REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

JANUARY TERM, 1894.

VOLUME XL.

D. A. CAMPBELL,
OFFICIAL REPORTER.

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1894.

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.

PRACTICING ATTORNEYS.

ADMITTED SINCE THE PUBLICATION OF VOLUME XXXIX.

L. H. ALBERTI.
FRED W. ASHTON.
ALLEN G. FISHER.
A. D. GIBBS.
J. J. KING.
HENRY C. LEFLER.
WM. S. LEWIS.
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SANFORD PARKER.
R. M. PROUDFIT.
J. L. RICHARDS.
BRENT K. YATES.

SUPREME COURT COMMISSIONERS.

(Laws 1893, chapter 16, page 150.)

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

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

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

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

Approved March 9, A. D. 1893.

See page xxiii for table of cases overruled.

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

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CASES MARKED † ARE CRITICISED IN THIS VOLUME.

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STATUTES AND CONSTITUTIONAL PROVISIONS

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Figures in ( ) indicate corresponding sections in Consolidated Statutes.

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COMPILED STATUTES.

1893.

CONSOLIDATED STATUTES.

CODE OF CIVIL PROCEDURE.

CRIMINAL CODE.

CASES

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.

WESTERN HOME INSURANCE COMPANY v. E. B. RICHARDSON, ASSIGNEE.

FILED APRIL 3, 1894. No. 5661.

1. **Fire Insurance:** PROOF OF LOSS: EVIDENCE. Ordinarily, in an action on an insurance policy containing a provision to the effect that the insured shall furnish to the company written proof of his loss within sixty days after the fire, the plaintiff, in order to recover, must establish on the trial that such proof was duly furnished, or that the same was waived by the defendant.
2. **Pleading:** WAIVER OF PROOF OF LOSS. Where the answer filed to the petition puts in issue the execution and delivery of the policy, the defendant thereby waives the terms of the policy relating to the preliminary proof of loss.

3. **Proof of Loss:** OBJECTIONS: WAIVER. In case the preliminary proof of loss submitted to the company is unsatisfactory, it should return the same to the insured within a reasonable time, stating in what respect it is considered defective, and if it fails to do so, but rejects such proof on the ground that the same was not furnished in proper time, it cannot afterwards avail itself of the insufficiency of such preliminary proof.

4. **Evidence.** The omission of the plaintiff to introduce in evidence a paper or document essential to his case is cured by the defendant afterwards putting in evidence such paper or document.

5. **Fire Insurance:** WHEN ACTION ON POLICY ACCRUES. Where an insurance company denies the making of the policy and all liability thereunder, and absolutely refuses to pay the loss, the right of action of the insured immediately accrues, although the policy contains a clause giving the company an option either to pay the loss or replace the property damaged within a specified time.

6. ———: RENEWAL OF POLICY: PAYMENT OF PREMIUM: TENDER. An agent of an insurance company, duly authorized to take and approve risks and to insure, issued a policy of insurance extending credit for the premium, although the policy acknowledged the payment thereof. Prior to any loss the full amount of such premium was tendered by the insured to such agent, but the money was not received owing to the fact that the latter was about to enter a railroad car, and would not accept the money. Before the agent returned home the property was destroyed by fire. Afterwards, but prior to instituting suit on the policy, the amount of premium was paid to the company and the same was retained by it with full knowledge of all the facts. *Held*, That such payment related back to the time the tender was made to the company's agent, and that the company could not avail itself of the condition contained in the policy that "this company shall not be liable by virtue of this policy, or any renewal thereof, until the premium therefor shall be actually paid," to prevent a recovery.

7. **Action on Policy:** EVIDENCE OF VALUE OF PROPERTY. In an action to recover for a loss under a policy, it is competent for the insured, who was acquainted with the value of the property destroyed at the time of the fire, to testify as to such value.

8. **Witnesses.** It is not the proper practice to permit a witness to answer a question without objection, and then move to have the testimony excluded.

9. **Objections to the rulings of the trial court on the admission and exclusion of testimony examined and considered, and said objections overruled.**

ERROR from the district court of Butler county. Tried below before WHEELER, J.

H. W. Chase and *W. E. Bauer*, for plaintiff in error.

Matt Miller, contra.

NORVAL, C. J.

This is an action brought by E. B. Richardson, as assignee of C. E. McCarty & Co., upon a policy of fire insurance on a stock of general merchandise. From a judgment in favor of the plaintiff below for the full amount covered by the policy the defendant brings the case to this court for review.

At the close of the plaintiff's testimony the defendant requested the court to direct the jury to return a verdict in its favor, for the reason that no evidence had been introduced tending to show that the plaintiff or his assignors had furnished to the company the preliminary proof of loss, as required by the provisions of the policy. The court refused to so instruct the jury, to which an exception was taken, and the defendant introduced testimony in support of the defenses set up in the answer. This ruling is the first error assigned.

The policy contained the usual stipulation that the assured, in case of loss or damage by fire, should, "within sixty days, render an account of the loss or damage, signed and sworn to, stating how the fire originated, giving copies of the written portions of all policies thereon, also the actual cash value and ownership of the property, and the occupation of the premises, and incumbrance, if any, and whenever required the assured, his, her, or their agents or servants wherever, and as often as required, shall submit to

examinations under oath by any person designated by the company, and apart from all other persons, except the attesting magistrate or notary, and subscribe thereto when reduced to writing, and produce all books of account, bills, and other vouchers, 'or copies thereof, if originals are lost,' at the office of the company or at such other place as the company may designate, and permit copies and extracts thereof to be made, * * * and shall, if required, produce the certificate of a magistrate or notary public nearest to the place of fire, stating that he has investigated the circumstances of the fire, and believes the owner has without fraud sustained loss to the amount claimed." The general rule is, and we have so held, that, in an action upon a policy of insurance containing provisions similar to those in the case before us, it is necessary for the plaintiff to prove upon the trial that proof of loss was made, or that the same was waived by the insurer. (*German Ins. Co. v. Fairbank*, 32 Neb., 750.) It is true the bill of exceptions discloses that the plaintiff failed to prove proof of loss was furnished the insurer, but this omission will not defeat a recovery, since the answer filed by the defendant put in issue the execution and delivery of the policy, and the plaintiff was required to prove the making of the contract of insurance. Besides, the defendant insisted upon the trial that the policy was not in force when the fire occurred. These facts constituted a waiver of the terms of the policy relating to the preliminary proof of loss. (*Phenix Ins. Co. v. Bachelder*, 32 Neb., 490.)

Again, the defendant, when it came to make out its case, established that such proof of loss was furnished by the plaintiff's assignors and actually introduced the original statement of loss in evidence, thereby supplying the omission in plaintiff's testimony, and curing the error, if any, in the failure of the court to direct a verdict for the defendant. It is said it should not have that effect, because the preliminary proof of loss was not delivered to the

company within sixty days after the loss. The fire occurred on the night of October 26, 1890; and it is undisputed that notice and proof of loss were sent to defendant at Sioux City, Iowa, by registered mail from Ulysses, Nebraska, on December 23, following. There was evidence introduced tending to prove that they were not received by the company until December 26, or sixty-one days after the loss occurred. However that may be, they were delivered by McCarty & Co. to the postmaster at Ulysses, postage thereon prepaid, in ample time to have been transmitted by the usual and ordinary course of mail to Sioux City, before the expiration of the sixty days, and they had a right to assume that the same would reach the place of destination in time. They were either miscarried in the mails or the defendant did not call for or receive them as soon as they reached Sioux City. So far as the evidence shows they may have laid in the post-office at that place a day or more before their delivery to the defendant. The jury were justified in finding that proof of loss was made in due time.

It is also urged that the preliminary proof of loss does not comply with the requirements of the policy. This objection is unavailing, as the proof furnished was never returned to McCarty & Co., or their assignee, for correction, but was retained by the defendant and by it produced on the trial. True, the company on December 27, in acknowledging the receipt of the paper, stated that it did not comply with the terms of the policy; but the only objection pointed out in the letter was that the same was not delivered within sixty days. If the proof was defective in form or substance, and the company intended to contest its liability for that reason, it should have been returned to the insured with a statement of the particulars in which the same was considered defective, in order that the defect might be corrected. Having failed so to do, the company will not now be heard to say that such proof was insuf-

ficient. (*Union Ins. Co. v. Barwick*, 36 Neb., 223.) This rule is well sustained by authorities elsewhere. (*Fireman's Ins. Co. v. Crandall*, 33 Ala., 9; *Inland Ins. & Deposit Co. v. Stauffer*, 33 Pa. St., 397; *McMasters v. Westchester County Mutual Ins. Co.*, 25 Wend. [N. Y.], 379.) In the last case the court say: "The law is well settled, that if there be a formal defect in the preliminary proofs, which could have been supplied had an objection been made by the underwriters to payment on that ground, if they do not call for a document, for instance, or make objection on the ground of its absence or imperfection, but put their refusal upon other grounds, the production of such further preliminary proofs will be considered as waived." In the case we are considering the company rejected the proof or statement of loss on the ground that it was not delivered in proper time. Had it been objected to on account of defects, they might have been remedied.

Another defense relied on here is that the suit was prematurely brought. The policy contained a stipulation that "the amount of loss or damage should be due and payable at the office in Sioux City, Iowa, after satisfactory proofs of the same, as required hereinafter, shall have been made by the assured under the conditions and limitations of this policy, and received by the company at its office, unless the property be replaced by the company, the company reserving the option to take the whole or any part of the personal property specified, at its appraised value, or to repair or rebuild, or to replace any property burned or damaged with other of like kind or quality, within a reasonable time, on giving notice of its intention so to do within sixty days after the filing of the proof of loss." It was admitted on the trial that the action was commenced on February 18, 1891, which was less than sixty days after the preliminary proof of loss was made. It is contended that plaintiff in error, under the clause of the policy quoted, had sixty days after proof of the loss was delivered to the company in

which to make its election whether it would pay or replace the property burned or damaged. It must be admitted that the policy gave the company that option, but it has waived that right by denying the execution of the contract of insurance and denying all liability thereon. There is no claim that it has ever offered to replace the property. It cannot now urge that the suit was instituted too soon. The authorities sustaining this proposition are numerous.

In *Norwich & New York Transportation Co. v. Western Massachusetts Ins. Co.*, 31 Conn., 461, it was held that the denial of all liability and refusal to pay the loss was a waiver of the stipulation in the policy allowing the insured sixty days within which to pay the loss, and that the suit could be maintained on the policy at once. To the same effect are *Phillips v. Protection Ins. Co.*, 14 Mo., 220; *Allegre v. Maryland Ins. Co.*, 10 Md. App., 408.

Counsel contend that no portion of the premium on the policy had been paid at the time of the fire; hence, it is urged there can be no recovery. The policy in suit provides: "This company shall not be liable by virtue of this policy, or any renewal thereof, until the premium therefor shall be actually paid to this company. Nor shall this company be liable for any loss under this policy occurring at a time when any note, or part thereof, given for a part or whole of his premium shall be due and unpaid." When the policy was delivered the premium was neither paid, nor was any note given therefor. While the policy recites on its face the payment of $60, the full amount of the premium charged on the risk, as a matter of fact the agent issuing the policy extended to the insured credit for the premium. Some time before the fire, Thomas McCarty, one of the firm of McCarty & Co., went to C. I. Rafter, who executed the policy on behalf of the company, and was then its authorized agent, and offered and tendered to him the full amount of the premium due. Mr. Rafter, who was at that time preparing to take the train at Ulys-

ses, replied, "'Wait until I come back;' I says, 'It's all right,' and Tom says, 'No.' He says, 'Wait and I will give you the money.' I says, 'I aint got time, because the train is coming, to get this money of you,' and I went off on the train." Before Mr. Rafter returned home, he being absent about thirty days, the fire occurred. Subsequently, but prior to bringing the suit, the full premium was paid to the company, which returned it to the plaintiff. The latter sent the money again to the defendant, and it has since retained the same, with full knowledge of all the facts. We are convinced, under the circumstances disclosed by this record, that the payment of the premium, although not actually received until after the fire, should be regarded as having been made as of the date the money was tendered to the company's agent, Mr. Rafter. It was the fault of the latter that the premium was not received prior to the loss. The doctrine that an act done at one time may take effect as of a prior date, by relation back, is applicable. (*Heaton v. Manhattan Fire Ins. Co.*, 7 R. I., 502; *Dayton Ins. Co. v. Kelly*, 24 O. St., 345; *Miller v. Brooklyn Life Ins. Co.*, 79 U. S., 285; *Franklin Ins. Co. v. Colt*, 87 U. S., 560.) The case last cited was this: On August 26, 1870, the agents of the company entered into a parol contract of insurance with Colt to insure his premises in the sum of $10,375 for five years for a specified premium. Credit was given until October 1 following for the payment of the premium, it being agreed that the agents should retain the policy in their possession, when issued, for Colt until October 1. The property was destroyed by fire on September 20, 1870. At the request of Colt, after the fire, the agents filled out a blank policy of the company, properly signed and countersigned, but they declined to surrender the possession of the same to Colt until they should have consulted the company. The company had no knowledge of the transaction prior to the loss. The policy was subsequently returned by the agents to the company. Colt

tendered to the agents the premium on September 22, 1870, and demanded the policy, which request was not complied with. He again tendered the premium and demanded the insurance money, which was refused, and he thereupon brought suit against the company to recover the amount of his loss. The court charged the jury to return a verdict for the plaintiff. The supreme court, on a review of the case, held that the policy was valid and binding, and affirmed the judgment of the circuit court.

The seventh instruction given to the jury in the suit at bar, by the court on its own motion, reads as follows:

"7. The jury are instructed that it was incumbent on the plaintiff, under the terms and conditions of the policy issued by defendant to him or his assignee, that the premium must have been paid before loss, in order to hold the defendant liable on the policy; and if they find from the evidence that premium was tendered, or that C. E. McCarty & Co. offered to pay the same to the agent of the defendant, and that for any reason the same was not accepted at that time and a loss occurred after the tender or offer of payment of premium, the defendant would be liable for that loss."

This instruction, when considered in connection with the other portions of the court's charge, was not prejudicial to the rights of the plaintiff in error. In fact we are inclined to the opinion, after a careful perusal of the testimony in the bill of exceptions, that the court would have been warranted in directing the jury to return a verdict for plaintiff.

On the trial, J. T. McCarty, of the firm of C. E. McCarty & Co., on being interrogated as to the value of the stock of goods covered by the policy at the time of the fire, answered "$3,500 to $4,000." The defendant thereupon moved to strike out the answer of the witness "for the reason that it is not competent for the witness to state in this wholesale way what the value of the goods was.

He should go on and enumerate the different articles, and not be allowed to state or lump the value." The motion was overruled, and this ruling is claimed to be erroneous. The testimony was received without objection, therefore the question of its competency was waived. (*Palmer v. Witcherly*, 15 Neb., 98; *Oberfelder v. Kavanaugh*, 29 Neb., 427.) Moreover, we think it was competent for the witness to state the value of the stock in the store. Such evidence was not the statement of a conclusion, but of a fact. If the defendant desired, he could, on cross-examination, have interrogated the witness as to the value of the different articles and kind of goods.

The case of *Schlesinger v. Springfield Fire & Marine Ins. Co.*, 26 Jones & Spencer [N. Y.], 112, cited in the brief of plaintiff in error, is not in point upon the question we have just been considering. That was an action upon an insurance policy and one of the plaintiffs was asked, "What was the amount of loss and damage sustained by the plaintiffs by reason of the fire?" The court was clearly right in holding that the question was improper, as it called for the conclusion of the witness, and invaded the province of the jury. It was for the triers of fact to determine from all the evidence the amount of the damages which the plaintiffs sustained.

J. T. McCarty, a witness for plaintiff, was asked on cross-examination: "Who made the application for this insurance?" The plaintiff objected for the reason that it was immaterial, incompetent, and not cross-examination, and for the further reason that it had not yet been shown that an application had been made. The objection was sustained. It was not a proper examination, as the witness had not been questioned on the subject of an application. He had merely testified to the fact of the delivery of the policy to the firm of C. E. McCarty & Co. The question also assumed that an application had been made, when there was no evidence on the subject, and for that reason was objectionable.

Objections were sustained on the trial to several questions propounded to witnesses for the defendant on direct examination. These rulings cannot be reviewed, inasmuch as counsel for the company made no statement to the trial court, at the time, of what he expected to prove by the witness being examined. (*Burns v. City of Fairmont*, 28 Neb., 866, and cases there cited.)

Such of the rulings of the court on the admission and exclusion of testimony as are properly raised by the bill of exceptions we have carefully examined, and find no reversible error therein. The verdict is in accordance with the evidence. The judgment is right and is

AFFIRMED.

POST, J., not sitting.

JAMES H. BLENKIRON ET AL. V. STATE OF NEBRASKA.

FILED APRIL 3, 1894. NO. 5472.

1. **Jurors:** CHALLENGES: EVIDENCE: REVIEW. Where the trial court overruled defendant's challenge for cause to a juror, and the record is silent as to the manner in which the juror was dismissed, and does not show that the defendant was compelled to exhaust his peremptory challenges to exclude him from the jury, and the record does disclose that the party challenged was not one of the jurors who tried the case, *held*, that, so far as indicated by the record, there was no prejudicial error in overruling the challenge to the juror.

2. **Witnesses.** In the cross-examination of a witness it is competent to interrogate him in regard to any interest, pecuniary or otherwise, and the extent of such interest he may have in the result of the trial of the case in which he is testifying, as affecting his credibility.

ERROR to the district court for Cedar county. Tried below before NORRIS, J.

H. A. Miller & Son, B. Ready, and *Wilbur F. Bryant,* for plaintiffs in error.

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

HARRISON, J.

On the 21st and 22d days of October, 1891, the plaintiffs in error, James H. Blenkiron and John C. Blenkiron, were tried in the district court of Cedar county, Nebraska, before Judge Norris and a jury, on a charge of felonious assault committed upon one A. G. Bagley, and the trial resulted in a verdict against the Blenkirons of assault and battery. They filed a motion for a new trial, which was argued and overruled, and the court sentenced them, the sentence being that they should pay a fine of $100 and the costs of the prosecution in the sum of $235.96. The defendants have come to this court by petition in error and ask that the case be reviewed.

The first error assigned, which is argued in the brief of counsel for plaintiffs in error, is the sixth assignment of the petition, and states that "the court erred in overruling the defendants' challenge for cause of the juror Marcellus S. Merrill." The portion of the record referring to the impaneling of the jury, in which mention is made of Marcellus S. Merrill, and the only place where we find anything regarding this assignment of error, is as follows: "We challenge the juror M. S. Merrill, because he has served as a juror in Cedar county, Nebraska, in the past two years, when called as talesman, and we offer to prove that he has so served. Challenge overruled by the court. Defendants excepted."

We are nowhere informed in the record of what became of Mr. Merrill or how he was dismissed from the jury, or whether the defendants were forced to exhaust one of their peremptory challenges in order to exclude him from the

jury, but the record does disclose the fact that he was not one of the jurors before whom the defendants were finally tried. The record is also silent on the question of whether the juror objected to by the defendants was one of the regular panel of jurors or was called as a talesman. If there was any error in overruling the challenge to the juror Merrill, it was, so far as the record discloses, error without prejudice. In *Bohanan v. State*, 15 Neb., 209, it was held: "Although there may be error in overruling a challenge to a juror for cause, yet if the prisoner be not compelled to exhaust his peremptory challenges to exclude him from the panel, it is error without prejudice." And in the text of the opinion it is stated by LAKE, C. J.: "The challenge of this juror for cause ought to have been sustained, but as he did not sit in the case, having been excused or challenged peremptorily, and it not being shown that to exclude him the prisoner was compelled to exhaust his right of challenge, the overruling of it caused no injury." (See also *Palmer v. People*, 4 Neb., 68; *Burnett v. Burlington & M. R. Co.*, 16 Neb., 332; *Nowotny v. Blair*, 32 Neb., 175.)

The next assignment of error which we will consider is that the court erred in not allowing certain questions to be answered by the witness Bridenbaugh on cross-examination, in reference to his connection as attorney with a civil suit for damages by Bagley against the defendants, based upon the same state of facts or alleged assault as a cause of action, as the criminal charge or complaint in the present case. We will give the portion of the cross-examination of the witness, in which it is claimed the error occurred, in full. It is not very lengthy, and the point will probably be better understood. It was as follows:

Q. What is your business or profession?

A. Why, collecting and practicing law.

Q. I notice this case No. 134, Albert G. Bagley against James H. Blenkiron and John C. Blenkiron, of the civil docket, with John Bridenbaugh marked as attorney for

the plaintiff. You are the same Bridenbaugh, are you, that is marked as attorney for the plaintiff there?

State objects, as being improper cross-examination, incompetent, irrelevant, and immaterial. Objections overruled by the court. State excepted.

A. I have a case against these parties in which Mr. Bagley is the plaintiff and I am attorney for him. I do not know whether that is the case or not.

Q. The case that you have for Mr. Bagley against the Blenkirons is a case for civil damages for this alleged assault, isn't it?

State objects, as being incompetent, irrelevant, and immaterial, and improper cross-examination. Objections overruled by the court. State excepted.

A. Yes, sir; it is a case for civil damages.

Q. For civil damages for this same alleged assault?

A. I think so.

Q. Don't you know so?

A. Why, yes, I said I did.

Q. You prepared the papers in that case, did you not?

A. Yes, sir.

Q. In that petition in that case you allege that the doctor's bill is five dollars, don't you?

State objected, as incompetent, irrelevant, and immaterial, and not proper cross-examination. Objections sustained by the court. Defendants excepted.

Q. That suit is for $2,500 damages?

State objects, as being incompetent, irrelevant, and immaterial, and improper cross-examination, and merely a scheme or device on the part of the attorney to get something before the jury which he knows he is not entitled to. Objections overruled by the court. State excepted.

A. I think that is the amount, yes, sir, that we are seeking to recover.

Q. Isn't it a fact, Mr. Bridenbaugh, that your fee in that case is contingent on what you recover?

State objects, as being incompetent, irrelevant, and immaterial, and not proper cross-examination. Objections sustained by the court. Defendants excepted.

* * * * * * *

Q. Now, have you had any conversation with Mr. Blenkiron about these transactions since that time?

State objected, as being incompetent, irrelevant, and immaterial, and not proper cross-examination. Objections overruled by the court. State excepted.

A. Why, I don't recollect any conversation with him; no, sir.

Q. Were you at the preliminary examination of this case?

A. I don't remember whether I was or not. I have forgotten all about whether I was or not. I don't recollect any preliminary examination that was had.

Q. You have a law office here in town, haven't you?

A. Yes, sir.

Q. The night before the preliminary examination in this case didn't you ask the two defendants to go up into your office with you?

State objects, as being incompetent, irrelevant, and immaterial, and improper cross-examination. Objections overruled by the court. State excepted.

A. I met him on the north side of the Hartington State Bank there in the evening, and he said he wanted to speak to me, and I stopped, and we stood there a moment and John C. Blenkiron came up. He was right at hand there, close, and James H. Blenkiron came to me and asked me,—he said, "I want to know what you are going to swear to in that case." I said, "Mr. Blenkiron, if I testify in the case, why you will probably hear it." Otherwise I didn't want him to talk to me about it. He said he didn't want me to testify to anything but the truth. I said: "Mr. Blenkiron, I am not in the habit of testifying to anything but the truth and I wish you would go away and let me

alone." What I believed was that he was trying to tip me or buy me off. I intimated very strongly that he could not do anything of the kind. That was the conversation.

Defendants move to strike the last part of the last above answer from the record. Motion sustained.

Q. Did they go with you to your office at that time?

A. Then?

Q. I asked you if they went with you to your office at that time?

A. They were in my office that evening; yes, sir, after that.

Q. And they went right up with you after that?

A. I think they did. I think they went up with me.

Q. Didn't you ask them to go with you?

A. Well, I will tell you how that occurred.

Q. Didn't you ask them to go up with you?

A. I finally asked them to go up into my office; yes, sir, but it was after some other conversation that we had.

Q. Well, now, when they were up in your office isn't it a fact that you presented a bill to James H. Blenkiron, the defendant here, for attorney's fees and demanded payment —for sixty-five dollars—and did you not say that if he refused to pay the bill that you would testify against him in this case and do him all the harm you could?

A. I didn't tell him any such thing.

Q. That is false, is it?

A. The latter part is entirely false.

State objects, as being incompetent, irrelevant, and immaterial, and not proper cross-examination, and moves the court to strike the answer from the record. Objections and motion overruled. State excepted.

Q. Mr. Bridenbaugh, is it not a fact that on the evening before the preliminary examination in this case, at Hartington, Cedar county, Nebraska, in your office, in the presence and hearing of these defendants, James H. Blenkiron and John C. Blenkiron, you presented a bill for sixty-

five dollars attorney's fees to the defendant James H. Blenkiron and demanded payment, and stated to him that if he did not pay that bill that you would testify against him in this case and do him all the harm you could, or words to that effect?

State objects, as being incompetent, irrelevant, and immaterial, and there is no proper foundation laid for the question of impeachment. Objections sustained by the court. Defendants excepted.

The action of the court in sustaining the objection to the last interrogatory above quoted it is insisted was erroneous, and possibly it was. This we will not decide, but if the defendants were entitled to thus interrogate the witness on cross-examination and to receive his answer thereto for the consideration of the jury for the purpose of affecting the credibility of the witness, or that they might introduce evidence afterward contradictory of his answer, it will be noticed that immediately prior to this question in the cross-examination the witness was asked this same question, almost *verbatim*, and answered it; hence, if sustaining the objection to the second interrogatory on the same subject was error, it was without prejudice, as the defendants had received the full benefit of it in former question and answer and it was not prejudicial error to deny them a repetition of it.

Among the interrogatories propounded to the witness Bridenbaugh during his cross-examination, and given in the part herein quoted, will be found the following question and disposition of it by the court:

Q. Isn't it a fact, Mr. Bridenbaugh, that your fee in that case is contingent on what you recover?

State objects, as being incompetent, irrelevant, and immaterial and not proper cross-examination. Objections sustained by the court. Defendants excepted.

This evidence was sought to be drawn out on cross-examination of this witness to show his interest in the re-

sult of the criminal case, and that he would possibly have a strong desire that the defendants should be convicted.

Great latitude is allowable and should always be given in the cross-examination of a witness on his connection with the subject-matter being tried and about which he is called to testify, and whether it is of a nature to awaken in him a lively and possibly active interest in the outcome of the trial.

In this case it appears that the witness Bridenbaugh was attorney for Mr. Bagley in a civil action for damages against defendants herein, predicated upon the injuries claimed to have been received at the time of the alleged assault, for which they were being tried in this case and in the trial of which he was at the time of cross-examination giving testimony, and the defendants had an undoubted right to interrogate him fully in regard to his interest in the civil suit and to ascertain the exact extent of the interest, whether strong or weak, as affecting his credibility as a witness. In the case on trial he was the only witness, except Mr. Bagley and the defendants, who was present and saw the fracas or affair out of which the prosecution of defendants arose, and hence was a very material witness, and the weight and credibility accorded to his testimony by the jury would exert a strong influence and perhaps a controlling one on the conclusion or verdict to be arrived at and returned by them.

The interrogatory under consideration was, we think, competent, and the defendants entitled to ask it and have it answered, for if answered in the affirmative it would have disclosed that the witness was directly interested in the civil action, almost or quite the same as a party to it, and the defendants should have been allowed, if such was the fact, to show it to the jury in this case as a fact or circumstance to be considered by them when determining the credibility of the witness. The extent of his connection with or interest in the civil case was just as material as the main fact that he was connected with it or had an interest

in it. In the case of *Olive v. State*, 11 Neb., 1, one of the witnesses for the state, who was attorney for the prosecution, was asked during cross-examination in the district court whether he was not interested in a case brought against the prisoner Olive, by one of the survivors of the deceased, to recover $5,000 damages. The attorney for the state objected to the question, as "immaterial and improper cross-examination," which objection was sustained, and on review of the case in this court it was held: "Any interest that a witness may have in the result of the trial of a case in which he is testifying, whether pecuniary or other, may be called out on his cross-examination, as affecting his credibility." LAKE, J., says in the opinion: "In this we think the court erred. The evidence thus sought was material, tending, as it did, to show that the witness was interested in procuring a conviction, and as placing him in his real attitude toward the prisoners before the jury, by which they could better judge his testimony, and it was proper to bring this out on the cross-examination. Any interest which a witness may have in the result of a trial in which he is testifying, whether pecuniary or other, may be called out on his cross-examination, as affecting his credibility. Mr. Greenleaf says: 'The power of cross-examination has been justly said to be one of the principal, as it certainly is one of the most efficacious, tests which the law has devised for the discovery of truth. By means of it the situation of the witness with respect to the parties and to the subject of litigation, his interest, his motives, his inclination and prejudices, * * * are all fully investigated and ascertained, and submitted to the consideration of the jury before whom he has testified, and who have thus had an opportunity of observing his demeanor and of determining the just weight and value of his testimony.' Where it is fully understood by the presiding judge that these are among the purposes of a cross-examination, he should be more inclined to enlarge than to narrow the limits to which

it may be carried. Prejudicial errors in cross-examination, it will be observed, occur most frequently by restricting too much the field of inquiry." In *State v. Collins*, 33 Kan., 77, it was held: "Great latitude should be allowed on the cross-examination of a witness where it is claimed that his testimony is affected by the friendship or enmity he has toward either party in the action, and as a general rule the party against whom the witness is produced has a right to show everything which may in the slightest degree affect his credibility. The admission by a witness of ill feeling or prejudice against one of the parties to an action does not preclude such party from inquiring into the degree or intensity of the hostile feeling, nor from cross-examining the witness as to the character and extent of the prejudice he may have against such party." (See also *Kellogg v. Nelson*, 5 Wis., 125; *State v. Krum*, 32 Kan., 375; Wharton, Criminal Evidence, secs. 376, 476, 485; *Morgan v. Freese*, 1 Am. Law Reg., o. s., 92.) The court erred in not allowing the witness to answer the question, and for this error the judgment must be reversed and the cause remanded.

There are some other assignments of error, but as the main one refers to the sufficiency of the evidence to support the verdict and its discussion would involve review and expression of opinion upon the testimony, inasmuch as there must be a new trial, we will not discuss the evidence or express an opinion as to its weight or sufficiency.

REVERSED AND REMANDED.

POST, J., not sitting.

J. B. SPAULDING & SONS v. GEORGE W. OVERMIRE.

FILED APRIL 3, 1894. No. 4877.

Replevin: ATTACHED PROPERTY: JUSTIFICATION OF ATTACHING OFFICER. Where an officer attached property which was afterwards taken from him under a writ of replevin issued in an action by parties who claimed to be the owners and entitled to the immediate possession of the property, it devolves upon the officer to show his authority by a regularly issued writ of attachment. If he alleges as a justification his possession under the attachment process, this is necessary to prove his right of possession and the value of his possession if the action is decided in his favor.

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

R. A. Moore, for plaintiffs in error, cited: *Gamble v. Wilson*, 33 Neb., 270; *Schars v. Barnd*, 27 Neb., 97; *Williams v. Eikenberry*, 25 Neb., 721; *Gates v. Parrott*, 31 Neb., 581; *Paxton v. Moravek*, 31 Neb., 305; *Thornburgh v. Hand*, 7 Cal., 555; *Matthews v. Densmore*, 109 U. S., 216; *Oberfelder v. Kavanaugh*, 21 Neb., 483; *McDonald v. Moore*, 21 N. W. Rep. [Ia.], 505; *Rock v. Singmaster*, 17 N. W. Rep. [Ia.], 744.

Greene & Hostetler, contra.

HARRISON, J.

On the 24th day of May, 1888, the plaintiffs filed a petition and affidavit in replevin in the district court of Buffalo county, by which they claimed to be the owners and entitled to the immediate possession of a set of plumbers' and steamfitters' tools and an entire stock of plumbing goods, contained in a room in a building known as the Scott Block in Kearney, Nebraska, claiming the ownership by virtue of a chattel mortgage. A writ was issued and served, an un-

dertaking filed, and the property delivered to plaintiffs. The defendant George W. Overmire filed an answer, which was as follows:

"Now comes the defendant and for answer to the plaintiffs' petition herein alleges that on the 21st day of May, 1888, orders of attachment were issued out of the county court of Buffalo county, Nebraska, in the case of W. J. Cooper and Cole Brothers against Jos. Walther and Charles A. Bartz, and the case of the U. S. Wind Engine & Pump Co. against Jos. Walther. The claim of the said W. J. Cooper and Cole Brothers as aforesaid aggregated $529.27, and the claim of the said Wind Engine & Pump Company aggregated $400.

"2. That on said 21st day of May, 1888, as aforesaid, this defendant was the duly elected and qualified constable in and for Kearney, Buffalo county, Nebraska, and that as such constable and in pursuance of the command contained in said orders of attachment the said defendant did, on said date as aforesaid, levy upon and attach the goods and chattels described in plaintiffs' petition as the property of said Jos. Walther and held the same to satisfy said claims as aforesaid, and so held said property at the commencement of this action.

"3. The defendant for further answer to plaintiffs' petition says that said Jos. Walther and Geo. P. Antley executed to said plaintiffs the chattel mortgage described in said petition; that the said mortgage covered and described a stock of goods and merchandise in the city of Kearney, Nebraska; that said mortgagors were allowed, with full knowledge and consent of said mortgagee, to remain in possession of said stock of goods and to sell and dispose of said mortgaged property and use the proceeds of said sales for their own use and benefit, and that said proceeds of said sales were not applied upon said debt secured by said mortgage, and that said mortgage was therefore fraudulent and void as to this defendant.

"4. The defendant denies each and every allegation in said petition contained not hereinbefore specifically admitted or denied."

To this answer the plaintiffs filed the following reply:

"Now come the plaintiffs and deny each and every allegation contained in the answer.

"2. They aver that the mortgage was for a valuable consideration and made in good faith for a valuable consideration and the money actually paid thereon, and aver that the goods were the same and now in the store when the mortgage was executed."

By consent of parties, W. J. Cooper and Cole Bros. and the United States Wind Engine & Pump Co. were substituted defendants in place of George W. Overmire.

As a result of a trial of the issues to the court and a jury, a verdict was returned for the defendants, finding that at the commencement of the action they were entitled to the possession of the property in controversy and the value of the possession to be the sum of $627.43, and assessing their damages at the sum of ten cents.

Plaintiffs filed a motion for a new trial, which was overruled, and judgment was rendered on the verdict in the following words and figures:

"And judgment is hereby rendered by the court, against the plaintiffs in favor of defendants, in the sum of $627.43 and costs."

Plaintiffs file the record in the case, bill of exceptions, and petition in error in this court and ask a reversal of the judgment because of certain errors which they allege occurred during the trial of the cause in the court below. Plaintiffs' counsel states in his brief that there has been filed in this court a stipulation between plaintiffs and W. J. Cooper and Cole Bros., defendants, authorizing this court to decide the case here in favor of plaintiffs in error, of which the following is a copy according to the brief:

"It is hereby stipulated that the defendants W. J.

Cooper and Cole Bros., who were substituted as one of the defendants in the case, hereby withdraw their answer and make no further appearance, and agree that as to them the plaintiffs may have judgment for the possession of the property described in said petition at plaintiffs' cost, and acknowledged full satisfaction of said judgment set up in said answer against the said Walther, and that said appeal to the supreme court can be decided in favor of the plaintiffs in error and that no personal judgment shall be rendered against Cooper and Cole Bros."

We have searched through the entire record for the foregoing agreement, but have been unable to find it and can therefore give it no effect.

The first points argued in the brief of counsel for plaintiffs, viz., that there was no final judgment rendered, but only an order made that one should be rendered, and that the judgment, if one was rendered, was a direct money judgment when it should have been in the alternative for a return of the property or the value of it, or its possession in case the return could not be made, were not mentioned in the petition in error and therefore cannot be considered. (*Birdsall v. Carter*, 11 Neb., 143.)

The plaintiffs assign as error in their petition in error, and it is also a part of their motion for a new trial, that there was no evidence introduced of defendants' lien by attachment on the property in controversy. An examination of the transcript of evidence in the case, we are satisfied, shows this statement of the plaintiffs in their petition in error to be a true one. There was no evidence on the subject of the issuance and levy of the attachments, except some recitals contained in the entries on the docket of the county judge, made when the cases in which the attachments, under which Constable Overmire alleges in his answer in this case that he claims the goods, were pending in the county court, and these recitals are confined to the fact of the issuance of some attachments and the filing of mo-

tions in the cases to dissolve the attachments. This evidence was not sufficient. In *Williams v. Eikenberry*, 22 Neb., 211, it was held: "Where an officer attaches property which is subsequently replevied from him by a stranger who claims title and the right to its possession, and such officer seeks to justify his possession under his attachment process, it is incumbent upon him to prove his authority by the order of attachment, in order to show his right to possession, and the measure of his damages, if successful in the suit." REESE, J., in the body of the opinion states: "By this rule it is very clear that the officer levying the writ, and seeking to hold the property in replevin proceedings against him, must at least prove his right by the introduction of the writ, which could be his only authority for the seizure." (See also *Oberfelder v. Kavanaugh*, 21 Neb., 483.)

The evidence, measured by the rule announced in the cases cited above, which is unquestionably the true rule, was insufficient to support the verdict, and the judgment is therefore reversed and the case remanded.

REVERSED AND REMANDED.

POST, J., not sitting.

JOHN D. THOMAS V. CHARLES W. EDGERTON, CONSTABLE, ET AL.

FILED APRIL 3, 1894. No. 4671.

1. **Constables:** APPROVAL OF INSUFFICIENT REPLEVIN BOND. In an action on the bond of a constable for having received and approved an insufficient undertaking in replevin in an action pending before a justice of the peace, the provisions of section 189 of the Code of Civil Procedure, requiring the defendant in re-

plevin, within twenty-four hours of the time of the giving of the undertaking referred to, to give notice to the sheriff that said defendant excepted to the sufficiency of the sureties on the replevin undertaking, is not applicable, and proof of such notice was improperly required as a condition precedent to a right of recovery upon the constable's bond.

2. The former decision, reported in 36 Neb., 254, overruled.

REHEARING of case reported in 36 Neb., 254.

Bradley & De Lamatre, for plaintiff in error.

W. S. Felker, *G. A. Rutherford* and *George H. Hastings*, *contra:*

Under similar statutes to ours, other courts have held that the officer was liable only where the defendant in replevin suit excepts to the sufficiency of the sureties on the bond. (*Westervelt v. Bell*, 19 Wend. [N. Y.], 531; *Wilson v. Williams*, 18 Wend. [N. Y.], 585; Cobbey, Replevin, sec. 695, and cases cited.)

RYAN, C.

There was filed in this cause on February 15, 1893, an opinion by MAXWELL, then chief justice of this court. In this opinion, reported in 36 Neb., on pages 254 *et seq.*, he made use of the following language: "This is an action brought by the plaintiff against Edgerton, who is a constable in the city of Omaha, and his sureties, for approving an insufficient undertaking given by one Helm in an action of replevin. The facts are substantially as follows: In December, 1886, one Olive Helm began an action in replevin against the plaintiff before a justice of the peace to recover the possession of certain goods to which she claimed the right of possession. The order of replevin was placed in the hands of Edgerton for service. He thereupon seized the goods and delivered them to Helm on the making and delivery to him of an undertaking signed by one J.

F. Clapp as surety. The judgment in the replevin action was in favor of the plaintiff for the return of the goods or the value thereof, assessed at $90. The goods could not be found, and it is alleged that Clapp is insolvent, and was known to Edgerton to be so when he approved the bond." The judgment of the district court, in favor of the defendant, the constable, and his sureties, was affirmed on the former hearing in this court in which the above mentioned opinion was filed. A rehearing was afterwards granted, in consequence of which the case is again presented for determination.

On the former hearing it was assumed that the failure of the defendants to give notice of exceptions to the sufficiency of the sureties on the replevin undertaking within twenty-four hours after the same was taken was a waiver of all objections which might be made as to the sufficiency of such sureties. The case presents no other question on rehearing. Section 189 of the Code of Civil Procedure requires that the defendant, within twenty-four hours from the time the undertaking in replevin is taken, shall give notice to the sheriff that he excepts to the sufficiency of the sureties, but that if he fails to do so he must be deemed to have waived all objections to such sureties. The following sections are found under the general provisions regulating the replevin of property: Section 1085 is as follows: "The provisions of this Code which are in their nature applicable, and in respect of which no special provision is made by statute, shall apply to the proceedings before justices of the peace." This section is found under title 30 of the Code of Civil Procedure, which refers exclusively to the jurisdiction and mode of procedure before justices of the peace. Under the same title are found sections 1037 and 1040 of the aforesaid Code, which are in the following language:

"Sec. 1037. The officer shall not deliver to the plaintiff, his agent or attorney, the property so taken, until there has been executed by one or more sufficient sureties of

the plaintiff a written undertaking to the defendant in at least double the value of the property taken, but in no case less than fifty dollars, to the effect that the plaintiff shall duly prosecute the action and pay all costs and damages which may be awarded against him."

"Sec. 1040. If the undertaking required by section 1037 be not given within twenty-four hours of the time of the taking of the property under said order, the officer shall return the property to the defendant; and if the officer deliver any property so taken to the plaintiff, his agent or attorney, or keep the same from the defendant without taking such security within the time aforesaid, or if he take insufficient security, he shall be liable to the defendant in damages."

The special feature of difference between the provisions of section 189 and those of sections 1037 and 1040, read together, is that no notice of exception is required of the defendant in the last named sections, while it is in section 189 expressly required to be given to the sheriff within the time fixed, otherwise objections must be deemed waived. The undertaking was approved in the replevin proceedings pending before the justice of the peace, and in respect thereto the special provisions of sections 1037 and 1040 applied and governed, rather than the general provisions contained in section 189. There was, therefore, no requirement of notice of exception to the sufficiency of the sureties, and it was error to require proof of compliance in this respect with the provisions of section 189 to entitle plaintiff in this action to a judgment. The judgment of the district court is

REVERSED.

POST, J., not sitting.

OMAHA STREET RAILWAY COMPANY v. JOHN DUVALL.

FILED APRIL 3, 1894. No. 5520.

1. **Street Railways**: PERSONAL INJURIES: NEGLIGENCE: INSTRUCTIONS. An instruction that if the motorman in charge of a street car could, in the exercise of reasonable care, have seen the plaintiff in time to have checked his car after plaintiff's horse sprang upon the track and before the car collided with plaintiff's horse, and that if plaintiff was not guilty of negligence which contributed to his injury, then the defendant would be liable, *held*, properly given, qualified as it was by an immediately preceding instruction, that if the injury resulted from the sudden fright of plaintiff's horse, by reason of which said horse sprang in front of the moving car, and that if the motorman in the exercise of reasonable care could not have checked the car in time to have prevented the collision, the defendant would not be liable; these alternatives presenting as they did the only disputed propositions of fact involved.

2. ———: ———: ———: ———. As applied to the liability of street railway companies whose cars are propelled by means of electricity, the following instruction was proper: "The violation of any statutory or valid municipal regulation, established for the purpose of protecting persons or property from injury, is of itself sufficient to prove such a breach of duty as will sustain a private action for negligence, if the other elements of actionable negligence concur. Thus, the violation of the statutes or ordinances regulating the speed of vehicles, horses, or trains or street cars is such a breach of duty as may be made the foundation of an action by any person belonging to the class intended to be protected by such regulation, provided he is specially injured thereby."

3. ———: ———: ———. Street railway companies have no such proprietary interest in that portion of the streets upon which their tracks are laid as limits the right of the general public also to use the same territory as a part of the public highway. Whether an injury resulting from such joint use is attributable solely to the negligence of the railway company, or is wholly or in part imputable to contributory negligence of the person by whom injury has been sustained, is a question of fact to be determined by the jury.

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

John L. Webster, for plaintiff in error.

Lee S. Estelle, Crow, Johnson & Cooper, contra.

RYAN, C.

This action was begun in the district court of Douglas county by the defendant in error, for the recovery of damages alleged to have been inflicted by an electric motor car negligently operated by the agents of plaintiff in error. In consequence of the negligence alleged the defendant in error averred that the aforesaid car ran against the horse on which he was riding in the streets of the city of Omaha with such force as to throw the defendant in error upon the pavement with such violence as to produce concussion of his brain and spine, whereby it resulted that the defendant in error became so insane that he was of necessity confined in the hospital for the insane of this state from some time in March, 1890, until June 17 immediately following. There were other averments as to the nature and extent of the injuries suffered, which need not be reviewed at length, for plaintiff in error in its brief concedes that the amount of damages is not in question, provided the defendant in error was entitled to recover. Issue was duly joined upon the averments of the petition and on a trial had there was a verdict and judgment for $4,330. There was evidence introduced showing that on March 19, 1890, John Duvall (plaintiff in the district court) was riding his horse northward on that portion of Twenty-fourth street which lies on the east side of, and along the street car line on, said Twenty-fourth street at about the intersection of that street with Parker street, when plaintiff's horse became suddenly frightened and jumped upon the nearest track of the defendant; that on the farther track there was moving

from the north a train of the defendant which left no safe way of escape for plaintiff but by moving to the right with his horse; that though plaintiff's horse was ordinarily manageable, at this particular time he refused to turn to the right and leave the street railway track upon which he had jumped; that there was then at a distance of about one hundred and twenty-five feet, moving towards plaintiff at rate of speed of about twelve miles per hour, from the south, along said track last referred to, a car under the control of the employes of the defendant, by whom, with ordinary care, the dangerous situation of plaintiff could have been seen in time to have avoided a collision with him and his horse. There was evidence also that the motorman who had control of the movements of the said last-mentioned car was, at the particular time last referred to, engaged in noting the speed of a bicycle which was keeping pace with the advance of the said car, rather than keeping a lookout for objects upon the track in front of the car of which he had management, and that owing to his said inattention and the great speed with which said car was moving, it resulted that the said car struck plaintiff's horse and caused the injury as described in the petition. There was introduced in evidence an ordinance of the city of Omaha which prohibited the running of street cars in said city at a speed greater than eight miles per hour. There was sufficient evidence to justify a finding that the motor last above referred to, followed by a trailer, was moving at the rate of twelve miles per hour when the accident happened, and there was evidence to justify a contrary conclusion. The same observation is applicable to the claim that the motorman was otherwise engaged than in observing whether or not there was danger ahead, either to the cars under his charge or to individuals on the track in front of him. No review of the evidence will therefore be necessary, for the verdict is sufficiently supported by proofs as to every essential to sustain a recovery under the rule announced in

City of Lincoln v. Gillilan, 18 Neb., 114. The consideration of this case is, therefore, limited to such questions as arise upon the instructions given and refused.

In the first instruction given by the court the question to be first determined by the jury was stated to be whether or not the injury of which complaint was made was the result of negligence on the part of the defendant, its agents or employes. In respect to this order of inquiry, counsel for plaintiff in error insists that logically the inquiry should have been, first, as to the question of contributory negligence on the part of the plaintiff, and that then would follow the consideration of the question of negligence on the part of the street railway company, employes, and agents. From the standpoint of corporations of this character the relative importance of contributory negligence as defeating a recovery and such negligence as would entitle to a recovery, is usually insisted upon in this order. We are at a loss to conjecture why contributory negligence as a question of fact should be considered as of more importance than the negligence upon which the recovery is sought to be predicated. It seems to us that the order prescribed by the trial court for the consideration of these questions was the more logical, for, if plaintiff could show such negligence as caused his injuries without thereby disclosing contributory negligence on his part, he was entitled to recover (*City of Lincoln v. Walker*, 18 Neb., 244); and in the event that his own evidence disclosed no negligence on his part, he was not bound to disprove its existence. (*Oberfelder v. Doran*, 26 Neb., 118. It might be in the trial of these questions of fact that the jury would find that plaintiff's evidence entitled him to avail himself of the above rule, from which it might result that there would be no room or occasion for the consideration of the question of contributory negligence on his own part. Possibly the jury might not have been misled if the trial court had required the consideration of these questions in the order in which plaintiff in error insists

that they should have been presented to the jury. It seems to us, however, that the more natural and logical order of examination was as given by the instruction of which complaint is made.

Plaintiff in error argues that the fifth instruction given by the court declared the street railway company liable if the motorman could in the exercise of reasonable care have seen the plaintiff in time to have checked the car after plaintiff's horse sprang upon the track. The unsubstantial nature of this criticism is best exposed by quoting the instruction complained of conjunctively with that which preceded it, the connection between the two being suggested by the language with which the fifth instruction began. These instructions were as follows:

"4. If you find from the testimony that the injury to the plaintiff resulted from the sudden fright of plaintiff's horse from which he sprang in front of the moving car, and that the motorman in charge of the car could not in the exercise of reasonable care have checked the progress of the car in time to have prevented the collision with plaintiff's horse, then and in that case the defendant could not be charged with negligence and would not be liable for the injuries to the plaintiff in this action.

"5. If, however, you find from the testimony that the motorman in charge of the car could in the exercise of reasonable care have seen the plaintiff in time to have checked his car after plaintiff's horse sprang upon the track and before the car collided with his horse, and that the plaintiff was not himself guilty of negligence which contributed to his injury, then the defendant would be liable."

Instruction No. 1, asked by the plaintiff and given, was in the following language: "The violation of any statutory or valid municipal regulation, established for the purpose of protecting persons or property from injury, is of itself sufficient to prove such a breach of duty as will sustain a private action for negligence, if the other elements

of actionable negligence concur. Thus, the violation of the statutes or ordinances regulating the speed of vehicles, horses, trains, or street cars is such a breach of duty as may be made the foundation of an action by any person belonging to the class intended to be protected by such regulation, provided he is specially injured thereby." This instruction will be considered in connection with the seventh instruction asked by the defendant and refused, which was in the following language: "The jury are instructed that it was the duty of the plaintiff to keep himself and horse out of the way of the approaching train, and if he failed in that duty and allowed his horse to jump upon the track immediately in front of the northward bound train and in such close proximity thereto that the train could not be brought to a stop by the use of proper care before it collided with him, then the plaintiff has not made out his case and your verdict should be for the defendant."

Street railways are constructed and operated on public highways under grants of that right by municipal corporations. The grant is of a privilege to occupy and use these streets in conjunction with, and not to the exclusion of, the general public. It is therefore but right that the city by general ordinances shall provide restrictions and regulations under which the franchise granted must be exercised. In the city of Omaha the ordinance introduced in evidence prescribed that no street car should move over the streets at a greater rate of speed than eight miles per hour. This restriction has for its main purpose the prevention of collisions between street cars and individuals, animals, or vehicles. In argument it was insisted on behalf of the street railway company that the defendant was not a skilled horseman. There has never been any requirement, statutory or otherwise, that to a use of the streets a certain degree of skill in the management of horses is an essential prerequisite. These highways are for the use of the general public, and their use by street railway companies is tolerated not for

the purpose of encouraging monopolies, but to facilitate travel by improved methods of locomotion. The street railway companies obtain no exclusive proprietary rights in the streets by the franchises granted them. They only secure thereby the privilege of traversing the streets with such natural or mechanical means of propulsion as shall best subserve the interests of its patrons. The appropriation of the streets for any other purpose would be foreign to the use to which they were dedicated, and could not be sanctioned by municipal authority. If, therefore, the privilege granted is exercised in a manner forbidden by ordinances enacted for the safety of the general public, and injuries result, these facts afford reasonable grounds for inferring negligence prejudicial to the rights of those in whose interests and for whose protection such municipal regulations were adopted. (See *Mueller v. Milwaukee Street R. Co.*, 56 N. W. Rep. [Wis.], 914, and cases cited.) These principles were embodied in instruction No. 1, requested by plaintiff, and that instruction was, therefore, properly given. To have instructed as was requested in the seventh instruction asked by the defendant would have been little if anything short of an outrage. This instruction opened with the proposition that "it was the duty of the plaintiff to keep himself and his horse out of the way of an approaching train," etc. This instruction assumes that the street railway company was the owner and entitled to the exclusive use of such portions of the streets as were occupied by its railway tracks. While street cars were drawn by animals, there was something of a chance for the occupant of a vehicle dependent on like means of locomotion, and the danger of injury by collision was much less than at present. In the propulsion of street cars, however, such advances have been made that the use of horse power is practically obsolete. Instead, there have been substituted the most powerful agencies known, and either steam, by means of cables, or directly applied, or electricity gives

speed and irresistibility to the progress of modern street cars. In the ordinance to which reference has been made, the right to move at the rate of eight miles per hour along the crowded thoroughfares of a populous city is accorded to these powerfully equipped and dangerous vehicles. Such a rate of speed was impossible to horse cars. It is now the ordinary rate fixed—very liable at any time to be transcended at the pleasure of an irresponsible motorman. In the management of these powerful agencies there is a subserviency to the will of the agent in charge of the car, which, in the nature of things, could not exist when horses were the necessary means of propulsion. The public must depend almost entirely upon the watchful care of the motorman, and his absolute control of the machinery by which his car is impelled forward, as measuring the ability of these public vehicles to avoid the infliction of injury. There is great reason, therefore, for requiring the exercise of the utmost skill and watchfulness on the part of this agent as well as of other employes of street railway companies to avoid collision with individuals equally entitled to the use of these public highways. The change which we have noted in the methods of propulsion of street cars, and the dangers incident thereto, constitute a powerful argument for the strict application and enforcement of the principles which have been recognized as measuring the liability of street railway companies, in *Omaha Street R. Co. v. Craig*, 39 Neb., 601, filed at this term, and in *Lincoln Rapid Transit Co. v. Nichols*, 37 Neb., 332.

The judgment of the district court is

AFFIRMED.

POST, J., not sitting.

OMAHA STREET RAILWAY COMPANY V. CAROLINE LOEHNEISEN, ADMINISTRATRIX.

FILED APRIL 3, 1894. No. 5361.

1. **Negligence**: QUESTION FOR JURY. It is the settled rule in this state that where different minds may reasonably draw different inferences from the same state of facts as to whether such facts establish negligence or contributory negligence, the question of negligence must be left to the jury.
2. ——: ——. The facts of this case examined, and *held* to be within the rule above stated.

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

The opinion contains a statement of the case.

John L. Webster, for plaintiff in error:

The public has demanded rapid transit. A higher degree of care is required of the public than under the horse car system. (*Carson v. Federal Street & Pleasant Valley R. Co.*, 15 L. R. A. (Pa.), 257, and cases cited.)

Passengers and traveling public are bound to look out for approaching trains when crossing an electric street car track. (*Thomas v. Citizens Passenger R. Co.*, 132 Pa. St., 504; *Ehrisman v. East Harrisburg City Passenger R. Co.*, 24 Atl. Rep. [Pa.], 596; *Ward v. Rochester Electric R. Co.*, 17 N. Y. Supp., 427.)

When Loehneisen stepped from the car into the street he was no longer a passenger, but a traveler in the street. (*Creamer v. West End Street R. Co.*, 31 N. E. Rep. [Mass.], 391.)

To alight from one car and then attempt to cross a parallel track without looking for approaching train is negligence. (*Busby v. Philadelphia Traction Co.*, 126 Pa. St.,

559; *Schmidt v. McGill*, 120 Pa. St., 412; *Weber v. Kansas City Cable R. Co.*, 100 Mo., 194; *Chicago City R. Co. v. Wilcox*, 4 Am. R. & Corp. Cas. [Ill.], 672.)

De France & Richardson, contra:

Under all the facts and circumstances shown by the evidence in this case, the question of the negligence of the deceased was properly submitted to the jury. (*Chicago City R. Co. v. Robinson*, 127 Ill., 9; *Shea v. St. Paul City R. Co.*, 52 N. W. Rep. [Minn.], 902; *Dale v. Brooklyn City H. P. & P. R. Co.*, 1 Hun [N. Y.], 146; *Orleans Village v. Perry*, 24 Neb., 833; *Atchison & N. R. Co. v. Bailey*, 11 Neb., 332; *Stevens v. Howe*, 28 Neb., 547; *Johnson v. Missouri P. R. Co.*, 18 Neb., 690; *City of Omaha v. Ayer*, 32 Neb., 386; *City of Plattsmouth v. Mitchell*, 20 Neb., 228; *Terry v. Jewett*, 14 Hun [N. Y.], 399; 2 Thompson, Trials, sec. 1648.)

IRVINE, C.

The defendant in error, as administratrix of the estate of Carl Loehneisen, deceased, brought this action under chapter 21 of the Compiled Statutes, alleging negligence on the part of the street railway company, causing the death of her intestate. The errors assigned relate to the giving and refusal of instructions, and for the purpose of considering these errors we adopt the statement of facts made in the brief of the plaintiff in error. We have, however, somewhat abridged that statement. Loehneisen was forty-seven years of age, and employed as a laborer near South Omaha. On the evening of March 22, 1890, he was returning to his home in the city of Omaha on a train of plaintiff in error, hereinafter referred to as the railway company. The train was operated by electricity and consisted of two cars, one a motor, the other a trailer, both of them closed cars. The train was passing northward on Sixteenth street, and was brought to a stop at the usual place for passengers to

alight just after crossing Jackson street. The surface of the street was almost level for a considerable distance in each direction from this point. There were two tracks upon the street, four feet apart. The west track was used for south bound trains, the east track for north bound trains. Loehneisen was familiar with the street car lines and the movement of cars thereon. After the car stopped he alighted from the front platform of the trailer on the side next the parallel track, and, stepping across the space between the two tracks, and upon the parallel track, he was struck by a train going south upon that track. At the time when he stepped upon the west track he did not have time to walk across it before the south bound train struck him. There is a conflict of testimony as to the rate of speed of the south bound train and as to whether or not signals were given of its approach.

The petition alleged, as negligence upon the part of the railway company, first, the failure to provide gates or other guards upon the platforms of its cars on the side next the opposite and parallel tracks; second, the failure of the company to warn passengers, and particularly the deceased, of the danger of getting off the car on the side next the parallel track and not warning him to look out for approaching trains on that track; third, in running the south bound train at a high and dangerous rate of speed and failing to give any signal of its approach; fourth, in running the south bound train at a high and dangerous rate of speed while passing a north bound train standing still for the purpose of receiving and discharging passengers without giving signals or warning of its approach.

We quote all the instructions given by the court upon the subject of negligence and contributory negligence, and we do so not only for the purpose of more clearly presenting the questions raised as to errors in the giving and refusing of instructions, but also for the reason that these instructions, in our opinion, state concisely and correctly the

law applicable to the questions presented in this case. These instructions are as follows:

"You are instructed, first—That the ground of plaintiff's action is negligence on the part of the defendant, its agents and employes engaged in running its trains of cars, and the burden is upon the plaintiff to establish by a preponderance or greater weight of evidence the allegation in the petition that the injuries received by the deceased were caused by the negligence of defendant or its employes. The mere fact that an accident occurred whereby the deceased was killed by the cars of the defendant is not sufficient to establish the liability of the defendant. Before the plaintiff can recover she must go further and prove by a preponderance of testimony that the injury resulted from negligence or want of due care on the part of the defendant or its employes.

"Second—Negligence is the absence of such care, prudence and attention as under the circumstances duty requires should be given or exercised. It is the omission to do something which a reasonable man, guided by the considerations which ordinarily regulate the conduct of human affairs, would do in the circumstances shown; or it is the doing of something which such a prudent and reasonable man would not do in the circumstances.

"Third—It is the duty of a street railway company operating trains upon the public streets of a city in running its trains to exercise such care and precaution for the safety of passengers upon such trains or when alighting therefrom as a reasonable and prudent man would exercise (in the same circumstances), having in view the necessities of the public service and the safety of the passengers. A failure to exercise such care is negligence.

"Fourth—The mere fact that a train of cars on a street railway is run at a greater speed than is prescribed by the city ordinance is not of itself such negligence as will make the company liable; but if you believe from the testimony

that the train which struck deceased was run at a greater speed than eight miles per hour at the time of the accident, and that but for such excessive rate of speed the accident would not have occurred, then you would be justified in finding the defendant guilty of negligence in running its trains at such excessive speed; and if you should find the defendant guilty of negligence in that regard, and that the injury to the deceased resulted from such negligence while the deceased himself was in the exercise of due care, and was himself without negligence, then the defendant would be liable.

"Fifth—If you believe from the evidence that the defendant permitted passengers to get on and off of its cars at such place, and that the arrangement and use of the place of exit by passengers between the tracks was such as to afford an invitation to the deceased to get off at such place, then in such case the deceased was justified in believing that such exit was a suitable and safe place for him to alight, and was justified in believing that the defendant would exercise such care in regulating its cars that passengers would be warned and notified of the approach of cars on the parallel track while passengers were being discharged; and if you further believe that while so alighting the defendant's employes did not give the deceased notice or warning of the approach of the train going south and that the deceased himself was exercising such care and prudence as a reasonable and prudent man would exercise in the same circumstances, but notwithstanding was injured, and that his injury resulted from the negligence of the defendant, then the defendant would be liable.

"Sixth—Although you believe from the testimony that the defendant was negligent in operating its trains at the time of the accident, it is not liable, if you also believe from the testimony that the deceased himself did not exercise such care and prudence as a reasonable and prudent man ordinarily would exercise in the same circumstances.

In determining whether the deceased was guilty of negligence you will consider all the facts shown by the evidence. You will consider his knowledge of the manner in which trains were run at the place where the accident occurred, the opportunities he had for observing the approach of trains on the parallel track, and his right to assume that the defendant would not place him in a position of unnecessary danger, and any other fact or circumstances shown by the evidence. If after considering all of these you believe that a reasonable and prudent man would, before stepping upon the parallel track, listen or look for an approaching train, and that the deceased failed to do so, then such failure would be negligence on his part.

"Seventh—If you find the deceased was guilty of negligence as defined in the preceding instructions, then the plaintiff cannot recover in this action unless you further find that, after the deceased placed himself in his dangerous position, the employes of the defendant engaged in operating its trains discovered the dangerous position of the deceased, and might thereupon, by the use of such means as they had at hand, in the exercise of due care, avoid the accident.

"Eighth—You are further instructed that if you find from the evidence that the deceased was guilty of contributory negligence in stepping upon the west track without looking for an approaching train, and if you further believe from the evidence that the employes of the company in charge of the south bound train, by use of due care and diligence, could not have stopped the said train after they saw deceased on the track in front of the train, before said train struck him, then the plaintiff cannot recover in this action, and your verdict should be for the defendant."

We have but one criticism to make upon these instructions, and that is, that the court did not state to the jury in connection with the general rule as to what constitutes negligence, the particular rule of care required of carriers of pas

sengers; but if this was erroneous, it was an error of which the railway company cannot complain, and the case having gone to the jury without such a special instruction, but upon instructions stating the rule of care as applied to persons not passengers, there is eliminated from the case the question raised by the railway company as to whether or not Loehneisen had ceased to be a passenger at the time of his injury.

The whole argument of the plaintiff in error is in effect addressed to the proposition that under the facts of the case the trial court should not have left the question of contributory negligence to the jury, but should have instructed the jury that as a matter of law Loehneisen was guilty of contributory negligence in stepping upon the west track without looking for approaching trains. This argument is based upon the assignments of error relating to the giving of the fifth instruction above quoted, and to the refusal of each of the thirteen instructions asked by the company.

The case does not call for any extended discussion. The rule in this state is well established, that questions of negligence and contributory negligence are for the jury where the facts are such that reasonable minds may honestly draw different conclusions therefrom. It is only where opinions cannot reasonably differ as to the inference to be drawn from the facts that the court is justified in withdrawing the question from the jury. This rule has often been announced and adhered to. However applicable the Pennsylvania and Massachusetts cases cited by plaintiff in error may be to the law of those states, they are not applicable to the law of this state.

Our courts have never undertaken to determine, except under the limitations just stated, what facts constitute negligence or contributory negligence. Is this case within the exception? If Loehneisen left the train at a point on the street where it was proper and customary for passengers to alight, while the train was standing still for the purpose

of permitting passengers to alight; if he alighted by means of a platform and steps manifestly intended to afford a means of egress for passengers; if there was no gate or barricade to prevent his using that particular platform; if there was no warning given him of the danger of using it, then he certainly was justified in believing that due care would be exercised by the company in regard to approaching trains on the parallel track. This portion of the instruction must also be taken in connection with the sixth instruction. If, in addition to these facts, the company did not give Loehneisen warning of the approach of the south bound train, then, taking all the circumstances together, there can be no doubt that the inference of negligence upon the part of the railway company was a reasonable one and properly left to the jury. So as to contributory negligence. If the facts were found as above stated, and if it further appeared that Loehneisen did not look out for trains on the west track, still it does not follow that the only reasonable conclusion was that he was negligent. The facts would justify a reasonable inference that a man of ordinary prudence would alight at the place and in the manner provided for him by the company, relying upon the company's duty to render his egress safe and to give warning of danger of approaching trains. All these facts and inferences were left by appropriate instructions to the determination of the jury. The fifth instruction complained of, taken in connection with the others, was an absolutely correct statement of the law.

It will not be necessary to quote the instructions requested by defendant and refused. They were all in conflict with those we hold to have been correctly given. Every one of them either ignored some essential element or withdrew from the jury some element proper for its consideration.

JUDGMENT AFFIRMED.

POST, J., not sitting.

SANFORD RICHARDS V. COUNTY COMMISSIONERS, CLAY COUNTY.

FILED APRIL 3, 1894. No. 5525.

1. **Taxes:** COLLECTION. Taxes are not debts in the ordinary acceptance of the term, and generally an action at law will not lie for their collection. While the right to an action may be implied from a failure of the legislature to provide any means for enforcing the payment of taxes, yet where the legislature has provided a means of enforcing payment that remedy is exclusive.
2. ———: ———: FORUM OF JURISDICTION. Where the legislature in providing for the collection of taxes has prescribed a remedy by action under certain circumstances in a particular forum and in a particular manner, no action will lie, except under the circumstances prescribed, in the forum provided, and after the manner defined.
3. ———: ———: ———. A and B owned certain personal property assessed for taxation in Clay county. Before the tax became delinquent they removed the property from Clay county. A and B were both non-residents of the state. The county commissioners of Clay county brought an action in York county and attached property of A there situate. York county was not the place of abode of either A or B. No tax claim had been forwarded to York county, nor had the action been authorized by the treasurer or any tax collector of York county. *Held*, That the case did not fall within any of the provisions of section 89 of the revenue law providing for the collection of taxes; and the remedy provided by that law being exclusive, the action would not lie.

ERROR from the district court of York county. Tried below before WHEELER, J.

Sedgwick & Power, for plaintiff in error.

William M. Clark, contra.

IRVINE, C.

The county commissioners of Clay county began this action in the district court of York county against Sanford

Richards, Edward Bailey, and David Bailey, alleged to have been copartners under the firm name of Richards, Bailey & Bailey, to recover certain personal taxes assessed and levied for the year 1888 upon corn owned by the firm, and, at the time of the assessment, stored in cribs in Clay county. The petition, in addition to the above facts, avers that before the tax became due and delinquent the defendants sold and removed all their personal property out of Clay county; that a distress warrant was issued in Clay county and returned unsatisfied; that the firm has no partnership property out of which to make the tax. Judgment is prayed against the individuals composing the firm for the amount of the tax.

An affidavit for attachment was filed and lands of the defendant Richards were attached. The grounds of attachment were that the firm had converted and removed all its copartnership property into money and out of the county for the purpose of placing it beyond the reach of the plaintiffs; had absconded with intent to defraud the plaintiffs, and that each and all of the defendants were non-residents of the state of Nebraska.

No service of summons was had except upon Richards. The proceedings in the case were somewhat complicated and suggest a number of questions relating to practice; but the conclusion reached upon the principal question involved avoids the necessity of detailing the proceedings and of deciding other questions.

To the petition there was finally filed an answer in the nature of a plea in abatement. This answer alleged that the defendant had not resided in York county since 1887; that York county was not his place of abode or adopted residence; that the tax claim set out in the petition had never been forwarded to the county treasurer of York county, nor to any tax collector of York county; and that the action had never been authorized by the county treasurer, nor any tax collector of York county. These alle-

gations were all admitted by the reply. The answer further averred that the plaintiffs had no legal capacity to sue; that the court had no jurisdiction of the subject-matter of the action, and that there was a defect of parties defendant. These latter allegations were denied, but they are all conclusions of law.

The case was tried upon the pleadings without any evidence, and judgment rendered for the plaintiffs, from which the defendant Richards prosecutes error.

The action is one aided by attachment by the commissioners of Clay county in the district court of York county to collect personal taxes levied in Clay county against one who is a non-resident of the state. Will such an action lie?

Judge Cooley, in his work on Taxation, second edition, page 16, states that in general the conclusion reached by the courts has been that when the statute undertakes to provide remedies and those given do not embrace an action at law a common law action for the recovery of the tax as a debt will not lie. Numerous authorities are cited in support of that doctrine. Similar language in the first edition of Cooley on Taxation was cited with approval by this court in *Nebraska City v. Nebraska City Hydraulic Gas Light & Coke Co.*, 9 Neb., 339, where it was held, after a review of the authorities, that in a suit against a city to recover for gas furnished it, taxes due the city from the gas company could not be set off, and this for the reason that the method provided by statute for the enforcement and collection of taxes is exclusive.

In *Millett v. Early*, 16 Neb., 266, it was held that where the person bound to pay the taxes had died, a claim therefor was properly filed against his estate, but the doctrine of *Nebraska City v. Nebraska City Hydraulic Gas Light & Coke Co.* was expressly adhered to, and the decision of the court was upon the ground that the filing of a claim against an estate is not an action; the court saying: "While such taxes

are not a debt in the ordinary meaning of the word, they do constitute an obligation imposed by law, for which the estate is liable."

The law is further announced in Cooley on Taxation, page 435, as follows: "Sometimes a right to bring suit is expressly given, and where it is the statute must be closely followed, and any conditions which are named must be observed." How strictly it is necessary, in the collection of taxes, to follow the method prescribed by statute may be seen by a consideration of any of the cases upon the subject. We will, however, refer particularly to *New York & Harlem R. Co. v. Lyon*, 16 Barb. [N. Y.], 651; *State v. Jones*, 24 Minn., 86; *Washington County v. German-American Bank*, 28 Minn., 360.

We think it is well settled, therefore, that a tax is not a debt capable of enforcement generally by civil action; that where an action is permitted, it is only because the statute expressly provides therefor, or by failing to provide any method, necessarily implies a right of action; and further, that when the statute does provide a method of enforcing and collecting taxes, such method is exclusive; and if it embraces a right of action, the conditions and manner of the action, as specified by the statute, must be strictly observed.

Our present revenue law does contain provisions for the enforcement and collection of personal taxes. Section 89 of that law is as follows:

"Sec. 89. No demand for taxes shall be necessary, but it shall be the duty of every person subject to taxation under the laws of the state to attend at the treasurer's office at the county seat and pay his taxes; *Provided*, That in counties under township organization the town collector shall, as soon as he receives the tax book or books, call at least once on the person taxed at his place of residence or business, if in town, city, or village, and shall demand payment of the taxes charged to him on his property. And if any person neglect so to attend and pay his

personal tax, or shall neglect and refuse after being called upon by the town collector, until after the first day of January next after such taxes become due, the treasurer, either by himself or deputy, or the sheriff of the county when directed by distress warrant issued by said treasurer to said sheriff, or the town collector, is directed to levy and collect the same, together with the penalty and costs of collection, by distress and sale of personal property belonging to such person in the manner provided by law for the levy and sale on execution, and the treasurer and town collector shall be entitled to the same fees for their services as are allowed by law for selling property under execution; *Provided*, That in case no personal property of the delinquent can be found, it shall be the duty of the treasurer and town collector, when directed so to do by order of the board of county commissioners, or the board of supervisors, to commence suit by civil action in the district court of said county in the same manner as other civil actions are commenced, and prosecute the same to judgment and collection by attachment, execution, or garnishment, as the case may require, and that no property whatever shall be exempt from levy and sale under process issued on the judgment obtained in such action, and in case judgment shall be recovered, costs shall follow the judgment without regard to the amount of said judgment; *Provided, further*, That in case any person having personal property assessed, and upon which the taxes are unpaid, shall, in the opinion of the treasurer and town collector, be about to remove out of the county, or in any other manner seek to put his personal property out of the reach of the treasurer or collector, it shall be the duty of the treasurer and town collector to collect such taxes by distress or attachment, as the case may require, at any time after the tax has become due. In case any person owing taxes remove, the treasurer and town collector shall, among other steps to collect such tax, forward, when necessary, such tax claim to the treasurer or

tax collector at the adopted residence or place of abode of such tax debtor, and such taxes shall be collected at the latter place as other personal taxes, by distress or civil action, as the case may require, and return to the proper county, less such charges for collection, as are hereinbefore provided. And such treasurer, or tax collector, to whom such tax claim shall be so forwarded, is hereby authorized to commence and prosecute to judgment such civil action as may be necessary in the district court of such county, in the name of the board of county commissioners, or the board of county supervisors, of the county from which such tax claim shall be forwarded, immediately upon receipt thereof by him, upon which judgment, without regard to the amount thereof, the plaintiff shall recover costs, and such judgment shall have the same effect as hereinbefore provided when suit is brought in the county where such tax is levied."

It will be observed that the section quoted authorizes actions in three cases only. First, where no personal property of the delinquent can be found, the treasurer or town collector, when directed so to do by the commissioners or supervisors, may commence an action in the district court of the county where the tax is levied; secondly, if any person having personal property assessed shall, in the opinion of the treasurer or town collector, be about to remove out of the county or in any other manner seek to put his personal property out of the reach of the treasurer or collector, the treasurer and collector shall collect such taxes by distress or attachment as the case may require; and thirdly, if any person owing taxes remove, the treasurer and town collector shall forward such tax claim to the treasurer or tax collector at the adopted residence or place of abode of such taxpayer, where the taxes may be collected by distress or civil action. In the last case the treasurer or tax collector to whom such claim is forwarded is authorized to institute the action in the name of the

commissioners or supervisors of the county from which such tax claim was forwarded.

No other provisions for suit are found. This case is not within any of these classes. The suit was not brought in Clay county, where the tax was levied. York county was not the adopted residence or place of abode of the taxpayer, nor had the tax claim been forwarded to the treasurer or any collector of York county, nor has the treasurer or any collector of York county authorized the bringing of the suit.

Counsel for the defendants in error cite us to section 59 of the Code of Civil Procedure, which provides that actions against non-residents other than those mentioned in former sections relating to real estate "may be brought in any county in which there may be property of or debts owing to said defendant or where said defendant may be found." But this section is not applicable. It would be if the revenue law gave generally a right of action to collect taxes, but the right of action itself is given by the revenue law and extends only to the cases therein specified. Such an action is governed by the provisions of that act. A special provision in a statute relating to a specific subject-matter controls general provisions. (*McCann v. McLennan*, 2 Neb., 286; *Tecumseh Townsite Case*, 3 Neb., 267; *People v. Gosper*, 3 Neb., 310; *Albertson v. State*, 9 Neb., 429; *Richardson County v. Miles*, 14 Neb., 311.)

But the question really lies deeper than the mere determination of the forum by statutory construction. The right of action, where it exists at all, is given only by section 89 of the revenue act, and that statute prescribes the forum in which the action must be brought. It is clear that in a case where a tax debtor is about to remove from the county, the action must be brought in the county where the tax was levied. It is probable that after he has succeeded in removing from the county and in removing all his property therefrom the action might still be brought in

that county, and, in case he had removed from the state so that the last provision could not have effect, attachments might be issued from the county where the action was brought under section 202 of the Code, to counties where he might have property. That question is not, however, before us for determination. It is sufficient to say that this action was not properly brought. The district court of York county did not have jurisdiction and therefore the judgment is

REVERSED AND THE ACTION DISMISSED.

POST, J., not sitting.

FRANK HANLON ET AL. V. UNION PACIFIC RAILWAY COMPANY.

FILED APRIL 3, 1894. No. 4594.

1. **Trespass:** TITLE. An action of trespass *quare clausum* can only be maintained where the plaintiff had title or possession at the time of the acts complained of. *Chicago, R. I. & P. R. Co. v. Shepherd*, 39 Neb., 523, followed.
2. ———: ———. So where the trespass complained of consists of the occupation of the land by railroad tracks, and the entry and construction of the tracks is admitted to have been beyond the period of limitations for such an action, the plaintiff, to recover, must show title in himself to the land occupied.
3. **Boundaries:** PAROL EVIDENCE. Where the description in a deed contains a call to and along a line, the true location of which is uncertain, parol evidence is admissible to show that at the time of the conveyance a particular line was in the community generally recognized by the name used in the deed.
4. ———: MAPS AS EVIDENCE. Maps proved to be in common and accepted use in the community at the time of the conveyance are likewise admissible for the same purpose.

5. **Adverse Possession.** In order to create title by adverse possession, the possession, in addition to other elements, must be exclusive for the period of limitations.

6. **Trespass:** EVIDENCE OF TITLE. Evidence that a roadmaster in charge of the construction of a side track over certain land, when a person claiming to be the owner of the land objected to the construction of the track, promised such person that he would be paid for the land occupied, is insufficient to prove that the company entered under a license from the claimant and in recognition of his title.

7. ———: ———. Nor will a license be implied from the fact of occupancy for a long time without objection on the part of the claimant, the claimant relying on adverse possession during that period to establish his title.

8. **Adverse Possession:** CORPORATIONS. A corporation chartered by an act of congress and incompetent to acquire title to land in this state may still maintain a possession adverse to all persons except the state. *Myers v. McGavock*, 39 Neb., 843, followed.

9. **Review:** ASSIGNMENTS OF ERROR. In order to obtain a review of alleged errors the petition in error must assign the same with such particularity as to enable the court to determine the precise ruling complained of.

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

Frick & Dolezal, for plaintiffs in error.

John M. Thurston, *W. R. Kelly*, and *E. P. Smith*, *contra*.

IRVINE, C.

The plaintiffs in error, who were also plaintiffs in the district court, alleged that they were the heirs and widow of Patrick Hanlon, deceased; that on March 18, 1878, Patrick Hanlon became the owner of two tracts of land described in the petition by courses and distances, both tracts being in the city of Fremont; that Patrick Hanlon died seized of said land July 1, 1881; that in March,

1879, and at divers other times between that date and the beginning of the action, the defendant "without right or authority, wrongfully and unlawfully, and with force entered upon said premises at and near the buildings thereon situated and erected, and committed acts of trespass on said premises by digging the soil thereof, by laying and putting thereon tracks of iron and wood, and leaving and placing thereon daily during said period steam engines and cars propelled by steam, and by making and suffering within the four years last past loud noises and deleterious and offensive odors by live hogs and cattle in said cars, to the injury of said premises and said buildings thereon situate, and to the depreciation of rental value of said premises and said buildings during all of said times, to the damage of plaintiffs in all in the sum of $1,975." The action was begun April 28, 1888. For the purposes of this opinion it will not be necessary to set forth the answer in detail. Among other things in the answer the trespasses complained of and the ownership of plaintiffs' ancestor are denied. There was a verdict and judgment for the defendant.

The first assignment of error which we shall notice relates to the sufficiency of the evidence to sustain the verdict. This is the assignment chiefly relied upon and has been argued ably and elaborately. It will not be necessary to review all the evidence or discuss all the details of the case, but its intricacies are such and the questions of fact presented are so combined with questions of law that it is due to counsel that we should not pass over the assignment with a statement of our conclusions, but that our reasons should be given for holding that the evidence sustains the verdict.

The tracts to which plaintiffs claim title adjoin one another and constitute a portion of what is known as "lot 3," in block 214, in the city of Fremont. The original plat of the city of Fremont shows block 214 as one of the

southern tier of blocks in the town site. The lots in this portion of the town site were 66 feet by 132 feet. Lot 3 fronts north and is the third in order, counting from the east line of the block. It appears, however, that the town survey was made prior to the government survey, and through some error, apparently by not allowing for the variation of the compass, the lines were not correctly located, and, at some later period not definitely fixed, it was ascertained that the half section line which constitutes the southern boundary of the town site did not correspond to the southern line of the town site as originally platted, but extended through the southern tier of blocks, forming, some place westward of block 214, an angle with the southern limit as originally surveyed, cutting off the four southern lots of block 214, and portions of the southern ends of the four northern lots, including lot 3.

When the construction of the Union Pacific railway was undertaken, the owner of the land south of this half section line conveyed that land to the railway company Lot 4, in block 214, was also conveyed to the company. It appears from the evidence that in 1865 condemnation proceedings were had for the purpose of appropriating land in Dodge county for the use of the railway company. Under the act of congress relating to such appropriations the report of the appraisers was required to be returned into a court of record, any judge of a court of record being authorized to appoint the appraisers. Payment of the amount awarded was required to be made to the clerk of the court. There is in evidence from the files of the district court of Dodge county an oath of appraisers and an award of damages to Alvin Coe, then the owner of lot 3, the land being described as follows: "Said appraisal being for two hundred feet on each side of the central line of said road as located by the engineer of said company, to-wit, lot number 3, in block 214, in the town of Fremont, amounting to about four rods of land,

in county of Dodge, in territory of Nebraska." No other record relating to condemnation proceedings was found, but it did appear that there had been a fire in the court house whereby a portion of the records of the court was destroyed.

About the year 1865 the Union Pacific railway was constructed through Fremont and its depot located near the land in controversy. About the year 1869 Patrick Hanlon contracted for the purchase of a portion of lot 3 and entered into the possession of that portion. March 18, 1878, this portion was conveyed to him by the following description: "Commencing at the northwest corner of lot 3 in block 214 of the city of Fremont, Dodge county, Nebraska, thence running easterly on south margin of First street thirty feet; thence running southerly at a right angle to First street to the Union Pacific Company's grounds; thence running northwesterly along the Union Pacific Railway Company's grounds to the west line of lot number 3 aforesaid; thence running northerly along the west line of said lot to First street, the place of beginning."

In the meantime, on October 7, 1876, the other tract had been conveyed to Hanlon by the following description: "Commencing at a point in south margin of First street ninety-six feet easterly from northwest corner of block 214 of the city of Fremont, Nebraska; thence running southerly at right angles to First street, thence running in a southeasterly direction along said railroad company's grounds to the Union Pacific Railroad Company's grounds, about twenty-three feet to the west line of a certain parcel of land sold to Fred Weis, October 5, 1876; thence running northerly along west side of land sold Weis to First street; thence running westerly along south margin of First street twenty-two feet to the place of beginning."

About the year 1872, and while Hanlon was in possession of a portion of the premises, the railway company constructed a side track extending across the southern portion

of lot 3 not far from the southern end of Hanlon's building, and at a later period another track was constructed further to the south but crossing the lot. It is of these tracts that the plaintiffs complain, claiming ownership of the land upon which they are situated.

A great deal of the argument of plaintiffs in error is devoted to showing that the defendant is without title to the land occupied by the tracks. This, however, becomes immaterial. The action is trespass and cannot be maintained unless plaintiffs either had title or were in possession of the premises at the time of the acts complained of. (*Chicago, R. I. & P. R. Co. v. Shepherd*, 39 Neb., 523, decided at the present term.) It is conceded that no recovery can be had for any acts except those committed within four years preceding the commencement of the action. The question is, therefore, not whether the defendant had title, but whether the plaintiffs showed themselves to have either title or possession during the period to which the action relates. The entry being long before the period of limitations, no claim can be based on possession.

In determining the plaintiffs' title we are met with difficulties, arising, first, from the errors in the original survey; second, from the uncertain language of plaintiffs' deeds; third, from the uncertainty of the records as to the land appropriated by the condemnation proceedings.

There is much evidence tending to show that the railway's main track, as originally constructed and at present existing, passes in a general southeasterly and northwesterly direction over the land immediately south of the half section line which forms the south boundary of lot 3. Such record as we have of the condemnation proceedings shows a purpose to appropriate land to the width of 200 feet on each side of the line of the railway as originally located. There is no evidence to show that the railroad was in fact constructed or that it is now maintained according to the original location. There is, however, evidence

tending to show that soon after the construction of the railroad, maps were made indicating these grounds as extending 200 feet north of the center line of its main track. Such maps have been in common and public use in the city of Fremont ever since. The line as shown on the maps crosses lot 3 near the northern side track, but whether far enough north to include it is by no means certain. It is, however, shown that a line 200 feet from the center line of the main track would include all the land covered by the side tracks. The call in plaintiffs' deeds is in effect south to the railway company's grounds, and the evidence referred to was submitted to the jury upon the theory that if it should find that at the time of the conveyances a line 200 feet from the center line of the track was generally known in Fremont as the boundary of the railroad company's land, then such line should be taken as the southern boundary of plaintiffs' land in the absence of evidence to show that a different line was intended.

Objections are urged to this line of evidence upon the ground that it amounts to establishing title in the railway company by parol. This is not true. The question has nothing to do with the railway company's title. It is merely extrinsic evidence for the purpose of identifying the subject-matter of the conveyances to Hanlon. Whether or not this was the true northern boundary of the railway company's land is immaterial. The question is, merely, what was the intention of the parties in the conveyances to Patrick Hanlon? And the evidence was admissible for that purpose, upon the same principle that it would be admissible provided the grantor in that deed had described it as his "hotel property in the city of Fremont," to prove what property was understood by the parties by that description. A somewhat similar question has been recently discussed and decided in the case of *Schneider v. Patterson*, 38 Neb., 680.

Again, the award of the appraisers in the condemnation proceeding describes the land taken in lot 3 as "about

four rods." This, unenlightened by any other evidence, would probably mean, as plaintiffs contend, four square rods; but the 200 foot line is also referred to, and taking the center line of the track as constructed as a basis, and including all within 200 feet of that center line, the land appropriated would include just about four rods, measuring north and south along lot 3, thus reaching the same result. Whether or not the record introduced was sufficient to show title in the company, it was sufficient to add some force to the evidence of notoriety in regard to the railway boundary. We think that all of this evidence, taken together, was sufficient to sustain the verdict of the jury.

The plaintiffs contend that the call in one of the deeds, of "about twenty-three feet" for the southern boundary, corresponds closely to the line of one of the southern side tracks, and that it should therefore be inferred that that line was intended. But it also corresponds just as closely with a line drawn anywhere parallel to the main track of the railway company, so we can see no force in the argument. It does not closely correspond to the length of the southern line of lot 3 between the side lines given, and from that fact, as well as from all the language of the description, it is clear that it was not intended to convey to the south line of lot 3.

The case was also presented upon the theory that although the plaintiffs may have had no paper title to the portion of the land occupied by the tracks, they had title by adverse possession. It does appear that Patrick Hanlon, prior to the construction of the first side track, had planted trees and exercised dominion over the southern portion of the lot. The first track was, however, constructed within two or three years after the time he took possession. Since the construction of that track Patrick Hanlon, during his lifetime, and his heirs, since his decease, have maintained sidewalks over the southern portion of the lot and probably exercised other acts of dominion, but the railway com-

pany has continuously maintained its side tracks there without obstruction or hindrance by the Hanlons. Such possession as the Hanlons had was, therefore, not exclusive, an element which is essential to create title by adverse possession. There is much argument relating to the theory that the tracks were maintained under a license from Patrick Hanlon. If so, the occupancy by the railway company would not be adverse to him, and this element of exclusiveness might be supplied. It is only in this view of the case that we can see that the question of a license is particularly material. So far as an express license is concerned, the evidence upon which this claim is based is, in brief, that when the construction of the side tracks was commenced, Hanlon protested to the roadmaster, who promised Hanlon that he would be paid for the property, and then Hanlon permitted the work to proceed. The authority of the roadmaster does not appear. He seems to have been in charge of the work of constructing the side track, but we do not think that that fact implied in him any authority to bind the company by a recognition of Hanlon's title. There is evidence tending to show that aside from maintaining the side tracks the railway company has exercised other acts of dominion over the property, as by grading and filling, and there was ample to warrant the jury in finding that the occupancy of the railroad was under a claim of ownership and adverse to the Hanlon title. There is an assertion that the evidence is sufficient to establish an implied license, but so far as the claim of title in the Hanlons by adverse possession is concerned, there could be no implication of license from the fact of occupancy. To permit this would destroy the whole theory of adverse possession. By the same reasoning the occupancy of the Hanlons themselves would be deemed to be under a a license from the real owner of the southern portion of the lot, whoever he may be.

In this connection we should notice the argument, repeat-

edly made upon different points of the case, that the Union Pacific Railway Company, not being a corporation organized under the laws of this state, cannot exercise the right of eminent domain under the present constitution, and cannot otherwise acquire title, even by adverse possession. This question has been recently considered in the case of *Myers v. McGavock*, 39 Neb., 843, decided at the present term, where the former decisions are cited, and the conclusion reached that the title of such a railway company can be attacked only by the state, and that a title may be acquired by adverse possession which would be valid against all but the state. In this case the railroad does not plead title by adverse possession, but it is the plaintiffs' title we are considering; and if the railroad could acquire title by adverse possession, then it may occupy adversely, and such occupancy of this land would prevent the plaintiffs' possession from being exclusive.

The plaintiffs claim that even though they fail to establish title in themselves to the land occupied by side tracks, their petition contains a count based upon a nuisance caused by leaving cars of live stock upon the track close to plaintiffs' buildings, obstructing the light and causing injurious and offensive odors. The petition is in one count. We have quoted the material portion thereof. It will be seen that the allegations relied upon as stating a case for damages by reason of a nuisance are inserted merely in connection with the other averments of acts of trespass and by way of allegations of damages. But treating the petition as one declaring on nuisance, it is insufficient for that purpose. The hauling of cars loaded with live stock is a necessary and proper operation of a railway company. The placing of such cars upon side tracks, even within the limits of a city, is lawful and necessary. It is not alleged that this side track was an improper or unreasonable place to place such cars, that they were placed there unnecessarily, or that they were allowed to remain an unreasonable length of

time. These, or similar allegations, would certainly be necessary to state a cause of action based upon a nuisance. While there is some testimony upon these elements, such testimony does not supply the want of proper averments in the petition, and there is also so much contradictory evidence that upon a proper petition a verdict for the defendant would have to be sustained.

It is assigned as error that the court erred in stating in the presence of the jury that plaintiffs could not claim their premises to have extended south of the half section line. We presume that this assignment is based upon the theory that such a statement amounted to an oral instruction. It was made during the trial and seems to have been an incidental remark in connection with the discussion of a question of law arising. We do not think that it was in anywise prejudicial, for we cannot find any claim of ownership beyond the limit mentioned, and we cannot see how such a claim could be supported under any view of the case.

There was an exception to each instruction given by the court, either of its own motion or at defendant's request, and an exception to the refusal of each of plaintiffs' instructions refused. Error on this subject is assigned as follows: "Sixth—The court erred in giving instructions numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 17, respectively, of the instructions given by the court of its own motion." The instructions given at request of defendant, and those requested by plaintiffs and refused, are grouped likewise and assigned in the same manner. Whether such assignment is sufficient we will not here determine. They cover the whole charge, and, so far as they are at all referred to in the briefs of counsel, it is in connection with a general discussion of the evidence in the case and the sufficiency thereof. The only points suggested upon which it is claimed the instructions are erroneous are in reference to that discussion, and we think what has been said upon the question of the sufficiency of the evidence covers all questions raised.

Complaint is made of errors in the admission and rejection of testimony and acts of alleged misconduct of an agent of the defendant relating to a view of the premises by the jury. The assignments of error relating to these subjects are as follows: "Second—There was misconduct of the defendant and its agent, as appears in the bill of exceptions, for which a new trial should have been granted, defendant being the prevailing party. * * * Third—There was irregularity in the proceedings on the part of the defendant and its agent by which, as shown in the bill of exceptions, the plaintiffs were prevented from having a fair trial. * * * Ninth—Errors in the rejection of evidence, exhibits, and papers, as shown in the bill of exceptions, and to each of which plaintiffs duly excepted. Tenth—Errors in the admission of testimony, exhibits, and papers in evidence over objections of plaintiffs, as shown in the bill of exceptions, and to each of which plaintiffs duly excepted. Eleventh—Errors in striking out testimony after the same had been admitted in evidence, as shown by the bill of exceptions, and to all of which the plaintiffs duly excepted." These assignments are too general to call upon the court to review the errors complained of. (*Lynam v. McMillan*, 8 Neb., 135; *Burlington & M. R. Co. v. Harris*, 8 Neb., 140; *Tomer v. Densmore*, 8 Neb., 384; *Graham v. Hartnett*, 10 Neb., 517; *Lowe v. Omaha*, 33 Neb., 587; *Gregory v. Kaar*, 36 Neb., 533; *Riverside Coal Co. v. Holmes*, 36 Neb., 858.) Errors complained of must be assigned in the petition in error with such certainty as to enable the court to ascertain the particular ruling of which complaint is made.

JUDGMENT AFFIRMED.

POST, J., not sitting.

ANNIE MCGAVOCK V. CITY OF OMAHA.

FILED APRIL 4, 1894. NO. 5337.

1. **Municipal Corporations:** STREETS: CHANGE OF GRADE: ASSESSMENT OF DAMAGES: NOTICE TO PROPERTY OWNERS. A notice must be given by a city of proceedings to assess the damage to property which will be caused by a proposed change of the grade of a street in said city and of the time and place where the appraisers appointed for the purpose of assessing such damages will meet, in order that the owner of the property so damaged may have an opportunity to be heard in his own behalf.

2. ———: ———: ———: ———: ———. The fact that the ordinance changing the grade of a street was published in the official paper of the city enacting such ordinance, in the manner required by law after its enactment, where the ordinance so published merely provides for the appointment of appraisers by the mayor, and makes no provision for their meeting or its time or place, will not be sufficient notice to parties, owners of property abutting on the street where the grade is to be changed, of the appraisement proceedings; and this is especially true where the charter of the city provides that from the appraisement proceedings the party may have an appeal, and that the proceedings shall be exclusive of any other remedies, as the right to an appeal implies the right to notice, and it is immaterial that the legislature has not in the charter of the city made any provision for notice or required any to be given. If the notice is not given, the appraisement proceedings will not exclude the party of any remedy, but such party may commence an action at law to recover damages caused by such change of grade to property of which he or she is the owner.

3. ———: CHARTERS: ORDINANCES. Where a city by its charter is invested with certain powers, or the control and regulation of certain matters, and the charter fails to prescribe or direct the mode of exercise of the power so conferred, the council may act by resolution, and it will be as effectual as would an ordinance passed for the same purpose.

4. ———: STREETS: CHANGE OF GRADE: ASSESSMENT OF DAMAGES: ORDINANCES. Under the section of a city charter which provides as follows: "The mayor and city council of a city gov-

erned by this act shall have the power to establish by ordinance the grade of any street, alley, or avenue within the city, and when the grade of any street, avenue, or alley shall have been so established, such grade shall not be changed except by a vote of two-thirds of the council, and not then until the damages to property owners, which may be caused by such change of grade, shall have been assessed and determined by three disinterested appraisers, who shall be appointed by the mayor and council for that purpose, who shall make such appraisement, taking into consideration the benefits, if any, to such property, and file their report with the city clerk within ten days after receiving the notice of their appointment, and the amount of damages so assessed shall be tendered to such property owners, or their agents, before any such change of grade shall be made,"—*held*, that an ordinance, which by its terms established grades upon certain streets of the city named in the ordinance and made no provision for the appointment of appraisers and assessment of damages as required by the charter when a change of grade was sought to be effected, and, as far as the record in the case on trial discloses, no appraisers were appointed or assessment of damages had, did not change the grades upon the streets named, where valid grades had been established prior to the enactment of such ordinance; that the section of the charter above quoted is mandatory in its provisions, and the appointment of appraisers, assessment of damages, and tender of the same to the parties damaged, are conditions precedent to the taking effect of any ordinance enacted by the city council, the enforcement of which would be to change a grade previously established.

5. **Ruling on Admission of Evidence**: REVIEW: HARMLESS ERROR. The action of the trial court in sustaining an objection to certain testimony offered by plaintiff and not allowing the testimony to be introduced, considered, and *held*, that if such action was erroneous, it was error without prejudice.

6. **Judgments**: PLEADING: AMENDMENTS: EVIDENCE. Facts which appear in the evidence of a case, on a point not put in issue by the pleadings, cannot be made the basis for a judgment for one of the parties unless the pleadings are made to conform to the facts on proper motion, and leave obtained of the court to make such amendment.

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

Francis A. Brogan, for plaintiff in error.

W. J. Connell and *E. J. Cornish, contra.*

See opinion for citations.

HARRISON, J.

Annie McGavock, plaintiff in the court below, filed a petition in the district court of Douglas county on January 31, 1890, in which, after alleging that the defendant is a city of the metropolitan class, further pleads as follows:

That on or about the 19th day of June, A. D. 1883, she became the owner of lot 1, in block 51, in the city of Omaha, county of Douglas, state of Nebraska, also a strip of land 20 feet wide and 132 feet long adjoining said lot on the east, bought of defendant November 22, 1886, the same being situated within the corporate limits of the said city; that she purchased the first above described property from one B. F. Lowe; that she took possession of the premises and has continued in possession; that she has erected valuable improvements on the lot and fitted the same as a desirable residence for herself and family; that there are numerous and valuable shade trees growing on the lot, which add greatly to the beauty and convenience of the same as a residence; that some time prior to her purchase and improvement of said lot as aforesaid the said defendant had fixed the grades of Twenty-first street, upon which said lot abuts on the east, and of Chicago street, upon which said lot abuts on the north, and had caused the same to be surveyed by its engineer, but neither of said streets had been at any time worked or graded to said grade, so fixed and surveyed as aforesaid; that said grade, so fixed and surveyed as aforesaid, was known as the "Phillips grade," and had the said streets been worked to such grade, the plaintiff could have used her property with but slight injury or loss of value, and access to her said residence, from both of the streets aforesaid, would have been reason-

ably convenient, and no lowering of her lot or destruction of the trees and buildings thereon would have been necessary, but, on the contrary, the said property could then have been used as a home by the plaintiff for herself and family, and was in fact a convenient and desirable residence, and of great value to the plaintiff.

The plaintiff alleges further that the said defendant, by and through its mayor and council, by its grade ordinance No. 104, approved March 30, 1889, ordered the grade of parts of said Chicago and Twenty-first streets to be changed in such a manner that whereas the elevation of the curb-stone at the northeast corner of the plaintiff's lot at the intersection of Chicago and Twenty-first streets was 153 feet, yet by the change so ordered by the ordinance the elevation at the same point should be 144.5, or eight and one-half feet lower than the former, or Phillips grade, and the change in the grade on the north and east sides of said lot was similar to the change at said intersection; that afterwards said defendant, by and through its mayor and council and other proper officers, ordered said streets to be worked to such grade, as fixed by its grade ordinance No. 104 as aforesaid, and caused the same to be done, and has therefore changed the surface and grade of said street in the manner and to the extent of the difference between said former or Phillips grade, and the grade fixed by grade ordinance No. 104 as aforesaid; that by reason of the change in the surface and elevation of such streets so abutting on the plaintiff's lot as aforesaid the plaintiff's said residence has been rendered almost inaccessible, and it can no longer be used by her as a home, except with great difficulty and inconvenience, and at great expense in the building of approaches and stairways; that although the streets on the north and east of the plaintiff's said lot were changed in their grades, as above set forth, yet the alley running east and west through the center of said block 51, upon which alley the plaintiff's lot abuts on

the south, has not been changed in grade but remains the same as before; that there is thereby a high embankment remaining at the east end of the said alley, where the same opens into Twenty-first street, and all access from such street into said alley and through it into the plaintiff's lot is thereby prevented.

The plaintiff further alleges that although the value of her said property has been depreciated to the extent of $5,000 by such change of grade, and working of the same, and she has thereby been damaged in that amount, and although the said grade ordinance No. 104 provided for the appraisal of damages caused by such change of grade, yet, in fact, the said defendant has at no time caused the damages of the said plaintiff as aforesaid sustained to be appraised, and has not tendered nor paid to her, nor caused to be tendered or paid to her, any amount whatever in satisfaction of her said damages; that by reason of the acts and doings of the said defendant as aforesaid, and its neglect and failure to cause the amount of plaintiff's damages to be appraised, ascertained, and paid to her, she has been damaged in the sum of $5,000. Plaintiff demanded judgment in the sum of $5,000 and costs.

To this petition an answer was filed by the defendant city and reply to the answer by plaintiff. Afterwards the city filed what is styled in the record an "amended and substituted answer," in which it admitted that it was a municipal corporation duly organized and existing as a city of the metropolitan class; also admitted that prior to the year 1883, while existing as a city of the first class, it fixed the grades on Chicago and Twenty-first streets, on which the property described in the petition abuts on the north and east, and that said streets were never worked to grade, but alleges that the grades on these streets were surveyed and established at different times and did not conform to each other; that as so fixed, the grade of Chicago street was more than ten feet below the grade on Twenty-first street;

and if said streets had been worked to grade as alleged in petition, the property described in the petition would have been greatly damaged for residence property or any other purpose, and Chicago street would have been more than ten feet below Twenty-first street at the point of intersection of said streets on which the said property abuts on the east and north, and Chicago street would have been below the present grade complained of by plaintiff.

Defendant further admitted that by its grade ordinance No. 104, approved March 30, 1889, it ordered the grades of portions of Chicago and Twenty-first streets changed in such a manner that at the intersection of the streets, at the northeast corner of the lot described in the petition, the elevation was 144.5 feet, but alleges that the elevation of Chicago street by grade established prior to this change was 137.93 feet, and sixteen feet below the established grade of Twenty-first street at the same point; admitted further, that it ordered the street to be worked to the grade fixed by ordinance No. 104, and caused the work to be done, and thereby changed the former grade at Chicago and Twenty-first streets to conform to the grade fixed by said ordinance No. 104; admitted the statements of the petition in reference to the alley, but alleges that there was good and sufficient access to the land or lot through the alley from Twenty-second street, and also alleges that the property had been greatly benefited by the changes of grades and working of streets; and further answering, denies each and every other allegation in the petition.

Then follow allegations in which it is stated in substance that when the change was made in the grades of said streets by ordinance No. 104, appraisement was made and damages assessed in the regular and legal manner as provided in such cases; and after due and legal notice to the owner of the property described in the petition, the appraisers, who were duly appointed, caused notice to be given by publishing grade ordinance No. 104 in the Omaha

Evening World-Herald, the official newspaper of the city, on the 6th day of April, 1889; that the appraisers assessed, as the damages to said property, the sum of $700, and reported their action to the city council, which body confirmed the report; that the sum so ascertained as damages to the property was tendered to and accepted by Alexander McGavock, the husband of the plaintiff, Annie McGavock, and that no appeal was ever taken from the award of damages made in the appraisement proceedings.

To this answer the plaintiff replied as follows: "Comes now the plaintiff and for reply to the amended answer of the defendant, admits that Alexander McGavock is the husband of this plaintiff, and resides on the property described in the plaintiff's petition, and denies each and every allegation set forth in said amended answer, except as stated and admitted in the petition of the plaintiff."

A jury was impaneled and trial had. During its progress the following stipulation was filed:

"It is hereby agreed that the court shall submit to the jury the special question, whether the property has been damaged by the change of grade in 1889, from an elevation of 153 feet, at the northeast corner of said lot, to an elevation of 144.5 feet at the same point, and the amount of such damages, if any.

"It is further agreed that if, in the opinion of the court, upon the pleadings and evidence in the case, the plaintiff is entitled to her action against the city, a judgment shall be entered for the plaintiff against the defendant for the amount of damages so fixed by the jury, if any, a general verdict being waived.

"It is further agreed that if the court shall find, as a matter of law, that the plaintiff is not entitled to recover, then said special findings shall be set aside and a judgment entered dismissing action.

"Each party reserves all exceptions noted on the trial, and all right to cause the rulings of the court to be re-

viewed in the supreme court by proceedings in error, including the rulings upon the questions of law reserved by this stipulation, the same as if the stipulation had not been entered into, and the same as if the cause had been submitted to the jury, it being the object of this agreement to have the questions of law raised in this case reserved for further argument."

The verdict returned by the jury was as follows:

"We, the jury, impaneled and sworn to try the issues joined, do find as follows, in answer to the questions below submitted:

"1. Do the jury find, under the evidence and instructions, that plaintiff's property described in the petition was damaged by the grading of Chicago and Twenty-first streets to the grade established by the ordinance of 1889? Answer, 'Yes.'

"2. If you do find the plaintiff's property was damaged by such grading, what do you find to be the amount of such damage? Answer, '$1,800 (eighteen hundred and $\frac{no}{100}$ dollars).'"

Plaintiff then filed a motion for judgment upon the verdict, which was argued and overruled, and the court determined the questions of law submitted to it in favor of defendant and rendered judgment, dismissing the case and taxing the costs to plaintiff.

In the copy of the journal entry of the judgment we find this statement, viz.: "And at the request of the plaintiff the court doth find, specially, that the plaintiff had no actual notice of the proceedings taken to appraise the damages, caused by a change of grade, complained of in her petition, and no notice of any kind was given her except only that the city did cause to be published a copy of the proposed change of grade ordinance, No. 104, in the official paper of the city of Omaha, as provided by section 133 of chapter 12*a* of the Compiled Statutes of the state of Nebraska."

Motion for a new trial was filed by the plaintiff, and, being submitted, was overruled, and the case brought here on petition in error on the part of plaintiff.

This case seems, from an examination of the record, to have been tried and decided mainly upon the determination of the question of notice or no notice to plaintiff of the proceedings to appraise the damages to the property, if any, caused by the change of grade, or whether the publication of the ordinance No. 104, by which the change in grade from what was known as the "Phillips grade," effected by ordinance No. 104 (the grade established by this ordinance being the one to which the street was worked), was sufficient notice of the appraisement proceedings to bind the plaintiff. We say this was an important point, because it was treated as such throughout the trial of the case by both court and counsel. The court instructed the jury in reference to the different grades as follows:

"The court instructs the jury that by the ordinance of 1873, known as the "Phillips grade" ordinance, the grade was established at the northeast corner of the plaintiff's lot at the intersection of Chicago and Twenty-first streets at 153 feet above low water mark; and the grade as so established existed and had not been changed at the time when plaintiff bought her said lot in 1883; that by the ordinance of May, 1889, the city changed the grade at the corner to 144.5 feet above low water mark, thereby lowering the established grade of the street at that point 8½ feet, and consequently leaving the surface of plaintiff's lot and her buildings and improvements thereon 8½ feet higher than the previously established grade; and the plaintiff is entitled to recover in this action such sum, as damages, as the jury may find from the evidence her property was lessened or diminished in value by reason of such change of grade, if any, not considering, however, any damage that would result from the bringing of the streets to grade on the previously established grade."

The only finding requested of and made by the court at the time it rendered judgment in the case was upon the subject of notice. (See copy of portion of journal entry hereinbefore quoted.) From a consideration of the stipulation filed during the trial providing for the submission of the question of damages, the instruction of the court as given above, and the special finding at the time of decision and judgment we conclude that the determination of the query submitted to the court by the stipulation, when it states "that if, in the opinion of the court, upon the pleadings and evidence in the case, the plaintiff is entitled to her action against the city, a judgment shall be entered for the plaintiff against defendant," turned largely, if not wholly, upon the sufficiency of the publication of the ordinance as notice to plaintiff of the pendency or progress of the appraisement proceedings.

The question of what, if any, notice of the appraisement proceedings was necessary, or whether the publication of the ordinance containing, as it did, a section authorizing the mayor to appoint the appraisers and put in motion the machinery provided by law for the ascertainment of the damages, if any, caused by the establishment or change of grade, but not providing for any notice to property owners of any meeting or time or place of meeting of the appraisers, or for any hearing of the matters necessarily involved in their making appraisement, was sufficient notice, will probably be most satisfactorily determined by an examination of the law governing the subject. Section 21 of the Bill of Rights, constitution of 1875, is as follows: "The property of no person shall be taken or damaged for public use without just compensation therefor." In construing this section, or the words "or damaged," in the case of *City of Omaha v. Kramer*, 25 Neb., 489, it was held: "The words 'or damaged,' in section 21, article 1, of the constitution, include all damage arising from the exercise of the right of eminent domain which cause a diminution in the value

of private property." The opinion contains this statement in reference to the above section, viz.: "The section above taken, except the words 'or damaged,' was in the constitution of 1867. Under that constitution, if any portion of a person's real estate was taken for public use, he could recover all the damages sustained by the taking; but if none of his real estate was taken for public use, he could recover nothing, although his property had been greatly damaged by such use. The provision, therefore, is remedial in its nature, and the well known rule that, in the construction of remedial statutes, three points are to be considered, viz., the old law, the mischief, and the remedy, and so to construe the act as to suppress the mischief and advance the remedy is to be applied. (1 Blackstone Com., 87.) Applying this rule to the provision in question, and it embraces all damages which affect the value of a person's property, and includes cases like that under consideration. In other words, the words 'or damaged,' in section 21, article 1, of the constitution, include all actual damages resulting from the exercise of the right of eminent domain which diminish the market value of private property. * * * The right of the legislature to authorize the taking of private property for public use is based on the condition that an equivalent in value be paid to the owner. If property is diminished in actual value by reason of a public improvement, it is to the extent of the diminution taken for public use as much so as if it was directly appropriated. The cases differ in regard to the mode of appropriation only. In the one case all the property is taken, while in the other it is taken only to the extent that it is diminished in value, and in either case the owner is entitled to be compensated for his loss." To the same effect are: *Harmon v. City of Omaha*, 17 Neb., 48; *Hammond v. City of Harvard*, 31 Neb., 635; *McElroy v. City of Kansas City*, 21 Fed. Rep., 257; *Schaller v. City of Omaha*, 23 Neb., 332.

We take it, from the above holdings and construction of the section of the constitution referred to, that any exercise of the power of eminent domain which damages property must be with the same formalities and requirements in regard to notice, etc., of the different steps taken, as in cases where the whole of the property is to be, or is, subjected to public use.

This being true, the citizen then turns, for a further safeguard of his rights, to section 3 of the same portion of the constitution, which is as follows: "No person shall be deprived of life, liberty, or property without due process of law." The term "due process of law" has been much discussed and defined a great many times with much learning and more or less clearness, the last being, to a great extent, according to the natural and aquired mental equipment or ability of the party forming the definition. From them we find, in Winfield on "Adjudged Words and Phrases," page 209, some which the author has selected and given, and among them are the following: "A course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. (*Pennoyer v. Neff*, 95 U. S., 733.)" "Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question belongs. (*Stuart v. Palmer*, 74 N. Y., 191; quoting Cooley, Const. Limit., 355.)" In *Zeigler v. South & N. A. R. Co.*, 58 Ala., 599, the following excellent, though somewhat extended, definition is stated: "Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property, in its most comprehensive sense; to be heard, by testimony or otherwise, and to have the right of contro-

verting, by proof, every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, this is not due process of law."

But probably as short and comprehensive a statement of the meaning of these words as will be found was that of Webster in the argument in the *Dartmouth College Case*, where he said: "In judicial proceedings, 'due process of law' requires notice, hearing, and judgment." In other words, as we hear it often stated in common parlance, "every man is entitled to his day in court," has a right to be notified of the hearing, of its time and place, and, if he desires so to do, to appear and be heard in his own behalf; and it is guarantied by the two sections of our constitution herein quoted, when read and construed together, that no person's property can be taken for public use, or damaged for such use, without compensation for such use, or payment of such damage; and when the amount of the damages is to be investigated and determined by proceedings in the nature of a trial, and after considering and deliberating upon certain facts, necessarily entering into and to be settled or decided upon before the damages are fixed, then the person whose property is to be appropriated or damaged is entitled to notice, in some prescribed manner, of such hearing, and to appear or not, at his option; and this is a right of which he cannot be deprived by courts, city council, county commissioners, or even by the legislature, as any act of the legislature which authorizes an appropriation or damaging of property for public use in any manner, or by any person or persons, must further provide for compensating the owner of the property; and if a hearing is to be had, or proceedings in the nature of a judicial determination of the damages, then for a notice of such hearing, and its time and place; and if no notice is given, if provided for in the act of the legislature, or if the act omits to make such provision, this will not and cannot deprive the citizen

of his right to damages guarantied to him by the constitution, but he will have a right of action at law for any damages he may have sustained, in the proper court.

In the act of the legislature governing "cities of the metropolitan class" they are authorized to establish grades of streets, etc., and to change existing grades, but in so doing must appoint appraisers, who are to assess the damages to any property by the change in grade, taking into consideration, in arriving at the amount of damages, the benefits, if any, to the property, the amount finally assessed to be tendered to the owner of the property. There is also a section which provides for an appeal from the award of damages made by the board of appraisers and reported to and confirmed by the city council, the closing sentence of which reads as follows: "The remedy by appeal, herein allowed, shall be deemed and held to be exclusive, and no person shall be allowed to prosecute or maintain any original action to recover any damages herein authorized or provided for." Here is conferred the power and authority to one party to appoint or form the tribunal or body, take, hear, or examine the evidence, and assess the amount of recovery, without any notice to other parties concerned, or any provision for them being in any manner represented in the proceedings, and providing for an appeal from an adjudication of their rights about which they can have no knowledge, and making the remedy by appeal exclusive. Can this be done? We are satisfied it is within the inhibition of the provisions of the constitution, as an attempt to appropriate or damage property "without due process of law," and will not bar parties of the right to an action for the damages sustained, and the fact that the legislature has failed to provide for any notice cannot bar the right to compensation.

We have no doubt that the advisability or wisdom of the establishment or change of grades are matters for the city council to pass upon, and come wholly within their

province, and cannot be questioned; but with the subject of damages others are concerned and must be considered. To say that there shall be a trial or hearing, affecting the rights of parties, with no notice to them, and that after a determination of their rights they shall have an appeal from the adjudication or conclusion reached, and if not appealed from it is exclusive and bars the parties of any remedy, is a proposition which embodies within it its own negative.

Ordinance No. 104, which was passed March 27, 1889, and by which the change of grade complained of by plaintiff was effected, contained a section, No. 5, in reference to appointment of appraisers, which stated: "That the mayor, with the approval of the city council, appoint three disinterested appraisers, to appraise, assess, and determine the damage to property owners which may be caused by such change of grade, taking into consideration, in making such appraisement, the benefits, if any, to such property by reason of such change of grade."

This ordinance was published in the *World-Herald*, we presume, in compliance with the law which required all ordinances of a general nature to be published in a paper which had been selected as the official paper of the city government; and it is strenuously contended by counsel for the city that this publication of the ordinance was sufficient notice to the plaintiff of the assessment proceedings. We are unable to agree with the counsel in this argument. This publication only informed the public that such an ordinance had been passed and acquainted them with its provisions, among which was the one by which they were told that the mayor was authorized to appoint persons to assess damages to property, but giving no date when any action would be taken under the ordinance, nothing here with which the plaintiff had any immediate concern, and nothing to inform her of where, when, or how, if she possessed any claim or rights which she desired to present

for the consideration of the appraisers, that such presentation could be made. This was clearly no notice which would bring it within any definition of "due process of law." The law also provides that the damages must be tendered to the party damaged. It is not contended in this case that any tender of the amount was ever made to plaintiff. The law giving the city the right to establish and change grades must provide for notice, and such notice must be given as prescribed, in order to bind parties whose property is damaged by a change of grades. (2 Beach, Public Corporations, p. 1152, sec. 1159; *People v. McRoberts*, 62 Ill., 38; *City of Topeka v. Sells*, 48 Kan., 520; *Kuntz v. Sumption*, 117 Ind., 1; *Scott v. City of Toledo*, 36 Fed. Rep., 385; Mills, Eminent Domain [2d ed.], secs. 95, 96.)

It is true that the authorities on this question of the necessity of notice are not uniform, but the weight of authority quite heavily preponderates in favor of the view hereinbefore expressed, and we have confined it here to the holding that if notice is not given it does not, under our constitutional provisions, bar the right to bring an action.

There is another error assigned in the petition in error, and argued by counsel for the parties in their briefs, the consideration of which we thought, when we first examined the case, would not, under the stipulation filed during the progress of the trial and the instructions given by the court to the jury, be necessary to a determination of the case, believing that a decision of the question of the notice or lack of notice to plaintiff would fully dispose of the controversy; but we are now satisfied that the problem of the different and, possibly, as claimed by defendant, conflicting grades must be adjusted. By the charter of the city of Omaha, in force at the time of the passage by the city council of a resolution by which it is claimed was established what is designated as the "Creighton grade," it was provided on the subject of grades, by section 31: "The council shall have the exclusive authority to establish the grade of all

streets and alleys of the city, and may change the same upon the petition of the owners of two-thirds of the value of the real property on both sides of the street when it is desired to be changed." By virtue of the authority contained in the foregoing section, the council, in the year 1867, passed an ordinance, entitled "An ordinance to regulate the manner of fixing grades in the city of Omaha," the first section of which was as follows: "*Be it ordained by the City Council of Omaha:* That every grade hereafter agreed upon for any street, alley, or highway within the boundaries of said city shall be fixed and established by resolution of the city council, adopted after the subject of such grade has been referred to a committee, and a report made thereon accompanied by a profile from actual survey by the city engineer, and all grades so fixed shall be duly established and recorded, with the profiles thereof, in a suitable book, to be prepared and kept by the recorder, and entitled the 'Grade Book.'" And during the year 1868 the council passed a resolution, by its terms fixing the Creighton grade. It is contended by counsel for the defendant that if the Creighton grade was the established grade for plaintiff's property when ordinance No. 104 was enacted by the council, that inasmuch as it was lower than the grade fixed by such ordinance, plaintiff was benefited and not damaged by the change. Plaintiff claims that grades must be established by ordinance, and not by resolution, hence the Creighton grade was never a valid grade; that if it was, it was repealed or rendered ineffective by general ordinance No. 277½, passed July 29, 1873, which purported to establish at and for the property which she afterwards bought, a grade known as "Phillips grade." Section 42 of this ordinance was as follows: "All ordinances and resolutions heretofore passed, fixing the grades of any of the streets in the city of Omaha, be and the same are hereby repealed."

The charter in force at the time ordinance No. 277½

was enacted provided as follows: "The mayor and city council of any city governed by this act shall have power to establish, by ordinance, the grade of any street, alley, or avenue within the city, and when the grade of any street, avenue, or alley shall have been so established, such grade shall not be changed except by a vote of two-thirds of the council, and not then until the damages to property owners, which may be caused by such change of grade, shall have been assessed and determined by three disinterested appraisers, who shall be appointed by the mayor and council for that purpose, who shall make such appraisement, taking into consideration the benefits, if any, to such property, and file their report with the city clerk within ten days after receiving notice of their appointment, and the amount of damages so assessed shall be tendered to such property owners, or their agents, before any such change of grade shall be made."

Counsel for defendant contend that ordinance No. 277½, having failed to provide for the appointment of appraisers, etc., was inoperative, and the Creighton grade in no manner or part affected by its provisions.

Counsel for plaintiff makes the following statement in his brief on page 3: "Whether the plaintiff was damaged by the grade fixed in 1889 will depend upon which of these two conflicting grades [he here refers to the 'Creighton' and 'Phillips' grades] must be regarded as the true grade at the corner of Twenty-first and Chicago streets when the plaintiff purchased the property and improved it."

To determine the status of the different grades at the dates referred to, *i. e.*, when plaintiff bought her property and when the grade was changed in 1889, it will be necessary to examine into the history of the resolution and ordinances passed by the city council, and the authority given it by the various charters under which the council was acting at the times of their enactment respectively. First we

will pursue our quest as to the Creighton grade, as it was first in order of enactment. Section 31 of the charter (quoted above), in force at the time of enactment of the ordinance and passage of the resolution, by which it was sought to establish the Creighton grade, did not state, prescribe, or indicate any method or manner in which the council should exercise the power therein granted. Where the law by which the power to do certain acts or to control and regulate certain matters is conferred upon the city through its council or legislative body, by whatever name it may be designated, does not in any manner limit or direct the mode in which the power granted shall be exercised, the council may choose the method, and its exercise of such control may be by resolution or by ordinance, and the passage of a resolution for that purpose is as valid and will have as much force as if it was done by the enactment of an ordinance, although ordinances are generally passed with more formality.

In Dillon, Municipal Corporations, p. 271, chapter 12, in note to section 244, it is said: "Where the charter commits the decision of a matter to the council, and is silent as to the mode, the decision may be evidenced by a resolution, and need not necessarily be by an ordinance." (*State v. Mayor of Jersey City*, 3 Dutch. [N. J. Law], 493.) A resolution has ordinarily the same effect as an ordinance, as both are legislative acts. (*Sower v. City of Philadelphia*, 35 Pa. St., 231; *San Francisco Gas Co. v. City of San Francisco*, 6 Cal., 190.) To the same effect is the case of the *Board of Education of Atchison v. De Kay*, 13 Sup. Ct. Rep., 706, decided by Mr. Justice Brewer. (See, also, note in *Robininson v. Mayor of Franklin*, 34 Am. Dec. [Tenn.], 632; *City of Crawfordsville v. Braden*, 28 N. E. Rep. [Ind.], 849; *Beers v. Dalles City*, 16 Ore., 334; *Halsey v. Rapid Transit St. R. Co.*, 46 Am. & Eng. R. Cases [N. J. Eq.], 76.) The fact that the council passed an ordinance authorizing the grade to be fixed by resolution, we do not

think had any effect upon the validity of the resolution, either to strengthen or weaken it, since the action could be taken in the first instance by resolution. We conclude that the grade fixed by the resolution, passed in 1868 and known as the Creighton grade, was a valid grade.

We will now turn our attention to ordinance No. 277½, passed July 29, 1873. This ordinance was entitled as follows: "Ordinance No. 277½.—Streets, Grades.—An ordinance to establish the grades of certain streets in the city of Omaha," and section 1 stated: "That the grades of the following named streets be and the same are hereby established as follows." From this, and the text of the ordinance, we gather that this was an ordinance which purported to establish grades, and was not one by which the council purposed, or supposed it was, changing them; and this view is strengthened by the fact that the ordinance made no provision for the appointment of appraisers or assessment of damages.

We have hereinbefore quoted section 40 of the charter in force in 1873 when the ordinance No. 277½ was enacted, and by referring to it it will be seen that it conferred upon the council power to establish grades by ordinance, and further provided: "When the grade of any street * * * shall have been so established, such grade shall not be changed except by a vote of two-thirds of the council, and not then until the damages to property owners, which may be caused by such change of grade, shall have been assessed and determined by three disinterested appraisers, who shall be appointed by the mayor and council for that purpose, who shall make such appraisement, taking into consideration the benefits, if any, to such property, and file their report with the city clerk within ten days after receiving notice of their appointment, and the amount of damages so assessed shall be tendered to such property owners, or their agents, before any such change of grade shall be made."

It will be remembered that this ordinance, by its terms,

repealed "all ordinances and resolutions heretofore passed fixing the grades of any of the streets of Omaha." (See section 42 hereinbefore quoted.) By this repealing clause, seeking to effect a change in the grades previously established, under the guise of an ordinance fixing grades and repealing other enactments by which grades had been fixed, on streets covered by the provisions of this ordinance No. 277½, the Creighton grade was established in 1868, and, in order to change it, it was necessary that appraisers be appointed and the damages assessed and tendered to the owners of property, and this was by the charter made a a condition precedent to any change in grade. In the case of *Hurford v. City of Omaha*, 4 Neb., 336, the plaintiff secured a decree in the district court of Douglas county, granting a perpetual injunction restraining the city from levying an assessment upon certain real estate abutting upon a public street of Omaha to pay a portion of the expense of grading the street. The facts in the case were that in 1866 the council had established the grade of St. Mary's avenue, and in 1868 the grade of Howard street. That on July 29, 1873, the council passed an ordinance entitled "An ordinance establishing the grade of St. Mary's avenue." This ordinance, it is stated, "defines what the grade shall be." July 10, 1874, the city entered into a contract with A. J. Hanscom to grade St. Mary's avenue and a part of Howard street, and on the 18th day of July appraisers were appointed by the mayor to assess the damages to owners of property abutting on the streets. This was after the work of grading had been commenced. These proceedings were in the same city and had under the same charters, as to the enactment of the ordinances and resolutions, as the ones under consideration in the case at bar. The court held: "A statute providing that when the grade of a street has been established it 'shall not be changed until damages shall have been assessed and determined, and the amount of damages tendered to property owners before any such

change shall be made,' is mandatory; and the proceedings of a city council, changing the grade of a street, entering into a contract for work on the same, and levying taxes on adjoining property to pay therefor, without having first caused the amount of damages to be ascertained and tendered, are void," and in discussing it the learned Judge GANTT divided it into two general propositions, the second of which was: "Whether the proceedings of the council changing the grade of a street, without having first caused the damages to owners of property abutting thereon to be ascertained and tendered are without authority and void,"—and, in arguing this proposition, says: "Upon application for the change of a street grade, the council must determine as to the propriety of making such change. But the determination of this question not only involves the inquiry as to whether the public necessities require such change to be made, but it seems that under the provisions of the law conferring the power the council shall first ascertain the damages which such change of grade shall occasion to the owners of property abutting on such street, and should also have a reliable estimate of the cost of grading, and then, under all the circumstances and conditions of things at the time, it can intelligently determine whether the work of such change of grade should be undertaken or not. * * * Now, according to these principles, it seems clear that the provisions of the statute are mandatory. They provide that when a grade has been established 'it shall not be changed until the damage to property owners, which may be caused by such change, shall have been assessed and determined; and that the amount of damages so assessed shall be tendered to the property owners, or their agents, before any such change of grade shall be made.' * * * But the statute in question imposes a limitation on the exercise of the power delegated, requiring a condition precedent to be performed, and until this prerequisite is complied with, it

seems clear that the council acquires no jurisdiction of the subject-matter. The restriction is absolute, and therefore the exercise of the power in any other way than that prescribed renders the procedings void." (See also *Hentig v. Gilmore*, 33 Kan., 234.) We are satisfied with the reasoning in the above case, and it applies directly to the situation in the case at bar, and we conclude that the Creighton grade, established in 1868, was not changed or affected by ordinance No. 277½.

There was another grade ordinance, No. 9, introduced in evidence, which was passed December 22, 1885, but this was not pleaded by plaintiff, and cannot be considered here as a foundation for relief to plaintiff.

We conclude, on the subject of grades, that, so far as shown by the evidence, competent under the issues raised by the pleadings in the case, the Creighton grade was the valid grade at the point in question at the time, in 1889, when the change was made by ordinance No. 104.

Another assignment of error is that the court excluded as testimony the original answer of the city when offered by plaintiff and objected to by defendant. The record on the subject of the offer and rejection of this evidence is as follows: "The plaintiff offers in evidence the original answer filed in this case on the 28th of February, 1890, signed by A. J. Poppleton, city attorney, and sworn to by him with his oath thereto attached. Objected to, as incompetent, irrelevant, and immaterial. Sustained. Exception. The paper is marked 'Exhibit 7,' and hereto attached." It will be remembered that the defendant city had filed an amended answer, and the plaintiff sought to show by the introduction in evidence of the original answer which the defendant had filed in the case, that it had admitted that the "Phillips grade," the grade set forth in ordinance No. 277½, was a valid and existing one at the time the plaintiff purchased her property. The action of the court in not allowing this testimony to be introduced, if erroneous, we

think was error without prejudice. If introduced, it would not have been conclusive of the fact of the validity of ordinance No. 277½, or of the establishment of the Phillips grade, and with the answer in evidence the court could not have arrived at any different conclusion on the question of the validity of said ordinance or of the grade which was attempted to be fixed by it. (See *Chamberlain v. Brown*, 25 Neb., 434.)

We conclude that the judgment of the district court was right, and it is

AFFIRMED.

POST, J., and IRVINE, C., not sitting.

OMAHA & REPUBLICAN VALLEY RAILWAY COMPANY v. FRANK M. RYBURN.

FILED APRIL 4, 1894. No. 5215.

1. **Railroad Companies:** DEFECTIVE CROSSINGS: NEGLIGENCE: DAMAGES. It is the duty of every railroad company in this state to properly construct and maintain in good repair crossings over all public highways on the line of its road, so that the same will be safe and convenient for travelers, so far as it can do so without interfering with the safe operation of the railroad. If a railroad company in that regard is negligent, by reason whereof a person without fault is injured while traveling over a defective crossing, the corporation owning and operating such railroad is liable for the damages sustained. Following *Burlington & M. R. R. Co. v. Koonce*, 34 Neb., 479.

2. **Damages:** EVIDENCE. The testimony of defendant in error showed what had been his earning capacity just previous to the receipt of his injuries, and what he had actually earned during twenty-five weeks immediately following his injuries. *Held*, Error to permit a much greater earning capacity during the same period to be shown by proof that in larger towns than that wherein the defendant in error had had employment a much

higher rate of wages prevailed than what was paid in the town in which he was employed during and just preceding the aforesaid twenty-five weeks.

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

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

The company is not liable for a failure to keep in repair at a village street crossing the planking between the rails constituting a sidewalk. (*McCandless v. Chicago & N. W. R. Co.*, 71 Wis., 41; *Northern C. R. Co. v. Mayor and City Council of Baltimore*, 46 Md., 425; *State v. Chicago, B. & Q. R. Co.*, 29 Neb., 412; *People v. Lake Shore & M. S. R. Co.*, 52 Mich., 277; *State v. District Court*, 42 Am. & Eng. R. Cases [Minn.], 246; *Schild v. Central Park, N. & E. R. Co.*, 31 N. E. Rep. [N. Y.], 327.)

Evidence of what wages were paid journeymen in Lincoln and Omaha was erroneously admitted. (*Bierbach v. Goodyear Rubber Co.*, 54 Wis., 208; *Anderson v. Sloane*, 72 Wis., 584; *Baldwin v. Western R. Corporation*, 4 Gray [Mass.], 333; *Wylie v. Wausau*, 48 Wis., 508.)

Steele Bros., *contra*, contending that it is the duty of the company to construct and maintain suitable crossings and keep the same in repair, cited: Sec. 110, ch. 78, Comp. Stats.; *State v. Chicago, B. & Q. R. Co.*, 29 Neb., 417; *Sharrett's Road Case*, 8 Pa. St., 92; *Manchester v. City of Hartford*, 30 Conn., 120; *Taber v. Graftmiller*, 109 Ind., 209; *City of Kansas City v. Kansas City Belt R. Co.*, 47 Am. & Eng. R. Cases [Mo.], 157; *Scanlon v. City of Boston*, 2 N. E. Rep. [Mass.], 787.

The evidence objected to was properly admitted to aid the jury in arriving at plaintiff's damages by reason of loss of time. (*City of Lincoln v. Beckman*, 23 Neb., 677; *Wade v. Leroy*, 20 How. [U. S.], 34.)

RYAN, C.

In this case the defendant in error recovered judgment in the district court of Butler county for the sum of $875 on account of injuries sustained from a fall on the crossing at the intersection of the railroad of plaintiff in error with a street in David City.

1. The error first alleged is that the railroad company was improperly held accountable for whatever want of repair of the crossing was shown by the proofs. While this case has been awaiting consideration there has been authoritatively stated the rule which obtains in this state upon this proposition in *Burlington & M. R. R. Co. v. Koonce*, 34 Neb., 479. Under the authority of this fully considered case, the railroad company must respond in damages for the want of repair of the crossing referred to, which the jury found by their verdict existed and was the proximate cause of the injuries sustained by the defendant in error. In this connection it is proper to state that it was not incumbent upon the trial court to instruct the jury, or by withdrawing the case from the jury to countenance conclusively the assumption, that because the defendant in error stumbled on one of the rails in plaintiff in error's road just before reaching the crossing not in repair, his stumbling was to be deemed the proximate cause of his injuries. To what these injuries were attributable was a question of fact to be determined by the jury under proper instructions. As the instructions on this proposition are not criticised in argument, it must be assumed they were correct, and for this reason, as well as from full consideration of the evidence itself, we are satisfied that the verdict is not open to the objections urged.

2. The plaintiff in error complains because the defendant in error was permitted to state to the jury what wages were paid journeymen in Lincoln and Omaha per week covering the time when he earned only a portion of what

he could have earned if he had been sound and well. The evidence of the defendant in error was, that for twenty-five weeks after the accident he had been able to earn only a portion of what he would have earned if he had been sound and well; that during ten weeks of said twenty-five weeks he earned $45.63, and during the remaining fifteen weeks he earned $120; that is to say, during the twenty-five weeks he actually earned, notwithstanding his injuries, the sum of $165.63. He further testified that just before he was injured, he was at work at commission business and that his earnings were from nine to twelve dollars per week. A comparison of these figures, if we accept nine dollars per week, the minimum of the earning capacity of defendant in error just before the receipt of his injuries, as the correct measure of that capacity, shows that while his earning capacity for these twenty-five weeks would have enabled him to earn $225, as a matter of fact he did actually earn $165.63, or that for these twenty-five weeks his earning capacity by reason of his injuries was reduced but $59.37. Notwithstanding this showing the subsequent examination of the defendant in error was as follows:

Q. What could you have earned during that period if you had been sound and well?

Objected to, as incompetent, immaterial. Overruled. Defendant excepted.

A. I do not know.

Q. Well, about.

Same objection, for the reason that the witness stated he did not know. Objection overruled. Defendant excepted.

A. I was offered that job in Lincoln and I was going there if I had not been hurt.

The last answer was stricken out.

Q. About what could you have earned during that period if you had been sound and well during that period?

Objected to, as incompetent, immaterial, and for the reason that the witness says he does not know. Overruled. Defendant excepted.

A. I think somewhere between ten and twelve dollars, that is, if I had still worked on commission, but I would not have done that.

Q. What could you have earned for your services if you had been sound and well during that twenty-five weeks, as absolute pay per week?

Objected to, as immaterial, and because it called for a speculative opinion. Overruled. Defendant excepted.

A. It would have been according to where I had went.

Q. Go where it was best for you.

A. Twelve dollars per week are journeyman wages in small towns, and in towns like Lincoln and Omaha fifteen to eighteen.

Assuming that eighteen dollars per week was shown by this evidence, and it would result that the earning capacity of Mr. Ryburn for twenty-five weeks was $450. On his positive testimony as to what he had been earning before his injuries were sustained and what he actually earned during the twenty-five weeks referred to there was an actual loss in earning capacity of but $59.37. The hypothetical method of examination pursued, by which it was shown that his earning capacity might have been $450, was improper and prejudicial upon principle and in fact, as is clearly demonstrated by the above *argumentum ad absurdum*. It must be assumed that this hypothetical evidence influenced the jury to the full extent of its tendency, and there was, therefore, error prejudicial to the rights of plaintiff in error. In view of the fact that the result of this error can with reasonable certainty be estimated and segregated from the amount of the verdict rendered, it is deemed but just that the defendant in error shall have his election, within twenty days from the filing of this opinion, to enter a remittitur in this court of the sum of $400, with seven per cent per annum interest thereon from the date upon which the verdict was returned, in which event, judgment for the balance shall be affirmed; or, if such remit-

titur be not entered, that the judgment of the district court be reversed, and it is accordingly so ordered.

JUDGMENT ACCORDINGLY.

POST, J., not sitting.

THOMAS MCGHEE V. FIRST NATIONAL BANK OF TOBIAS.

FILED APRIL 4, 1894. No. 4801.

1. **Usury:** INTEREST. Where a national bank loans money at a usurious rate which is included in the note, in an action to enforce the contract the interest is forfeited. Following *Hall v. First Nat. Bank of Fairfield*, 30 Neb., 99.
2. **Negotiable Instruments:** CONSIDERATION: USURY. A promissory note given for already accrued interest, in part usurious, was without consideration, and suspension of the right of collection between its date and maturity in no way operated to supply this essential element otherwise lacking.
3. **Chattel Mortgages:** CONSIDERATION FOR NOTE. A mortgage gives to the mortgagee no right of possession of the chattels mortgaged when the note thereby secured is wholly without consideration.

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

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

F. I. Foss, contra.

RYAN, C.

The defendant had taken from plaintiff a note for the sum of $470.50, secured by a chattel mortgage on certain

stock owned by the plaintiff. After the note fell due the defendant, by its agent, took possession of the mortgaged property with a view to the payment of the aforesaid note by foreclosure of the mortgage securing its payment. Plaintiff replevied the mortgaged property, and upon a trial of the rights of the respective parties had to the court, judgment was rendered in favor of the defendant for the return of said property or its value. This value having been fixed by stipulation, the judgment was made absolute for the sum of $505 as measuring defendant's damages.

There is but one question presented, and that, too, upon facts as to which the parties differ but slightly in their contentions. Contemporaneously with the making of the note for $470.50, there was made between the parties thereto a written agreement, by the terms of which McGhee agreed, in consideration of the surrender by the defendant to Byers, Patterson & Co. of McGhee's three notes for the aggregate sum of $3,684.04 (the bank receiving therefor $2,700 cash from Byers, Patterson & Co.), that he, McGhee, should give to the bank his said note for $470.50, and that he would not bring an action for usury against defendant. This agreement further provided that all the notes which plaintiff had made to defendant should remain with a party named therein, who should deliver the said notes to plaintiff after the time for bringing suit under the federal statutes for the exaction of usury should have fully elapsed, and not before. If we add together the above $2,700 which Byers, Patterson & Co. were to pay the bank, the $470.50 for which the note was given, and the $513.54 denominated a "discount" in the agreement, we have a total of $3,684.04, the exact amount of the three notes stipulated to be turned over to Byers, Patterson & Co. Upon full consideration of all the evidence adduced, we conclude that the so-called "discount" of $513.54 was but another name for the difference between the interest already accrued on usurious notes made by defendant to plaintiff and a sum

which the interest reckoned on loans at the rate of eight per cent per annum equaled at the date of said written agreement. In this view the note for $470.50 represented legal interest if the aforesaid agreement was effective to relieve previous transactions from the taint of usury, and not otherwise. The agreement, while it purported to be a compromise of differences between the parties, was clearly confined to the usurious transactions above referred to. In *Hall v. First Nat. Bank of Fairfield*, 30 Neb., 99, it was held that "where a national bank loans money at a usurious rate which is included in the note, in an action to enforce that contract the interest is forfeited." This principle forfeits all the interest due upon the transactions between the parties, provided the contract is tainted with usury. It is insisted, however, that the forbearance for the time covered by the note was a sufficient consideration upon which to predicate the right to enforce its payment. This proposition ignores the fact that the entire interest had been forfeited and that at the date of the note there was no liability whatever on plaintiff's part. The forbearance for a stated time of the collection of that which the payee had no right to collect falls within no definition of a consideration of which we have any knowledge. If the contention of defendant's counsel upon this proposition is correct, there could never be shown a want of consideration for a note due at a time later than its date, for the proposition insisted upon implies a sufficient consideration from the mere fact that an interval of time intervenes between its date and maturity. The mortgage was but an incident of, and dependent upon, the note for its validity. As the note by reason of the premises was not collectible, the mortgage securing it conferred no right of possession of the mortgaged chattels upon the defendant. The judgment of the district court is, therefore,

REVERSED.

POST, J., not sitting.

DAVID ACKERMAN ET AL. V. GEORGE H. THUMMEL.

FILED APRIL 17, 1894. No. 5580.

1. **The damages to owners of land assessed in establishing public roads,** whether the county is under township government or the commissioner system, cannot lawfully be paid from the general fund of the county, but should be paid out of the road fund belonging to the road district in which the land taken for the highway is situated.
2. **An injunction lies at the suit of a taxpayer** of the proper county to restrain the issuance by the county clerk of a warrant on the county treasurer for an illegal or unauthorized purpose, and to enjoin the payment of such warrant by the county treasurer.

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

Charles G. Ryan and *W. H. Thompson*, for plaintiffs in error, cited: *Stuart v. Palmer*, 74 N. Y., 190; *People v. O'Brien*, 111 N. Y., 1; *South Platte Land Co. v. Buffalo County*, 7 Neb., 257; *State v. Ryan*, 70 Wis., 676; *Harwood v. Inhabitants of North Brookfield*, 130 Mass., 561.

W. H. Platt and *Abbott & Caldwell, contra*, cited: *Whitcomb v. Reed*, 24 Neb., 50; *People v. Flagg*, 46 N. Y., 401; *Sangamon County v. City of Springfield*, 63 Ill., 66; *Dennis v. Maynard*, 15 Ill., 477; *People v. Power*, 25 Ill., 187; *State v. Shawnee County*, 28 Kan., 431; *Normand v. Otoe County*, 8 Neb., 18; *Johnson v. Hahn*, 4 Neb., 139; *Touzalin v. City of Omaha*, 25 Neb., 817; *State v. Nemaha County*, 10 Neb., 32; *Doody v. Vaughn*, 7 Neb., 28.

NORVAL, C. J.

This was an action brought by the defendant in error, a taxpayer of the city of Grand Island, to enjoin David Ackerman, county clerk of Hall county, from issuing or

delivering to Henry E. Timkie a warrant on the general fund of said county for the sum of $400, awarded to said Timkie by the county board as damages sustained by the location of a public road over lands owned by him in Washington township in said county, and to restrain William Cornelius, the county treasurer, from paying said warrant. A general demurrer to the petition was overruled, and the defendants declining to further plead, and electing to stand on the demurrer, a perpetual injunction was granted by the court as prayed.

The facts set up in the petition, briefly stated, are these: The county of Hall is under township organization, and is divided in towns, one of which is called Washington township. In January, 1891, the county board of Hall county made an order establishing a public highway within the limits of Washington township, and not on any town line, which road passed over the real estate of Henry E. Timkie, one of the plaintiffs in error. Appraisers were duly appointed to ascertain and fix the amount of damages caused by reason of the location of the road, who appraised the damages sustained by Timkie at $300. Subsequently, in November, 1891, the county board fixed and assessed the damages incurred by said Timkie at $400, and said board, on the 15th day of January, 1892, by resolution, instructed the county clerk to draw a warrant upon the county general fund for said sum in favor of said Timkie. No petition has ever been presented by Washington township, or any one in its behalf, to the county board praying for the allowance of any sum by the county to aid in bearing the expense of opening and constructing said road, and the road taxes of said township, under the usual levy for road purposes, would be sufficient in any one year to pay all damages sustained by reason of the location of said road, as well as for all labor and material necessary to construct the same. The assessed valuation of the property of the county for the year 1891 was $2,766,162, and the

assessed valuation of the property of the city of Grand Island for said year was $1,342,240.

No question is raised as to the validity of the proceedings of the county board relating to the establishing of the road and the appraising of the damages sustained by Timkie by reason thereof. The sole question presented for decision is whether Hall county, or Washington township, or the road district in said township, should pay the damages resulting from locating and opening the highway in question.

Section 1 of chapter 78 gives to the county board the general supervision over public roads of the county, and the power to establish and maintain them.

Sections 2 and 3 define public highways and the width thereof, while other sections of the same chapter regulate the proceedings which shall govern the establishment, vacation, or alteration of public roads, and provide the procedure for ascertaining the damages of the land-owner.

Sections 39 to 43, inclusive, provide for an appeal to the district court from the assessment of damages, and regulate the proceedings on appeal.

Section 42 declares: "The amount of damages the claimant is entitled to shall be ascertained by said court in the same manner as in actions by ordinary proceedings, and the amount so ascertained shall be entered of record, but no judgment shall be rendered therefor. The amount thus ascertained shall be certified by the clerk of the county board, who shall thereafter proceed as if such amount had been by them allowed the claimant as damages."

Section 53 authorizes the county board to divide the county into road districts, and to change the boundaries thereof.

Sections 76 and 91 read as follows:

"Sec. 76. In counties not under township organization, one-half of all moneys paid into the county treasury from the several road districts in discharge of road tax shall con-

stitute a county road fund, which shall be at the disposal of the county commissioners for the general benefit of the county, for road purposes; the other half of all the moneys paid into the county treasury from the several road districts, in discharge of road tax, and all money paid in discharge of labor tax shall constitute a district road fund, which shall be paid by the county treasurer to the overseer of the road district from which it was collected, and expended by him only for the following purposes: First—For the construction and repair of bridges and culverts, and making fire guards along the line of roads. Second—For the payment of damages of the right of [way of] any public road. Third—For the payment of wages of overseers, and for the expense of procuring the necessary guideboards. Fourth—For the payment of the wages of commissioners of roads, surveyor, chainmen, and other persons engaged in locating or altering any county road, if the road be finally established or altered as hereinbefore provided. Fifth—For work and repairs upon road. *Provided*, That the county commissioners of counties not under township organization may levy the same rate of road tax upon the property within any incorporated city of the metropolitan class and cities of the first class as is levied upon the property situated within the several road districts, and all moneys paid into the county treasury in discharge of road tax levied upon property within the corporate limits of any such city shall constitute a part of the general road fund of the county, and be subject to the disposal of the county commissioners for the general benefit of the county and city, one-half of which shall go to the county for road purposes and one-half to the council of said cities to be used for road purposes.

"Sec. 91. In counties under township organization all moneys paid to the township treasurer in discharge of township road tax, and all money paid in discharge of labor tax, shall constitute a township road fund, which fund

shall be divided as follows: All of said fund shall be held by the township treasurer, subject to the order of the town board, excepting an amount, not to exceed one-fifth of the entire fund aforesaid, shall be paid by the town treasurer to the overseer of the district from which such tax is collected. The amount under the control of the town board as aforesaid shall be expended for the general benefit of the township, for road and bridge purposes. The amount under the control of the overseer shall be applied within his district as follows: First—For the construction and repair of bridges and culverts, and making fire guards along the lines of roads. Second—For the payment of damages for any right of way of any public road. Third—For payment of wages of overseers, and for necessary guide boards. Fourth—For the payment of wages of commissioners of roads, surveyor, chainmen, and other persons engaged in locating or altering any county road, if the road be finally established or altered as hereinbefore provided. Fifth—For work and repairs on roads."

So far as we have been able to discover there is no express statutory provision which directs that damages resulting from the location of a highway shall be paid out of the county general fund, nor is there any express enactment which provides how, or by whom, such damages assessed shall be paid. If such authority exists, it arises by implication. The legislature has made provision for taking of private property for highway purposes, and has given a mode for ascertaining the amount of compensation. It must be presumed that the damages assessed shall be paid. Else, why assess them? By section 77 of the general revenue law, the county board is empowered, among other things, to levy a tax for road purposes, not exceeding five mills on the dollar valuation, and this whether the county is under township organization or not. The legislature, by section 76 above quoted, has directed that one-half of the moneys paid into the road fund in counties not under

township organization shall compose the county road fund, and is placed at the disposal of the county board for the benefit of the county for road purposes. The other half of the moneys which come into the county treasury in discharge of road tax is required to be paid to the overseer of the road district from which it was collected, to be expended by him for certain designated purposes, among other mentioned in the statute, "for the payment of damages for the right of [way of] any public road." In counties under township system of government, as will be seen by a perusal of section 91 already copied, there is no road tax at the disposal of the county board, but all moneys levied and collected in a township for road purposes constitute a township road fund, four-fifths of which are held by the township treasurer, to be disbursed under the directions of the town board for the benefit of the township for road and bridge purposes. The remaining one-fifth of the township road fund is under the control of the road overseer, to be expended by him within the district for five enumerated purposes, the first two of which are as follows: "First—For the construction and repair of bridges and culverts, and making fire guards along the lines of roads. Second—For the payment of damages for right of way of any public road." The legislature having set apart a certain portion of the revenues derived by taxation in counties under township organization, and those under the county commissioner system, for the payment of damages occasioned by the location of public highways, it is not unreasonable to infer, and we are constrained to decide, that it was the intention of the law makers that such damages should be paid out of the fund specially provided by statute for that purpose, and none other. In other words, while there is no express provision to that effect, damages assessed in consequence of laying out roads, whether the county is under township government or the other system, cannot be paid from the general fund of the county, but out

of the road fund of the road district in which the land taken for the highway is situated. (See *Whitcomb v. Reed*, 24 Neb., 50.)

Attention has been called by counsel to section 100 of the road law, which declares: "When it shall be necessary to build, construct, or repair any bridge or road in any town, which would be an unreasonable burden to the same, the cost of which will be more than can be raised in one year by ordinary road taxes in such town, the town board shall present a petition to the county board of the county in which such town is situated, praying for an appropriation from the county treasury to aid in the building, constructing, or repairing of such bridge or road, and such county board may (a majority of all the members elect voting for the same) make an appropriation of so much for that purpose as in their judgment the nature of the case requires and the funds of the county will justify; said appropriation to be expended under the supervision of an authorized agent or agents of the county, if the county board shall so order. In such case, where the county grants aid as aforesaid, the contract shall be let by the town board, under the provisions of sections 83, 84, and 85." It is said that the language of this section, "to build, construct, or repair any bridge or road in any town," etc., is broad enough to include the costs of the right of way for a highway. It is exceedingly doubtful whether this construction is tenable; but whether it is or not, it is unnecessary to determine, and we do not decide the point. Assuming it should be so interpreted, still the ordering of the payment of the damages in this case out of the county general fund was without jurisdiction. The county board under this section have no authority to appropriate money from the county treasury to assist a town in the building or constructing a road, except the board in a proper case is petitioned so to do by the town board. It is alleged in the petition, and admitted by the demurrer, that no such petition was ever presented

to the supervisors of Hall county by the town board of Washington township. This section 100 adds strength to the interpretation we have placed upon sections 76 and 91. If the county board had authority, and it was their duty to construct roads and pay for their right of way out of the county treasury in counties under supervisors' system, it was useless to enact section 100. The legislature having authorized the appropriation of moneys from the county treasury for such purpose upon petition, all other modes are thereby excluded.

It is said, in effect, Washington township should not be made liable for the damages in this case, since the statute does not authorize a township to establish a public road, or to determine the amount of damage resulting from the location of a road. These considerations might be properly urged upon the legislature as reasons why the law should be amended, but the objections urged are insufficient to justify us in holding that the county is liable. The legislature, doubtless, might have vested the power in town boards to lay out roads, and determine the amount of compensation the land-owner shall receive. That it has not done so, but has clothed another tribunal with that authority, does not invalidate the law and cast the burden upon the county to pay the damages in controversy. Many of the provisions of the road and township organization laws are very crude and imperfect, and will have to be amended before these acts attain the stage of perfection; but the people must look for relief to the body empowered to enact and change statutes, and not to the courts.

It is finally insisted that plaintiff has mistaken his remedy; that he should have appealed from the decision of the county board. It is a sufficient answer to this suggestion to say that the statute does not authorize a taxpayer to appeal in such a case. Plaintiff's only adequate remedy was by injunction. (*Normand v. Otoe County*, 8 Neb., 18;

Whitcomb v. Reed, 24 Neb., 50.) The decree of the court below is

AFFIRMED.

HARRISON, J., having decided the case in the district court, took no part in the above opinion.

LOUIS SCHIELDS ET AL. V. JOHN A. HORBACH.

FILED APRIL 17, 1894. No. 6777.

1. **Bill of Exceptions:** ALLOWANCE. The judge of the district court, who passes upon a preliminary motion in a case, may properly settle a bill of exceptions preserving the evidence introduced upon the hearing of such motion, notwithstanding another judge presided at the trial of the case upon the merits.
2. ———: TIME TO SERVE. The time for preparing and serving such a bill of exceptions, where no time is given to reduce the exceptions to writing, begins to run from the final adjournment of the term of court at which the decision upon the motion was made, and not from the close of the term at which the final judgment in the case was rendered.
3. ———: TIME TO PRESENT FOR ALLOWANCE: NOTICE: AMENDMENTS. Where amendments are proposed to a bill of exceptions, the draft of the bill, with the proposed amendments, must be presented to the trial judge within ten days after the return of the same to the party seeking the allowance of the bill, upon five days' notice to the adverse party or his attorney of record of the time and place of such presentation.
4. ———: ———: ———: WAIVER: AMENDMENTS. When the party suggesting amendments to a bill of exceptions appears before the judge and insists that his amendments be allowed, without making any objections as to the sufficiency of the notice, or that the bill was not submitted to the judge in time, he waives all objections as to the sufficiency of the notice, and as to the time the bill was presented to the judge for his approval and signature.

MOTIONS to quash bills of exceptions.

Lake, Hamilton & Maxwell, for the motions.

John P. Breen, contra.

NORVAL, C. J.

This was an action brought by defendant in error against Louis Schields to recover certain real estate situate in the city of Omaha. Subsequently Doratha Schields filed a petition of intervention, and was made a party defendant. Horbach obtained a verdict in the district court, to reverse which the defendants prosecute a petition in error to this court.

Two bills of exceptions were settled and allowed, one signed by Judge Ogden, which purports to contain a transcript of the evidence introduced upon the hearing in the court below on the motion of the plaintiff to exclude Edward R. Duffie from participating in the trial of the cause as the attorney for said Doratha Schields; and the other bill of exceptions was settled and allowed by Judge Scott, which purports to contain a transcript of the evidence introduced upon the trial upon the merits. The case is submitted to us upon motions to quash both bills of exceptions.

The motion to exclude Edward R. Duffie from appearing as an attorney in the case was sustained at the February, 1893, term of the district court of Douglas county, which term adjourned without day on April 29, 1893; but no time was given by the court for preparing and serving a bill of exceptions. At the same term of court a trial upon the merits was had to a jury, and a verdict returned. A motion for a new trial was filed by the defendants, which was not passed upon until the following May term of the court, which term adjourned *sine die* on July 26, 1893. An order was entered extending the time forty days for reducing the exceptions to writing, and on the 24th day of June, 1893, a second order was made granting an additional forty days in which to prepare and serve a bill of

exceptions in the case. Both bills of exceptions were served upon counsel for Mr. Horbach on September 2, 1893, and within ten days thereafter were returned to defendants' counsel. To the one allowed by Judge Scott, amendments were proposed, and to the one containing the evidence upon the hearing of the motion, objection was made to the same being signed and allowed by the judge, for the reason that it was not served upon the plaintiff or his attorney within the time provided by law.

The following, among other grounds, are now urged for quashing the bill of exceptions allowed by Judge Ogden:

1. That it was not signed by the judge who presided at the trial of said cause.

2. That the same was not submitted to defendant in error, or his attorneys of record, for examination and amendment within the time fixed by statute.

3. Because said bill of exceptions was not settled and allowed within the statutory time.

The first objection is not well taken. The order excluding the attorney from appearing in the case was made by Judge Ogden, and the latter could properly settle the bill of exceptions relating to that part of the proceedings, notwithstanding he did not preside at the trial of the case upon the merits. The statute contemplates that the judge who makes the decision, of which complaint is made, should sign the bill of exceptions, except in cases where the clerk of the district court is authorized to allow and sign the same. The judge who makes an interlocutory order may properly settle the bill of exceptions containing the evidence upon which such order was based. The proposed bill was not presented to Judge Ogden for settlement, nor was the same submitted to the defendant in error for examination or amendment, until the expiration of more than four months after the adjournment of the term of court at which the ruling on the motion to exclude the attorney was entered. The bill, therefore, was neither prepared, served,

nor signed within the time allowed by statute, and the same must be quashed. The time for preparing and serving the bill of exceptions preserving the evidence introduced on the hearing of the motion to exclude the attorney began to run from the final adjournment of the term of court at which such motion was passed upon, and not from the close of the term at which the final judgment was rendered.

Three objections are urged against the bill of exceptions signed by Judge Scott, namely:

1. The bill was not presented to the judge for settlement within ten days after the same had been returned to the attorneys of the plaintiffs in error by the defendant in error with his proposed amendments.

2. Five days' notice was not given the defendant in error of the time when said bill would be presented to the judge for allowance.

3. Said bill of exceptions was not settled within the time provided by law.

The draft of the bill of exceptions we are now considering the defendant in error returned to the plaintiffs in error with six proposed amendments thereto, all of which, excepting one, were conceded and allowed by counsel for plaintiffs in error. Notice was served upon counsel for defendant in error of the time and place the proposed bill would be presented to the trial judge for his signature, which date was eleven days subsequent to the time the draft was returned to the plaintiffs in error; but such notice was given only three days prior to the date fixed for the presentment of the bill to the judge. This was not a compliance with section 311 of the Code. This section makes it the duty of the party seeking the settlement of the bill of exceptions, in case amendments are suggested to the bill by the adverse party, to present the same with the proposed amendments to the trial judge within ten days from the return of the same to the defeated party, and to give the successful party, or his attorney of record, five days'

notice of such presentation for allowance. The defendant in error, however, has waived the provisions of the statute by appearing before the judge and insisting upon his proposed amendments. It does not appear that any objection was made to the trial judge that sufficient notice was not given, or that the bill was not presented for settlement within the period prescribed by law. (*Smith v. Kaiser*, 17 Neb., 184; *State v. Gaslin*, 25 Neb., 71; *State v. Gaslin*, 32 Neb., 291.)

The motion to quash the bill of exceptions signed by Judge Ogden is sustained, and the motion to quash the bill allowed by Judge Scott is overruled.

JUDGMENT ACCORDINGLY.

WALTER L. SPEAR ET AL., APPELLANTS, V. TIDBALL & FULLER ET AL., APPELLEES.

FILED APRIL 17, 1894. NO. 5398.

Res Adjudicata. A judgment in full force is a complete bar to a subsequent action between the parties thereto, or their privies, upon the same subject-matter litigated in the first suit.

APPEAL from the district court of Fillmore county. Heard below before MORRIS, J.

Billings & Billings, for appellants.

Wooley & Gibson and *W. C. Sloan, contra.*

NORVAL, C. J.

This action was commenced in the court below by Walter L. Spear and Walter S. Huston, against Tidball & Fuller and Neil Duncan, to establish an equitable mortgage upon

lots 35 and 36 of Heiderstadt's subdivision of out-lot No. 12, of the city of Geneva, and to foreclose the same. Upon the trial there was a decree dismissing the action, from which plaintiffs appeal.

The facts disclosed by the pleadings and proofs are these: On or about the 8th day of August, 1888, one F. Heiderstadt, being the owner of the above described premises, by a parol executory contract agreed to convey said lots to Truman W. Wheeler, upon his paying the sum of $200, one-half of which to be paid in sixty days, and the remainder in one year. When the sale was made it was agreed that Heiderstadt should give the purchaser a bond for a deed. Wheeler took possession of the lots shortly after the purchase, and entered into a contract with one Melvin Jones for the erection of a dwelling thereon. The latter erected the building, Tidball & Fuller furnishing the lumber for the purpose, amounting to $377.61. On December 8, 1888, and within the period provided by law, Tidball & Fuller duly filed in the office of the county clerk of Fillmore county a statement, under oath, of the amount and value of materials so furnished by them, and claimed a mechanic's lien therefor on the lots and buildings. Other parties, who furnished labor and materials for the erection of the improvement, also filed statements and claimed liens on the premises for the value of the labor and materials so furnished by them. On the 23d day of January, 1889, Wheeler sold his interest in the lots to Deniston Gilmore, and on that date said Heiderstadt and his wife Martha, by the direction of Wheeler, entered into a written contract with Gilmore to convey to the latter the premises in controversy on his making the following payments: $50 cash, $50 on or before June 23, 1889, and $100 on or before January 23, 1890, with interest at ten per cent per annum. The first $50 was paid when the contract was executed, and is receipted for therein. On the 6th day of March, 1889, appellees Tidball & Fuller

commenced an action in the district court of Fillmore county to foreclose their mechanic's lien on said premises, making F. Heiderstadt, Martha Heiderstadt, Truman W. Wheeler, Ella W. Wheeler, his wife, Deniston Gilmore, D. J. Spear, Walter S. Huston, Melvin Jones, and various holders of mechanics' liens parties defendant. The several lien-holders appeared in the action and filed answers and cross-petitions, setting up their mechanics' liens. The Heiderstadts also answered and set up their verbal contract with Wheeler, the transfer of the latter's interest in the lots to Gilmore, the execution of the written contract by the Heiderstadts to Gilmore, whereby they agree to convey the property to him upon his making the payments above referred to, and alleging that $150 was due and unpaid on said contract, with prayer for equitable relief.

At the May term, 1889, of the district court of said county, upon the trial of the cause, a decree was entered foreclosing the several mechanics' liens, among others those held by appellant Huston and D. J. Spear, through whom appellant Walter L. Spear claims title. No appeal was taken from this decree.

On the 2d day of August, 1889, Gilmore assigned his contract for a deed to appellant Huston and said D. J. Spear, for the consideration of $52.65, and the latter subsequently transferred his interest to appellant Walter L. Spear. On the 5th day of the same month the Heiderstadts, having been paid the purchase money, conveyed the premises to the appellants herein, Walter S. Huston and Walter L. Spear. Subsequently, on August 15, an order of sale was issued in said foreclosure case. The lots in dispute were sold thereunder to appellees Tidball & Fuller on September 28, 1889, for $670, which sale was reported by the sheriff to the district court. The sale was confirmed by the court on November 20, 1889, and the sheriff was ordered to make a deed to the purchasers. On the 19th day of December, 1889, the sheriff, in compliance with the

said order of the court, conveyed the premises to said Tidball & Fuller, which deed was duly recorded the same day, and on the 14th day of January, 1890, Tidball & Fuller, by deed of general warranty, conveyed the lots to appellee Neil Duncan. Subsequently, and on the 24th day of June, 1890, Duncan brought an action of ejectment in the district court of Fillmore county against Danford J. Spear, Walter S. Huston, Charles Woodruff, and Walter L. Spear, to recover said premises. Judgment was obtained in said action by Duncan on June 18, 1891. A writ of restitution was issued, and the sheriff put Duncan in possession of the premises. No proceedings have ever been instituted to obtain a reversal of the said judgment. To the present action the decree in the suit to foreclose the mechanics' liens and the judgment in the ejectment case already mentioned are pleaded in bar.

The petition in the present action sets up, *inter alia*, the said verbal agreement of Heiderstadt to convey the lots to the Wheelers; the transfer of their interest in the property to Gilmore; that Heiderstadt, in conformity with the directions of the Wheelers, executed a written contract whereby they agreed to convey the lots to Gilmore on the terms above stated; the assignment of the same to D. J. Spear and Walter S. Huston; the sale of D. J. Spear's interest to plaintiff Walter L. Spear; the payment to F. Heiderstadt of the unpaid purchase price of the lots; the execution and delivery of a warranty deed by Heiderstadt conveying the property to plaintiff; that the amount due plaintiff for the purchase money, amounting to $200 and interest thereon, was and is the first lien on the lots, with prayer that the property be sold to satisfy the same with interest and costs.

The decree in the former action brought by Tidball & Fuller to foreclose their mechanic's lien, no appeal having been taken therefrom, is conclusive of the rights of all the parties thereto and their privies. As already stated, the

Heiderstadts were defendants in that action. They filed an answer and cross-petition therein setting up facts, which if established by the evidence, would have entitled them to a vendor's lien on said premises. The decree gave them no relief, but the lots were ordered sold to satisfy the various mechanics' liens, and, under the decree, the premises were sold by the sheriff to Tidball & Fuller, appellee Duncan's grantors. The decree, and sale in pursuance thereof, cut off all equities of the parties to the action. Plaintiffs herein are the grantees of the Heiderstadts, and are therefore their privies. It is too well settled to require the citation of authorities in support thereof that a judgment or decree, not appealed from and unreversed, is a bar to a subsequent action between the same parties or their privies upon the same subject-matter litigated in the first suit.

The judgment in the ejectment suit brought by Duncan against the appellants herein and others, who were in possession of the premises, is likewise a bar to this action. No equitable defense was interposed. That suit was defended upon the ground that the defendants had a good and valid title to the lots in controversy, and that the title obtained through the sheriff's deed in the mechanic's lien foreclosure case was void and created a cloud upon the defendants' title. The trial court decided the issues in Duncan's favor. A writ of restitution was issued, and Duncan was put into possession of the premises. If these appellants had any equities in the property they should have pleaded the facts in their answer in the ejectment suit. They are estopped by the judgment in that case from doing so now. The judgment of the district court is right, and is therefore

AFFIRMED.

WASHINGTON I. CARSON, SHERIFF, V. CASSIE A. STEVENS.

FILED APRIL 17, 1894. No. 5703.

1. **Fraudulent Conveyances:** HUSBAND AND WIFE: BURDEN OF PROOF. Ordinarily, fraud will not be presumed, but must be proved by the party alleging it. The rule has no application in a suit between a wife and a creditor of her husband, concerning property transferred to her by him, after the contracting of the indebtedness. In such a case the burden is upon the wife to establish by a preponderance of the evidence the *bona fides* of the sale or transfer of the property to her.

2. **Instructions.** A misstatement of the law by the court in an instruction upon a material issue in the case is reversible error, even though the correct rule is stated in other paragraphs of the court's charge.

ERROR from the district court of Fillmore county. Tried below before HASTINGS, J.

Carson & Fifield and *W. C. Sloan*, for plaintiff in error.

F. B. Donisthorpe, contra.

NORVAL, C. J.

This was an action of replevin brought by the defendant in error to recover possession of a general stock of merchandise taken by the plaintiff in error, as sheriff of Fillmore county, under several writs of attachments issued against Garrett Stevens, husband of defendant in error. The plaintiff below claimed title to the property by virtue of a bill of sale given to her by her husband. She having failed to give a replevin bond as required by law, the action proceeded as for conversion.

Two trials have been had, the first of which resulted in a verdict and judgment for the sheriff. Plaintiff below prosecuted a petition in error to this court, where, at the

September term, 1890, the judgment was reversed and the cause remanded to the district court for a new trial. (30 Neb., 544.) On the second trial a verdict was rendered for defendant in error for $611.11, upon which judgment was rendered. The sheriff brings the case to this court on error.

It is undisputed that the stock of goods in controversy was owned by Garrett Stevens on and prior to January 15, 1889. On that day Stevens, being insolvent, conveyed by bill of sale all of his property to his wife, the defendant in error, in payment of an alleged indebtedness. Mrs. Stevens was aware at the time of the transfer that her husband was being pressed by his creditors for the payment of their claims. Shortly after the execution of the bill of sale the sheriff seized the goods by virtue of three writs of attachment in suits brought by the creditors of Garrett Stevens. Upon the last, as well as the former trial, defendant in error introduced testimony tending to show that the property was transferred to her in payment of a pre-existing indebtedness of her husband. There was likewise evidence before the jury from which the inference could properly be drawn that the bill of sale was fraudulently made for the purpose of hindering and delaying the creditors of Garrett Stevens in the collection of their debts.

In the opinion on the former hearing we said: "Where a debtor transfers property to his wife, and such transfer is contested by the creditors of the husband, the presumption is against the *bona fides* of the transaction, and the law places the burden upon the wife to show that the sale was not made to defraud the creditors of the husband." In other words, she is required to prove by a preponderance of the evidence that the transfer was made in good faith and not with the intent of hindering, delaying, and defrauding the husband's creditors, where such transfer is made subsequent to the contracting of the indebtedness for which the attachments were sued out.

The principal ground upon which we are asked to reverse the case is that the instructions of the trial court upon the question of the burden of the proof are contradictory and misleading. The third and fourth instructions given at the request of the plaintiff in error are as follows:

"3. The jury are instructed that transactions between husband and wife in relation to the sale or transfer of property from one to the other, whereby creditors are prevented from collecting their just dues, should be scrutinized very closely, and the *bona fides* of such transaction should be established satisfactorily by a preponderance of the evidence.

"4. The jury are instructed that in a contest between the wife and the creditors of her husband in regard to property transferred by him to her, there is a presumption against her which she must overcome by affirmative proof; and prove by a preponderance of the evidence the *bona fides* of the sale."

The second and fourth instructions given by the court on its own motion read as follows:

"2. The defendant admits the taking of the property, but says that it was the property of Garrett Stevens, and the claim of plaintiff therein fraudulent, and that the defendant took the goods by virtue of certain writs of attachment against Garrett Stevens, which were set forth in defendant's answer herein, and that the transfer to plaintiff of the merchandise was made and received with the knowledge of the claim of the creditors and with intent to hinder, delay, and defraud the creditors of Garrett Stevens."

"4. It is a general rule of law that a party alleging a fact undertakes the burden of proving such fact by a preponderance of the evidence."

And at the request of the defendant in error the court gave this instruction, to the giving of which the plaintiff in error excepted:

"8. You are instructed that fraud is never presumed.

The burden is upon the defendant to establish the allegations by a preponderance of evidence in this case."

Generally, the burden is upon the party alleging fraud to prove the same. But the rule is different in cases like the one at bar, where the transfer was made after the contracting of the indebtedness for which the attachments were issued. As was said by this court in the opinion in *First Nat. Bank of Omaha v. Bartlett*, 8 Neb., 328: "Transactions between husband and wife in relation to the transfer of property from him to her, by reason of which creditors are prevented from collecting their just dues, will be scrutinized very closely, and it must be clearly established that such transactions were made in good faith. (*Aultman v. Obermeyer*, 6 Neb., 264.) The reason is that there is such a community of interest between husband and wife that such transfers are often resorted to for the purpose of withdrawing the debtor's property from the reach of his creditors and preserving it for his own use. Therefore, in a contest between a wife and the creditors of her husband there is a presumption against her which she must overcome by affirmative proof."

In the case under consideration the sheriff was not required to establish that the property was transferred to Mrs. Stevens with an intent to defraud; but it devolved upon her to establish, by a preponderance of the evidence, the good faith of the transaction. The two instructions above quoted, which were given at the request of plaintiff in error, stated the law applicable to the evidence correctly, and the doctrine therein enunciated is in harmony with the previous decisions of this court upon the question under consideration. (*First Nat. Bank of Omaha v. Bartlett, supra*, 8 Neb., 328; *Thompson v. Loenig*, 13 Neb., 386; *Stevens v. Carson*, 30 Neb., 544.)

The trial court in its fourth instruction announced the general rule upon the question of the burden of proof. This instruction was not excepted to when read to the jury,

nor is the giving thereof now assigned for error, but it is urged that the plaintiff's eighth instruction and the defendant's third and fourth requests are contradictory. We think this contention is well founded, since the eighth instruction asked by defendant charged the jury, in effect, that the sheriff was required to prove the allegations of fraud in his answer by the preponderance of the evidence, while by the other two instructions referred to the jury were informed that the law raised a presumption that the transfer of the property to the wife was fraudulent, and that the burden was upon her to overcome this presumption by a preponderance of the evidence. The two rules laid down for the guidance of the jury were conflicting and misleading, and, therefore, were prejudicial to the rights of plaintiff in error. (*Wasson v. Palmer*, 13 Neb., 376; *School District v. Foster*, 31 Neb., 501.)

There are other errors assigned, such as the verdict is contrary to the evidence, and errors of law occurring during the trial, but they will not be considered, since the judgment must be reversed for the reasons already stated. The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

M. E. JONES V. LOUIS WESSEL.

FILED APRIL 17, 1894. No. 5540.

1. **Sale**: RESCISSION OF CONTRACT. One who seeks to rescind a contract is required to place the other party *in statu quo* by returning the property received thereby within a reasonable time.
2. ——: ——: EVIDENCE. Evidence examined, and *held* not to prove a return of the property or notice of an election to rescind within a reasonable time.

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

Adams & Scott, for plaintiff in error.

Wooley & Gibson, contra.

POST, J.

This was an action for the price of a mare pony purchased by Jones, the plaintiff in error, from the defendant in error Wessel. It was alleged by way of answer that by one of the conditions of the contract Wessel warranted the said pony to be kind and gentle and in all respects safe and reliable, but that she was in fact vicious and balky, and that on the discovery of her true character he, Jones, elected to rescind the said contract and immediately returned her to Wessel. The reply was a general denial. We assume the alleged warranty to have been fully established by the evidence, but upon the issue of rescission there is, we think, a failure of proof. Jones, according to his own testimony, discovered the vicious character of the pony the day of the purchase. He drove at once to the store of Wessel, where the following conversation was had: J.—"I came pretty near having a suit for damage against you. My sister and I came pretty near having our necks broken." W.—"She [referring to the pony] used to be so, but I thought she was all over it." That evening he took the pony to a livery stable, where she remained, according to his recollection, three or four days or longer; when he tied her in front of Wessel's store, from whence she was taken by the pound-master and sold for her keeping. He directed a boy who accompanied him from the livery stable to notify a man engaged in sweeping Wessel's store to notify the latter of the return of the pony. He does not claim to have personally notified Wessel of his election to rescind the contract, nor does it appear that any such

communication was made by the boy above mentioned. Wessel, on the other hand, testifies that he saw the pony in front of the store, but did not know who left her there or when she was taken to the pound. It further appears from his testimony that Mr. Pratt, keeper of the livery stable above mentioned, told him that the pony was at his stable and that Jones wanted him to go there and get her. It is a universal rule that one who seeks to rescind a contract must place the other party in *statu quo* by returning the property received within a reasonable time. (*Brown v. Waters*, 7 Neb., 424, and cases cited.) And all authorities agree that the election to rescind must be accompanied by some act which is equivalent to notice of such intention. It is not claimed that the notice to call at Pratt's stable for the pony was such a return as would entitle Jones to rescind the contract. Nor was he more fortunate in leaving the pony hitched in front of Wessel's store. That fact is of itself in nowise inconsistent with an intention to ratify the contract. It is true he sent a stranger to notify a person acting in the capacity of janitor for Wessel, but did not attempt even to prove that his message was communicated to the latter. For reasons stated the judgment of the district court is right and is

AFFIRMED.

BERNARD D. BARTELS ET AL. V. GEORGE W. MILLESON.

FILED APRIL 17, 1894. No. 5080.

Review: EVIDENCE. This case presents questions of fact only, and the evidence *held* sufficient to sustain the judgment of the district court.

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

Godfrey & Godfrey, for plaintiffs in error.

St. Clair & McPheely, contra.

POST, J.

This was an action by the defendant in error, plaintiff below, against the plaintiffs in error for injury to live stock by dogs of the latter. A trial before the district court of Kearney county resulted in a verdict and judgment for the plaintiff therein, which we are asked to review in this proceeding. A reversal of the judgment of the district court is sought on account of numerous alleged errors, but from an inspection of the motion for a new trial we discover that the only ground therein assigned is that the verdict is not supported by sufficient evidence. The only claim which can be made for the evidence of the plaintiffs in error is that it is contradictory of that offered by the successful party. It is possible that a finding of no cause of action would have been sustained on the evidence in the record; but this court will not retry questions of fact on a petition in error for the purpose of determining whether the verdict or finding is in accordance with the weight of the evidence. The judgment is

AFFIRMED.

LYMAN PARSONS v. A. H. BABCOCK.

FILED APRIL 17, 1894. No. 5287.

Usury: EVIDENCE: REVIEW. Evidence examined, and *held* to sustain the finding that the contract sued on is tainted with usury.

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

J. E. Cobbey, for plaintiff in error.

J. A. Smith, contra.

POST, J.

This was an action in the district court of Gage county on a note executed by the defendant for $1,066.90, under date of February 14, 1884, payable to the order of the plaintiff two years from date with interest at the rate of eight per cent per annum. The answer, omitting caption, is as follows: "That the note set forth in plaintiff's petition, and upon which this action is brought, was executed by this defendant for the sole purpose of taking up another note executed by this defendant to said plaintiff on the 15th day of September, 1879, for the payment to the plaintiff or order of the sum of $656.33, with interest at the rate of twelve per cent per annum, and which said note of September 15, 1879, was so executed by this defendant for the sole purpose of taking up the following notes, viz.: One executed by this defendant in the name of Collins & Babcock, dated August 21, 1874, for the sum of $114.50, payable to plaintiff or bearer one day after date with interest at twenty per cent per annum; one executed by this defendant in the name of Collins & Babcock, dated July 1, 1874, for the sum of $52.92, payable to plaintiff or bearer one day after date with interest at twenty per cent per annum; one executed by this defendant in the name of Collins & Babcock, dated August 1, 1874, for the sum of $25.98, payable to plaintiff or bearer one day after date with interest at twenty per cent per annum; one executed by this defendant in the name of Collins & Babcock, dated August 3, 1874, for the sum of $34.85, payable to plaintiff or bearer one day after date with interest at twenty per cent per annum; one executed by this defendant, dated June 27, 1874, for the sum of $86.25, payable to plaintiff or bearer with interest at twenty per cent per annum; one executed by

this defendant, dated August 1, 1874, for the sum of $18.19, payable to plaintiff or bearer with interest at twenty per cent per annum; and one executed by this defendant, dated August 3, 1874, for the sum of $4.89, payable to plaintiff or bearer with interest at twenty per cent per annum; all of which said seven notes last above described were given for money loaned to this defendant by said plaintiff to the amount of $337.58. On the 15th day of September, 1879, the said notes representing said amount of $337.58, the interest was calculated and figured at the rate of twenty per cent per annum and added to the principal, amounting to the sum of $683.44, from which amount a credit was taken of $27.66, leaving a balance due the plaintiff on said notes of $656.33, for which sum the said plaintiff took a renewal note on said date executed by this defendant and delivered to him for the payment of $656.33 to plaintiff or order with interest at twelve per cent per annum until paid, in which note the said plaintiff contracted for and reserved a greater rate of interest than that authorized and allowed by the statutes of the state of Nebraska. On the 14th day of February, 1884, the plaintiff required defendant to again renew said note, and the interest was calculated at said usurious rates, amounting to the sum of $1,066.90, and at plaintiff's request defendant executed and delivered the note sued upon to plaintiff. The defendant received from the plaintiff the sum of three hundred and thirty-seven and $\frac{58}{100}$ dollars only as the consideration for said note, and that the additional seven hundred and twenty-nine $\frac{32}{100}$ dollars of said note represents the interest contracted for and to be paid upon the sum loaned as aforesaid."

The reply is a general denial. Prior to the month of June, 1874, the plaintiff, whose residence was Des Moines, in the state of Iowa, left with the defendant, who resided at Pawnee City, in this state, about $4,000, to be loaned at the rate of twenty per cent per annum. During the

months of June, July, and August, of the year named, the defendant and his partner, Collins, used $337.58 of the plaintiff's money and executed notes therefor as follows: Four notes of Collins & Babcock amounting to $228.25, and three notes of the defendant amounting to $109.33. Statements were rendered annually by defendant, who testifies that he reported the notes above described in the first statement made after their execution, and that shortly thereafter plaintiff visited him at Pawnee City, at which time said transaction was the subject of a conversation between the parties. On that occasion the defendant, according to his testimony, fully advised plaintiff of the use of money and submitted said notes to him, but the latter directed him to keep them in his own possession, remarking that all he wanted was his interest at the stipulated rate.

The plaintiff, on the other hand, testifies that he never held any notes of the defendant or Collins & Babcock previous to the note for $656.33 executed September 15, 1879. He also contends that the note last named represented the amount of money then in defendant's hands and unaccounted for. Upon this issue, which is the only controverted question in the case, the finding of the district court was for the defendant, and with that finding we are entirely satisfied. The undisputed facts attending the transaction tend strongly to corroborate the defendant. For instance, the seven notes in question were all introduced in evidence, each of which bears the following indorsement written across its face: "Paid by new note, September 15, '79." Again, the plaintiff in his deposition denies that he ever held the seven notes described, but fails to deny the use of the money with his knowledge and consent or the understanding that defendant would pay interest thereon at the rate charged other borrowers. He also denies taking or contracting for "illegal interest," but neglects to fortify his conclusion with any statement of fact, such, for instance, as the state of the account with defend-

ant as shown by his own books. Nor does it appear from his testimony, except by inference, that the amount of said notes, $337.55, was not the exact balance in his favor. The judgment is clearly right and is

AFFIRMED.

BUFFALO COUNTY NATIONAL BANK, APPELLEE, V. FOUNTAIN M. SHARPE ET AL., APPELLANTS.

FILED APRIL 17, 1894. NO. 5575.

1. **Corporations**: OFFICERS: NOTICE. "A corporation is not chargeable with the knowledge nor bound by the acts of one of its officers in a matter in which he acts in behalf of his own interests, and deals with the corporation as a private individual, and in no way represents it in the transaction." (*Koehler v. Dodge*, 31 Neb., 329.)

2. **Chattel Mortgages**: REGISTRATION: PLACE OF SALE. Mortgaged chattels may be sold under the mortgage in a county other than the one in which they were at the time of the execution of the mortgage, and were afterwards kept up to the time of seizure under same, when the mortgage by its terms provides that the sale may take place in such other county, if the mortgagee, prior to the sale, files or causes the mortgage to be filed in the county where the sale is made.

3. ———: UNLAWFUL SALE OF CHATTELS: DAMAGES. If chattels seized by virtue of a mortgage are sold in a manner other than is provided by law, without the consent of the mortgagor, said mortgagor will be entitled to any damages caused by such illegal sale.

4. **Mortgage by Wife to Secure Husband's Debt**: CONSIDERATION. Where a married woman gives a mortgage on real estate, which is her individual property, to secure a note executed by her husband, the consideration of such note and mortgage being the extension of time of payment of the debt evidenced by such note, the consideration will be held sufficient and the wife bound, to the extent of the property mortgaged, for the payment of the debt.

5. **Review**: EVIDENCE. The findings and decree of the lower court *held* to be in accordance with the testimony and sustained by the weight thereof.

APPEAL from the district court of Custer county. Heard below before HOLCOMB, J.

Henry M. Kidder, for appellants:

The burden of proof was on the bank, when the question of usury was raised by the answer, to show that it was a *bona fide* purchaser for value without notice. (*Darst v. Backus*, 18 Neb., 231.)

R. A. Moore, contra:

The wife has a right to mortgage her property, if she so desires, and the consideration moving to the husband is sufficient to sustain the mortgage, when it is entered into voluntarily on her part. (*Mundy v. Whittemore*, 15 Neb., 652; *Webb v. Hoselton*, 4 Neb., 308; *Gillespie v. Smith*, 20 Neb., 456; *Savings Bank v. Scott*, 10 Neb., 83; *Barnum v. Young*, 10 Neb., 309; *Hale v. Christy*, 8 Neb., 268; *Eckman v. Scott*, 34 Neb., 817.)

HARRISON, J.

On the 24th day of November, 1891, the Buffalo County National Bank commenced an action in the district court of Custer county to foreclose a mortgage on lot number two, in block number seven, in Mason City, Nebraska, executed and delivered by Tonnie A. Sharpe and Fountain M. Sharpe November 20, 1889, to one A. J. Gallentine to secure the payment of a note in the sum of $1,052.91, of date November 20, 1889, signed by Fountain M. Sharpe and payable to A. J. Gallentine, and by him sold for a valuable consideration and before maturity to the plaintiff. The Sharpes were husband and wife, and the real estate described in the mortgage upon which the suit was

brought was in the wife's name, and from all that appears in this case belonged to her. The note of $1,052.91 was given by the husband to Gallentine in settlement of some prior claim or indebtedness of the husband to Gallentine, and apparently to settle and stop further proceedings in a lawsuit then in progress or pending in court, and the consideration, if any, for the execution of the mortgage by the wife, Tonnie A. Sharpe, was whatever extension of time was granted to her husband on his indebtedness to Gallentine and the settlement of the then pending case or lawsuit.

It is alleged in the petition, and appears in the case, that when the note and mortgage above described were executed and delivered to Gallentine he received from Fountain M. Sharpe a chattel mortgage on a number of horses and that this mortgage also became the property of the plaintiff bank. It further appears that there were also indorsed and delivered to the bank, by Sharpe, a note and mortgage executed by one W. C. Blaine in favor of F. M. Sharpe, said note being in the sum of $287 and secured by mortgage on four head of horses.

The defendants answered separately, the answer of the wife being, in substance, that she never received any consideration or benefit for or from the execution of the mortgage. There was a further allegation in her answer that she was induced to execute the mortgage by fraud and misrepresentation, but this portion of her defense was afterward abandoned. Fountain M. Sharpe states in his answer, in substance, that the note in suit was given in renewal of two notes which evidenced a prior indebtedness of defendant F. M. Sharpe to Gallentine for money loaned by Gallentine to defendant, and that the note sued upon in this action was in part for usurious interest on the loans, the principal and interest of which, added together, constituted the amount of the note secured by the mortgage declared upon in this case; that Gallentine was a director of

the plaintiff bank at the time of the sale of the note in suit to it, and that the bank was not an innocent purchaser, as it was charged with such knowledge or notice as was possessed by its director, of any defense in favor of defendant to the note; that defendant sold to plaintiff one horse at the agreed price of $100 and was to be credited with such sum as a payment on the note; that the plaintiff forcibly took possession of the property covered by the two chattel mortgages and removed it from Custer county, Nebraska, to Buffalo county, Nebraska, and there sold it and converted it to its own use; that the property included in the Blaine mortgage was reasonably worth $350, and that the property covered by the other chattel mortgage was worth the sum of $2,975, and for these several sums defendant demanded a set-off.

To these answers plaintiff filed a reply which contained a general denial of each answer and a further statement that all the matters set up in the answer of defendant F. M. Sharpe had been litigated in an action in the county court of Custer county, Nebraska, wherein this plaintiff was plaintiff and F. M. Sharpe defendant, and fully adjudicated and determined in favor of plaintiff.

The first question argued by counsel in their briefs is, was the knowledge of the director of the bank, at the time he sold the note to them, that the defendant had a defense to the note, notice to the bank of the infirmity of the note and the defense thereto? It was not pleaded, and there was no proof, that the bank had any other or further notice than the knowledge possessed by its director Gallentine, who, in the negotiations for the sale of the note to the plaintiff, acted for himself and as a stranger to the bank, and not in his capacity as director of the bank; nor is it contended that there was any collusion between the parties to the sale of the note. Clearly the knowledge possessed by Gallentine was not the knowledge of or notice to the the bank of any defense claimed by the defendant

against the note. This is the rule of law governing such cases, established by this court in *Koehler v. Dodge*, 31 Neb., 329, where it was held: "A corporation is not chargeable with the knowledge nor bound by the acts of one of its officers in a matter in which he acts in behalf of his own interests, and deals with the corporation as a private individual, and in no way represents it in the transaction;" and the following cases were cited by NORVAL, J., in support of the doctrine announced: *Barnes v. Trenton Gas Light Co.*, 27 N. J. Eq., 33; *First Nat. Bank v. Christopher*, 40 N. J. Law, 435; *Custer v. Tompkins County Bank*, 9 Pa. St., 27; *Winchester v. Baltimore & S. R. Co.*, 4 Md., 231; *United States Ins. Co. v. Shriver*, 3 Md. Ch., 381; *Wickersham v. Chicago Zinc Co.*, 18 Kan., 481; *La Farge Fire Ins. Co. v. Bell*, 22 Barb. [N. Y.], 54; *Washington Bank v. Lewis*, 22 Pick. [Mass.], 24; Angell & Ames, Corp., secs. 308, 309. (See also *Merchants Nat. Bank of Kansas City v. Lovitt*, 21 S. W. Rep. [Mo.], 825; *Commercial Bank of Danville v. Burgwyn*, 14 S. E. Rep. [N. Car.], 623.) This also disposes of the defense of usury. The plaintiff having been determined to be an innocent purchaser and holder of the note, the above defense fails and cannot be further considered.

The next inquiry which presents itself is, did the wife subject her separate property to the payment of her husband's note or debt, or render it liable therefor by the execution and delivery of the mortgage upon it, to secure such note or debt? The note signed by the husband and the mortgage given by the husband and wife were both executed on the same day and, so far as the evidence discloses, at the same place; but however this last fact may have been, there was a sufficient consideration for the execution of the note by the husband, viz., the extension of the time for the payment of his debt. The wife executed and acknowledged as her voluntary deed and act, and delivered to Gallentine, the mortgage on her separate property to secure the

payment of the note which evidenced the debt of the husband, and the consideration being its extension of payment. This was a contract which she had the power to make and by which she bound her property for the payment of the amount of the note. (*Nelson v. Bevins*, 19 Neb., 715; *Hale v. Christy*, 8 Neb., 265; *Stevenson v. Craig*, 12 Neb., 464; 1 Jones, Mortgages, sec. 113.)

The only other question for our consideration is the one in reference to the foreclosure of the chattel mortgages and the amount with which the defendants should be credited as the proceeds of the property included in such mortgages. It is conceded by plaintiff that the four horses covered by what is designated as the Blaine mortgage (or, as shown by the evidence, two mares and two colts) were taken from Custer county to Buffalo county and there kept for several months, for the reason, as claimed by plaintiff, that they were in very poor condition and could not be sold. The bank does not claim that these horses were sold under the mortgage in the manner provided by law for conducting such sales, but that it disposed of them to the best advantage possible for all parties concerned, at private sale, and was liable for any damages suffered by defendants by reason of the irregular sale of these four horses. The property taken by virtue of the mortgage from Sharpe to Gallentine was sold in Kearney after notice by advertisement as required by law. This mortgage provided by its terms for the sale of the stock in Kearney, and prior to the sale the mortgage had been duly filed in the office of the clerk of Buffalo county. This mortgage seems to have been foreclosed and sale of the stock had in the place stated in the mortgage, and in a legal manner. After a thorough examination of all the evidence bearing upon the taking of all the stock, and its sale at the prices obtained, and the values of the horses as given in the testimony of the different witnesses, we are satisfied that the judge who tried the case in the lower court gave the proper credit to defend-

ants for the proceeds of the stock taken by plaintiff under the chattel mortgages and sold, and that the finding of the amount of the balance due upon the note was correct when viewed in the light of all the evidence in the case.

The decree of the lower court is affirmed, but the journal entry ordered amended to make it a proper decree of foreclosure of the mortgage, and omitting the portion in which a personal judgment is rendered against the defendants.

JUDGMENT ACCORDINGLY.

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

FILED APRIL 17, 1894. NO. 4542.

Stare Decisis. The conclusion and decision announced on a former hearing of this case (38 Neb., 1) are approved and adhered to.

REHEARING of case reported in 38 Neb., 1.

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

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

HARRISON, J.

This case was appealed to this court from the district court of Sherman county, and in an opinion written by RYAN, C., filed here October 17, 1893 (38 Neb., 1), the judgment of the district court was reversed and a decree ordered in this court for certain defendants. Appellee filed a motion for a rehearing, which was granted, and on the rehearing additional briefs were filed and further oral arguments heard. In the former opinion a very extended

statement of the issues presented by the pleadings was made and the evidence examined and reviewed in a very complete manner. We have carefully read and considered the testimony and pleadings in the case, together with the briefs filed on rehearing, as well as those filed at the original hearing and argument of the case in this court, and are fully satisfied that the former conclusion reached was correct and the decision announced right. The case was so thoroughly examined, and argued at such length in the prior opinion, that we deem it unnecessary to discuss it further here, but will content ourselves with saying that the former decision is approved and adhered to and decree ordered as therein stated.

ORDER ACCORDINGLY.

GEORGE W. BLAKESLEE V. CHARLES L. ERVIN ET AL.

FILED APRIL 17, 1894. No. 5349.

1. **Review.** The evidence examined, and *held* sufficient to sustain the verdict.
2. **Instructions.** Objections to an instruction given by the court on its own motion considered, and *held* that there was no error in giving such instruction.
3. **Commission for Sale of Stock: EVIDENCE.** Where a party, owner of 260 shares of bank stock, each share being of the value of $100, desired to sell the stock and agreed with a firm in the business of selling real estate and other property that if the firm would find him a purchaser for the stock said firm should receive, as compensation for such services, all of the consideration received for the sale of such stock in excess of the face or par valuation thereof, and the consideration for the sale of the stock was $26,000, the face value, and the seller to retain a dividend then earned of $780, *held*, that this was a sale of the stock for the sum of $780 in excess of the face or par value, and on proof of performance of the services contracted for, the plaintiffs were entitled to recover the above amount.

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

E. A. Cook, for plaintiff in error.

H. C. May and *Hamer, Sinclair & Brown, contra.*

HARRISON, J.

This action was commenced by defendants in error in the county court of Dawson county, Nebraska, where they filed the following petition:

"The plaintiffs complain of the defendant and allege that they are partners doing business under the firm name of Ervin & Hammond, and are engaged in the sale of real estate and other property on commission in Dawson county, Nebraska; that on the 10th day of May, 1890, the defendant, being the owner of certain shares of stock in the Dawson County National Bank, a corporation organized and existing under the laws of the United States, applied to the plaintiffs to find a buyer or purchaser therefor, and then and there agreed to give the plaintiffs, as commission therefor, the amount in excess of the face or par value of said stock, for which the same was sold to the purchaser furnished by them; that pursuant to said agreement the plaintiffs furnished purchasers for said stock, and on or about June 1, 1890, the same was sold to them; that the face value of said stock was the sum of twenty-six thousand dollars ($26,000); that the purchase price of said stock, and the amount for which the same was sold, was the sum of twenty-six thousand dollars ($26,000) cash, and the defendant, in addition thereto, to retain and reserve three (3) per cent of said twenty-six thousand dollars ($26,000), amounting to the sum of seven hundred eighty dollars ($780) of the assets of said corporation; that said defendant took and received for said stock from the purchasers as aforesaid said sum of twenty-six thousand dol-

lars ($26,000) in cash, and good solvent promissory notes of the amount and value of the sum of seven hundred eighty dollars ($780); that the said sum of seven hundred eighty dollars ($780) is due and payable to the plaintiffs from the defendant as per said contract made as aforesaid; that notwithstanding the premises aforesaid the defendant has refused, and still refuses, to pay the same, although he has often been requested to do so, to the plaintiffs' damage in the sum of seven hundred eighty dollars ($780.)"

To this petition the plaintiff in error, defendant in the courts below, filed an answer, admitting the partnership of Ervin & Hammond, also admitting that on or about May 10, 1890, he was owner of certain shares of stock in the Dawson County National Bank, and denying each and every other allegation or statement of the petition.

A trial was had of the issues thus presented in the county court, and an appeal taken by the party defeated there to the district court, where no new pleadings were filed, but by agreement of the parties the case was tried to the judge presiding and a jury, on the pleadings filed in the county court. The trial in the district court resulted in a verdict for Ervin & Hammond. Blakeslee filed a motion for a new trial, which was overruled, and judgment rendered on the verdict for Ervin & Hammond. The case is brought here by Blakeslee by petition in error.

The first of the assignments of error urged is that the judgment is not sustained by sufficient evidence. The evidence, we conclude, after a careful examination of it, discloses that Mr. Blakleslee was, on or about May 10, 1890, the owner of, or could control, 260 shares of the stock of the Dawson County National Bank, of the face value of $26,000, or $100 per share, and desired to sell the same; that probably Mr. Leflang, who subsequently purchased it, and who then was understood to have in contemplation the establishment of another bank in Lexington, Dawson county, Nebraska, was approached by Mr.

Blakeslee and asked by him to buy the stock of the Dawson County National Bank, of which he was the owner; that Mr. Ervin, of the real estate firm, after this conversation between Blakeslee and Leflang, went to Mr. Blakeslee and told him he thought he could get him a purchaser for his bank stock, and after some talk between them was finally told by Blakeslee that if he could find him a buyer for the bank stock, he could have all that was received or to be paid for it in excess of its face value, $26,000. During the conversation had by the parties at this time, Mr. Blakeslee was informed by Ervin that Leflang was the probable purchaser whom he then had in view. The evidence further shows that during the month or more following this interview with Mr. Blakeslee, Ervin was very diligent in laboring with Mr. Leflang, saw him very frequently, went to the Dawson County National Bank and received from Mr. Blakeslee, or from some person ordered by him to deliver it, a statement of the condition of the bank, and took it and exhibited it to Mr. Leflang; that he reported to Mr. Blakeslee often during this time the progress he was making in effecting the sale of the stock; and his arguments with Mr. Leflang in favor of the purchase of it and urging it strenuously, seem to have exercised a very material influence and to have been largely instrumental in inducing him to take the stock, and Mr. Blakeslee knew of this being done by Ervin and accepted the result. Although there is some conflict of testimony on some of the points involved in the above statement, we think it is a fair summary of the determination which would be reached from a careful and impartial consideration of all the evidence introduced; and there is sufficient evidence to sustain the finding that the contract of hiring was made between Mr. Blakeslee and Ervin, and that the work was performed by Ervin and the fruits of it accepted by Blakeslee. This, by well-established rules governing such cases, was sufficient in law to entitle the plaintiff firm to the compensation agreed upon.

(*Potvin v. Curran*, 13 Neb., 303; *Hartley v. Dorr*, 15 Neb.' 451; *Butler v. Kennard*, 23 Neb., 357; *Anderson v. Cox*, 16 Neb., 10; *Rees v. Spruance*, 45 Ill., 308; *Middleton v. Findla*, 25 Cal., 76.)

This brings us to another branch of the case, viz., whether the stock was sold for more than its face value, $26,000. The evidence was to the effect that there was a $780 dividend earned, or very nearly so, at the time Mr. Leflang bought the stock, and all parties agree that Mr. Blakeslee was to, and did, receive for the stock $26,000, and according to the terms of the sale was to, and did, receive the further sum of $780, the dividend.

There is testimony that he received credit on his account at the bank for this sum before the completion of the sale of the stock, but it is very clear that the dividend was not regularly made or declared until several days subsequent to the time of the transfer of the stock to Leflang, and that Blakeslee was to have this dividend entered into, and it was a constituent element and moving and active part of, the consideration of the contract of sale and purchase between Mr. Blakeslee and Leflang; and if so, then it was this much given for the stock in excess of its face or par value, as clearly as if the like sum had been paid from Leflang to Blakeslee in money, check, draft, or property, or in any manner which served to increase the amount of consideration for the stock to more than its face value.

The only other error assigned is that the court below erred in giving the fourth paragraph of the instructions given on its own motion. This instruction is as follows: "You can find a sum less than the amount claimed if there is evidence to warrant it, but the suit is on a special contract of three per cent of $26,000, and I submit to your careful consideration whether there is evidence to find any other sum than three per cent claimed." This instruction, standing alone, is not as definite or clear as it might or probably should have been, and may be somewhat ob-

jectionable; but when read in connection with the other instructions given to the jury by the court, in which they were in substance told that before the plaintiffs were entitled to recover anything, the jury must believe from a preponderance of the evidence that the contract of employment was made as stated in the petition, and that they had performed the services and found a purchaser for the bank stock, and that it was sold to such purchaser and for more than its face value, we are unable to discover wherein the jury could have been misled by it or the plaintiff in error in any way or manner prejudiced by its being given. Instructions to a jury must be considered together, and if when so construed they state the law applicable to the facts in the particular case correctly, it is sufficient. (*Bartling v. Behrends*, 20 Neb., 211; *Gray v. Farmer*, 19 Neb., 69; *City of Lincoln v. Smith*, 28 Neb., 762.) The judgment of the lower court is

AFFIRMED.

LEROY MARTIN, APPELLEE, V. WILLIAM P. MILES, APPELLANT.

FILED APRIL 17, 1894. NO. 6592.

1. **Elections**: CONTESTS: BALLOTS: EVIDENCE. In a contest of election the ballots cast at the election constitute the primary evidence on which to determine the rights of the respective parties. It must appear, however, that these ballots have been preserved substantially in the manner and by the officers prescribed by the statute. If they have been placed in a position to be tampered with by interested parties, the burden of proof is on the party offering them in evidence to show that they are in the same condition as when sealed up by the several election boards. Following *Albert v. Twohig*, 35 Neb., 563.

2. ——: ——: PRESERVATION OF BALLOTS: EVIDENCE. Where the testimony in a contested case showed that the ballots offered in evidence had been by the county clerk sent to the secretary

of state, by whom, about a month afterwards, they had been returned to such county clerk in a grain sack tied with a string and not sealed or in any other way fastened so as to afford evidence that the same had not been tampered with, and there was no evidence negativing the possibility that the string fastening said grain sack might have been untied and its contents altered, *held*, that such ballots should not have been considered.

APPEAL from the district court of Cheyenne county. Heard below before NEVILLE, J.

William P. Miles, George W. Heist, and *Henry St. Rayner,* for appellant:

The burden of proof is on the contestant, when he seeks to introduce the ballots to overturn the official count, to establish by affirmative evidence that they have been preserved substantially in the manner and by the officers prescribed by the statute; that they are the genuine ballots cast by the voters, and that they have not been tampered with. (*Albert v. Twohig*, 35 Neb., 563; *Spurgin v. Thompson*, 37 Neb., 39; *People v. Livingston*, 79 N. Y., 279; *Hudson v. Solomon*, 19 Kan., 186; *People v. Sackett*, 14 Mich., 325; *People v. Robertson*, 27 Mich., 129; *People v. Holden*, 28 Cal., 123; *People v. Burden*, 45 Cal., 241; *Coglan v. Beard*, 65 Cal., 58; *Fenton v. Scott*, 17 Ore., 189; *Newton v. Newell*, 26 Minn., 259; *Kingery v. Berry*, 94 Ill., 521; *Dorey v. Lynn*, 31 Kan., 758; *Powell v. Holman*, 6 S. W. Rep. [Ark.], 509; *State v. Randall*, 35 O. St., 64; *Spidle v. McCracken*, 25 Pac. Rep. [Kan.], 897; *State v. Bate*, 70 Wis., 413; *Andrews v. Judge of Probate*, 74 Mich., 278; *State v. Donnewirth*, 21 O. St., 220; Cooley, Const. Lim. [5th ed.], 625; 6 Am. & Eng. Ency. Law, 341, 342, 424, 425.)

H. D. Rhea, contra:

The preservation of the ballots being the ultimate purpose of the statute, the omission to follow all the requirements and formalities of the statute to secure that object is

not fatal. (*People v. Higgins*, 3 Mich., 233; *People v. Cicott*, 16 Mich., 283–306; *People v. Sackett*, 14 Mich., 320; *Hudson v. Solomon*, 19 Kan., 180; *Russell v. State*, 11 Kan., 308.)

Returns sent out after a statutory time are good if not defective in form. (*Hulseman v. Rems*, 41 Pa. St., 396.)

The rights of one properly elected cannot be impaired by an omission of the officers to properly preserve the ballots. The statute prescribing how they shall be preserved is directory merely. (*State v. Judge of Ninth Judicial Circuit*, 13 Ala., 806; *People v. Livingston*, 79 N. Y., 290; *Fenton v. Scott*, 17 Ore., 189; *Coglan v. Beard*, 65 Cal., 62; *People v. Holden*, 28 Cal., 124.)

RYAN, C.

At the general election held in Cheyenne county, Nebraska, on November 8, 1892, the parties to this case were candidates for the office of county attorney of said county. The canvassers of the votes cast at said election declared that the incumbent had received 463 votes and that the contestant had received 462 votes for the aforesaid office of county attorney. Upon a trial in the county court it was found and adjudged that there had been cast for the incumbent 471 votes and for the contestant 454 votes,—a majority of seventeen for the incumbent. On appeal in the district court of said county it was adjudged that contestant had received 503 votes, while the incumbent had received but 474,—a majority of twenty-nine in favor of the contestant. The incumbent appeals to this court. It is deemed necessary to consider but one question, for reasons which will hereafter require no explanation. On the trial in the district court Daniel McAleese, county clerk of Cheyenne county, testified as follows:

Q. You may state to the court if you have the ballots that were used and voted at the last general election held November 8, 1892, in your possession.

A. I could not say whether they were the same or not. They were sent to Lincoln to be examined in a case. I don't know what it was—an amendment, I think, to the constitution,—and they were returned again. I can't say. I don't know whether they were the same or not.

Q. Are they the same ballots that were returned to you by the judges of election?

A. I cannot tell. They were the same that were returned from Lincoln.

Q. And the ones returned from the judges and clerks of election?

A. They may be. I would not swear to it.

* * * * * * *

Q. How many packages did you send to Lincoln?

A. I don't know how many. I think about fifteen.

Q. Fifteen districts?

A. Districts or precincts.

Q. Were the same number sent back to you?

A. I did not count them. It was my deputy.

On cross-examination this witness testified as follows:

Q. How long were they [the ballots] away from your office?

A. I am not sure about that—the exact time.

Q. About how long?

A. I think about a month.

Q. And you do not know whether these ballots you say you have in the county clerk's office now are the same ballots that were sent to Lincoln by you?

A. I would not swear positively that they were, but I think they are.

Q. Can you swear positively that they are all or the same ballots that were sent to Lincoln by you?

A. I can't swear, because I did not count them.

* * * * * *

On re-examination this witness testified as follows:

Q. By what authority did you send the ballots to Lincoln?

A. By authority of the auditor of public accounts.

By the Court: Do you mean the state auditor?

A. Yes, sir; the secretary of state.

Q. In what manner did you send them?

A. My deputy sent them.

* * * * * * *

Q. Were they sent as directed by the auditor of public accounts?

A. Yes, I presume they were.

Q. In what manner were they returned, and by whom?

A. My deputy can tell you that. I don't know. We have no instructions for their return whatever.

By the Court: Do you know who they were received from?

A. I do not.

Q. Does your deputy know?

A. He may know.

James McMullen, the deputy clerk of said county, was then called, and testified that the ballots in question were sent to Lincoln by authority of an act passed by the state legislature and certified to the county clerk of Cheyenne county by the secretary of state. This order was in the following language:

"STATE OF NEBRASKA,
"OFFICE OF THE SECRETARY OF STATE,
"LINCOLN, NEB., February 10, 1893.

"*Dan'l McAleese, Esq., County Clerk, Cheyenne County, Sidney, Nebraska*—DEAR SIR: Your attention is respectfully called to House Roll No. 112:

"'An act to recount the ballots cast for and against an amendment to the constitution relating to executive officers, and an amendment to the constitution relating to permanent school funds, on the 8th of November, 1892, and to declare the result.

"'*Be it enacted by the Legislature of Nebraska:*

"'Section 1. County clerks of each county of this state

are hereby required to forward, on or before the 15th day of February, 1893, all ballots and poll-books returned to said clerks by the judges and clerks of election held on the 8th day of November, 1892.

"'Sec. 5. Any county clerk failing to transmit the ballots and poll-books as required by this act shall be deemed guilty of a misdemeanor and shall be fined not less than $100 or not more than $500.'

"The act referred to in this letter originated in the house of representatives and passed the legislature February 9, 1893. You will please forward to secretary of state the ballots and poll-books as mentioned in this letter.

"Yours respectfully,

"[SEAL.] JOHN C. ALLEN,
"*Secretary of State.*
"By C. C. CALDWELL,
"*Deputy.*"

"By express, February 13, 1893.
"D. MCALEESE,
"*County Clerk.*
"JAMES MCMULLEN, *Deputy.*"

After identifying the above notice, Mr. McMullen's evidence was as follows:

Q. Upon receiving that order what did you do in reference to the ballots of this county?

A. I immediately tied up all the ballots that I received from the judges and clerks of election, and also all poll-books, and put them in a grain sack and secured a string around the neck of the grain sack and sealed it thoroughly with sealing wax and sent it by express to the secretary of state to Lincoln, Nebraska.

Q. When were they returned, if at all?

A. A similar package was returned. I did not note the date, but I presume they were gone about a month. I believe I noted the date when I sent them away, but when I received them back again I did not note the date. They

came back in the same grain sack, I believe, unsealed, simply tied with a string.

Q. How was it sent?

A. By express.

Q. And you have these ballots in your possession at this time as a public officer?

A. I never opened the sack. I don't know what was in it.

Q. I say, you have that sack in your possession and its contents?

A. Yes, sir.

On his cross-examination this witness said:

A. I received no note of any kind from the secretary of state whatever. I got notice from the express agent at Sidney that a package was in the office for the county clerk. I sent to the express office for it and left it in the office of the county clerk. Have no communication from the secretary of state.

Q. Didn't the secretary of state ever notify you that the ballots sent by you had been returned?

A. He did not.

Q. Did he ever notify you that the same identical ballots sent by you had been returned?

A. He did not.

There was other evidence from these witnesses who were recalled, but in substance it was the same as that which has been just set out.

House roll No. 112, referred to in the circular letter of the secretary of state, is found under the head of "Special Laws and Resolutions," as chapter 68 of the Laws of 1893. This act makes no provision for the return of the ballots and poll-books to the respective counties from which they were required to be forwarded to the secretary of state. In the matter under consideration the ballots and poll-books were absent from the office of the county clerk of Cheyenne county for the space of about a month. It is shown by the

above testimony that when they were forwarded by the said county clerk they were sealed in a securely tied grain sack, and this fact of sealing would afford some guaranty against the contents of the sack being tampered with in transit. While the special act referred to was silent as to the duty of the secretary of state in respect to the manner of his returning the poll-books and ballots to the clerks of the counties from which they had been forwarded to him, it would be but a reasonable requirement that if such return was made in a grain sack the sack should be securely tied, and precaution should be taken against the sack being opened without leaving evidence of that fact. Under analogous circumstances this sealing is required by sections 77 and 78, chapter 26, Compiled Statutes. So far as the testimony shows, we are left entirely in the dark as to the receipt and disposition of this sack in the office of the secretary of state, as well as of the manner in which it was preserved while in that office, as also while it was under the consideration of the legislature; and finally the sack with its contents was returned to the county clerk in such condition that to have tampered with its contents would have been the easiest matter in the world, and one as to which no trace or evidence would have remained. We are not required to determine whether or not, in addition to this carelessness, there should be shown an actual tampering with the ballots and poll-books; neither are we required to infer that through this carelessness such tampering did actually take place. It is sufficient that ample opportunities were afforded for falsifying the choice of the people as shown by the ballots and poll-books, in the course of their transportation from Lincoln to Sidney, and afterwards from the office of the express company to the office of the county clerk.

In *Albert v. Twohig*, 35 Neb., 563, it was held in a contest of election that the ballots cast at such election constituted the primary evidence to determine the rights of the respective parties, and that to their consideration in evidence

it must appear that they had been preserved substantially in the manner and by the officer prescribed by the statute. To our purpose the following language of the syllabus is specially applicable: "If they [the ballots] have been placed in a position to be tampered with by interested parties, the burden of proof is on the party offering them in evidence to show that they are in the same condition as when sealed up by the several election boards." It requires no amplification to extend the operation of this rule to the facts of the case at bar. The court erred in overruling the objection of the incumbent to the ballots offered as original evidence for the reasons above fully indicated. The judgment of the district court is

REVERSED.

PATRICK DUNPHY V. GEORGE BARTENBACH.

FILED APRIL 17, 1894. No. 5517.

1. **Admission of Evidence:** OBJECTIONS: REVIEW. The sustaining of an objection to an answer which was immaterial to the issues on trial, presents no question for review; and this result is not avoided subsequently by copious offers to prove facts, entirely outside the scope of both the question and answer, to which the objection had already been sustained.
2. **Instructions not complained of in the motion for a new trial** cannot be reviewed in the supreme court, even though their correctness is challenged by the petition in error and in argument of counsel.

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

Thummel & Platt, for plaintiff in error, cited: *Buffalo County Nat. Bank v. Hanson*, 34 Neb., 455; *Bedford v. Terhune*, 30 N. Y., 453; *Whitman v. Watry*, 31 Wis., 638; *Schieffelin v. Carpenter*, 15 Wend. [N. Y.], 400.

Abbott & Caldwell, contra, cited: *Enyeart v. Davis,* 17 Neb., 236; *Jungerman v. Bovee,* 19 Cal., 355; *Livingston v. Potts,* 16 Johns. [N. Y.], 28; *Wheeler v. Walden,* 17 Neb., 125; *Kittle v. St. John,* 7 Neb., 73; *Grimman v. Legge,* 8 Barn. & C. [Eng.], 324; *Lyon v. Reed,* 13 M. & W. [Eng.], 306; *Thursby v. Plant,* 1 Saunders [Eng.], 236; *Bailey v. Wells,* 8 Wis., 141*; *Randall v. Rich,* 11 Mass., 493; *Shepard v. Spaulding,* 4 Met. [Mass.], 416.

RYAN, C.

The defendant in error obtained judgment in the district court of Hall county against plaintiff in error for the sum of $405, as the balance due on the lease of a certain store room in a building in Grand Island, known as the "Bartenbach Opera House." Originally this room was, by a contract in writing, leased for five years, commencing with July 1, 1883, and thereunder the plaintiff in error paid the rent until December 1, 1885, when, as defendant in error alleged in his petition, the plaintiff quit and abandoned said premises and refused further to occupy the same or pay rent thereon, though repeatedly requested to comply with the terms of the aforesaid lease. In the petition it was alleged that during the portion of the unexpired term remaining after December 1, 1885, the landlord had been wholly unable to lease the said room, and for such portion that he was able to lease it the rent was of necessity at a lower rate than that agreed in the aforesaid written lease. The prayer of the petition was for judgment for the amount of the alleged shortage, in the sum of $433.15.

The contention of the plaintiff in error on the trial was, that on or about May 1 he sold out the business carried on in said room to one John Kuhlsen, with the knowledge and consent of Bartenbach, the defendant in error, who at that time and place released the plaintiff in error from the aforesaid contract of lease, and then and there defend-

ant in error accepted said Kuhlsen as his lessee of said premises, and then and there leased said premises to Kuhlsen for $65 per month, payable monthly, and that Kuhlsen took possession of said premises from Bartenbach, to whom Kuhlsen paid the rent up to December 1, 1885, at which time Kuhlsen quit possession. Dunphy sought to prove that this abandonment of the premises was because of Kuhlsen having trouble with Bartenbach, who thereupon ordered him to vacate; while the testimony of Bartenbach is that he never ordered Kuhlsen to vacate, but that Kuhlsen's abandonment was purely voluntary. A receipt introduced in evidence showed payment by Dunphy, on January 3, 1885, of the rent up to July 1, 1885. From the date last named until December 1, immediately following, the receipts show that the rent was paid monthly by Kuhlsen. Each receipt was for $65, and, as between Dunphy and Bartenbach, the original lease had fixed the annual rent at $780, so that the amounts paid monthly are of little significance.

The contention of the parties was narrowed down to one proposition, and that is, whether or not there was an agreement on the part of Bartenbach to release Dunphy from his obligation under the written lease to accept Kuhlsen thenceforward as his tenant. On the authority of *Buffalo County Nat. Bank v. Hanson*, 34 Neb., 455, it was insisted by the plaintiff in error that the written lease having been surrendered by an agreement between the parties and the term thereby terminated, and that the agreement having been acted upon by both parties, all liability of Dunphy was terminated. On this point the evidence of Mr. Dunphy was as follows:

Q. What transpired between you and him [Kuhlsen], if anything, along in the spring of 1885?

A. He came to me and asked me if I wouldn't do something for him. He had worked for me a long time; and I asked him what he wanted, and he said he would like to buy the Opera House saloon.

Q. Tell what you did,—you and him.

A. I finally sold the place to him and we had everything arranged satisfactory. I says to him, we better go and see Mr. Bartenbach about the lease. So him and me went up to his store and I told him I had sold the place to Hans, and whether he would take him for the rent or not.

Q. You may state whether you and Mr. Kuhlsen, after you made your deal in there, were to see Mr. Bartenbach.

A. Yes, sir.

Q. What was said and done between you parties?

A. I told him I had sold out to him, and whether he would take him for the lease or not; if not, it would stand just as it was and I would be accountable for it.

Objection was made, in the language of the record itself, "to anything that was said between this party and Mr. Bartenbach in regard to taking Mr. Kuhlsen for the rent, as being incompetent and immaterial." The objection was sustained and an exception taken. This was after the answer had been given. Thereupon the record shows as follows: "The defendant desires to prove by this witness, and can prove, that at this time Mr. Dunphy, Mr. Kuhlsen, and Mr. Bartenbach together had a talk with reference to this lease, and that Mr. Bartenbach said to Mr. Dunphy and Mr. Kuhlsen that 'it makes no difference to me to whom the building is rented or leased;' that 'I would just as soon have Mr. Kuhlsen lease the property as you,' and at that time and there Mr. Kuhlsen and Mr. Bartenbach made an agreement in my presence that Mr. Bartenbach was to make a lease out in writing to Mr. Kuhlsen to commence on July 1, 1885, to the expiration of that written lease—along about the 1st of May, 1885; and it was then and there agreed by and between the parties that the original lease should be surrendered, and was then and there surrendered. Objected to, as incompetent, immaterial, and tending to dispute the contents of a written lease. Court: The objection is sustained except as to that portion

offering to prove that the written lease was at the time surrendered, which may be proved, to which defendant excepts." Notwithstanding the permission of the court there was no attempt to prove in any manner that the written lease was surrendered. Upon this same point the evidence of Mr. Kuhlsen was as follows:

Q. What transpired or happened about that time between you and Mr. Dunphy, if anything?

A. Well, I thought I would try——

Q. Just tell what you did.

A. I bought the fixtures of Mr. Dunphy for to run the saloon for myself at that place.

Q. Did you talk with Mr. Bartenbach about this?

A. Yes, sir.

Q. When was it you talked with Mr. Bartenbach about it?

A. It was in the latter part of April, I think; some part of April.

Q. What did you talk to Mr. Bartenbach about it?

A. I was talking about the lease. The time when I bought the stuff from Mr. Dunphy we went to Mr. Bartenbach to see whether he would hold Mr. Dunphy for the lease.

Objected to, as incompetent and immaterial. Sustained and defendant excepts.

The defendant offers to prove by this witness, and can prove, that along about the latter part of April or the first of May, 1885, the witness Kuhlsen purchased the interest of Patrick Dunphy in this saloon that was run and operated in the building of Mr. Bartenbach, and at this time Mr. Bartenbach stated to Mr. Kuhlsen and to Mr. Dunphy "I am willing that Mr. Kuhlsen shall have this property for the balance of this lease for the price of $65 per month and that there shall be a change in it, and that the monthly rent shall be paid by Mr. Kuhlsen each month in advance after the first day of April, 1885, to which time it

is paid," and then and there at that time leased this property to Mr. Kuhlsen for the sum of $65 per month, each month to be paid in advance until the expiration of the Dunphy lease, and that he then and there agreed with Mr. Kuhlsen that he would cause a written lease to be made on this agreement, and the parties should sign it at some day later. He did not at that time—at that present moment.

Abbott: The plaintiff makes no objection to the proof of the sale by Mr. Dunphy to Mr. Kuhlsen of the fixtures and furniture and other property in the saloon building, but does object to any conversation in regard to the surrender of the lease and the releasing of Mr. Dunphy from the payment of the rent, as incompetent, irrelevant, and immaterial.

The objection as made is sustained, and the defendant excepts.

It will be noted that in the testimony of Mr. Dunphy and in that of Mr. Kuhlsen the exceptions taken are to the sustaining of objections to the offers of proof by each of the witnesses respectively. In neither case was there any question pending, much less was there under consideration an objection thereto. Each witness had answered fully the question which had been last propounded to him. In the evidence of Mr. Kuhlsen the last question was: "What did you talk to Mr. Bartenbach about it?" And the answer: "We were talking about the lease. The time when I bought the stuff from Mr. Dunphy we went to Mr. Bartenbach to see whether he would hold Mr. Dunphy for the lease." In the evidence of Mr. Dunphy, the question was: "What was said and done between the parties?" The answer: "I told him I had sold to him and whether he would take him for the lease or not; if not, it would stand just as it was and I would be accountable for it." Neither this question nor the answer to it tended to show a surrender of the lease by Mr. Bartenbach to Mr. Dunphy and the release of Mr. Dunphy from its obligations. It is

true that in each case the evidence was followed by an offer to prove facts which, if established, would show a surrender of the lease by Bartenbach. While an offer to prove is necessary to illustrate the purpose for which the question has been asked, we do not understand that by a mere offer to prove certain facts the materiality, relevancy, or competency of testimony, which by no possible means could be responsive to the question propounded, is presented for determination. The objection sustained in each instance under consideration was to an offer to prove made by the attorney, not upon objection to a question in response to which no answer had yet been given. After the question had been answered in each case without objection, it was of doubtful propriety to object to the answer; still more was that propriety strained by subsequently offering to prove certain facts entirely foreign to the scope of the question which had last been asked and answered. We are of the opinion that the objections made and sustained cannot now be reviewed on account of the facts to which attention has just been directed.

By his petition in error the plaintiff in error attempts to question the correctness of instructions 1 and 10 given by the court on its own motion. It is insisted that each of these instructions is in conflict with the proposition to which we have adverted as established in the case of *Buffalo County Nat. Bank v. Hanson, supra.* Unfortunately for this contention, neither of these instructions was referred to in the motion for a new trial, and it is an established rule in this court that upon petition in error no question will be reviewed which was not presented in the district court by a motion for a new trial. (*McCormick v. Keith*, 8 Neb., 142; *Manning v. Cunningham*, 21 Neb., 288; *Becker v. Simonds*, 33 Neb., 680.)

The plaintiff insists that there was error in refusing to give instruction No. 2, asked by the defendant. It was in the following language:

"No. 2. If the jury find from the evidence in this case that Bartenbach rented the premises to Kuhlsen commencing on July 1, 1885, for a term from month to month without demanding rent of Dunphy, or without notifying the said Dunphy that he did it on his account, then under the law it was a surrender of the Dunphy lease, and you should find for the defendant."

This instruction required only that the jury should find that Bartenbach rented to Kuhlsen for a term from month to month without demanding rent from Dunphy, or without notifying Dunphy that he did it on his account, to constitute a surrender of Dunphy's lease. Whether or not Dunphy's lease was surrendered was a question of fact to be submitted to the jury upon all the evidence, and an instruction which undertook to limit the inquiry to the considerations above stated was too restrictive in its terms and was properly refused.

Again, it is insisted there was error in refusing instruction No. 3, asked by the defendant, which was in the following language:

"No. 3. You are instructed that if you find from the evidence that on the 1st day of May, 1885, the defendant Patrick Dunphy sold his interest in the fixtures and other property contained in the building in controversy in the case to Honas Kuhlsen, and the said Bartenbach agreed to and did release the defendant Dunphy from the lease in controversy in this case, and rented the said premises to the said Kuhlsen, and the said Kuhlsen immediately took possession thereof, then you will find for the defendant."

This instruction improperly assumed that there was evidence that Bartenbach had agreed to and did release the defendant Dunphy from the lease in controversy and rented the said premises to Kuhlsen. In all cases instructions given should be as to facts in support of which competent evidence had been introduced before the jury. (*Kilpatrick v. Richardson*, 37 Neb., 731.) The instructions

asked by the defendant were therefore properly refused. The question whether or not a lease in writing had been surrendered by an agreement between the parties (by both unequivocally acted upon) that the same should be terminated, was attempted to be presented in no other form or connection than those to which at some length we have already given attention, unless we except the offer to prove by whom the gas bills were paid—a fact of no special significance either way.

The petition in error and the motion for a new trial challenge consideration upon but one other question, and that is whether or not there was error in giving the third instruction of the court, which was in the following language:

"If the plaintiff is entitled to recover at all, he would be entitled to a verdict at your hands for the difference between the amounts called for by the written contract between the plaintiff and the defendant, and the amount which he actually received or could have received from leasing said building by ordinary diligence."

In argument no attempt is made to enlighten us as to any objections to which this instruction is open. It would seem that if there had been no surrender of the lease and no release of Mr. Dunphy from his liability on his obligations therein contained, that this instruction, which gave to him the benefit of whatever rentals the landlord derived, or by the use of reasonable diligence could have derived, from the use of the premises inured to the benefit of Mr. Dunphy, was open to no objection on his part.

There were special interrogatories submitted to the jury, each of which was answered favorably to the contention of the defendant in error. They embraced every fact and proposition necessary to a full determination of all the matters in controversy. In support of each there was competent testimony sufficient to sustain it, and therefore no review will be attempted on that ground. This dis-

poses of all the questions presented, and the judgment of the district court is

AFFIRMED.

HARRISON, J., not sitting.

WILLIAM SCHULTZ, JR., ET AL., APPELLEES, V. ALTIE E. LOOMIS ET AL., APPELLANTS.

FILED APRIL 17, 1894. NO. 6613.

1. **Mortgage Foreclosure**: APPRAISEMENT: VALIDITY OF SALE. Where plaintiffs, having joint interests in a mortgage, in their petition declared the mortgage wholly due and collectible because of non-payments according to stipulations therein contained, consistently with which declaration the prayer was for the ascertainment of the whole amount secured by such mortgage, in which foreclosure proceeding a decree for much less than was really due was entered, *held*, in proceedings to enforce said decree, that the deduction by the appraisers from the value of the property of the balance omitted from the decree, as being a subsisting lien on the property, vitiated the sale made on such basis of deduction adopted by the appraisers.
2. ———: ELECTION TO DECLARE DEBT DUE: PLEADING. After default of defendants, the filing of an amended petition, differing from the original only in omitting the averments of an election by plaintiffs according to the terms of the mortgage declared upon to consider it wholly due and collectible, was not operative to repudiate such election, even though, in the absence of express stipulation to that effect, plaintiffs might have had the right to reconsider the election made and pleaded as aforesaid.
3. ———: PLEADING: DECREES. An amended petition, filed after an answer was due from defendants, who had made no appearance and who never had notice of the filing of such amended petition, formed no basis for a valid judgment or decree against said defendants. Under such circumstances a decree could only be entered conformably to the averments and prayer of the original petition.

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

Cobb & Harvey and *Darnall & Kirkpatrick*, for appellants, cited: *Vought v. Foxworthy*, 38 Neb., 790; *Young v. Brand*, 15 Neb., 601; *Vincent v. Moore*, 51 Mich., 618; *Walton v. Hollywood*, 47 Mich., 385; *Caruthers v. Humphrey*, 12 Mich., 270; *Moynahan v. Moore*, 9 Mich., 9.

S. L. Geisthardt, contra, cited: *State Nat. Bank of Lincoln v. Scofield*, 9 Neb., 499; *Johnson v. Bemis*, 7 Neb., 224; *Runge v. Brown*, 29 Neb., 116; *Dietrichs v. Lincoln & N. W. R. Co.*, 13 Neb., 43; *Sessions v. Irwin*, 8 Neb., 5; *Craig v. Stephenson*, 15 Neb., 362; *La Flume v. Jones*, 5 Neb., 256.

RYAN, C.

The appeal in this case is from the confirmation of a sale and a decree of foreclosure in the district court of Lancaster county. To an understanding of our conclusion it is necessary to give a history of the proceedings antedating and forming the basis of the order of confirmation of which complaint is now made.

On the 25th day of April, 1893, William Schultz, Jr., and the Clark & Leonard Investment Company (a Nebraska corporation), as plaintiffs, filed in the aforesaid district court their joint petition, in which Altie E. Loomis and Carlton E. Loomis, her husband, were made defendants. This petition was for the foreclosure of a mortgage executed by the defendants to the Clark & Leonard Investment Company October 14, 1891. This mortgage was to secure payment of a bond contemporaneously made, whereby Altie E. Loomis and Carlton E. Loomis promised to pay to the aforesaid investment company the principal sum of $7,000 October 1, 1896, and interest thereon at six per cent per annum, as evidenced by nine coupons, each for $210,

one of which fell due on each of the following dates, to-wit, October 1, 1892, 1893, 1894, 1895, 1896, and April 1, 1893, 1894, 1895, and 1896, respectively. The plaintiffs averred in their petition that after the 14th day of October, 1891, the date of said mortgage, it was duly assigned, indorsed, and delivered by the aforesaid investment company to its co-plaintiff, William Schultz, Jr., who, it was alleged in the petition, was still the owner thereof at the time said petition was filed, such ownership being qualified only as afterward set forth in the petition. It was averred that the investment company, when it assigned the said mortgage to William Schultz, Jr., guarantied payment of the interest thereon as part of the consideration of said assignment. The sixth and seventh paragraphs of the petition are in this language:

"6. The defendants have not paid, or caused to be paid, the debt secured by said mortgage, or any part thereof, as provided thereby as due on the annexed note and coupons, but are in default in this, to-wit, that they have not paid, or caused to be paid, the interest coupons due on October 1, 1892, and thereafter, nor the taxes levied on said lands for the years 1890 and thereafter, but the same have become delinquent, and said land has been sold by the county treasurer of said county for the payment thereof, according to the statute in such case made and provided; wherefore plaintiffs have elected, and hereby elect, to consider the whole sum so secured due and payable, and said mortgage deed has thereby become absolute.

"7. That heretofore, to-wit, on October 1, 1892, and April 1, 1893, the defendants were in default of the interest coupons then maturing, and the plaintiff the Clark & Lecnard Investment Company did pay the amount thereof to the plaintiff William Schultz, Jr., pursuant to its contract of guaranty aforesaid, and said coupons were thereupon reassigned and delivered to the plaintiff the Clark & Leonard Investment Company, and the same is now the lawful owner and holder thereof."

As a cause of action in favor of the Clark & Leonard Investment Company alone, that company stated in the petition aforesaid that on May 2, 1892, the defendants made to said company their promissory note for $956.75, due November 1, 1892, upon which interest accrued at the rate of ten per cent per annum after maturity by its terms; that to secure the payment of said note the defendants mortgaged to said company the same premises which had previously been mortgaged as hereinbefore stated. In respect to the last made mortgage there were the proper averments to entitle the investment company to a decree of foreclosure. The prayer of the petition was as follows: "Wherefore the plaintiffs pray that the court will ascertain the facts in the premises and render judgment for such sum as may be found due; that the defendants, and each of them, may be foreclosed in and to said premises; that the premises may be sold according to law, and the proceeds duly applied to satisfy the amounts found due according to priority; that judgment be rendered for each of plaintiffs for any deficiency which may remain against the defendants, and for such other and further relief as may be just and equitable."

In this connection it is proper to say that the mortgage first referred to in the petition provided that the failure to pay any of the money therein promised to be paid, either principal or interest, within thirty days after the same became due, or to perform any other condition (one of which was timely payment of taxes), should cause the whole sum secured to become due and collectible at once without notice, if the mortgagee, its successors or assigns, should so elect, and that the said mortgage might thereupon be foreclosed immediately for the whole of said money, interest and costs.

On the 17th day of June, 1893, there was filed an amended petition, differing from the original, so far as concerns this inquiry, only in omitting the election to declare

due and subject to foreclosure the whole sum secured. No leave seems to have been given to file this amended petition, and we are at a loss to discover any use or purpose which it subserved, as will readily appear from the considerations which will now be enumerated:

1. While the summons was omitted from the record so that we cannot determine just when the defendants were in default, it appears from the journal entries that on the very day when this amended petition was filed the default of the defendants was adjudged by the court, and a decree thereon rendered against them. It cannot be assumed that the court entered a decree upon the amended petition under the circumstances stated inconsistently with the decisions of this court in *Hapgood v. Ellis*, 11 Neb., 131; *Cockle Separator Mfg. Co. v. Clark*, 23 Neb., 702; *Taylor v. Trumbull*, 32 Neb., 508, and *Arnold v. Badger Lumber Co.*, 36 Neb., 841.

2. If the foreclosure had been for only an installment or a matured portion of the debt secured by the mortgage, the decree should have followed the requirements made in such cases by the provisions of sections 858–861 of the Code of Civil Procedure.

3. It is very questionable, after declaring the whole amount secured by the mortgage to be due and collectible, whether in the same suit the plaintiff could, without stipulated authority, revoke such election; in this case there was, however, no attempt at such revocation.

We are therefore constrained to hold that the amended petition in no respect modified or superseded the original petition, and that both the plaintiffs having once declared upon, elected to treat as wholly due, and obtained a decree of foreclosure upon, the mortgage securing payment of the bond for $7,000 and interest, their remedy was wholly exhausted as to said mortgage. The decree was for the sum of $1,463.80 established as a lien upon the property mortgaged. To satisfy this decree an order of sale issued and

thereunder the mortgaged property was appraised at $10,000. The sale was made September 19, 1893, for the sum of $1,696. It was afterward confirmed by the district court, and from the order of confirmation this appeal was taken. One question alone need be considered. The certificate of the register of deeds of Lancaster county included the $7,000 mortgage made by the defendants to the Clark & Leonard Investment Company. In ascertaining the value of the interest of the defendants in the real property about to be sold, the mortgage just referred to (amounting, with interest, to $7,197) was deducted by the appraisers from $10,000, the gross valuation made by them. The bid upon which the property was sold by the sheriff was not more than sufficient to equal the amount which had been decreed a lien against the mortgaged premises with prior tax liens thereon. After a decree was entered upon the mortgage declared upon as wholly due and collectible, it admits of no doubt that another action could not be brought for foreclosure as to a balance remaining by reason of the first foreclosure being for too small an amount. The only remedy available would have been to procure the first decree to be set aside, and afterward by proper proceedings to obtain proper relief. The plaintiffs could not treat the first decree as valid and subsisting, and at the same time insist, notwithstanding the existing decree, that additional relief should be granted because the first decree failed to recognize the full amount of the liability of the defendants. This practice would at once be disapproved, for it is by common consent accurately and pointedly characterized as splitting causes of action. On principle, and in its effects, the method actually pursued in this case accomplished the same results. The decree was for interest paid by the guarantor and due from defendants on the $7,000 mortgage, as well as for the amount of the subsequent mortgage to the investment company. Instead of afterward having the mortgage for security of the

$7,000 bond and other accrued interest by the court declared a lien additional to what in the shape of interest on the $7,000 had already been carved out of the $7,000 mortgage security, plaintiffs procured it to be so declared by the appraisers, and afterwards by the sheriff as fully and effectually recognized and enforced as though that official had found it included within the order of sale under the authority of which he was acting. The difference is only in the method; the result is the same.

This cause is reversed and is remanded to the district court of Lancaster county, with directions to enter a decree conformably to the prayer of the original petition of plaintiffs.

REVERSED.

STATE OF NEBRASKA V. EZRA M. BUSWELL.

FILED APRIL 17, 1894. No. 6495.

1. **Physicians and Surgeons:** PRACTICE IN VIOLATION OF STATUTE: CHRISTIAN SCIENCE. The act to establish a state board of health, to regulate the practice of medicine in Nebraska, etc., is as much directed against any unauthorized person who shall operate on, profess to heal, or prescribe for or otherwise treat any physical or mental ailment of another, as against one who practices "medicine, surgery, and obstetrics," as those terms are usually and generally understood.
2. **The object of the statute establishing a state board of health,** etc., is to prevent imposition upon the afflicted by ignorant and unqualified pretenders to healing power; and any person not within the exceptions prescribed in said act, and not having complied with its requirements as to a certificate, who shall under any pretense operate on, profess to heal, or prescribe for or otherwise treat any physical or mental ailment of another, thereby renders himself liable to its penalties.

EXCEPTIONS by the county attorney to the decision of the district court for Gage county, BUSH, J., presiding.

Filed under the provisions of section 515 of the Criminal Code. *Exceptions sustained.*

George H. Hastings, Attorney General, and *R. W. Sabin, County Attorney,* for the state.

Rickards & Prout and *Alfred Hazlett, contra.*

RYAN, C.

The material parts of the indictment upon which the defendant was tried were in the following language:

"That Ezra M. Buswell, late of the county aforesaid, on the first day of September, in the year of our Lord one thousand eight hundred and ninety-one, in the county of Gage, and state of Nebraska aforesaid, then and there an illiterate man and unskilled in the art and faculty of medicine and surgery, and devising and intending by divers unlawful means falsely, unlawfully, craftily, and wickedly to deceive and defraud the people and citizens of said county of their goods, chattels, and money, to maintain his dishonest course of living, on the first day of September, in the year of our Lord one thousand eight hundred and ninety-one, and thence continually until the finding of this indictment, to-wit, for the space of eighteen months, at divers places in said county, falsely and unlawfully did assume upon himself to execute, exercise, and occupy the art, faculty, and science of a physician and surgeon, and did then and there profess to heal and otherwise treat sick persons of their physical and mental ailments, and did then and there falsely and fraudulently as a physician and pretended healer of sick persons attend on sick persons and persons with various infirmities, diseases, and wounds, and treat them and profess to heal them in the city of Beatrice and divers other places in said county,—the said Ezra M. Buswell never having been a graduate from any medical college; nor had he a diploma from any medical college,

as required by law, to practice medicine in said state, nor had he a certificate from the state board of health of said state entitling him to practice medicine or surgery or otherwise treat or profess to heal physical or mental ailments, nor had he complied with the law in any respect so as to entitle him to practice medicine or surgery or treat in any manner physical or mental ailments, nor had he confined himself to administering gratuitous services in case of emergency or to the administering of ordinary household remedies."

The defendant was acquitted and the case is brought to this court under the provisions of sections 483, 515, 516, 517 of the Criminal Code. To a compliance on our part with the provisions of the sections just referred to it is necessary only to consider the sixth instruction given at the request of the defendant. This instruction was in the following language:

"6. The jury are instructed, as a matter of law, that it is manifest from the law under which defendant is indicted that the object of the legislature in the enactment thereof was only to provide for the regulation of the practice of 'medicine, surgery, and obstetrics,' as these terms are generally understood; and unless you believe from the evidence, and beyond a reasonable doubt, that the defendant within the time mentioned in the indictment practiced 'medicine, surgery, and obstetrics,' as these terms are usually and generally understood, then you will find the defendant not guilty."

The law to which reference was made in the instruction is found in chapter 35 of the Laws of 1891. The act constituting chapter 35 aforesaid was entitled "An act to establish a state board of health, to regulate the practice of medicine in the state of Nebraska," etc. Section 17 thereof was as follows:

"Sec. 17. Any person shall be regarded as practicing medicine within the meaning of this act who shall operate

on, profess to heal, or prescribe for or otherwise treat any physical or mental ailment of another; but nothing in this act shall be construed to prohibit gratuitous services in case of emergency, and this act shall not apply to commissioned surgeons in the United States army and navy, nor to nurses in their legitimate occupations, nor to the administration of ordinary household remedies."

The other provisions of the act are, for our purpose, sufficiently indicated in the language already quoted from the indictment. The instruction complained of required, as an indispensable prerequisite to a conviction, that the jury should find that the defendant within the time mentioned in the indictment had practiced "medicine, surgery, or obstetrics," as those terms are usually and generally understood. Governed by this instruction, the jury could not do otherwise than acquit, for there was no proof to meet its requirement. Whether or not the instruction was proper in view of the evidence adduced, is the sole question presented for our determination.

It is conceded that the perfect toleration of religious sentiment and the enjoyment of liberty in all religious matters is of paramount importance, and lest the contention of the defendant may be misunderstood or imperfectly stated in our own language, that contained in the brief filed on behalf of the defendant will be freely used. Such evidence as was in that brief deemed sufficient to illustrate the argument for defendant, was as follows:

Richard Walthers testified that his brother's boy came home from Florida in September, 1892; that there were running sores on his legs caused by rheumatism, and that he could not walk except by the aid of crutches; that after the defendant had seen him, about two weeks after the boy came back, he laid aside his crutches and walked by the aid of a cane, and after using that for awhile, threw it away and walked as other boys do.

James Ellerbeck testified to having been bitten by a

rattlesnake, and that he at once sought the defendant and asked him for help. After talking with the defendant at the church rooms, they went to Rev. Buswell's house, and what took place there is best told in the language of the witness himself:

Q. What did you do then?

A. The pain ceased after his treatment, and after driving to his house it seemed to get worse until about 8 o'clock. He talked to me on the Bible and different subjects in the Bible, and about 8 o'clock he said he would treat me again. I laid down on a lounge and he sat down and put his hands over his face and was in that position may be ten or fifteen minutes; and all at once I felt it come right through me and it raised me up, and I sat on the lounge and I told him I had wakened up; and from that time on I had no more pain, only there was one or two minutes when I first got up and put my feet on the floor that the stiffness seemed to be hard for a few minutes. Now, during all this time I never lost a meal nor an hour's sleep after that one treatment.

L. Bushnell testified that he was afflicted with a disease that baffled the skill of the physicians, who advised him if he could obtain assistance from scientists that he should try; that he then sought aid from them and a very short time afterwards was able to go about as usual and sawed wood for the people of the village in order to earn his livelihood; that about three years prior to the time of giving his testimony he had fallen down a flight of stairs and had received serious injuries; that the defendant was sent for and visited him, and that he recovered without any other aid than that of the prayers of the defendant.

The witness Burgess testified of his serious illness from pneumonia, and that the defendant called on him and explained the Scripture to him and prayed for him, and that in a short time he recovered.

Mrs. Gibbs testified that in the previous January her

little boy, four years of age, had an attack of scarlet fever; that the physicians pronounced his case hopeless; that the child was treated by the Scientists and fully recovered.

The defendant Buswell, having been sworn, testified that he was a Christian Scientist so far as he understood, and that he lived up to the teachings of Jesus Christ; that he first studied the Christian Science in his home at Beatrice, and was cured of physical ills through that study; after that he studied with Mary B. G. Eddy in her Metaphysical College in Boston, of which college he was afterward a graduate. The term "Christian," as he understood it, means "Christ-like;" the teachings of Jesus understood and followed; science, truth understood. He further testified that the Scripture teaches us that God is truth. "Truth," the witness said, "is that which is always the same; can never change; the one Supreme Being; the All Powerful; that which created all things that are; He who made all that was made, and made it good, as is said in His Word. The Scripture tells us to know the truth and it will make us free. We understand 'to be free' means to be free in the full sense, free from sickness as well as from sin; that if God can heal the sinner He can heal the sick, or else the sick are more hopelessly lost than the sinner." "The Christian Science Church," said the witness, "has a recognized code and text-books of theology; these text-books are the Bible, Science and Health. Reverend Mary B. G. Eddy, of Boston, is the author of the book called 'Science and Health.' It and the Bible are the recognized standard among Christian Scientists and adherents of that faith." The accused further testified that he had not practiced surgery or medicine or any of the branches thereof within the state of Nebraska within the eighteen months preceding the trial; that in a medical sense he had not within eighteen months treated any physical or mental ailment within that time, for, said he, "I understand, with God's laws and not mortal man's. We

can experience this only as we learn of the nothingness of mortal man and of the omnipotence of God. When persons request aid and come to us for advice and assistance we treat them as a mother treats her child that is frightened at some object it fears, by showing them that God is love; and understanding the all-presence of love, there is no room for fear. We treat it as a question of fear; that is, we seek to dispel the fear by showing them the presence of love. The Scripture tells us that perfect love casts out fear. If we can convince ourselves, and those that are suffering, that God is all-powerful and that God is supreme; if we can show them through the Bible that God is the power that reigns entirely, just so far as they understand that, so far will they experience love and harmony and respond—as we speak of it. So far as I understand them, I have taught and teach the doctrines of Christian Science. Prayer enters into our work. We are taught by the Scripture to pray always. We understand prayer to mean the earnest sincere desire of the heart, and that desire is that we may know the omnipotence of God and the nothingness of ourselves. Our authority for this treatment is the Scripture—Jesus' teachings. Jesus taught His disciples to go out in the world and heal the sick and cast out devils and raise the dead, and he further said (His last words before His ascension): 'Teach all nations, baptizing them in the name of the Father, Son, and Holy Ghost. Teach them, if you are my disciples, to observe all things whatsoever I have commanded you; and lo, I am with you alway, even unto the end of the world.' We believe and understand (so far as we obey Him) that the same power is for us to-day as well as eighteen hundred years ago." Continuing his evidence, this witness said: "I have been engaged in this work since I first began to read Science and Health in connection with the Bible, which was eight years ago. I was healed from physical ills through the Science and Health and the Scripture. I was not treated

by Christian Scientists." In the course of his testimony this question was asked the witness, and the following answer was elicited:

Q. What is your custom in allowing people and parents to call physicians—the custom of yourself and church?

A. We believe that every one has a right to express their wish, and it is always understood that if they prefer some other treatment, or some other mode, or some one else to aid them, it is their privilege. We always do that. It is taught in our text-books. We never give any medicine; that is entirely contrary to the teaching of Christian Science. I treated Mr. Burgess about three years ago. I found him suffering a great deal. If I remember he was not able to sit up; was bolstered up in bed, I think. I treated him solemnly and talked with him of the teaching of the Scripture and read to him from them, and also from Science and Health, and sought to show him that there was a greater power than man, and that that power ruled in love, and in proportion as that power was understood we should realize (demonstrate) the presence of love. At the end of a week he was able to go to his stock yards. I have no way of knowing the number of persons I have treated within eighteen months by means of Christian Science. I may have treated a hundred, or more. Of these only two died.

Commenting upon the facts counsel for defendant make use of the language following: "To place upon this section [17, *supra*] the construction contended for by the state, and to hold that the practices of the defendant are a violation of the law, would be to abrogate section 4, article 1, of the constitution of this state, which provides that all persons have the natural and indefeasible right to worship Almighty God according to the dictates of their own conscience, and also the second provision of section 4 of the enabling act, which provides that perfect toleration of religious sentiment shall be secured, and no inhabitant of said

state shall ever be molested in person or property on account of his or her mode of religious worship. The defendant, and those of the same faith with him, believe as a matter of conscience that the giving of medicine is a sin; that it is placing faith in the power of material things, which belongs alone to Omnipotence. To the Christian Scientist it is as much a violation of the law of God to take drugs for the alleviation of suffering or the cure of disease, as for a Methodist clergyman to take the name of his God in vain to relieve his over-wrought feelings. It is as much the duty of the defendant, as his conscience and understanding teach him his duty, to visit the sick and afflicted and relieve their distress of mind, as it is for the Presbyterian minister to go into his pulpit on Sabbath morning and preach the Word of God according to the understanding of that denomination, or visit the bedside of one of his sick parishioners and administer that religious consolation which is so dear to the heart of the Christian and which is apparently so necessary to their spiritual welfare. The act of the latter the eyes of all Christendom look upon in admiration as the performance of a Christian duty. Upon the former the able counsel for the state would have the world look as upon the act of a criminal." The defendant relied upon the teachings of the Bible as his authority as a Christian Scientist. It will not, therefore, be amiss to refer to it for instances applicable to his case. In the eighth chapter of the Acts of the Apostles we find an account of Simon, a sorcerer, who had used sorcery and bewitched the people of Samaria, giving out that himself was some great one. This Simon was thought to be the possessor of great power. Under the ministrations of Philip he believed and was baptized. Thereafter, sufficiently for our purpose, there follows a statement of the conduct of this convert, beginning with the eighteenth, and ending with the twenty-third, verse of the chapter just cited. These verses are as follows:

"18. And when Simon saw that through laying on of the apostles' hands the Holy Ghost was given, he offered them money,

"19. Saying, Give me also this power, that on whomsoever I lay hands, he may receive the Holy Ghost.

"20. But Peter said unto him, Thy money perish with thee, because thou hast thought that the gift of God may be purchased with money.

"21. Thou hast neither part nor lot in this matter; for thy heart is not right in the sight of God.

"22. Repent therefore of this thy wickedness, and pray God, if perhaps the thought of thine heart may be forgiven thee.

"23. For I perceive that thou art in the gall of bitterness, and in the bond of iniquity."

It would seem from this account that Simon regarded the gift of the Holy Ghost by the laying on of hands as something akin to, and an improvement upon, the sorcery which he himself had practiced, and, therefore, that its advantages were proper subjects of barter. The language of Peter, "Thy money perish with thee, because thou hast thought that the gift of God may be purchased with money," was a most emphatic and authoritative refutation of the idea that this special gift of God could form a proper basis for money transactions. The universal reprobation in which the conduct of Simon has ever been held has crystallized in the Latin word "*Simonia*," the English "Simony," etc., the derivative in each instance signifying either the crime of buying or selling ecclesiastical preferment or the corrupt presentation of any one to an ecclesiastical benefice for money or reward. In the case at bar the defendant testified as follows:

Q. You may state whether or not you make any charges when people come to you for advice or when you go to them.

A. As a rule I do not. We tell them we leave the ques-

tion to them and God. I spend my whole time at work showing to the people through examination and administration what the teachings of the Scripture are; and Jesus says, the laborer is worthy of his meat (?), and we expect that those who we spend our time for to remunerate us for it. If they are not willing to part with the sacrifice themselves, it is not expected that those should reap the benefit." This language puts the matter of compensation in a milder form than that adopted by Simon in the case above cited, but that even this modified claim is open to serious objection we think still further illustrated by an instance to which reference will now be made. In the fifth chapter of the second book of Kings there is an account of the healing of Naaman of leprosy, by compliance with a very simple hydropathic course of treatment prescribed by the prophet Elisha. After he was healed Naaman said to Elisha, "I pray thee take a blessing of thy servant," but Elisha said, "As the Lord liveth, before whom I stand, I will receive none. And he urged him to take it; but he refused." The subsequent proceedings are best given in the language found in verses 20 to 27, inclusive:

"20. But Gehazi, the servant of Elisha the man of God, said, Behold, my master has spared Naaman this Syrian, in not receiving at his hands that which he brought: but, as the Lord liveth, I will run after him, and take somewhat of him.

"21. So Gehazi followed after Naaman. And when Naaman saw him running after him, he lighted down from the chariot to meet him, and said, Is all well?

"22. And he said, All is well. My master hath sent me, saying, Behold, even now there be come to me from mount Ephraim two young men of the sons of the prophets: give them, I pray thee, a talent of silver, and two changes of garments.

"23. And Naaman said, Be content, take two talents. And he urged him, and bound two talents of silver in two

bags, with two changes of garments, and laid them upon two of his servants; and they bare them before him.

"24. And when he came to the tower, he took them from their hand, and bestowed them in the house: and he let the men go, and they departed.

"25. But he went in, and stood before his master. And Elisha said unto him, Whence comest thou, Gehazi? And he said, Thy servant went no whither.

"26. And he said unto him, Went not mine heart with thee, when the man turned again from his chariot to meet thee? Is it a time to receive money, and to receive garments, and oliveyards, and vineyards, and sheep, and oxen, and menservants, and maidservants?

"27. The leprosy therefore of Naaman shall cleave unto thee, and thy seed forever. And he went out from his presence a leper as white as snow."

In chapters 22 *et seq.* of Numbers is recorded God's disapproval of Baalam's partly-executed project of profiting by the use of the Divine power with which he was endowed.

In the light of these instances, cited from defendant's own authority, it is confidently believed that the exercise of the art of healing for compensation, whether exacted as a fee or expected as a gratuity, cannot be classed as an act of worship. Neither is it the performance of a religious duty, as was claimed in the district court. There is no claim in this case that compensation in one or the other of these methods was not accepted when tendered. The evidence affirmatively shows the contrary. Not only is this true, but we find a very considerable part of defendant's brief devoted to an argument as to the inefficiency of the established and recognized modes of treatment in the cure of diseases as compared with defendant's method, as tested by the results attained. The evidence upon which the case was tried convinces us that the defendant was engaged in treating physical ailments of others for compensation. He

was within none of the exceptions provided by statute. The instruction which required that, to a conviction, he should be found guilty of practicing medicine, surgery, or obstetrics, as generally or usually understood, was erroneous. The object of the statute is to protect the afflicted from the pretensions of the ignorant and avaricious, and its provisions are not limited to those who attempt to follow beaten paths and established usages. The conservatism resulting from the study of standard authors might be somewhat depended on to minimize the evils attendant upon unlicensed practitioners' attempts to follow regular and approved methods, although as against even these the law should be enforced. Still more stringently should its provisions be rendered effective against pretensions based upon ignorance on the one hand and credulity on the other. The statute does not merely give a new definition to language having already a given and fixed meaning. It rather creates a new class of offenses in clear and unambiguous language, which should be interpreted and enforced according to its terms.

Under the indictment, the sole question presented upon the evidence was whether or not the defendant within the time charged had operated on, or professed to heal, or prescribed for or otherwise treat any physical or mental ailment of another. There was involved no question of sentiment nor of religious practice or duty. If the defendant was guilty as charged, neither pretense of worship nor of the performance of any other duty should have exonerated him from the punishment which an infraction of the statute involved. In cases presented as in this case, no judgment can be rendered in this court, and, therefore, none will be attempted. The exceptions of the county attorney are sustained.

EXCEPTIONS SUSTAINED.

P. H. BARRY ET AL., MANAGERS OF IMPEACHMENT, v. STATE OF NEBRASKA, EX REL. GEORGE W. DOANE.

FILED APRIL 17, 1894. No. 6575.

1. **Expenses of Impeachment**: DUTY OF AUDITOR OF PUBLIC ACCOUNTS. The duty of the state auditor of public accounts, to audit and allow or disallow claims for expenses incident to the impeachment of certain officers and ex-officers of the state, was not and could not by joint resolution be devolved upon a board of managers intrusted with the management of such impeachment proceedings.
2. **Mandamus to Managers of Impeachment.** As there was no duty specially enjoined by law upon the board of managers aforesaid, resulting from an office, trust, or station, such board, by *mandamus*, could not be compelled to act in the performance of an alleged duty which, in reality, was by law specially devolved upon a designated public officer.

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

M. B. Gearon and *Steele Bros.*, for plaintiffs in error.

A. J. Sawyer, contra.

RYAN, C.

The proceedings in error in this case are brought into this court for the review of an order of *mandamus* issued by the district court of Lancaster county. The findings of that court and the order complained of were as follows:

"1. That the legislature of the state of Nebraska, at the twenty-third session thereof, in joint convention, adopted articles of impeachment against John C. Allen, secretary of state, and other executive officers of the state of Nebraska, and also against Thomas H. Benton, ex-auditor of public accounts of said state, and against other ex-officers of the

said state, and presented the said articles of impeachment to the supreme court of the state of Nebraska for a trial thereon.

"2. That the said joint convention appointed the said P. H. Barry, C. D. Casper, and George R. Colton, respondents, a board of managers to prosecute said articles of impeachment, and authorized said board of managers to employ counsel to assist in said prosecution.

"3. That said board of managers employed the relator, George W. Doane, as one of the counsel in said prosecution, and agreed with said relator to pay him the sum of $2,500 for such services.

"4. That the legislature of the state of Nebraska made an appropriation of $15,000 to defray the expense of said prosecution, and that more than enough of said appropriation to pay the amount contracted and agreed to be paid to the said relator still remains in said fund unexpended.

"5. That the relator has been paid for his said services the sum of $2,000 and no more, and that the sum of $500 still remains due him and unpaid upon the contract for his services as counsel in the prosecution of said articles of impeachment.

"6. That the services contracted for have been fully rendered by relator, and that said prosecution has been fully and finally determined, and that relator is entitled to said sum of $500 still remaining due him for said services.

"7. That the respondents, acting as such board of managers, have refused to issue a voucher in favor of said relator for the sum of $500 so remaining due to him.

"8. That the respondents, as such board of managers, are authorized by the said joint convention of the legislature of the state of Nebraska to audit all accounts drawn against the funds appropriated for said impeachment proceedings, and that it is the duty of respondents, acting as such board of managers, to audit the relator's account and issue to him a voucher for the sum of $500 still due and

unpaid to him for his services as counsel in the prosecution of said impeachment proceedings.

"9. That the relator has no adequate remedy at law.

"10. On consideration whereof I find the issues in favor of the relator.

"It is therefore considered by me, sitting in chambers as aforesaid, that a peremptory writ of *mandamus* issue against said respondents P. H. Barry, C. D. Casper, and George R. Colton, constituting the board of managers of impeachment appointed by the joint convention of the legislature of the state of Nebraska at the twenty-third session thereof, commanding them, as said board of managers, to issue their voucher in favor of the relator, George W. Doane, for the sum of $500 still remaining due and unpaid to him for his services in prosecuting the articles of impeachment before the supreme court of Nebraska, against John C. Allen, secretary of state, and other executive officers and ex-officers of the state of Nebraska, against whom articles of impeachment were adopted by the joint convention of the legislature at its twenty-third session thereof.

* * *

"(Signed) J. B. STRODE,

"*Judge District Court of the 3d Jud. Dist. Neb.*"

To an understanding of the manner in which the respondents were created a board of managers, and their duties as such, there was introduced in evidence a record of the proceedings of both branches of the legislature in joint convention. It will be necessary for our purpose to quote but parts of this record. The first of these is as follows: "On April 6, 1893, the senate and house of representatives, in joint convention assembled, adopted the following motion: 'That this convention adopt and present to the supreme court the articles of impeachment prepared against George H. Hastings, attorney general, a member of the board of public lands and buildings; also those presented against John C. Allen, secretary of state; Augustus R.

Humphrey, commissioner of public lands and buildings, and John E. Hill, ex-treasurer of state.' * * * The following motion was adopted: 'I move that a committee of three members of the joint convention, one from each of the political parties represented in the legislature, to be chosen by their respective parties, be selected to employ attorneys to prosecute the cases of impeachment against the various officers and ex-state officers.' Subsequently, and in accordance with the above motion, Mr. Howe, on the part of the republicans, presented the name of George R. Colton; Mr. Darner, on behalf of the independents, presented the name of P. H. Barry; and Mr. North, on the part of the democrats, presented the name of C. D. Casper. And on motion the parties last above named were made the choice of the joint convention. On motion, the committee appointed by the joint convention to prosecute the several impeachment cases were empowered to employ attorneys and to send for persons and papers."

The proceedings in joint convention under date of April 7, 1893, were recorded in the following language: "The following resolution was adopted: 'That the committee appointed by this joint convention to manage the impeachment proceedings shall be granted each the sum of $2.50 per diem and expenses, and shall be authorized to audit all accounts drawn against the funds appropriated for the impeachment proceedings.'"

In the joint appropriation act (chapter 55, Laws of 1893) there was an appropriation of $15,000, or of so much thereof as was necessary, to defray the expenses of the impeachment proceedings. In this appropriation act section 2 provides as follows:

"Sec. 2. The auditor of public accounts is hereby authorized and required, upon the presentation of the proper vouchers, to draw his warrants on the stated funds and against the appropriations as made in section one (1) of this act in favor of the party performing the service, for

the amount due, and such warrants shall give the name of the person and the nature of the service."

The matter of difference between the relator and the respondents arose as to the necessity that the claims of the nature of this of the relator should be audited or authenticated by the board of managers as a condition precedent to its being audited by the auditor of public accounts of the state. The theory of the auditor of public accounts is perhaps best stated in his answer to a question which appears in the record. The question and answer were as follows:

Q. Would you in any case—would you audit and allow any claim, or issue a warrant therefor, against that appropriation for the expense of the impeachment proceedings unless a voucher was previously presented to you and approved by the board of managers?

A. No, sir; not with my present information. If the court would direct me to do it, I do not know what course I might pursue.

Article 3 of chapter 83 of the Compiled Statutes defines the duty of the auditor of public accounts. By the second section the auditor is declared to be the general accountant of the state, etc. In the fourth section one of his duties is defined as follows: "First, to audit, adjust and settle all claims for services rendered, or expenditures made, for the benefit of the state, provided such services are rendered, or expenditures made, by authority of law, except only such claims as may be expressly required by law to be audited and settled by other officers or persons." In section 6, article 3, just referred to, it is provided that "all persons having claims against the state shall exhibit the same, with the evidence in support thereof, to the auditor to be audited, settled, and allowed, within two years after such claims shall accrue." Section 7 is as follows:

"Sec. 7. The auditor, whenever he may think it necessary to the proper settlement of any account, may examine

the parties, witnesses, or others on oath or affirmation touching any matter material to be known in the settlement of such account."

It has already been shown, by a quotation from section 2 of the general appropriation act for 1893, that the auditor of public accounts was authorized and required, upon the presentation of proper vouchers, to draw his warrant on the stated funds and as against the appropriations made in section 1 of that act, in favor of the parties performing the services, for the amount due. This provision is entirely harmonious with the provisions of the general statutes which have already been quoted. The board of managers was created and its duties defined simply by a joint resolution, which possessed none of the dignity of a statute, and could not operate to abrogate or modify statutory provisions in existence. The provision of this joint resolution, that the board of managers should be authorized to audit all accounts against the funds appropriated for the impeachment proceedings, did not operate to relieve the auditor of that duty; neither did it relieve him of any responsibility attached to the duties of his office by statutory provisions. The joint resolution was simply an instruction to a standing committee, and that committee, by auditing the "claim," as it is called, could do no more than furnish evidence which would justify the auditor of public accounts in his duty as to auditing and allowing the claims presented. In case the auditor of public accounts was in doubt as to whether the claim should be allowed or not, he might, under the general provisions of the statute, examine the members of the board of managers on oath or affirmation touching any matter material to be known to a settlement of such account. Section 645 of the Code of Civil Procedure provides that a "writ of *mandamus* may be issued to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust,

or station." The board of managers were not by law specially enjoined or required to audit claims; neither did that duty result from an office, trust, or station held by the board or its members. It is very probable that the evidence afforded by the approval of claims arising out of the impeachment proceedings by this board might be satisfactory evidence whereon the auditor of public accounts could act with confidence, but the approval of this board was not indispensable. In this respect it differs from the case of *State v. Moore*, 37 Neb., 507. In the case last referred to this court held that the original vouchers should in all cases be sent to the auditor, and that Commissioner Garneau, the relator, should approve the same before sending them. It was said in the opinion: "The auditor will then have the evidence of the debt before him and will know whether it is such a claim as the legislature has provided an appropriation for. If it is, it is his duty to draw a warrant. If it is not, then he should refuse." The claims which were under consideration in that case were those of Commissioner General Garneau, and were for the reimbursement to him of moneys paid out by him in the discharge of his duties as commissioner general. This requirement in the opinion was only that the voucher, when presented by the commissioner general, should show the nature of the account presented, and that he had approved the same. That case is authority only for the requirement by the auditor of public accounts, in the matter under consideration, that the relator should, to qualify his claim for allowance, furnish proof of its correctness. In the Garneau case there was no requirement that any board or person other than himself should certify to his claims as a condition precedent to their presentment and allowance. We are of the opinion, even conceding all the facts found by the district court to have been established by the evidence, that nevertheless, there never existed any power or warrant for the allowance of the writ of *mandamus* against the re-

spondents. For this reason the order was erroneous, and is therefore reversed and the action dismissed.

REVERSED AND DISMISSED.

PARIS R. HIATT v. M. P. KINKAID.

FILED APRIL 17, 1894. No. 6471.

1. **Amendment of Pleadings:** EXCEPTIONS: REVIEW. To enable a party to present for review the alleged error of permitting to be filed or to be refiled an amended answer the record must show an exception to have been taken to the order complained of by the party alleging error in respect thereto.
2. **Defective Record for Review:** SUFFICIENCY OF EVIDENCE. The objection that the verdict is not sustained by, or is contrary to, the weight of the evidence, or that it is contrary to law, cannot be considered upon a record in which such verdict does not appear.
3. **Instructions:** ASSIGNMENTS OF ERROR: REVIEW. An assignment in a petition in error, that the trial court erred in refusing to give a group of instructions asked, will be considered no further when it is found that the refusal of any one of such instructions was proper.
4. ———: ———: ———. An assignment of error as to the giving *en masse* of certain instructions will be considered no further than to ascertain that any one of such instructions was properly given.

ERROR from the district court of Boone county. Tried below before THOMPSON, J.

Charles Riley and *Paris R. Hiatt*, for plaintiff in error.

M. P. Kinkaid, pro se.

RYAN, C.

Of a judgment in favor of the present defendant in error the adverse party, upon error prosecuted to this court,

obtained a reversal (*Hiatt v. Kinkaid*, 28 Neb., 721), and thereupon this cause was remanded for further proceedings. Subsequently an amended answer was filed, the court reserving the right to strike the same from the files—a right which later was exercised. Soon afterward, however, the court permitted the refiling of this amended answer upon condition that the costs up to that time should be paid by the defendant. To this answer a reply was filed and the cause was continued generally. In argument, counsel for plaintiff in error complained of this, but upon what ground does not from the record very clearly appear. Certain it is, however, that no exception was taken by the complaining party; a fact which, while it leaves in doubt the nature of the complaint made, is equally effective in excusing its review in this court.

The issues upon which this case was last tried were in general terms as follows: Paris R. Hiatt, the plaintiff, alleged that the defendant M. P. Kinkaid, with the intent to injure plaintiff, and falsely, maliciously, and without any reasonable or probable cause, did charge plaintiff with the crime of larceny by a complaint filed before a justice of the peace of Holt county, Nebraska, in that, as said complaint stated, the said Paris R. Hiatt, on or about May 29, 1884, had stolen certain checks and drafts of said Kinkaid, payable to the order of Hiatt and Kinkaid, drawn by firms in Chicago, amounting to the aggregate sum of $3,627.19, and that said complaint alleged that the said drafts and checks were concealed on the person of said Hiatt. The plaintiff further alleged that said justice of the peace issued upon said complaint a warrant requiring the sheriff of Holt county aforesaid to diligently search the person of Paris R. Hiatt for said instruments and to bring his person before said justice of the peace, or some other magistrate having jurisdiction of the case presented by said information, to be dealt with according to law, and that pursuant to the mandate of said warrant the sheriff of Holt county

did search the person of said plaintiff and took therefrom the aforesaid drafts and checks, and that after said search plaintiff was required to enter into a recognizance in the penal sum of $100 for his further appearance to answer the charge made in and by said complaint; that thereafter, as required, plaintiff did so appear, and was fully acquitted and discharged of the crime alleged; that the defendant took from plaintiff's person and converted to his own use the aforesaid drafts and checks, which were the property of said plaintiff, and that by reason of the foregoing facts the plaintiff was damaged in the sum of $14,086.07, for which he prayed judgment.

The amended answer first contained a general denial of the averments of the petition, except as thereafter such denial should be qualified or admitted by the answer itself. The defendant in his amended answer thereupon averred that he filed a complaint against plaintiff and caused to be taken from plaintiff the checks described in plaintiff's petition; and further, that at that time defendant was the owner thereof and entitled to the immediate possession of the same; that in the spring of 1883 defendant employed the plaintiff as his agent to buy cattle for feeding purposes, and to take care of and fatten said cattle at plaintiff's own expense; that pursuant to said agreement plaintiff got into his possession seventy-six head of cattle, the ownership and title to which were in defendant, to so take care of, feed, and fatten, and that plaintiff, thus being the custodian of defendant's said cattle, without defendant's knowledge or permission or any authority so to do, wrongfully and fraudulently shipped to the city of Chicago, Illinois, the said cattle and there sold them, and received in payment therefor the checks described in plaintiff's petition, together with $41.12 in money, and that soon after said sale, the plaintiff being in Holt county, Nebraska, defendant ratified the sale of said cattle by plaintiff and thereby made the proceeds of the sale of said cattle his own; that there-

upon defendant demanded of plaintiff a delivery of said proceeds to him, which plaintiff refused, and that plaintiff then and there feloniously converted the proceeds to his own use and concealed the same from defendant and denied having possession of the same, and that it was to discover said checks so converted by plaintiff that defendant made and filed the complaint for a search warrant, pursuant to which plaintiff was searched and that two of said checks were found concealed upon plaintiff's person, and defendant further alleged that he filed no other complaint for the arrest of plaintiff and did not cause his arrest in any other manner than as set forth; that he had reasonable and probable grounds for making said complaint and acted without malice in so doing in said premises.

By his answer the defendant claimed compensation for the value of two missing steers with which defendant had been intrusted by plaintiff, which value, the defendant alleged, was $75. The defendant also claimed the right to recover the sum of $41.12 in cash received by plaintiff as part of the proceeds of the sale of said cattle in Chicago, and also the right to recover the value of feed furnished by him which was used in fattening the aforesaid cattle to the amount of $40. The defendant in his amended answer prayed for a judgment for the sum of $156.12, the aggregate amount of the above three items.

By his reply the plaintiff denied each allegation in the answer except as admitted, and alleged that in May, 1883, a contract was entered into by and between the plaintiff and the defendant for the purchase, care, keeping, and sale of certain cattle, which contract was evidenced by letters between the parties which were set out in the reply. The first of these letters was written by Paris R. Hiatt to the defendant, in which occurred the following language: "I am ready for business, as soon as you make out your papers authorizing me to buy as your agent, for such part of the profits as is named—all profits above thirty-five per cent—

steers kept one year and sold fat." In the answer to this letter the defendant stated the terms defining the relation of the parties as follows: "My understanding now is that you buy, take care of, and fatten the cattle, pay all damages caused by cattle trespassing upon the property of others, and that I pay you for the same all profits to me over and above thirty-five per cent net profits. With this understanding you may begin to buy and check out funds to pay for the same as you buy. Return this sheet to me by return mail signifying your acceptance of these terms." In his reply the plaintiff averred that he accepted the foregoing proposition of the defendant, and in pursuance of the terms thereof bought seventy-six head of steers, and on the 1st day of October, 1883, began to feed said cattle for the purpose of fattening them; that thereafter the plaintiff kept said cattle on full feed for the period of 240 days, to-wit, until the 26th day of May, 1884, on which date plaintiff sold seventy head of the same in Chicago, obtaining therefor three several drafts. (These drafts are described at length and are those which were taken from the person of the plaintiff under the search warrant.) In the reply the plaintiff admitted that beside the drafts he obtained the sum of $41.12 in cash as part of the proceeds of the sale of the aforesaid cattle. In the reply the plaintiff further averred that he had expended for the purchase of cattle the sum of $2,445, and for feed the sum of $4,000; also for labor, keeping, and caring for said cattle he had expended a further sum of $900. In all, plaintiff alleged in his reply he had expended the sum of $7,345 in pursuance of the terms of the contract made as aforesaid. It was admitted in the reply that the defendant had furnished the plaintiff with the sum of $3,275, all of which, as plaintiff alleged, was expended by him in pursuance of the terms of the contract as aforesaid. He further alleged that he had paid to the defendant on the contract the sum of $100, and that on or about the 1st day of June, 1884, defendant took and

converted to his own use four of the steers then unsold, which were of the reasonable value of $200. It was further alleged by the plaintiff in his reply that on or about the 26th of February, 1884, one W. N. Hawkins recovered possession of one of the steers previously referred to in the reply, upon a suit in replevin, which was finally determined in favor of said Hawkins. The plaintiff averred that in respect of this suit he had incurred costs and expenses in the sum of $120. There was no prayer for relief in this reply.

The issues have been stated very fully, for the reason that the plaintiff, on the trial of the case, introduced evidence that the defendant had sold to the plaintiff the cattle which had been purchased for him and had taken the note of the plaintiff for $2,400, with thirty-five per cent added thereto, making in all, as the plaintiff claimed, the sum of $3,040. Through this alleged purchase of the cattle by the plaintiff from the defendant it was sought to be established that the absolute ownership and right of possession of the cattle, when sold in Chicago, were in the plaintiff, to the exclusion of the possession of any rights of that nature on the part of the defendant. There was no attempt to amend the pleadings after the introduction of this evidence for the purpose of making the allegations conformable to the alleged proofs in this respect, and, therefore, whether or not the plaintiff by the purchase of the property had become the owner and entitled to the possession thereof before its shipment and sale in Chicago, is rendered an irrelevant inquiry.

By the pleadings there were presented first, by the petition, a claim for malicious prosecution and false imprisonment; and, second, for the value of the property secured by means of the search warrant and alleged to have been converted by the defendant to his own use. The answer alleged facts which, if established, showed that the title and ownership of the cattle, when they were shipped to

Chicago and disposed of, were in the defendant, and that the plaintiff had no interest therein nor in respect thereof, except the right to receive, as his compensation for caring for said cattle and furnishing the feed, sixty-five per cent of the net profits when ascertained. The title and ownership of the property meantime were clearly in the defendant, measured by the terms of his answer. The defendant also asserted a right to a counter-claim in the sum of $156.12. While the averments of the reply are made at considerable length, they in effect countenance the claim of the defendant as to his alleged right of ownership and possession of the cattle previous to the time of their being sold in Chicago. In the reply it was alleged, it is true, that one of the steers had been lost in a replevin suit instituted by Hawkins, and that two others had been taken possession of and used by the defendant. In respect of these three head of cattle, however, it cannot escape observation that there was no prayer for relief by an amendment of the petition; neither was a like attempt made by the reply which, under the former holdings of this court, must have been unavailing. (*Savage v. Aiken*, 21 Neb., 605; *School District v. Colwell*, 16 Neb., 68; *Holmes v. Hutchins*, 38 Neb., 601.) There was, therefore, properly presented but the right of the plaintiff to recover $14,086.07 damages, as prayed in his petition, and, on the part of the defendant, the affirmative right to a counter-claim of the sum of $156.12. In this connection it is proper to say that the assignment in the motion for a new trial, that the verdict was not sustained by the evidence, and all other matters with reference to the verdict, must be ignored, for the record fails entirely to show what that verdict was. Following the recitals as to the overruling of the motion for a new trial, the plaintiff's exceptions, and the allowance to him of forty days to settle bill of exceptions, there was judgment that the defendant go home without day and recover his costs taxed at $422.96, and that the plaintiff recover his costs

of this term taxed at $155.88. For the purposes of this case it may be assumed that the expression "go hence" has the same force as "go home," in respect to constituting a judgment final for the purpose of review in this court. The sum of $422.96 was probably taxed against the defendant, conditioned upon his filing his amended answer. Such costs as were taxed to the plaintiff were probably those which accrued subsequently. The judgment itself, however, does not serve to enlighten us as to what amount of damages, if any, the jury found had been sustained by the plaintiff, nor in what sum the defendant was entitled to maintain his counter-claim. For all that appears in the record it might well have been that the jury found that the damages sustained equaled the amount of the counter-claim asserted, and that, therefore, no verdict was rendered in plaintiff's favor.

It is a matter of but simple justice to say that the evidence has been carefully considered with a view to ascertaining whether or not a verdict should have been returned in favor of the plaintiff in error. The testimony showed that the plaintiff in error had undertaken to feed and care for the cattle, and for his outlay of labor and money was to receive as full compensation sixty-five per cent of the net profits. Until a sale he was but a bailee for hire. The defendant in error furnished the money wherewith the cattle were purchased, and until they were sold they were his property. The plaintiff had no right upon his own volition to turn these cattle into money; and when he shipped them to Chicago the evidence shows that he did so surreptitiously and without the knowledge of the defendant in error, whose information that the cattle had been shipped to Chicago was acquired when it was too late to stop them in transit. Thereupon the defendant in error did all that lay in his power to prevent the plaintiff in error securing the proceeds of the sale of the cattle, but he had received his information of their shipment too late to accomplish anything

in even that direction. With the drafts and checks, which were the fruits of his treachery, the plaintiff in error returned to Nebraska, and in an interview with the man whose confidence he had so shamefully abused, he refused to do anything until his own claims were satisfied. Even the nature and extent of these he did not state. The plaintiff in error was financially irresponsible, and a personal judgment against him could afford no redress. Under these circumstances the defendant in error resorted to replevin proceedings to secure possession of the checks and drafts which were the avails of and at that time constituted the sole substitutes for the cattle. When the sheriff, by virtue of the writ of replevin, demanded of Hiatt the possession of the checks and drafts accurately described, he denied that he had them. Thereupon possession was secured by searching the person of Hiatt under a search warrant issued upon an information filed by the defendant in error. Until this time the conduct of the defendant in error was above reproach. When, however, he resorted to this measure, he laid himself liable for such damages as the jury should find Hiatt suffered by reason of this violation of his rights. This question was, by the instructions, submitted fairly to the jury. In the absence of the verdict from the record, we, in passing upon the evidence, cannot say but that the counter-claim pleaded was sufficient to fully meet the demands of justice in this respect. The jury must have found for the defendant in error as to his claim of right of ownership and possession of the drafts and checks, for had they found differently there must have been in the record a judgment for about $3,000 in favor of the plaintiff in error. If we are correct in this assumption, and we think it admits of no doubt, the conclusion of the jury was in accordance with our own; that is, that the drafts and checks rightfully belonged to the defendant in error.

This disposes of all the questions presented upon which a review is sought, except such as arose upon the giving

and refusal to give certain instructions. In respect of these it may be remarked that the modification complained of, as to the first instruction asked by the plaintiff, has no merit, as will be seen by a statement of the instruction as asked, and as given. As asked, the instruction was as follows: "If you find that the defendant, previous to the commencement of the prosecution, believed plaintiff to be an honest man, and find that the plaintiff and defendant, just before plaintiff went out of defendant's office with the drafts in controversy, disputed as to whether or not plaintiff was entitled to the drafts, the plaintiff claiming that he was and the defendant denying it, and find that the defendant knew when he commenced the prosecution that plaintiff had taken such drafts under a claim of right, and that he took and kept them openly and not secretly in the day-time and without other suspicious circumstances, such fact would be evidence of want of probable cause." As given, the instruction was in the following language: "If you find from a preponderance of the evidence that the defendant, immediately previous to the commencement of the prosecution, believed the plaintiff to be an honest man, and find that the plaintiff and defendant, just before plaintiff went out of defendant's office with the drafts in controversy, disputed as to whether or not the plaintiff was entitled to the drafts, the plaintiff claiming that he was and the defendant denying it, and find that the defendant knew when he commenced the prosecution that plaintiff had taken said drafts under a claim of right, and that he took and kept them openly and not secretly in the day-time and without other suspicious circumstances, such fact would be some evidence of want of probable cause." It requires very close scrutiny to locate the modifications as made of the instruction asked by the plaintiff. When located, however, they will be found simply to require that the finding by the jury must be "from a preponderance of the evidence," and that the belief of plaintiff must have been "immediately" pre-

vious to the commencement of the prosecution, and that the requisite facts, if found, would be "some" evidence of want of probable cause.

The other assignments as to error in giving and refusing instructions were in the following language:

"3. The court erred in giving the 3d, 6th, 7th, and 8th instructions given by the court on its own motion."

"5. The court erred in giving the 1st, 3d, 4th, 5th, 6th, 8th, 9th, 10th, 11th, 12th, 13th, and 15th instructions asked by the defendant."

"6. The court erred in refusing the 1st, 2d, 3d, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, and 20th instructions asked by plaintiff which the court refused."

In *Lowe v. City of Omaha*, 33 Neb., on page 590, NORVAL, J., delivering the opinion of the court, said: "When a party desires this court to review the rulings of the trial court on the admission or exclusion of testimony, he must specifically point out the alleged errors in the petition in error. This has been held in a long line of decisions. (*Tomer v. Densmore*, 8 Neb., 384; *Shaffer v. Maddox*, 9 Neb., 205; *McCormick v. Drummett*, 9 Neb., 384; *Graham v. Hartnett*, 10 Neb., 517; *Birdsall v. Carter*, 11 Neb., 143; *Cook v. Pickrel*, 20 Neb., 435.)"

In *Davis v. Getchell*, 32 Neb., 792, COBB, then chief justice, used the following language: "The fourth assignment of error is in the following words: 'Errors of law occurring during the trial, in the admission and rejection of evidence, which will more fully appear by reference to the bill of exceptions herewith filed.' This method of assigning errors is scarcely permissible in a petition in error. It is permissible in a motion for a new trial, solely for the reason that such motions are usually prepared in the hurry and confusion of the trial, or other absorbing business of the court; but this cause does not extend to the preparation of a petition in error. A reviewing court is

entitled to have the errors complained of specifically pointed out, and upon it should not be thrust the duty of searching through the bill of exceptions to find wherein the court may have erred in the admission or rejection of evidence."

In *Farwell v. Cramer*, 38 Neb., 61, in the opinion of this court by IRVINE, C., occurs the following language: "Complaint is made of the exclusion of certain other evidence sought to be elicited from the witness Cortelyou; but the assignment of error upon this point was that the court erred in refusing to allow the defendants to show by Cortelyou when on the witness stand 'according to the offer made by defendants in the record.' This assignment is too general. By force of the statute a general assignment of 'errors occurring upon the trial' is sufficient in a motion for a new trial, but in a petition in error the assignment should be with sufficient certainty to direct the attention of the court to the particular error complained of. (*Lynam v. McMillan*, 8 Neb., 135; *Graham v. Hartnett*, 10 Neb., 518.)"

In *Gregory v. Kaar*, 36 Neb., 533, it was held that assignments of error which are so vague and indefinite as not to indicate the ruling complained of will be disregarded in this court. It happens that in each case cited above, the error held too indefinitely assigned was with reference to the admission or rejection of evidence; but it will now be shown that the same reasons for the application of this rule apply to instructions given and refused with equal force.

In *Tagg v. Miller*, 10 Neb., 442, in an opinion of this court delivered by LAKE, J., occurs this language: "The second point made is, that the court erred in charging the jury, the assignment of error being 'that the said court erred in the instructions given to the jury on the trial of the said action.' This is too indefinite when it is conceded, as it is of these, that some of the instructions state the law applicable to the case correctly. If the whole charge were bad, such general assignment would be sufficient; but not

being so, the particular portions complained of should have been distinctly pointed out."

In *Birdsall v. Carter*, 11 Neb., 143, the assignment was that the court erred in the instructions given to the jury in the trial of the said cause, and as applicable to this form of assignment the court with approval quoted the last sentence above reproduced from the opinion in *Tagg v. Miller*, *supra*. In principle there can be no difference whether errors as to instructions are assigned in gross or to the same instructions numbered one, two, three, etc., from first to last. It is a like violation of this principle, less only in degree, to assign error to only a part of the instructions coupled as one, two, three, etc., though such enumeration may not in fact cover all the instructions given or refused. In the case at bar, for illustration, the third assignment was that the court erred in giving the third, sixth, seventh, and eighth instructions given by the court on its own motion. Some of these instructions are quite lengthy. We find no error in any of them, but simply to illustrate the matter under consideration, the seventh instruction, which is brief, is reproduced:

"No. 7. As applied in this case, malice is defined to be the doing of a wrongful act intentionally and with a purpose to wrong and oppress without any just cause or excuse."

Again, the fifth assignment of error was because the court gave the first, third, fourth, fifth, sixth, eighth, ninth, tenth, eleventh, twelfth, thirteenth, and fifteenth instructions asked by the defendant. Here were grouped twelve instructions as to which, in gross, the assignment was made. Solely on account of its comparative brevity the tenth instruction mentioned is selected for the purposes of illustration. It was as follows:

"No. 10. Probable cause is defined to be the reasonable grounds of suspicion supported by circumstances sufficiently strong in themselves to warrant a reasonably cautious and

prudent man in the belief that the person accused is guilty of the offense with which he is charged."

Again, let this proposition be illustrated from another stand point, by reference to the sixth assignment, which was, that the court erred in refusing to give the instructions asked by plaintiff numbered consecutively from the first to the twentieth inclusive. If one of these instructions was bad the sixth assignment of error must fail for the reasons stated in reference to a kindred matter by COBB, C. J. in *Davis v. Getchell, supra.* He said: "A reviewing court is entitled to have the errors complained of specifically pointed out, and upon it should not be thrust the duty of searching through the bill of exceptions to find wherein the court may have erred in the admission or rejection of evidence." Under the sixth assignment the third instruction was in this language:

"No. 3. If you believe from the evidence that the contract and preponderance of the evidence represented a usurious loan, then you are instructed to find the full value of the drafts, with seven per cent interest from the 29th day of May, 1884, and damages for malicious prosecution."

There was in the pleadings no averment as to usury. The petition was for malicious prosecution, false imprisonment, and the forcible misappropriation to defendant's use of drafts and checks owned by plaintiff. To have given this third instruction would have presented for the consideration of the jury an issue entirely foreign to all those presented by the pleadings. Not only was the instruction bad in this respect, but by it the jury would have been required, upon finding the existence of usury, to have returned a verdict against the defendant for the full amount of drafts and interest, and damages for malicious prosecution. There are other erroneous instructions grouped under the sixth assignment, but reference to them is unnecessary, for the third instruction quoted vitiates this entire assignment.

We have carefully considered each of the many other

assignments made, but have found nothing of such importance as to justify special consideration. The judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA V. STATE BANK OF WAHOO.

FILED APRIL 17, 1894. No. 5962.

Creditors' Bill: ACTION BY STATE: JURISDICTION: PARTIES: RECEIVERS OF STATE BANKS. On a petition in this court by the receiver of an insolvent state bank for an order requiring Charlotte M. Dickinson and Harriet E. Adams (not theretofore parties to the proceeding) to show cause why a half interest in an electric light plant, which had been conveyed to them by W. H. Dickinson, Sr., the *quondam* proprietor of said bank, should not be converted into assets of said bank, issues were joined and tried to a referee, to whose findings of fact and conclusions of law exceptions were filed by the receiver, upon consideration whereof there are approved and confirmed the following conclusions of said referee: 1. That the state is not a proper party to bring the action in the nature of a creditor's bill to determine the *bona fides* of the conveyances of said one-half of said electric light plant from said W. H. Dickinson, Sr., to said Charlotte M. Dickinson and Harriet E. Adams. 2. That said action should be brought in the name of the receiver of said bank, and that this (the supreme) court has not original jurisdiction of such action.

ORIGINAL action to wind up the affairs of the state bank of Wahoo, Nebraska, under the banking law of 1889.

The receiver appointed by the court filed a petition for an order requiring W. H. Dickinson, Sr., and others to answer and show cause why the undivided one-half interest in the Wahoo Electric Light Company should not be converted into assets of the bank. *Petition dismissed.*

George H. Hastings, Attorney General, and *Good & Good,* for receiver.

Pound & Burr, W. J. Courtright, V. L. Hawthorne, H. Gilkeson, and *Reese & Gilkeson, contra.*

RYAN, C.

Under the provisions of section 14, chapter 37, Laws of 1889, C. B. Campbell was by this court appointed receiver of the State Bank of Wahoo. Subsequently a petition was by the receiver pre-ented for an order requiring W. H. Dickinson, Sr., W. H. Dickinson, Jr., Charlotte M. Dickinson, and Harriet E. Adams to answer and show cause why the undivided one-half interest in the Wahoo Electric Light Company should not be converted into assets of said State Bank. Issues were joined, which presented the question of the *bona fides* of the interests held by the above Dickinsons and Harriet E. Adams in the electric light plant, and their right to protection as against the creditors of the aforesaid bank. The issues were referred to W. H. Munger, Esq , to whose report exceptions have been filed on behalf of the receiver, who was unsuccessful before the said referee. Specifically the correctness of the following conclusions of law was questioned by the aforesaid exceptions:

"I find first—That the state is not a proper party to bring the action in the nature of a creditor's bill to determine the *bona fides* of the conveyance of said one-half of said electric light plant from said W. H. Dickinson, Sr., to said Charlotte M. Dickinson and Harriet E. Adams. Second—That said action should be brought in the name of the receiver of said State Bank of Wahoo, and that this court has not original jurisdiction of such action."

In support of exceptions to these conclusions counsel for the referee cite *State v. Commercial State Bank,* 28 Neb., 677, *State v. Exchange Bank of Milligan,* 34 Neb., 198,

and *State v. Commercial and Savings Bank of Kearney*, 37 Neb., 174. The case last cited has no bearing upon the question of jurisdiction in a case like that under consideration. The order made in that case was not one affecting title to either real or personal property, it was simply one requiring parties to the original case to turn over to the receiver the value of property misappropriated and destroyed by one of the defendants, who was an officer of the bank being administered upon, under penalty of being held liable for contempt of the orders of this court. There was therein no proceedings having any analogy to proceedings by creditor's bill, hence it affords no precedent for the relief sought in this case. In *State v. Commercial State Bank*, 28 Neb., 677, the only proposition presented was the power of this court to appoint a receiver, and to order the bank concerned to turn over to its receiver, so appointed, its assets, and to direct such receiver to wind up the affairs of the bank as required by law. It was held that the statute conferring upon this court power to appoint a receiver, under the circumstances therein contemplated, was not unconstitutional. A reference to the case of *State v. Exchange Bank of Milligan*, 34 Neb., 198, will show that Judge POST prefaced his opinion with the statement that the sole question presented was as to the constitutionality of section 14, chapter 8 of the Compiled Statutes, which was but another designation for section 14, chapter 37, Laws of 1889. There is in neither of these cases any warrant for the assumption that this court has jurisdiction to subject real property fraudulently conveyed to the payment of claims against an insolvent bank for which this court has appointed a receiver. It is a matter of grave doubt whether or not this court should at all have assumed jurisdiction to wind up the affairs of an insolvent bank. Probably it would have been better in the first instance to have declined functions which with more efficiency, expedition, and economy might have been performed by the district courts of the respective

counties in each of which the winding up of the affairs of an insolvent bank became necessary. It is at least undesirable, as well as unwarranted by the constitution, to extend the exercise of judicial powers beyond their present scope. The conclusions of law quoted above were correct, and the exceptions thereto are, therefore, overruled. This result leaves no alternative but the confirmation of the report of the referee, which is accordingly ordered.

JUDGMENT ACCORDINGLY.

FRANCIS LEON ENGLEBERT, APPELLEE, V. BENJAMIN F. TROXELL ET AL., APPELLANTS.

FILED APRIL 17, 1894. No. 5165.

1. **Infants:** CONTRACTS. All contracts of an infant, except those for necessaries, are voidable by him at his election, made within a reasonable time after he becomes of age.
2. **Ratification:** DISAFFIRMANCE: CONTRACTS OF INFANTS. The validity of a contract made by an infant does not depend upon a ratification thereof by him after his minority ends, but to invalidate such contract he must by some act, clear and unmistakable in its character, disaffirm the same.
3. **Infants:** ACTION TO CANCEL DEED: DISAFFIRMANCE. The bringing of a suit in equity by a party to cancel a deed made by him when a minor, and on that ground, is an unequivocal and sufficient disaffirmance of such deed.
4. ———: TIME TO DISAFFIRM CONTRACT. What is a reasonable time for one after becoming of age to disaffirm a contract made by him during his minority is a mixed question of law and fact to be determined from the circumstances in each particular case.
5. **The meaning of the term "necessaries"** cannot be defined by a general rule applicable to all cases; the question is a mixed one of law and fact to be determined in each case from the particular facts and circumstances in such case.

6. **Infancy**: SERVICES OF GUARDIAN AD LITEM NOT NECESSARIES. Under the evidence in this case, *held*, that services performed by the guardian *ad litem* of an infant in defending a suit brought to foreclose a real estate mortgage executed by the infant's ancestor were not necessaries.

7. ———: DISAFFIRMANCE OF CONTRACT: RETURN OF CONSIDERATION. One who seeks to disaffirm a contract on the ground that he was an infant at the time of its execution is required to return so much of the consideration received by him as remains in his possession at the time of such election, but is not required to return an equivalent for such part thereof as may have been disposed of by him during his minority. *Bloomer v. Nolan*, 36 Neb., 51, followed.

8. ———: ———: ———. An infant conveyed his real estate to one P. in consideration of $240 in cash paid by P. to the infant's father. The father purchased a piano for the infant with the money. The infant, on coming of age, had in his possession the piano, and disaffirmed the deed. *Held*, That the *quondam* infant, as a condition precedent to his right to disaffirm the deed, was under no legal obligation to tender or surrender the piano to P., nor repay P. the money which he had paid the infant's father.

9. **A deed made by an infant to his guardian ad litem,** in consideration of services rendered or to be rendered by him as such guardian *ad litem*, is voidable at the election of such infant on his becoming of age.

10. **Infancy**: FEES OF GUARDIAN AD LITEM. The statute makes it the duty of an attorney at law to act as the guardian *ad litem* of an infant in any suit pending against him when appointed for that purpose by an order of the court; and for performing the duties of a guardian *ad litem*, the attorney must look, and look only, for the amount of his compensation to the court. The compensation allowed the attorney as guardian should be taxed as part of the costs in the proceeding and collected as such, and no other different or greater amount can be collected than that so allowed.

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

The facts are stated by the commissioner.

George E. Pritchett, appellant, contending that the con-

tract was beneficial to the infant and should be sustained, cited: *Breed v. Judd*, 1 Gray [Mass.], 455; *Baker v. Lovett*, 6 Mass., 78; *Wheaton v. East*, 5 Yerg. [Tenn.], 41; *Radford v. Westcott*, 1 Desau. [S. Car.], 596.

In some cases it has been held that services of counsel for an infant in regard to his estate are necessaries. (*Epperson v. Nugent*, 57 Miss., 45; *Thrall v. Wright*, 38 Vt., 494; *Askey v. Williams*, 74 Tex., 294.)

The first deed was an executed contract, and the plaintiff still retains the consideration given him for it, to-wit, my services. All the cases hold that the infant cannot disaffirm the contract and retain the consideration if he still has it. (*Bartholomew v. Finnemore*, 17 Barb. [N. Y.], 428; *Gray v. Lessington*, 2 Bos. [N. Y.], 257; *Ex parte Taylor*, 8 De. G., M. & G. [Eng.], 254*, *Holmes v. Blogg*, 8 Taunt. [Eng.], 508; 1 Parsons, Contracts [5th ed.], 322; *Kitchen v. Lee*, 11 Paige Ch. [N. Y.], 108; *Ottman v. Moak*, 3 Sand. Ch. [N. Y.], 432.)

Switzler & McIntosh, for appellant Troxell:

To avoid his executed contracts an infant must restore the consideration received by him. (*Badger v. Phinney*, 15 Mass., 359; *Roberts v. Wiggin*, 1 N. H., 73; *Roof v. Stafford*, 7 Cow. [N. Y.], 179; *Hamblett v. Hamblett*, 6 N. H., 339; *Smith v. Evans*, 5 Humph. [Tenn.], 70; *Hall v. Butterfield*, 59 N. H., 358; *Bryant v. Pottinger*, 6 Bush [Ky.], 473; *Cummings v. Powell*, 8 Tex., 82; *Bozeman v. Browning*, 31 Ark., 364; *Ferguson v. Bobo*, 54 Miss., 133; *Gray v. Lessington*, 2 Bos. [N. Y.], 257; *Hanley v. Carroll*, 3 Sand. Ch. [N. Y.], 331; *Kilgore v. Jordan*, 17 Tex., 355; *Stuart v. Baker*, 17 Tex., 421; *Kerr v. Bell*, 44 Mo., 125; *Deichmann v. Deichmann*, 49 Mo., 107; *Baker v. Kennett*, 54 Mo., 88; *Davidson v. Young*, 38 Ill., 146; *Judd v. Blake*, 14 Vt., 410; *Bailey v. Barnberger*, 11 B. Mon. [Ky.], 113; *Locke v. Smith*, 41 N. H., 346; *Prout v. Wiley*, 28 Mich., 168; *Middleton v. Hoge*, 5 Bush [Ky.], 478; *Strain v.*

Wright, 7 Ga., 568; *City Savings Bank v. Whittle*, 63 N. H., 587; *Ex parte Watson*, 16 Ves. [Eng.], 265.)

Having issued his deeds in manner and form as appears in proof, the plaintiff is in equity estopped to avoid them as against innocent purchasers. (*Ferguson v. Bobo*, 54 Miss., 133; Bigelow, Estoppel, pp. 584–586; *Overton v. Banister*, 3 Hare [Eng.], 503, *Esron v. Nicholas*, 1 De G. & Sm. [Eng.], 118; *Hall v. Timmons*, 2 Rich. Eq. [S. Car.], 120; *Whittington v. Wright*, 9 Ga., 23; *Irwin v. Morill*, Dud. [Ga.], 72; *Thompson v. Simpson*, 2 Jones & L. [Irish], 110; *Brantley v. Wolf*, 60 Miss., 420; *Stikeman v. Dawson*, 1 De G. & Sm. [Eng.], 90; *Wright v. Snowe*, 2 De G. & Sm. [Eng.], 321; *Ex parte Unity Joint-Stock Mutual Banking Association*, 3 De G. & J. [Eng.], 63; *Western Union Telegraph Co. v. Davenport*, 97 U. S., 369; *Goodman v. Winter*, 64 Ala., 410; *Merritt v. Horne*, 5 O. St., 307; *Commonwealth v. Shuman's Adm'rs*, 18 Pa. St., 343; *Pickard v. Sears*, 6 Ad. & E. [Eng.], 469; *Gregg v. Wells*, 10 Ad. & E. [Eng.], 90; *Griffin v. Ransdell*, 71 Ind., 440; *Lichtenberger v. Graham*, 50 Ind., 288.)

Charles Offutt and *St. John & Stevenson*, *contra*, cited,

On the question as to the effect of the deeds to Pritchett: *Kleffel v. Bullock*, 8 Neb., 341; *Tucker v. Moreland*, 10 Pet. [U. S.], 59; *Roof v. Stafford*, 7 Cow. [N. Y.], 179; *Beeler v. Young*, 1 Bibb [Ky.], 519; *McCrillis v. How*, 3 N. H., 348; *McMinn v. Richmonds*, 6 Yerg. [Tenn.], 9; *Bouchell v. Clary*, 3 Brev. (S. Car.], *194; *Swasey v. Administrator of Vanderheyden*, 10 Johns. [N. Y.], 33; *Fenton v. White*, 1 South. [N. J.], 111; *Hanks v. Deal*, 3 McCord [S. Car.], 158; *Earle v. Reed*, 10 Met. [Mass.], 387; *Tupper v. Cadwell*, 12 Met. [Mass.], 559; *Bainbridge v. Pickering*, 2 W. Black [Eng.], 1325; *Angel v. McLellan*, 16 Mass., 31; *Etrod v. Myers*, 2 Head [Tenn.], 33; *Hull v. Connolly*, 3 McCord [S. Car.], 6; *Philpot v. Sandwich Mfg. Co.*, 18 Neb., 55; *Keane v. Boycott*, 2 H. Black

[Eng.], 511; *Uecker v. Koehn*, 21 Neb., 570; *Zouch v. Parsons*, 3 Burr. S. C. [Eng.], 1794; *Oliver v. Houdlet*, 13 Mass., 237; *Swafford v. Ferguson*, 3 Lea [Tenn.], 292; *Robinson v. Weeks*, 56 Me., 102; *Fridge v. State*, 3 Gill & J. [Md.], 103; *Van Etten v. Butt*, 32 Neb., 289; *Cole v. Superior Court*, 63 Cal., 86; *Gallatian v. Cunningham*, 8 Cow. [N. Y.], 371; *Hendee v. Cleveland*, 54 Vt., 142; *Davoue v. Fanning*, 2 Johns. Ch. [N. Y.], 252.

On the right and method of disaffirming voidable conveyances of real estate: *O'Brien v. Gaslin*, 20 Neb., 350; *Tucker v. Moreland*, 10 Pet. [U. S.], 71; *Jackson v. Carpenter*, 11 Johns. [N. Y.], 539; *Jackson v. Burchin*, 14 Johns. [N. Y.], 124; *Hastings v. Dollarhide*, 24 Cal., 195; *Roof v. Stafford*, 7 Cow. [N. Y.], 179.

The return or tender of consideration received is not a condition precedent to recovery. (*Shaw v. Boyd*, 5 S. R. [Pa.], 309; *Cresinger v. Lessee of Welch*, 15 O., 194; *Dawson v. Holmes*, 15 N. W. Rep. [Minn.], 463; *Chandler v. Simmons*, 97 Mass., 514; *Price v. Furman*, 27 Vt., 271; *Mustard v. Wohlford*, 15 Gratt. [Va.], 329; *Fitts v. Hall*, 9 N. H., 441; *Robbins v. Eaton*, 10 N. H., 562; *Boody v. McKinney*, 23 Me., 517; *Brawner v. Franklin*, 4 Gill [Md.], 463.)

The acts of the guardian in taking the deed and paying the money were a breach of duty and the infant is not bound to repay the purchase money to him. (*Fonda v. Van Horne*, 15 Wend. [N. Y.], 631; *Green v. Winter*, 1 Johns. Ch. [N. Y.], 27; *Parkist v. Alexander*, 1 Johns. Ch. [N. Y.], 394; *Evertson v. Tappen*, 5 Johns. Ch. [N. Y.], 497; *Hawley v. Mancius*, 7 Johns. Ch. [N. Y.], 174; *Schieffelin v. Stewart*, 1 Johns. Ch. [N. Y.], 620; *Brown v. Rickets*, 4 Johns. Ch. [N. Y.], 303; *Torrey v. Bank of Orleans*, 9 Paige Ch. [N. Y.], 659; *Hassard v. Rowe*, 11 Barb. [N. Y.], 22; *Putnam v. Ritchie*, 6 Paige Ch. [N. Y.], 390.)

The infant has not confirmed the deeds. (1 Story, Eq. Jurisprudence, secs. 317, 319; *Tucker v. Moreland*, 10 Pet. [U. S.], 71.)

RAGAN, C.

On April 1, 1874, Mrs. Frances H. Englebert was the owner of lot 3 in Geise's addition to the city of Omaha. At that time she and her husband, J. Lee Englebert, executed a mortgage on said lot to Max Meyer & Bro. to secure a note of $378.48, due July 1, 1874. Soon after that time Mrs. Englebert and her husband removed to Des Moines, Iowa, in which city Mrs. Englebert died on the 29th of December, 1875. She died intestate, leaving her husband and one child, the appellee herein, then a boy about seven years of age. November 1, 1881, Max Meyer & Bro. brought suit in the district court of Douglas county against Mr. and Mrs. Englebert only, to foreclose the mortgage above mentioned, and obtained service upon them by publication, Max Meyer & Bro. being then ignorant of the fact of Mrs. Englebert's death.

December 17, 1881, George E. Pritchett, an attorney at law, residing at Omaha, Nebraska, informed Mr. Englebert by letter of the pendency against him and his wife of Max Meyer & Bro.'s mortgage foreclosure suit, and requested to be authorized to appear in and defend the same. Various communications took place immediately afterwards between Pritchett and Mr. Englebert, finally culminating in an agreement between them that Pritchett should defend the foreclosure suit for Englebert and his minor son, and receive as compensation for his services one-half of whatever of the lot he might succeed in saving from the lien of the Max Meyer & Bro. mortgage. In pursuance of this agreement, on the 4th day of August, 1885, Mr. Englebert and his minor son conveyed to Pritchett, subject to the Max Meyer & Bro. mortgage, an undivided one-half of the aforesaid lot. Pritchett seems to have succeeded in having the foreclosure suit, as brought, continued from time to time on one pretext or another until August, 1884.

In August, 1885, Max Meyer & Bro. filed an amended

petition in their foreclosure suit, making Francis Leon Englebert, the minor son of Mr. and Mrs. Englebert, a party defendant to the action. Pritchett filed an answer on behalf of Mr. Engelbert to this amended petition, and having been by the court appointed guardian *ad litem* for Francis Leon Englebert, also filed an answer in the action for him. These answers admitted the execution and delivery of the note and mortgage described in the foreclosure suit; alleged that the legal title to the property was at the time of the execution of the mortgage in Mrs. Englebert; her death, and that the legal title to the real estate had descended to and was then vested in the minor son, Francis Leon Englebert; that the only interest that Mr. Englebert had in the property mortgaged was a life estate as tenant by the curtesy of his deceased wife; and that the interest of the minor, Francis Leon Englebert, in the real estate could not be sold to satisfy the mortgage debt, because the action as against him was not brought within ten years from the date of the maturity of the note which the mortgage was given to secure. The court rendered a decree and ordered the life estate only of Mr. Englebert sold to satisfy the amount found due on the mortgage. This life estate was sold under a decree; the property purchased by one of the plaintiffs in the foreclosure suit, and the sale confirmed; a deed was ordered but never made to the purchaser.

On the 6th day of January, 1886, on the joint application of Mr. Englebert and his minor son, Mr. Pritchett was appointed guardian of the minor son by the county court of Douglas county; accepted the trust, and qualified therefor by taking the oath and giving bond as required by statute.

On June 1, 1886, in pursuance of an agreement between Mr. Pritchett and Mr. Englebert, his son, then being about eighteen years of age, and in consideration of $240 in cash then paid by Pritchett to Englebert, conveyed to Pritchett the undivided one-half of the lot.

On the 22d day of December, 1888, J. Lee Englebert died. On the 11th of October, 1889, Francis Leon Englebert became of age, and one month and three days thereafter, to-wit, on the 14th day of November, 1889, brought this suit in equity in the district court of Douglas county, against the said George E. Pritchett and others who were claiming to be owners of some part of said lot under conveyances from Pritchett, to cancel and set aside the deeds hereinbefore mentioned made by himself and father to Pritchett, alleging that at the time he executed said deeds he was seized in fee-simple of the property and was a minor.

The district court rendered a decree canceling and setting aside said deeds and awarding the plaintiff a writ of possession for said real estate. The case is before us on appeal.

The reported decisions, especially the older ones, abound with grave, learned, and lengthy discussions of the question as to whether the contracts of an infant are void or voidable; and there are respectable authorities which hold that certain contracts of an infant, made under certain circumstances, are absolutely void; but we think that the better rule, and the one supported by the weight of authority, is that all contracts of an infant, except those for necessaries, are voidable by the infant at his election within a reasonable time after he becomes of age. In *Tunison v. Chamblin*, 88 Ill., 378, the rule is thus stated: "Deeds made by a minor are not void, but only voidable. Their validity does not depend upon a ratification after the minor attains his majority, but to avoid them he must by some act, clear and unmistakable in its character, disaffirm their validity." (See, also, *Bonner v. Illinois Land & Loan Co.*, 75 Ill., 315; *Hyer v. Hyatt*, 3 Cranch C. C., 276; *Kendall v. Lawrence*, 39 Mass., 540; *Dixon v. Merritt*, 21 Minn., 196; *Singer Mfg. Co. v. Lamb*, 81 Mo., 221; *Irvine v. Irvine*, 76 U. S., 617; Pom., Eq. Juris. [2d ed.], sec 945.) Such is

also the doctrine of this court as stated in *Philpot v. Sandwich Mfg. Co.*, 18 Neb., 54, where it is said: "Contracts of an infant, other than for necessaries, are voidable only, and upon coming of age he may affirm or avoid in his discretion." The deeds made by the appellee in this case to Pritchett were voidable and not void. The appellee, within less than two months after his becoming of age, instituted this suit for the purpose of canceling the deeds made to Pritchett. This was, on the part of the appellee, an unequivocal and sufficient disaffirmance on his part of the contracts made. (*Tunison v. Chamblin*, 88 Ill., *supra; Sims v. Everhardt*, 102 U. S., 300.)

Was the disaffirmance of these deeds by appellee made within a reasonable time? As to what is a reasonable time for an infant after becoming of age to disaffirm contracts made during his minority is a mixed question of law and fact to be determined from the circumstances in each particular case. In *Ward v. Laverty*, 19 Neb., 429, this court said: "A minor who has conveyed his real estate must disaffirm the deed within a reasonable time after becoming of age or be barred of that right." In that case the disaffirmance was not made until more than three years after the minor became of age, and the court held that the disaffirmance under the facts in the case was not made within a reasonable time. In *O'Brien v. Gaslin*, 20 Neb., 347, this court, adhering to the rule announced in *Ward v. Laverty*, held that a disaffirmance made by a party fourteen years after he became of age was not made within a reasonable time. In *Johnson v. Storie*, 32 Neb., 610, an infant who had signed a note as surety disaffirmed the same a year and a half after he became of age, and it was held that the disaffirmance was made within a reasonable time. There are some eminent authorities which hold that an infant may disaffirm a deed which he has made to his real estate during his minority at any time after he becomes of age before he would be barred by the statute of limitations from bringing

an action in ejectment for the real estate; but this is not the doctrine of this court. It is now firmly settled here that an infant, in order to avoid a contract made during his minority, must disaffirm the same within a reasonable time after his minority ends. There can be no doubt, in view of the authorities quoted above, but that the appellee disaffirmed within a reasonable time after he became of age the deeds made to Pritchett.

It is insisted by the appellants that the first deed made by appellee to Pritchett was voidable only, and that the services performed by Pritchett in the foreclosure suit of Max Meyer & Bro. for the appellee were necessaries, and that therefore the appellee cannot avoid said first deed. Were the services performed by Pritchett for the appellee in the foreclosure suit "necessaries" within the meaning of that term? As to what are necessaries for an infant, cannot be defined by any general rule applicable to all cases; it is a mixed question of law and fact to be determined in each case from the particular facts, circumstances, and surroundings in that case. In *Shelton v. Pendleton*, 18 Conn., 417, a wife, without her husband's consent, employed an attorney to prosecute a suit for divorce in her favor against her husband for a legal and sufficient cause. The attorney performed the services and the decree of divorce was granted. The attorney then sued both the husband and wife for his fees. The court held that the services rendered were not necessaries and that the husband was not liable therefor. The court said: "By the law the defendant is liable only for necessaries which the plaintiffs have provided for his wife. * * * The common law defines 'necessaries' to consist only of necessary food, drink, clothing, washing, physic, instruction, and a competent place of residence." In *Munson v. Washband*, 31 Conn., 303, a female infant was seduced under a promise of marriage. Her seducer refused to marry her and she was left in a state of destitution. At her request an attorney brought

suit against the seducer for a breach of promise of marriage. The suit was settled by the intermarriage of the plaintiff and defendant. The attorney then sued both the husband and the wife for his services. The court held that the services rendered by the attorney, under the circumstances, were 'necessaries' within the meaning of that term. The court said: "Can the plaintiff's charges for prosecuting that action be considered as necessaries under the circumstances? The rule usually stated in the text-books confines the term 'necessaries,' for which a minor may bind himself, to suitable food, shelter, clothing, washing, medicine, medical attendance, and education. It is admitted that it depends entirely upon what a court or jury may think in each case suitable and proper in reference to the infant's condition and station in life. * * * The personal security of the wife, then, is legally a necessary, and the expense of securing it is a proper charge against the husband. * * * If we look at the prosecution of the suit which the infant commenced as her only mode under her peculiar circumstances of procuring the means of living, it comes within the principle allowing her to contract for necessaries. * * * It was not the case of merely prosecuting an infant's right to property or for the recovery of an ordinary debt. In such cases there is, or ought to be, a guardian to protect the infant's rights. There was none here, and it does not appear that there were any practicable means of procuring one to be appointed. * * * It appears to us, therefore, that while the court recognized the rule that the ordinary fees of an attorney for the prosecution of an infant's rights to property could not generally be said to be necessaries, it yet further correctly informed them in substance that such services, where requisite for the personal relief, protection, and support of the infant, might be lawfully contracted for by the infant, and that he would be liable to pay for the same." In *Wallace v. Bardwell*, 126 Mass., 366, it was held: "A ward is not liable for repairs

put upon his dwelling house by a person employed by the guardian to make them, even after the death of the guardian; and evidence that the repairs were necessary is immaterial." In *Tupper v. Cadwell*, 53 Mass., 559, it was held: "An infant is not liable for the expense of repairing his dwelling house on a contract made by him therefor, although such repairs were necessary for the prevention of immediate and serious injury to the house." The court said: "An infant may make a valid contract for necessaries, and the matter of doubt in the present case is what expenditures are embraced in the term 'necessaries.' * * * It has sometimes been contended that it was enough to charge the party, though a minor, that the contract was one plainly beneficial to him in a pecuniary point of view. That proposition is by no means true, if by it it be intended to sanction an inquiry in each particular case, whether the expenditure or articles contracted for were beneficial to the pecuniary interests of the minor. The expenditures are to be limited to cases where, from their very nature, expenditures for such purposes would be beneficial; or, in other words, they must belong to a class of expenditures which are in law termed beneficial to the infant. What subjects of expenditure are included in this class is a matter of law to be decided by the court. The further inquiry may often arise whether expenditures, though embraced in this class, were necessary and proper in the particular case, and this may present a question of fact. It is therefore a preliminary question to be settled whether the alleged liability arises from expenditures for what the law deems 'necessaries,' and unless that be shown it is not competent to introduce evidence to show that in a pecuniary point of view the expenditure was beneficial to the minor." (See, also, *Price v. Sanders*, 60 Ind., 310; *Mathes v. Dobschuetz*, 72 Ill., 438; *Bloomer v. Nolan*, 36 Neb., 51.) In *Turner v. Gaither*, 83 N. Car., 357, it was held that money furnished an infant to enable him to acquire a professional education

was not a necessary. In *Decell v. Lewenthal*, 57 Miss., 331, it was held that money furnished an infant to enable him to carry on a plantation was not a necessary. In *Barker v. Hibbard*, 54 N. H., 539, it was held that the services rendered by an attorney in defending an infant in a bastardy proceeding was a necessary. In *Anding v. Levy*, 57 Miss., 51, it was held that where an infant had no guardian, and the services rendered by an attorney were beneficial to the infant's estate, that he was liable for such services. In *Connolly v. Assignees of Hull*, 3 McCord [S. Car.], 6, and in *Kline v. L'Amoureux*, 2 Paige Ch. [N. Y.], 419, it was held that if an infant was living with his parents or guardian, and properly maintained by them, his contract even for necessaries was not binding. In the case at bar, when the appellee made the first deed to Pritchett, in consideration that he would defend the Max Meyer & Bro. mortgage foreclosure suit, he was living with his father, his natural guardian; so that if we held that the services rendered by Pritchett in the foreclosure suit were necessaries, still the appellee would not be bound to pay for the services if this was a suit by Pritchett on the contract made for that purpose. In the light of the authorities quoted above upon this subject, we are clearly of the opinion that the services rendered by Mr. Pritchett in the foreclosure suit cannot be considered necessaries under the facts of this case.

Another contention of the appellants is that the appellee has not restored the consideration he received from Pritchett for the execution of the two deeds which he seeks to cancel by this suit and therefore he cannot maintain this action. There are many authorities which hold that it is not necessary, to enable an infant on coming of age to disaffirm a contract made during his minority, to restore or return, or offer to restore or return, as a condition precedent to his right to disaffirm such contract, the consideration which he received therefor. But the rule of this court is otherwise. In *Philpot v. Sandwich Mfg. Co.*, 18 Neb., 54, the rule is

thus stated: "If an infant purchase personal property and give his note therefor, he cannot, upon arriving at the age of twenty-one years, retain the property and plead infancy as a defense to the note." This is a somewhat loose statement of the rule. The rule is concisely and correctly stated by POST, J., in *Bloomer v. Nolan*, 36 Neb., 51, in this language: "One who seeks to disaffirm a contract on the ground that he was an infant at the time of its execution is required to return so much of the consideration received by him as remains in his possession at the time of such election; but is not required to return an equivalent for such part thereof as may have been disposed of by him during his minority." That is to say, the infant, on coming of age and electing to disaffirm a contract made by him during his minority, must restore or return so much of the consideration received by him in consideration of executing the contract as he then has in specie in his possession. The language of the authorities is that he must return or restore whatever of the consideration he then has; not that he is to pay to the party with whom he made the contract an equivalent or that which he received from said party. In *Reynolds v. McCurry*, 100 Ill., 356, the rule is thus stated: "It is the general rule that where the consideration of a conveyance by an infant has been expended so that he is not in a condition to restore it, he may nevertheless avoid the conveyance. It is only when he still has the consideration that he will be compelled to return it." (See also *Miller v. Smith*, 26 Minn., 248.) In *Chandler v. Simmons*, 97 Mass., 508, the rule is stated in this language: "If money paid to a minor as the consideration for his conveyance of real estate has been wasted or spent by him during his minority, payment or tender of the amount is not necessary to enable him * * * to avoid the conveyance." The Iowa Code provides that a minor is bound by his contract unless he disaffirms it and restores to the other party all money or property received by him by virtue of his contract and re-

maining within his control. Construing this section of the Code the supreme court of Iowa in *Hawes v. Burlington, C. R. & N. R. Co.*, 64 Ia., 315, held that where a minor had disaffirmed a contract he was only required to return the identical money or property received by him for the execution of such contract remaining in his possession at the time of his disaffirmance thereof. The court said: "It is not shown or pretended that he had remaining under his control at any time after attaining his majority any money or property received by him by virtue of the contract, and it is only such money or property as may thus remain that he is bound to restore."

So far as the consideration for the first deed made by the appellee to Pritchett is concerned the only consideration which it is claimed appellee received for such deed was the services rendered by Mr. Pritchett in defending the Max Meyer & Bro. foreclosure suit. There are several things to be said of these services. In the first place, but for the voluntary intervention of Mr. Pritchett in that suit we are led to believe, from the record before us, that Max Meyer & Bro. would have proceeded to decree of foreclosure against the father and mother of appellee only, notwithstanding that the appellee's mother was dead at the time the foreclosure suit was brought and the title to the real estate had vested in the appellee. Such a decree would not have been binding upon the appellee and would not have deprived him of the right at least to redeem his property from such decree, if such decree would have in any manner interfered with appellee's title.

Again, at the time Mr. Pritchett rendered these services he was an officer of the court in which the foreclosure suit was pending and had been by the court appointed guardian *ad litem* for the appellee; he had accepted this appointment and was acting for the appellee. Section 14, chapter 7, Compiled Statutes of 1893, then and now in force, provides: "It shall be the duty of every attorney to act as

the guardian of any infant defendant in any suit pending against him, when appointed for that purpose by order of the court; he shall prepare himself to make the proper defense, to guard the rights of said defendant, and shall be entitled to such compensation as the court shall deem reasonable." In view of this statute, and in view of the circumstances under which Mr. Pritchett rendered the services for the appellee in the foreclosure suit, we are constrained to say that if such services had been necessaries, nevertheless the appellee's contract, by which he paid Pritchett one-half the real estate in litigation in consideration of the services, would still have been voidable at the suit of the appellee. It was the duty of Pritchett to render the services he did. This was a duty imposed upon him by law and resulting from his profession. For performing the duties of a guardian *ad litem* an attorney must look, and look only, for the amount of his compensation to the court, and the compensation allowed the guardian should be taxed as costs in the proceedings and as such collected. Perhaps it might be filed as a claim against the minor's estate, but no other different or greater amount can be collected than that allowed by the court. Whatever may be said of the services rendered by Mr. Pritchett in the foreclosure suit for the appellee, such services of course cannot be returned in kind.

The consideration for the second deed was $240 in money paid by Pritchett to appellee's father. It is not claimed or pretended that this money, or any part of it, ever came into the possession of the appellee. It appears that the appellee's father bought a piano with this money and gave it to the appellee, and that he still has it. But the appellee was under no legal obligations to offer or tender or surrender this piano to Pritchett as a condition precedent to his right to disaffirm the deed; nor was the appellee under any legal obligation, as a condition precedent to his right to disaffirm the deed, to repay Pritchett

the money which he had paid appellee's father in consideration of the execution of the deed. At the time appellee disaffirmed these deeds and brought this suit there was in his possession no part of the consideration parted with by Pritchett at the time appellee executed the deeds.

The final contention of the appellants is that the appellee, having executed the deeds, he is in equity estopped from disaffirming them as against innocent purchasers. This is a remarkable argument, in view of the record in this case. Not one of the appellants is an innocent purchaser of any part of this property in any sense whatsoever. There is in all this record not one word of evidence that the appellee, by any act or omission of his, either before or after his coming of age, induced either of the appellants to purchase any of the property in this suit. Certainly the appellants, as purchasers of this property, were bound by such notice as the public records of Douglas county afforded of the fact of the infancy of the appellee. Had appellants, intending to purchase this property, exercised ordinary care and looked into the records of Douglas county as to the title of this property, they would have found the title to the same in appellee's mother in 1874. They would have found the record of the foreclosure suit of Max Meyer & Bro. They would have seen that the decree in that case found that the title of this property had passed to appellee; that he was at that time an infant. They would have found the first deed from appellee to Pritchett antedating the decree in the foreclosure suit. They would have found of record in the office of the probate court of Douglas county the very day and hour of appellee's birth; the finding by that court that appellee was a minor in 1888, giving his age; the appointment by that court on that date of Pritchett as his guardian. Certainly these records were sufficient to have protected the appellants had they looked for them. If they did not examine the records and chose to rely upon the ability of their grantors to make good the title for

them, they have no one of whom to complain. Certainly they are in no position to invoke the aid of this court in this case to protect them as innocent purchasers; and besides there is no such thing as an innocent purchaser of a minor's property. The decree of the district court is

AFFIRMED.

BANK OF COMMERCE OF GRAND ISLAND, APPELLANT, v. CHRISTIAN SCHLOTFELDT ET AL., APPELLEES.

FILED APRIL 17, 1894. No. 5497.

1. **Fraudulent Conveyances:** PROOF OF FRAUD: PRESUMPTIONS. Fraud is never to be presumed. It must be proved. A creditor of a vendor seeking to invalidate a sale upon the grounds of fraud must prove facts from which a legitimate inference of fraudulent intent can be drawn. Evidence simply justifying a suspicion is not sufficient. *Jaege v. Kelley*, 52 N. Y., 274, followed.

2. ——: ——: ——: BURDEN OF PROOF. In the absence of evidence to the contrary, honest and fair dealing in all transactions are to be presumed; and if any person claims that there was fraud in any transaction, it devolves upon such person to prove the fraud, and it does not devolve upon the party charged with committing the fraud to prove that the transaction was honest. *Long v. West*, 31 Kan., 298, followed.

3. **Preferring Creditors:** EVIDENCE OF FRAUD. *Farwell v. Wright*, 38 Neb., 445; *Kilpatrick-Koch Dry Goods Company v. McPheeley*, 37 Neb., 800; *Jones v. Loree*, 37 Neb., 816; *Temple v. Smith*, 13 Neb., 513; *Smith v. Schmitz*, 10 Neb., 600, cited, applied, and approved.

APPEAL from the district court of Hall county. Heard below before HARRISON, J.

W. A. Prince, for appellant, cited: *Atkins v. Atkins*, 18

Neb., 476; *Tootle v. Dunn*, 6 Neb., 99; *Wake v. Griffin*, 9 Neb., 52.

W. H. Thompson, contra, cited: *Ensign v. Roggencamp*, 13 Neb., 33; *Leffel v. Schermerhorn*, 13 Neb., 342; Wait, Fraudulent Conveyances [2d ed.], p. 336, and cases cited.

J. H. Woolley, also for appellees.

RAGAN, C.

This is a creditor's bill brought by the Bank of Commerce of Grand Island, Nebraska, against Christian Schlotfeldt and Edward Hooper, and their wives, to set aside a conveyance of some real estate made by Schlotfeldt to Hooper, the bank alleging that such conveyance was made by Schlotfeldt with the fraudulent intent of hindering and delaying his creditors.

The answers of Hooper and Schlotfeldt deny all fraud, and allege that the conveyance was made for a valuable consideration and in good faith.

The only evidence in the case is that produced by the bank; and after it had rested its case the court, on motion of Hooper and Schlotfeldt, rendered a decree dismissing the action, and the bank comes here on appeal.

The question then is, admitting the truth of all the testimony offered, does it show that the conveyance was made and accepted with a fraudulent purpose? The evidence, summarized, is as follows: On the 5th of November, 1890, the bank brought a suit at law in the district court of Hall county against Schlotfeldt; on the 9th of December, 1890, judgment was recovered in this action against Schlotfeldt for $2,475; on the 15th of December, 1890, Schlotfeldt paid on said judgment, $574.47; that execution has been issued on said judgment and returned unsatisfied; that on the 28th of November, 1890, Schlotfeldt and wife, by warranty deed, conveyed the real estate in question to the appellee Ed-

ward Hooper; on the 29th of November, 1890, this deed was filed for record in the office of the recorder of deeds of Hall county; the consideration for the conveyance, as expressed in the deed, is $12,700; that the property was worth about that sum; that at the time of the conveyance Schlotfeldt was indebted in about the sum of $5,000 to other parties than the bank. The evidence does not show whether Schlotfeldt had any other property than that conveyed to Hooper; that Hooper told an officer of the bank after the conveyance had been made that he, Hooper, took the conveyance to secure himself. Counsel for the appellant insists that this evidence shows a fraudulent disposition of the property by Schlotfeldt. Counsel also insists that the transfer of his property by Schlotfeldt, during the pendency of the suit against him brought by the bank, and the fact that Schlotfeldt at the time was largely indebted to other parties, were and are badges of fraud. But if these circumstances are badges or indices of fraud, they simply afford grounds of inference, from which the trial court was authorized to conclude that the transaction was fraudulent; but we do not think that those indices of fraud were, or are, such that the trial court was necessarily compelled to find that the conveyance was fraudulent. Fraud is never to be presumed. It must be proved. A creditor of a vendor, seeking to invalidate a sale upon the grounds of fraud, must prove facts from which a legitimate inference of fraudulent intent can be drawn. Evidence simply justifying a suspicion is not sufficient. (*Jaege v. Kelley*, 52 N. Y., 274.) In the absence of evidence to the contrary, honest and fair dealing in all transactions are to be presumed; and if any person claims that there was fraud in any transaction, it devolves upon such person to prove the fraud, and it does not devolve upon the party charged with committing the fraud to prove that the transaction was honest. (*Long v. West*, 31 Kan., 298.) The return of the execution issued against Schlotfeldt unsatisfied raises the presumption that Schlot-

feldt was insolvent at that time; but a debtor in failing circumstances has the right to secure or pay in full a portion of his creditors to the exclusion of others, and whether in so doing he is actuated with a fraudulent purpose is a question of fact and not of law. (*Farwell v. Wright*, 36 Neb., 445; *Stewart v. Dunham*, 115 U. S., 61.) The only explanation in the record as to why this conveyance was made is the one given by Hooper that it was to secure himself. The intention on the part of a debtor to defraud cannot be inferred merely from the fact that he desires to and does prefer certain of his creditors. (*Jones v. Loree*, 37 Neb., 816.) We do not think that the evidence shows that Schlotfeldt made this conveyance with the intention to defraud his creditors, nor do we think that such a conclusion is necessarily inferable from all the evidence; but if we had reached that conclusion as to the purpose of Schlotfeldt, the decree appealed from would still have to be affirmed. The bank does not plead that Hooper accepted this conveyance for the purpose of enabling Schlotfeldt to defraud his creditors, and certainly there is no word of evidence which tends to show that Hooper, in taking the conveyance, was actuated with any such purpose. The only evidence in the record, as already stated, which shows what Hooper's intentions were is the statement which it is alleged he made that he took the conveyance to secure himself. He certainly had the right to do this; and the evidence does not show that at the time he took the conveyance he knew that Schlotfeldt was indebted to other parties, but if it did, that knowledge alone would not be evidence sufficient to support a finding that Hooper, in taking the conveyance, was actuated with a fraudulent purpose. To render this conveyance void the fraudulent purpose of Schlotfeldt in making it, if his purpose was fraudulent, must have been shared in by Hooper; he must have had knowledge of Schlotfeldt's fraudulent purpose, or have had notice of such facts tending to show Schlotfeldt's fraudulent purpose as would put a man of or-

dinary prudence on inquiry. (*Temple v. Smith*, 13 Neb., 513; *Smith v. Schmitz*, 10 Neb., 600.) The judgment appealed from must be and the same is

AFFIRMED.

HARRISON, J., not sitting.

CARL A. ARNOLD ET AL. V. DAVID F. WEIMER.

FILED APRIL 17, 1894. No. 5586.

1. **Receivers:** ATTACHMENT: BANKS. The property of an insolvent bank, prior to the appointment of a receiver therefor or putting the sheriff in possession thereof by order of a court or judge, is not exempt from seizure by attachment or other legal process at the suit of its creditors.
2. **Attachment Lien.** The lien acquired by the levy of an attachment upon the property of an insolvent bank is not vacated by the subsequent appointment of a receiver for such bank.
3. **Receivers:** INSOLVENT BANK. The receiver of an insolvent bank takes the assets thereof incumbered with all valid liens thereon which attached prior to his appointment.
4. **Judgments:** RECEIVERS: INTERVENTION. The receiver of an insolvent bank who intervenes in an action to which said bank is a party, thereby submits himself to the jurisdiction of the court in which such suit is pending, and can only review the judgments and rulings of such court in the same manner as any other litigant.

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

George H. Hastings, Attorney General, J. S. Kirkpatrick, and *Hutchinson & Dickinson,* for plaintiffs in error.

No briefs filed.

RAGAN, C.

On, and some time prior to, the 13th day of November, 1891, Charles Kloman and Carl Arnold (hereinafter called "the bank") were associated together as partners under the name of Kloman & Arnold, and conducting a general banking business in the city of Broken Bow, Custer county, Nebraska. David Weimer was a depositor in said bank, and on said date it was indebted to him in the sum of $2,414.56. On said date he brought a suit in the district court of Custer county against said bank, caused an attachment to be issued and levied upon certain real estate belonging to said bank. Afterwards, one George W. Goodell was, by an order of this court, appointed receiver of said bank, and he filed a motion in said suit brought by Weimer against the bank in the district court of Custer county to discharge said attachment. This motion the district court overruled, sustained the attachment, and ordered the attached property to be sold. The receiver has filed a petition in error in this court to reverse said order.

The receiver alleged in his motion to dissolve said attachment, as his grounds therefor, that at the time of the levy of the writ of attachment the bank had been closed by order of the officers of the "state banking board," and that the property seized by the attachment was at the time in the hands of a receiver, and in the hands of the officers of the "state banking board of Nebraska," and was not subject to attachment.

The motion to dissolve the attachment was tried by the district court on a stipulation of facts. From this stipulation it appears that Weimer's attachment was levied upon the real estate by the sheriff of Custer county on the 13th of November, 1891; that the bank was then unable to pay its obligations; that before noon of said day the bank suspended business and posted on its doors a notice as follows: "Bank closed. In hands of receiver. Depositors

will be paid in full;" that on the morning of said date the manager of said bank telegraphed to the "state banking board" that the bank was closed and asked the board to send a receiver; that on the 14th of November the bank was duly examined by an examiner appointed by the "state banking board;" and that on the 19th of November Goodell was by this court appointed receiver of said bank.

The real contention of the receiver is that after the bank suspended business and closed its doors on the 13th, its property was not subject to attachment at the suit of a creditor, but that all the bank's assets from that moment became a trust fund to be divided *pro rata* among all the bank's creditors; or, if the property of the bank was subject to attachment on the 13th, then the appointment of a receiver on the 19th vacated the attachment. If the contention of the receiver is correct, it must be so because of some express statute or arise by operation of law from the fact of the receiver's appointment. We have been cited by counsel to no statute, nor have we been able, after a careful search, to find a statute which exempts the property of an insolvent banking association from an attachment at the suit of the creditors; nor that divests the lien of an attachment already levied by reason of the appointment of a receiver thereafter for such association.

It is said by the receiver that under the banking act, chapter 8, Compiled Statutes, 1893, the district court of Custer county had no jurisdiction over the bank or its property, and that the only remedy a creditor of said bank had for the collection of his debt was to await the appointment of a receiver, the winding up of the affairs of the bank by that officer, and the distribution of the bank's assets. We do not agree with either of these contentions. By section 9, article 6, of the constitution the district courts are given both chancery and common law jurisdiction and such other jurisdiction as the legislature may provide; and by section 34, chapter 19, Compiled Statutes, 1893, the

legislature has provided that the district courts shall have and exercise general, original, and appellate jurisdiction in all matters, both civil and criminal, except where otherwise provided. There is nothing in the banking act, or any other statute, which forbade the district court of Custer county from entertaining jurisdiction of Weimer's suit against this bank; nor is there anything in the banking act which expressly, or by implication, compels the creditor of an insolvent banking institution to await the appointment of a receiver thereof for the collection of his debt against such association. The legislature may have the authority to say that from the moment a banking association becomes insolvent that its property shall not be liable to an attachment at the suit of one of its creditors, but it has not said so. The legislature may have the authority to provide that an attachment levied upon the property of an insolvent banking association shall be vacated upon the appointment of a receiver thereof, but it has not said so.

Another argument of the receiver is that inasmuch as the assets of a national bank are not liable to be attached at the suit of a creditor, the legislature must have intended, by the enactment of the banking law of this state, that the assets of an insolvent banking association from the moment of its insolvency should occupy the same status as the assets of an insolvent national bank. If the legislature had intended by the banking act to render the property of an insolvent bank exempt from an attachment at the suit of one of its creditors it would doubtless have said so. The national banking act expressly provides that the United States shall have a first and paramount lien upon all the assets of the bank, and that no attachment shall be issued against said association or its property till final judgment rendered in the suit brought.

Counsel for the receiver cite us to *State v. Commercial State Bank*, 28 Neb., 677, as an authority for their contention. In that case one McConaughy was a large stockholder in the

Commercial State Bank. He, McConaughy, became insolvent and made an assignment to the sheriff for the benefit of his, McConaughy's, creditors. The sheriff took possession of not only McConaughy's property, but claimed the right to the possession of the assets of the bank as well. The attorney general made application to this court for the appointment of a receiver for the assets of the bank. The sheriff, as McConaughy's assignee, resisted the application, claiming that McConaughy owned all the stock in the bank. The court, by the present chief justice, NORVAL, held, in effect, that although McConaughy was the owner of the majority or all the stock of the corporation, he did not thereby become the corporation, and that while his assignee could hold his, McConaughy's, property, the assignee had no claim to the assets of the bank; that they were a trust fund for the payment of its debts, and that the rights of the creditors to the bank's property were superior to the rights of the stockholders and the assignee of the stockholders thereto. Nothing in that case supports the contention made by the receiver. There being no statutory provision which exempts the property of this bank from attachment at the suit of one of its creditors prior to the appointment of a receiver therefor, or possession taken by the sheriff under section 268, Code of Civil Procedure, and no provision vacating an attachment already levied upon the appointment of a receiver for its assets, we proceed to inquire what right or title the receiver acquired to the property attached by virtue of his appointment. Section 212 of the Code of Civil Procedure provides that the order of attachment shall bind the property attached from the time of the service of the order. The order of attachment in Weimer's case was issued on the 13th day of November, 1891, and the property attached on that day by the sheriff.

In Beech, Receivers, section 202, it is said: "It is a general rule that the receiver obtains title subject to all liens previously acquired, but this rule is applicable only

to property which is subject to levy and sale under execution. As to other property, such, for example, as equitable interests, the commencement of the action for the appointment of a receiver creates a lien in favor of the plaintiff." The real estate attached at the suit of Weimer was subject to levy and sale under execution. The legal title to this property was in the bank.

A question very similar to the one at bar arose and was decided in *Hubbard v. President and Directors of the Hamilton Bank*, 48 Mass., 340. In that case the Phœnix Bank stopped payment on the 3d day of October, 1842, and afterwards, on the same day, the Hamilton Bank brought a suit against the Phœnix Bank in the common pleas court in Suffolk county, had an attachment issued and levied upon the real and personal property of the Phœnix Bank. On the 6th of October, "on the application of the bank commissioners," the supreme court of Massachusetts issued an injunction restraining the Phœnix Bank from transacting any further business until a hearing could be had. On the 18th of October the supreme court appointed a receiver to take possession of the assets of the Phœnix Bank. The receivers then filed a petition in the supreme court praying it to enjoin the Hamilton County Bank from further prosecuting its suit at law against the Phœnix Bank and to dissolve the attachment levied upon the property of the Phœnix Bank. The court by Dewey, justice, said: "This leads us directly to the consideration of the effect to be given to an injunction upon a banking corporation, and the appointment of receivers under the statute, and in connection therewith, and as the material inquiry in the present case, to consider the nature and effect of an attachment on *mesne* process and to what extent such attachment constitutes a lien or incumbrance upon the assets of the bank. The power and authority of receivers appointed under the provisions of the statute referred to are not distinctly defined by this statute, but it is provided, in general terms, that one

of the justices of this court 'may appoint agents or receivers to take possession of the property and effects of the corporation, subject to such rules and orders as may from time to time be prescribed by the supreme judicial court.' * * * There is no express provision in the statutes cited dissolving existing attachments upon the transfer of the property of the corporation to receivers similar to that found in the general insolvent law, and if such effect follows, it results from general principles governing cases of this nature rather than by force of any special enactment. * * * We are satisfied that under the laws of Massachusetts an attachment is a lien or incumbrance upon the property attached. It fastens itself upon the property, and whoever takes the property takes it *cum onere*. It is constantly spoken of as a lien in the books of reports, in the arguments of the bar, and in the opinions of the bench. It is not a lien in that sense which requires the party to be in possession of the property thus incumbered or charged with it. An attachment of real estate does not require a change of possession, but that does not make it the less a lien in the sense which we attach to that term. * * * But it is further urged that if such be the rule of law as to the nature and effect of an attachment, yet it is a lien capable of being dissolved, and that by the force and effect of an injunction issued by this court against the Phœnix Bank, and the appointment of receivers to take the control and management of the assets of the bank for the benefit of all concerned, the attachment was *ipso facto* dissolved. * * * We think that there is a manifest distinction between the case of an attachment before and one made after proceedings instituted praying for an injunction and the appointment of receivers. In the latter case the attachment is ineffectual, the property is in other hands and beyond the process of an attachment; but in the former, a valid attachment has been made, and hence it will bind the property; and though the assets pass into the hands

of the receivers they take them with all the liens thereon, and an existing attachment is a lien. * * * It seems therefore quite clear that there is nothing in the nature of the process by injunction against the Phœnix Bank and the appointment of receivers which necessarily dissolves an attachment of the assets of the bank previously made. There is nothing in the principle of equal distribution among all creditors *pro rata*, which has been considered powerful enough to set aside the priority already acquired by a vigilant creditor. There is nothing in our statutes declaring such previous attachments to be dissolved by force and effect of the appointment of receivers." To the same effect see *Von Roun v. Superior Court of San Francisco*, 58 Cal., 358; *Walling v. Miller*, 108 N. Y., 173.

In *Breene v. Merchants & Mechanics Bank*, 17 Pac. Rep. [Col.], 280, the Merchants & Mechanics Bank suspended payment on the afternoon of the 30th day of January, 1884. It was then, and had been for some time, insolvent. At the time it closed its doors it was indebted to Breene in the sum of $7,000, and on that day he brought a suit against the bank to recover the amount due him and caused an attachment to be issued and levied upon the assets of the bank. Six days later, on application of the stockholders, one Talbot was appointed receiver for the bank. He intervened in the suit brought against the bank by Breene and filed a motion to dissolve the attachment. The supreme court of Colorado held that the creditors of insolvent corporations, as those of other insolvents, have no equitable liens superior to an attachment unless a court of equity lawfully assumes jurisdiction before such attachment; and reversed the judgment of the district court, which had dissolved the attachment on the motion of the receiver.

The lien acquired by Weimer on the real estate of the bank by the levy of his attachment thereon was not dissolved by the appointment of a receiver to take charge of

the assets of the bank, and as Weimer's lien was acquired prior to the appointment of the receiver, that officer took the property attached incumbered with the lien.

There are a few things which remain to be said of this case. The record before us does not show how the receiver became a party to the suit brought by Weimer against the bank. We presume that he made application to the district court to be made a party. We are led to this remark because the receiver seems to be under the impression that by reason of the fact that he was appointed receiver of the assets of the bank by this court, he is not subject to the rules governing other litigants. In the case brought by Weimer against the bank in the district court the receiver was entitled to be made a party to the action; but he owed it to that court to make a formal application for that purpose; and when he was once a party to the suit he submitted himself to the jurisdiction of the court, and whatever steps he desired to take in the case he was compelled to take under the same rules and regulations as any other litigant. The stipulation of facts on which the court below tried the motion to dissolve the attachment is in the record here, but is not incorporated into any bill of exceptions. For that reason alone we might have affirmed the judgment of the district court. After the district court had overruled the motion of the receiver to discharge the attachment the receiver applied to this court for, and obtained, an injunction restraining the sheriff of Custer county from selling the real estate attached by Weimer. This injunction we ought not to have granted. If the receiver desired to stay the execution of the order of the district court and prevent a sale of the property attached, he had a plain and adequate remedy at law by filing in this court, with his petition in error, a supersedeas bond.

We have deemed it our duty, notwithstanding the failure of the receiver to comply with the matters alluded to above, to dispose of this case upon its merits; still we think it

but justice to receivers to call their attention here to the fact that when they intervene in an action pending in any court, that they occupy then the position of any other litigant. The judgment of the district court was right and is

AFFIRMED.

HARRISON, J., having presided in the court below, took no part in the decision.

CARL A. ARNOLD ET AL. V. GLOBE INVESTMENT COMPANY.

FILED APRIL 17, 1894. No. 5587.

Attachment: RECEIVERS: BANKS. On the authority of *Arnold v. Weimer*, 40 Neb., 216, the judgment of the district court in this case is affirmed.

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

George H. Hastings, Attorney General, J. S. Kirkpatrick, and *Hutchinson & Dickinson,* for plaintiffs in error.

No briefs filed.

RAGAN, C.

The facts in this case are the same as in *Arnold v. Weimer*, 40 Neb., 216, decided at this term, and on the authority of that case the judgment of the district court is

AFFIRMED.

HARRISON, J., having heard the case in the district court, offered no opinion.

SANDWICH MANUFACTURING COMPANY V. GEORGE E. FEARY ET AL.

FILED APRIL 17, 1894. No. 4062.

1. **Sales:** HARVESTING MACHINES: CONTRACTS: WARRANTY: NOTICE OF DEFECTS: EVIDENCE. A manufacturing company sued a farmer for the price of a harvester delivered to him by its agent under a contract of sale and warranty, which provided: "That the harvester was to be paid for when tested and found to do good work; that if on starting the machine it should in any way prove defective or fail to work, the purchaser should give prompt written notice thereof to the agent from whom he purchased it, and allow sufficient time for a person to be sent to put it in order, and the defective part, if any, replaced, the purchaser rendering necessary and friendly assistance." The harvester was delivered to the farmer on Saturday evening. Monday morning, following, the employes of the agent, with the assistance of the farmer, tested the harvester, and it failed to work properly. Of this trial and failure of the harvester the agent was informed on Monday evening by his employes. Wednesday evening, following, the farmer, in person, verbally notified the agent of the trial of the harvester and its failure to work, and the agent then promised to send a person Thursday morning, "bright and early," to put the harvester in order. The farmer's grain was then ripe for harvesting; he waited for the person whom the agent was to send until 1 o'clock in the afternoon Thursday, and, such person failing to appear, the farmer then went to a neighboring village to procure a machine to harvest his grain; and while there employes of the agent offered to then go with the farmer and put the machine he had purchased in order. This offer the farmer declined, and returned the harvester to the agent. *Held*, (1) That it seems the agent was not entitled to a written notice of the failure of the harvester to work, when his own employes started and tested the harvester; (2) that, in any event, the written notice of the failure of the harvester to work was waived by the agent by his agreeing to send a person on Thursday morning to put the harvester in order; (3) that the findings of the jury that the farmer allowed the agent sufficient time to send a person to put the harvester in order, and that such agent did not send such person for such purpose within a reasonable time, were supported by the evidence.

2. ———: ———. *Sandwich Mfg. Co. v. Feary*, 34 Neb., 411, overruled.

REHEARING of case reported in 34 Neb., 411.

Norval Bros. & Lowley and *Leese & Stewart*, for plaintiff in error.

R. P. Anderson and *D. C. McKillip, contra.*

RAGAN, C.

The Sandwich Manufacturing Company (hereinafter called "the company,") sued George E. Feary and Rufus B. Feary (hereinafter called "Feary") in the district court of Seward county for the price of two harvesting machines. The case was tried before a jury, and Feary had a verdict and judgment, and the company brought the case to this court, where the judgment rendered was reversed. The opinion will be found in 23 Neb., page 53. The case was again tried in the district court, and Feary had a verdict and judgment, and the company again brought the case to this court, which reversed the judgment of the district court and remanded the case. (See 34 Neb., 411.) Before the mandate was issued, counsel for Feary made application to this court for a rehearing, suggesting, in effect, that this court was wrong in sustaining the error alleged by the company for a reversal of the case. The error relied upon by the company for a reversal was that the verdict was contrary to the law and the evidence. A rehearing was accordingly granted and we have again carefully examined the entire case. It is not thought necessary to restate the pleadings and facts in full, as they will be found in the opinions of the cases in the 23d and 34th Nebraska Reports, *supra.*

The harvesting machines were sold to Feary under a written contract accompanied by a written warranty. The contract provided that the machines should be delivered to Feary on the 1st day of July, 1883, and that he should pay for them $480 when they had been tested and found

to do good work. The warranty provided, among other things, that "if, upon starting the machine, it should in any way prove defective and fail to work, the purchaser shall give prompt written notice to the agent from whom he purchased it and allow sufficient time for a person to be sent to put it in order, and the defective part, if any, be replaced, the purchaser rendering necessary and friendly assistance. If it then cannot be made to work, the machine shall be returned by the purchaser, free of charge, to the place where received, and the payment of money or note will be refunded, ending all further responsibility on the part of either party."

Feary's defense was, substantially, that the machine, when tested, did not do good work; that he gave notice of this fact to the agent from whom he purchased it; that he allowed sufficient time for a person to be sent out to put the machine in order, and the company failing to do this, he, Feary, returned the machine to the company. The machine was not delivered to Feary until the 7th of July, 1883, but Feary, by taking the machine and trying it, waived its delivery on the 1st of July, as provided by the written contract.

The evidence shows that the machines were delivered to Feary on Saturday, July 7; that on Monday, July 9, Feary and his hired hand and two employes of the company put up one of the machines and attempted to run it, and that it did not do its work properly; that it failed to properly elevate and bind the grain, and that it had a side draft, making it heavy to draw, and pulling the horses into the grain. On this 7th day of July Feary expressed to the employes of the company, who had put up the machine and been trying to make it work, his dissatisfaction with the binders; he sent word by them to their employer, the agent of whom Feary purchased the machine, that the machine did not do satisfactory work. This word was communicated by these employes to the company's agent

on Monday evening. On Wednesday evening, July 11, Feary called in person on the agent of whom he purchased the machine, told him of the trial made and of the failure of the machine to work, and the agent then and there agreed that on Thursday morning, July 12, "bright and early," the agent would come out and bring a person to remedy the defects in the machines and make them do the work for which they were purchased. Feary's grain was, at this time, ripe and needed harvesting. The grain of his neighbors, which he had contracted to cut, was also ripe. Feary waited at home for the agent until 12 or 1 o'clock of Thursday, July 12, for some person representing the machines to come and make them work. No one appearing at that hour, Feary went elsewhere for the purpose of securing machinery to harvest his grain. Later in the day the agents of the company found Feary at the place where he had gone to secure other machinery and offered to go back to his farm and put the machine in proper order. Feary declined this, and that evening returned the machines and delivered them to the company.

It will thus be seen that the real issue litigated on the trial was whether Feary allowed the company sufficient time for a person to be sent to put the machines in order, as provided in the warranty. The trial judge submitted that question to the jury under an instruction as follows: "What is a reasonable time for a person to be sent to put the machines in order, after notice was given to Babson, you are to determine from all the facts and circumstances proved surrounding the parties; the distance the defendant resided from Seward; the diligence or want of diligence in Babson in sending such person. No greater dispatch is required than such as would be fairly just and reasonable in view of all the facts and circumstances proved." The jury, by its finding, said that Babson, who was the company's agent, did not send a person to put the machines in order within a reasonable time; and that Feary allowed the company a sufficient time for

a person to be sent to put the machines in order. We think that finding of the jury is supported by the evidence.

It is true that the warranty provided that if, upon starting the machines, they should fail to work, the purchaser should give the agent a written notice. But it would seem that the written notice provided for by the warranty was not required to be given by the purchaser when the company or its agents started or tested the machines themselves. They were on the ground when the test was made; they knew that it failed to work; and that being the case, it would seem they were not entitled to a written notice of what they knew. But had the company been entitled to a written notice from Feary that the machines did not work, the company waived that when the agent was verbally notified by Feary on Wednesday evening that the machine did not work and he thereupon agreed to furnish a man to put it in order on Thursday morning.

The former opinion of this court, 34 Neb., 411, is overruled, and the judgment of the district court is

AFFIRMED.

NORVAL, C. J., not sitting.

LORA A. THOMPSON, APPELLANT, V. R. B. HARRIS, ROAD OVERSEER, APPELLEE.

FILED APRIL 17, 1894. NO. 5645.

Boundaries: MONUMENTS: GOVERNMENT CORNERS. A mound or other monument established by United States surveyors, as section or quarter-section corners, controls both courses and distances.

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

W. H. Thompson, for appellant.

Abbott & Caldwell, and *Charles G. Ryan*, *contra*.

RAGAN, C.

Lora A. Thompson is the owner of the southwest quarter of section 4, township 11 north, and range 10 west, in Hall county, Nebraska, and brought this suit in the district court of said county against R. B. Harris, who is a road overseer of the road district in which the land of Thompson is situated. She alleged in her petition that Harris was threatening to appropriate, use, and work as a highway a portion of her land, and prayed for an injunction restraining him. The court below rendered a decree dismissing Thompson's bill, and she brings the case here on appeal.

The only controversy in the case is the precise location of the government corner at the corner common to sections 4, 5, 8, and 9 of said township. The contention of the appellant is that, starting from the government corner at the northwest corner of said section, extending a line due south to the section line on the south side of said sections 4 and 5, that the point of intersection of said lines should be, and is, the southwest corner of appellant's land. The contention of the appellee is that the original government corner common to said sections 4, 5, 8, and 9 is thirty-three feet east of where a line extended due south from the northwest corner of said section 4 would intersect the section line on the south side of said sections 4 and 5.

The contention of the appellant, that starting from the government corner at the northwest corner of section 4 the section line should run due south to the section line on the south side of section 4 and 5, cannot be maintained unless by so doing said line would pass through the government corner common to sections 4, 5, 8, and 9. The rule is that a mound or other monument established by United States surveyors as a section or quarter-section corner controls

both courses and distances. (*Johnson v. Preston*, 9 Neb., 474; *Bruckner v. Lawrence*, 1 Doug. [Mich.], 14; *Climer v. Wallace*, 28 Mo., 566.)

The court below found that the government surveyors established the corner common to said sections 4, 5, 8, and 9, at a point thirty-three feet east of the point through which a line extended due south from the northwest corner of section 4 to the south line of said section 5 would pass. The evidence sustains this finding, and the decree appealed from must be

AFFIRMED.

HARRISON, J., took no part in the decision.

ALBERT BARTELL V. STATE OF NEBRASKA.

FILED APRIL 17, 1894. No. 6790.

1. **Criminal Law: TRIAL: JURY: REPORTER'S NOTES.** On a trial for felony, the jury, after having been sent out to consider of their verdict, returned into court and requested to have the testimony of two of the witnesses for the prosecution read to them. By direction of the trial judge, the court reporter read from his notes the evidence requested by the jury. The prisoner was present in court in charge of the sheriff; his counsel was not present and had no notice of the transaction. *Held*, Reversible error. *Jameson v. State*, 25 Neb., 185, distinguished.
2. **Assault with Intent to Commit Murder: EVIDENCE.** The evidence in this case examined, and *held*, not sufficient to sustain a conviction for an assault with intent to commit murder.

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

R. L. Keester, for plaintiff in error.

George H. Hastings, Attorney General, Gomer Thomas, J. G. Thompson, and *D. S. Hardin,* for the state.

RAGAN, C.

Albert Bartell was convicted in the district court of Harlan county of the crime of an assault with intent to murder. From the judgment pronounced against him upon such conviction he prosecutes error to this court.

Of the numerous assignments of error, two only are deemed worthy of serious consideration. Bartell's case was submitted to the jury on the afternoon or evening of November 29th, and on November 30th, that being Thanksgiving day, the jury, having been out all the previous night without agreeing upon a verdict, sent word to the trial judge that they desired to communicate with him; thereupon the judge of the court, the court reporter, the sheriff with Bartell in his charge, and the prosecuting attorney, went to the court room and the judge sent for the jury, and on their being brought in asked them what they desired. The jury responded that they desired to have read to them the evidence of two of the witnesses who had testified on behalf of the state; and thereupon the judge directed the court reporter to read to the jury, from his notes, the evidence given on the trial by two of the witnesses for the state. The court reporter read the evidence as directed from his notes. The counsel for the prisoner was not present, nor was he notified to be present.

Section 484 of the Criminal Code provides: "When the case is finally submitted to the jury they must be kept together in some convenient place under the charge of an officer until they agree upon a verdict or are discharged by the court. The officer having them in charge shall not suffer any communication to be made to them or make any himself, except to ask them whether they have agreed upon a verdict, unless by order of the court."

In *Jameson v. State*, 25 Neb., 185, it is said—I quote from the syllabus: "On a trial for felony, the jury, after having been sent out to consider of their verdict, returned into court, announced that they had not been able to agree, and requested to have the testimony of the principal witness for the prosecution read to them from the reporter's notes, which being agreed to in open court by the attorneys on either side, was accordingly done. *Held*, That while the practice would not be encouraged, a conviction would not be reversed for that cause."

In the case at bar, as already stated, the counsel for the prisoner was absent, and in that respect the case is distinguishable from *Jameson v. State, supra*. But we do not approve of the practice; we think it is a practice fraught with danger to the liberty and life of the citizen. The constitution guaranties the right to one accused of crime to meet the witnesses against him face to face. The evidence read by the reporter in the case at bar was hearsay. This practice, if allowed to ripen into a precedent, will open the door for fraud. It will enable a court reporter, should he be biased for or against a party to a suit, to read such parts of the testimony as are favorable to the party whom he favors. The reading of this evidence was unauthorized and irregular. It is no answer to the objection to say that the prisoner was present. He was present; he was in charge of the sheriff; he was under arrest; he was in chains, and the record does not disclose that he consented; and if it did, we still think, under the circumstances, that he would not be estopped from assigning the transaction as error.

The second error alleged is that the verdict of the jury is not supported by the evidence. It would subserve no useful purpose to quote the evidence at length, or any considerable part of it. Summarized, it amounts to this: That trouble arose between the plaintiff in error and his sister over some property. A quarrel ensued, during which the plaintiff in error struck his sister over the head and

shoulders with a buggy whip. The evidence is conflicting as to whether he struck her with the butt end of the whip; but conceding that he did, we are of the opinion that this evidence was wholly insufficient to support a finding of an assault with intent to commit murder. The evidence did not warrant the jury's finding that the prisoner made the assault with deliberate and premeditated malice, nor with any felonious intent. The judgment of the district court is

REVERSED.

F. Y. ROBERTSON v. BUFFALO COUNTY NATIONAL BANK.

FILED APRIL 17, 1894. No. 5640.

1. **Appeal From Inferior Courts:** ISSUES IN APPELLATE COURT. A case should be tried in an appellate court on the same issues on which it was tried in the court below; but an objection to the variance in the issues should be made of record in the case, by motion or otherwise, before the commencement of the trial; and if not so made, such objection will be waived.
2. **Banks and Banking:** PRESIDENT'S CONTRACTS: SUBSCRIPTION: DONATIONS. No agent of a corporation has the implied authority to give away any portion of the corporate property or to create a gratuitous corporate obligation binding on the corporation; accordingly, where the president of a national bank signed its name to a subscription paper obligating the bank to donate two hundred dollars to certain parties on condition that they would erect a paper mill in the city of K, *held*, (1) that the making of donations of its funds to aid in the building of a paper mill was no part of the business for which the bank was incorporated; (2) that the act of the president was not within the scope of his authority, and that the bank, in the absence of an authorization or ratification by it of the president's act, was not bound by the agreement made.

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

Dryden & Main and *Calkins & Pratt*, for plaintiff in error:

The defense of *ultra vires* is a special defense, which can only be raised when pleaded, and the action having been tried in the justice court upon general denial, under which the plea of *ultra vires* could not be raised, there was error in the action of the district court in permitting an amended answer to be filed raising this question. (Bliss, Code Pleading [2d ed.], sec. 352; *Carr v. Luscher*, 35 Neb., 318; *First Nat. Bank of Madison v. Carson*, 30 Neb., 104.)

The plaintiff's assignors, relying upon the subscription of the defendant, with others, invested thirty thousand dollars in the city of Kearney. The defendant received all the benefits from the subscription which it bargained for and should not now be heard to say that it had no authority to make the contract set out in the plaintiff's petition. (*Rich v. State Nat. Bank of Lincoln*, 7 Neb., 201; Beach, Private Corporations, sec. 424, ch. 22; *Whitney Arms Co. v. Barlow*, 63 N. Y., 68; *Dewey v. Toledo, A. A. & N. M. R. Co.*, 51 N. W. Rep. [Mich.], 1063; *Sherman Center Town Co. v. Russell*, 26 Pac. Rep. [Kan.], 715; *Whetstone v. Ottawa University*, 13 Kan., 320; *State Board of Agriculture v. Citizens Street R. Co.*, 17 Am. Rep. [Ind.], 702; *Hitchcock v. City of Galveston*, 96 U. S., 341.)

R. A. Moore and *Hamer, Sinclair & Brown, contra:*

The first alleged error complained of by the plaintiff in error in his brief is that the court permitted the defendant to set up the defense of *ultra vires* for the first time in the appellate court. There is no suggestion in the motion for a new trial that the court erred in this respect, which is necessary before it can be urged in this court. (*Midland P. R. Co. v. McCartney*, 1 Neb., 398; *Mills v. Miller*, 2 Neb., 299; *Cropsey v. Wiggenhorn*, 3 Neb., 108; *Hull v. Miller*, 6 Neb., 128; *Cruts v. Wray*, 19 Neb., 581.)

He who deals with a corporation is chargeable with notice of its powers and the purposes for which it was formed; and when dealing with its agents or officers, is bound to know the extent of their powers and authority. (*Jemison v. Citizens Savings Bank*, 122 N. Y., 135, *Alexander v. Cauldwell*, 83 N. Y., 480; *Relfe v Rundle*, 103 U. S., 222; *Davis v. Old Colony R. R. Co.*, 131 Mass., 258; *Leonard v. American Ins. Co.*, 97 Ind., 299; *Franklin Company v. Lewiston Institution for Savings*, 68 Me., 43.)

The bank made no contract of subscription, for the reason that no one was authorized to make such a contract for it. (*Hodges v. First Nat. Bank of Richmond*, 22 Gratt. [Va.], 51; Ball, National Banks, p 60; *United States v. City Bank of Columbus*, 21 How. [U. S.], 356; *Rich v. State Nat. Bank of Lincoln*, 7 Neb., 206.)

The contract is not within the scope of the corporate powers of a national bank organized under the national banking act. (*Wiley v. First Nat. Bank of Brattleboro*, 47 Vt., 546; *First Nat. Bank of Lyons v. Ocean Nat. Bank*, 60 N. Y., 278, *Weckler v. First Nat. Bank of Hagerstown*, 42 Md., 581; *Bank of the United States v. Dandridge*, 12 Wheat. [U. S.], 68.) This proposition cannot be denied, and, unless it would defeat justice or accomplish a legal wrong, it is a good defense. (*Jemison v. Citizens Savings Bank*, 122 N. Y., 135; *Huntington v. Savings Bank*, 96 U. S., 388; *Thomas v. West Jersey R. Co.*, 101 U. S., 71; *Nassau Bank v. Jones*, 95 N. Y., 115; *Miner's Ditch Co. v. Zellerbach*, 37 Cal., 543; *Bissell v. Michigan, S. & N. I. R. Co.*, 22 N. Y., 258.)

RAGAN, C.

On the 8th of January, 1889, the president of the Buffalo County National Bank signed its name to a subscription paper, by which the signers of said paper agreed to donate and pay to one Johnson and others the sums of

money set opposite the respective names of said signers when said donees should have on the grounds $20,000 worth of paper mill machinery for the purpose of erecting in Kearney, Nebraska, a paper mill. The amount subscribed by the bank was $200. On August 15, 1889, Johnson and the other donees mentioned in said subscription paper brought suit before a justice of the peace against the bank on said subscription and by the consideration of said justice obtained a judgment. The bank appealed to the district court, where F. Y. Robertson was substituted as plaintiff. At the conclusion of the trial the jury, in obedience to an instruction of the court, returned a verdict in favor of the bank. Robertson's motion for a new trial was overruled and he brings the case here for review.

There are two assignments of error argued by Robertson's counsel in their briefs in this court. The first is that the court permitted the bank to file an answer in the district court setting up the defense of *ultra vires* for the first time in the history of the case. It appears from the record that the case was tried before the justice of the peace on the bill of particulars of plaintiff and an answer of the bank consisting of a general denial. When the case reached the district court the donees filed their petition against the bank, alleging that it was a banking corporation organized under the act of congress; that it had signed the subscription paper agreeing to pay the plaintiffs $200 when they should have $2,000 worth of machinery on the grounds ready for the erection of a paper mill; and that the plaintiffs had complied with their part of the contract. The bank answered two defenses: First, a general denial; and, second, that the bank was a national bank organizied for the purpose of lending money and receiving deposits, and that the signing of subscription papers like the one in suit was not a part of the business of the bank, and that the same was never signed, or authorized to be signed, by the board of directors of said bank, and that it was not liable

thereon. The petition of the donees was filed in the district court on the 18th of December, 1889, and nothing further appears to have been done in the case until April 4, 1891, when Robertson, on motion, was substituted as plaintiff in the action, and on the same day leave was given the bank to file an answer *instanter*. The bank complied with this leave by filing the answer mentioned above on the 26th day of January, 1892, and on the 27th day of January, 1892, Robertson filed a reply consisting of a general denial.

So far as the record shows the attention of the court was never called to the fact that the bank's answer in the district court set up a different defense from the answer it filed in the justice's court. Robertson at no time filed a motion to strike out the defense of which he complains in the bank's answer. He made no objection in any manner or form to this defense previous to the trial, nor at the time of the trial. If the defense interposed by the defendant was a different one from that interposed by it in the justice court, Robertson, if he desired to object to trying the case on the issues as made by the bank's answer in the district court, should have moved to strike out of such answer all the defenses therein, except that of a general denial, before the case came on for trial to the jury; but having replied to the answer of the bank, and having made no effort to strike out of the bank's answer the defenses not interposed before the justice of the peace, it was too late for him, after the trial commenced, to raise the objection for the first time that the issues in the district court were different from those in the justice court. "Where a cause is appealed from a county court the case should be tried in the district court upon the same issues that were presented to the lower court. If the appellee goes to trial in the appellate court without objection, upon new issues, it is a waiver of the error." (*First Nat. Bank of Madison v. Carson*, 30 Neb., 104.) It remains to be said of this assignment of error, however,

that Robertson did not raise it either in his motion for a new trial or in the petition in error filed in this court.

The next error assigned here and argued in the briefs of counsel is that the court below erred in instructing the jury to return a verdict for the bank. The undisputed evidence in the case is that the president of the bank, without the knowledge or consent of the directory, signed the name of the bank to the subscription paper, and that the directory of the bank had never ratified this act of the president. Whether the court erred in instructing the jury to return a verdict for the bank depends, then, upon the question as to whether the bank is bound by the subscription made by its president. This bank was organized under the act of congress for the purpose of lending money, receiving deposits, and for the conducting of a general banking business. The making of donations of its funds or capital to aid in the building of paper mills, canals, or churches is no part of the business for which it was incorporated. The bank, that is, the corporation, by the unanimous consent of its stockholders, might, no doubt, make such donation of its capital to any enterprise or person it chose; but is the bank bound by a contract made in its name by its president, in and by which it is agreed to donate to some person or enterprise a part of its capital?

A large part of the argument of the counsel in this court has been directed to the doctrine of *ultra vires*, but we do not think that it is necessary to invoke that doctrine in order to reach a correct decision in this case. It seems to us that the question is one of agency. The bank is the principal and the president of the bank was its agent, and the bank, of course, was bound by the acts of its president done within the scope of his authority. In Morawetz, Private Corporations, section 423, it is said: "The property and funds of a corporation belong to its shareholders and cannot be devoted to any use which is not in accordance with their chartered purposes, except by unanimous

consent. No agent of a corporation has implied authority to give away any portion of the corporate property or to create a corporate obligation gratuitously." In *Jones v. Morrison*, 31 Minn., 140, it is said: "The directors of a corporation have no authority to appropriate its funds in paying claims which the corporation is under no legal or moral obligation to pay; as to pay for past services which have been rendered and paid for at a fixed salary previously agreed on; or under a previous agreement that there should be no compensation for them." To the same effect see *Salem Bank v. Gloucester Bank*, 17 Mass., 29; *Bissell v. City of Kankakee*, 64 Ill., 249; *Minor v. Mechanics Bank*, 1 Pet. [U. S.], 44; *Case v. Citizens Bank*, 100 U. S., 446.

In *Alexander v. Cauldwell*, 83 N. Y., 480, it is said: "One who deals with the officers or agents of a corporation is bound to know their powers and and the extent of their authority; the corporation is only bound by their acts and contracts which are within the scope of their authority." In *Rich v. State Nat. Bank*, 7 Neb., 201, it is said in the syllabus: "No officer of a bank can bind it by a promise to pay a debt which the corporation does not owe and was not liable to pay, unless the bank authorizes or has ratified the act; but ratification is equivalent to original authority to act in the matter, and corporations are bound in the same manner as natural persons."

We think these authorities are decisive of the case at bar. This is not a case in which the bank has received and retains the fruits of an unauthorized contract made by its agent. The contract sought to be enforced here was one by which the president agreed that the bank would donate a part of its capital to the assignor of the plaintiff in error. If this bank can be bound by the agreement of its president to donate $200 to an individual to aid him in building a paper mill, then the bank can be bound by the agreement of its president to donate its entire capital. Such a rule as this would confer upon the agent of a corporation greater

powers than that possessed by its directory. The judgment of the district court is

AFFIRMED.

W. H. H. PILLSBURY, APPELLEE, V. JOHN C. ALEXANDER ET AL., APPELLANTS.

FILED APRIL 17, 1894. No. 5699.

1. **Dedication:** FAILURE TO ACKNOWLEDGE PLAT: ESTOPPEL. The state of Nebraska sold to Arnold & Abbott certain land and gave them a contract for a deed; Arnold & Abbott caused this land to be surveyed and platted into lots, blocks, and streets, and designated as "Arnold & Abbott's Addition to Grand Island." They did not attach or acknowledge or sign a certificate to such plat as required by section 105, chapter 14, Compiled Statutes, 1893. They caused said plat to be filed in the office of the recorder of deeds of Hall county. They sold and conveyed parts of the land platted, describing the parts so sold as lots and blocks in Arnold & Abbott's addition. The public took possession of and used the land designated as streets on said plat. *Held*, (1) That the failure of Arnold & Abbott to comply with said section 105 in platting said land did not render the plat of the addition void; (2) that Arnold & Abbott, by their acts, had estopped themselves, their heirs and grantees, from claiming any title to said land designated as streets on the plat in said addition; (3) that the acts of Arnold & Abbott, in platting said addition amounted to a common law dedication to the public of the land reserved on said plat for streets.

2. **Deeds:** STATE CONTRACTS: LEGAL TITLE. Arnold & Abbott sold and conveyed by warranty deed lots 3 and 4 in block 18 of said addition to one McCarthy, and he conveyed said lots to one Pillsbury. Arnold & Abbott then assigned their state contract to one Thomas, and the state of Nebraska conveyed the legal title of all said land to him. Thomas then conveyed the said lots 3 and 4 to Abbott. *Held*, That the legal title of said lots acquired by Abbott, by his conveyance from Thomas, passed at once by operation of law to, and vested in, Pillsbury, the grantee of McCarthy.

3. **Specific Performance.** Pillsbury then filed a bill in equity against Alexander & Marsh, to whom he had contracted to sell and convey the lots, to compel them to comply with their agreement to purchase. They defended the action on the ground that Pillsbury did not have the legal title to the property. *Held*, That the defense was not good; that Pillsbury had the legal title to the property and was entitled to a decree of specific performance against Alexander & Marsh.

4. ———: ESTOPPEL. In an action brought by a vendor against a vendee to compel the latter to specifically perform his contract to purchase real estate, such vendee is estopped from alleging, as a defense to said action, a defect in his vendor's title; which defect was brought to the actual knowledge of the vendee at the time he entered into such contract of purchase, and where the evidence shows that he contracted to purchase such real estate incumbered with the alleged defect.

APPEAL from the district court of Hall county. Heard below before HARRISON, J.

The opinion contains a statement of the case.

W. H. Thompson, for appellants:

The records of Hall county, in order that the plaintiff should recover, must show a true and correct title in fee-simple in the plaintiff. (21 Cent. Law Journal, p. 164, and cases cited; *Cornell v. Andrews*, 15 Cent. Law Journal [N. J.], 8.)

Where there is no agreement as to the kind of title that is to be conveyed, the law presumes and makes it a part of every such contract that the title shall be a marketable title; that is, a title free from flaws or serious defects. It should show a full and perfect right of property and personal possession vested in the vendor, free from the liens, burdens, and charges or incumbrances of others; and should be free from litigation, and the vendee should not be compelled to go into court or otherwise do anything in order to perfect his title. (*Jordon v. Poillon*, 77 N. Y., 518; *Taft v. Kessel*, 16 Wis., 291; *Speakman v. Forc-*

paugh, 44 Pa. St., 363; *Jeffries v. Jeffries*, 117 Mass., 184; *Miller v. McAllister*, 59 Ind., 492; *Powell v. Conant*, 33 Mich., 396.)

A court of equity will not compel one who has agreed to purchase land and accept a title so doubtful that it may be exposed to litigation. (*Richmond v. Gray*, 3 Allen [Mass.], 25.)

The grantor must be able to furnish proper title prior to the commencement of suit, and prior to the time the contract was rescinded. (*Richmond v. Gray*, 3 Allen [Mass.], 25; *Lick v. Ray*, 43 Cal., 83; *Page v. Greeley*, 75 Ill., 400; *Noyes v. Johnson*, 139 Mass., 436; *Brown v. Cannon*, 5 Gilm. [Ill.], 182.)

Hatch & Shangle and *Abbott & Caldwell, contra.*

RAGAN, C.

On the 9th day of June, 1890, W. H. H. Pillsbury and Alexander & Marsh entered into a written agreement, in and by the terms of which Alexander & Marsh agreed to purchase of Pillsbury lots 3 and 4, in block 18, of Arnold & Abbott's addition to Grand Island. They also agreed to pay, and did pay, Pillsbury on that day $400 in cash, and agreed to pay him on the 9th day of July, 1890, the further sum of $1,000, and assumed the payment of a mortgage of $1,000 already on said real estate. Pillsbury on his part agreed, when Alexander & Marsh had complied with their promises, to convey to them, by good title, the above described real estate. Alexander & Marsh having failed to perform their part of the written agreement, Pillsbury brought this suit in equity in the district court of Hall county, alleging in his petition the making and the terms, as above stated, of the written agreement of June 9, 1890; that he had complied with his part of the agreement; that he was ready and willing to convey to Alexander & Marsh a good title to said premises; that

Alexander & Marsh had failed to perform their part of the agreement to purchase, and prayed for a decree requiring them to complete their purchase, and in default thereof, that their interest in the premises might be sold to satisfy the amount due him on the contract of June 9, 1890, and for certain moneys paid out by him since the execution of said contract to protect his lien on said real estate. To this suit Alexander & Marsh interposed the defense that they were induced to enter into the contract of June 9, 1890, by the false and fraudulent representation of Pillsbury, then and there made, that he had a perfect title to the premises described in said contract, when, as a matter of fact, Pillsbury at that time did not have a good title to said premises and had not since acquired one. The district court rendered a decree in favor of Pillsbury and ordered the interest of Alexander & Marsh in the lots sold to pay the amount found due him on the contract made with Alexander & Marsh, and they bring the case here on appeal.

1. It is as well to say in the beginning that the charge made by the appellants, that they were induced to enter into the contract with Pillsbury by reason of false and fraudulent representations made by him, was not proved on the trial. Indeed, there was no effort made to prove it. The appellants relied in the court below, and rely here, upon the one contention to defeat the claims of Pillsbury, viz., that Pillsbury, at the date of the contract, June 9, 1890, did not have a good and legal title to the premises which he agreed to convey. This contention of the appellants is sought to be established by three alleged defects in Pillsbury's title as follows, viz., that there had not been any legal dedication of the streets to the public in Arnold & Abbott's addition to Grand Island, in that the plat of said addition contained no statement to the effect that the addition had been platted with the free consent and in accordance with the desires of the owners; and such plat was

not acknowledged, and contained no certificate of any kind signed by either Arnold or Abbott.

The evidence shows that in July, 1870, Abbott & Arnold held a contract from the state of Nebraska for the conveyance to them of the northeast quarter of the southwest quarter of section 16, in township 11 north, and range 9 west of the 6th P. M., this land having been sold to them by the state authorities in pursuance of the provisions of the statute for the sale and leasing of the public school lands of the state. In this month Arnold & Abbott caused this piece of land to be surveyed and platted into lots, blocks, and streets, and designated as "Arnold & Abbott's Addition to Grand Island." This plat they caused to be filed in the office of the recorder of deeds of Hall county. This plat neither Arnold nor Abbott signed or acknowledged in any manner whatever. The only certificate on the plat is that of the surveyor. The evidence further shows that for about twenty years prior to the bringing of this suit the public had been in the open, exclusive, and notorious possession of the streets designated on said plat; that Arnold & Abbott and others had sold and conveyed parts of said addition described by lots and blocks in the addition.

Now, while the statute, section 105, chapter 14, Compiled Statutes of 1893, requires that every such plat as this shall have thereon the certificate of the owners certifying that the plat has been made with their consent and in accordance with their desires, and shall be given the same as a deed, the failure of Arnold & Abbott to comply with these provisions of the statute did not make the platting of Arnold & Abbott's addition void; and though there has been no statutory dedication to the public by them of the streets marked upon said plat, still their platting this addition, filing the plat in the recorder's office and leaving spaces for streets, and their sale and conveyance of part of the property in this addition described as lots and blocks

of the addition, estop Arnold & Abbott and their heirs, grantees, and assigns from claiming any title whatever to any of the land laid out as streets in said addition; and such acts amounted to a common law dedication of the land, platted as streets, to the public. (*Gregory v. City of Lincoln*, 13 Neb., 352, *Village of Weeping Water v. Reed*, 21 Neb., 261; *Ruddiman v. Taylor*, 55 N. W. Rep. [Mich.], 376.) The failure of Arnold & Abbott to comply with said section 105 in the platting of Arnold & Abbott's addition did not render the title which Pillsbury had to the property in question on the 6th of June invalid or unmarketable, or doubtful.

2. The next contention of counsel for appellants is that in order to enable Pillsbury to maintain this action he must show a true and correct title in fee-simple to the property in question from the public records of Hall county. We think this contention of counsel is too broad; but, assuming, for the purpose of this opinion, that counsel is correct, we proceed to inquire what the public records of Hall county disclosed as to the title of Pillsbury to this property on the 6th of June, 1890.

From the evidence in the record before us it appears that on the 6th day of June, 1870, Arnold & Abbott purchased from the state of Nebraska the forty acres of land now constituting Arnold & Abbott's addition to Grand Island, and that the state issued to them a contract agreeing to convey the land to them, or their assigns, on payment to the state of the purchase price mentioned in said contract; that in the month of July, 1870, as already stated, Arnold & Abbott caused the land which they had purchased from the state to be surveyed and platted as Arnold & Abbott's addition to Grand Island; that on the 17th day of October, 1870, Arnold & Abbott conveyed by an absolute warranty deed the property in controversy in this suit to one Patrick D. McCarthy; that subsequently, on the 9th day of December, 1887, McCarthy, by a war-

ranty deed, conveyed the property in question to Pillsbury; that some time prior to the 24th day of July, 1880, Arnold & Abbott assigned the contract, which they held from the state, to one Claude W. Thomas; that on the 24th day of July, 1880, the state of Nebraska conveyed by deed the forty acres of land constituting Arnold & Abbott's addition to said Thomas; that on the 26th day of July, 1880, Thomas, by deed, conveyed to Abbott, of Arnold & Abbott, the property in controversy. Now section 51, chapter 73, Compiled Statutes, 1893, then and now in force, provides: "When a deed purports to convey a greater interest than the grantor was at the time possessed of, any after-acquired interest of such grantor, to the extent of that which the deed purports to convey, shall accrue to the benefit of the grantee." The deed from Arnold & Abbott to McCarthy was an absolute warranty deed, and purported of course to convey the fee-simple title of the property described therein to McCarthy. Arnold & Abbott at this time did not own the fee-simple title to the lots conveyed to McCarthy, but Thomas, by the deed from the state in July, 1880, acquired the fee-simple title to this property, and by operation of the statute above quoted the fee-simple title to the property acquired by Abbott from Thomas on the 26th of July, 1880, vested at once in Pillsbury, the grantee by warranty deed from McCarthy. Pillsbury, then, on the 6th of June, 1890, at the time he made the contract with Alexander & Marsh, had the fee-simple title to the property in question, and that title was of record in the office of the recorder of deeds of Hall county.

Counsel for appellants say that their clients were entitled to a marketable title, an undoubted title, and a title not likely to be exposed to litigation. All this may be conceded, and the answer is that there has never been a time, since the clients of counsel entered into the contract with Pillsbury, but that Pillsbury could have given such a title. The fact that a loan company, or an abstracter, was not

sufficiently versed in the laws of the state to know that whatever title Abbott acquired to this property, after the execution of the deed by Arnold & Abbott to McCarthy, passed by operation of law to McCarthy, or his grantees, did not make Pillsbury's title defective, unmarketable, or doubtful.

3. Another objection urged by the appellants to Pillsbury's title is that it does not appear whether Arnold or Abbott, either or both of them, were married or single men at the time of their conveyance of the property in question to McCarthy. The answer to this is that, by reason of the conveyances and statutes already quoted, Pillsbury had of record the legal title to this property, even if Arnold & Abbott had both been married men at the date of their conveyance to McCarthy; and another answer is that the undisputed evidence in the record shows that at the time they made such conveyance to McCarthy they were both unmarried.

4. There is, however, another reason why this decree cannot be reversed. As before stated, the first contract between the parties hereto was entered into on the 9th of June, 1890. It appears that soon after that the appellants made application to some eastern loan company for a loan with which to take up the mortgage on the property which the appellants had assumed. This loan company made some objections to the title, and the appellants, in their testimony in this case, say that some time about the 1st of July, 1890, they went to Pillsbury and made to him the objections to the title, which have been litigated in this suit. Afterwards, on the 3d of November, 1890, the parties to this suit, by their solemn agreement in writing, extended the time of the performance of the things to be done by the original contract until June 9, 1891. At this time appellants paid $50, the interest due on the mortgage which they had assumed. They afterwards took possession of the property in controversy and made some slight im-

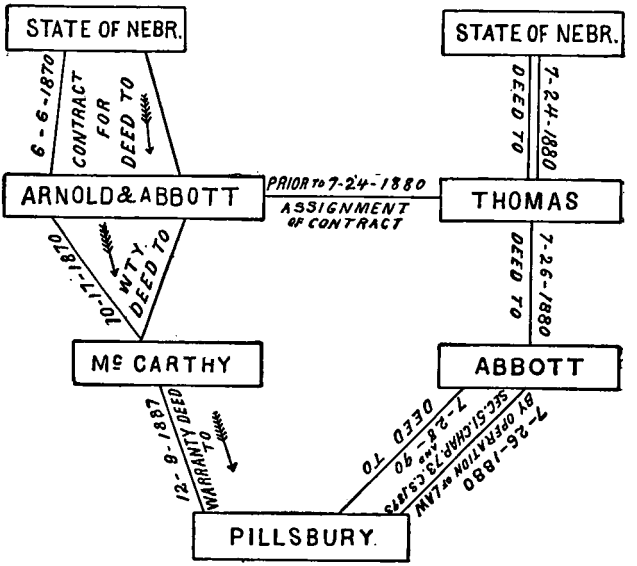
provements on it. They put it in the hands of real estate agents for sale as their property, and they paid the taxes upon the property. At the time of this modification of the contract the appellants knew of the existence of everything which they now claim made the title, which Pillsbury was to give them, defective, and their defense to Pillsbury's action comes too late.

In *McAusland v. Pundt*, 1 Neb., 211, CROUNSE, J., discussing this principle, at page 252, says: "To my mind all these circumstances are evidence that McAusland well knew the fact that Jones' title was in litigation and that he had bargained and acted with reference to it." The syllabus of the case declares that specific performance of a contract for the sale of real estate would not be decreed to a vendee when he had been guilty of gross negligence in the performance of his stipulations; and that the neglect of the vendee to perform his stipulations would not be excused on the ground that the title was involved in a dispute existing when the contract for the purchase was made.

In *Winne v. Reynolds*, 6 Paige Ch. [N. Y.], 407, it is said: "Where there are trifling incumbrances upon the title which were known to the vendee at the time he contracted to purchase, a specific performance will be decreed without compensation, although by a mistake of the scrivener they were not excepted in the written contract of sale." In that case the chancellor remarked: "There is no doubt, however, from the testimony that the defendant knew of the existence of this covenant in the lease at the time he contracted to purchase the land; and he either expected to take the title subject to the conditions of the patroon's conveyance, or he intended to commit a fraud upon the complainant by insisting upon this technical objection to the title afterwards." (See also *Ten Broeck v. Livingston*, 1 Johns. Ch. [N. Y.], 357.)

In the case at bar the appellants knew, when they entered into the contract of November 3, for a modification

of the contract of June, everything that they know now as to the alleged defects in Pillsbury's title, and having made the modification of November, with the knowledge of the condition of Pillsbury's title, and having made the agreement voluntarily and freely, without fraud or deception, they are now estopped from alleging anything as a defect in Pillsbury's title, of which they then had knowledge, as they must be presumed to have made the modification they did with reference to the title as it then stood. But the evidence in the record leaves no doubt in my mind that the only objection which the appellants in July, 1890, urged to Pillsbury's title was the objection that the legal title to the property appeared of record to be in Abbott by reason of the conveyance of it to him by warranty deed from Thomas on the 26th of July, 1880; and that, as Thomas held directly from the state, therefore, on the face of the record, the legal title appeared to be in Abbott. To remedy this defect, or supposed defect, Abbott and wife, on the 28th day of July, 1890, made a quitclaim deed of the property in question to Pillsbury, and this deed was recorded, so that on the 3d of November, 1890, when the contract was modified, the public records of Hall county showed the legal title of this property to be in Pillsbury by a direct chain of conveyance from the state of Nebraska; the title at that time standing of record as follows:



This shows the legal title to the property in question was perfect in Pillsbury. The learned district court was right and the decree appealed from is

AFFIRMED.

HARRISON, J., having presided in the court below, took no part in the decision.

WILLIAM F. LAING V. EDWARD NELSON.

FILED APRIL 17, 1894. No. 4752.

1. **Slander: EVIDENCE.** In an action for slander, the occasion of the publication making the case one of qualified privilege, evidence of the falsity of the charges imputed is admissible on the part of the plaintiff as tending to prove malice, although such evidence is not in itself sufficient for that purpose.

2. ———: ———. In an action for slander, where portions of the language used are actionable *per se*, it is not erroneous to permit the plaintiff to testify that the publications complained of caused him mental anxiety and suffering, no testimony having been admitted as to details or as to the amount of damages.

3. ———: INSTRUCTIONS. A party cannot be heard to complain because the court did not specifically charge the jury that the burden of proof upon a particular issue was upon the adverse party, where the instructions given did not state or imply the contrary, and where the party complaining did not himself request any instruction upon the subject.

4. Certain evidence examined, and *held* to be properly admitted.

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

See opinion for a statement of the case.

John L. Webster, for plaintiff in error:

The court erred in permitting the plaintiff Nelson to testify to the falsity of the slanderous charges alleged to have been made concerning him by the defendant Laing. (Cooley, Torts, p. 207; *Greenwood v. Cobbey*, 26 Neb., 449; *Briggs v. Garrett*, 111 Pa. St., 414; *State v. Balch*, 3 Kan., 465; *Rearick v. Wilcox*, 81 Ill., 77; *Pennington v. Meeks*, 46 Mo., 217; *Lick v. Owen*, 47 Cal., 252; *Bergmann v. Jones*, 94 N. Y., 51; *Bacon v. Michigan C. R. Co.*, 66 Mich., 166; *Grace v. Dempsey*, 75 Wis., 321; *Porter v. Batkins*, 59 Pa. St., 484; *Huson v. Dale*, 19 Mich., 17; *Donaghue v. Gaffy*, 53 Conn., 43.)

The court erred in permitting the plaintiff to testify that he was caused anxiety and suffering. (*Prettyman v. Shockley*, 4 Har. [Del.], 112; *Lucas v. Flinn*, 35 Ia., 9; *Artieta v. Artieta*, 15 La. Ann., 48; *Porter v. Hughey*, 2 Bibb [Ky.], 232; *Sturgenegger v. Taylor*, 2 Brev. [S. Car.], 7; *Ward v. Weeks*, 7 Bing. [Eng.], 211; *Hopwood v. Thorn*, 8 C. B. [Eng.], 293; *Boldt v. Budwig*, 19 Neb., 744; *Terwilliger v. Wands*, 17 N. Y., 59; *Wilson v. Gort*, 17 N.

Y., 442; *Bassell v. Elmore*, 48 N. Y., 563; *Pettibone v. Simpson*, 66 Barb. [N. Y.], 492; *Cook v. Cook*, 100 Mass., 194.)

The court erred in instructing the jury that the burden of proof was on the defendant to prove good faith in making the charges. (*Bacon v. Michigan C. R. Co.*, 66 Mich., 172; *Chaffin v. Lynch*, 84 Va., 886.)

Cowin & McHugh, contra:

The testimony upon the question of malice was proper. Evidence of the falsity of the charges was properly admitted to prove malice. (*Lewis v. Few*, 5 Johns. [N. Y.], 1; *Edwards v. Chandler*, 14 Mich., 472; *McCleneghan v. Reid*, 34 Neb., 472; *Gribble v. Pioneer Press Co.*, 25 N. W. Rep. [Minn.], 710; *Prime v. Eastwood*, 45 Ia., 640; *Flanders v. Groff*, 25 Hun [N. Y.], 553; Newell, Defamation, Slander & Libel, 337; Odgers, Libel & Slander, 280.)

The testimony of the plaintiff that he was caused anxiety and suffering was admissible. (*Craker v. Chicago & N. R. Co.*, 36 Wis., 657.)

IRVINE, C.

The defendant in error sued the plaintiff in error for slander. The language charged, omitting the innuendoes, is as follows: "He (Nelson) is an unworthy, dishonest man, and a villain. He is a criminal. He is a forger, a perjurer, and an outlaw. He is a dishonest scoundrel. He has committed crimes which should put him in the penitentiary, and he has only narrowly escaped the penitentiary several times. I have saved him from going to the penitentiary, when the officers were at the door of his house to arrest him, by paying a certain amount of money to the party causing the arrest." The defendant admitted saying that the plaintiff was an unworthy, dishonest man, but denied the other language. The defend-

ant further averred, in substance, that at the time the language was spoken concerning the plaintiff the plaintiff was a candidate for the office of postmaster; that whatever defendant said concerning him was spoken only to persons receiving their mail at the post-office referred to, and was spoken for the purpose of guiding them in reference to signing petitions and remonstrances to be used in connection with the appointment of a postmaster; that the words were spoken in good faith, in the belief, based upon reasonable grounds, that they were true, and that the defendant had not been actuated by malice. There was a verdict and judgment for the plaintiff. The case was tried throughout upon the theory that it was one of qualified privilege, and in the argument here the plaintiff concedes that the case was of that character. It must, therefore, be treated in that light.

1. The first error argued relates to the admission of the testimony of the plaintiff below going to the falsity of the charges imputed to him by the words proved. This evidence begins as follows:

Q. Did you ever commit any crime?

A. Not that I know of; never.

Q. Did you ever do any act that under the laws of this or any other state would entitle you to be sent to the penitentiary?

A. No, sir; I did not.

Q. In June, 1889, or before that year, were you an unworthy and dishonest man and a villain?

A. Not that I know of; no, sir.

Q. Were you, during the same time, a criminal?

A. No, sir.

Q. Were you at that time, or before or since, a forger?

A. No, sir.

Continuing this line of examination plaintiff's counsel followed through the whole of the slanderous language charged, and by similar questions drew from the plaint-

iff general answers negativing each of the charges. All this testimony was objected to, one class of objections going to the form of the questions, the other to their substance. If the testimony was admissible in substance, we do not think it was reversible error to admit it in the form in which it was adduced. The charges were general in their nature. If it was proper to prove their falsity, this could only be done by a resort to questions general in their nature and necessarily somewhat leading. It is in the discretion of the trial judge to determine whether a question is objectionable as leading, and his action thereon will not be ground of reversal, except for abuse of discretion. (*Obernalte v. Edgar*, 28 Neb., 70.) The impossibility, in view of the general charges made, of negativing them by proof of specific facts, justified the trial court in permitting the questions to be put directly and in a general form. It is true that some of these questions, such as whether the plaintiff was a villain, and whether he had done anything which should send him to the penitentiary, were so very broad and indefinite in their nature that the trial court probably should not have permitted the questions to be answered. They necessarily left a good deal to the judgment or inference of the witness as to what acts would justify such charges, and the method of examination was for that reason objectionable; but the very generality and indefiniteness of the language renders it impossible for us to see how the defendant could have been prejudiced by the testimony. A defendant may testify directly and generally that a conveyance made by him was not made with an intent to defraud. (*Campbell v. Holland*, 22 Neb., 587.) So the defendant in an action for malicious prosecution may testify that he did not make the complaint maliciously. (*Jonasen v. Kennedy*, 39 Neb., 313.) General testimony of this character is admissible to rebut equally general charges made against the person offering it, and while the court might properly require some of these questions to be put

more specifically, we do not think that the defendant was prejudiced by his failure to do so.

The most serious question arises upon the objections which go to the substance of this testimony. The truth of the charges was not pleaded in justification. The defendant relied upon the occasion of his making the charges and upon absence of malice. The question presented is, therefore, whether in an action for slander, the circumstances of the publication presenting a case of qualified privilege, the truth not being pleaded in defense, but privilege and good faith being pleaded, the falsity of the charges may be affirmatively shown to establish malice.

In *McCleneghan v. Reid*, 34 Neb., 472, it was said: "To show malice the plaintiff introduced proof tending to show the falsity of the charge, and that the defendant below had, at other times than those charged in the petition, uttered the words claimed to be slanderous. Such proof is admissible to show the *quo animo*." In that case there was matter in the answer which amounted to a plea of justification, and the order of proof was declared to be in the discretion of the trial court, and a judgment not subject to reversal upon that ground, except for abuse of discretion. While the language used is significant in its bearing upon this case, the condition of the issues forbids its being accepted as authority upon the point here presented. We must, therefore, examine the question further.

Neither the opinions of text-writers nor the decisions of courts afford any very satisfactory test. One writer says: "The mere fact that the words are now proved or admitted to be false is no evidence of malice unless evidence be also given by the plaintiff to show that the defendant knew they were false at the time of publication. * * * As a general rule, therefore, the plaintiff cannot give any evidence as to the falsity of the charge unless a justification be pleaded, for such evidence is no proof of malice and the truth of the charge is not in issue." (Odgers, Libel & Slander, 274.)

Another writer says: "Where the defamatory words are spoken on a privileged occasion, the mere proof that they are false, without evidence that they are false to the defendant's knowledge, will not entitle the plaintiff to have the question of malice left to the jury." (Starkie, Slander & Libel, 581.) Another says: "It is said that falsehood may be evidence of malice; but the mere falsity of a publication, without its being shown that the publisher knew it to be false, is not *per se* evidence of malice." (Townshend, Slander & Libel, 389.) The general inference from these statements would be that evidence of falsity of the charge is admissible when coupled with evidence tending to show the defendant's knowledge of its falsity. The authorities tend to bear out this statement. Thus, in *Fountain v. Boodle*, 3 Q. B. [Eng.], 5, the libel counted upon was contained in an answer to inquiries in regard to the competency of a servant, and the whole opinion turns upon the sufficiency of the evidence of defendant's knowledge of the falsity of the statements made. So it has been held that in the absence of a plea of justification evidence tending to prove the truth of the charges may be introduced to rebut evidence of malice. (*Remington v. Congdon*, 2 Pick. [Mass.], 310; *Bradley v. Heath*, 12 Pick. [Mass.], 163.) The contrary, however, was held in *Fero v. Ruscoe*, 4 N. Y., 162.

In *Child v. Affleck*, 9 B. & C. [Eng.], 403, there is an intimation that in a case of qualified privilege evidence of the falsity of the charge is proper. The court said: "If, indeed, the plaintiff had distinctly proved the falsehood of the statement the case would have assumed a different shape, but according to the case proved the nonsuit was right." In *Fairman v. Ives*, 5 B. & Ald. [Eng.], 642, it is said: "If the communication be made maliciously the case would be otherwise, and the falsehood of the fact stated might, in some cases, be evidence of malice." In *Blagg v. Sturt*, 10 Q. B. [Eng.], 899, Chief Justice Denman

said: "We are also of opinion that proof of falsehood in a part of the statement is evidence for the jury, to renew the presumption of malice where the occasion of the publication has been evidence to rebut it." In *Edwards v. Chandler*, 14 Mich., 471, Campbell, J., said: "Where a communication is privileged, the plaintiff cannot recover without proving affirmatively not only the falsehood of its contents, but also that it was published with express malice. Unless he can prove both of these points he must fail. The falsehood being a necessary part of the case to be made out by the plaintiff, the truth is but a contradiction of that case, and may be made out under the general issue, therefore, without resort to a special plea or notice. Upon this question there seems to be no conflict of authorities." It would seem that this last case goes too far in holding that the plaintiff, in order to recover, must necessarily prove the falsity of the charge. The privilege arising from the occasion of the publication rebuts the presumption of malice, but we do not think that it so rebuts the presumption of innocence of slanderous charges that they are to be taken as true because made under circumstances of privilege. The case is, however, authority in line with the English cases cited for holding that evidence of falsity is admissible.

Upon a review of the decisions we think the proper rule to be that while the plaintiff might rely upon the presumption of falsity of the charges made against him, he is not required to do so, but may introduce affirmative evidence of such falsity in cases where malice must be expressly shown, as a step in the proof of malice; but the falsity of the charges is not in itself sufficient to establish malice, and only becomes sufficient when coupled with evidence tending to show that the plaintiff made the charges knowing them to be false, or with other evidence tending to show malice. The objections here made, except as to the form of the questions, were directed simply in general terms to

its competency. We think it was competent in the manner stated, and that this assignment of error was not well taken.

2. It is next urged that the court erred in admitting certain testimony of the witness Russell. The defendant, to show a reasonable ground for the charges affecting plaintiff's honesty, relied largely upon evidence that the plaintiff had mortgaged to defendant horses in plaintiff's possession but belonging to one McLaughlin. Russell's attention was called to a church trial in 1888 or 1889, and the following question was asked: "In the conference, or trial, or whatever it was that was held there, did Dr. McLaughlin, who is a witness on the stand here, say that the team of horses referred to in this mortgage to Mr. Laing wasn't his property and they didn't belong to him, but that they belonged to Nelson, but that he thought Nelson ought not to have mortgaged them without speaking to him about it?" The question was answered in the affirmative. The objection made to it was that it was not proper rebuttal testimony, because it was not shown that there was no record of the evidence, and because no proper foundation had been laid. It was proper in rebuttal, if there was a proper foundation for it, for the purpose of impeaching McLaughlin's evidence offered by defendant. The objection that it could not be shown by parol is equally untenable and is not now urged, and we think counsel have overlooked a portion of the cross-examination of McLaughlin where the foundation was laid. McLaughlin's attention was called to this church trial, and this question asked:

Q. At that time, in Waterloo, and at that investigation, didn't you make the statement in the presence of a large number of persons?

A. No, sir; not a large number of persons.

Q. Well, a small number of persons, then. Didn't you make the statement to a small number of persons that Nelson bought these horses, and that they were his horses, and

that you never claimed that they were your horses, but you thought Nelson ought not to have mortgaged them because they were not paid for, or that in substance?

A. No, sir; not any such statement. I made just such a statement as I give here in regard to the horses.

While this is not the precise language of the question put to Russell, it is the same in substance, and was a sufficient foundation for the impeaching testimony.

3. The following question was asked the plaintiff: "You may state if, in July, after Mr. Laing had made these charges against you to which you have heard the witness testify this morning, and learned that it was generally talked about in the community, whether it caused you any anxiety or any suffering?" Objected to, as incompetent, irrelevant, and improper. Objection overruled. Plaintiff excepts. Answer: "Yes, sir; it did." There was nothing further upon this subject, and the admission of this evidence is assigned as error. The argument is that as to such language as was not actionable *per se*, mental suffering, without other damage, is not such a special damage as will alone justify a recovery; and that as to such language as was actionable *per se*, no evidence at all was admissible to show damages. The objection, as we have seen, was general in its nature, and if the testimony was competent and relevant for any purpose it was admissible. The question as to the right to recover for mental suffering because of words not actionable *per se* may, therefore, be dismissed from our inquiry.

The case of *Boldt v. Budwig*, 19 Neb., 739, is relied upon in support of the proposition that the evidence was not admissible to support the allegations of the language actionable *per se*. The court was there considering an instruction permitting in such a case the jury to consider mental suffering without any positive evidence thereof, and the language used must be taken in connection with the question under consideration. The language is as follows:

"The instructions are clearly right so far as the question of the measure of damages is concerned. The words charged in the petition are actionable *per se;* hence there not only need be no proof of special damages, but such proof would be inadmissible. No witness could swear to the mental suffering of the female plaintiff. The jury must decide upon that from the defamatory words themselves, and the sex, age, and condition of the plaintiff. So also as to the question of future damage. No human being could say that the plaintiff's life would be prolonged for a single day after the trial, and yet the jury should consider the damage to her character as well as her mental suffering caused thereby during a life to be prolonged for the usual period of expectation according to ordinary experience, and not according to the opinion or testimony of witnesses. So the objection that there was no evidence before the jury of the mental suffering of the plaintiff, or of future damage, and hence that the instructions as to those matters were not supported by the evidence, is not well taken." By this it was not meant that in a case where general damages are allowed no evidence may be introduced of the facts from which such damages arise. It is clear from the language used that in that case evidence of the sex, age, and condition of the plaintiff was deemed admissible. What was meant there was that witnesses could not be called to prove the *quantum* of damages, but that the amount of damage must be left to the determination of the jury under the circumstances of the case. Neither this plaintiff nor any other witness could give an opinion as to the amount which he should recover because of mental suffering, but all that was proved was the fact that anxiety was caused. It is true the law would probably presume this; but if so, this single question, answered as it was, could not have been prejudicial. We think that it was proper, and that the existence of circumstances from which the law implies damages may be shown, although the case be one where dam-

ages are implied by law from those circumstances, and evidence as to the amount of damages would be improper.

4. The only other point urged relates to the instructions, and the argument is addressed to the first instruction given by the court of its own motion. This instruction is as follows: "That the burden of proof is upon the plaintiff to satisfy you by a preponderance of the testimony of the speaking by the defendant of the words, or some of them, charged in the petition as slanderous; and if you find from the testimony that such slanderous words, or some of them, were spoken by the defendant, you will next inquire whether or not they were spoken under such circumstances as rendered them privileged, within the designation given by the law to privileged communications." It is said that this instruction, especially when taken with the others in the case, casts upon the defendant the burden of disproving malice. We do not think so. The instruction quoted referred to only a portion of the case. The following instruction expressly told the jury that "the law presumes malice from the use of slanderous words unless they were used under such circumstances as rendered them privileged." This was quite a distinct instruction that malice was not presumed in cases of privilege, and other instructions fully covered the question of privilege.

In a number of instructions given at the request of the plaintiff the issue as to malice was placed affirmatively, so that the jury could not very well infer that the burden was on the defendant. As an illustration we quote the nineteenth: "You are further instructed that if you believe from the evidence that the defendant, during the month of June, A. D. 1890, spoke of and concerning the plaintiff the words herein sued upon, then you have a right to consider all the circumstances in evidence to determine the question whether such words were spoken by the defendant maliciously; and if you believe, from all the evidence and circumstances in evidence in this case, that the defend-

ant did speak such words of and concerning said plaintiff maliciously, and with a desire and intent to injure the plaintiff, then and in that case your verdict should be in favor of the plaintiff. Modified by adding at the close the words: 'Provided you shall further believe from the evidence that such words were untrue and that the defendant had not reasonable and probable cause to believe them to be true.'"

The defendant requested twenty-five instructions, twenty-four of which were given. The issue was in these instructions stated to the jury substantially as in those requested by the plaintiff. The single instruction refused related to an entirely different branch of the case. Upon an examination of all the instructions we cannot find that the court in any place said or implied that the burden upon the issue of malice was upon the defendant. The most that can be urged is that the jury was not distinctly told that it was upon the plaintiff; but if the defendant had desired such an instruction he should have requested it.

JUDGMENT AFFIRMED.

CHARLES M. RICE, APPELLANT, V. E. C. GIBBS, APPELLEE.

FILED APRIL 17, 1894. No. 4013.

1. **Contracts**: EQUITY: SPECIFIC PERFORMANCE. Courts of equity in the exercise of their jurisdiction to compel the specific performance of contracts, will generally enforce the contract only as it was made by the parties, and will not make a new contract or enforce the performance of an act upon conditions other than those agreed upon by the parties in the contract.

2. **Specific Performance**: OPTIONAL CONTRACTS. The assignee of an optional contract for the sale of land, the contract provid-

ing that payment of a portion of the purchase money shall be deferred, cannot substitute his own personal liability for that of the original vendee and compel a conveyance upon tender of his own notes for the deferred payments.

3. Vendor and Vendee: SPECIFIC PERFORMANCE: TENDER. In order to enforce a conveyance by a vendor under an optional contract of sale the vendee or owner of the contract must comply with, or tender compliance with, the terms of the contract. Therefore, where the contract was with A and provided for payments of $1,500 in cash, $1,000 in one year and $1,000 in two years from the date of the deed, and A assigned the contract to B, the depositing in a bank, with notice to the vendor, of C's check for $1,500, and the notes of D for the deferred payments, together with a mortgage upon the land securing them, and the draft of a deed conveying the land to D, was not a compliance with the terms of the contract, and specific performance was properly refused.

4. *Rice v. Gibbs*, 33 Neb., 460, overruled.

REHEARING of case reported in 33 Neb., 460.

Marston & Nevius and *T. M. Stuart*, for appellant.

Calkins & Pratt, contra.

IRVINE, C.

This was an action for the specific performance of a contract for the sale of land. The action was brought by an assignee of the vendee in the contract relied upon. Upon a consideration of the case this court reached the conclusion that the decree of the district court dismissing the case was erroneous, reversed that decree, and ordered a decree in accordance with the prayer of the petition. Subsequently a rehearing was allowed. The former opinion is found in 33 Neb., 460, where the pleadings and decree are set out, and where the general question of the assignability of contracts for the sale of land in the nature of options is discussed at length.

Upon a reconsideration of the case we are satisfied that upon the former hearing the opinion was based upon too

broad a question and that the questions which should control the decision were not there considered. If the former opinion be consulted, it will be found that among the conditions of the contract relied upon, which was entered into by the defendant Gibbs as vendor and one Archibald as vendee, were these: That within the time limited by the contract the vendee should declare his option to take the property, and that a conveyance should be made to him upon the vendor's being requested in writing; that $1,500 in cash should be paid upon execution of the deed, $1,000 in one year and $1,000 in two years from the date of the deed, with interest at ten per cent on deferred payments. The contract concluded with the following sentence: "It is mutually agreed that all the covenants and agreements herein contained shall extend to and be obligatory upon the heirs, executors, administrators, and assigns of the respective parties hereto." The precise point in the construction of this contract is not whether it is in its nature assignable so that, its conditions being performed, an assignee might enforce it, but whether or not the plaintiff in this case as assignee did perform or tender a performance of those conditions. In the enforcement specifically of contracts courts of equity usually undertake simply to enforce the contract as made by the parties, not to compel the performance of acts upon other conditions than those agreed upon by the parties. If the contract in this case had provided for a payment of the entire purchase price in cash upon the execution of the deed, we would have no doubt that the assignee might, upon tender of the purchase money, compel the execution of the deed to him. But the contract did not contemplate such a payment. It expressly provided that $1,000 should be paid in one year and $1,000 in two years after the date of the deed, without providing in what manner, if at all, these deferred payments should be secured.

In *Arkansas Smelting Co. v. Belden Mining Co.*, 127 U. S., 379, it was said: "Everyone has a right to select and

determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman, 'You have the right to the benefit you anticipate from the character, credit, and substance of the party with whom you contract.'" In that case the following language in Pollock on Contracts was quoted with approval: "Rights arising out of contract cannot be transferred if they are coupled with liabilities or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided." Many of the cases cited in the former opinion reflect this same principle, and, indeed, it is not too broad a statement to say that the rule has been recognized in every case where the question has been discussed.

In *Wagner v. Cheney*, 16 Neb., 202, specific performance was enforced in favor of an assignee under somewhat similar circumstances, the defense there being that the contract forbade the assignment without the assent of the vendor; but it appears from the opinion in that case that the vendor held the notes of the original vendee, so that, in enforcing the contract, the personal liability which the vendor had a right to rely upon was not lost to him. So in this case, if the plaintiff had tendered the cash payment and the personal obligations of Archibald, the contract would have been substantially complied with and perhaps specific performance might have been enforced; but he did not do so. He did not even tender his own notes. The transaction was as follows: The plaintiff having an assignment of the option and being in New York, not intending to return until after the option would expire, he instructed Mr. Frank to act for him in the premises and "do whatever was necessary." Mr. Frank returns to Kearney, procures Mr. Scoutt, an entire stranger to the transaction, to make his notes and mortgage to secure the same, then draws a deed

from Miss Gibbs' execution conveying the land to Scoutt, and then procures Mr. Elmendorf to make the tender to Miss Gibbs of these papers, together with Mr. Frank's check for $1,500, and Elmendorf does not even make this kind of a tender. Miss Gibbs seems to have declined an interview with him, whereupon Mr. Frank addressed her a letter stating that he and Mr. Elmendorf had been at her residence and other places named with $1,500 and the two notes and the mortgage and deed, and that she would find the papers at the Kearney National Bank to be delivered to her upon the execution of the deed. No other request in writing and no other tender was made to her. These acts in several respects fail to comply with the conditions of the contract. There had been no election by Archibald to take the property and no action on his part to obligate him for the deferred payments. No notes or other obligations of Archibald had been tendered. In a contract of sale, where payment of a portion of the purchase money is deferred and there is no provision for securing such payment, it is a necessary inference that the character and solvency of the vendee was an inducement to the contract, and the contract cannot be assigned so as to permit the assignee to enforce it and compel the vendor to substitute the obligation of any other person for the obligation of the one with whom the contract was made. Aside from this fatal departure from the contract, the plaintiff failed to tender the cash payment. Nothing was offered the defendant in person. She was merely informed by the letter of a third person that the check of that third person was at a bank for her acceptance upon the execution of the deed. Still further, she was asked to accept as security for the deferred payments the notes of still another stranger, neither the assignee of the contract nor the agent of the assignee, nor any person connected therewith, and the deed that she was called upon to execute was not a deed to the vendee, to his assignee, to his agent, but to a total stranger to the transaction.

Further discussion is unnecessary. The finding of the trial court contained in the second paragraph of the decree quoted in the former opinion was not only sustained by the evidence, but was the only finding which the evidence would sustain. The former judgment of this court is overruled and the judgment of the district court is

AFFIRMED.

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

FILED APRIL 17, 1894. NO. 4858.

1. **Error Proceedings:** RECORD OF REVIEW. The jurisdiction of this court in error proceedings extends only to the affirmance or the reversal, vacating, or modifying of a judgment according to the record made in the district court. Original evidence, by affidavits or otherwise, cannot be here received to alter, contradict, or avoid that record.
2. **Chattel Mortgages:** REPLEVIN BY MORTGAGEE: ATTACHMENT: REVIEW. In an action of replevin by a mortgagee of chattels against a sheriff who has taken them on attachment against the mortgagor, the defendant cannot be permitted to recover merely upon the finding of the jury that the value of the mortgaged chattels was sufficient to satisfy both the mortgage and the attachment, regardless of the *bona fides* of the mortgage. If the mortgage was good, the mortgagee was entitled to the full security afforded him thereby, and he is entitled to have the proceedings adjudging it void reviewed in this court. *McDonald v. Bowman*, 35 Neb., 93, in this respect overruled.
3. **Attachment:** LIEN PENDING REVIEW OF ORDER TO DISCHARGE. Where an order is made discharging an attachment, the filing of a petition in error and the filing and approval of a supersedeas bond within the time fixed by the court, not to exceed twenty days, operate to continue the lien of the attachment in force pending error proceedings. The issuance of a summons in error within that time is not necessary for that purpose.

4. **Chattel Mortgages:** FRAUD OF MORTGAGOR: EVIDENCE. Declarations of a mortgagor of chattels, made after the execution of the mortgage, are admissible in an action between the mortgagee and creditors of the mortgagor for the purpose of establishing a fraudulent intent on the part of the mortgagor. *Sloan v. Coburn*, 26 Neb., 607, followed.

5. ———: ———: ———. If such declarations are made while the mortgagor remains in possession of the property, they are admissible as part of the *res gestæ*. *Campbell v. Holland*, 22 Neb., 587; *White v. Woodruff*, 25 Neb., 797, and *Cunningham v. Fuller*, 35 Neb., 58, followed.

6. **Instructions:** REVIEW: ASSIGNMENTS OF ERROR. An assignment of error as to the giving *en masse* of certain instructions will be considered no further than to ascertain that any one of the instructions was properly given. *Hiatt v. Kinkaid*, 40 Neb., 178, followed.

7. **New Trial:** REVIEW. In an action by several plaintiffs, where there was a verdict against all, a motion for a new trial, made by them jointly, must be overruled if the verdict was correct against one of them. *Scott v. Chope*, 33 Neb., 41, followed.

REHEARING of case reported in 35 Neb., 93.

Letton & Hinshaw, for plaintiffs in error.

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

IRVINE, C.

An opinion was filed in this case January 30, 1892, and is reported in 35 Neb., 93. Subsequently a rehearing was allowed. The principal facts are stated in the former opinion. There has been attached to the record a showing by affidavits and certificates that the lien of one of the attaching creditors has been finally divested, and further, that the property involved did not realize its value as found by the jury. This showing must be disregarded in considering the case. The jurisdiction of this court in error proceedings extends only to reviewing the record made in the

district court and affirming, reversing, vacating, or modifying the judgment of that court upon the record there made. Original evidence, by affidavits or otherwise, cannot be received in this court to support or defeat the judgment below.

The judgment of affirmance upon the former hearing was given without examination of the errors assigned, upon the theory that there remained in the hands of the mortgagees, after satisfying the judgments of the attaching creditors, sufficient to satisfy their claims, and that the mortgagees were not therefore prejudiced. Upon a reconsideration of the case we think that the court overlooked the purely legal nature of the action, and overlooked the fact that the judgment was in the alternative, for a return of the property, or, in case a return could not be had, for the value of defendant's possession. If the value of the property mortgaged was grossly disproportionate to the debts secured, this was a fact from which the jury might have found a fraudulent intent in the making of the mortgages; but unless the jury so found, if the mortgages were otherwise valid, the mortgagees were entitled to the security of all the property mortgaged. Upon foreclosure of the mortgages it would be probable that the goods would not realize their full value as found by the jury, and it will not do, therefore, for the court to say that, regardless of the merits of the case and the legal rights of the plaintiffs, the plaintiffs must satisfy the attaching creditors as a condition of retaining the property. This was the effect of the former decision. A review of the errors assigned is, therefore, necessary.

Upon the trial it was stipulated, among other things, that on the 31st of January, 1891, the county judge issued a valid writ of attachment in favor of the Lycoming Rubber Company against Tester; that on that day the sheriff levied the attachment upon the goods in controversy and held the same until taken from him by the writ of replevin in this case; that on February 18, and before judg-

ment in said action, the county court dissolved the attachment; that on the 28th day of February the rubber company filed its petition in error in the district court of Jefferson county, seeking a reversal of the order dissolving the attachment, and at the same time filed a valid supersedeas bond, approved by the clerk of the district court, and at the time of the trial the error proceedings were still pending and undetermined. The plaintiffs objected to the admission of any evidence in regard to the petition in error and supersedeas bond, for the reason that no summons in error had been issued and that Tester had not appeared in the error proceedings. The overruling of this objection is assigned as error.

Sections 236*e* and 236*f* of the Code of Civil Procedure provide a method of retaining property taken in attachment pending a review on error of proceedings resulting in the discharge of the attachment. By these sections it is provided that when an order discharging an attachment is made, the court shall fix the number of days, not to exceed twenty, in which a petition in error may be filed. During the period so fixed the officer retains the property. Within that time the party seeking the reversal must file his petition in error and give a supersedeas bond. It is not distinctly stated that upon so doing the order discharging the attachment shall be superseded pending the review, but the act was entitled "An act to provide for the retention of attached property pending a review on error of an order discharging the attachment," and sections 588 and 590 of the Code, relating generally to supersedeas pending error proceedings, make the filing of a petition in error and the taking and approval of a bond the conditions of the supersedeas. The evident purpose of sections 236*e* and 236*f* was to provide for a supersedeas of orders dissolving attachments after the analogy of other cases. This is the construction which the court has heretofore given this act. (*State v. Cunningham*, 9 Neb., 146; *Wilson v. Shepherd*,

15 Neb., 15; *Adams County Bank v. Morgan*, 26 Neb., 148; *Lehnoff v. Fisher*, 32 Neb., 107.) The necessary conclusion is that the filing of the petition in error and the filing and approval of the bond within the proper time operated as a supersedeas, and the issuance or service of summons in error, or the appearance of the defendant in error, is nowhere made a condition of superseding the judgment. The lien acquired by the levy of the attachment therefore remained in force, and that part of the stipulation disclosing these proceedings was properly admitted to establish that fact.

The next assignment of error relates to the admission in evidence of certain declarations tending to impeach the good faith of the mortgages, made by Tester, the mortgagor, to the witness Bates a few days after the mortgage to McDonald & Co. was executed. This conversation was in the presence of McDonald & Co.'s agent and it was also at a time when there is considerable evidence to show that Tester was still in possession of the mortgaged property, disposing of it in the usual course of trade. It is claimed that he was in possession as agent of McDonald & Co., but if he was, his declarations were clearly admissible against them. If he was in possession in his own right, they were admissible for that reason. (*White v. Woodruff*, 25 Neb., 797; *Cunningham v. Fuller*, 35 Neb., 58; *Campbell v. Holland*, 22 Neb., 587.) But these declarations were admissible for another reason. The intent of the mortgagor in making the mortgages, as well as that of the mortgagees in receiving them, were material inquiries, and the declarations of the mortgagor, subsequent to the execution of the mortgages, were admissible for the purpose of establishing his intent, although not that of the mortgagees. This has been distinctly decided. (*Sloan v. Coburn*, 26 Neb., 607.)

Complaint is made of the giving of the third instruction by the court of its own motion. This, however, we

cannot review. The assignment upon this point in the motion for new trial is as follows: "The court erred in giving the first, second, third, fourth, and fifth paragraphs of instructions given by the court of its own motion." The correctness of those other than the third is not questioned by counsel in the briefs. Under these circumstances this assignment of error must be overruled. (*Hiatt v. Kinkaid*, 40 Neb., 178.)

Complaint is made of the giving of three instructions at the request of the defendant; but these relate to the validity of the McDonald mortgage alone, and do not affect the case of the Symns Grocer Company. The motion for a new trial was joint by both mortgagees, and by a well established rule, if the verdict was correct against one of the parties, such a motion must be overruled. (*Scott v. Chope*, 33 Neb., 41, and cases there cited.) Errors which would affect the case of McDonald & Co. alone cannot, therefore, be reviewed.

JUDGMENT AFFIRMED.

SAMUEL S. PORTER V. SHERMAN COUNTY BANKING COMPANY ET AL.

FILED APRIL 17, 1894. No. 4612.

1. **Sufficiency of Evidence to Support Verdict.** Upon a re-examination of the evidence, *held*, that it is insufficient to sustain a verdict for a sum so small as found by the jury. *Porter v. Sherman County Banking Co.*, 36 Neb., 271, affirmed.

2. **Usury:** ACTION TO RECOVER DEPOSITS: AGENCY. Where a partner in a banking partnership, or an officer of a banking corporation, is the agent of an individual for the management of his property, and such agent collects rents and, under an agreement with the principal, invests the proceeds at usurious rates, keeping an account in the bank in which he deposits all sums

realized, the bank cannot set up usury as a defense to an action by the principal against it to recover his deposits.

3. **New Trial**: JOINT MOTION. In an action against several defendants, where there was a verdict against all, a motion for a new trial made by the defendants jointly must be overruled if the verdict was correct against any one of them. *Scott v. Chope*, 33 Neb., 41, followed.

4. **Judgment Upon Review in Supreme Court**: APPEAL. Except where the decision of an appellate tribunal necessitates a trial of an issue for which the constitution guaranties a trial by jury, it rests in the discretion of the appellate tribunal, upon the reversal of a judgment, to enter in the appellate court a proper judgment or to remand the case to the court from which it was appealed, either with directions to enter a specific judgment, for a retrial of particular issues, or for a new trial of the whole case. Such discretion should be exercised in such manner as to best and most surely accomplish the ends of justice.

5. **Proceedings in Error**: ORDER TO REMAND CAUSE. The plaintiff below brought this case to this court on error, complaining of error in the assessment of the amount of recovery. The defendants filed a cross-petition in error, assigning many errors. The defendants having joined in the motion for a new trial, and the verdict being clearly right in its direction against one of the defendants, the court was precluded from examining the questions sought to be presented affecting only the rights of the others; but the plaintiff being entitled to a reversal of the judgment against that one defendant because of error in the assessment of the amount of recovery, the court refused to remand the case for a reassessment of damages only and awarded a new trial of the action.

REHEARING of case reported in 36 Neb., 271.

Nightingale Bros., for plaintiff in error.

G. M. Lambertson and *J. R. Scott, contra.*

IRVINE, C.

This case is before us upon a rehearing. Upon the first hearing there was a judgment of reversal. The case is reported in 36 Neb., 271. In the opinion there reported the issues are disclosed by setting forth the pleadings at some

length. It will not be necessary, therefore, to make any extended statement of fact. The manner in which the case reached this court is not, however, disclosed by the former opinion. The plaintiff below, Porter, brought the case to this court on error, assigning as error that the assessment of the amount of recovery was too small; that the court erred in overruling the motion for a new trial; and that the court erred in rendering judgment on the verdict. Within a year after the rendition of judgment the defendants in error appeared here and filed a cross-petition in error, alleging many errors in the proceedings below. The case, therefore, took the form of proceedings in error by the parties on either side.

Upon a reconsideration of the case we are entirely satisfied with the conclusion evidently reached, but not very clearly expressed, in the former opinion, that upon the uncontradicted evidence there was due from the banking company to the plaintiff a larger sum than was found by the jury. The greater portion of the amount claimed was counted upon as an account stated, and the evidence supports the averments of the petition in this regard, as it also supports the further averment of smaller sums due upon an open account. It is true that the evidence consists largely of entries upon the books of the banking company, but as against the bank at least these entries were competent evidence wherewith to charge it.

The only ground upon which the defendants in argument rely to sustain the finding of the jury as to the amount of the recovery against the bank is that a large portion of the amount shown to be due plaintiff upon the books of the bank represents usurious interest upon plaintiff's deposits. Usury is pleaded by the defendants, but so far as there is any evidence upon the subject it is to the following effect: That one Theiss and one Whaley were at one time doing business under the name of the Northwestern Banking Company. Subsequently a copart-

nership known as the Sherman County Banking Company succeeded to their business, and on November 1, 1887, the Sherman County Banking Company was incorporated and succeeded to the business of the former copartnership. Upon each of these changes the account of Porter with the former concern was carried to the books of its successor, and Porter ratified the transference of his account from the copartnership to the corporation. The bank occupied rooms in a building owned by Porter in which there were other tenants. Porter had other property at Loup City. Theiss, or Theiss and Whaley, were his agent in its management. The deposits creating the indebtedness upon which he declares were created largely from receipts of rent upon this property. There was an agreement between Theiss and Porter that Theiss should retain the moneys received from Porter's Sherman county property and invest them for Porter. Porter's evidence is tha Theiss said he could invest the moneys so they would pay thirty-six per cent a year, and that Porter agreed to divide the profits with him. The books indicate that about eighteen per cent per year upon the moneys belonging to Porter was credited to his account. These credits were made under the head of interest; but so far as there is any evidence it is that investments were made by Theiss and when moneys were realized therefrom they were deposited to Porter's credit. The defendant contends that the circumstances show that outside investments were not in fact made, but that the bank took the moneys as deposits and allowed eighteen per cent interest thereon. There is no evidence to this effect, however, except the fact that about eighteen per cent was credited under the name of interest, and there is no evidence whatever that Porter was a party to any such acts. So far as he is concerned the uncontradicted evidence is that Theiss was to invest the moneys and share the profits with him, and there is nothing to prove or indicate that any deposits were made in the bank with the

knowledge upon his part that the money was to be taken by the bank and usurious interest paid by the bank to him. It is very clear that if one lends money at usurious rates, and the borrower pays the usury agreed upon, and the lender deposits the money so received in the bank, the bank cannot set up the fact that the money was obtained through usurious contracts in defense of a suit to recover the deposit. The fact that the lender acts through an agent who both lends the money and makes the deposit of the interest thus obtained does not change the rule. The fact that that agent happens to be a partner or a director in the bank in which the deposit is made does not affect the case. We take it that an agent who lends money at usurious rates could not defeat an accounting between him and his principal because of that fact. *A fortiori*, a banking corporation in which the agent is a director could not repudiate a deposit upon the ground that the depositor had obtained the money in violation of the usury law.

The argument has been chiefly directed to the case of the individual stockholders who were defendants in the action; that is, to the subject-matter of the cross-petition in error. It is argued that there were errors in the instructions of the court upon the question of their liability; that there were errors in the admission of certain testimony against them; and further, that no action at law would lie, prior even to the act of 1891, against a corporation and its stockholders jointly, by a single creditor, to enforce the statutory liabilty. It was intimated in the former opinion that a proceeding in equity would be the proper course to enforce that liability, if it exists. These questions, as disclosed by the record, are serious, and none of them free from doubt; but the record comes to us in such a shape that we are precluded from here determining them. There is no doubt that the plaintiff was entitled to some judgment against the bank. If no remedy could be had in this action against the stockholders, the petition still stated

enough to charge the bank. The answer is a joint one by the bank and the individual defendants. The motion for a new trial and cross-petition in error are also joint for all the defendants. There were no proceedings, so far as the record discloses, on behalf of the individual defendants, to separate their case from that of the corporation, and in the absence of any proceedings to reduce the petition to a single cause of action against one defendant, no matter what it may contain in the nature of charges against others, if sufficient appears to charge that defendant and the proceedings against that defendant are free from error, a judgment, so far as it affects such defendant, must be affirmed. The petition stated, and the proof established, a cause of action against the bank. If the joinder of the individual stockholders and the averments against them were improper, they must be treated merely as surplusage, there having been no motion to strike them out or to sever.

In *Scott v. Chope*, 33 Neb., 41, it was distinctly held that in an action against several persons, if the motion for a new trial be by all the defendants jointly, it must be overruled if the verdict was good as against any one of them. The same doctrine had been announced in a number of prior cases. They were cited in *Scott v. Chope* and approved. This must be taken as the settled rule of this state, and is supported by a very respectable array of authorities elsewhere. The verdict against the bank was certainly correct in its direction, although not correct in its amount, and proceedings in error on behalf of the bank alone could not have resulted in its reversal. It follows, therefore, that the error proceedings of the individual defendants were equally unavailing, and we cannot consider any of the questions affecting their rights as distinguished from those of the corporation.

The plaintiff in error contends that inasmuch as he only complained of the amount of recovery the order of reversal should only extend that far, and that the cause should be

remanded for a trial upon the sole issue of the amount due him from the banking company. Section 582 of the Code of Civil Procedure provides that a judgment rendered by a district court may be reversed, vacated, or modified by the supreme court for errors appearing upon the record. The power to modify a judgment without vacating or reversing it as a whole is granted by that section. Section 594 provides that the supreme court, upon reversing a judgment, shall proceed to render such judgment as the court below should have rendered, or remand the cause to the court below for such judgment. It is conceded, however, that the cause must be remanded in this case to assess, by a new trial, the amount of recovery. It is probable that this court might remand the case for that purpose alone; but we do not think that such a course is required or that it would be proper. From a recent and valuable work on Appellate Procedure we quote as follows: "It is in accordance with the principles we have stated that it is held that an appellate tribunal is not bound to direct a judgment on the facts stated in a special finding or in a special verdict, but may, if upon an examination of the whole result it appear that justice will be better and more surely done by awarding a new trial, specifically direct the trial court to grant a new trial to the parties." (Elliott, Appellate Procedure, sec. 563.) "Whether a new trial shall be ordered or a specific judgment shall be directed is a matter so largely within the discretion of the appellate tribunal that it can hardly be said that there is any established general rule upon the subject except that which forbids the trial of original questions of fact in cases where a trial by jury is demandable as a matter of right under the provisions of the constitution." (Elliott, Appellate Procedure, sec. 568. See on this subject *Buchanan v. Milligan*, 108 Ind., 433; *Thomasson v. Wood*, 42 Cal., 416.) In the latter case an action was brought upon a promissory note. The only defense pleaded was the want of a sufficient revenue stamp.

The defendant prevailed below upon the authority of a decision of the California supreme court, which was overruled before this case reached the supreme court. A new trial was granted rather than a judgment in the supreme court, because the defendants had probably relied upon the earlier case and should in justice be permitted to interpose any other defense they might have.

As this cause must be remanded for error in assessing the amount of recovery, we think that justice demands a general order of reversal and a new trial of the cause, in order that the pleadings may be revised if the parties deem it proper, and the questions, which we are here precluded from determining, presented anew.

REVERSED AND REMANDED.

NEBRASKA LOAN & TRUST COMPANY, APPELLEE, v. FRANCIS G. HAMER ET AL., IMPLEADED WITH NEBRASKA LAND, STOCK GROWING & INVESTMENT COMPANY, APPELLANT.

FILED APRIL 17, 1894. No. 6551.

1. **Appeal From Order Confirming Sale:** REVIEW OF ORIGINAL DECREE: TRANSCRIPT. In an appeal from an order confirming a sale in a foreclosure case, the transcript in this court containing none of the record prior to the decree, assignments of error relating to the propriety of the decree, will be disregarded.

2. **Judicial Sales:** ALIAS ORDERS: APPRAISEMENT. Where land was sold under an order of sale, the sale vacated for irregularities, and an *alias* order of sale issued on which there was a new appraisement higher than the first, *held*, that the making of the second appraisement was not a valid objection on the part of the mortgagor to the confirmation of the sale.

3. ———: DEFECTIVE NOTICE. A sale will not be vacated for inaccuracies of recitals in the published notice which were in no way prejudicial to the parties or the purchaser.

4. **Qualifications of Appraisers.** The only land held by one of the appraisers was originally conveyed to him as security for a debt by deed absolute in form. Subsequently, and before the appraisement, he paid further money to the grantor under the agreement that the deed should thenceforth be treated as absolute. *Held*, That this constituted a conveyance of the land and that he was a freeholder.

5. **Whether the qualifications of an appraiser** may be impeached by parol evidence to show that a deed to him absolute on its face, was in fact a mortgage, *quære.*

6. **Judicial Sales:** VALIDITY OF APPRAISEMENT. A sale will not be vacated because one of the appraisers misconceived the manner of estimating the value of the property where it does not appear that such misconception resulted in an unfair appraisement.

7. ———: POWER OF COURTS TO SET ASIDE. The courts cannot interpose to prevent creditors from enforcing their claims or to set aside judicial sales to satisfy debts because of depression in business or financial stringency.

8. **An order of confirmation** may be made at an adjourned term of court, and at any reasonable time after the return of the order of sale, even though such return be made before the expiration of the full period permitted for that purpose.

9. **Applications for continuances** or postponements of hearings are addressed to the discretion of the court and will not be reviewed except for abuse of discretion.

10. **A judicial sale** must be made in accordance with the decree of the court, and its terms cannot be changed by agreement of parties or counsel not incorporated into the record.

11. **The officer conducting a sale** is not required to entertain any bids coupled with conditions not in conformity with the terms of the decree.

12. **Acceptance of Bid.** Until a bid is accepted it is a mere proposal and may be withdrawn by the bidder. After acceptance it becomes a binding contract and cannot be withdrawn or changed except under such circumstances as would justify the rescission or reformation of other contracts.

APPEAL from the district court of Phelps county. Heard below before BEALL, J.

F. G. Hamer, for appellant:

A judicial sale may be set aside for fraud or unfairness of any kind. (*McKeighan v. Hopkins*, 19 Neb., 34; *Paulett v. Peabody*, 3 Neb., 196; *Taylor v. Courtnay*, 15 Neb., 190; *Aldrich v. Lewis*, 28 Neb., 502.)

The case was taken up immediately after the filing of affidavits by the plaintiff, and no time was given to prepare and file affidavits. The court erred in overruling the application for a continuance. (*Hair v. State*, 14 Neb., 503; *Gandy v. State*, 27 Neb., 719; *City of Lincoln v. Staley*, 32 Neb., 63; *Johnson v. Mills*, 31 Neb., 524; *Miller v. State*, 29 Neb., 437; *Elliott v. State*, 34 Neb., 48.)

John A. Casto, contra.

IRVINE, C.

This was an action by the Nebraska Loan & Trust Company against the Nebraska Land, Stock Growing & Investment Company to foreclose a mortgage. The appeal is from the order confirming a sale made under a decree rendered in the action. The transcript filed here begins with the decree, from which it appears that Francis G. Hamer and Rebecca A. Hamer, his wife, were originally parties defendant, but it appearing that they had conveyed the land to the investment company the case was dismissed as to them. The premises mortgaged are described as "the west one-half of section three (3), town five (5) north, range eighteen (18) west of the sixth principal meridian." The decree finds due the trust company $1,568.70, with interest at ten per cent from the date of the decree, December 30, 1891, and that that amount is a first lien upon the land. It finds that the trust company has a mortgage to secure notes not due at the time of the decree amount-

ing to $9,200, with interest from June 1, 1891, and that the amount of $1,568.70 found to be due was delinquent interest on those notes. The decree next finds due the defendant Isaac E. Pierce, on a note and mortgage constituting a second lien, $3,797, with interest at ten per cent per annum from the date of the decree; and to the defendant James N. Clarke, on a note and mortgage constituting a third lien, $4,872, with interest at a like rate from the same time. There were two other defendants, the Holdrege Manufacturing Company and C. H. Bogue & Co., whose claims were evidently found to be junior to those named, but reserved for further hearing until the coming in of the report of sale. The decree provides a period of fifteen months for redemption, and in default of payment within that time orders a sale of the property, or so much thereof as may be necessary, to pay first, the costs; second, the sum found due the trust company; third, the sum found due Pierce; fourth, the sum found due Clarke; fifth, the surplus to be paid into court to abide its further order; and the decree further directs the sale to be made subject to the liens of the trust company for its $9,200 mortgage, with eight per cent interest from June 1, 1891. With the propriety of this decree we have nothing to do. The record prior to the decree is not before us, and we must, therefore, assume the decree to be in all respects correct. This statement is necessary because some of the objections made to the confirmation of the sale really go to the correctness of the decree and clearly not valid, if the decree is correct.

An order of sale was issued March 31, 1893, upon which a sale was made, which was on June 24 set aside, and on June 29 another order of sale was issued, upon which a new appraisement was had and a sale made August 9. The order of sale was returned August 10, the sale confirmed August 24, the court overruling objections filed by the investment company to the confirmation of the sale and its

motion to set the same aside. In view of the fact that the investment company assigns sixty-five reasons why the sale should be set aside we will probably be excused from discussing each assignment at length. As already stated, some of the objections really go to the validity of the decree and not to the regularity of the sale. Others are based upon allegations of fact which an inspection of the record shows to be without any support whatever. As an instance of the former class we may cite the assignment that the holders of mechanics' liens should have been brought into court and their liens ascertained before the premises were sold. The certificate of liens shows that the mechanics' liens referred to must be the liens of the Holdrege Manufacturing Company and C. H. Bogue & Co., parties who were evidently in court and their priorities at least adjusted in the decree. If the decree was erroneous for not determining these liens in full before the sale was ordered, there should have been an appeal embracing all the proceedings. As an instance of the latter class we may cite the objection that the appraisement was not made until after the notice of sale had been published. The record discloses that the appraisement was made July 1, and the first publication of the notice of sale was July 5. These are but instances of a number of objections and are cited only to show their nature and the futility of considering all the objections in the opinion.

There are several objections based upon the fact that the sale was not made under the appraisement had under the first order of sale. This objection is based upon sections 495 and 509 of the Code of Civil Procedure, which provide for a new appraisement where lands shall have been twice advertised and offered for sale and remain unsold for want of bidders. This provision was for the benefit of the party to satisfy whose lien the sale is made, in order to obtain a lower appraisement. Here the land did not remain unsold for want of bidders, but was sold and the sale

vacated for irregularities. Within the time limited by section 510 of the Code for the return of the writ no new sale could have been had under the old order, and the issuing of the new order of sale and the making of a new appraisement was not necessarily improper. Under the first appraisement the gross value of the lands was placed at $17,600 and the value of the interest of the investment company at $6,436.53, while under the second appraisement the gross value was placed at $18,950 and the value of the interest of the investment company at $9,350.68. The reappraisement operated manifestly to the advantage of the investment company and it could not in any event complain.

It is complained that the published notice of said sale was deficient. One objection to this notice is that it states the amounts incorrectly. A comparison of the notice with the decree and order of sale shows that this objection is unfounded. The other objection is that it described the liens to satisfy which the sale was to be made as judgments against Francis G. Hamer, Rebecca A. Hamer, and the investment company, whereas the Hamers had been dismissed out of the case, and the judgment was against the investment company alone. The notice certainly was inaccurate in this respect, but we cannot see how the investment company could possibly have been prejudiced thereby. The same remark will apply to the further statement in the notice of sale that there had been a levy upon the land ordered sold.

Another objection urged is that Mr. Scranton, one of the appraisers, was not in fact a freeholder as the statute requires. The evidence upon this point shows that land in Phelps county appears of record as belonging to Scranton; that the deed was made to Scranton to secure a loan made by him to the grantor, but that subsequently, and before the appraisement, Scranton had advanced further moneys to the grantor, with the agreement that the conveyance

should be treated as absolute. Under this state of affairs we do not feel called upon to consider the question as to whether, for the purpose of determining the qualifications of an appraiser, strangers may attack a deed to him, absolute on its face, by parol evidence to show that it is a mortgage. While this conveyance was a mortgage when made, the advancement of other moneys later and the agreement then made that it should no longer be treated as a mortgage but as a conveyance absolute, would operate by estoppel, if the transaction was fair, which we must presume, to constitute it a sale. Proof of these facts would undoubtedly have defeated the grantor in an action to redeem, and would have defeated the grantee in an action to recover the moneys advanced as a debt. (*Peugh v. Davis*, 96 U. S., 337; *Niggeler v. Maurin*, 34 Minn., 118.)

Another objection is based upon the affidavit of Scranton, that he appraised the land at what he supposed it would bring at forced sale, and that he believed the land in ordinary times would be worth $100 per acre. Appraisements should be made according to the judgment of the appraisers of the fair market value of the property at the time of the appraisement, and where it appears that they proceeded upon a different basis, to the prejudice of the party objecting, it is probable that the appraisement should be vacated upon proper proceedings for that purpose. Another objection was made that the appraisement was too low, and there was a number of affidavits fixing a valuation of the property per acre considerably greater than the valuation placed upon it by the appraisers; but, upon the other hand, a number of witnesses place the value at $40 and $50 per acre, while the appraisement is nearly $60 per acre. The trial judge must have considered this evidence in connection with the objection in relation to the method pursued by Scranton, and he must have found on this conflicting evidence in favor of the lower valuation. If the value of the land was even approximately as low as

that fixed by plaintiff's witnesses, the appraisement was fair and the investment company was in nowise prejudiced by the erroneous notions entertained by Scranton. This conclusion is emphasized when we find that the appraised value of the investment company's interest was $9,350.68, while the land sold for more than $12,000, the bids having gone far above two-thirds of the appraised value. It is not possible that Scranton's error in judgment resulted in a sacrifice of the property. His testimony is that in "ordinary times" the land would be worth $100 per acre, but the investment company has in the record a vast volume of testimony to show that the appraisement was had and the sale made in a period of extreme business depression and financial stringency, and Mr. Scranton does not say that he believed the land to be worth $100 per acre at that time. The suggestions just made render it appropriate to here say all that is necessary upon the assignments relating to the fact that the sale was had during a period of panic and business depression. It would hardly require evidence to satisfy the court that August of 1893 was not a propitious time for the forced sale of land, but we cannot see how the courts can interpose upon such grounds for the protection of unfortunate debtors. Laws suspending actions for the collection of debts are not known to our jurisprudence, and the legislature could not constitutionally enact them, much less can the courts interpose to provide such a suspension. The decree had been rendered, the period of redemption, unusually long, had expired, the mortgagees had a legal right to proceed, and the courts could not stay their hand or refuse them process merely because of circumstances of misfortune or hardship. Appeals for relief upon such grounds must be addressed to the conscience and mercy of creditors, and are wholly beyond the jurisdiction of judicial tribunals.

It is said that the confirmation was irregular because entered at an adjourned term of court and within sixty days

of the issuance of the order of sale. We know of no provision of law requiring an order of confirmation to be made at a regular rather than at an adjourned term; nor are we aware of any provision which forbids a confirmation at any reasonable time after the return. Section 510 of the Code required a writ to be returned "within" sixty days from its date. The word "within" in itself indicates that the return need not be deferred until the sixtieth day, and indeed diligence on the part of the officer requires the return to be made promptly.

Complaint is made that the court overruled an application to continue the hearing of the motion to confirm until the following term or a future date, for the reason that counsel had not had sufficient opportunity to examine the return and to procure affidavits. Applications for continuances and postponements of hearings are addressed to the discretion of the court, and will not be reviewed except for abuse of discretion. The investment company filed sixty-five objections to the confirmation. It filed twenty-six affidavits in support of these objections and three affidavits in rebuttal of those of the mortgagees. Many of these affidavits are detailed and elaborate. It would seem, therefore, that a fair opportunity had been allowed it to present proof. There appear as exhibits attached to one of the affidavits a vast number of newspaper clippings of the date of August last containing information relating to the finances of the Union, the attitude assumed by members of congress upon questions relating to the currency, the failures of banks, the closing up of manufactories, and the decline in value of stocks. It also includes the whole of a speech made by a Nebraska representative upon a bill relating to the currency. If further time had been afforded, the trial judge might have entertained a well-grounded fear that he would have thrust upon his attention the remainder of the Congressional Record and a further vast volume of distressing current literature.

The objections chiefly urged, and those reaching most closely the merits of the case, relate to the refusal of the sheriff to accept certain bids made on behalf of Rebecca A. Hamer, and to his selling the property to the plaintiff in the case at less than the amount of Mrs. Hamer's bids. The affidavits as to what occurred upon the sale are exceedingly voluminous and narrate in detail the whole course of the bidding. The land was first offered in lots of forty acres each, according to governmental subdivisions. In this way six lots were sold. The two remaining forty-acre tracts adjoining one another, having then been offered separately without bids, were sold together. The plaintiff was the purchaser of all. When the proof upon the subject is analyzed very little conflicting evidence is found. On the southeast quarter of the southwest quarter there can be no doubt that the plaintiff was the highest bidder. Mrs. Hamer made a bid upon this tract, together with others, but the plaintiff was the only separate bidder. It was quite proper to sell the tracts separately where separate bids were obtainable. The investment company complains that this forty was cut off from the highway and only became accessible through ownership of the adjoining tract, but that is a fact affecting the value of the land and not the validity of the sale.

Upon each of four other tracts there was a more or less prolonged series of bids made alternately by Mrs. Hamer and the plaintiff. In each case the land was declared sold to the plaintiff, in spite of a bid by Mrs. Hamer, in three cases $5 higher than plaintiff's bid and in one case $45 higher; but Mrs. Hamer's bid was in three instances declared by her agent to be "subject to all liens except $1,568.70," and in the fourth instance "subject to all prior liens except $1,568.70." The proof on the part of the plaintiff tends to show that nothing was said as to what this exception referred to, while the proof on the part of the investment company tends to show that the exception was stated to relate

to the first lien being foreclosed. This discrepancy is immaterial, because without any more definite statement the identity of amount would afford almost a conclusive presumption to that effect. As to the three bids which were made "subject to all liens except $1,568.70," there can be no doubt that this was a condition altering the terms of the sale and the terms of the decree. As to the bid which was "subject to all prior liens except $1,568.70," it is very difficult to tell from the bid itself what was the intention of the bidder or how it was sought by that condition to effect her purchase; but when we examine all the proof and examine the whole course of the bidding the intention becomes evident. It is claimed on the behalf of the investment company that the decree in the case was rendered in pursuance of a stipulation which was entered into in reliance upon an assurance by the trust company's attorney that the trust company would be satisfied with the collection of the $1,568.70. This attorney also appeared of record for the lienors Clarke and Pierce, and it is the investment company's contention that upon this assurance it was entitled to have the land sold simply to satisfy the $1,568.70, leaving all other liens in force. Again, we must remind counsel that we cannot review the decree in the case. The decree is clear and positive in awarding a foreclosure of the Clarke and Pierce liens and a sale to satisfy them. The sale had to be according to the decree. If there was a valid arrangement between the parties prior to the decree, it should have been embodied in the decree. If there was a subsequent arrangement capable of enforcement, the decree should have been modified to conform to it. From the affidavit of Mrs. Hamer's agent it distinctly appears that he attached these conditions to her bids for the purpose of enforcing the understanding which he claims he had upon the subject. This being true, the bids made by Mrs. Hamer were clearly coupled with conditions. The prior bidding had been complicated in many cases with double bids, one unconditional

and the other subject to the conditions named. The following language of the supreme court of Indiana in *Swope v. Ardery*, 5 Ind., 213, is quite applicable to the case: "The course of Robinson in bidding now with and then without the condition was well calculated to confuse the officer and perhaps justify him in disregarding it altogether. To bid with the condition was wholly inadmissible. It is well settled that the sheriff can receive only unconditional cash bids." In *Moore v. Owsley*, 37 Tex., 603, it was said in regard to an administrator's sale: "We understand the law governing sales at public auction to be, where the sale is advertised to be on specific and restricted terms, any bid made at that sale not in strict conformity with the terms advertised is no bid at all, and the crier is not bound to notice the same." It was further held there that such a bid cannot be treated as an absolute bid or enforced as such. Therefore Mrs. Hamer's bid, subject to the conditions, could not be enforced against her under the terms of the sale, and to disregard the bid was the only proper course.

The sale of the southwest quarter of the southwest quarter stands upon a somewhat different footing. The first bid was by Mrs. Hamer for $500. This was followed by one for the plaintiff for $1,505. It then went upon straight bids made alternately by Mrs. Hamer and the trust company until it reached $1,565, when Mrs. Hamer began to make double bids of different amounts, one absolute, the other coupled with conditions, until finally there was a straight bid by the plaintiff for $1,825, and a single bid by Mrs. Hamer for $1,830, conditioned as in the other cases. Thereupon the plaintiff withdrew all its bids down to $1,505, and Mrs. Hamer withdrew all her bids to $1,510, and made that bid subject to the usual conditions. Whereupon the land was sold to the plaintiff for $1,505. This left this tract in the same condition as the others, provided the withdrawal of higher bids was proper. In *Payne v. Cave*, 3 T. R. [Eng.], 148, it was held that a bidder might

retract his bid at any time before the hammer was down, the sale being declared to be analogous to ordinary cases of contract where the assent of both parties is necessary. The same doctrine was announced in *Fisher v. Seltzer*, 23 Pa. St., 308, in regard to a sheriff's sale, and in *Blossom v. Milwaukee & C. R. Co.*, 3 Wall. [U. S.], 196, as applying to a sale under a decree of foreclosure. The reason of these cases is unanswerable. The bid only amounts to a proposition to buy, and until the crier of the sale, by the fall of the hammer or other recognized act of acceptance, signifies assent to the proposition there is no contract, and the proposal may be withdrawn. We think, therefore, that this tract was properly sold to the plaintiff at $1,505.

An entirely different state of affairs exists in regard to the two tracts sold together. Mrs. Hamer made one small bid on this tract, which was followed by one somewhat larger by the plaintiff. This being the only land remaining unsold the plaintiff's agent voluntarily raised his bid to $2,831.66. He states that his object was to bid enough to make the whole proceeds of the sale equal the amount of the decree with interest and costs, and it would appear that this object was made known to the sheriff. The land was declared sold at that price, but thereafter finding that he had made a mistake in his calculations, and before leaving the place of sale, plaintiff's agent changed his bid to $2,126.66, which is the amount shown in the return as the purchase price of these tracts. The investment company's witnesses swear that they did not hear the change announced, but whether they did or not is immaterial. A mere mistake on the part of the bidder in his own calculations as to the amount which he intended to bid, there being no mistake as to the land sold, the terms of that sale, or other facts of that nature, and the mistake not being induced by any conduct on the part of the vendor, is no ground for a rescission. While a bid may be changed or withdrawn before its acceptance by the vendor (in this case by the offi-

cer of the court), it cannot, in the absence of circumstances justifying a rescission or reformation of ordinary contracts, be changed or withdrawn after acceptance. The same reasons which permit the withdrawal of a bid before acceptance forbid it after acceptance, at least in a case where the sale is judicial and the officer making the sale is a ministerial officer of the court and has no power to change the terms or contract otherwise than by a public sale of the property. The sale might have been reported at the higher bid, and had it been so done it would be enforced at that figure; but having been returned according to what amounted to a private arrangement between the sheriff and the purchaser after the sale was complete, we see no course except to remand the case to the district court with directions to set aside the sale of the southeast quarter of the northwest quarter and the northeast quarter of the southwest quarter. In other respects the judgment of the district court is affirmed.

JUDGMENT ACCORDINGLY.

RAGAN, C., not sitting.

WILLIAM NASH, APPELLANT, V. NELSON A. BAKER ET AL., APPELLEES.

FILED APRIL 17, 1894. No. 5147.

1. **Estoppel.** In order to constitute an equitable estoppel by silence or acquiescence, it must be made to appear that the facts, upon which it is sought to make the estoppel operate, were known to the party against whom the estoppel is urged and unknown to the party urging it.
2. **Bonds to Aid in Construction of Railroad.** *Nash v. Baker*, 37 Neb., 713, reaffirmed.

REHEARING of case reported in 37 Neb., 713.

Calkins & Pratt and *H. M. Sinclair*, for appellees:

The undisputed testimony shows that the appellant and those on whose behalf he brings this action stood by and permitted, without complaint or objection, the Kearney & Black Hills Railroad Company to complete its part of the contract, at a large expenditure of money, on the result of the election and the faith and expectation that it would receive the bonds. These facts raise an equitable estoppel as against them, and therefore they cannot now maintain this suit to enjoin the issuance of these bonds on the ground of fraudulent representations. (*Horn v. Cole*, 51 N. H., 287; *Burlington, C. R. & M. R. Co. v. Stewart*, 39 Ia., 267; *Johnson v. County of Stark*, 24 Ill., 75; *Mahaska Co. R. Co. v. Des Moines V. R. Co.*, 28 Ia., 437; *Helenkamp v. City of Lafayette*, 30 Ind., 192; *Palmer v. Stumph*, 29 Ind., 329; *Motz v. City of Detroit*, 18 Mich., 496; *Brown v. Bowen*, 30 N. Y., 519; *Prettyman v. Supervisors of Tazewell County*, 19 Ill., 406; *Zabriskie v. Cleveland, C. & C. R. Co.*, 23 How. [U. S.], 381; *Lamb v. Burlington, C. R. & M. R. Co.*, 39 Ia., 333; *Ellis v. Karl*, 7 Neb., 381; *Dawson County v. McNamar*, 10 Neb., 282; *Forbes v. McCoy*, 24 Neb., 706; *Fremont Ferry & Bridge Co. v. Dodge County*, 6 Neb., 18; *Michigan P. M. & M. Co. v. Parsell*, 38 Mich., 475; *Studdard v. Lemmond*, 48 Ga., 100; *Markland M. & M. Co. v. Kimmel*, 87 Ind., 560; *Griffin v. Nichols*, 51 Mich., 575; *Gleason v. Owen*, 35 Vt., 598; *Wheeler v. New Brunswick & C. R. Co.*, 115 U. S., 29; *Texas & St. L. R. R. Co., v. Robards*, 60 Tex., 545; *Commissioners of Morris Co. v. Hinchman*, 31 Kan., 729; *Kirk v. Hamilton*, 102 U. S., 68; *Leather Manufacturers Bank v. Morgan*, 117 U. S., 96; *City of Atlanta v. Gate City Gas Light Co.*, 71 Ga., 106; *Mayor of Athens v. Georgia R. Co.*, 72 Ga., 800; *Strosser v. City of Fort Wayne*, 100 Ind., 443; *State v. Wertzel*, 62 Wis., 184.)

Greene & Hostetler and *R. A. Moore, contra.*

IRVINE, C.

Upon a rehearing of this case we are entirely satisfied with the conclusion reached upon the first hearing and reported in 37 Neb., 713. The argument upon the rehearing is largely directed to the proposition that the evidence failed to establish some elements necessary to sustain a claim for relief on the ground of false representations. We think that each one of these elements is fairly established by the proof in the case, but if the case depended upon other principles the result would be the same. It is an incontrovertible fact that the contract of the voters, in view of the representations made and assurances held out, was for a railroad independent of other lines and not subject to the control of any other road. What they obtained was in fact a railroad practically owned and absolutely controlled by the Union Pacific Railroad Company, and bound to it by a close traffic agreement. Commenting upon certain language in the former opinion, as to the propriety of exercising the taxing power for such purposes, counsel insist that that question is for the legislative branch of the government and not for the courts. This may be conceded, but still, if taxes are to be imposed upon the whole body of taxpayers by a vote of a certain proportion of them for the purpose, not of exercising any legitimate function of government, but solely for the purpose of making a gift in aid of an enterprise *quasi*-public in its nature, but still of a business character, it is the duty of the courts to see that such power is not abused; that the donees bring themselves within the strict terms of the grant, and that the donors receive precisely what they bargain for.

A single question argued upon the rehearing requires consideration, because not referred to in the former opinion. It is very strenuously insisted that the plaintiff, by

permitting the road to be constructed, is equitably estopped from maintaining the action. The principle of equitable estoppel might perhaps apply to some of the reasons urged in support of the injunction relating to the regularity of the proceedings resulting in the election and the canvassing of the returns; but the principle of equitable estoppel does not apply to the matters upon which the decision is based. Without resorting to a detailed review of the authorities, we think that the following extracts from Pomeroy's Equity Jurisprudence properly state the law upon the subject: "When one of two innocent persons, that is, persons each guiltless of an intentional moral wrong, must suffer a loss, it must be borne by that one of them who by his conduct, acts, or omissions has rendered the injury possible." (Pomeroy, Equity Jurisprudence, sec. 803.) "Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded both at law and in equity from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who has in good faith relied upon such conduct and has been led thereby to change his position for the worse." (Pomeroy, Equity Jurisprudence, sec. 804.) "These facts must be known to the party estopped at the time of his said conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him. The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel at the time when such conduct was done, and at the time when it was acted upon by him." (Pomeroy, Equity Jurisprudence, sec. 805.)

The evidence in this case wholly fails to show that the plaintiff delayed an unreasonable time after learning the facts before instituting the suit, or that he was aware of the facts during the period of the construction of the road. The railroad company, on the contrary, was a party to the fraud, in fact the party committing the fraud, and pro-

ceeded with the construction with full knowledge of the facts. The principles of equitable estoppel do not apply to the case. Judgment according to the former order of this court.

JUDGMENT ACCORDINGLY.

STATE OF NEBRASKA, EX REL. LORENZO CROUNSE, V. JOSEPH S. BARTLEY, STATE TREASURER.

FILED MAY 2, 1894. No. 6711.

1. **Permanent School Fund:** LOANS: STATE OFFICERS. By section 1, article 8, of the state constitution the sole power to manage, loan, and invest the permanent school funds of the state is lodged with a board composed of the governor, secretary of state, treasurer, attorney general, and commissioner of public lands and buildings; and said board cannot be deprived of its functions by legislative enactment, nor can the legislature confer authority upon a single member of said board, or any other person, to invest any portion of said trust funds.
2. **Constitutional Law:** SCHOOL FUND: STATE TREASURER. Section 25, chapter 80, of the Compiled Statutes of 1893, in so far as it attempts to authorize the state treasurer alone to invest moneys in his hands belonging to the permanent educational funds of the state, contravenes section 1, article 8, of the constitution, and is therefore inoperative.

ORIGINAL application for *mandamus*.

George H. Hastings, Attorney General, for relator cited: *In re State Warrants*, 25 Neb., 659; *Storm v. Waddell*, 2 Sandford Ch. [N. Y.], 544; *Hall v. County Commissioners of Middlesex*, 10 Allen [Mass], 102; *Jennings v. Davis*, 31 Conn., 139.

John H. Ames, contra.

NORVAL, C. J.

This is an application for a *mandamus* by the state, on the relation of Lorenzo Crounse, against Joseph S. Bartley to compel respondent, as state treasurer, to pay relator, out of moneys belonging to the permanent school fund, the amount due him on a certain warrant issued by the auditor upon the state general fund. The material allegations of the petition are substantially as follows: On the 17th day of January, 1894, the relator was the owner and holder of a state warrant duly and legally drawn in his favor by the auditor of public accounts against the general funds of the state for the sum of $10, for office supplies and stationery, which warrant was issued in pursuance of an appropriation made by the state legislature of 1893, and was secured by the levy of a tax for its payment. Although on the date aforesaid said warrant was presented to the respondent, as state treasurer, and payment thereof demanded, yet respondent declined to pay the same out of the general fund, for the reason there was no money in said fund from which payment could be made. Thereupon relator demanded that said warrant be paid from moneys in the state treasury belonging to the permanent school fund, as provided by statute. The respondent declined to comply with said demand and gave the relator the following reasons in writing for such refusal, to-wit:

"*Gov. Lorenzo Crounse, Chairman of the Board of Educational Lands and Funds*—SIR: Section 1, article 8, of the constitution of the state of Nebraska provides that the governor, secretary of state, treasurer, attorney general, and commissioner of public lands and buildings shall, under the direction of the legislature, constitute a board of commissioners for the investment of the school funds in such manner as may be prescribed by law. In the Compiled Statutes of 1887, chapter 80, section 1 of article 1, provision is made for the commissioners created by section 1, article 8, of the constitution to invest the school fund.

"Section 25 of article 1, chapter 80, of the said statute of 1887 says that the said board of commissioners above referred to shall, at regular meetings, make the necessary orders for the investment of the funds. The legislature of this state in 1891 amended section 25 of article 1, chapter 80, Statutes of 1887. It now provides: 'That said board of commissioners shall at regular meetings provide for the investment of said funds,' and in addition to United States and state securities and registered county bonds it makes state warrants proper securities. The legislature, in my opinion, could not relieve the commissioners of their responsibility, and I do not believe it was the intention to do so in chapter 48, Session Laws of 1891. My idea is, the legislature, when the commissioners at a regular meeting passed upon certain securities, including state warrants, and approved them, made it the duty of the treasurer to invest the funds in the securities so approved. The board of commissioners should, in my judgment, do three things: First, they should ascertain that there is a levy behind the warrants presented; second, that they are regularly issued, and on a proper appropriation; third, that the party presenting them is the rightful owner. Having ascertained these facts, it is then the duty of the commissioners, under the law, to direct the treasurer, by resolution, to purchase the warrants. To do otherwise is to give the treasurer privileges which I do not think he is entitled to. In view of the action taken by the board to-day in refusing my request for authority to place the warrants now on hand in the school fund, I shall be obliged to discontinue the purchase of warrants until the question is decided by the supreme court, which I trust will be done in a few days.

"Your obedient servant, J. S. BARTLEY,

"*State Treasurer.*"

The petition also avers that while the governor, secretary of state, treasurer, commissioner of public lands and buildings, and attorney general are made a board for the sale,

leasing, and general management of all lands and funds set apart for educational purposes, and for the investment of the school funds in such manner as may be prescribed by law, yet neither the constitution, nor the act of the legislature relating to the investment of the permanent school funds, contemplated that said board should make an order directing the investment of moneys in the permanent school fund in state warrants issued in pursuance of an appropriation regularly made and secured by the levy of a tax for their payment when such warrants have been duly presented for payment and there is no money in the proper fund to pay the same.

The petition contains the further allegation that the respondent had sufficient money in his hands, as state treasurer, to the credit of the permanent school fund to pay relator's warrant when the same was presented for payment as aforesaid.

The respondent has interposed a demurrer to the petition on the following grounds: 1. That it does not state facts sufficient to constitute a cause of action. 2. That the provisions of the statute directing the investment of the permanent school funds in state warrants is unconstitutional and void.

The first question argued in the brief of counsel is whether or not warrants upon the state treasury issued by the auditor of public accounts in pursuance of a legislative appropriation are "state securities," within the meaning of section 9, article 8, of the state constitution, which declares that "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 provisions of the foregoing section have been frequently before this court for interpretation, and in an opinion delivered by REESE, C. J., in *Re State Warrants*, 25 Neb., 659, it was held that state warrants drawn by the auditor upon the state treasury in pursuance of an appropriation regularly made by the legislature, and secured by a levy of taxes for their payment, are "state securities" within the meaning of the above quoted section of the constitution.

Both parties in the briefs, and at the bar, have ably discussed the proposition whether or not the decision to which reference has already been made correctly interprets the constitutional provision which we have quoted; but inasmuch as the respondent did not, at the time he declined to purchase or pay the warrant in question, place his refusal on the ground that such warrant was not a state security, the court does not now feel called upon to examine anew the question argued by counsel, or to venture an opinion upon the subject; nor is it necessary to do so, since the writ must be denied on the ground hereinafter stated.

Assuming that state general fund warrants are "state securities" in the sense in which that term is used in the constitution, the question is fairly presented for consideration, was it the duty of the respondent to have invested any portion of the permanent school fund in relator's warrant? Section 25, chapter 80, Compiled Statutes, 1893, is in the following language:

"Sec. 25. The said board shall, at their regular meetings, make the necessary orders for the investment of the principal of the fund derived from the sale of said lands then in the treasury, but none of said funds shall be invested or loaned except on United States or state securities and registered county bonds; *Provided*, That when any

state warrants issued in pursuance of an appropriation made by the legislature, and secured by the levy of a tax for its payment, shall be presented to the state treasurer for payment, and there shall not be any money in the proper fund to pay said warrant, the state treasurer shall pay the amount due on said warrant from any funds in the state treasury belonging to the permanent school fund, and shall hold said warrant as an investment of said permanent school fund, and shall stamp and sign said warrant as provided in section eleven (11) of article two (2) of chapter eighty (80) of the Compiled Statutes of 1887."

If the foregoing is a constitutional or valid enactment, then the duty to invest moneys belonging to the permanent school fund of the state in state warrants devolves upon the state treasurer, and not upon the board of educational lands and funds. The contention of the respondent is that the proviso clause of said section 25 contravenes section 1, article 8, of the constitution, which declares that "the governor, secretary of state, treasurer, attorney general, and commissioner of public lands and buildings shall, under the direction of the legislature, constitute a board of commissioners for the sale, leasing, and general management of all lands and funds set apart for educational purposes, and for the investment of school funds in such manner as may be prescribed by law." By this provision the power to sell, lease, and manage the educational lands of the state is conferred upon a distinct board, composed of the state treasurer and four other state officers. Likewise, upon the same board the constitution has placed the duty of investing the permanent school fund of the state. The authority thus conferred upon the board of commissioners, or board of educational lands and funds, as it is usually called, the legislature is powerless to take away. The legislature may, by statute, provide upon what terms the educational lands shall be leased or sold, yet it cannot empower the governor, or any other state officer alone, to sell or lease such lands.

So the legislature may, by statute, prescribe the mode or manner in which the permanent school fund shall be invested in the securities enumerated in the constitution; but it has no power to relieve the board created by said section 1 of article 8 of the duty of making such investment; nor can it authorize any other board or person to invest said funds. It will be observed that by said section 25 of chapter 80 the legislature has attempted to direct that the state treasurer alone, and without any action on the part of the board of educational lands and funds, shall invest the moneys arising from the sale of lands set apart for educational purposes in state warrants issued in pursuance of a legislative appropriation, and secured by a tax levy, in case there shall be no money in the proper fund to pay the same. As regards the investment of school funds in state warrants, the board is, by this statute, relieved of all responsibility, duty, and discretion, and to the extent that such funds are so invested it is deprived of its constitutional functions. If the statute under consideration can be upheld, then there is nothing to prevent the legislature from empowering the state treasurer, without any action of the board of educational lands and funds to purchase for the permanent school fund registered county bonds of this state, or United States securities; and if the legislature may do this, it may confer upon the superintendent of public instruction, or any other state officer, the authority to invest the permanent school funds in these securities. Clearly, the framers of the constitution never intended that the duty of loaning or investing any portion of these funds should be performed by the state treasurer alone, without any directions from the board of which he is a member. The constitution has, in plain and unmistakable language, clothed the governor and four other state officers, as a board, with the power to invest the educational funds of the state, and the same instrument has designated the kinds of securities in which said funds shall be invested, and the legislature is powerless to change

the same. It follows, from the views above expressed, that the statute which we have had under consideration, in so far as it attempts to confer authority upon the state treasurer to invest the permanent school fund in state warrants, contravenes section 1, article 8, of the constitution, and is, therefore, inoperative.

In the brief of the attorney general it is said: "It was never intended that this board of commissioners should remain in constant and continuous session from January 1 to December 31 of each year in order to pass upon such warrants presented for payment at the office of the state treasurer, and make orders for the payment of the same from the permanent school fund." The construction we have placed upon the constitution will not have the effect outlined by the attorney general. It is the duty of the board charged with the management and control of the school funds to determine when, and in what sums, said funds shall be invested, as well as what securities of the kinds authorized by the fundamental law shall be purchased, and the price that shall be paid for the same. When the board has so determined and ordered, it may, by resolution entered upon the record of its proceedings, authorize and direct the state treasurer to pay out the money therefor. It may, prior to the purchase, examine the particular security offered for sale, if deemed desirable and expedient; but it is not indispensable that it should do so. The board may direct the treasurer, or any other member of the board, to do that. For the reasons stated we are all of the opinion that the writ should be denied, and it is so ordered.

WRIT DENIED.

ZIMMERMAN MANUFACTURING COMPANY V. ADDISON TOWER.

FILED MAY 2, 1894. No. 5269.

Failure to File Briefs: REVIEW. This cause having been submitted to the court upon the transcript and bill of exceptions, without any brief or oral argument from either party, the judgment is affirmed without an examination of the record. *Stabler v. Gund*, 35 Neb., 648, followed.

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

G. W. Norris, for plaintiff in error.

McClure & Anderson, contra.

NORVAL, C. J.

This was a suit upon a promissory note for $25. The defense set up in the answer was a breach of warranty in the sale of a windmill and pump, for which property said note was given as part of the purchase price. The cause was tried to the court below on the pleadings and evidence, which resulted in a judgment for the defendant.

The errors assigned in the petition in error are that the finding and judgment are contrary to the law and the evidence, and that the court erred in overruling plaintiff's motion for a new trial. The case was submitted to this court upon the transcript and bill of exceptions without any brief or oral argument for either party. In *Stabler v. Gund*, 35 Neb., 648, it was said: "This court is burdened with business, and counsel bringing cases here for review should file briefs of the points and authorities relied upon for a reversal of the judgment. A case that does not possess sufficient merit to demand the filing of briefs is of too little

importance to occupy the time of the court in its consideration, and in the future such cases, ordinarily, will be affirmed without an investigation of the questions presented." We adhere to that decision. It will control this case. The judgment of the district court is therefore

AFFIRMED.

MARY C. WOODS v. DANIEL P. WEST.

FILED MAY 2, 1894. No. 4181.

1. **Boundaries:** LOCATION OF GOVERNMENT CORNERS: EVIDENCE. Field notes and plats of the original government survey are competent evidence in ascertaining where monuments are located, in case a government corner is destroyed, or the point where it was originally placed cannot be found, or the location of the original corner is in dispute; but when it is shown by uncontradicted evidence that a section corner was located by the government surveyors at a certain point, such location must control, even though it is at a place different from that given in the field notes and plat.
2. ———: ———: REVIEW. Evidence examined and considered, and *held* to support the finding of the jury.

REHEARING of case reported in 37 Neb., 400.

L. W. Colby, J. P. Lindsay, and *Pemberton & Bush,* for plaintiff in error.

McClure & Anderson and *W. S. Morlan, contra.*

NORVAL, C. J.

An opinion was filed in this case at the January term, 1893, which is reported in 37 Neb., 400, 56 N. W. Rep., 30. A rehearing was afterwards, at the September term,

granted on the application of defendant in error, and the cause has been again submitted for our consideration.

Daniel P. West and Mary C. Woods own adjoining lands, and the pending litigation grew out of a dispute concerning the exact location of the division line. The sole ground of contention between the parties was, and is, as to the actual location of the original government corner common to sections 8, 9, 16, and 17, town 1, range 21 west, in Furnas county, for that would determine and set at rest the boundary line between them. The lands affected by this disputed corner have, at different times, been surveyed by Joseph S. Phœbus, A. Coppom, D. S. Hasty, and C. E. Worthington, respectively. The first two surveyors named located the original government corner at the same place, which is referred to by the witnesses as the "Phœbus corner." By the survey made by Mr. Hasty the disputed corner was located several rods north and east of the Phoebus corner. The corner thus located by Mr. Hasty is known as the "Hasty corner." By the Worthington survey the corner was located about a rod distant from the Hasty corner. If the place where the United States surveyors located the section corner in controversy was not at the point which is known as the "Phœbus corner," the plaintiff below had no cause of action. If, upon the other hand, what is known as the "Phœbus corner" is the real government corner, it is conceded by defendant below that plaintiff was entitled to recover, since at the commencement of the trial the parties stipulated "that, if the jury find the orginal government corner to be at the corner known as the 'Phœbus corner,' they should find for the plaintiff; if they find that the corner is at or near the corner known as the 'Hasty corner,' or 'Worthington corner,' they shall then find for the defendant." The jury, after hearing all the evidence, in accordance with the above stipulation, in addition to the returning of a general verdict for the plaintiff, made and returned a special finding as follows:

"We further find the government corner of sections 8, 9, 16, and 17, town 1, range 21, is the corner known as the 'Phœbus corner.'" On the former hearing, the judgment of the district court was reversed on the ground that the verdict was against the weight of the testimony. After a careful reading and consideration of the entire testimony in the bill of exceptions, we are satisfied that very important and material evidence in the record, and which we think should control the disposition of the case, was inadvertently overlooked; that the finding of the jury was correct, and the judgment below should be affirmed.

Through a long line of decisions this court has adhered to the doctrine that a finding of a trial court, or the verdict of a jury, upon a question of fact will not be disturbed, unless it shall appear to be clearly against the weight of the evidence. It is, therefore, pertinent here only to ascertain whether the judgment below is contrary to the clear weight of the evidence; and in determining this we shall be content with merely stating the tendency of the evidence and the conclusions which should be drawn therefrom. In the outset it should be stated that a reference to the former opinion in the case will disclose that it was based largely, if not wholly, upon the evidence of the surveyors, Phœbus, Hasty, and Worthington, a portion of the testimony of these witnesses being copied into the opinion. The bill of exceptions contains copies of the field notes and plats of the original government survey of the township in which the lands of plaintiff and defendant are situated. The witnesses Hasty and Worthington each located the disputed corner according to the government field notes, by running lines from recognized government corners. There is no room for doubt that if the Phœbus corner is the point at which the government surveyors located the corner of sections 8, 9, 16, and 17, the one in dispute, then so much of the government field notes as assume to state the length of the lines of the original survey is inaccurate and unrelia-

ble. Field notes and plats of the original survey are assumed to be correct until the contrary is shown, and they are competent evidence in ascertaining where monuments are located in case government corners are destroyed or their location are in dispute; but when it is shown by undisputed evidence that a section corner was located by the government surveyors at a distance different from that given in the field notes, they must give away. This is the doctrine of this court as laid down in *Johnson v. Preston*, 9 Neb., 474, where it was held that "the mounds established by the government surveyors will control course and distance whenever they can be identified. If they have been destroyed, or their existence is in dispute, their location may be determined by secondary evidence, and course and distance may be considered for the purpose of re-establishing them." This case was cited with approval by Commissioner RAGAN in *Thompson v. Harris*, 40 Neb., 230, decided at the present term.

If we have correctly read the testimony contained in the bill of exceptions, this is not a case where the government mounds have been obliterated or destroyed, and the location of the corner is to be ascertained by secondary evidence. The question to be determined is not where the government corner ought to have been located, but where it was in fact established. The record before us shows that the government survey of the township was made in July, 1871. Upon the trial, A. Coppom, a practical surveyor, testified that he found the corner in dispute, and he particularly described how it was marked, its location, and the condition it was in when he first saw it in 1871, shortly after the government survey; that he lived in the county before the government survey and for several years afterwards, and that he saw the corner more than once, and that there was no indication of another mound near. The corner was new when witness first saw it, and consisted of a mound, four pits, and a marked stake driven into the

mound. Mr. Hasty testified that he saw what is known as the "Phœbus corner" first in 1879, and that it had then a mound and four pits which looked like a government corner. Plaintiff below called as witnesses A. Galerd, John T. Brown, W. H. Vining, Harvey Carpenter, E. Hanson, and O. P. West, who were early settlers of the county, and who saw the original government corner shortly after the same was located, and since, and they each testified, with positiveness, that the monument made by the government surveyors for the section corner of sections 8, 9, 16, and 17 was at the point known as the "Phœbus corner," and that the same had been recognized by everyone as the true government corner from the time of the government survey in 1871 until the Hasty survey in 1879. One of the witnesses, Mr. Brown, testified that in 1873 he broke fire-guards and hedge-rows for another party between sections 16 and 17, with reference to what was known as the "Phœbus corner," and settlers of government land in that vicinity located their claims with reference to it. It is not contended, nor is there a line of testimony to show, that anything was found at the places where the Hasty and Worthington corners were established to indicate that there was ever a government corner located at either point, and no witness has stated that he ever observed a government corner marking sections 8, 9, 16, and 17, except at the place known as the "Phœbus corner." If the witnesses called by the plaintiff are truthful, and knew what they were talking about, and it is fair to presume that they did know whether that was a government corner or not, the jury were warranted in finding that the corner in controversy, as located by the government survey, was at the place contended for by plaintiff below. After a careful perusal of the testimony, we are convinced that the verdict is right, and the judgment of the court below is

AFFIRMED.

MICHAEL LAMB V. STATE OF NEBRASKA.

FILED MAY 2, 1894. No. 5733.

1. **The admission of incompetent testimony** to prove a fact is harmless error, where such fact is established by other sufficient uncontradicted evidence.
2. **To constitute a larceny of an estray,** converted to his own use by the finder, the felonious intent to misappropriate must have existed at the time of the taking of the estray into his possession.
3. **Where the felonious intent** is formed after the possession of the animal is acquired, the finder is not guilty of larceny, although he subsequently appropriates the property to his own use.
4. **In a prosecution for larceny of a stray animal** it is not necessary to the conviction of the accused that, at the time of taking the property, he should have known, or have had reason to believe, who was the owner thereof.
5. **Criminal Law:** ACCOMPLICE: EVIDENCE: INSTRUCTIONS. It is not error to refuse an instruction to the effect that a person accused of a crime cannot be convicted upon the uncorroborated testimony of an accomplice. The weight to be given the testimony of such a witness is for the jury to determine, after a careful examination of the same, in the light of all the other evidence in the case.
6. **A conviction may rest on the uncorroborated evidence** of an accomplice, when, considered with all the testimony, it satisfies the jury beyond a reasonable doubt of the guilt of the accused.

ERROR to the district court for Boone county. Tried below before HARRISON, J.

W. F. Critchfield and *M. B. Gearon*, for plaintiff in error.

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

NORVAL, C. J.

The plaintiff in error, Michael Lamb, was accused by information filed by the county attorney in the district court, of the crime of grand larceny, committed by feloniously stealing and carrying away "one black registered sow, with white points, with nick in left ear, named Black Queen, register number 13770 S," of the value of $75, of the personal property of one J. C. Hardman. The accused was convicted, and the value of the sow was fixed by the verdict at $25. On the trial the state was permitted to introduce in evidence, over the objection and exception of the defendant, a certificate of the registration of the pedigree of the sow in question, which certificate purported to be signed by Ira K. Alderman as secretary of the Standard Poland-China Record Association of Maryville, Missouri, and authenticated with the seal of said association. The admission in evidence of this paper or document is urged as a reason for a reversal of the case. It would have been better had the county attorney not inserted in the information the allegation as to the registration of the animal, as such averment was not essential to the validity of the information. Had it been omitted, the state would not have been called upon to prove the pedigree of the sow; but having alleged the same, it became a part of the description of the property, and therefore it was incumbent on the prosecution to establish it, by competent evidence, substantially as averred. That the certificate introduced was incompetent to prove the fact of registration, it requires no argument to show. We have been cited to no case which holds such a certificate is admissible, and we do not believe any such can be found. But the accused was not prejudiced by the ruling, since it had already been established by other proof that the sow was a thoroughbred Poland-China, and that she was a duly registered animal, and no testimony was introduced or offered by the defendant to dispute that fact.

The evidence objected to was merely cumulative upon a question upon which no additional proof was required, and the admission thereof was therefore harmless error.

Another reason urged for reversal is that the evidence fails to sustain the charge of larceny. The testimony on the part of the state tended to establish the following facts: The complaining witness, J. C. Hardman, and the defendant were neighbors, their farms being less than a mile apart. The sow in controversy was owned by Hardman, and had either escaped from his pasture, or had been let out. Afterwards, on a Sunday in September, 1891, the sow came to the premises of the defendant, and during his absence from home R. L. Nickerson and William Collins, employes of the defendant, and who resided with him at the time, drove her into the defendant's hog lot, where she remained until his return home that evening, when the defendant was informed what had been done. Although it was known to the defendant, and the other parties, that the animal belonged to Hardman, he was not informed that she was in defendant's possession, but was kept until Thursday night of the same week, when about 11 o'clock the defendant Lamb, Nickerson, and Collins loaded her into defendant's wagon, and with his team she was taken by Collins and Nickerson to the farm owned by Collins' father, some four or five miles distant, where she was left until she was subsequently discovered and claimed by her owner. It further appeared in evidence that the sow was taken to the Collins farm to prevent the owner from finding her, and that it was agreed between Lamb, Collins, and Nickerson, prior to the removal of the animal, that all should share in the proceeds whenever the same should be sold. The facts, of which the above is only a brief summary, were testified to positively by both Collins and Nickerson. There is in the bill of exceptions testimony of other witnesses for the state tending to connect the accused with the transaction. While it is also true that the

defendant, when upon the witness stand, denied having anything to do with the loading of the sow and her removal to the Collins' farm, and he is to some extent corroborated by the testimony of one or more members of his family, we are convinced that the jury were warranted in returning the verdict they did. If the testimony of the witnesses for the state is true, and of which fact the jurors, who heard the evidence and saw the witnesses, were the sole judges, it establishes a conversion of the animal by the plaintiff in error. It is contended that there is no evidence in the record tending to show an intent on the part of the accused to convert the property at the time it came into his possession, but on the other hand that the testimony in behalf of the state is to the effect that he had no such intention until long after he was advised that the sow was in his possession. If the record so disclosed, we concede that the contention would not be without merit, since the animal, when it came into possession of the plaintiff in error, was an estray. In order to constitute larceny of an estray, converted by the finder to his own use, the felonious intent to misappropriate the same must have existed at the time the estray came into his possession. If the felonious intent is formed after possession has been acquired, the subsequent misappropriation of the estray will not amount to a larceny. (*Commonwealth v. Mason*, 105 Mass., 163; *Starck v. State*, 63 Ind., 285; *Griggs v. State*, 58 Ala., 425.)

There is testimony in the bill of exceptions from which the inference can be drawn that the intention to misappropriate the sow existed at the time the plaintiff in error first ascertained that she was on his premises. The witness Nickerson testified that he had a conversation with Lamb the day the animal was turned into his enclosure. The witness details the conversation thus: "When he [defendant] came home—I don't know just how it came up, but I told him that there was one of Mr. Hardman's sows in the pen. He wanted to know how it came there, and I told

him it came there and we turned it in, and I told him what I told the women, that if Hardman came there inquiring for a hog to tell him there was a sow in the pen; and he asked me what I done that for, and I don't know what answer I made. He says then, 'I don't believe we had better let him have it back, had we?' I says, 'I don't know.' He says, 'I guess we hadn't;' he says, 'the son of a bitch can get along without it,' something to that effect. That was all that was said at that time." This testimony, if true, was sufficient to justify the finding that Lamb intended to convert the animal to his own use when he first learned that it was upon his premises. In argument it is said the record is silent as to whether plaintiff in error ever saw the sow until it is claimed he assisted in loading her in the wagon on Thursday night. It is quite immaterial whether he had seen the animal or not, since she was at all times in his possession, and under his control. Conceding that she was not in the possession of plaintiff in error from the time she was turned into his lot until Thursday night, she was in his possession when he helped to load her, and by that act his intention to misappropriate was made manifest. The evidence supports the verdict.

Objections are made to the ninth and tenth paragraphs of the instructions of the court, which read as follows:

"9. You are instructed that if you believe from the evidence beyond a reasonable doubt that the defendant took the animal mentioned in the information into his possession, or found it running with his stock, and at the time he so took it, or found it, knew it was not his own, and that he then and there intended to steal and convert it to his own use, and to deprive the owner of his property, whoever he might be, and at the time took possession of the animal and held such possession with such intention, this would amount to the crime of larceny, provided you find all other material allegations of the information proved by the evidence beyond a reasonable doubt.

"10. You are instructed that if from the evidence in this case that the animal mentioned in the information was an estray, and that the defendant took it into his possession, or found it running with his stock, and took care of and fed it with his own stock, and that when he first obtained possession of it or discovered it with his stock he did not intend to steal it or feloniously convert it to his own use, then he would not be guilty of larceny, although you may find from the evidence beyond a reasonable doubt that he afterwards converted it to his own use with intent to deprive the owner of it."

It is insisted that these instructions are inapplicable to the evidence, and therefore were misleading. This objection is not well taken. They were based upon the testimony in the case. The further objection is made to the ninth instruction, that it omitted to inform the jury that the plaintiff in error could not be convicted, unless, at the time of the conversion, he knew, or had the means of ascertaining, who was the owner of the property, and the case of the *State v. Boyd*, 32 N. W. Rep. [Minn.], 780, is cited by counsel in support of the proposition. That was a prosecution for larceny against the finder of lost property, and the court held that "it is not necessary that the finder should know who the owner is, but he must have such means of inquiry on that subject as to give him reason to believe that, with reasonable effort on his part, the owner will be found." That decision was based upon a statute of Minnesota, which makes a person who finds lost property, "under circumstances which give him knowledge or means of inquiry as to the true owner," guilty of larceny, if the finder appropriates such property to his own use, or to the use of another person who is not entitled thereto, without first having made every reasonable effort to find the owner and restore the property to him. In this state we have no such statute, hence the case cited is not an authority upon the question under consideration. Whether

plaintiff in error knew who was the owner of the property was wholly immaterial. As was stated by Napon, J., in *State v. Martin*, 28 Mo., 537: "It is with no propriety, either in view of custom or statutory law, that animals can be called lost goods here, simply because they are outside of the owner's enclosures and the owner does not know where they are. Such animals are not lost in the proper sense of the term, nor can the person, who comes across them and feloniously appropriates them to his own use, with any propriety be called the finder, as he might be if he, with the same felonious intent, picked up a purse upon the highway. A person does not lose the possession of his horses or cattle here because they happen to be outside of his enclosures, and he may not be able at any given time to lay his hands upon them. They are still in his possession, as much as though they were in his stable or pasture. Nor can it make any difference that they have gone five or ten miles from their ordinary range. The owner is as entirely ignorant of their precise position in the former as in the latter case; and the fact that they are branded or not branded with the owner's name is perfectly immaterial. It is sufficient for the person who comes across them to know that they are not his property; and if he drives them off and converts them feloniously to his own use, he is as much guilty of larceny when he is ignorant of their true owner, and their owner is ignorant of where they are, as he would be if both he and the owner had full knowledge on both these points." To the same purport is *Brooks v. State*, 35 O. St., 46; *Baker v. State*, 29 O. St., 184. In the last case the rule is well stated in the syllabus thus: "When a person finds goods that have been actually lost, and takes possession with intent to appropriate them to his own use, really believing at the time, or having good ground to believe, that the owner can be found, it is larceny." The ninth instruction stated the correct rule upon the subject, was applicable to the testimony, and therefore the trial judge did not err in giving it.

Complaint is made because the court refused to give the following instruction requested by the plaintiff in error:

"1. You are instructed that while the testimony of witnesses who claim to be accomplices with the defendant in the commission of the offense charged is received in evidence, in determining the weight to be given to such testimony, the jury should use great caution, and unless the testimony of Robert Nickerson and William Collins is corroborated by other evidence in some material point in issue, it would be dangerous and unsafe to convict upon such evidence, and you are at liberty to disregard it entirely."

This request to charge was properly refused. A person may be convicted of a crime upon the unsupported testimony of an accomplice if such testimony is true. The rule as to accomplices as witnesses was accurately stated by the twelfth instruction given by the court on its own motion, in the following language: "While it is a rule of law that a person accused of crime may be convicted upon the testimony of an accomplice or accomplices, still, a jury should always act upon such testimony with great care and caution, and subject it to careful examination, in the light of all the other evidence in the case, and the jury ought not to convict upon such testimony alone, unless, after a careful examination of such testimony, they are satisfied beyond a reasonable doubt, of its truth, and that they can safely rely upon it." This instruction was doubtless taken from Sackett's Instructions to Juries, and stated the correct rule. (*Olive v. State*, 11 Neb., 3.)

We are unable to discover any prejudicial error in the record, and the judgment is

AFFIRMED.

HARRISON, J., having presided in the court below, took no part in the above decision.

WILLIAM HALL v. STATE OF NEBRASKA.

FILED MAY 2, 1894. NO. 6774.

1. **An information for assault with intent to commit rape** need not allege either the age of the person upon whom the assault was made, nor the age of the defendant, where it charges that the act was committed forcibly and against the will of the prosecutrix.
2. **Assault With Intent to Commit Rape: INFORMATION.** In case it is not averred the act was done with force and against the consent of the prosecutrix, it is essential the information disclose that the person upon whom the offense was committed, at the time of the assault, was under fifteen years of age, and that the accused was of the age of eighteen years or over.
3. **Allegations in an information** which are immaterial and unnecessary may be treated as surplusage, and be entirely rejected.
4. ——: INSTRUCTIONS. In a prosecution for an assault with intent to commit rape, under an information which charges an assault by force and against the will of the female by a male under eighteen years, it is error to instruct the jury that the defendant is guilty of an assault with intent to commit rape, whether the attempted intercourse was with or without the consent of the prosecutrix and whether any force was used or not.

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

E. W. Thomas and *G. W. Cornell*, for plaintiff in error.

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

NORVAL, C. J.

Plaintiff in error was convicted of the crime of assault with intent to commit a rape upon one Maggie Holthus, a girl under the age of fifteen years. The prisoner presented a motion for a new trial, which was overruled. Thereupon

he filed a motion in arrest of judgment, on the ground that the facts stated in the information upon which he was tried do not constitute a crime, which was likewise overruled.

It is insisted, in the first place, that the trial court erred in refusing to sustain the motion in arrest of judgment. The information, under which the conviction was had, omitting the verification, reads as follows:

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

"Of the October term of the district court of Nemaha county, in the year 1893, A. J. Burnham, prosecuting attorney for said county of Nemaha, in the name and by the authority and on behalf of the state of Nebraska, information makes that William Hall, then and there being a male person and over the age of seventeen years, in the said county, and on the 14th day of September, A. D. 1893, in and upon one Maggie Holthus, a female under the age of fifteen years, did then and there violently, unlawfully, and feloniously beat and ill treat, with intent to injure her, the said Maggie Holthus, forcibly and against her will feloniously to ravish and carnally know; contrary to the form of the statute in such cases made and provided and against the peace and dignity of the state of Nebraska.

"A. J. BURNHAM,
"*County Attorney.*"

The information was framed under the fourteenth section of the Criminal Code, which enacts that "if any person should assault another with intent to commit a murder, rape, or robbery upon the person so assaulted, every person so offending shall be imprisoned in the penitentiary not more than fifteen nor less than two years." Section 12 of the same Code declares that "if any person shall have carnal knowledge of any other woman, or female child, than his daughter or sister, as aforesaid, forcibly and against her will; or if any male person, of the age of eighteen years or upwards,

shall carnally know or abuse any female child under the age of fifteen years, with her consent, every such person so offending shall be deemed guilty of a rape, and shall be imprisoned in the penitentiary not more than twenty nor less than three years." It is urged that the information is insufficient, because it fails to charge that the person committing the offense was of the age of eighteen years or upwards, but alleges that he was over seventeen years old. It will be observed that the section last above quoted enumerates two classes of facts, either of which constitutes a rape. By the first clause of the section it is a rape for a person to unlawfully have carnal knowledge of a woman or female child other than his daughter or sister, forcibly and against her will. By the last clause it is made a rape for a male person of the age of eighteen years or upwards to unlawfully have carnal knowledge of a female child under fifteen years of age, with her consent. An information for the crime of rape under the second clause of the section must charge that the person upon whom the offense was committed as being a female child under fifteen years of age, and the accused as being a male person of the age of eighteen years or over; but where the unlawful intercourse is had forcibly and against the will of the complainant, the prosecution for the offense should be brought under the first part, or clause, of section 12 copied above, and in which case it is unnecessary that the information should disclose the age of the accused, or that of the prosecutrix; and the same rule obtains in framing an information for an assault with intent to commit rape. The facts constituting the attempt must be so stated in the information as to show that the crime of rape would have been committed had the purpose of the assaulting party been accomplished. Tested by these rules, it is obvious that the information is sufficient, even though it does not describe the accused as being over the age of eighteen years. The charge is not for attempting to have sexual intercourse with the prosecutrix with her consent,

but for unlawfully attempting so to do, "forcibly and against her will;" hence the age of the prosecutrix, as well as that of the accused, it was wholly unnecessary to allege, and that portion of the information describing the ages of the parties may be regarded as surplusage. The rule is that any allegation in an information which is not essential to constitute the offense, and which might have been omitted without affecting the charge against the accused, and without detriment to the information, may be treated as surplusage, and may be entirely rejected. (*Bowles v. State*, 7 O., 599; *Coleman v. State*, 2 Tex. Ct. App., 512; *Mayo v. State*, 7 Tex. Ct. App., 342.) The information at bar, after eliminating surplusage, so avers the constituents of the offense as to inform the defendant of the charge against him, and is therefore sufficient in substance. The motion in arrest of judgment was properly overruled.

The undisputed evidence shows that the accused was over thirty-one years old and that the complaining witness was under fifteen years of age. The state also introduced upon the trial, evidence tending to establish the material averments in the information. The court, at the request of the county attorney, gave this instruction:

"2. The court instructs the jury that by the laws of the state a female child under the age of fifteen years is incapable of giving legal consent to an act of sexual intercourse, so that every act of carnal connection with such a child will constitute the crime of rape, whether with or without the consent of such child; and in this case, if you believe from the evidence, beyond a reasonable doubt, that the defendant assaulted the said Maggie Holthus with intent to have sexual intercourse with her, as charged in the information, whether with or without her consent, and at the time she was under the age of fifteen years, then the defendant is guilty of an assault with the intent to commit a rape, and the jury should so find."

The court, on its own motion, gave the following instruction:

"2. You are instructed that by the laws of this state a female child under the age of fifteen years is incapable of giving legal consent to an act of sexual intercourse, so that every act of carnal connection will constitute the crime of rape, whether with or without the consent of such child; and in this case, if you believe from the evidence, beyond a reasonable doubt, that the defendant assaulted the prosecutrix with intent to commit rape, and that at the time she was under the age of fifteen years, then the defendant is guilty of an assault with intent to commit rape, irrespective of the question of force, and the jury should so find."

Each of these instructions were at the time excepted to, and their giving is assigned as error.

In *State v. Wright*, 25 Neb., 38, it was held that "the act of 1887 fixes the age of consent for a female child at fifteen years, and in effect declares that she is incapable of consenting to the act of sexual intercourse, and that such intercourse with her, when under that age, by a person over eighteen years of age, even with her consent, will constitute rape."

The first two points of the syllabus in *Davis v. State*, 31 Neb., 247, are as follows:

"1. An assault by a male person of the age of eighteen years or upwards, with intent to carnally know a female child under the age of fifteen years, is punishable in this state as an assault with intent to commit a rape.

"2. In a prosecution for an assault upon the person of a girl under the statutory age of consent, with intent to commit a rape, it is not necessary to allege and prove that the acts were done against her will. Whether she consented or resisted is immaterial."

It follows from the decisions from which the foregoing excerpts are taken that no force on the part of the defendant, or resistance on the part of the female, is essential to constitute the crime of rape, or of an assault with intent to commit that offense, when it is alleged and proved that

the female is under the statutory age of consent and the defendant is at least eighteen years old. In drafting the instructions excepted to the averment in the information as to the age of the accused and that force was used must have been overlooked. Had it charged that he was of the age of eighteen years or upwards, the instructions would still have been objectionable, inasmuch as they omitted a material element of the offense, namely, that the accused must be at least eighteen years old. But, as we have seen, the information, after eliminating surplusage, charges an attempt to commit rape forcibly and against the will of the girl; hence the state, in order to entitle it to a conviction, was required to establish upon the trial by competent evidence, beyond a reasonable doubt, that the defendant assaulted the prosecutrix with intent, forcibly and against her will, to ravish her. Both instructions were clearly wrong and prejudicial to the prisoner, when applied to the offense charged in the information, since they, in effect, told the jury that they might find him guilty whether the assault was committed with or without the consent of the prosecutrix, or whether any force was used or not. For errors in giving the instructions the judgment below is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

JACOB BIGLER, EXECUTOR, v. JAMES A. BAKER.

FILED MAY 2, 1894. No. 5617.

1. **Judgment by Default: ORDER VACATING: REVIEW.** The vacation of a judgment by default during the term at which it is rendered is largely within the discretion of the trial court, and presents no grounds for reversal unless there appears to have been a clear abuse of discretion.

2. ———: REVIEW OF ORDER ON MOTION TO VACATE. This court will require a stronger showing of abuse of discretion where the motion to vacate is allowed than in cases where a trial on the merits is denied.

3. **Contracts**: MUTUALITY: SPECIFIC PERFORMANCE. Want of mutuality is no defense, even in an action for specific performance, where the party not bound thereby has performed all of the conditions of the contract and brought himself clearly within its terms.

4. **Ejectment**: PLAINTIFF'S TITLE. The plaintiff, in an action of ejectment, must rely upon the strength of his own title and not upon the weakness of that shown by the adversary.

5. **Statute of Frauds**: VERBAL CONTRACTS TO PURCHASE LAND: LEASE: POSSESSION. Continued possession by a tenant is not such a part performance of a verbal contract for the purchase of land as to take the case out of the statute of frauds. Possession, to have such an effect, must be clearly shown to refer to and result from the contract and not the lease.

6. **Principal and Agent**: RATIFICATION. An averment that an agent was duly authorized is sustained by proof of subsequent ratification by his principal.

7. **Statute of Frauds**: DEEDS: PRINCIPAL AND AGENT. The deed of an agent, executed in the presence and under the personal direction of his principal, is not within our statute of frauds, and is not void for the reason that the execution thereof was not authorized in writing.

8. **Ejectment**: IMPROVEMENTS: DEFAULT IN PAYMENTS: VENDOR AND VENDEE. When the vendor in a parol agreement for the sale of land puts the purchaser in possession, and the latter, while holding under such agreement, makes lasting and valuable improvements upon the premises, such facts amount to a performance of the contract by him, and are a sufficient defense in an action of ejectment by the vendor, notwithstanding default of payment for the land.

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

The facts are stated in the opinion.

Pound & Burr, for plaintiff in error:

To entitle a defendant to have default and judgment set

aside he must furnish not only satisfactory reasons in excuse for his default, but he must accompany his motion by his proposed answer, duly verified, so that the court may see whether he has a defense to the action. (*Spencer v. Thistle*, 13 Neb., 227; *Hale v. Bender*, 13 Neb., 66; *Mulhollan v. Scoggin*, 8 Neb., 202.)

When one writes the name of another to an instrument in his presence and at his request, the act of writing is regarded as the party's personal act as much as if he had held the pen and signed the instrument with his own hand. (*Wood v. Goodridge*, 6 Cush. [Mass.], 120; *Gardner v. Gardner*, 5 Cush. [Mass.], 483; *Jansen v. McCahill*, 22 Cal., 565; Story, Agency, sec. 51; *Ball v. Dunsterville*, 4 T. R. [Eng.], 313.)

The contract is void for want of mutuality. (Pomeroy, Contracts, sec. 162; Fry, Specific Performance, 286; *Jacobs v. Peterborough & S. R. Co.*, 8 Cush. [Mass.], 224; *Maynard v. Brown*, 41 Mich, 298; *Irwin v. Bailehy*, 72 Ala., 467; *Sturgis v. Galindo*, 59 Cal., 28; *Bodine v. Glading*, 21 Pa. St., 53; *Ballou v. March*, 133 Pa. St., 64.)

The mere fact that a person has made a contract for the purchase of land does not entitle him to enter upon and hold it, and a purchaser's possession so obtained, in the absence of some agreement permitting him to enter, would be unauthorized and unlawful. (*Williams v. Forbes*, 47 Ill., 148; *Dean v. Comstock*, 32 Ill., 173; *Burnett v. Caldwell*, 9 Wall. [U. S.], 290; *Carlisle v. Breman*, 67 Ind., 12.)

If the defendant was in possession under a lease at the time the contract of sale was made, his possession after that time must be referred to the original tenancy and not to the contract of sale. (*Mahana v. Blunt*, 20 Ia, 142; *Rosenthal v. Freeburger*, 26 Md., 75; *Wills v. Stradling*, 3 Ves. [Eng.], 378; *Jacobs v. Peterborough & S. R. Co.*, 8 Cush. [Mass.], 224.)

Ratification and estoppel, to be available, must be pleaded. (*Cravens v. Gillilan*, 73 Mo., 529; *Noble v. Blount*,

77 Mo., 235; *Bray v. Marshall*, 75 Mo., 327; *Burlington & M. R. R. Co. v. Harris*, 8 Neb., 140; *Maxwell v. Longenecker*, 89 Ill., 102; *Anderson v. Hubbell*, 93 Ind., 570; *Robbins v. Magee*, 76 Ind., 381; *Sims v. City of Frankfort*, 79 Ind., 452; *Ragan v. Chenault*, 78 Ky., 545; *Pollard v. Gibbs*, 55 Ga., 45; *Wilson v. Butler*, 33 Eng. Com. Law, 956.)

Holmes, Cornish & Lamb and *R. J. Greene, contra:*

The court was not in error in setting aside default and giving defendant permission to answer. (*Mulhollan v. Scoggin*, 8 Neb., 202.)

Under a general denial in the answer the defendant may prove any fact which negatives the plaintiff's right to the possession. (*Dale v. Hunneman*, 12 Neb., 221; *Rowe v. Beckett*, 30 Ind., 160; *Stehman v. Crull*, 26 Ind., 436; *Wicks v. Smith*, 18 Kan., 508; *Warren v. Crew*, 22 Ia., 315; *Sparrow v. Rhoades*, 9 Am. St. Rep. [Cal.], 197; *Kimball v. Gearhart*, 12 Cal., 50; *Bell v. Brown*, 22 Cal., 672; *Wilson v. Cleaveland*, 30 Cal., 201; *Bell v. Bed Rock Tunnel & Mining Co.*, 36 Cal., 219; *Semple v. Cook*, 50 Cal., 29; *Crary v. Goodman*, 12 N. Y., 266; *Traphagen v. Traphagen*, 40 Barb. [N. Y.], 537; *Tibeau v. Tibeau*, 19 Mo., 78; *Hayden v. Stewart*, 27 Mo., 286; *Cadiz v. Majors*, 33 Cal., 288; *Warren v. Crew*, 22 Ia., 315.)

The contract was not void for want of mutuality. (Pomeroy, Contracts, secs. 164, 165; *Walker v. Eastern Counties R. Co.*, 6 Hare [Eng. Ch.], 594*; *Dalzell v. Crawford*, 1 Pa. L. J. Rep., 155.)

When the contract makes no mention of the possession and the land is vacant, and the vendee has paid the entire consideration and fully performed on his part, and the delivery of the deed is all that remains to be done, there is an implied agreement or license that the vendee may at once take possession and have the use of the land. (*Sherman v. Savery*, 2 McCrary [U. S. C. C.], 118; *Miller v.*

Ball, 64 N. Y., 293; *Suffern v. Townsend*, 9 Johns. [N. Y.], 35.)

Tender is equivalent to payment. (*Gaven v. Hagen*, 15 Cal., 208; *Henry v. Raiman*, 25 Pa. St., 354.)

In ejectment by the vendor to recover the land the vendee can defend or protect his possession by showing a performance on his part, or that he is not in default. (*Pierce v. Tuttle*, 53 Barb. [N. Y.], 155.)

Mr. C. C. Burr, now being the owner of the land, is, by the law of estoppel, precluded from asserting title superior to that of the defendant in error. (*Griswold v. Haven*, 25 N. Y., 595; *Smith v. McNeal*, 68 Pa. St., 164; *McKelvy v. Truby*, 4 Watts & Serg. [Pa.], 323; *Sherrill v. Sherrill*, 73 N. Car., 8.)

POST, J.

This was an action by James E. Jones in the district court of Lancaster county to recover possession of a part of the northwest quarter of section No. 14, township No. 10, range No. 6, in said county, which is fully described in the pleadings, but which does not call for a more specific description in this opinion. At the September, 1890, term of the district court the defendant in error, who was the defendant below, being in default, judgment was entered in favor of the plaintiff in accordance with the prayer of his petition. Three days later, and presumably at the same term, the defendant filed a motion, supported by affidavit, for the vacation of said judgment, which motion was, at the November, 1890, term, sustained and leave given the defendant to answer, which he did four days later, to-wit, on the 15th day of December. At the September, 1891, term a trial was had, resulting in a finding and judgment for the plaintiff, which was, on the motion of the defendant, set aside and the cause continued. At the February, 1892, term the defendant, by leave of court, filed an amended answer, to which a reply was in due time filed

and a trial had, resulting in a verdict and judgment for the defendant, which we are now asked to review upon petition in error. Subsequent to the filing of the petition in error, Jones died, whereupon the action was revived in the name of the plaintiff in error, his executor.

The errors alleged are: 1. The court erred in vacating the judgment by default. In this connection it is argued that the grounds stated in the affidavit accompanying the motion were not sufficient to excuse the default, and that the motion should have been accompanied by the proposed answer. The affidavit referred to is as follows:

"R. D. Stearns, being first duly sworn, on oath says that he is attorney for said defendant in the above entitled cause, and has been for the last two years or more; that at the commencement of the September, A. D. 1890, term of the district court affiant spoke to L. C. Burr, one of the attorneys of record in the above cause, and informed him, said Burr, that he, affiant, was attorney for defendant, and told him, said Burr, that he, affiant, was very busy with the criminal docket, and asked said Burr if it made any difference if said answer was not filed for a while, and said Burr said, 'No, it didn't make any difference;' that he would take no advantage of it, as the case could not be tried anyhow this term; that within a day or so affiant prepared an answer to plaintiff's petition, except the attaching of a copy of a contract, which defendant desired to make a part of his answer, and which said contract had been mislaid and defendant was unable to find at that time, and the filing of the answer was thereby delayed. Affiant says he was entirely misled by Attorney L. C. Burr in the matter. He had no idea the case could possibly be reached, a jury case, No. 309 on the docket. This said case is one in ejectment, affecting the title to valuable land which defendant claims to be entitled to; that defendant has been a resident of this land some four or five years; has put valuable and lasting improvements upon said land, such as dwelling house,

farm corrals, windmills, fences, etc.; that he has a good and valid defense to the claims made by plaintiff in his petition. In any event defendant is an occupying claimant and is entitled to compensation for his valuable and permanent improvements placed upon said lands. Wherefore defendant asks to have said judgment opened up and defendant allowed to come in and defend, and defendant now asks leave to file his answer setting out his defense.

"R. D. STEARNS.

"Subscribed in my presence and sworn to before me this 27th day of October, 1890. J. D. HARRIS,

"*Deputy Clerk District Court.*"

It is not claimed for this affidavit that the showing therein is in all respects such as good practice requires. For instance, the defense must be inferred from the conclusions of the affiant rather than the facts alleged. But the vacation during the same term, of judgments by default, is so largely a matter of discretion for the trial court that this court will decline to interfere unless there appears to have been a clear abuse of discretion. (*Mulhollan v. Scoggin*, 8 Neb., 202.) It may be said also that good practice requires the motion to be accompanied by the proposed answer in order that it may be determined whether there is a sufficient defense to the action. When, however, the court has resolved that question in favor of the moving party upon the evidence in the motion and affidavits and an answer subsequently filed and trial had, a stronger showing of abuse of discretion will be required than where a trial on the merits has been denied. (*Westphal v. Clark*, 46 Ia., 262.)

2. It is argued that the court erred in admitting in evidence the written agreement upon which the defense rests. In this connection it is deemed proper to set out the material allegations of the answer, which after, a general denial, are as follows:

"Further answering, this defendant alleges that he is in

possession of the premises described in plaintiff's petition, and has been since the 25th day of May, 1886, by virtue of a certain written agreement given by the plaintiff through his authorized agent, C. C. Burr, which arrangement was in words and figures as follows, to-wit:

"'LAW OFFICE OF CARLOS C. BURR,
"'LINCOLN, NEBRASKA, May 25, 1886.

"'In consideration that James A. Baker shall pay me $100 on June 1, 1887, execute a mortgage and notes to me aggregating $1,900, as follows:

$200, due June 1, 1888,
200, " " 1889,
200, " " 1890,
200, " " 1891,
300, " " 1892,
400, " " 1893,
400, " " 1894,

with interest at six per cent per annum from June 1, 1887, I agree to convey to him by quitclaim deed the undivided ($\frac{2}{3}$ of S. $\frac{1}{2}$ N. W. $\frac{1}{4}$) two-thirds of the south half of the northwest quarter 14-10-6. JAS. E. JONES,

"'By C. C. BURR, *Agt.*'

which said agreement was duly filed for record in the office of the county clerk for Lancaster county, Nebraska, on the 25th day of May, 1886, being same land described in petition, interest having been apportioned in partition.

"Defendant further alleges that since entering in and upon the said described premises by virtue of said contract of sale as aforesaid, he has made lasting and permanent and valuable improvements on said premises of the value of $10,000. Defendant further alleges that he has performed all of the terms and conditions of said written contract upon his part to be performed, and upon the first day of June, 1887, this defendant tendered to C. C. Burr, the agent as aforesaid, $100, lawful money of the United States, and at the same time made known his willingness and in-

tentions to execute the notes and mortgage as provided in said written agreement; and that afterwards and from time to time the said defendant has made tender of all the money due and owing upon said written agreement to the said plaintiff, which tender has been refused, and the said defendant now brings into court the full sum of money due upon said contract, together with all accrued interest thereon, and makes tender for the same in open court; and defendant avers that at all times since the making of said memorandum or agreement this defendant has been ready and willing to pay the several sums of money as they became due, from time to time, and has made tender of the same, either to the plaintiff or to his agent."

The ground of the objection to the agreement is that according to the testimony of the defendant it was made with the plaintiff and not with Burr as agent, and that the only connection of the latter with the transaction was to reduce the agreement to writing in accordance with the dictation of the plaintiff. We will not controvert the proposition that an allegation of a contract through an agent is not sustained by proof of a contract in person by the party sought to be charged. It is asserted by the plaintiff, and readily conceded, that where an instrument is executed in the name of the maker in his presence and at his request, it will be regarded as the personal act of the latter; but that is a rule for the benefit of the adverse party, and has never, so far as we are informed, been given the application here suggested. The defendant might have alleged a personal agreement, but having elected to treat Mr. Burr as agent of the plaintiff the latter will not be heard to complain, since the agreement set out is the identical one tendered to and accepted by the defendant.

3. It is contended that the agreement relied upon is void for want of mutuality. It is true there is found therein no express agreement by the defendant to purchase the land in controversy; but it is charged in the answer, in

substance, that the defendant went into possession under said contract on the day of its execution, that he has since said date made lasting and valuable improvements thereon, and that he has performed all of the conditions imposed upon him by the terms of said contract. With regard to the degree of mutuality required in a contract in order to warrant its enforcement at the hands of a court of equity, the authorities are, unfortunately, not harmonious. There are cases in this country which hold that unilateral agreements, like the one under consideration, are mere wagers, and will not be enforced, either at law or in courts of equity (see *Maynard v. Brown*, 41 Mich., 298); but the true rule is believed to be that want of mutuality in such case is not a valid objection, even to decree of specific performance, where the moving party has performed all of the conditions imposed upon him, and brought himself clearly within the terms of the agreement. (See *Van Doren v. Robinson*, 16 N. J. Eq., 259; *Green v. Richards*, 23 N. J. Eq., 32; *Reynolds v. O'Neil*, 26 N. J. Eq., 223; *Johnston v. Trippe*, 33 Fed. Rep., 530; *Schields v. Horbach*, 30 Neb., 536; Fry, Specific Performance, 291.) Perhaps the leading case in this country is *Clason v. Bailey*, 14 Johns. [N. Y.], 484, where Chancellor Kent was at first disposed to follow Lord Redesdale in *Lawrenson v. Butler*, 1 Sch. & Lef. [Irish Ch.], 13; but upon a careful review of the authorities he concluded that the contrary doctrine was firmly established in the English courts. Our conclusion is that the answer alleges such an acceptance of the agreement and performance of its conditions as to bring this case clearly within the rule stated.

4. It is next argued that the evidence does not prove that defendant went into possession under the contract of sale. It is conceded that he was in possession as tenant of Jones at the date of the contract. It is a well established rule that where one is in possession as tenant at the time he contracts for the purchase of the demised premises, his

subsequent possession will be presumed to be under the lease, unless it be clearly shown to result from the subsequent agreement. (1 Sugden, Vendors & Purchasers, 162, 163; *Johnston v. Glancy*, 4 Blackf. [Ind.], 94; *Mahana v. Blunt*, 20 Ia., 142.) The trial court, in several paragraphs, instructed the jury, in substance, that in order to find for the defendant they must be satisfied that he entered into possession under the contract of sale. The court might with propriety have added that the defendant's subsequent possession was presumed to be under his lease, especially since it, by its terms, did not expire until some months thereafter; but as no such instruction was tendered by the plaintiff, the inference is that he was satisfied with that feature of the charge. The jury evidently found that the defendant held under the contract and not the lease; and with that finding we cannot interfere, for reasons which will be stated in the consideration of the application of the statute of frauds to the contract in question.

5. Plaintiff offered to prove by a witness called to testify in rebuttal that the defendant had sold the contract relied on to Mr. Imhoff, and had in pursuance of said sale placed it in the hands of the witness; that Imhoff had paid to plaintiff $200, and agreed to pay the further sum of $800 therefor, and that plaintiff had "surreptitiously obtained said contract" from the witness while the latter was holding it for Imhoff. This evidence was excluded on the objection of the defendant, which ruling is assigned as error. The plaintiff in ejectment must recover on the strength of his own title, and cannot rely upon the weakness of that shown by his adversary. (*Butler v. Davis*, 5 Neb., 521.) If the contract had been so far executed by the defendant as to entitle him to possession thereunder, it would not avail the plaintiff to prove that a stranger had subsequently acquired rights which would entitle the latter to possession as against him. The trial court therefore did not err in excluding the evidence offered.

6. Several paragraphs of the instructions are assailed on the ground that the question of ratification by Jones of Burr's act in executing the contract was thereby submitted to the jury, whereas it was not presented by the pleadings. In other words, it is contended that ratification by a principal of the unauthorized act of his agent must be specially pleaded by the party asserting it. The authorities cited in support of this proposition are all, we believe, cases involving the question of estoppel and therefore not in point, while it has been held that an averment in a pleading that an agent was duly authorized by his principal is sustained by proof of subsequent ratification. (*Hoyt v. Thompson*, 19 N. Y., 207; *Hubbard v. Town of Williamstown*, 61 Wis., 400.)

7. The question of Burr's authority to execute the contract mentioned was presented both during the trial and by requests to instruct. It is provided by section 3 of our statute of frauds that "no estate or interest in land, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, or surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same;" and by section 25 it is provided that "every instrument required by any of the provisions of this chapter to be subscribed by any party may be subscribed by his agent, thereunto authorized by writing." These provisions were construed together in *Morgan v. Bergen*, 3 Neb., 209, where it was held that a written agreement executed in behalf of his principal by an agent did not satisfy the requirement of the statute, but that the authority of the latter must also be in writing. To this, which is without doubt the general rule, there are recognized exceptions, some of which wil now be noticed. In *McMurtry v. Brown*, 6 Neb., 375, it is said: "The character of a power under which an agent

may execute a deed for another depends upon the presence or absence of the principal. If it is signed in his presence by his direction, an oral request to do the act is all that is required." And the rule as there stated is sustained by the decided weight of authority. (See *Gardner v. Gardner*, 5 Cush. [Mass.], 483; *Mutual Benefit Life Ins. Co. v. Brown*, 30 N. J. Eq., 193; Story, Agency, sec. 51; 2 Greenleaf, Evidence, 295.) According to the testimony of the defendant the agreement under consideration was prepared and signed in the presence of Jones and in accordance with his personal direction. The question of authority was therefore properly submitted to the jury. Another exception to the general rule is where the vendor in a parol agreement for the sale of land puts the purchaser in possession, and the latter, while holding under such agreement, and induced thereby, makes valuable and lasting improvements upon the premises. In such case the purchaser may, upon tendering the consideration price, demand a specific performance of the contract, or may rely upon such facts to defeat an action of ejectment by the vendor, although in default of payment of the purchase money. (Pomeroy, Equity Jurisprudence, 1409.) The defendant testified that upon the execution of the contract he took immediate possession of the premises and built thereon a house 24 by 60 feet and 16 feet high, barn, and windmill; that he dug three wells on the land, set out trees, and broke up a part of it, which improvements are of the value of $5,000. He also testified that while engaged in the erection of the house above described he was visited by Jones, who, although aware of said improvements, made no objection thereto. It is conceded that defendant on the 1st day of June, 1887, tendered to Mr. Burr, who executed the agreement of sale as agent of Jones, the sum of $100, being the first payment to mature under said agreement. This tender was refused by Burr, for reasons assigned in writing as follows:

"LINCOLN, NEB., June 1, 1887.

"I hereby acknowledge tender to me of $100, by Jas. A. Baker, J. E. Jones, under a pretended contract of his, dated May 25, 1886, involving the undivided ⅔ of S. ½ N. W. ¼ sec. 14, T. 10 N., R. 6 E., Lancaster Co., Neb., for the reason that I am not the agent of the said James E. Jones, nor authorized to receive any money for him for any purpose whatsoever. C. C. BURR."

Defendant made repeated but unsuccessful efforts to find Jones, who it seems had left about that time for his home in England. Finally, he was referred to a Mr. Muff, of Crete, as the person to receive payment of the sum due, to whom he offered settlement, but which was refused on the advice of Mr. Burr, to the effect that the agreement was not binding on Jones. Again, in the year 1890 defendant tendered the plaintiff the full amount due by the terms of the contract, which was also refused. The making of the improvements enumerated does not appear to have been controverted on the trial. Defendant is corroborated to some extent by Mr. Strode, who was present at a conversation of the former with Jones, in May, 1890, when the latter, referring to the amount alleged to be due on the contract, remarked that he wanted all of the money. Although this evidence was contradicted on the trial by the testimony of Jones, who is to some extent corroborated by other evidence, the question was properly submitted to the jury.

8. It is strenuously argued that the verdict is not supported by the evidence. It is sufficient to say that the evidence is conflicting, and while we might have reached a conclusion different from that of the jury, we cannot now disturb the judgment based upon the verdict without overruling a multitude of cases which assert a rule as salutary as it is well established, viz., that this court will not reverse a judgment on account of mere difference of opinion be-

tween ourselves and the trial court on questions of fact. The judgment is

AFFIRMED.*

SAMUEL R. SMITH v. M. ELLEN SPAULDING.

FILED MAY 2, 1894. No. 4254.

1. **Married Women:** SURETY FOR HUSBAND. A married woman in this state may contract as surety for her husband.
2. ——: ——: CONSIDERATION. The extension of time of payment of her husband's past due indebtedness is a sufficient consideration to support her contract as his surety for such debt.
3. **Abatement.** An objection on the ground that there is another action pending for the same cause must be made before a trial on the merits or it will be waived.
4. **Review.** Parties will as a rule be restricted in this court to the theory upon which the cause was prosecuted or defended in the court of original jurisdiction.

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

Walter A. Leese, for plaintiff in error.

W. S. Morlan, contra.

POST, J.

Defendant in error, a married woman, signed the note in controversy in order to obtain an extension on the past due indebtedness of her husband to the John D. Zernitz Company. In order to secure said note she at the same time, and as part of the same transaction, executed a mortgage on certain real estate, her separate property, in Frank-

* Upon motion for a rehearing, payment into court by the defendant in error of the purcha-e money and interest by September 1, 1894, was made a condition of affirmance.

lin county, in which mortgage her husband joined. She also signed the following property statement:

"FEBRUARY 6, 1886.

"For the purpose of securing an extension of time on a certain book account of $325.95, and now due the John D. Zernitz Company, of Chicago, Illinois, we hereby make the following statement: That the house and lot of one and one-half acres of ground which is located in the town of Riverton, Franklin county, Nebraska, on which we are about to give a mortgage to the above John D. Zernitz Company for $325.95, and said property being the same as described in said mortgage, is free and clear from all incumbrances of any kind whatever.

"M. ELLEN SPAULDING.

"B. J. RYAN. MERRILL A. SPAULDING."

The mortgage here mentioned was subsequently foreclosed by decree of the district court of Franklin county, and the mortgaged property sold, leaving a balance due on said note. Plaintiff in error, to whom said claim had in the meantime been assigned, then brought this action in the district court of Red Willow county, against both makers of the note, to recover the balance due thereon.

At the trial the district court, on its own motion, gave the following instruction: "If you find from the evidence that the defendant M. Ellen Spaulding executed the note introduced in evidence in this action, and that she signed the same merely as surety for her husband, and the consideration of said note being an antecedent debt of her husband, for the payment of which she was in no way liable, then your verdict should be for the defendant M. Ellen Spaulding." The giving of this instruction is error, for which the judgment must be reversed. A married woman may in this state become surety for her husband. (*Stevenson v. Craig*, 12 Neb., 464.) The extension of time on her husband's past due indebtedness was a sufficient consid-

eration. (Stewart, Husband & Wife, 136; *Green v. Scranage*, 19 Ia., 461; *Low v. Anderson*, 41 Ia., 476.)

The plaintiff requested the following, among other instructions, which was refused: "The material question for you to settle from the evidence in this case is, did the parties, at the time the note was executed, contract with reference to and upon the faith and credit of the separate estate of the defendant M. Ellen Spaulding. If they did so contract, then she would, under the law of this case, be liable for the amount due on the note." This instruction should have been given. (*Barnum v. Young*, 10 Neb., 309.)

Defendant in error in her brief argues that the action cannot be maintained without the consent of the court which rendered the decree of foreclosure. There is no doubt that the district court of Franklin county had jurisdiction of the parties and the subject-matter, and might have determined their rights upon a motion for a deficiency judgment. It is no doubt true, as a general rule, that the court which first obtains jurisdiction of a cause of action will retain it until judgment. If this objection had been made in the district court, it is probable that it would have been sustained, and the plaintiff required to seek relief in the foreclosure case. The defendant will not be permitted, however, to ignore that question in the trial court and urge it for the first time after a trial on the merits of the case.

We are asked by counsel who appears for the plaintiff in error in this court to re-examine the question of the contractual liability of married women. In support of that request he has submitted a brief in which this rule, as stated in *Barnum v. Young*, 10 Neb., 309, and *Davis v. First Nat. Bank of Cheyenne*, 5 Neb., 242, is assailed, as in conflict with overwhelming weight of authority. It is conceded that in view of the formidable array of authorities cited the question suggested is worthy consideration whenever properly presented; but we think it is not raised in this proceeding, for the reason that it was not submitted to the district

court in such manner as to secure an explicit ruling thereon. It is true that the proposition contended for was embodied in one of the instructions refused, but it is so decidedly opposed to the other instructions asked as to leave us in doubt upon which theory the case was tried in that court. It is an accepted rule which restricts parties in the appellate court to the same theory upon which they relied in the court of original jurisdiction. (Elliott, Appellate Procedure, 489 *et seq.*; *Norton v. Nebraska Loan & Trust Co.*, 40 Neb., 394.) That rule is especially applicable in this instance, since the case must be reversed for reasons stated, and the plaintiff will thus have an opportunity to present the question to the district court.

REVERSED.

STATE OF NEBRASKA V. NEBRASKA SAVINGS BANK.

FILED MAY 2, 1894. No. 6336.

1. **Insolvent State Banks:** CLAIMS OF CREDITORS HOLDING COLLATERAL SECURITY: DIVIDENDS: RECEIVERS. Where a receiver has been appointed for an insolvent bank in proceedings under the state banking law, on application by certain creditors holding collateral security for the payment of their claims, to be allowed to make proof of their claims before the receiver and to share in dividends declared from the general assets of the insolvent bank, *held*, that all sums collected upon the securities must be deducted from the original amount of the claims and proof may be made for the balance, and that any sums derived from the collaterals or security, during the intervening time between any dividends, shall be deducted from the amount of the claim as it existed at the date of the dividend declared immediately prior to such interval, and in the succeeding dividend the claim be represented in the amount of its balance in the total amount taken, as a basis for declaring such dividend, and this rule is to apply in each and every instance of declaring dividends.

2. ——: ——: ——: ——. *Held, further*, That the creditor will be required to deliver the securities to the receiver as a condition precedent to being allowed to make proof of his claim as aforesaid; such securities to be collected by the receiver, or disposed of by him in such manner as may be ordered by the court for the benefit of such creditor, the proceeds to be paid to the creditor on his claim, after deducting therefrom all expenses incurred by the receiver in handling, collecting, or disposing of the securities.

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

The First National Bank of Lincoln, Nebraska, and others, filed in this case in the supreme court a petition for an order upon the receiver of the Nebraska Savings Bank to allow the amount due upon certain notes as claims against the latter. The petitioners held collateral security for the payment of the notes, but alleged it was insufficient. The receiver demurred to the petition. The petition and demurrer are set out in the opinion. *Demurrer overruled.*

G. M. Lambertson and *John H. Ames*, for petitioners.

George H. Hastings, Attorney General, and *Field & Holmes*, for receiver.

HARRISON, J.

On the 24th day of March, of the current year a petition was filed in this court by certain of the creditors of the Nebraska Savings Bank, and as it fully explains its purpose, we will copy it in full and allow it to speaks for itself. It reads as follows:

"Now comes the First National Bank, the American Exchange National Bank, the Columbia National Bank, the German National Bank, all organized and incorporated under the national banking act of the United States and

engaged in a general banking business in the city of Lincoln, Nebraska, and the Lincoln Savings Bank, the Union Savings Bank, the Industrial Savings Bank, and the Merchants Bank, all duly organized and incorporated under the laws of the state of Nebraska, and engaged in the business of banking in the city of Lincoln, Nebraska, and by leave of the court file their petition, and for their cause of action say:

"1. That the Nebraska Savings Bank is, and was at all times mentioned herein, a corporation organized and incorporated under the laws of the state of Nebraska and doing a general banking business in the city of Lincoln, Nebraska.

"2. That prior to the 11th day of May, 1893, the said Nebraska Savings Bank was a going concern, but on or about said date a run was made on said bank by the depositors of the bank, and the said bank was in great danger of having its doors closed by lack of sufficient funds to meet said run, and by the depositors demanding money deposited by them in said bank; that said Nebraska Savings Bank, without the aid and assistance of the other banks in the city of Lincoln, would have been unable to stop the run on the above named bank and the demands upon it, and in its distress and peril it called upon the above named banks of the city of Lincoln for assistance, and on or about the 11th day of May, 1893, the said banks agreed to come to the aid and assistance of the said Nebraska Savings Bank, and on or about said last named date said banks advanced and made a loan to said Nebraska Savings Bank, of the sum total of $50,000, part of which was paid, so that on the 1st day of July, 1893, there was due your petitioners the sum of $47,922.13, in the respective amounts as follows:

American Exchange National Bank	$6,702 54
Columbia National Bank	6,702 54
German National Bank	6,697 28
First National Bank	6,702 39
Union Savings Bank	6,702 38

Merchants Bank.....$3,028 22
Lincoln Savings Bank..... 5,701 06
Industrial Savings Bank..... 5,685 72

"For the said sums advanced respectively by the above named and enumerated banks the said Nebraska Savings Bank on the 1st of July, 1893, executed and delivered to the said banks promissory notes, whereby the said Nebraska Savings Bank agreed to pay on the 1st day of January, 1894, to each of said banks one-half of the amount advanced by said bank, and the balance, or remaining half, was made payable on or about the 1st of July, 1894. Separate notes were given to each bank for the amount of money advanced by said bank.

"3. For the purpose of securing the payment of said several sums of money advanced by the said banks respectively, and evidenced by the said promissory notes executed to each of said banks by the Nebraska Savings Bank, the said Nebraska Savings Bank, after having been duly authorized thereto by resolution of the board of directors, transferred, assigned, and made over to Richard Miller, cashier of the said Lincoln Savings Bank, in trust for each and all of said banks, notes, bills receivable, and other assets and collateral of the face value of $55,279.48, of which amount the sum of $9,158.58 has been collected and applied *pro rata* upon the said notes, leaving a balance of $41,536.38 due to all of said banks, which indebtedness is proportioned to the several banks according to the amount of the sums advanced by each of said banks to the said Nebraska Savings Bank.

"4. Your petitioners allege that the collateral in their hands is insufficient to pay in full and satisfy the said notes, and your petitioners have no other assets of said bank, or any other way or means by which they can satisfy and secure the payment of the said notes and the said sums of money advanced by the said banks as aforesaid, except they are permitted to share in the assets and participate in

the dividends to be paid by the receiver of said bank. Your petitioners have offered to surrender to the receiver the whole of their security and collateral if the receiver will pay ninety per cent of your petitioners' claim, which offer the receiver has declined.

"5. Your petitioners further allege that on or about the 12th day of July, 1893, the said Nebraska Savings Bank closed its doors, and, being then insolvent, was proceeding to wind up its business under the supervision of the state banking board; that on an application made to this court on the 17th day of July one Charles H. Morrill was appointed receiver of the said Nebraska Savings Bank, and on or about the 17th day of July the said Charles H. Morrill entered upon his duties as the receiver of said bank and took possession of all of its assets and proceeded to administer the estate of said bank and wind up its business affairs pursuant to law and under the direction of the said court.

"6. Your petitioners further allege that the said Charles H. Morrill, receiver of the said Nebraska Savings Bank, has in his possession a large amount of assets of the said bank, upon which and from which and out of which a dividend to the creditors of the said Nebraska Savings Bank will be paid.

"7. Your petitioners further allege that the said notes, hereinbefore mentioned and described, were duly presented by the said banks, respectively, to the said Charles H. Morrill, as receiver of the said Nebraska Savings Bank, as a claim against said bank, and the said Charles H. Morrill, as such receiver, was duly requested by your petitioners to allow said notes as a claim against said bank and in favor of the said respective banks for the amount of the said separate notes; and in this behalf your petitioners further allege that the said Charles H. Morrill refused, and still refuses, and does now refuse, to allow said notes, or either of them, as a claim against said bank, and is about to dis-

allow the same as such receiver, unless otherwise ordered and directed by this court.

"8. Your petitioners allege that at the time of the failure of said bank there was due to each of said banks the said sums of money as alleged to have been advanced by the said banks, and interest on the same from the 1st day of July, 1893, making a sum total of $47,922.13 and interest from the 1st day of July, 1893, due to all of said banks; and there was due at the date of the last report made to the said trustee, Richard Miller, by the receiver of said bank, bearing date March 13, 1894, $41,556.38.

"Your petitioners therefore pray that the said receiver, Charles H. Morrill, of the said Nebraska Savings Bank, be ordered and required to allow the claims of the said several banks, for the amounts due from the said Nebraska Savings Bank to each of said banks upon said promissory notes at the time the receiver entered upon his trust and took possession of the assets of said bank, and that he be further ordered and required to pay these petitioners, upon the said sums due at the date of his appointment, *pro rata* to that paid and to be paid to the other creditors of the said Nebraska Savings Bank; and your petitioners also pray for such other and further relief as the circumstances in the case may require."

To the petition the following demurrer was filed:

"In the matter of the claims presented by the First National Bank, the American Exchange National Bank, the Columbia National Bank, the German National Bank, the Lincoln Savings Bank, the Union Savings Bank, the Industrial Savings Bank, and the Merchants Bank v. the defendant, the Nebraska Savings Bank, asking for an order on C. H. Morrill, the receiver, the object and purpose of which said order is to require the said receiver to allow the said claim presented by the above named banks and filed with the receiver, the said receiver comes now, and does hereby demur to the petition of the said above named

plaintiffs or petitioners, for the reason that the same does not state facts sufficient to justify this honorable court in issuing an order to, and directing, the said receiver to allow said claims filed by the above named banks, and permit them to participate in dividends that may be hereafter declared."

And on the issues of law thus raised the matter was argued and submitted to the court for decision. That the petitioners made the loan to the Nebraska Savings Bank, and all other facts well pleaded, are, of course, admitted by the demurrer, and it is fully established that the savings bank was and is indebted to the banks presenting the petition, and in the sums set forth therein, and that the collateral notes and securities, stated in the pleadings, were delivered to the banks making this application and are now held by them.

The questions to be decided may be thus stated: Are these plaintiffs, the banks, entitled to prove their claims against the general assets of the savings banks? And if so, in what amount, for the whole original sum of the loans and interest, or must they deduct any and all sums collected of the collaterals, and prove their claims for the balance, and should a similar deduction be made before each dividend declared by the receiver, each bank to receive, at each time the dividend is declared, only such amount as the balance remaining due it after such deduction entitles it? And if they are entitled to share in the general assets, should they be required, as a condition precedent thereto, to deliver the collaterals held by them to the receiver, to be by him collected, or disposed of, should the court so order, for the benefit of these banks, and applied on their claim until it is extinguished or fully paid?

In dealing with insolvent estates, and in assignment proceedings, the courts, where the necessity has arisen for a rule on points similar to the ones involved in this case, have established and ordered to be followed such a course of pro-

cedure as seemed most equitable and just. Some adopted the rule which prevailed in bankruptcy, viz.: If any creditor, who held security for the payment of his claim, desired to be allowed the full amount of the claim and share accordingly in the assets, he was required to deliver his security to the assignee in bankruptcy, or, at his option, have his security valued, and deduct the value from his claim and prove for the balance. Another rule required that all sums collected from the collaterals be deducted and proof made for the balance of the claim, and immediately before or at the time of each dividend all sums derived from the collaterals between the date of proof and the date of such dividend be deducted from the claim and the creditor draw dividends according to the balance; and another has been formulated allowing the party holding security to prove his claim for the full amount, as does any other creditor, secured or unsecured, and to draw dividends on the full amount of his claim, and to apply these sums and all sums collected from the security to the payment of his claim until the same is fully paid, or the general assets and also his security exhausted, if insufficient or just sufficient to meet the claim.

There has been no case decided in this court of a similar nature to the one now before us, hence we are at liberty to adopt any course which appears most agreeable to the principles of equity, good conscience, and fair judgment, and consonant with the best reason. The bankruptcy rule has been adopted, or practically so, by the courts of last resort of the following states: Iowa, Massachusetts, South Carolina, and Washington. This rule had its origin in statutory enactment (not now in force) and was dependent for its fairness or applicability upon the wisdom of the framer of the law and the individual members of the legislative body enacting it, and was devised for special proceedings, and has no binding power or effect, except that it has been adopted after due consideration by the above

courts (all of them recognized as being among the best authorities in our nation) as the most equitable and true one, and we fully concur in the reasoning and argument which lead to this conclusion, but not with the rule deduced from it and formulated to enforce the rights of parties in accordance with the conclusion. We think it is unfair to the creditor to require him to surrender his security entirely and derive no benefit therefrom, or to submit to have it appraised and accept the value placed upon it as a payment upon his claim. There certainly is, and can be ascertained, a more equitable plan of adjusting the difficulty than this.

We will next notice the third rule above stated. We are thoroughly convinced that this rule is objectionable, as being inequitable and unfair when viewed in its relation to the claims of unsecured creditors, and its effects in withdrawing from the general assets of the insolvent debtor, in this case the bank, portions of such assets as dividends on the full amount of the secured claims and paying them thereon, at the same time allowing the secured creditor to collect the security or securities and also apply the proceeds to the payment of the claim, thus diminishing the fund to which the unsecured creditor is entitled for the payment of his claim, in favor of the secured creditor, beyond the limits and demands of justice and fairness to him or his claim, or the true enforcement of the contract entered into when the debt was created which is the basis of his claim. The secured creditor would obtain an advantage over the unsecured one, to which no rule of law or equity entitles him, and which cannot be accorded him without working injustice to the other parties. Such is not the province or duty of the courts and cannot prevail. A very forcible illustration of the application of the doctrine under consideration and the undue advantage effected by it in favor of the creditor holding security, is given in *Re Frasch*, 5 Wash., 344, 31 Pac. Rep., 756, which we will copy here with some of the comments thereon, as both the illustration and

comments are so entirely applicable and pertinent to the discussion here. They are as follows:

"A assigns his estate, worth $15,000, including security in the hands of B, worth $5,000. B has a claim against the estate of $5,000, secured as mentioned above, and an unsecured claim of $5,000. C has an unsecured claim of $10,000. Deducting the securities from the assets, the estate has $10,000 with which to pay claims aggregating $20,000, and as a consequence pays fifty cents on the dollar. B is allowed a *pro rata* on his whole claim of $10,000, which gives him $5,000. He then makes the other $5,000 out of the security, and in consequence has his whole debt paid in full. Thus on his unsecured debt of $5,000 he receives $5,000, while C on his unsecured debt receives only $2,500. It is not difficult to see that, by some species of legerdemain in logic, B has not only had the full benefit of his security, but that the security has reached beyond its legitimate purpose and original intention, and given him an undue advantage of an unsecured creditor with whom he stood on equal footing so far as their unsecured claims were concerned. In fact it has placed him in a different and more favorable position than he would have been if his secured debt had been paid in full immediately prior to the assignment. Abstract theory should not be allowed to refute practical example, and it cannot be gainsaid that the practical effect of holding in favor of appellant's contention is as demonstrated above, which must be admitted to be an inequitable effect."

From the above considerations we conclude that we cannot follow the plan announced in the third rule, although supported by the weight of authority, if such weight consists in the number of cases decided, the number of judges reasoning in the same line and concurring in the conclusions reached, or the number of states following and approving the same doctrine. The third rule has been adopted in United States courts, and in the state courts of New York,

Illinois, Connecticut, Kentucky, North Carolina, Oregon, Pennsylvania, Rhode Island, Michigan, Vermont, Tennessee, and New Hampshire.

We will next examine the second rule hereinbefore set forth, and this, to our minds, contains the truest and most satisfactory solution of the problem of the adjustment of the rights of the different creditors involved in this case or any similar case. On the main contention as to whether the secured creditor is to retain the securities and realize therefrom and apply the same on the debt, and at the same time prove for the full amount of his claim before the receiver as a basis for declaring dividends to be applied in payment of his claim, the reasoning of the courts of Iowa, Massachusetts, South Carolina, and Washington is identical with that of the court of Maryland, the only court which has announced the rule we are now considering. All of them agree in the answer to the main question involved, and only separate when they reach the point where it is necessary to formulate and adopt a rule founded upon such conclusions, all except the last named state selecting the rule in bankruptcy proceedings. In the consideration here it must be borne in mind that the main reason alleged in the petition in this case for the relief demanded is the fact that the collaterals are, or will be, insufficient to fully meet or pay the claim of the secured creditors. Paragraph 4 of the petition states, among other things, as follows: "Your petitioners allege that the collateral in their hands is insufficient to pay in full and satisfy the said notes, and your petitioners have no other assets of said bank, or any other way or means by which they can satisfy and secure a payment of the said notes, and the said sums of money advanced by the said banks as aforesaid, except they are permitted to share in the said assets and participate in the dividends to be paid by the receiver of said bank."

In *Armory v. Francis*, 16 Mass., 308, it was held: "If a creditor to an insolvent estate have a mortgage, as secur-

ity for his debt, of less value than the amount of the debt, he can claim from the commissioners only for the difference between his debt and the value of the property mortgaged," and Parker, C. J., in the text of the opinion says, in speaking of the security, and the rule adopted in the case: "For originally it would have been security only for a proportion of the debt equal to its value; whereas by proving the whole debt and holding the pledge for the balance, it becomes security for as much more than its value, as is the dividend which may be received upon the whole debt. This rule was adopted in England on account of its reasonableness, and because consistent with the nature of the contract. For the property pledged is in fact security for no more of the debt than its value will amount to; and for all the rest the creditor relies upon the personal credit of the debtor, in the same manner he would for the whole if no security were taken."

The decisions in the other cases where the bankruptcy rule was approved are founded upon the proposition that "if a creditor has two funds out of which he may make his debt, he may be required to resort to that fund upon which another creditor has no lien;" but, say the authorities holding the contrary view, this proposition must be modified by the further statement that it will be the rule "whenever it will not trench upon the rights, or operate to the prejudice of the party entitled to the double fund," and this, it must be conceded, is undoubtedly correct; that it cannot be otherwise needs not even to be stated. But will any of the vested legal rights of the secured creditors be infringed upon or wrested from them by the adoption of the rule by which there will be deducted from their original claim the sum derived from the collaterals, and only allowing them to prove for the balance in the first instance as a basis for their representation in the declaration of dividends by the receiver, and further requiring that prior to declaring any subsequent dividends, and im-

mediately before each of such dividends, the amount collected on collaterals during the intervals between such dividends shall be deducted from the amount of their then existing claim, and the remainder, or balance, be the basis for their representation in the then declared dividend? We do not think so. By the contractual relation which was created between the Nebraska Savings Bank and these creditors when the loan was made by the banks to the Nebraska Savings Bank and the securities delivered to them they were empowered to enforce their claim against two funds, the collaterals and any other property possessed by the debtor; but if a collection was made from either, it must have been applied at the time of its collection, and by so much as was its amount diminished, the claim afterwards to be enforced against either or both of the two sources existing and to be resorted to for its extinguishment. If, after a sum realized from the collaterals, suit was brought to enforce the debt, judgment could only have been rendered for the amount remaining due after deducting the sum collected. If default had been made in payment of the debt prior to anything being collected on the securities, and an action instituted thereon and prosecuted to judgment and execution issued and levied on the property of the bank, any sum realized by such proceedings must have been applied to reduce the amount of indebtedness, and thus decrease the charge against the collaterals. This would have been true before the appointment of the receiver, and he stands in the place of the debtor, and by his appointment the secured creditors could not have, and did not secure, any superior rights or equities to those before possessed by them; nor were the unsecured creditors, by such appointment, deprived of any rights to resort to any property belonging to the debtor for the payment of their claim, nor were they less entitled to have the secured creditors apply sums coming from the securities to the extinguishment of their claim; nor were any

new privileges conferred upon the secured creditors, by which they were entitled to change the manner of collecting their claim, in so far as related to the funds to be resorted to or the extent to which they, or either of them, could be subjected to the payment of their claim. We are satisfied that the second rule, the one which we are discussing at present, is the true one, and that it will, in its practical workings, result in keeping the parties in as near the exact relations they occupied as to enforcement of their claims before the appointment of the receiver, and in greater equity, fairness, equality, and justice as or than can be attained in any other manner, and hence we conclude to adopt it.

What should be done with the collaterals has been variously determined by the courts which agreed on the main rule as to proof of the claim or claims; but we think the best and most equitable disposition that can be made of them is that they be delivered to the receiver, to be by him held and collected, or otherwise disposed of, if the court so orders, and the amount realized in either manner, or both if pursued, to be applied by him to the payment of the debt due the banks until these sums, together with the dividends, result in canceling the indebtedness, or both funds are exhausted; the remainder, if any, then to be and become a part of the general assets and for the benefit of all creditors; the expense of the collection of collaterals to be paid from such collections, and the general assets not be chargeable with such expense, and no expense of collecting other assets to be paid from moneys derived from collaterals; the receiver to be paid such compensation for handling the collaterals as shall be ordered by the court, to be paid from the proceeds of the collaterals. By this we think the collaterals will be more rapidly made, and at less expense, and any possible controversy between the receiver and the creditors holding the securities, in reference to it, or failure to collect or enforce it on their part, will be avoided. We

conclude that the demurrer was not well taken and it is therefore overruled. An order will issue to the receiver of the Nebraska Savings Bank in accordance with the above opinion.

JUDGMENT ACCORDINGLY.

ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY V. WILLIAM E. LAWLER.

FILED MAY 2, 1894. No 5470.

1. **Trial**: SPECIAL FINDINGS: DISCRETION OF COURT. It is discretionary with the trial judge to submit or not submit special findings to the jury, and where it appears that there has been no abuse of such discretion in refusing to require a jury to make special findings, *held*, that such refusal was not erroneous.

2. **Carriers of Goods**: DESTRUCTION OF PROPERTY: MEASURE OF DAMAGES. Where property delivered to a common carrier for shipment is destroyed while in transit, the measure of the shipper's damages is the market value of the property at its place of destination at the time it should have been delivered there.

3. ——: ——: EVIDENCE: REVIEW. The action of the trial court in excluding certain testimony, examined, and *held* to be correct and not error.

4. **Witnesses**: MEMORANDA. A memorandum which it appears was prepared at the time of the fact in question or soon afterwards, which the witness knew to be correct at the time it was made, may be used by the witness to refresh his memory.

5. **Expert Testimony**: OPINION EVIDENCE. Evidence in the nature of expert or opinion testimony is not competent, and cannot be received upon a subject of inquiry which is of such a character as to be within the knowledge of men of common education and experience and require no special skill, knowledge, or experience in considering or forming an opinion upon it, as the jury will be presumed, if all the facts are before them, to be competent to draw the inference and form the opinion from such facts.

6. **Carriers of Goods:** VALIDITY OF CONTRACTS TO LIMIT LIABILITY. A contract between a shipper and a common carrier, which, by its terms, limits the liability of the carrier and relieves it from either entirely or partially responding in damages for injury or loss to property shipped under such contract, resulting from negligence of the carrier, is invalid or void under the common law rule, as against public policy.

7. **Instructions.** It is not error for a court to refuse to give an instruction to a jury when the points covered by the instruction requested to be given have been fully and fairly submitted to the jury by other instructions.

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

The opinion contains a statement of the case.

George R. Peck, F. A. Brogan, A. A. Hurd, and *G. W. Hurd,* for plaintiff in error:

It was an abuse of discretion for the court to refuse to submit questions for special findings. (*Floaten v. Ferrell,* 24 Neb., 352; *Nebraska & Iowa Ins. Co. v. Christiensen,* 29 Neb., 581; *Doom v. Walker,* 15 Neb., 347.)

The court erred in refusing to admit in evidence the contract releasing the company from liability for damage arising from fire. Congress has the exclusive right to regulate commerce between the states, and the states are powerless so to do. (*State v. Pratt,* 59 Vt., 590; *People v. Brooks,* 4 Den. [N. Y.], 469; *Sweatt v. Boston, H. & E. R. Co.,* 3 Clif. [U. S. C. C.], 348; *Norfolk & W. R. Co. v. Commonwealth,* 3 S. E. Rep. [Va.], 340; 2 Story, Const. [3d ed.], p. 4; *State v. Delaware, L. & W. R. Co.,* 30 N. J. Law, 473; *Lafarier v. Grand Trunk R. Co.,* 24 Atl. Rep. [Me.], 848; *Moor v. Veazie,* 31 Me., 360; *State Tonnage Tax Cases,* 12 Wall. [U. S.], 214; *Hall v. De Cuir,* 95 U. S., 491; Pomeroy, Const. Law, sec. 378; *Wabash, St. L. & P. R. Co. v. Illinois,* 118 U. S., 558; *State Freight Tax,* 82 U. S., 232; *Hannibal & St. J. R. Co. v. Husen,* 95 U. S., 465;

Western Union Telegraph Co. v. Texas, 105 U. S., 460; *Louisville & N. R. Co. v. Railroad Commission of Tennessee*, 16 Am. & Eng. R. Cases [Tenn.], 3.)

John M. Ragan, contra, cited,

On the question of the power of the carrier to limit its liability: Constitution, sec. 4, art. 11; *Atchison & N. R. Co. v. Washburn*, 5 Neb., 117; *Missouri P. R. Co. v. Vandeventer*, 26 Neb., 222; *Union P. R. Co. v. Marston*, 30 Neb., 241; *Baltimore & O. R. Co. v. Campbell*, 36 O. St., 647; *Adams Express Co. v. Stettaners*, 61 Ill., 184; *Chicago, R. I. & P. R. Co. v. Conklin*, 32 Kan., 55; *Hannibal & St. J. R. Co. v. Swift*, 12 Wall. [U. S.], 262; *Hale v. New Jersey Steam Navigation Co.*, 15 Conn., 539; *Chicago, R. I. & P. R. Co. v. Witty*, 32 Neb., 279, and cases.

On refusal of court to submit questions for special findings: *Floaten v. Ferrell*, 24 Neb., 347; *Adams Express Co. v. Pollock*, 12 O. St., 618; *Ward v. Busack*, 46 Wis., 407.

On measure of damages: *Ward v. New York C. R. Co.*, 47 N. Y., 29; 5 Lawson, Remedial Rights & Privileges, sec. 2634, and cases; Hutchinson, Carriers, sec. 186.

On the constitutional provision forbidding common carriers from limiting their liabilities by contract: *Hart v. Chicago & N. W. R. Co.*, 69 Ia., 485; *Sherlock v. Alling*, 93 U. S., 99; *Johnson v. Chicago & P. Elevator Co.*, 119 U. S., 388; *Smith v. Alabama*, 124 U. S., 465; *State of Iowa v. Chicago, M. & St. P. R. Co.*, 33 Fed. Rep., 391; *Kimmish v. Ball*, 129 U. S., 217.

J. B. Cessna, also for defendant in error,

HARRISON, J.

W. E. Lawler, the plaintiff in the court below, commenced an action in the district court of Nuckolls county, Nebraska, to recover from the defendant railroad company

the value of certain property shipped by him over the defendant's line of road from Superior, in this state, to Trinidad, Colorado. The petition pleaded the corporate character of the defendant, that it was a common carrier for hire, and owned and operated a line of railroad extending from the city of Superior, Nebraska, to Trinidad, Colorado, and had an office in Superior for the transaction and management of its business; that it made contracts for the shipment of freight to Superior from any point in the United States, and also from Superior to any point in the United States; that on the 20th day of December, 1890, the plaintiff resided in Superior and was the owner and possessed of a lot of household goods—a piano, chairs, tables, beds, bedsteads, etc., and a buggy, and also owned a stock of boots and shoes, shoemakers' tools, store fixtures, etc.; that on the said 20th day of December, 1890, this plaintiff desired to remove to the city of Trinidad, in the state of Colorado, to engage in business in said city, and he desired to have transported thither all his said household effects and his said stock of boots and shoes and shoemakers' tools and store fixtures, and this plaintiff, on said date, entered into a verbal contract with said defendant, in and by which the defendant agreed that the said plaintiff should load all of his said described property into a car to be furnished him by said defendant at its depot in the said city of Superior, and thereupon the said defendant agreed to transport said car and property to the city of Trinidad in the state of Colorado, and there safely deliver all said property to this plaintiff within a reasonable time from this date, in consideration of the sum of $100 freight charges, to be paid to the defendant by this plaintiff; that thereupon, on or about the said 20th of December, 1890, the plaintiff went to the said city of Trinidad, Colorado, and left one Ferd W. Saltow to load said property of plaintiff into the car agreed to be furnished by the said defendant, and to pay the freight of the same, and to see that the said property

was shipped, as agreed; on the 27th day of December, 1890, said Saltow put all of the said property above described of the plaintiff's into a car furnished this plaintiff by the defendant, on its contract, at its depot in the city of Superior, Nebraska, for shipment to Trinidad, Colorado, to be there delivered to plaintiff by the defendant as per said contract, and the said Saltow, on behalf of the plaintiff, then and there paid to the defendant the $100 compensation, or freight money, agreed upon between plaintiff and the defendant, and for which the defendant agreed to transport and safely deliver the said property of this plaintiff; that thereupon the defendant issued and delivered to the said Saltow, for this plaintiff, a way bill, bill of lading, or receipt for said goods, but this plaintiff, nor the said Saltow, did not examine nor read such receipt or bill of lading, and never knew the contents of same until after the happening of the loss hereinafter mentioned, nor did the said defendant, or any of his agents or servants, at any time, until after the happening of the loss hereinafter mentioned, call the attention of this plaintiff or the said Saltow to the conditions or terms of said bill of lading or paper, and the plaintiff charges the fact to be that the said paper, or bill of lading or receipt, by whatever name it may be called, so delivered by the said defendant to the said Saltow for this plaintiff, was not the contract entered into between the plaintiff and defendant for the shipment of the goods as aforesaid, and that neither the plaintiff, nor the said Saltow, ever knew or consented to the terms of the said bill of lading, and had they, or either of them, known that it contained this clause, to-wit: "Car Emgt. & Stk., val. $5.00 cwt.,"—which clause means, car of emigrant goods and live stock, of the value of $5.00 per hundred weight,—would the said plaintiff or the said Saltow have allowed said defendant to take said goods; but the said defendant, nor any agent or servant of it, did not call the attention of said Saltow or this plaintiff to said clause

in said receipt or bill of lading, but the said defendant and its agents fraudulently concealed from said Saltow and this plaintiff said clause in said bill of lading. The plaintiff further alleges that said clause in said bill of lading was never known to or seen by this plaintiff or the said Saltow, or either of them, until after the happening of the loss hereinafter mentioned, and that the same was not the contract of shipment made by this plaintiff with the said defendant for the shipment of said goods, but was an attempt on the part of the defendant to change, limit, and modify the contract actually made by said plaintiff with said defendant for the shipment of the goods; and the plaintiff further alleges that the said Saltow, when he received the said bill of lading or paper from the said defendant, supposed the same to be a mere receipt for the goods, and this plaintiff never saw the said bill of lading until after the destruction of the goods, as hereinafter stated; that said bill of lading or receipt, delivered by the said defendant to said Saltow for the said goods, was partly in writing and partly in print, and was and is, as nearly as the plaintiff can produce the same, in words and figures as follows:

"ATCHISON, TOPEKA & SANTA FE RAILROAD CO.,
"SUPERIOR, NEBR., STATION, Dec. 27, 1890.

"Received from W. E. Lawler the following described property, in apparent good order (or condition noted), contents and value unknown, to be transported over the road and delivered in like order to consignees, or the next company or carriers (if same is going beyond its line of road), for them to deliver to the place of destination of said property, it being distinctly understood that this company shall not be responsible as common carriers for said property beyond its line of road, or while at any of its stations awaiting delivery to such carriers, this company being liable as warehousemen only.

"To W. E. Lawler, Consignee, Trinidad, Colorado.
"Charges advanced, $.....

Marks and numbers.	Articles.	Weights, subject to correction.
———	Car Emgt. & Stk., O. R. Rel. Val. $5.00 cwt.....	20,000

"Prepaid, $100. Car 12144.
"W. G. TAYLOR, *for the Company.*"

"And the plaintiff further alleges that the defendant and its agent, at the time and before said goods were put in said car and received by the said defendant, knew the character, quality, quantity, and the destination and ownership of said goods. The said defendant entered into the contract, as above stated, with the plaintiff to safely transport said goods from the city of Superior, Nebraska, and safely deliver said goods to this plaintiff at Trinidad, Colorado, for the sum of $100, and the said defendant furnished to this plaintiff a car for the shipment of said goods. The plaintiff loaded all of said goods in said car, consisting of household goods, including a piano, a buggy, a lot of bedsteads, bedding, and clothing, and the stock of boots and shoes and store fixtures, and the said defendant, with a full knowledge of their character, quality, quantity, ownership, and destination, accepted the said goods, took possession of the said car, and undertook to transport them from Superior, Nebraska, to Trinidad, Colorado, and that while the said goods were in transportation over the said railroad of the defendant, in some manner or means to this plaintiff unknown, but through the neglect and carelessness of the said defendant, or its agents or servants, said goods were either lost or destroyed or converted to the use of the said defendant, but the said defendant has never complied with the terms of its contract nor has it delivered said goods, or any part of the same, to this plaintiff, or to any person for him, at Trinidad, Colorado, or at any other place; that said goods, at the time

they were to be delivered to this plaintiff at Trinidad, Colorado, were then and there of the value of $7,000. Plaintiff asks judgment against defendant in the sum of $7,000, with interest at seven per cent per annum from January 1, 1891.

The defendant railroad company, for answer, denies each and every allegation of the petition, except such as are afterward admitted, qualified, or explained. Further answering it admits that it is a corporation, that it executed the bill of lading described in the petition, but states that it was executed November 27, 1890, and not on December 25, 1890, and alleges that if the car containing the property mentioned in said petition did not arrive at Trinidad as alleged in said petition, said defendant avers that the same was caused by the carelessness and negligence of the said Fred W. Saltow, the agent and servant of said plaintiff, who was accompanying and had charge of said car, for, on behalf of, and instead of said plaintiff, at said plaintiff's special instance and request, by carelessly and negligently leaving a burning lamp or lantern in said car, which set fire to said car, and that on account of which said plaintiff's property was consumed by fire on or about the 28th day of November, 1890, at Pierceville, in the state of Kansas, and that the same was not the result of any negligence or carelessness on the part of said defendant. The said defendant, further answering said petition, avers that on the 27th day of November, 1890, said plaintiff made, executed, and delivered to the said defendant herein his release and guaranty, whereby and by the terms of which he released the said defendant from all liability from damages or loss to said property arising from fire and other causes, a copy of said release and guaranty so signed by said plaintiff herein is hereto attached, marked "Exhibit A," and made a part of this answer.

"EXHIBIT A.

"ATCHISON, TOPEKA & SANTA FE RAILROAD CO.

"*Release and Guaranty.*

"No. ..... NOV. 27, 1890.

"In consideration of the transportation, at a reduced rate (as provided and shown in the classifications and tariffs published by this company, and which are hereby referred to and made a part hereof), of the following described property, viz.: One car emigrant outfit and stock, released to value of $5.00 per cwt., case of loss or damage from Superior, Nebraska, to Trinidad, Colorado, the same being consigned to W. E. Lawler, of Trinidad, via A., T. & S. F. Ry., hereby release all the companies over whose lines said property may pass to its destination from any and all liability from damage to, or loss of, said property arising from fire or wet, chafing or breaking, effect of heat or cold, leakage of liquids, loss of weight or otherwise of property in bags, decay of perishable property, injury to hidden contents of package, delays arising from breakage of or accident to engines, cars, tracks, or bridges, deficiency of side tracks, motive power of cars, or loss or damage by providential causes. And I hereby agree to hold such companies harmless and protect them against any claim which may arise from damage or loss as above specified. And I also guarantee that the through charges, unless prepaid, shall be paid at destination, as per bill of lading or the company's tariffs.

"Witness: W. E. LAWLER.

"E. S. AGUR.

"To be signed by a responsible party, and witnessed, when convenient, by the agent of the company.

"Agents please fill out properly, have signed and witnessed, and attached to way bill on which property is forwarded. For their own protection, agents should have a good press copy, or retain a duplicate release attached to copy of way bill."

To this answer the plaintiff filed a general denial to each and every allegation of new matter therein contained.

Of the issues thus joined a trial was had to the court and a jury, and the jury returned a verdict for plaintiff in the sum of $4,373.

The defendant filed a motion for a new trial, which was argued, submitted, and overruled, and the case was brought here by petition in error on the part of the railroad company for review.

The evidence establishes that W. E. Lawler, in November, 1890, was a resident of Superior, this state, and having concluded to remove to Trinidad, Colorado, applied to the agent of the plaintiff in error at Superior and made inquiry of him in regard to shipping his stock of boots and shoes, shoemakers' tools, and household goods to Trinidad. He was informed as to the different rates, that the rate on boots and shoes was $160, and on an emigrant outfit was $100 per car. It appears that Lawler had at this time in his employ a shoemaker, one Fred Saltow, who desired to go with him to Trinidad and whom Lawler wanted to take along and retain in his employment; that Lawler spoke to the agent in regard to Saltow and stated to him that he would like to get a pass for Saltow, or obtain transportation for him at as light an expense as possible, or none, if it could be so arranged; that it was agreed that some pigs were to be bought and put in the car and this would entitle them to pass one man through with the car. Lawler went east and left the loading of the goods into the car, etc., in the charge of Saltow, who, assisted by some other parties, placed the goods in the car and with them the two pigs which he had purchased; that Saltow signed the necessary papers for Lawler and received a pass, or transportation to Trinidad; that the car containing the goods was, in the usual course of business of the railroad, taken into a train and started on its way to its destination; that Saltow boarded the same train and the first night slept in the car which

contained Lawler's goods. It nowhere appears in the evidence that Saltow was to have any charge of the car, or to pay any attention to it. It does appear that he at one time contemplated delaying his departure for Trinidad until some days subsequent to the starting of the car containing the goods, but finally did go by the same train and had the key to the car in which the goods were shipped. At Pierceville, Kansas, the car in question was discovered to be on fire, and was totally destroyed, together with the goods. The claim of the company is that the car was set on fire by a coal oil lantern, which it is further claimed Saltow lighted and left in that condition in the car while he was riding in the caboose. There is a conflict in the evidence on this point and Saltow swears that the lantern was not burning. Some of the witnesses for the company state that he told them that he had left a lighted lantern in the car. The jury evidently believed Saltow, or, if they did not, concluded, from the evidence, that he was not properly in charge of the car for Lawler, either of which findings on the subject would be consistent with the verdict rendered by them. It appears that the agent of the company at Superior had full knowledge of the loading of the car, of all its contents, and probably some of the articles or things constituting the car load were included, following suggestions advanced by him at the time of the making of the contract for the car and the transportation of the goods to Trinidad. The foregoing is a statement of the testimony, sufficient, we think, to present its main or salient points which will be involved in our consideration of the case here.

The plaintiff in error sets forth in his petition in error different causes of complaint, or objection, to the rulings and actions of the court below during the trial of the suit there, but in the brief filed in this court does not argue all of them, but selection is made of those which were evidently considered the leading ones and most material, and

the argument in the brief is directed to the assignments of error thus chosen, and to them we will mainly, if not wholly, confine our examination.

The first point which challenges our attention is that the court erred in not submitting to the jury special findings requested by defendant, numbering in all fourteen, but more especially those numbered 1, 4, 8, 10, 13, and 14. Section 4813, Consolidated Statutes, 1893 (Cobbey), page 1108, providing for special findings, is as follows: "In every action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases the court may direct the jury to find a special verdict, in writing, upon all or any of the issues; and in all cases may instruct them, if they render a general verdict to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon." * * * It will be noticed that the word "may" is used in the statute wherever reference is made to the court's action in submitting special verdicts or findings to the jury. In the statutes of some states the word "shall" is used in this connection, and where the word "shall" is used the courts hold that when the findings are in proper form and the request to submit is at the proper time, the judge must submit them; but, on the other hand, where "may" is used, as in our law, it is discretionary with the trial judge or court to submit special findings or not, however proper or pertinent they may be in substance, or sufficient in form. (*Floaten v. Ferrell*, 24 Neb., 353; *Nebraska & Iowa Ins. Co. v. Christiensen*, 29 Neb., 581; *Adams Express Co. v. Pollock*, 12 O. St., 618; *Ward v. Busack*, 46 Wis., 407; *Webb v. Denver & R. G. W. R. Co.*, 24 Pac. Rep. [Utah], 616; *Texas & P. R. Co. v. Miller*, 15 S. W. Rep. [Tex.], 264; *City of Topeka v. Tuttle*, 5 Kan., 311–323; *Hairgrove v. Millington*, 8 Kan., 480.) In Oregon, under a section of the Code of that state which provides that the court may, in all cases,

instruct the jury, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, it was held: "It is discretionary with the trial court whether it will require the jury to make special findings, and such discretion is not reviewable." (*Knahtla v. Oregon Short Line & U. N. R. Co.*, 27 Pac. Rep. [Ore.], 91, citing *Swift v. Mulkey*, 14 Ore., 59.) This is also supported by *Webb v. Denver & R. G. W. R. Co.*, *supra*.) We think that it is the better rule that it is a discretion which must be soundly and reasonably exercised by the court or trial judge and its exercise may be reviewed, as may the exercise of other discretionary powers. We then have only the question on this branch of the case for determination, was the refusal to submit the special findings, requested by defendant, an abuse of the discretionary power of the trial court, or an improper exercise of it? The case was not a very complicated one and the facts to be considered and the questions to be determined from them, by the jury in their deliberations, were not very numerous, and after a careful and thorough examination of all the facts and circumstances of the case as presented and preserved in the record, the manner in which the case was tried and submitted to the jury, we cannot discover any arbitrary, or, partial exercise, or abuse of discretion in the refusal of the trial judge to present the fourteen questions to the jury for them to answer.

Counsel for plaintiff in error, during his cross-examination of Lawler in the lower court, asked him the following questions: "Your business had been unsatisfactory for considerable time before that, had it not?" "You may state if you had not been advertising, for a long time before leaving Superior, that you were selling these goods at cost." "You had been selling your stock of boots and shoes at cost, or at reduced prices, and were you not closing out your stock for considerable length of time before leaving Superior?" To each of which the counsel for Law-

ler interposed an objection to the first one quoted, that it was immaterial; to the second, that it was incompetent and immaterial; and to the third, that it was incompetent, immaterial, and irrelevant. These objections were sustained by the court. The counsel for plaintiff in error in the examination of W. G. Taylor, a witness called by his client, the company, interrogated him as follows: "State if you know whether, before he quit business, he advertised that he would sell his stock at reduced prices." "State if you know as a matter of fact whether the plaintiff did, for several months before quitting the sale of boots and shoes, try to sell his goods at reduced prices or at cost." Each of which interrogatories was objected to by counsel for Lawler as being "incompetent, immaterial, and irrelevant," and the objections were sustained by the court. The action of the judge in sustaining the several objections above indicated is assigned for error in paragraphs numbers 23, 24, 25, 29, and 30 of the petition in error, and will be noticed together, as the reasoning which will apply to one will apply with equal force to all. It is contended by counsel for plaintiff in error that inasmuch as Lawler had testified that he fixed the value of the stock of boots and shoes, by adding to the cost price thereof freight to Superior and also freight from Superior to Trinidad, that the evidence sought to be elicited by the foregoing interrogatories was material and competent on the question of the value of the stock of goods, and that the value of the stock of boots and shoes was the measure of Lawler's damages if he recovered any. There would be some force in the argument of counsel for plaintiff in error if the measure of Lawler's damages was to be determined by any value which the stock of boots and shoes had in Superior, as the questions were all directed to what transpired in Superior, but the rule for determining Lawler's damages in this case was the value of the goods at their place of destination (Trinidad) at the time they should have been delivered there to him

by the company, hence the testimony excluded by the court in sustaining the foregoing objections could have no possible bearing on the point to be determined, *i. e.*, the value of the goods in Trinidad, Colorado, and the court did not err in its action. As to the rule of the measure of damages see *Ward v. New York C. R. Co.*, 47 N. Y., 29; 5 Lawson, Rights, Remedies & Practice, sec. 2634, and cases cited; Hutchinson, Carriers, sec. 769.

During the cross-examination of Lawler he was asked: "Why did he give him a pass; what did you understand about it why a man should have a pass to go with an emigrant outfit? Objected to, as to the last part of the question, as incompetent and immaterial. Objection sustained." He was further interrogated, and the record made as follows: "The only object in putting those two pigs in the car was to make an emigrant outfit of it, was it not? Objected to, as incompetent, irrelevant, and immaterial. Sustained. Exception." In the examination of Taylor, witness for the company, the agent with whom Lawler made his contract for the car and the transportation of his property, the following interrogatory was propounded to him: "Was there anything said between you and the plaintiff about the reason why a man was permitted to go with an emigrant outfit?" The counsel for Lawler objected to the question, as leading, which objection was sustained. In the course of his testimony this witness testified as follows: "I cannot state why it was made out to Mr. Saltow any more than the fact that it was the understanding he was to accompany the car." Then came the question, "From whom?" Counsel for Lawler here objected and moved as follows: "Objected to, and plaintiff moves to strike out the last answer as to what was the understanding. Sustained. Exception." It is alleged that the court erred in its action in each and every of the above instances, for the reason that the evidence which would have appeared in the answers to the interrogatories, to which objections were

sustained, would have been pertinent to the issue of the authority of Saltow from Lawler to go with the car and have charge of it en route. Conceding that the evidence in each of the foregoing instances would have been competent and relevant, and have had a bearing on any material issue in the case, which, to say the least, is doubtful, the error, if any, committed by the court was cured, for in each particular the same evidence had been given in a prior answer of the witness, or was contained in an answer to an interrogatory subsequently put to the same witness, and the plaintiff in error was not injured by the action of the court. (*Jonasen v. Kennedy*, 39 Neb., 313.)

In testifying to the value of various articles which were put in the car at Superior and afterwards destroyed by fire, Lawler referred to a memorandum which he stated he made at Trinidad, soon after the car was burned, and the immediate cause of his making it was his being asked by the agent of the company to give him a statement of the values of the articles burned. Counsel for the company objected to the use of this memorandum by Lawler, which objection was overruled by the court and the witness allowed to use it. This is assigned as error. By an examination of all the testimony of this witness in respect to this memorandum, we are satisfied that it was made soon after the occurrence of the burning of the car and property; that it was prepared by the witness at a time when he knew it to be a correct list, or as nearly correct as could be made, of the articles burned and of their respective values, and that, after refreshing his memory from it, he was enabled to testify from his own knowledge as to the original facts, in so far as it is possible for a person to have any knowledge of such facts as were then being investigated. This brought it within the rule governing the allowance of the use of a memorandum by a witness to refresh his memory, and there was no error in the court permitting the witness to refer to the memorandum. (See *Schuyler Nat. Bank v. Bol-*

long, 24 Neb., 825; *Bonnet v. Glattfeldt*, 120 Ill., 166; 1 Greenleaf, Evidence, secs. 436-439; 1 Wharton, Evidence, sec. 522, and note.)

J. W. Lusk, one of the witnesses for the company, was a trainman in the employ of plaintiff in error on the route over which the car had passed, just prior to the time it arrived at Pierceville and was discovered to be on fire, and had been so employed and on this route for seven years, and testified that he was well acquainted with the road, knew its general direction, curves, cuts, etc., and knew which way the wind was blowing on the day and night the train and car in question passed over the route, and testified that the car containing Lawler's property was the thirteenth car in number, counting back from the engine pulling the train. This witness was asked a question (quoted below), to which counsel for Lawler objected and the objection was sustained. The ruling is assigned as error. The record is as follows: "You may state whether or not, from any point on the road between Dodge City and Pierceville, the road curves toward the south sufficiently to carry sparks from the engine to a car thirteen cars back. Objected to, as calling for a conclusion of the witness. Objection sustained. Exception." The contention of counsel for plaintiff in error is that the testimony called for by the foregoing interrogatory would have been in the nature of expert testimony and should have been admitted. We have no doubt of the ability of the witness as a competent railroad or trainman, or of his knowledge of the portion of the road of plaintiff in error over which the car was drawn immediately prior to its arrival in Pierceville, where it was found to be burning; but that he was competent to testify as an expert and give as an opinion the distance to which, or direction in which, the wind which blows across these western prairies will carry a spark of fire and where it will deposit it we cannot agree. This would be extending the doctrine of expert testimony

far beyond any reasonable limits and wandering far away in the mazes of uncertainty, speculation, and conjecture. It would be equivalent to asking the witness and allowing him to testify whether he had arrived at a conclusion as to a spark from the engine being the cause of the burning, which would clearly not be competent. Doubtless it was competent for this witness to testify as he did in regard to the wind, the quarter to which and from which it was blowing, its direction relatively to the train, whether with or across or against its path, to state the trend of the line of the company's road, which way the train was running, and the position in the train of the car containing Lawler's property in relation to that of the engine, relate the facts within his knowledge, but it was not competent for him to give his conclusions drawn from such facts. The jury, being composed of men of ordinary knowledge and experience, when put in possession of the facts, were as capable of seeing what inferences should be drawn from them as the witness; hence, his opinion was not competent. (Rogers, Expert Testimony, p. 12, sec. 8.) Furthermore, this same witness was, prior to this time, asked the following question: "Now state, if you know, taking into consideration your experience, your knowledge and the location of the burning car in that train, and the direction of the wind and the direction in which the train was running,—state whether or not the car could have caught fire from the engine." To which he answered, and this without an objection. If it can be said that the evidence in reference to the sparks would have been in even the remotest degree competent or material, the plaintiff in error had received the full benefit of it in the answer to the question last quoted, and it was not error to exclude a repetition of it, although not asked for in the same words as in the prior interrogatory. This is too well settled a rule to need any citations to support its statement.

The further allegations of error were made that the court

refused to admit in evidence the contract releasing the company from liability for damage by fire and further limiting any recovery of damages to a valuation of the goods of "$5 per cwt.," and in ignoring the stipulations and provisions in contracts made between the parties, in second, third, fourth, and fifth instructions given by the court. The counsel for the company, in this branch of the case, enters into a very able discussion of the validity of the portion of section 4 of article 11 of the constitution of this state, which declares that "the liability of railroad corporations as common carriers shall never be limited," contending that this provision is invalid and of no effect, because it conflicts with, as he states it in his argument, "the exclusive rights of congress to regulate 'commerce' between the states." Whether he is right in his contention or not, or whether it is settled or established by the weight of authority, or sustained by the best reason, that the states cannot in any manner regulate or legislate so as to affect the portions of such contracts as the one in the case at bar, as would be governed by the above provision, are not necessarily to be determined in reaching a decision of this branch of the case. We think they can, and will more rightfully be decided and determined upon the ground of the invalidity of the contract, as an attempt to limit the common law liability of the company under an agreement, in its capacity as a common carrier. In the case of *Chicago, R. I. & P. R. Co. v. Witty*, 32 Neb., 275, a contract was entered into between the railroad company and Witty for the shipment of a horse from Henry, Illinois, to Jansen, Nebraska, and there was a stipulation contained therein by which the company was only liable for injuries to the horse occurring by reason of its gross negligence, and then for not to exceed the sum of $100. This was held to be invalid under the rule of the common law. NORVAL, J., in the text of the opinion states: "We do not doubt that a carrier may, by contract fairly entered into, limit in some respect its liability as an insurer, or its com-

mon law liability, where the restriction imposed is reasonable. But, on grounds of public policy, the law has wisely prohibited a common carrier of freight from in any manner contracting against its own negligence. This doctrine was distinctly held and applied in *Atchison & N. R. Co. v. Washburn*, 5 Neb., 117. GANTT, J., in the opinion says: 'The common law fixes the degree of care and diligence due from railroad companies as common carriers; and a failure to exercise this care and diligence is negligence, without any legal distinction as being gross or ordinary; and the better rule of law, sustained by the weight of authority, is, that it is against the policy of the law to allow stipulations which will relieve the company from the exercise of that care and diligence, or which, in other words, will excuse them for negligence in the performance of that duty.' Decisions are to be found which lay down a contrary doctrine, but the better reason as well as the current of authority in this country, sustain, the rule announced by this court in the case referred to;" and cites in support of the doctrine announced: *New York C. R. Co. v. Lockwood*, 17 Wall. [U. S.], 357; *Grand Trunk R. Co. v. Stevens*, 95 U. S., 655 *Shriver v. Sioux City & St. P. R. Co.*, 24 Minn., 506; *Welsh v. Pittsburg & C. R. Co.*, 10 O. St., 65; *Kiff v. Atchison, T. & S. F. R. Co.*, 4 Pac. Rep. [Kan.], 401; *Durgin v. American Express Co.*, 20 Atl. Rep. [N. H.], 328; *Morrison v. Phillips Construction Co.*, 44 Wis., 405, and a great many more which we will not repeat here. (See, also, *Louisville, N. A. & C. R. Co. v. Faylor*, 25 Ohio L. J., 55, 25 N. E. Rep. [Ind.], 869; *Eells v. St. Louis, K. & N. W. R. Co.*, 52 Fed. Rep., 903; *Galveston, H. & S. A. R. Co. v. Ball*, 16 S. W. Rep. [Tex.], 441; *International & G. N. R. Co. v. Folts*, 22 S. W. Rep. [Tex.], 541; *Johnstone v. Richmond & D. R. Co.*, 17 S. E. Rep. [S. Car.], 512; *Baughman v. Louisville, E. & St. L. R. Co.*, 21 S. W. Rep. [Ky.], 757; *Ambach v. Baltimore & O. R. Co.*, 30 Ohio L. J., 111.)

On the subject of limitation as to the amount of damages it is said in the foregoing opinion: "It is claimed that the limitation in the contract, as to the amount of damages in case of loss or injury, does not tend to exempt the carrier from liability for negligence. The authorities cited in brief of plaintiff in error so hold, but we are unable to draw such a distinction. If a carrier cannot, by stipulation, be relieved from liability for its negligence, it is equally clear, for the same reason, that it cannot, by contract with the shipper, limit the amount of damages resulting from such negligence. If the plaintiff in error can lawfully stipulate that the damages shall not exceed $100, it could likewise contract that it should not be more than $25, or any smaller sum, thereby practically relieving itself from all responsibility for injuries occasioned by its own negligence. That would be accomplished indirectly what it could not lawfully do directly. The proof fully shows that the horse, when shipped, was worth not less than $400, and to hold that the owner could only recover one-fourth that sum would be to exempt the carrier from a part of the liability assumed by it for injuries resulting from its own carelessness or negligence. This the law will not sanction;" citing *Morrison v. Phillips Construction Co.*, 44 Wis., 405; *Kansas City, St. J. & C. B. R. Co v. Simpson*, 30 Kan., 645; *Chicago, St. L. & N. O. R. Co. v. Abels*, 60 Miss., 1017; *United States Express Co. v. Backman*, 28 O. St., 144; *Boehl v. Chicago, M. & St. P. R. Co.* 46 N. W. Rep. [Minn.], 333.

The contract in the case at bar comes directly within the rule of the common law as set forth in the case from which we have quoted, being somewhat stronger in its terms and provisions than the contract passed upon in that case, in that it absolutely exempts the company from any and all liability for damages caused by fire, etc., and places the value at "$5 per cwt.," without any reference to negligence on the part of the road in any degree, while the one in the case

referred to made the company liable for gross negligence. We are satisfied that the provisions of the agreement between the railroad company and Lawler, whereby the limitation was attempted to be placed upon the liability of the road for loss or damage by fire, and valuing the goods, were void as against public policy. There is another element which enters into and is connected with this branch of the case, which is embraced in the proposition that when the plaintiff in the court below had proved the delivery of the property to the railroad and its failure to deliver it at its destination, it raised the presumption of negligence on the part of the company, and it devolved upon it to overcome such presumption by proof, and that it was not sufficient for it to show that the goods were destroyed by fire, but it must go further and show that there was no negligence on its part.

In *Louisville & N. R. Co. v. Touart*, 11 So. Rep. [Ala.], 756, where the company was sued for failing to deliver five bales of cotton received by it as a common carrier, consigned to the plaintiff in the case at Mobile, the defense was that the contract set out in the bill of lading contained a provision that the railroad was not liable "for loss or damage on any articles of property whatever by fire or other casualty while in transit or while in depots or places for reception." The evidence disclosed that the cotton was destroyed by fire while in the depot warehouse in charge of the company. There was a verdict and judgment for the plaintiff, for the value of the cotton, and on error to the supreme court the court in its opinion says: "There are some principles of law applicable to the evidence which will dispose of the charges requested by the defendant. At common law a common carrier, to whom was intrusted goods for transportation, was liable for all losses not the result of the act of God, the public enemy, or the party complaining. It may safely be said, as a conclusion from numerous decisions, that by special contract a com-

mon carrier may limit his liability, and protect himself against losses by accident and losses which are not the result of fault or negligence on his part or that of his employes. After showing the delivery of the cotton and its consignment to plaintiff at Mobile, and the failure by the common carrier, defendant to deliver the same within a reasonable time, the plaintiff's case was made out, and he was entitled to recover. At common law nothing but the act of God, the common enemy, or plaintiff's own fault could relieve the defendant of the case made against him by such proof, and the burden rested on the common carrier to prove his defense. His responsibility as a common carrier is the same now as at common law, except so far as limited by special contract. If the loss resulted from some cause excepted by the contract, the carrier must plead the exception specially, and his plea, to present a defense, must aver that the excepted cause was not the result of negligence on his part. It is not enough to sustain this plea to show that the loss was the result of a cause excepted by the contract; he must go further and affirmatively show that the cause resulted without fault on his part. The contract as framed does not relieve him of this burden."

In 2 Greenleaf, Evidence, sec. 219, we find the following: "In all cases of loss by a 'common carrier,' the 'burden of proof' is on him to show that the loss was occasioned by the act of God, or by public enemies; and if the acceptance of the goods was special, the burden of proof is still on the carrier to show not only that the cause of the loss was within the terms of the exception, but also that there was on his part no negligence or want of due care."

The case of *Ryan v. Missouri, K. & T. R. Co.*, 57 Am. Rep. [Tex.], 589, was an action against the company for the value of goods which it was alleged were not delivered at their destination, but were converted by the company.

The defense was that the goods were burned without any negligence on the part of the road. The bill of lading exempted the company from liability for loss by fire. The evidence showed that the goods were destroyed by fire while in the possession of the company, at night, while in the cars at the depot and before the transportation was completed. It was held "that it devolved on the carrier to show that the fire did not occur through its negligence;" and in the body of the opinion it was stated: "In a suit of this character it is sufficient for the plaintiff to aver and prove that the goods were delivered to the carrier, and that they have not been received at their point of destination. This is said to make a *prima facie* case of negligence which the carrier must rebut or the plaintiff will recover. He may rebut it only in one way, and that is by showing that the goods were lost by one of the exceptions known to the common law, or one of the special exceptions reserved in this contract with the shipper. If by neither a common law exception nor one especially reserved he is exonerated, he must show that the loss happened without negligence on his part. Take for instance the exception of loss by fire. The contract recites merely that if the loss occurs by fire the carrier should not be liable, but the law incorporates the words 'without negligence on the part of the carrier.' What the law inserts is as much a part of the contract as what is expressly written in it. When, therefore, the plaintiff makes out a *prima facie* case of negligence, by proving that the goods were not delivered, is this case rebutted by proof that they were not delivered by reason of a fact which may have existed, and the carrier still have been negligent? If so, he can stop with the presumption of negligence arising from non-delivery still resting upon him, and call upon his adversary to further strengthen his own *prima facie* case, or it shall lose this character altogether. This would be against all the rules of evidence." (See *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb., 890;

Central R. & B. Co. v. Hasselkus, 17 S. E. Rep. [Ga.], 838; *Newport News & M. V. R. Co. v. Holmes*, 14 Ky. L. Rep., 853; *Missouri P. R. Co. v. China Mfg. Co.*, 14 S. W. Rep. [Tex.], 785; *Browning v. Goodrich Transportation Co.*, 47 N. W. Rep. [Wis.], 428; 4 Lawson, Rights, Remedies & Practice, sec. 1860.)

In the case at bar the company attempted to show that fire was occasioned by a lighted coal oil lantern left in the car by Saltow, and that Saltow was in charge of the car for Lawler; but these were disputed points in the testimony, and, as we have once before stated, the jury evidently determined them in Lawler's favor, and the evidence was sufficient to sustain such a finding; further than this there was very little or no attempt on the part of the company to prove anything in reference to negligence or the lack of it, or to explain the cause of the loss or the occasion of the fire which destroyed Lawler's goods. We are fully satisfied that the court below did not err on this branch of the case.

There is but one more error of those assigned, which is argued in the brief filed in behalf of plaintiff in error, which is that the court refused to instruct the jury that "the plaintiff cannot recover in this case, if the fire which destroyed his property resulted from any act of the plaintiff or his servant or agent, whether such act was such as to constitute negligence or not." An examination of the instructions given to the jury convinces us that they were fully instructed on the points covered by the instruction requested by plaintiff in error quoted above, and that there was no error in refusing to give it. This disposes of all the assignments of error discussed in the brief of counsel for plaintiff in error, and we conclude that there were no rulings of the court below complained of which were erroneous or call for a reversal of the case. The judgment of the lower court is

AFFIRMED.

FREMONT, ELKHORN & MISSOURI VALLEY RAILROAD COMPANY V. GEORGE BATES.

FILED MAY 2, 1894. No. 5522.

1. **Trial:** ADMISSION OF TESTIMONY: REVIEW. The rulings of the trial court in admitting testimony examined, and *held* no prejudicial error in such rulings.

2. **Instructions.** The action of the court in giving certain instructions and refusing to give others requested by defendants reviewed, and *held* no error in either the giving or refusing.

3. **Eminent Domain:** MEASURE OF DAMAGES: EVIDENCE. On the trial of an appeal in the district court, from condemnation proceedings of right of way of a railroad through a farm, *held*, that testimony of the rent, which could be obtained for the farm since the appropriation of the right of way, was competent, not as a basis for damages, but as tending to show whether such appropriation had depreciated the market value of the farm; and this is the rule whether the rent is, or had been, for a money consideration or a share of the crops.

4. ———: VALUE OF PROPERTY: TIME. The valuation of property taken for a right of way for a railroad should be made as of the time of filing the petition for the assessment of damages for the land. (*Missouri P. R. Co. v. Hays*, 15 Neb., 224.)

5. **Railroads:** RIGHT OF WAY: DAMAGES: EVIDENCE. In an inquiry whether, and how much, the part of a farm not taken for railroad right of way is depreciated in value by the appropriation of a part, evidence as to the size of the farm; the purpose for which it is used; the improvements thereon, and how located; the direction of the road across the farm; the cuts and fills made or to be made in the construction of the road; the width of the right of way; the height of embankments; the depth of ditches; the inconvenience of crossing the track from one part of the farm to another; the liability of stock being killed; the danger from fire from passing trains, are all facts competent for the jury's consideration in determining the depreciation in value of the remainder of the farm. *St. Louis & S. E. R. Co. v. Teters*, 68 Ill., 144; Mills, Eminent Domain, sec. 163, followed." (*Omaha & S. R. Co. v. Todd*, 39 Neb., 818.)

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

John B. Hawley and *B. T. White*, for plaintiff in error, cited: *Missouri P. R. Co. v. Hays*, 15 Neb., 224; *Blakeley v. Chicago, K. & N. R. Co.*, 25 Neb., 212; *Republican Valley R. Co. v. Linn*, 15 Neb., 234; *Chicago, K. & N. R. Co. v. Hazels*, 26 Neb., 375; *City of Plattsmouth v. Boeck*, 32 Neb., 297.

Charles Ogden, also for plaintiff in error.

John C. Cowin and *Henry D. Estabrook, contra*, cited: *Dearborn v. Boston, C. & M. R. Co.*, 24 N. H., 179; *Watson v. Pittsburgh & C. R. Co.*, 37 Pa. St., 469.

HARRISON, J.

March 23, 1887, the plaintiff in error filed a petition in the county court of Douglas county and instituted proceedings to condemn the right of way, etc., for a line of railroad across and through the southeast quarter of section 20, township 16, range 12, in Douglas county, Nebraska. The regular condemnation proceedings were had and the commissioners made a report finding the quantity of land taken to be 9.88 acres and valued the same at $60 per acre, and awarded and appraised the damages to the owner in the sum of $592.80. The defendant in error George Bates was, at the time of the condemnation proceedings, the owner of the east half of said section 20, which was all in use as one farm. He appealed from the award of the commissioners to the district court of Douglas county. The case was tried to the court and a jury, on the papers sent up from the county court, without further pleadings. The jury returned a verdict for Bates in the sum of $5,084.22. The railway company filed a motion for a new trial, which was overruled and judgment entered on the verdict, against the

company. In the record there is the following stipulation:

"It is hereby agreed by the parties to this suit, that for the purpose of the hearing therein on error in the supreme court there was presented to the county judge of Douglas county, by the railroad company, a petition in due form of law, praying for the appointment of appraisers to assess for the right of way in question; that such appraisers were duly appointed, and made their appraisement and award, from which the plaintiff duly appealed to the district court, and filed an appeal bond in due time and in proper form; and that no questions are to be raised in the supreme court on account of the absence of pleadings of any kind, and that the report of the appraisers to the county judge, and which appears in the bill of exceptions, shall stand and be taken as a sufficient pleading and description of the right of way and land in controversy, and the case shall be considered and disposed of in all respects as though the record showed a sufficient petition for the appointment of the appraisers and their appointment by the county judge; also, that an appeal from the award was duly and legally taken, and an appeal bond, from the award of such appraisers, filed in due time as required by law.

"Dated at Omaha this 8th day of June, A. D. 1892."

This somewhat imperfect and general statement of some of the main and more important points in the testimony will, we think, suffice for an understanding of the questions raised by the petition in error for our decision.

The first assignment of error argued by counsel for plaintiff in error in the brief filed is that the trial court erred in permitting the plaintiff Bates and some of his witnesses to testify, over objections of defendant the railroad company, to the value of the farm after the railroad was constructed. In other words, that the testimony as to value should have been confined to the time of the taking, March 23, 1887. The rule in this state we believe to be

that the damages must be assessed as of the time of the taking. In the case at bar the witnesses were, some of them, interrogated in regard to the value of the land immediately prior to March 23, 1887, and then asked "What, in your opinion, was the market value of that farm per acre, after the railroad had gone through it and made its embankment and cuts?" To this defendant objected. The objection was overruled and the witness allowed to answer. One of these witnesses had, prior to the asking of the above question, been asked and answered, that he knew or was acquainted with the reasonable market value of the Bates farm during the spring and summer of 1887. The evidence in this case shows that the 320 acres of land owned by defendant was all worked as one farm, the northeast quarter being, a greater portion of it, used for pasture and what is known in this state as "hay land." There was also a part of this quarter section which was being cultivated. The southeast quarter was all, or had been all, under cultivation, and on this quarter section there was a house, stable, and other improvements; that running through the farm there was a stream of water, and that taken as a whole the half section of land constituted a good Nebraska farm and was worth, according to the witnesses for plaintiff, from seventy to eighty dollars per acre, and by witnesses for defendant stated to be worth from fifty to sixty dollars per acre. The railroad was so constructed that its direction was somewhat diagonally across the entire southeast quarter, thus dividing the farm. Its line was near the house and other buildings, some two hundred feet or more distant from the house and to the north of it. In front of the house was what was described as "a fill," some twenty feet high, and beyond this, and on the plaintiff's land, a deep cut. The condemnation was in March and the fills and cuts on this farm made during the following summer. The court below, in permitting the questions, such as we have quoted above, to be answered, probably committed an

error; but after a careful and critical reading of all the testimony in the case, we are satisfied that the error, if any, was without prejudice to the rights of defendant.

There were several witnesses who testified as to the values before and after the taking, and the court instructed the jury on this particular point, as to time of computing the damages, as follows: "The measure of damages is the difference between the fair market value of plaintiff's whole farm of 320 acres with and without defendant's right of way as graded and constructed. The values to be compared are those of March 25, 1887, the day when said condemnation proceedings were commenced in the county court. It is true that the improvements on said right of way were not made on that day, but the law presumes them to have been made on said day as contemplated and outlined in defendant's petition in the condemnation proceedings. You will not, therefore, in your estimate of said values be allowed to include any elements of appreciation or depreciation of values which have arisen since said 25th day of March, 1887." And there is evidence in the record that the market value of land remained very much the same during the entire year of the taking.

There is the further reason for not reversing the case because of the possible error committed in the admission of this testimony. The counsel for defendant tried the case upon exactly the same theory as to values and the time at which the witness should be asked to state them. We will quote his examination of one of his witnesses: "D. J. O'Donahue, called as a witness for defendant," after some preliminary testimony, was questioned and answered as follows:

Q. I will ask you to state what the value of this Bates farm, per acre, was immediately prior to the 25th day of March, before the location and the construction of the railroad through the same?

A. I think about fifty dollars an acre would be my estimate.

Q. We are asking you for your judgment?

A. Yes, sir.

Q. What was the value of the farm immediately after the construction and operation of the railroad through the farm?

A. I don't think there was any material change in the value of the farm.

It will be seen from this that he introduced exactly the same kind of testimony to which he had previously objected when offered and introduced by plaintiff. This waived the error, if any, of the court in admitting the testimony, and it cannot be considered applying the rule in *Chicago, K. & N. R. Co. v. Wiebe*, 25 Neb., 542, where it was held: "Where evidence is introduced without objection to prove certain facts, a party cannot predicate error thereon, and the same rule will apply if a party excepts to the introduction of certain evidence, and afterward introduces the evidence objected to, or that of a like character."

The next assignment of error is that the court erred in giving certain instructions, and each of them on its own motion. Under this assignment the counsel for plaintiff in error has argued, in the brief filed in this court, objections to but two of the instructions, the fifth and ninth, which were as follows:

"5. If you find from a preponderance of the evidence that the value of plaintiff's land, not actually appropriated by defendant, has been decreased by the existence of any stagnant pools, floods, or objectionable thing necessarily caused by the improvement of said right of way, you should also add said decrease in value to your verdict for plaintiff; but if said pools, floods, or objectionable thing be caused by the faulty and negligent construction of said right of way, then any decrease in the value of the land

in consequence thereof must be disregarded by you and omitted from your verdict."

"9. The burden of proof is on the plaintiff, and he must sustain his claims for damages by a preponderance of all the evidence. You are the judges of the credibility of the witnesses, and in weighing their opinions of value you may consider the facts or circumstances proved on the trial which tend to show that they have an interest in the result of this case, or that they are biased or prejudiced against either of the parties, and you may also consider their experience and means of knowledge and observation; and you are instructed that it is proper for the witnesses in estimating the value of the farm to consider the effect of said right of way, or the uses to which the said farm is adapted, on its productiveness, on its appearance, rendering it more or less attractive to buyers. The witnesses may also consider whether or not said right of way renders it more inconvenient and expensive to carry on said farm, and whether or not its proximity to plaintiff's dwelling renders said dwelling less desirable by reason of the prospect and view thereof being obstructed, and because of the noise and smoke of defendant's trains; and you are also instructed that witnesses may, in fixing the value of the farm, consider the danger by fire to plaintiff's dwelling and crops from defendant's trains, the danger of plaintiff, his teams and live stock being killed or injured while crossing defendant's track in the use and enjoyment of his farm. But the witnesses have no right to base their valuation on any loss which plaintiff has already suffered, or may hereafter suffer, by reason of the operation of defendant's road, and you will not be allowed to include any such loss or prospective loss in your verdict, nor can witnesses be allowed to base their valuations on any general benefits which plaintiff derives from the building and operation of defendant's railroad."

It is argued that instruction No. 9 does not embody the

law applicable in cases of this kind. By this instruction the jury were told, in effect, that if the fact that the risk or hazard of the happening of any of the things enumerated in the instruction, being present in the mind of a person desiring to purchase such a farm, would operate to lessen its value or decrease the price which would be paid for it (in other words, lessen its market value), then they were essential elements entering into the inquiry, then before the jury, and necessary constituent elements of a just and true measure of the damages to plaintiff's farm resulting from the construction of defendant's line of road through the farm. In the case of *Omaha S. R. Co. v. Todd*, 39 Neb., 818, in which opinion was filed in this court March, 1894, written by RAGAN, C., it was held: "In an inquiry whether, and how much, the part of a farm not taken for railroad right of way is depreciated in value by the appropriation of a part, evidence as to the size of the farm; the purpose for which it is used; the improvements thereon, and how located; the direction of the road across the farm; the cuts and fills made or to be made in the construction of the road; the width of the right of way; the height of embankment; the depth of ditches; the inconvenience in crossing the track from one part of the farm to another; the liability of stock being killed; the danger from fire from passing trains, are all facts competent for the jury's consideration in determining the depreciation in value of the remainder of the farm. *St. Louis & S. E. R. Co. v. Teters*, 68 Ill., 144; Mills, Eminent Domain, secs. 162, 163, followed." To the same effect are *Chicago, P. & St. L. R. Co. v. Graney*, 25 N. E. Rep. [Ill.], 798; *Chicago, P. & St. L. R. Co. v. Nix*, 27 N. E. Rep. [Ill.], 81; *Chicago, P. & St. L. R. Co. v. Blume*, 27 N. E. Rep. [Ill.], 601; *Denver & R. G. R. Co. v. Bourne*, 16 Pac. Rep. [Col.], 839.

The objection urged to instruction No. 5 is that it is not specific and definite enough, too broad and general, wherein it states to the jury that they may allow damages for

"pools and floods or objectionable thing necessarily caused by the improvement of said right of way." The words "objectionable thing" comprise the portion of the instruction against which the complaint is directed. We think the above words, used in the connection in which they are placed in the instruction, are subject in some degree to the criticism made and urged by defendant's counsel. It is quite probable that the court should have enlarged on the instruction in its statement and enumerated the different elements of damages instead of grouping them, as it did, under the head of "objectionable thing;" but it will be noticed that the court, in the first sentence of said instruction, told the jury: "If you find from a preponderance of the evidence that the value of plaintiff's land, not actually appropriated by defendant, has been decreased;" thus limiting the "objectionable thing" to what was shown by the evidence. This, coupled with the fact that in No. 9 the jury was informed specifically what things could or should be considered as objectionable, was sufficient to enlighten the jury as to the court's meaning contained in the statement made in instruction No. 5, of which the plaintiff in error complains. The two instructions, when considered together and viewed in connection with the facts as developed by the evidence, we think are sufficiently definite and specific enough at least not to mislead the jury as to the measure of damages.

The third point of error argued in the brief filed for plaintiff in error is that "the court erred in refusing to give instructions 2, 3, and 4, as requested by the defendant below." These instructions are as follows:

"2. In this case the jury cannot allow any damage to plaintiff on account of danger of loss to the plaintiff by fire occasioned by the operation by the defendant of its railroad across his land.

"3. In this case the jury cannot allow any damage to the plaintiff on account of danger of loss from killing

cattle or other stock in the operation of its railroad over the land of the plaintiff.

"4. In this case the jury cannot allow any damages on account of danger to life or limb of plaintiff or his family by reason of the operation of its road by the defendant over the plaintiff's land."

The theory upon which the counsel for plaintiff in error claim they offered these was that the court, in its ninth instruction, had told the jury that they could consider the danger of certain occurrences, of injuries to stock, buildings, etc., and that these were necessary to inform the jury that no damages could be allowed on account of these matters, as an independent proposition. We think this was sufficiently done by the court in the portion of the instruction No. 9, where it stated to the jury: "But the witnesses have no right to base their valuation on any loss which plaintiff has already suffered, or may hereafter suffer, by reason of the operation of defendant's road; and you will not be allowed to include any such loss or prospective loss in your verdict;" and did not err in refusing to give these three instructions.

The only other point argued in the brief is that inasmuch as the plaintiff in the court below testified that he had rented the farm for a number of years, and that he had rented it for the same rent since the construction of the road as before, leaving out the ground actually taken for the right of way, and no instruction was given by the court on the subject of increase or decrease of the value of the farm for leasing as affecting the value of the farm, or on the applicability of such evidence as tending to show whether or not the value of the farm was lessened by the construction of the railroad across it, that it was error in the court to refuse to give an instruction on this point offered by plaintiff in error and which reads as follows:

"If the jury believe from the evidence that the plaintiff has rented the farm in question both before and since the

construction of the railroad, and that he has rented for as high a rate and rental since as before the construction of the railroad, then it is proper for the jury to consider such facts in arriving at the question of damages to the lands not actually taken."

The testimony on the subject of rent is very short, and we will give it in full:

Q. You have rented this land, have you?

A. Part of the time.

Q. Have you got any less rent on account of the railroad than before.

A. I have got—I think so.

Q. Why? State to the jury why.

A. Well, I rented it on shares and they can't produce as much.

Q. Well, when you rented the land, did you rent it for any less than taking out the railroad land than you did before?

A. No, sir.

Q You rented it for just the same?

A. Yes, sir.

Redirect examination:

Q. Mr. Bates, you have rented your farm for a cash rental or a share of the crops?

A. Share of the crops.

Q. That has been your invariable rule, has it?

A. Yes, sir.

Q. And you rented it for the same share of the crops as before?

A. Yes, sir.

The above testimony is confined to what is generally known as "grain rent," or a share of the crops, and the proposition presented is whether or not the above evidence was pertinent to the issues being tried in the case and should have been submitted to the jury by a proper instruction. If the plaintiff Bates had established by compe-

tent evidence the fact that the farm could not be rented as readily or that he had been forced to accept a reduced rent, either money rent or in share of the crops, since the construction of the road, and that the reduction was attributable to the inconvenience in cultivation and dangers which the construction of the railroad across the farm necessarily caused to any person occupying or working it, he would have been entitled to the benefit of such testimony and to have it submitted to the jury by the court in an instruction, not as an independent element or cause of damage, and to be taxed and allowed for in the estimate of the jury as such, but as relevant to the issue of the market value of the farm before and after the appropriation of the right of way by the company, and as tending to show that the farm had suffered a depreciation in value by such appropriation, and it would unquestionably have been competent and would have tended to prove the fact that the market value of the farm had been lessened, for the market value to be determined here is the value to the average would-be purchaser of a farm, and one of the inquiries he would make would be, what is the value of the farm for leasing or renting purposes? The share of the crops given is very often increased or diminished by the owner of the farm furnishing seed for planting, or teams, tools, etc., for use in cultivation of the farm; but we have no doubt that anything that would render the farm less convenient for cultivation, or would annoy or be a detriment to one owning the farm and cultivating it, would operate in the same manner and to the same extent upon a person to whom it was leased and who was living upon or cultivating the farm as a renter. In this case it appears that Bates was not living on the farm or working it himself but was letting it to renters. Hence the above reasoning applies here in full force. If the above is a fair conclusion, then it follows that the evidence hereinbefore quoted, on the subject of the rent received for the farm before and since the condemnation of the land, was

competent and material to the issues presented for trial in this case. To this effect is *City of Omaha v. Hansen*, 36 Neb., 135, 54 N. W. Rep., 83, where it was held by this court: "Where rented property is injured by a public improvement it is proper, on an inquiry of the damages, to inquire to what extent, if any, the improvement will affect the rental value. This is merely an element of damages for the jury to consider, keeping in view the fact that the measure of damages is the difference between the value of the property immediately before and immediately after the construction of the same, and disregarding public benefits." (See, also, *Minnesota B. L. R. T. Co. v. Gluek*, 48 N. W. Rep. [Minn.], 194; *Denver & R. G. R. Co. v. Bourne*, 16 Pac. Rep. [Col.], 839; *City of Denver v. Bayer*, 7 Col., 113, 2 Pac. Rep., 6; 3 Sutherland, Damages, p. 437; *Pittsburgh & C. R. Co. v. Rose*, 74 Pa. St., 363; *Kahn v. New York E. R. Co.*, 22 N. Y. Supp., 793; *Alger v. New York E. R. Co.*, 15 N. Y. Supp., 960.) The cases cited all refer to money rent, but we think the principle is the same and the reasoning in the above cases applicable to the evidence in reference to rent in the case at bar.

It follows that if the company, by its counsel, requested an instruction which covered the question raised by the testimony on the subject of rent, and was sufficiently definite and certain in its terms and application to such testimony, that it should have been given; but we do not think instruction No. 5, above quoted, was so pertinent to the evidence regarding the rent that the refusal of the court to give it was error which calls for a reversal of the judgment. By the instruction the jury were to be told that if they believed that the plantiff has rented his farm "for as high a rate and rental since as before the construction of the railroad, then it is proper to consider such facts in arriving at the question of damage to the lands not actually taken." Webster defines the word "rental" as follows: "A sum total of rents; as, an estate that yields a rental of

ten thousand dollars a year." Therefore, by the use of the word "rental" in the instruction requested the jury would have been informed that if Mr. Bates received as great an amount, or sum total, from the farm as rent since the construction of the road as he did before, they might consider this fact in their inquiry in determining the damages to the farm, or the portion of it not actually taken by the company for its line of road. This was not what was meant, nor what was intended to be submitted to them. The evidence on this point, hereinbefore quoted, was confined to "grain rent," or a share of the crops, and had the instruction presented been confined to the statement that if the jury believed from the evidence that the plaintiff had received as great or large a percentage or share of the crops as rent since the construction of the road as before, such fact was proper for the jury to consider, then it would have been reversible error for the court to refuse to give it, but, as framed and worded, the instruction was not fairly applicable to the evidence and would probably have misled the jury, and the court therefore did not err in refusing to give it. The judgment of the lower court is

AFFIRMED.

W. C. NORTON V. NEBRASKA LOAN & TRUST COMPANY.

FILED MAY 2, 1894. No. 4496.

1. **Review**: QUESTIONS IN APPELLATE COURT. Where a case is brought to this court on petition in error, to review the decision of the lower court on a motion of a purchaser to vacate the confirmation and set aside a judicial sale of real estate, only such questions as were presented in the lower court, or to which its attention was called and its ruling taken or requested, will be reviewed or considered in this court.

2. **Judicial Sales:** CAVEAT EMPTOR. The former decision in this case (*Norton v. Nebraska Loan & Trust Co.*, 35 Neb., 466) approved and adhered to.

REHEARING of case reported in 35 Neb., 466.

Reese & Gilkeson and *S. S. McAllister*, for plaintiff in error.

Steele Bros., contra.

HARRISON, J.

An action was commenced by the Nebraska Loan & Trust Company in the district court of Butler county to foreclose a mortgage on certain real estate situated in said county. Decree was rendered foreclosing the mortgage, order of sale issued, sale made and confirmed, and a motion made by the purchaser to vacate and set aside the sale and confirmation. There also appears to have been a motion by the principal defendant (the mortgagor) for an order on the purchaser to compel him to pay the amount of his bid into court. The motion to vacate the sale was overruled by the lower court, and Norton, the purchaser at the sale, ordered to pay the amount of his bid, as reported by the sheriff in his return to the order of sale, into court. From this order Norton prosecuted a petition in error to this court, and on the first hearing here the ruling and decision of the lower court was sustained and affirmed, NORVAL, J., writing the opinion; MAXWELL, the then chief justice, dissenting. POST, J., having made the order in the lower court, over which he was then presiding judge, did not participate in the hearing or decision in this court. The opinion of NORVAL, J., affirming the action of the lower court, will be found in *Norton v. Nebraska Loan & Trust Co.*, 35 Neb., 466, and the dissenting opinion of MAXWELL, C. J., commencing on page 474 of the same volume of reports. Each of these opinions contained a full and

sufficient statement of the case and of the facts necessary to an understanding of the points raised and argued, and we will make no further statement here. Norton made a motion for a rehearing, which was granted, and the case was reargued in briefs filed by counsel for either party.

The main contention in the case is over the question of the application of the rule of *caveat emptor* to judicial sales. The counsel for Mr. Norton, in the briefs filed at the rehearing, contended that there is a well settled and marked distinction between sales made under a decree of foreclosure (as was the one in the case at bar) and sales made by virtue of an execution issued to enforce a judgment at law. That in the former the court is making the sales and the officer acting under its special direction and supervision, and in the latter not, or not so directly. These sales, under our Code, are made under the same rules as prescribed by statute in regard to notice, appraisement, offer, return or report of sale, and confirmation of the same, the only distinction or difference that we remember, or can discover, being that the one is made under and by virtue of an order issued to enforce a decree in an action, wherein a specifically described tract of land or piece of property is sought to be subjected to the payment of a debt which it has been mortgaged to secure; and in the other, the execution is issued to enforce the collection of a judgment, to be levied on any property of the debtor, and is directed against no certain or described tract or piece of property, and for this reason it is claimed the purchaser is put to a more direct and special inquiry, as the record in the case in which the execution is issued will not furnish any information regarding the property to be sold, and the papers and records in the mortgage foreclosure case will. In a large number of cases, in which decisions have been made in reference to releasing purchasers from their bids or forcing them to complete purchases, the distinction is clearly and definitely raised and established that sales of particularly described

tracts or pieces of property by orders of the court, for any purpose, or in any of the many different proceedings in which such sales may be had, being held more directly within the province of the court and under its immediate supervision, and the officer acting its agent, the sales being considered as made by the court, are judicial sales proper, and as such to be distinguished from sales under execution, and that the doctrine of *caveat emptor* will not be applied to what, according to these decisions, are judicial sales proper, or sales by the court, in its full force and vigor, but will be given a somewhat modified or relaxed effect and each case be decided or determined as seems best and wisest to the chancellor or judge who decides it, under the facts and circumstances developed in it. Whether this is the truest and most equitable doctrine has been much mooted and has been, and is a field, fruitful of much controversy; but we are fully satisfied that there is no necessity, and possibly very slight, if any reason, and it serves no useful purpose, to distinguish between the sales in any degree or extent and that in the interest of uniformity and certainty (since there appears no real or substantial distinction or difference), that we shall not arbitrarily establish any, and that a true business course and method with regard to judicial sales will be best subserved if the doctrine of "*caveat emptor*" as to such sales is allowed and held to prevail. It will undoubtedly, we think, be better that when a sale has been made there shall exist some certain rule by which the rights of the parties can be truly and equitably determined, measured, and adjusted than that every sale be left open to attack for any fancied error, objection, or grievance, for there is no more fruitful source of vexatious and unsatisfactory litigation than confirmation and kindred proceedings. It always opens a field for the labors of the affidavit maker. In the Bible it is said: "Of making many books, there is no end." We have often thought, when hearing one of these proceedings on

affidavits, that of making many affidavits, there is no end. The certain and definite rule cannot, we think, but result in justice to the greatest number; and if so, we have then accomplished all that can be expected of the laws and rules of men for men.

The motion to vacate the order of confirmation and set aside the sale, filed in the lower court, contained but two reasons for so doing, one being that the property was not advertised as the law requires, and the other that the purchaser was deceived by the sheriff and clerk of the district court as to liens and incumbrances and as to the title he would acquire by purchase at the sale, and did not raise the question of whether any bid was made by Norton, and if so, whether the bid was a conditional one, and this latter question is not presented in either the motion for a new trial or the petition in error, and, in accordance with the well established rule of this court, it cannot be considered here. (*Chicago, St. P., M. & O. R. Co. v. Lundstrom*, 16 Neb., 263; *Cruts v. Wray*, 19 Neb., 581; *Harrington v. Latta*, 23 Neb., 98; *Hurford v. Baker*, 17 Neb., 446. See, also, *Smith v. Spaulding*, opinion filed May 2, 1894, in which it was held: "Parties will as a rule be restricted in this court to the theory upon which the cause was prosecuted or defended in the court of original jurisdiction.")

The only point to be considered in the case then is whether the doctrine of "*caveat emptor*" is to be applied. The query arises here, was Norton deceived by the sheriff and clerk of the district court, or did he have any right to rely on, or was he warranted in relying upon, the statements made by them, with reference to the title of the property, or was he negligent in not searching the records of the case and of the county and ascertaining the condition of the title of the land for himself? Clearly it cannot be contended that the clerk can verbally warrant the title or vouch for it, and the sheriff is not and cannot be made the agent of the court for any such purpose; he makes the sale as or-

dered in the decree, and the writ, if any, issued to him. In this case the notice of sale stated that the land was to be sold subject to the lien of $3,000, which is now the subject-matter of the complaint and objection of Mr. Norton, and the writ in the sheriff's hands, under which the sale was being made, disclosed the same fact. Any reasonable diligence, the smallest in degree, on the part of Mr. Norton, would have discovered to him the condition of the title of the property offered for sale, of which he now complains, and because of which he asks to be relieved of his purchase. He had no right to rely upon the statements of the officers who might or might not have correct knowledge or information of the title, but should have examined or had the title examined before making his bid. A number of authorities are cited in the former opinion in support of this doctrine, but we will here cite a few more which we have examined. In Freeman on Void Judicial Sales, section 48, page 83, it is said: "In some of the states, '*caveat emptor*' is the rule of all execution and judicial sales. Each bid is made for such title as the defendant, ward, or decedent may have, and is, therefore, binding whether either had title or not." (See, also, *Neal v. Gillaspy*, 26 Am. Rep. [Ind.], 37, and note; Rorer, Judicial Sales, 168, 169; *McManus v. Keith*, 49 Ill., 388; *Sackett v. Twining*, 57 Am. Dec. [Pa.], 599; *Barron v. Mullin*, 21 Minn., 374; *England v. Clark*, 4 Scam. [Ill.], 486; *Dresbach v. Stein*, 41 O. St., 70.)

We have examined the authorities cited by the counsel for plaintiff in error in the briefs filed on rehearing, and while they are in point and entirely applicable and sustain counsel in the position taken, we are satisfied that the rule is that a purchaser at a judicial sale buys at his peril in respect to the title, and it is his duty to search and ascertain the condition of the title for himself. Under the facts and circumstances surrounding the sale in this case as disclosed by the record, and the rule of law pertinent thereto, there

was no excuse for the purchaser, and he has not shown himself entitled to any relief. The former decision in the case is

REAFFIRMED.

POST, J., and RAGAN, C., offered no opinion.

A. G. KINGSBURY ET AL. V. GUS FRANZ.

FILED MAY 2, 1894. NO. 5380.

Appeal From Inferior Courts: JURISDICTION OF APPELLATE COURTS: AMOUNT OF CLAIM. The right of appeal from the judgment of a justice of the peace upon the verdict of a jury must be determined by the amount claimed in the bill of particulars when the trial was had; and after the right of appeal had arisen and been exercised, the appeal should not be dismissed because in the appellate court there has been eliminated from consideration a part of the amount claimed.

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

A. G. Kingsbury and *F. M. Northrop*, for plaintiffs in error, cited: *Finch v. Hartpence*, 29 Neb., 368; *Sterner v. Wilson*, 68 Ia., 714; *Brooks v. Wright*, 19 Kan., 501; *Bethel v. Woodworth*, 11 O. St., 393.

J. J. McCarthy, *contra*, cited: *Riddle v. Yates*, 10 Neb., 510; *Nichols v. Hail*, 5 Neb., 194; *State v. Babcock*, 20 Neb., 528; *Mordecai v. Lindsay*, 19 How. [U. S.], 199; *Dowell v. Caruthers*, 26 Kan., 720; *Street v. Francis*, 3 O., 277; *Wetherbee v. Johnson*, 14 Mass., 420; *Sampson v. Welsh*, 24 How. [U. S.], 207; *Mills v. Brown*, 16 Pet. [U. S.], 525; *Fink v. Denny*, 75 Va., 663; *Hansbrough v. Stinnett*, 22 Gratt. [Va.], 593; *Tower v. Lamb*, 6 Mich., 362; *Cox v. Carr*, 79 Va., 28.

RYAN, C.

This action was begun before a justice of the peace of Dixon county, among whose docket entries in relation thereto is the following: "On the 25th day of April, 1891, the plaintiffs filed their bill of particulars, claiming from the defendant the sum of $21 for commission and abstract on sale of lots 4 and 5, block 22, city of Ponca." Upon a trial had to a jury there was a verdict and judgment for defendant, from which judgment plaintiffs appealed to the district court of Dixon county, wherein a formal petition was filed containing two causes of action. The first count of the petition was for a commission of five per cent on the sale of the above described lots, for $350; the second was for $3.50, the value of an abstract of title furnished by plaintiffs to defendant. There was an answer, in which was an admission that plaintiffs had undertaken the sale of lots as alleged in the petition, but this was coupled with a denial of performance. There was a demurrer to the second count, for the reason that it did not state facts sufficient to constitute a cause of action. The record of date February 3, 1892, contains this recitation: "Comes now the plaintiffs and confess the demurrer filed herein as to second cause of action set forth in plaintiffs' petition." On February 16, following, there was filed a motion to dismiss plaintiffs' appeal, for the reason that "plaintiffs claim less than twenty dollars," and the cause had been tried to a jury in the court below, as appeared from the transcript. This motion was sustained. Exception was taken, and there is presented in this court solely the question of the correctness of this ruling.

Section 1017 of the Code of Civil Procedure provides that appeals "shall not be allowed * * * in jury trials where neither party claims in his bill of particulars a sum exceeding twenty dollars." In *Finch v. Hartpence*, 29 Neb., 368, it was held that the rights of the parties, so

far as they related to appeals, were to be determined by the amount claimed in the bill of particulars on the trial before the justice of the peace, and that plaintiff, by amendment of his bill of particulars after trial so as to claim less than twenty dollars, could not cut off defendant's right of appeal. The statutory provision recited should receive the same construction when the appeal is by the plaintiff as when by the defendant, and we find no warrant, after the right of appeal has accrued and been exercised, for its dismissal because of the elimination from further consideration of a part of plaintiffs' claim. This conclusion has support in the ajudications of the courts of other states. (*Vide Lundak v. Chicago & N. W. R. Co.*, 65 Ia., 473; *Sterner v. Wilson*, 68 Ia., 714; *Brooks v. Wright*, 19 Kan., 501.) The judgment of the district court is

REVERSED.

IN RE PETITION OF THE ATTORNEY GENERAL RELATIVE TO RULES OF THE SUPREME COURT IN ORIGINAL CASES.

FILED MAY 2, 1894. No. 6801.

1. **Supreme Court: JURISDICTION IN ORIGINAL CASES.** The provision of section 2, article 6, of the constitution, that the supreme court shall have jurisdiction in civil cases in which, the state shall be a party, *held*, to have already been sufficiently supplemented by legislation to obviate the objection that the legislature has not provided by law in what manner suit should be brought as required by section 22 of said article of the constitution, even though the first above quoted constitutional provision may not be self-executing, which is not decided.

2. ———: ———. The original jurisdiction conferred by the constitution upon the supreme court, when not expressly restricted, is concurrent with that of the district courts of proper counties,

and will be entertained in such cases and manner, and upon such terms, as shall be prescribed by said supreme court by its order made in each case before commencement of the action and in accordance with its rules already or hereafter formulated.

PETITION of attorney general for rules relative to original cases in the supreme court.

The substance of the petition is stated in the opinion.

George H. Hastings, Attorney General, and *E. Wakeley,* for petitioner:

Section 2, article 4, of the constitution confers upon the supreme court original jurisdiction in civil cases in which the state shall be a party. That the legislature cannot take away, nor impair, this jurisdiction, either by express action or by non-action, is an elementary proposition. (*Kane v. People,* 4 Neb., 509; *State v. Frazier,* 28 Neb., 454; *Harris v. Vanderveer,* 21 N. J., Eq., 424; *Callanan v. Judd,* 23 Wis., 343; *Commonwealth v. Commissioners of Allegheny County,* 37 Pa. St., 237; *Haight v. Gay,* 8 Cal., 297; *McMillan v. Savage,* 6 Fla., 748; *Montross v. State,* 61 Miss., 429; *Ex parte Whitlow,* 59 Tex., 273; *Green v. Jersey City,* 42 N. J. Law, 118.)

Such grant of jurisdiction, especially to the supreme court of the sovereignty, carries with it, as an incident, the power to make the grant effective by resort to necessary writs, rules, or other usual instrumentalities. (*State v. Brailsford,* 2 Dal. [U. S.], 402; *Kentucky v. Dennison,* 24 How. [U. S.], 66; *Chisholm v. Georgia,* 2 Dal. [U. S.], 419; *Grayson v. Virginia,* 3 Dal. [U. S.], 320; *Huger v. South Carolina,* 3 Dal. [U. S.], 339; *Oswald v. New York,* 2 Dal. [U. S.], 415; *New Jersey v. New York,* 3 Pet. [U. S.], 461, 5 Pet. [U. S.], 284; *Rhode Island v. Massachusetts,* 12 Pet. [U. S.], 657, 756; *Nebraska v. Iowa,* 143 U. S., 359; *Attorney General v. Blossom,* 1 Wis., 277; *Attorney General v. Chicago & N. R. Co.,* 35 Wis. 425.)

All courts of record have inherent power to make necessary rules for exercising their jurisdiction. (*Barry v. Randolph*, 3 Bin. [Pa.], 277; *Vanatta v. Anderson*, 3 Bin. [Pa.], 417; *Snyder v. Bauchman*, 8 S. &. R. [Pa.], 336; *Harris v. Commonwealth*, 35 Pa. St., 416; *Risher v. Thomas*, 1 Mo., 739; *Brooks v. Boswell*, 34 Mo., 474; *Kennedy v. Cunningham*, 2 Met. [Ky.], 538; *David v. Ætna Ins. Co.*, 9 Ia., 45; *Seymour v. Phillips & Colby Construction Co.*, 7 Biss. [U. S. C. C.], 460; *Texas Land Co. v. Williams*, 48 Tex., 602.)

The grant of original jurisdiction to this court in civil cases in which the state shall be a party is not qualified by section 22, article 6, of the constitution. (*Michigan State Bank v. Hastings*, 1 Doug. [Mich.], 224; *State v. Delesdenier*, 7 Tex., 76; *Ex parte State of Alabama*, 52 Ala., 231; *State v. Stout*, 7 Neb., 101; *State v. Lancaster County Bank*, 8 Neb., 218; *Spencer v. Brockway*, 1 O., 259; *Esley v. People*, 23 Kan., 510; *People v. Miles*, 56 Cal., 401; *Green v. State*, 73 Cal., 29; *People v. Dennison*, 84 N. Y., 272; *Lowry v. Thompson*, 25 S. Car., 416; *Dunnington v. Ford*, 80 Va., 177; *Hagood v. Southern*, 117 U. S., 52.)

The usage and practice since juries were first known clearly demonstrate that the right of trial by jury does not require that jurors shall be drawn or selected by any particular method, or in any particular manner. The method may be regulated by statute, or by judicial action, when necessary; and any method may be adopted which is likely to secure a trial by a fair and impartial jury of twelve men. (*Shaffer v. State*, 1 How. [Miss.], 238; *United States v. Woodruff*, 4 McLean [U. S. C. C.], 105; *Watson v. Walker*, 33 N. H., 131; *People v. Harding*, 53 Mich., 48; *Claussen v. La Franz*, 1 Ia., 226; *United States v. Fries*, 3 Dal. [U. S.], 515; *King v. State*, 38 Wis., 71.)

A party no longer has the right to a jury of the vicinage. The reason of the common law rule has not only ceased, but by the changed nature of jury trials the jury should be

selected upon the contrary principle. In most cases jurors should be selected, not as at common law, because they are of the vicinage, but because they are not, and therefore do not know the parties or the facts. (Thompson & Merriam, Juries, 1; *Schmidt v. New York Union Mutual Fire Ins. Co.*, 1 Gray [Mass.], 529; *Taylor v. Gardiner*, 11 R. I., 182; *Baccigalupo v. Commonwealth*, 33 Gratt. [Va.], 807; *State v. Lake City*, 25 Minn., 404.)

The provision for trial by jury in the constitution of the United States has no application to state courts. A trial in this court with or without a jury would be with "due process of law." (*Walker v. Sauvinet*, 92 U. S., 90.)

T. M. Marquett, John H. Ames, J. H. Broady, J. C. Cowin, George E. Pritchett, Griggs, Rinaker & Bibb, and *C. O. Whedon, contra*, cited: Constitution, art. 1, secs. 3, 6, 13, 24; art. 6, secs. 2, 22; Laws, 1877, pp. 19–24; *Stout v. State*, 7 Neb., 102; *State v. Andrews*, 11 Neb., 523; Cooley, Constitutional Limitations, [4th ed.], pp. 99–103, 410, 319, 352–356; *Hallenbeck v. Hahn*, 2 Neb., 403; *Ex parte Milligan*, 4 Wall. [U. S.], 2; Proffatt, Jury Trial, sec. 80; *Olive v. State*, 11 Neb., 1; *Swart v. Kimball*, 43 Mich., 448; *Kilbourn v. Thompson*, 103 U. S., 168; *United States v. State Bank*, 96 U. S., 30.

RYAN, C.

The petition of the attorney general, filed in this court, represented that by the constitution of this state it is provided that the supreme court shall have original jurisdiction in civil cases in which the state is a party, yet that no provision has as yet been made by law for the service of process in such cases, or as to the method of procedure by which such jurisdiction may be exercised, and that controversies have heretofore frequently arisen of such character and importance that it would have been greatly to the benefit, convenience, and advantage of the

state if the attorney general, in his discretion, could have instituted and prosecuted such actions in this court, and that controversies of like character are liable frequently to arise in the future. As an instance of the controversies referred to, this petition referred to the necessity of the commencement and prosecution of an action, under the direction of the governor of this state, against John E. Hill, late state treasurer, and the sureties upon his official bond. The prayer of the attorney general's petition was that this court take such action as shall be proper and necessary in relation to the class of controversies described. Upon the suggestion of this court, notice of the proposed application was served upon ex-Treasurer Hill and the sureties on his official bond. When the petition of the attorney general was presented, he and his associate counsel, on the one hand, and counsel for ex-Treasurer Hill and the sureties on his official bond, on the other hand, submitted exhaustive briefs and oral argument, addressed to this court's jurisdiction of the subject-matter in controversy as against ex-Treasurer Hill and his sureties, rather than the mere formulation of rules for the exercise of such jurisdiction. The constitutional provision discussed were those following, each being contained in "Article (VI)—The Judicial Department."

"Sec. 2. The supreme court shall consist of three judges, a majority of whom shall be necessary to form a quorum or pronounce a decision. It shall have original jurisdiction in cases relating to the revenue, civil cases in which the state shall be a party, *mandamus*, *quo warranto*, *habeas corpus*, and such appellate jurisdiction as shall be provided by law."

"Sec. 22. The state may sue and be sued, and the legislature shall provide by law in what manner and in what courts suit shall be brought."

Adversely to the attorney general's application it is insisted that these two constitutional provisions, for the

purpose of construction, should be read as a single enactment, thus: "The state may sue and be sued, and the legislature shall provide by law in what manner and in what courts suits shall be brought, and the supreme court shall have original jurisdiction in civil cases in which the state shall be a party." Commenting upon this consolidation counsel say: "So read, the implication is too strong to leave room for doubt that the intent of the convention was merely and solely to include the supreme court in the class of tribunals from which it would otherwise have been excluded, upon which the legislature may devolve the duty of determining litigation of the kind mentioned in the first instance, and whose jurisdiction in this respect can only be called into action by legislative mandate." The chief argument against the jurisdiction of this court is indicated in the language of counsel quoted, and resolved into its primary elements, and stated in the simplest form, it is, first, the constitutional provisions quoted are not self-executing; and, second, that supplemental statutory enactments are necessary to bring into existence the otherwise inchoate jurisdiction of this court. It is at least doubtful whether the broad provision that this court "shall have original jurisdiction in civil cases in which the state shall be a party" should be qualified by a construction based upon an independent constitutional provision. Without considering this question, we shall now quote such provisions of the statutes as are deemed applicable to the considerations urged upon the line of argument suggested.

An act entitled "An act to amend chapter 13 of the Revised Statutes of 1866," approved February 27, 1879, contained the following provision:

"Sec. 13. The supreme court shall have original jurisdiction in cases relating to the revenue, civil cases in which the state shall be a party, *mandamus*, *quo warranto*, and *habeas corpus*, and shall have appellate and final jurisdiction of all matters of appeal and proceedings in error

which may be taken from the judgments or decrees of the district courts in all matters of law, fact, or equity, where the rules of law or the principles of equity appear from the files, exhibits, or records of said court to have been erroneously determined."

The section quoted appears as section 13, chaper 19, of the Compiled Statutes. Section 1 of the Code of Civil Procedure requires that the provisions of said Code, and all proceedings under it, shall be liberally construed, with a view to promote its object and assist the parties in obtaining justice. By section 2 of the aforesaid Code it is provided that there shall hereafter be but one form of action, which shall be called a civil action. Section 903 of said Code is in the following language: "Where, by general or special statute, a civil action, legal or equitable, is given, and the mode of proceeding therein is prescribed, this Code shall not affect the proceedings under such statute, until the legislature shall otherwise provide; but in all such cases, as far as it may be consistent with the statute giving such action, and practicable under this Code, the proceedings shall be conducted in conformity thereto. Where the statute designates by name or otherwise the kind of action, but does not prescribe the mode of proceeding therein, such action shall be commenced and prosecuted in conformity to this Code; where the statute gives an action, but does not designate the kind of action, or prescribe the mode of proceeding therein, such action shall be held to be the civil action of this Code, and proceeded in accordingly." This language is very comprehensive; but, apparently to avoid the possibility of any oversight, there is contained in section 901 the provision that "if a case ever arise in which an action for the enforcement or protection of a right, or the redress or prevention of a wrong, cannot be had under this Code, the practice heretofore in use may be adopted so far as may be necessary to prevent a failure of justice." Even if the constitutional provisions quoted must of necessity be held

to rest in abeyance until statutory enactments conferred vital energy upon them, there is wanting no statute essential to that purpose. The very section of the statute which makes effective the constitutional provision, that this court shall have "such appellate jurisdiction as shall be provided by law," in the same sentence provides that this court shall have jurisdiction "in civil cases in which the state shall be a party."

Section 675 of the Code of Civil Procedure provides that "in actions in equity either party may appeal from the judgment or decree rendered or final order made by the district court to the supreme court of the state," but neither this nor any other section of the statute attempts to confer appellate jurisdiction in such cases otherwise than as above noted. This section 675 furthermore provides that within six months after the date of the rendition of the judgment or decree, etc., the party appealing should procure a certified transcript of the proceedings had in the case in the district court, containing the judgment or decree therein, together with certain prescribed evidence; and that the party appealing should have the case docketed in this court. There was contained in the statute no requirement of notice to the appellee. This defect was supplied by our rule 15 until the present January term, 1894, of this court, when substantially the same provision as to notice in cases of appeal was embodied in rule 14. We can see no reason countenancing this right by rule to provide for notice in an appeal in equity which does not equally support the contention that this court may provide the manner in which civil cases, in which the state may be a party, may be commenced. Section 2 of the Code of Civil Procedure provides that there shall be but one form of action, while in section 903 is the provision that "where the statute designates by name or otherwise the kind of action, but does not prescribe the mode of proceeding therein, such action shall be commenced and prosecuted in conformity to this Code," and that "where the statute

gives an action, but does not designate the kind of action or prescribe the mode of proceeding therein, such action shall be held to be the civil action of this Code and proceeded in accordingly." The Code of Civil Procedure furnishes rules to govern this court in the exercise of its original jurisdiction, and if to that jurisdiction the assent of the legislature shall be essential, we have already seen that such assent is embraced in section 13, chapter 19, of the Compiled Statutes. In this connection it is not deemed amiss to say that nearly all the common law rules of practice were developed by the courts as occasion required, irrespective of existing statutory provisions. It is highly probable that if every statute relating to rules of procedure should be unconditionally repealed, the jurisdiction created by the constitution and statutes would not of necessity therefore fail, but that the courts in which such jurisdiction was vested would have power to provide by rule for the exercise of that jurisdiction.

It has been urged in argument that a defendant is entitled to a jury chosen from the vicinage. Originally, in criminal prosecutions there were reasons for such a rule, but in civil actions they now have no existence. At the present time the efforts of courts are directed towards securing jurors who must decide the facts solely upon the evidence adduced upon the trial, and the absence of bias or prejudice on the part of the jurors, by reason of knowledge of the facts or of the parties, is rather sought than shunned. Whenever a proper case is presented wherein there must be a jury, this court will make such order in that regard as shall be deemed necessary. The original jurisdiction conferred upon this court by the constitution, where not expressly restricted, is concurrent with that of the district court of the proper county. Such jurisdiction will not be entertained by this court in cases wherein the state is but a nominal party. The case must be such that the state as a real substantial party has a direct interest in

having determined. This interest must be made to appear not merely by the title of the action, but it must be shown by facts clearly pleaded. For the determination of this court whether jurisdiction will be entertained in any proceeding, a petition setting forth the cause of action must be in the first instance presented and an order made in respect thereto, in conformity with such rules of this court as shall be applicable to the case presented, whether such rules have already or may be hereafter formulated.

A. W. COX, ADMINISTRATOR, v. ANNA D. EINSPAHR.

FILED MAY 2, 1894. No. 5562.

Witnesses: EXAMINATION: FRAUDULENT CONVEYANCES: EVIDENCE. In an action by the wife for the value of certain chattels sold on judicial process for the satisfaction of a debt of her husband the defense was want of consideration, and fraud as against the creditors of her husband in the transaction whereby her husband conveyed such chattels to her. *Held*, That a very liberal cross-examination should have been permitted of each party to said transaction, and that it was error to sustain an objection to an inquiry made of her husband on such cross-examination as to whether or not, after said conveyance to his wife, there had not been transferred a certain described part of said property to a designated creditor of the husband in consideration of a debt by him owing before the transfer to his wife.

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

Batty, Casto & Dungan, for plaintiff in error.

Capps & Stevens, *W. P. McCreary*, and *C. H. Tanner*, *contra.*

RYAN, C.

This action was brought by Anna D. Einspahr against Abraham Yeazel for the value of certain personal property levied upon by the sheriff of Adams county under and by virtue of a writ of attachment issued upon the petition of Abraham Yeazel against Herman D. Einspahr, the husband of Anna D. Einspahr. Subsequently the attached property was sold and proceeds applied in payment of the debt of Herman D. Einspahr adjudged due Abraham Yeazel in the suit wherein the attachment had been issued and levied. In the petition of Anna D. Einspahr, above referred to, there were contained averments material to a correct understanding of the matters hereinafter discussed. These averments were as follows:

"This plaintiff further alleges that on or about the 28th day of January, 1890, this defendant entered into an agreement with one H. D. Einspahr, the husband of this plaintiff, whereby and wherein this defendant consented and agreed that the said H. D. Einspahr might and should sell to this plaintiff the property described in the petition in this action, for the purpose of inducing and procuring this plaintiff (the wife of H. D. Einspahr) to sign certain real estate mortgages to property in which the said H. D. Einspahr was seized, and in which mortgages this plaintiff was to dispose of and relinquish her equity and dower right which she then had in said real estate, and that in pursuance to the said agreement between this defendant and the said H. D. Einspahr, did, on the 29th day of January, 1890, sell, set over, and transfer unto this plaintiff all of his right, title, and interest in and to the aforesaid personal property to this plaintiff."

The above quotation was made because it serves to elucidate the transactions; that following is given for the very opposite reason:

"That the said Abraham Yeazel, defendant, was, on the

28th day of January, 1890, cashier of the Exchange National Bank of Hastings, Nebraska, which bank the said H. D. Einspahr owed at that time a large amount of money, to-wit, about $15,000, which said proposed mortgages were desired by the said Abraham Yeazel, this defendant, at that time to secure said indebtedness; that in pursuance of said agreement this plaintiff did, on the 29th day of January, 1890, sign, execute, and deliver real estate mortgages on her interest in the lands so mortgaged, including her homestead, to secure the said sum of $15,000 of indebtedness of the said H. D. Einspahr so as aforesaid due from him to the said bank, and that the transfer of the aforesaid property from H. D. Einspahr to this plaintiff was made as aforesaid with full knowledge thereof to this defendant and at his instance and request."

The petition alleged that Abraham Yeazel, through the sheriff, obtained possession of said chattels, unlawfully and wrongfully converted them to his own use, to the damage of the plaintiff in the sum of $6,868, for which sum she prayed judgment. Before an answer was filed, Abraham Yeazel died, and his administratrix, Lueva Yeazel, was substituted as defendant. Afterwards this substituted defendant answered, in effect, justifying the levying of the writ of attachment and the sale in pursuance of said levy, because, as alleged in the answer, the transfer of the property levied on was made and received for the sole purpose of enabling H. D. Einspahr to avoid the payment of the debt due Abraham Yeazel, and for the purpose of cheating, defrauding, hindering, and delaying his creditors, and for the further reason that the said transfer was totally without consideration and void as to creditors. Subsequently a reply was filed in denial of every allegation contained in the answer inconsistent with the averments of plaintiff's petition. Upon a trial had to a jury, a verdict was rendered in favor of the plaintiff, assessing the amount of her damages at the sum of $6,000, upon which, after the over-

ruling of a motion for a new trial, and exceptions thereto, judgment was duly rendered.

The controversy in this action was as to the *bona fides* of the transfer of the personal property from H. D. Einspahr to his wife. The consideration alleged in the petition, if proved, was sufficient, so far as consideration was necessary, to sustain the transfer of the personal property, provided that in all other respects said transfer was free from objection. The defense does not seem to have been so much upon the want of consideration, however, as because of the alleged fraudulent nature of the transaction. In the instructions the relation of the parties between whom the transfer of the personal property took place was duly noticed by the court, and in that regard there could have been no misunderstanding. The above observations are addressed more particularly to the objections made to the first instruction asked by the plaintiff than to any other matter whereby the question arose.

Fraud is peculiarly a question of fact under our statute for the determination of the jury. If the right of a party to a suit depends upon the establishment of fraud, he must prove it in order to succeed; the burden of proof is upon him whose success depends upon showing the fraud. (*Clark v. Tennant*, 5 Neb., 549.) In a case of this kind the facts can only be ascertained by a full examination of the witnesses. This is especially true where the transaction is between husband and wife, and where, in the nature of things, it is questionable whether or not there has been such change of possession of the property disposed of as would indicate a change of ownership. Among the personal property transferred by H. D. Einspahr to his wife, and for the value of which this suit was brought, there were two stallions, which the evidence of Mr. Einspahr showed were worth, as he said, all the way from $1,500 to $2,500. The party who was witness to the bill of sale, and who read the same over to Anna D. Einspahr, was

John Steiner, not at that time related to Mr. and Mrs. Einspahr, but who has since married their daughter. On cross-examination the bill of exceptions shows the following proceedings. Counsel for defendant, in the cross-examination of H. D. Einspahr, propounded the following questions, with the results indicated:

Q. What became of these two stallions mentioned in this bill of sale?

A. John Steiner got them.

Q. From whom did he buy them?

A. From my wife.

Q. Before or after the execution of this bill of sale?

A. After the execution of the bill of sale.

Q. What was the consideration paid by John Steiner to your wife for these two stallions?

Counsel for plaintiff objected, as incompetent, immaterial, irrelevant, and not proper cross-examination. Objection sustained. Defense excepted.

Q. Was that consideration a money consideration or some other kind?

Counsel for plaintiff objected, as incompetent, immaterial, and not proper cross-examination. Objection sustained on the ground that it is incompetent and immaterial. Defense excepted.

Q. Is it not a fact that these two stallions were transferred to John Steiner after this bill of sale was given by you to Anna D. Einspahr, and in consideration of a debt that you owed John Steiner prior to the execution of this bill of sale?

Counsel for plaintiff object, as incompetent, immaterial, and irrrelevant, and not proper cross-examination. Objection sustained. Defense excepted.

Counsel for defense now offer to prove that H. D. Einspahr, this witness, was indebted to John Steiner in a certain amount of money prior to the execution of this bill of sale to his wife, Anna D. Einspahr, and that subsequent

to the execution of said bill of sale, the two stallions mentioned in the bill of sale were transferred to John Steiner to liquidate this indebtedness of said H. D. Einspahr to John Steiner. Offer denied, and defense excepted.

The objection that this was not proper cross-examination was not well taken, for in his direct examination H. D. Einspahr had testified concerning the sale to his wife, and that the same was made for the purpose and with the intention stated in the petition. A careful examination of the record has disclosed that nowhere else was there any evidence introduced which would supply the place of that offered and rejected as indicated by the last three questions and the proceedings in reference thereto. A copy of an affidavit, made by Anna D. Einspahr with reference to the dissolution of the attachment in the case brought by Abraham Yeazel against H. D. Einspahr, was introduced in evidence, and as to the transaction sought to be elicited by the questions to which objections were sustained the affiant said: "Affiant further says that she is acquainted with the transaction of the transfer of the two stock horses, and grain and accounts to John Steiner in payment of the notes held by Steiner against her said husband, and knows that the same was in good faith and done as set forth in the affidavit of her said husband and the said John Steiner." In the record there is no other allusion to this transaction, the affidavits of John Steiner and H. D. Einspahr, just referred to, being wholly omitted. We cannot avoid the conviction that the objections to the questions propounded to H. D. Einspahr concerning the consideration for the transfer of the two stallions to John Steiner were improperly sustained. If, as was indicated in the last question, the answer thereto should have shown that the consideration for the transfer was a debt owing by H. D. Einspahr to John Steiner, and for which Anna D. Einspahr was in no way responsible, the bearing might have been very direct in sustaining the imputation of

fraud in the sale and transfer of property by H. D. Einspahr to his wife. If there had been other evidence which explained this transaction, the proposed testimony might have been immaterial. As it was however, the defendant, having pleaded and insisted on the fraudulent nature of the transaction, was entitled to cross-examination upon a matter having as important a bearing on this question as that in relation to the transfer of the two stallions to Steiner, presented as it was by the questions to which objections were sustained. For the error pointed out the judgment of the district court is

REVERSED.

PHŒBE A. MUNSON, APELLANT, V. THOMAS W. CARTER ET AL., APPELLEES.

FILED MAY 2, 1894. No. 5001.

Homestead: FRAUDULENT INTENT. The ownership of a homestead, exempt at and before the rendition of a judgment, was by *mesne* conveyances transferred from the judgment debtor to his wife. *Held*, That the right of the wife to assert such homestead exemption was in no way affected by the fraudulent intent with which either of said conveyances was given or received.

APPEAL from the district court of Adams county. Heard below before GASLIN, J.

C. H. Tanner and *Capps & Stevens*, for appellant.

Batty, Casto & Dungan, contra.

RYAN, C.

In the district court of Adams county appellant filed her petition, in the nature of a creditor's bill, against the

appellees with the view of subjecting to the satisfaction of a judgment in her favor the southeast quarter of section 22 township 6 north, range 11 west, 6th P. M., a tract of land lying and being situate in said county. It was, in effect, alleged in this petition that originally the title of said lands had been held by the judgment defendant, Thomas W. Carter, by whom (his wife joining) it was conveyed to U. S. Rohrer; by whom it was conveyed to Lydia J. Carter, who (her husband, Thomas W. Carter, joining) conveyed to G. W. Spicknall, who now holds the title for the benefit of Thomas W. Carter. The petition contained averments which, if sustained by proof, would have entitled the appellant to the relief prayed, for fraud and fraudulent intentions were freely charged against both the grantors and grantees in each conveyance noted. The allegations as to G. M. McKinzie, the Kansas City & Omaha Railroad Company, and the Muscatine Mortgage & Trust Company were simply that each claimed an interest in, or lien upon, the above described real property, and as against each there was a prayer akin to that for the foreclosure of a mortgage or other lien. No special mention need be made of the nature or description of the interest or liens just referred, for our decision must be governed wholly by other considerations. The answers of the appellees contained denials of the fraudulent intent charged in the petition as to the several conveyances therein described, and alleged that the conveyance to Lydia J. Carter and that to G. W. Spicknall were made for a valuable consideration in each instance, the first as an absolute conveyance, the second as security for the payment of $325 due from Thomas J. Carter to G. W. Spicknall. There were in the joint answer of Thomas W. Carter and Lydia J. Carter averments of the relation of husband and wife between them, and of facts which in law were sufficient to exempt from judicial sale as a homestead their interest in the real property—subject as it was to the mortgages therein described. As to the right of

homestead exemption claimed, issues were duly joined, involving necessarily the existence of the mortgage liens described in the aforesaid answer. The district court, justified by amply sufficient evidence, found generally for the appellees, and specially that at the time of the recovery of plaintiff's judgment, and ever since, the property in question was, and is, the property of Thomas W. Carter; and that there are valid liens on said premises prior to the said judgment of plaintiff, placed there by Thomas W. Carter and his wife, under the provisions of section 3, chapter 36, Compiled Statutes of Nebraska, to the amount of $1,800; that the value of said premises at the time of the recovery of plaintiff's judgment was, ever since has been, and now is, $3,700; that the equity of said Thomas W. Carter was at the time of the recovery of said plaintiff's judgment, ever since has been, and still is, $1,900; that at the time of the recovery of plaintiff's judgment it is admitted by the petition, and shown by the evidence, that said premises was the homestead of said defendant Thomas W. Carter and his family, consisting of himself and wife, of which he then was, ever since has been, and is now the head. The court further found that the real property sought to be subjected had been the homestead of said Thomas W. Carter and his family ever since the recovery of plaintiff's judgment and for considerable time prior thereto. As a conclusion of law the court found that under the homestead law the property was exempt from judicial sale for the satisfaction of the claim of the appellant, and that it would therefore be immaterial whether or not a fraudulent intent existed in the alleged conveyances, and, thereupon, the appellant's action was dismissed. The findings of fact and the conclusions of law, upon a full examination of the case, meet with our approval, and the judgment of the district court is

AFFIRMED.

STEELE & WALKER v. M. W. CRABTREE ET AL.

FILED MAY 2, 1894. No. 5211.

1. **Constables:** EXECUTIONS. It is the duty of a constable to exercise all reasonable diligence necessary to a compliance with the mandates of an execution intrusted to him for the satisfaction of a money judgment.
2. ———: EXECUTING WRITS: NEGLIGENCE: DAMAGES. A constable, to whom has been intrusted the collection of a judgment by an execution placed in his hands, must with reasonable diligence seek out and levy on such personal property of the judgment defendant as is subject to execution, and for his failure so to do, the constable is liable to the execution creditor for such damages as result from this neglect of duty.
3. ———: ———: FAILURE TO MAKE LEVY. To excuse the liability of a constable for a failure to levy upon available personal property of an execution defendant, it is not sufficient to show that such constable failed to make a levy because of his reliance on the false representations of the execution defendant as to such defendant having taken a stay of, or appeal from, the judgment upon which execution had issued; neither is it sufficient to show notice of an application by the judgment defendant for the issue of an injunction to restrain the collection of such judgment.
4. ———: ———: ———: INDEMNITY BONDS. The failure of a constable seasonably to levy an execution on personal property legally subject thereto in possession of the debtor, and within his reach, was not excused by a subsequent demand from the judgment plaintiff of a bond of indemnity against damage because of a proposed levy on the property of the judgment defendant, and it matters not that such bond, when so demanded, was refused.

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

The facts are stated by the commissioner.

Wigton & Whitham, for plaintiffs in error:

The execution being valid and regular on its face, and

there being property in the possession of the judgment debtor, owned by him, the title to which was unquestioned, the defendants will be liable irrespective of the fact that plaintiff gave defendant Crabtree no indemnity bond. (Maxwell, Justice Practice, 253; Crocker, Sheriffs, sec. 283; Murfree, Sheriffs, sec. 959; *Phillips v. Spotts*, 14 Neb., 139; Cooley, Torts, 466.)

The burden of proof is on the defendants to show some excuse or reason why the defendant Crabtree was not negligent in failing to levy, it having been shown that Hoover had sufficient property not exempt in his possession at the time the execution was in the hands of Crabtree, to satisfy it. (Maxwell, Pleading & Practice [5th ed.], 576; *Elmore v. Hill*, 46 Wis., 618, 51 Wis., 365; *People v. Palmer*, 46 Ill., 398; 2 Greenleaf, Evidence, 585; Crocker, Sheriffs, 432.)

It is a well established rule of law that a paper filed after the time limited by statute for its filing has no force or effect and may be stricken from the files, and that a justice of the peace approving the same exceeds his authority. (*Duckwell v. Rogers*, 15 O. St., 546; *Bell v. White Lake Lumber Co.*, 21 Neb., 525; *Greenwood v. Craig*, 27 Neb., 669; *Birdsall v. Carter*, 16 Neb., 422; *Patterson v. Woodland*, 28 Neb., 250.)

When property is pointed out by the plaintiff as that of the defendant, the officer must levy, or must justify his failure to levy by proving that the ownership was not in the defendant. (Freeman, Executions, 107, 254; *Mann v. Brophy*, 38 Wis., 426; *People v. Palmer*, 46 Ill., 398.)

The officer cannot shield himself by showing bare assertions and rumors which he has heard. He must show that they are well founded. He is bound to notice only legal claims fairly exhibited and not assertions and threats of individuals or vague information. If he takes notice of these and fails to make a levy, he does so at his peril and will be liable for damages. (Freeman, Executions, 107, 254; *Peo-*

ple v. Palmer, 46 Ill., 398; *Dunlap v. Berry*, 4 Scam. [Ill.], 327; Crocker, Sheriffs, 35, 851; *Hinman v. Borden*, 10 Wend. [N. Y.], 367; *Reeves v. Parish*, 4 S. E. Rep. [Ga.], 768; *Mann v. Brophy*, 38 Wis., 413.)

John R. Hays, contra:

Under the most favorable circumstances a constable must often act at his peril, and besides the legal presumption of the validity of his official acts, he is entitled to the most lenient consideration consistent with the law, when it is manifest that he acted with perfect good faith and endeavored honestly to do his whole duty. (*Green v. Jones*, 39 Ga., 521; Murfree, Sheriffs, sec. 960.)

The constable is not bound to use more than ordinary diligence. Ordinary diligence is such as a reasonable man would exercise in the performance of like duties under the same circumstances. Reasonable diligence is sufficient. (*Crosby v. Hungerford*, 59 Ia., 715; *Elmore v. Hill*, 51 Wis., 365; *Whitney v. Butterfield*, 13 Cal., 335.)

The presumption of diligence obtains in favor of the officer in the service of process, as it does in other situations that the officer did his duty. (*Livar v. State*, 9 S. W. Rep. [Tex.], 552.)

It is not always required that an officer proceed at once to execute process, when not warned of the existence of special urgency. (*Whitney v. Butterfield*, 13 Cal., 335.)

The officer is not an insurer that no loss shall happen to the plaintiff or creditor in consequence of any delay on his part to serve process. (*Tucker v. Bradley*, 15 Conn., 46.)

RYAN, C.

The petition alleged that the defendant M. W. Crabtree, on November 8, 1887, was duly elected to the office of constable in and for Norfolk precinct, Madison county, Nebraska; that in due time he qualified as such officer, the sureties on his official bond being his co-defendants; that

on November 26, 1888, the plaintiff recovered a judgment against J. D. Hoover before George N. Beels, a justice of the peace in and for said Norfolk precinct, in the sum of $77.47, and costs amounting to $3.20; that afterwards, on December 10, 1888, an execution was duly issued upon said judgment and delivered to said constable, commanding him to collect the amount of said judgment, interest, and costs, and accruing costs, out of the personal property of said J. D. Hoover, and to pay the same to the party entitled thereto, and make return showing his manner of executing the said writ within thirty days from the receipt thereof. The above allegations were by the answer admitted to be true. There was, however, a denial of the other averments of the petition, which other averments were as follows:

"6. Said constable neglected and refused to execute said process, although there was then in his county property belonging to said J. D. Hoover on which he might have levied sufficient to make said amounts, but the defendant M. W. Crabtree, on the 12th day of June, 1889, returned said writ without executing the same, and the said J. D. Hoover has not now, nor has had since the return of said writ, property upon which a writ of execution could levy, and said defendant M. W. Crabtree did not therein faithfully perform the duties of his said office of constable as required by law, but has wholly failed to perform the same, whereby the plaintiff has lost his said debt, to his damage in the said sum of $87.07, with interest thereon from the 26th day of November, 1888, at the rate of ten per cent per annum."

Judgment was prayed for the amount last named. That portion of the answer not above referred to was in the following language:

"2. The defendant, for further answer to said petition, avers that upon the delivery of the execution mentioned in count 5 of said petition to the said M. W. Crabtree, constable, he went to Battle Creek, the place of residence

of J. D. Hoover, the execution defendant, for the purpose of levying on the property of said J. D. Hoover, for the satisfaction of said judgment. Whereupon he was informed by the said J. D. Hoover, execution defendant, that prior to the date of said execution the said J. D. Hoover, execution defendant, had filed with George N. Beels, justice of the peace, before whom the judgment referred to in said petition was rendered, a bond provided by law to stay execution on said judgment, and on the said day the said J. D. Hoover, execution defendant, served upon M. W. Crabtree a notice in writing that he intended applying to the county court of Madison county, Nebraska, for an injunction for the purpose of restraining the enforcement of said judgment, which said notice in writing is hereto attached, marked 'Exhibit A.' That upon receiving said notice, and being advised by said Hoover, execution defendant, of the filing of said bond, the defendant M. W. Crabtree reported to Messrs. Wigton & Whitham, attorneys for plaintiffs herein, that said notice had been served upon him, and demanded of them a bond of indemnity to secure him against any damage which he might be called upon to do by reason of the levying of said execution upon the property of said J. D. Hoover, execution defendant, and the said Wigton & Whitham refused to furnish bonds of indemnity; whereupon defendant M. W. Crabtree returned said execution as set forth in plaintiff's petition.

"3. Defendants deny that by reason of the failure to deliver the execution as set forth in said petition that plaintiffs have lost their demand against the said J. D. Hoover, and aver that on the 7th day of December, 1888, said execution defendant J. D. Hoover filed with the said George N. Beels, justice of the peace, a bond in manner and form as provided by law to stay execution upon said judgment with sureties approved by the said justice, and said bond is sufficient to secure the payment of said demand."

The following is a copy of the notice referred to as Exhibit A in the above referred to second paragraph of the answer:

"BATTLE CREEK, NEB., 12–11–'88.

"*To Wigton & Whitham and M. W. Crabtree:* Please take notice, that I, J. D. Hoover, defendant in the case of Steele & Walker v. J. D. Hoover, do intend to apply to the district court for an injunction restraining the enforcement of the execution in favor of said Steele & Walker and against the undersigned now in the hands of said M. W. Crabtree for execution, and issued from the court of George N. Beels, justice of the peace in and for Madison county, Nebraska. Said application will be made before his honor Judge Duncan on the 15th day of December, A. D. 1888. J. D. HOOVER."

There was a reply in denial of the averments of the answer. The issues were tried to the court, without a jury, and judgment rendered in favor of the defendants. The trial of the case began with the following admission:

"Mr. Hays: The defendants admit that, if present, J. D. Hoover, W. E. Hoover, and Simon Montgomery would testify that at the time the execution was given to the defendant Crabtree, and until and including the 12th of December, 1888, J. D. Hoover had property not exempt from execution in the county of Madison sufficient to satisfy the execution held by the defendant Crabtree and being the same mentioned in this case; and the defendants further admit, and the defendant Crabtree further admits, that the judgment of Steele & Walker v. J. D. Hoover still remains unpaid. The defendants further admit that at the time of the return of said execution, and at the time of the commencement of this action, and thenceforth to the present time, said J. D. Hoover has had no property upon which this execution could be levied to make the judgment mentioned in the pleadings."

The defendant Crabtree testified that the reason he did

not levy the execution when the same was placed in his hands for that purpose was (to use his own language) "because they notified me that they had filed a stay bond and appealed the case." He further testified that he went to Battle Creek, where he saw J. D. Hoover, the execution defendant, and informed him of his business, and was thereupon told by Hoover that he had filed a stay bond with the justice, and had also filled out this notice of appeal to the district court. Witness stated further: "I believe that he [Hoover] said if I made the levy I did it at my risk, that a bond for an appeal was filed and that I would get my foot in it if I levied, and that I had better go back and get an indemnity bond." He further said that he received the notice, made a part of his answer, just after Hoover had notified him about the stay bond; that Hoover said, "just wait a minute, I want to serve a notice on you," and went back to the desk and wrote out the notice, and said, "if you insist on making a levy, I would advise you to go back and get an indemnity bond before you make it;" that he showed the notice to Mr. Whitham, one of the attorneys of Steele & Walker, the same day, and asked for an indemnity bond, which was refused; that he made inquiry as to the stay bond of Mr. Beels, the justice before whom the judgment was obtained, and was told that a stay bond had been sent down, but, in the opinion of the justice of the peace, it was one day too late. This so-called stay bond was not introduced in evidence, but since the judgment it is admitted to have been rendered on November 26, 1888, and in the third paragraph of the answer it is alleged that the stay bond was filed on December 7, following. It is clear that whatever was the contents of the bond, it was filed too late to be of any avail under section 1049 of the Code of Civil Procedure.

On behalf of plaintiff, George L. Whitham testified as follows: "On the day that Mr. Crabtree received the execution, or on the day on which it was to be levied, he

came to me with the execution in his hands [as attorney for plaintiff, of course] and requested instructions in regard to the levying of the execution. I said to him that he should go to Battle Creek and see Mr. Hoover, and that I thought Mr. Hoover would pay him the money on the execution, but that if he did not do so, he [Crabtree] should at once levy on Mr. Hoover's stock of goods, which was there at Battle Creek, and which Mr. Hoover owned at that time. When Mr. Crabtree returned on the day on which he testified—I cannot recollect whether that was the day or not, but I think it was—he returned on either the 10th or 11th of December, I think it was, of 1888; he said to me that he did not make the levy and showed me this notice that he has stated about, and he said to me, also, that Mr. Hoover had that stock of goods at that time."

It is without question that there was, as alleged, the recovery of the judgment; the issue of an execution thereon to Crabtree as constable; the existence of a stock of goods of the execution defendant, subject to and within the power of said constable to make a levy thereon for the satisfaction of the execution with the collection of which he was charged. It is equally without question that afterwards, and before the return of the execution, the stock of goods was placed beyond reach, and that Hoover never since has owned sufficient property from which the judgment in favor of plaintiff could be satisfied. Every element essential to the liability of the defendants is thus established, and it remains but to consider whether the failure to make the levy has been sufficiently excused by the defendants. As applied to the facts of this case, the law admits of but little question.

In the case of *Dunlap v. Berry*, 4 Scam. [Ill.], 331, we find the following language: "The first instruction is in the following words: 'If the jury believe that the said Elder had property in the county of Morgan sufficient to pay the execution, or part thereof, against him, and that

the said Dunlap by reasonable diligence and exertions could have made the amount of the said execution, or part thereof, they will find for the plaintiff.' The purport of this instruction is simply to require the sheriff to make reasonable exertions to levy upon the property of the defendant in his county. This at least every sheriff and constable is bound to do, and if he fails to exercise due diligence in the discharge of his duty in that respect, he is responsible for whatever loss or detriment the person who commits an execution to his hands may sustain in consequence of such failure. (*Hargrave v. Penrod*, 1 Ill., 401.)

In *People v. Palmer*, 46 Ill., 403, is the following language: "The judgment against Crawley was obtained in a foreign county, and could only be made a lien by the levy of the execution which issued upon it, and filing, by the sheriff, a certificate of such levy in the recorder's office of the county where the land was situated. (Ch. 57, R. S., 305, sec. 25.) By omitting to make this levy and making and filing the certificate thereof, the plaintiff in the execution lost his lien on the land. The excuse for this neglect by the sheriff is that the plaintiff in the execution had not furnished any funds to pay the fees for filing and recording the certificate of levy. This excuse is wholly insufficient to relieve the sheriff from his responsibility in failing to levy and making and presenting his certificate thereof to the clerk to be filed. It was his duty to make a levy on the land and present the certificate, to be filed of record with the clerk of the circuit court, and if the clerk failed to record it by reason that his fees were not paid, the sheriff had discharged his duty by presenting the certificate for record. The sheriff should have levied on the land at all hazards and have made a certificate thereof, which if, on being presented to the clerk, he refused to record, the sheriff would be exonerated."

In *Elmore v. Hill*, 51 Wis., on pages 366 *et seq.*, occurs the following language: "The rule of diligence required of an officer in making a levy of an execution placed in

his hands for collection was very clearly and carefully stated by Mr. Justice Lyon when this case was here on a former appeal. (See 46 Wis., 618.) It is there stated that 'the result of the adjudications on the subject seems to be that on receipt of the execution, in the absence of specific instructions, the officer must proceed with reasonable celerity to seize the property of the debtor if he knows, or by reasonable effort can ascertain, that such debtor has property in his bailiwick liable to seizure on execution. The officer must do this as soon after the process comes to his hands as the nature of the case will admit. If he fails to execute the process within an apparently reasonable time, the burden is upon him to show by averment and proof that his delay was not in fact unreasonable; failing this, he must respond in damages to the party injured by his negligence.' Within this rule of law it is clear to our minds that the plaintiffs were entitled to judgment upon the undisputed facts of the case, and the court should have so directed the jury to find. The execution was delivered to the sheriff about 4 P. M. of the 25th of April, 1876. The defendant in the execution carried on its business in the city of Fond du Lac, within a mile or a mile and a half of the court house. The under-sheriff the same evening saw the secretary of the company and told him that he had an execution against the company, and asked him what he was going to do about it; if he was ready to pay it. The secretary informed him that the board would have a meeting the next morning and make some arrangements, as the under-sheriff understood, about paying the execution. Nothing further was done towards collecting the execution by the officer, and on the following Saturday, the 29th of April, the company made an assignment. It was admitted that during this time the judgment debtor had property accessible, or which the officers might readily have found, sufficient to satisfy the execution. Under these circumstances, as was

said by Mr. Justice Lyon in the former opinion, we have no difficulty in holding that this unexplained delay was actionable negligence if the debt was thereby lost. For the purposes of the case we assume that no instructions were given to the sheriff by the plaintiff's attorney to proceed and execute the writ at once. Proper diligence required him to make a levy, within a reasonable time, without such instructions. It probably would not have taken an hour to make a levy, as property of the judgment debtor was so accessible and near at hand. The delay of the officer in making it is unexplained and entirely unexcused. The plaintiffs have lost their debt in consequence of it, and the defendant is answerable for the injury occasioned by his want of diligence in the discharge of his duty. (See *Lindsay's Ex'rs v. Armfield*, 3 Hawks [N. Car.], 548; *Hearn v. Parker*, 7 Jones' Law [N. Car.], 150; *Hinman v. Borden*, 10 Wend. [N. Y.], 367; *Janvier v. Vandever*, 3 Harr. [Del.], 29; *State v. Roberts*, 7 Hals. [N. J. Law], 115; *State v. Brophy*, 38 Wis., 413.) The court in this case should have directed the jury, upon the evidence, to render a verdict for the plaintiffs for the amount claimed in the complaint."

In the petition it was alleged that the execution was issued on December 10. In the answer it was averred that constable Crabtree, upon the delivery of the execution to him, went to Battle Creek for the purpose of levying it. There is no evidence as to the particular date on which Crabtree made this trip. The notice served on him by Hoover bears date the 11th, so that it may fairly be assumed that he went to Battle Creek the day after the execution was issued, possibly on the day he actually received it. The party from whom he was required to collect his execution informed him that he had filed a stay bond. This the constable had no right to believe, for section 1052 of the Code of Civil Procedure requires that the justice of the peace who issues an execution, in case of a stay, shall recall

it. The constable should have acted upon no other evidence as to the filing of a stay bond than that required by statute. As a matter of fact, it seems that the execution issued after the time had expired for staying the judgment, and the constable had no excuse for the inference that the justice of the peace who issued the execution must have done so notwithstanding a stay bond filed. Again, it is alleged, as excusing the failure to levy, that the execution defendant Hoover informed the constable that he had appealed from the judgment. An undertaking on an appeal, to be effective, must be taken by the justice of the peace who rendered the judgment within ten days from such rendition. The constable was equally censurable for assuming that the justice of the peace had in the issuance of the execution ignored the fact of his approval of the appeal undertaking as in acting upon the assumption that he had ignored the filing of the stay bond. The judgment was admittedly rendered on November 26, 1888, and thereon execution was issued December 10 following. It is probable if there had been approved an appeal undertaking, or had been filed a stay bond within the proper time—which fact had been overlooked by the justice of the peace when he issued the execution—that the constable, upon a showing of that fact, could have exonerated himself from liability; but having acted upon the assumption of such a mistake on the part of the justice of the peace, he was bound at his peril to make good the assumption, which in this case he has completely failed to do. The notice served upon the constable by Hoover is wholly unknown in law, and, in view of the immediately previous contradictory statements made by Hoover of a stay taken, and of an appeal approved, ought not to have received the slightest consideration. The demand for an indemnity bond came after a failure to make the levy required of the constable. In some states the officer, after making the levy under the provisions of the statute, may demand an indemnity bond un-

der certain circumstances, and upon failure to receive it, may release his levy. There is, however, no such statutory provisions in this state, and we may not, therefore, proceed under the analogy furnished by such statutory provisions. It is safe, however, to say that even in the states where the statutes authorize the demand of an indemnity bond, such demand can be made only after levy. In principle there could exist no good reason why, before the levy, such bond should be required, for the danger to be indemnified against must then be purely imaginary. In the case at bar the constable wholly failed to excuse his neglect to make a levy of his execution, in consequence of which the plaintiff's claim has been lost. The judgment of the district court in favor of the defendant was, therefore, erroneous and is

REVERSED.

LUEVA YEAZEL, ADMINISTRATRIX, v. M. F. WHITE ET AL.

FILED MAY 2, 1894. No. 5229.

1. **Execution Sales:** REAL ESTATE. A purchaser of real estate, at a sale thereof on execution, acquires thereby, prior to confirmation only, the lien which the execution debtor had on such land.
2. ———: CONFIRMATION: TITLE OF PURCHASER. Under our law governing sales of real property on execution, the title of a purchaser thereat depends upon a final confirmation of the sale made; and until this is had and a conveyance of the real estate is executed and delivered in pursuance of such confirmation, the legal title of the execution debtor to the real estate is not divested.
3. ———: ———: RELATION. Where real estate is sold on ordinary execution, the sale confirmed and a conveyance made and delivered to the purchaser, the title he thereby acquires relates

back, and such purchaser obtains the same title to the real estate the execution debtor had at the time the judgment under which the land was sold became a lien thereon, except as affected by subsequent tax liens.

4. **But this doctrine of relation** back applies only to the title. It has no necessary reference to the *quantum* of the estate which the execution debtor owned at the time the judgment became a lien.

5. **Execution Sales of Real Estate:** TITLE OF OWNER BEFORE CONFIRMATION. The owner of real estate that has been sold on execution retains the legal title thereto, and is entitled to the possession, rents, profits, and usufruct of such real estate until a final confirmation of the sale made.

6. ———: GRASS CUT BY JUDGMENT DEBTOR BEFORE CONFIRMATION: REPLEVIN. A judgment debtor harvested a crop of wild grass from land after it had been sold on execution against him but before the confirmation of the sale. In an action of replevin brought by the purchaser of the real estate at the execution sale for said grass, *held*, that as the grass was severed from the realty before the confirmation of the sale, the title to the grass did not pass to the purchaser of the land.

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

The opinion contains a statement of the case.

Batty, Casto & Dungan, for plaintiff in error:

The authorities go to the extent of holding that if the fixtures and products of the soil have been sold before severance, and subsequent thereto, and before the severance, the land to which the fixtures are attached should be sold to a *bona fide* purchaser, the fixtures and products of the soil will pass to the purchaser of the land, unless they are reserved in the deed. (Tiedeman, Sales, sec. 59; *Gibbs v. Estey*, 15 Gray [Mass.], 587; *Dolliver v. Ela*, 128 Mass., 559; *Southbridge Savings Bank v. Exeter Machine Works*, 127 Mass., 542.)

The weight of authority seems to support the proposition that the hay, which was shown to be *fructus naturales*

by the testimony of both plaintiff and defendant, was part of the soil and must pass with the title of the land. (Freeman, Executions, sec. 113; *Coombs, v. Jordan*, 22 Am. Dec. [Md.], 236; *Green v. Armstrong*, 1 Denio [N. Y.], 550; *Bennett v. Scutt*, 18 Barb. [N. Y.], 347; *Purner v. Piercy*, 40 Md., 212; *Kain v. Fisher*, 6 N. Y., 597; *Crosby v. Wadsworth*, 6 East T. R. [Eng.], 602; *Kimball v. Sattley*, 55 Vt., 285.)

The possession of the sheriff in the case at bar was sufficient. A sheriff or constable levying upon real estate and growing crops appurtenant thereto cannot go into actual manual possession thereof, and it is not necessary that he should. (*Johnson v. Walker*, 23 Neb., 736; *Swift v. Agnes*, 33 Wis., 228.)

When a sale of real estate made under an execution is confirmed, the title relates back to the time of the sale, so that the purchaser can maintain an action in trover or replevin for fixtures or crops *fructus naturales* severed and removed therefrom. (2 Freeman, Executions, sec. 333; *Jackson v. Dickenson*, 15 Johns. [N. Y.], 309; *Osterburg v. Union Trust Co.*, 93 U. S., 424; *Pettit v. Black*, 13 Neb., 157.)

The sheriff's sale, in fact, substitutes the purchaser in place of the landlord, not only as of the time of the sale, but as to his title and interest at the date of the judgment. (2 Freeman, Executions, secs. 333, 348; *Whitney v. Huntington*, 34 Minn., 458.)

The hay in the case at bar was all *fructus naturales*, and before severance was a part of the realty, and could only be sold as a part of the realty, and the lien of the plaintiff in error attached thereto from the date of the filing of the judgment, and by the virtue of the sale of the real property the title to the hay in question passed to the purchaser. (*Lane v. King*, 8 Wend. [N. Y.], 584; *Crews v. Pendleton*, 1 Leigh [Va.], 327; *McLean v. Bovee*, 24 Wis., 295.)

When a levy is made under execution against real prop-

erty, from the time the levy is made to sale and delivery of the deed to purchaser, possession is in the sheriff, and on delivery of the deed the title relates back to the sale, and the purchaser can recover for trover or trespass during the intervening time. (*Frink v. Roe*, 70 Cal., 296; *Keaton v. Thomassons*, 2 Swan [Tenn.], 138; *Sands v. Pfeiffer*, 10 Cal., 258; *Hill v. Gwin*, 51 Cal., 47; 2 Devlin, Deeds, sec. 1434.)

Capps, McCreary & Stevens, contra, cited: *State Bank of Nebraska v. Green*, 10 Neb., 135; *Renard v. Brown*, 7 Neb., 449; *Higginbottom v. Benson*, 24 Neb., 463; *Cassilly v. Rhodes*, 12 O., 96; *Beggs v. Thompson*, 2 O., 106.)

RAGAN, C.

On the 9th day of April, 1890, Herman D. Einspahr was the owner of a tract of land in Hall county, Nebraska. On that date there was filed in the office of the clerk of the district court a transcript of a judgment in favor of Abraham Yeazel and against said Einspahr. Execution was duly issued on this judgment; the land levied upon and sold by the sheriff on the 7th day of June, 1890, Yeazel becoming the purchaser. This sale was duly confirmed on July 21, 1890, and on or about that date the sheriff executed to Yeazel a conveyance for the real estate. At the time of the levy upon this land, and at the time of its sale, there was growing thereon a crop of wild grass. After the sale of the land, but before the confirmation, Einspahr cut this grass, removed it from the land and sold it to one M. F. White. After Yeazel had procured his conveyance from the sheriff he brought this action in replevin against Einspahr and White, to recover the possession of the wild grass or hay which Einspahr had taken from the land, as above stated. There was a verdict and judgment in the court below for White and Einspahr, and Yeazel brings this suit here on error. All the material

evidence in the case is undisputed and is embraced in the foregoing statement of facts, and the question is as to the correctness of the verdict and judgment upon that evidence. Counsel for the plaintiff contend:

1. That the wild grass growing upon the land at the time of the execution sale was real estate. For the purposes of this opinion we concede the contention to be correct. We do not decide, however, that growing wild grass is always real estate, nor do we decide that it is personal property. A decision of that point is not necessary here and we do not decide it.

2. That Yeazel, by his purchase of the land on the 7th of June, 1890, at the execution sale, acquired on that date the legal title to the land; and as the wild grass was then growing on the real estate, Yeazel acquired the title to that. We do not agree with this contention. A purchaser of real estate at an execution sale in this state solely by the purchase does not acquire the title of the execution debtor to the land purchased. Such a purchaser acquires simply the lien which the execution creditor had on said land at the time.

By section 497*a* of the Code of Civil Procedure it is provided that the owner of any real estate against which a decree of foreclosure has been rendered, or upon which an execution has been levied to satisfy a judgment or decree of any kind, may redeem the same from the lien of such decree or levy at any time before the sale of the same shall be finally confirmed. Section 498 provides for the examination and confirmation of such sale by the court. Section 499 provides that upon the confirmation of a sale made of real estate sold on execution the sheriff or other officer who made such sale shall make to the purchaser of such real estate as good and sufficient a deed of conveyance for the property or land sold as the person against whom such writ of execution was issued could have made of the same at the time the land became liable

to the judgment or at any time thereafter. And section 500 provides, amongst other things, that the deed so made shall vest in the purchaser as good and perfect an estate in the premises as was vested in the execution debtor at or after the time when the land became liable for the satisfaction of the judgment.

In *State Bank of Nebraska v. Green*, 10 Neb., 130, LAKE, J., speaking for this court, said: "Under our law governing sales of real property on execution the title of the purchaser depends entirely upon the sale being finally confirmed, and until this is done the rights of the execution debtor are not certainly divested." And in *Lamb v. Sherman*, 19 Neb., 681, MAXWELL, C. J., speaking for this court on that subject, said: "A purchaser at execution sale of real estate, upon the payment of the purchase money and confirmation of the sale, becomes the equitable owner of the property, and, in a proper case, may compel the issuing of a sheriff's deed to himself."

In Freeman, Executions, sec. 323, that author, in commenting upon the titles of the purchaser and the judgment debtor before the latter's right to redeem has passed, remarks: "It is certain that prior to the execution of the sheriff's deed the purchaser has no title in the lands purchased. He cannot recover possession, nor can he, unless expressly authorized by statute, maintain an action for rents and profits. Frequently his interest is spoken of as that of a mere lien-holder. 'The purchaser, prior to the execution of the sheriff's deed, holds merely a lien upon the land, differing from the lien of the judgment in this, that it is more specific and may continue after that of the judgment has expired, and that the lien is much nearer a complete enforcement than that of the judgment; the single act of the execution and delivery of the sheriff's deed being required.' But the interest of the purchaser is certainly something more than a lien. It seems more like an inchoate title than like a lien, and it is generally for the

purposes, both of voluntary and involuntary transfers, treated like real estate; and while the purchaser has something more than a mere lien, the judgment debtor, until after the expiration of the time to redeem, has an interest different from, and superior to, a mere right or equity of redemption. He is the holder of the legal title, and must in all respects be treated as the owner of the land, even after he has lost his right of redemption, unless a deed has been executed in pursuance of the sale."

In *Curtis v. Millard*, 14 Ia., 128, it was held that "the general purchaser of real property at a judicial sale made under execution acquires only a lien for the amount of the purchase money and interest, which may ripen into a perfect title at the expiration of the time allowed for redemption." This case was cited and adhered to in *Everingham v. Braden*, 58 Ia., 133.

The statutes of Wisconsin on the subject of the sale and confirmation of real estate on execution in force in 1882 were substantially the same as ours, and under those statutes the supreme court of Wisconsin, in *Allen v. Elderkin*, 62 Wis., 627, said: "Under section 3169, Revised Statutes, the title to land sold on the foreclosure of a mortgage does not vest in the purchaser until the confirmation of the sale, and until then the mortgagor, or those claiming under him having the right of possession, may cut and remove all crops which are in condition to be cut and removed in the usual course of good farming." Taylor, J., delivering the opinion of the court, remarked: "The only question in this case is whether the title to the mortgaged property vests in the purchaser at a mortgage sale upon the day of sale and the execution of the deed to the purchaser, or upon the confirmation of the sale by the court. If the title vests on the sale and execution of the deed, then the circuit court properly directed a verdict for the plaintiff; but if it does not vest until after confirmation of the sale, then the court should have directed a verdict for

the defendant. * * * The law of this state is plain and unequivocal, and under it it is clear that the title of the mortgagor or his assigns is not divested and vested in the purchaser at a sale upon the foreclosure of a mortgage given by him until such sale is confirmed."

In view of these authorities it seems clear that the legal title of Einspahr to the land sold was not divested, nor did Yeazel acquire the legal title to such real estate until the delivery to him of the sheriff's conveyance, made in pursuance of the order of confirmation of the sale. Yeazel acquired an equitable title to the real estate when the sale was confirmed, but the legal title did not pass to him until he received his sheriff's deed.

3. But counsel for the plaintiff in error insist that the legal title finally acquired by Yeazel to the land he purchased related back to the date the sale was made. This is conceded. Indeed, the title which Yeazel finally acquired related back to the date and the hour that the judgment to satisfy which the land was sold became a lien upon the real estate; and the conveyance made by the sheriff to Yeazel vested in him the same title, and as good a title to the real estate as Einspahr himself possessed at the time which the judgment became a lien, except as to subsequent tax liens. But counsel confuse the title to the real estate with the *quantum* of the estate. This doctrine of relation has reference only to the title which the execution debtor had to the real estate at the time the judgment became a lien, but it has no necessary reference to the *quantum*, whether more or less, of estate which the execution debtor owned at the time the judgment became a lien. The contention of counsel that because the title which Yeazel finally acquired related back and vested in him the same title which Einspahr had when the judgment became a lien, therefore, as the wild grass was growing on the land at the time the land was sold, Yeazel is owner of such grass, will be found upon investigation to be un-

tenable. The judgment became a lien upon this real estate from the date of its filing in the clerk's office, and might have so continued for a period of five years. Thus it will be seen that it is in the power of a judgment creditor to maintain a lien against the real estate of his debtor for that period of time without any effort to sell the land. Again, after the sale was made and reported to the court there was no obligation upon the part of Yeazel to have this sale immediately confirmed. Had he chosen to do so, he probably could have postponed a confirmation for a number of years. Now, if counsel is correct, all the wild grass grown upon this land from the time that the judgment became a lien thereon, although the land might not be sold for a number of years to satisfy such judgment, would become the property of the purchaser of the real estate at the sale finally made. It cannot be doubted, we think, that if after this judgment became a lien upon the land, or after the land had been sold on execution, Einsphar had built a house, or erected some other permanent fixture upon the real estate, that such fixture would have passed to the purchaser of the land along with the title he acquired thereto by the sheriff's deed. Yet, if the rule, as to the doctrine of relation, which counsel contend for should be applied, the purchaser at execution sale, should he finally acquire the title to the real estate by the sheriff's conveyance, would not be entitled to the fixtures placed thereon by the execution debtor after the judgment became a lien, or after the sale of the premises. It is not disputed by the learned counsel for the plaintiff in error that Einspahr might have removed a crop of corn or oats from this land at any time before the sale was confirmed, if such crops had been ripe and fit for harvesting; but he claims that this rule does not apply to a crop of wild grass. It is not contended but this grass was ripe for cutting and stacking. It is not contended that the harvesting of this grass by Einspahr was done for the purpose of depreciating

the value of the land. Suppose that this land had been planted to fruit trees and that the fruit had matured between the time of the sale of the land and the confirmation of the sale. Can it be contended that Einspahr would not have had the right to gather the fruit and appropriate it to his own use? Suppose that this land had been covered by a sheet of water, and the water had been frozen, then, no doubt, the ice, while it remained unbroken, would have been real estate. Can it be said that Einspahr might not have cut such ice and sold it between the time of the sale of the real estate and the confirmation of such sale? We think that Einspahr was the owner of the legal title to this land until the sale was confirmed; that he was entitled to the possession of it; to the use of it; to the rents and profits thereof; that he was entitled to harvest all fruits and crops thereon, whether the fruits of industry or of nature, that were in a proper condition for harvesting at any time before the confirmation of the sale, and entitled to appropriate to his own use such crops or fruits. The judgment of the district court is

AFFIRMED.

HARRISON, J., took no part in the opinion.

STATE OF NEBRASKA, EX REL. E. HARRIS, V. R. W. LAFLIN, CLERK OF THE DISTRICT COURT.

FILED MAY 2, 1894. No. 6833.

1. **Mortgages:** STAY OF EXECUTION OF DECREE OF FORECLOSURE: TIME TO FILE REQUEST. But for the provisions of the statute, the plaintiff in a foreclosure suit would be entitled to immediate execution of his decree upon its rendition. By the statute it is provided, however, that the defendant in a decree of foreclosure may stay the execution of the same by filing with the clerk of the court in which said decree is rendered a written

request for a stay of execution thereof within twenty days from the date of its rendition. This is a statutory remedy, and is only obtained by a strict compliance with all the required conditions. Time is an essential element in the proceeding and one which neither the court nor the judge thereof can disregard. If a delay in filing such request beyond the limited time occurs, the right to the remedy is gone, and the plaintiff holds his decree discharged from this means of staying its execution.

2. ———: FORECLOSURE: ORDER FOR STAY OF EXECUTION: TIME. An order of a district court recalling an order of sale in a decree foreclosing a real estate mortgage, and permitting the defendant in such decree to file with the clerk, more than twenty days after its rendition, a request for a stay thereof, is not void.

3. ———: ———: ———: REVIEW. Such an order is one affecting a substantial right made upon a summary application in an action after judgment, is a final order, and may be reviewed on error.

4. **Order to Recall Execution:** REVIEW. The filing in this court of a petition in error to review such order, and the execution, approval, and filing of a supersedeas bond therefor required by the district court, does not vacate or suspend such order.

5. **Mandamus.** The remedy by *mandamus* is the last resort of the litigant. It is only when all other remedies have failed that he is entitled to this writ.

6. **Review by Mandamus.** *Mandamus* will not issue when its effect would be to reverse or vacate an order of a court or tribunal having jurisdiction to make such order, although the same may be palpably erroneous; and especially is this so when such order is one that may be reviewed on error or appeal. (*McGee v. State*, 32 Neb., 149; *State v. Cotton*, 33 Neb., 560; *People v. Garnett*, 130 Ill., 340.)

ORIGINAL application for *mandamus*.

F. B. Sheldon and *E. O. Kretsinger*, for relator.

E. N. Kauffman, contra.

RAGAN, C.

On the 6th day of November, 1893, E. Harris obtained a decree of foreclosure of a mortgage in the district court

of Gage county against one Nichols. On December 13, 1893, Nichols having taken no appeal or error proceedings from said decree, and not having filed a request staying the execution of said decree, an order for the sale of the property described in said decree and to satisfy the same was issued by the clerk of said district court at the request of Harris. This order was placed in the hands of the sheriff of Gage county, who appraised and advertised the property to be sold on the 12th day of February, 1894. On the 5th day of February, 1894, the court, on motion of Nichols, and without other showing, made an order requiring the sheriff to return said order of sale and permitting Nichols to file of record a request for the stay of the execution of the decree as of the date of its rendition; Nichols filed the request for the stay of the execution of the decree, and the sheriff returned the order of sale. To this order of the court Harris took an exception; prayed the district court to fix a supersedeas bond, which the court did, and which bond Harris then gave, and the same was approved, and thereupon Harris filed in this court a petition in error to review the said order of the district court. Harris then obtained from the clerk of this court a certificate setting forth that he had filed with said clerk a petition in error and a supersedeas bond to review the order of the district court to issue an alias order for the sale of the property described in the decree. This the clerk refused to do. Harris thereupon applied to the district court for an order directing its clerk to issue the order of sale requested. This application the court denied. Harris then made application to this court for a peremptory writ of *mandamus* to compel the clerk of the district court to issue an order for the sale of the real estate described in his decree of foreclosure, and set out at length in his application the facts stated above. To this application the clerk of the district court has demurred. But for the provisions of the statute, the relator, on obtaining his decree

of foreclosure on the 6th day of November, 1893, would have been entitled to immediate execution of the decree; that is, to an immediate order for the sale of the property to satisfy the amount found due him by the decree. The The statute has provided three methods by which Nichols could have stayed the execution of the decree rendered against him. One method was by taking an appeal from the decree and executing a supersedeas bond, as provided by section 677 of the Code of Civil Procedure. Another method was by prosecuting a writ of error from the decree rendered, and executing a supersedeas bond, as provided by section 588 of the Code of Civil Procedure. A third method provided by the statute, by which Nichols might have stayed the execution of the decree rendered against him, is found in section 477*b* of the Code of Civil Procedure, which provides: "The order of sale on all decrees for the sale of mortgaged premises shall be stayed for the period of nine months from and after the rendition of such decree, whenever the defendant shall, within twenty days after the rendition of such decree, file with the clerk of the court a written request for the same; *Provided*, That if the defendant make no such request within said twenty days, the order of sale may issue immediately after the expiration thereof."

"A supersedeas is a statutory remedy. It is only obtained by a strict compliance with all the required conditions, none of which can be dispensed with. Time is an essential element in the proceeding and one which neither the court nor the judge can disregard. If a delay beyond the limited time occurs, the right to the remedy is gone and the successful party holds his judgment or decree freed and discharged from this means of staying proceedings for its collection or enforcement. This is a right which he has acquired and of which he cannot be deprived without due process of law. While the court may enter an order in a cause *nunc pro tunc* where the action asked for has been

delayed by, or for the convenience of, the court, it is never done where the parties themselves have been at fault or where it will work an injustice. To make a *nunc pro tunc* order effectual for the purposes of a supersedeas it must appear that the delay was the act of the court and not of the parties, and that an injustice will not be done." (Chief Justice Waite in *Sage v. Central R. Co.*, 93 U. S., 412.) Nichols did not file with the clerk, within twenty days from the rendition of the decree against him, a written request for stay of execution of said decree. The order of sale, then, issued by the clerk was rightfully issued, and this brings us to a consideration of the force and effect of the order made by the district court recalling the order of sale and permitting Nichols, after more than twenty days had elapsed from the date of the rendition of the decree, to file a request for staying the execution of the same as of the date of its rendition. Was this order of the court void? There can scarcely be a doubt that the order was erroneous, but we do not think it was absolutely void. The district court had jurisdiction of the subject-matter and jurisdiction of the parties, and if the order made by him is still in force, then the clerk cannot be compelled by *mandamus* to issue another order of sale. The filing in this court of a petition in error by the relator to review the order of the court, the execution, approval, and filing by the relator of the supersedeas bond fixed by the district court therefor, did not vacate the order made. As already stated, supersedeas is a statutory remedy; and there is no provision in our statutes by which such an order as the one made by the district court can be suspended or vacated by the giving of a supersedeas bond. The supersedeas bond given in this case amounted merely to a bond for costs. Such order, however, was one that might be reviewed on error. Section 581 of the Code of Civil Procedure provides that "an order affecting a substantial right made in a special proceeding, or upon a summary application in an

action after judgment, is a final order, which may be vacated, modified, or reversed." The order made by the district court was one made in a summary application in an action after judgment. The order made affected a substantial right, viz., the right of the relator to have the decree rendered in his favor carried into immediate execution.

In *State v. Theile*, 19 Neb., 220, the defendant in a foreclosure decree, for the purpose of staying the execution thereof, filed a bond conditioned that "he shall abide the judgment and decree if the same should be affirmed and pay the costs," whereas the statute provided that the supersedeas bond in such case should contain a condition that the appellants "will prosecute such appeal without delay, and will not during such appeal time commit, or suffer to be committed, any waste upon such real estate." Application was made to the clerk of the district court, after the filing by the defendant in the decree of foreclosure of the bond conditioned as above stated, for an order of sale for the mortgaged premises. The clerk refused to issue the order and this court granted him a *mandamus* compelling him to do so.

In *State v. Moores*, 29 Neb., 122, this court said that it would not issue a *mandamus* compelling a clerk of a district court to issue an order of sale upon a decree of foreclosure where there had been no application to, and refusal by, the district court to direct its clerk to issue such order of sale.

The relator is not within the rule laid down in either of these cases. The remedy by *mandamus* is the last resort of the litigant. It is only when all other remedies have failed that he is entitled to this writ. Here the relator is now prosecuting proceedings in error in this court to reverse the order made by the district court. The relator, then, is not without a plain and adequate remedy at law. The effect of the order made by the district court was to deny to the relator the immediate execution of his decree; and for us to

compel, by *mandamus*, the clerk to issue an order for the sale of the premises described in the decree of the relator would be, in effect, to reverse the order made by the district court staying the execution of the decree; that is, *mandamus* would be made to perform the functions of a proceeding in error. The demurrer to the application is sustained and the writ denied.

WRIT DENIED.

JOHN H. DUNTERMAN ET AL. V. JOSEPH STOREY.

FILED MAY 2, 1894. No. 5561.

1. **Estoppel:** SUPERSEDEAS BONDS: RECITALS: SURETIES. The surety in a supersedeas bond, which recites that his principal had filed in the supreme court a transcript and petition in error to obtain the reversal of the judgment which said bond was given to supersede, is estopped, in a suit on such bond, from alleging that no such transcript and petition in error had, at the time of the execution of said supersedeas bond, been in fact filed in the supreme court.

2. **Review:** SUPERSEDEAS BONDS: FAILURE TO PROSECUTE APPEAL: LIABILITY OF SURETIES. For the purpose of enabling his principal to prosecute proceedings in error in the supreme court for the reversal of a judgment rendered against him, a surety executed a supersedeas bond, conditioned that he would "pay the condemnation money and costs in case such judgment should be affirmed in whole or in part." The surety's principal neglected for more than one year after the rendition of the judgment to institute any proceedings whatever in the supreme court for its reversal. *Held*, That such failure operated as an affirmance of the judgment.

3. **Judgments:** STAY OF EXECUTION. A judgment is the final and solemn adjudication and determination of the rights of the parties in and to the subject-matter litigated; and a creditor on obtaining judgment is entitled to an immediate execution for the satisfaction thereof, unless such execution is stayed by compliance with the provisions of the statute therefor.

4. **Appeal**: DISMISSAL IN APPELLATE COURT: AFFIRMANCE. The general rule is that the dismissal of an appeal from an appellate court without an examination of the case upon its merits operates as an affirmance of the judgment appealed or attempted to be appealed from.

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

See opinion for statement of the case.

Batty, Casto & Dungan, for plaintiffs in error:

The surety on the supersedeas bond should be bound only in the event of an actual affirmance of the judgment in whole or in part. He has a right to stand upon the strict construction of the language of the bond. (*Drummond v. Husson*, 14 N. Y., 60; *Watson v. Husson*, 1 Duer [N. Y.], 242; *Gregory v. Obrian*, 13 N. J. Law, 11; *Wilson v. Churchman*, 6 La. Ann., 468; *Duncan v. McGee*, 7 Yerg. [Tenn.], 103; *Ashley v. Brasil*, 1 Ark., 144; *Malone v. McClaine*, 3 Ind., 532; *Ovington v. Smith*, 78 Ill., 250; *Lang v. Pike*, 27 O. St., 498; *Miller v. Stewart*, 9 Wheat. [U. S.], 680; *State v. Medary*, 17 O., 565; *Leggett v. Humphreys*, 21 How. [U. S.], 66; *Manufacturers Bank v. Cole*, 39 Me., 188; *Henderson v. Marvin*, 31 Barb. [N. Y.], 297.)

Capps & Stevens and *W. P. McCreary*, *contra*, cited: *O'Dea v. Washington County*, 3 Neb., 118; *Casey v. Peebles*, 13 Neb., 7; *McConnel v. Swailes*, 2 Scam. [Ill.], 571; *Gudtner v. Kilpatrick*, 14 Neb., 348; *Adams v. Thompson*, 18 Neb., 541; *Sutherland v. Phelps*, 22 Ill., 92; *Love v. Rockwell*, 1 Wis., 331.)

RAGAN, C.

On the 25th day of November, 1889, Joseph Storey recovered a judgment in the district court of Adams county, Nebraska, against John H. Dunterman. On the 9th day

of January, 1890, Dunterman, as principal, and Jacob Bernhart, as surety, executed and filed in the office of the clerk of the district court a supersedeas bond in words and figures as follows:

"Whereas, on the —— day of ——, 1890, John Dunterman has filed in the supreme court his transcript and petition in error to obtain a reversal of a judgment rendered in the district court of Adams county on the 25th day of November, 1889, in favor of Joseph Storey and against John H. Dunterman, for the sum of $621.36 and for costs of suit pending therein, wherein said Joseph Storey was plaintiff and John H. Dunterman was defendant:

"Now, therefore, we, John H. Dunterman, as principal, and Jacob Bernhart, as surety, do hereby undertake to said Joseph Storey, in the sum of $1,250, that said John H. Dunterman will pay the condemnation money and costs in case said judgment shall be affirmed in whole or in part."

The bond was approved by the clerk of the district court on the day of its execution. This suit was brought by Storey against Dunterman and Bernhart on said bond. Storey in his petition alleged the recovery of the judgment against Dunterman; the execution, delivery, and approval of the aforesaid supersedeas bond by Dunterman and Bernhart; its filing with and approval by the clerk of the district court of Adams county. The petition further alleged that more than a year had elapsed since the making of the last final order and judgment in the case of Storey against Dunterman in the district court of Adams county; that no bill of exceptions had ever been settled in said case, and that no proceedings in error or appeal are now pending in the supreme court of Nebraska from the said judgment, whereby the same has been wholly affirmed, unreversed, and unmodified, and the conditions of said obligation have become absolute and payable; that Dunterman was wholly insolvent and had no property

out of which the money due on said judgment could be made. Dunterman did not appear in the case. Bernhart filed an answer in which he admitted the recovery of the judgment by Storey against Dunterman; the execution, delivery, and approval of the supersedeas bond; and that more than a year had elapsed since the making of the last final order and judgment in the case of Storey against Dunterman, and that no bill of exceptions had ever been settled in the case; and admitted that no proceedings on appeal or error were pending in the supreme court from said judgment. Bernhart also in his answer said: "Denies that the same [the judgment] has been wholly affirmed, unreversed, and unmodified, and denies that the conditions of said obligation have become absolute and payable." The eighth paragraph of Bernhart's answer was as follows: "As a further answer this defendant alleges the fact to be that no appeal was ever initiated in the case of Storey against Dunterman; that no petition in error was ever filed in the supreme court of Nebraska and that no proceedings whatever, either in error or on appeal, were had in said cause of Storey v. Dunterman from the final order and judgment of the district court of Adams county, therein." There was the further suggestion in Bernhart's answer that the petition of Storey did not state a cause of action. To this answer Storey filed no reply, but submitted a motion for judgment on the pleadings. The district court, in response to this motion, rendered a judgment for Storey for the amount of his judgment against Dunterman, with interest and costs, and Bernhart brings the case here on error.

1. Does Storey's petition state a cause of action? It must be confessed that the petition is not a model by any means, but we think it states a cause of action.

2. The allegation in Bernhart's answer that, as a matter of fact, no proceedings to review on error or appeal the judgment rendered in favor of Storey were ever instituted

in the supreme court, not being denied by Storey in a reply, must of course be taken as true; but Bernhart, having solemnly asserted in the supersedeas bond which he executed and filed with the clerk that Dunterman had prior to that time filed in this court a transcript and petition in error to obtain the reversal of the Storey judgment, is now estopped from disputing the truth of that statement. In *Hundley v. Filbert*, 73 Mo., 34, it was held that "the obligors in a delivery bond which recites a levy of execution are estopped in an action on the bond from pleading that there was no levy." In *Gudtner v. Kilpatrick*, 14 Neb., 347, a suit was brought on an undertaking entered into for the purpose of appealing from the judgment of a justice of the peace, and it was there ruled that the defendants were estopped to deny that an appeal had been taken in the case in contradiction of their undertaking executed in conformity to the statute for the purpose of perfecting an appeal, although no appeal lay from the judgment rendered. (See, also, *Adams v. Thompson*, 18 Neb., 541; *Love v. Rockwell*, 1 Wis., 331; *Pierce v. Banta*, 31 N. E. Rep. [Ind.], 812.) The case then stands precisely as if Dunterman had filed a transcript of the Storey judgment and a petition in error in this court, and this brings us to another contention of the counsel for the plaintiff in error, viz.:

3. That as the petition alleged that the Storey judgment had been affirmed and the supersedeas bond had been forfeited, and that these allegations were denied by the answer, that the court could not render a judgment in favor of Storey without evidence to support such allegations of the petition. If counsel for the plaintiff in error in his answer had stopped after denying that the Storey judgment had been affirmed, his contention would be correct; but he went further, and pleaded as a defense that no proceedings in error of any nature looking to a reversal of the Storey judgment were ever had or filed in this court. This allegation was not denied by Storey, and it then stood admitted

of record that the judgment was in the same plight as when pronounced by the district court. The denial in the answer of the affirmance of the judgment and the averment that no proceedings had ever been taken to reverse it, coupled with the other admissions in the pleadings, that more than a year had elapsed since its rendition, if not inconsistent defenses, amounted to the pleader's conclusion that the failure of Dunterman to take any step toward reversing the judgment did not amount as a matter of law to an affirmance of the same.

4. The bond which Bernhart signed provided that he would pay the condemnation money and costs in case said judgment should be affirmed in whole or in part. So, then, we have the question as to whether the failure of Dunterman to institute, or attempt to institute, in this court any proceeding for a reversal of the judgment for more than one year after its rendition amounted to an affirmance of it. We are cited by the counsel for the plaintiff in error to *Drummond v. Hussen*, 14 N. Y., 60, to sustain the contention of counsel that such failure on the part of Dunterman did not affirm the judgment. In that case the bond signed by the surety was in the following language: "Now we, the subscribers, hereby undertake that if the judgment appealed from, or any part thereof, be affirmed, the appellant will pay the," etc. This bond was said by Selden, J., who delivered the opinion of the court, to be in the precise language of section 335 of the New York Code. It appears from the opinion that the appeal was filed and docketed in the court of appeals and was dismissed for want of prosecution. In the suit on the bond the dismissal of the appeal from the appellate court was made the sole ground of defense, and the court of appeals sustained the defense made, holding that "a dismissal of the appeal for want of prosecution is clearly not an affirmance of the judgment. This court has decided nothing whatever in respect to the validity of the judgment." This case from New York is in

point; but we are constrained to say that we do not think it sound. The opinion of the court proceeds on the theory that in order to the affirmance of a judgment appealed from the appellate court must hear or examine the case appealed, deliberate thereon, and reach the same conclusion that the court below reached and render a formal judgment of affirmance. This case, so far as we have been able to ascertain from a somewhat extended examination of the reported decisions, stands alone and is certainly not in line with the weight of authority. The general rule is that the dismissal of an appeal from an appellate court without an examination of the case upon its merits operates as an affirmance of the judgment appealed or attempted to be appealed from. In *McConnel v. Swailes*, 2 Scam. [Ill.], 571, the supreme court of Illinois said: "The dismissal of an appeal or *certiorari* is equivalent to a regular technical affirmance of the judgment of the court below so as to entitle the party to claim a forfeiture of the bond and have his action therefor." In *Sutherland v. Phelps*, 22 Ill., 92, it was said: "The dismissal of an appeal is equivalent to an affirmance of the judgment." In *Clark v. Miles*, 2 Pinn. [Wis.], 432, the supreme court of Wisconsin said: "Where an appeal is dismissed, the party who brought it, with his sureties in the recognizance, will be immediately liable thereon for the amount of the judgment rendered by the justice." In *Ellis v. Hull*, 23 Cal., 161, it was held: "Where an appeal is taken to the supreme court from a judgment, by filing notice of appeal and undertaking, and the appeal is afterwards dismissed by the supreme court for failure of the appellant to send up a transcript, the sureties are liable on the undertaking on appeal." To the same effect are *Healey v. Newton*, 55 N. W. Rep. [Mich.], 666; *Shannon v. Dodge*, 32 Pac. Rep. [Col.], 61; *Pratt v. Gilbert*, 29 Pac. Rep. [Utah], 965. It is true that the contract of a surety is to be construed strictly in his favor, but such a construction as the one contended for in this case would be

too technical. Bernhart promised that if the judgment rendered against Dunterman should be affirmed in whole or in part he would pay it. This was, in effect, a promise on his part to pay the Storey judgment unless the supreme court should reverse it. Bernhart cannot allege as a defense the failure of his principal to successfully and properly prosecute his petition in error. (*Pierce v. Banta*, 31 N. E. Rep. [Ind.], 812.)

5. By the execution and filing of the supersedeas bond Bernhart took one step in the proceedings to have reviewed on error the Storey judgment. He then abandoned all further attempts to reverse the judgment, thus leaving it in full force. The judgment, then, is in the same plight that it would have been had Bernhart filed his transcript of the record of said judgment and bill of exceptions in this court and then had neglected to have a summons in error issued within one year from the date of the judgment and this court had dismissed such error proceeding. We have already seen that had this court dismissed the error proceedings, by reason of the failure of Bernhart to comply with some requirement necessary to a review of the judgment on error, the dismissal of the proceedings would in effect be an affirmance of the judgment rendered. Is not the effect on the judgment just the same, whether proceedings in error be instituted and then dismissed without an examination of the case upon its merits, or whether the judgment debtor, after taking one or more steps looking towards reviewing the judgment on error, abandons the proceedings? A judgment debtor, by filing a supersedeas bond with the clerk of the district court and a petition in error in this court, stays the execution of the judgment at least for one year from the date of its rendition, as the filing in this court of the petition in error does not invest this court with jurisdiction over the person of the judgment creditor. For this purpose it is necessary that a summons in error shall be issued within a year from the date of its rendition,

although it may be served afterwards. Now, if the contention of counsel for the plaintiff in error be correct, a judgment debtor, by filing a supersedeas bond with the clerk of the court and a petition in error here, may stay the execution of the judgment for a year, and then, by voluntarily abandoning the proceedings in error, or by failing to have a summons in error issued, may thus deprive the judgment creditor of the power of collecting his judgment for the length of time intervening between its rendition and the dismissal of the error proceedings, and at the end of that time leave the judgment creditor with no more security for the collection of his judgment than he had on the date of its rendition. Such a construction of the statute would deprive the judgment creditor of the very rights given him by the statute. It would be in effect a judicial enactment of a stay law without bond. A judgment is the final and solemn adjudication and determination of the rights of the parties in and to the subject-matter litigated, and a creditor on obtaining a judgment against his debtor is entitled to an immediate execution for the satisfaction of such judgment, unless the judgment debtor stays such execution by complying with the provisions of the statute therefor. Dunterman and Bernhart, having taken such steps looking to a review of the judgment on error as to deprive Storey of the right to execution, cannot be heard to say that they are not liable upon the supersedeas bond because they did not take all the steps necessary to a review of the judgment on error and have it reviewed and examined by this court on its merits. It is true that Storey was not deprived of the right to issue an execution until a petition in error should be filed in this court. As a matter of fact no petition in error was ever filed, and therefore, as a matter of fact, there never was a time after the rendition of such judgment when Storey might not have had an execution issued thereon; but as a matter of law, by the asseverations of Dunterman and Bernhart in their supersedeas bond, and

which statements they are estopped to deny, a petition in error was on file to review the Storey judgment on the date of the filing with the clerk of the district court of the supersedeas bond. It does not appear from the record whether Storey knew, as a matter of fact, that no such petition in error had been filed in the supreme court; nor do we think it material. He had a right to rely upon the statement of Dunterman and Bernhart made in their supersedeas bond, that such petition in error was on file here, and he was under no obligation to inquire of the clerk of this court as to whether such petition in error had been filed. The judgment of the district court is

AFFIRMED.

HENRY ZARRS, APPELLEE, V. SAMANTHA KECK ET AL., APPELLANTS, AND SPOONER R. HOWELL ET AL., APPELLEES.

FILED MAY 2, 1894. No. 5466.

1. **Mechanics' Liens**: ESTOPPEL. A building contract between the owner and contractor provided: "The contractor hereby covenants and agrees that all materials and labor used in said building shall be promptly paid for, so that the same shall not become the subject of a lien against said premises, * * * and the owner shall have the right to retain, out of any payment due or to become due, an amount sufficient to indemnify her against any claim for materials or labor." *Held*, That this agreement did not estop the contractor from filing a lien upon the premises.

2. ———: SUBCONTRACTOR. One who furnishes material used in the construction of an improvement is not excluded from the benefits of the mechanic's lien law solely because the materials so used were furnished to a subcontractor of a subcontractor.

3. **Pleading**: MECHANICS' LIENS: APPEAL. A subcontractor brought a suit to foreclose a mechanic's lien. The owner, the

original contractor, and a material-man were made defendants. The material-man filed an answer, in the nature of a cross-bill, claiming a lien upon the premises of the owner for material furnished in the erection of the improvement. To this cross-bill the owner filed no answer. *Held*, That the owner could not be heard to object, on appeal, to the correctness of the finding and decree of the district court in favor of the material-man.

4. **Review.** Where a finding of fact is made by a district court on conflicting evidence, this court will decline to disturb such finding, unless it appears that the same is unsupported by competent evidence.

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

Calkins & Pratt, for appellants.

Thompson & Oldham and *Dryden & Main*, *contra*.

RAGAN, C.

On the 25th day of May, 1889, Mrs. Samantha Keck was the owner of certain real estate in the city of Kearney, Nebraska, and upon said date she entered into a written contract with one Arthur Campbell. By the terms of this contract Campbell agreed to furnish all material and labor and erect for Mrs. Keck an annex to her hotel in said city. The hotel was to be completed by the 1st of October, 1889. As a consideration for the performance of his contract Campbell was to be paid $25,800. These payments were to be made in instalments on the first days of July, August, September, and October, each payment to be equal to eighty per cent of the value of the material and labor furnished the preceding month. The contract further provided: "It being understood that the final payment is to be made within twenty days after this contract is completely finished; provided, * * * that before each payment, if required, the contractor shall give the owner good and sufficient evidence that the premises are free from

all liens and claims chargeable to said contractor; and the owner shall have the right to retain, out of any payment then due or thereafter to become due, an amount sufficient to completely indemnify her against such lien or claim. After all such payments are made, the contractor shall refund to the owner all moneys that the latter may have been compelled to pay in discharging any lien on said premises made obligatory in consequence of the former's default. The contractor hereby covenants and agrees that all materials and labor used in said building shall be promptly paid for, so that the same shall not become the subject of a lien against said premises; * * * that he will, before each and every instalment shall become due on this contract, and before he shall be entitled to the same, furnish to the owner satisfactory written evidence that all materials furnished for and used in said building up to such time, and all labor performed thereon, has been fully paid for; and the said contractor shall not be entitled to receive, nor shall the owner be required to pay, any instalments of this contract until all obligations for labor and materials which may become the subject of a lien upon said premises shall have been fully paid and settled; * * and the owner shall have the right to retain, out of any payment due or to become due, an amount sufficient to completely indemnify her against any lien or claim for materials or labor." There was a further provision in the contract that Mrs. Keck should be entitled to damages at the rate of $20 a day for each day that the hotel remained unfinished after the first of October. To secure the faithful performance of this contract on his part Campbell executed a bond to Mrs. Keck in the sum of $25,000, signed by himself as principal and several others as sureties, among them, Henry Zarrs, the appellee in this case. Campbell sublet the excavating, masonry, and stone-work and plastering to the said Henry Zarrs under a written contract between them, in and by which Zarrs agreed to have all

the work in his contract, except the plastering, wholly completed by August 1, and to have the plastering completed by August 15. Zarrs sublet the plastering to Peterson & Ryan, and they bought of Spooner R. Howell the materials for the plastering.

This suit was brought by Henry Zarrs against the said Samantha Keck, Arthur Campbell, Spooner H. Howell, and Peterson & Ryan to have established, by decree of court, a lien which he claimed against the said hotel for labor and material furnished therefor under his contract with Campbell, and also to establish a lien against the property for some extras which he alleges he furnished for said hotel on an oral contract made with Mrs. Keck. During the progress of the trial, however, it was shown that this claim for extras had been settled and compromised before the bringing of this suit, and it will not be further noticed. Mrs. Keck and Mr. Campbell answered the petition of Zarrs. Peterson & Ryan filed an answer, in the nature of a cross-bill, claiming a balance due them of $760, for labor and material furnished in the erection of the hotel in pursuance of the contract with Zarrs, and prayed that the same might be declared a lien on the premises of Mrs. Keck. Howell filed an answer, in the nature of a cross-bill, claiming a balance due him of $391.94, for material furnished by him to Peterson & Ryan and used by them in the plastering of said building, and prayed that the same might be made a lien upon the premises of Mrs. Keck. Neither Campbell nor Mrs. Keck filed any answer whatever to the cross-petitions of Peterson & Ryan or Howell. The court below rendered a decree in favor of Howell, Peterson & Ryan, and Zarrs, and made the amounts found due those parties liens upon the premises of Mrs. Keck. From this decree Arthur Campbell and Mrs. Keck appeal.

1. We will first dispose of the appeal of Campbell. His objection to the decree is thus stated by his learned counsel in their brief: "We cannot escape the suspicion

that in the interval which elapsed between the trial of the case and its final decision the learned judge had forgotten the controversy made by the pleadings and evidence between the plaintiff and the defendant Campbell, and overlooked the same in making his finding." Zarrs in his petition claimed that there was a balance due him from Campbell, for labor and material furnished, of $3,398, but on the trial it was clearly made to appear, and conceded by Zarrs, that that amount should be reduced to at least $2,368. The court, by its decree, allowed Campbell $1,606. The court made no special findings, and the evidence as to the merits of the respective claims of Zarrs against Campbell and Campbell against Zarrs was conflicting. Campbell resisted, both by his pleadings and evidence, the claim made by Zarrs and sought to set off as against the claims of Zarrs damages for alleged inferior workmanship and material furnished by Zarrs; damages for delay in not completing his work at the time agreed in his contract. He also pleaded certain payments had been made to Zarrs which should go to reduce the amount claimed by the latter, and finally he claimed that instead of his being in debt to Zarrs the latter owed him $1,606, for which he prayed judgment. We cannot say, after a careful reading of this evidence, that the district court was wrong in finding that Campbell was indebted to Zarrs in the sum of $1,606, and since it does not affirmatively appear that this finding is not supported by competent evidence we decline to disturb it.

2. We now proceed to the consideration of the objections urged by Mrs. Keck to the findings and decree. She objects to the decree and finding in favor of the appellee Howell on this ground: That since it appears from the record that the claim of Howell is for material furnished by him to a subcontractor of a subcontractor, therefore Howell is not entitled under the statutes of the state to a lien for the value of the materials so furnished. In *Livesey v. Brown*, 35 Neb., 111, it is said: "Under the me-

chanic's lien law of this state, the person who furnishes any material for the construction of a building by virtue of a contract, express or implied, with the owner thereof, is entitled to a lien thereon for the amount due for the same," upon complying with the statute. And in *Pomeroy v. White Lake Lumber Co.*, 33 Neb., 243, it is said: "The right of a material-man to a lien upon a building does not result from the contractor being an agent of the owner, but from having furnished such contractor materials which were used in the erection of the building." In the case at bar the evidence is undisputed that Howell furnished material used in the plastering of Mrs. Keck's building and that the value of this material so furnished was $391.94. We perceive no reason for such a construction of the statute as would exclude Mr. Howell from its benefits simply because he furnished material to a subcontractor of a subcontractor.

3. Mrs. Keck alleges here certain objections to the finding and decree of the court in favor of Peterson & Ryan, the substance of which is that the amounts allowed Peterson & Ryan by the court were erroneous under the evidence. As already stated, Mrs. Keck filed no answer to the cross-bill of Peterson & Ryan in the district court. As against her, then, the averments in this cross-petition were to be taken as true, as every material averment in a petition not denied by the answer for the purposes of the action will be taken as true. (*Livesey v. Brown, supra.*) Mrs. Keck therefore is in no position to assail the correctness of the court's finding in favor of Peterson & Ryan.

4. Another contention of Mrs. Keck is that as Zarrs was surety on the indemnity bond of Campbell, therefore he, Zarrs, is estopped from maintaining this suit. It is said that Campbell himself could not file a lien against these premises, and that therefore the surety on his indemnity bond cannot. This leads us to a construction of the contract between Campbell and Mrs. Keck. Is there any-

thing in that contract which would preclude or estop Campbell from filing a lien against this property to secure a balance due him had he himself performed all the labor and furnished all the material in the erection of the hotel? In other words, did Campbell, by his contract, agree that he would not file a lien against the premises of Mrs. Keck? That portion of the contract which it is claimed would preclude Campbell from filing a lien against this property has been quoted above. We think a fair construction of it amounts to this: "That Campbell would furnish the material and labor and build this hotel according to the plans and specifications and deliver it to Mrs. Keck by the 1st of October, 1889, free and clear of all liens for either labor or material furnished in its construction. There is no provision in this contract by which Campbell expressly agreed to waive his statutory right to a lien on the premises; nor can such an agreement be fairly inferred from the language used. The very object of taking an indemnity bond was that Campbell should complete the building according to the contract and that he should save and keep Mrs. Keck harmless from any liens that material-men or laborers might file against the building. By the terms of the contract Mrs. Keck was allowed at all times to retain in her hands $5,160, for the express purpose of protecting herself from the claims of laborers and material-men. For aught that appears from the record she has this money in her hands now; and it does not appear from the record that the total amount of money paid out by Mrs. Keck towards the erection of this hotel added to the amount of all the liens claimed by parties to this suit would equal, much less exceed, the contract price for the building. It is not claimed by Mrs. Keck that the building has not been completed; but her claims are that she is entitled to a discount of $525, by reason of defective workmanship and material, and she further claims that she is entitled to damages at the rate of $20 a day for ninety-six days, that be-

ing the time that elapsed after October 1 and before the completion of the building. In *Murphy v. Morton*, 20 Atl. Rep. [Pa.], 1049, the contract between the owner and the contractor stipulated that before the last payment should become due the contractor should furnish releases from all persons having a right of lien against the property for any work or materials. It was urged in that case that this contract estopped the contractor from filing a lien upon the building and that therefore a subcontractor was estopped from filing a lien. The supreme court of Pennsylvania, in construing this contract and in speaking to the point made, said: "There is here no covenant on the part of the contractor not to file a lien; on the contrary, there is a recognition of the right of subcontractors and material men to lien the building. All it [the contract] amounts to is that before the contractor shall receive his last payment he shall furnish releases from all persons entitled to file liens. Until the contractor complies with this stipulation he cannot get his money." In the case at bar it seems to have been anticipated by Mrs. Keck that subcontractors, laborers, or material-men might file liens on the property, and for that very reason she retained in her hands what she deemed a sufficient sum of money to discharge all such liens and thus protect herself. We conclude, then, that by the contract between Mrs. Keck and Campbell the latter would not be estopped from filing a lien upon the building, and that if he is not, the surety on his indemnity bond is not estopped. (See Jones, Liens [2d ed.], sec. 1502, and cases there cited.)

5. Another objection urged by Mrs. Keck to the finding and decree in favor of Zarrs is that the court erred in not allowing her damages for the delay in completing her building. As already stated, this delay amounted to ninety-six days, and the contract provided that Campbell should forfeit for each day's delay $20. Counsel for Mrs. Keck contend that since the evidence shows that Mrs. Keck had the building rented, to take effect from October 1, at the

rate of $350 a month, she should at least be allowed damages for the loss of rents. All that has been said as to the conflict in the evidence between Campbell and Zarrs applies to the case as between Mrs. Keck and Zarrs. The evidence as to the cause of the delay was conflicting. We cannot say in the first place but that the court did allow Mrs. Keck $762 on account of this delay, as the evidence would sustain a finding in Zarrs' favor for $2,368 and the court only allowed him $1,606. If the court did not allow Mrs. Keck anything by reason of the delay, we cannot say from the evidence that the court was wrong. We find no error in the record and the decree is

AFFIRMED.

C. B. BURROWS, APPELLEE, V. GEORGE B. HOVLAND ET AL., IMPLEADED WITH JAMES STUART, APPELLANT.

FILED MAY 2, 1894. No. 5360.

1. **Public Lands:** VENDEE'S INTEREST SUBJECT TO MORTGAGE. A vendee in a contract for the sale of land made to him by the state has such an interest in the real estate described in such contract as may be made the subject of sale and mortgage.
2. **Mortgages:** ASSIGNMENT OF INTEREST IN CONTRACT OF SALE. An assignment by a vendee in an executory contract for the sale of real estate, made to secure the payment of money, is in effect a mortgage of the vendee's interest in the real estate described in such contract.
3. ———: REGISTRATION: PRIORITIES. Where two mortgages are executed and delivered on the same property by the same grantor at different times, the mortgage last executed and delivered will take precedence if first filed for record in the office of the recorder of deeds in which the real estate mortgaged is situate, if such last executed mortgage was made and delivered for a valuable consideration in good faith and without any notice on the part of the mortgagee therein of the existence of the prior mortgage.

4. School Land Contracts: VALIDITY OF ASSIGNMENTS: PUBLIC LANDS. A contract for the sale of school lands issued by the state contained the provision that no assignment of the contract should be valid unless such assignment should be indorsed on the contract. *Held*, (1) That such provision was inserted in the contract for the benefit of the state, and it only could insist upon a compliance therewith; (2) that the failure of the vendee in said contract to indorse thereon an assignment thereof made by him did not render such assignment void.

APPEAL from the district court of Madison county. Heard below before POWERS, J.

The commissioner stated the facts in the opinion.

Allen, Robinson & Reed, for appellant:

The assignment, to be valid, must be indorsed on the contract. (*Shuman v. Willets*, 17 Neb., 482; *McCraney v. Griffin*, 13 Ia., 313; *Emerick v. Clemens*, 26 Ia., 332; *Green v. Day*, 31 Ia., 328.)

In case of a doubtful and ambiguous law, the contemporaneous construction of those who have been called on to carry it into effect is entitled to great respect. Such construction is not to be overruled without urgent and cogent reasons. (*Hahn v. United States*, 107 U. S., 402; *Stuart v. Laird*, 1 Cranch [U. S.], 299; *Martin v. Hunter*, 1 Wheat. [U. S.], 304; *Cohens v. Virginia*, 6 Wheat. [U. S.], 264; *Edwards v. Darby*, 12 Wheat. [U. S.], 206; *Union Ins. Co. v. Hoge*, 21 How. [U. S.], 35; *United States v. Moore*, 95 U. S., 760; *Brown v. United States*, 113 U. S., 568.)

Constructive notice arising from recording and registration acts is purely a matter of positive statutory regulation and finds no place in the common law. (*Barney v. Little*, 15 Ia., 527.)

The law of notice and registration does not apply to conflicting claims on public lands. (*Klein v. Argenbright*, 26 Ia., 493; *David v. Rickabaugh*, 32 Ia., 540.)

Wigton & Whitham, contra, cited: Boone, Mortgages, secs. 49, 60, 122; 3 Pomeroy, Equity Jurisprudence, sec. 1195; *Dorsey v. Hall,* 7 Neb., 460; *McDonald v. Early,* 15 Neb., 63; *Hoxie v. Iiams,* 26 Neb., 616; *Malloy v. Malloy,* 35 Neb., 224; *Bently v. Deforest,* 2 O., 221; *Sexton v. Chicago Storage Co.,* 21 N. E. Rep. [Ill.], 920; *Webster v. Nichols,* 104 Ill., 160; *Willoughby v. Lawrence,* 116 Ill., 11; *Baldwin v. Canfield,* 1 N. W. Rep. [Minn.], 261; *Nicollet Nat. Bank of Minneapolis v. City Bank,* 35 N. W. Rep. [Minn.], 578; *Morgan v. Struthers,* 9 Sup. Ct. Rep., 728.

RAGAN, C.

On the 9th day of April, 1883, the state of Nebraska sold the southeast quarter of section 16, township 21 north, and range 4 west of the 6th P. M., in Madison county, to George B. Hovland, and executed and delivered to him a contract for a deed. On the 1st day of May, 1888, Hovland, by a writing duly signed, witnessed, and acknowledged by him, assigned the contract to one C. B. Burrows to secure the payment of some money then owing the latter by Hovland. This assignment was not on the state contract, nor was the latter delivered to Burrows. The assignment made by Hovland to Burrows was recorded in the office of the recorder of deeds of Madison county on the 19th day of January, 1889. Default having been made in the payment of the money which the assignment of this contract was made to secure, Burrows brought this suit in equity to foreclose the assignment of the contract as a mortgage. James Stuart, to the petition filed by Burrows in the case, filed an answer, in which he denied that Burrows had any lien or claim on the land described in the state contract aforesaid. He further alleged in his answer that prior to the date of the execution of the assignment from Hovland to Burrows, Hovland, with the knowledge and

consent of Burrows, had assigned to him, Stuart, the said state contract, and that he then was the owner of the same. To this answer Burrows filed a reply, denying the allegations of new matter therein, and alleging that at the time he took the assignment of the state contract from Hovland he did so in good faith and without notice of any claim right, title, or interest in the real estate mentioned in said state contract claimed by said Stuart, and that at the time he filed the assignment from Burrows for record no conveyance or assignment of said land contract or the real estate therein mentioned from Hovland to Stuart was of record in said Madison county. The district court rendered a decree in favor of Burrows, and Stuart brings the case here on appeal.

The evidence in the case, summarized, established the following facts in addition to those above stated: In the year 1886 Hovland became indebted to Stuart, and to secure the payment of the debt he made an assignment in writing of the contract he held from the state and delivered it to Stuart. This assignment of the state contract was not written on the latter, but on a separate piece of paper. On the 29th day of March, 1889, Hovland, still being in debt to Stuart, executed a formal assignment of the state land contract to Stuart to secure the payment of such debt, and delivered the said contract to Stuart. This last assignment of the contract was written thereon. At this time Hovland took up and destroyed the former assignment of the contract made by him to Stuart. Neither of the contracts made by Hovland to Stuart were ever filed or recorded in the office of the recorder of deeds of Madison county.

1. A vendee in a contract for the sale of lands made to him by the state has such an interest in the land described in such contract as may be made the subject of sale and mortgage. (*Dorsey v. Hall*, 7 Neb., 460.)

2. The assignments made by Hovland of the state con-

tract to Burrows and to Stuart, having been made for the purpose of securing the payment of money, were mortgages on the real estate described in said state contract. (*Lipp v. South Omaha Land Syndicate*, 24 Neb., 602; *Scharman v. Scharman*, 38 Neb., 39.)

3. The real question in this case, then, is as to the priority of the assignments or mortgages of Burrows and Stuart. Section 16, chapter 73, Compiled Statutes, 1893, provides: "All deeds, mortgages, and other instruments of writing which are required to be recorded shall take effect and be in force from and after the time of delivering the same to the register of deeds for record, and not before, as to all creditors and subsequent purchasers in good faith without notice; and all such deeds, mortgages, and other instruments shall be adjudged void as to all such creditors and subsequent purchasers without notice, whose deeds, mortgages, and other instruments shall be first recorded." * * The assignment or mortgage made by Hovland to Burrows, as already stated, was filed for record in the office of the recorder of deeds of Madison county on the 19th day of January, 1889; and neither of the assignments made by Hovland to Stuart were ever recorded. Under this statute, where two mortgages are executed and delivered upon the same property by the same grantor at different times, the mortgage last executed and delivered will, nevertheless, take precedence if first filed for record in the office of the recorder of deeds where the real estate mortgaged is situate, if such last executed mortgage was made and delivered for a valuable consideration in good faith and without any notice on the part of the mortgagee therein of the existence of the prior mortgage. There is testimony in the record which tends to show that Burrows, before the date of his assignment or mortgage to him from Hovland, knew that the latter had assigned the said contract to Stuart as security for the payment of money; but this evidence is contradicted, and the district court

found that Burrows was "a mortgagee of the real estate in good faith and without notice that Stuart had, or claimed to have, any right, title, or interest in the same." This finding, then, of the district court is not unsupported by the evidence and we decline to disturb it.

4. The contract issued by the state to Hovland contained this provision: "And it is further stipulated that no assignment of the premises shall be valid unless the same shall be indorsed hereon, and that no agreements or conditions or relations between the second party and his assignee, or any other person acquiring title or interest from or through him, shall preclude the first party [the state] from the right to convey the premises to the second party [Hovland] or his assigns on the surrender of this agreement." * * * Counsel for the appellant contend that by reason of the foregoing provision embraced in the state contract of sale made to Hovland his assignment of this contract to Burrows, not having been indorsed or made on the said contract, was void, and that Burrows took nothing thereby. We are not called upon at this time to express any opinion as to the binding force of the provision in the state contract just quoted, but we do not agree with the contention of counsel that the assignment made of this contract by Hovland to Burrows was void. The provision in the state contract was inserted therein for the benefit of the state, and the state only can insist upon a compliance therewith. The failure of Hovland to indorse the assignment he made of his state contract thereon did not render such assignment void. The most that can be said of it is that the assignment made to Burrows was voidable at the election of the state. (*Webster v. Nichols*, 104 Ill., 160; *Willoughby v. Lawrence*, 116 Ill., 11.)

5. Another objection urged by counsel for the appellant to the decree is that the assignment or mortgage which Burrows obtained from Hovland was obtained by fraud.

There is evidence in the record which tends to show that Hovland refused to mortgage the land embraced in the state contract to Burrows, and that at the time he executed and acknowledged the assignment of the state contract he supposed that he was mortgaging other lands to Burrows; but this evidence is also contradicted, and we cannot say that the district court was wrong in finding against the contention of the appellant. The decree of the district court is

AFFIRMED.

CAPPS & MCCREARY V. HASTINGS PROSPECTING COMPANY.

FILED MAY 2, 1894. No. 5261.

1. **Corporations:** SUBSCRIPTION FOR STOCK. The plaintiffs in error were sued on a writing signed by them, as follows: "For the purpose of organizing a corporation * * * to bore for gas, we, the undersigned, agree to subscribe and pay for the amount of stock set opposite our names * * * within thirty days from the organization of said corporation." *Held*, That by this writing the plaintiffs in error promised to take and pay for stock of a corporation *de jure*, not of a corporation *de facto*, thereafter to be organized.

2. **A de jure corporation** is one whose right to exercise a corporate function would prove invulnerable if assailed by the state in *quo warranto* proceedings.

3. **De Jure Corporations.** The Hastings Prospecting Company was organized for the purpose of boring for gas. Its articles of association fixed its principal place of business in Adams county, Nebraska. It did not file its articles of incorporation in the office of the county clerk of said Adams county. *Held*, That by such default it failed to become a corporation *de jure*. *Abbott v. Omaha Smelting & Refining Co.*, 4 Neb., 416, followed.

4. **Corporations:** SUBSCRIPTION: ESTOPPEL. It seems that persons subscribing for the stock of an association, then acting as and assuming to be a corporation, are estopped in a suit on such

subscription from questioning the legal existence of such corporation.

5. ——: ——: ——. A subscription of stock to preliminary articles of association, not purporting to be a contract with an existing corporation, does not estop the subscriber from afterwards denying the legal existence of the corporation in a suit by the alleged corporation upon the subscription. *Rikhoff v. Brown's Rotary Shuttle Sewing Machine Co.*, 68 Ind., 388, followed.

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

Capps, McCreary & Stevens, for plaintiffs in error, cited: Bishop, Contracts, secs. 321, 886; *In re Empress Engineering Co.*, 16 Ch. Div. [Eng.], 125; *Glass v. Glass*, 71 Ind., 392; *Grangers Life & Health Ins. Co. v. Kamper*, 73 Ala., 325; *Scovill v. Thayer*, 105 U. S., 143; *Abbott v. Omaha Smelting Co.*, 4 Neb., 419; *Mokelumne Hill Canal & Mining Co. v. Woodbury*, 14 Cal., 427; *Livesey v. Omaha Hotel Co.*, 5 Neb., 50; *Estabrook v. Omaha Hotel Co.*, 5 Neb., 76; *Ticonic Water Power & Mfg. Co. v. Lang*, 5 Am. Corp. Cases [Me.], 414; *Belfast & M. L. R. Co. v. Cottrell*, 66 Me., 185; *Garling v. Baechtel*, 41 Md., 305; *McCann v. American Central Ins. Co.*, 4 Neb., 256; *St. Paul, S. & T. F. R. Co. v. Robbins*, 23 Minn., 439; *Nelson v. Blakely*, 47 Ind., 38; *Thrasher v. Pike County R. Co.*, 25 Ill., 393; *Strasburg R. Co. v. Echternacht*, 21 Pa. St., 220; *Athol Music Hall Co. v. Carey*, 116 Mass., 571; *Rikhoff v. Brown's Rotary Shuttle Sewing Machine Co.*, 68 Ind., 388; *Indianapolis Furnace & Mining Co. v. Herkimer*, 46 Ind., 142; *Galena & S. W. R. Co. v. Ennor*, 116 Ill., 55; *Quick v. Lemon*, 105 Ill., 578; *Abbott v. Omaha Smelting Co.*, 4 Neb., 416; *Ward v. Brigham*, 127 Mass., 24.

Batty, Casto & Dungan, contra: Harrod v. Hamer, 32 Wis., 162; *First Nat. Bank of Davenport v. Davies*, 43 Ia.,

424; *Cross v. Pinckneyville Mill Co.*, 17 Ill., 54; *McClure v. Wilson*, 43 Ill., 360; *Trustees Baptist Education Society v. Carter*, 72 Ill., 247; *Griswold v. Trustees of Peoria University*, 26 Ill., 41; *Braun v. City of Chicago*, 110 Ill., 186; *City of Beardstown v. City of Virginia*, 81 Ill., 545.

RAGAN, C.

The Hastings Prospecting Company sued Lucius J. Capps and Willis P. McCreary, copartners doing business under the name, firm, and style of Capps & McCreary, in the district court of Adams county on a subscription or writing obligatory signed by them, in words and figures as follows: "For the purpose of organizing a corporation with a capital stock of $15,000 to bore for gas, oil, or coal, at or near the city of Hastings, Adams county, Nebraska, and to buy or lease the land to experiment thereon for such purposes, and to buy, lease, or hire the necessary machinery and labor for such purposes, we, the undersigned, agree to subscribe and pay for the amount of stock set apposite our names; said stock to be paid for in the manner following, to-wit: Ten per cent within thirty days from the organization of said corporation, and the balance at the call of the directors; provided, that said directors shall not have power to call for more than ten per cent of said stock at any one time; and provided further, that payment shall not be called for oftener than once a month. Names, Capps & McCreary; number of shares, ten shares; dollars, $100.00." The case was tried to the court, a jury being waived, resulting in a finding and judgment in favor of the prospecting company, and Capps and McCreary bring the case here for review.

The only errors assigned are that the finding and judgment of the court are contrary to the evidence and the law. The undisputed evidence in the case is that the plaintiffs in error and a number of other citizens signed the subscription paper quoted above; that after the $15,000 of stock had

been subscribed, the subscribers, or some of them, met and elected a board of directors, adopted articles of incorporation, and filed a copy of the same in the office of the secretary of state and the original in the office of the register of deeds of Adams county, the county in which the principal place of business was fixed by the articles of association. This incorporation, or attempted incorporation, occurred on the 15th day of April, 1889. The articles of incorporation were never filed in the office of the county clerk of Adams county. We have here then the questions: First, whether the prospecting company failed to become, as it attempted, a corporation *de jure* by neglecting to file in the office of the county clerk its articles of incorporation; second, and if it did, whether such default or failure on the part of the prospecting company is available as a defense to the plaintiffs in error? The first inquiry which presents itself is as to the nature of the agreement which the plaintiffs in error signed. What did they promise to do? We think a fair construction of the writing signed by them amounts to this: That they agreed to accept and pay for ten shares of the capital stock of the corporation the subscribers to the enterprise of boring for gas should organize, such payment to be made within thirty days after such corporation should be organized. The next inquiry is, what is meant by the expression, "when the corporation shall be organized"? It must be remembered that the plaintiffs in error agreed to become stockholders in the corporation that should be formed, and a fair construction of this promise is that they meant to become stockholders in a corporation *de jure* and not a corporation *de facto*. A *de jure* corporation is one whose right to exercise a corporate function would prove invulnerable if assailed by the state in *quo warranto* proceedings. The plaintiffs in error might have been willing to invest a part of their capital towards a public enterprise and take their chances of the investment being remunerative, if no further liability would at-

tach to them than that of stockholders in a *de jure* corporation, when they would not have embarked the same money for the same purpose in a partnership or a *de facto* corporation, where they would assume liabilities greater than those of stockholders in a *de jure* corporation. We hold, then, that by the subscription signed by the plaintiffs in error they promised to take and pay for ten shares of the capital stock of such *de jure* corporation as might be formed for the purpose for which the subscription was made.

Is the Hastings Prospecting Company, or has it ever been, a *de jure* corporation? It is admitted that it did not file in the office of the county clerk of Adams county, that being the county in which its articles of incorporation fixed its principal place of business, its articles of incorporation. Did this default prevent the Hastings Prospecting Company from becoming a corporation *de jure?* The authorities are not entirely in harmony on this question, but the weight of authority is, that where the statute requires the articles of incorporation to be filed with some public officer before the commencement by the proposed corporation of the business for which it is organized, such filing is a condition precedent to the right of such corporation to perform any corporate function; consequently, until a compliance with the statute, the corporation has no valid existence as a *de jure* corporation. Morawetz, Private Corporations, section 27, says: "A substantial compliance with all the terms of a general incorporation law is a prerequisite of the right of forming a corporation under it. Thus, where it is provided that a certificate or articles of association, setting forth the purposes of the corporation about to be formed, the amount of its capital, and other details, shall be filed with some public officer, a performance of this requirement is essential; and until it has been performed, the association will have no right whatever to assume corporate franchises." Cook on Stock and Stockholders, sec-

tion 231, speaking to this same subject, says: "Occasionally, however, it happens that this certificate is not fully made out, as required by the statute, or is not filed, or some other step prescribed by law is not complied with. The corporation is then not duly incorporated; and the state, by *quo warranto*, may oust it from its user of corporate franchises." In *Doyle v. Mizner*, 42 Mich., 332, it was ruled: "All private corporations must be organized under general laws, and can be valid only when strictly conforming to all the conditions imposed on their completion." The court says: "The incorporation was sought to be shown by asking Doyle, on cross-examination, concerning the signing of a paper purporting to be articles of incorporation which had been filed in the Detroit city clerk's office April 6, 1875. This paper was not acknowledged, and was not filed in the county clerk's office. * * * The statute concerning manufacturing corporations expressly requires that the articles shall be 'acknowledged before some person authorized by the laws of this state to take acknowledgments of deeds,' * * * that before any such corporation shall commence business, the articles should be filed with the secretary of state and county clerk;" and the court held that by reason of the failure to acknowledge and file in the office of the county clerk the articles of incorporation, the association did not become a corporation *de jure*. To the same effect are *Stowe v. Flagg*, 72 Ill., 397; *Bigelow v. Gregory*, 73 Ill., 197; *Utley v. Union Tool Co.*, 11 Gray [Mass.], 139; *Unity Ins. Co. v. Cram*, 43 N. H., 636; *Childs v. Smith*, 46 N. Y., 34; *Harris v. McGregor*, 29 Cal., 125.

Section 126, chapter 16, Compiled Statutes, 1893, provides: "Every corporation, previous to the commencement of any business except its own organization, when the same is not formed by legislative enactment, must adopt articles of incorporation and have them recorded in the office of the county clerk of the county * * * in which the

business is to be transacted." * * * Section 132 of said chapter provides: "Any corporation formed without legislative enactment may commence business as soon as its articles of incorporation are filed by the county clerks of the counties as required by this subdivision, and shall be valid if a copy of its articles be filed in the office of the secretary of state, and the notice required be published within four months from the time of filing such articles in the clerk's office." These two sections of the statute, read together, leave little room for doubt that the filing of the articles of incorporation in the office of the county clerk is one of the things required to make the corporation one *de jure*. To organize a corporation there must be subscribers to the stock; a meeting of said subscribers, or some of them; the adoption of articles of association for the government of the proposed corporation, and such articles must be filed in the office of the county clerk of the county in which is fixed the corporation's principal place of business. These sections of the statute quoted above were construed by this court in *Abbott v. Omaha Smelting & Refining Co.*, 4 Neb., 416, and it was there said: "In this state the filing of articles of incorporation with the county clerk is a condition precedent to the existence of any corporate franchise. The law and the articles so filed, taken together, are considered in the nature of a grant from the state and constitute the charter of the company." A corporate franchise is a privilege, a power, a right. It is a very different thing from the performance of any step necessary to the organization. In *Indianapolis Furnace & Mining Co. v. Herkimer*, 46 Ind., 142, the question we are considering arose and was decided by the supreme court of Indiana, under a statute substantially like the one we have quoted above, and the court said: "The signing of articles of association by parties proposing to form a manufacturing corporation does not create such corporation. The subscribers must also make, sign, and acknowledge the certificate of

incorporation prescribed [by the statute] and must file the same in the recorder's office of the proper county." We think, therefore, that the Hastings Prospecting Company, the name of the corporation attempted to be organized by the subscribers who signed the subscription on which the plaintiffs in error are sued, is not, and has never been, a corporation *de jure*.

2. Is that fact available to the plaintiffs in error as a defense to this suit? It is to be borne in mind that the plaintiffs in error did not subscribe for the stock of any corporation, either *de facto* or *de jure*, then in existence; and there is a distinction as to the liability of parties for subscriptions to a corporation, or an association which assumes to be and is acting as a corporation, and the liability for subscriptions made by parties for the purpose of organizing a corporation from among the subscribers. If the subscription made by Capps & McCreary had been made to the Hastings Prospecting Company when it was acting as a corporation, when it was exercising the functions of a corporation, when it was claiming to be a corporation, and had their agreement been to pay such corporation certain sums of money for certain shares of its stock, it seems that they would then be estopped from setting up as a defense that the prospecting company was not a corporation *de jure*. (Cook, Stock & Stockholders, sec. 186, and cases cited.) Morawetz on Private Corporations, section 67, thus lays down the rule in such cases: "Every subscription [to the stock of a corporation to be organized] by implication refers to and incorporates the terms of the charter or general law under which the corporation is to be formed; and every subscriber agrees to become associated with the others only upon condition that the formalities prescribed by the charter shall be observed in making the mutual contract. Thus, if certain preliminaries, such as the filing of a certificate, are required to be performed after the articles of association

have been subscribed, but before the corporation shall be in existence, the contract of membership does not go into effect until these formalities are complied with, and a subscriber to the articles cannot until then be made to contribute the amount of his subscription." In *Rikhoff v. Brown's Rotary Shuttle Sewing Machine Co.*, 68 Ind., 388, it was held: "A subscription of stock to preliminary articles of association, not purporting to be a contract with an existing corporation, does not estop the subscriber to afterward deny the existence of the corporation in a suit upon the subscription." See, also, *Indianapolis Furnace & Mining Co. v. Herkimer*, 46 Ind., 142, where it is said: "Until the statutory requirements to organize a corporation have been complied with, a subscriber to the articles of association is not estopped to deny the existence of the corporation." (See, also, *Dorris v. Sweeney*, 60 N. Y., 463.) We think these authorities are decisive of the case under consideration. The rule they lay down is sound law, good sense, and exact justice.

If the plaintiffs in error are to pay for the stock subscribed, it of course follows that they become entitled to the stock. This would make them stockholders in a *de facto* corporation and liable as copartners, whereas their contract was to become liable as stockholders. The plaintiffs in error have not broken their promise. The judgment of the district court is

REVERSED.

JOHN D. KILPATRICK ET AL. V. ANDREW J. RICHARDSON, JR.

FILED MAY 2, 1894. No. 4683.

1. **Negligence: EVIDENCE.** A verdict for negligence may be supported by inference, but the inference must be the logical, probable, and reasonable deduction from proved or conceded facts.

2. **Personal Injuries**: EXPLOSIVES. *Kilpatrick v. Richardson*, 37 Neb., 731, adhered to.

REHEARING of case reported in 37 Neb., 731.

Harwood, Ames & Kelly and *Alfred Hazlett*, for plaintiffs in error, cited: *Fairbanks v. Kerr*, 70 Pa. St., 86; *Pennsylvania R. Co. v. Kerr*, 62 Pa. St., 353; *Fleming v. Beck*, 48 Pa. St., 313; *Huff v. Ames*, 16 Neb., 139; *Hargreaves v. Deacon*, 25 Mich., 1; *Brown v. European & N. A. R. Co.*, 58 Me., 384; *Gillespie v. McGowan*, 100 Pa. St., 144; *Baltimore & O. R. Co. v. Schwindling*, 101 Pa. St., 258; *Wright v. Malden & M. R. Co.*, 4 Allen [Mass.], 283; *Stevens v. Oswego & S. R. Co.*, 18 N. Y., 422; *Cooper v. Waldron*, 50 Me., 80; *Hall v. First Nat. Bank of Fairfield*, 30 Neb., 99; *Fisher v. Thirkell*, 21 Mich., 1.

Brome & Jones and *B. T. White, contra*, cited: *Stokes v. Saltonstall*, 13 Pet. [U. S.], 181; *Louisville, N. A. & C. R. Co. v. Jones*, 108 Ind., 555; *Stoher v. St. Louis, I. M. & S. R. Co.*, 91 Mo., 509; *Great Western R. Co. of Canada v. Braid*, 1 Moore, n. s. [Eng.], 101; *Marshall v. Widdicomb Furniture Co.*, 67 Mich., 167; *Harriman v. Pittsburgh, C. & St. L. R. Co.*, 45 O. St., 28; *Lynch v. Nurdin*, 1 Q. B. [Eng.], 29; *Illidge v. Goodwin*, 5 Car. & P. [Eng.], 182; *Clark v. Chambers*, 3 Q. B. Div. [Eng.], 327; *Lane v. Atlantic Works*, 111 Mass., 136; *Powers v. Harlow*, 53 Mich., 507.

RAGAN, C.

This is a rehearing of *Kilpatrick v. Richardson*, 37 Neb., 731. A careful re-examination of this case leads us to the same conclusion reached on the former hearing. The undisputed evidence in the record shows, and counsel for the defendant in error concede, that the exploder by which the boy was injured was not found in the tunnel where such exploders were used for blasting; and that the ex-

ploder was not found in nor taken by the boy from the magazine used for storing the exploders during the progress of building the tunnel. There is no evidence that any exploders were seen in the tunnel after the completion of the work and before this accident, and the undisputed evidence is that the unfortunate boy was injured after the plaintiffs in error had completed the tunnel and abandoned the premises, and was injured by an exploder which he picked up in a shanty occupied by some of the employes of the plaintiffs in error who worked in and about the construction of the tunnel. The verdict of the jury in this case found the plaintiffs in error guilty of negligence. For that verdict to stand it must have for support competent positive evidence that the injury was caused through the negligence of the plaintiffs in error, or such negligence must be fairly and reasonably inferable from proved or conceded facts in evidence. Had the exploder which injured this boy been found in the tunnel, we think the jury would have had the right to infer that it was left there by the men employed in blasting in the tunnel, and that such leaving it there was negligence on the part of the plaintiffs in error; but we do not think that, under the evidence in this case, because the boy found the exploder which injured him in a shanty occupied by some of the employes of the plaintiffs in error, the jury had the right to infer that the presence of the exploder where found was attributable to the negligence of the plaintiffs in error. This was a mere conjecture, not an inference. A verdict for negligence may be supported by inference, but such inference must be the legal, probable, and reasonable deductions from proved or conceded facts. The judgment must stand

REVERSED.