for contempt for a disobedience of an order to pay into court the purchase money. (*Lansdown v. Elderton*, 14 Ves. [Eng.], 512; *Goodwin v. Simonson*, 74 N. Y., 133; *Brasher v. Cortland*, 2 Johns. Ch. [N. Y.], 505; *Coulter v. Herrod*, 27 Miss., 685; *Seaman v. Hicks*, 8 Paige Ch. [N. Y.], 655; *Phillips v. Dawley*, 1 Neb., 320; Rorer, Judicial Sales, sec. 149.)

The order was properly made on the facts proved. The order of the court directing sale subject to the incumbrances was in conformity to the statute, and appellant was chargeable with notice by the terms of the order, and the requirements of the statute. (Comp. Stats. Neb., ch. 23, sec. 99.)

RAGAN, C.

On the 12th day of May, 1890, M. O. Maul, administrator of the estate of A. B. Snowden, sold at public auction the east one hundred feet of lot 2, Bartlett's addition to the city of Omaha, having first obtained a license to make such sale from the district court of Douglas county. Meyer Hellman was present at such sale and the highest

bidder for the real estate offered. His bid was accepted and duly reported to the court. After personal notice to Hellman of the time and place when the motion to confirm said sale would be heard, it was duly confirmed by the court. Hellman refused to comply with his bid and pay the purchase money unless the administrator would deduct from the proceeds of the sale the amount of certain liens on the property which Hellman claimed that the administrator had agreed to do, and that he made his bid with that understanding. The administrator applied to the district court for an order to compel Hellman to comply with his bid. The court referred the matter to a referee to take evidence and report the facts and law to the court. The referee found that the incumbrances complained of were liens on the property at the death of Snowden; that the sale was regular, and fairly conducted by the administrator; that no fraudulent or misleading representations were made by the administrator or by any other person on his behalf to Hellman concerning the incumbrances, but that before the sale Hellman had actual notice of the incumbrances against the property; and the referee found and reported that the motion of the administrator to compel Hellman to comply with his bid should be sustained. Hellman filed exceptions to this report, which exceptions were heard by the court, and the report of the referee sustained, and an order made by the district court that Hellman should comply with his bid. From this order Hellman prosecutes an appeal to this court. His counsel allege two reasons why this order should be vacated: First, that the court had no power or jurisdiction to make this order; and second, that the order ought not to be made under the evidence in the case.

Whether the district court had jurisdiction to make the order appealed from depends upon whether the sale made by the administrator under the license granted by the court was a judicial sale. What is a judicial sale? "All sales

made by order or decree under direction of the court and requiring confirmation by the court are judicial sales." (Rorer, Judicial Sales [2d ed.], sec. 29; *Chew v. Hyman*, 7 Fed. Rep., 7.)

The law of this state governing the sales of the real estate of intestates by administrators is found in chapter 23, Compiled Statutes, 1893. By section 67 of this act an administrator can only sell the real estate of his intestate when the personal estate is insufficient to pay the debts and charges of administration of the estate of the intestate.

By section 68 the administrator, in order to obtain a license for the sale of real estate of his intestate, must present a petition to the district court of the county in which he was appointed. In this petition he must set forth the amount of the personal estate that has come into his hands; how much of such personal estate remains undisposed of; the debts outstanding against the estate of the intestate; a description of all the real estate of which the intestate died seized, and the condition and value of such real estate; and this petition must be verified by the oath of the administrator.

By section 69 the district court is authorized, if it appears from an inspection of the petition that there is not sufficient personal estate in the hands of the administrator to pay the debts of the intestate and the expenses of administration, to make an order directing all persons interested in the estate to appear, at a time and place in such order specified, and show cause why license should not be granted to the administrator as prayed in the petition.

Section 70 requires that a copy of such order to show cause shall be personally served on all persons interested in the estate at least fourteen days before the time appointed for the hearing on the petition, or that such order shall be published four weeks in such newspaper as the district court shall direct in the order.

Section 72 provides that at the time and place appointed

in said order for a hearing on said petition the court, after finding, upon proof made, that the service of the order has been made as directed upon the parties interested in the estate, shall hear and examine the allegations of the petition, hear such proofs as may be offered by the administrator, and by any and all persons interested in the estate who may desire to and do oppose the granting of the license prayed for.

Section 73 provides that the administrator may be examined on oath; that witnesses may be produced and examined by either party to the proceeding, and that the court may issue process to compel the attendance of witnesses and the taking of testimony, as in other cases.

Section 79 provides that if the court shall be satisfied, after a full hearing upon the petition and an examination of the evidence that it is necessary to sell a whole or a part of the real estate for the payment of the valid claims against the intestate and the charges of administration, the court shall then make an order of sale authorizing the administrator to sell the real estate of the intestate.

Section 80 provides that this order of sale shall specify the lands to be sold, and that the court may direct the order in which the several tracts, lots, or parcels shall be sold.

Section 81 provides that after such order of sale has been made the judge of the court shall deliver a certified copy of it to the administrator, and this shall be his authority for the sale of the real estate of the intestate.

Section 83 provides how and what notice of sale shall be given by the administrator; but provides that if there shall be no newspaper printed in the county in which the sale is to be held, that notice of such sale shall be given by being published in such paper as the court may direct.

Section 87 provides that the administrator, after making such sale, shall immediately make a report of his proceedings under the order of sale to the district court granting

the same, and if such court shall be of the opinion that the proceedings of the administrator were unfair, or that, if another sale were had, the bid for the real estate could be increased as much as ten per cent, exclusive of the expenses of a new sale, then the court shall vacate the sale and direct another.

Section 88 provides that if the district court shall be of the opinion that the sale by the administrator was legally and fairly conducted, and that the sum bid for the property is not disproportionate to its value, or if disproportionate, that the amount realized would not be increased as much as ten per cent by a new sale, then the court shall make an order confirming such sale and direct the administrator to execute a conveyance to the purchaser.

It will be observed that a proceeding by an administrator to sell the real estate of his intestate is, under this statute, in all respects a judicial proceeding. The sale can only be made by authority of and by an order of the court. The order to make the sale can only be granted by the court, or judge thereof, after due notice to all persons interested in the estate of the intestate. The application of the administrator for leave to sell the real estate must be heard like any other proceeding by the court, and granted or denied after hearing the evidence. Finally, after the sale has been made it must be reported to the court, and is not a sale until confirmed. By the term "court" herein is meant the court or judge thereof when authorized to act. The administrator and the entire proceeding are under control and direction of the court from the time of the filing of the petition until the proceeding is ended and determined by the conveyance of the real estate sold to the purchaser thereof. It certainly cannot be doubted but that the court in this case had power, had the appellant complied with his bid, to compel the administrator to execute and deliver to him a conveyance for the real estate sold; and appellant by becoming a purchaser made himself a party to the proceed-

ing and brought himself within the control and the power of the court quite as much as the administrator himself. This statute, then, and the steps required to be taken thereunder for the sale by an administrator of the real estate of his intestate, bring the proceeding, out of which the order complained of grew, within the definition of a "judicial sale," quoted above. (See also *Halleck v. Guy*, 9 Cal., 181; *Lynch v. Baxter*, 4 Tex., 431; *Vandever v. Baker*, 13 Pa. St., 126.)

Ought the order appealed from not to have been made upon the facts proved in this case? His counsel say appellant acted in good faith, with no intent to deceive the court or interrupt the orderly dispatch of its business, and to compel him to comply with his bid will require him to pay the sum of $800 more for the property than he supposed he was paying. The answer to this is that appellant's claim that he bid in this property relying on an agreement of the administrator to pay off the liens thereon out of the purchase money has been found against appellant, both by the chancellor and the referee, and the evidence in the record sustains their finding. It also appears from the evidence before us that appellant had actual knowledge of the terms and conditions on which this sale was to be made, and of the incumbrances existing against the real estate, yet he was present at the sale and bid on the property; that he was given actual personal notice that the administrator, at a certain time and place mentioned, would move the district court for a confirmation of the sale. This notice he disregarded. Having bid in the property at the sale, he made himself a party to the proceeding, and if he had any reason to urge why he should be released from his bid, he should have appeared and resisted the motion to confirm the sale. (*Phillips v. Dawley*, 1 Neb., 320.) To remain silent while the motion to confirm the sale was pending, and afterwards refuse to comply with his bid, was to trifle with the court and delay the administration of jus-

tice. This record discloses no fact which calls for the exercise of the powers of the court in behalf of the appellant. The decree or order under which this real estate was sold expressly provided that it should be sold subject to the incumbrances thereon. This order of sale or license or decree was a matter of public record and of itself notice to all bidders at the sale made under it. Again, section 75, chapter 23, Compiled Statutes, 1893, provides that the proceeds of any real estate sold for the payment of the debts of an intestate shall be assets in the hands of an administrator, in like manner as if the same had been originally part of the goods and chattels of the intestate, and that the administrator and the sureties on his bond shall be accountable and chargeable therefor. And section 99 of said chapter provides that all sales of land made by administrators for the payment of the debts of their intestate shall be made subject to all liens on such real estate, whether by mortgage or otherwise, existing at the time of the death of the intestate. This law appellant was conclusively presumed to know and bound to obey, and he cannot now be heard to say, under the facts in evidence in this case and as a reason for being released from his bid, that he and the administrator agreed to violate the law by appropriating the proceeds of the sale of the real estate to the discharge of the incumbrances thereon. An administrator can only sell the interest his intestate had in the real estate at his decease, and the title acquired to such real estate by the purchaser thereof at an administrator's sale made under a decree of the court, when all the requirements of the law have been complied with, is, in effect, a quitclaim deed from the heirs of the intestate. There is no error in the order appealed from and the same is in all things

AFFIRMED.

MARC A. UPTON v. ROSA LEVY.

FILED FEBRUARY 8, 1894. No. 5184.

1. **Findings of Fact:** REVIEW. It is a settled rule of this court that the finding of fact made by a jury or trial judge will not be disturbed if supported by competent evidence.
2. **New Trial:** NEWLY-DISCOVERED EVIDENCE. A new trial will not be granted a litigant on the ground of newly-discovered evidence when it appears that such evidence was not produced at the trial of the case because the litigant had forgotten its existence.
3. **False Representations:** DECEIT: COUNTER-CLAIM: PLEADING. To maintain a counter-claim for damages for false representations, the defendant must allege and prove (1) what representations were made; (2) that they were false; (3) that the defendant believed the representations to be true; (4) that he relied and acted on them; (5) and that he was thereby injured.

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

B. G. Burbank, for plaintiff in error.

Slabaugh, Lane & Rush, contra.

RAGAN, C.

Rosa Levy sued Marc A. Upton in the district court of Douglas county and for cause of action alleged: That on April 27, 1887, in consideration of a thousand dollars then paid him, Upton sold and conveyed to her by warranty deed an undivided one-half of lot 11, block 77, in South Omaha, Nebraska; that said deed contained a covenant that he, Upton, was lawfully seized of said premises, that he had good right and lawful authority to sell the same, and that he would forever warrant and defend the title to the said premises to the said Rosa Levy, her assigns, against the claims of all persons whomsoever. She alleged a

breach or failure of said covenant and that she had been, by legal process, dispossessed of said premises by the owner of the paramount title thereto.

The answer of Upton, so far as material to this opinion, was in the nature of a plea of confession and avoidance and counter-claim. It alleged that one Jacob Levy was the husband and agent of Rosa Levy, and that about March 10, 1887, Jacob informed him, Upton, that said real estate could be purchased at a low price and proposed that he, Jacob and Upton, buy the same, each to own one-half; that shortly after that Jacob came again to Upton in company with one William Jones, and Jacob then stated to Upton that Jones owned said premises; that Upton purchased said premises for $2,000, paying $1,000 cash and giving a mortgage thereon for $1,000, took the title to the real estate in his own name, one-half, however, he held in trust for Jacob, to be conveyed to him when he should furnish his one-half of the cash payment; that on the 27th day of April, 1887, Jacob paid Upton the $500 and he made a deed for one-half the property to Jacob's wife, at his request, the conveyance being subject to the thousand dollar mortgage thereon, the payment of one-half of which Jacob's wife assumed; that said Jones did not own said real estate, as Jacob represented and knew, but had long before conveyed and given actual possession of it to one Lipp; that Jacob made such representations, knowing them to be false, and for the fraudulent purpose of cheating and defrauding him, Upton, and by them he had been damaged $500 paid for the land, $300 attorney's fees paid in defending the title against Lipp, and $1,000 he had paid on the note given as part purchase money for the premises. The prayer was that Mrs. Levy's suit might be dismissed and Upton be given judgment against her for $1,800.

Mrs. Levy's reply was a general denial of the allegations of the new matter in this answer.

The case was tried to a jury on the issues presented by

these pleadings, and a verdict returned in favor of Mrs. Levy for $687.50. The court overruled a motion for a new trial, rendered a judgment on the jury's finding, and Upton brings the case here for review.

The errors alleged here for a reversal of the judgment are three:

1. That the evidence does not support the verdict rendered. The questions of fact litigated before the jury were whether Jacob made the representations as to Jones' ownership of the lots, and whether Jacob or his wife, Rosa, was the real owner of the property conveyed by Upton to Rosa Levy. The burden was on Upton to establish these allegations of his answer. A careful study of the evidence fails to convince us that the jury's findings are wrong. There was a sharp conflict in the testimony on all the issues. The weight to be given the evidence and the credibility to be given the witnesses, the law has confided to the jury, and there is ample evidence in the record, if believed by the jury, to support their verdict; and we cannot say that the jury erred in believing certain witnesses and certain statements and in not believing other witnesses and other statements. It is a settled rule of this court that the finding of fact, made by a jury or trial court, will not be disturbed if supported by competent evidence.

2. The second error alleged by Upton is that the court erred in overruling his motion for a new trial asked for on the grounds of newly-discovered evidence. The evidence which Upton claims is newly discovered is a check dated March 24, 1887, for $150, drawn on the Merchants National Bank by one Dr. Hoffman, payable to the order of J. Levy, and indorsed by the latter. Upton claims that Jacob Levy borrowed the money represented by this check from Hoffman, and paid it to him, Upton, as a part of the five hundred dollars which Upton swears Jacob was to and did pay him as the cash consideration for the conveyance of the property to Mrs. Levy. The excuse offered by Mr.

Upton for not producing this check at the trial is that, owing to the number of business transactions in which he was engaged during the year 1887, he forgot the circumstance of its existence and the memorandum made by him of its receipt and payment. There is one sufficient reason why the court did not err in giving Mr. Upton a new trial on account of this evidence, viz.: It does not appear that this evidence could not have been discovered and produced at the trial, if Mr. Upton had exercised reasonable diligence. This suit was brought April, 1889, and the trial occurred in October, 1890. If courts should grant litigants new trials in order to enable them to produce evidence which they had forgotten existed, there would be few final judgments rendered. Another item of evidence which Mr. Upton claims was newly discovered, and on which he asks a new trial, is that one Freyhan will now swear that Jacob told him, Freyhan, that he, Jacob, owned a one-half interest in the property and that the other one-half could be purchased from Mr. Upton for one hundred dollars; that Freyhan, as agent for one Altschuler, advanced Jacob the one hundred dollars, and he went to Mr. Upton and purchased his interest in the property for Altschuler, and that Freyhan subsequently finding the title bad went to Upton and demanded and received back the one hundred dollars. Mr. Upton certainly knew this, if true, and no valid reason is shown for not producing it at the trial.

3. The third error alleged is the giving to the jury by the court the following instruction: "Should you be satisfied by a preponderance of the evidence that Jacob Levy was plaintiff's agent; that by false and fraudulent representations, knowing them to be false, or by fraudulent concealment of the facts within his knowledge and unknown to defendant," etc. The fault found with this instruction is that by it the court limited Mrs. Levy's liability for the fraudulent representations of her agent, Jacob, to such false

representations as he made, knowing them to be false. We do not determine whether this instruction was right or not. Mr. Upton is in no position to complain of it. He pleaded that the representations made by Jacob were false and fraudulent and at the time known by Jacob to be so, and tendered that issue to the jury by his evidence. Again, the answer or counter-claim of Mr. Upton does not allege that he believed or relied on the alleged false statements made by Jacob, and furthermore, although Mr. Upton testified in his own behalf at the trial, yet there is in the record no statement of his that he believed or relied and acted upon the alleged false representations which he says were made to him by Jacob. Mr. Upton then, by his counter-claim, did not state a cause of action against Mrs. Levy, nor by his evidence did he prove one. (*Stetson v. Riggs*, 37 Neb., 797; *Runge v. Brown*, 23 Neb., 817.)

The judgment of the district court is right and the same is in all things

AFFIRMED.

FRED SCHROEDER V. DAVID H. NIELSON.

FILED FEBRUARY 8, 1894. No. 5272.

1. **Negotiable Instruments:** CONSIDERATION. A promissory note given for the privilege of using or selling an article which all men are equally at liberty to lawfully use and sell, lacks consideration to support it.
2. ———: ACTION BY INDORSEE: BURDEN OF PROOF. In a suit against the maker of a promissory note by an alleged indorsee thereof, as such, the defendant's answer denied plaintiff's ownership. *Held*, To entitle plaintiff to recover, he must establish, by competent evidence, that the indorsement on the note was that of the payee.
3. **Contracts:** RULE OF CONSTRUCTION. Where the terms of an agreement were intended in a different sense by the parties

thereto, in a suit between the parties on such agreement the court will construe the agreement as understood by one party when the evidence shows that the other was aware of such first party's understanding of the agreement, and that such understanding induced him to execute it.

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

W. S. Felker and *H. B. Holsman*, for plaintiff in error.

G. E. Bertrand, contra.

RAGAN, C.

Fred Schroeder sued David H. Nielson in the district court of Douglas county on a promissory note given by the latter to Ingolsbe & Co., and by them assigned to Schroeder. The case was tried to the court, a jury being waived, and Nielson had judgment, and Schroeder brings the case here on error.

The trial court specifically found that the note was given without consideration and that Schroeder purchased it with knowledge of that fact. The evidence fully supports the findings of the court.

Counsel for plaintiff in error cite us to numerous authorities, among others, *Moses v. Comstock*, 4 Neb., 516, and *Nash v. Lull*, 102 Mass., 60, to show that a note, given for a patent right or license to use or vend a patented invention, is supported by good consideration; but these authorities are not in point here. There is nothing in this record showing, or tending to show, that the note in suit was given for a patent right or for a license to use or vend one. To put it mildly, this note was procured by false pretenses. As it may be useful in practice, we quote the "article of agreement" executed between the original parties to this note at the time it was given:

"Article of agreement, made and entered into this 15th day of December, A. D. 1887, by and between Ingolsbe

& Co., of Chicago, state of Illinois, parties of the first part, and D. Nielson, of Union, of the county of Douglas, state of Nebraska, party of the second part, witnesseth:

"That said parties of the first part, as legal owners of an improved machine to manufacture the combination slat and wire fence, and desiring to establish a permanent industry in Douglas county for the purpose of manufacturing and selling said fence, do hereby make and constitute the party of the second part a lawful agent, with power to contract, build, or sell, the manufactured fence in the township of Union, county of Douglas, state of Nebraska. The manufactured fence to be kept in stock by the manufacturing agent, Veny Kelsey, at Millard, county of Douglas, state of Nebraska, and at all times to be furnished to the second party at wholesale prices: 35–40 cents per rod for two-foot or hog fence; 50 cents per rod six-wire fence; 60 cents per rod for eight-wire fence; and 65 cents per rod for ten-wire fence. All the fence to be composed of No. 12 annealed steel and galvanized wire, with forty-six pickets per rod. The manufacturing agent has also bound himself by contract to use his endeavors to sell the fence, and on all sales made by him or at the factory to credit the township agent wherein the fence goes with all in excess of wholesale prices, the same to be sold so that the net profit to the agent shall at all times be fifteen cents per rod, or $48 per mile.

"The party of the second part, for and in consideration of the rights and privileges herein granted, does hereby agree to use his endeavors to sell the fence in the above named territory, keep a true account of the same, and remit by draft or postal order to the first parties five cents per rod of the commission, after he has received all of the commission amounting to $360 on the first twenty-four hundred rods sold, as he has this day paid $120 to the first parties by the execution of his obligation, his commission on eight hundred rods, said eight hundred rods to be sold

in one year from above date, as said obligation is given in consideration of the township, two-thirds interest in the business and privileges herein granted, and if said eight hundred rods of fence are not sold at the expiration of one year, and said $120 not obtained by the extended date of one year from maturity of said obligation, said Ingolsbe & Co., or their authorized representatives, are unconditionally empowered to cancel said obligation of said agent and appoint another agent in his stead, returning to said agent the original obligation of $120, but not the amount of commissions paid thereon.

"The second party has also the right to use on all his own lands the fencing at factory prices and the exclusive management of the business in his territory, and is to report amount of business by letter, to the first parties at the general office in Chicago, Ill., quarterly, on or before January, April, and October.

"In witness whereof, we have hereunto set our hands the day and year above written.

"INGOLSBE & CO.
"DAVID H. NIELSON."

Neither by this agreement, nor the evidence, does it appear that the "combination slat and wire fence" was a patented article or invention, and the court certainly will not presume it was. For aught that this record shows, any person had the lawful right at all times and places to manfacture, build, buy, and sell this fence. A promissory note given for the privilege of using or selling an article which all men are equally at liberty to use and sell, lacks consideration to support it. But this "article of agreement" must be construed as the agent of Ingolsbe & Co. knew at the time it was signed by Nielson that he understood it. (Sec. 341, Code Civil Procedure.) It is clear from the evidence that Nielson understood, when he executed the note in suit, that the article of agreement required that the note should be canceled and returned to him if he

did not, within one year, sell sufficient fence to earn him a commission of $360; that the party who induced Nielson to execute the new agreement put such a construction on the agreement and thus procured Nielson's signature to the note. Ingolsbe & Co., if there is such a firm, could not enforce this note against Nielson, and Schroeder not being an innocent purchaser, is in no better condition. This judgment is right for another reason. The answer of Nielson denied Schroeder's ownership of the note. The note was drawn payable to the order of Ingolsbe & Co. It was indorsed "Ingolsbe & Co., O. Ingolsbe." There was no proof offered that the indorsement "Ingolsbe & Co." was made by that firm, a member thereof, or by any one else. The note was offered and admitted in evidence, but that did not prove that the indorsement thereon was that of the payee. The judgment of the district court is

AFFIRMED.

N. A. RAINBOLT v. A. L. STRANG.

FILED FEBRUARY 8, 1894. No. 4824.

1. **Pleading:** DEFENSE OF USURY. The Code of Civil Procedure provides that a pleader shall state facts and not conclusions; and it is essential to a plea of usury that it state with whom the agreement alleged to be usurious was made, when made, where made, and the facts which it is alleged make the transaction usurious. It must also state the amount of interest agreed to be paid, taken, or reserved, or that was paid, taken, or reserved, in the transaction.

2. ———. This was a suit on a contract. The answer of the defendant, set out in the opinion, *held*, not to state facts sufficient to constitute the defense of usury.

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

Brome, Andrews & Sheean, for plaintiff in error, cited: *Blain v. Wilson*, 32 Neb., 302; *McArthur v. Schenck*, 31 Wis., 673.

Montgomery & Montgomery, contra.

RAGAN, C.

N. A. Rainbolt sued A. L. Strang in the district court of Douglas county for damages for his failure to purchase of Rainbolt certain certificates of stock of the Norfolk Water-Works Company. Strang's contract of purchase was in writing and as follows:

"December 4, 1888, for value received, I, A. L. Strang, of Omaha, Nebraska, do hereby agree to purchase and pay for, within ninety days from this date, certificate No. 10 and certificate No. 29, one for five and the other for four shares, of $100 each, in the Norfolk Water-Works Company, the sum of $300, and on payment of said sum within said date, I am entitled to said certificates, the same having been issued to me and by me indorsed to N. A. Rainbolt to whom this agreement is made.

"A. L. STRANG."

Rainbolt alleged in his petition the tender of the certificates to, and demand of, Strang that he comply with his contract, his refusal so to do, and that such certificates were of no value. He tendered them in court to Strang and prayed judgment in his petition for $300 and interest.

Strang answered the petition as follows:

"Now comes the defendant and, answering plaintiff's petition, alleges the fact to be that said writing and agreement is wholly without consideration, and was delivered by the defendant to the plaintiff under the following circumstances, to-wit: On or about the 4th day of December, 1888, and prior thereto, one C. G. Miller, of Norfolk, Nebraska, had advanced money for this defendant and to whom this defendant was at that time indebted in the sum

of $5,000, which amount this defendant was at that time unable to pay to said Miller. Said Miller was then in need of money and was compelled to pay usurious interest to the Norfolk National Bank, of Norfolk, Nebraska, of which the plaintiff herein is president, he, said Miller being required to pay interest at the rate of one and one-half per cent each month, upon money that he was at that time and had been borrowing from said plaintiff, and his bank. On said date mentioned, this defendant entered into an agreement with the plaintiff that the plaintiff and his bank should loan to the said C. G. Miller such sums of money as he should require, at the rate of eight per cent interest; and that this defendant, in consideration of the said bank and the said plaintiff accommodating the said Miller with loans at the said rate of eight per cent interest, then and there agreed to and did execute to the said plaintiff a note or acceptance bearing said date for the sum of $300, due ninety days after date, and at the same time this defendant delivered to the said plaintiff, as collateral security to said note, nine shares of stock, being the two certificates of stock in the Norfolk Water-Works Company, mentioned in plaintiff's petition, and at the request of the plaintiff executed the agreement set up by plaintiff in his petition.

"This defendant alleges the fact to be that said plaintiff still holds the said promissory note or acceptance above mentioned, as well as the said certificates of stock and the said agreement in writing mentioned in plaintiff's petition; that they are wholly without consideration and were executed contemporaneously by this defendant and accepted by the said plaintiff for the sole and only purpose of inducing the plaintiff and his bank to forbear charging the said Miller a usurious rate of interest and in order that a usurious interest might be received of this defendant for the said loan to said Miller."

To this answer Rainbolt replied by a general denial.

The case was tried to a jury, and at the conclusion of the

testimony the court instructed the jury to return a verdict for Strang. Rainbolt's motion for a new trial was overruled, a judgment rendered upon the verdict, and the case is here on error.

On the trial to the jury, counsel for Rainbolt objected to the introduction of any evidence on behalf of Strang, for the reason that his answer did not state facts sufficient to constitute a defense. This objection was overruled and Rainbolt excepted.

The only error assigned here which we shall notice is the ruling of the court holding that the answer stated facts sufficient to constitute a defense. This answer attempts to state two defenses: First, no consideration for the contract sued on. It will be observed that Strang alleges that the money he promised to pay for the stock certificates was $300, represented by the note given to Rainbolt in consideration that he would lend Miller money at eight per cent interest and would forbear charging him usurious rates of interest. This contract, then, was not without consideration to support it when made. The answer does not allege that Rainbolt did not lend Miller money at the rate agreed, and does not allege that Rainbolt did not comply with his agreement not to charge Miller usurious rates of interest, and hence does not show a failure of consideration. The second defense attempted to be set up by Strang in his answer is that the $300 note he gave Rainbolt, and secured by stock certificates, was for money in the nature of a bonus agreed to be paid Rainbolt for money he was to lend Miller at eight per cent, which interest, added to the $300, would render the loan to Miller usurious. But Strang does not allege how much money Rainbolt agreed to lend Miller, nor whether he did lend him any; nor does he allege what length of time the loan which Rainbolt was to make Miller was to run. For anything that this answer shows, Rainbolt may have agreed to and may have loaned Miller $5,000, the amount Strang

owed him for three years, at eight per cent interest per annum. If he did so, the interest paid or promised to be paid by Miller, added to the $300 promised to be paid by Strang, would not taint the transaction with usury. The Code of Nebraska provides that a pleader shall state the facts and not conclusions, and it is essential to a plea of usury that it state with whom the agreement alleged to be usurious was made, when made, where made, and the facts which it is alleged make the transaction usurious. It should also state the amount of interest agreed to be paid, taken, or reserved, or that was paid, taken, or reserved, in the transaction. (*Manning v. Tyler*, 21 N. Y., 567; *New England Mortgage Security Co. v. Sandford*, 16 Neb., 689.) The answer of Strang, then, is bad for want of these essential allegations, and being thus defective, and no application to amend it on the trial so as to present a defense having been made, no evidence should have been admitted in his behalf under it. The judgment must be reversed and it is so ordered.

REVERSED.

FARMERS & MERCHANTS BANK OF YORK, APPELLANT, V. HENRY F. ANTHONY ET AL., APPELLEES.

FILED FEBRUARY 8, 1894. NO. 6040.

1. **Validity of Unrecorded Chattel Mortgage: RIGHTS OF CREDITORS.** When the possession of property described in a chattel mortgage remains with the mortgagor, and the mortgage, or a copy thereof, is not filed as required by section 14, chapter 32, Compiled Statutes, 1893, the mortgage is absolutely void as to creditors of the mortgagor, no matter whether they have actual notice of the mortgage or not. *Houk v. Condon*, 40 O. St., 569, *Sayre v. Hewes*, 32 N. J. Eq., 652, and *Brothers v. Mundell*, 60 Tex., 240, followed.

2. ——: BONA FIDE PURCHASERS OF CHATTELS. It seems that

a "subsequent purchaser in good faith," within the meaning of section 14, chapter 32, Compiled Statutes, 1893, is one who acquires title to mortgaged property by contract with the mortgagor or his vendee, after the execution of the mortgage and without notice thereof; and that a purchaser of such property at execution sale, would take it discharged of the mortgage lien, irrespective of such purchaser's knowledge of the existence of such mortgage lien.

3. **Marshaling Securities**: CHATTEL MORTGAGE LIEN: LIEN OF LEVY. The rule of compelling a first resort to a particular one of two funds for a creditor's benefit, who can reach but one of them, will not be enforced, when to do so will operate to the prejudice of the party entitled to the double fund. *Sweet v. Redhead*, 76 Ill., 374, followed.

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

The opinion contains a statement of the case.

M. B. Reese, E. E. Brown, and *G. W. Bemis*, for appellant:

A purchaser who has actual notice of the claim of a third party in the property purchases subject to such right, although the instrument under which the third party claims is not of record. (*Railsback v. Patton*, 34 Neb., 490; *Russell v. Longmoor*, 29 Neb., 209; *Patrick v. Paulson*, 34 Neb., 416.)

If one party has a lien on or interest in two funds for a debt, and another party has a lien on or interest in one only of the funds for another debt, the latter has a right in equity to compel the former to resort to the other fund, in the first instance, for satisfaction, if that course is necessary for the satisfaction of both claims. (Story, Eq. Juris., sec. 633; *Ingalls v. Morgan*, 10 N. Y., 178; *Kurdig v. Landis*, 135 Pa. St., 612; *Fassett v. Mulock*, 5 Col., 466.)

Gilbert Bros., contra:

The clear meaning of section 1796, Cobbey's Statutes, is,

that an unrecorded mortgage is void as to creditors absolutely without qualification, and that it is void as to subsequent purchasers and mortgagees in good faith; in other words, the qualification "in good faith" applies to "subsequent purchasers and mortgagees" alone, and not to creditors. This is the construction which is placed upon identical statutes in other states. (Jones, Chattel Mortgages [3d ed.], sec. 318; *Farmers Loan & Trust Co. v. Hendrickson*, 25 Barb. [N. Y.], 484; *Tyler v. Strang*, 21 Barb. [N. Y.], 198; *Tiffany v. Warren*, 37 Barb. [N. Y.], 571; *Sayre v. Hewes*, 32 N. J. Eq., 652; *Houk v. Condon*, 40 O. St., 569; *Brothers v. Mundell*, 60 Tex., 240; *Pyle v. Warren*, 2 Neb., 241; *Ransom v. Schmela*, 13 Neb., 76; *Earle v. Burch*, 21 Neb., 702.)

If a party has two mortgages to secure a debt, both of them due, and there is any advantage which will accrue to him by foreclosing either one first, the law allows him to exercise his option as to the order of foreclosure. (*Swift v. Redhead*, 76 Ill., 374; *Cutler v. Ammon*, 21 N. W. Rep. [Ia.], 604; *Clarke v. Bancroft*, 13 Ia., 320.)

RAGAN, C.

During the summer of 1890 the York National Bank, of the city of York, in York county, Nebraska, loaned $4,000 to Henry F. Anthony with which to buy flaxseed. The money was advanced at different times in sums of $1,000, Anthony giving the bank a note for each thousand when advanced and a chattel mortgage calling for a thousand bushels of flaxseed. The flaxseed, covered by four mortgages, was commingled in one bin. Some time prior to February 11, 1892, the notes of Anthony remaining unpaid, the bank discovered that the bin contained not 4,000 bushels of flaxseed, but about 2,000 bushels, and on said date procured Anthony to confess judgment in its favor on the first one of said four notes for $1,000, caused an execution to be issued on said judgment and placed in the

hands of an officer, who levied the same upon some grain belonging to Anthony. This grain was at the time stored in elevators and had been purchased by Anthony with money borrowed of the Farmers & Merchants Bank of said York county. This bank, at the time of the levy on the grain, held three chattel mortgages thereon, given to it by Anthony as security for money so borrowed by him of the bank. These mortgages, nor copies thereof, at the date of the levy of the execution on said grain, had not been filed in the office of the county clerk of said York county. After the officer had seized Anthony's grain under the execution, the Farmers & Merchants Bank filed its mortgages and brought this suit against Anthony, Snodgrass, the officer, and the York National Bank, to enjoin Snodgrass from selling the grain levied upon, to have its three mortgages declared a first lien upon the grain, and a decree entered for its sale to pay the amount due it from Anthony; or, if the court should decide the York National Bank's lien on the grain, by reason of the levy of the execution thereon, was superior to the lien of the Farmers & Merchants Bank by virtue of its mortgages, then to compel the York National Bank to apply the value of the flaxseed on hand, and on which it held mortgages, to the payment of the note reduced to judgment, and on which the execution levied on the grain had been issued. The Farmers & Merchants Bank also alleged in its petition that the York National Bank, at the time and before its levy of the execution on the grain, had actual knowledge of the existence of the mortgages sought to be foreclosed, and this allegation was not denied in the answer of the York National Bank. The district court found that by the agreement with Anthony, and by virtue of the four mortgages given by him to the York National Bank, it had a lien on all the flaxseed in said bin securing the entire sum of $4,000, evidenced by his four notes, and that no part of either of said notes had been paid; that the value

of the flaxseed covered by the York National Bank's mortgages did not exceed $1,500; that the York National Bank had neither actual nor constructive notice of the existence of the mortgages held by the Farmers & Merchants Bank on Anthony's grain prior to its seizure under the execution; that the York National Bank, by virtue of the levy of the execution on the grain of Anthony, acquired a lien thereon superior to the mortgage lien of the Farmers & Merchants Bank; that the Farmers & Merchants Bank was not entitled to a decree compelling the York National Bank to apply any part of the value of the flaxseed on which it had mortgages to the satisfaction of the judgment against Anthony, and rendered a decree accordingly. The Farmers & Merchants Bank appealed.

For the purposes of this opinion we shall disregard the finding of the district court, that the York National Bank had no actual notice of the mortgages held by the Farmers & Merchants Bank on the grain levied upon, and assume that, at and before the York National Bank caused the grain in controversy to be levied upon, that bank did have actual knowledge that Anthony had pledged it, by the mortgages in suit, to the Farmers & Merchants Bank, to secure money borrowed from it by him and used in the purchase of the grain mortgaged. The correctness of the decree of the district court is assailed here on two grounds:

1. That although copies of appellant's mortgages had not been filed in the office of the county clerk of York county at the time of the seizure of the grain on the execution, yet the York National Bank, having actual knowledge of the existence of said mortgages, could not, and did not, by the seizure of the mortgaged grain on execution, acquire a lien thereon superior to the lien created by the mortgages. No claim is made here that appellant was ever in possession of the grain covered by these mortgages, nor that the York National Bank was not in fact a creditor of the mortgagor, Anthony. We have, then, the clear ques-

tion, does the fact that a creditor, knowing his debtor has mortgaged his personal property, a copy of such mortgage not being filed and the debtor remaining in possession of the property, estop such creditor from seizing the property on execution and holding it as against such mortgagee?

Section 14, chapter 32, Compiled Statutes, 1893, provides: "Every mortgage, or conveyance intended to operate as a mortgage, of goods and chattels hereafter made, which shall not be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be filed in the office of the county clerk," etc. By this law, then, a chattel mortgage, when the same, or a copy thereof, is not filed in the clerk's office, and no actual change of possession of the mortgaged property has occurred and continues, is absolutely void as against the creditors of the mortgagor. Whether a creditor has knowledge of such a mortgage is immaterial. So far as he and his rights are concerned, such a mortgage does not exist. The term "creditor" in this statute means a judgment, execution, or attachment creditor; that is, a creditor who is using the courts of law and their processes for the collection of his debt.

Statutes in all essential respects the same as ours exist in the states of New York, New Jersey, Ohio, Michigan, and Minnesota, and have been before those courts for construction, and the writer is not aware of any decision which holds that under such a statute as this, knowledge on the part of a creditor that his debtor had executed a chattel mortgage, which mortgage, or a copy thereof, had not been filed, and under which no change of possession of the things mortgaged had occurred, precludes the creditor from seizing, on execution, the property described in the mortgage of his debtor. Such is the doctrine in New Jersey.

In *Sayre v. Hewes*, 32 N. J. Eq., 652, it is said: "Unless a chattel mortgage is filed in the county where the mortgagor resides at the time of its execution, or the mortgagee takes immediate possession of the mortgaged chattels and continues in the actual and constant possession of them, the mortgage is absolutely void against the creditors of the mortgagor. * * * The statute concerning chattel mortgages makes an important distinction between creditors and subsequent purchasers or mortgagees. Purchasers or mortgagees, to avail themselves of a default on the part of a prior mortgagee, must take without notice of his rights, but a creditor is not affected by such notice." Such is the doctrine of the supreme court of Ohio. See *Houk v. Condon*, 40 O. St., 569, where it is said: "This case requires the determination of two questions: Did the levy of the executions create a lien on the wheat prior to the lien of the chattel mortgage of plaintiff in error? * * The wheat was levied upon on May 21st. At that time the mortgage to Houk was on file in the township in which the property was. The statute required the mortgage to be on file in the township in which the mortgagor resided. This section of the statute provides that unless the mortgage shall be filed in the township in which the mortgagor resides it shall be void as against the creditors of the mortgagor, subsequent purchasers and mortgagees in good faith. Under this provision, the mortgage not being on file with the clerk of the township where the mortgagor resided, it was void as to creditors. * * * The rule applicable to a mortgagee in good faith is not applicable to a general creditor. A mortgagee may give credits solely upon the faith of the mortgage security, which, if taken in good faith, is valid. The lien created by it arises from the acts of the parties, while the lien of a levy arises by operation of law." To the same effect see *Brothers v. Mundell*, 60 Tex., 240; Jones, Chattel Mortgages, sec. 318.

As opposed to the views expressed by the above authori-

ties, counsel for appellant call our attention to *Russell v. Longmoor*, 29 Neb., 209, and *Patrick v. Paulson*, 34 Neb., 416. Those cases, however, are not in point here. The contest in those cases was between mortgagees of the same property. We are also referred by appellant's counsel to *Railsback v. Patten*, 34 Neb., 490. In the syllabus of this case it is stated that one who purchases property with knowledge that another has an unfiled mortgage lien thereon, is not a purchaser "in good faith" as against such mortgagee. This language is not in conflict with the conclusion we have reached in the case under consideration. It seems that a "subsequent purchaser in good faith," within the meaning of section 14, quoted above, is one who acquires title to mortgaged property by contract with the mortgagor, or his vendee, after the execution of the mortgage, and without notice thereof; and that a purchaser of such property, sold under execution, would take it discharged of the mortgage lien, itself invalid, as against the lien created by seizure of the property under the execution, irrespective of such purchaser's knowledge of the existence of such mortgage lien. But that point is not necessary to a decision of the case before us, and we do not determine it.

The decree of the district court, giving the York National Bank a lien on the grain superior to the lien of the Farmers & Merchants Bank, by virtue of its unfiled mortgages, was right.

2. Counsel for appellant also contend that the decree appealed from is erroneous, in that it did not compel the York National Bank to credit its judgment with the value of the flaxseed pledged to secure the payment of the note on which the judgment was confessed. The court found, however, that the debt owing by Anthony to the York National Bank and unpaid was more than $4,000; that all the flaxseed covered by all the mortgages was pledged to pay this entire debt, and that the value of all the flaxseed did not exceed $1,500. This finding is supported by the evi-

dence. To compel the York National Bank to apply the value of the flaxseed to a satisfaction of the execution levied on the grain, would leave the debt, now partly secured by the flaxseed, without adequate security; in fact, with a security largely insufficient to satisfy such debt. True, the York National Bank has two securities, the mortgage on the flaxseed, and the levy on the grain. It acquired these securities by a prudent compliance with the law, and if by enforcing its lien on the grain it can strengthen its other security and thus decrease its loss, I know of no rule or principle of equity that forbids it from so doing. This rule of compelling a first resort to a particular one of two funds for a creditor's benefit, who can reach but one of the funds, will not be enforced, when to do so would operate to the prejudice of the party entitled to the double fund. (*Sweet v. Redhead*, 76 Ill., 374.)

The decree appealed from must be affirmed and it is so ordered.

AFFIRMED.

POST, J., and RYAN, C., not sitting.

JESSIE JOHNSON, APPELLANT, V. SENA E. RAWLS ET AL., APPELLEES.

FILED FEBRUARY 20, 1894. No. 5493.

Complete Record: WAIVER: MORTGAGE FORECLOSURE. In an action to foreclose a mortgage it is the duty of the clerk of the district court to make a complete record of the case, unless the same, or some part thereof, is waived by all parties to the suit during the term at which the decree is rendered.

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

Spargur & Fisher, for appellant.

A. W. Orites, contra.

NORVAL, C. J.

This is an appeal from a decree of foreclosure of a real estate mortgage. A single question is presented for review, namely, did the district court err in not directing that a complete record of the proceedings in the case be not made? The precise point was made and decided in *Colonial & United States Mortgage Co. v. Foutch*, 31 Neb., 282. In that case, which was an action of foreclosure, the plaintiff alone waived the making of a complete record by the clerk of the district court. This court construed sections 444 to 448, inclusive, of the Code of Civil Procedure and held that it was the duty of the clerk to make a complete record of the case, unless such record be waived by both parties at the term the judgment is rendered. This case falls squarely within that decision. Here the complete record was waived by the plaintiff and two of the defendants, J. L. Browne, assignee, and the Western Farm Mortgage Company. The latter was the mortgagee. The other two defendants, Sena E. Rawls and James Rawls, who were the mortgagors, did not consent to such waiver. They had a right to insist that a complete record be made by the clerk, and inasmuch as they did not waive the making thereof, the decision of the trial court was right. The judgment is

AFFIRMED.

STATE OF NEBRASKA, EX REL. FIRST NATIONAL BANK OF CRETE, V. JOSEPH S. BARTLEY, STATE TREASURER.

FILED FEBRUARY 20, 1894. No. 6709.

1. **Construction of Statutes.** In construing a statute effect must be given, if possible, to every word, clause, and sentence therein. In other words, a statute should be so construed as to make all its parts harmonize with each other and render them consistent with its general scope and object.
2. **The term "several current funds,"** as employed in section 1 of the act of the legislature of 1891, entitled "An act to provide for the depositing of state and county funds in banks," construed to mean all the moneys belonging to the state in the possession or under the control of the state treasurer.
3. **Funds of State Treasury.** The subject-matter of said act, and the obvious scope and purpose of its many provisions, leave no room for doubt that the legislature intended the statute should apply alike to each of the different funds of the state treasury.
4. **Where money is deposited in a bank,** on an open account, subject to check of the depositor, and not received as a special deposit, the bank agreeing to pay interest on the money, the transaction, although called a "deposit," is in substance and legal effect a loan. *State v. Keim*, 8 Neb., 63, followed.
5. **Investment of Educational Funds.** Under section 9, article 8, of the state constitution, moneys belonging to the several permanent educational funds of the state cannot be "invested or loaned except on United States or state securities, or registered county bonds."
6. **The depositing in banks of public funds,** under the provisions of the depository law, constitutes a loan and investment of the moneys so deposited.
7. **Constitutional Law:** PERMANENT EDUCATIONAL FUNDS: DEPOSIT IN BANKS. *Held*, That the said law, in so far as it requires the depositing of the moneys belonging to the permanent educational funds of the state in banks, contravenes section 9, article 8, of the constitution, and said law is inoperative as to said funds.

ORIGINAL application for *mandamus*.

James W. Dawes, for relator.

W. S. Summers and *John H. Ames*, *contra*.

NORVAL, C. J.

This is an application by the relator, the First National Bank of Crete, for a peremptory writ of *mandamus* to Joseph S. Bartley, state treasurer, to compel respondent to deposit with relator a portion of the moneys in the state treasury, according to the requirements of the act passed by the state legislature of 1891, entitled "An act to provide for the depositing of state and county funds in banks." The petition charges, in substance, that on the 9th day of January, 1894, the governor, attorney general, and secretary of state, in pursuance of the provisions of said act, designated the First National Bank of Crete as a state depository, and on said day said bank executed and delivered a bond conditioned as required by said law, which bond, and the sureties thereon, were duly accepted and approved by the proper officers; that only three other banks have complied with the provisions of said act of the legislature so as to entitle them to the deposit of state funds, and that the amount of the bonds furnished by each of said other banks was, and is, $100,000, so that the aggregate amount which the respondent is authorized at any time to have on deposit in all of said banks pursuant to said act is $150,000; that respondent has refused to deposit any of the moneys now in the state treasury with the relator, although requested so to do; that respondent, at the time of such demand and refusal, stated that all the moneys belonging to the state which he is empowered by said act to deposit were already deposited in the said several banks, except moneys belonging to the following funds: sinking, relief, permanent school, temporary school, permanent university, library, agricultural college endowment, normal school en-

dowment, temporary university, normal school interest, and saline. The petition further charges that respondent refuses to deposit in relator's bank any of the moneys belonging to either of the above enumerated funds, although the amount in his possession and belonging to any one of said funds, added to the amount on deposit by said treasurer with the said other banks, exceeds in the aggregate the sum of $150,000, and that the sole reason given by the respondent for his refusal to deposit in the bank of the relator any of the moneys in the above mentioned funds was, and is, that none of said moneys are "current funds" within the meaning of the said depository law. The cause was submitted on a general demurrer to the petition.

The first question in this case is one of construction to be given to the act above mentioned relating to the deposit of public moneys in banks. Was it the intention of the legislature to require all moneys coming into the state treasury to be deposited, or only a certain portion thereof? Sections 1 and 2 of said act, chapter 50, Laws of 1891, are in these words:

"Section 1. The state treasurer shall deposit, and at all times keep in deposit for safe keeping, in the state or national banks, or some of them doing business in the state, and of approved standing and responsibility, the amounts of money in his hands belonging to the several current funds in the state treasury, and any such bank may apply for the privilege of keeping on deposit such funds or some part thereof; all such deposits shall be subject to payment when demanded by the state treasurer on his check, and by all banks receiving and holding such deposits as aforesaid, shall be required to pay, and shall pay to the state for the privilege of holding any such deposit not less than three per cent per annum upon the amounts so deposited, as hereinafter provided, and subject also to such regulations as are imposed by law, and the rule adopted by the state treasurer for receiving and holding such deposits.

"Sec. 2. The amount to be paid by any and all banks under the provisions of this act, for the privilege of keeping public funds on deposit, shall be computed on the average daily balances of the public moneys kept on deposit therewith, and shall be paid and credited to the state quarterly on the first days of January, April, July, and October of each and every year, and the treasurer shall require every such depository to keep separate accounts of such several funds of the state as may be deposited, showing the name of each fund to which the same belongs and the amounts and sums paid to the state for the privilege of keeping the same on deposit as aforesaid, and to each of said funds respectively shall be credited directly to the account of the fund or funds so held on deposit, in proportion to the amount of such funds so held."

By section 3 each bank designated as a depository under the act is required to give a bond for the safe keeping and payment of all deposits and the accretions thereof, conditioned that it will render each month to the state treasurer a statement, in duplicate, showing the several daily balances, and the amount of state moneys held by it during the month, the amount of the accretions thereof, how credited separately, and for the payment of the deposit and the accretions accruing thereon, upon the presentation of the check of the state treasurer, and also that such depository will faithfully discharge the trust and comply with the provisions of the act. The section further provides the form of the bond, names the officer with whom the same shall be deposited, and forbids the treasurer having on deposit in any bank, at one time, moneys exceeding one-half of the penalty of the bond.

Section 4 provides: "The making of profit, directly or indirectly, by the state treasurer, out of any money in the state treasury belonging to the state, the custody of which the state treasurer is charged with, by loaning, depositing, or otherwise using it, or depositing the same in

any manner, or the removal by the state treasurer, or by his consent, of such moneys, or a part thereof, out of the vault of the treasurer's department, or any legal depository of the same, except for the payment of warrants legally drawn, or for the purpose of depositing the same in the banks selected as depositories under the provisions of this act, shall be deemed guilty of felony, and on conviction thereof shall be subject to punishment in the state penitentiary for the term of not more than two years, or a fine not exceeding five thousand ($5,000) dollars, and shall also be liable under and upon his official bonds for all profits realized from such unlawful using of such funds. And it is hereby made the duty of the state treasurer to use all reasonable and proper means to secure to the state the best terms for the depositing of the money belonging to the state, consistent with the safe keeping and prompt payment of the funds of the state when demanded."

The next section prescribes the penalty for the willful failure or refusal of the state treasurer to comply with the provisions of the act.

Counsel for the relator insists that it is the duty of the state treasurer to keep on deposit in the several banks designated as depositories all money received by him belonging to the state, while the respondent contends that the moneys belonging to what is commonly known as the "general fund," a fund created for the purpose of paying the salaries of the state officers and defraying the general expenses of the state government, are the only moneys to which the depository act applies. The principal controversy in the case is as to the meaning of the term "several current funds" as used in the section first above quoted. The decisions of the courts of other states do not aid us in our investigation. In fact, we have been unable to find a law upon the statute book of any state, relating to the deposit of public moneys in banks, precisely like our own. In most of the states having a depository law the treasurer

is either required by express enactment to deposit all moneys that shall come into his hands, or else the statute specifically enumerates what funds shall be deposited in banks. Of course, the phrase "current funds," as employed in commercial transactions, has a fixed, known signification. Thus, these words as used in notes or bank checks have been frequently defined by various courts as meaning current money; lawful money; par funds, or money circulating without any discount. (See *Galena Ins. Co. v. Kupfer*, 28 Ill., 332; *Wharton v. Morris*, 1 U. S., 125; *Hulbert v. Carver*, 40 Barb. [N. Y.], 245; *Phœnix Ins. Co. v. Allen*, 11 Mich., 501; *American Emigrant Co. v. Clark*, 47 Ia., 671.) All will agree, we think, that the phrase "current funds" was not employed by the legislature in enacting the statute under consideration in the same sense in which that term is used in commercial dealings. The term "current funds," like many other words in our language, is susceptible of more than one meaning. Where a word is employed in a contract or statute which has different meanings, the sense in which it is used is to be gathered from the context. It is an elementary rule of construction that effect must be given, if possible, to every word, clause, and sentence of a statute. In other words, a statute must receive such construction as will make all its parts harmonize with each other and render them consistent with its general scope and object. (*Follmer v. Nuckolls County*, 6 Neb., 204; *State v. Babcock*, 21 Neb., 599.) If we apply the foregoing rule in the interpretation of the law under consideration, it is not a difficult task to ascertain the legislature's intent.

It should be remembered that the moneys which come into the state treasury from time to time are, either by constitutional provision, or by legislative enactments, applicable to a variety of objects, and are divided into several separate and distinct funds, according to the sources from which they are derived and the uses to which the same may be devoted. We know at the time this law was enacted that

there were several of these funds, each having a well-understood and appropriate name, as the general fund, sinking fund, permanent school fund, and others which it is unnecessary to stop now to enumerate. It is obvious, therefore, that the words "several current funds" were employed by the legislature with reference to the various designations or divisions of the public moneys of the state. Manifestly the construction placed upon the provisions of the statute by respondent's counsel is entirely too narrow and strained, and should not obtain. To adopt it would violate the rule above stated for the construction of statutes, which requires that some meaning, if possible, must be given to every word in the act, since the construction insisted upon cannot prevail unless we attach no meaning to the word "several" in the above phrase of the first section of the law. The statute declares that "the amounts of money in his hands belonging to the several current funds in the state treasury" shall be deposited. This language was without doubt intended to apply to more than one fund. This is manifest by the use of the plural of the word "fund" and the employment of the adjective "several." It certainly could not have been the intention of the law-makers that the moneys belonging to one fund alone should be kept on deposit with some designated depositary. If they did, they were very unfortunate in the use of language. Had it been the intention of the legislature that the act should apply to a single fund, it is fair to assume that language which could not be misunderstood would have been employed to express such purpose. But it is said that the word "current," in the connection in which it is used with the word "funds," indicates that the moneys which the law-makers intended are those raised by taxation, and which are devoted to defraying the current expenses of the state government by disbursements from what is known as the "general fund," and in the same connection reference is made to the definition of the word

"current." In the Century Dictionary it is defined thus: "Running; moving; flowing; passing; present in its course; as, the current month or year." Other standard authorities give the word about the same definition. Assuming that the word was employed by the legislature in the sense indicated, yet the interpretation contended for by respondent is not permissible. While the amount of money belonging to the general fund of the state is continually changing or fluctuating, caused by the paying of the revenues derived from taxation into the treasury, and by their being disbursed, it is likewise true that the amount in each of the other different funds in the treasury is constantly changing, as the records kept by the treasurer and auditor, respectively, will disclose, and of which public records this court is bound to take judicial notice.

We do not entertain a doubt as to the sinking fund, relief fund—which is also a sinking fund, and the permanent educational funds, the moneys in each of which, counsel strenuously insist, are not "current funds" within the meaning of the law. The sinking and relief funds, now aggregating about a quarter of a million of dollars, consist of moneys derived from taxes levied for the purpose of paying the interest on outstanding bonds issued by the state, and for the purpose of paying the principal of said bonds when they become due. The moneys constituting these two funds are collected and paid into the treasury, from time to time, precisely the same as the taxes are collected and paid into the general fund. The interest on one set of the bonds is paid by the state treasurer annually and the other semi-annually.

The permanent school fund, permanent university, normal school endowment, and agricultural college endowment funds constitute the permanent educational funds of the state. The permanent school fund is composed of the proceeds of the sale of land by the state, and of the redemption of United States and state securities and county bonds

belonging to said fund, and of escheated estates, and a five per centum granted by congress on the sale of government lands in the state. Each of the other educational funds is composed of the proceeds of lands which have been set apart for that purpose and sold by the state, and the redemption of securities belonging to said funds respectively. Each of these several funds is continually augmented by moneys received from the sources indicated, and the moneys therein are diminished from time to time by the making of investments for the benefit of said funds. Hence, the several educational funds are "current funds" in the sense in which that term is used in the law, if the moneys composing the general fund fall within the definition, and all concede that the law applies to the fund last named. In the language of counsel for relator, "For the purpose of the business of a great state all funds are current funds so long as they remain on hand, or not invested. Shall we, by the use of jugglery of language, extend the provisions of this law to the pittance of the general fund, as we often find it, and deny them to the sacred trust funds of the state? * * * These trust funds are current, in that they should have, and in that they demand, constant attention, hourly, daily, all the time, looking to their profitable, permanent investment. These trust funds are current, moving, and changing funds, increasing and diminishing."

In respect to two of the other funds of the state treasury, the temporary school and temporary university, which aggregated at the close of the last year more than $360,000, it may be observed that the former is derived from a tax levied and collected at the same time as other state taxes for the support of the common schools of the state, together with the interest and rentals accruing from the sale and lease of school lands, and the interest received from the investments made for the benefit of the permanent school fund. The temporary university fund is supplied from a tax levied for the support of the state university, which is

likewise paid at the same time other taxes are collected, and by moneys received from the interest and rentals of lands belonging to the university endowment fund, sold and leased by the state, together with the interest on securities belonging to said fund, and tuition fees. The moneys composing the temporary school and temporary university funds are paid into the state treasury as often as the moneys constituting any other fund of the state are paid in, and more frequently than the moneys belonging to the general fund. The moneys composing the temporary school fund are apportioned among the counties every six months, and are paid upon warrants upon the state treasury drawn by the auditor. The moneys belonging to the temporary university fund are disbursed from time to time upon the auditor's warrant. Both of these are moving funds, so to speak, and the balances therein are constantly increasing and diminishing.

There is no word or provision in the act we are discussing which directly in terms, or by fair implication, limits the operation thereof to the moneys of the state belonging to one fund more than another. On the contrary, the subject-matter of the act, and the obvious scope and purpose of its provisions, conclusively show it was the intention of the legislature that the statute should apply to all funds of the state alike. An examination of the provisions of the second and fourth sections of the law strengthens this conclusion. By the second section it is made the duty of every bank designated as a depository "to keep separate accounts of such several funds of the state as may be deposited, showing the name of the fund to which the same belongs and the amounts and sums paid to the state for the privilege of keeping the same on deposit as aforesaid, and to each of said funds respectively shall be credited directly to the account of the fund or funds so held on deposit, in proportion to the amount of such fund as held." There is no ambiguity in this provision. Plainer language could

not have been used. It shows that the moneys in the several funds were to be deposited, and that the depositary should keep a separate account with each fund. The fourth section, which we have quoted above, makes it the duty of the state treasurer to make every reasonable effort to secure to the state the best terms for the depositing of "the money belonging to the state," and it is also made a felony for such officer to make any profit out of any money in the state treasury belonging thereto, by loaning, depositing, or otherwise using or disposing of it; and the removal of such money, or a part thereof, by the treasurer, or with his consent, out of the vaults of the treasury, or any legal depository, except for the payment of warrants, or for the purpose of depositing in the banks legally selected as depositories, is also declared a felony. Whether or not this section is legal and valid as a criminal statute is not now involved and will not be decided. Its consideration, however, tends to show the purpose and object of the legislature in enacting the law, and that the power to deposit all the moneys in the state treasury for the benefit of the state was meant to be conferred, and we think it has been, in plain terms, so far as the legislature possessed the power to do so.

This brings us to the consideration of another question, and that is, whether the act which we have been considering is unconstitutional in so far as it requires the deposit in banks the moneys in the treasury belonging to the several educational funds of the state. Section 9 of article 8 of the constitution of Nebraska reads as follows: "All funds belonging to the state for educational purposes, the interest and income whereof only are to be used, shall be deemed trust funds held by the state, and the state shall supply all losses thereof that may in any manner accrue, so that the same shall remain forever inviolate and undiminished; and shall not be invested or loaned except on United States or state securities, or registered county bonds of this state; and such funds, with the interest and income

thereof, are hereby solemnly pledged for the purposes for which they are granted and set apart, and shall not be transferred to any other fund for other uses." The foregoing provision prohibits the loaning or investing of any moneys belonging to any of the permanent educational funds of the state, "except on United States or state securities, or registered county bonds of this state." The moneys in these several funds the constitution has impressed with a trust character, and the legislature is powerless to authorize them to be devoted to any purpose not within the scope of the constitutional provision quoted. Does the statute attempt to authorize the loaning or investing of these trust funds? Counsel for relator contends that it does not; that it merely requires their deposit temporarily for safe keeping, pending need for use or opportunity for permanent investment. This construction would be a reasonable and proper one if the deposit contemplated by the statute was a special one merely for safe keeping, and that the same identical money should be returned. But this is not the kind of deposit the legislature meant. If it was, the purpose is not indicated in the title of the act, since it makes no reference to the safe-keeping of the funds deposited in banks. It is manifest, from an examination of the entire act, that a general deposit of the funds was what the framers intended. True, the first section declares that "the state treasurer shall deposit, and all times keep in deposit for safe keeping," in the banks that shall be designated as depositories, the moneys in his hands belonging to the several current funds, subject to payment on the treasurer's check; but further along, in the same section, the bank receiving and keeping such deposit is required to pay the state not less than three per cent per annum upon the amounts so deposited; and the next section provides, among other things, in substance, that the interest shall he computed on the average daily balances of the public moneys kept on deposit. While the statute mentions "safe keeping," when

the several provisions are construed together it is quite clear that the transaction contemplated does not amount to a special deposit. Whoever heard of that kind of a deposit of money being paid out on checks, or of a banking institution paying for the privilege of holding a special deposit of funds? The identical moneys deposited are not required to be returned. Obviously the bank receiving them had the right to use and control the money as its own. It could loan the funds for the purpose of earning the money with which to pay the stipulated interest due the state. A deposit of state funds, under the provisions of the law, amounts to a loan or investment of the funds so deposited.

As was said by Mr. Justice Miller in his opinion in *Marine Bank v. Fulton Bank*, 2 Wall. [U. S.], 256, "All deposits made with bankers may be divided into two classes, namely, those in which the bank becomes bailee of the depositor, the title to the thing deposited remaining with the latter, and that other kind of deposit of money peculiar to banking business, in which the depositor, for his own convenience, parts with the title to his money, and loans it to the banker, and the latter, in consideration of the loan of the money and the right to use it for his own profit, agrees to refund the same amount, or any part thereof, on demand."

The decisions are quite uniform to the effect that where money deposited in a bank is passed generally to the credit of the depositor, the relation of debtor and creditor is thereby created, and the transaction, although called a "deposit," is nevertheless in substance and legal effect a loan, and this though it is payable on demand. (*Commercial Bank of Albany v. Hughes*, 17 Wend. [N. Y.], 100; *Perley v. County of Muskegon*, 32 Mich., 132; *State v. Executor of Buttles*, 3 O. St., 309; *Ætna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y., 82; *Lowry v. Polk County*, 51 Ia., 50; *Long v. Emsley*, 57 Ia., 11; *In re Franklin Bank*, 1 Paige Ch. [N. Y.], 249; *Wray v. Tuskegee Ins. Co.*, 34

Ala., 58; *Bank v. Jones*, 42 Pa. St., 536; *Knecht v. United States Savings Institution*, 2 Mo. App., 563.)

In *Foley v. Hill*, 2 H. L. Cases [Eng.], 28, Lord Chancellor Cottenham said: "Money when paid into a bank ceases altogether to be the money of the principal. It is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it. The money paid into the banker's is money known by the principal to be placed there for the purpose of being under the control of the banker; it is then the banker's money; he is known to deal with it as his own; he makes what profit of it he can, which profit he retains to himself, paying back only the principal, according to the custom of bankers in some places, or the principal and a small rate of interest, according to the custom of bankers in other places. The money placed in the custody of a banker is, to all intents and purposes, the money of the banker, to do with it as he pleases; he is guilty of no breach of trust in employing it; he is not answerable to the principal if he puts it into jeopardy, if he engages in a hazardous speculation; he is not bound to keep it or deal with it as the property of his principal, but he is, of course, answerable for the amount, because he has contracted, having received that money, to repay to the principal, when demanded, a sum equivalent to that paid into his hands. That has been the subject of discussion in various cases, and that has been established to be the relative situation of banker and customer. That being established to be the relative situations of banker and customer, the banker is not an agent or factor, but he is a debtor."

The Ohio case was this: The Ohio canal fund commissioners deposited with the Columbus Insurance Company $100,000 of the money and funds of the state, belonging to the canal fund, and in consideration of which the company gave a bond, signed by various persons, to repay the

same in two years with seven per cent interest thereon per annum, payable annually. In an action by the state upon the bond, the court held that the advancement of the money to the insurance company was a loan, although the bond denominated the receipt of the money as a "deposit."

In *State v. Keim*, 8 Neb., 63, this court held that the deposit of state moneys by a state treasurer in a bank was a loan in its legal effect. This case was cited with approval in *First Nat. Bank of South Bend v. Gandy*, 11 Neb., 431.

It is urged that the Nebraska cases cited do not apply to the questions here at issue, since at the time they arose no law was in existence which required the deposit of public funds in banks, while now the treasurer is not only authorized to deposit them for safe keeping, but he is expressly commanded to do so. We are unable to see the force of the argument. The fact that the legislature has enacted that state moneys shall be deposited in banks does not make the placing of the funds therein any the less a loan than had they been deposited without sanction of law. On the contrary, it would seem that the two cases decided by our own court are the more valuable as precedents for our now holding that such a transaction amounts in law to a loan, since we have a statute which authorizes the deposit of public funds, and in every case of deposit, this statute enters into and forms a part of the contract.

Connecticut has a statute which declares that where the real estate of a married woman has been sold and the proceeds thereof "secured or invested in her name, or in the name of a trustee for her benefit, the same shall * * * not be liable to be taken on execution for the debts or liabilities of her husband." The supreme court of that state, in *Jennings v. Davis*, 31 Conn., 134, held that where the money received by the wife from the sale of her lands is deposited in her name in a bank, it is invested within the meaning of the statute. Sanford, J., in deliv-

ering the opinion, observes: "It is not stated whether the money was deposited in the bank for safe keeping merely, or in the character of a loan to the bank for which a stipulated rate of interest was to be paid during its continuance there; nor is it material to inquire, because, in either case, the deposit (being a general as contradistinguished from a special one) created a debt in favor of the depositor and against the bank, and then the money became 'invested' in that debt, and being thus invested in the name of Mrs. Morehouse was protected by the statute against her husband's claims upon it. * * * It can make no difference whether the depositor took any written evidence of this investment or did not. The statute does not require any particular species of evidence that the investment has been made; it only requires that it should be made in her name, or in the name of a trustee for her benefit. Money loaned is 'invested' in a debt against the borrower. If a promissory note is taken for it in the lender's name, the note becomes the evidence of the investment and secures it to the lender. If no note is taken, the money is nevertheless 'invested' in the debt against the borrower and in the lender's name."

The conclusion is irresistible that the framers of the law under review contemplated that the moneys deposited in pursuance of the provisions thereof should be retained by the bank receiving the same for an indefinite period of time and be used and loaned by it as its own, the bank being under obligation to repay the amount so deposited on the presentation of the check of the state treasurer. There is no room for doubt that where money is deposited under this act, the bank receiving the same is not a bailee, which would be the case if the title to the money remained in the state after the same was received by the bank. Prior to the adoption of the present statute there existed in this state no law authorizing or requiring the deposit of public funds in banks. It was, however, generally understood that each

of the former state treasurers had loaned the state funds to various banking institutions of the state for his own pecuniary benefit. The state received no income from such use of its moneys, and it was to remedy this that the depository law was enacted, rather than to provide for the safe keeping of the moneys belonging to the state treasury. The clear and manifest object of the statute was to enable the state to receive interest on its funds deposited in banks. The transaction contemplated by the statute is as much a loan or investment of the moneys deposited under its provisions as where a bank loans its moneys on the note of its customer; and if this law can be upheld, so far as it relates to the depositing of the permanent educational funds in banks, then there is nothing to prevent the legislature from enacting a law authorizing the loaning of the educational or trust funds to its citizens with or without security for the repayment thereof; and all will agree that such a law, if enacted, would contravene the section of the constitution above quoted. But it is said that the constitution does not say that these educational funds shall not be temporarily deposited in banks until opportunity for their permanent investment is presented. That instrument in express terms forbids their being "loaned or invested" except in a certain manner, and, as we have already attempted to show, the depositing of these moneys in banks on open account drawing interest, although deposited temporarily, constitutes a loan and investment of the money. The fact that a person borrows money for an indefinite period, payable on demand of the lender, does not make the transaction any the less a loan than if the money had been taken for a fixed, long period of time. The same is equally true as regards the depositing of money in banks. The length of time the money is left does not determine whether the transaction is a loan or not. We are satisfied, both from reason and upon authority, that the depositing of the moneys belonging to the permanent educational fund of the state in banks under

the provisions of the depository law is, in effect, a loan and investment of the funds so deposited, and is, therefore, inhibited by the constitution. We do not wish to be understood as in the least intimating that the legislature is powerless to enact a law requiring the state treasurer to deposit the moneys belonging to these funds in a bank or banks for safe keeping merely. Perhaps it has that power, but such is not the scope and effect of the law before us, since it requires a general deposit of the funds and not a special deposit, where the identical moneys deposited are to be returned. The amount of uninvested moneys belonging to the several permanent educational funds of the state is large, and opportunities for the permanent investment of these moneys in the class of securities and bonds described in the constitution are daily becoming less frequent, so that the amount in the treasury belonging to these trust funds is constantly increasing. That they should be invested so that they will yield an income to the state, no one will deny; but the remedy, in part at least, must come through an amendment of the constitution. The courts cannot, under the guise of interpretation, extend the powers conferred by the constitution beyond the scope of its provisions.

We have not considered, nor do we now determine, whether the relator has such an interest as entitles it to maintain the action, since its right to do so has not been raised or argued by counsel. As the state at large is directly interested in the enforcement of the depository law, the attorney general could, and doubtless it is his duty to, institute proceedings to compel the depositing of the funds in the banks designated as depositories; and perhaps a bank which has complied with the law might do so, at least in case the attorney general should refuse to appear and file the application. As it is important to the public interests that the real questions involved in this controversy should be determined and set at rest, we have thought it necessary

to pass upon the merits of the case, without going into the question of who should have instituted the proceedings. It follows, from the views expressed in this opinion, that the demurrer to the application should be overruled and a peremptory writ of *mandamus* allowed.

WRIT ALLOWED.

RASMUS P. JENSEN ET AL., APPELLEES, V. LEWIS INVESTMENT COMPANY, APPELLANT, ET AL.

FILED FEBRUARY 20, 1894. No. 5236.

Principal and Agent: SUFFICIENCY OF EVIDENCE. The evidence in the case examined and considered, and *held* to sustain the finding of the trial court that S. was the lender's agent in negotiating the loan, and not the borrower's, and that the loss resulting from the failure of S. to pay over the money to the borrower, delivered to him for that purpose by the lender, falls on the latter.

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

Howard B. Smith, for appellant.

Morris & Beekman, contra.

NORVAL, C. J.

The appellant, the Lewis Investment Company, is a corporation organized under the laws of the state of Iowa and engaged in the business of making loans upon real estate security, its principal place of business being at Des Moines. Rasmus P. Jensen made an application to the investment company for a loan of $1,200 on certain real estate owned by him and situate in the city of Omaha. After receiving

notice that the application was accepted, he, with his wife, Mary Jensen, executed and delivered to said company two mortgages covering said real estate, one for the sum of $1,200, due in five years from date thereof, with seven per cent interest, payable semi-annually, and the other for the sum of $60, payable in ten equal payments. Both mortgages were duly recorded in the office of the register of deeds of Douglas county. Subsequently, Jensen sold and conveyed the premises to Ole Oleson, warranting the title against incumbrances. About two years afterwards, Rasmus P. Jensen and Ole Oleson brought this action in the court below to cancel the mortgages, alleging in their petition, as a ground therefor, that the investment company had not paid to Jensen, nor to any one for him, the money agreed to be loaned, but had wholly failed and refused to pay the same, or any part thereof, and that it refused to surrender said mortgages or to discharge the same of record. The investment company filed an answer and cross-petition, making Mary Jensen a party defendant, praying a foreclosure of the mortgages. Upon the hearing the district court found the issues in favor of the plaintiffs, and rendered a decree in accordance with the prayer of the petition.

For convenience we shall hereafter designate Rasmus P. Jensen as "plaintiff," and the Lewis Investment Company as "defendant."

The record discloses that one L. A. Stewart, on and prior to March 17, 1887, was engaged in the loan business in the city of Omaha, and had submitted numerous applications for loans to, and procured loans to be made by, defendant and other loan companies. On the date aforesaid plaintiff applied to Mr. Stewart for a loan of money, and signed and left with him a written application for a loan of $1,200, which application was forwarded by mail by Stewart to the company at Des Moines. In due time the application was approved, papers were prepared by defendant and sent to Stewart, which were subsequently executed by plaintiff.

The money to pay out on the loan was given by the defendant to Stewart, and it is undisputed that the latter never paid any part of the $1,200 to the plaintiff, but absconded without accounting for the same to the defendant.

The only question presented for consideration is: Was the payment of the money to Stewart, in law, a payment to the plaintiff? In other words, was Stewart the agent of the plaintiff in negotiating the loan and receiving the money? A consideration of the evidence in the record satisfies us that the answer should be in the negative, and that the defendant should bear the loss occasioned by Mr. Stewart's dishonesty. That Stewart for a long time prior to the transaction in question had been the agent of the defendant in negotiating loans for it in the city of Omaha there is no room for doubt.

George P. Russell, who was Mr. Stewart's clerk and had charge of his loan office, testified as to the manner in which the business was conducted, as follows:

Q. Were you familiar with the method of transacting business between L. A. Stewart and the Lewis Investment Company?

A. Yes, sir.

Q. State to the court the manner of conducting the business between them.

A. You refer to his negotiating loans?

Q. In regard to this loan business, you say they were in correspondence?

A. Yes, sir.

Q. State the manner of conducting this business.

A. Well, sir, we received the application for a loan on one of the Lewis Investment Company's blanks, which we furnished the party making the application. We then made an examination of the property, procured an abstract and forwarded it to the Lewis Investment Company for their approval. If approved, we received draft, mortgages, notes, and instructions from the company.

Q. Did you have an appraisal made?

A. Yes, sir; that is provided for in the blank.

Q. When was that made?

A. Made before the papers were submitted to the investment company.

Q. Who chose the appraisers?

A. As a general thing, Stewart. If he didn't, the investment company did.

Q. Where were the mortgages made out and prepared?

A. At the office of the company in Des Moines.

Q. What rates were they getting at that time?

A. Their rate was eight per cent.

Q. That is, eight per cent per annum?

A. Yes, sir.

Q. During the course of the loan?

A. Yes, sir.

Q. Usually for five years?

A. Yes, sir.

Q. Two mortgages were made out, were they not?

A. Yes, sir.

Q. The principal mortgage was to secure the principal amount of the loan, was it not?

A. Yes, sir.

Q. What rate of interest would that mortgage draw?

A. If the loan was eight per cent, as a general thing, the first mortgage was made at six per cent.

Q. How was the other two per cent evidenced?

A. By a second mortgage, which ran sometimes one, two, or five years, as agreed.

Q. Who filed these mortgages with the register of deeds?

A. L. A. Stewart.

Q. Was there any custom as to the order in which these two mortgages were filed?

A. The instructions were to file the first mortgage first.

Q. So it would show on the record that it was the prior of the two mortgages?

A. Yes, sir.

Q. What commissions did L. A. Stewart get for doing this business?

A. There was a general understanding on eight per cent mortgages that two per cent of the face of the mortgages was to be the commission to be paid by the Lewis Investment Company to L. A. Stewart—two per cent of the face of the loan.

Q. When were these commissions paid?

A. They were paid at different times; as a general rule, once a month.

Q. Were they paid with each loan or at stated periods?

A. Sometimes the draft was made out to include commissions; sometimes not. It might be left for several loans to accumulate and paid then or whenever it was asked.

The Court: State whether the borrower ever paid Mr. Stewart the commission outside of these papers.

A. No, sir.

Q. Mr. Davis: What was the usual custom in making these second mortgages as to whom the second mortgage ran?

A. I am inclined to think, as a general rule, to the investment company.

Q. You spoke of the second mortgage being equal to two per cent for the entire term of the loan?

A. Yes, sir.

Q. In a five year loan it would be ten per cent of the principal sum.

A. Yes, sir.

Q. You spoke of the Lewis Investment Company paying two per cent of the face of the mortgage to Mr. Stewart?

A. Yes, sir.

Q. Was that the rule in loans for shorter period than five years?

A. I think that rule applied to loans in general. That

was the general understanding. Loans as they were made were made on certain terms.

The testimony of the witness Russell is not contradicted by any officer of the defendant, although George H. Lewis, the president, and Robert P. Maynard, the secretary of the investment company, were both examined as witnesses on the trial. Mr. Lewis in his testimony states that he was acquainted with Mr. Stewart, and knew him while he was a resident of Des Moines, which was before his removal to Omaha; that witness declined to appoint Stewart agent, but admits that he requested him to send in applications for loans, and that the defendant had made about one hundred loans on applications taken by Stewart; that the latter in every case gave his opinion as to the desirability of the loan, and in some instances they were made on his recommendation and approval without an examination of the real estate offered by the borrower as security. The witness further testified: "We make it an imperative rule that no one shall represent himself as agent of the Lewis Investment Company in any way, or publicly advertise himself as such. Mr. Stewart asked us to permit him to advertise himself as our agent in 1886, but we refused him. We have refused it to Messrs. Muir & Gaylord of this city. This is our universal custom and practice in all our business."

The record further discloses that about a year after Stewart began to procure applications for the defendant he was required to, and did, give a bond to the investment company in the sum of $10,000, signed by two sureties, conditioned as follows:

"Whereas, the said L. A. Stewart is engaged in the business of negotiating and making loans secured by mortgage upon real estate in the city of Omaha and in the county of Douglas, outside the city of Omaha and in other portions of the state of Nebraska;

"And whereas, in the course of said business, acting as

the agents of various parties desiring such loans, it is his practice to send applications to said Lewis Investment Company, and if such loans are accepted by them to forward the note or notes and mortgages securing the same, duly executed, to said company, and receiving from them in return the funds to fill the loans for which said Stewart makes drafts upon said Lewis Investment Company, or receives from said company such drafts, the same to be applied in payment of any mortgage or mortgages already upon the property securing said loans, or any mechanics' liens or unpaid bills for lumber or materials of any kind constituting a valid claim against any such real estate, paying the balance, if any, to the respective parties who have obtained such loans and made such notes and mortgages above referred to:

"Now, therefore, the condition of this obligation is such that if the said Stewart shall well and truly pay any and all funds received from such loans to the parties entitled thereto, and mortgage above referred to, and shall apply said funds in payment of any prior incumbrances existing on any piece of property upon which a loan is made by said Lewis Investment Company, so that the mortgage securing their loan shall be the first lien, except the current taxes, then, and in that event, this obligation shall be null and void, otherwise to be in full force and effect; it being the intent of this obligation to protect any person who may apply to said Stewart to procure him a loan through said investment company from any harm or loss by reason of any negligence or any wrongful act on the part of said Stewart, or any one in his employ, in the transaction of the business above referred to, including also the purchase and sale of real estate purchase-money mortgages, so called. But nothing in this bond contained shall be construed as constituting said Stewart the agent of said Lewis Investment Company, or as giving him any authority to bind them by any contract, expressed or implied."

If Stewart was agent of the borrower merely, as the defendant now contends, why was this bond required? Such action cannot be reasonably explained upon any other theory than that Stewart was the agent of the defendant, and that the bond was taken to protect the company against loss resulting from the agent's acts. Counsel for appellant calls attention to the clause in the bond to the effect that the instrument should not be construed as constituting Stewart as agent of the obligee therein named. If the defendant believed that the other provisions in the bond did not constitute Stewart its agent, why was the clause referred to inserted expressly disclaiming such agency? Doubtless the defendant hoped thereby to escape any responsibility for Stewart's acts, although it availed itself of the benefits of the agency. We decline to place a construction upon the instrument that would lead to the result indicated. The conditions contained in the bond established that Stewart was the agent of the lender, and the clause under consideration, especially in view of the entire course of dealing between the parties, should not be held as releasing the defendant from the responsibility which the law imposes upon a principal for the acts of his agent, so far as third parties are concerned. But, independent of the bond, the evidence establishes that the relation of principal and agent existed between Stewart and the defendant. It is uncontradicted that all applications for loans were taken on the defendant's printed blanks furnished by it to Stewart. The latter examined the property upon which each loan was made, and in every instance made a recommendation as to the value of the security. All mortgages and notes were prepared by the defendant and sent to Stewart, who, after procuring the same to be executed by the borrower, filed the mortgages for record. The money to pay out on the loan was sent to Stewart, who was required by the defendant to, and he did, pay out of the same all existing liens on the property, and the balance of the money

remaining, if any, he turned over to the borrower. All commissions on the numerous loans negotiated for the defendant were invariably paid by it to Stewart. These facts are entirely inconsistent with the theory advanced that the latter was the agent of the borrower merely. On the contrary, they establish beyond question that he represented the lender. An examination of the many letters, which passed between Stewart and the company, strengthens this view. Copies of more than seventy-five of the letters are incorporated in the bill of exceptions, the following being a fair selection from those written by defendant:

"DES MOINES, IOWA, Nov. 13, 1886.

"*Messrs. Stewart & Co., Omaha, Neb.*—DEAR SIRS: We received your favor of the 9th inst. inclosing the Inez Christensen bond November 1 for $900, with abstract of title and commission notes of $31.50. We hand you herewith N. Y. exchange for $900. When you send us the mortgage please also send the insurance policy for $1,850 as called for by the terms of the loan.

"We also enclose you N. Y. exchange in your favor for $68, being the balance due on the Wm. Gibson loan. This, as we wrote you, was sent by mistake to a party in the east and has just been returned to us.

"We also send you N. Y. exchange for $20 to cover the rebate due you on the McNair loan.

"Find herewith the Inez Christensen application made out on our form. Please have this signed and have two appraisers value the property as usual, and return to us the other papers.

"We also send you a lot of our subrogation slips, which we would ask you to have attached to all policies connected with loans made for us before these policies are sent on. This will save us much trouble.

"Yours truly, LEWIS INVESTMENT CO.,

"ROB'T MAYNARD, *Sec.*"

"DES MOINES, IOWA, Nov. 16, 1886.

"*Mr. L. A. Stewart, Omaha, Neb.*—DEAR SIR: We herewith hand you N. Y. exchange for $40, being the rebate allowed you on the Gibson $2,000 loan. This was overlooked when we sent you the McNair rebate. Please acknowledge receipt.

"Yours truly, LEWIS INVESTMENT CO.,
"ROB'T P. MAYNARD, *Sec.*"

"DES MOINES, IOWA, March 9, 1887.

"*Mr. L. A. Stewart, Omaha, Neb.*—DEAR SIR: Mr. R. E. Gaylord of your city has taken a block of the stock of our company, and we have agreed with him that he shall have the control of our business in Omaha and that vicinity. We should, however, be very glad to receive any applications which you may have and would recommend, but in accordance with the arrangements entered into with Mr. Gaylord, they should come to us through his office. You can make such arrangements with him in this connection as you and he may agree upon. We would assure you that we have been well pleased with all your efforts in our behalf, and with the loans which were sent to us, and it is from no dissatisfaction with you that we have taken this step. We will hope that in the future we may continue to receive the benefits of your active and wide-awake business tact.

"We would be obliged if you were to send us in a statement of what rebates may be due you on the various loans made through you since our last settlement. There are various matters in connection with them, such as insurance policies, perfecting of the abstracts, etc., which are not yet completed. As soon as these matters are closed up in each case we will remit what is due you.

"Yours truly, LEWIS INVESTMENT CO.,
"ROB'T P. MAYNAND, *Sec.*"

"JUNE 14, 1887.

"*Mr. L. A. Stewart, Omaha, Neb.*—DEAR SIR: Refer-

ring to the various loans which have been negotiated for us by you, there is insurance still needed as detailed on the various loans specified. [Then follows a list of the loans.] All of these loans bear date of several weeks or months back and we cannot understand why the insurance has not been furnished us before. Please stir around and poke up the various parties and send us on the insurance in some first-class company without further delay.

"Yours truly, LEWIS INVESTMENT CO.,
"ROB'T P. MAYNARD, *Sec.*"

Under date of February 9, 1887, the defendant, in reply to a letter written by Mr. Stewart enclosing the application of Barney Calelly, says: "We conclude to make the papers and send to you, but we will fill the loan only upon condition that some one from your office shall go and personally inspect the property, and give us a full and careful report and estimate of value. We are afraid the loan is too heavy. Would rather cut it down to $2,000 or $2,200, than complete it at this figure. We shall require first-class eastern insurance on the loan, particularly if made at this amount. If possible, I would rather you would go personally to look at the land, as Russell, I think, is a little inclined to be enthusiastic, and to overrate values. Perhaps I am mistaken on this point."

No disinterested person can peruse the whole correspondence between Stewart and the defendant without being convinced that the former was the agent of the latter in the negotiation of loans and in paying out the moneys thereon to the borrower. The manner in which the business was conducted is not susceptible of any other reasonable interpretation than that Stewart was in fact the defendant's agent, and was so considered by the company.

But it is urged that the relation of principal and agent ceased on March 9, 1887. If the agency terminated on that day, and Stewart acted for the plaintiff merely in negotiating the loan in question, then Jensen must bear the

loss occasioned by the failure of Stewart to pay the money over to him. The letter written by the investment company, bearing date March 9, a copy of which appears above, is relied upon to support the defendant's contention. This letter does not in express terms revoke the agency, nor does it contain language from which such an inference must necessarily be drawn. True, it states that Mr. Gaylord is to have the control of the defendant's business in Omaha and vicinity; but we think the proper construction to be placed upon this language, when taken in connection with the remainder of the communication, is that Stewart was not superseded by Mr. Gaylord, but that the latter had the general management of the defendant's business in Omaha, and that the applications thereafter taken by Stewart should pass through Mr. Gaylord's hands. It will be observed that the letter states: "We should, however, be very glad to receive any applications which you may have and would recommend. * * * We will hope that in the future we may continue to receive the benefit of your active and wide-awake business tact." This does not indicate that the defendant expected Stewart to cease negotiating loans for it. The contrary idea is conveyed. Plaintiff's application was taken on one of the defendant's printed blanks and was forwarded by him to the company direct after March 9, the letter transmitting the application reading as follows:

"MARCH 22, 1887.

"*Robert P. Maynard, Sec'y, Des Moines.*—DEAR SIR: I enclose application and contract for $1,200 loan to Rasmus P. Jensen. Been expecting Mr. Gaylord home, but as he is away we send it to you, but the commission should be credited to his account.

"The application speaks for itself, and I think is a safe loan. I inspected the property personally on the 17th, and found it about as represented, and should consider $5,000 a low valuation.

"Truly yours, L. A. STEWART.

"P. S.—The cable line is already in front of said premises. Property is selling at about $100 per front foot in the neighborhood."

To the above letter the defendant, under date of March 23, replied as follows: "Referring to the Rasmus P. Jensen $1,200 application, we will accept the same subject to Mr. Gaylord's approval, and forward you papers herewith for their usual course. We, of course, will want to see the abstract and examine the same before the money is paid out on the loan. We also return the Jensen application so that you can fill, in the same handwriting, the description of the property."

It appears from the testimony that plaintiff's application took precisely the same course, and that the loan was made through Stewart in the same manner, as had been the custom in making loans prior to March 9, except that Mr. Gaylord approved the loan. The Jensen papers were sent to Stewart for him to have executed. He filed the mortgages for record, and the money was paid to him by the defendant to close the loan. The only thing Mr. Gaylord had to do with the transaction was to approve the application. If the defendant believed that the latter was its sole agent at Omaha, why were not the Jensen papers and the money to pay out on the loan sent to Mr. Gaylord? The failure to do so is convincing proof that the company regarded Stewart as its agent in the transaction, which in fact he was.

It is disclosed that the plaintiff, at the time of his making the application for the loan, also signed a writing addressed to L. A. Stewart, which states: "I hereby appoint you my agent and attorney to negotiate for me a loan of $1,200, with interest at eight per cent per annum, payable semi-annually." This paper also recites: "I authorize you to procure an abstract of title to said premises. And I hereby agree, in consideration of your services in the negotiation of said loan, to pay you or the assignee of this

contract a commission of —— per cent on the amount loaned, the actual cost of abstract of title, and for perfecting the same, and also recording the mortgage, * * * and my said attorney is hereby instructed and authorized to pay off and discharge all existing liens on the above described land with the proceeds of the loan applied for, paying me the balance after deducting the above named commissions and charges, and the money advanced to pay off existing liens. * * * I farther agree that this contract may be assigned to any person or persons from whom my said agent may procure this loan." Counsel for appellant insists that the foregoing writing, which we will hereafter call a contract, constituted Stewart plaintiff's agent to negotiate the loan for him and to receive the money. It is evidence tending to prove that the relation of principal and agent existed, and it would be conclusive upon that point if there were no other proof in the record upon the subject. But there is other evidence. It is shown that it was the usual custom of the defendant to require all applicants for loans to sign a similar agreement to the one before us, and said contracts were invariably forwarded to the defendant with the applications. That was done in this case. The application signed by plaintiff in express terms authorized the defendant to secure the loan for him. It recites: "The undersigned hereby authorizes the Lewis Investment Company, of Des Moines, Iowa, to procure for me a loan of $1,200 for five years, to bear interest at eight per cent per annum, payable semi-annually. * * * All incumbrances will be removed before the completion of this loan. * * * I will furnish a complete abstract of title to said realty, showing the record of the above mortgage as the first lien on said premises." The application has this indorsement: "Negotiated by the Lewis Investment Company, 316 West Fifth street, Des Moines, Iowa." Plaintiff is not estopped by the provisions contained in the above writing or contract from showing that

Stewart was not his agent. The question of agency must be determined from all of the testimony in the case. This point is sustained by the decisions of this court in *Olmsted v. New England Mortgage & Security Co.*, 11 Neb., 487, and *New England Mortgage & Security Co. v. Addison*, 15 Neb., 335.

It appears that when the application for the loan was made there was a valid mortgage of record on the premises in favor of one Byron Reed for the sum of $500, and although the contract recites that Stewart is authorized to pay off all liens out of the proceeds of the loan and procure an abstract of title, the proofs fail to show that he did either. On the contrary, the Reed mortgage was paid by the plaintiff on March 31, 1887, which was before the money was paid to Stewart. Defendant must have been aware of the existence of the mortgage given to Mr. Reed when it paid over the money to Stewart, since the lien was shown upon the abstract which had been furnished it. Appellant not having been apprised of the release of the mortgage, it is unreasonable to suppose that it would have paid the $1,200 to Stewart had it not regarded him as its own agent in the transaction, and that with the money he would discharge the mortgage. It is not usual or business-like for a lender to trust the agent of the borrower to pay off existing liens upon the property out of the money loaned. Plaintiff did not know the contents of the paper when it was signed. He only applied for one loan, and evidently did not intend to constitute both Stewart and the defendant as agents to procure the money for him. We are satisfied the contract was a mere device, obtained for the same purpose that the clause was inserted in the bond given by Stewart, to the effect that it should not be construed as constituting Stewart the agent of the investment company, namely, to enable the defendant to escape liability for the acts of its agent. The application and contract should be construed together, and in the light of the prior

and subsequent dealings between Stewart and the defendant. So construing them, we are forced to the conclusion that the trial court was justified in holding that Stewart was the agent of the defendant for the purpose of disbursing and paying over the money to the plaintiff, and that he was not plaintiff's agent in the transaction. Defendant paid the money to Stewart at its peril, and must stand the loss. The judgment is

AFFIRMED.

M. D. HOY V. LEWIS ANDERSON.

FILED FEBRUARY 20, 1894. No. 5094.

1. **Homestead: VALUE.** The extent of a homestead is not to be determined from the fee-simple value of the land, but from the value of the homestead claimant's interest therein.
2. **Lien of Judgment Upon Homestead.** A owns 160 acres of land in this state, of the value of $2,800, upon which he resides with his family as a homestead. There is a valid mortgage upon the premises to secure the payment of $1,200, no part of which sum has been paid. Subsequent to the giving of the mortgage, but while the land was occupied as a homestead, two judgments were obtained against A, transcripts of which were duly filed in the district court of the county in which the real estate is situated. *Held*, That the judgments are not liens upon said premises.

ERROR from the district court of Polk county. Tried below before MILLER, J.

Albert & Reeder, for plaintiff in error:

The extent of the homestead is to be determined by the value of the land, and not by the value of the claimant's interest therein. (*Yates v. McKibben*, 66 Ia., 357; *Raber v. Gund*, 110 Ill., 589.)

J. L. Makeever and *E. L. King, contra,* cited: Thompson, Homestead & Exemption, secs. 656–663; Boone, Law of Mortgages, p. 319; *Quinn's Appeal,* 86 Pa. St., 447; *Hill v. Johnston,* 29 Pa. St., 362; *Vermont Savings Bank v. Elliott,* 18 N. W. Rep. [Mich.], 805.

NORVAL, C. J.

Defendant in error commenced an action in the court below against Samuel Maxwell and M. D. Hoy, for the purpose of having two judgments declared not to be liens upon certain premises claimed as a homestead. Defendant in error Lewis Anderson is now, and has been for ten years last past, a married man, and the head of a family, residing in Polk county, this state. For three years prior to the instituting of this action he has owned and occupied as a homestead the following real estate, to-wit: The northwest quarter of section 1, township 15, range 3 west, containing 160 acres, and no more, which premises do not exceed in value $2,800. There is now, and has been for three years past, a mortgage on said real estate amounting to $1,200, leaving the equity of Anderson in said quarter section not to exceed the value of $1,600. Subsequent to the recording of the mortgage, Samuel Maxwell recovered a judgment against Anderson and others in the county court of Merrick county for $163.16 and $11.50 costs, and on the 15th day of December, 1888, a transcript of said judgment was filed in the office of the clerk of the district court of Polk county. One M. D. Hoy obtained a judgment in the county court of Platte county against said Anderson and others, in the sum of $605.08 and $31.50 costs, and on the 17th day of September, 1889, said judgment was duly transcripted to the district court of Polk county. Each of the above mentioned judgments was rendered upon an ordinary debt, and not upon any claim whatsoever which would bind the homestead. Ander-

son filed his petition in the district court setting up the foregoing facts. The defendants appeared and filed separate demurrers to the petition, which were overruled, and defendants failing and refusing to answer, the cause was heard upon the petition and evidence, and a decree rendered in favor of plaintiff. Defendant Hoy brings the case to this court for review on error.

The sole question in this case is whether the extent of a homestead in this state is to be determined from the fee-simple value of the land, or from the value of the homestead claimant's interest therein above the mortgages and other valid liens. The question presented is a new one in this court, and calls for a construction of the provisions of our homestead law.

Section 1, chapter 36, of the Compiled Statutes declares that "a homestead not exceeding in value $2,000, consisting of the dwelling house in which the claimant resides, and its appurtenances, and the land on which the same is situated, not exceeding 160 acres of land, to be selected by the owner thereof, and not in any incorporated city or village, or instead thereof, at the option of the claimant, a quantity of contiguous land not exceeding two lots within any incorporated city or village shall be exempt from judgment liens and from execution or forced sale, except as in this chapter provided."

Section 2 provides that if the claimant be married, the homestead may be selected from the property of the husband, or from the separate property of the wife, with her consent.

Section 3 reads as follows: "The homestead is subject to execution or forced sale in satisfaction of judgments obtained: First—On debts secured by mechanics', laborers', or vendors' liens upon the premises. Second—On debts secured by mortgages upon the premises, executed and acknowledged by both husband and wife, or an unmarried claimant."

It will be observed that the statute does not limit the right of homestead to any particular estate in land. It does not require that the claimant must be the owner of an estate in fee-simple in order to entitle him to the benefits of the homestead law. We are persuaded that any interest in land, coupled with the requisite occupancy by the debtor and his family, is sufficient to support a homestead exemption. In *Giles v. Miller*, 36 Neb., 346, it was ruled that the ownership of an undivided interest in land occupied as a homestead will sustain a claim of exemption from forced sale on execution or attachment as to such interest in the land. It has been held in Dakota, under a statute quite similar to ours, that homestead rights can be claimed in real estate held under a contract of purchase, although all the purchase money has not been paid. (*Myrick v. Bill*, 5 Dak., 167.) So in Michigan, a homestead can be acquired in land held under a partly paid school-land certificate. (*Allen v. Cadwell*, 55 Mich., 8.) If an interest in land less than the fee is sufficient to entitle a claimant to the benefits of the provisions of the homestead act, and there can be no doubt of it, it follows logically that the extent of a homestead is to be determined by the value of the claimant's interest in the land, whatever it may be. In case a valid mortgage upon the homestead remains unpaid, the mortgagor is entitled, as against subsequent judgment creditors, to the statutory exemption of $2,000 over and above the amount of the mortgage lien. That this is the proper construction to be given to the sections already quoted is made more clear when we consider the language of section 16 of the homestead law, which declares that "if the homestead be conveyed by the claimant, or sold for the satisfaction of any lien mentioned in section 3, the proceeds of the sale beyond the amount necessary to the satisfaction of such lien, and not exceeding the amount of the homestead exemption, shall be entitled, for the period of six months thereafter, to the same protection against legal

process and the voluntary disposition of the claimant which the law gives to the homestead." Under this section, where a homestead is sold to satisfy a mechanic's or mortgage lien, the proceeds of the sale above the amount sufficient to discharge such lien, to the extent of $2,000, are exempt from execution for the period of six months thereafter. It is reasonable to suppose that the legislature intended in enacting the statute that the extent of the homestead right should attach to the claimant's interest in the land over and above the amount of all valid mortgages or mechanics' liens thereon. This construction we have adopted is not without precedents elsewhere, and certainly is in line with the liberal rule of construction which always obtains in the interpretation of exemption laws. The following authorities have more or less bearing upon the question we have been considering: *Quinn's Appeal*, 86 Pa. St., 447; *Hill v. Johnston*, 29 Pa. St., 362; *Lozo v. Sutherland*, 38 Mich., 168; *Vermont Savings Bank v. Elliott*, 53 Mich., 256.

Applying the foregoing considerations to the case before us, it is clear that Anderson's interest in the land cannot be reached by an ordinary execution. The total value of the quarter section is but $2,800, and deducting therefrom $1,200, the amount of the mortgage, leaves Anderson's interest less than $2,000. It follows that the transcripted judgments are not liens upon the real estate, and the court below did not err in so decreeing. To hold otherwise would be against the spirit, if not the very letter, of our homestead law.

It is said that the mortgage may in the future be paid off and released, or the land may increase in value, and it is argued from this that plaintiff below was not entitled to the relief prayed for. The decree only determined the rights of the parties at the time it was pronounced. In the event the land should rise sufficiently in value, or the mortgage thereon be canceled, the judgment creditors would

be entitled to enforce their judgments against the land, should it remain Anderson's property. The decree is

AFFIRMED.

SCHOOL DISTRICT NUMBER TEN OF POLK COUNTY ET AL. V. J. H. COLEMAN ET AL.

FILED FEBRUARY 20, 1894. No. 6023.

1. **Construction of Statutes.** A proviso should be construed as referring to what immediately precedes it only, unless a different intention is apparent from the act itself.
2. **Schools:** DIVISION OF DISTRICTS BY COUNTY SUPERINTENDENT: NOTICE. The proviso contained in the seventh paragraph of section 4, subdivision 1, of the general school law (ch. 79, Comp. Stats.) was intended to enlarge the powers of the county superintendent so as to authorize the creation of new districts in certain cases, containing less than six sections of land, and the changing the boundaries of existing districts without regard to the size of districts affected thereby, and is not authority for changing the boundary lines of districts in any case without the notice mentioned in paragraph number three of said section.

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

Sedgwick & Power and *E. E. Stanton*, for plaintiffs in error.

E. L. King, contra.

POST, J.

This was a proceeding before the county superintendent of schools for Polk county under the provisions of section 4, subdivision 1, of the general school law (ch. 79, Comp.

Stats.). The proceedings before the superintendent are shown by his transcript as follows:

"OSCEOLA, January 12, 1892.

"A verbal notice being given me by Thomas Record, that a petition would be presented to me praying that sections 17 and 18, or parts thereof necessary to give school privileges to petitioners of school districts 10 and 56, Polk county, Nebraska, be detached from said districts and annexed to school district No. 34 of Polk county, Nebraska, the 18th day of January was set for hearing said petition. W. F. KEPNER,

"*County Superintendent.*

"January 18, the day set for hearing said petition. The petition was presented, but not having all names desired on petition, I set January 19 as time for hearing said petition and prayer. W. F. KEPNER,

"*County Superintendent.*

"January 19, the day set for hearing said petition, the following named persons, viz., Thomas Record, Joseph Rosine, N. P. Johnson, appeared with petition signed by Joseph Rosine, Anna Rosine, Milo Austin, Ellena Austin, Nels P. Johnson, Josephine (her × mark) Johnson. The substance and prayer of the petition was as follows:

"We, Nels P. Johnson and Josephine Johnson, Alma Johnson, Mabel Johnson, Emil Johnson, and William Johnson, and we, Ellena Austin and Milo Austin, parents of Clide Austin, Charles Austin, Vinnie Irene Austin, Alice Austin, Thomas Isaac Austin, and we, Joseph Rosine and Annie Rosine, parents of Irene Edith Rosine, and I, J. H. Coleman, parent of Chatta Coleman, would request that you attach to the adjoining district No. 34 sections 17 and 18 in districts 10 and 56, or so much thereof as you may deem necessary for the purpose of giving said children school privileges, for the following reason: A stream flowing through districts 56 and 10, known as the 'Blue River,'

makes it impracticable for their children to attend school in said districts, the school houses being on the north side of stream and they living on the south side of said stream.

"The undersigned persons, after being duly sworn before me, stated that the above statements are true and correct.

"THOMAS RECORD.
"JOSEPH ROSINE.
"N. P. JOHNSON.

"After due consideration of petition and prayer, I find in favor of petitioners, and that the cause is a just one, and hence the following decision:

"OSCEOLA, January 19, 1892.

"Joseph Rosine and Annie Rosine, Milo Austin, Ellena Austin, Nels P. Johnson and Josephine Johnson having certified before me this day that the Blue river makes it impracticable, during the wet season of the year, for their children to attend school in their own districts, Nos. 10 and 56 of Polk county, Nebraska, therefore, according to section 4, subdivision 1, of School Law, I have detached the following portion of land from district No. 56 of Polk county, Nebraska: E. ½ of sec. 17, and from district No. 10 of Polk county, Nebraska, W. ½ of sec. 17, E. ½ sec. 18, and and E. ½ of N. W. ¼ and E. ½ of S. W. ¼ of sec. 18, all of which is in twp. 13, range 2 W., and joined the same to district No. 34 of Polk county, Nebraska.

"W. F. KEPNER,
"*County Superintendent.*

"January 30, 1892. Appeal bond filed and approved, and notice of appeal filed. W. F. KEPNER,
"*County Superintendent.*"

From this order in favor of the petitioners an appeal was taken by district No. 10 and certain resident taxpayers therein. A trial was had in the district court and judgment entered substantially in accordance with the prayer of the petition, whereupon the cause was brought into this court for review by means of a petition in error.

Numerous reasons are assigned by plaintiffs in error for a reversal of the judgment, the first of which is the overruling of their objection to the introduction of evidence by the petitioners on the ground that the proceedings before the superintendent were without jurisdiction and void. The cause was tried in the district court without pleadings, upon the original petition. But the foregoing objection appears to have been construed by all parties as presenting the question of the jurisdiction of the persons of the appellants and also the sufficiency of the petition. The contention of plaintiffs in error is that notice of the proposed change of the boundaries of the several districts affected is indispensable in all cases, while defendants in error argue that notice is not essential where the change is rendered necessary on account of streams of water which prevent children residing in any district from attending school therein. The particular provision relied upon to sustain this contention is the last sentence of the seventh paragraph of the section above cited, as follows: "When streams of water make it impracticable for children to attend schools in their own district, the county superintendent shall have authority, and it shall be his duty when requested by the parents of such children, to attach to adjoining districts such territory as he may deem necessary for the purpose of giving said children school privileges." Prior to the amendment of the school law in 1885 the first sentence of section 4 read as follows: "New districts may be formed from other organized districts under the following conditions only." In the year last named said section was amended by the addition thereto, immediately following the word "district" in the provision quoted, of the following: "and boundaries of existing districts may be changed."

It will be observed that the law as thus amended, and which is still in force, in express terms prohibits any change in the boundaries of school districts except upon

the conditions named therein. Immediately following the limitation referred to it is provided: First—That the superintendent may in his discretion create new districts upon petition of one-third of the legal voters in each district to be affected thereby. Second—That he may in his discretion change the boundaries of existing districts upon petition of one-half of the legal voters of the districts affected thereby. Third—That he shall not refuse to change the boundary lines of existing districts or to form new ones when petitioned to do so by two-thirds of the legal voters of each district affected thereby; also, that "a notice of said petition, containing an exact statement of what changes in district boundaries are proposed, and when the petition is to be presented to the county superintendent, shall be posted in three public places, one of which places shall be on the outer door of the school house, if there be one in each district affected, at least ten days prior to the time of presenting the petition to the county superintendent; *Provided*, That changes affecting cities shall be made upon the petition of the board of education of the district or districts affected." Fourth—That districts may be divided or consolidated on certain conditions. Fifth—For a verified list of the legal voters in each district affected, also for proof of service of the notice provided for in paragraph number three. Sixth—That new districts shall not be formed between the first Tuesday of April and the first day of October. Seventh—That no new district shall contain less than four sections of land; "*Provided*, That when streams or water-courses make it impracticable to form districts containing four sections the superintendent may form districts with less than four sections without regard to valuation." This proviso was added to the section by the amendment of 1883 and was the first authority for new districts of less than six sections. But the prohibition against the change of boundary lines so as to reduce existing districts to less

than that amount of territory (except in the cases provided for in the original act) continued in force until the amendment of the section in 1885 by the addition thereto of the provision under consideration. The original provision for districts of not less than six sections was evidently intended as a limitation upon the discretion conferred upon the superintendent by the other provisions of the act. According to an elementary rule of construction a proviso will be confined in its application to what immediately precedes it, unless a different intention is apparent from the act itself. (Sedgwick, Construction of Statutory and Constitutional Law, p. 226, note; 23 Am. & Eng. Encyc. of Law, 436, and note.) The effect of the amendments of 1883 and 1885 was therefore to enlarge the powers of the superintendent so as to authorize the creation of new districts of less than six sections and to change the boundaries of existing districts where children are prevented by streams from attending school, without regard to the size of districts affected thereby. The amendment of 1885, like that of 1883, was intended merely as a modification of the restrictive language of the original act with respect to the size of districts and not to confer upon the superintendent jurisdiction to change district boundaries at will, and, as in this instance, without notice of any kind.

The several provisions cited, when read together, are susceptible of but one construction, viz., that the notice mentioned in the third paragraph of the section is an essential condition to the exercise of the jurisdiction conferred upon the county superintendent to change the boundaries of school districts. This case is therefore within the rule stated in *State v. Compton*, 28 Neb., 491, and *Dooley v. Meese*, 31 Neb., 428. Quite applicable in this connection is the language of the court in the last named case: "In controversies in regard to the boundaries of school districts, where it is sought to change the same, it must appear that the preliminary steps were taken not only by the presenta-

tion of the proper petitions, but by notice of the time and place of presenting the same. These notices should be placed in public places within each district to be affected, and if not so posted the proceedings will be invalid. The design of the notices is to give publicity to the proposed change so that all parties interested may appear in favor of or to oppose such change." It follows that in making the *ex parte* order changing the boundaries of the three districts named, the county superintendent exceeded his authority and that the objection should have been sustained. This conclusion renders an examination of the other questions presented unnecessary. The judgment of the district court is reversed and the action dismissed.

REVERSED.

GEORGE A. HOAGLAND ET AL., APPELLANTS, V. SOPHIA LOWE ET AL., APPELLEES.

FILED FEBRUARY 20, 1894. No. 5181.

1. **Mortgages: MECHANICS' LIENS: PRIORITY: PRIVITY OF CONTRACT.** Where a party sells real estate and takes a mortgage for part of the purchase price, and postpones the lien of the mortgage to that of another mortgage given to obtain a loan, at the request of the purchaser, in consideration of his promise to use the money derived from the loan in making improvements on the premises, such promise being included and expressed in the purchase-money mortgage, *held*, that this did not constitute the mortgagor the agent of the mortgagee in making the contract for the erection of the building; that there was no privity of contract between the mortgagee and the laborers on, or furnishers of material for, the building; and that mortgagee was not a promoter of the building scheme, or operations; and that the mortgage lien would not be subordinated to the liens for labor done and material furnished,—the commencement of such labor and furnishing material being subsequent to the recording of the mortgage.

2. **Mechanics' Liens:** INTEREST TO WHICH LIEN ATTACHES. "A person commencing to furnish material for, or commencing to labor on, an improvement on real estate must, at the time, take notice of the interest and title in the premises of the person with whom he contracted, as shown by the public records, as his lien for labor or material, aside from the improvement itself, attaches only to such interest." (*Henry & Coatsworth Co. v. Fisherdick*, 37 Neb., 207.)

3. ———: MORTGAGES: PRIORITY. Where a party receiving a mortgage for a part of the purchase price of real estate takes it subject to a mortgage given for a loan, the consideration for making the mortgage subject to the loan mortgage being the promise on the part of the mortgagor to use the loan so obtained for putting improvements on the premises, and the mortgagor pays the mortgagee a portion of the loan money on the purchase price as a cash payment, it being shown that the mortgagee had no knowledge that this was done, the mere fact of receiving such money will not entitle the mechanics' lien-holders who commenced to perform work and furnish material for the buildings erected on the premises subsequent to the time of recording the purchase-money mortgage, in a suit for foreclosure of the mortgage and the liens, to a decree giving the liens priority over the mortgage, or to have the said mortgage lien postponed or made subordinate to the mechanics' liens in the amount of the sum so paid to the mortgagee.

4. ———: ———: ———. Where a party, purchaser of real estate, gives a mortgage to the vendor of such real estate to secure the balance of purchase price unpaid, and such mortgagee, in consideration of improvements being made and buildings erected on said real estate, allows said mortgage to become subsequent in priority to mortgages made to secure a loan for the purpose of erecting such improvements, said mortgage thereby made subsequent containing a clause whereby the mortgagor agrees to use all money procured by such loan mortgages in the erection of such buildings, and fails to do so, *held*, that the lien of the mortgage of said vendor should not be subordinated to the liens of the mechanics and material-men who commenced to perform labor and furnish material subsequent to the recording of said mortgage.

5. ———: ———: ———. A mortgage on real property in this state does not convey any title or vest any estate either before or after conditions broken, but merely creates a lien upon the mortgaged property; and the mortgagee's interest in the property mortgaged is not such an interest as constitutes him an owner within

the meaning of the mechanics' lien law, and as a general rule his mortgage lien will not be subordinated to mechanics' liens predicated upon claims for labor and material, the performance and furnishing of which were commenced on a date subsequent to the record of the mortgage, pursuant to a contract with the mortgagor.

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

Switzler & McIntosh and *A. C. Read*, for appellants.

Chas. E. Clapp, J. B. Meikle, Mahoney, Minahan & Smyth, Smith & Powell, Cornish & Robertson, and *Cavanagh & Thomas, contra.*

HARRISON, J.

In this case the plaintiff filed a petition in the district court of Douglas county, Nebraska, praying the foreclosure of a mortgage on "lot No. fourteen (14), block three (3) of Summit Place, an addition to the city of Omaha, as surveyed, platted, and recorded, said lot being sixty-eight (68) feet front on Farnam street and one hundred thirty-two (132) feet on Thirty-first street, together with all the appurtenances thereunto belonging, in the sum of $4,761.27," alleging that the same was given for a portion of the purchase price of the premises mortgaged. The mortgage contained the following statement in regard to its being given to secure a part of the purchase money: "This mortgage being given to secure a portion of the purchase money of said premises." The mortgage also contained the following statement in reference to incumbrances, and the use of the money derived from the prior mortgages to pay for improvements, thereafter to be placed upon the lots: "That they are free from incumbrance except as follows, to-wit: One mortgage on the west half of said lot for $4,000, payable five years after date and bearing interest at seven per cent per annum; one other mortgage of $200 on said west

half of said lot, payable one year from the 25th day of July, 1889; one mortgage on the east half of said lot for $3,500, payable in five years from date and bearing interest at seven per cent per annum; and one other mortgage for $175 on said east half of said lot, payable one year from the 25th day of July, 1889; all of said mortgages being from said Riley to Eugene C. Bates; said mortgages of $4,000 and $3,500 being given to procure a loan for the purpose of making improvements on said premises; and I further covenant, in consideration of this mortgage being made subject to said mortgages above described, that I will use the whole of the proceeds of said mortgages in the making of such improvements on said premises."

Of the defendants, E. Lillian Goodman filed an answer and cross-petition, asking the foreclosure of a mortgage on the "east half of lot fourteen (14), in block three (3), in Summit Place, an addition to Omaha, Nebraska, as surveyed, platted, and recorded, being a part of the southeast quarter of the northwest quarter of section twenty-one (21), in township fifteen (15), range thirteen (13) east, of the sixth principal meridian, with all the appurtenances thereto belonging," being a part of the same property covered by the Lowe mortgage. The Goodman mortgage was in the sum of $3,500, and was one of the mortgages described in the Lowe mortgage and to which it was made subject. (See statement herein copied from Lowe mortgage, referring to this mortgage and its priority.) Eliza Marvin, guardian, filed a cross-petition, alleging ownership of the $4,000 mortgage to which that of plaintiff was made subject, covering a portion of the property included in the Lowe mortgage, "the west half of lot fourteen (14), in block three (3), in Summit Place, an addition to Omaha, Nebraska, as surveyed, platted, and recorded, being a part of the southeast quarter of the northwest quarter of section twenty-one (21), in township fifteen (15), range thirteen (13) east, of the sixth principal meridian, with all the appurtenances thereto

belonging." The prayer of each of these cross-petitions was for foreclosure of the mortgage described in such petition. Chas. C. Bates also filed answers and cross-petitions asking for foreclosure of his mortgages on the same premises, they being given for his commission for making the loan evidenced by the Marvin and Goodman mortgages, one being for the sum of $200, and one in the amount of $175. Except Meyer & Raapke, all the other answering defendants filed answers in the nature of cross-petitions, alleging the performance of labor or furnishing of material, or both, in and for the erection of two houses on the premises in controversy, one house being placed on the portion of the lot described in the Goodman mortgage and one on the part covered by the Marvin mortgage.

The several answers of the mechanics' lien holders prayed for the foreclosure of the mechanics' liens, and that they might be declared prior to the mortgages of Goodman and Bates, Marvin and plaintiff. Meyer & Raapke filed an answer alleging the ownership of a judgment against the principal defendant, John Riley, and praying that the judgment be established as a lien against the premises in controversy, etc., but on the trial discovered that the defendant Riley in this case was not the one against whom they had judgment and offered no proof.

John Riley, the principal defendant, did not answer and was defaulted. A trial was had and proof offered of the various mortgages and mechanics' liens and evidence introduced bearing upon the question of the priority of the several liens of the mortgages and mechanics' liens, and a decree rendered ordering the sale of the property to satisfy the liens and establishing their priority, as follows:

"The court further finds that the order of priority of the several mortgages and liens as above described is as follows:

"First—That the mortgage of defendant E. Lillian Goodman is the first lien upon the east one-half of said lot,

and the mortgage of David M. Marvin, testamentary guardian of Walter T. Marvin, a minor, is the first lien upon the west one-half of said lot.

"Second—The two mortgages of the defendant Charles C. Bates are the second lien on the said premises.

"Third—The mortgage of the plaintiff is the third lien upon said premises.

"Fourth—The mechanics' liens of the defendants Nell Seiroe, Balfe & Reed, George A. Hoagland, Freeman J. Ham, the Omaha Coal, Coke & Lime Company, and McBryan & Carter are fourth in the order of priority, and are equal to each other in the point of priority and shall share *pro rata*."

The case comes here on appeal by the several parties defendant who sought foreclosure of the mechanics' liens, their complaint being against that portion of the decree in which they are postponed in priority to the mortgages in suit, and more particularly that of Sophia Lowe. There is no claim made that the mortgages are not prior in point of time to the commencement of any labor or furnishing of material for the houses, either in the execution or recording.

The mortgages of Goodman, Marvin, and Bates were executed July 25, 1889, and recorded July 29, 1889. The mortgage to plaintiff was executed July 27, 1889, and recorded July 30, 1889, and no labor was performed on the houses or material furnished for them until the month of August 1889. Nor do the mechanics' lien holders claim that they did not know of the existence of the mortgages, or that they were not informed as to their recitals and contents, but the contention is made that, inasmuch as the plaintiff waived her right of priority and allowed her purchase-money mortgage to be postponed to the Marvin, Goodman, and Bates mortgages, under the statement in her mortgage that it was done in order that money might be obtained through the medium of the loans secured by the Good-

man and Marvin mortgages for the purpose of improving the property and building the houses, the mortgagor agreeing to use such money for that specific purpose and none other, and, furthermore, since Sophia Lowe was paid $4,500 of the funds thus obtained as a part of the purchase price of the property, the liens of the mechanics and materialmen should be given priority to her mortgage and receive prior satisfaction from the proceeds of the sale of the premises. The further claim is made in regard to the Lowe mortgage, by the mechanics' lien holders, that it and the deed from Sophia Lowe to John Riley were executed in conformity with a verbal negotiation or contract of purchase and sale of the premises in controversy, and that the agreement of the purchaser to improve the premises was a constituent part of such contract of sale. That the Marvin, Goodman, and Bates mortgages should be held subsequent to the liens of the mechanics and parties furnishing material, for the reason that when the loans were made it was with the agreement that such funds were to be used for the improvement of the property and to build these houses, all parties to the loans entering into such agreement and having full knowledge of it. There is not much direct evidence respecting these points, and what there is does not, to any great extent, tend to sustain the allegations or positions of appellants, rather to contradict them; and it is only when we look to the face of the Lowe mortgage and what is therein stated in reference to improvements, coupled with the circumstances surrounding the whole transaction, that we can say that the evidence in the case tends to support their view of the situation and rights of the parties.

The following facts are established by the evidence: That the sale from Sophia Lowe to Riley was effected between Riley and one Fred Lowe, who acted for Sophia Lowe; that the agreement between them was that the mortgage which was to be taken by plaintiff (the one sought

to be foreclosed in this case) should be subject to the Goodman, Marvin, and Bates mortgages, the consideration moving to plaintiff for so subordinating the lien of her mortgage being the promise of Riley to improve the property and to use for such improvement the money derived from the loans secured by said mortgages. This agreement on the part of Riley was embodied in the mortgage to plaintiff. (See copy hereinbefore set forth.) We are satisfied, from a careful examination of the evidence, that the contract for the improvement of the property on the part of Riley did not enter into the original agreement of sale between Riley and Fred Lowe, agent for Sophia Lowe, but was first talked of and agreed upon when the proposition was made by Riley to Fred Lowe that the mortgage to Sophia Lowe should be postponed, as a lien upon the premises, to the liens of the mortgages to Bates, now the Marvin, Goodman, and Bates mortgages. The evidence further discloses that Bates, in making the loan, relied upon the security of the property mortgaged, but understood, and was probably verbally promised by Riley, that improvements would be made upon the property; that Bates never knew any more about it and paid no further attention to it, relying upon the lot alone as security. The testimony further discloses that the money derived from these loans was paid to Riley, $4,500 immediately upon the execution of the mortgages and the balance as he asked for it. That the loan of $7,500 was divided and made upon different portions of the premises, for the reason that Bates, or the company for which he was agent, did not have money enough belonging to any one party to fill the whole loan. The evidence further shows that the $4,500 paid by Bates to Riley July 29, 1889, was by Riley paid to Fred Lowe for Sophia Lowe as a part of the purchase price of the property without any knowledge on the part of Fred Lowe or Sophia Lowe, who it appears was never here and had no knowledge of the transaction except that gained by her mortgage, etc., that the $4,500

was part of the funds coming from the loan of Bates to Riley and covered by the Marvin and Goodman mortgages. It also appears from the evidence that the plaintiff never in any manner, either herself or through her agent, directed, supervised, or knew anything of the payment of the loan money by Bates to Riley, the building contracts, or furnishing of material, or performance of labor, or any matter concerning the improvements. There is no evidence that the various persons furnishing material or performing labor, or any of them, ever examined the records before so doing, or knew of the agreement contained in the Lowe mortgage, or that they, or any of them, relied upon it in any degree or attempted to ascertain from what source the money to pay for the buildings was to be derived, other than from Riley, the apparent owner of the lot and the one with whom the contract for building was made. We have before stated that we were satisfied from the evidence that neither the plaintiff nor her agent, Fred Lowe, had any knowledge of where Riley obtained the $4,500 with which he made the first payment of the purchase price of the lot. It must be further borne in mind that this payment was made July 29, 1889, several days prior to the time when any labor was performed on the buildings, or any material furnished, or any other rights had intervened or attached, at a time when Mrs. Lowe and Mr. Riley, being the only parties interested, could have changed the agreement to build to any extent, or wholly set it aside if so disposed, and no person has a right to complain. If it had been shown that the Lowes, or either of them, knew that the $4,500 paid July 29, 1889, was a portion of the loan funds which by agreement was to be applied in payment for buildings or improvements, then the case would have appeared in a different light; but as it is, without any such knowledge on their part, we are satisfied that the mere facts that they received the money, and that it was received by Riley from the amount of the

loans, are not sufficient to bind Mrs. Lowe to pay all or any of such amount on the liens for labor and material performed and furnished subsequent in their date of commencement to the filing and recording of the mortgage to her.

Section 1, article 1, chapter 54, Compiled Statutes, 1893, entitled "Mechanics' and Laborers' Liens," provides as follows: "Any person who shall perform any labor, or furnish any material or machinery or fixtures for the erection, reparation, or removal of any house, mill, manufactory, or building or appurtenance, by virtue of a contract or agreement, expressed or implied, with the owner thereof or his agents, shall have a lien to secure the payment of the same upon such house, mill, manufactory, or building or appurtenance, and the lot of land upon which the same shall stand." It will be noticed that two of the necessary elements entering into a claim for a lien for the performance of labor or furnishing of material by virtue of this section are a contract, expressed or implied, and this with the owner of the property to be affected by the lien. It is not controverted in the case at bar that the parties declaring upon mechanics' liens had furnished material or performed labor in the improvement of the premises sought to be subjected to the liens in this case, and it is admitted that the contracts for such labor and furnishing of material were made with John Riley, the owner of the premises. There is some testimony to the effect that the property was bought by his brother, Bernard Riley, and for some purpose was deeded to John. With this we have nothing to do here, and will hereafter refer to Riley, or John Riley, to whom the deed on its face was made, as the owner. The mortgagees in this case were not in any sense owners of the premises upon which the buildings were erected. They derived no title to the property by the mortgages and no other or further right than if any default was made in their conditions, to subject the property by legal procedure to the payment of

the debts secured thereby. In this state a mortgage of real estate merely creates a lien thereon as security for the debt, but conveys no title or vests no estate either before or after condition broken. (*Hurley v. Estes*, 6 Neb., 386; *Davidson v. Cox*, 11 Neb., 250; *McHugh v. Smiley*, 17 Neb., 626.) There is no contention made that the Goodman, Marvin, and Bates mortgages were given for any other consideration than the money loaned and a possible verbal understanding at the time of the loaning, between Riley, the owner of the property, and the loan agent, Bates, that Mr. Riley intended erecting buildings upon the lot at some time in the future. We have before stated that we are satisfied that the agreement of Riley to build did not enter into the contract of sale between Mrs. Lowe, or Fred Lowe, her agent, and Mr. Riley. The law of our state says that they took no title to the real estate by their mortgages, nothing but liens on the lot for the security of the debts, and we are left with the question, whether an agreement by the mortgagor of the premises with the mortgagee that he will improve or erect buildings, either verbally made or included in the mortgage as one of the conditions or covenants thereof, will subordinate or postpone the lien of the mortgage to a mechanic's lien for labor or material commenced to be performed or furnished after the mortgage is recorded.

In Phillips, Mechanics' Liens [2d ed.], sec. 225, p. 378, the general principle governing contests for priority between lien-holders and mortgagees is stated as follows: "The governing principle upon which the adjudications in contests for priority have been based is, that vested rights of purchasers or incumbrancers, and, reciprocally, the liens of mechanics, are not affected or displaced, when once attached, by other rights subsequently accruing. The priorities of each are jealously protected from hostile interference. The law imposes on mechanics, like other persons, the necessity to ascertain for themselves the nature of the interest in

the land to be improved of the persons with whom they contract, and all negligence in this regard is charged to their own account." In section 232 it is further stated: "The rule of *caveat emptor* therefore applies against a mechanic as well as in the case of a vendee. If a contractor proposes erecting buildings, furnishing materials, or putting labor on a lot of ground, it behooves him to examine and assure himself of the fact that the person with whom he contemplates making a contract, or for whose benefit he is about to employ his means or labor, has such an interest or title unincumbered as will enable him to avail himself of a valid or efficient lien."

In the case of *Hill v. Aldrich*, 50 N. W. Rep. [Minn.], 1020, a case in which the owner of a lot sold it on time with the understanding that the party purchasing was to build a house on the lot, the vendor to lend her $1,000, it was held "that the vendor's mortgage was *bona fide* and prior to any lien on the premises for material furnished to the vendee for the construction of the building;" and in the body of the opinion, Mitchell, J., in passing upon the case, says: "There is no ground for imputing to the phrase '*bona fide*,' as used in this statute, any other than its usual and established meaning. Huntington certainly paid a full and valuable consideration for the mortgage. The arrangement between him and Mrs. Aldrich was one they had a right to make, and violated no rule of law or good morals. Mrs. Aldrich had a right to buy a lot on time and borrow money with which to improve it, and Huntington had an equal right to sell the lot on time and also lend the purchaser the money with which to improve it. That the building would enhance the value of the mortgage security, and that this fact was the inducement for Huntington's selling on time and lending part of the money with which to construct the building, certainly cannot affect the good faith of the transaction, as no one could have been misled or deceived by it. The deed and mortgage were

both on record, and had plaintiffs examined the records before furnishing the material, they would have disclosed the exact amount of incumbrance on the property. If they trusted Mrs. Aldrich without examining the records, it was their own negligence, for the consequences of which the law furnishes no relief. If they did examine, then they found Huntington's lien for $3,000 on the property; and if they then made no inquiry of Huntington, they trusted Mrs. Aldrich with an apparent lien of $3,000 ahead of them; and if they did inquire of him, then they learned that Mrs. Aldrich had $1,000, and no more, in his hands to use building the house. In any view of the case they could not have been misled, and have no show of equity to demand that their lien shall be preferred."

In *Morony's Appeal*, cited in brief for appellee Sophia Lowe, 24 Pa. St., 372, the syllabus is as follows: "A mortgage given with a bond, and in common form and immediately recorded, and intended to secure the payment of a sum of money which the mortgagee then contracted to loan to the mortgagor for the purpose of enabling him to erect houses on the mortgaged property, and which was to be advanced in proportion to the progress of the work, is valid, though the contract of loan be not referred to in the mortgage, nor recorded; and it ranks as a lien for the amount loaned, from the date of its record and not from the date of the actual advances; and this is so though the mortgagor contracted to apply the money to the payment of the builders, and had, in part, failed to do so, and they had entered their liens;" and in the opinion it is stated: "If the owners of these liens trusted Montgomery without examining the state of the records, the law provides no relief from the consequences of their negligence, and morality does not demand that it shall and even charity will not allow it at the expense of more careful men. If they did examine the records, then they found the lien of Cadwalader standing good against Montgomery, and honesty forbids

them to cut it out for their profit. If they found it and still trusted Montgomery without inquiry, then they agreed to trust him even with a lien against him of $12,000, and with no apparent means to pay them. If they made inquiries, then they learned that he would have $12,000 in hands to pay for the improvements he was making and they trusted him that he would appropriate it properly. In no way that we can regard this case can we perceive that the appellants have any show of equity to demand that their claims shall be preferred to the mortgages."

Since the commencement of this action this court has decided the case of *Henry & Coatsworth Co. v. Fisherdick*, 37 Neb., 207, in which decision it was held that where one furnishes money to build a house, for which he took a mortgage upon the premises whereon the erection was to be made, the record of such mortgage gave it priority to the rights of material-men and mechanics who began to confer value upon the mortgaged property after the record of the mortgage; and this was a case where the agreement was with the mortgagee to build on the lots mortgaged, and the money, the proceeds of the loan, to be held by the mortgagee and paid out only upon the presentation to it of receipted bills for labor and material,—a much stronger case for and in favor of allowing the claims of liens prior to the mortgage lien than is the one at bar as between the Bates and Goodman, Marvin and Lowe mortgages, and the mechanics' liens. (See also *Platt v. Griffith*, 27 N. J. Eq., 207; *Choteau v. Thompson*, 2 O. St., 114; *Martsolf v. Barnwell*, 15 Kan., 612; *Wisconsin Planing Mill Co. v. Schuda*, 39 N. W. Rep. [Wis.], 558; *Crowell v. Gilmore*, 18 Cal., 370; *Mechanics Mill & Lumber Co. v. Denny Hotel Co.*, 32 Pac. Rep. [Wash.], 1073.) We believe the correct rule to be that the record of a *bona fide* mortgage entitles it to priority as a lien over the liens of mechanics and material-men, who, after the recording of the mortgage, commenced to labor upon or furnish material

for improvements made on the premises covered by the mortgage. Measuring the rights of the parties in this case by the above rule, the mortgages are placed in priority to the mechanics' liens, and in view of the conditions and relations existing between the parties, as shown by the testimony, this does not seem inequitable, nor do we think it is a departure from the just and wholesome rule which requires us to give to the provisions of the mechanics' lien law a liberal construction.

We do not believe there has been anything shown which could require that the liens of the Goodman, Marvin, and Bates mortgages should be postponed to those of the mechanics' lien holders; and as to Mrs. Lowe, Mr. Riley's contract with her, set forth in her mortgage and of record, plainly evidenced that she would have no control of the money to be obtained from the loans, or its appropriation; that she wholly relied upon him to fulfill his promise in regard to improvements and to use the loan funds in paying for them, and if he failed to do so, then she to be left with any remedy the law would afford her. The evidence does not show that any of the parties claiming liens for labor or material ever examined the records or made any investigation to ascertain the condition of the title, whether incumbered or not, or that there were any inquiries made; and the conclusion must be that they relied upon Riley as owner of the property and whatever lien they might be able to acquire and hold as against the premises; or if they in fact did examine the records (which the evidence does not disclose), they discovered that the plaintiff was relying solely upon the honesty and promise of Riley to apply the money loaned in the manner and to the purpose agreed upon, and in furnishing material and performing labor they placed reliance in the same condition of affairs and must be held bound by such action.

The counsel for appellants, the lien-holders, cite the case of *Bohn Mfg. Co v. Kountze*, 30 Neb., 719, and *Millsap v.*

Ball, 30 Neb., 728, decided the same day, and strenuously contend that the doctrine then announced is applicable to and decisive of the case at bar. In the *Bohn Mfg. Co.* case, Kountze, the vendor, under a contract of sale, and holding the legal title, not only authorized but required the vendee to build a house upon the premises within a certain time and of a fixed value, and further agreed to advance money to pay for the building, but retained control of the funds, and no payments were made without his approval, and the money being placed in a bank, none was paid out unless he countersigned the checks. A careful and true examination and analysis of the case and of the cases therein cited will, we think, lead to the conclusion that it was held (quoting the language of the now Chief Justice NORVAL in the body of the opinion): "The correct rule doubtless is, where one holding land under a contract of purchase causes a building to be erected thereon, and the contract of sale contains no provision for the erection of a building, that the mechanic's lien is confined to the interest of the purchaser in the premises, and is subordinate to that of the vendor of the land for unpaid purchase money;" but, "where a vendee, owning the equitable title, contracts for the erection of a building upon the express authority of the owner of the legal title, it is but just that the lien of the mechanic should attach to the interest of both vendor and vendee in the premises, and be paramount to the lien of the vendor." The opinion in *Millsap v. Ball* was also written by Judge NORVAL, and the main question raised was the same as in *Bohn Mfg. Co. v. Kountze*, and the decision in the last mentioned case was followed. We understand the rule announced in the above cases to be, that where a vendor of real estate, holding or owning the legal title, authorizes or requires the vendee to erect improvements upon the premises, the subject of the contract of sale between them, the lien of laborers or material-men, who perform labor or furnish material for the

improvements, will attach to the interest of both vendor and vendee and be prior to the lien of vendor for unpaid purchase money, and that the rule is general and applicable to any case coming within its terms. This is unquestionably the correct doctrine, just and right, but clearly can have no force in, and will not govern, the adjustment of the interests and claims of parties in the present case, where the agreement to build was not included in the original contract of sale and purchase, where the contract of sale and purchase has resulted in a deed from the vendor to the vendee and a mortgage back by vendee to secure payment of a part of the purchase money, whereby the vendor became a mortgagee, not the owner and holder of the legal title or of any title or estate, but possessed of a mere lien or security for the payment of the debt, no right or title in the premises upon which, under our statutes, a lien can be predicated. The case at bar is entirely without the rules established in the above cases.

We think the facts as developed in this case entitle the plaintiff's mortgage lien to the position which she agreed it should take, and that the appellants have selected, by their own choice, their place in the list of liens and must keep it. We conclude the decree of the lower court was right and answered the demands of justice and equity in the case and it is

AFFIRMED.

AMERICAN BUILDING & LOAN ASSOCIATION v. DWIGHT MORDOCK.

FILED FEBRUARY 20, 1894. No. 5144.

1. **Rulings on Admission of Evidence:** REVIEW. The ruling of the trial court, sustaining objections to questions and answers in a deposition offered to be read at the trial, and ex-

cluding the testimony from the jury, examined, and *held* correct, and no error in such action.

2. **Erroneous Admission of Evidence:** INSTRUCTIONS. Where erroneous evidence is admitted by a court, and in the instructions to the jury such evidence is withdrawn by the court from their consideration, *held*, that such withdrawal by the court cures the error committed in the admission of the evidence.

3. **Instructions.** The refusal of a trial court to give to the jury instructions asked by parties to the case, when instructions already given by the court on its own motion embody, though in different phraseology, the substance of instructions asked, *held*, no error in such refusal.

4. **Review.** Objections to instructions to a trial jury will not be noticed by the supreme court, unless the attention of the trial court is first called to them by the proper exceptions taken at the time the instructions were given. (*Warrick v. Rounds*, 17 Neb., 412.)

5. **Sufficiency of Evidence:** REVIEW. Questions of fact are to be decided by the trial jury, and a verdict will not be set aside on the ground of a want of sufficient evidence to support it, unless the want is so great as to show that the verdict is manifestly wrong. (*Warrick v. Rounds*, 17 Neb., 412; *Sycamore Marsh Harvester Co. v. Grundrad*, 16 Neb., 529.)

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

J. L. Epperson and *Charles H. Epperson*, for plaintiff in error.

Thomas H. Matters, *contra.*

HARRISON, J.

The defendant in error (plaintiff in the court below) commenced an action before a justice of the peace in Clay county, Nebraska, and recovered a judgment against plaintiff in error, who appealed the case to the district court, where the plaintiff below filed a petition alleging, first, the corporate character of defendant; second, that about the month of May or June, 1889, one James H. Brooks, agent

for the defendant company, agreed to make plaintiff a loan of $350 on certain property in the town of Fairfield, Clay county, Nebraska, but stated that, in order to procure the loan, it was necessary for plaintiff to become a member of the defendant company; that plaintiff entered into the agreement for a loan and became a member of the company, receiving a certificate of stock for six shares of $100 each; third, that by one of the conditions of the certificate of stock the plaintiff was allowed to return the certificate to the company at any time after one year from its date, and on so doing the company bound itself to repay to him all the several sums of money he had paid to it, with one-fourth the accrued profits upon the stock; that plaintiff was required to pay sixty cents per share on or before the 24th day of each and every month for the period of one year; that plaintiff made all of such payments as required by the contract; that defendant refused to make the loan, and also refused, upon the presentation for cancellation of the stock at the expiration of the year, to pay the amount of money paid it by the defendant, viz., $52.20. The certificate of stock was attached to the petition as an exhibit and made a part of it. The plaintiff prayed judgment in the amount of $52.20 and costs.

Defendant company, for its answer, denied each and every allegation of the petition except those expressly admitted; expressly denied the authority of James H. Brooks to promise plaintiff, for the company, a loan to plaintiff by the company, and pleaded that he was expressly forbidden to promise loans to any one, and that plaintiff knew of the limitation of the authority of Brooks as agent for the company. Defendant admitted that it was a corporation duly organized under the laws of the state of Minnesota; admitted that on June 24, 1889, it issued a certificate to plaintiff for six shares of its stock; admitted that payments of sixty cents per month per share were required to be made until the maturity of the stock or until with-

drawal; admitted the application by plaintiff for a loan and that it was refused or rejected; admitted the application by plaintiff for withdrawal and its refusal. Defendant further pleaded that plaintiff had made two applications for loans, one August 19, 1889, and one November 2, 1889, and in each application agreed to pay all the necessary expenses incident to the securing of the loans; that defendant procured appraisals of the property offered as security for the loans to be made, at an actual and necessary expense in each instance of $3.50, which sums the company states have never been paid by plaintiff, though often demanded of him; that by the terms and conditions of the certificate of stock, any sums due from plaintiff were to be and were liens on the stock; and further on this branch of the case pleaded chapter 34 of the General Statutes of Minnesota, alleging it to be as follows: "That it is provided by the General Statutes of the state of Minnesota, chapter 34, title 2, section 114, that building and loan associations 'shall at all times have a lien upon the stock or property of its members invested therein, for all the debts due from them to such corporation, which may be enforced by advertisement and sale in the manner provided for selling delinquent stock.'" The defendant further stated that section 5 of article 2 of the by-laws provides as follows: "If any stockholder becomes indebted to the association in any way, such debt shall be a first lien upon the stock of such member, and such stock cannot be transferred or withdrawn until said debt is paid." That by reason of the indebtedness of plaintiff to the company, the company had a lien upon the stock of plaintiff, who was therefore not entitled to withdraw from the association; that plaintiff had not paid dues on the six shares of said stock for the months of July to October, inclusive, in the sum of $14.40, and that for such failure to pay dues, fines had been incurred by plaintiff in the sum of $2.40. Defendant prayed for the dismissal of the plaintiff's action and for judgment against plaintiff for $23.80 and costs.

Plaintiff replied, denying all new matter set up in the answer of defendant.

On the issues formed there was a trial to a jury, during which the court, by agreement of parties in open court, instructed the jury orally. The jury returned a verdict for plaintiff in the sum of $40.87.

Motion for a new trial was filed, argued, submitted, and overruled. The court then made an order that the plaintiff, within ten days of the date of such order, bring into court and place on file the certificate of stock in controversy, for delivery to defendant and cancellation, plaintiff failing to so do, the verdict to be set aside and a new trial ordered. This order was of date May 28, 1891. On November 19, 1891, the following entry appears: "It satisfactorily appearing to the court that the defendant has deposited in this court for cancellation the shares of stock as by a former order of court he was required to do, and that said order has been fully complied with, it is considered and adjudged that the plaintiff, Dwight Mordock, have and recover of the defendant, the American Building & Loan Association, the sum of $40.87 and his costs herein, taxed at $47.93."

The first error of which the plaintiff in error complains is that the court erred in sustaining the objections to certain questions asked of witness B. F. Stoneman, and excluding the evidence from the jury. The questions and evidence referred to were contained in the deposition of witness Stoneman on pages 3 and 4 thereof. In order to understand the points raised by such assignment of error we will here give the questions and answers:

Q. On receiving applications for loans, what is the usual and customary practice of the association in getting information regarding the property offered by the applicant as security?

A. We apply for the appraisal from three disinterested parties.

Q. You may state whether or not it is customary to charge the appraisals so secured to applicants for loans.

A. It is.

Q. You may state whether or not it is customary practice of the association to permit the withdrawal of stock before all liens or charges against such stock are paid.

A. It is not.

Q. State whether under the rules, regulations, and by-laws of the association the expense of appraisals secured on plaintiff's property now are, and at the time of plaintiff's application for withdrawal were, a subsisting lien and charge against the plaintiff's stock.

A. Yes.

The first three of these questions called upon the witness to state what was customary with, or what was the usual customary practice of, the company in transacting the business of the loan department, and more particularly in regard to appraisals of the property offered as security, and the expense incurred in making such appraisals, and in the adjustment with members holding stock, of relations arising from the right of a member to the withdrawal of his stock when liens and charges existed in favor of the company against the stock. These were all governed directly, either by the terms of the contract entered into between the company and plaintiff at the time of the application for a loan, or the rules and by-laws of the association. The rights of the parties to this action could not be determined by "customary practice," but by their contract and the rules and by-laws of the association. We do not discover any prejudicial error in the ruling of the court sustaining the objection to these three questions.

The fourth and last question called upon the witness to give his conclusions of what was contained in the rules and by-laws of the company on the subject embraced in the question, and is open to the objection made for the reason that it was not the best evidence which could be produced.

The rules and by-laws should have been introduced, they being unquestionably the best evidence on the point as to which the witness was interrogated. The rule of evidence requires the best evidence of the facts to be proved, of which the case by its nature is susceptible, and especially does this apply where the question, as does the one in this case, indicates by its terms that there is better evidence than that sought to be elicited by the question as asked. We are satisfied the trial court was right in its ruling upon the objection to this question.

The court below sustained an objection to the offer of, by defendant as evidence, what is designated or known in the record as "printed literature," and this action on the part of the court is assigned as error. This "printed literature" is a pamphlet or circular, used mainly, I should judge, as an advertising medium of the association and contains certain of the rules and by-laws of the company and some general information regarding the objects of the company, its plan and business methods. If competent for any purpose under the issues being tried, it could only be, after proving that the plaintiff had seen it, to establish that he had notice of that portion of it which refers to the expenses of effecting a loan. This, in exactly the same words, is printed upon the back of the application for a loan which plaintiff signed, which was in evidence and not disputed in any particular. We cannot see where the defendant was harmed by the ruling of the court which excluded this "printed literature" from the jury.

Another alleged error of which complaint is made is that the court allowed the witness H. N. Jones, overruling the objection of defendant, to testify as follows: "Q. What is the usual and customary price for services of that kind? [Meaning the customary price for appraising property.] A. I never paid anything for having a piece of land appraised for obtaining a loan of money." This was probably objectionable; but if it was, the court cured any error

there was in admitting the testimony by afterward instructing the jury to disregard it. We here give the paragraph of the instruction of the court in which he calls attention to the evidence of Mr. Jones: "They were entitled, of course, to such reasonable charges as are usually made for like services, and I don't go out of my way to say that it is not what Mr. Jones would pay,—that is not the rule,—but what such services, if rendered, are reasonably worth in the community in which this loan is sought, and you must find that from the testimony." Such instruction effectually withdrew the evidence of Mr. Jones from the consideration of the jury and destroyed its effect; and the error, if any, admitting it was therefore avoided.

The further complaint is made that the court erred in giving certain portions of the instructions given by it on its own motion. No exceptions were taken to these instructions when given in the court below, according to the record, and objections to them will not now be considered here.

The defendant company assigns as error the refusal of the court below to give instructions numbered one, two, three, four, five, six, seven, eight, nine, and ten, as requested by it. We have made a careful and thorough examination of these instructions in connection with the instructions to the jury by the court on its own motion, and in any and all particulars in which the propositions embodied in the instructions refused were applicable to the issues and evidence in the case,—and in the main they were entirely applicable and pertinent,—they were substantially embodied in the instructions given to the jury by the court on its own motion, the only difference being in language, phraseology, and arrangement employed in delivering them. This brings this objection within the well known rule of this court "that it is not error in the court to refuse to give instructions when the same have in substance been already given." We conclude the court did not err in refusing to give the instructions.

The court below ordered the plaintiff to file with the clerk the certificate of stock within ten days, that the same might be canceled and delivered to defendant,—if the order not complied with, a new trial to be granted. This is complained of as error. We think it was clearly within the province of the court to make the order. It was undoubtedly a movement to assist in meting out justice and right between the parties, and we fail to see how it in any manner prejudiced the defendant company. If it was entitled to the surrender of the certificate, it was of as much effect and value at this time as earlier in the suit, or even prior to its commencement; and furthermore, the proof shows that when plaintiff requested to be allowed to withdraw, the certificate was deposited where the association could receive it at any time on payment of the amount due plaintiff on withdrawal, and that of this the company was informed at the time. The court had a right to make the order and its so doing was not error.

The only assignment of error which we have not noticed is that the verdict is not sustained by the evidence. We have read, examined, and carefully considered all the testimony produced on the trial of this case as contained in the bill of exceptions, and while we do not think that it was altogether satisfactory and convincing, and men might honestly differ in conclusions reached from hearing it and deliberating upon it, yet we do not feel warranted in saying that there was such a lack of evidence to sustain the verdict arrived at and returned by the jury that the verdict was clearly or manifestly wrong, and hence we will not disturb it.

The instructions given by the court below fairly submitted the issues between the parties to the jury, and there was sufficient evidence to sustain the verdict. The defendant had a fair trial and determination of its case. The judgment of the court below is

AFFIRMED.

WILLIAM J. MCGILLIN V. CHASE COUNTY ET AL.

FILED FEBRUARY 20, 1894. No. 5526.

Taxes: INJUNCTION TO RESTRAIN COLLECTION. The plaintiff filed a petition praying for an injunction to restrain a county and its officers from the forcible collection of a tax against personal property, averring, as grounds therefor, that the tax was illegal or unauthorized. The evidence discloses that he listed the property for taxation, the schedule on its face being a list of his individual property, signed by him and sworn to individually, and not as manager for a company, for whom he alleges in his bill for injunction that he listed the property, and to whom he stated it belonged, the taxes being charged to him in the tax lists as transcribed from the assessor's book. *Held*, That this was not such a state of facts as would entitle him to have the collection of the taxes enjoined or restrained as illegal or unauthorized, as such entry or charge on the tax list was the result or consequence of his own voluntary act.

ERROR from the district court of Chase county. Tried below before WELTY, J.

Charles W. Meeker, for plaintiff in error.

S. E. Starry, contra.

HARRISON, J.

November 25, 1890, the plaintiff filed a petition in the district court of Chase county, Nebraska, praying for an injunction. The petition was positively verified, and probably a better understanding of the grounds of the complaint and the relief sought will be obtained by here giving the pleadings in the case. The bill was as follows:

"Now comes the above named plaintiff, William J. McGillin, and respectfully represents and makes known to the honorable court, that he is a resident and taxpayer of Chase county, Nebraska, and that he is the owner and possessor

of real estate to the amount of 800 acres, and personal property consisting of horses, cattle, hogs, machinery, farming implements, harness, wagons, household goods, etc., of the value of $10,000, all in said county and state aforesaid.

"Second—Your petitioner alleges and says that heretofore, to-wit, from on or about the first day of January, 1885, until on or about the 28th day of October, A. D. 1888, he was the duly chosen, selected, and acting manager of the Harlem Cattle Company, a corporation duly incorporated under and by virtue of the laws of the state of Colorado, and doing business in the counties of Chase, Dundy, and Hitchcock, and state of Nebraska; that it was the business of said Harlem Cattle Company to purchase, buy, raise, and breed, and sell horses, cattle, and hogs, both common and thoroughbred, and that while so engaged in said business of stock raising, buying, and selling, said company had upon its Chase county ranches, at all times, several hundred head of horses and cattle, and also several thousand dollars' worth of other personal property, consisting of farm machinery, wagons, harness, and household furniture, and did have and own upon its Harlem ranch in Chase county, Nebraska, almost all the buildings and other improvements it owned in said county, and that said Harlem ranch was petitioner's headquarters as manager of and for said Harlem Cattle Company for said Chase county.

"Third—Your petitioner represents that during the year 1888 the said Harlem Cattle Company had and kept the major or greater portion of their said stock of horses and cattle in Chase county, upon their Harlem ranch, which is located in what was then known and called 'McGillin Precinct,' in said county, there being kept thereon about 350 head of cattle, and about 150 head of horses, and about 10 to 25 head of hogs; also, there was kept at said Harlem ranch the greater portion of their farm machinery, household and kitchen furniture, wagons, and feed; and that

the total value of all of said personal property, so as aforesaid kept upon said Harlem ranch, during said year of 1888 was between $10,000 and $15,000; that all of said property so as aforesaid was the property of and belonged to the Harlem Cattle Company, and was under their exclusive charge, control, and directions, and that your petitioner had no authority or interest in them or over it save only as was delegated to him by said Harlem Cattle Company as its manager.

"Fourth—Your petitioner further represents that all of said property of the said Harlem Cattle Company in the counties of Chase, Hitchcock, and Dundy was mortgaged to the Kit Carter Cattle Company of Texas for about $92,000, and said mortgage was duly of record in the clerk's office in said counties.

"Fifth—Your petitioner further represents that for the year 1888 the county officers and local assessors and taxing officers of Chase county procured an assessment to be made by the precinct assessors in said county upon the real and personal property of said Harlem Cattle Company and levied a tax thereon and spread the same upon the records in the tax books of said county, and that the county officers and local assessors and taxing officers for the precinct then known, designated, and called 'McGillin Precinct,' in said Chase county, one of the precincts in which a large portion of the lands, buildings, and personal property of the said Harlem Cattle Company was then kept and located, said assessor being H. B. Walker, of said McGillin precinct, listed, scheduled, and assessed the said real and personal property of the said Harlem Cattle Company in the said McGillin precinct from the data, information, and facts furnished to said H. B. Walker by your petitioner, then the manager of said Harlem Cattle Company, 350 head of cattle, valued at $5,000; horses, 150 head, valued at the sum of $6,000; hogs, 10, valued at $10; agricultural implements, household goods, etc., valued

$140; carriages and wagons, 3, valued at $30; making a total valuation of $11,185. That after said assessor had finished taking down, listing, and scheduling property, he passed said list or schedule to your petitioner to sign for said Harlem Cattle Company, and your petitioner did then and there, in the presence of said H. B. Walker, assessor for said McGillin precinct, sign the same, 'W. J. McGillin, Manager,' and did there acknowledge the said schedule to be true, as I believed, said schedule being marked at the top, 'Property of Harlem Cattle Company.'

"Sixth—That said county officers and local taxing officers and assessor of said county proceeded to and levied a tax thereon and spread the same upon the tax books and records of said county as a tax against the petitioner in and for said precinct of McGillin, instead of against the Harlem Cattle Company, the rightful owners of said property, and said tax for said year of 1888 for said precinct of McGillin was spread, and does now stand against this petitioner, on the tax books and records of said Chase county, and the same was wrongful, illegal, unlawful, and unjust.

"Seventh—The total valuation placed upon said personal property of said Harlem Cattle Company in said precinct of McGillin by said assessor for said year of 1888, and wrongfully, illegally, and unjustly spread upon the tax books and records against this petitioner, was the sum of $11,185, and the total amount of tax levied thereon for said year 1888 by the county officers and local taxing officers of said county was and is the sum of $303.39, which was and is spread upon the tax books of said county as a tax lien and against the property of this petitioner.

"Eighth—Your petitioner further alleges that at and during the year 1888 he was not the owner of, in his own name or right, any personal property in said Chase county which was subject to assessment and tax whatever, except his bedroom set and wearing apparel, the total value

of which would not exceed $15, and that he was not the owner of any of the personal property assessed to the Harlem Cattle Company in said precinct of McGillin, and erroneously, illegally, unlawfully, and unjustly spread upon the tax records of said county in this petitioner's name for said year of 1888, but that all of petitioner's personal property then owned by him was assessed and taxed in Hitchcock county, the county in which his personal property was then kept.

"Ninth—Your petitioner further alleges and says that on or about the 28th day of October, 1888, and while petitioner was yet the manager of said Harlem Cattle Company, the Kit Carter Cattle Company commenced an action in foreclosure of its mortgage against the said Harlem Cattle Company in the United States circuit court for the district of Nebraska, and at the same time made their application to said United States circuit court for the appointment of a receiver for all the property of said Harlem Cattle Company, which application was by the said court duly allowed and granted, and Erastus D. Webster was by said court duly appointed and empowered receiver, and the said Erastus D. Webster, as receiver, did immediately take full possession of all of the said Harlem Cattle Company's property and effects in the state of Nebraska; that said receiver held said property and effects until the 19th day of August, 1889, when the whole of the personal property of said Harlem Cattle Company was, by the order of the United States court, sold, and your petitioner, being the purchaser thereof, paid into the said United States court therefor the sum of $36,200, and by order of said circuit court the said entire personal property and effects of the said Harlem Cattle Company was, by said Erastus D. Webster, receiver, delivered over to the possession of your petitioner, and he became the sole and absolute owner of the same.

"Tenth—Your petitioner alleges further that said tax

of $303.39, for the year of 1888, so as aforesaid spread upon the reports and tax books of said county, upon the $11,185 valuation in said McGillin precinct of said Chase county, against this petitioner by the assessor and local taxing officer of said Chase county, is wrongful and unjust, and for an illegal and unauthorized purpose.

"Eleventh—Your petitioner further alleges that said Chase county, through its officers and assessors, had no authority of law for the assessment of said property, and the levying of said taxes in said precinct of McGillin, in said Chase county, to this petitioner; that said property was not assessable or taxable to him under the law, and could only be valued, assessed, and levied for taxation to the legal and proper owner thereof, the Harlem Cattle Company, and the pretended assessment, levy, and taxation of the same to this petitioner by the local taxing authorities of said Chase county is null and void, and of no effect in law as to this petitioner other than to create an apparent lien and cloud upon petitioner's property.

"Twelfth—Further, this petitioner represents to the court that said tax, so levied by the said taxing officer and authorities of Chase county for the precinct of McGillin upon the said property of said Harlem Cattle Company for the year 1888, and spread upon the tax books and records of said county as a tax lien against the said property of your petitioner, does now appear thereon as an apparent lien upon his property in said county, and that said county, through its officers, and through the said Robert A. Ewing, as treasurer of said county, have threatened to proceed to the collection of said tax, as aforesaid wrongfully and illegally assessed and recorded against this petitioner, by process of law, and that unless they are restrained by said court, the county, through its officers, will proceed to collect the said tax so illegally levied and recorded by said county on the property of petitioner by advertisement and sale of petitioner's personal property; that this petitioner

has no remedy at law to prevent said county and Robert A. Ewing, treasurer, and its officers from collecting the said tax by distress and sale, and that he will suffer great and irreparable damage if they are allowed to procced in the collection of the same.

"Therefore, your petitioner prays that a writ of injunction may be issued restraining the said county and the said Robert A. Ewing, as treasurer of said county, and all other officers and agents of said county, from in any manner interfering with or intermeddling with the property of this petitioner, and restrain them, and each of them, from the collection of said tax, or any part thereof, and from taking any steps under the law for that purpose, and for the return of all property already taken and held by them, and that on the final hearing of said cause the said tax may be decreed null and void and of no lien or effect on the property of or against this petitioner, and that said temporary injunction may be made perpetual, together with such other and further equity as justice may require."

This was presented to the county judge with the showing of absence from the county of the district judge, and the county judge allowed a temporary injunction. March 26, 1891, the defendants filed answer as follows:

"Now come the above named defendants, and in answer to plaintiff's petition, deny each and every allegation therein, except those especially hereinafter admitted.

"Admit that plaintiff herein is a resident and taxpayer in Chase county, Nebraska, as alleged and set forth in first count of said petition.

"Wherefore defendants pray that said temporary injunction be dissolved, with such other and further relief as equity and justice may require."

May 3, 1892, there was a trial had of the issues, and the following is the journal entry of the proceedings in this case, to-wit:

"On this third day of May, 1892, this being one of the

days of the regular May, A. D. 1892, term of the district court begun and holden in Chase county, Nebraska, and this cause coming on to be heard before the court upon the motion of the defendants to vacate and set aside the injunction heretofore granted in the case, was submitted to the court upon the petition, answer, and evidence of the parties, on consideration whereof it is ordered that said motion be sustained, and the court finds, upon the issues joined, in favor of the defendants.

"It is therefore considered, adjudged, and decreed by the court that the injunction heretofore granted in this cause be, and the same hereby is, vacated and set aside, and that the defendants recover from the plaintiff their costs herein expended, taxed at $150."

There was a motion for a new trial, which was overruled and the case brought here for review.

At the time of the assessment and levy of the tax complained of in the foregoing petition the assessor was required to visit every person owning or holding any property in the precinct for which he was assessor and list the name of the party and demand from him a correct list of the taxable property owned by him, and the party so requested to schedule his property was by the law required to give a full, true, and correct statement of his taxable property, such list to be signed and sworn to by him. This list or schedule was preserved, indorsed with the name of the person assessed and with all others received by such assessor, the whole number being arranged in alphabetical order, delivered to the county clerk and by him kept in his office. The assessor was also to enter the various lists of property in a book, giving the names of the parties in alphabetical order, and to return such book, verified by his affidavit as to correctness, etc., to the county clerk to be filed and kept in his office. Our law further provided for the equalization of taxes by the proper board, and after equalization, the transcribing, by the county clerk, of the

assessments of the several precincts, etc., into a suitable book, and from the list of names and charges entered in such book the collection of taxes was to be made. The above is a general statement of the effect of the several sections of the Compiled Statutes of Nebraska, 1887, chapter 77, under the head of "Revenue," of which we will not make specific citation by section, as the foregoing general statement will be sufficient for our purposes here. We desire to call attention more particularly to the facts that the list or schedule, required of the taxpayer and to be signed and sworn to by him, is the initial or starting point of the assessment, is copied into the assessor's book, indorsed with the name of the person assessed, and after the assessor has verified this book as a correct list of names of persons from whom schedules have been received or taken, together with such book, is delivered to the county clerk and filed in his office and there kept; that the tax list prepared by the county clerk and turned over to the treasurer is a transcript of the assessor's book and the book a copy of the schedules. From this we gather that unless, for some reason, a change has been made or an error occurred, the property will be charged in the tax list against the one whose name is signed to and who has verified the schedule. On this point there was evidence introduced on the trial below tending to show that the schedule in this case was headed "The Harlem Cattle Company," and was signed "Harlem Cattle Company, by W. J. McGillin, Manager," or "W. J. McGillin, for the Harlem Cattle Company." On the other hand, there was testimony that the schedule was one purporting to list, or by its terms listing, the individual property of W. J. McGillin, and signed and sworn to by him in his individual capacity, and not as manager for the company as before stated. The original schedules were not produced at the trial. One witness states: "We had a fire soon after that, burning the buildings down containing the records, and the original schedule is sup-

posed to have been burnt in that fire. It was only a few days before that, I think, that we got that copy." After a full and careful consideration of all the evidence in the case, we conclude that it establishes the facts that the schedule was, on its face, a list of the individual property of W. J. McGillin, and as such was signed and verified by him personally and without referring in any manner to his being manager of the Harlem Cattle Company; that the assessment book was copied from the schedule and the tax lists transcribed from the assessor's book or the schedule, or possibly by referring to both, and was thus constituted from the information furnished by the party who would now be heard to complain. Hence, the officer who prepared the tax list was warranted in entering the tax against McGillin; indeed, he could not do otherwise. We conclude that the appellant stands in no position to ask the court to set aside or enjoin that which springs from his own voluntary act. He made the statement upon which the officers proceeded, was taxed accordingly, and the fault, if any, was his. (*Winfield Bank v. Nipp*, 28 Pac. Rep. [Kan.], 1015; *Hubbard v. Winsor*, 15 Mich., 146.)

The appellant failed to make out such a case as calls upon a court to enjoin the collection of the taxes in question on the ground of their being illegal or unauthorized. To hold otherwise would make the tax field a much larger one than it now is for the exercise of the industry of the courts and counsel, and would introduce into the collection of the public revenues an element of uncertainty and allow the proceedings and lists, through which they are evidenced and collected, to be questioned in a manner which would not nearly be compensated by the justice and equity possibly thereby effected in some individual or particular instances or cases.

There were some other questions raised and discussed in the briefs of counsel, but as the foregoing decision of one question will dispose of the case, we do not think it

necessary to take up any of the other matters. The findings and judgment of the lower court were right and are

AFFIRMED.

FIRST CHRISTIAN CHURCH OF BEATRICE, NEBRASKA, APPELLANT, V. CITY OF BEATRICE, APPELLEE.

FILED FEBRUARY 20, 1894. No. 6602.

Taxation: PROPERTY OF RELIGIOUS SOCIETIES: EXEMPTION. The exemption by section 2, article 1, chapter 77, Compiled Statutes, of "property which may be used exclusively for religious purposes" does not extend to property owned by a religious society separate and distinct from that on which is situated its church edifice, the mere intention in the future to erect such an edifice on said property not so occupied, and the accumulation of the present rents arising therefrom for that purpose, not being sufficient to bring the property within the purview of the statute referred to.

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

J. E. Cobbey, for appellant, cited: *Omaha Medical College v. Rush*, 22 Neb., 449; *Von Steen v. City of Beatrice*, 36 Neb., 421; *House of Refuge v. Smith*, 21 Atl. Rep. [Pa.], 353; *State v. Fisk University*, 87 Tenn., 233; *Northwestern University v. People*, 99 U. S., 309; *State v. Collector of Chatham*, 52 N. J. Law, 373; *State v. Silverthorn*, 52 N. J. Law, 73; *Tulane Education Fund v. Board of Assessors*, 38 La. Ann., 292; *New Orleans Female Orphan Asylum v. Houston*, 37 La. Ann., 68; *City of Philadelphia v. Pennsylvania Hospital for the Insane*, 154 Pa. St., 9; *State v. Powers*, 10 Mo. App., 263; *North St. Louis Gymnastic Society v. Hudson*, 85 Mo., 32; *Mt. Hermon Boys' School v. Town of Gill*, 13 N. E. Rep. [Mass.], 354; *Willard v. Pike*, 59

Vt., 202; *Trustees of Wesleyan Academy v. Inhabitants of Wilbraham*, 99 Mass., 599; *Young Men's Christian Association v. City of New York*, 44 Hun [N. Y.], 102; *Hebrew Free School Association v. Mayor of City of New York*, 4 Hun [N. Y.], 446; *Shaarai Berocho v. Mayor of City of New York*, 18 N. Y. Supp., 792; *Vestry of St. Philip's Church v. City Council of Charleston*, McMul. Eq. [S. Car.], 144.

E. O. Kretsinger, contra, cited: *Gibbons v. District of Columbia*, 116 U. S., 404; *Morris v. Lone Star Chapter No. 6, Royal Arch Masons*, 5 S. W. Rep. [Tex.], 519; *Third Congregational Society v. City of Springfield*, 18 N. E. Rep. [Mass.], 68; *Congregation Kal Israel Auschi Poland v. City of New York*, 1 N. Y. Supp., 35; *Massenbury v. Grand Lodge F. & A. M. of Georgia*, 7 S. E. Rep. [Ga.], 636; *People v. Collison*, 6 N. Y. Supp., 711; *People v. O'Brien*, 6 N. Y. Supp., 862; *Young Men's Christian Association v. Mayor of City of New York*, 21 N. E. Rep. [N. Y.], 86; *Ramsey County v. Church of the Good Shepherd*, 47 N. W. Rep. [Minn.], 783; *People v. Ryan*, 27 N. E. Rep. [Ill.], 1095; *Ottawa University v. Board of County Com'rs of Franklin County*, 29 Pac. Rep. [Kan.], 599; *City of Kansas v. Kansas City Medical College*, 20 S. W. Rep. [Mo.], 35; *St. Edward's College v. Morris*, 17 S. W. Rep. [Tex.], 512; *Mulroy v. Churchman*, 52 Ia., 238; *Mulroy v. Churchman*, 60 Ia., 717; *Kendrick v. Farquhar*, 8 O., 189; *Trustees of Methodist Episcopal Church v. Ellis*, 38 Ind., 3; *Fort Des Moines Lodge No. 25, I. O. O. F., v. Polk County*, 56 Ia., 34; *Green Bay & M. Canal Co. v. Outagamie County*, 45 N. W. Rep. [Wis.], 536; *Brodie v. Fitzgerald*, 22 S. W. Rep. [Ark.], 29; *City of New Orleans v. St. Patrick's Hall Ass'n*, 28 La., 512; *Northwestern University v. People*, 80 Ill., 333; *First M. E. Church v. City of Chicago*, 26 Ill., 482; *Pierce v. Inhabitants of Cambridge*, 2 Cush. [Mass.], 612; *Boston Society of Redemptorist*

Fathers v. City of Boston, 129 Mass., 178; *Washburn College v. Commissioners of Shawnee County*, 8 Kan., 344; *Wyman v. City of St. Louis*, 17 Mo., 336; *Trustees of the Methodist Episcopal Church v. Ellis*, 38 Ind., 3; *State v. Ross*, 4 Zab. [N. J. L.], 497; *County Commissioners of Frederick County v. Sisters of Charity of St. Joseph*, 48 Md., 43; *Ramsey County v. Macalester College*, 53 N. W. Rep. [Minn.], 704.

RYAN, C.

The appellant in this case appeared before the city council of the appellee, sitting as a board of equalization, and asked that certain real property assessed as the property of appellant be stricken from the assessment roll. This request was denied, and therefrom an unsuccessful appeal was taken to the district court of Gage county, from which the church appeals to this court. The case was submitted and determined in said district court upon the following stipulation of facts:

"It is hereby stipulated and agreed by and between the parties hereto that the plaintiff and defendant are incorporated as alleged in petition; that the plaintiff, the First Christian Church, owned in Beatrice at the corner of Sixth and Ella streets the land upon which stood their house of worship, and that the said plat of ground was used exclusively for church purposes, and was not assessed or valued for taxation; that said property was sold to the United States government, and the proceeds thereof, after the payment of the incumbrance thereon and the debts of said church, were invested in the property in question in this suit, lots four, five, and six, in Freeman's subdivision, upon which were and still are standing two dwelling houses and a small barn; that no other money went into the purchase price of said property; that the official board of plaintiff, by resolution, about the time of the purchase and more than a year prior to this date, decided that all funds arising from the rentals of said property be, and the same were, set apart,

and since have been kept in a separate fund for the purpose of erecting and building on said lots a house of worship or church building; that while said fund is accumulating, said church society are temporarily holding religious and other services in another place, and not on the lots in question, there being no suitable room or building on said lots, so assessed, in which to hold their meetings; that said property was placed on the assessment roll, and that the board of equalization of said defendant refused to strike the same therefrom on plaintiff's motion.

"It is further stipulated that the said church society now hold in fee at the corner of Seventh and Ella streets, in the city of Beatrice, a piece of real estate 100 feet wide and 140 feet deep, on which is situated a parsonage for the home of the minister of said society; and a large church house also stands upon said real estate, which is now, and has for more than two years last past been, used for all purposes by said society as a place of worship, and where religious services of all kinds have been held by said society; that the lots so taxed and in dispute are entirely disconnected from the lots or real estate on which the parsonage and church house of the said society are now situated, and 460 feet therefrom in another block in said city; and that the church property now used by said society is worth not less than $5,000, and the lots so taxed are worth not less than $2,500; and that the lots taxed have never been used for religious purposes, and at no time have religious services been held there.

"J. E. COBBEY,
"*Attorney for Plaintiff.*
"E. O. KRETSINGER,
"*Attorney for the City of Beatrice.*"

The right of exemption from taxation is claimed by the appellant under the provisions of section 2, article 9, constitution of Nebraska, supplemented by section 2, article 1, chapter 77, Compiled Statutes. That part of the section of

the constitution referred to which has application to this case is as follows: "The property of the state, counties, and municipal corporations, both real and personal, shall be exempt from taxation, and such other property as may be used exclusively for * * * religious * * * purposes may be exempted from taxation, but such exemptions shall be only by general law." Section 2, article 1, chapter 77, Compiled Statutes, provides that such property as may be used exclusively for religious and other specified purposes shall be exempt from taxation. This exemption extends to property, personal as well as real, though that under consideration falls within the latter class. The stipulation shows that the appellant owns real property upon which is situate its church edifice, which property and edifice is of the value of $5,000. Separate and quite a distance from this property it owns other lots, including buildings, which it rents, of the aggregate value of $2,500. It is insisted that the fact that this religious society has duly resolved that it will erect a church building upon the real property last above referred to at some indefinite time in the future, and that meantime the rents arising from leasing said last named property in its present condition to that purpose, makes the said property such as is used exclusively for religious purposes. It might be that these rents would be exempt under the provisions of the constitution and the statute to which allusion has been made, for it might be contended with much plausibility that the money derived from rents is property to be used exclusively for religious purposes. After the rent has been collected it is as property very distinct from the realty out of which it arose, and evidence of an intention to devote rents to a religious purpose has not even a tendency to show the nature of the use of the real property from which the rents have been derived. Let us suppose, merely by way of illustration, that one of the lessees of this real property should erect a building thereon for use as a saloon. Would it be contended that

the property was, after the saloon was in operation, used exclusively for religious purposes merely because of appellant's intention to make such use of the rents issuing from the thus improved property? This question would meet with a prompt and unequivocal negative, and such negative would be a complete answer to the contention made on behalf of the appellant. Authorities have been freely cited by both appellant and appellee, but as the cases decided depend very much upon distinct statutory provisions, we have thought best to confine attention to our own constitution and statute on the subject under discussion. The judgment of the district court is

AFFIRMED.

BANK OF COMMERCE V. PETER GOOS.

FILED FEBRUARY 20, 1894. No. 5150.

1. **The damages recoverable for the refusal of a bank to pay a check,** drawn upon it by one who has funds with the bank wherewith to make such payment, should not exceed such amount as reasonably and fairly in the natural course of things would result from such refusal.
2. **Damages.** General damages are such as the jury may give when the judge cannot point out any measure by which they are to be ascertained except the opinion and judgment of a reasonable man. Special damages are such as by competent evidence are directly traceable to defendant's failure to discharge his contract obligations, or such duties as are imposed upon him by law.
3. **Introduction of Improper Evidence:** EFFECT: REVIEW. When a party litigant has, by an evasion of the adverse ruling of the court, intentionally and willfully introduced evidence of facts improper for consideration by the jury, it must be presumed that such improper evidence has had a prejudicial effect, and the verdict should accordingly be set aside.

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

Cornish & Robertson, for plaintiff in error.

C. A. Baldwin, contra.

RYAN, C.

By his petition filed in the district court of Douglas county, Nebraska, Peter Goos alleged that the Bank of Commerce was a corporation carrying on a general banking business, and that as such it invited and received deposits to be held and paid out upon the checks of its customers; that during the month of September, 1889, the said Goos was a depositor in said bank, and had on deposit in said bank about $3,300 on the 20th of said last-named month. The injuries for which compensation was sought were described in the following language: "Plaintiff says that on the 20th day of September, 1889, and when he so had in said bank said balance of more than $3,300, that said bank had so received from plaintiff, as aforesaid, on deposit, and which said sum of money was so held by defendant subject to the order of plaintiff, he drew his check on said bank for the sum of $804.90, payable to the order of the city treasurer of Omaha; that at said date John Rush was the city treasurer of Omaha, and plaintiff delivered said check to said Rush in payment of certain taxes due from the plaintiff to the city of Omaha; that afterwards, on the 23d day of September, the said check was presented to said defendant [Bank of Commerce] for payment, and payment was refused on said check on the pretended excuse that plaintiff had no funds in the bank, and the defendant made no other or different excuse for not honoring and paying said check, and said check was not paid by defendant and never was, and was returned by said bank to said Rush dishonored and

unpaid. Plaintiff says that at the time said check was presented for payment at defendant's bank, and at all times from and after September 20, 1889, plaintiff had on deposit in said bank, subject to his order and to be paid on his checks, more than $3,000, and out of which said funds said check should have been paid. Plaintiff says that for the reason that said check was not paid by said defendant when it was so as aforesaid presented to said bank for payment, and for no other cause, and without any fault on the part of said plaintiff whatever, the said John Rush filed a complaint with the police court of Omaha charging said plaintiff therein with the crime of obtaining a tax receipt under false pretenses and by falsely and feloniously representing to said Rush that he had funds in said defendant's bank subject to be paid on the check of said plaintiff; and upon said complaint having been so filed a warrant was issued by the police judge of Omaha for the arrest of said plaintiff, and by authority of said warrant and upon said complaint said plaintiff was arrested by the police officers of Omaha and was taken to the city prison, where said plaintiff was imprisoned with the lowest, filthiest, and most abandoned of human creatures, and plaintiff was kept so imprisoned for a long space of time, to-wit, four hours, and was released from his said imprisonment on the condition only of giving bail in the sum of $1,200 for his appearance at the time fixed by said court for the trial of his case, and plaintiff was compelled to and did give said bail and was thereby released from his said imprisonment. Plaintiff says that when he so gave said check he had, and knew he had, in said bank, subject to his order, a sum of money greatly in excess of the amount of said check, and plaintiff had no notice or suspicion even that said check would not be honored and paid, and said check was so given by said plaintiff in good faith expecting that it would be honored and paid, and said check would have been paid but for the false, wicked, and cruel and illegal act of said defendant, its offi-

cers and employes, in refusing to honor and pay the same. Plaintiff says that he was, and for several years last past has been, engaged in the business of keeping a hotel in Omaha, and by so doing formed an extensive acquaintance in the state of Nebraska and adjoining states among the traveling public; that plaintiff is also doing an extensive business in various branches of trade, oftentimes requiring an extensive credit to carry on his said business, which before the occurrence of the events so complained of he was able to and did obtain. Plaintiff says that by reason of the refusal of the said defendant to honor and pay his said check, and his said arrest upon said charge aforesaid, and before the truth or falsity of said charge was known or could be determined, the said charge against him and the fact of his arrest and imprisonment was published in the daily papers of Omaha and sent broadcast over the land in this state and adjoining states, and plaintiff was brought thereby to great and everlasting disgrace and contumely; and plaintiff's character was by reason of the premises aforesaid greatly injured; and persons whose confidence he was entitled to and did have before that time, by reason of the acts of said defendant, questioned the integrity of said plaintiff and refused to give him the financial credit which they had been accustomed to, and although plaintiff is possessed of a large amount of property over and above all his indebtedness, by reason of the said acts of said defendant, his said creditors became clamorous for their pay, and plaintiff has been caused great embarrassment and has been compelled to make great sacrifices to meet and pay his said creditors, all of which said state of facts were caused by the said acts of said defendant. Plaintiff says by reason of said averments and the disgrace brought upon him he has suffered great distress and pain of mind, and has suffered great loss and damage to his reputation as an honest business man; that he has suffered great pecuniary loss and damage in the manner aforesaid, and he says by reason of the premises

he has sustained damages in the sum of $50,000." For the sum last named judgment was prayed.

The answer admitted that the defendant was a banking corporation, and that plaintiff was a customer of said bank, and that on September 1, 1889, plaintiff had on deposit in said bank the sum of $103.50, and the defendant denied all other allegations of the petition. Affirmatively, the defendant answered that about September 20, 1889, plaintiff drew his check on said bank for the sum of $804.90, payable to John Rush, city treasurer of Omaha, which check was presented for payment on the 23d day of said month, and payment thereof was refused for the reason that the said bank then held a note of Peter Goos dated August 15, 1889, due by its terms in ninety days from its date, and which it had been agreed, as defendant alleged, should be paid out of the proceeds of a mortgage loan (which at the date of the note Goos had in contemplation) whenever said loan should be effected. The defendant further answered that in accordance with said understanding the amount of the note aforesaid was charged against plaintiff when said loan was effected, and the unearned interest upon said note was credited to the account of Goos, and that this charge was afterwards assented to by Goos, and that by reason of charging said note against the account of Goos there was left an insufficient amount to pay his check afterwards given against said account in favor of the city treasurer. The bank further answering denied that the filing of the complaint, and the resulting arrest and imprisonment, and the publication alleged in the petition were the actual and necessary consequences of defendant's refusal to pay the check drawn in favor of said city treasurer, and denied that damages on that account were chargeable to the defendant. The matters affirmatively pleaded in the answer were denied *seriatim* in plaintiff's reply.

During the progress of the trial the parties stipulated as

follows: "It is agreed by the parties hereto for the purposes of this trial that Peter Goos, at the time his check that he gave the city treasurer for $804.90 was presented for payment and payment thereof refused, had in the defendant's bank, subject to being drawn by him, $3,625.24, unless the bank was authorized to charge Goos, as the bank did, the amount of his note which was dated August 15, 1889, given for $3,000, and due in ninety days from date. If the bank had the right to charge Goos with the amount of that note, as they did charge him, then, at the time the check to the city treasurer was presented for payment, the bank was not liable for dishonoring the check. It is not the intention of this stipulation to admit on the part of the defendant that said sum of $3,625.24 was correct except for the purposes of this action, nor is it the intention of this stipulation to admit any proposition of law, the intention of the parties being simply to save on this trial an accounting of these matters." This stipulation restricted the scope of inquiries to the ground upon which the defendant acted in charging the ninety-day note against the account of the plaintiff whereby arose the insufficiency of funds to pay the check in favor of the city treasurer when it was afterwards presented. The difficulty attending an analysis of the grounds of damage alleged in the petition was met in no way or degree, and to that question our attention must first be directed.

A reference to the averments of the plaintiff relative to the special damages which he claims the right to recover will show that plaintiff alleged that he had been keeping a hotel, whereby he had formed an extensive acquaintance throughout the state of Nebraska and adjoining states among the traveling public, etc. Following these introductory statements is this language: "Plaintiff says by reason of the refusal of said defendant to honor and pay his said check, and his said arrest upon said charge aforesaid, and before the truth or falsity of said charge was or

could be known or determined, the said charge against him and the fact of his said arrest and imprisonment was published in the daily papers of Omaha and sent broadcast over the land in this and adjoining states, and plaintiff was brought thereby to great and everlasting disgrace and contumely; and plaintiff's credit was by reason of the premises aforesaid greatly injured," etc. Towards the close of his petition plaintiff alleged that by reason of said premises and the disgrace brought upon him, he had suffered great disgrace and pain of mind, and great loss and damage to his reputation as an honest business man, etc. It is evident that the petition was framed upon the theory that the bank was liable for the arrest and imprisonment of plaintiff and the publication of that fact, whereby his credit was greatly damaged. The trial court, however, very properly held that these matters could not be charged to the bank for the mere refusal to pay the check of the plaintiff, his prosecution and imprisonment, and the published statements in relation thereto not being the natural result of such refusal. (*Sycamore Marsh Harvester Co. v. Sturm*, 13 Neb., 210; *Aultman v. Stout*, 15 Neb., 586.) The action, therefore, as was properly held by the trial court, was maintainable only as one for the loss of credit resulting from defendant's refusal to pay plaintiff's check. While this was the theory to which the court sought to limit the trial of the case, the utmost vigilance could not prevent evidence going to the jury, of the arrest and imprisonment of plaintiff, and of the manner in which these facts were published to the world. The offense charged against Goos, as will be noted in his petition, was that he fraudulently obtained credit by falsely pretending that he had on deposit with the defendant sufficient money to pay the check which he tendered the city treasurer for his taxes. Judge Benecke, one of plaintiff's witnesses, being under examination, was asked as to the arrest of plaintiff and how he learned of it. In the face of an objection, which,

in view of the innocent appearance of the question, could not be sustained, this witness answered: "I was sitting in my office on Fifteenth and Douglas, and the news-boys were hallooing on the street, "All about Peter Goos' arrest,' and I went down the street and bought a newspaper, and to my great astonishment I found that he had given a check to John Rush, the city treasurer, which was not honored." This was followed by other evidence of the same witness, that the fact just sworn to had a very bad effect upon the credit of plaintiff. In the examination of plaintiff himself he was asked: "What did they say about the matter; what did the boys say—the news-boys?" Answer: "All about Peter Goos' arrest; giving a forged check." This evidence was given under a ruling of the court that evidence might be given as to what the news-boys said as to the refusal of the bank to pay plaintiff's check, and how that refusal affected his credit. Immediately following this, plaintiff testified that immediately after his arrest, imprisonment, and the publication above referred to, ten or twelve business men of Omaha, where plaintiff did business, came down that same evening to plaintiff's house and wanted to settle up with him, and asked him what was the matter. In another part of his evidence plaintiff testified that he was arrested because of the refusal of the bank to pay his check. Again, on re-examination, he was asked why he did not go to the bank in answer to a telephone message instead of going home as he did, and he answered, "I did not get the papers; I got arrested; I got pulled in before I reached home." A motion was sustained to strike this out of the record, but that ruling did not probably efface from the minds of the jurors the effect of the testimony. Following this ruling upon the motion to strike from the record the above evidence, plaintiff's counsel offered to prove, without any question pending, that the reason he did not go to the bank was because he was arrested. Upon the final submission of the case the jury was instructed

that the fact Peter Goos had been arrested and imprisoned must not be taken into consideration to enhance his damages. The giving of this instruction was probably all that lay within the power of the court to do in avoidance of the prejudicial effect of the evidence to which we have just made reference, and yet that evidence must necessarily have had a prejudicial effect upon the minds of the jurors. This result was attained through the mistaken zeal of plaintiff's counsel in his endeavor to avoid the effect of the adverse rulings of the court, as to which, if he was aggrieved, he had an ample remedy otherwise than by circumvention.

At best, it is a question more difficult of application than of a general definition to determine what the measure of damages is for the refusal by a bank to pay a check when it has in its hands sufficient funds of the drawer for that purpose. In *Rosewater v. Hoffman*, 24 Neb., on page 230, is found the following language: "It is a well settled rule in this state that punitive, vindictive, or exemplary damages cannot be allowed. The only damages recoverable are denominated 'compensatory,' which are a satisfaction for the injury sustained. (*Boyer v. Barr*, 8 Neb., 70; *Roose v. Perkins*, 9 Neb., 315; *Riewe v. McCormick*, 11 Neb., 263; *Boldt v. Budwig*, 19 Neb., 739.)" In *Brooke v. Tradesmen Nat. Bank*, 69 Hun [N. Y.], 202, it was said that the measure of damages for a refusal to pay a check drawn upon a bank, which had sufficient funds of the drawer for that purpose, was such damages as might fairly and reasonably be considered as arising from a breach of contract according to the usual course of things. The supreme court of Illinois, in *Schaffner v. Ehrman*, 139 Ill., 109, used the following language: "The question therefore is, what is the measure of a banker's liability to a person engaged in trade for a refusal to pay his check, he having sufficient funds on deposit for that purpose, in the absence of evidence of malice or special injury to the depositor? Authorities are not

numerous on the question, but they seem to be uniformly to the effect that more than mere nominal damages are in such cases recoverable. The leading case is that of *Rolin v. Steward*, 14 Com. Bench [Eng.], 595. In that case there was no evidence of malice in fact nor of special damages; but the jury were told that they ought not to confine their verdict to nominal damages, but should give the plaintiffs such temperate damages as they should judge to be a reasonable compensation for the injury they must have sustained from the dishonoring of their checks, and the jury accordingly, by their verdict, gave substantial damages, on which judgment was rendered by the trial court. On appeal, all the judges concurred in holding that the direction to the jury was correct, the case being likened to that of a slander of a person in the way of his trade. Williams, J., said, 'I think it cannot be denied that if one who is not a trader were to bring an action against a banker for dishonoring a check at a time when he had funds of the customer in his hands sufficient to meet it, and special damages were alleged and proved, the plaintiff would be entitled to recover substantial damages; and when it is alleged and proved that the plaintiff is a trader, I think it is equally clear that the jury in estimating the damages may take into their consideration the natural and necessary consequences which must result to the plaintiff from the defendant's breach of contract, just as in the case of an action for slander of a person in the way of his trade, the action lies without proof of special damages.' This case was cited with approval in *Prehn v. Royal Bank of Liverpool*, 5 L. R. Exch. [Eng.], 92, in which Martin, B., says, 'Now with respect to damages in general, they are of three kinds: first, nominal damages; * * * the second kind is general damages, and their nature is clearly stated by Creswell, J., in *Rolin v. Steward*, 14 C. B. [Eng.], 595, to be such as the jury may give when the judge cannot point out any measure by which they are to be assessed except the opinion and judgment of a reasonable

man.' In Wood's Mayne on Damages [1st Am. ed.], sec. 8, p. 12, the rule is announced, that 'when there may be an injury existing at present, though unascertainable, or to arise hereafter, and for which no further action could be brought, substantial damages might be given at once;' citing the case of *Rolin v. Steward, supra.* And text-writers, without exception, seem to approve of the rule announced in that case. (See Bishop on Non-contract Law, sec. 49; 1 Sutherland on Damages, 129.) In 3 Am. & Eng. Encyc. of Law, 226, it is said: 'The depositor, by proving special loss, may recover special damages from the bank for its breach of duty; but if unable to do so he may recover such temperate damages as will be a reasonable compensation for the injury he has sustained.' (Citing authorities.) 'Where a bank refuses to honor a check of its depositor without legal cause, the latter is entitled to recover substanial damages.' (5 Gen. Digest of the United States, Ann., 283.) Citing *Patterson v. Marine Nat. Bank,* 130 Pa. St., 419, and other authorities." Plaintiff might have relied upon his right to general damages under the above rule, but he did not. Special damages, we believe, are such as by competent evidence are directly traceable to a defendant's failure to discharge his contract obligations, or such duties as are imposed upon him by law. The language which we have just quoted at great length probably, as nearly as possible, defines this kind of damages in cases like that under consideration. In the case at bar the attempt to recover special damages was upon allegations and proofs of an unjustifiable dishonor of a check presented by the city treasurer, so confusedly interwoven with the subsequent arrest of the plaintiff, his incarceration, and the newspaper and news-boys' account thereof, that it was impossible in the nature of things for the jury to segregate and ascertain the amount of damages which were solely traceable to the refusal to pay plaintiff's check, independently of the other circumstances to which we have referred. This confusion of matters, which should have

been kept distinct, seems by plaintiff to have been intensified by working in evidence which the court had repeatedly ruled was inadmissible in proof of recoverable damages. For the reasons given, the judgment of the district court is

REVERSED.

UNION PACIFIC RAILWAY COMPANY V. JOHN PETER MERTES.

FILED FEBRUARY 20, 1894. No. 4651.

1. **Contributory Negligence.** Although a party may have negligently exposed himself to an injury, yet if the defendant, after discovering his exposed situation, inflicts the injury upon him through a failure to exercise ordinary care, the plaintiff may recover damages. (Reaffirming fourth paragraph of the syllabus in *Union P. R. Co. v. Mertes*, 35 Neb., 204.) Where there is in such a case no evidence of a failure by the defendant to exercise ordinary care a recovery of damages cannot be sustained.
2. ———: EVIDENCE. The evidence examined as to this charge of negligence, and found insufficient to justify the submission of that question to the jury.

REHEARING of case reported in 35 Neb., 204.

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

The plaintiff below was guilty of contributory negligence. There was no evidence to show any failure on the part of the company to do its whole duty. There was therefore no question of negligence on the part of the company to submit to the jury, and the motion to direct a verdict for defendant below should have been sustained. (*Apsey v. Detroit, L. & N. R. Co.*, 47 N. W. Rep. [Mich.], 513; *Hamilton v. Delaware, L. & W. R. Co.*, 50 N. J. Law,

263; *International & G. N. R. Co. v. Graves*, 59 Tex., 331; Beach, Contributory Negligence, pp. 19, 20; *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S., 697; *Cincinnati, H. & I. R. Co. v. Butler*, 2 N. E. Rep. [Ind.], 138; *Payne v. Western & A. R. Co.*, 13 Lea [Tenn.], 522; *Schaefert v. Chicago, M. & St. P. R. Co.*, 62 Ia., 624; *Henzie v. St. Louis, K. C. & N. R. Co.*, 71 Mo., 636; *Pennsylvania R. Co. v. Beale*, 73 Pa. St., 504; *Haas v. Grand Rapids & I. R. Co.*, 47 Mich., 401; *Tucker v. Duncan*, 9 Fed. Rep., 867; *Union P. R. Co. v. Adams*, 33 Kan., 427; *Reading & C. R. Co. v. Ritchie*, 102 Pa. St., 425; *Cogswell v. Oregon & C. R. Co.*, 6 Ore., 417; *State v. Baltimore & O. R. Co.*, 69 Md., 494; *Mynning v. Detroit, L. & N. R. Co.*, 64 Mich., 93; *Seefeld v. Chicago, M. & St. P. R. Co.*, 70 Wis., 216; *O'Connor v. Missouri P. R. Co.*, 94 Mo., 150; *Moebus v. Herrmann*, 108 N. Y., 349; *Louisville, N. A. & C. R. Co. v. Phillips*, 112 Ind., 59; *Pennsylvania R. Co. v. Bell*, 122 Pa. St., 58; *Guggenheim v. Lake Shore & M. S. R. Co.*, 66 Mich., 151; *Norfolk & W. R. Co. v. Burge*, 84 Va., 63; *Chicago & E. I. R. Co. v. Hedges*, 118 Ind., 5; *Candelaria v. Atchison, T. & S. F. R. Co.*, 27 Pac. Rep. [N. M.], 497; *McAdoo v. Richmond & D. R. Co.*, 11 S. E. Rep. [N. Car.], 316; *Tennis v. Interstate C. R. T. R. Co.*, 25 Pac. Rep. [Kan.], 876; *Norfolk & W. R. Co. v. Carper*, 14 S. E. Rep. [Va.], 328; *Spicer v. Chesapeake & O. R. Co.*, 11 L. R. A. [W. Va.], 385; *Union P. R. Co. v. Adams*, 33 Kan., 427; *Baltimore & O. R. Co. v. State*, 16 Atl. Rep. [Md.], 212; *Wright v. Boston & M. R. Co.*, 129 Mass., 440; *Illinois C. R. Co. v. Godfrey*, 71 Ill., 500; *Telfer v. Northern R. Co.*, 30 N. J. Law, 188; *Schofield v. Chicago, M. & St. P. R. Co.*, 8 Fed. Rep., 488; *Wright v. Boston & A. R. Co.*, 142 Mass., 296.)

Mahoney, Minahan & Smyth and *H. B. Holsman, contra:*

Although the plaintiff has carelessly exposed himself to an injury, yet if the defendant, after discovering his ex-

posed condition, inflict the injury upon him through a failure to exercise ordinary care, the plaintiff may recover damages. (2 Thompson, Negligence, 1157; *Barker v. Savage*, 45 N. Y., 191; *Brown v. Lynn*, 31 Pa. St., 510; *Northern C. R. Co. v. Price*, 29 Md., 420; *Locke v. First Div. St. Paul & P. R. Co.*, 15 Minn., 350; *Nelson v. Atlantic & P. R. Co.*, 68 Mo., 593; *O'Keefe v. Chicago, R. I. & P. R. Co.*, 32 Ia., 467; *Morris v. Chicago, B. & Q. R. Co.*, 45 Ia., 29; *Lannen v. Albany Gas-Light Co.*, 44 N. Y., 459; *McKean v. Burlington, C. R. & N. R. Co.*, 55 Ia., 192; *Brown v. Hannibal & St. J. R. Co.*, 50 Mo., 461; *Omaha Horse Railway Co. v. Doolittle*, 7 Neb., 481; *Burnett v. Burlington & M. R. R. Co.*, 16 Neb., 332; *Cook v. Pickrel*, 20 Neb., 433; *Union P. R. Co. v. Sue*, 25 Neb., 772.)

RYAN, C.

The opinion originally filed in this case was reported in 35 Nebraska on pages 204 *et seq.* A rehearing was granted, and upon full argument we have reached the conclusions which will now be briefly stated. To this end, it is not necessary to review or criticise the syllabus or opinion already referred to. For the purposes of this re-examination they will be assumed to be correct statements of the law applicable to the facts, and the synopsis of the pleadings, proofs, and established facts will be assumed to be correctly stated, except in so far as otherwise hereinafter pointed out. The fourth paragraph of the syllabus states correctly a principle applicable to our inquiries. It was in the following language: "Although a party may have negligently exposed himself to an injury, yet if the defendants, after discovering his exposed situation, inflicts the injury upon him through a failure to exercise ordinary care, the plaintiff may recover damages." At almost the close of the opinion the principle just stated is given the following application: "Even if it be conceded that the plaintiff below

was unlawfully on the track and did not look for an engine before crossing the same, still there is testimony in the record from which the jury would be warranted in finding that after the engineer became aware of the perilous situation of the plaintiff below, he could, by the exercise of ordinary care, have stopped the engine."

Neither in the briefs nor in the oral argument of counsel has evidence been pointed out which justifies this last statement. It is insisted by counsel for defendant in error that while there were two railroad lines admitting of trains passing each other at the point where Mertes was injured, yet that it was fairly inferable from the evidence of Mertes himself that he was upon that particular line over which the engine which injured him was advancing. The evidence of three other witnesses, who were upon the engine, was directly contradictory of this location of Mertes, as it is claimed his evidence justified the jury's above inference in respect thereto. Mertes seems to have been rather awkward in the use of the English language, it is true, and, therefore, in some parts of his evidence left uncertain just where he was just previous to the collision with him. He said that he was walking "between the tracks" which were "two or three yards apart." After this he said he walked "between the railroad." The most that should be claimed by plaintiff in error is that such expressions as "between the railroad" and "between the tracks" were ambiguous. This ambiguity is removed, however, by the statement of Mr. Mertes that these tracks were two or three yards apart. If this was left in any doubt it should have been entirely removed by the further testimony of Mertes that he was walking between the track where the east-bound train and the west-bound train ran. It must, therefore, be accepted as an unquestioned fact that from the time when it was the duty of the employes in charge of the engine of plaintiff in error to note and act with reference to the whereabouts of Mertes, he was moving forward, having at his left the

track upon which, according to his evidence, a Missouri Pacific freight train was moving eastward past him with all the noise incident to the moving of such a train, and with a continuous sound of its bell and whistle. On his right was the track along which, and following him, was advancing the engine to which reference has already been made. The collision is thus graphically described by Mertes in his own peculiar language: "I went on the middle of the two tracks to Sheeley's crossing. I went to go over, you know, and the engine whistled behind me, and I looked back and it caught me and throw me off." Again he said: "It throw me off the track, you know. I was pretty near off the track when it struck me." Later on in giving his testimony his examination was as follows:

Q. Was this engine which struck you making any noise, and if so, what, when it came up?

A. No, sir; it made no noise—no whistle or no bell ring. I looked back and it whistled a little.

Q. How did it whistle?

A. Toot, toot; that is all.

Q. Just as it struck you?

A. Yes, sir.

Naturally this witness could by no possibility give evidence as to what, previous to the accident, was transpiring on the engine, for of that fact the jury could derive knowledge only from the engineer, the fireman, and the pilot, three individuals, whose evidence is concurrent upon these questions. They testified that upon the engineer noticing a man walking alongside the track some distance ahead of where the engine then was, he immediately shut off steam, causing the engine's speed gradually to decrease until Mr. Mertes started to cross the track, when the engine was immediately reversed and the air brake instantly applied, which was all that could be done to suddenly stop the engine, which measures succeeded in that respect so completely that within the distance of the length of the

engine and tender they came to a complete standstill. As to the whistle being sounded, the evidence of these witnesses differed from that of Mertes, for they say that it was sounded by the engineer at Twenty-fourth street (the collision was at Twenty-sixth street, then known as Sheeley's crossing), while the fireman rang the bell. It would seem that the testimony of Mr. Mertes as to the noise caused by the Missouri Pacific train was given with a view to showing that the sounding of the whistle and ringing of the bell on the Union Pacific engine could not be heard or distinguished by Mertes on that account, and that thereby he was excused from the imputation of contributory negligence, which would naturally be imputable to an attempt to cross the track in front of an engine giving such warnings. Possibly this evidence accounted for the failure to hear these warnings so that thereby Mr. Mertes was not liable to the same inference of contributory negligence that might otherwise have been imputed to him. The Union Pacific company's employes having sounded the whistle, rung the bell, and shut off steam, so as to decrease speed, as soon as they discovered that Mr. Mertes, apparently intoxicated, was walking along the side of the track upon which they were running their engine, and afterwards, when he actually stepped upon this track, having, as we have seen, used every available means to stop the engine as quickly as that result could be accomplished, nothing more could be required at their hands. Proof of all these facts being without contradiction, there was no question of negligence upon the part of the railway company to be submitted to the jury, and hence a verdict in support of which that indispensable prerequisite is wanting cannot stand. Let us not be misunderstood. Negligence is a question of fact to be determined by the jury upon the weight of the evidence, as is any other question of fact. When, however, there is no evidence to sustain the essential finding of negligence as against a party sought to be charged there-

with, the court cannot sustain the verdict. There can be no preponderance of that evidence which is without existence. The judgment of the district court is

REVERSED.

OMAHA STREET RAILWAY COMPANY v. MATTHEW W. CLAIR.

FILED FEBRUARY 20, 1894. No. 5451.

1. **Review**: CONFLICTING EVIDENCE. Where there is a mere conflict in the evidence and the verdict is not clearly unsupported thereby, the judgment of the trial court will not be reversed merely because in this court it may appear as an original question that the preponderance of proof was with the party other than the one in whose favor the verdict was returned.
2. **Personal Injuries**: DAMAGES: INSTRUCTIONS. In an action to recover damages for injuries charged to have been inflicted by a street railway company, an instruction, designed to embrace all elements essential to a recovery, sufficiently met requirements as to the absence of contributory negligence by requiring the use of "ordinary care and diligence" by plaintiff,—the term "ordinary care and diligence" being subsequently by instructions fully defined.
3. **Negligence**: QUESTION FOR JURY: TRIAL. The jury alone must determine the existence of negligence, contributory or otherwise, as a question of fact, subject to the judgment of the court as to whether or not sufficient proof has been made to justify its consideration, and after the rendition of a verdict, whether or not it is contrary to or unsustained by the evidence. It is not the duty of the trial court to instruct what inferences of fact must or must not be deduced from proofs offered to establish the existence or absence of negligence.

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

John L. Webster, for plaintiff in error, cited: *Warner v. People's Street R. Co.*, 141 Pa. St., 615; *Miller v. St. Paul*

City R. Co., 42 Minn., 454; *Thomas v. Passenger Railway*, 132 Pa. St., 504; *Buzby v. Philadelphia Traction Co.*, 126 Pa. St., 559; *Weber v. Kansas City Cable R. Co.*, 100 Mo., 194; *Belton v. Baxter*, 54 N. Y., 245; *Fenton v. Second Avenue Railway*, 126 N. Y., 625; *Adolph v. Central Park, N. & E. R. R. Co.*, 76 N. Y., 530; *Spencer v. Illinois C. R. Co.*, 29 Ia., 55; *Brown v. Milwaukee & St. P. R. Co.*, 22 Minn., 165; *Cordell v. New York C. & H. R. R. Co.*, 64 N. Y., 538; *Gordon v. Erie R. Co.*, 59 N. Y., 468; *McGrath v. New York C. & H. R. R. Co.*, 59 N. Y., 468; *Havens v. Erie R. Co.*, 41 N. Y., 296; *Chicago, B. & Q. R. Co. v. Harwood*, 80 Ill., 88; *Cleveland, C., C. & I. R. Co. v. Elliott*, 28 O. St., 340; *Toledo, P. & W. R. Co. v. Riley*, 47 Ill., 514; *Chicago, R. I. & P. R. Co. v. Bell*, 70 Ill., 102; *McCoy v. Milwaukee Street R. Co.*, 52 N. W. Rep. [Wis.], 93.

Frank T. Ransom and *Gurley & Marple, contra*, cited: *Brooks v. Lincoln Street R. Co.*, 22 Neb., 816; *Anderson v. Minneapolis Street R. Co.*, 42 Minn., 490; *Winter v. Kansas City Cable R. Co.*, 6 L. R. A. [Mo.], 536; *City of Lincoln v. Gillilan*, 18 Neb., 114; *Orange & Newark Horse R. Co. v. Ward*, 47 N. J. Law, 560; *Leavitt v. Chicago & N. W. R. Co.*, 64 Wis., 228; *Copley v. New Haven & Northampton Co.*, 136 Mass., 6; *Williams v. Syracuse Iron Works*, 31 Hun [N. Y.], 392; *Tolman v. Syracuse, B. & N. Y. R. Co.*, 31 Hun [N. Y.], 397; *Texas & P. R. Co. v. Levi*, 59 Tex., 674; *White v. Milwaukee City R. Co.*, 61 Wis., 536; *Hutchinson v. St. Paul, M. & M. R. Co.*, 32 Minn., 398.

RYAN, C.

This action was brought against the Omaha Street Railway Company, and successfully maintained, for the recovery of damages on account of personal injuries sustained by the defendant in error. The allegations of his petition, upon

which the liability of the railway company was predicated in the district court of Douglas county, wherein the judgment was obtained, were made in the following language: "On or about the 24th day of December, 1889, the plaintiff was passing along Fourteenth street in the city of Omaha, at the intersection of Dodge street and Fourteenth street, between the hours of 7 and 8 o'clock in the evening, using due care and caution in passing; that no cars of the said defendant were passing along said street at said time, and without any warning from the servants and agents of said defendant the agents and servants in charge of one of its cars carelessly and negligently drove one of its cars upon and against the plaintiff; that when said car struck the plaintiff he was thrown violently to the ground thereby, and was by the concussion deprived of his senses, and while the plaintiff was endeavoring to escape from off the railway tracks of the defendant, another car of the defendant, being operated by the agents of said company, approached from the east, and the persons in charge of said car saw, or could easily have seen, plaintiff on said track, and while plaintiff was endeavoring to raise himself from said track and remove himself therefrom, and while insensible as aforesaid, the defendant by its agents negligently and carelessly ran its car upon and against the plaintiff and caught the plaintiff in the gearing of said car and carried him for about seventy feet underneath said car; that when the second car struck plaintiff, the iron bolts and gearing of said car were forced into and through the leg of plaintiff at and near his knee, and plaintiff was wounded and bruised and injured to such an extent that he was confined to his bed for six months following, and was caused to expend large sums of money for physicians, and nurse and care, and was caused to expend large sums of money for attention to him during his said confinement because of said wounds and bruises so received. Plaintiff has been by reason of the facts aforesaid deprived of following his usual calling ever since then,

and has suffered great bodily pain and mental anguish; that the wounds so received by plaintiff through the negligence and carelessness of the defendant have rendered him a cripple for life, and he has been damaged in the sum of $25,000." For this sum named he prayed judgment. The railway company by its answer admitted that it was a corporation operating a street railway, and that the plaintiff was injured at about the time and place alleged, but denied every other allegation of the petition. In the answer it was further alleged that the injuries complained of were attributable solely to the carelessness and negligence of plaintiff, and that if plaintiff at the time of said injury had been exercising due and reasonable care he would not have been injured. By the reply there was a denial of negligence and want of care on the part of plaintiff.

Consistently with the averments of the petition, three witnesses, one of whom was the plaintiff, testified that the forward car in the cable train going eastward on Dodge street had no head-light or other light making the train visible at the time of the injury complained of, and with different degrees of positiveness these three witnesses testified that no audible warning was given of the approach of the said east-bound train. The testimony of plaintiff and one of these witnesses was that plaintiff attempted to cross Dodge street from the south at its intersection with Fourteenth street; that he was not warned of the approach of the east-bound cable train, and could neither see nor hear it, and that when crossing the most southerly of the two parallel tracks running lengthwise of Dodge street, he was struck by the east-bound train approaching on said track; that he was thereby stunned and rendered incapable of exercising due caution and avoiding contact with another cable train approaching from the east on the most northerly of the two parallel tracks referred to, though plaintiff admitted in his evidence that he had, just before being struck, noticed the near approach of the west-bound train,

carrying a head-light and thereby rendered visible. Plaintiff and one of his witnesses further gave evidence that after plaintiff was struck by the east-bound train, and in the dazed condition resulting from said collision, he attempted to cross the northernmost of the two parallel tracks on Dodge street. The evidence of the plaintiff and the two witnesses above referred to was that he was struck by the westward-bound train and borne down beneath the advance car thereof and thus sustained very serious injuries. The evidence on behalf of the defendant, given by eight witnesses, was that the eastward-bound train met that bound westward on Dodge street at some point between Fourteenth and Fifteenth streets, and that there was a head-light on the eastward-bound train, and that the ordinary signal for a crossing was given by means of a bell before the east-bound train reached Fourteenth street, and as soon as it became apparent, when the front of the train had nearly reached a point opposite where the plaintiff was standing, just south of the car track, that plaintiff was about to cross in front of the moving train last mentioned, a danger signal was at once given and that the train was stopped before it traversed a distance of fifteen feet, but too late to avoid a collision with plaintiff, who had meantime stepped upon the track in front of the eastward-moving train; that the effect of this collision was to throw the plaintiff under the forward car in the eastward-bound train where he sustained the injuries complained of. It is useless to attempt to harmonize the testimony, for, as will be very readily seen, it is contradictory at all points, even as to the identity of the train with which plaintiff collided. The jury evidently believed the version given by plaintiff's witnesses, though said witnesses were numerically in the minority. As this verdict was not without support of competent testimony, and as the trial judge, who had opportunity for observation of the witnesses which is denied us, refused to interfere with it, thereby adding his

sanction to the jury's estimate of the weight of the evidence upon which it was founded, we cannot interfere solely on the ground of the insufficiency of the evidence in support of the verdict.

It is insisted, however, by plaintiff in error, that instructions numbered 1, 9, and 10, given at the request of the defendant in error, stated the law incorrectly as applicable to the facts in controversy. The same objections are made to each of these instructions. It will therefore be necessary only to quote the first referred to, especially in view of the fact that it was selected as a sample instruction against which objections are specifically urged. This instruction is in the following language:

"1. If you believe from the evidence that at the time of the collision between the plaintiff and the defendant's cars, plaintiff was endeavoring to cross Dodge street, and that he was using ordinary care and diligence at the time; that the defendant's agents in charge of the east-bound train did not give any alarm of the approach of said train, and that said train had no head-light thereon, and no warning whatever was given to plaintiff of the approach of said train, and plaintiff did not know of the proximity of said train, and that said train struck the plaintiff and threw him against the pavement and he was thereby stunned to such an extent that he did not have control of his actions, and while in that condition plaintiff endeavored to cross the north track of the defendant, and while so endeavoring to cross said track the west-bound train of the defendant collided with the plaintiff and plaintiff was thereby injured, you will find for the plaintiff, provided you further find from the evidence that the accident would have been prevented and the plaintiff would not have been struck by the east-bound train if the defendant's servants in charge of said east-bound train had given an alarm of the approach of said train the plaintiff could have seen said train in time to escape it had there been a head-light thereon."

It is argued that the language in the above instruction, "and plaintiff did not know of the proximity of said train," excuses from responsibility for knowledge of the proximity of the train which by the exercise of due and ordinary care plaintiff could have obtained. To this objection, as well as to another, that this clause ignores the question of contributory negligence, it is deemed a sufficient answer to call attention to the fact that this very instruction states as one of the essentials of defendant's liability that plaintiff "was using ordinary care and diligence" at the time the accident occurred. What was ordinary care and diligence was explained in the fourth instruction given by the court in the following language:

"4. You will therefore inquire, in the second place, if you shall find in favor of the plaintiff upon the first proposition, whether or not the plaintiff was himself in the exercise of due and reasonable care at the time he received his injuries, for if by the exercise of reasonable care the plaintiff could have avoided the injury, then he is not entitled to recover in this action, notwithstanding you may believe from the evidence that the employes of the defendant in charge of the cars were guilty of negligence in the operation of the cars."

Upon the suggestion of the plaintiff in error, the court further elaborated this question by instructions numbered 3, 4, 5, and 8, which are in the following language:

"3. The jury are instructed that even if you believe from a consideration of all the evidence that the train which approached from the west was going eastward on Dodge street did not have a head-light on the front end of the front grip car, still the plaintiff could not recover if by the use of his eye-sight and hearing he could have seen or known that such train was approaching, by the use of ordinary care on his part, and that if he failed to use ordinary precautions to ascertain whether such train was approaching, then he was guilty of contributory negligence and cannot recover.

"4. The jury are instructed that in determining whether the plaintiff was guilty of contributory negligence, and in determining whether he could not have seen or heard the approaching train from the west, you should take into consideration that part of the evidence relating to gas-lights and electric lights at the intersection of Fourteenth and Dodge streets and determine from all the evidence upon that point whether there was sufficient light for the plaintiff to have seen the approaching train from the west in time to have avoided the collision with him, and if from the whole evidence you find that there was sufficient light so that by the use of ordinary care he could have seen the approaching train, then it was his duty to have avoided stepping upon the track in front of the approaching train, and such failure to avoid the train on his part constitutes contributory negligence which would prevent any recovery by him in this action.

"5. The jury in determining whether the plaintiff was guilty of contributory negligence may take into consideration the condition of the plaintiff as to intoxication, and if you find from the evidence that the plaintiff was intoxicated, and that his failure to see the approaching train or to avoid the approaching train was by reason of his intoxication, then he was guilty of such contributory negligence as prevents a recovery in this case, and your verdict should be for the defendant."

"8. The jury are instructed that if you believe from the evidence that the plaintiff stepped in front of the moving train and in such close proximity to the train that it could not be brought to a stop before colliding with the plaintiff, and that after colliding with plaintiff the train was brought to a stop as speedily as possible, then the defendants were not guilty of any negligence in that regard," [modified by the court by adding] "unless you find from the evidence that there was no head-light on the forward car, and that no signal of the approach of the train was given,

and that by reason of the absence of such head-light and signal the plaintiff had no knowledge of the approach of the train, and could not by the exercise of ordinary care and prudence have discovered the approach of the train, and that under such circumstances the plaintiff stepped in front of the train and received his injuries, then, and in such case, the plaintiff could not be charged with contributory negligence in stepping in front of the train, and the defendant would be chargeable with negligence."

In view of these instructions, plaintiff in error had no ground to complain that the term "ordinary care and diligence," and the nature and effect of contributory negligence, were not explained to the jury as favorably as the law on these subjects would justify. The remainder of the argument of plaintiff in error is devoted to deductions to be drawn from the absence of a head-light, etc., as constituting negligence sufficient to require that the trial court should have instructed that the various factors named were sufficient or not, *per se*, to constitute negligence or contributory negligence. It is believed that the following paragraph of the syllabus of the opinion in the case of *Omaha & R. V. R. Co. v. Brady*, 39 Neb., 29, filed during this term of court, states correctly the rule upon the subject of negligence in what manner soever it may arise:

"10. The existence of negligence should be proved and passed upon by the jury as any other fact. It is improper for the trial court to state to the jury a circumstance or group of circumstances as to which there has been evidence on the trial, and instruct that such fact or group of facts amounts to negligence. At most, the jury should be instructed that such circumstances, if established by a preponderance of the evidence, are proper to be considered in determining the existence of negligence."

The judgment of the district court is

AFFIRMED.