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REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

JANUARY AND SEPTEMBER TERMS, 1894.

VOLUME XLI.

D. A. CAMPBELL,
OFFICIAL REPORTER.

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

THE SUPREME COURT

OF

NEBRASKA.

1894.

CHIEF JUSTICE,

T. L. NORVAL.

JUDGES;

A. M. POST,
T. O. C. HARRISON.

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JOHN M. RAGAN,
FRANK IRVINE.

OFFICERS.

ATTORNEY GENERAL,

GEORGE H. HASTINGS.

CLERK AND REPORTER,

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DEPUTY CLERK,

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J. E. BUSH.....Beatrice.

Second District—

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Third District—

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

Fourth District—

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C. R. SCOTT.....Omaha.
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Sixth District—

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Ninth District—

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Tenth District—

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Eleventh District—

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Twelfth District—
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Thirteenth District—
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Fifteenth District—
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M. P. KINKAID.....O'Neill.

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SUPREME COURT COMMISSIONERS.

(Laws 1893, chapter 16, page 150.)

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

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

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

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

Approved March 9, A. D. 1893.

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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.

UNION PACIFIC RAILROAD COMPANY v. LARS E. ERICKSON.

FILED JUNE 5, 1894. No. 5516.

1. **Master and Servant:** NEGLIGENCE: PERSONAL INJURIES: QUESTION FOR JURY. The plaintiff was a section man employed by the defendant. He was engaged in repairing the roadway and stepped away from the track to permit a fast passenger train to pass. He stood about twelve feet from the track. As the train passed him a large piece of coal fell from the tender, struck the ground, and, being shattered, a fragment rebounded and struck the plaintiff, injuring him. The evidence showed that it required the full capacity of the tender to store enough coal to supply the engine during its run, and that the tender had been

loaded to its full capacity from a chute without any precautions as to the safe disposition of the coal in the tender; that it was the fireman's duty to place in safety any coal found in a dangerous position. *Held*, That under these facts it was proper to submit the case to the jury as to whether the company had been negligent in loading the coal.

2. **Negligence.** While the facts justifying an inference of negligence must be established by the evidence and their existence must not be left to the conjecture of a jury, and while ordinarily negligence cannot be presumed merely from the happening of an accident, still facts may be established by circumstances, and the same facts which prove the accident may be circumstances from which the facts justifying an inference of negligence may be found to exist.

3. **Master and Servant:** NEGLIGENCE: EVIDENCE. In such a case evidence tending to show that it was practicable to place railings about the top of the tenders to safely increase their capacity, and that this tender was not provided with such a railing, *held*, to be admissible.

4. ———: FELLOW-SERVANTS: NEGLIGENCE. Employment in the service of a common master is not alone sufficient to constitute two men fellow-servants within the rule exempting the master from liability to one for injuries caused by the negligence of the other. To make the rule applicable there must be some consociation in the same department of duty or line of employment.

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

A statement of the facts appears in the opinion.

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

The plaintiff has entirely failed to prove any actionable negligence on the part of the defendant's employes in any respect stated in the petition, or to account for the falling or bursting of the piece of coal mentioned therein. Such being the case, it was the duty of the court to have withdrawn the case from the jury, or to have directed a verdict in favor of the defendant in accordance with the request of the defendant. (Patterson, Railway Accident Law, sec. 373;

Grossenbach v. Milwaukee, 65 Wis., 35; *Baker v. Madison*, 62 Wis., 137; *Brown v. Kendall*, 6 Cush. [Mass.], 292; *Rockwood v. Wilson*, 11 Cush. [Mass.], 221; *Nitro-Glycerine Case*, 15 Wall. [U. S.], 524; *Burlington & M. R. R. Co. v. Wendt*, 12 Neb., 76; *Stevenson v. Chicago & A. R. Co.*, 18 Fed. Rep., 493; *Morrison v. Phillips & Colby Construction Co.*, 44 Wis., 410; *Ladd v. New Bedford R. Co.*, 119 Mass., 412; *Steffin v. Chicago & N. W. R. Co.*, 46 Wis., 259; *Wood v. Chicago, M. & St. P. R. Co.*, 51 Wis., 196; *Chappell v. Oregon*, 36 Wis., 145; *Payne v. Forty-second & Grand St. R. Co.*, 40 Super. Ct. [N. Y.], 8; *Smith v. Chicago, M. & St. P. R. Co.*, 42 Wis., 526; *De Vau v. Pennsylvania & N. Y. C. & R. Co.*, 28 N. E. Rep. [N. Y.], 532; *Wheelan v. Chicago, M. & St. P. R. Co.*, 52 N. W. Rep. [Ia.], 119; *Chicago, B. & Q. R. Co. v. Barnard*, 32 Neb., 316; *Sorenson, Adm'r, v. Menasha Paper & Pulp Co.*, 56 Wis., 338; *Schultz v. Chicago & N. W. R. Co.*, 67 Wis., 616.)

The court erred in allowing the plaintiff, on cross-examination of the engineer, to show that, after the date of the accident, railings were put around the top of the locomotive tenders belonging to the company. (*Lang v. Sanger*, 76 Wis., 71; *Columbia & P. S. R. Co. v. Hawthorne*, 12 U. S. Sup. Ct. Rep., 591; *McClary v. Sioux City & P. R. Co.*, 3 Neb., 44; *Pickett v. Crook*, 20 Wis., 378; *Cooper v. Milwaukee & P. R. Co.*, 23 Wis., 668; *Couch v. Watson Coal Co.*, 46 Ia., 17; *Lee v. Detroit Bridge & Iron Works*, 62 Mo., 565; 7 Am. & Eng. Ency. of Law, 855; *Galveston, H. & S. A. R. Co. v. Arispe*, 17 S. W. Rep., [Tex.], 47; *Baulec v. New York & H. R. R. Co.*, 59 N. Y., 356; *McKee v. Chicago, R. I. & P. R. Co.*, 50 N. W. Rep. [Ia.], 209; *Loftus v. Union Ferry Co.*, 84 N. Y., 459; *Sjogren v. Hall*, 18 N. W. Rep. [Mich.], 814; *Richards v. Rough*, 18 N. W. Rep. [Mich.], 785; *Schultz v. Chicago & N. W. R. Co.*, 67 Wis., 622; *Atchison, T. & S. F. R. Co v. Howard*, 49 Fed. Rep., 206; *Meyer v. Mid-*

land P. R. Co., 2 Neb., 339; *Chicago & A. R. Co. v. Kelly*, 127 Ill., 627; *St. Louis & S. R. Co. v. Weaver*, 35 Kan., 412.)

If the plaintiff is right in his assumption that this injury arose from a defect in the construction of the tender, or in its management, obvious to himself, or which with ordinary care he might have known, then by continuing in his employment, without demurrer, he assumed such risk and hazard. (*Chicago, R. I. & P. R. Co. v. Londergan*, 7 N. E. Rep. [Ill.], 55; *Minty v. Union P. R. Co.*, 21 Pac. Rep. [Idaho], 660; *Randall v. Baltimore & O. R. Co.*, 109 U. S., 478; *Herbert v. Northern P. R. Co.*, 13 N. W. Rep. [Dak.], 349; *Northern P. R. Co. v. Herbert*, 116 U. S., 642; *Bunt v. Sierra Butte Gold Mining Co.*, 138 U. S., 483; *Howland v. Milwaukee, L. S. & W. R. Co.*, 54 Wis., 230; *De Forrest v. Jewett*, 88 N. Y., 264; *Hughes v. Winona & St. P. R. Co.*, 27 Minn 137; *Fraker v. St. Paul, M. & M. R. Co.*, 32 Minn., 54; *Dowell v. Burlington, C. R. & N. R. Co.*, 62 Ia., 629; *Chicago & N. W. R. Co. v. Donahue*, 75 Ill., 106; *Sweeney v. Central P. R. Co.*, 57 Cal., 15; *Kansas P. R. Co. v. Peavey*, 8 Pac. Rep. [Kan.], 780; *Tuttle v. Detroit, G. H. & M. R. Co.*, 122 U. S., 189; *Bartonshill Coal Co. v. Reid*, 3 McQueen [Scotch App.], 266.)

Had the negligence been shown to exist, and to have been that of the engineer or fireman, then they were fellow-servants with the plaintiff, engaged in the same general business, and under the same employer, and for that reason no recovery can be had. (*Farwell v. Boston & W. R. Co.*, 4 Met. [Mass.], 49; *Murray v. South Carolina R. Co.*, 1 McMullen [S. Car.], 385*; *St. Louis, A. & T. R. Co. v. Triplett*, 15 S. W. Rep. [Ark.], 833; *Tuttle v. Detroit, G. H. & M. R. Co.*, 122 U. S., 195; *Louisville & N. R. Co. v. Collins*, 5 Am. Law Reg., n. s. [Ky.], 265; *Coon v. Syracuse & U. R. Co.*, 1 Seld. [N. Y.], 492; *Wilson v. Merry*, 1 L. R. H. L. Sc., 326; *Brodeur v. Valley Falls*

Co., 17 Atl. Rep. [R. I.], 54; *Union P. R. Co. v. Fort*, 17 Wall. [U. S.], 553; *Waller, Adm'r, v. Southeastern R. Co.*, 2 Hurl. & Nor. Exch. Rep. [Eng.], 109; *Randall v. Baltimore & O. R. Co.*, 109 U. S., 478; *Baltimore & O. R. Co. v. Andrews*, 50 Fed. Rep., 732; *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S., 377; *Pittsburg & Ft. Wayne & C. R. Co. v. Devinney*, 17 O. St., 198; *Kumler v. Junction R. Co.*, 33 O. St., 150; *Mealman v. Union P. R. Co.*, 37 Fed. Rep., 189; *Hough v. Texas & P. R. Co.*, 100 U. S., 213; *Van Wickle v. Manhattan R. Co.*, 23 Blatch. [U. S. C. C.], 422; *Rohback v. Pacific R. Co.*, 43 Mo., 187; *Armour v. Hahn*, 111 U. S., 318; *Howard v. Denver & R. G. R. Co.*, 26 Fed. Rep., 837; *Clifford v. Old Colony R. Co.*, 141 Mass., 564; *Keyes v. Pennsylvania R. Co.*, 3 Atl. Rep. [Pa.], 15; *Collins v. St. Paul & S. C. R. Co.*, 30 Minn., 31; *Whaalen v. Mad River & L. E. R. Co.*, 8 O. St., 249; *Gormley v. Ohio & M. R. Co.*, 72 Ind., 31; *Pennsylvania R. Co. v. Wachter*, 60 Md., 395; *Houston & T. C. R. Co. v. Rider*, 62 Tex., 267; *Boldt v. New York C. R. Co.*, 18 N. Y., 432; *Blake v. Maine C. R. Co.*, 70 Me., 60; *Coon v. Syracuse & U. R. Co.*, 5 N. Y., 492; *Capper v. Louisville, E. & St. L. R. Co.*, 103 Ind., 305; *Henry v. Staten Island R. Co.*, 81 N. Y., 373; *Russell v. Hudson River R. Co.*, 17 N. Y., 134; *Heine v. Chicago & N. W. R. Co.*, 58 Wis., 525; *Cooper v. Milwaukee & P. C. R. Co.*, 23 Wis., 668; *Toner v. Chicago, M. & St. P. R. Co.*, 69 Wis., 188; *Brown v. Central P. R. Co.*, 7 Pac. Rep. [Cal.], 447; *Besel v. New York C. & H. R. R. Co.*, 70 N. Y., 171; *Valtez v. Ohio & M. R. Co.*, 85 Ill., 500; *Harvey v. New York C. & H. R. R. Co.*, 88 N. Y., 481; *Holden v. Fitchburg R. Co.*, 129 Mass., 268; *King v. Boston & W. R. Co.*, 9 Cush. [Mass.], 112; *Van Wickle v. Manhattan R. Co.*, 32 Fed. Rep., 278; *Gillshannon v. Stony Brook R. Co.*, 10 Cush. [Mass.], 228; *International & G. N. R. Co. v. Ryan*, 18 S. W. Rep. [Tex.], 219; *Elliot v. Chicago, M. & St. P. R. Co.*, 41 N. W. Rep.

[Dak.], 758; *Cincinnati, N. O. & T. P. R. Co. v. Mealer*, 50 Fed. Rep., 725; *Sullivan v. Mississippi & M. R. Co.*, 11 Ia., 421; *Foster v. Minnesota C. R. Co.*, 14 Minn., 360; *Capper v. Louisville, E. & St. L. R. Co.*, 21 Am. & Eng. R. Cas. [Ind.], 527; *Chicago & N. W. R. Co. v. Moranda*, 93 Ill., 302; *Chicago & A. R. Co. v. Murphy*, 53 Ill., 336; *Indianapolis & St. L. R. Co. v. Morgenstern*, 106 Ill., 216; *Chicago & N. W. R. Co. v. Moranda*, 108 Ill., 576; *Chicago & A. R. Co. v. O'Bryan*, 15 Ill. App., 134; *Dow v. Kansas P. R. Co.*, 8 Kan., 642; *Kansas P. R. Co. v. Salmon*, 11 Kan., 83; *Little Miami R. Co. v. Stevens*, 20 O., 416; *Waller v. Southeastern R. Co.*, 2 H. & C. Exch. [Eng.], 101; *McAndrews v. Burns*, 39 N. J. Law, 117; *Nashville & D. R. Co. v. Jones*, 9 Heisk. [Tenn.], 27; *Louisville, C. & L. R. Co. v. Cavens*, 9 Bush [Ky.], 559; *Louisville & N. R. Co. v. Collins*, 2 Duv. [Ky.], 114; *Louisville & N. R. Co. v. Robinson*, 4 Bush [Ky.], 507; *Murray v. South Carolina R. Co.*, 1 McMullan [S. Car.], 385; *Clarke v. Holmes*, 7 H. & N. [Eng.], 937*.)

Frick & Dolezal, contra:

The court did not err in permitting the engineer to be questioned concerning a railing to prevent the coal from falling off the tender. (*Cropsey v. Averill*, 8 Neb., 152; *Chicago, K. & N. R. Co. v. Wiebe*, 25 Neb., 512; *St. Louis & S. F. R. Co. v. Weaver*, 35 Kan., 412; *Readman v. Conway*, 126 Mass., 374; *West Chester & P. R. Co. v. McElwee*, 67 Pa. St., 311; *Kansas P. R. Co. v. Miller*, 2 Col., 442; *O'Leary v. City of Mankato*, 21 Minn., 65; *Brehm v. Great Western R. Co.*, 34 Barb. [N. Y.], 256; *Westfall v. Erie R. Co.*, 5 Hun [N. Y.], 75; *Harvey v. New York C. & H. R. R. Co.*, 19 Hun [N. Y.], 556; *St. Joseph & D. R. Co, v. Chase*, 11 Kan., 47; *Atchison, T. & S. F. R. Co. v. Retford*, 18 Kan., 245; *City of Emporia v. Schmidling*, 33 Kan., 485; *Phelps v. City of Mankato*, 23 Minn., 279; *Kelly v. Southern M. R. Co.*, 28 Minn., 98; *Sewell v. City of Cohoes*, 11 Hun [N. Y.], 626.)

The defendant in error and the engineer and fireman were not fellow-servants within the rule of law in this state which would prevent a recovery against the railway company,—the master of all three. (*Chicago & N. W. R. Co. v. Moranda*, 93 Ill., 302; *Chicago & A. R. Co. v. Kelly*, 21 N. E. Rep. [Ill.], 203; *Indianapolis & St. L. R. Co. v. Morgenstern*, 106 Ill., 216; *Richmond & D. R. Co. v. Norment*, 84 Va., 167; *Moon v. Richmond & A. R. Co.*, 78 Va., 745; *Baltimore & O. R. Co. v. McKenzie*, 81 Va, 71; *St. Louis & S. F. R. Co. v. Weaver*, 57 Am. Rep. [Kan.], 176; *Chicago, St. P., M. & O. R. Co. v. Lundstrom*, 16 Neb., 254; *Sioux City & P. R. Co. v. Smith*, 22 Neb., 775; *East T., V. & G. R. Co. v. De Armond*, 86 Tenn., 73; *Krogg v. Atlanta & W. P. R. Co.*, 77 Ga., 202; *Cooper v. Mullins*, 30 Ga., 146; *Hough v. Texas & P. R. Co.*, 100 U. S., 213; *Priestley v. Fowler*, 3 M. & W. [Eng.], 1; *King v. Ohio & M. R. Co.*, 14 Fed. Rep., 277; *Garrahy v. Kansas City, St. J. & C. B. R. Co.*, 25 Fed. Rep., 258; *Northern P. R. Co. v. Herbert*, 116 U. S., 642; *O'Donnell v. Allegheny V. R. Co.*, 59 Pa. St., 239; *Ryan v. Chicago & N. W. R. Co.*, 60 Ill., 171; *Lewis v. St. Louis & I. M. R. Co.*, 59 Mo. 495; *Darrigan v. New York & N. E. R. Co.*, 52 Conn., 285; *Vautrain v. St Louis, I. M. & S. R. Co.*, 8 Mo. App., 538; *Hall v. Missouri P. R. Co.*, 74 Mo., 298; *Hardy v. Minneapolis & St. L. R. Co.*, 36 Fed. Rep., 657; *Louisville & N. R. Co. v. Brooks*, 83 Ky., 129; *Louisville, C. & L. R. Co. v. Cavens*, 9 Bush [Ky.], 559.)

IRVINE, C.

Erickson was employed by the railway company as a section hand and was engaged in his work repairing the road-bed of the railroad near Fremont, when a fast passenger train approached and he stepped aside to let it pass. As the train passed him a large piece of coal fell from the tender of the locomotive, struck the ground near him and broke into smaller pieces, one of which flew towards him,

striking him and causing a fracture of the leg. He brought this action against the railroad company, alleging as negligence that the piece of coal had been negligently allowed to fall from the tender while the train was running at a high rate of speed; that the coal had been negligently loaded and negligently permitted to remain on the tender in a position rendering it liable to fall and to be cast off by the motion of the train. The railway company answered, among other things denying any negligence upon its part and alleging contributory negligence on the part of Erickson. There was a verdict and judgment for Erickson for $1,625.

Probably to follow the order of discussion in the brief of the railway company will disclose the features of the case as well as possible. The first point made is that the evidence did not establish any negligence on the part of the railway company or its employes. The rule of negligence has been so frequently announced by this court that it is hardly necessary to restate it. Questions of negligence and contributory negligence are for the jury where, from the facts proved, different minds may reasonably draw different conclusions. The evidence here tends to show that Erickson, when he saw the train approaching, stepped aside, until he was about twelve feet from the track, and that in so doing he pursued the course customarily resorted to by section men. There is no doubt that a large lump of coal did fall from the tender as the train passed him; that it struck the ground near the track and, breaking into pieces, one portion thereof rebounded and struck him, causing the injury. It is quite clearly established that the lump of coal was no larger than would conveniently go into the fire-box of the engine, and it may be assumed that it was proper to have a lump of such size upon the tender. The train was bound east. The run of the engine was from Grand Island to Council Bluffs, a distance of over 150 miles. Coal was loaded upon the tender at Grand Island. There was no

coaling station for passenger trains between the two points. The tender of this engine would hold from ten to eleven tons, and it required that amount of coal to supply the engine during its run. The coal was loaded from a chute at Grand Island, and, according to the fireman, the tender was loaded at this time, as usual, before the engineer and fireman mounted the engine. As he states, "I found it in all ways thrown in, just as they pulled the chute down." It lay "in all shapes, upside down, everyway dropped in there." From this and from all the evidence it is quite clear that in order to make the run it was necessary to completely fill the tender; that in order to do so the coal was dropped in from a chute without any precautions as to its safe disposition; but the fireman testifies that it was his duty to "wet the coal down;" that for that purpose he mounted the tender before the engine started, and if he saw any coal liable to fall from the tender it was his duty to put it in a place of safety. According to this witness, about six tons of coal remained in the tender at the time of the accident. The train was a through train and stopped at only a few stations. We think that this evidence fairly made a case to submit to the jury, under the rule as above stated.

The principal contention on the part of the railroad company is that negligence in loading the coal could not be inferred from the fact that the lump fell from the tender. There is no doubt of the general principle that negligence cannot be inferred merely from the fact that an accident happened, and it is also true that while negligence is an inference to be drawn from the facts proved, facts warranting that inference must be proved, and the jury cannot be left to conjecture the existence of facts which might ground the inference of negligence. Facts may be established by circumstances as well as by direct testimony, and the same facts which prove the accident may, in some cases, be circumstances which establish the facts justifying an inference of negligence. So in this case. Neither fireman nor en-

gineer saw the coal fall. It was certainly not dislodged from a place of safety by any act of theirs at the time. Erickson and the section boss did see it fall as the train passed. It is not merely a conjecture, it is a plain inference, from the fact that it fell under the circumstances, that it had been so placed upon the tender that it was in a position from which it was liable to be dislodged by the motion of the train. All the evidence shows that it was necessary to heap the coal up on the tender in order to enable it to carry sufficient to make the run. The fireman's testimony shows that no precautions were taken in loading to load it safely, and that he was charged with the duty to inspect the loading and change the position of the pieces where they were unsafe. The method of loading accounts for the lumps being in a position of unstable equilibrium, and unless we disregard the laws of physics we must say that it had been left in such a position or it would not have fallen. In this connection we are cited to the case of *Schultz v. Chicago & N. W. R. Co.*, 67 Wis., 616, a case arising out of a similar accident. Portions of that decision are open to criticism; but upon the question of negligence we do not think that the conclusion was wrong, or that it conflicted with that we reach. All that the court there held was that the facts established did not make out a case of negligence in law. The court did not say that a jury would not be justified in finding negligence from such facts. We would say the same,—that the court should not, under such facts, instruct the jury either that there was or was not negligence. This was an inference for the jury to draw. As to contributory negligence, we can see no room for doubt. Erickson was necessarily near the track. He had never seen coal fall from tenders. He did not observe how this tender was loaded, and he was certainly far enough away to be secure from any ordinary danger to be apprehended from a passing train properly loaded.

Our attention is here directed to an assignment of error

in regard to the admission of evidence, to the effect that subsequently to this accident railings were put around the tops of tenders belonging to the company. If testimony had been directly admitted to show that fact, a question, to say the least, serious, would be presented; but the record hardly supports the assignment of error in that regard. We quote all relating to the subject:

Q. The Union Pacific Company—or arrangements can be made by which there is a kind of railing around the top of the tenders, isn't there?

A. Well, I should answer that that there could be arrangements made.

Q. Would not you answer that they have got such railing around the top of the tenders?

A. They have at this time, but we did not then.

These questions and answers were objected to. They occur in the cross-examination of the engineer, who was called by the company. They were followed by some questions, without objections, as to the purposes for which these railings were placed upon the tenders. Such evidence tended to show that they were to increase the capacity of the tender. When the questions objected to are examined it will be found that there was no inquiry in regard to subsequent acts of the company. The first question merely asked if it was practicable to use a railing. The second asked whether the company had not such railings around the tenders, without specifying the time. The statement that they had been placed there since the accident was the engineer's answer, and from his use of pronouns it is not clear whether he meant that all tenders had been so provided since the accident, or whether he meant to say simply that his engine did not have one at that time. We do not think this testimony is open to the objection urged. The feature objected to was really introduced by the company itself upon redirect examination as follows:

Q. Now, with regard to this railing that Mr. Frick has

spoken about, were such railings used at the time of that tender, at that time, that you knew of?

A. No, sir.

Q. Do you know of any other passenger engine at that time?

A. I don't remember, but I think they were putting them on. I would not say positively.

The peculiar construction both of these questions and their answers still leaves the same doubt as to the meaning of the evidence; but when we consider the evidence as to the capacity of this tender and the amount of coal required, together with the evidence just referred to, it would seem that the railings were found necessary to prevent overloading and that the company then realized this fact. This much was certainly material and tended to establish the negligence complained of.

The next contention is that if the accident resulted in the manner claimed by the plaintiff it was a matter obvious to him, and that continuing in the employment he submitted to the hazard thereof, but, as already stated, he never knew such an accident to happen; moreover, he knew nothing about the manner of loading the tenders. These were matters wholly foreign to that portion of the company's work in which he was engaged, and this argument ill accords with the further argument made, that the company could not be held liable unless it had been informed by the previous occurrence of similar accidents that this manner of loading the tenders was dangerous. Neither argument is well founded. The former, for the reason that Erickson did not know, was not bound to know, and was not in a position to know the danger. The latter, for the reason, if for no other, that it must occur to every one of ordinary judgment that the natural and probable consequence of an insecure load of coal upon the tender of an engine running at a high rate of speed might be the falling of coal therefrom and consequent injury to persons at sta-

tions and workmen necessarily engaged near the track. It would not require the actual happening of such an event to apprise one of the danger.

The next proposition is that Erickson was a fellow-servant of whoever was guilty of negligence, and that the company is, therefore, not liable. Upon this subject elaborate briefs have been filed upon either side reviewing nearly all the American authorities. We shall not here undertake such a review. We are aware of the hopeless conflict existing. In fact a study of the question must convince any one that shortly after the introduction of railways the law entered upon a slow but marked period of transition upon the subject of fellow-servants. No definite result has yet been reached. Probably the leading case, both in America and in England, applying the doctrine of fellow-servants to all the employes of a common master, is that of *Farwell v. Boston & W. R. Co.*, 4 Met. [Mass.], 49. All the cases holding that broad doctrine seem to be based directly or indirectly upon the authority or the reasoning of Chief Justice Shaw in that case. It was decided in 1842, before the railway system of the country was developed, before the existence of other large corporations employing vast numbers of men engaged in the pursuit of one general object, but performing different functions and engaged in many distinct departments. This state of affairs was then just arising, and the vast change of conditions in the relations of master and servant was only then beginning to appear. The extent of that change and the consequences of applying old rules to new conditions could not then be foreseen. In that case, as in all others upon the subject, the reasons for the rule exempting masters from liability to servants for injuries produced by the negligence of their fellow-servants are stated as twofold: First, that such injuries must be presumed to be within the contemplation of the parties when they made their contract; and second, that public policy requires the enforcement of such

a rule, upon the theory that by enforcing it each servant is made closely observant of the acts of his fellow-servants, and that the scrutiny of one another naturally tends to efficiency and care. The first reason given, where the rule is sought to be applied without discrimination to all servants of a common master, has already been completely set aside and disregarded, even by those courts in America most inclined to conservatism upon the subject. It is everywhere conceded that inasmuch as a corporation can only act through agents and all agents are servants, the logical application of the rule would discharge a corporation entirely from liability to its servants, and this gives rise to a corollary that where the negligence is that of a vice-principal whose acts must be taken as those of the master, the rule does not apply. The recognition of this exception was necessary to preserve another rule, that while a servant assumes the dangers incident to his employment, he does not assume dangers caused by the negligence of his master. There is as much reason for holding that a servant in entering an employment contracts with a view to possible negligence of the master as to hold that he contracts with a view to possible negligence of the man who works beside him and upon the same footing. To illustrate by reference to railways, which probably afford as great a variety of grades in employment as any occupation. Can it be logically said that a section man in the matters within the scope of his employment is less liable to err than a conductor, superintendent, or general manager with reference to his own duties? To the writer's mind, when the first distinction was drawn between grades of servants, the force of the general rule, so far as it was based upon contract, was destroyed. As to the second reason,—that founded upon public policy,—there is much force in the observation of Mr. Justice Field in *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S., 377: "It may be doubted whether the exemption has the effect thus claimed for it. We have never

known parties more willing to subject themselves to dangers of life or limb because, if losing the one, or suffering in the other, damages could be recovered by their representatives or themselves for the loss or injury. The dread of personal injury has always proved sufficient to bring into exercise the vigilance and activity of the servant." Still we concede that there may be some force to the rule so far as grounded upon public policy and confined to servants who are, in the language of the supreme court of Illinois, "consociated by means of their daily duties or cooperating in the same department of duty or the same line of employment." (*Chicago & N. W. R. Co. v. Moranda*, 93 Ill., 316.) Beyond this line we can see no force in it. When the authorities are examined it is found that they range themselves in two general classes, those following the opinion of Chief Justice Shaw and those distinguishing between grades of employment, and employes in distinct departments of service. The principal objection urged to the latter class is that by adopting such distinctions the courts overthrow a general rule of easy application and adopt one not susceptible of precise application and uncertain in its results. Possibly this objection is well taken. If so, we can only say that it accords with the general spirit of the common law. Perhaps the main distinction between the civil law and the common law is that the civil law is based upon well-defined logical rules readily susceptible of ascertainment, while the common law is founded upon broader general principles, to be applied to the diversity of human affairs in such a manner as to favor individual liberty and to conform themselves to changed conditions. When the law of fellow-servants was first announced business enterprises were comparatively small and simple. The servants of one master were not numerous. They were all engaged in the pursuit of a simple and common undertaking. Now, things have changed. Large enterprises are conducted by persons or by corporations employing vast numbers of

servants divided into classes, each pursuing a different portion of the work, and each practically independent of the other. The old reasons do not apply to the new conditions. We are not prepared in this case to propose any set rule for always determining when two employes are fellow-servants within the meaning of the law and when they are not, nor are we required for present purposes so to do. Erickson was a section man. He was employed with several others to keep the road-bed and the track in repair. The fireman was employed to fire the engine and perform certain duties in connection with the operation of trains. Some one was employed at Grand Island to load the tenders with coal. With either the fireman or this third person Erickson had nothing in common, except that he drew his pay from a common source, and that in a broad sense they were all carrying out parts of a vast transportation business. Erickson had no control over either of the others, no opportunities of judging of their competency, no supervision of their specific acts, and only by adopting the broadest rule as announced by Chief Justice Shaw could we hold them to be fellow-servants. This rule we are not prepared to adopt. We hold on the contrary that employment in the service of a common master is not alone sufficient to constitute two men fellow-servants within the rule exempting the master from liability to one for injuries caused by the negligence of the other, and that to make the rule applicable there must be some consociation in the same department of duty or line of employment. For the purposes of this case we are content to follow the opinion of Mr. Justice Miller in *Garrahy v. Kansas City, St. J. & C. B. R. Co.*, 25 Fed. Rep., 258, where, in the light of quite recent decisions and of the mature judgment of the supreme court of the United States in *Chicago, M. & St. P. R. Co. v. Ross, supra*, he held that persons occupying such relations were not fellow-servants within the meaning of the rule.

The other errors discussed in the briefs relate to the giving and refusal of instructions. If we are right in the conclusions reached on the branches of the case already discussed, there was no error in the instructions, as those given and refused, so far as they are complained of, simply relate to those questions.

JUDGMENT AFFIRMED.

ANNA LOREE BRIGGS V. FIRST NATIONAL BANK OF BEATRICE.

FILED JUNE 5, 1894. No. 5593.

1. **Husband and Wife:** SURETYSHIP. In this state a married woman may contract as surety for her husband. *Smith v. Spaulding*, 40 Neb., 339, followed.
2. **Married Women:** SURETY FOR HUSBAND: CONSIDERATION. The contemporaneous lending of money to the husband is a sufficient consideration for the wife's signing a note evidencing such indebtedness, and a clause in such a note pledging her separate estate is binding upon her, although she personally received no consideration therefor.

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

Rickards & Prout, for plaintiff in error.

Griggs, Rinaker & Bibb, contra.

IRVINE, C.

The defendant in error sued the plaintiff in error and Charles E. Briggs upon a promissory note as follows:

"$500. "BEATRICE, NEB., November 26, 1890.

"Ninety days after date I promise to pay to First National Bank, Beatrice, Nebraska, or order, five hundred

dollars, at the First National Bank, Beatrice, Nebraska, with interest at the rate of ten per cent per annum from maturity until paid, for value received; and the said Anna L. Briggs hereby pledges her separate estate.

"CHARLES E. BRIGGS.
"ANNA LOREE BRIGGS."

The plaintiff in error admitted the execution of the note, but averred that she signed it only as surety for Charles E. Briggs, her husband, to whom the entire consideration was paid, and that the note was not given with reference to her separate estate, nor upon the faith and credit thereof, nor did she bind the same. The evidence showed that she was the wife of Charles E. Briggs; that the money was borrowed from the bank by him; that she executed the note as surety; that the debt was not an antecedent debt, but was one contracted when the note was made. There was a peremptory instruction to the jury to find for the bank. The giving of this instruction, the refusal to give an instruction practically to find for the defendant, and the insufficiency of the evidence are the errors assigned. They all raise the single question as to whether, upon the pleadings and uncontradicted evidence, Mrs. Briggs was liable upon the note.

The plaintiff in error cites in favor of her view of the case, *Davis v. First Nat. Bank of Cheyenne*, 5 Neb., 245; *Hale v. Christy*, 8 Neb., 264; *State Savings Bank v. Scott*, 10 Neb., 83; *Barnum v. Young*, 10 Neb., 309; *Jeffrey v. Fleming*, 26 Neb., 685. None of these cases justifies her contention. The case last cited merely holds that in an action for goods sold and delivered to a restaurant, the evidence showing that the restaurant was kept by the husband, belonged to him, and the credit evidently given to him, the wife was not liable; and the other cases are to the effect that the wife is not liable upon her contracts unless they are made with reference to her separate estate, or an intention is shown to bind her separate estate. To the same

effect is *Eckman v. Scott*, 34 Neb., 817. In a recent case (*Smith v. Spaulding*, 40 Neb., 339) it was held, citing *Stevenson v. Craig*, 12 Neb., 464, that a married woman in this state may contract as surety for her husband, and that the extension of time of payment of the husband's past due indebtedness is a sufficient consideration to sustain such a contract. That case is decisive of the one under consideration. The contemporaneous lending of the money to the husband was a sufficient consideration to sustain the wife's contract and in the note she expressly pledges her separate estate. There is no allegation and no proof of fraud or mistake in procuring the note and she is bound by its terms.

JUDGMENT AFFIRMED.

CLAUS JOHNSON V. SUSAN M. GUSS ET AL.

FILED JUNE 5, 1894. No. 4725.

Review: EVIDENCE: INSTRUCTIONS. The only questions arising relating to the sufficiency of the evidence and the applicabilty of certain instructions thereto, it was *held* that the evidence was sufficient to sustain the verdict, and the instructions applicable to the evidence.

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

Frank Fuller, for plaintiff in error.

W. M. Wright and *A. A. Welch*, *contra*.

IRVINE, C.

This was an action brought by the defendants in error against the plaintiff in error to recover for corn sold and

delivered by defendants in error to plaintiff in error. There was a verdict for defendants in error for $266.65, from which error is prosecuted.

The question in controversy was as to whether the agreement was to pay for the corn according to the market price on January 1, 1891, or at the market price upon any date to be selected by defendants in error between October, 1890, and January 1, 1891. The day selected by defendants in error for estimating the market price was December 18, on which day the market price was six cents a bushel higher than on January 1 following.

The plaintiff in error contends that the verdict is not sustained by the evidence. We have examined the evidence and find a sharp conflict therein; but two witnesses testify directly in support of the contention of the defendants in error. The credibility of these witnesses was for the jury.

The plaintiff in error also complains of certain instructions, admitting that they state the law correctly, but arguing that they are not applicable to the evidence. They are instructions stating the familiar rules in regard to the preponderance of evidence and the credibility of witnesses, leaving these questions to the jury; and also stating to the jury that the fact that a number of witnesses testified in contradiction of one another did not require the jury to find the evidence evenly balanced, but that the jury had a right to determine from the probability or improbability of the truth of the witnesses' statements, the opportunities of the witnesses of knowing the facts, and from surrounding circumstances, which witnesses were more worthy of credit. The evidence being conflicting, these instructions were strictly applicable.

JUDGMENT AFFIRMED.

PHENIX INSURANCE COMPANY OF BROOKLYN V. RAD BILA HORA LODGE.

FILED JUNE 5, 1894. No. 5268.

1. **Fire Insurance**: SUFFICIENCY OF NOTICE OF LOSS. Where a policy of insurance simply requires that notice of loss shall be given to the company at a specified office in writing, and that payment shall be made upon receipt of proper proof, and does not specify otherwise of what such notice and proof shall consist, if notice of the loss be sent in writing to the office specified and the company makes no objection on account of the form of the notice and makes no demand for other or further proof, such notice is a sufficient compliance with the terms of the policy.

2. ———: ———: ORAL NOTICE: AGENCY. This rule held to apply where oral notice was given to the local agent of the company and he, at the request of the insured, communicated the fact of the loss in writing to the specified office of the company, it being *held* that, without regard to his authority as agent of the company, the facts proved constituted him the agent of the insured to give notice of loss.

3. ———: AUTHORITY OF AGENTS: WAIVER. A clause in a policy prohibiting agents from waiving any of its terms or conditions does not prevent the insured from showing that the company, through its proper agents, accepted acts of the insured as a sufficient compliance with the terms of the policy.

4. **Record for Review**: TRANSCRIPT. A transcript of the record authenticated by the certificate of the clerk of the district court is conclusive evidence of the contents of the pleadings upon which the case was tried.

5. **Fire Insurance**: ACTION ON POLICY: LIMITATION: ESTOPPEL. Where a policy provides that no action shall be sustained unless commenced within six months after a loss shall occur, if the insured is reasonably induced by the conduct or statements of the company's agents to believe that the claim will be paid without suit and therefore withholds bringing suit until after that period, the insurer will in such case be estopped from claiming the benefit of such clause in the policy.

6. **Trial**: REVIEW. Certain rulings of the trial court on the admission of evidence examined, and *held* not to be erroneous.

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

Dillon & Preston and *E. A. Houston*, for plaintiff in error.

S. Draper and *Reese & Gilkeson, contra*, contending that the insurance company by its conduct waived its right to insist upon the enforcement of the six months' limitation clause of the policy, cited: *Barnes v. McMurtry*, 29 Neb., 178; *Thompson v. Phenix Ins. Co.*, 10 Sup. Ct. Rep., 1019; *Allemania Ins. Co. v. Peck*, 24 N. E. Rep. [Ill.], 538.

IRVINE, C.

This was an action on a policy of insurance written upon a building owned by the defendant in error and occupied by it as a lodge room. There was a verdict and judgment in the district court against the insurance company, from which it prosecutes error. A number of the rulings of the court in relation to the admission of evidence are complained of.

Mr. Schmidt, being upon the stand, testified that he was the secretary of the plaintiff association; that the lodge had a charter issued by the grand lodge of the state; that it derived its authority from this charter; that the charter was destroyed in the fire. He was then asked to state what this charter was. This question was objected to as incompetent, immaterial, and calling for secondary evidence upon an insufficient foundation. If the evidence was material, it was certainly competent. We cannot imagine a more satisfactory foundation for secondary evidence than proof that the primary evidence had been totally destroyed. We presume the object of this testimony was to show the organization of the plaintiff and establish its capacity to sue. The petition does not allege the nature

of the plaintiff's organization, whether a corporation or a voluntary association; but no objection was taken, either by demurrer or answer, to the plaintiff's capacity to sue, and by sections 94 and 96 of the Code of Civil Procedure any objection upon that ground was therefore waived. Indeed, the insurance company expressly admitted in its answer the issuance of the policy to plaintiff,—that is, a contract with the plaintiff,—and we cannot see how, under the issues, it was material to prove plaintiff's character as an association or corporation. The objection for immateriality should have been sustained, but the error was of such a character that it was clearly not prejudicial.

The answer denied plaintiff's ownership of the land upon which the building stood. In order to prove ownership plaintiff called Mr. Tikalsky, who testified that he had sold the land to the plaintiff; made a deed to the plaintiff of the land in 1886; that this deed was burned with the building. He then testified that after the fire another deed was executed to the plaintiff. This deed was then offered in evidence and its admission is urged as error. The deed itself recites that it was executed to take the place of a former deed which had been destroyed by fire in the society hall. It was not necessary to offer the deed, as, upon the proof made, secondary evidence might have been given, and to a certain extent was given, of the contents of the original deed; but this deed, being in the nature of a further assurance, had effect by relation to the original conveyance, and it was competent and material in support of the issues as to plaintiff's ownership.

It appeared in evidence that there had been some negotiations in regard to the loss between plaintiff's secretary and three individuals, whose authority to act for the insurance company the plaintiff had considerable difficulty in establishing. There is a long list of assignments of error in relation to evidence in regard to the authority of these men and in regard to transactions with them. To discuss

each assignment would unreasonably extend this opinion, and there are no questions of law presented of sufficient importance to warrant such a detailed discussion. For the purpose of illustration we will take two or three of the rulings complained of in their order. Mr. Kamansky testified that at the time of the fire he represented the insurance company, "doing insurance business," and "was employed by them to look after their interests." He was then shown a letter which he testified was written by Mr. Williams. He was then asked if he knew what relation Williams sustained to the insurance company. This question was objected to upon the ground that he could not know of his own personal knowledge and that the policy provided how agents must be appointed. The objection was overruled, and the witness answered that he did not know except by hearsay. In the first place, the question was a proper one. It only inquired whether or not he knew the fact. In the next place, the answer was such that the objection became utterly inconsequential, and to urge it here is frivolous. The time of this court is too valuable to be consumed in examining records for the purpose of investigating such points as this. Mr. Wyman was another person who had dealings with the plaintiff. Mr. Kamansky was asked, "Who was Mr. Wyman?" He answered, "Well, he is a representative of the company." The defendant then moved to strike out all the testimony in relation to Wyman unless the company was connected with these men. This motion was overruled,—properly so. The question was a competent question, and if the motion had been to strike out the answer as stating the witness' conclusion, it might have been well taken; but the motion referred vaguely to some other testimony, and at the time it was made the plaintiff was proceeding, as well as it could, to establish the connection between Wyman and the company. Moreover, the question was at once repeated, and the answer this time was that Wyman had been repre-

sented to the witness as the company's representative. On motion of the defendant this testimony was then stricken out. The same remarks apply to this assignment as to the other. These illustrations, we think, are sufficient to disclose the futility of any elaborate discussion of such assignments.

In a general way, the other assignments may be said to be based upon evidence as to statements made by Williams or Wyman as to their authority and to evidence of their conduct, upon the ground that no authority had been shown in them. As to the first of these classes, it is sufficient to say that on every occasion when a question was asked directly calling for the declarations of these persons as to their authority the court promptly sustained objections thereto, and where their statements were admitted they were statements made in the course of negotiations and were admissible, and were admitted not for the purpose of proving agency, but as part of the *res gestæ*. As to the latter class of objections, we think counsel, to a certain extent, misapprehended the precise issue involved. There was no doubt of the authority of the agent to issue the policy. Its issuance and the payment of premium were expressly admitted.

The defense was two-fold: First, that the plaintiff had not made proper proofs of loss; and second, that the action was not begun within six months, as the policy required. The legal aspects of these defenses will be hereafter considered. It was proved by Kamansky himself that he was a local agent for the company with authority to take applications and some authority at least to collect premiums. Immediately after the fire the plaintiff's secretary gave to him oral notice of the fire and requested him to communicate with the company, which he at once did. Counsel conceive that the plaintiff was endeavoring to establish a waiver by Kamansky of the requirements as to proof of loss, and that no authority to do so was shown; but for

plaintiff's real purpose Kamansky's authority was immaterial. What notice or proof of loss was required will be considered later. If the notice given to the general agent in Chicago by Kamansky was sufficient notice, it was entirely immaterial what Kamansky's authority as agent was or whether he had any authority. If he was not the company's agent, by complying with the plaintiff's demand and notifying the proper officer of the company he constituted himself the plaintiff's agent to give the notice. If the case rested upon any waiver by Kamansky, we would agree with the defendant that no authority was shown in him; but the question was not whether Kamansky had waived proof of loss, but whether notice of loss had been given the Chicago office, and whether that notice was sufficient. This notice did not have to be given through the company's agent, but might be given by the plaintiff or by any one delegated by the plaintiff for that purpose. The plaintiff was endeavoring to meet the other defense by showing that the company lulled defendant into a sense of security by negotiations and proposals until the six months allowed by the policy for bringing suit had expired. These negotiations were carried on by Kamansky, Williams, and Wyman. Without any regard to declarations made by any of these men, there is ample evidence to show that all of them sustained some relation of agency to the company; that they habitually acted for it in the examination and adjustment of losses, and their acts were recognized by the company. If the special limitation in the policy was valid, and if the negotiations and proposals during that period excused the plaintiff from earlier beginning this suit, we think there was ample to charge the company with the consequences of the acts of these men in that behalf.

Coming now to the assignments of error relating to the instructions, we will consider first the law as applicable to this case in regard to notice or proofs of loss. On this subject the court gave the following instruction: "And

upon the issues found it devolves upon the plaintiffs to prove by a preponderance of the evidence its ownership of the property insured and the destruction of the same by fire, as alleged, and the value of said property at the time of its destruction, and that the plaintiff immediately after such loss notified the said company, or its adjusting agent, of the destruction of said property, or that the plaintiff gave defendant notice of such loss, although not in exact conformity with the requirement of said policy, and that the notice was received by the company without objection and without suggesting that it did not conform to the terms of the said policy, in such case defendant will be deemed to have waived other or further proof of the said loss." The defendant requested a peremptory instruction to find for the defendant, because there was no evidence that proofs of loss had been made. The policy in evidence is very simple in its requirements. The following are the only provisions as to notice or proofs of loss: "The Phenix Insurance Company hereby agrees to make good unto the insured, their executors, administrators, or assigns, upon receipt of proper proofs at its Chicago office, all such immediate loss," etc.; also, "In case of loss or damage the insured shall forthwith give notice of such loss in writing to the company." It will be observed that the policy does not specify in what form the proofs or notice shall be given, except that the notice shall be in writing. The evidence shows that, upon request of plaintiff's secretary, Kamansky did notify in writing the Chicago office, and that thereafter a person, whom Kamansky testifies was the adjuster, appeared upon the scene and negotiations in regard to the loss were had. It does not appear that objections were ever made that the notice was insufficient or that the plaintiff was ever called upon for other or further proofs. In *Continental Ins. Co. v. Lippold*, 3 Neb., 391, it was said that the clauses in a policy as to preliminary proofs and notice should always be construed with great liberality, and that if objec-

tion is made by the company to the form of proof of loss, it is its duty to notify the party of the alleged defect, and failing to do so, it will be deemed waived. In *State Ins. Co. v. Schreck*, 27 Neb., 527, the policy did not require written notice, and it was held that under such a policy, where agents of the company were present at the fire and agreed to give notice to the company, and soon thereafter an adjuster appeared, this was sufficient. In *Union Ins. Co. v. Barwick*, 36 Neb., 223, it is repeated that if objection is made to the form of the proof it should be communicated to the insured, and he should be required to make out a full statement, otherwise the objection will be unavailing; that if a company has notice from its own agent that a loss has occurred and it sends an adjuster to estimate the amount, that constitutes a waiver. These authorities are all applicable to the case under consideration. There being no requirement as to the nature of the proof or notice, and notice in writing having been given by the authority of the plaintiff, and the adjuster having appeared in response thereto, this was a sufficient compliance with the policy, no objections having been communicated to the insured and no further proofs or information having been requested.

It is said that no waiver is pleaded. The amended petition pleads a performance of "all the conditions of said policy of insurance except final proof of loss, which was waived by the defendant." It is charged by plaintiff in error that the last clause was not in the petition when the case was tried, and a passage near the close of the bill of exceptions tends to corroborate this statement. We place the decision rather upon the ground that the terms had been complied with than that there had been a waiver; but if the case was one of waiver, we would have to accept the transcript of the record, authenticated by the clerk's certificate, as conclusive evidence of the contents of the pleadings, and could not permit this evidence to be im-

peached, either by statements of counsel or by colloquies in the bill of exceptions between counsel and the trial judge. It is true that there is a clause in this policy denying to agents the power to waive any of its terms or conditions, except in the case of a general agent at Chicago, who is only empowered to waive conditions by writing. This is not such a case as that of the *German Ins. Co. v. Heiduk*, 30 Neb., 288, where such a provision was enforced. There is a distinction between waiving the terms of a policy and accepting and acting upon an attempted performance of such terms in such a manner as to adopt such attempts as a compliance. Probably no special agent could orally waive the requirement as to notice of loss, but the company itself, acting through an agent of general authority or one of special authority in that regard, might, and in this case did, accept what was done as sufficient and estop itself from requiring anything further.

The limitation clause in the policy was as follows: "No suit or action against this company shall be sustainable in any court of law or chancery unless commenced within six months next after such loss shall occur, any statute of limitations to the contrary notwithstanding." A respectable line of authorities is to be found in support of the validity of similar provisions. There have been at least two cases in this court whose language indicates that such provisions under certain conditions are enforceable. (*Barnes v. McMurtry*, 29 Neb., 178; *German Ins. Co. v. Fairbank*, 32 Neb., 750.) In no case, however, has effect been given to such a provision in this state. Notwithstanding the authorities upon the subject, the writer would hesitate to commit himself to the view that the parties to a contract may bind the courts to a period of limitations other than that prescribed by statute. That question is not, however, necessarily in this case. The court instructed the jury upon the subject as follows: "If you find from the evidence that the defendant, by any conduct or statement of its adjusting agent

while attempting to adjust the said loss, did that which calculated to induce a reasonable belief in the plaintiff that the claim would be paid without suit, and that the plaintiff was reasonably induced by such conduct of defendant and proposition of settlement to withhold bringing suit until after six months after said loss, then defendant will be deemed to have waived the right to insist upon requiring such suit to be brought within six months from the date of the loss." The evidence fairly tended to support this instruction. Persons undoubtedly authorized to represent the company to some extent and for some purposes in the adjustment of the loss were shown to have conducted negotiations and made proposals for settlement until after the expiration of six months. We have no doubt that if such a provision is of any validity the company may, by its conduct, estop itself from claiming the benefit thereof, and that when the company by holding out prospects of an amicable settlement induces the plaintiff to forbear suit until after the expiration of the time limited, the company is thereby estopped from claiming the benefit of the special limitation. (*Thompson v. Phenix Ins. Co.*, 136 U. S., 287; *Steel v. Phenix Ins. Co.*, 47 Fed. Rep., 863; *Martin v. State Ins. Co.*, 44 N. J. Law, 485; *Ripley v. Ætna Ins. Co.*, 30 N. Y., 136; *Blanks v. Hibernia Ins. Co.*, 36 La. Ann., 599; *St. Paul Fire & Marine Ins. Co. v. McGregor*, 63 Tex., 399; *Bish v. Hawkeye Ins. Co.*, 69 Ia., 184; *Home Ins. Co. v. Myer*, 93 Ill., 271.) All of the cases above cited fully recognize the principle and sustain the instruction given by the trial court. Some of them hold that under the facts of the cases under consideration there was no estoppel, but those cases were either where there was a denial of liability accompanying an offer to compromise or cases where there was distinct denial of liability following negotiations for a settlement and within such a period that there was a reasonable time after such denial to begin the suit before the period of limitations expired.

We can find neither error in the record nor merit in the defense interposed.

JUDGMENT AFFIRMED.

M. W. THOMPSON ET AL. v. JOHN T. WERTZ.

FILED JUNE 5, 1894. No. 5321.

1. **Review:** ADMISSION OF EVIDENCE: PLEADING. The proof must be confined to the issues as made by the pleadings, and the admission of irrelevant testimony in a case tried to a jury is prejudicial error where it may have influenced the verdict.
2. **Witnesses:** IMPEACHMENT. A party cannot impeach a witness by showing written or oral statements made by him contradicting his evidence without first calling his attention to such statements on cross-examination and asking him whether or not he made them.

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

Paul & Templin, for plaintiffs in error.

Meiklejohn & Thompson and *T. T. Bell, contra.*

IRVINE, C.

The defendant in error was the plaintiff in the district court and in his petition alleged that the plaintiffs in error, the defendants below, employed plaintiff as a traveling salesman under an oral contract, by the terms of which they guarantied to plaintiff a salary of $2,000 per year; that in compliance with said contract plaintiff performed services for defendants, by reason of which services defendants became indebted to plaintiff in the sum of $514.97, which amount was due and unpaid, and for which plaintiff

prayed judgment. The defendants answered, denying every allegation not specifically admitted; then alleging that in November, 1888, the plaintiff was desirous of entering their employment as a salesman; that he claimed he was well acquainted with certain territory, including the state of Nebraska, and that he could sell therein a large amount of goods, as large as $50,000 per year, and that thereupon he was employed under a contract as follows: That he should sell not less than $30,000 per annum; that the cost of selling such goods should not exceed seven per cent, and that if he should sell said sum of $30,000 per annum he could draw a salary at the rate of $2,000 per annum and also have his traveling expenses advanced, and that if either party became dissatisfied such party could terminate the contract at his will. Defendants further allege that the employment of plaintiff was unsatisfactory to them; that his sales from December 1, 1888, to October 1, 1889, amounted only to about $11,000; that about October 1, 1889, plaintiff abandoned the work; that at divers times during his term of employment plaintiff refused to obey instructions, and that defendants had already paid him more than was due him. The reply was a general denial. There was a verdict and judgment for the plaintiff.

The defendants assign forty errors, mostly relating to the instructions and to the admission of evidence. We shall consider only two assignments, and those relating to the evidence. In order to their discussion a consideration of the pleadings and a reference to the manner in which the trial was conducted is necessary.

The plaintiff's theory upon the trial was that he had been employed for a year certain at a fixed salary of $2,000. The defendant's theory was that they had employed plaintiff upon a contract terminable at the will of either; that he was to draw during his employment at the rate of $2,000 per year, but that in no event was he to receive more than that sum, nor was he to receive, if his sales fell short of $30,000

per year, a greater sum than that which, added to his traveling expenses, would amount to seven per cent of his sales. It is extremely doubtful whether the pleadings presented such issues. The petition merely alleged, without dates, a contract of employment at $2,000 per year, without stating the term of employment; that is, from all that appears from the petition, plaintiff might have been employed for an indefinite period, his pay to be at the rate of $2,000 per year. In the next place the petition, after stating this contract, merely alleges a conclusion, that by reason of services performed the defendants became indebted to him in a certain amount, without stating the time he was employed or other facts from which this conclusion was drawn. The answer alleged quite specifically the contract as defendants claimed it to be, then alleged a voluntary abandonment of the work by plaintiff, and alleged a breach of contract by his refusing to obey instructions. The evidence upon the trial took a wide range. The plaintiff undertook to prove the contract as he claimed it to be. The defendants undertook to prove it as they alleged it. They then undertook to prove that Wertz was incompetent; that he wasted his time; that his expense accounts were exorbitant; that he had misrepresented to them the character of his services for other firms prior to their engagement. To rebut this the plaintiff undertook to prove that defendants were dilatory in advancing him money to pay his traveling expenses; that they were about to go out of business and allowed their stock to run down; that they were unable to fill the orders which he sent them, and that his inability to make large sales was due to their failure to properly fulfill their contracts with purchasers. The evidence was largely by depositions in narrative form, containing, hopelessly commingled with competent evidence, statements as to the contents of letters, arguments, and even invective against the different parties. With pleadings in such shape, the case tried on such theories, and the evidence adduced in

such a manner, it is not surprising that the trial judge made some errors in the admission of evidence. His rulings were, under the circumstances, generally more accurate than could be expected.

Mr. Cushing, a member of the firm which had formerly employed Wertz, gave his deposition for the defendants to the effect that his firm had employed Wertz for two years; that the last year he sold less than $30,000, and that they deemed it to their interest to have him leave their employment. This was wholly irrelevant, but was received without objection. The plaintiff in rebuttal introduced in evidence two letters written by Cushing to Wertz at the close of his employment,—one wishing him health, happiness, and success, and stating that he had the best wishes of Cushing's firm; the other saying, "We wrote to Austrian, Wise & Co. and gave you a good setting-up." The admission of these letters was objected to. If Cushing's direct examination had been admissible, these letters might have been competent, in connection with some explanations he gave on his cross-examination, for the purpose of contradicting his statements that Wertz's employment had not been satisfactory and that he was not an efficient salesman; but Cushing's attention was not called in any way to these letters on his cross-examination. They were for that reason inadmissible to impeach him. They were also entirely immaterial to the issues, and the fact that the plaintiff had permitted his equally immaterial direct evidence to go in without objection rendered this evidence none the less objectionable when offered.

The deposition of one Carl A. Treusch was read in evidence by the plaintiff. This deposition consisted of a single question and its answer. Treusch was asked to relate his experience in dealing with the defendants and all matters in his knowledge pertaining to the case. He answered that he bought one bill of goods of the defendants, but found them not to be what he called square business men,

for the following reasons: He had bought a large bill of goods, among which there were some which the defendants did not send him, and then in detail he stated that the goods which were sent were not properly finished and were shelf worn; that the prices were not correct and the whole order not as it should have been; that he had always found plaintiff to be a straight, honest man; that he had bought goods before from him; that he was a good salesman, and knew the value of goods. On objection made to the question by the plaintiff, the court struck out the statement that the defendants were not what he called square business men, but admitted the rest of the answer.

We need enter into no argument to show the entire irrelevancy of all this testimony to the issues as made by the pleadings. It was of such a character that it may have influenced the jury, and the error was prejudicial. For the errors referred to the judgment must be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

EDWARD F. DAVIS V. JOSEPH HILBOURN.

FILED JUNE 5, 1894. NO. 4587.

1. **Chattel Mortgages:** DEBTS OF THIRD PERSONS: VOLUNTARY ASSIGNMENTS. A chattel mortgage is not void as constituting a prohibited assignment for creditors solely for the reason that it is made to secure the payment of debts to third persons as well as to the mortgagee. *Hamilton v. Isaacs*, 34 Neb., 709, and *Jones v. Loree*, 37 Neb., 816, followed.

2. **Review:** VERDICT: SUFFICIENCY OF EVIDENCE. The discretion of a trial judge to set aside a verdict as not sustained by the evidence is greater than that of an appellate court. Where a verdict has for its support substantial, competent evidence, and the trial judge has refused to set it aside as being without

support, this court will not disturb the verdict, although the evidence, upon examination, may seem of doubtful credibility.

3. ———: TRIAL: INSTRUCTIONS: ASSIGNMENTS OF ERROR. The objection that the trial judge failed to instruct the jury upon the law of the case is not raised by the assignment that the court erred in giving such instructions as were given, those instructions upon the subjects to which they related being correct.

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

A. Hazlett and *Rickards & Prout*, for plaintiff in error.

R. S. Bibb, *Samuel Rinaker*, and *W. V. A. Dodds*, *contra*.

IRVINE, C.

This action was in the nature of trover by Hilbourn against Davis, who was sheriff of Gage county, for the value of the stock, furniture, and fixtures of a restaurant formerly conducted in Beatrice by one Bromley and one Coonley. The plaintiff claimed under a chattel mortgage. The defendant justified under an execution upon a judgment against Bromley & Coonley. The answer alleged that the mortgage to plaintiff was in fraud of creditors of Bromley & Coonley. There was a verdict and judgment for plaintiff.

The assignment of error to which the argument is for the most part addressed is that the verdict was not sustained by the evidence. The evidence tends to show that in 1883 Mrs. Coonley received from her father $500, which she lent to Coonley for use in his business at six per cent interest; that he kept this money without giving any evidence of the indebtedness until early in 1889, when he formed a partnership with Bromley and opened the restaurant in Beatrice; that at this time he was indebted to his wife in the sum of $626, and that this sum was invested in the business of Bromley & Coonley, the firm making its note to Mrs. Coonley, dated May 3, 1889.

The plaintiff below, Hilbourn, also lent Bromley and Coonley $300, but took no note at that time. The business did not prosper, and in June Peycke Brothers, to whom the firm owed a bill, were pressing for payment. Hilbourn, learning of this state of affairs, insisted upon security. The firm informed him of the indebtedness to Mrs. Coonley and desired him to take a second mortgage subject to her indebtedness. This he refused to do, and eventually Mrs. Coonley indorsed her note to Hilbourn. Bromley & Coonley executed to Hilbourn their note, dated May 3, for the amount of Hilbourn's debt, and executed and delivered to Hilbourn a mortgage upon the stock in controversy to secure both notes. Mrs. Coonley's note was delivered to Hilbourn by Bromley & Coonley, and it is admitted that the indorsement to him was merely for convenience and for the purpose of collection. Hilbourn took possession under the mortgage, permitted the business to be continued for two or three days (but he claims for his own benefit and not for that of Bromley & Coonley), then closed the place of business and retained possession for a few days longer until the goods were seized by the sheriff. The foregoing are the essential facts disclosed by the evidence. We think they are sufficient to sustain the verdict.

The defendant seems, upon the trial, to have relied chiefly upon the case of *Bonns v. Carter*, 20 Neb., 566, and to have considered that case as conclusive in his favor by constituting the mortgage an assignment for creditors and therefore void for not conforming to the assignment law. Since the trial of the case in the district court, however, *Bonns v. Carter* has been overruled. (*Hamilton v. Isaacs*, 34 Neb., 709; *Jones v. Loree*, 37 Neb., 816.) The fact that the mortgage was given to secure not only Hilbourn's debt but also the debt to Mrs. Coonley did not render the instrument void as an attempted assignment, the instrument being plainly a mortgage and not an assignment, when tested by the rule announced by Judge REESE in the dis-

senting opinion in *Bonns v. Carter* upon rehearing (22 Neb., 495) and by the rule announced in *Hamilton v. Isaacs* and *Jones v. Loree, supra.* The instrument, therefore, not being void as an attempted assignment, it was valid as against the creditors of Bromley & Coonley, if given to secure *bona fide* debts of the firm and without any intention, participated in by the creditors secured, of hindering, delaying, or defrauding other creditors. The mere fact that a preference was created, if done in good faith, would not avoid the instrument. (*Hamilton v. Isaacs, Jones v. Loree, supra.*) So far as Mrs. Coonley's debt was concerned, we are aware of the rule subjecting such transactions between husband and wife to close scrutiny, and we were also impressed, upon examining this record, with the fact that the testimony of Mr. and Mrs. Coonley, when taken with the surrounding circumstances, is not above criticism. Indeed, there is much in the record calculated to arouse suspicion as to the motives of the parties to the mortgage. This question was, however, for the jury (Comp. Stats., ch. 32, sec. 20), and the jury found in favor of good faith. To this finding the trial judge, by overruling a motion for new trial, set his seal of approval. His opportunities for considering the sufficiency of the evidence were better than ours. Had he seen fit to set aside the verdict, it is probable that we would not disturb his ruling, but there being competent evidence to support the verdict, and the trial judge having considered the evidence sufficient, it is not for us to disturb his finding thereon. There is a marked distinction between the discretion which may be exercised by the trial judge, who sees the witnesses and is an eye and ear witness to the proceedings upon the trial, and that of this court, which is limited in its review of the evidence to a consideration of a written record, in which many of the tests for determining the credibility of witnesses are absent. It is for this reason that this court always refuses to weigh conflicting

evidence or to set aside a verdict which has for its support any substantial, competent testimony. The distinction between trial courts and appellate courts upon this subject is stated with force and incontrovertible logic in *Dewey v. Chicago & N. W. R. Co.*, 31 Ia., 373.

What we have said in regard to the sufficiency of the evidence practically disposes of most of the assignments of error. Certain instructions asked by the defendant were refused. Some of these were based upon the rule announced in *Bonns v. Carter*, which we have already referred to. The others were based upon the theory that the indebtedness to Mrs. Coonley was the individual indebtedness of Coonley, and not that of the firm. Whatever may be said of the inference to be drawn from the evidence as to the motives of the parties to the transfer, there is no evidence at all to support the latter class of instructions. The uncontradicted evidence is that while Coonley had originally borrowed Mrs. Coonley's money, it was turned over to the partnership upon its formation and treated immediately as a partnership debt, and not as an advance or contribution of capital by Coonley.

But one instruction was given by the court. It was to the effect that if the jury should find the plaintiff had a valid mortgage, the amount of recovery should be the amount of debts secured, with interest, provided such sum did not exceed the value of the property; but if the debt exceeded the value of the property, then the verdict should be for such value, with interest from the time of seizure. The criticism made upon this instruction is that it failed to state to the jury fully the issues and the law of the case. We think the court should have instructed the jury more fully upon the law of the case; but this instruction was correct as far as it went, and neither in the motion for a new trial nor in the petition in error do we find any assignments based upon the failure of the court to instruct upon the law of the case. The instruction complained of

being correct in itself, the assignment of error directed against it must be overruled.

JUDGMENT AFFIRMED.

CHARLES MCDONALD V. L. AUFDENGARTEN.

FILED JUNE 6, 1894. No. 5075.

1. **Negotiable Instruments:** BONA FIDE HOLDERS: EVIDENCE. In an action by the transferee of a negotiable promissory note properly indorsed before maturity, the production of the note shows *prima facie* that he is a *bona fide* holder, and is sufficient to entitle him to recover.

2. ———: ———: ———: BURDEN OF PROOF. In an action against the maker of a negotiable promissory note by the indorsee thereof, before maturity, proof that the note is tainted with usury shifts to the plaintiff the burden of showing that he is a *bona fide* holder for value without notice.

3. **Usury:** NOTICE TO INDORSEE OF NOTE: EVIDENCE. When the defense to a note is usury, evidence that the indorsee knew at the time of the purchase that the payee usually loaned money at an usurious rate of interest, while insufficient of itself to charge the purchaser with notice of the defense, is competent to go to the jury as a circumstance to be considered, in connection with other proven or admitted facts, as tending to establish that plaintiff took the paper with notice of its infirmities. (*Blackwell v. Wright*, 27 Neb., 269.)

4. ———: RENEWAL NOTES. Every renewal of a note given for a usurious loan of money is subject to the defense of usury between the original parties and purchasers with notice.

5. ———: SUFFICIENCY OF EVIDENCE. The evidence considered, and *held* sufficient to sustain the plea of usury, and that plaintiff was not an innocent purchaser without notice.

6. **Review:** VERDICT. *Held*, That under the pleadings and proof plaintiff was entitled to recover a larger sum than was awarded him by the verdict.

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

George E. French and *Grimes & Wilcox*, for plaintiff in error.

E. J. Short and *John J. Halligan, contra.*

NORVAL, C. J.

This action was brought by Charles McDonald upon two promissory notes signed by the defendant in error, each for the sum of $2,000, payable to the order of the Keith County Bank, and bearing date September 10, 1889. The petition contains the usual averments. The answer sets up the defense of usury. Plaintiff for reply denies each and every allegation contained in the answer, and avers that he purchased the notes before their maturity, for a valuable consideration, and without notice or knowledge of any of the transactions or matters pleaded in the answer. Upon the trial the jury returned the following verdict:

"CHARLES MCDONALD, PLAINTIFF,
v.
L. AUFDENGARTEN, DEFENDANT.

"We, the jury in this case, being duly impaneled and sworn in the within entitled cause, do find that the consideration for the notes upon which this action was brought was usurious, and that when the plaintiff Charles McDonald purchased said notes he had notice of the usurious consideration for said notes, and that there is now due from the defendant to plaintiff the sum of $181.37.

"C. DEPRIEST,
"*Foreman.*"

Plaintiff presented to the court below a motion for a new trial, which was overruled, and judgment was rendered upon the verdict of the jury.

After the plaintiff had put in evidence the notes in controversy, and before he closed his case in chief, he offered to prove by his own testimony that he purchased the notes before maturity, for a valuable consideration, without notice of any defense existing against them. The testimony was excluded, and this ruling of the trial court is the foundation of the first assignment of error. The notes being negotiable in form, and properly indorsed by the payee, their possession by the plaintiff was sufficient to establish a *prima facie* case. At the time the offered testimony was excluded the defendant had not put any evidence, therefore the law presumed the plaintiff to be a *bona fide* holder for value. When the defendant introduced evidence establishing his defense of usury, the burden was thereby cast upon the plaintiff to show that he was an innocent purchaser of the paper for value, and before maturity. This is the settled rule in this state. (*Wortendyke v. Meehan*, 9 Neb., 221; *State Savings Bank of Missouri v. Scott*, 10 Neb., 86; *Cheney v. Cooper*, 14 Neb., 416; *Evans v. De Roe*, 15 Neb., 630; *Darst v. Backus*, 18 Neb., 231; *Cheney v. Janssen*, 20 Neb., 128; *Knox v. Williams*, 24 Neb., 630; *Lincoln Nat. Bank v. Davis*, 25 Neb., 376; *First Nat. Bank of North Bend v. Miltonberger*, 33 Neb., 847; *Colby v. Parker*, 34 Neb., 511; *Suiter v. Park Nat. Bank*, 35 Neb., 372.) After the defendant rested, the plaintiff was permitted, on rebuttal, to go fully into the question of the *bona fides* of the transfer of the notes. This was the proper practice, since plaintiff was not required to produce proof on that branch of the case when introducing his evidence in chief.

Three assignments in the petition in error are based upon the rulings of the trial court in admitting in evidence certain canceled notes, which had been executed by the defendant to the Keith County Bank, and the bank books, and also the overruling of the plaintiff's motion to strike out the testimony of O'Brien and the defendant with reference to said books. The uncontradicted proofs show that

the notes sued on were renewals of numerous other notes which had been given by the defendant to the bank, but which had been returned to the defendant canceled. These canceled notes, the testimony of the witnesses above mentioned, and the bank books were permitted to go before the jury for the purpose of establishing that the notes declared upon were renewals of others executed by defendant for the loan of money in excess of the legal or statutory rate. The criticism made upon this class of testimony in the brief of counsel is that the same was incompetent, until some evidence was first introduced tending to show that the plaintiff had notice or knowledge of the usurious transaction. Defendant was not required, under the authorities cited above, to establish in the first instance that plaintiff was aware of the consideration for which the notes were given; but it was legitimate and proper for the defendant to prove that the notes were usurious, and having done this, the burden of showing good faith was on plaintiff below.

Complaint is made because the defendant was permitted to testify what the customary rate of interest charged by the Keith County Bank to its customers was from the latter part of 1885 until September, 1889, this being the period during which the alleged usurious loans were made by the bank to the defendant, and which are represented in part by the notes sued on herein. If this testimony was improperly admitted, plaintiff was not thereby prejudiced, inasmuch as the same witness, but a moment before, had stated, without objection, that the customary rate of interest at which money was loaned by the different banks in the county during the time mentioned in the interrogatory criticised was "from twelve to thirty-six per cent per annum," which is precisely the same answer that was made to the question to which plaintiff takes exception. This evidence was not of a very convincing character, and, standing alone, falls far short of showing that plaintiff

knew, or had notice, when he purchased the notes that they were given in a usurious transaction; but for the same to be of any value, it should further appear that plaintiff knew, or was chargeable with notice, at the time of the purchase, that the bank or payee usually contracted for and charged interest for the use of money in excess of the legal rate. This court, in considering a similar question in the case of *Blackwell v. Wright*, 27 Neb., 272, uses this language: "While the fact alone that the purchaser of the note knew that the vendor and payee was loaning money at an usurious rate might not of itself be sufficient to charge the purchaser with notice of the defense of usury, yet it would be competent, as a circumstance to be considered in connection with other proven or admitted facts, as tending in that direction; and the court did not err in overruling plaintiff's objection to the question asked." In the case at bar plaintiff admitted on cross-examination that he himself made usurious loans, and knew when he bought these notes that the interest usually charged by the payee exceeded the rate fixed by statute. In view of this, and other facts disclosed by the record, we conclude that the objection to the question asked was properly overruled.

The three remaining assignments of error argued in the brief are as follows: The court erred in overruling plaintiff's motion made at the close of the testimony, to instruct the jury to return a verdict in his favor for the face of the notes and interest, less payments, amounting to $250, indorsed thereon; the verdict is not sustained by the evidence; and the verdict is contrary to the fourth and fifth instructions given by the court on its own motion. These assignments raise substantially the same questions, and will be considered together.

Are the notes in suit tainted with the vice of usury? The evidence upon this branch of the case is without conflict, and may be summarized as follows: The defendant has been for years a resident of, and engaged in business

in, Keith county. In the year 1884 he commenced doing business with the Keith County Bank, by making deposits of money therein, subject to be drawn upon his checks. Prior thereto he entered into a contract with the bank, through its president, whereby it was agreed that the bank should furnish him the necessary money needed to carry on his business, and permit him to overdraw his account, and he was to pay the bank on such overdrafts interest at the rate of ten per cent per annum. Under this arrangement the defendant overdrew his account with the bank at various times until June, 1886, he paying ten per cent on the money. On the 1st day of June of the year last mentioned, the defendant's overdraft was $3,648.85, and on the last day of the month it had reached the sum of $7,246.38. During the month of June, 1886, the defendant entered into another contract with the bank, by which it was agreed that he should pay twelve per cent interest upon all overdrafts from and after the first day of that month, and interest at that rate was thereafter charged on his overdrafts and added to his account monthly, except for the month of August, he was charged eighteen per cent; for November, fifteen per cent, and for April, 1887, he was charged forty-eight per cent. The overdraft of the defendant at the bank continued to increase from June, 1886, until September 21st of the same year, when it reached nearly $12,000. On said date the defendant executed and delivered to the bank his promissory note in the sum of $10,000, due November 1st following, drawing ten per cent interest after due. Twelve per cent interest until maturity, or $240, was deducted from the face of this note, and the defendant was credited on his overdraft with $9,760. On November 22, 1886, the defendant owed the bank the $10,000, besides an overdraft exceeding $3,500. On that day he executed to the bank his two promissory notes, one for $7,210, due in three months, and the other $5,375, maturing in five months, both by their terms draw-

ing interest at ten per cent after due, the notes being discounted at twelve per cent for the time they were to run. With the proceeds of these notes the $10,000 note was taken up, and the remaining $2,000 was applied on his overdraft. The two notes executed on November 22d were renewed at their maturity by the defendant giving in lieu thereof two other notes of $5,000 each, the balance due on the surrendered notes being at the time paid in cash. The two $5,000 notes were subsequently renewed by the defendant executing to the bank other notes, which in turn were likewise renewed, and so on, there being numerous renewals of the debt, prior to the giving the notes in suit, some of which renewals included the amounts of defendant's overdrafts made after November 22d, and upon which illegal interest had been charged and paid. Most of the renewed notes included interest on the indebtedness at the rate of eighteen per cent per annum, and, excepting the two notes involved in this litigation, all were renewed at a usurious rate. On September 10, 1889, the amount of the indebtedness to the bank on the transactions already detailed had been reduced by payments upon the principal of $8,433, and upon interest $3,608.63, and these notes are the last or final renewals of the balance of the indebtedness.

Upon the foregoing facts, it is contended that the defense of usury is not available, even if the notes were in the hands of the original payee. Counsel for plaintiff, in the brief, say: "The original contract, by virtue of which these banking transactions were had and this indebtedness incurred, was free from the taint of usury, and it was only after the debt of the defendant to the Keith County Bank had reached $7,246.38, a sum much larger than that for which plaintiff has sued, that any excess was charged." The above sum of $7,246.38 represented the amount of defendant's overdraft on June 30, 1886. Counsel are in error in stating that it was not until the indebtedness reached that sum that interest in excess of the legal rate was paid,

since the undisputed testimony is to the effect that twelve per cent was charged on the average daily overdrafts for June, 1886, and that the amount of overdraft existing on June 1st, on which no usurious interest had prior thereto been contracted to be paid the bank, was $3,648.85. This correction, however, would only become important in case it should be determined that the notes in controversy were not usurious to the extent of the amount due the bank at the time interest in excess of the legal rate was first collected from the defendant by the bank on his overdraft. In *Richards v. Kountze*, 4 Neb., 200, GANTT, J., speaking for this court, says: "If the original contract is *bona fide*, and wholly free from the taint of usury, then no subsequent agreement to pay usury or an usurious premium upon the debt will invalidate the instrument given for the payment of the debt, or affect the original contract with the vice of usury, or prevent the collection of the debt with its legal interest. And this proposition, I think, is well founded in principle and just in equity, for, if there was once a valid subsisting debt, bearing interest, the contract creating such debt cannot be impaired or destroyed by a subsequent void agreement." The rule thus stated was affirmed in *Dell v. Oppenheimer*, 9 Neb., 454. We adhere to these decisions, but they are distinguishable from the cause under consideration. In each of the cases referred to, the action was upon the original contract of loan, which was not tainted with usury, and not upon the subsequent void agreement to pay usurious interest upon the contract after it matured. In neither was there any renewal of the original indebtedness by the giving of a usurious note. In the case at bar the action was not brought to recover the amount of the overdraft existing on June 1, 1886, and upon which no illegal interest had then been charged, but to recover upon notes, given in renewal of other notes, which included and represented numerous usurious transactions between the defendant and the bank. It should be

borne in mind that interest in excess of the lawful rate had been contracted for and paid, not only upon the notes of which these are renewals, but upon all overdrafts after June 1st, including the amount due upon the overdraft on that date. A loan of $10,000 at twelve per cent, as we have already stated, was made the defendant and the proceeds of the same credited to the defendant's account with the bank. More than double the amount which the defendant's account was overdrawn in June, 1886, has since been paid. It is true no usurious agreement was entered into when the notes in question were taken, and they on their face bear a legal rate; but being merely renewals of obligations which had been given in connection with numerous usurious transactions, the taint of usury attaches to them. It is the settled law of this state that every renewal of a note given for a usurious loan of money is subject to the defense of usury, to the same extent as if the action had been brought on the original obligation. (*Nelson v. Hurford*, 11 Neb., 465; *Knox v. Williams*, 24 Neb., 630.) We do not deem it necessary to review the authorities cited in the brief of plaintiff in error to sustain his contention. Most of them are in line with *Richards v. Kountze, supra*, and for the reason stated above are inapplicable. The jury in their verdict expressly found that the notes were usurious, and we are constrained to hold that the evidence is ample to support such finding.

It is next contended that the defense of usury is not available against this plaintiff. The rule is that one who purchases a negotiable note for value before due, in the usual course of business and without notice, is a *bona fide* purchaser, and takes the paper free from all defenses which existed in favor of the maker while the instrument remained in the hands of the payee. (*Wortendyke v. Meehan*, 9 Neb., 229; *Evans v. De Roe*, 15 Neb., 630; *Dobbins v. Oberman*, 17 Neb., 163; *Cheney v. Janssen*, 20 Neb., 128.) Applying this rule to the case at bar, did the evidence justify the jury

in finding that the plaintiff was not an innocent purchaser? It is undisputed that he paid for the notes $3,800, which was their full value; but that alone was not sufficient to entitle him to the protection the law affords a *bona fide* holder. Upon the subject of notice the plaintiff on rebuttal testified in answer to questions as follows:

Q. State what, if any, notice you had of the dealings of L. Aufdengarten with the Keith County Bank at the time of the purchase of these notes in suit.

A. I really had no information regarding his dealings with the bank.

Q. You may state whether or not you had any knowledge of any usurious transactions between L. Aufdengarten and the Keith County Bank.

A. I did not.

Q. Did you have any knowledge of any defense that could be set up to these notes?

A. No, sir; I had no knowledge whatever before I took the notes. I supposed it to be a straight business transaction.

Q. State what, if any, knowledge you had in regard to L. Aufdengarten's standing or reputation at that time.

A. I had known L. Aufdengarten for some years, and I had been in his place of business when he ran a store on the south of the track, and I knew that he was doing a large business in the mercantile line, and I was informed that he had a large ranch, well stocked with cattle at that time, and that he was the owner of a mill, or had a large interest in a mill.

Q. You may state whether or not you supposed at that time he was all right financially.

A. I had been all the time led to believe that he was one of the wealthiest men of this part of the country.

Q. State whether or not the Keith County Bank gave you any notice of any dealings or transactions that they had had with L. Aufdengarten.

Objected, as leading.

Q. State what notice they gave you of their dealings with the defendant.

A. They did not give me any information as to the character of their dealings at all.

Q. State whether they gave you any reasons for wanting to sell these notes or not.

A. The only reason they assigned was they wanted to realize some money on them.

* * * * * * *

Q. You may go on and state if anything was brought to your knowledge, either by sign, word, or deed, as to any usury or other defense to these notes.

A. There was no notice whatever of any kind.

It must be conceded by all, we think, that if the foregoing testimony stood alone, and that none of the other facts and circumstances disclosed by this record were to be considered, the jury would have been warranted in finding, nay, more, it would have been their duty to have found, that the plaintiff was a *bona fide* purchaser, before maturity, for value and without notice. There appear in the testimony facts which tended to show that plaintiff took the paper either under such circumstances which ought to have excited his suspicion, or with knowledge of facts which would have put a prudent person upon inquiry, which, if pursued, would have shown that the notes were usurious. We have already mentioned the fact that plaintiff had knowledge that the payee of the notes usually loaned its funds at a usurious rate of interest. Plaintiff admits having a conversation with the president of the bank some time prior to the purchase of these notes, in which the president proposed that the plaintiff discount some of the bank's paper, and mentioned that the bank held notes of the defendant, which he would dispose of, yet these notes sued upon had not, at that time, been given, and within four days after they were executed, plaintiff purchased them. Another fact to be considered is the manner in which the

notes were transferred. Each was indorsed on the back as follows: "Without recourse. By J. H. Carnahan, cashier of Keith County Bank." The character of the indorsement was not of itself sufficient to charge the plaintiff with notice of the informities of the paper. (*First Nat. Bank of Rapid City v. Security Nat. Bank of Sioux City*, 34 Neb., 71); but the jury were entitled to take the same into consideration, with all the other circumstances proved, in determining the character of the transfer. Notwithstanding the above indorsements on the back of the notes, the bank executed on a separate paper and delivered to the plaintiff at the time of the transfer the following instrument:

"SEPTEMBER 14, 1889.

"For value received, we hereby guaranty all reasonable costs or deficiencies of interest or principal that may occur in the collection of two certain notes signed by L. Aufdengarten, and payable to the order of the Keith County Bank, dated September 10, 1889, and coming due on January 10, 1890, and of two thousand dollars each ($2,000), and Nos. 4732 and 3. The above described notes being sold and assigned to the bank of Charles McDonald.

"KEITH COUNTY BANK,

"By H. CARNAHAN, *Cashier*."

The foregoing and the writing on the back of the notes, all belonging to the same transaction and executed at the same time, must be construed together, and so construed we must hold do not constitute an indorsement according to commercial usage. (*Hatch v. Barrett*, 8 Pac. Rep. [Kan.], 134.) The peculiar manner of the indorsement of the notes, together with the other facts alluded to, are sufficient to sustain the finding of the jury that plaintiff was not a *bona fide* purchaser in the usual course of business, and the defense of the maker was not cut off by the transfer. There was no error, therefore, in refusing to instruct the jury to return a verdict for the plaintiff for the full amount demanded in the petition.

Under the pleadings and the evidence, plaintiff was entitled to recover a larger sum than $181.37, the amount awarded him by the verdict. The transactions between the bank and the defendant are set up with great particularity in the answer, consisting of thirty-seven paragraphs, the last two being a summary of the other thirty-five. In the thirty-sixth paragraph it is alleged that the total amount of money received by the defendant from the bank is $12,433, and in the last paragraph of the pleading the different items of payment on the principal are stated, which aggregate $8,433, as well as the several items of interest paid, amounting to $3,608.63. The total sum averred to have been paid on the loan is $12,041.63, or $391.37 less than the aggregate amount of moneys actually received from the bank. The evidence tended to establish the various allegations in the answer as to the amounts the defendant received on the loan and the payments made thereon by him. The verdict is $210 too small. (*Hall v. First Nat. Bank of Fairfield*, 30 Neb., 99.) The judgment is therefore reversed and the cause remanded.

REVERSED AND REMANDED.

WILLIAM BROWN V. WILLIAM R. RITNER.

FILED JUNE 6, 1894. No. 5262.

1. **Review**: ERROR PROCEEDINGS: MOTION FOR NEW TRIAL. The supreme court, upon a petition in error, will not examine the question of the sufficiency of the evidence to support either the findings of a court or the verdict of a jury, unless such question has been first presented to the trial court by a motion for a new trial and a decision obtained thereon.

2. **Motion for New Trial**: TIME TO FILE. Such a motion, except upon the ground of newly discovered evidence, must be filed within three days after the verdict or decision was ren-

dered, unless the party was unavoidably prevented from making the same in time.

3. **Review**: JUDGMENTS: TRIAL DOCKET ENTRIES. This court cannot consider entries made upon the trial docket of the district court for the purpose of ascertaining what was decided in the court below. The approved journal entry of a judgment is indisputable evidence of what the judgment was.

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

Grimes & Wilcox, for plaintiff in error.

T. Fulton Gantt and *James M. Ray, contra.*

NORVAL, C. J.

This was an action in replevin by William Brown against William C. Ritner, for the recovery of a horse, which plaintiff claimed by virtue of a chattel mortgage executed by the owner of the animal. The defendant claims the right of possession by virtue of a contract made with the owner of the horse for his keep. The defendant won in the court below, and the plaintiff prosecutes a petition in error, alleging that the verdict is contrary to law and the evidence.

The question we are asked to decide is, whether the lien of the agister is paramount to the lien of plaintiff's chattel mortgage, and this cannot be determined without an examination of the evidence in the bill of exceptions. We cannot review the sufficiency of the evidence to support the finding and judgment, because no motion for a new trial has been passed upon by the trial court. The insufficiency of the evidence to support the verdict of a jury, or the findings of a court, is specially named in section 314 of the Code of Civil Procedure as one of the grounds for a new trial, and in order to review the evidence, by petition in error, a motion for a new trial, alleging the insufficiency of the evidence, must be presented to the dis-

trict court and a ruling obtained thereon. This proposition is well established by repeated judicial utterances of this court. (*Cropsey v. Wiggenhorn*, 3 Neb., 108; *Carlow v. Aultman*, 28 Neb., 672; *Jones v. Hayes*, 36 Neb., 526; *Withnell v. City of Omaha*, 37 Neb., 621.) It is due the trial court, as well as to litigants, that every opportunity should be afforded for the examination and correction of errors while the case is pending in the court below, where the same can be reviewed with but little expense or delay. For this purpose the legislature has authorized the filing of a motion for a new trial, and it must be presented to, and passed upon by, the trial court before the decision can be reviewed by this court on error. The journal entry of the judgment found in the transcript shows that the cause was tried to the court, without a jury, on June 19, 1891, and was taken under advisement, and that on the 10th day of November, following, a judgment for the plaintiff in due form was rendered. The transcript also contains a copy of a motion for a new trial, indorsed "Filed December 9, 1891." We must assume that this motion is still pending in the district court. If it has ever been passed upon, the copy of the journal entry fails to disclose it. The trial docket of the district court contains this entry in the case under date of December 7, 1891: "Plaintiff granted leave to file motion for a new trial. Motion overruled. Exception. Forty days from rising of court to perfect bill of exceptions." This memorandum, made by the trial judge upon his docket, is not competent evidence to show that the motion in question was denied. (See *Ward v. Urmson*, 40 Neb., 695.) That the notes made upon the judge's docket are not always reliable is fully verified in this case by the affidavit of the judge who presided in the court below, and which is attached to the bill of exceptions. The trial docket states, in substance, that judgment was rendered in favor of the plaintiff, while the journal entry and the affidavit referred to show that the judgment was for the de-

fendant. Again, the court journal contradicts the trial docket as to the date of the rendition of the judgment. The latter shows that it was entered on December 7th, while the former recites that it was given on November 10th. The judgment, as actually spread at length on the journal of the court, controls. This being true, the motion for a new trial, in any event, could be of no avail, since it was not filed until December 9th, or twenty-nine days after the rendition of the judgment. The statute requires that a motion for a new trial, except for newly discovered evidence, must be filed within three days after the verdict or decision was rendered. (Code, sec. 316.) The provision of the statute is mandatory. (*Fox v. Meacham*, 6 Neb., 530; *Roggencamp v. Dobbs*, 15 Neb., 620; *Aultman v. Leahey*, 24 Neb., 286; *Davis v. State*, 31 Neb., 240; *McDonald v. McAllister*, 32 Neb., 514; *Fitzgerald v. Brandt*, 36 Neb., 683. The judgment is

AFFIRMED.

A. A. THOMAS V. JAMES W. LONG.

FILED JUNE 6, 1894. No. 5169.

Review. This case involves questions of fact only, and the conclusion of the trial court being in accordance with the evidence, the judgment will not be disturbed.

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

I. D. Shamhart, for plaintiff in error.

M. B. Welch, contra.

POST, J.

This action originated before a justice of the peace for Blaine county, from whence it was taken by appeal to the

district court. The subject of the controversy is a certain Winchester shot gun of the alleged value of $20, which had been seized by the plaintiff in error, as sheriff, to satisfy an execution against the defendant in error. The latter recovered before the justice, and also in the district court, on the ground that the gun in controversy was exempt from execution under the provisions of section 521 of the Civil Code. There are no questions of law presented by the record. The questions of fact were fairly submitted to the trial court, and the conclusion reached being in accordance with the proofs, the judgment is

AFFIRMED.

HARRISON, J., took no part in the above decision.

PAXTON & GALLAGHER v. M. E. SMITH & COMPANY.

FILED JUNE 6, 1894. No. 5391.

1. **Contracts:** CONSTRUCTION. Where the parties to a contract have, with a knowledge of its terms, given it a particular construction, such construction will generally be adopted by the courts in giving effect to its provisions.

2. **Chattel Mortgages.** A mortgage of personal property with possession and power of sale in the mortgagor, for his own benefit, is void as to his creditors and subsequent purchasers in good faith.

3. ———: POSSESSION BY MORTGAGOR: PRESUMPTION OF FRAUD. A chattel mortgage, where the mortgagor retains possession of the property conveyed, is, under section 11, chapter 32, Compiled Statutes, entitled "Frauds," presumptively fraudulent as to creditors of the mortgagor and subsequent purchasers in good faith.

4. ———: ———: ———: BURDEN OF PROOF. In all such cases the burden is upon the mortgagee, or those claiming through him, to overcome the presumption of fraud by proof that the mortgage was executed in good faith.

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

J. W. James, *Howard B. Smith*, and *Smith & Powell*, for plaintiffs in error.

J. S. West and *Charles B. Keller*, *contra.*

POST, J.

This is a petition in error from the district court of Dundy county, and presents the following material facts: On the 26th day of August, 1889, one John R. King was the owner of a stock of general merchandise in Benkleman, in said county, of the invoiced value of $5,964.47, and the firm of McClain & Sons also engaged as general merchants in Benkleman, owned a stock invoiced at $6,600. On the day above named a deal was consummated whereby said stocks were consolidated. As a consideration therefor McClain & Sons executed in favor of King their promissory notes for $5,964.47, in amounts of $300 each, one of which matured each month. At the same time a written agreement was executed in which it was stipulated that McClain & Sons "shall, as a part of this agreement, make, execute, and deliver to party of the first part promissory notes for the sum of $5,964.47 as follows: One note for $300, due on the 26th day of September, A. D. 1889, and one note for a similar amount due and payable on the corresponding day of each succeeding month until the gross amount of said notes so paid shall be equal to said sum of $5,964.47, said notes to bear interest from date at the rate of ten per cent per annum. Party of the first part shall at all times have free access to said store and free opportunity to inspect all books, bills, invoices, and all stock in said store, so far as the same may be necessary to inform himself of and to protect his interest. He shall also be permitted at all times to keep in said store one representative, who may

look after and protect the rights and interests of party of the first part. Said representative shall, when not employed, assist in the said store as a clerk during the first two months, and shall therefor be paid by party of the second part such wages monthly as his services are reasonably worth, for two months and no longer, and as such clerk shall be under the supervision and direction of said party of the second part as if employed by party of the second part." In carrying on the business in accordance with the foregoing stipulation McClain & Sons became indebted to various persons, including the plaintiffs in error, to whom, on the 18th day of August, 1890, they owed $641.94 for merchandise. On the day last named they executed in favor of plaintiffs in error a chattel mortgage for the amount of said bill upon the entire stock of goods, which mortgage was filed in due form on the next day. On the same day, to-wit, August 20, King took possession of the goods in order to realize the balance due under the contract with McClain & Sons, and on the same day defendants in error commenced a suit by attachment against McClain & Sons in the district court of Dundy county to recover the sum of $—— for merchandise, and caused King to be summoned as garnishee, alleging that he had money and credits in his hands belonging to the defendants therein. King answered in due time as garnishee, admitting that he held a sum of money, the proceeds of said goods. At this point the plaintiffs in error were permitted to intervene in the attachment suit and assert their claim to the fund in controversy through the mortgage above described. The controversy was, as appears from the foregoing statement between plaintiffs in error as mortgagee and defendants in error as attaching creditors, over the proceeds of the stock of goods in the hands of King. A preliminary question with respect to the character of the instrument through which King claims may be briefly disposed of. Said contract has from the first been by both parties treated as a mortgage from

McClain & Sons to King, and in the plaintiffs in error's mortgage it is recited that it is "subject to a mortgage given August 26, 1889," evidently the contract with King. The construction thus adopted by the parties will be adhered to by this court. (*School District v. Estes*, 13 Neb., 52; *Rathbun v. McConnell*, 27 Neb., 239.)

2. We com enow to a consideration of plaintiffs in error's mortgage. It is true the district court made a general finding only, but it evidently determined the mortgage to be void as to creditors of McClain & Sons, and that finding is, we think, in accordance with the decided weight of the evidence. For instance, two of the McClains testify to a specific agreement at the time of the execution of the mortgage that they, the McClains, should remain in possession of the mortgaged goods and sell from and replenish them in the usual course of business. This statement is, it is claimed, denied by Mr. Platter, who represents the plaintiffs in error in the transaction; but assuming that counsel correctly interpret the testimony of the witness named, the finding of the district court is conclusive in this proceeding. It was held in *Tallon v. Ellison*, 3 Neb., 63, that a mortgage of a stock of goods, where the mortgagor continues in possession thereof and disposes of the same in the usual course of trade, is void as to the creditors of the mortgagor and subsequent purchasers in good faith. The reporter is unfortunate in his statement of the rule in the head-notes of that case. The point therein decided is that a mortgage with possession and power of sale in the mortgagor, for his own benefit, is void as to creditors and subsequent purchasers in good faith; and the rule as thus stated has been repeatedly asserted by this court. (See *Hedman v. Anderson*, 6 Neb., 392; *Gregory v. Whedon*, 8 Neb., 373.)

3. But the finding of the district court is right for another reason. It is conceded that there was no change of possession made or contemplated at the time the mortgage was executed. Nor was any attempt made at the trial to

remove the presumption of fraud created by the retention of possession by the mortgagors. Such contracts are presumptively fraudulent as to creditors and purchasers in good faith. (Sec. 11, ch. 32, Comp. Stats., entitled "Frauds.") In all such cases the burden is upon the mortgagee, or others claiming under him, to overcome the presumption of fraud by proof that the mortgage is in good faith. (*Marsh v. Burley*, 13 Neb., 261; *Severance v. Leavitt*, 16 Neb., 439.)

We are unable to discover any error in the record, and the judgment of the district court is

AFFIRMED.

THOMAS MURRAY V. MAGGIE MACE.

FILED JUNE 6, 1894. No. 5339.

1. **Trespass by Officer in Execution of Writ: LIABILITY OF PLAINTIFF.** One who delivers to an officer a valid writ, without directions as to the manner of its service, will not be liable for torts committed by the latter while engaged in the execution thereof.

2. ———: ———. But one who, with a knowledge of the facts, advises an abuse of a process of court by an officer, such as a trespass against the person or property of another, or subsequently ratifies such unlawful act, will be deemed a wrong-doer from the beginning.

3. ———: ———: DAMAGES. Compensation for mental suffering of the injured party is a legitimate element of damage in actions for trespass to property where the unlawful act is inspired by fraud, malice, or like motives.

4. ———: ———: ———. But in cases where the wrong consists in the taking or destruction of personal property without fraud, malice, or other aggravating circumstances, the measure of damage is compensation for the plaintiff's loss, which is ordinarily the value of the property with such incidental damage as may be shown to be the natural and proximate result of the act charged.

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

Slabaugh, Lane & Rush and *Lake, Hamilton & Maxwell*, for plaintiff in error.

John L. Carr and *Frank A. Parker, contra.*

POST, J.

This is a petition in error from a judgment of the district court of Douglas county. The defendant in error, who was plaintiff below, filed in the district court the following petition:

"MAGGIE MACE, PLAINTIFF,
v.
THOMAS MURRAY, DEFENDANT. } Petition.

"The plaintiff complains of the defendant for that on the 24th day of December, 1889, and at divers other days and times before the commencement of this suit, the defendant unlawfully and with force broke and entered a certain dwelling house of the plaintiff, situated on lot 2, block 145, in the city of Omaha, in Douglas county, Nebraska, and then and there made a great noise and disturbance therein, and staid and continued to make such noise and disturbance for two hours then next following, and then and there took and carried from said house all of the defendant's furniture and household utensils, consisting of four spring bedsteads, four mattresses, three commodes, three bedroom tables, three stoves, one lounge, ten chairs, three trunks, a large quantity of bedding, dishes, and other things, and forcibly and wantonly threw said furniture down a steep embankment into the public street and broke and injured said property, to the value of $75. By means of which said several premises said plaintiff was, during all the time aforesaid, greatly disturbed, the property of the plaintiff of the value of $75 was destroyed, and the plaintiff was

prevented from carrying on and transacting her lawful and necessary affairs and business, and the plaintiff became sick, ill, and disordered, and so continued for the space of one week, and the plaintiff suffered great humiliation, anguish, and distress of mind, and has continued to do so up to the present time, to her damage in the sum of $5,000.

"2. The plaintiff complains of the defendant for that on the 24th of December, 1889, the defendant unlawfully and with force broke and entered a certain dwelling house of the plaintiff situated on lot 2, block 145, in the city of Omaha, Douglas county, Nebraska, and then and there ejected and expelled the plaintiff and her family from the possession, use, and occupation, and has kept them so ejected until the present time, whereby the plaintiff, during all said time, was deprived of the benefit of said dwelling house, to her damage in the sum of $50.

"3. The plaintiff complains of the defendant for that on or about the 24th day of December, 1889, the said defendant seized and forcibly took and carried away the following described goods, chattels, and effects, the property of the plaintiff, to-wit, one white bed spread, four white sheets, one carpet, one bureau, one red carpet, one old axe, of the value of $25, and has converted the same to his own use, and kept plaintiff from the possession of said property until the present time, to the damage of the plaintiff in the sum of $25.

"The plaintiff therefore prays judgment against the defendant for the sum of $5,150 and costs of suit.

"MAGGIE MACE,
"*Plaintiff.*"

The answer was a general denial.

The facts disclosed by the evidence are as follows: In the month of June, 1889, Mrs. Mace, the plaintiff below, leased and entered into possession of a house owned by Murray, the defendant below. On the 29th day of November following Murray recovered judgment in a pro-

ceeding for the forcible detention of said property before a justice of the peace for Douglas county, and an order for a writ of restitution. On the 2d and 10th days of December writs of restitution were issued, which were both returned without having been served. On the 24th day of December a third writ was issued and placed in the hands of one Small, a constable, for service. On the day last named said Small, armed with the writ of restitution, visited the premises in question for the purpose of placing Murray in possession, but Mrs. Mace locked the door and refused him permission to enter. About one hour later Murray and the constable visited the premises in the absence of Mrs. Mace, and entering the house through a back door proceeded to remove the property found therein, and which acts are the wrongs alleged in the foregoing petition.

It is argued, first, that Murray incurred no liability for his acts in the execution of the writ, for the reason that he was merely called upon to assist the officer, and that whatever was done by him in the premises was under the direction and in obedience to the command of the latter. The rule we regard as settled, that one who places in the hands of an officer a valid writ, without directions as to the manner of its service, will not be liable for torts committed by the latter while engaged in the execution thereof; but where he, with knowledge of the facts, advises an abuse of the process of the court, such as a trespass against the person or property of another, he will be regarded as a wrong-doer from the beginning. (*Taylor v. Ryan*, 15 Neb., 573; *Hyde v. Cooper*, 26 Vt., 552; Cooley, Torts, 129.) In this instance Murray was not satisfied apparently to trust the officer, but voluntarily assisted in the removal of the property, and now justifies their joint action on the ground that it was necessary and proper in the execution of the writ. He is, therefore, clearly within the rule above stated, provided there was an abuse of the process, a question which will now be considered.

The evidence of the plaintiff below tends to prove that Murray and the constable tore the carpets from the floor and stairs without removing the tacks, and that the window shades were torn down without removing the fixtures. It is shown, also, that there were two or three dishes broken, and that a few knives and forks, a breast pin, and four sheets were lost. It may also be inferred from the plaintiff's evidence that the property, when removed from the house, was deposited on the bare ground and thereby slightly soiled. This evidence was contradicted by the witnesses for the defendant below, but that issue appears to have been settled by the verdict of the jury in favor of the plaintiff, and with that finding we must be content in this proceeding. In the leading case of *Jenner v. Joliffe*, 9 Johns. [N. Y.], 384, the rule is thus stated: "And where the plaintiff, upon a process of attachment, causes an officer so to conduct himself as to misbehave in the execution of his office and produce the loss or destruction of goods in his custody, the party has his election either to sue the principal or the officer." So far as this branch of the case is concerned, we agree with the views expressed in the instructions of the district court.

The record presents for consideration a further question, the solution of which is attended with greater difficulty. It is disclosed by an examination of the petition that the amount claimed for the destruction of property is $75, and for property lost and carried away $25. While the evidence tends to sustain the foregoing allegation with respect to damage by destruction of property, the highest estimate placed upon property lost is $12. It is apparent, therefore, from the verdict for $1,623.90, that it is based substantially upon the claim for "humiliation, anguish, and distress of mind." In this connection it should be observed that the proceeding for the forcible detention of the property is apparently regular and the writ of restitution in due form. Indeed, no claim was made at the trial

on the ground of a want of jurisdiction or abuse of process other than as above stated, viz., that the action of the defendant below was "unlawful and with force." It must be assumed, therefore, that the entry of the premises did not of itself amount to a trespass, and that all acts for which Murray is liable relate to the manner of the execution of the writ. Another fact which calls for notice is, that Mrs. Mace was not present at the time her property was removed. Her version of what transpired on that occasion best appears from her own language. In answer to the question, "What conversation, if any, did you have that day with Mr. Murray?" she said: "I had in the morning he came in there. I was in the front part of the house, and I thought I heard some one in the kitchen, and I wanted to know what was there, and he said that he was going to put me out this morning, and I said, 'No, Mr. Murray,' I said, 'as soon as I get money I would pay you,' and he said, no, he was going to put me right out, he said, and he commenced going around there and swearing, and I told him not to swear in the house, and he said he would, it was his own house, and he would; and he went away and he came back again in about twenty minutes. I saw him come around there with another man and I locked the door. I would not let him in, and he kept knocking and knocking and I never opened it; and I had a roomer upstairs, and I went and called him and told him to come downstairs, because Mr. Murray was going to put me out, and he said, 'O, he wouldn't put me out,' and I said, 'yes, he said he will,' and then he came downstairs and staid a while, and I never opened the door to let him in. I sent the children in-doors, as I was looking for them, and they came in, and they would not stay in the house. They commenced to cry, and they said they wouldn't stay in, so they went out, and I locked the door again, and I dressed myself after awhile and went up town, and I went up town and staid about half an hour,

and when I came to Sixteenth and Harney I seen all my things out on the street." Other witnesses testified that she cried on discovering her property on the sidewalk and appeared to be greatly distressed thereat; but it does not appear that she suffered insult or was subjected to personal indignity of any kind. The question is therefore fairly presented, whether the measure of damage in an action for a simple trespass to personal property includes injury to the feelings of the complaining party. The distinction must not be overlooked between cases like this, where the act charged is simply unlawful in the sense that it is a violation of the right of property, and those cases where the unlawful act was inspired by fraud, malice, or like motives. As to those last named, the question is free from doubt. In all such cases mental suffering is a legitimate element of damage. (*Day v. Woodworth*, 13 How. [U. S.], 363; *Cutler v. Smith*, 57 Ill., 252; *Jamison v. Moon*, 43 Miss., 598; *Brown v. Allen*, 35 Ia., 306; *Merrills v. Tariff Mfg. Co.*, 10 Conn., 384.) But in cases of trespass, where personal property is taken and carried away, in the absence of fraud, malice, or other aggravating circumstances, the measure of damage is compensation to the plaintiff for his loss, which is, as a rule, the value of the property with such incidental damage as is shown to be the natural and proximate result the wrong charged. (*Brown v. Allen, supra; Wooley v. Carter*, 7 N. J. Law, 85; *Hopple v. Higbee*, 23 N. J. Law, 342; *Cushing v. Longfellow*, 26 Me., 306; *Sims v. Glazener*, 14 Ala., 695; *Woodham v. Gelston*, 1 Johns. [N. Y.], 134; *Felton v. Fuller*, 35 N. H., 226; *Coolidge v. Choate*, 11 Met. [Mass.], 79; *Meagher v. Driscoll*, 99 Mass., 281. It is believed that no precedent can be found in the reports for the allowance of damage on account of injury to feelings in actions of this character. It is certain that we have been referred to no such case, nor have we found any during a careful examination of the question. It follows that the damage awarded is excessive, and that a new

trial should have been allowed on that ground; but, as we have seen, the court properly permitted a recovery for the damage actually sustained, to-wit, for property destroyed, $75, and property carried away, $12. The defendant in error may therefore elect to remit all but $87 of the damage allowed, with interest, within thirty days, in which case the judgment will be affirmed; otherwise it will stand reversed.

JUDGMENT ACCORDINGLY.

MAX MEYER ET AL. V. UNION BAG & PAPER COMPANY.

FILED JUNE 6, 1894. No. 5521.

1. **Review:** ASSIGNMENTS OF ERROR: INSTRUCTIONS. Error assigned as to the giving of a group of instructions will be considered only so far as is necessary to determine that any one of such instructions was properly given.

2. **Fraudulent Conveyances:** PREFERRING CREDITORS: QUESTION FOR JURY. A debtor who is insolvent, or in failing circumstances, may pay or secure one or more of his creditors in full, and thus create a preference in their favor, which may have the effect to exclude other creditors, and the question of whether such action was with an honest or with a fraudulent intent or purpose is one of fact and not of law.

3. ———: ———. A debtor in failing circumstances may lawfully prefer one or more of his creditors and secure such creditors by mortgage or conveyance absolute, provided the transaction is in good faith and not made with intent to defraud other creditors. (*Costello v. Chamberlain*, 36 Neb., 45.)

4. **Voluntary Assignments:** BILL OF SALE. The bill of sale herein *held* to be a conveyance to secure or pay *bona fide* debts, and not void for being such a conveyance as to constitute a voluntary assignment within the true meaning or construction of the terms of the provisions of the assignment law.

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

Charles Ogden and *Joel W. West*, for plaintiffs in error.

W. W. Morsman, contra.

HARRISON, J.

May 1, 1890, H. Rehfeld and Julius Rosenberg were in business in the city of Omaha as partners under the firm name and style of "Omaha Chemical Works," and being indebted to the parties, business firms and banks, plaintiffs in error herein and others, including the defendant in error, executed and delivered to Moritz Meyer, of the firm of Max Meyer & Co., the following conveyance or bill of sale:

"For and in consideration of the sum of five thousand six hundred and nineteen and $\frac{60}{100}$ (5,619.60) dollars to us in hand paid, and the receipt whereof is hereby acknowledged, we do hereby bargain, sell, convey, assign, and set over unto Max Meyer & Co., Omaha National Bank, A. J. Simpson, Commercial National Bank, and Julius Meyer all our right, title, and interest in and to all the chattels, stock, goods, wares, merchandise, machinery, tools, implements, and fixtures contained in the building known as Nos. 310 and 312 South Eleventh street, in the city of Omaha; also, all goods, wares, and merchandise, a list of which is hereto attached, marked 'Exhibit A,' and made a part hereof; it being the intent of this instrument to sell and convey all and each of said articles; and by these presents we do hereby sell, assign, transfer, and set over unto the above named vendees all our right, title, and interest in and to all book accounts due us or which may become due."

Max Meyer & Co. immediately took possession of the property described in the above instrument and proceeded to sell it and pay from the proceeds the sums due the different grantees named therein, the several amounts having been aggregated to form the sum named in the bill of sale as a consideration for the conveyance. The Union Bag &

Paper Company, at this time a creditor of the Omaha Chemical Works, commenced an action on its claim and procured and levied an attachment by garnishment process on the goods and chattels described in the bill of sale. As an outcome of the garnishee proceedings, the plaintiffs in error were ordered by the court to pay certain moneys into court, and failing to comply with the order, were sued by the defendant in error in this action, to recover the amount of its claim. The case was tried to the court and a jury and a verdict returned for the defendant in error, motion for a new trial was filed by plaintiffs in error, submitted to the court and overruled, and judgment was rendered in favor of defendant in error on the verdict. The plaintiffs in error removed the case to this court by petition in error.

One of the assignments of error is as follows: "The said court erred in the instructions given to the jury on the trial of said action, especially instructions numbered 1, 2, 3, 4, 5, 6, and 7, given on its own motion." Under this assignment counsel for plaintiff in error make an attack on but one of the instructions, viz., No. 3. This was the only instruction of those given to which exception was noted at the time of the trial. In the motion for a new trial and in the petition in error it was grouped with others, there being no specific and definite assignment of complaint as against any single or particular one. Nos. 4 and 5 of the instructions given by the court on its own motion were entirely proper and correct, and having determined this to be true, we will not further consider this assignment of error, agreeably to the rule of this court announced in *Hiatt v. Kinkaid*, 40 Neb., 178, where it was held: "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." (See, also, *McDonald v. Bowman*, 40 Neb., 269; *Jenkins v. Mitchell*, 40 Neb., 664.)

The only other assignment of error to which counsel

have directed our attention is, that the verdict was not sustained by sufficient evidence and contrary to law. This case was tried in the court below, by both court and counsel for defendant in error, on the theory that the bill of sale was void for the reason that it was a voluntary assignment for the benefit of creditors, and not made in conformity with the provisions of our statute under the head of assignments (Comp. Stats., ch. 6), the first section of which provides as follows: "That no voluntary assignment for the benefit of creditors hereafter made shall be valid unless the same shall be made in conformity to the terms of this act," and preferred the creditors named in the bill of sale. The court told the jury in one instruction that there was no question of actual fraud involved in the case. The evidence does not show any fraudulent intent on the part of either debtor or creditors named in the conveyance to hinder, delay, or defraud other creditors. The amounts owing by the Omaha Chemical Works to each creditor named in the bill of sale was a true indebtedness, and the bill of sale was a *bona fide* conveyance to the creditors named for the purpose of securing their claims, and if it was not within the scope of the section of the assignment law above quoted, or was not a voluntary assignment within the true meaning and construction of the statute in regard to assignments, it was not invalid. In *Costello v. Chamberlain*, 36 Neb., 45, it was held: "A debtor in failing circumstances may lawfully prefer one or more of his creditors and secure such creditors by mortgage or conveyance absolute, provided the transaction is in good faith and not made with intent to defraud other creditors." In *Kilpatrick-Koch Dry Goods Co. v. McPheely*, 37 Neb., 800, it was held: "A debtor in failing circumstances has a right to secure or pay in full a portion of his creditors, to the exclusion of the others; and whether in so doing he was actuated with a fraudulent purpose, is a question of fact and not of law." And in the text of the opinion it is stated: "A debtor has a

right to prefer his creditors; to pay part in full to the exclusion of others; and he has right to secure the debts of a part of his creditors to the exclusion of the others; and this is true whether he be insolvent or in failing circumstances, or not. All that the law requires of him is that he should act honestly; that his disposition of his property should not be made for the fraudulent purpose of hindering, delaying, or defrauding his creditors; and whether an act of a debtor in the disposition of his property was fraudulent, is always a question of fact, and not a question of law." (See, also, *First Nat. Bank of Denver v. Lowrey*, 36 Neb., 290, and cases cited.)

It is strenuously contended by counsel for defendant in error that this case is within the rule announced in *Bonns v. Carter*, 20 Neb., 566, 22 Neb., 495; but *Bonns v. Carter*, in so much as it refers to the assignment law, was overruled in an opinion written by IRVINE, C., in the case of *Jones v. Loree*, 37 Neb., 816, and had been in the case of *Hamilton v. Isaacs*, 34 Neb., 709, and *Hershiser v. Higman*, 31 Neb., 531, we may say overruled, but not in express terms. Commenting upon the doctrine of *Bonns v. Carter* and the scope to be given to the provisions of our assignment law, in the case of *Landauer v. Mack*, 39 Neb., 8, RYAN, C., says: "The argument of plaintiff in error seems to be based largely upon the theory that the several mortgages in fact constituted an assignment of the firm of G. H. Mack & Co., contrary to the terms of the assignment law of this state. It is true that in *Bonns v. Carter*, 20 Neb., 566, language was employed by a portion of this court which would seem to justify this contention of the plaintiffs in error. It is quite clear that the provisions of the assignment law should not be made to operate more broadly than its terms express; in other words, its operation should not be extended by implication. The assignment law prohibited assignments made in any other manner than that fixed by its terms, but did not undertake to abrogate the provisions of section 20

chapter 32, Compiled Statutes. The language of this section is as follows: 'The question of fraudulent intent, in all cases arising under the provisions of this chapter, shall be deemed a question of fact and not of law,' etc. The repeal of a statute by implication is not favored, and certainly the force given the assignment law by a portion of this court in *Bonns v. Carter, supra,* necessarily has this operation. Whether an assignment is made in conformity with the provisions of the assignment law, may be properly a question for the court to determine upon its construction of the instrument or instruments creating the assignment. It nevertheless remains true that whether mortgages or conveyances are fraudulent is a question of fact to be determined by the jury, or, in cases tried like the one at bar, by the court, solely upon the weight of the evidence adduced. Such questions are questions of fact involving largely the intention of the parties to the transaction, and should not be determined as questions of law arising under the assignment act." In the case at bar it is not contended that the transaction is in any manner tainted with fraud, and, viewed in the light of all the evidence, it cannot be called an assignment such as is contemplated by our statute. It can be called nothing more than an attempt to pay or secure certain creditors. By the conveyance they were preferred, it is true, but with—so far as the testimony discloses—an honest motive and with no intent to hinder, delay, or defraud other creditors in the collection of their claims, further than any allowed preference must necessarily so operate. The judgment of the lower court is reversed and the case remanded.

REVERSED AND REMANDED.

SARAH A. QUIGLEY ET AL., APPELLEES, V. H. C. MCEVONY, SHERIFF, ET AL., APPELLANTS.

FILED JUNE 6, 1894. No. 5489.

1. **Homestead:** MOTION TO DISCHARGE ATTACHMENT. The homestead character of real estate upon which attachment process had been levied is not a proper question to be heard and determined upon a motion to discharge the attachment, and should not be included in the motion as one of the grounds for such discharge, and should not be entertained by the court or judge if so included.

2. **Res Adjudicata:** RULING ON MOTION TO DISCHARGE ATTACHMENT: HOMESTEAD RIGHT. The defendant in attachment suit set up in a motion to dissolve an attachment, as one of the grounds for such motion, a claim of exemption of the attached property (real estate) as a homestead. The court made a general finding against the motion and overruled it. *Held*, That it will be presumed that the court deciding the motion only considered and determined such questions as could properly be included in the motion, and such decision will not be given the force of a former adjudication in a proceeding by the debtors afterwards, to select the property as their homestead, by following the statutory provision for making such selection, by giving notice to the officer who levied the writ upon the premises, nor will it be a bar to such selection proceedings.

3. **Homestead Right:** PROCEDURE TO ENFORCE. The parties claiming the premises which were sought to be subjected to the payment of the debt by attachment, as a homestead, were husband and wife, and the property belonged to the wife, or the interest of the defendants (a life estate) therein was vested in her, and the debt upon which the attachment was issued was her individual debt. She having ascertained the fact of the levy of the attachment, the husband being at the time in another state, signed a notice and had it served upon the sheriff before the sale. *Held*, That under the facts in the case this was a sufficient compliance with the requirements of our statutory provisions in regard to selection of homestead from real estate upon which a writ had been levied.

4. **Homestead:** APPRAISAL. Where the debtor takes the necessary initiative steps after the writ is levied upon his or her prop-

erty, and makes a selection from the property, within the limit as to quantity allowed by the statute, any excess the property selected may have in value above the limit allowed by the law regarding the value does not make any other proceedings necessary on the part of the debtor. It then becomes the duty of the creditor to make application, as provided by law, for appraisal of the premises, and no valid sale of the premises levied upon can be made by the sheriff until the creditor has procured the appraisal to be made as provided by statute.

5. ———: ABANDONMENT. Two things must concur to show an abandonment of a homestead, viz., an intent to abandon, and actual abandonment. (*Eckman v. Scott*, 34 Neb., 817.)

6. Review: FINDINGS OF FACT. This court will not disturb a finding of fact, unless it is clearly wrong, or clearly against the weight of the evidence upon which it is based; and this is the rule in cases tried by the court and in equity cases.

7. Sufficiency of Evidence to Support Decree. The evidence *held* sufficient to support the finding and decree of the court.

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

See opinion for statement of the case.

H. M. Uttley, for appellants:

The testimony shows that appellees were not, at the time of levying the attachment, actually residing upon the property claimed to be a homestead, and had not been so residing thereon for more than four months previous to that time. Actual occupancy is necessary in order to make the homestead exemption available to a claimant. The appellees cannot make the property the homestead after the levy of the attachment thereon so as to defeat the lien created thereby. (*Kelly v. Dill*, 23 Minn., 438; *Larimer v. Kelley*, 10 Kan., 299; *Galligher v. Smiley*, 28 Neb., 194; *Jackson v. Creighton*, 29 Neb., 319; *Rector v. Rotton*, 3 Neb., 171; *Brandon v. Moore*, 7 S. W. Rep. [Ark.], 36; *Baker v. Leggett*, 4 S. E. Rep. [N. Car.], 37; *Finley v.*

Saunders, 4 S. E. Rep. [N. Car.], 516; *Morgan v. Nunes*, 54 Miss., 308; *Hanson v. Graham*, 23 Pac. Rep. [Cal.], 56; *Keller v. Carr*, 42 N. W. Rep. [Minn.], 292; *Dennis v. Gayle*, 4 So. Rep. [La.], 6; *Colbert v. Henley*, 1 So. Rep. [Miss.], 631; *Fitzgerald v. Fernandez*, 12 Pac. Rep. [Cal.], 562; *Nance v. Hill*, 1 S. E. Rep. [S. Car.], 897; *King v. Goetz*, 11 Pac. Rep. [Cal.], 656; *Myrick v. Bill*, 37 N. W. Rep. [Dak.], 369; *Binzel v. Grogon*, 29 N. W. Rep. [Wis.], 895.)

The husband, being the head of the family, has the right to determine and control their residence; and, when he intentionally removes from and abandons the homestead, and his family accompanies him, neither he nor they have any power to resume it, so as to cut off intervening liens which have attached during such abandonment. (*Titman v. Moore*, 43 Ill., 169; *Galligher v. Smiley*, 28 Neb., 194; *Spaulding v. Crane*, 46 Vt., 292; *Garrett v. Jones*, 10 So. Rep. [Ala.], 702; *Philleo v. Smalley*, 23 Tex., 498.)

On the question of *res adjudicata*, see *Brigham v. McDowell*, 19 Neb., 413; *Nelson v. Bevins*, 19 Neb., 716; *Helphrey v. Redick*, 21 Neb., 83.

E. H. Benedict, contra:

The fact of removal, coupled with an intention never to return to the homestead, constitutes an abandonment, and nothing else does. (*Cline v. Upton*, 56 Tex., 319; *Fyffe v. Beers*, 18 Ia., 4; *Dunton v. Woodbury*, 24 Ia., 76; *Lindsay v. Murphy*, 76 Va., 428.)

Leaving or renting a homestead, after the claimant has by his occupancy impressed upon it the character of a homestead, is not evidence of abandonment. (*Guy v. Downs*, 12 Neb., 532; Thompson, Homestead & Exemptions, sec. 273; *Tumlinson v. Swinney*, 22 Ark., 400; *Dunn v. Tozer*, 10 Cal., 167; *Stewart v. Brand*, 23 Ia., 477; *Campbell v. Adair*, 45 Miss., 170; *Wetz v. Beard*, 12 O. St., 431; *Herrick v. Graves*, 16 Wis., 157*; *Myers v. Ford*, 22

Wis., 139; *McDermot v. Kernan*, 7 Am. St. Rep. [Wis.], 864.)

The homestead once established is presumed to continue, and the burden is upon the general creditor, who seeks to appropriate it to the satisfaction of his claim, to show by a preponderance of clear and decisive proof that it has been abandoned by the claimant. (*Boot v. Brewster*, 75 Ia., 631; *McMillan v. Warner*, 38 Tex., 414; *Riggs v. Sterling*, 1 Am. St. Rep. [Mich.], 554.)

The owner of a life estate is the owner of the property, and may use the same so as to make it exempt as a homestead. (Thompson, Homestead, sec. 220; *Kendall v. Powers*, 96 Mo., 142; *Pryor v. Stone*, 70 Am. Dec. [Tex.], 344; *Spencer v. Geissman*, 37 Cal., 96.)

The notice served on the sheriff was sufficient. (*McPhee v. O'Rourk*, 10 Col., 301.)

The homestead question was not adjudicated. (*Gayer v. Parker*, 24 Neb., 643; *Uppfalt v. Woermann*, 30 Neb., 189.)

HARRISON, J.

On the 24th day of February, 1890, the appellees filed a petition in the district court of Holt county, alleging that H. C. McEvony, of appellants, was sheriff of Holt county, Nebraska; the Holt County Bank, a corporation doing business at O'Neill, Nebraska; that on or about June 10, 1890, the bank commenced an action against Sarah A. Quigley in the district court of Holt county, and procured an order of attachment to be issued therein, which was delivered to the sheriff, McEvony, who, on the 11th day of June, 1890, levied the writ on lots 6, 7, and 8, in block 26, O'Neill, Nebraska; that subsequently judgment was rendered in the action, in favor of the bank, in the sum of $950, and on the —— day of ——, A. D. 1890, an order of sale was issued and delivered to the sheriff to sell the above described premises for the satisfaction of the judgment; that the petitioners are now, and have been, hus-

band and wife since the —— day of ——, A. D. 188–, and that Sarah A. Quigley has been for eight years, and now is, owner of a life estate in said premises worth not to exceed $2,000; that on lots Nos. 7 and 8 was a dwelling house and other buildings, and the same have been used and occupied by her as a home and homestead for eight years last passed, and she and her husband have so occupied them since their marriage; that prior to the date of the levy of the attachment they had removed a part of their household goods therefrom and were temporarily absent, but with the intention of returning thereto, and that they did so return and continued to occupy and use said premises as a home; that Sarah A. Quigley served a notice in writing on the sheriff that she claimed said premises as a homestead; that the sheriff refused and refuses to call appraisers to ascertain the value of the premises or to discharge the levy thereon, and is about to offer the property for sale and thus deprive petitioners of their homestead, and cause them irreparable injury. The prayer of the petition was for a decree declaring lots 7 and 8, block 26, to be the homestead of the petitioners, and enjoining the sheriff from further proceeding with the sale as to these two lots. Appellants filed an answer to the petition, admitting that McEvony was sheriff, and the corporate character of the bank, its place of doing business, the action of the bank, the issuance of the attachment therein, and its levy upon the property, the obtaining of the judgment, the order of sale, and that the sheriff was proceeding under it to make the sale; admitted further the life estate of Sarah A. Quigley in the premises, but denied the allegation of value; admitted that there was and is a dwelling and other buildings on lots 7 and 8, but denied the allegation of their homestead character or use as such, and further denied each and every other allegation of the petition, and for further answer alleged, in substance, that the Quigleys filed a motion in the original action for a dissolution of

the attachment therein, setting forth as one of the grounds for the dissolution and discharge of the attachment their claim of the homestead character of the premises and their exemption as a homestead; that by this motion they submitted the question of whether the premises constituted their homestead to the consideration and decision of the court, and that the court determined such issue against them, and such adjudication was and is a bar to the present suit. To this portion of the answer of appellants which set up new matter the appellees filed a reply, which was in effect a general denial. A trial of the issues to the court resulted in special findings on the points in the case, in favor of appellees, and a decree in accordance with such findings and the prayer of the petition, from which determination of the cause the appellants have duly effected an appeal to this court.

We will first notice the contention of appellants, that the proceeding by motion to dissolve the attachment and the matters therein decided were such as to constitute an adjudication of the homestead rights of the Quigleys in the premises in controversy, and consequently a bar to the bringing of this suit. The motion to dissolve the attachment was made on the grounds that the order of attachment was wrongfully sued out, want of jurisdiction of the court to grant the writ, the untruth or falsity of the allegation of nonresidence of Sarah A. Quigley, the defendant in the attachment suit, and that the property levied upon was the homestead of the defendants in the case. The main propositions to be decided at such a hearing are, first, the sufficiency of the affidavit; second, the falsity of the charge in the affidavit filed to obtain the issuance of the writ of attachment. Whatever matters may be in some cases necessarily or properly heard and determined, we do not think it is competent or proper practice, where the writ is levied upon real estate belonging to the debtor, to allow the homestead character of the property to be drawn in question as one of the grounds

for the motion to discharge the attachment. The hearing is upon affidavits, more or less skillfully drawn, according to the ability or lack of the same in this particular branch of the party who frames them, or his artistic skill, or want of it, in the affidavit line. We think it is unquestionable that the question of whether the premises constitute a homestead should be determined in proceedings instituted in the manner directed by our statutory law, and if there is any disagreement, then the same can be determined in a proper action in court, in which issues can be regularly joined and the matter tried in the manner prescribed for the trial of issues of law and fact, and that the ends of justice will be better subserved by this latter course of proceedings than by determination of the homestead question in the course of a hearing on a motion to discharge an attachment. In *Langdon v. Conklin*, 10 O. St., 439, it was held: "It is not competent for a defendant in attachment to move the court to discharge the attachment on the ground that the property attached does not belong to him, and it is error for a court or judge at chambers to sustain such motion;" and we think this rule applicable to the case at bar. The attachment in the case at bar seems to have been issued on an affidavit which, as grounds for the same, alleged that the defendant was a non-resident of the state, and the judge who passed upon said motion did not make any finding as to any particular portion or ground of the motion, but made a general order overruling it. It is to be presumed that in doing so he only considered and passed upon such questions as were properly before him by the motion, and if so, he did not decide the paragraphs of it in which it was sought to bring into controversy and decide at the time the question of the homestead character of lots 7 and 8, block 26, and their exemption. These facts were not in direct issue and could not be determined, and any determination of them in the proceedings by motion to dissolve the attachment was not conclusive, as they could not then be prop

erly in controversy. (*Uppfalt v. Woermann*, 30 Neb., 189; *Gayer v. Parker*, 24 Neb., 643.)

This brings us to the main contentions in the case, which may be briefly stated as follows:

First—That the notice given to the sheriff, that the defendants in the attachment suit claimed the premises to be exempt as a homestead, was not served on the officer at the time of the levy, as required by law, but some thirty days afterwards, and was not served by the husband, but was served by the wife, and hence was ineffective.

Second—That the defendants (appellees) failed to prove that the property was not worth more than $2,000; that it was incumbent upon them to do this, and having failed, their proof was incomplete and not sufficient to support the decree in their favor.

Third—The evidence does not show that they were occupying the premises levied upon, or that it was their home, but on the contrary does show that they had removed to another city and state, and abandoned these premises as a home.

The sections of our statute (see Comp. Stats., 1893, pp. 500, 501) governing the subject of homestead, in so far as a discussion of it will be necessary in this case, are as follows:

"Section 1. A homestead not exceeding in value $2,000, consisting of the dwelling house in which the claimant resides, and its appurtenances, and the land on which the same is situated, not exceeding 160 acres of land, to be selected by the owner thereof, and not in any incorporated city or village, or instead thereof, at the option of the claimant, a quantity of contiguous land not exceeding two lots within any incorporated city or village shall be exempt from judgment liens and from execution or forced sale, except as in this chapter provided.

"Sec. 2. If the claimant be married, the homestead may be selected from the separate property of the husband, or

with the consent of the wife, from her separate property. * * *

"Sec. 5. When an execution for the enforcement of a judgment obtained in a case not within the classes enumerated in section 3 is levied upon the lands or tenements of a head of a family, such head of a family may notify the officer at the time of making the levy of what he regards as his homestead, with a description thereof, within the limits above prescribed, and the remainder alone shall be subject to such levy, except as otherwise provided in this chapter. The judgment creditor may thereupon apply to the district court in the county in which the homestead is situated, for the appointment of persons to appraise the value thereof. * * * * * * *

"Sec. 15. The phrase 'head of a family,' as used in this chapter, includes within its meaning: First—The husband, when the claimant is a married person." * * *

It is first claimed that inasmuch as the statute requires the notice to be given at the time of the levy, and that its service in this case was thirty days subsequent to the time of the levy, it had no effect; and further, that the law requires it to be served by the "head of the family," and that the head of the family in this case was the husband, and the notice served in this case was signed by the wife, it was not such a notice as could bind the sheriff or the creditor, or affect the attachment, or call for any such action on the part of the creditors, as is contemplated by section 5 above quoted; and the further argument is advanced, to which it will probably be better to give attention here than elsewhere, that there is nothing to show that the wife never gave her consent to the selection of the property as a homestead. The evidence shows that the Quigleys went to Sioux City on or about August, 1889; that Sarah A. Quigley, when she returned to O'Neill, about the middle of the month of July of the following year, saw the attachment notice in the papers and thus for the first time became aware of the

levy of the attachment on the property of which she was the owner. The evidence further discloses that she at once wrote to her husband, then in Sioux City, and immediately took the steps prescribed by statute to establish the exemption of what they claimed as their home and homestead, by serving or having served upon the officer the notice required. The fact that she, being the owner of the property, signed the notice, we think disposes of the contention that there is nothing to prove that she ever gave her consent to its selection; shows not only that she was willing it should be so chosen, but that she actively and of her own volition set it apart and characterized it as a homestead. The statutory exemption of a homestead was intended and enacted in the interest of, and for the benefit of, the debtor, and it is the policy of the law that such enactments be liberally construed, so that the intention of the legislature shall be enforced or carried out to its fullest and greatest extent, and especially is this true of homestead and exemption acts. The primary and sole object and purpose of the notice required by the section of our statutes doubtless was and is that the sheriff, and the attachment or execution creditors, should and shall be apprised of the debtor's right or claim of right in the premises, that they may act or proceed accordingly; and we think that the notice in this case, given as it was by the party owning the property, and as soon as it was ascertained that a levy had been made, was sufficient to apprise the sheriff and creditor of the right claimed by the debtor in the property, and was sufficient, both as to the person signing and giving it and as to the time of service, to satisfy and fulfill the requirements of the law in regard to notice. (*McPhee v. O'Rourke*, 3 Am. St. Rep., 579, 10 Col., 301.)

We will next discuss the claim that it devolved upon the appellees to prove the value of the premises which they allege is their homestead, and that having failed so to

do, there is such a lack of proof on their part as precludes the rendering of a decree in their favor. There were three lots levied upon by the sheriff by virtue of the writ of attachment, and the debtor then selected two of them upon which stood the buildings, and notified the sheriff of such selection. Under the provisions of the statute, section 1, above quoted, the debtor was entitled to two lots, and having taken the initiative steps to preserve and protect the homestead right, the debtor had done all that the law required in the first instance. The property selected was within the limit as to quantity allowed by the terms of the statute, and any excess in value did not make any other proceedings necessary on the part of the debtor. It then devolved upon the creditor as a duty to ascertain the value of the premises selected, in the manner pointed out in the law, by making application for an appraisal, and having its value assessed, and until a creditor did so, no valid sale could be made by the sheriff of the lots selected as a homestead. (See *Riggs v. Sterling*, 1 Am. St. Rep., 554, 60 Mich., 643, and cases cited.)

The third contention of the appellants is that the evidence introduced in the case was not of such a character as to warrant the court in finding that the premises constituted the homestead of the appellees at the time the officer levied the writ of attachment upon them; but, on the contrary, the testimony clearly disclosed that the Quigleys had removed to, and were living at the time of the levy in, Sioux City, Iowa, and had abandoned these premises as a home and homestead. The testimony in this case may, we think, fairly be said to establish, that on or about August, 1889, the appellee, being then engaged in the millinery business in O'Neill, and occupying these premises as a home, became dissatisfied with the returns from her business and concluded to remove to Sioux City for the purpose of disposing of the stock of goods, and did go to Sioux City, rented a store room, and engaged in business there;

also rented a house for residence purposes and together with her husband lived therein; that when they removed from O'Neill they did not take with them all their household goods, but left quite a number of articles in the house and buildings on the lots levied upon; that before starting they took counsel as to whether they could leave these premises and go to Sioux City as they did, and go into business there for a time, and not jeopardize their homestead right, and were informed that they could, provided their removal was temporary and with a *bona fide* intention to return. That this evidence in regard to taking counsel was competent and material see *Painter v. Steffen*, 54 N. W. Rep. [Ia.], 229, in which case it was held: "On the question of whether plaintiffs have abandoned their homestead, evidence that before going away plaintiffs took legal advice that such absence would not constitute an abandonment if there was a *bona fide* intention to return is admissible as *res gestæ*." The evidence further shows that they never intended to leave these premises permanently, only temporarily, and that it was at all times their intention to return to it, as they did, as a home. During the time they were away from it the property in O'Neill was rented to some person, and there is evidence in the record that they, or that Sarah A. Quigley, stated during this time that they, or she, would never return to O'Neill to live or to stay. While it is true that the evidence was conflicting on this and some other points, we cannot say that the finding of the court, that the testimony, considered as a whole, supported the claim of appellees to the premises in suit as their homestead, was clearly wrong, or that there was not evidence sufficient to support or warrant such a finding, and, according to a well established rule of this court, cannot disturb it. (*White Lake Lumber Co. v. Stone*, 19 Neb., 402; *Witter v. Hoover*, 24 Neb., 605; *Aultman v. Patterson*, 14 Neb., 58; *McLaughlin v. Sandusky*, 17 Neb., 110.) Each case of this nature, where the

abandonment of a homestead is involved, must be decided or turn upon a conclusion or determination, under the testimony, of whether or not the intention to abandon existed, and that there was an actual abandonment, and it follows necessarily that every individual case must depend upon and be governed by the facts developed in it. In *Eckman v. Scott*, 34 Neb., 817, we find the following statement, which is quite applicable to the case at bar: "It appears that W. T. Scott went to Beatrice in 1888 to obtain employment; that there was no intention to remove from Pawnee City, although, in consequence of the expense of supporting his family in one place and hiring his own board in another, his family moved temporarily to Beatrice, and the wife rented the homestead, and afterwards she returned to Pawnee City and sold and conveyed the same. To constitute an abandonment of a homestead two things must concur, viz., an intention to abandon, and actual abandonment. (*Elder v. Reilly*, 10 N. W. Rep. [Ia.], 804.) In the case at bar the proof fails to show an actual abandonment, and the lien of the judgment did not attach to the same." (See, also, *Painter v. Steffen*, 54 N. W. Rep. [Ia.], 229; *Osborne v. Schoonmaker*, 28 Pac. Rep., 711, 47 Kan., 667; *Robinson v. Swearingin*, 17 S. W. Rep. [Ark.], 365.) In *Edwards v. Reid*, 39 Neb., 645, decided by this court March 6, 1894, it was held: "Removing from a homestead and residing temporarily elsewhere for the purpose of business, pleasure, or health, will not work an abandonment of a homestead, unless coupled with such removal is the intention not to return, or, after removal, the intention is formed of remaining away." The judgment of the district court is

AFFIRMED.

JAMES W. LOVE V. LEVERETT B. PUTNAM.

FILED JUNE 6, 1894. No. 4831.

1. **Chattel Mortgages:** DESCRIPTION OF PROPERTY. A description in a chattel mortgage which suggests inquiry, by the aid of which a party will be able to ascertain the location of property and to otherwise identify it, is sufficient.
2. ——: ——: EVIDENCE. The description in the mortgage, under which one party claimed in this case, *held* sufficient to create a lien on the property described, in favor of the mortgagee or his assigns, and the evidence sufficient to warrant a finding that the party who afterwards purchased the property had actual notice of the lien created by the mortgage.
3. **Instructions:** REVIEW. Instructions to a jury should be considered together and as a whole, and their meaning and effect determined from their construction when so considered, and not by selecting and referring to detached paragraphs or portions alone, and when thus weighed they are found to be correct, no error can be predicated upon the action of the court in giving them.
4. **Instructions given and refused** by the court examined, and *held* no error in either the giving or refusing.

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

E. F. Gray, for plaintiff in error.

Frick, Dolezal & Stinson, contra.

HARRISON, J.

This is an action instituted in the district court of Dodge county by the defendant in error against plaintiff in error to recover damages for the alleged conversion of some hay by plaintiff in error which it is claimed by defendant in error belonged to him. The petition was in the words and figures following:

"The plaintiff complains of the above named defendant and alleges that on the 8th day of August, 1887, one N. L. Hughes made and delivered his certain promissory note in writing to I. B. Hickok in words and figures following, to-wit:

"'$167. FREMONT, NEBRASKA, August 8, 1887.

"'Sixty days after date we jointly and severally promise to pay to the order of I. B. Hickok one hundred and sixty-seven $\frac{no}{100}$ dollars, for value received, with interest at ten per cent per annum, payable annually, from date until paid. N. L. HUGHES.

"'Address: City.'

"That to secure the payment of said note said N. L. Hughes, on said 8th day of August, 1887, made and delivered to said I. B. Hickok a chattel mortgage in writing, duly signed by said N. L. Hughes, and thereby conveyed to said I. B. Hickok, as security for said note, the following described goods and chattels, to-wit: One hundred thirty tons of hay in stack on the east half of northwest quarter of section 30, township 18, range 6, in Dodge county, Nebraska; that on the 8th day of August, 1887, at 5 o'clock and 55 minutes P. M. said mortgage was duly filed for record in the office of the county clerk of said Dodge county; that on or about the 1st day of October, 1887, said I. B. Hickok, for a valuable consideration, and before said note and mortgage became due, did in the usual course of business assign said note, with the moneys due thereon, to this plaintiff, and did at the same time deliver said note and mortgage to this plaintiff, and said plaintiff thereby became, and at the times hereinafter stated was, and now is, the owner of said note and mortgage; that no part of said note has been paid except the sum of $8.56, paid on the 30th day of August, 1888; that on or about the —— day of ——, 1888, and before the commencement of this action, and while plaintiff was the owner of said note and mortgage and the special owner of the 130 tons of

hay above described and entitled to the immediate possession of said property of the value of $260, said defendant took possession of 100 tons of said hay and unlawfully and wrongfully converted the same to his own use, to the damage of the plaintiff $200. Wherefore the plaintiff prays judgment against said defendant for the sum of $200, with costs of suit."

To this the plaintiff in error filed the following answer: "The defendant, for answer to the plaintiff's petition herein, admits that N. L. Hughes executed and delivered the note mentioned in said petition to I. B. Hickok, and admits that N. L. Hughes executed the mortgage mentioned in the petition and that it was filed as stated in the petition; but defendant denies that said mortgage was in the terms stated in said petition, or conveyed 130 tons of hay, or conveyed any hay, and defendant denies each and every allegation in said petition not above expressly admitted;" and on a trial of the issues in the case to the court and a jury a verdict was returned for defendant in error in the sum of $150. Motion for a new trial was filed by the unsuccessful party, J. W. Love, argued, submitted, and overruled, and judgment rendered, on the verdict, for Putnam. To reverse this judgment the plaintiff in error has prosecuted a petition in error to this court.

The first error which is argued by counsel for plaintiff in his brief is that the description of the property contained in the chattel mortgage executed by Hughes to Hickok, and sold by him to Putnam, was insufficient and indefinite, and did not pass any title to the hay in question to Hickok or Putnam, and if it did, was not sufficient to be constructive notice to him of the mortgaging of the hay or the lien created thereby, or to put him upon inquiry regarding the title before he purchased it, and in this connection that the court erred in allowing Hughes to answer the following question over the objection of plaintiff in error: "Mr. Hughes, you may state whether the hay described in the

mortgage, Exhibit B, is the hay you mortgaged to Mr. Hickok," the objection of the plaintiff in error being that the question was "incompetent, irrelevant, immaterial, and seeking to vary the terms of a written instrument, and as seeking to aid a defective and indefinite description in the mortgage by parol testimony, and to substitute parol testimony as a description of the property for that in writing." The record shows that at the time of this objection the plaintiff below offered to prove that "the description in this mortgage is defective; that is, there was a mistake made in describing the range on which the hay was located —the hay is described as being upon section 30, township 18, range 6, when it ought to have been section 30, township 18, range 7 east;" and further offers to prove that the Love farm mentioned in the mortgage was the Love that is defendant in this action, and that he had no other farm at that time in section 30, township 18, range 6, and did own the farm six miles further east in section 30, township 18, range 7; and the above objection, being renewed to the offer, was overruled and the evidence received, to which exception was taken by attorney for Mr. Love. The above assignments of error all have reference to and depend upon the determination of the sufficiency or insufficiency of the description contained in the mortgage. The description of the property in the mortgage was as follows: "One hundred thirty tons of hay now in stack upon east half northwest quarter of section 30, town 18, range 6; also, one sorrel horse, thirteen years old; one bay horse, twelve years old; one spring wagon, three spring; one set of double harness; said property is now and will be kept on J. W. Love's farm northwest of town." The land upon which the hay in controversy was standing was in range 7 and not in range 6, as stated in the mortgage, but it was on the farm of J. W. Love northwest of town, and Hughes had obtained of J. W. Love the right to cut the grass upon this land and put up the hay, this being the same J. W. Love, party defend-

ant in the court below, and he had no farm answering to the description by part of section and township and range set forth in the mortgage. Such a description has been held sufficient in a number of cases. (See *Rawlins v. Kennard*, 26 Neb., 181; *Peters v. Parsons*, 18 Neb., 191; *Wiley v. Shars*, 21 Neb., 712; *Buck v. Davenport Savings Bank*, 29 Neb., 407.) We are satisfied that the description in the mortgage was sufficient to give Mr. Love notice of the rights of the other parties in the hay; but there is this much further to be said here: It was shown by four witnesses on behalf of the plaintiff below that they had conversations with Mr. Love in reference to this hay and this mortgage lien upon it, before the time he claimed to have purchased Hughes' interest in the hay, and that he had full notice and knowledge of the existence of the mortgage and that it purported to convey this particular hay. Mr. Love denies that he had any such notice, or any actual knowledge, of the existence of the mortgage on the hay at the time he claims to have paid for any interest Hughes had in it. Hence there was a conflict of evidence on this point, but the jury determined it in favor of the defendant in error, and, according to a well settled rule of this court, that a finding made upon conflicting evidence will not be disturbed unless clearly wrong, this finding must prevail; and if Mr. Love had actual notice of the mortgage and of its lien upon this hay, error, if any, committed in the admission of the testimony objected to was without prejudice.

It is claimed that the court erred in refusing to give instruction No. 1 and also No. 2 requested by plaintiff in error. These instructions were directed to and raised the same questions argued above under the objections to the testimony, and the mortgage being admitted in evidence, and agreeably to the conclusion there reached, the assignment of error because of the refusal to give these instructions must be held not well taken.

It is next contended that the court erred in giving in-

struction No. 6 to the jury, being one of the instructions given by the court on its own motion. This instruction reads as follows: "The jury are instructed that the chattel mortgage given in evidence, and the transfer or assignment of the note by the mortgagee, I. B. Hickok, to the plaintiff, would pass the legal title to the hay therein described to the plaintiff, if from the evidence in this case the jury believe that the witness N. L. Hughes, at the time of the execution of said mortgage, was the owner of said hay." It is argued that the judge trying the case, in giving the above instruction, assumed it to be conclusively proved without conflict that the hay in question was intended to be embraced in the mortgage, and that defendant below knew it at the time, and that he was clearly, and beyond a question for the jury, estopped from controverting it. We do not think this instruction can be fairly said to be open to the criticism urged. An instruction or instructions are given after the evidence is all in and before the court and jury, and must be directed and applicable to the testimony as developed in the case. The judge, when he admitted the mortgage in evidence, determined that it was sufficient to pass the title to the hay embraced therein and to be constructive notice of its conveyance by the mortgage, and he here but states the legal effect of the assignment or transfer of the note secured by the mortgage; and, in view of all the evidence introduced on the trial of the case, and upon which he was basing his instructions, we think it was fully applicable and pertinent thereto, and its giving warranted and not erroneous.

It is next complained that the court erred in not giving instructions numbered 3 and 4 requested by plaintiff in error. These instructions are as follows: "That if the defendant told Hughes he might have the hay in question when he should pay the rent for the ground, and upon this permission, and no other, Hughes cut and put up the hay, then the title in the hay would remain in defendant

until the rent was paid, and if you so find the facts to be, and also find that Hughes had not paid the rents when the mortgage was made, then it will be your duty to return your verdict for the defendant." No. 4: "If you find from the evidence that the defendant Love bought Hughes' interest in the hay in question and paid upon the same $100 in at bank on Hughes' note, as agreed between them he should do, before he, Love, had any actual notice of the mortgage introduced in evidence, then it will be your duty to return a verdict in favor of the defendant Love." The propositions covered by these two instructions, and which it was sought by them to direct the attention of the jury, were fully embraced in the instructions given by the court on its own motion, hence it was not error to refuse to give them. (See *Angle v. Bilby*, 25 Neb., 595; *City of Lincoln v. Smith*, 28 Neb., 762; *Northeastern N. R. Co. v. Frazier*, 25 Neb., 42.)

Our attention is particularly called by the petition in error and brief for plaintiff in error to instructions 8, 9, and 10 given by the court on its own motion, and it is strenuously insisted that it was error to give each and every one of the above numbered instructions, more especially No. 10. After a close and careful reading and examination of these instructions, in connection with all the others submitted to the jury for their information and guidance, and their applicability to the issues and evidence in the case, and giving due weight to the argument of the counsel in the briefs filed and authorities cited therein, we are convinced that the action of the court in giving these instructions was not open to the objections urged against it and was not erroneous; that the instructions, when considered and construed together as a whole, properly stated the law applicable to the case, and fairly submitted the questions of fact arising in the action and were not prejudicial to the plaintiff in error, and if so, they complied with the well settled rule of this court, "That instructions are to be considered

and construed together and their meaning and effect thus determined, and not by reference to detached portions alone." (See *Murphy v. State*, 15 Neb., 383; *City of Lincoln v. Smith*, 28 Neb., 762; *Campbell v. Holland*, 22 Neb., 589.) The judgment of the district court is

AFFIRMED.

POST, J., not sitting, having presided at the trial in the district court.

RICHARD ELLISON V. JOEL T. ALBRIGHT.

FILED JUNE 6, 1894. No. 5429.

Payment: CONCLUSIVENESS OF RECEIPT AS TO STRANGERS. As against strangers thereto, a receipt is incompetent evidence of the payment thereby acknowledged; for, as against such strangers, such receipt is but the hearsay declaration of the party who signed it, made without opportunity for his cross-examination, and independently of the sanction of his oath.

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

C. L. Richards, Marquett, Deweese & Hall, and *W. H. Morris*, for plaintiff in error.

W. P. Freeman and *Ben S. Baker, contra.*

RYAN, C.

In this action as originally brought in the district court of Thayer county Joel T. Albright was plaintiff and Richard Ellison was defendant. Except where otherwise expressly noted the same designation will be applied to the respective parties. In his petition plaintiff Albright alleged

"that on the 19th day of February, 1886, the plaintiff, then being the owner of the southwest quarter of section 28 and the northeast quarter of section 34, all in township 4 north, range 1 west, 6th P. M., in Thayer county, Nebraska, sold and conveyed the same to said defendant, for which defendant agreed to pay plaintiff the sum of $6,400 at that date; that the defendant has paid plaintiff as part consideration for said real estate the sum of $3,930, as follows: The sum of $1,200 thereof by assuming and agreeing to pay one-half part of a mortgage for $2,400 which had been previously given by plaintiff on said northeast quarter of said section 34 and other land of plaintiff; also by assuming and agreeing to pay a mortgage for $1,600 which had been previously given by plaintiff on said southwest quarter of said section 28, and which said mortgages, with interest and taxes on said land, then amounted to the sum of $2,930; and also the further sum of $1,000 thereof in cash. The plaintiff further says that the sum of $2,470 of said sum of $6,400, the purchase price which defendant agreed to pay plaintiff for said lands, with interest thereon at the rate of seven per cent per annum from the 19th day of February, 1886, is unpaid and now due from the defendant to the plaintiff." Following the above language there was set out in the petition what was termed a "second cause of action." This appears to have been but another statement of the same cause above set out, with some slight variations unimportant to note, since Albright in this court disclaims any reliance on said so-called "second cause of action." In the petition there followed the so-called "second cause of action" this language: "3. That at the instance and request of the defendant, and relying on the defendant's promise to reimburse plaintiff therefor, the plaintiff has incurred expense, costs, and attorney's fees in endeavoring to sustain his title and claim to said stock of goods, wares, and merchandise, amounting to the sum of $337.46, an itemized bill and statement of said expenses, costs, and

attorney's fees being hereto attached, marked Exhibit A, and made a part hereof." On the trial there was introduced no testimony to sustain the above claim for attorney's fees, costs, and expenses, hence this part of the petition will be dismissed from further consideration. Plaintiff alleged that he had sustained damages in the premises in the sum of $3,500, no part of which had been paid, and he prayed judgment in the sum named, with seven per cent interest on $2,470 from February 19, 1886.

In the brief filed on behalf of the defendant in error Albright his counsel summarized the facts constituting plaintiff's cause of action in this language: "Albright sold and conveyed the land before described to Ellison for $6,400, which fact is admitted by all. That Albright received $1,600 and $1,200 (being the mortgage on the quarter in section 28, and one-half of the mortgage on the quarter in section 34, with other lands, with some accrued interest) and the further sum of $1,021 (or $1,023) there is no dispute. Allow us to say the mortgages assumed, with accrued interest, and the cash paid, left only $2,470 of the purchase price of the land, to-wit, $6,400. It was this balance of the purchase money for which suit was commenced." This concise statement of the matters in issue, limiting as it does the inquiry to the item of $2,470, will be accepted as correct, for thereby, without prejudice to the rights of either party, is avoided a tedious recitation of the matters presented by the answer and reply. To an understanding of the matters involved it will be necessary to explain the transactions which gave rise to the alleged indebtedness for the sum last mentioned. For this purpose the evidence on this point of Mr. Albright, summarized, was as follows: On February 19, 1886, Albright sold the southwest quarter of section 28 and the northeast quarter of section 34, town 4, range 1 west, 6th P. M., situate in Thayer county, to Richard Ellison for $6,400. On one of these quarter sections there was a mortgage of $2,400,

with some interest due, one-half of which principal and interest was assumed by the grantee. On the other quarter there was a mortgage of $1,600, with some interest due, the payment of the entire amount of which was assumed by Ellison. In addition to assuming payment of the above amounts, Ellison was to pay Albright either $1,021 or $1,023,—there is some uncertainty as to the exact amount,—which left to be provided for the $2,470 above referred to. Albright agreed for this $2,470 to accept a stock of goods owned by a Mr. Brown. On this stock Ellison held a chattel mortgage and a bill of sale answering the purposes of a chattel mortgage. It was agreed between Ellison and Brown that the amount due on the notes secured by these two instruments was $1,800. Before negotiations were consummated, however, the sheriff of Thayer county levied on the stock of goods and garnished Ellison for the satisfaction of a claim due from Brown. These proceedings by the sheriff caused a delay in closing up the trade. It was finally arranged, however, that the difference between the $1,800 and the estimated value of the stock of goods, which was $2,470, should be paid by Ellison to Brown, less the amount of the two executions, which left $418 going from Ellison to Brown. Following this adjustment, Albright sent a note by Mr. Brown to Mr. Ellison, wherein he said for Ellison to settle with Brown according to the agreement; that the stock had fallen a little short, but that would be fixed in rent with Mr. Brown. There was a defect in the title to the land which was to be conveyed to Ellison, and, therefore, when this order was presented to him, he refused to pay it; subsequently the defect in title having been obviated, the land was conveyed by Albright to Ellison, and Albright took possession of the goods. Ellison indorsed to Albright, without recourse, the notes of Brown, on which was due the sum of $1,800, together with the chattel mortgages securing payment of that amount. These notes and the mortgages were left in a

bank at Alexandria, and Mr. Albright had no knowledge that either had been indorsed to him. After Albright had taken possession of the goods Brown surreptitiously obtained possession thereof, whereupon Albright brought a replevin suit, and thereunder, having obtained possession of the stock, sold it. The replevin action resulted in a verdict and judgment for Brown, and others who were joined with him as defendants, against Albright for the sum of $2,421. The opinion directing an affirmance of this judgment was reported in 23 Nebraska, 136.

The foregoing statement, as indicated, is compiled from the testimony of Albright, and is given that his version of the affair may appear. It is not to be understood, however, that by this court any attempt has been made to weigh the testimony or settle controverted fact propositions, for no such effort has been made. As was said in the brief for defendant in error, this suit was brought to recover the $2,470 item, to which reference has already frequently been made. It can scarcely escape observation that the defendant in error went into possession of the stock of goods which this $2,470 represented; subsequently such possession was resumed by Brown, and that thereby there was necessitated a suit on the part of Albright to regain his lost possession. Concededly, the only circumstance which could justify Brown's resumption of possession was that Ellison had failed to pay him the balance of $418, or, as Brown figures it, $425, due him from Ellison. Even as to this Brown's testimony was that after his own resumption of possession Ellison tendered this balance to him, which he refused to receive, and refused to deliver up the stock of goods unless he was also paid for the trouble and expense he had been put to. Under these circumstances this action was brought by Albright for the recovery of the $2,470. In his testimony Mr. Albright said that he replevied the stock on the suggestion of Ellison that he should do so, and that he, Ellison, would sign his replevin undertaking to en-

able Albright to replevin. This was denied by Ellison, and in this connection it is noteworthy that as a matter of fact Ellison's name does not appear on the copy of this undertaking set out in the bill of exceptions. It is difficult to conjecture how the alleged encouragement of Albright by Ellison could become important in this case, for the proof necessary to sustain the plaintiff's allegations was of the failure of the consideration alleged. The petition was not framed upon the theory that Ellison was liable upon the warranty of his title as to the stock of goods transferred to Albright, but was for a failure of consideration for land transferred to Ellison by Albright. The possession of the goods was transferred to Albright in pursuance of the terms of a contract, under which Ellison became the owner of Albright's land. This possession was afterwards interrupted by one who at most could justify his interruption of such possession to the extent in amount of $425. In the case of *Albright v. Brown*, reported in 23 Neb., 136, it seems that Albright, as absolute owner, claimed the right of possession of the entire stock. It admits of grave doubts whether under these circumstances Ellison could in any event be held liable for more than the amount he had failed to pay to Brown; that is, according to the evidence of Albright, $418. (*Vide Aultman v. Stout*, 15 Neb., 586; *Sycamore Marsh Harvesting Machine Co. v. Sturm*, 13 Neb., 210; *Hadley v. Baxendale*, 9 Exch. Rep. [Eng.], 341.) It appears from the evidence of Albright—though this may admit of doubt—that Brown predicated his right to resume possession upon the fact that there remained due him, as Brown claimed, $425. Under the rule laid down in *Long v. Clapp*, 15 Neb., 417, a serious question might be made as to whether or not it was the duty of Albright to have paid this amount, his recovery against Ellison in that event being limited to the amount so paid. If this petition had presented Albright's cause of action as one for damage for failure of Ellison's title to the stock of goods, it would, to

say the least, have better comported with the proofs offered, and would have afforded an opportunity to try the question of the amount and nature of the damages sustained by the defendant in error. It is quite evident that the matters in controversy herein can never be satisfactorily determined on the issues heretofore presented on the pleadings. For our present purpose, however, we shall proceed as though the evidence introduced was strictly relevant to the issues joined.

There was a judgment in the replevin suit, which was afterwards affirmed in this court. The cause was then remanded to the district court. The theory of the defendant in error in the trial of this case was, that Ellison was liable for the amount paid by the defendant in error for the satisfaction of the judgment in the replevin action. For the purpose of showing this payment there was introduced in evidence a page of the judgment docket No. 1 of the district court, on which there appeared the name of Joel T. Albright as judgment debtor, and the names of the parties to the suit, the kind of action, the date of judgment, April 21, 1886, the page of the journal, and the amount of the judgment, $2,421. The matters described were followed by this writing:

"AUGUST 14, 1889.

"Received of Joel T. Albright full satisfaction and payment of this judgment, interest, and costs, and the same is hereby satisfied and discharged in full.

"J. L. BROWN,
"CLARA A. BROWN,
"JAMES LOCKWOOD,
"*Defendants,*
"By W. O. HAMBEL,
"*Their Attorney.*"

There was no evidence of the alleged payment other than above given. Indeed, on May 20, 1889, there was in said replevin action returned an execution *nulla bona.*

In the suit which we have now under consideration there were examined as witnesses the above named J. L. Brown and Clara A. Brown, as well as Joel T. Albright, but by neither of these was there an attempt made to prove the amount paid in satisfaction of the judgment rendered in the replevin action. The plaintiff in the district court relied upon the sufficiency of the above receipt, entered, as it doubtless was, on the original judgment docket. To the introduction of the receipt proper objections were made and exceptions taken. There is, therefore, now presented the competency of this receipt as against Ellison, who was not a party to the action in which the judgment was rendered, of which satisfaction and payment is attempted to be shown by the receipt. In *Davidson v. Berthoud*, 1 A. K. Marsh. [Ky.], 261, the case was for money laid out and expended by the defendants in error to the use of the plaintiff, and for work, labor, etc. The language used in discussing the effect and nature of a receipt was as follows: "The only question material to be decided is, whether the circuit court erred in admitting as evidence a receipt signed by A. Woolford for $222.11, alleged to be advanced by the defendants in error to the plaintiff's use. It is explicitly laid down by Peak in his treatise on Evidence, p. 254, that to prove the payment of money in such a case, the person who made it, or he by whom it was received, should be called as a witness, for the receipt or acknowledgment of a person will be no evidence against the defendant. And, of the correctness of this doctrine, on principle, there can be but little reason to doubt, for proof of the acknowledgment of a person who received the money would only be hearsay evidence, and the receipt of such person is nothing more than written evidence of his acknowledgment, and whether in writing or by parol hearsay evidence is equally inadmissible. (Phillip, Evidence, 174.)" In *Lloyd v. Lynch*, 28 Pa. St., 419, there was under consideration the effect to be given a receipt on a deed as against one not a party to the deed.

Having premised that such receipt was competent evidence against the grantor and all who derived title from him, and was such evidence as to pass the grantor's title, the opinion continued in the following language: "But it is no evidence whatever of the fact of payment against a stranger, or even against one who derived title from Thomas Farrell (the grantor) previously to the date of the conveyance to Lloyd; against them it is nothing but hearsay. It is a mere *ex parte* declaration, not under oath, taken without any opportunity to cross-examine. It has been long settled that such declarations are not evidence against strangers. * * * If such evidence were received against strangers for the purpose of extinguishing their equitable rights, the salutary rules established for ages would be subverted. Hearsay evidence would be substituted for evidence under the sanction of an oath, and all the advantages of a cross-examination would be swept away. Under such a system no equitable title could be protected. But it is urged that there is a presumption that the grantor and grantee have acted with integrity. This may be so, but that is no reason why their declarations should be given in evidence against persons who have no connection with them. If they are acquainted with material facts, they are as much bound to deliver their testimony under oath as other persons, if competent witnesses." Other authorities might be cited to sustain this proposition, but this is hardly necessary, for, on reflection, it is very clear that a receipt signed by Mr. Hambel as attorney could have, as against strangers to it, no greater effect than would his oral utterances made to the same parties. If Albright paid the amount of the judgment, it is no hardship that he be required to so testify, giving thereby an opportunity for an examination as to the media and time of payment, as well as to other material circumstances. Certain it is, there was no competent proof of payment, and without such proof of this essential fact, the

judgment is unsupported in a very important respect. The judgment of the district court is

REVERSED.

ANDREW J. HALE V. MICHAEL SHEEHAN.

FILED JUNE 6, 1894. No. 5499.

Master and Servant: SERVICES RENDERED AFTER EXPIRATION OF CONTRACT: EVIDENCE OF TERMS. After the expiration of a term of hiring, the law does not so strongly imply that thereafter continued services were rendered upon the terms fixed by the contract, the term of which had expired, that parol evidence of different terms is incompetent.

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

A. Hardy, for plaintiff in error.

Rickards & Prout and *George A. Murphy, contra.*

RYAN, C.

This action was brought by plaintiff for the possession of fifty bushels of potatoes, one hundred and seventy-four bushels of corn, and one hundred and sixteen shocks of corn fodder. There was a verdict for the defendant, in accordance with the findings of which judgment was rendered against the plaintiff for the sum of $118.70, the value of the property replevied. The potatoes were raised by the defendant on the farm of the plaintiff; the corn on a neighboring farm owned by Mr. Corithers; both were of the crop of 1890. The plaintiff predicated his right to the potatoes and corn upon the provisions of a written agreement made between the parties to this action. It was in the following language:

"GAGE COUNTY, NEB., August 29, 1887.

"This memorandum of agreement, made and entered into this 29th day of August, 1887, between A. J. Hale, of said county, party of the first part, and M. Sheehan, of said county, party of the second part, witnesseth: That the said party of the first has employed the said party of the second part and his son Willie to work for him on his farm, known as the 'Sicily Creek Farm,' for one year, four months, from the first day of November, 1887, for the sum of fifty dollars per month, and agrees to board all extra hands employed on said farm for the sum of ten dollars per month while working on said farm. Said Hale to furnish sulky plow for boy to use. Said Hale hereby agrees to pay said party of the first part the said sums hereinbefore specified for the times and purposes therein expressed. Said Hale also agrees to keep two cows and two calves for the said party of the second part, and to furnish feed for hogs sufficient for the meat for his own use. Said party of the second part is to keep his team on said farm as long as he wishes, free of charge, by using them the same as he does party's of the first part.

"A. J. HALE.

"M. SHEEHAN."

In brief, it is contended by plaintiff that under the terms of this contract the defendant was bound to devote his entire time to the service of the plaintiff, and that whatever was raised by defendant was for the use of, and necessarily belonged to, plaintiff; hence that replevin would lie for it. The employment of the defendant was, by the terms of this agreement, for a year and four months from November 1, 1887. This term expired March 1, 1889. If the defendant, without any further arrangement, continued in the employ of plaintiff after the date last named, a fair implication, in the absence of contravening evidence, would be that he did so on the terms fixed by the written contract. Many of the objections urged were to the introduction of

testimony showing that, after the term fixed by the written contract, modifications of its provisions were agreed to. This was not varying the terms of the writing. It was merely proving a contract made after the original contract by its own terms had fully terminated. The introduction of evidence to rebut a mere presumption which would arise because of the absence of express provisions tended in no way to impair the right to make proof of such provision.

It is argued that there was error in overruling plaintiff's objection to question No. 168 asked John Corithers by defendant, and in allowing such indefinite evidence to go to the jury. Question 168, the objection, and answer thereto were as follows:

Q. You may state if you know what corn fodder was worth last fall at the time of the seizure, per shock.

Objected to, unless confined to these shocks. Overruled. Exception.

Q. Do you know?

A. No, I don't really know what it was worth.

Fully impressed with the importance of this question and of the objection made, we have given the matter the consideration to which it is entitled, and have critically analyzed the answer elicited, but have been able to discover no error prejudicial to plaintiff.

By his fourth instruction, asked and refused, plaintiff sought to have the jury instructed that if the defendant or his son William took the ground to raise corn thereon, and that they, or either of them, with the use of plaintiff's team, tools, and hired help cultivated and raised said corn in the time they were to work for plaintiff under the contract introduced in evidence, the share that would go to the defendant was plaintiff's property, of which plaintiff was entitled to demand and enforce possession. This corn was raised on a neighboring farm, not on plaintiff's; and while plaintiff, in an action brought by defendant to recover his wages, might, by way of set-off, plead damages caused

by the misappropriation of time necessary to the production of this corn, or, if not sued, refuse to pay to that extent, he had no right to the corn itself, especially as against William, who never signed the contract, nor, so far as the evidence shows, was ever a party to it. This instruction was properly refused.

The other errors assigned relate to the giving of four instructions by the court. As these reflected the views above indicated as favorably to plaintiff as it was possible, consistently with the facts, to frame them, their examination in detail or in gross would subserve no useful purpose. The judgment of the district court is

AFFIRMED.

SAMUEL M. MELICK v. HANNAH J. VARNEY.

FILED JUNE 6, 1894. No. 4935.

1. **Review:** VERDICT. When the existence of a fraudulent motive was the question of fact submitted to a jury, its verdict will not be disturbed if there exists competent evidence to sustain it.
2. **Fraudulent Conveyances:** HUSBAND AND WIFE: BURDEN OF PROOF. In a suit between a wife and a creditor of her husband concerning property transferred to her by him after the contracting of indebtedness by him, the burden is upon the wife to establish by a preponderance of the evidence the *bona fides* of the transfer of the property to her. Following *Carson v. Stevens*, 40 Neb., 112.
3. **Married Women:** SEPARATE ESTATE: CONTRACTS. A married woman, in this state, may bargain for and purchase personal property, sell the same, and do all acts in relation to such property as though she was single. Following *Farwell v. Cramer*, 38 Neb., 61.

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

G. M. Lambertson and *H. J. Whitmore*, for plaintiff in error.

C. M. Parker and *John P. Maule, contra.*

RYAN, C.

This action of replevin originated in the district court of Lancaster county, and was brought by the defendant in error against the plaintiff in error for the possession of certain horses, wagons, cattle, and farming implements. The right of possession upon which the above claim was resisted was, that plaintiff in error held his possession under and by virtue of a levy thereon made by plaintiff in error, as sheriff, of a certain execution issued on a judgment in favor of J. Fred Hutchins and James D. Parker against Leroy S. Varney and John P. Varney. Hannah J. Varney, the defendant in error, is the wife of John P. Varney, and the mother of Leroy S. Varney. The property replevied had formerly been owned by John P. Varney, by whom, on February 25, 1889, it had been conveyed by bill of sale to Hannah J. Varney. This bill of sale was filed for record in the office of the county clerk of Lancaster county on June 20, 1889. It was agreed on the trial, in open court, that on April 8, 1888, John P. Varney and Leroy S. Varney executed their promissory note for $300, with ten per cent per annum interest; that said note was not paid when due, and that suit was brought in the county court of Lancaster county on May 8, 1889, and judgment rendered June 20, 1889, for $336.60, with costs $36.30. In connection with and immediately following the above stipulation there was introduced in evidence the execution under which levy was made, indorsed with the return of the plaintiff in error, evidencing the fact of such levy. It is clear from the testimony that at the time the note above executed was given, the property replevied was owned by John P. Var-

ney, and continued to be his property until the execution of the aforesaid bill of sale. There was no evidence indicating any change in the management or control of the chattels described in the bill of sale after its execution. There was evidence, too, that just before the execution of the note, upon which judgment was rendered against John P. Varney, he stated to the parties contemplating taking the note, and who were afterwards therein named as payees, that he was the owner of the property which was after replevied, and that he was taken as one of the makers of said note in payment for the property sold. The defendant in error had no knowledge of these representations, however, so far as the evidence shows. Plaintiff in error examined John P. Varney as his own witness, from whose undisputed testimony it appears that the note, on which judgment was afterward rendered, was signed by John P. Varney as surety for his son, Leroy S. Varney, at least to the value of a team which was part of the consideration. What proportion of the note referred to was for the team sold Leroy S. Varney was not disclosed in evidence.

It was claimed by the defendant in error that in Cedar county, Iowa, her father and mother conveyed to her and her husband forty acres of land in June, 1871, which land in March, 1873, was sold for $1,400, of which defendant in error received $1,000, which she loaned to her husband. There were introduced in evidence deeds showing transfers as above recited. While the deed first above referred to was made to Hannah J. Varney and John P. Varney jointly, there was ample unquestioned evidence that the land was intended as a gift by the father of defendant in error to her. For the money intrusted to John P. Varney by his wife no evidence of indebtedness was given or asked, neither was any interest paid or required to be paid. To rebut these claims of the defendant in error no evidence was introduced, the sole reliance of plaintiff in error was on the inherent improbability of the evidence introduced

as to their existence and history. These questions of fact were submitted to the jury for determination; the verdict, sustained by amply sufficient evidence, was in favor of the defendant in error. In the course of the trial there was introduced in evidence a scrap of paper on which was a written assurance by the father of defendant in error of what he proposed as to making a conveyance to her of the land which afterward formed the subject-matter of the deed which he executed. Possibly, if it was sought to enforce a specific performance of the undertaking of which assurance of performance was given, the terms thereof would have been too indefinite, but, as indicating an intention afterward executed, though not in exact accordance with the terms of such writing, it was competent. The court properly permitted this memorandum to be introduced in evidence for consideration by the jury. A receipt was allowed in evidence which recited that a deed had been made by the father and mother of the defendant in error and intrusted to John P. Varney, by whom said receipt was executed. This receipt recited the sale of the land by John P. Varney to Luke Enlow in consideration of the sum of $1,400, of which sum $1,000 was to be held by John P. Varney for the use of Hannah J. Varney. It is true that the deed to Enlow was dated March 26, 1873, while the receipt last named bore date the 12th day of the same month. This discrepancy was one of the facts proper to be considered by the jury, and undoubtedly it was given due weight. This receipt was competent as showing that it was understood, long before any of the transactions out of which the levy involved herein took place, that Hannah J. Varney was entitled to receive of the sale of the land to Enlow the sum of $1,000, as in her oral testimony she claimed.

The criticisms of the instructions are very general. As to one, it is insisted that it assumed that the father gave the defendant in error forty acres of land, and because it

recognizes the receipt above mentioned as a valid and binding obligation for the payment of money. We do not understand how any misconstruction could have arisen as to this instruction. The evidence showed that the deed was made to defendant in error and her husband in consideration of the relationship of defendant in error to the grantors. As to the receipt, the instruction was, that if it was taken with the intention that it should be enforced, it would be legal and binding, and she could in good faith receive the property of her husband in payment thereof as against other creditors. No error is perceived in this instruction.

There is complaint made of the refusal of the court to give the ninth instruction asked by the plaintiff in error. This was in the following language: "You are instructed that if a married woman places her money or property in the hands of her husband for the purpose of enabling him to carry on his business, under such circumstances as to enable him to obtain credit on the faith of his being the owner of such money or property, and he does thereby obtain credit, she will not be permitted to assert her claim to the prejudice of other creditors of her husband; and if you believe from the evidence that the plaintiff did so advance to her husband any money, and that such money was used by the said John P. Varney in purchasing a farm and stock and implements, and that the said John P. Varney was enabled to obtain, and did obtain, credit by means of the farm and stock so purchased and on the faith of his ownership of the same, then the plaintiff will not be permitted to assert her claim as against the claims of such creditors of her husband; and if you find from all the evidence that Hutchins and Parker were such creditors, your verdict will be for the defendant." This instruction was properly refused, for by the rule therein laid down there is an inhibition upon the loan of money by a wife to her husband, since if such a loan is made for business uses

and the husband thereafter contracts other debts, the indebtedness to the wife is postponed to the priorities of such other creditors. In the case of *Goldsmith v. Fuller*, 30 Neb., 369, cited as supporting the above embodied proposition, this court said that it was probable that if the wife intrusted to her husband property, which to all appearances he absolutely controlled and disposed of as he saw fit, to all appearances as owner thereof, the wife could not assert her ownership of the property as against one who, deceived by appearances, had given credit to the husband on the faith of his apparent ownership. But the principle invoked by the instruction in question went much further than this, for by it the wife (if she loans money to her husband, with which he purchases property which he manages and controls as his own, thereby securing credit) is postponed, as to her loan, to the rights of such creditor of her husband. The instructions bearing upon this point which were given were correct statements of the rule made necessary by the intimate relations between the husband and wife, and none more exacting should have been laid down. These instructions were the fifth and seventh of those given. They were as follows:

"Fifth—The law in this state is, that transactions between the husband and wife, in regard to the transfer of property from one to the other, by reason of which creditors are prevented from collecting their just dues, should be scrutinized very closely, and it must appear clearly that such transfers were made in good faith and for value; so in this case, the dealings between the plaintiff and her husband herein, first as to the debt she claims to have been due her from him, and then the sale and transfer of the property in question by the husband to her as payment of such debt, should be closely and carefully examined into by you and fully established by the plaintiff before she can be entitled to receive the benefits therefrom."

"Seventh—And while the law is that all the transac-

tions between the husband and a wife, where the same affects in any way the creditors of either, should be closely scrutinized and fraud and unfair dealing prevented, still if, after carefully considering all the testimony in this case, the wife has established the *bona fides* of her claim, and that her husband was in fact indebted to her as claimed, and that the property was transferred to her fairly to pay a valid and existing obligation due and owing to her from her husband, and that this was done without any intention on her part of defrauding the creditors of her husband, but only a just endeavor to collect what was fairly her dues, then the transactions between the husband and wife should be as fully sustained as though made between strangers, the wife having the same right to secure her debt due from her husband, or take property in payment thereof, as any other creditor, the law, in case of dealings between the husband and wife, only requiring that the transactions should be genuine and made in good faith and without any intent to cheat or defraud the creditors, and the burden is upon the wife to show that the transactions herein were of such character."

The same rule stated in these instructions, as to the character of the proof required of transactions between husband and wife as against the creditors of either, was approved by this court in *Carson v. Stevens*, 40 Neb., 112. The other principles are sustained by *Farwell v. Cramer*, 38 Neb., 61. The judgment of the district court is

AFFIRMED.

WILLIAM B. GRIMES DRY GOODS COMPANY V. JENNIE SHAFFER.

FILED JUNE 6, 1894. No. 5246.

1. **Fraudulent Conveyances: EVIDENCE: QUESTION FOR JURY.** Where the existence of a fraudulent intent in making and receiving a transfer of a debtor's property is to be determined by evidence collateral to the writing, whereby was effected the alleged fraudulent transfer, such question is determinable alone by the jury. Following *Houck v. Heinzman*, 37 Neb., 463.

2. ——: ——: ——: REVIEW. Where a bill of sale of a stock of goods was made by a debtor in failing circumstances to one of his creditors, who took the bill of sale with the agreement that he was to receive the property, make sales from it, and with the proceeds reimburse himself for antecedent indebtedness due him, and for advances made to discharge levies upon the said stock, and after such reimbursements were complete to return to the debtor whatever should remain of such stock, *held*, that a verdict sustaining the contention that such transfer was fraudulent as against existing creditors of the maker of the bill of sale should not be disturbed.

3. **Depositions: WHEN ADMISSIBLE IN EVIDENCE.** Whether or not the deposition of a witness should be received in evidence must be determined from the facts in existence at the time of the trial, and if at that time it is shown that the witness does not reside in, or has removed from, the county wherein the trial is proceeding, his deposition, otherwise unobjectionable, is receivable in evidence.

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

Edgar C. Ellis, *C. C. Flansburg*, and *William B. Clark*, for plaintiff in error.

Morning & Keester and *W. S. Morlan*, *contra*.

RYAN, C.

On the 14th day of November, 1888, Frank Shaffer, a merchant at Alma, Nebraska, made a bill of sale of his

entire stock to the William B. Grimes Dry Goods Company, of Kansas City, Missouri, to which company he was indebted in the sum of about $1,500. After the execution of this bill of sale, possession was thereunder taken by the grantor of the stock of goods conveyed. Subsequently executions on judgments in favor of Jennie Shaffer against Frank Shaffer, to the aggregate amount of about $2,000, were levied on the aforesaid stock. These goods were replevied by the plaintiff in error from the sheriff, in whose stead Jennie Shaffer was substituted as defendant. She obtained a verdict establishing her interest to the amount of the judgments in her favor, upon which verdict a judgment was duly rendered. Edgar C. Ellis, the general attorney and general agent of the Grimes Dry Goods Company's credit department, had, a few days before the date of the above mentioned bill of sale, reached Alma in response to a telegram from Mr. Shaffer. Mr. Ellis was sworn on the trial of this cause, which was had in the district court of Harlan county. He testified as follows: "On arriving here I saw Mr. Shaffer at his hotel and learned from him that his stock of goods had been seized by the sheriff of this county under executions amounting to $3,600. I further learned from him that he had confessed judgment in favor of the plaintiff in this action for the sum of about $1,500, as I remember. Mr. Shaffer requested me to make an effort to save his goods from sale under execution. After being here a couple of days and looking the field over, I finally entered into an agreement and this bill of sale. I bought the stock of goods, paid off the executions for $3,600, and costs, and I receipted his claim to us. There was something over $200 worth of goods at the depot then not levied on. The total amount of executions levied on the property, and the judgment he had confessed in the county court, and the merchandise at the depot, amounted only to $5,286."

On his cross-examination Mr. Ellis testified that the

goods were shipped from Alma to Kansas City, and from thence sold to some party in Kansas; that after taking possession he retained it about twenty-four hours, and then turned the goods over into the possession of W. H. Cook, and that he (Mr. Ellis) hired Mr. Turner to assist Mr. Cook, after consulting with Mr. Shaffer as to the advisability of so doing. As to the conversation between himself and Mr. Shaffer relative to the execution of the bill of sale, Mr. Ellis, on cross-examination, testified as follows: "We had different conversations, extending through two days, about this matter. Mr. Shaffer expressed himself as very anxious that I should take the property. He told me that unquestionably at sheriff's sale the property would not pay off the executions; that the goods would not bring more than one-third or one-half of what they were worth under the sheriff's hammer. He said that he was very desirous that the company should have their pay; that since this trouble a year before our company had treated him very nicely, and he confessed judgment that we might be safe, and the only way to prevent the sale. I told him there was not enough in it to justify paying off the executions. I made a thorough investigation and finally told him I would take the property, and would draw on the company for the $3,600 to pay off the execution, if he would give a bill of sale. This he expressed himself very glad to do. He expressed himself to me as very confident that in a short time he would be able to get out of his embarrassment. He told me of a section of land to the south of here somewhere that was heavily mortgaged, but he thought he could dispose of his equity in it and get rid of his indebtedness and resume business. He also said during his conversation that there were more goods in the store than I thought there were. I told him when I took the bill of sale that if he did sell his land and got the money, I would be perfectly willing at any time to step out with my money." In answer to the question whether or not Mr. Shaffer told him

that he owed others, Mr. Ellis said he thought Mr. Shaffer so told him. Mr. Ellis in his evidence denied that there was any arrangement or agreement with Mr. Shaffer other than as shown by the writings introduced in evidence. The bill of sale, which Mr. Ellis identified and which was introduced in evidence, was of date November 14, 1888, signed by Frank Shaffer, and was made to the William B. Grimes Dry Goods Company for the consideration recited, of the sum of $5,286. By its terms it was an absolute conveyance of the stock of goods owned by Shaffer, and which was described with considerable minuteness. There was also introduced in evidence a writing in the following terms:

"ALMA, NEBRASKA, November 15, 1888.

"Having this day purchased of Frank Shaffer, of Alma, Nebraska, his stock of goods, paying him therefor $5,286, as follows: $3,560.48, by paying executions levied on said stock of merchandise by the Michigan Manufacturing Company and others; $1,423.14, by payment of judgments against him held by us; $249.39, by goods sold and delivered; balance, by payment of costs and expenses in taking said judgments and making this arrangement, which said Shaffer consents and agrees to pay:

"Now we agree if, at any time before the complete sale or transfer of said goods by us, said Frank Shaffer shall wish to purchase so much of same as shall be still owned by us, the price shall be determined as follows: We are to receive the said sum of $5,286, with interest thereon at the rate of ten per cent per annum, together with the expenses we shall have incurred in taking, holding, and selling so much thereof as we shall have at the time of said repurchase sold, including rent, insurance, fuel, lights, clerk-hire, traveling expenses, and all other similar reasonable expenses, and the proceeds from the portion of said merchandise which shall then have been sold by us shall count and apply as part of said repurchase money; pro-

vided, that this agreement is not to be construed as affecting the transfer this day made to us by said bill of sale in any [manner] way. We are to be free and unrestrained to handle the property as our own in such manner as will be in our judgment surest to realize to us a return of our investment, our title being absolute, carrying with it all rights as to the control of the property incident thereto.

"W. B. GRIMES DRY GOODS COMPANY,
"By EDGAR C. ELLIS,
"*Their Att'y.*"

In contradiction of the evidence of Mr. Ellis, Frank Shaffer testified as follows: "I think it was between the 12th and 14th of November, 1888, my stock was attached by the sheriff and the store shut up. I thought my stock would pay out if handled properly, but I did not know what to do, and Mr. Ellis came here—and in regard to telegraphing to him, I cannot say about that, but Mr. Beall came to me and asked me if I owed the William B. Grimes Dry Goods Company anything. I said, 'I did.' He said, 'will you confess judgment in favor of the company.' I said, 'yes,' and I did so, and shortly after that Mr. Ellis came up here and asked me what I was going to do. I said, 'I did not know what was best.' He wanted to know how many goods were in there, and I told him as nearly as I could. He was here two or three days, and finally I agreed he should have a bill of sale, provided he put up this money for the judgments against the stock, and I was to go in the store and look after matters and turn the money over to them and he was to give the goods back to me after their claim was paid, and also that my commission should be cut in two. Then he drew up this bill of sale, and also a letter that I did not stop to read much, but put it in my pocket, and we went over to the Valley Bank and the check was paid to the sheriff there and the sheriff turned over the keys to the store. I started to go back into the store and Mr. Ellis said I had better

fight shy for a day or two so as not to excite suspicion, and then he turned a cold shoulder on me. Mr. Ellis asked me about Mr. Turner. I told him he was as good a man as he could get. I went with Mr. Ellis and hired Mr. Turner; and the building in which the stock of goods were was owned by the Valley Bank, and I got them to cut the rent down ten dollars on the month, and Mr. Turner said he would work for forty dollars instead of fifty dollars, if it would help me any. The stock was to be turned back to me; that is, the balance after realizing what was coming to them." On his cross-examination Mr. Shaffer testified that in giving the bill of sale he had no intention, nor was there any talk, of defrauding Jennie Shaffer, who was his wife, nor any other of his creditors. On re-cross-examination Mr. Shaffer said that Mr. Ellis said that the reason he did not put into the agreement any writing of the provisions testified to was because other parties might get hold of it and attach the goods and they might be sold at sheriff's sale after all, but that Mr. Ellis said he would do as he had agreed.

S. B. Turner testified that he had in the year 1888 been employed in the store of Frank Shaffer at Alma, and that when Shaffer's stock was turned over to the W. B. Grimes Dry Goods Company it was worth $8,500. He further testified that Mr. Ellis told him when they got their account of about $5,200 out of the stock they were to return it to Mr. Shaffer; that this was said by Mr. Ellis when witness and others were in and going to work selling goods for the W. B. Grimes Dry Goods Company, and that Mr. Ellis told witness to cut about half the profit which had theretofore been realized; that the exact words of Mr. Ellis were to "cut the profit in two." This witness further said that when he was employed by Mr. Ellis the latter gentleman said it was to Mr. Shaffer's interest to have the expenses as low as possible.

The testimony of this last witness was given by a depo-

sition, which plaintiff in error attempted to exclude for two reasons: The first was, that the deposition was not filed until within a day before the trial began. As we understand the contention of counsel, it is, that though the deposition was received in the office of the clerk of the district court some time before the trial began, it was not in fact opened, but the filing mark of the clerk, upon the receipt of the package, was placed upon the unopened envelope containing the deposition, and that for this reason the deposition was not filed until the envelope was opened and the filing indorsed on the deposition itself. If counsel for plaintiff in error desired an inspection of this deposition he could have secured it at any time, without doubt, by asking the clerk to open the envelope. He is not shown to have done this, and this objection is without weight. The other ground of contention is, that the deposition was taken in Harlan county, which was not permissible, for it is insisted that Turner should have been subpœnaed instead of taking his deposition. In the testimony of Frank Shaffer it was made to appear that Mr. Turner, when his place of residence was last known, was a resident of Denver, and was absent from Harlan county. Section 372 of the Code of Civil Procedure gives the right to use the deposition of a party as evidence when he does not reside in the county wherein is pending the action or proceeding, etc. Clearly the status of the witness referred to in the statute is of the time when the trial is had. This objection to the deposition was, therefore, properly overruled.

There was presented by all the evidence introduced a material question of fact, which was whether or not the plaintiff in error obtained possession and control of the stock of goods of Frank Shaffer under and by virtue of a collateral arrangement whereby a secret trust was created in favor of Mr. Shaffer. Upon consideration of the evidence the jury found adversely to the plaintiff in error.

This settled the fact proposition involved. (*Houck v. Heinzman*, 37 Neb., 463.) The trial court adopted the views of the supreme court of North Dakota as enunciated in *Newell v. Wagness*, 44 N. W. Rep. [N. Dak.], 1014, and accordingly instructed the jury. The plaintiff in error concedes that the principles recognized in the case of *Newell v. Wagness, supra*, are excellent law, but contends that they are not applicable to the evidence in this case.

The first criticism, as we gather it, is, that there was no proof of the insolvency and inability of Mr. Shaffer to pay his debts, and that there was no evidence that the transfer could have a tendency to defraud other creditors who were trying to collect the debts due them from Shaffer. The evidence on this point was not so direct and circumstantial as to clearly demonstrate the existence of these mooted facts, and yet there was sufficient to justify the jury in believing they existed. There was in existence when this transfer was made some $1,500 of the claim of the defendant in error. Mr. Ellis testified that when he and Mr. Shaffer went up to see Mr. Flansburg, who, as an attorney, had some claims against Shaffer, and showed him the bill of sale and the written contract contemporaneously made, and satisfied Mr. Flansburg that this contained the entire agreement between the witness and Shaffer, that Mr. Flansburg relinquished the executions on the goods which he had previously caused to be issued against Shaffer. This was some time after the bill of sale and its accompanying memoranda had been made, and yet this release was so nearly contemporaneous with the making of said writings and was so directly influenced by them as to justify the assumption of the existence of such evidence as to render applicable the instructions given.

Again, complaint is made that the court assumed the possibility of the existence of evidence sufficient to justify consideration by the jury of the question whether or not a secret trust was created or existed between the defendant in

error and Mr. Shaffer. The testimony, hereinbefore set out quite at length, will have served no useful purpose whatever if it has not shown that there were sufficient grounds on which to base the conclusion that a secret trust was created in favor of Frank Shaffer by the transaction between him and Mr. Ellis, provided the jury believed the testimony of Mr. Shaffer and Mr. Turner in preference to that of Mr. Ellis. With the comparative weight of the evidence of these three witnesses we have no concern,—that was an inquiry alone determinable by the jury. The observations which we have made in respect of the instructions given comprehend and meet the contentions with respect to the refusal of one or more instructions asked. No error is found in the record and the judgment of the district court is

AFFIRMED.

UNION PACIFIC RAILWAY COMPANY v. WILLIAM A. G. COBB.

FILED JUNE 6, 1894. No. 5541.

1. **Review**: CONFLICTING EVIDENCE. As to the existence of negligence sufficient to justify or defeat a recovery, the evidence being conflicting, the special findings of the jury are conclusive.
2. **Trial**: INSTRUCTIONS: NEGLIGENCE: QUESTION FOR JURY. Whether there were such facts shown, as, in view of a conflict in the evidence, would sustain or defeat a recovery, was not within the province of the trial judge to instruct the jury. His whole duty was discharged as to the existence or absence of negligence when he instructed the jury what evidence might be taken into account in determining the preponderance of the evidence upon this branch of the case.
3. **Special Findings**: DISCRETION OF COURT: REVIEW. The requirement that special findings be made by the jury is a matter of discretion with the trial court, and the refusal to require

a special finding requested does not ordinarily afford a sufficient reason for the reversal of the judgment subsequently rendered. Following *Atchison, T. & S. F. R. Co. v. Lawler*, 40 Neb., 356.

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

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

Frick & Dolezal, contra.

RYAN, C.

The defendant in error recovered a judgment in the district court of Dodge county for the sum of $1,425 against the plaintiff in error. The petition upon which the judgment was recovered alleged that the defendant therein named was a corporation on the 20th day of January, 1885, owning and operating a railroad line through said county, and that while plaintiff was traveling with due care on and along Main street, a public highway in the city of Fremont, in said county, crossed by defendant's said railroad line, the defendant, by its agents, servants, and employes, carelessly, negligently, and without ringing the bell on its locomotive, and without sounding the whistle thereon, and without any warning of its approach to and on said highway, ran its locomotive and cars against plaintiff, to plaintiff's great injury. Following these averments were allegations describing the extent of plaintiff's injuries and the manner and degree in which they had caused him damage. The answer admitted the corporate existence of the defendant and its ownership of the line of railroad upon which plaintiff was injured, but denied the extent of the injury to be as alleged; denied that they were imputable to defendant's negligence, or any other cause than plaintiff's own negligence. These last averments were denied in plaintiff's reply.

There were submitted to the jury special interrogatories, in answer to which the jury found that the engineer of defendant's train would, but for too high a rate of speed, have had time to lower the speed or to stop the train so as to have prevented the injury after he became aware of plaintiff's intention to cross in front; and that, after discovering the plaintiff in a place of danger, the said engineer did not at once use all appliances on his engine for arresting his train for the purpose of stopping so as to prevent a collision and injury; and that plaintiff was not guilty of negligence in failing to look for a train; and that defendant was guilty of negligence which directly contributed to the injury. The jury also specially answered that the jury did not know whether plaintiff, after he first looked for the train, could have seen it in time to avoid injury had he again looked before he attempted to cross defendant's track, and that the jury did not know whether the appliances on defendant's locomotive were such as were in general use, nor whether they were in good order. The affirmative special findings were not in each instance sustained, as they should have been, by the evidence. There were supported a sufficient number of these, however, to establish specially as facts that the defendant's employes were negligent in failing to ring the bell and sound the whistle of the locomotive, and were running the train at an unusual rate of speed just before reaching the street crossing where plaintiff received his injuries. There was also evidence to justify the special finding that the injury was not imputable to negligence on plaintiff's part. The serious nature of the injury was shown, and we do not understand that it is contended that the recovery was disproportionately large. There were, therefore, sufficient facts found, practically conceded or established by the proofs, to entitle plaintiff to the judgment rendered in his favor.

There remains to be considered another matter urged in argument as to the facts, and this refers to alleged miscon-

duct on the part of attorneys for plaintiff in the district court. In the bill of exceptions descriptive of the commencement of the trial was contained the following language:

"Plaintiff offers, and stated in his opening to the jury, that plaintiff will prove on the trial that the witnesses of defendant, who will testify for defendant that the train that struck plaintiff was moving with proper speed and gave the signals required to be given of the approach of the train to the crossing, were employes of defendant, and that if said witnesses had reported that the striking of plaintiff was the result of any want of care on their part such witnesses would have lost their situations and been discharged by defendant, and that with such knowledge said witnesses reported said collision to have occurred from no want of care on their part.

"Counsel for defendant objects, that this is improper in the opening of plaintiff. Objection sustained. Plaintiff excepts."

Later in the trial the same matter was presented in the manner following: After asking engineer Livingston whether he made a report to the company of the accident, and receiving an answer in the affirmative, plaintiff's counsel asked, "In that report did you, or did you not, report that you had performed your duty properly?" and upon the witness answering "I did," counsel then asked him, "If you had reported that you were negligent, would you, or would you not, have been discharged?" Upon this question being overruled, counsel again questioned the witness thus:

Q. You are now in the employ of the Union Pacific Railway Company?

A. Yes.

Q. If you were to state now that this injury sued upon here occurred by the negligence of yourself or any one, would you or would you not be deprived of your position?

Objection being renewed, was sustained.

Again, upon cross-examination of Mr. Fitch, the fireman, the evidence was as follows:

Q. Did you ever make, or join in making, any report concerning this occurrence to the company when it happened?

A. I did. If I recollect I signed a report.

Q. Now Mr. Fitch, if you had reported or signed a report that this injury was caused by your negligence would you not have been discharged from your situation?

Defendant objects, as immaterial and irrelevant, and not within the scope of cross-examination. Objection sustained.

Q. Is it, or is it not, a fact that your omission, should you report that you did not ring the bell, that you would be subject to be discharged and lose your situation?

Objection renewed upon the same grounds, and objection sustained.

In the course of the re-examination of Mr. Livingston, the engineer, the following evidence was given and proceeding had:

Q. You had anticipated that there would be trouble on this thing?

A. No, I did not know there would be. I knew the company required me to make an accurate report of the accident just as it occurred.

Q. Now, if the engineer running the train when the accident happened in this case had stated in his report that he had omitted or forgotten to sound the station whistle on an incoming train, would he, or would he not, under the rules of the company, have been discharged or lost his position?

Defendant objects, as immaterial, irrelevant, and not within the scope of cross-examination. Objection sustained. Exception taken.

It is urged by counsel for plaintiff in error that the

above insistence upon this point was for effect upon the minds of the jury and evinced a marked disrespect for the ruling of the court and could have subserved no useful purpose in the trial. In these matters much must be left to the discretion of the trial judge. Counsel might be criticised very severely for the course above taken if impelled by the motive ascribed. Whether disrespect was intended, and whether the interrogatories were propounded with the evil design charged by counsel for plaintiff in error, depends very largely on the circumstances surrounding the acts criticised, and the motive. Of these the trial court had better opportunities to judge than we can possibly have, and as there was found no offense by the trial court, we should be slow to indulge in what might be a radical misconstruction of both the motive and results. If the verdict and judgment had been in favor of the defendant, whereby the present defendant in error would have been compelled to proceed as plaintiff in error in this court, the record made might not have been too full to present for review the question whether on cross-examination the engineer and fireman should not have been compellable to answer the questions propounded to each of them. It is not intended to intimate an opinion either way as to the existence of such necessity. It is sufficient for our purpose to say that the trial judge, having taken no umbrage at the method whereby exceptions were saved, the judgment by which his actions were governed will not be reviewed. There was no abuse of discretion in the refusal by the court to submit other interrogatories than those above referred to for special findings thereon by the jury. The alleged error in this respect does not, therefore, justify interference on the part of this court. (*Atchison, T. & S. F. R. Co. v. Lawler*, 40 Neb., 356; *Floaten v. Ferrell*, 24 Neb., 347.)

There is in the brief of plaintiff in error a short discussion of alleged errors on account of the giving of eight

instructions, each designated by number. The criticisms in regard to these instructions are, first, that there was no evidence showing the want of ordinary care, but that the evidence was to the contrary. This has heretofore received consideration. Second, it is insisted that there was no foundation for the assumption in the instructions complained of that the bell was not rung, and that the whistle sounded. As already indicated, there was evidence from which the jury might find the facts to exist, as in the instructions it was assumed their existence might be found. The third criticism of the eight instructions singled out is, that the fact that the plaintiff may have testified that he did not hear the bell or whistle, furnished no evidence to the jury, as nothing shows that the failure was the proximate cause of the injury. The evidence of the defendant in error, in addition to the fact that he failed to hear the sound of the bell or whistle, was that if he had heard either of these warnings in sufficient time to allow of it he would have stepped from the track before the engine reached and struck him. From the well ascertained results of the failure to avoid colliding with a locomotive moving at the rate of fifteen miles an hour the jury very properly believed this statement as to defendant in error's probable conduct under the condition of known impending danger just stated. The court left with the jury the question of the existence of negligence contributing to the accident, as one of fact. Plaintiff in error requested instructions defining what would constitute contributory negligence, *per se*, and by what evidence the alleged negligence on the part of the employes of plaintiff in error would be disproved. It need only be said that the theory of the trial court was in accord with the rule laid down by this court in *Atchison & N. R. Co. v. Bailey*, 11 Neb., 332; *Johnson v. Missouri P. R. Co.*, 18 Neb., 690; *Omaha, N. & B. H. R. Co. v. O'Donnell*, 22 Neb., 476; *Stevens v. Howe*, 28 Neb., 547; *Missouri P. R. Co. v. Baier*, 37 Neb., 236;

Chicago, B. & Q. R. Co. v. Grablin, 38 Neb., 90. There is no error apparent in the record, and the judgment of the district court is

AFFIRMED.

POST, J., not sitting.

CHARLES G. LOW V. REES PRINTING COMPANY.

FILED JUNE 6, 1894. No. 5390.

1. **Constitutional Law: EIGHT HOUR LAW: CLASS LEGISLATION: RIGHT TO CONTRACT.** Sections 1 and 3 of chapter 54 of the Session Laws of 1891 having provided, in effect, that for all classes of mechanics, servants, and laborers, excepting those engaged in farm or domestic labor, a day's work should not exceed eight hours, and that for working any employe over the prescribed time the employer should pay extra compensation in increasing geometrical progression for the excess over eight hours (the rate of payment for the eighth hour being taken as the basis upon which to reckon such progression), *held*, that these provisions are unconstitutional, (1) because the discrimination against farm and domestic laborers is special legislation; (2) because by the act in question the constitutional right of parties to contract with reference to compensation for services is denied.
2. ———: ———. It being apparent from an inspection of the entire act in question that sections 1 and 3 thereof formed an inducement to its passage, no part of said act can be sustained as constitutional. Following *Trumble v. Trumble*, 37 Neb., 340.

ERROR from the district court of Douglas county. Tried below before WAKELEY, DOANE, and DAVIS, JJ.

The opinion contains a statement of the case.

Mahoney, Minahan & Smyth, for plaintiff in error:

Chapter 54, Laws of 1891, an act to regulate the hours of labor of mechanics, servants, and laborers, does not of-

fend against the last sentence of section 15, article 3, of the constitution, which is as follows: "In all cases where a general law can be made applicable, no special law shall be enacted." (*Hingle v. State*, 24 Ind., 34; *Heridia v. Ayres*, 12 Pick. [Mass.], 344; *McAunick v. Mississippi & M. R. Co.*, 20 Ia., 338; *State v. Graham*, 16 Neb., 76; Cooley, Constitutional Limitations, 129; *Haskell v. City of Burlington*, 30 Ia., 237; *State of Louisiana v. Schlemmer*, 10 L. R. A. [La.], 135; *Barbier v. Connolly*, 113 U. S., 27; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S., 26; *Hancock v. Yaden*, 6 L. R. A. [Ind.], 576; *Vermont Loan & Trust Co. v. Whithed*, 49 N. W. Rep. [N. Dak.], 318; *Smith v. Judge of Twelfth District*, 17 Cal., 547.)

Suppose the law is a special one. The constitution does not prohibit, under all circumstances, the enacting of special laws. It prohibits it only where a general law can be made applicable. Could a general law have been made applicable? If this be a special law, the legislature by passing it has answered the question in the negative. Is that answer reviewable by this court, or is it final? The authorities say it is final. (*City of Wichita v. Burleigh*, 36 Kan., 34; *Gentile v. State*, 29 Ind., 412; *State v. Hitchcock*, 1 Kan., 184; *Beach v. Leahy*, 11 Kan., 27; *Marks v. Trustees of Purdue University*, 37 Ind., 155; *State v. Tucker*, 46 Ind., 355; *State v. County Court*, 50 Mo., 317; *State v. County Court*, 51 Mo., 82; *Richmond v. Board of Supervisors*, 42 N. W. Rep. [Ia.], 422.)

The act is not violative of that provision of the constitution which declares that no person shall be deprived of his liberty or property without due process of law. (Cooley, Constitutional Law, 430; *Murray v. Hoboken Land & Improvement Co.*, 18 How. [U. S.], 277; *In re Brosnahan*, 18 Fed. Rep., 66; *Rowan v. State*, 30 Wis., 146; *Ex parte Ah Fook*, 49 Cal., 406; *Weimer v. Bunbury*, 30 Mich., 210; *Brown v. Board of Levee Commissioners*, 50 Miss., 479; *Wurts v. Hoagland*, 114 U. S., 606; *Kennard v. Morgan*,

92 U. S., 480; *McMillen v. Anderson*, 95 U. S., 37; *Davidson v. New Orleans*, 96 U. S., 105; *Dent v. State of West Virginia*, 28 Cent. L. J. [W. Va.], 264; *Hawthorn v. People*, 109 Ill., 302; *Kansas P. R. Co. v. Mower*, 16 Kan., 576; Tiedeman, Limitations of Police Power, sec. 178; *Powell v. Commonwealth*, 114 Pa St., 265, 127 U. S., 678; *State v. Moore*, 10 S. E. Rep. [N. Car.], 144; *Alexander v. Archer*, 24 Pac. Rep. [Nev.], 374; *Mohle v. Tschirch*, 63 Cal., 382; *Mugler v. Kansas*, 123 U. S., 623; *Singer v. Maryland*, 8 L. R. A. [Md.], 551; *Territory of Washington v. Ah Lim*, 9 L. R. A. [Wash.], 395; *State v. Addington*, 77 Mo., 110; *Butler v. Chambers*, 36 Minn., 69; *State v. Marshall*, 64 N. H., 549; *Messenger v. State*, 25 Neb., 676; *Donnell v. State*, 48 Miss., 661; *Munn v. Illinois*, 94 U. S., 113; *Nash v. Page*, 80 Ky., 539; *Munn v. People*, 69 Ill., 80; *Hockett v. State*, 105 Ind., 250; *Davis v. State*, 68 Ala., 58; *People v. Budd*, 117 N. Y., 1.)

The law is not unconstitutional as limiting the power of the citizen to contract concerning a certain subject. (*Ogborn v. Hoffman*, 52 Ind., 439; *Smith v. Tyler*, 51 Ind., 512; *Markel v. Spitler*, 28 Ind., 488; *Maloney v. Newton*, 85 Ind., 565; *Kneettle v. Newcomb*, 22 N. Y., 249; *Curtis v. O'Brien*, 20 Ia., 376; *Moxley v. Ragan*, 10 Bush [Ky.], 156; *McLane v. Elmer*, 4 Ind., 239; *Develin v. Wood*, 2 Ind., 102; *Bauer v. Samson Lodge*, 102 Ind., 262; *Dugan v. Thomas*, 79 Me., 221; *German-American Ins. Co. v. Etherton*, 25 Neb., 508; *Home Ins. Co. v. Morse*, 20 Wall. [U. S.], 455; *Doyle v. Continental Ins. Co.*, 94 U. S., 535; *Taylor v. Saurman*, 110 Pa. St., 3; *Herdic v. Roessler*, 109 N. Y., 127; *New v. Walker*, 108 Ind., 365; *United States v. Fisher*, 2 Cranch [U. S.], 358; *Warren v. Sohn*, 112 Ind., 213; *Churchman v. Martin*, 54 Ind., 380; *Long v. Straus*, 107 Ind., 94; *Hudson Canal Co. v. Pennsylvania Coal Co.*, 75 U. S., 276.)

Ambrose & Duffie, contra, insisting that the statute should

be held to be in conflict with constitutional principles as an attempt to legislate in favor of a particular class, and to abridge the guaranteed rights of citizens, cited: *Deppe v. Chicago, R. I. & P. R. Co.*, 36 Ia., 52; *Foxworthy v. City of Hastings*, 23 Neb., 772; *Wally v. Kennedy*, 2 Yerg. [Tenn.], 554; *Durham v. Lewiston*, 4 Greenl. [Me.], 140; *Lewis v. Webb*, 3 Greenl. [Me.], 326; *Holden v. James*, 11 Mass., 396; *Picquet, Appellant*, 5 Pick. [Mass.], 64; *Budd v. State*, 3 Humph. [Tenn.], 483; *Godcharles v. Wigeman*, 113 Pa. St., 431; *Durkee v. City of Janesville*, 28 Wis., 464; *Calder v. Bull*, 3 Dal. [U. S.], 387*; *Fletcher v. Peck*, 6 Cranch [U. S.], 143; *Bank of the State v. Cooper*, 2 Yerg. [Tenn.], 599; *Atchison & N. R. Co. v. Baty*, 6 Neb., 37; *People v. Gillson*, 109 N. Y., 389; *Butchers' Union Slaughter House & Live Stock Landing Co. v. Crescent City Live Stock Landing & Slaughter House Co.*, 111 U. S., 747; *In re Jacobs*, 98 N. Y., 98; *People v. Millett*, 117 Ill., 291; *State v. Goodwill*, 6 L. R. A. [W. Va.], 621, and cases cited in notes.

RYAN, C.

In the district court of Douglas county plaintiff in error filed his petition, wherein were stated three causes of action. Of these the third cannot be reviewed, for the reason that there was no motion for a new trial filed or passed upon in respect to it after a trial upon evidence adduced. The stipulation waiving the motion for a new trial and consenting that the action in this court should be treated as if such motion had actually been filed and ruled upon in the district court ignores the consideration that is due to the trial court, where the motion in question should have been duly passed upon, that whatever errors were presented thereby might be corrected. The consideration of this case, for the reason just indicated, will, therefore, be confined to the first and second causes of action stated in the petition.

After alleging that the defendant was a corporation doing business in the city of Omaha, the averments of plaintiff in his petition were as follows: "Further complaining, plaintiff states for his first cause of action that on the 10th day of August, 1891, he contracted with the defendant to work for it as a printer for thirty cents per hour; that pursuant to said contract he entered the employment of said defendant, and that on said 10th day of August said defendant worked this plaintiff eleven hours. Said defendant thereby became indebted to this plaintiff in the sum of $6.60; that is to say, $2.40 for the first eight hours worked, 60 cents for the ninth hour worked, $1.20 for the tenth hour worked, and $2.40 for the eleventh hour worked. Of said sum thus due, defendant has paid plaintiff $3, and no more.

"For a second cause of action plaintiff states that on the 8th day of August, 1891, he, at the request of the defendant, entered into a contract with the said defendant, which contract was in the words and figures following, viz.:

"'To all employes of Rees Printing Co.: From and including August 1, 1891, all employes of this company will be employed and paid by the hour for the number of hours they work, at the same rate of wages now paid, and not by the day. Any employe who is willing to work the same number of hours as heretofore at the rate of wages heretofore paid him will report in writing at once to the undersigned.

"'July 30th, 1891. REES PRINTING CO.'

"'Receipt of the above rule and regulation is hereby acknowledged. I am willing to continue in the service of the company subject to the same.

"'August 8, 1891. CHARLES G. LOW.'"

"That the rate of compensation or wages agreed upon between the plaintiff and defendant and paid to the plaintiff by said defendant prior to entering into said contract was $3 per day for each day worked by plaintiff, which

day consisted of ten hours; that on said 8th day of August, 1891, the defendant worked this plaintiff ten hours, and thereby became indebted to him in the sum of $4.20; that is to say, $2.40 for the first eight hours, 60 cents for the ninth hour, and $1.20 for the tenth hour worked. Of said sum thus due to the plaintiff defendant has paid $3, and no more."

A demurrer was filed to the above two causes of action on the grounds following:

"1. The said petition does not state facts constituting a cause of action against the defendant, nor does any of the counts thereof state facts constituting a cause of action in plaintiff's favor against the defendant.

"2. Chapter 54 of the acts of the twenty-second session of the legislature of Nebraska, under the provisions of which this action was brought, and by virtue of which plaintiff must recover, if at all, is unconstitutional and void, and in contravention of the constitution of Nebraska and of the United States.

"(*a.*) It seeks to take away and limit the right of the citizen to enter into contracts relating to legal and lawful business.

"(*b.*) It seeks to abridge the rights of the people in disposing of their lawful property and the purchase of the same.

"(*c.*) It is special and class legislation, and an attempt on the part of the legislature to grant special immunities and privileges upon certain employes and employers.

"(*d.*) The statute, while intending to be general in its operation, excepts certain of our citizens from its provisions.

"(*e.*) It seeks to abridge the privileges of certain of our citizens and deprive them of their property without due process of law, and denies to certain of our citizens equal protection of the law, and is, therefore, in conflict with sections 1 and 2 of article 3 of the constitution of Ne-

braska, and section 1 of the fourteenth amendment of the constitution of the United States.

"3. Said act is broader than the title, in so far as it provides for a penalty for violation thereof, and seeks to fix the compensation of the employe, and to that extent the provisions of the act are in conflict with section 11, article 3, of the constitution of this state.

"4. Said act is in conflict with section 5, article 8, of the constitution of Nebraska, in that it seeks to give to the employe a part of the penalty provided for its violation."

This demurrer was argued in the aforesaid district court, Judges Wakeley, Doane, and Davis presiding, by whom, upon due consideration, it was sustained as to said first and second causes of action. Thereupon, the plaintiff electing to stand on said two causes of action and refusing to further plead, judgment was thereon rendered in favor of the defendant. By petition in error plaintiff has duly presented for review by this court the same questions passed on in the district court.

Chapter 54, specially described in, and against which the demurrer was directed, is in the following language:

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

"Section 1. That eight hours shall constitute a legal day's work for all classes of mechanics, servants, and laborers throughout the state of Nebraska, excepting those engaged in farm and domestic labor.

"Sec. 2. Any officer or officers, agent or agents of the state of Nebraska, or any municipality therein, who shall openly violate or otherwise evade the provisions of this act shall be deemed guilty of malfeasance in office, and be suspended or removed accordingly by the governor or head of the department to which such officer is attached.

"Sec. 3. Any employer or corporation working their employes over the time specified in this act shall pay as extra compensation double the amount per hour as paid for previous hour.

"Sec. 4. Any party or parties contracting with the state of Nebraska, or any such corporation or private employer, who shall fail to comply with or secretly evade the provisions hereof by exacting or requiring more hours of labor for the compensation agreed to be paid per day than is herein fixed or provided for shall, on conviction thereof, be deemed guilty of a misdemeanor and be punished by a fine of not less than one hundred ($100) dollars nor more than one thousand ($1,000) dollars."

The constitutional provisions with which it is claimed the above act is in conflict are, first, the closing sentence of section 15, article 3, that "in all other cases where a general law can be made applicable no special law shall be enacted;" second, the third section of the bill of rights, that "no person shall be deprived of life, liberty or property without due process of law." It is also urged against the act that it is void, as an attempt by the legislature to prevent persons legally competent to enter into contracts from making their own contracts. In the present controversy there is necessarily involved the validity of the entire act, for although only the first and third sections are directly attacked, yet it is apparent, from an inspection of the act as a whole, that these two sections formed an inducement to its passage. The act must therefore stand or fall as an entirety. (*Trumble v. Trumble*, 37 Neb., 340.)

There seems to have been an oversight as to the first cause of action, for the averments therein were, in substance, that there was a contract of employment at the rate of thirty cents per hour; that the plaintiff was by the defendant worked eleven hours, and had received payment to the amount of but $3; that is, for ten hours' work at the rate stipulated. On the face of the petition there was, therefore, unpaid thirty cents upon the first cause of action. This has not been insisted upon in argument, however, and will therefore receive no further attention.

The second cause of action avers that there was a written

agreement between the parties that after August 1, 1891, employment should be by the hour at the rate of $3 for ten hours' work; that is to say, plaintiff was to receive thirty cents per hour, but he agreed to work each day ten hours It is alleged that on August 8, 1891, plaintiff worked ten hours and had been paid therefor $3. According to the terms of the agreement between the parties, the plaintiff, by the payment of $3, had received all that was his due. By virtue of the provisions of section 3 of the act under consideration it is insisted, however, that for the ninth hour plaintiff is still entitled to receive thirty cents, and for the tenth hour he is yet entitled to ninety cents. This clearly presents the question whether a contract fairly entered into, and in compliance with which both parties have acted to the full discharge of their obligations thereunder, must be deemed modified by the existing provisions of the statute, irrespective of the intention of the parties as expressed in their contract.

Until a comparatively recent period it would have been quite difficult to find adjudications pertinent to the legal propositions involved. For some reason, not necessary to consider, there has in modern times arisen a sentiment favorable to paternalism in matters of legislation. The outgrowth of this sentiment has been legislation for the regulation of the media of payment; the manner in which products shall be measured or weighed when compensation depends upon measure or weight; the hours of labor, and other kindred subjects. In each instance the statutory provision is necessarily a restriction of the right to regulate relations and duties by contract. To the fact that these attempts have recently been so frequently made, we are indebted for a number of well considered adjudications bearing upon the questions now presented for our determination. While there has not been entire unanimity, the decided weight as well as the number of authorities are coincident with those from which quotations will hereafter be

made. That these quotations are freely made requires no other apology than that the cases quoted from are so ably and carefully considered that to them we should be hopeless to make any additions or improvement by the most careful research of which we are capable. The three several objections to the act under consideration will be taken up in the order of their statement, and considered rather in the light of authority than in that of original reasoning or research.

1. The first section of the statute under consideration provided what number of hours should constitute a legal day's work for all classes of laborers except those engaged in farm or domestic labor. The argument made in favor of the necessity that each day the excess over eight hours should be devoted to rest, recreation, and mental improvement loses much of its force when these very desirable benefits are by the statute itself restricted to certain defined classes of laborers, no one of which, independently of the statute, devotes so many hours to labor as do the classes denied the protection of the statute. Legislation of this kind is always fraught with danger, hence arose the prohibition of special legislation when avoidable which is found in our constitution. In *State v. Loomis*, 22 S. W. Rep. [Mo.], 350, we find an opinion of the supreme court of Missouri, one judge alone dissenting, of which the syllabus is as follows: "Revised Statutes, 1889, sections 7058–7060, making it unlawful for any corporation, person, or firm engaged in manufacturing or mining to issue for the payment of wages any order, check, or other token of indebtedness, payable otherwise than in lawful money, unless the same is negotiable and redeemable at its face value in cash or in goods at the option of the holder at the store or other place of business of the corporation, person, or firm, without placing similar restrictions on others employing labor, is unconstitutional as class legislation." In the majority opinion which was filed March 25, 1893, class

legislation is ably discussed in the following language: "There is no doubt but many of our legislative enactments operate upon classes of individuals only, and they are not invalid because they so operate, so long as the classification is reasonable and not arbitrary. Thus, it is perfectly competent to legislate concerning married women, minors, insane persons, bankers, common carriers, and the like; and the power of the legislature to prescribe police regulations applicable to localities and classes is very great, because such laws are designed to protect property and the safety, health, and morals of the citizen; but classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations. Thus, the legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon stature or color of the hair. Such a classification for such a purpose would be arbitrary and a piece of legislative despotism, and, therefore, not the law of the land. When speaking upon this subject, Judge Cooley says: 'The doubt might also arise whether a regulation made for any one class of citizens entirely arbitrary in its character and restricting their rights and privileges or legal capacity in a manner before unknown to the law could be sustained notwithstanding its generality. Distinctions in these respects must rest upon some reason upon which they can be defended, like the want of capacity in infants and insane persons; and if the legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to build such houses as others

were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict. To forbid an individual or a class the right to the acquisition and enjoyment of property in such manner as should be permitted to the community at large, would be to deprive them of liberty in particulars of primary importance to their pursuit of happiness; and those who shall claim a right to do so ought to be able to show specific authority therefor instead of calling upon others to show how and where the authority is negatived.' (Cooley, Const. Lim. [6th ed.], 484.) There can be no doubt that the legislature may regulate the business of mining and manufacturing so as to secure the health and safety of the employes, but that is not the scope of the two sections of the statute now in question. They single out those persons who are engaged in carrying on the pursuits of mining and manufacturing and say to such persons: 'You cannot contract for labor payable alone in goods, wares, and merchandise. The farmer, the merchant, the builder, and the numerous contractors employing thousands of men, may make such contracts, but you cannot.' They say to the mining and manufacturing employes: 'Though of full age and competent to contract, still you shall not have the power to sell your labor for meat and clothing alone as others may.' It will not do to say these sections simply regulate payment of wages, for that is not their purpose. They undertake to deny to the persons engaged in the two designated pursuits the right to make and enforce the most ordinary, every-day contracts,—a right accorded to all other persons. This denial of the right to contract is based upon a classification which is purely arbitrary, because the ground of the classification has no relation whatever to the natural capacity of persons to contract."

After the above expression of its views the supreme court of Missouri reviewed the authorities bearing upon the question discussed. This review we shall quote, because therein is contained a condensed statement of the purport of numerous decisions which tend to enlighten the subject under discussion. The language in which this review was made is as follows:

"The supreme judicial court of Massachusetts had under consideration in *Commonwealth v. Perry*, 28 N. E. Rep., 1126, a statute which provides that 'no employer shall impose a fine upon, or withhold the wages or any part of the wages of, an employe engaged at weaving, for imperfections that may arise during the process of weaving.' It was held that if the act went no further than to forbid the imposition of a fine for imperfect work it might be sustained, but that the attempt to make inferior work answer a contract for good work presented a different question; that the right to acquire, possess, and protect property includes the right to make reasonable contracts which shall be under the protection of the law. Says the court: 'If it [the statute] be held to forbid the making of such contracts, and to permit the hiring of weavers only upon terms that prompt payment shall be made of the price for good work, however badly their work may be done, and that the remedy of the employer for their derelictions shall be only by suits against them for damages, it is an interference with the right to make reasonable and proper contracts in conducting a legitimate business which the constitution guaranties to every one when it declares that he has a natural, inalienable right of acquiring, possessing, and protecting property.'

"*Godcharles v. Wigeman*, 113 Pa. St., 431, 6 Atl. Rep., 354, was an action brought by Wigeman to recover wages as a puddler. Plea of payment, etc. During the time of his employment the plaintiff asked for and received orders from defendants on different parties for coal and other articles, which orders were honored by the parties on whom

drawn, and the defendants paid them. It seems an act of the legislature made all orders given by employers engaged in the business of manufacturing, to their workmen, payable in goods or anything but money, void. Speaking of these sections of the act the court said: 'They are utterly unconstitutional and void, inasmuch as by them an attempt has been made by the legislature to do what in this country cannot be done; that is, prevent persons who are *sui juris* from making their own contracts. The act is an infringement alike of the right of the employer and the employe. He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal, and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges, and consequently vicious and void.'

"In *State v. Goodwill*, 33 W. Va., 179, 10 S. E. Rep., 285, a statute of that state prohibited persons engaged in mining and manufacturing from issuing orders in payment for labor except as such should be made payable in money. It made a violation of its provisions a misdemeanor. The constitution of that state declares that all men have certain inherent rights; that is to say, 'the enjoyment of life and liberty, with the means of acquiring and possessing property and of pursuing and obtaining happiness and safety.' The statute was held unconstitutional after a full consideration. Says the court: 'The right to use, buy, and sell property, and contract in respect thereto, including contracts for labor, which is, as we have seen, property, is protected by the constitution.' The scope of the opinion is well summarized in the head-note in these words: 'It is not competent for the legislature under the constitution to single out owners and operators of mines and manufacturers of every kind and provide that they shall bear the burdens not imposed on other owners of property or employers of labor and prohibit them from making contracts which it is competent for other owners of property or employers

of labor to make.' And this ruling was followed and approved in *State v. Fire Creek Coal & Coke Co.*, 33 W. Va., 188, 10 S. E. Rep., 288.

"The statute brought in question in *Millett v. People*, 117 Ill., 294, required all coal produced in the state to be weighed on scales to be furnished by the mine owners, and subjected the mine owner to fine or imprisonment for a failure to comply with its provisions. By another section it was provided 'that all contracts for the mining of coal in which the weighing of coal as provided for in this act shall be dispensed with, shall be null and void.' It was held that the mine owners could not be compelled to make their contracts for mining coal so as to be regulated by weight; and that they could not be compelled to keep and use scales for such purposes, save when they saw fit to make contracts for mining on the basis of weight. The law was considered repugnant to the constitutional provision that 'no person shall be deprived of life, liberty, or property without due process of law;' that to single out coal-mine owners and prohibit them from making contracts which it was competent for other employers of labor to make was not due process of law. And for like reasons the same court held an act void which denied to persons and corporations engaged in mining and manufacturing the right to keep or be interested in a truck store for furnishing supplies, etc. (*Frorer v. People*, 31 N. E. Rep. [Ill.], 395.)"

The opinion above quoted from reversed the judgment of the second division of the same court reported in 20 S. W. Rep., 332, by which division it had been referred to the full bench for determination.

In *State v. Sheriff of Ramsey County* the supreme court of Minnesota filed an opinion on January 19, 1892, which is reported in 51 N. W. Rep., 112, in which was used this language: "In *Nichols v. Walter, supra*, 37 Minn., 264, it was held that the law was general and uniform in its operation which operates equally upon all the subjects

within the class for which the rule is adopted, but that the legislature cannot adopt an arbitrary classification, though it be made to operate equally upon each subject within the class; and the classification must be based on some reason suggested by such a difference in the situation and circumstances of the subjects placed in different classes as to disclose the necessity or propriety of different legislation in respect to them. In *State v. Donaldson*, 41 Minn., 74, a distinction or classification of dealers in medicines, based on the location of their places of business in respect to distance from drug stores, was held reasonable and not a mere arbitrary distinction. In *Johnson v. St. Paul & D. R. Co.*, 43 Minn., 224, this court in dealing with chapter 13, Laws 1887, defining the liability of railway companies to their employes, said, in substance, that not only must the statute treat alike, under the same conditions, all who are brought within it, but in its classifications it must bring within it all who are under the same conditions. 'Such law must embrace all and exclude none whose condition and wants render such legislation necessary or appropriate to them as a class.' (*Randolph v. Wood*, 49 N. J. Law, 88.) * * * No arbitrary distinction between different kinds or classes of business can be sustained, the conditions being otherwise similar. The statute is leveled against nuisance occasioned by dense smoke, and it can make no practical difference in what business the owners or occupants of the buildings in which such smoke is produced are engaged, or whether the heat evolved from the combustion of the fuel producing such smoke is applied to the generation of steam or other useful purposes; or, further, whether steam power is used in manufacturing or is applied to other uses, as a grain elevator or hoisting apparatus in a warehouse. We are obliged to hold that the distinction or classification attempted to be made is untenable."

There is perceived no reason why a resort to special legislation was necessary in respect to the subject-matter

of the act with which we are now dealing. If we are correct in this assumption, the language quoted is specially applicable to the provisions of the statute by which its benefits are withheld from domestic and farm laborers. These views are enunciated with somewhat more of confidence because they are in line with the reasoning of this court in *Atchison & N. R. Co. v. Baty*, 6 Neb., 37.

2. The third section of article 1 of the constitution of this state provides that "no person shall be deprived of life, liberty, or property without due process of law." What is implied by the term "due process of law" is a question which has received discussion by this court. In *Atchison & N. R. Co. v. Baty, supra*, it was held, in the language of the first paragraph of the syllabus, that "legislative authority cannot reach the life, liberty, and property of the individual, except when he is convicted of crime, or when the sacrifice of his property is demanded by a just regard for the public welfare." In the discussion of the principles involved in the case, from which the above quotation of the first paragraph of the syllabus was taken, GANTT, J., delivering the opinion of this court, said: "The terms 'due process of law' and 'the law of the land' —one or the other of which is found in all constitutions of the states—are said to mean the same thing; and it is quite clear that they are indifferently used in constitutions for the same purpose. They are said to refer to a pre-existing rule of conduct, and designed to exclude arbitrary power from every branch of the government. (*State v. Doherty*, 60 Me., 509; *Norman v. Heist*, 5 W. & S. [Pa.], 171; *State v. Simons*, 2 Spears [S. Car.], 767.) Hence these terms do not mean merely a legislative enactment, for, 'if they did, every restriction upon the legislative authority would be at once abrogated. For what more can a citizen suffer than to be taken, imprisoned, disseized of his freehold, liberties, and privileges; be outlawed, exiled, and destroyed; and be deprived of his property, his liberty, and

his life, without crime. Yet all this he may suffer, if an act of the assembly, simply denouncing these penalties upon particular persons, or a particular class of persons, be in itself the law of the land within the sense of the constitution.' (*Hoke v. Henderson*, 4 Dev. [N. Car.], 1.) Webster interprets these terms to mean 'that every citizen shall hold life, liberty, property, and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered as the law of the land;' and, he says, 'if this were so, acts directly transferring one man's estate to another, legislative judgments, decrees, and forfeitures in every possible form would be the law of the land. There would be no general, permanent law for the courts to administer or even to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees, and not to declare the law, or administer the justice of the country.' (5 Webster's Works, 487; *State v. Doherty*, 60 Me., 509; *Holden v. James*, 11 Mass., 404; *Lane v. Dorman*, 2 Scam. [Ill.], 240–1; *Commonwealth v. Bryne*, 20 Gratt. [Va.], 165; *Bank of Columbia v. Okely*, 4 Wheat. [U. S.], 243.) It is, however, true that subject to the qualified negative of the governor, the legislature possesses all the legislative power of the state; but as it is said in *Taylor v. Porter*, 4 Hill [N. Y.], 144, 'under our system of government the legislature is not supreme. It is only one of the organs of absolute sovereignty which resides in the whole body of the people,' and, therefore, as the 'security of life, liberty, and property lay at the foundation of the civil compact, to say that the grant of legislative power included the right to attack private property would be equivalent to saying that the people had delegated to their servants the power of defeating one of the great ends for which government was established.' (Smith's Const. Law, 484.) This one great end of gov-

ernment is the protection of the absolute right of individuals—the life, liberty, and property of each citizen of the state." In *State v. Loomis, supra,* the term "due process of law" was discussed and applied to subjects kindred to those now under consideration. The court of appeals of Texas, in an opinion filed June 25, 1892, and found in *San Antonio & A. P. R. Co. v. Wilson,* 19 S. W. Rep., 910, cites with approval the case of the *Atchison & N. R. Co. v. Baty, supra.* Immediately following and enforcing their approval was a full review of the same subject as had been discussed by Judge GANTT, with a synopsis of the holdings of numerous courts with reference thereto. The length of this opinion forbids an extended quotation from the opinion to which reference has just been made, but its examination will be found to further illustrate and enforce the principles laid down in *Atchison & N. R. Co. v. Baty, supra.* The special practical application of the principles to which we have just referred refer to the alleged attempt to deprive parties of the right to contract as they see fit, and will, therefore, be treated under that head.

3. In *Braceville Coal Co. v. People,* there was filed October 26, 1893, by the supreme court of Illinois an opinion, reported in 147 Ill., 66, in which was the following language: "There can be no liberty protected by government that is not regulated by such laws as will preserve the right of each citizen to pursue his own advancement and happiness in his own way, subject only to the restraints necessary to secure the same right to all others. The fundamental principle upon which such liberty is based, in free and enlightened government, is equality under the law of the land. It has accordingly been everywhere held that liberty, as that term is used in the constitution, means not only freedom of the citizen from servitude and restraint, but is deemed to embrace the right of every man to be free in the use of his powers and faculties, and to adopt and pursue such a vocation or calling as he may

choose, subject only to the restraints necessary to secure the common welfare. (*Frorer v. People, supra; Commonwealth v. Perry*, 28 N. E. Rep. [Mass.], 1126; *People v. Gillson*, 109 N. Y., 389; *Live Stock Dealers & Butchers Association v. Crescent City Live Stock Landing & Slaughter House Co.* 1 Abb. [U. S.], 388; *Slaughter House Cases*, 16 Wall. [U. S.], 36; *Godcharles v. Wigeman*, 113 Pa. St., 431; *State v. Goodwill*, 33 W. Va., 179.) Property, in its broader sense, is not the physical thing which may be the subject of ownership, but is the right of dominion, possession, and power of disposition which may be acquired over it; and the right of property preserved by the constitution is the right not only to possess and enjoy it, but also to acquire it in any lawful mode, or by following any lawful industrial pursuit which the citizen, in the exercise of the liberty guarantied, may choose to adopt. Labor is the primary foundation of all wealth. The property which each one has in his own labor is the common heritage; and as an incident to the right to acquire other property, the liberty to enter into contracts by which labor may be employed in such way as the laborer shall deem most beneficial, and of others to employ such labor, is necessarily included in the constitutional guaranty. * * * We need not extend this opinion by further discussion. The right to contract necessarily includes the right to fix the price at which labor will be performed and the mode and time of payment. Each is an essential element of the right to contract, and whosoever is restricted in either, as the same is enjoyed by the community at large, is deprived of liberty and property."

For a further discussion of these propositions reference is made to the case entitled *Application of Jacobs*, 98 N. Y., 106. A complete review of the authorities upon this point will be found in *Leep v. St. Louis, I. M. & S. R. Co.*, 25 S. W. Rep. [Ark.], 75, in which the opinion of the supreme court of Arkansas was filed February 23, 1894. It is the latest case which has come under our observation,

and is strictly in line with those above quoted from and cited as to the questions under consideration.

A full and careful examination of all the questions presented has satisfied us that sections 1 and 3 of the act discussed are unconstitutional for the reasons above assigned. The legislation attempted cannot be defended as a police regulation, as was attempted in argument, for, under pretense of the exercise of that power, the legislature cannot prohibit harmless acts which do not concern the health, safety, and welfare of society. (*Millett v. People, supra; Frorer v. People, supra; State v. Loomis, supra; Ex parte Kuback,* 85 Cal., 274; *Application of Jacobs, supra; People v. Gillson, supra.*) The claim that this act was a proper exercise by the legislature of its police power cannot be sustained. It results that the judgment of the district court is

AFFIRMED.

FRANK O. OLSEN V. ADA WEBB.

FILED JUNE 6, 1894. No. 4965.

Landlord and Tenant: INJURIES TO PROPERTY: BURDEN OF PROOF. A land-owner sued his tenant for damages for injuries inflicted by her on his property during her occupancy thereof. The tenant answered that whatever injury she had done to the property was by the direction and permission of the land-owner. To this he replied by a general denial. The court instructed the jury: "The burden of proof is upon the plaintiff to make out his case. He must satisfy you by a preponderance of the evidence that the things complained of were done by the defendant without authority from him and the amount of damage done." *Held*, Error; that the defense was an affirmative one, and the burden of proof was upon the defendant to prove it. *Williams v. Evans*, 6 Neb., 216, followed.

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

C. P. Halligan, for plaintiff in error.

W. C. Van Gilder, contra.

RAGAN, C.

Frank O. Olsen sued Ada Webb in the district court of Douglas county for damages, alleging that Miss Webb, while his tenant, cut, sawed, broke, and otherwise injured the building leased to her. To this petition Miss Webb filed an answer consisting of a general denial and an affirmative defense, that if there was any cutting, sawing, or any other injury done to the premises it was done at the dictation and express orders of Olsen. To this answer Olsen filed a reply consisting of a general denial. Miss Webb had a verdict and judgment, and Olsen brings the case here on error.

On the trial of the case the district court instructed the jury as follows: "The court instructs the jury that the burden of proof is upon the plaintiff to make out his case. He must satisfy you by a preponderance of the evidence that the things complained of were done by the defendant without authority from him, and the amount of damages done." The giving of this instruction is the only error assigned. The burden of proof was upon Olsen to show that Miss Webb had damaged his property, and the amount of such damage, but the burden was not upon him to show that the damage done by her to his property was without his authority. Miss Webb, by her answer, in effect pleaded that the damage done to Olsen's property by her was caused by his authority and direction. This was a good defense, if proved. It was an affirmative defense, and the burden was upon her to show it. (*Williams v. Evans*, 6 Neb., 216.) The instruction was erroneous and the judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

MARY A. BURGE, APPELLEE, V. MARY E. GANDY, APPELLANT, ET AL.

FILED JUNE 6, 1894. NO. 5314.

1. **Set-Off:** ACTION ON CONTRACT. A set-off can only be pleaded in an action founded on contract, and must be a cause of action arising upon contract or ascertained by the decision of a court. (Code of Civil Procedure, sec. 104.)

2. ———. A claim on the part of the defendant which he will be entitled to set off against the claim of a plaintiff against him must be one upon which he could, at the date of the commencement of the suit, have maintained an action on his part against the plaintiff. *Simpson v. Jennings*, 15 Neb., 671, followed.

3. ———: DOMESTIC JUDGMENTS. The owner of a domestic judgment may maintain an action thereon, and he may make it the basis of a set-off in a suit brought against him to foreclose a mortgage owned by a party liable on such judgment.

4. **Evidence:** JUDICIAL RECORDS. A judicial record of this state may be proved by the producing of the original, or by a copy thereof, certified by the clerk or the person having the legal custody thereof, authenticated by his seal of office, if he have one. (Code of Civil Procedure, sec. 413.)

5. **Judicial Records.** A judicial record is a precise history of a suit from its commencement to its termination, including the conclusion of law thereon, drawn by the proper officer for the purpose of perpetuating the exact state of facts. *Davidson v. Murphy*, 13 Conn., 213, followed.

6. ———: SET-OFF. In a suit brought by Mary Burge against M. E. Gandy the latter pleaded as a set-off a judgment of the county court rendered in her favor against Burge. The only evidence offered by Gandy to support her plea of set-off was as follows: "Defendant requests the clerk of the court to read the judgment; who complied, reading as follows: 'Judgment record B 2, page 243. Mary E. Gandy, plff., v. John B. Burge and M. Burge, defts. Rendered February 28, 1887. Judgment rendered against both defendants. Amount, $146.45. Costs, $1.20. Interest, ten per cent. Transcript filed April 23, 1888, from county court. G. T. Belding, County Judge.' Q. What book is that? A. (By the clerk.) Judgment record B 2." *Held*, (1)

That this evidence did not show a judgment, but was a mere recital that one had been rendered; (2) that it was not an original record of a judgment nor an exemplification of such record; (3) that the set-off pleaded was not proved.

APPEAL from the district court of Pawnee county. Tried below before APPELGET, J.

E. W. Thomas, for appellant.

H. C. Lindsay, contra.

RAGAN, C.

Mary E. Burge brought this suit in the district court of Pawnee county to foreclose a mortgage against Mary E. Gandy and others. Mrs. Gandy in her answer alleged that she was the owner of a judgment rendered by the county court of said county in her favor and against Mrs. Burge and others; that such judgment was wholly unsatisfied, and prayed that the amount of such judgment, with interest and costs, might be set off against the amount due Mrs. Burge on the mortgage sought to be foreclosed. To this answer Mrs. Burge filed a reply consisting of a general denial. The district court rendered a decree in favor of Mrs. Burge for the amount due on her mortgage, but disallowed the set-off pleaded by Mrs. Gandy, and she brings the case here on appeal, her only complaint being the action of the district court in disallowing her set-off.

Section 104 of the Code of Civil Procedure provides: "A set-off can only be pleaded in an action founded on contract and must be a cause of action arising upon contract or ascertained by the decision of a court." Mrs. Burge's action is founded on contract, and the set-off as pleaded by Mrs. Gandy not only arose upon contract, but had been ascertained by the judgment of a court. In *Simpson v. Jennings,* 15 Neb., 671, it is said: "A claim on the part of a defendant which he will be entitled to

set off against the claim of the plaintiff against him must be one upon which he could, at the date of the commencement of the suit, have maintained an action on his part against the plaintiff." Mrs. Gandy, at the time this suit was commenced, could have maintained an action against Mrs. Burge on the judgment which she pleaded as a set-off. (2 Black, Judgments, sec. 958, and cases cited.) The set-off then pleaded by Mrs. Gandy came within both the letter and the spirit of the Code and within the construction placed thereon by this court. The judgment pleaded was a joint and several one, and since it was a proper subject of set-off, the district court erred in not allowing it if the recovery and existence of the judgment as pleaded was proved.

2. The evidence, and all the evidence, offered by Mrs. Gandy to support her plea of set-off was as follows:

"Defendants offer in evidence the judgment that they set up here. Defendant requests the clerk of the court to read the judgment, who complied, reading as follows: 'Judgment record B 2, page 243. Mary E. Gandy, plff., v. John B. Burge and M. Burge, defts. Rendered February 28, 1887. Judgment rendered against both defendants. Amount, $146.45. Costs, $1.20. Interest, ten per cent. Transcript filed April 23, 1888, from county court. G. T. Belding, County Judge.'

"Q. What book is that?

"A. (By the clerk.) Judgment record B 2."

The recovery and existence of the judgment pleaded by Mrs. Gandy as a set-off were put in issue by her answer and the reply of Mrs. Burge thereto. The question then is, does the evidence quoted above prove the set-off pleaded by Mrs. Gandy? We are of opinion that it does not. Section 413 of the Code of Civil Procedure provides: "A judicial record of this state * * * may be proved by the producing of the original, or by a copy thereof, certified by the clerk or the person having the legal custody thereof, authenticated by his seal of office, if he have one."

A judicial record is a precise history of a suit from its commencement to its termination, including the conclusion of law thereon drawn by the proper officer for the purpose of perpetuating the exact state of facts. (*Davidson v. Murphy*, 13 Conn., 213.) If the evidence read by the clerk was the original record made by the county judge in the proceeding of Gandy against Burge and others, it was not a judgment at all, but a mere recital that a judgment had been rendered against Burge and Burge. (*Sprick v. Washington County*, 3 Neb., 243.) If we consider the matter read by the clerk a judgment, then there is no evidence that it was the original judgment rendered by the county court in favor of Mrs. Gandy, and against Burge and Burge. The rendition or existence of a domestic judgment may be proved by the original record thereof, or by an exemplification of such record, but the evidence offered in support of this judgment entirely fails to show that any such judgment as that pleaded was rendered. The evidence does not purport to be the original record of the judgment, nor an exemplification of such record. Again, the judgment pleaded as a set-off was alleged to have been recovered against Mary A. Burge. The proof offered tends to show that a judgment was rendered in favor of Mrs. Gandy and against M. Burge; but there is no proof of the identity of Mary A. Burge and M. Burge. So that, in any view we may take of the case, the district court had before it no evidence from which it would have been justified in finding in favor of Mrs. Gandy the set-off pleaded by her. The decree is

AFFIRMED.

C. B. HAVENS & COMPANY v. GRAND ISLAND LIGHT & FUEL COMPANY.

FILED JUNE 6, 1894. No. 5557.

1. **Sales:** DELIVERY OF GOODS TO CARRIER: EFFECT. The general rule is that the delivery of goods to a carrier consigned to the purchaser thereof is a delivery to such purchaser, and that the title of the goods so delivered to the carrier at once vests in the purchaser; but this rule is not a universal one, and whether applicable in any case, depends upon the facts, circumstances, and contract between the seller and the purchaser in the case.

2. ———: ESTOPPEL. It seems that a defendant sued on a contract for goods of a certain quality and price is estopped from interposing the defense that the goods were inferior in quality to those he had contracted for when it is shown that he, without protest or objection, converted to his own use the goods furnished him under said contract, and the defect in such goods was apparent on inspection.

3. ———: EVIDENCE. The evidence in this case examined, and *held* to support the findings of the jury, that the coal sued for herein was to be delivered at Grand Island, and that the coal delivered was inferior in quality to that contracted to be delivered.

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

Bartlett, Crane & Baldrige and *Martin Langdon*, for plaintiff in error.

Abbott & Caldwell, contra.

RAGAN, C.

In October, 1889, C. B. Havens & Co. were coal merchants in the city of Omaha and the Grand Island Light & Fuel Company was a corporation engaged in the manufacture of gas and dealing in coal in the city of Grand Island. On the 12th day of October of said year Havens

& Co. wrote a letter to the fuel company as follows: "We had two cars of grate coal shipped on our account from mine to consumer of ours, who reports that the coal is a little too large size for his use. Knowing that you prefer the larger sized grate coal, we will make you offer of $9.85 on these two cars if you can receive them between the 20th and 30th of this month. The coal is straight D. L. and W. Scranton, fresh from the mine. Please advise us at your early convenience." On the 15th of October the fuel company answered this letter as follows: "Your letter of the 12th inst. at hand. You may ship the two cars of hard coal at price named in your letter." On the 16th of October Havens & Co wrote to the fuel company the following letter: "We have your favor of the 15th and have entered your order for two cars of grate coal at $9.85 per ton, F. O. B. Grand Island. Will have the cars forwarded to you in a few days." In pursuance of this correspondence Havens & Co. shipped to the fuel company two cars of coal. One car was numbered 29390 and contained 29,010 pounds of coal. This car of coal is only incidentally involved in this action, as it was accepted by the fuel company and paid for. The other car shipped by Havens & Co. was a car numbered 6855, and claimed by them to contain 29,680 pounds of coal. It was to recover for this last car of coal that this action was brought. The fuel company defended on the grounds that they did not receive as much coal as sued for, and that the coal received was inferior in quality to that which Havens & Co. agreed to furnish by their contract. Havens & Co. had a verdict for $8.13, on which judgment was rendered, and they bring the case here for review.

1. The first, second, and third errors assigned are that the verdict is not sustained by sufficient evidence and is contrary to the law of the case. There is practically no dispute but that the car of coal delivered to the fuel company did not contain the amount of coal sued for; and the

evidence supports the finding of the jury that the coal delivered was inferior in quality to that contracted for. Counsel for Havens & Co., however, contend that the title to the coal vested in the fuel company when it was delivered to the carrier at Omaha, and that if the coal received by the fuel company was inferior in quality or less in amount than the coal delivered to the carrier at Omaha, that such loss and depreciation must be borne either by the carrier or the fuel company. The general rule doubtless is that the delivery of goods to a carrier consigned to the purchaser is a delivery to the purchaser, and that the title of the goods so delivered to the carrier at once vests in the purchaser; but this rule is by no means universal, and whether applicable in any case, depends upon the facts, circumstances, and the contract between the seller and the purchaser in the case. But if we consider that the title to this car of coal sued for vested in the fuel company at the moment it was consigned to the carrier at Omaha by Havens & Co., we do not see how that would help the plaintiff in error here. To make the fuel company or the carrier bear the loss resulting from the inferior quality of coal and its depreciation in amount the plaintiffs in error would have to show that they delivered the amount of coal sued for to the carrier at Omaha, and that the coal delivered was of the quality called for by the contract; and the evidence in the record does not show either one of these facts. The fuel company was not to pay for this coal by the car, but to pay so much per ton for it, and the coal was to be of a certain quality, and if Havens & Co. delivered this coal to the fuel company at Omaha, then the fuel company is not compelled to pay for any more coal than was delivered to it at Omaha, and not compelled to accept or pay for coal inferior in quality to that purchased.

Another argument under this assignment of error is that the fuel company accepted and used the coal shipped without protest and is now estopped from alleging that the coal

received was inferior in quality to that called for by the contract. If one contracts for property of certain quality, and on receiving it accepts and uses such property without any protest or objection, such act affords very strong evidence, indeed, either that the goods purchased came up to the standard of those contracted for, or that their inferiority was waived; and it may be that a defendant, when sued on a contract for goods of a certain quality and price, would be estopped from interposing the defense that the goods were inferior in quality to those he had contracted for, when it was shown that he had, without protest or objection, converted to his own use the goods furnished him under the contract, and the defects therein were apparent on inspection. In the case at bar the evidence shows that the car of coal sued for and the car with which it was shipped reached the city of Grand Island on the 6th of November, but was not delivered to the fuel company until the 14th, at which time the two cars were unloaded into bins of the fuel company; and on that date it wrote a letter to Havens & Co., as follows: "We have just received Wabash car 6855. This car has been in wreck and is still broken at the end. We believe that the coal is short from one and a half tons to two and a half tons. Before we accept this coal we want you to wire the Union Pacific agent and make the shortage good, or sell it to other parties." On the same day Havens & Co. answered this letter with a communication as follows: "Referring to your favor of the 14th in which you say Wabash car 6855 has been received and evidently been in a wreck, will say we have seen Mr. Van Kuran, auditor Union Pacific railway, to-day concerning this and he will take the matter up at once and if the car is damaged will have the coal weighed out to you by the agent at Grand Island, and he promises to attend to the same to-morrow." On the 25th day of November following the fuel company wrote another letter to Havens & Co., inclosing them the pay for the car of

good coal shipped with the car No. 6855, and in this letter the fuel company said: "We claim shortage of 1,280 pounds. This car of coal is no good, and you must make us a discount. We would not buy this class of coal at any price. We in fact can hardly make use of any of it." On the 26th of November Havens & Co. answered this letter, acknowledging receipt of the pay for the car of good coal, and in the letter said: "Relative to Wabash car 6855, we can do nothing in this matter until you send us expense bill on the same." Nothing was said in the letter in any manner about the inferior quality of the coal. We do not think that this evidence shows such an acceptance of the coal by the fuel company as would estop it from alleging in this suit the defense of the inferior quality of the coal.

2. The fourth and fifth errors alleged are assigned in the following language: "The court erred in sustaining objections made by the defendant to the evidence offered by the plaintiff and in overruling objections made by plaintiff to evidence offered by defendants." These assignments are too indefinite for review. The rule of this court many times announced is that if a litigant is of opinion that the trial court erred in its ruling and desires to review such error in this court, he should specifically state in his petition in error here what action of the district court he claims was erroneous. (*Haskell v. Valley County*, 41 Neb., 234.)

3. The sixth error alleged is assigned in this language: "The court erred in giving instructions given by the court on its own motion, Nos. 1, 2, 3, 4, and 5." Some of these instructions were properly given, and under the rule laid down in *Hiatt v. Kinkaid*, 40 Neb., 178, and *McDonald v. Bowman*, 40 Neb., 269, as the objection goes to the instructions *en masse*, we will not consider the error alleged further than to ascertain if any one of them is good.

4. The eighth assignment of error is in the following language: "The court erred in giving instructions that there was a contract to deliver goods to defendant at Grand

Island." What has already been said sufficiently disposes of this assignment.

5. The ninth error alleged is as follows: "Defendant did not plead a contract to deliver said coal at Grand Island, and the court erred in finding the same." It is not stated in any of the pleadings in the case at what place this coal was to be delivered, and if the jury found from the evidence that the coal was to be delivered at Grand Island, we think the evidence ample to sustain that finding. By the letter of October 16, written by Havens & Co. to the fuel company, it is stated: "We have your favor of the 15th and have entered your order for two cars of grate coal at $9.85 per ton F. O. B. Grand Island." The evidence shows that the total cost of this coal to the fuel company was to be $9.85 per ton at Grand Island; and it also appears from the record that Havens & Co. accepted from the fuel company, as part payment of the other car of coal shipped with the one in suit, the freight bills for the coal turned over by the carrier to the fuel company. To adopt the contention of counsel that by the terms of the contract the fuel company was to pay $9.85 a ton for the coal at the place of delivery, and that that place of delivery was Omaha, would make the coal cost the fuel company in Grand Island about $16 per ton, as the evidence shows that the carrier's charges amounted to about $6 per ton.

6. The tenth, and last, assignment of error is as follows: "The court erred in refusing to give instructions Nos. 1, 2, 3, and 4, asked for by the plaintiff." At least three of these instructions should not have been given, and for reasons already assigned we will not determine whether or not there was any error in the refusal of the court to give the other two. The judgment of the district court is

AFFIRMED.

FREMONT, ELKHORN & MISSOURI VALLEY RAILROAD COMPANY v. SHERRY LESLIE.

FILED JUNE 6, 1894. No. 5182.

1. **Master and Servant:** NEGLIGENCE. The evidence in this case examined, and *held* to support the findings of the jury, that the injury sued for herein by the defendant in error was not caused or contributed to by his negligence, but resulted from the negligence of the employes of the plaintiff in error.
2. **Personal Injuries:** DAMAGES. The law, for a temporary injury, awards damages to the party injured through the negligence of another, not as a punishment of the negligent party, but as compensation for the pecuniary loss sustained and the pain and suffering endured by the injured party.
3. **Negligence:** PERSONAL INJURIES: REVIEW. It is only after the most careful deliberation that this court will reduce the amount awarded by a jury to a party who has been injured through the negligence of another; and not then if such award has for its support sufficient competent evidence.
4. ——: ——: ——: REMITTITUR. The amount awarded the defendant in error by the jury in this case *held* not supported by the evidence and a remittitur ordered.

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

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

H. E. Murphy and *M. F. Harrington, contra.*

RAGAN, C.

Sherry Leslie sued the Fremont, Elkhorn & Missouri Valley Railroad Company in the district court of Holt county for damages for an injury which he alleges he sustained through the negligence of the employes of that company. Leslie had a verdict and judgment, and the company brings the case here on error and alleges five reasons for the reversal of the judgment.

1. That the evidence does not support the jury's finding that the injury received by Leslie was the result of the negligence of the company's employes. The undisputed evidence is that on the 5th of December, 1887, Leslie and some eight other men were in the employ of the company and under the charge of a foreman named Howlett. This force of men was on that date engaged in constructing an ice-break to protect a bridge of the company across the Cheyenne river by driving piles in said stream; that in said work they used a pile-driver, some thirty feet high, and a hammer weighing some 2,600 pounds. To elevate this hammer a team of horses was hitched to the end of a rope and this passed over a wheel or pulley at the top of the pile-driver. The pile-driver was stayed by means of three guy-ropes. Early in the morning on the date above mentioned, while Leslie was on or near the top of this pile-driver oiling the aforesaid wheel or pulley, the pile-driver fell and Leslie was injured. The evidence on the part of Leslie tends to show that it was his duty to oil the wheel or pulley; that he was on the pile-driver at the time it fell for that purpose; that he was there in obedience to the orders of the foreman; that while engaged in oiling the wheel the other men, in obedience to the order of the foreman, began moving the pile-driver by means of "pinching it" with crow-bars; that only one man had charge of the guy-rope staying the pile-driver in the direction which the men were moving it; that it was necessary that said guy-rope should be in charge of two men when the pile-driver was being moved so as to take up the slack in such guy-rope; that the hammer was at the time near the top of said pile-driver; that he did not know that the men were about to move said pile-driver when he went upon it; that no warning was given him while on the pile-driver that it was about to be moved; that it was improper or unusual to move or attempt to move the pile-driver when the hammer was so near the top; that the failure to

have at least two men in charge of said guy-rope to take up the slack in the same and the having the hammer so near the top of the pile-driver caused the same to fall. This moving of the pile-driver by the men while he was on the same oiling the wheel and at the time the hammer was so near the top of said pile-driver and the failure to have more than one man in charge of the guy-rope constituted the grounds of negligence alleged against the company by Leslie in his petition. The evidence on the part of the company tends to show that at the time the pile-driver fell the hammer was resting on a "chalk" not more than twelve feet from the base of the pile-driver; that it was not unusual, improper, or dangerous to move said pile-driver with the hammer in that position; that one man was sufficient to take up the slack in the guy-rope when the pile driver was being moved; that Leslie was not ordered or directed to go upon the pile-driver at the time he did; that he had been cautioned not to go upon the pile-driver when it was to be moved or about to be moved; that he knew before going upon the pile-driver that it was about to be moved; that he was on the pile-driver when it was being moved and gave no notice to the men moving it of his position; that neither the foreman in charge of the men nor the men engaged in "pinching" the pile-driver knew of Leslie's presence thereon until it fell; and that the pile-driver was caused to fall by a sudden gust of wind. It will be seen from this statement that the evidence as to the cause of the fall of the pile-driver was sharply conflicting. Had the jury found for the company on this issue we certainly could not say that their finding was unsupported by the evidence. If the statements made by the witnesses for Leslie were true, we think the jury's conclusion, that the fall of the pile-driver and Leslie's injury was due to the negligence of the company's employes.

2. That the evidence shows that the injury sustained by Leslie was caused by his contributory negligence. All

that has been said in reference to the jury's finding in reference to the negligence of the company is equally applicable to the contention that Leslie was injured through his contributory negligence. We cannot say that Leslie knew before going upon the pile-driver that the men were about to move it and continued so doing for a considerable time before it fell without his warning the men of his presence; nor that he was not ordered to go upon the pile-driver at the time he did. These were all questions submitted to the jury upon conflicting testimony and under proper instructions by the trial court.

3. The third argument is that the court erred in giving certain instructions to the jury. We cannot consider the error alleged as to the first instruction, for the reason that the company took no exception to the giving of the same. The third instruction objected to was in the following language: "The jury are instructed that to entitle plaintiff to recover, the burden of proof rests upon him to show by a preponderance of all the evidence that his falling from the pile-driver in question and any injury and damage thereby suffered by him was the direct and proximate result of the negligence of the defendant railroad company by some negligent act of omission or some negligent act of commission permitted or directed by its foreman or managing officer there on the ground, J. N. Howlett; and in addition thereto that the plaintiff was not guilty of negligence on his own part which contributed to such fall, and without which negligence such fall, injuries, and damages would not have occurred." The objection to this instruction is in effect that by it the jury were told that the company might be charged with any negligent act of its foreman which was the proximate cause of the pile-driver's falling and Leslie's injury, whether such negligent act was pleaded by Leslie in his petition or not. This objection is not tenable. No evidence was offered on the trial of the case tending to show that Leslie's alleged injury was caused by any

negligent act or omission of the company's other than those stated in his petition; and the trial court in giving this instruction had in mind no act or omission of the company's claimed to be negligent and claimed to have caused Leslie's injury except the ones pleaded by him; nor could the jury have acted like reasonable men and have understood that they could charge the company with any negligence which was neither pleaded nor proved on the trial.

4. The fourth argument relates to the refusal of the trial court to give to the jury the following instructions:

(*a.*) "You are instructed that the burden of proof is upon the plaintiff to prove every material allegation contained in his petition, and this he must do by a preponderance of all the evidence." There was no error in refusing to give this instruction as the court had already given the substance of it in the third paragraph of its charge.

(*b.*) "You are instructed that the defendant is only bound to use ordinary care to prevent an injury to the plaintiff while in its employ, but plaintiff, when he entered defendant's employment, is deemed to have accepted all the ordinary hazards and dangers incident to the business in which he was engaged not occasioned by defendant's negligence, and in this case the injury complained of was one of the ordinary risks connected with the business in which the plaintiff was engaged and for which he cannot recover, unless you find from a preponderance of the evidence that the same was caused by the defendant's negligence and that plaintiff in no way contributed thereto." There was no error in refusing to give this instruction. The court had already in the third paragraph of his instructions to the jury in substance told the jury that the plaintiff could not recover unless he established by a preponderance of the evidence that his injury was caused by the defendant's negligence and without any contributory negligence on his part; and in the twenty-third instruction given by the court at the request of the company the jury were told that

the company was not an insurer against accidents happening to employes in its service, nor liable for any negligence on the part of defendant's co-employes who were working with him about said pile-driver.

(c.) "You are instructed that even though you may find that defendant was guilty of negligence as alleged in plaintiff's petition, still if you further find that plaintiff went upon said pile-driver knowing the same was about to be moved, or went upon the same while it was being moved, and continued thereon during its movement and had sufficient time prior to the fall of the pile-driver to have escaped from his position, but failed so to do, and sustained injuries in consequence by being thrown to the ground by said machine while it was falling, then the plaintiff cannot recover." The court did not err in refusing to give this instruction. At the request of the company the court told the jury that Leslie was bound to exercise ordinary care for his personal safety while performing his duties, upon, around, or about said pile-driver, and that if they believed from the evidence that Leslie was guilty of slight negligence which contributed directly to his injury they should find for the company. In the eighteenth instruction given at the request of the company the court told the jury that if they found that the company was guilty of negligence in the management of the pile-driver while moving the same, and that Leslie was also guilty of negligence which contributed to his injury and which by the exercise of ordinary care he might have avoided, then he could not recover.

5. The fifth argument is that the damages are excessive. The verdict in this case was for $5,000. The trial judge compelled Leslie to remit $2,350 of the verdict rendered or submit to have it set aside. The remittitur was entered and judgment rendered for $2,650. It is now somewhat strenuously argued that even this amount is greater than is warranted by the evidence. The testimony on the part

of Leslie tends to show that at the time the pile-driver fell his shoulder was dislocated and his ankles sprained or bruised; that from that time until the time of the trial he had been able to do only light work; that prior to the accident he was sound and robust and able to do heavy work; that he suffered constantly from pains in his back and sides and was able to use only one of his arms freely. The testimony on behalf of the company tends to show that he was laid up for about ten days as the result of the injury received; that he continued in the employ of the company from the first of January, 1888, until September of that year, working with the same force of men and in performing the same kind of labor that he had been engaged prior to the time of the accident; that in the spring of 1889 he went to the Black Hills and worked for about nine months of that year in saw-mills, performing heavy labor; that early in the year 1890 he "took up a claim" in Boyd county and that he told the citizens of that county that he could not work because of the pendency of this suit, and that if he labored that fact would injure his chances of success; that while he was in Boyd county he became involved in an altercation and kicked in the upper panel of a door several feet from the ground; and that a part of that year he operated a ferry-boat on the Niobrara river which required the exercise of considerable strength. We think this judgment is too large. The law gives damages to a party injured through the negligence of another, not as punishment of the negligent act, but as compensation for the pecuniary loss sustained and the pain and suffering endured by the injured party. There is no evidence in this record that Leslie was permanently injured. The evidence does not show that by reason of the fall and injury on the 5th day of December, 1887, Leslie has lost any considerable time; nor does the record show that he has undergone any severe suffering or pain. If Leslie, by reason of his injury, has been put to any expense for medi-

cal services or nurses, the record does not show it. The evidence in the record does support the jury's finding that Leslie was injured; that he was injured through the negligence of the employes of the company; and that his injury was not the result of his own contributory negligence. At the time of his injury he was a young man about twenty-six years of age and earning about $50 a month, and the evidence, to give it the most liberal construction in Leslie's favor, does not disclose that his ability to labor and to earn money is materially different from what it was before the date of the accident. The evidence does not disclose that from the time of the accident until the date of this trial, a period of about three years, that he was idle more than one-third of the time from all causes, and as a result of the injury sustained not more than a few months.

It is always with reluctance and after the most careful examination that this court will reduce the amount awarded by a jury to a party who has been injured through the negligence of another, and not then if the award made by the jury has for its support any competent evidence; but in the case at bar we cannot escape the conviction that a very large part of this award has for its support no evidence whatever. The defendant in error will have permission to file in this court, within twenty days from this date, a remittitur from the judgment rendered as of that date of $1,450, and in case of his doing so the judgment of the district court for $1,200, as of the date of its rendition, will be affirmed; otherwise the judgment of the district court will be reversed and the cause remanded.

JUDGMENT ACCORDINGLY.

ITHAMER C. STEPHENS V. OMAHA & REPUBLICAN VALLEY RAILWAY COMPANY.

FILED JUNE 6, 1894. No. 5374.

1. **Negligence:** RAILROADS: EVIDENCE. Railroads cannot be operated without noise; and if teams are frightened by the usual noise arising from a prudent and proper management of a train or engine, the railroad company is not liable for an injury resulting from said noise; and whether the noise complained of resulted from a prudent operation of the railroad or its appliances is a question to be determined from the circumstances and other evidence in the case. That the noise complained of was unnecessarily made is not of itself evidence that its making was negligence. To be evidence of negligence the noise must have been made under such circumstances and surroundings as to time, place, and situation of the parties as to show neglect to exercise that degree of care which a reasonable man would have exercised under the circumstances. *Omaha & R. V. R. Co. v. Brady*, 39 Neb., 27, followed and reaffirmed.

2. ———: ———: ———. The evidence in this case examined, and *held* to support the finding of the jury that the proximate cause of the injury to plaintiff was his own negligence and not the negligence of the agents of the defendant in error.

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

Clark & Allen and *Simpson & Sornborger*, for plaintiff in error.

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

RAGAN, C.

Ithamer C. Stephens sued the Omaha & Republican Valley Railway Company in the district court of Saunders county for damages for an injury which he alleged he sustained through the negligence of the agents of said

company. The railway company had a verdict and judgment, and Stephens brings the case here on error.

The material facts in the case, summarized, are as follows: The main track of the railway company passes east and west through the village of Valparaiso and crosses at right angles and at grade Cedar street, running north and south in said village. Near the track of said railway company, and about four hundred feet west of the point where it crosses Cedar street, the company has a coal chute elevated above the surface of the ground some twenty feet. From this coal chute, at a sharp incline, a track descends, parallel with the main track and close to it until near Cedar street, which it then crosses on a level with the main track. This incline track is used for the purpose of pushing cars loaded with coal into said chute, where the coal is dumped and the empty cars, in charge of a brakeman, are run down the incline track and stored on switches. In the year 1890 Stephens was a resident of the village of Valparaiso and had been for some years. He was engaged in said village and surrounding country in the practice of medicine and surgery. He was well acquainted with the crossing or intersection of Cedar street and the railroad company's tracks. He had frequently passed over said crossing. He was well acquainted with the incline track from the crossing to the coal chute and the manner in which and the purposes for which such incline track was used. A person driving north on Cedar street, and approaching the said crossing from the south, would have an unobstructed view of said coal chute and incline track for a distance of at least three hundred feet before reaching the crossing. On the 7th of May, 1890, the same being a clear, bright day, Dr. Stephens was driving north on Cedar street towards said crossing. He was riding in a two-wheeled cart drawn by one horse. As he approached the crossing he did not look or listen for cars or engines on the railroad tracks or

the incline track until within some sixteen feet of the crossing. He then looked west toward the coal chute and saw an empty car, with a brakeman on it, descending the incline track. His horse was not frightened. He had ample time to stop until the car passed over the street in front of him. He could easily have turned his horse and cart around and driven back south. At the time he first observed the car descending the incline track it was some three hundred and fifty feet from the crossing, and the doctor thought he had ample time to drive across the tracks before the car should reach the street. He whipped up his horse and crossed the tracks safely. After he had passed over the tracks the car came down across the street behind him and his horse took fright at the noise made by the car, ran away, and the doctor was thrown out and injured. The brakeman on the descending car saw the doctor and knew him at the time he whipped up his horse to drive across the tracks. The brakeman observed that the horse was not frightened. He saw that the doctor could and had passed over the track safely on which the car was descending and he made no effort to stop the car or slacken its speed.

1. The first error assigned here is that the court erred in giving the fourth, fifth, sixth, seventh, and eighth paragraphs, and each of them, of instructions given by the court to the jury on its own motion. These instructions are too long to be quoted in this opinion and it would subserve no useful purpose to copy them, or any of them, and it must suffice to say that the instructions complained of stated the law correctly and there was no error in giving them, or either of them.

2. The second error assigned is that the court erred in giving paragraph No. 7 of instructions given by the court at the request of the railroad company. That instruction is as follows: "The jury are instructed that every intelligent man is supposed to know that a railway crossing is a

dangerous place, and in approaching the same he must exercise corresponding caution in crossing it. A traveler should always approach a railroad crossing under the impression that a car or train is liable to come at any moment, and while he may presume that those in charge of it will use ordinary precautions to avoid injury, yet the law requires him to obey the instincts of self-preservation and not carelessly or without precaution thrust himself into a situation of danger which, notwithstanding any failure of the railroad company, he should have avoided by carefully using his senses. He should not only look but is required to listen for the noise of any approaching train or any signal which might be given to avoid it; and if he omits this, goes upon the crossing and is injured, he cannot recover." This instruction should not have been given. It is true that a party should not go upon a railway crossing without looking, if he have eyes, nor without listening, if he is not deaf; but if he does go upon the crossing without either looking or listening, it is for the jury to say whether by so doing he was guilty of negligence, all the facts and circumstances in the case and the time and place considered. There is omitted from this instruction a very material ingredient, viz., whether the failure of the doctor to look and listen before going upon the track was the proximate cause of his injury; or notwithstanding his failure to look and listen the negligent conduct of the railway company was the proximate cause of his injury. By the seventh paragraph of the instructions given the jury by the court at the request of the doctor the jury were told: "That if the plaintiff was himself guilty of negligence which contributed to the injury and without which the accident would not have happened, still the defendant would be liable in this case, provided the jury believed from the evidence that the servants of the defendant saw, or could have seen with ordinary diligence, the danger to which plaintiff was exposed in time to have avoided it and by the exercise of ordinary care and

prudence could have prevented the injury." This charge of the court, given at the request of the doctor, cured the error in the instruction No. 7 complained of given at the request of the railway company. We think further, that the instruction complained of, though erroneous, was not prejudicial to Dr. Stephens. The instruction said that the doctor was required to look and to listen for the noise of an approaching train or car before he went upon this crossing, and that if he had failed to do so and was injured, he could not recover. The undisputed evidence at the trial was that the doctor did look and listen before going upon the crossing, and not only that but he saw and heard the descending car. The jury, then, could not have based their finding in this case against the doctor on his failure to look and listen before he went upon the track.

3. The third error assigned is the giving by the court to the jury at the request of the railway company instruction No. 8, as follows: "The jury are instructed that the defendant's agent in charge of the car was not expected to know that the plaintiff's horse, if such was the case, was fractious or easily frightened at the sight or moving of railroad cars; but had the right to assume that, like most horses, it had become accustomed to the sight and motion of cars and that the plaintiff was aware of that fact and so was driving it in the vicinity of the crossing and car. If the plaintiff knew or suspected his horse to be liable to be frightened and then attempted to drive his horse close to the defendant's car or over the tracks, he did so at his own risk and took the chance of his getting across the track and at such a distance beyond that his horse would not be frightened, and if he failed in this, it would be his own fault and he could not recover." The criticism on this instruction is that by it the court told the jury that the brakeman on the car had a right to assume that the doctor's horse, like most horses, had become accustomed to the sight and motion of the cars. The instruction is not very hap-

pily framed, but when read in the light of the evidence in the case it was not erroneous. As already stated, the evidence showed that the doctor, before he went on the crossing, saw the brakeman and the descending car. His horse at this time evinced no evidence of being frightened. The brakeman knew the doctor and saw him before he went upon the crossing and observed that his horse was not frightened. It was with this evidence in his mind that the court gave the instruction complained of to the jury; and correctly told the jury that the brakeman on the car, seeing the doctor so near the crossing, and seeing him about to drive over when he had ample time to turn and go back, and seeing that his horse was not frightened, had a right to assume that the horse was not afraid of the noise of the car.

4. The remaining errors will be considered under the assignment that the verdict of the jury is not sustained by sufficient evidence. This verdict of the jury may be based upon their finding, either that the injury sustained by Dr. Stephens was not caused by the negligence of the railway company, or that the doctor's injury was caused by his own negligence; and if the jury's verdict is based on either of these conclusions, it is correct. It is not disputed but that the doctor was injured. He was injured because his horse became frightened and ran away, and his horse was frightened at the noise of a descending car. But while it may be said that there is some evidence in the record which tends to show that the noise which frightened the doctor's horse was unnecessarily made, we think the jury was entirely right in finding, if they did so find, that the noise which frightened the doctor's horse was not negligently made by the railway company. "Railroads cannot be operated without noise, and if teams are frightened by the usual noise arising from a prudent and proper management of a train or engine, the railroad company is not liable for an injury resulting from such noise; and whether the noise complained of resulted from a pru-

dent operation of the railroad or its appliances is a question to be determined from the circumstances and other evidence in the case. That the noise complained of was unnecessarily made is not of itself evidence that its making was negligence. To be evidence of negligence the noise must have been made under such circumstances and surroundings as to time, place, and the situation of the parties as to show a neglect to exercise that degree of care which a reasonable man would have exercised under the circumstances." (*Omaha & R. V. R. Co. v. Brady*, 39 Neb., 27.) In the case at bar, the brakeman, when he first saw the doctor and observed that he intended to cross the tracks, was 325 feet from him. He observed that his horse was not frightened. Now, at this time, the brakeman could have applied the brakes to his car and stopped it and kept it at that distance from the street until the doctor had passed so far beyond the crossing that there would be no reasonable probability that his horse would be frightened by the noise of the car descending behind him. Had the brakeman exercised this extraordinary care, doubtless the doctor would not have been injured. But it was for the jury to say from all the facts and circumstances in the case whether the brakeman, by not setting his brake and not stopping the car when he first observed the doctor, and keeping the car stationary until the doctor had gotten a considerable distance beyond the crossing, and whether the brakeman, in allowing the car to run down the incline track at the speed and making the noise it did, failed to exercise ordinary care; that is, whether the acts and omissions of the brakeman rendered him guilty of negligence. The jury by its verdict has said that the acts and omissions of the brakeman were not negligent ones under the circumstances, and the evidence justifies their conclusion. But it is suggested in argument here by counsel for Dr. Stephens that the evidence is undisputed that the brakeman on the descending car saw the doctor; saw that he was intending to cross and pass over

the crossing, in ample time to have brought his car to a standstill until the doctor should be so far away from the crossing that there would be no probability of his horse becoming frightened at the noise of the car, and that, therefore, the court should say, as a matter of law, that the conduct of the brakeman under the circumstances was negligence. We do not think that it is for the court to say as a matter of law what conclusion should be drawn from this evidence.

We agree with Mr. Justice Hunt in *Sioux City & P. R. Co. v. Stout*, 17 Wall. [U. S.], 657, where he uses this language: "Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used and that negligence existed; another man, equally sensible and equally impartial, would infer that proper care had been used and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard,—the merchant, the mechanic, the farmer, the laborer,—these sit together, consult, and apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment, thus given, it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge." The judgment of the district court is

AFFIRMED.

GLOBE PUBLISHING COMPANY ET AL. V. STATE BANK OF NEBRASKA AT CRETE ET AL.

FILED JUNE 6, 1894. No. 5538.

1. **Abatement:** REPEAL OF STATUTES. A suit pending to enforce a right or remedy conferred solely by statute is abated by the unconditional repeal of such statute before judgment rendered in such suit. *Bennet v. Hargus*, 1 Neb., 419, followed and reaffirmed.

2. **A penal statute** is an act by which a forfeiture is imposed for transgressing the provisions of the act. It may also be remedial in one part and penal in another. The effect and not the form of the statute is to be considered, and if its object is clearly to inflict a punishment on a party for doing what is prohibited or failing to do what is commanded to be done, it is penal in its character. *Diversey v. Smith*, 103 Ill., 378, followed.

3. **Corporations:** LIABILITY OF STOCKHOLDERS: STATUTES. When a law prescribes what the liability of a stockholder in a corporation to the creditors thereof shall be, as that the shareholder shall be liable for double the amount of his stock, or for a sum equal to the amount of his stock, or for the amount remaining unpaid on his stock subscription, such law is one prescribing the liability of a stockholder in a corporation *de jure*, as, without an express statute, a stockholder in such a corporation would not be liable for any debt of the corporation whatever.

4. ———: ———: ———. When such a statute so prescribes and fixes the amount for which a stockholder in a corporation shall be liable, it is intended to be a limitation upon the stockholder's exemption from liability for the debts of the corporation which but for the law he would enjoy.

5. ———: ———: ———. When such a statute is in force and persons organize themselves into a *de jure* corporation, such statute is incorporated into and becomes a part of the charter of such corporation, and the stockholders thereof impliedly assent and agree that their liability for the debts of the corporation shall be as fixed by such law.

6. ———: ———: ———. Such a statute and the rights of creditors acquired thereunder are contractual in their nature.

7. ———: ———: ———. Where a statute provides that until cer-

tain things are done by persons forming a corporation, such as the filing of its articles of incorporation in the office of a public officer, the stockholders of such corporation shall be liable for the debts thereof, such a statute is declaratory of the common law.

8. ———: ———: ———. Until the requirements of such a statute have been complied with, a *de jure* corporation does not exist, and the stockholders thereof are jointly and severally liable for the debts contracted by such voluntary unincorporated association of persons; and such a statute and the rights of creditors acquired thereunder are contractual in their nature.

9. ———: ———: ———. Where a law commands corporations to do certain acts, as to publish annually a notice of their indebtedness, such a law is addressed to the stockholders of the corporations *de jure;* and when such statute declares that all the stockholders thereof shall be liable for the debts of the corporation in case it fails to comply with the requirements of the statute, then the law is designed as a punishment of the stockholders for a violation of the law and is penal.

10. ———: ———: ———. *Abbott v. Omaha Smelting & Refining Co.*, 4 Neb., 416, and *White v. Blum*, 4 Neb., 555, reaffirmed. *Howell v. Roberts*, 29 Neb., 483, and *Coy v. Jones*, 30 Neb., 798, overruled.

11. ———: ———. Where persons attempt in good faith to incorporate themselves into a valid corporation, and such a corporation actually enters upon the discharge of corporate functions and so continues for a considerable time unchallenged by the state, persons who contract with such a corporation cannot hold the stockholders thereof liable on such contract because it transpires that by some mistake or oversight the corporation had never become a technical *de jure* corporation.

12. **Statutes.** Section 136 of chapter 11, General Statutes, 1873, repealed by an act approved April 6, 1891, was penal.

13. **Corporations:** CONSTITUTIONAL LAW. The word "ascertained," in section 4, article 11, of the constitution, means "judicially ascertained;" and to "judicially ascertain" the amount due from a corporation to a creditor thereof means to have the finding and judgment or decree of a court as to such amount.

14. ———: LIABILITY OF STOCKHOLDERS TO CREDITORS. The creditors of a *de jure* corporation have no right of action against the stockholders thereof until they have reduced their claims against the corporation to judgment, and until execution issued upon such judgment has been returned, wholly or in part, unsatisfied.

15. ———: ———. **Such a creditor's cause of action does not accrue until the return unsatisfied in whole or in part of an execution issued on a judgment rendered in his favor against the corporation for the corporate debt.**

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

The facts are stated in the opinion.

Robert Ryan, for plaintiffs in error, contending that the provisions of the statute upon which the action is founded are penal and that the repeal of the statute abates the action, cited: Compiled Statutes, 1889, sec. 136, ch. 16; Session Laws, 1891, ch. 13; *Bennet v. Hargus*, 1 Neb., 419; *Butler v. Palmer*, 1 Hill [N. Y.], 325; *People v. Livingston*, 6 Wend. [N. Y.], 526; *Dash v. Van Kleeck*, 7 Johns. [N. Y.], 477; *Macnawhoc Plantation v. Thompson*, 36 Me., 365; *Johnson v. Hahn*, 4 Neb., 146; *Key v. Goodwin*, 4 M. & P. [Eng.], 341; *Willliams v. County Commissioners*, 35 Me., 348; *Underwood v. McDuffee*, 15 Mich., 367; *Sturtess v. Ellison*, 4 M. & S. [Eng.], 586; *Yeaton v. United States*, 5 Cranch [U. S.], 281; *Rachel v. United States*, 6 Cranch [U. S.], 329; *United States v. Passmore*, 4 Dal. [U. S.], 372; *Commonwealth v. Kimball*, 21 Pick. [Mass.], 375; *Stoever v. Immell*, 1 Watts [Pa.], 558; *Wiles v. Suydam*, 64 N. Y., 173; *Flash v. Conn*, 109 U. S., 371; *Chase v. Curtis*, 113 U. S., 458; *Steam Engine Co. v. Hubbard*, 101 U. S., 188; *Halsey v. McLean*, 12 Allen [Mass.], 438; *Derrickson v. Smith*, 3 Dutch. [N. J.], 166; *Sturges v. Burton*, 8 O. St., 215; *First Nat. Bank of Plymouth, Pennsylvania, v. Price*, 33 Md., 487; *Irvine v. McKeon*, 23 Cal., 472; *Bird v. Hayden*, 1 Robt. [N. Y.], 383; *Moies v. Sprague*, 9 R. I., 541; *Veeder v. Baker*, 83 N. Y., 156; *Gadsden v. Woodward*, 103 N. Y., 242; *Cady v. Smith*, 12 Neb., 630; *Hanson v. Donkersley*, 37 Mich., 184.

The amount of the claim justly due from the Globe Publishing Company should have been ascertained by a judgment and the corporate property exhausted before proceedings were instituted against the stockholders. (Constitution, sec. 4, art. 11; *State v. Boyd*, 31 Neb., 734; *Weil v. Lankins*, 3 Neb., 384; *Wineland v. Cochran*, 9 Neb., 480; *Crowell v. Horacek*, 12 Neb., 622; *Brooks v. Stone*, 19 How. Pr. [N. Y.], 395; *Baines v. Babcock*, 27 Pac. Rep. [Cal.], 674; *Baines v. Story*, 27 Pac. Rep. [Cal.], 676; *Potter v. Dear*, 27 Pac. Rep. [Cal.], 676; *Cambridge Water-Works v. Somerville Dying & Bleaching Co.*, 4 Allen [Mass.], 243; *Holyoke Bank v. Goodman Paper Mfg. Co.*, 9 Cush. [Mass.], 576.)

James W. Dawes and *Abbott & Abbott*, also for plaintiffs in error.

Chas. Offutt and *Charles S. Lobingier*, *contra:*

Section 136 of chapter 16, Compiled Statutes of 1889, was not remedial. (Sutherland, Statutory Construction [ed. 1891], sec. 207.)

Section 136 did not provide for the recovery of a penalty. (Anderson's Dictionary of Law; Sutherland, Statutory Construction, sec. 208; *Howell v. Roberts*, 29 Neb., 483; *Coy v. Jones*, 30 Neb., 798.)

Section 136 is a part of the charter of the Globe Publishing Company. (*Abbott v. Omaha Smelting Co.*, 4 Neb., 416; *Smith v. Steele*, 8 Neb., 115; 1 Morawetz, Private Corporations [2d ed.], sec. 318; *Dartmouth College v. Woodward*, 4 Wheat. [U. S.], 518.)

Section 136 is a part of the contract by virtue of which persons were permitted to do business as a corporation; compliance therewith was the condition on which the shareholders escape personal liability. (*Doolittle v. Marsh*, 11 Neb., 244.)

The repealing act could not affect the rights of creditors

which had attached before the repeal. The state and federal constitutions forbid the enactment of any law "impairing the obligation of contracts." (*Howell v. Roberts*, 29 Neb., 483; *Coy v. Jones*, 30 Neb., 798; *Porter v. Sherman County Banking Co.*, 36 Neb., 271; *State v. Cathers*, 25 Neb., 250; 2 Morawetz, Corporations, sec. 872; Cook, Stock & Stockholders [2d ed.], 515; *Hawthorne v. Calef*, 2 Wall. [U. S.], 10; *McDonnell v. Alabama Gold Life Ins. Co.*, 85 Ala., 401; *Corning v. McCullough*, 49 Am. Dec. [N. Y.], 308; *Hodgson v. Cheever*, 8 Mo. App., 321; *Lowry v. Inman*, 46 N. Y., 119; *Central Agricultural & Mechanical Association v. Alabama Gold Life Ins. Co.*, 70 Ala., 120; *Edwards v. Williamson*, 70 Ala., 145; *Aultman's Appeal*, 98 Pa. St., 505.)

The citations relied on by the plaintiffs in error are not in point, because they all construe penal statutes, and counsel does not distinguish between a liability imposed upon officers or trustees, and upon the entire body of the shareholders. This distinction should be made. (*Thompson v. Reno Savings Bank*, 3 Am. St. Rep. [Nev.], 846, note; *Flash v. Conn*, 109 U. S., 371; *Chase v. Curtis*, 113 U. S., 452.)

Since the corporation was insolvent, the action was properly brought against it and the stockholders simultaneously. (*Smith v. Steele*, 8 Neb., 115; *Howell v. Roberts*, 29 Neb., 483; *Abbott v. Omaha Smelting Co.*, 4 Neb., 416; *White v. Blum*, 4 Neb., 555; Cook, Stockholders [2d ed.], 219; *Morgan v. Lewis*, 17 N. E. Rep. [O.], 558; *Sleeper v. Goodwin*, 67 Wis., 585; *Richards v. Beach*, 5 N. Y. Sup., 574; *Walton v. Coe*, 110 N. Y., 109; *Shellington v. Howland*, 53 N. Y., 371; *Kincaid v. Dwinelle*, 59 N. Y., 548; *Flash v. Conn*, 109 U. S., 371; *Munger v. Jacobson*, 99 Ill., 349; *Toucey v. Bowen*, 1 Biss. [U. S.], 81; *Marion Township Union Draining Co. v. Norris*, 37 Ind., 424; *Shafer v. Moriarty*, 46 Ind., 9.)

RAGAN, C.

The State Bank of Nebraska at Crete, Nebraska, sued the Globe Publishing Company and the stockholders thereof in the district court of Saline county to recover the amount of a promissory note owing by said Globe Publishing Company to the said State Bank. Both the bank and the Globe Publishing Company were domestic corporations, having their principal places of business in said Saline county. The bank had judgment, and the Globe Publishing Company and all stockholders, except two, bring the case here for review.

The liability of the stockholders of the publishing company for the debt due from it to the bank was based on the failure of the publishing company to publish an annual notice of its existing debts, as provided by section 136, chapter 11, General Statutes, 1873, in force at the time the debt sued for here was contracted. That section is as follows: "Every corporation hereafter created shall give notice annually in some newspaper printed in the county or counties in which the business is transacted, and in case there is no newspaper printed therein, then in the nearest paper in the state, of the amount of all the existing debts of the corporation, which notice shall be signed by the president and a majority of the directors; and, if any corporation shall fail to do so, all the stockholders of the corporation shall be jointly and severally liable for all debts of the corporation then existing, and for all that shall be contracted before such notice is given." After this suit was brought, but before judgment was rendered therein, the legislature repealed this section 136 without a saving clause. The argument of counsel for plaintiffs in error now is that the repeal of said section abated this action. Whether this is true depends upon the nature of the statute repealed. If it was a statute contractual in its nature; if the right of action acquired by the bank against the stock-

holders of the publishing company by virtue of said statute, and the corporation's violation thereof, was a vested right, then the repeal of the statute could not and did not take it away; but if the statute repealed was penal in its nature, then its repeal abated the action.

1. A suit pending to enforce a right or remedy conferred solely by statute is abated by the unconditional repeal of such statute, before judgment rendered in such suit. (*Bennet v. Hargus*, 1 Neb., 419; *Knox v. Baldwin*, 80 N. Y., 610; *Victory Webb Printing & Folding Machine Mfg. Co. v. Beecher*, 97 N. Y., 651; *Gregory v. German Bank of Denver*, 3 Col., 332; *Breitung v. Lindauer*, 37 Mich., 217; *Yeaton v. United States*, 5 Cranch [U. S.], 281; *Norris v. Crocker*, 13 How. [U. S.], 429.)

2. Was this a penal statute? This question must be answered by the authorities. In 1848 the legislature of New York enacted a statute governing manufacturing corporations (ch. 40). Section 12 of that act was as follows: "Every such company shall annually, within twenty days from the first day of January, make a report, which shall be published in some newspaper published in the town, city, or village, or if there be no newspaper published in said town, city, or village, then in some newspaper published nearest the place where the business of said company is carried on, which shall state the amount of capital and of the portion actually paid in and the amount of its existing debts, which report shall be signed by the president and a majority of the trustees and shall be verified by the oath of the president or secretary of said company and filed in the office of the clerk of the county where the business of the company shall be carried on; and if any of said company shall fail so to do, all the trustees of the company shall be jointly and severally liable for all the debts of the company then existing and for all that shall be contracted before such report shall be made." A New York corporation organized under this law failed

to give the annual notice of its indebtedness as provided by said section 12, and during such default became indebted to a bank. The bank then sued the trustees of the corporation for the amount of the debt. The court of appeals of New York in *Merchants Bank of New Haven v. Bliss*, 35 N. Y., 412, discussing said section 12 and another section, said: "The liability (of the trustees under said section 12), it must be observed, is not limited to the injury or damage sustained by the creditors in consequence of the violation, but upon failure to file the report, * * * the trustees are subjected to the payment of the whole amount of the debts of the company then existing and for all that shall be contracted. * * * These provisions appear to be severally punitive, inflicted on grounds of public policy for the protection of creditors and the prevention of frauds upon the public in respect to the financial condition of such corporations. It is clear that the liability of the trustees is not imposed as an indemnity, because it has no relation to the actual loss or injury sustained by the party in whose favor the action is given. The action depends wholly upon the statute. There never was any such remedy or cause of action in whole or in part at common law. If any action could have been maintained at common law for either of the causes mentioned in sections 12 and 13 of the general act in relation to manufacturing corporations, it could extend only to the actual damages or injury sustained. But those elements have nothing to do with the actions given by these sections, nor, indeed, is it necessary that the creditor should have sustained any injury or damage by reason of a violation of those sections. It is sufficient that the party prosecuting the action should be a creditor when the violation of the law takes place. The right of action is given to the creditors and they must be held to be the parties aggrieved. For these reasons I am satisfied that the sections 12 and 13 impose a penalty," etc. The question of the nature of this section 12 arose

again and was discussed and decided by the court of appeals of New York in *Miller v. White*, 50 N. Y., 137, and the court said: "It will be perceived that this is a highly penal act, extremely rigorous in its provisions." In *Wiles v. Suydam*, 64 N. Y., 173, the statute was again before the New York court of appeals. In that case the Imperishable Stone Block Pavement Company, a domestic corporation, became indebted to Wiles and others. Suydam was a stockholder in the corporation and indebted to it on his stock subscriptions. He was also a trustee of the corporation. The suit was brought by Wiles and others against Suydam to recover the amount of the debt owing them by the pavement company; and Wiles set out in his petition against Suydam two causes of action, viz., his indebtedness on his stock subscription to the Stone Pavement Company, and the failure of that corporation to publish annually the statement of its existing debts. The court held that the indebtedness of Suydam on his unpaid subscription constituted one cause of action against Suydam, and in discussing the other right of action of Wiles against Suydam originating by the failure of the corporation to publish its annual statement said: "The allegations against the defendant as trustee also constitute a distinct and perfect cause of action. * * * Here the liability is created by statute, and is in the nature of a penalty imposed for neglect of duty in not filing a report showing the situation of the company." The nature of this section 12 has been before the New York court of appeals and the construction placed upon said section in the leading case, *Merchants Bank of New Haven v. Bliss*, 35 N. Y., 412, and reaffirmed in the following cases: *Easterly v. Barber*, 65 N. Y., 252; *Knox v. Baldwin*, 80 N. Y., 610; *Veeder v. Baker*, 83 N. Y., 156; *Pier v. Nanmore*, 86 N. Y., 95; *Stokes v. Stickney*, 96 N. Y., 323; *Victory Webb Printing & Folding Machine Mfg. Co. v. Beecher*, 97 N. Y., 651. And in *Gadsden v. Woodward*, 103 N. Y., 242, the nature of said section

12 was again before the New York court of appeals, and the court said: "This action is brought against the defendant to recover a debt due by a manufacturing corporation of which he was a trustee, and he is sought to be made liable therefor on the ground that he failed to make the annual report required by the general manufacturing law. The action is not to recover a debt which he owes, but to impose upon him, as a penalty for his default, the payment of the debt of the corporation. We have repeatedly held that such an action is an action for a penalty or forfeiture. * * * The liability sought to be enforced against the defendant does not arise out of any contract obligation, but is imposed by the statute as a penalty for disobedience of its requirement." This section 12 of the New York law was construed by the supreme court of the United States in *Chase v. Curtis*, 113 U. S., 452, the court saying of said section 12: "But, as we have already seen, the statute involved in this discussion is not a remedial statute to be broadly and liberally construed, but is a penal statute, with provisions of a highly rigorous nature, to be construed most favorably for those sought to be charged under it, and with strictness against their alleged liability."

Section 15 of chapter 18 of the Revised Statutes of 1868 of the state of Colorado is a copy of section 12 of the New York act. The nature of this section 15 of the Colorado act was before the supreme court of that state in *Gregory v. German Bank of Denver*, 3 Col., 332, and of that statute that court said: "This statute is in its nature penal. It prescribes a determinate penalty for neglect of a duty imposed by law upon the trustees of companies organized under our general incorporation act. The amount of the forfeiture is measured by the aggregate debt contracted by the company. The liability is not founded upon contract, but arises from misconduct in office." This case was reaffirmed by the supreme court of Colorado in *Larsen v. James*, 29 Pac. Rep. [Col.], 183. A statute of Michigan required annual reports of cer-

tain corporations to be filed, and provided that if the directors neglected to file such report they should be liable for all the debts of the corporation contracted during the period of such neglect. Construing that statute the supreme court of that state held that the liability imposed was in the nature of a penalty and conferred no contract obligation upon which creditors could rely.

A statute of Connecticut provided that in the case of every corporation, certificates showing their condition should be filed annually by the president and secretary with the town clerk, and that in case of neglect those officers should be liable for all the debts of the corporation contracted during the period of such neglect. The supreme court of that state, construing this statute in *Mitchell v. Hotchkiss*, 48 Conn., 9, said: "We do not see how it is possible to construe this statute as creating, or attempting to create, any contract relation or duty between the creditors of a corporation and its president. The adoption of such a construction would suggest grave doubts as to the validity of the act which should attempt so arbitrarily to make a debtor out of a stranger to the debt, or, in other words, to make the debt of one person the debt of another. There was no privy between Hotchkiss and the plaintiffs. They had no transaction with each other, and the former owed the latter no private duty from which a promise might be implied." This Connecticut statute came before the supreme court of the United States, and its nature was construed by that court in *Steam Engine Co. v. Hubbard*, 101 U. S., 188, and that court held that the Connecticut statute was penal and must be strictly construed.

The supreme court of Illinois in *Diversey v. Smith*, 103 Ill., 378, defines a penal statute thus: "A penal statute is an act by which a forfeiture is imposed for transgressing the provisions of the act. It may also be remedial in one part and penal in another. The effect and not the form of the statute is to be considered, and if its object is clearly

to inflict a punishment on a party for doing what is prohibited or failing to do what is commanded to be done, it is penal in its character."

Cook, Stock & Stockholders [2d ed.], sec. 223, in discussing the enforcement of the statutory liability of stockholders in the courts of a state other than the one in which said corporation was created, uses this language: "In general, when the courts of one state are asked to enforce the statutory liability of stockholders in a corporation created by another state, two things are to be considered: First —Is the statutory liability itself a contract liability or a mere penalty? * * * The law is clear that the courts of one state will not enforce penalties imposed by another state. But the usual statutory liability of stockholders is not a penalty. * * * The ordinary statutory liability of stockholders is a contract liability and will be enforced as such by the courts of all the states. A different rule prevails as to the statutory liability of corporate officers for failure to file reports or give certain notices or make certain contracts. Such liability is generally construed to be penal, and will not be enforced by the courts of other states."

The section of the Nebraska statute under consideration is almost a literal copy of the eighteenth section of the first article of the corporation act of the state of Missouri, approved March 19, 1845, the section of the Missouri law being in the following words: "Every corporation hereafter created shall give notice annually in some newspaper printed in the county where the corporation is established, and in case no paper is printed therein, then in the nearest paper, the amount of all the existing debts of the corporation, which notice shall be signed by the president and a majority of the directors; and if any of the said corporations shall fail so to do, all the stockholders of the corporation shall be jointly and severally liable for all the debts of the company then existing, and for all that shall

be contracted before such notice shall be given." A corporation of that state having failed to publish an annual notice of its existing debts, and during such default having become indebted, an action was brought against all the stockholders of the corporation for the debt so contracted, on the ground of the default in publishing the annual notice required by the section just quoted. The right of the creditor to maintain the action against the stockholders depended upon whether the statute was in its nature penal, and the supreme court of the state of Missouri in *Cable v. McCune*, 26 Mo., 371, decided that the statute in question was a penal one. The court said: "Our opinion in this case is based entirely upon the penal character of the statute we are called upon to construe. The corporation is required to publish an annual statement of their condition for the information of the public, and the failure to do so renders the stockholders responsible for a specified class of demands existing prior to or at the time of such publication. * * * This liability, in the event of there being no required publication, does not depend upon the actual injury which the failure to publish may have occasioned in a given case, but is absolute, dependent only on the proof of publication or no publication. Such a statute can be regarded in no other light than a penal one."

Thus far we have been reviewing authorities which show that the Nebraska statute under consideration, and statutes like it, is a penal one. We now direct our attention to the argument of counsel for the defendant in error, and the authorities cited by them, that section 136 of the Nebraska statute is in its nature contractual. In other words, that the right of action given thereby to the creditors of a corporation against its stockholders for the failure of the corporation to publish the annual statement of its indebtedness is a right of action arising by contract and therefore a vested right and one that the legislature could not take away by repealing the statute. It is contended that as sec-

tion 136 was in force at the time of the organization of the Globe Publishing Company it became a part of its charter, and that the stockholders thereof, by virtue of such statute and the organization of such corporation while it was in force, impliedly contracted and promised that in case the corporation failed to publish its annual statement, they, the stockholders, would pay all the debts that the corporation contracted during the period of such default. But counsel lose sight of the distinction between the liability of a member of a voluntary unincorporated association for the debts thereof as it existed at common law and as fixed by statutes declaratory thereof, and the statutory liability of a stockholder of a corporation *de jure*. When the law prescribes what the liability of a shareholder shall be, for instance, that such shareholder shall be liable to the creditors of the corporation for double the amount of his stock, or for a sum equal to the amount of his stock, or for the amount remaining unpaid on his subscription to the stock of such company, the law is then speaking of and fixing the liability of a stockholder in a corporation *de jure*, as, without an express statute, a stockholder in such a corporation would not be liable for any debt whatsoever of such corporation; and when a statute so prescribes and fixes the amount for which the stockholders in a corporation shall be liable, such a law is intended to be a limitation upon the stockholder's exemption from liability for the debts of the corporation which he would otherwise enjoy; and persons who organize themselves into a *de jure* corporation, when such a statute is in force, incorporate it into, and it becomes a part of, their charter, and they impliedly agree and assent that their liability for the debts of the corporation shall be as fixed by such a law. Where a statute provides that until certain things are done by persons forming a corporation, such as the filing of its articles of association in the office of a public officer, the stockholders in such corporation shall be liable for the debts thereof,

such a statute is only declaratory of the common law. Until the requirements of the statute have been complied with, a *de jure* corporation would not exist, and the parties thereof would be jointly and severally liable for all the debts contracted by such voluntary unincorporated association of persons. At least, since the time our Norse ancestors settled on the shores of the Baltic sea, it has been the law that where two or more persons engaged in a common enterprise, each one was liable for the act of the others and for the debts incurred by the others in aid of the common object for which the association was formed or the enterprise undertaken. It is evident that the statute, which makes all the stockholders of a corporation liable for the debts thereof until the requirements of the statute have been complied with necessary to make such a corporation one *de jure*, cannot be considered a penal statute, as such statute adds nothing to the liability of such parties, nor takes away any right which a creditor of such parties might have had; but where the law commands corporations to do certain acts, as to publish annually a notice of their indebtedness, such a law is addressing itself, not to *de facto* corporations or copartnerships or unincorporated associations, but to corporations *de jure* and the stockholders of such corporations; and when such a statute declares that all the stockholders of such a corporation shall be liable for all the debts of the corporation, if it fails to comply with the requirements of the statute, then such a law is designed as a punishment of the stockholders, and is penal.

Among the authorities relied upon by the eminent counsel for the defendant in error to sustain their argument that the section of the Nebraska statute under consideration was contractual in its nature is the case of *Hawthorn v. Calef*, 2 Wall. [U. S.], 10. An examination of that case, however, discloses that it does not by any means sustain the contention of counsel. A statute of Maine passed in 1836 provided that the shares of the individual stockholders of a

corporation should be liable for the debts of the corporation, and in case of deficiency of attachable corporate property or estate, the individual property rights and credits of the stockholder should be liable for the corporation's debts to the amount of the stockholder's stock. A corporation organized under this law became indebted, and soon after the debt was contracted the legislature of the state repealed the law making the stockholder of a corporation individually liable to a creditor thereof. The creditor, however, sued the stockholder, alleging that the statute referred to was contractual in its nature; that the right of action he had acquired against the stockholder was a vested right, and that it was not within the power of the legislature of Maine to take that right away by repealing the statute. This contention the supreme court of the United States sustained in the case just cited. Another case relied on by counsel to support this argument is *Flash v. Conn*, 109 U. S., 371. The tenth section of the corporation law of the state of New York provided that all the stockholders of every company incorporated under the act should be severally and individually liable to the creditors of the corporation to an amount equal to the amount of stock held by them in such corporation. A corporation having become indebted, the creditors sued its stockholders for the debt under the section just quoted, and the supreme court of the United States, in construing said section 10, held that the liability created thereby was contractual in its nature. With the doctrine announced by the two cases last cited we entirely agree. The statute of the state of Maine which fixed the liability of a stockholder of a corporation for the debts thereof at the amount of the stock held by him in such corporation was contractual, and whoever became a stockholder in a corporation while that law was in force impliedly assented and agreed that he would be liable for the debts of the corporation to an amount equal to the stock held by him therein. It was a fixed, ascertained, and determined liability at the

time he became a member of the corporation. It was a law addressing itself to stockholders of *de jure* corporations; and a law of limitation upon the exemptions that such stockholders would have otherwise enjoyed but for such statute; and the same may be said of section 10 of the New York law construed by the supreme court in *Flash v. Conn.* But it is said that this court is committed to the doctrine of the contractual nature of the statute under consideration; and to sustain this contention we are cited to *Abbott v. Omaha Smelting & Refining Co.*, 4 Neb., 416, and *White v. Blum*, 4 Neb., 555; but these cases decide, and decide only, that where persons have attempted to form a corporation, until they shall have complied with the requirements of the statute for that purpose, are jointly and severally liable for the debts of such association. This conclusion is right and we adhere to it; but the conclusion reached in these cases resulted not alone from the statute, but could and would have been the same had no statute on the subject existed. Until the statute had been complied with the Omaha Smelting Company and the Midland Pacific Railroad Company did not become corporations *de jure;* and until they had become such corporations, the parties organizing them were simply members of voluntary unincorporated associations, and as such were liable both at common law and under the statute for the debts of such associations, contracted by any member thereof within the scope of his authority and for the purposes for which the associations existed. But we do not mean by anything said here to deny the correctness of the doctrine, expressed in many cases, that where persons attempt in good faith to incorporate themselves into a valid corporation, and in such corporations named actually enter upon the discharge of corporate functions, and so continue for a considerable time unchallenged by the state, that persons who contract with such corporation cannot hold the stockholders thereof liable on such contract, because it transpires that, by some mistake

or oversight, the corporation had never become a technical *de jure* corporation. On the contrary, we approve of that rule.

It is conceded by counsel for defendant in error that section 12 of the New York act construed in the cases cited above was and is penal, but it is said that, as that act made the trustees of the corporation liable for not publishing the notice of the corporation's existing debts, a distinction exists between the nature of that act and section 136 of the Nebraska act, wherein the liability is made to attach to all the stockholders of the corporation. We have reflected much upon this argument and confess our inability to comprehend the distinction which counsel would draw. We have been unable after a patient search to find any decided case or any text-writer supporting the counsel's argument. It may be that the directors of a corporation would be liable for fraud or deceit practiced by them in the name of the corporation upon another, and it may be that they would be liable for any damage which another should sustain in dealing with such corporation by the failure of such directors to comply with the law in force governing the corporation; but if such liability exists, it is not a statutory liability, but a common law liability; and in either of the cases supposed the liability of the directors would be measured by the damages sustained. If section 12 of the New York act is penal because it compels the directors to pay the debts of the corporation because they, its managing officers, did not comply with the requirements of the law, it would seem that a statute which makes all the stockholders of a corporation liable for the default of the corporation's directors would also be penal. If the section of the Nebraska statute under consideration is not a penal one, we are at a loss to know how the legislature could frame a penal statute. It certainly is not a statute of rewards. True, the punishment inflicted is pecuniary, but by the provisions of this statute a stockholder who owns $10 of stock in a corpora-

tion may, under certain contingencies, be compelled to pay a debt of $10,000 that he did not owe, that he did not contract, and suffer that liability because of the default of another. True enough, the object of the statute was to annually notify to the world the financial condition of the domestic corporations of the state, that parties having transactions with them might have a basis upon which to do their business safely; but this is not the only object of the statute. It is the exercise by the state of its police power. It is based upon principles of public policy, and it was intended as an incentive to stockholders of corporations to see to it that the law of the state was obeyed; and if they neglected their duty in that regard, to punish them for such neglect. We cannot recognize the argument that persons were induced to give the corporations of the state credit because of the existence of this section 136, for this would be to concede that the creditors parted with their property upon the understanding that when they did so that the officers of the corporation would violate the law which it was their duty to obey.

But, again, counsel for defendant in error say that the nature of the statute under consideration is no longer an open question in this court, as we have decided that the statute was not penal but contractual. In *Howell v. Roberts*, 29 Neb., 483, and again in *Coy v. Jones*, 30 Neb., 798, we did so decide. A somewhat extensive re-examination of the subject, however, constrains us to say that the conclusion reached by us in those cases was wrong and they must be overruled. We did say in those cases that said section 136 of the Nebraska statute was contractual in its nature. We were mistaken. The rule we announced in those cases is not supported by the weight of authority, nor indeed is it supported by any authority that we have been able to find. We conclude, therefore, that said section 136 was a penal statute, and that all rights of action which accrued thereunder to the creditors of a corporation against the

stockholders thereof and which had not been reduced to judgment were abrogated by the repeal of said section.

This suit was brought against the Globe Publishing Company and the stockholders thereof jointly. Was the action against the stockholders prematurely brought? We think it was. Cook, Stock & Stockholders, sec. 219, thus lays down the rule: "Even when not expressly provided by statute, it is the rule, according to the weight of authority, that corporate creditors, before they can proceed against the shareholders upon their statutory liability, must first exhaust their remedy against the corporation and its assets." We have no doubt but this is the general rule and the better practice, especially in the absence of a statute which authorizes a different procedure; but we are not concerned with what the rule may be in other states and courts. Section 4, article 11, of the constitution provides that "In all cases of claims against corporations and joint stock associations, the exact amount justly due shall be first ascertained, and after the corporate property shall have been exhausted, the original subscribers thereof shall be individually liable to the extent of their unpaid subscription, and the liability for the unpaid subscription shall follow the stock." The word "ascertained" in this provision we take to mean "judicially ascertained;" and to "judicially ascertain" the amount due from a corporation to a creditor means to have the finding and judgment or decree of a court as to such amount. Such an ascertainment of a debt due from a corporation could then be ascertained, and ascertained only, within the meaning of this constitution, in a suit brought by a creditor of a corporation against it; not against the stockholders thereof, nor against the stockholders and corporation jointly. The expression in the constitutional provision just quoted above, "that after the corporate property shall have been exhausted," means exhausted by judicial proceedings; that is, when executions issued on judgments or decrees rendered against corporations shall be returned

unsatisfied. This constitutional provision is the supreme law of the land, and we are not at liberty, nor desirous, of evading it or construing it away. We think, therefore, that the creditors of a *de jure* corporation have no right of action against the stockholders thereof until they have reduced their claims against the corporation to judgment, and until an execution issued upon such judgment has been returned wholly or in part unsatisfied. It follows from this that a creditor's cause of action against the stockholders of a corporation under said section 136 would not accrue until such creditor had sued the corporation for the corporate debt, obtained a judgment thereon, and an execution issued on such judgment had been returned, at least in part, unsatisfied. The judgment of the district court is affirmed as to the Globe Publishing Company and reversed as to all stockholders who prosecuted error, and the action as to them is dismissed.

JUDGMENT ACCORDINGLY.

NORVAL, C. J., concurs in the judgment solely on the ground last stated in the above opinion.

RYAN, C., having been of counsel, took no part in the decision.

L. K. SCROGGIN V. NATIONAL LUMBER COMPANY.

FILED JUNE 6, 1894. No. 4742.

1. **Error Proceedings:** REVIEW: MOTION FOR NEW TRIAL. Errors alleged to have occurred upon the trial of a case in the district court will not be reviewed here on petition in error, unless the record discloses a motion for a new trial in the district court and a ruling thereon. This rule applies as well to equity cases brought here by petition in error as to cases at law.

2. **Mechanics Liens:** LANDLORD AND TENANT: COST OF IMPROVEMENTS: RATIFICATION. Where a tenant erects buildings upon leased property without authority from the landlord, and

the landlord afterwards acknowledges the expense of erecting such buildings as a proper charge by the tenant against him, and settles with the tenant upon that basis, such facts constitute a ratification of the tenant's acts, and render the landlord's estate subject to a mechanic's lien arising out of such improvements.

3. ———: ———: ———: PAYMENT. In such case the payment by the landlord to the tenant of the cost of the improvement does not defeat the lien.

4. **Limitation of Actions: PLEADING.** The defense of the statute of limitations, if not raised either by demurrer or answer, is waived, and when sought to be raised by answer, in order to preserve the defense, the answer must be good against demurrer.

5. ———: ———. An answer alleging merely that the action was not brought within the time required by law, or until after the lien had expired by lapse of time, states conclusions merely and is insufficient.

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

S. A. Searle, for plaintiff in error.

S. W. Christy, contra.

IRVINE, C.

None of the errors alleged to have occurred on the trial of this case can be considered, for the reason that the case is brought here by petition in error and there was no motion for a new trial in the district court. (*Cropsey v. Wiggenhorn*, 3 Neb., 108; *Wells v. Preston*, 3 Neb., 444; *Singleton v. Boyle*, 4 Neb., 414; *Hull v. Miller*, 6 Neb., 128; *Crutts v. Wray*, 19 Neb., 581; *Manning v. Cunningham*, 21 Neb., 288; *Smith v. Spaulding*, 34 Neb., 128; *Miller v. Antelope County*, 35 Neb., 237.) This rule applies as well to equity cases brought here on error as to cases at law. (*Harrington v. Latta*, 23 Neb., 84; *Carlow v. Aultman*, 28 Neb., 672; *Fitzgerald v. Brandt*, 36 Neb., 683; *Gray v. Disbrow*, 36 Neb., 857.) This rule is so firmly established that parties would save to themselves expense,

and to the court the expenditure of time which cannot be spared from the consideration of other cases by paying due regard thereto. Whether or not the question is raised by the adverse party this court will look into the record and refuse to consider any assignments of error occurring at the trial unless the record discloses a motion for a new trial and a ruling thereon.

The only assignment of error sufficiently definite for consideration at all, and not relating to matters occurring upon the trial, is that the judgment is not supported by the findings of the court. A consideration of this assignment requires a statement of the pleadings. The defendant in error was the plaintiff below and alleged the sale and delivery to the plaintiff in error, under an oral contract made by one McClellan as agent for plaintiff in error, of certain lumber and material for the erection of a corn crib and hog pen upon land of the plaintiff in error, and the filing of a claim of lien therefor. The prayer was for judgment and a foreclosure of the mechanic's lien. To this petition the plaintiff in error made answer, denying the sale or delivery to him of any lumber or material, and denying any contract therefor; denying the agency of McClellan; averring that McClellan was a tenant of plaintiff in error, and that whatever he may have purchased from the defendant in error was bought upon his own account, without authority, knowledge, or consent of the plaintiff in error. The answer then averred that after the improvements were made McClellan charged the plaintiff in error with the cost thereof, and thereafter McClellan and the plaintiff in error had a full settlement of said account, including the cost of lumber, and in such settlement McClellan was allowed, satisfied, and paid in full for the same. This last averment renders a consideration of the special findings of the court, which practically confirm it, unnecessary. The answer thus far pleads a good defense to the lien by the denial of any direct transactions with the defendant in error and by

denial of McClellan's authority to deal for plaintiff. Unfortunately, however, for plaintiff in error he followed these averments with the statement that after the material was furnished, McClellan had charged him therefor on the accounting between them, that he had settled with McClellan on that basis, and had allowed and paid him therefor. If McClellan had no authority to make the improvements so as to charge the plaintiff in error, plaintiff in error's action in accepting them, and acknowledging that the expense thereof was chargeable against him, was a complete ratification of McClellan's acts and operated to charge plaintiff in error's estate with the lien. Having adopted and ratified McClellan's acts, his payment to McClellan was no defense to this action. It amounted simply to his payment of money to his agent and did not discharge the debt or lien of defendant in error. Therefore, so far as we have considered the pleadings, they entitled the defendant in error to a decree regardless of the evidence or findings.

The next paragraph of the answer avers that the claim of lien was not filed within the time required by law. There is a distinct special finding by the trial court adverse to the plaintiff in error upon this issue.

The only remaining averment of the answer is as follows: "That this suit was not brought within the time required by law, nor until after the so-called lien of plaintiff had expired by lapse of time." Upon this there is no finding. It does appear, however, from the plaintiff's petition that the claim of lien was filed April 20, 1887. The petition was filed in the district court March 14, 1889. The summons upon which service was had upon plaintiff in error was issued May 1, 1889. The statute (Comp. Stats., ch. 54, sec. 3) provides that the lien shall be operative "for two years after the filing of such lien;" and section 19 of the Code of Civil Procedure provides that an action shall be deemed commenced within the meaning of

title 2 (relating to limitations of actions), as to the defendant, at the date of the summons which is served upon him. While title 2 of the Code contains no provision relating to the foreclosure of mechanics' liens, it is probable that the special limitation quoted from chapter 54 should be construed with reference to other statutes of limitations, and that in determining whether or not an action is barred the time should be counted to the date of the summons served. It appeared, therefore, from the record that the summons which was served upon the plaintiff in error was not issued or dated until after two years from the filing of the lien, and a difficulty is thus presented which is not very clearly solved by the past adjudications of this court. Following the prevalent rule, it has several times been held that the defense of the statute of limitations is personal to the defendant and is waived unless pleaded. (*Taylor v. Courtnay*, 15 Neb., 190; *Atchison & N. R. Co. v. Miller*, 16 Neb., 661.) But it has also been held that the defense may be raised by a general demurrer where it appears from the petition that the bar of the statute has attached. (*Hurley v. Cox*, 9 Neb., 230; *Peters v. Dunnells*, 5 Neb., 460; *Merriam v. Miller*, 22 Neb., 218.) In order to determine this point it is in all cases necessary to look at the record outside of the petition and ascertain when the action was in fact commenced. The result would seem to be that had a demurrer been interposed to this petition it would have been sustained, but in view of the cases holding that the defense is one which is waived by failing to plead it, we cannot say that there was such a failure to state a cause of action as to call upon the court to reverse the judgment regardless of whether the sufficiency of the pleading was questioned in the district court. The rule would seem to be that the defense of the statute is waived unless raised either by demurrer or answer, and this seems to have been the view taken by the court in *Alexander v. Meyers*, 33 Neb., 773. (See, also *Sturges v. Burton*, 8 O. St., 215.)

The objection was not in this case raised by demurrer. It was attempted to raise it by answer. The answer in this respect pleaded no facts. It simply averred that the suit was not brought within the time required by law, nor until after the lien had expired. These were statements of mere conclusions of law and not of any facts. Where a plea of the statute of limitations is required, the facts must, as in other cases, be pleaded and not the pleader's conclusions of law. Thus, in *Barnes v. McMurtry*, 29 Neb., 178, a plea was held insufficient for not stating definitely when the statute began to run; and in *Alexander v. Meyers, supra*, a plea of adverse possession was held bad for not averring that defendant's possession had been exclusive. The plaintiff in error, not having raised the defense by demurrer, was required to raise it by answer, and this being so he was required to raise it by an answer which would have been sufficient against demurrer to the answer itself. We hold, therefore, that the defense of the statute, not being raised at all by demurrer or sufficiently by answer, was waived.

JUDGMENT AFFIRMED.

JAMES C. WEEKS ET AL. V. GIDEON WHEELER ET AL.

FILED JUNE 6, 1894. No. 4295.

1. **Error Proceedings:** ASSIGNMENTS IN APPELLATE COURT. Where error is taken from the judgment of a justice of the peace to the district court and the judgment of the justice there affirmed, and error is then prosecuted to this court from the judgment of affirmance, this court will only consider such assignments of error as were presented to the district court.
2. **Review:** ERROR. A judgment will not be reversed unless error affirmatively appears from the record.

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

Webster & White, for plaintiffs in error.

Meiklejohn & Thompson, contra.

IRVINE, C.

The defendants in error recovered a judgment against the plaintiffs in error before a justice of the peace in Merrick county, from which the plaintiffs in error prosecuted error to the district court, where the judgment of the justice was affirmed, and plaintiffs in error now bring the case here for review.

The first error assigned both here and in the district court is the refusal of the justice to sustain a motion to consolidate this action with another. Section 150 of the Code of Civil Procedure provides that whenever two or more actions are pending in the same court which might have been joined, the defendant may, on motion and notice to the adverse party, require him to show cause why the same shall not be consolidated, and if no such cause be shown, the said several actions shall be consolidated. In order to justify a consolidation it must, therefore, at least appear that the actions might have been joined. There is nothing whatever in the record before us to show the nature of the other action or the parties thereto, and error in overruling the motion to consolidate, therefore, does not appear.

The other errors assigned in the petition in error in this court relate to the use of certain depositions. Several errors are assigned upon the action of the district court in sustaining the justice in overruling a motion of plaintiffs to suppress the depositions referred to. In the petition in error in the district court, however, no errors were assigned upon the justice's ruling upon that motion. The only error

assigned were upon the justice's permitting the depositions to be read in evidence at the trial. These assignments are preserved in this court by the fifth assignment in error, in which it is alleged that the district court erred in sustaining the justice in overruling the objections of plaintiffs to the reading of said depositions. We cannot here consider any errors not presented to the district court by the petition in error there. (*Lean v. Andrews*, 38 Neb., 656.) This prevents our reviewing the action of the justice in overruling the motion to suppress the depositions. As to his action in overruling the objections to their being read in evidence, this was matter occurring upon the trial. The case was tried to a jury. The plaintiffs in error might have excepted to the justice's ruling and have procured the settlement of a bill of exceptions. They did not do so, and there is nothing in the record here or in the district court upon which to found this assignment.

JUDGMENT AFFIRMED.

D. W. REA V. PRESLEY BISHOP ET AL.

FILED JUNE 6, 1894. NO. 5316.

1. **Trial:** DEFENSE OF INSANITY: OPENING AND CLOSING. The plaintiff alleged the payment to a third person of specific sums of money for the benefit and at the request of the defendant. The answer made no denial of the allegations of the petition, but pleaded insanity as a defense. *Held*, That under this state of the issues the defendant was required to first introduce testimony and was entitled to the opening and close of the case.
2. **Insanity:** ACTION ON CONTRACT. The defense of insanity may be interposed to an action upon a contract without restoring what the insane person received thereunder, in cases where the ability does not remain of restoring what was received in specie.
3. **Instructions:** REVIEW. Instructions will not be reviewed un-

less the record discloses that exceptions were taken thereto, and where error is assigned upon the refusal of a group of instructions *en masse*, they will be considered no further than to ascertain that some one of the group was properly refused.

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

A. M. Robbins, H. E. Babcock, and *Good & Good*, for plaintiff in error.

J. R. & H. Gilkeson, contra.

IRVINE, C.

The plaintiff in error sued the defendants in error to recover three sums of money: the first on a promissory note for $102, alleged to have been executed by Bishop to one Harris and signed by plaintiff as surety, and which plaintiff paid; the second, $10, in payment of a livery bill at Bishop's request, and the third, $9, paid to the county judge at the request of Bishop. The petition alleged that since the transactions Bishop has been adjudged insane and his guardian was made a party defendant. The guardian answered for herself and Bishop, not denying any of the facts stated in the petition, but alleging that at the time of all of the transactions Bishop was insane, and that the plaintiff knew that fact when he incurred the obligation upon the note and paid the two sums of money. The reply was practically a denial of these allegations.

Error is assigned upon the court's permitting to the defendants the opening and close of the case. An inspection of the record does not disclose who made the opening statement to the jury. The objection was taken to the court's permitting the defendants first to introduce evidence. Upon this subject section 283 of the Code of Civil Procedure provides: "When the jury has been sworn the trial shall proceed in the following order, unless the court for

special reasons otherwise direct: First—The plaintiff must briefly state his claim, and may briefly state the evidence by which he expects to sustain it. * * * Third—The party who would be defeated, if no evidence were given on either side, must first produce his evidence; the adverse party will then produce his evidence. * * * In the argument the party required first to produce his evidence shall have the opening and conclusion." The whole of plaintiff's petition was practically admitted by the answer. The issues were only those relating to Bishop's sanity. Under this state of the pleadings, if no evidence had been introduced, judgment would have gone for the plaintiff, and the court, therefore, correctly gave to the defendant the opening and close.

The principal question discussed is as to the liability of an insane person upon his contracts, when made without fraud or deception with one not aware of his insanity. This argument is of course based upon the instructions. The record does not show that any exceptions were taken to the instructions given by the court, and they cannot, therefore, be reviewed. As to the instructions requested by plaintiff and refused, the assignment of error both in the motion for a new trial and in the petition in error is as follows: "The court erred in refusing instructions asked by the plaintiff numbered one to eleven inclusive, and which was duly excepted to by the plaintiff." Under such an assignment we can consider these instructions no further than to ascertain that one of them was correctly refused. (*Hiatt v. Kinkaid*, 40 Neb., 178; *McDonald v. Bowman*, 40 Neb., 269.) The second of these instructions refused was as follows: "The jury are instructed that an executed contract of an insane person cannot be rescinded, neither can it be successfully resisted in an action at law, unless the person contracted with can be placed in *statu quo;* that is in the same condition in which he stood before entering into the contract with the insane person." To have given

this instruction would have required the defendants to show that they had repaid to plaintiff all the money advanced. Since this case was submitted this court has had occasion to consider the question of the right of an insane person to rescind without restoring the consideration. (*Dewey v. Allgire*, 37 Neb., 6.) It was there held that the deed of an insane person may be avoided as against a grantee without notice of the grantor's insanity and against an innocent purchaser from such immediate grantee. In the latter case it is not necessary to restore the consideration paid by such purchaser to the immediate grantee. In that case the following language from *Gibson v. Soper*, 6 Gray [Mass.], 279, was quoted with approval: "'To say that an insane man, before he can avoid a voidable deed, must first put the grantee in *statu quo* would be to say, in effect, that in a large majority of cases his deed shall not be avoided at all. The more insane the grantor was when the bargain was made, the less likely will he be to retain the fruits of his bargain so as to make restitution. It would be absurd to annul the bargain for the mental incompetency of a party, and yet to require of him to retain and manage the proceeds of his sale so wisely and discreetly that they shall be forthcoming when, with restored intellect, he shall seek its annulment.'" While the facts of this case are not at all similar to those of *Dewey v. Allgire*, the principle is the same. In the recent case of *Englebert v. Troxell*, 40 Neb., 195, it was held in regard to a contract of an infant that in order to rescind the contract upon reaching his majority, he is required only to return so much of the consideration received by him as remains in his possession, and he is not required to return an equivalent for such part thereof as may have been disposed of by him during his minority. The right to rescind or to resist the enforcement of a contract is based upon the same ground, whether the party be an infant or insane; that is, a want of legal capacity to contract. We think the principle of the two cases cited is decisive here, and that

the instruction requested was, therefore, vicious. By it the jury would have been instructed that the enforcement of the contract could only be resisted when it was practicable to place the other party in *statu quo*. The rule is that the defense of incapacity will only be unavailing when it is possible to restore the consideration and this is not done.

Some argument is addressed to errors alleged to have occurred in the admission of evidence. These questions we cannot consider, for the reason that in the petition in error there is no assignment upon the subject.

JUDGMENT AFFIRMED.

JOHN REED ET AL. V. CALVIN MCRILL.

FILED JUNE 6, 1894. No. 5296.

1. **Conversion**: PLEADING. In order to state a cause of action for conversion it is sufficient to allege ownership generally without stating how such ownership was acquired.
2. **Tenancy in Common.** Where there is a contract between the owner of land and another person whereby such other person is to cultivate the land and harvest the hay for a share thereof, but where the relation of landlord and tenant is not created, and there is no specific agreement as to the possession of the land, the parties become tenants in common of the grass and hay.
3. **Trover and Conversion.** In such a case if one of the parties to such contract seize the whole crop either before or after severance, and dispose of it in denial of the other's rights, the other may maintain trover for his share.
4. **Special Findings**: DISCRETION OF COURT: REVIEW. The submission of questions to the jury for special findings is a matter within the discretion of the trial court, and the submission or refusal to submit such questions will not be reviewed except for abuse of discretion.

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

Nightingale Bros., for plaintiffs in error.

A. M. Robbins, contra.

IRVINE, C.

McRill sued the plaintiffs in error, alleging that in the months of July, August, and September, 1890, McRill was the owner and in possession of three-fourths of all the grass and hay then standing and growing on a certain quarter section of land described in the petition; that said hay was seventy-five tons and of the value of $600; that the plaintiffs in error, against the will and consent of McRill, cut down and converted to their own use all of such grass and hay. There was a verdict and judgment for McRill, from which error is prosecuted.

The assignments of error are quite numerous, but the plaintiffs in error in their brief have made a logical analysis of the case, and we shall follow that discussion rather than the petition in error.

The plaintiffs in error, in the first place, contend that it was incumbent upon McRill to allege and prove title or right of possession to the growing grass by virtue of an estate in the land or by virtue of some contract giving him the title or possession of the grass. This principle is undoubtedly correct, and the trial court instructed the jury in accordance therewith. But plaintiffs in error argue that the petition was insufficient to state the basis of the right of action, and they therefore moved to require McRill to make his petition more specific by stating how he acquired title, the nature of his possession, and whether actual or constructive, and certain other things which we do not understand they now insist upon. This motion was overruled. We do not think there was any error in

this ruling. The statutes require in cases of ejectment and replevin only general allegations of title, and we are not aware of any principle of pleading under the Code which requires a specific statement in actions either of trespass or trover. On the contrary, the Code expressly requires a statement of the facts upon which the right of action is based and not a pleading of the evidence. To have sustained the motion would have required the plaintiff below in effect to have pleaded the evidence to sustain his allegation of ownership instead of the principal fact of ownership. The chief ground upon which plaintiffs in error base their argument is that the petition left them uncertain as to whether the action was trespass *quare clausum* or trover. We do not think that any such uncertainty arises. That forms of action are not recognized under the Code of Civil Procedure is elementary, and the form of the petition was, therefore, unimportant. There was no allegation of either ownership or possession of the land, but only of three-fourths of the grass and hay thereon. By any reasonable construction the petition must be treated as an action for the conversion of the grass and hay. We cannot see that this was open to any doubt. The plaintiffs in error moved to strike out all the allegations in regard to the hay. We presume this motion was based upon the distinction between the terms "grass" and "hay," and upon the theory that any action relating to the grass related to the real estate and required an estate in the land to support it, while the term "hay" referred to the grass after it had been severed and cured and had become personal property. But growing grass is not in all cases a part of the realty. Cases may arise where before severance it belongs to a person other than the owner of the fee, or even the owner of a possessory estate. This ownership may depend upon contract, as we shall hereafter show.

Plaintiffs in error next argue that if a lease to McRill was established by the evidence it was unlawful, and for

that reason no action could be maintained. This is upon the theory that the plaintiff in error, John Rapp, Jr., had entered the land under the timber culture act; that this act required the entryman to perform certain acts upon the land, and that if there was a lease it operated to give McRill the exclusive possession, and therefore prevented the entryman from performing his contract with the United States. In the first place we can find no evidence sufficient to sustain this theory. There is parol evidence tending to show that John Rapp, Jr., had entered the land under the timber culture act, but the nature of his title at the time of the acts complained of nowhere appears. In the second place there is no evidence in any part of the record of any contract with or lease to McRill which would exclude the entryman from possession or which contemplated a breach of the conditions of the entry.

Indeed, we have presumed that the next argument of plaintiffs in error is well founded,—that there was no evidence tending to establish a lease of the land,—and from this it follows that their following argument is also sound, to-wit: That the contract, which the evidence tends to establish, was for a share of the crops and not for any estate in the land. These two points will be considered together. The evidence in behalf of McRill tends to show that McRill had cultivated a portion of the land in 1888 and 1889. The agreement of 1888 was immaterial; but there is evidence justifying the jury in finding that the agreement in 1889 was that he was to cultivate portions of the land and retain all the crops, and that he was to put up the hay and receive three-fourths thereof and give Rapp one-fourth. The evidence is distinct that John Rapp, Sr., conducted all the business in relation to the land, and that his acts as general agent were fully authorized by John Rapp, Jr. McRill and his wife testify that in the spring of 1890 a third Rapp appeared, the nephew of John Rapp, Sr. He stated that the elder Rapp had instructed him to tell Mc-

Rill he could have the place on the same terms as the year before. Mrs. McRill said they would not take the place unless they could have the hay, and the nephew stated that his instructions were that McRill could have the place, "hay and all, just the same as you had it last year." There is no doubt that the hay was harvested by Reed under agreement with the Rapps, that it was carried away and disposed of without the consent of McRill. Passing by for the present the question of the nephew's authority, we are led to a consideration of this contract. The argument of plaintiffs in error is that no lease being established there was nothing possible except a cropping contract which would convey no right to McRill to the grass or hay until after it had been severed and possession actually taken, and that, therefore, neither trespass nor trover would lie. The determination of the rights of the parties under such a contract is often difficult, but more as a question of fact than as a question of law.

In *Warner v. Abbey*, 112 Mass., 355, the court said: "In construing contracts for the cultivation of land at halves it is impossible to lay down a general rule applicable to all cases, because the precise nature of the interest or title between the contracting parties must depend upon the contract itself, and very slight provisions in the contract may very materially affect the legal relations of the parties, and their consequent remedies for injuries as between themselves. In some cases, the owner of the land gives up the entire possession, in which event it is a contract in the nature of a lease, with rent payable in kind; in other cases, he continues to occupy the premises in common with the other party, or reserves to himself that right, and so a tenancy in common to that extent is created, and each is entitled to the joint possession of the crops, or the possession of the one is the possession of the other until division; or he may retain the sole possession of the land, and the other party may have the right to perform the labor and

receive half the crops as compensation; or the two parties may become tenants in common of the growing crops, while no tenancy in common as such exists in the land." The nature of such an agreement must be determined by the facts of each case. (*Johnson v. Hoffman*, 53 Mo., 504.) Where a lease was canceled and afterwards the landlord told the tenant to put in and harvest fall wheat and promised that the tenant should have his just share of it, it was held that they were tenants in common of the wheat, and that the tenant, where the landlord kept the wheat himself, might maintain assumpsit for his share. (*McLaughlin v. Salley*, 46 Mich., 219.) The supreme court of Illinois has held that a letting of land for the purpose of raising a single crop does not necessarily raise the relation of landlord and tenant, but where such relation is not raised the parties are tenants in common of the crop. (*Alwood v. Ruckman*, 21 Ill., 200.) Other cases holding that similar agreements constitute the parties tenants in common of the crop, and not landlord and tenant, are *Taylor v. Bradley*, 39 N. Y., 129; *Guest v. Opdyke*, 31 N. J. Law, 552; *Fiquet v. Allison*, 12 Mich., 328. It was so held in the last case, even though the contract was for possession in the person doing the work.

We are quite satisfied that the contract which McRill's evidence tends to establish, created McRill and Rapp, Jr., tenants in common of the grass and hay. Ordinarily, trover will not lie by one tenant in common against another, but this rule ceases where there has been an ouster, as where one tenant in common has destroyed the property or where he has sold it to a stranger in denial of his cotenant's rights. (*Burbank v. Crooker*, 7 Gray [Mass.], 158; *Weld v. Oliver*, 21 Pick. [Mass.], 559; *Carr v. Dodge*, 40 N. H., 403; *Fiquet v. Allison*, *supra*.) The last two cases cited were upon contracts similar to that under consideration. Our conclusion is, therefore, that where there is a contract between the owner of land and another person, whereby

such other person is to cultivate the land and harvest the hay for a share thereof, but the relation of landlord and tenant is not created and there is no specific agreement as to the possession of the land, the parties become tenants in common of the crops, grass and hay, and if one of the parties seize the whole of the property, either before or after severance, and dispose of it in denial of the other's rights, the other may maintain trover for his share.

This brings us to the question of agency. It is true, as contended by plaintiffs in error, that there is not a particle of evidence to show that the nephew, when he went to McRill, had any authority to contract for the hay. All the direct evidence is that his instructions were to employ McRill to cultivate the tilled land, one-half in corn and one-half in millet, and that the Rapps were to have the hay. But the testimony of McRill discloses two conversations subsequently had with Rapp, Sr., whose authority is undisputed, and which, if believed, would constitute a ratification by distinctly recognizing McRill's right to three-fourths of the hay. There is no question of the authority of Rapp, Sr., to delegate his authority. The boy's errand was confessedly a special agency, and the court instructed the jury that he could only bind Rapp, Jr., to the extent of the authority actually conferred; but Rapp, Sr.'s, agency was general and is undisputed, and his ratification of the boy's act was binding upon Rapp, Jr., and would have been so had the boy's action been entirely voluntary and without any authority. Upon all of these points, and in fact upon every point in the case, the evidence is not only contradictory, but is conflicting to a bewildering extent. The jury was, however, justified in believing the testimony to which we have referred.

We will not notice in detail the instructions asked by plaintiffs in error and refused. They were for the most part embodied in instructions given by the court. Many of them were objectionable as narrating evidence and being argumentative upon the evidence and for infringing upon

the province of the jury. One or two which stated the law correctly were almost legal treatises, intelligible and instructive to a lawyer, but of such a nature as to be confusing to the minds of jurors not trained in the law and unfamiliar with the refinements of land tenures and common law pleading and practice. So far as the instructions were not in conflict with the views we have expressed, their substance was given by the court in direct untechnical language, and as specifically as could be safely done without invading the domain of the jury.

The plaintiffs in error complain that the court refused to submit a number of special questions to the jury. The submission of questions for special findings is within the discretion of the trial court. (*Floaten v. Ferrell*, 24 Neb., 347; *Nebraska & Iowa Ins. Co. v. Christiensen*, 29 Neb., 582.) We do not think that there was any abuse of discretion in this case. The facts were simple, and the district court did not err in leaving them to the determination of the jury for a general verdict under appropriate instructions as to the law.

It is finally contended that the court should have dismissed the case without prejudice as to the two Rapps, for the reason that they resided in Sherman county, were there served with summons, and that the verdict was such as to bring the action within the jurisdiction of a justice of the peace. If, since the case of *Pearson v. Kansas Mfg. Co.*, 14 Neb., 211, there remains any doubt as to the applicability of section 65 of the Code of Civil Procedure to justices of the peace, the question is not raised in this case. The record shows a petition and then the appearance of all the defendants, first by motion and then by answer, without any objection to the jurisdiction. There is nothing to show where they were served with summons, or that their appearance was not voluntary.

JUDGMENT AFFIRMED.

HARRISON, J., took no part in the decision.

CITY OF BEATRICE V. ANNA REID.

FILED JUNE 7, 1894. No. 5441.

1. **Assignments of Error:** INSTRUCTIONS: REVIEW. An assignment of error as to the giving *en masse* of certain instructions will be considered no further than to ascertain whether any one of such instructions was properly given. *Hiatt v. Kinkaid*, 40 Neb., 178, followed.

2. **Negligence.** If one attempts to pass over a place of danger, the law requires him to exercise caution commensurate with the obvious peril; but this means that the law only requires of the party to exercise ordinary care, the danger and his knowledge thereof considered.

3. **Municipal Corporations:** LIABILITY FOR NEGLIGENCE OF CONTRACTOR. Where a municipal corporation is vested by law with authority to construct a public improvement and lets the building of such improvement to a contractor to be by him constructed in such manner as is prescribed by the corporation, such contractor becomes, by virtue of such contract, the agent of the corporation, and it will be liable for an injury resulting from the negligence of such contractor in the manner of the construction of such improvement.

4. ———: DUTY TO KEEP SIDEWALKS AND STREETS IN REPAIR. A municipal corporation is charged by law with the duty of at all times keeping its streets and sidewalks in a reasonably safe condition for travel by the public.

5. ———: ———. No municipal corporation, by any act of its own, can devolve this duty on another so as to relieve itself from a liability resulting from its failure to perform such duty.

6. ———: LIABILITY FOR NEGLIGENCE OF CONTRACTOR. A municipal corporation, by contracting with another to construct an improvement for it, does not and cannot thereby abdicate its control over the streets or public grounds of such corporation, nor thereby exonerate itself from liability for an injury resulting from the negligence of such contractor in the manner of the performance of his contract.

7. ———: IMPROVEMENT OF STREETS: NOTICE OF DANGER. If a municipal corporation rightfully causes an improvement to be constructed or other work to be done, whether by an independ-

ent contractor or otherwise, it is bound to take notice of the character of the work and its condition, whether safe or dangerous; and is bound to take notice of the condition, whether safe or dangerous, of its streets and grounds as affected by the prosecution or performance of such improvement or work.

8. ———: ———. *City of Omaha v. Jensen*, 35 Neb., 68, followed and reaffirmed.

9. ———: LIABILITY FOR NEGLIGENCE OF CONTRACTOR: ESTOPPEL. The legal basis of the liability of a municipal corporation for an injury sustained by the negligence of an independent contractor constructing a public improvement for such corporation examined, and declared to be not necessarily based upon the doctrine of *respondeat superior*, but upon the doctrine that a municipal corporation, charged by law with the performance of a public duty, when sued for an injury for its failure to perform such duty, is estopped from alleging that it had delegated the performance of such duty to another, or had by contract exempted itself from liability for such injury resulting from its failure to perform such duty.

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

George A. Murphy and *W. C. Le Hane*, for plaintiff in error.

L. M. Pemberton, contra.

RAGAN, C.

Mrs. Anna Reid sued the city of Beatrice in the district court of Gage county for damages for an injury which she alleged she sustained through the negligence of the agents of said city. She had a verdict and judgment and the city brings the case here for review.

The testimony on behalf of Mrs. Reid, briefly stated, tends to establish the following facts: That in the year 1890 the city of Beatrice was a city of the second class, having more than five thousand inhabitants; that in said year it entered into a contract with one McMahon, in and by which he was to build, and did build, for said city a

sanitary sewer; that in the construction of this sewer, and for the purpose of settling the loose dirt thrown back into the sewer ditch, McMahon attached a gas or water pipe, some two and one-half inches in diameter, to a hydrant, and so laid the pipe as to have it discharge water in the sewer ditch; that said pipe crossed diagonally a public sidewalk on a public street of said city; that no guards, lights, or signals of any kind were erected so as to indicate to passers-by the presence of such pipe on said sidewalk; that in the night-time of the 10th of August, 1890, Mrs. Reid was walking on said sidewalk returning from a lecture; that she was not aware of the existence of said water pipe across the sidewalk, and in passing along she struck her foot or toe against said pipe, or her foot caught under said pipe, causing her to fall, and from which fall she received severe injuries; Mrs. Reid at this time was a large, fleshy lady weighing 240 pounds; that at the time of the trial, in June, 1891, her weight was reduced to 172 pounds; that she underwent severe suffering, caused by said fall, was put to expense for medicines and physicians, and her health was permanently impaired; that she earned her living by sewing, and had a family of two daughters depending upon her for support. On behalf of the city the testimony tends to show that it had no notice of the situation of the placing of the water pipe by McMahon across the sidewalk; that there were signal lights on the sewer ditch in the alley near by the point where the water pipe crossed the sidewalk; that just across the street from the water pipe was a high school building on which was erected an electric light some fifty feet from the ground; that these lights were sufficient to apprise a person in the exercise of ordinary care of the existence of the water pipe on the sidewalk; that Mrs. Reid was not permanently injured; that the condition of her health at the time of the trial was not the result of the fall on the sidewalk. There is no dispute in the record but that McMahon was constructing a sewer

for the city, and in accordance with a contract let to him for that purpose, and that the placing of the water pipe across the sidewalk for the running of water into the sewer ditch was a necessary and proper act in the performance of his contract.

1. The first error assigned here by the city is: "The court erred in giving paragraphs of instructions Nos. 1, 2, 3, 4, and 5 asked for by the defendant in error." In *Hiatt v. Kinkaid*, 40 Neb., 178, it is said: "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." Some of the instructions of which complaint is made stated the law correctly, and since they were not all erroneous, the error assigned cannot be sustained.

2. The second assignment of error is the refusal of the court to give to the jury an instruction asked by the city and numbered 8, as follows: "If the jury believed from the evidence that the place where the accident in question occurred was necessarily more dangerous than the ordinary streets and sidewalks, and that by the exercise of ordinary care and prudence this condition of things could have been known to the plaintiff or was known to her, then the plaintiff was required to use more than ordinary care and caution to avoid the accident, and if she failed to do so and thereby contributed to the injury she cannot recover in this suit." This instruction was properly refused for the reasons: First—That there is no evidence in the record that Mrs. Reid knew of the presence of this water pipe on the sidewalk prior to the time she fell over it. Second—That the only degree of care that the law imposed upon Mrs. Reid was ordinary care. Had she been aware of the presence of the water pipe on the sidewalk the law would have required of her to exercise the caution of a reasonable and prudent person in passing over it, but that requirement would have amounted only to the exercise of ordinary care.

If one attempts to pass over a place of danger, the law requires him to exercise caution commensurate with the obvious peril; but in doing so the care exercised would be only ordinary care, the danger and his knowledge thereof considered.

3. The third and fourth errors assigned are that the court erred in giving an instruction No. 3 asked for by the city as requested; and in modifying the instruction and giving it as modified. We cannot review this error, if it was an error, for the reason that no exception was taken to the modification of the instruction by the trial court, nor did the city except to the giving of the instruction when modified.

4. The fifth error assigned is that the court erred in giving paragraphs of instructions Nos. 1, 2, 3, 4, 5, 6, and 7 of the instructions given on the court's own motion. We have examined these instructions and find that some of them were correct and should have been given, and, following the rule laid down in *Hiatt v. Kinkaid, supra*, and cases there cited, we have gone no farther.

5. The sixth, seventh, and eighth assignments of error may be considered together. They are that the verdict is not sustained by sufficient evidence; that the amount of damages awarded by the jury to Mrs. Reid is excessive, and that the verdict and judgment are contrary to the law of the case. The amount of the judgment was $1,500, and it must suffice to say that we think the evidence warrants that amount in the case. We cannot quote the testimony further than has already been done, but it supports the finding of the jury that Mrs. Reid was injured, as alleged in her petition, through the negligence of the contractor of the city in placing and leaving the water pipe across the sidewalk without guards or signals. The argument of the counsel for the city, however, is that as the work of constructing the sewer was being done by an independent contractor, he alone, and not the city, is liable for Mrs.

Reid's injuries, and that, therefore, the verdict and judgment is contrary to the law of the case. Is it the law that the doctrine of *respondeat superior* does not apply to a case of this kind?

In *City of Detroit v. Corey*, 9 Mich., 165, the city of Detroit had let to some contractors a contract for constructing for said city a sewer. The contractors had dug a ditch and left it open and unprotected by either guards or lights, and Corey's wife fell into this ditch and was injured and sued the city therefor. The city defended on the ground that the contractors, and not the city, were liable for the injury to Mrs. Corey, as the sewer was being constructed by the contractors under a contract with the city when the accident occurred. The supreme court of Michigan, in answering and overruling this argument, said: "When the relation of principal and agent, or master and servant, exists the rule of *respondeat superior* is applicable, but not when the relation is that of contractor only. In all ordinary transactions the relation of contractor excludes that of principal and agent, or master and servant; but there is not necessarily such a repugnance between them that they cannot exist together. The difference between them is that a contractor acts in his own right and for himself, whereas an agent or servant acts for and in the name of another. In the case before us both relations exist, and must necessarily exist from the peculiar character and circumstances of the case. The contractors not only acted for themselves, but at the same time as agents for the city, under the power given it to construct sewers in its streets, which are public highways. They had no right to make the excavation they did except as agents for the city, and had they been proceeded against by indictment for creating a public nuisance, they could not have justified in their own right, but would have had to justify as agents of the city under their contract. It is also to be observed that the power under which they acted and which made that lawful which

would otherwise have been unlawful was not a power given to the city for governmental purposes, or a municipal duty imposed upon the city as to keep its streets in repair or the like, but a special legislative grant to the city for private purposes. The sewers of the city, like its works for supplying the city with water, are the private property of the city; they belong to the city. The corporation and its corporators, the citizens, are alone interested in them; the outside public or people of the state at large have no interest in them as they have in the streets of the city, which are public highways. The donee of such a power, whether the donee be an individual or a corporation, takes it with the understanding—for such are the requirements of the law in the execution of the power—that it shall be so executed as not unnecessarily to interfere with the rights of the public, and that all needful and proper measures will be taken in the execution of it to guard against accidents to persons lawfully using the highway at the time. He is individually bound for the performance of these obligations. He cannot accept the power divested of them or rid himself of their performance by executing it through a third person as his agent. He may stipulate with the contractor for their performance, as was done by the city in the present case, but he cannot thereby relieve himself of his personal liability or compel an injured party to look to his agent instead of himself for damages."

The *City of Springfield v. Le Claire*, 49 Ill., 476, was an action brought by Le Claire against the city of Springfield for damages sustained by him in falling into a sewer being constructed in said city by contractors in pursuance of a contract between the city and the contractors. The defense interposed by the city was that the contractors alone were liable. The court said: "The question is, was there a duty resting upon the city growing out of the franchises conferred upon it to keep its public streets in a safe condition for the passage of travelers and others having occasion to

use them? * * * Admitting that the power to construct sewers is discretionary as to the time of its exercise, yet when exercised it must be in such a manner as not to expose others to injury. A corporation, like individuals, is required to exercise its rights and powers and with such precautions as shall not subject others to injury."

The first and second paragraphs of the syllabus are as follows:

"1. Where the duty is imposed by law upon a municipal corporation to keep its streets in a safe condition for use by the public, an action will lie against it for damages arising from a neglect of such duty.

"2. And in such case, the duty being imposed upon the corporation, it cannot be shifted to a person who had been employed to perform it; and if an injury results from neglect of such duty, the corporation must be held liable for the damage."

The *Village of Jefferson v. Chapman*, 127 Ill., 438, was a suit brought by Chapman against the village for damages for injuries he alleged he had sustained by a fall upon a cross-walk or apron over a ditch at the intersection of two streets in the village. On the trial to the jury in the circuit court the village offered to prove that it had made a contract with one Goven for the grading of its streets; that the contractor acting under the contract proceeded with the work, and in the prosecution thereof removed the apron over the ditch where the accident occurred, and that the village retained by the contract no control or supervision over the work. This evidence the trial court excluded and its ruling was assigned as error. The supreme court of Illinois said: "There was one essential element wanting [in the offer] in that there was no intimation of a purpose or desire to prove that the work contracted for was not of itself dangerous or would not necessarily render the street defective or unsafe or dangerous for travel, or that the removal of the apron which

formed a part of the cross-walk over the ditch was not a necessary incident to the doing of the work contracted for. The general rule is that the principal of *respondeat superior* does not extend to cases of independent contracts, where the party for whom the work is to be done is not the immediate superior of those guilty of the wrongful act and has no choice in the selection of workmen and no control over the manner of doing the work under the contract. But there are exceptions to this general rule. One of these exceptions is where the contract directly requires the performance of a work which, however skillfully done, will be intrinsically dangerous. * * * Another exception to the general rule * * * is where the party causing the work to be done is under a primary obligation imposed by law to keep the subject-matter of the work in a safe condition. The principle upon which this exception is predicated as that where a duty is so imposed, the responsibility for its faithful performance cannot be avoided, and that the party under such obligation cannot be relieved therefrom by a contract made with another for the performance of such duty."

In *Circleville v. Neuding*, 41 O. St., 465, the action was brought against the city to recover the value of a horse which was killed by falling into an unguarded cistern being constructed in the streets by a contractor for the city. McCauley, J., speaking for the supreme court of Ohio, and delivering the opinion, said: "It is contended on behalf of the city that it is not liable for the loss of the horse because the cistern was in process of construction by an independent contractor when the injury occurred. The relation between the city and Barndt was clearly that of employer and independent contractor, and the rule is generally that for injuries occurring in the progress of work carried on by parties in that relation, the contractor alone is liable; but this liability is limited to those injuries which are collateral to the work to be performed and which arise

from the negligence or wrongful act of the contractor or his agents or servants. Where, however, the work to be performed is necessarily dangerous, or the obligation rests upon the employer to keep the subject of the work in a safe condition, the rule has no application. * * * In this case the cistern contracted for was to be built in a street. * * * The city was under the statutory obligation at the time of the accident to keep its streets open, in repair, and free from nuisance, and it could not cast this duty upon the contractor so as to relieve itself from liability to one who should receive an injury. It is primarily liable for an injury resulting from such dangerous place in a street. If it has required the contractor to assume the risk of such damage, it may have a remedy against him; but the public, in the use of the streets, may rely upon the legal obligation of the city to keep them free from dangerous places, or if such places become necessary to be made in the course of an improvement or work necessary or proper for the city to do, that it shall so guard them that no injury shall result in the ordinary use of the street." (See, also, *Harper v. City of Milwaukee*, 30 Wis., 365; *Robbins v. City of Chicago*, 4 Wall. [U. S.], 657; *Palmer v. City of Lincoln*, 5 Neb., 136; *City of Lincoln v. Walker*, 18 Neb., 244.)

The point under consideration was before this court in the *City of Omaha v. Jensen*, 35 Neb., 68, and there decided adversely to the contention of the plaintiff in error here. In that case Jensen sued the city for damages for an injury which he had sustained by falling into an unguarded sewer being constructed at the time for the city by some contractors. The defense of the city was that it was not liable, because the sewer was being constructed under a contract made by it with the contractors for the construction of such sewer. This defense was overruled by the district court and the city brought the case here, alleging as error the refusal of the district court to sustain its defense.

This court sustained the ruling of the district court. The opinion was written by MAXWELL, the then chief justice, and in the first point of the syllabus it was said: "Where an excavation is made in a public street under contract with the city authorities, such city cannot shift the responsibility for keeping its streets in a safe condition onto a contractor and thus relieve itself from liability for neglect to erect proper barriers to prevent accidents by falling into such excavation." Because of the earnest insistence of counsel for the city of Beatrice, that the district court was wrong in holding that the city was liable for an injury to Mrs. Reid under the evidence in the case, we have re-examined the point decided in *City of Omaha v. Jensen, supra,* and find that the conclusion reached therein is abundantly supported by the authorities. We have no desire whatever to modify the rule established by that case in any particular, but adhere to it and reaffirm it.

The cases cited and quoted from above establish the following propositions:

First—That where a municipal corporation is vested by law with authority to construct a public improvement and lets the building of such improvement to a contractor to be by him constructed in such manner as is prescribed by the corporation, such contractor becomes, by virtue of such contract, the agent of the corporation, and it will be liable for an injury resulting from the negligence of such contractor in the manner of the construction of such improvement.

Second—That a municipal corporation is charged by law with the duty of at all times keeping its streets and sidewalks in a reasonably safe condition for travel by the public.

Third—That no municipal corporation, by any act of its own, can devolve this duty on another so as to relieve itself from liability for an injury resulting from its failure to perform this duty.

Fourth—That a municipal corporation, by contracting with another to construct an improvement for it, does not and cannot thereby abdicate its control over the streets or public grounds of such corporation, nor thereby exonerate itself from liability for an injury resulting from the negligence of such contractor in the manner of the performance of his contract.

Fifth—That if a municipal corporation rightfully causes an improvement to be constructed or other work to be done, whether by an independent contractor or otherwise, it is bound to take notice of the character of the work and its condition, whether safe or dangerous, and is bound to take notice of the condition, whether safe or dangerous, of its streets and grounds as affected by the prosecution or performance of such improvement or work.

All that is said in the cases cited above is applicable to the case at bar. In this state, cities of the second class having more than five thousand inhabitants are by the law declared to be public corporations. As such corporations they are invested with certain powers and privileges. They may open and lay out streets, establish parks, build water-works, own and operate gas and electric light plants. They may pave and curb streets and establish sewers. To defray the expenses of such improvements they may compel the inhabitants and property in their limits to contribute annually a portion of their property as taxes, and they may compel the male citizens to perform annually at least two days' labor upon the streets, or, in lieu thereof, pay a certain sum of money. Corresponding to these powers and privileges the municipal corporations of this state are, by law, charged with the performance of certain public functions and duties; among these functions and duties is that of at all times keeping their streets and sidewalks, which are a part of the streets, in a reasonably safe condition for the traveling public. This duty a municipal corporation cannot delegate to an-

other, nor can it abdicate this public function or devolve its performance upon another, whether a contractor or not. To decide, and correctly decide, the case at bar it is not necessary to invoke the doctrine of *respondeat superior*, or any exception to that doctrine. The point can be correctly decided upon the doctrine that a corporation, charged by law with the performance of a public duty, when sued for an injury resulting from its failure to perform such duty, is estopped from saying that it had delegated to another the performance of such duty; or that it had by contract exempted itself from liability for an injury resulting from its failure to perform such public duty. The city of Beatrice could not devolve upon its contractors the duty of keeping its streets in a safe condition. That was a duty that the law compelled the city to perform, and since it is a corporation and can only act through agents, if it committed to any one, whether a contractor or an ordinary employe, the duty of keeping in a safe condition its streets and sidewalks, the acts and omissions of such employe or such contractor in the premises were the acts and omissions of the city. By committing this duty to a contractor the city did not abdicate its public functions, and it was bound to know the character of the work being performed by the contractor and the condition of its streets and sidewalks as affected by the performance of such work. The judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA V. J. DAN LAUER.

FILED JUNE 7, 1894. No. 6088.

1. **Grand Jury**: ORDER OF JUDGE OF DISTRICT COURT. So long as section 584 of the Criminal Code shall remain in force, no grand jury can be lawfully organized unless its selection and

impaneling has been previously ordered by a judge of the district court in which such grand jury is to act.

2. ———: ———. In counties having seventy thousand or more inhabitants an order of a district judge directing the selecting and summoning of a grand jury must be in writing and filed with clerk of the district court of such county more than twenty days prior to the first day of the term of court for which such grand jury is desired.

3. ———: DUTY OF COUNTY BOARD. The county board of the county in which said grand jury is ordered must, at least twenty days before the first day of the term of court at which said grand jury is to act, select the persons from among whom said grand jury is to be impaneled.

4. ———: TIME TO APPEAR. The district judge may, in his discretion, require, in the order made by him for the selection of a grand jury, that the persons selected as grand jurors by the county board be summoned to appear either at the first day of the term of court for which the grand jury is desired or at any other specified day of said term of court.

EXCEPTIONS to the decision of the district court for Lancaster county, STRODE, J, presiding. Filed under the provisions of section 515 of the Criminal Code.

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

D. G. Courtnay, contra.

RAGAN, C.

In the year 1892 Lancaster county contained a population of seventy thousand or more inhabitants and constituted the third judicial district of the state. On the 1st of January of that year the district judges fixed two terms of court for said year in said county, as follows: One term commencing February 1, 1892, and which closed July 5, 1892, known as the "February Term," and one term commencing September 19, 1892, and which closed December 24, 1892, and which was known as the "Sep-

tember Term." During the sitting of said September term of court, to-wit, on the 25th day of October, the district judges of said district made in writing under their hands and filed with the clerk of the district court of said county an order in words and figures as follows:

"In the Matter of the Calling of the Grand Jury.

"It is hereby ordered by the court that a grand jury be called on November 16, 1892, to take action on such matters as may properly come before it.

"Dated October 25, 1892. CHARLES L. HALL,
"SAMUEL J. TUTTLE,
"*Judges.*"

In pursuance of this order persons having the qualifications of grand jurors were selected, summoned, and appeared in court on the 16th of November, 1892, and were duly organized into a grand jury. This grand jury returned an indictment for felony against one J. Dan Lauer. To the indictment so returned Lauer filed a plea in abatement, assailing the validity of the indictment on the ground that the district judges had no authority of law for making such order, and that the grand jury's proceedings and the indictment returned were null and void. The district court overruled a demurrer filed by the county attorney to this plea and dismissed the state's action. To this ruling of the district court the county attorney took an exception and brings the action of the district court here for review in pursuance of the statute.

Article 1, section 10, of the constitution provides: "No person shall be held to answer for a criminal offense except in cases in which the punishment is by fine or imprisonment, otherwise than in the penitentiary, in case of impeachment, and in cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, unless on a presentment or indictment of a grand jury; *Provided*, That the legislature may, by law, provide

for holding persons to answer for criminal offenses on information of a public prosecutor; and may, by law, abolish, limit, change, amend, or otherwise regulate the grand jury system."

Section 578 of the Criminal Code provides: "That the several courts of this state shall possess and may exercise the same power and jurisdiction to hear, try, and determine prosecutions upon information for crimes, misdemeanors, and offenses, to issue writs and process, and do all other acts therein as they possess and may exercise in cases of like prosecutions upon indictments."

Section 584 of the Criminal Code provides: "Grand juries shall not hereafter be drawn, summoned, or required to attend at the sittings of any court within this state, as provided by law, unless the judge thereof shall so direct by writing, under his hand, and filed with the clerk of said court."

The precise question involved is whether or not in counties having seventy thousand or more inhabitants the judge of the district court of such county may, during the session of a term of court, order the selection and impaneling of a grand jury to act during such term of court; or whether the order of the district court directing the selection and summoning of a grand jury for any term of court must not be made prior to the first day of such term of court, and the persons from whom such grand jury is to be chosen must not be selected by the county board at least twenty days prior to the first day of the term of court at which such grand jury is to act. The answer to this question involves a construction of section 669*h* of the Code of Civil Procedure, which is as follows: "If a grand jury shall be required by law or by order of the judge for any term of court, it shall be the duty of the county board in each of the counties in this state wherein such court is directed to be holden, at least twenty (20) days before the sitting of such court, to select twenty-three (23) persons, possessing the qualifica-

tions as provided in section two (2) of this act, and as near as may be a proportionate number from each town or precinct in their respective counties, to serve as grand jurors at such term and to cause the county clerk, within five days thereafter, to certify the names of the persons so selected as grand jurors to the clerk of the court for which they are elected, who shall issue and deliver to the sheriff of the county wherein the court is to be held, at least ten (10) days before the term of court for which they shall have been selected, or during term time if the court shall order, a summons commanding him to summon the persons so selected as aforesaid to appear before such court at or before the hour of eleven (11) o'clock A. M. on the first day of the term, or upon such other day as the judge shall direct, to constitute a grand jury for such term," etc. Reading the foregoing section of the constitution and several sections of the Criminal Code in connection with the Code of Civil Procedure just above quoted we have reached the following conclusions:

1. That so long as section 584 of the Criminal Code remains in force, no grand jury can be lawfully selected and impaneled unless the selection and impaneling of such grand jury has been first ordered by the judge of the district court in which such grand jury is to act.

2. That in counties having seventy thousand or more inhabitants the order of the district judge ordering the selecting and summoning of a grand jury must be in writing and filed with the clerk of the district court of such county, more than twenty days prior to the first day of the term of court at which said grand jury is desired.

3. That the county board of the county in which said grand jury is ordered, at least twenty days before the first day of the term of court for which said grand jury is ordered, must select the persons from among whom said grand jury is to be impaneled.

4. That the district judge may, in his discretion, require,

in the order made by him for the selection of a grand jury, that the persons selected as grand jurors by the county board be summoned either at the first day of the term of court for which the grand jury is desired or at any other specified day of said term of court.

The order made by the district judges of Lancaster county, during the September, 1892, term of that court directing the selecting and impaneling of a grand jury for that term was void. The exceptions of the state are overruled.

EXCEPTIONS OVERRULED.

GEORGE L. JARRETT, APPELLEE, V. JOHN D. HOOVER ET AL., APPELLANTS.

FILED JUNE 7, 1894. No. 5054.

Mechanics' Liens: NOTES: PROCEDURE. Where a party has furnished another material for the erection of an improvement on real estate and has taken the notes of the party for the price of such material, he may have the benefit of the mechanics' lien law (1) by making an itemized account of the material so furnished, making oath thereto and filing the same, in the time prescribed by the statute, in the office of the register of deeds where the improvement is situate; or (2) he may file in the office of the register of deeds copies of the notes taken for the price of the material furnished, together with a sworn statement that the sum for which said notes were given is due him for material furnished the party giving the notes, that said material was used in the erection, reparation, or removal of an improvement on real estate for the payor of said notes, and giving a statement of the items of such material. He may secure the lien by doing either of these things, but he is not obliged to do both.

APPEAL from the district court of Madison county. Heard below before POWERS, J.

S. O. Campbell, for appellants.

Allen, Robinson & Reed, contra.

RAGAN, C.

George L. Jarrett brought this action to the district court of Madison county against John D. Hoover and others to foreclose a mechanic's lien. The findings and decree of the district court were in favor of Jarrett, and Hoover brings the case here on appeal.

Of the arguments relied on here for a reversal of the decree, one only need be noticed. Jarrett furnished Hoover some mill machinery in pursuance of a written contract between them for a mill, and within four months of the time of furnishing such machinery he made an account in writing of the items of the machinery, and, after making oath thereto, as required by the statute, he filed the same, and the contract between him and Hoover, in the office of the register of deeds of Madison county, and claimed a lien upon the improvement for which the mill machinery was furnished and the real estate upon which it was situate. About the time that Jarrett filed his verified account of the items of material furnished by him to Hoover, the latter executed and delivered his promissory notes to Jarrett for the contract price of the material made the subject of the mechanic's lien. Jarrett did not file in the office of the register of deeds of Madison county a copy of any of said notes with a sworn statement that the sum for which the notes were given, or any part thereof, was due him for labor and material furnished him by Hoover in the erection of the mill. The argument of the appellant here is that because Jarrett took these promissory notes and failed to file copies of them in the office of the register of deeds of Madison county, therefore Jarrett has not brought himself within the mechanics' lien law of the state. In other

words, that he has no lien on the mill fixtures and furniture furnished by him to Hoover.

Section 3, chapter 54, Compiled Statutes, 1893, provides: "Any person entitled to a lien under this chapter shall make an account in writing of the items of * * * machinery, or material furnished, or either of them as the case may be, and after making oath thereto, shall, within four months * * * of * * * furnishing such machinery or material, file the same in the office of the register of deeds of the county in which such * * * materials shall have been furnished. * * * And if any promissory note shall have been taken for any such labor or materials it shall be sufficient to secure the lien provided for in sections one and two hereof, to file in the office of the register of deeds a copy of such note within the time aforesaid, together with a sworn statement that the sum for which said note was given, or any part thereof, is due for labor and material used for the purpose hereinbefore mentioned, giving in such statement the items of such labor and material, and such lien shall be for the amount so shown to be due for such labor and material, with interest at the rate specified in said note."

Where a party has furnished another material for the erection of an improvement and has taken the notes of the party for the price of such material, he may have the benefit of the mechanics' lien law in either one of two ways. He may either make an itemized account of the material or labor furnished, make oath thereto, and file the same in the time prescribed by the statute in the office of the register of deeds of the county in which the improvement is situate, or he may file in the office of the register of deeds copies of the notes taken for the price of the material or labor furnished, together with a sworn statement that the sum for which said notes were given is due him for labor and material furnished from the party giving the notes, and that said material was used in the erection, reparation,

or removal of and improvement on real estate for the payor of said notes, giving a statement of the items of such labor or material. But having made and filed in the proper office, at the proper time, a verified account of the labor or material furnished for an improvement, a party does not lose his right to a lien because he afterwards takes notes from the party liable on said lien for the price or value of the materials or labor furnished; nor does he lose his lien because he fails to file copies of such notes in the office of the register of deeds. He may secure the lien by doing either, but he is not obliged to do both. The decree is

AFFIRMED.

ORSON S. HASKELL V. VALLEY COUNTY.

FILED JUNE 7, 1894. No. 4166.

1. **Review:** ASSIGNMENTS OF ERROR: BILL OF EXCEPTIONS. This court cannot review errors alleged to have been committed by a district court in the admission and rejection of evidence unless such errors are preserved in a bill of exceptions and specifically alleged in a petition in error here.
2. **Assignments of Error.** If a litigant is of opinion that a trial court erred in its ruling, and desires to review such error in this court, he should specifically state in his petition in error here the identical action of the district court which he claims was erroneous.
3. **Appeals from the decision of a county board** should be entered, tried, and determined in the district court the same as appeals from justices of the peace.
4. **Appeal from County Board:** ISSUES IN APPELLATE COURT: REVIEW. A district court should never proceed with the trial of an appeal from a county board, until the parties to such appeal have made up the issues therein, by filing the proper pleadings in the case; and where such an appeal is tried in the district court without pleadings, and brought here on error, this

court will not examine the evidence for the purpose of ascertaining what the issues litigated were.

5. **Costs**: MOTION TO RETAX: REVIEW. For this court to review an error alleged to have been committed by a district court in rendering judgment against a party for costs, the party against whom the judgment is rendered must file a motion in the district court to retax such costs and then come here from the ruling of the district court upon such motion.

6. **Review**: ASSIGNMENTS OF ERROR: COSTS. *Wilkinson v. Carter*, 22 Neb., 186; *Hiatt v. Kinkaid*, 40 Neb., 178; *Jewett v. Osborne*, 33 Neb., 24, and *Vincent v. State*, 37 Neb., 672, followed and reaffirmed.

ERROR from the district court of Valley county. Tried below before TIFFANY, J.

A. M. Robbins, for plaintiff in error.

Charles A. Munn, *E. J. Clements*, and *Thomas Darnall*, *contra*.

RAGAN, C.

From the decision of the board of county commissioners of Valley county, disallowing in part certain claims filed by him against said county, Orson S. Haskell appealed to the district court. The case was tried to a jury, which rendered a verdict in Haskell's favor for the same amount allowed him by the board of county commissioners. Upon this judgment a verdict was rendered for Haskell, and he has filed a petition in error here to review such judgment.

1. Of the errors assigned here by Haskell, eleven relate to the action of the district court in the admission and rejection of evidence at the trial. We are unable to review any of these alleged errors, for the reason that they have not been preserved by a bill of exceptions. A draft of what purports to be, and probably is, all the evidence offered or given on the trial of the case is in the record, but it has never been signed or allowed as provided by law. (*Jewett v. Osborne*, 33 Neb., 24; *Vincent v. State*, 37 Neb., 672.)

2. The first alleged error assigned here by Mr. Haskell is in the following language: "The verdict rendered therein is against the weight of evidence." In *Vincent v. State*, 37 Neb., 672, it was held that this court has no original jurisdiction or authority to vacate a judgment and grant a new trial in a cause tried and determined in a district court. That the jurisdiction of this court to grant a new trial was appellate only. The grounds upon which a new trial may be granted are enumerated in section 314 of the Code, and by the sixth subdivision of said section it is provided that a new trial may be granted where the verdict, report, or decision is not sustained by sufficient evidence; but we know of no law which vests this court with authority to grant a party a new trial solely because we might be of opinion that the verdict rendered was against the weight of evidence.

3. The fifteenth assignment of error is alleged here by Mr. Haskell as follows: "There were errors of law during the course of the trial and excepted to by plaintiff." This assignment is too vague and indefinite for consideration. If a litigant is of opinion that the trial court erred in its ruling, and desires to review such error in this court, he should specifically state in his petition in error here what action of the district court he claims was erroneous.

4. The second assignment of error alleged here by Mr. Haskell is that the amount awarded him by the jury is too small and not supported by the evidence. The board of county commissioners of Valley county allowed Mr. Haskell on the claims which he filed against that county $40, and this was the amount awarded him by the jury on the trial of this action. If we look into what purports to be a draft of the evidence given at the trial we are still unable to say whether or not the verdict of the jury is too small and not sustained by sufficient evidence, for the reason that no pleadings of any kind were filed in the district court, and we are unable to state what the issues were on which the

case was tried. Section 39, page 352, Compiled Statutes, 1893, provides that an appeal from the decision of a county board "shall be entered, tried, and determined the same as appeals from justice courts." Section 1010*a* of the Code of Civil Procedure provides: "That in all cases of appeal from the county court or a justice of the peace the plaintiff shall, within twenty days from and after the filing of his transcript in the district court as required by law, file his petition as required in civil cases in the court to which such appeal is taken; and the answer shall be filed and issue joined as in cases commenced in such appellate court." The district court should never proceed with a trial of an appeal from a county board until the parties to such appeal have made up the issues therein by filing the proper pleadings in the case; and where such an appeal is tried in the district court without pleadings, and brought to this court on error, we will not examine the evidence for the purpose of ascertaining what the issues litigated were.

5. The sixteenth assignment of error alleged here by Mr. Haskell is as follows: "The court erred in overruling the plaintiff's motion for a new trial." This assignment is sufficiently disposed of by what has been said above and need not be further noticed.

6. The tenth assignment of error alleged here by Mr. Haskell is in the following language: "The court erred in giving instructions Nos. 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13 over objections by plaintiff." The rule of this court is, where objections are assigned to the giving of instructions *en masse*, if any one of the instructions objected to is good, then the objection will fail as to all (*Hiatt v. Kinkaid*, 40 Neb., 178; *McDonald v. Bowman*, 40 Neb., 269); but as we do not know what the issues litigated were, we are not able to say whether or not any of these instructions were good or bad.

7. The seventeenth assignment of error is as follows: "The court erred in rendering judgment against this plaintiff for

$219.13 costs." Section 39, page 352, Compiled Statutes, quoted above, provides that appeals taken from the decision of county boards "shall be entered, tried, and determined the same as appeals from justice courts, and costs shall be awarded thereon in like manner." Section 1013 of the Code of Civil Procedure provides: "If any person appealing from a judgment rendered in his favor shall not recover a greater sum than the amount for which judgment was rendered, besides costs and the interest accruing thereon, every such appellant shall pay the costs of such appeal." As already stated, the decision of the board of county commissioners was in favor of Mr. Haskell, and on his appeal he recovered the same amount. There was no error then in the court rendering judgment against him for the costs of the appeal. We are unable to say from the record whether the judgment rendered against Mr. Haskell for costs embraced anything more than the costs of the trial in the district court. If it does, the judgment to that extent is erroneous; but in order for this court to review a judgment for costs the party against whom the judgment is rendered must first file a motion in the district court to retax the costs and then come here from the ruling of the court upon such motion, if the ruling is unsatisfactory to him. (*Wilkinson v. Carter*, 22 Neb., 186.) The judgment of the district court must be

AFFIRMED.

B. L. WANZER V. STATE OF NEBRASKA.

FILED JUNE 26, 1894. No. 5999.

1. **Assault: SUFFICIENCY OF EVIDENCE.** *Held*, Upon the examination of the record in this case, that the evidence is sufficient to sustain the conviction for the crime of assault.

2. **Criminal Law.** It is only when there is a total failure of proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty.

3. **Objections to instructions** not raised in the court below by the motion for a new trial will not be reviewed by this court.

4. **Instructions.** *Held*, That the instructions were based upon the evidence in the case.

5. **An assignment in a petition in error** of "error of law occurring at the trial" is insufficient to present for review the rulings of the trial court on the admission or exclusion of testimony.

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

A. G. Kingsbury and *Jay & Beck*, for plaintiff in error.

George H. Hastings, *Attorney General*, and *J. J. McCarthy*, for the state.

NORVAL, C. J.

The county attorney filed in the court below an information charging the plaintiff in error, B. L. Wanzer, on the 3d day of March, 1892, with having made an assault upon one Sarah E. Pomeroy with intent to commit rape. At the close of the testimony the trial judge, among other instructions, charged the jury that the evidence adduced was insufficient to authorize a conviction for an assault with intent to commit rape, and that they would only consider the question whether or not the accused had committed an assault, merely, upon the prosecuting witness. A verdict was returned by the jury finding the prisoner guilty of a simple assault, and thereupon the court, after overruling a motion for a new trial, sentenced him to pay a fine of $100, and that he be imprisoned for three months in the county jail.

The first assignment of error urged by counsel for a reversal of the judgment relates to the sufficiency of the evidence to sustain a conviction, and to the consideration of which we shall now direct our attention. The prosecuting witness is a married woman, residing with her husband on a farm in Dixon county, near the town of Allen. The plaintiff in error is a physician of said town, and in January, 1892, he treated, professionally, Mrs. Pomeroy for la grippe and heart trouble. Subsequently, but prior to the month of March, he treated her for a disease peculiar to her sex. On March 3 she called at his home, being accompanied by her husband, for the purpose of obtaining further treatment for her said malady. On this occasion Mrs. Pomeroy and the doctor alone went into a bedroom, where she laid down upon the bed and the medicines were applied by him as before. There is no dispute in the evidence as to the facts already narrated, but there is a sharp conflict in the testimony as to what transpired in the bedroom on the date last stated. Mrs. Pomeroy, on her direct examination, testified in plain and unequivocal language that the doctor, after he had finished the treatment, with his pants unbuttoned and his privates exposed, got upon her; that she grabbed hold of him and pushed him and told him to get off, which he did, although he declined to go away when first urged to do so. Mrs. Pomeroy was subjected to a lengthy and rigid cross-examination, yet her testimony given in chief was not in the least shaken or impaired. It appears that within a week or ten days after the occurrence Mrs. Pomeroy related the facts to her husband, who thereupon addressed a letter to the plaintiff in error urging him to leave the country. Shortly thereafter these proceedings were commenced. Opposed to the testimony of the complaining witness is the positive and direct evidence of the plaintiff in error, denying that he assaulted Mrs. Pomeroy. The defense also called to the stand Mrs. Grace Weaver and the wife of the accused, who were in

the sitting room at the time it is alleged the assault was committed, and who testified that when the complaining witness came out of the bedroom with the doctor she was smiling, talking, and laughing, and appeared to be in the best of humor. These witnesses are flatly contradicted by both Mr. and Mrs. Pomeroy. There is to be found in the bill of exceptions the testimony of Frank Flynn, the stepson of the plaintiff in error, and one S. C. Van Horn, to the effect that when the Pomeroys were leaving the doctor's residence for their home on the day in question, Mrs. Pomeroy invited the doctor to bring his wife with him and make her a visit at her home. Mrs. Pomeroy denies that any such conversation took place, and further, that Flynn and Van Horn were not present at the time the Pomeroys took their departure. In this she was likewise corroborated by her husband. The conflicting evidence was passed upon by the jury, and it was for them to say which witness should be believed and which ones should be discredited. The jury, by their verdict, have found that the defendant below and his witnesses were unworthy of belief. A second perusal of the bill of exceptions convinces us that there is ample testimony to support the verdict. We cannot express ourselves in a more fitting manner upon this branch of the case than to quote the following language from the brief of the attorney general: "Here is a man holding himself out to the world as a member of a noble and honorable profession to which none but gentlemen—and educated at that—should aspire; and to the credit of the profession be it said that but few, and those unworthy of the name, ever become oblivious or unmindful of the restraints of their position, and words are inadequate to express the loathing and contempt which all decent people entertain for a cold-blooded villain who can coolly disregard all principles of morality and the restraint of his profession, and abuse the confidence reposed in him by those who suffer and come to him for relief."

Complaint is made in the brief because the court refused to instruct the jury to acquit the accused. It is only when there is a total want of proof to support a material allegation of the information, or where the testimony in a criminal case is of so weak or doubtful a character that a conviction based thereon could not be sustained, that a court will be justified in directing a verdict of not guilty. It follows from what has already been said that this case does not fall within said rule. Moreover, the plaintiff in error is not in a position to have reviewed the refusal of the court to give to the jury his instruction to acquit, since the point is not raised either in the motion for a new trial or the petition in error. (*Hanover Fire Ins. Co. v. Schellak*, 35 Neb., 701; *Barton v. McKay*, 36 Neb., 633.)

It is insisted that the court erred in its instruction upon the question of a reasonable doubt, which is paragraph 3 of the series given by the court upon its own motion. Inasmuch as plaintiff in error failed to complain of the giving of this particular instruction in his motion for a new trial, we will not consider or pass upon the accuracy of that part of the charge.

Error is assigned in the petition in error upon the giving of the fifth instruction requested by the state. We find no such instruction in the record before us. In fact it does not appear that the state presented any request to charge. Doubtless the instruction intended is the fifth, given by the court upon its own motion, which reads as follows: "You are instructed that any man taking indecent liberties with a woman without her consent is guilty of an assault upon her, and if you believe, beyond a reasonable doubt, that upon the 3d day of March, 1892, defendant, while alone with the complaining witness, and while in the capacity of a physician, was treating her for a disease, and while so treating her took indecent liberties with her by lying upon her, that he at the time made an indecent exposure of his person before her, then you are instructed that in

law he was guilty of an assault." The sole vice imputed to this instruction is that it assumed that there was evidence before the jury from which they might find that the plaintiff in error took indecent liberty with the complaining witness and that he made an indecent exposure of his person in her presence. There is absolutely no merit in the criticism upon the instruction. The charge was based upon the evidence. On pages from 6 to 8, inclusive, of the transcript may be found the evidence of Mrs. Pomeroy to the effect that the plaintiff in error had his clothes unbuttoned, that he exposed to view his privates and touched her therewith.

It is finally insisted that the judgment should be reversed because the state was permitted by the court to introduce evidence of the character of the medical treatment employed by plaintiff in error, and afterwards directing the elimination of the testimony from the record. Such practice was condemned in *Bedford v. State*, 36 Neb., 702. The point, however, sought to be presented for consideration is not raised by petition in error so as to require our taking notice of it.

The fourth assignment of error is in this language: "Error of law occurring at the trial." While such an assignment is permissible in a motion for a new trial, it is insufficient in a petition in error to present for review the rulings of the trial court on the admission or exclusion of the testimony. (*Lowe v. City of Omaha*, 33 Neb., 587.) We discover no reversible error in the record, and the judgment is therefore

AFFIRMED.

JOHN HUNT, APPELLANT, V. JOHN HUFFMAN ET AL., APPELLEES.

FILED JUNE 26, 1894. No. 5178.

Review. This case presents no question of law, and the decree of the lower court being supported by sufficient testimony, is affirmed.

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

A. Ewing and *John Patterson*, for appellant.

G. W. Bemis and *J. W. Sparks, contra.*

NORVAL, C. J.

This is a creditor's bill brought by John Hunt against John Huffman and others to set aside and cancel certain conveyances covering a half section of land in Merrick county, and to subject said real estate to the payment of plaintiff's judgment. From a decree in favor of the defendants plaintiff prosecutes an appeal.

The defendants John Huffman and Joanna Huffman are husband and wife, and the defendants Josiah Huffman and Allen Huffman are their children. On and prior to the 11th day of August, 1879, plaintiff and the Huffmans were residents of the state of Pennsylvania, and on said date plaintiff and said John Huffman executed and delivered to one Israel White their promissory note for the sum of $1,113.50, bearing interest at six per cent, plaintiff signing the same as surety merely for said Huffman. The note not having been paid at maturity, suit was brought thereon in the court of common pleas in and for Green county, in the state of Pennsylvania, where judgment was rendered for the full amount of the note against said Huffman and

the plaintiff herein on the 7th day of March, 1885. Subsequently John Hunt, the surety, in order to prevent the sale of his property, was compelled to, and did, pay said judgment, interest, and costs. In the spring of 1885 the Huffmans moved to Nebraska, locating in Merrick county. On the 14th day of May, 1888, said Hunt commenced an action in the district court of said last named county against John Huffman to recover the amount he was compelled to pay for the latter to satisfy the said judgment in favor of said White. On the 24th day of October, 1888, a trial was had in said court, which resulted in Hunt's obtaining a judgment against said John Huffman for the sum of $1,540 and the costs of suit. This judgment remains in full force and effect, and unpaid. Execution was issued on said judgment, which, for want of goods and chattels and lands and tenements of the said Huffman whereon to levy, was returned by the sheriff wholly unsatisfied, the defendant then being, and for several years prior thereto was, and now is, wholly insolvent. It appears that said John Huffman, at the time plaintiff signed said note as surety, and from thence to the 31st day of January, 1885, was the owner of about 271 acres of real estate situtated in Green county, Pennsylvania, of the value of about $18,000, which was heavily incumbered by mortgage and other liens. D. A. Spragg, Dr. Braden, and a number of other residents of Green county were the owners of a half section of land near Central City, in Merrick county, this state, described as the south half of section 31, in township 14 north, of range 6 west, containing 312 acres. In December, 1884, and January, 1885, negotiations were pending between the several owners of this half section and John Huffman for the exchange of the above tracts of land, and with that end in view said Huffman came to Nebraska in the said month of December for the purpose of examining the Merrick county land. He was accompanied by Dr. Braden, and, after looking the premises over, they both re-

turned to Green county, Pennsylvania. The record further discloses that on the 31st day of January, 1885, John Huffman conveyed, his wife joining in the deed, his farm of 271 acres to D. A. Spragg, who received the title in trust for the several persons, or syndicate, who owned the above half section, and at the same time a contract was entered into by the members of said syndicate whereby they agreed to convey the said Merrick county lands to Joanna Huffman. Subsequently, on the 31st day of January, 1886, the several owners conveyed said half section to said Joanna, which deed was duly recorded in Merrick county April 16, 1886. On the 18th day of May, 1888, said Joanna conveyed to her son Josiah 100 acres of said half section, and on the same day she conveyed to her other son, Allen, another 100 acres of said land. On the 25th day of October, 1888, said Joanna deeded another 100 acres of said half section to one Isaac B. Traver, one of the defendants herein. The defendant John Huffman joined with his wife in each of the last three deeds mentioned. Since the commencement of this suit Allen Huffman has deeded the 100 acres, so as aforesaid conveyed to him, to his brother Josiah. On May 6, 1886, Joanna executed a mortgage to the Equitable Trust Company on the entire half section to secure the sum of $2,500. The appellant's contention is that John Huffman exchanged his 271 acres of land in Green county for the above described half section, and that the title to the latter tract was taken in the name of his wife, Joanna, for the purpose of cheating and defrauding appellant and to hinder and delay him in the collection of his aforesaid claim against John Huffman, and that the other deeds upon the different portions of the Merrick county land were likewise made for the same fraudulent purpose. The appellees insist that there was no exchange of land, but that the transfer of the half sections and the conveyance of John Huffman's farm were separate and distinct transactions, and in no manner connected the one with the other.

In addition to the facts already detailed, which are undisputed, it is also established beyond question, by the testimony of numerous disinterested witnesses, that John Huffman had declared on different occasions prior to his removal to this state that he never intended to pay the plaintiff, for the alleged reason that said debt was not an honest one, and thus far, in that respect at least, he has faithfully kept his word; that shortly after the conveyance of the farm, John Huffman caused his household goods, farming implements, and considerable other personal property, aggregating in value more than $1,000, to be sold at auction, the same being advertised in the name of, and the sale conducted by, his son Josiah. The sale notes were taken in Josiah's name. Plaintiff introduced testimony to show that John Huffman had considerable stock on his farm, and just before said public sale, from twenty to thirty head of cattle, which he then had upon his place, were shipped to this state in the name of D. A. Spragg, and they were placed and left by John Huffman upon the said half section; that said Huffman traded this 271 acres for the half section, the agreed price of the former being $65 per acre, less liens and incumbrances thereon, amounting to $11,000 or $12,000, which the purchaser was to and did pay; that the Nebraska land was taken in the deal at $20 per acre, and that said Huffman has stated that he made the exchange, likewise that he shipped his cattle to Nebraska, although he now insists, and so testified on the trial, that he sold them to Spragg before they were brought to this state. The evidence on behalf of the plaintiff, if believed, is sufficient to establish that the greater part, if not the entire, consideration for the lands in dispute were deducted from the equity which John Huffman had in the Pennsylvania lands, and that the title to the Nebraska tract was taken in the name of Mrs. Huffman for the sole purpose, and with the intent, of defrauding this plaintiff.

The evidence on behalf of the defendants show the

transaction in altogether a different light. John Huffman testified that he came to this state with Dr. Braden to look at the half section with the view of trading his farm therefor, but after his return to Pennsylvania he made a computation of the amount of liens against his farm, and his unsecured debts, when for the first time he ascertained that his entire indebtedness equaled the value of his farm, and he then abandoned all idea of a trade; that he sold his place at $65 per acre; that not a dollar of the purchase money was received by him, nor went to pay for the land in dispute, but that the whole consideration for his place was, under his direction, applied by Spragg in lifting the liens upon the land and paying the unsecured *bona fide* debts of Huffman. The witness in his testimony gives in detail the names of the persons to whom Spragg paid the money and the amount received by each, the aggregate of which sums equals, if not exceeds, the contract price at which his land was sold. Mr. Huffman further testified that he borrowed money with which to come to Nebraska, and Mr. Spragg corroborates him on this point; that Mrs. Huffman entered into a written contract for the purchase of the half section at $20 per acre, and paid down of her own moneys $1,000, and turned in a $1,500 note given by John Huffman to his son Josiah for several years' wages, it being agreed between the mother and the son that when she obtained title to the land she was to convey to the latter 100 acres of the tract; that the deed was not made to Mrs. Huffman for the half section at the time of the purchase, for the reason that she did not have the means with which to pay the balance of the consideration; that Mrs Huffman borrowed in November, 1885, from her brother, B. K. Harrington, $1,500, which was paid on the land, and subsequently she paid the remainder of the purchase money by borrowing $2,500, and executing a mortgage on the half section to secure the payment thereof; that the deed to her was delivered at the time of the execution of the mort-

gage, and that the amount of the $1,500 note given by the witness to Josiah Huffman was deducted from the price of the Pennsylvania land. Mrs. Huffman's testimony, in most respects, corroborates her husband; so does that given by Josiah Huffman, and also the testimony by deposition of D. A. Spragg, taken by plaintiff. The uncontradicted evidence is to the effect that Traver purchased in good faith of Mrs. Huffman 100 acres of the land and paid her therefor $2,500, out of which she repaid the $1,500 loan obtained from her brother, and the remainder was applied in making improvements on the land remaining unsold; that the consideration for the conveyance made to Josiah was the $1,500 note he let his mother have, and the assuming of $500 of the $2,500 mortgage upon the half section; and Allen Huffman, as consideration for the 100 acres conveyed to him, assumed the remaining $2,000 of said mortgage.

From the foregoing synopsis of the testimony it will be observed that while the court below would have been justified in entering a decree for the plaintiff, it cannot be said that the findings and decree actually pronounced are manifestly wrong, or against the clear weight of the evidence. It is true that John Huffman, out of the proceeds arising from the sale of his farm, paid what he owed his son for wages, as well as all his other debts then owing, instead of paying the plaintiff; but that did not make the transaction fraudulent. A debtor has a perfect right, in good faith, either to pay or secure one creditor in preference to another. The decree being supported by sufficient evidence, under the uniform decisions of this court it should not be disturbed, even though we might have reached a different conclusion, upon the evidence, from that adopted by the trial judge, had we presided in his stead. The decree is

AFFIRMED.

JAMES GORDON ET AL. V. WILLIAM LITTLE.

FILED JUNE 26, 1894. No. 4648.

1. **A joint assignment of error** in a petition of error made by two or more persons which is not good as to all who joined therein will be overruled as to all.
2. **A judgment without a finding** to support it is not void, but is erroneous.
3. **Replevin: DAMAGES.** In an action of replevin, where the property has been taken under the writ and possession thereof delivered to the plaintiff, he is entitled, if successful in the suit, to have his damages assessed for the unlawful detention of the property by the defendant. If no formal assessment of damages has been made by the court or jury, no judgment for damages can be properly rendered.

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

Hazlett, Bates & Le Hane and *L. M. Pemberton*, for plaintiffs in error.

Chamberlain Bros. & Rood, contra.

NORVAL, C. J.

This was an action in replevin brought by defendant in error against plaintiffs in error to recover possession of a quantity of household furniture, one billiard table, two pool tables, one bar, and some saloon fixtures. There was a trial to the court, a jury being waived, with a finding that the right of property and right of possession was in plaintiff at the commencement of the action, and upon which finding, without an assessment of damages, the court rendered judgment against the defendants for five cents damages and the costs of suit. The defendants prosecute error.

Although there are ten assignments of error in the peti-

tion in error, only two are discussed in the brief of counsel, namely, the evidence is insufficient to sustain the findings, and the judgment does not conform to the findings.

It is firmly settled in this state that a motion for a new trial and ruling thereon are necessary to obtain a review in this court of the proceedings of the district court by petition in error. (*Carlow v. Aultman*, 28 Neb., 672; *Jones v. Hayes*, 36 Neb., 526; *Withnell v. City of Omaha*, 37 Neb., 621, and cases there cited.) An examination of the record before us fails to disclose that any motion for a new trial was made in the court below by the defendant Eli Sivey, therefore we are precluded from reviewing the testimony in the case for the purpose of ascertaining whether or not it is sufficient to support the judgment as to said Sivey. The defendants below filed a joint petition in error in this court. The assignment of error therein, relating to the sufficiency of the evidence, not being good as to Sivey by reason of his failing to file a motion for a new trial, the question presented is whether it is good as to his co-plaintiff in error, James Gordon? We think the answer must be in the negative. We have frequently held that a motion for a new trial is indivisible, and when made jointly by two or more persons, if it cannot be sustained as to all, it must be overruled as to all. (*Long v. Clapp*, 15 Neb., 417; *Dutcher v. State*, 16 Neb., 30; *Real v. Hollister*, 17 Neb., 661; *Dorsey v. McGee*, 30 Neb., 657; *Hagler v. State*, 31 Neb., 144; *Scott v. Chope*, 33 Neb., 41.) The same principle holds good here. A joint assignment of errors in a petition in error, not good as to all who joined therein, will be held bad as to all. Judge Elliot, in his valuable work on Appellate Procedure, at section 318, states the correct rule thus: "Where several parties unite in one assignment of errors, they will encounter defeat unless the assignment is good as to all. If the errors affect the parties severally, and not jointly, the proper practice is for each party to assign errors, for the rule is well settled that a joint assign-

ment will not permit one of several parties to avail himself of errors alleged upon rulings which affect him alone and not those with whom he unites in the assignment." It follows from the foregoing, as well as our own cases already mentioned, that the evidence in the case cannot be reviewed by us.

The remaining ground urged for a reversal,—that the judgment for damages is not based upon any finding of the court,—will be considered, since it was not necessary to present that objection by a motion for a new trial. When such motion was made and passed upon in the trial court, no judgment had then been rendered, and the defendants had the right to presume that the proper judgment would follow the findings. Section 192 of the Code declares that "in all cases, when the property has been delivered to the plaintiff, where the jury shall find for the plaintiff, on an issue joined, or on inquiry of damages upon a judgment by default, they shall assess adequate damages to the plaintiff for the illegal detention of the property; for which, with costs of suit, the court shall render judgment for [against] defendant." Under the foregoing section, the plaintiff was entitled to have assessed all damages sustained by him by reason of the unlawful detention of the property by the defendants. He proved upon the trial substantial damages. Had he offered no evidence upon the subject, the other issues having been found in his favor, he would have been entitled to have nominal damages assessed. The court, it will be observed, failed to make a formal assessment of damages, the judgment, therefore, although not void, is erroneous. (*Doty v. Sumner*, 12 Neb., 378; *Connelly v. Edgerton*, 22 Neb., 82.) A judgment must conform to the findings. (*Black v. Winterstein*, 6 Neb., 224; *Search v. Miller*, 9 Neb., 26; *Bowers v. Rice*, 19 Neb., 576; *Lamb v. Briggs*, 22 Neb., 139.)

The defendant in error is given permission to file with the clerk of this court, within twenty days, a remittitur of

all damages, and if such remittitur is so filed, the judgment will be affirmed; otherwise it will be reversed, and the cause remanded for a new trial.

JUDGMENT ACCORDINGLY.

ANTHONY M. APPELGET V. MARY J. MCWHINNEY ET AL.

FILED JUNE 26, 1894. No. 5161.

1. **When no motion for a new trial is made in an equity case, the sufficiency of the evidence to sustain the finding will not be reviewed on petition in error.**
2. **Review:** BILL OF EXCEPTIONS. **This court will not consider an assignment in a petition in error that the verdict of the jury, or the finding of the court, is not supported by the evidence, unless the evidence is before the court by a proper bill of exceptions.**

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

T. Appelget, for plaintiff in error.

L. C. Chapman, contra.

NORVAL, C. J.

This was an action brought by plaintiff in error to foreclose a real estate mortgage. The district court found the issues in favor of the defendants, and dismissed the action. Plaintiff prosecutes a petition in error to this court, alleging the following grounds for reversal:

1. The findings and decree are not sustained by the evidence, and are contrary to law.

2. The findings and decree should have been in favor of the plaintiff and against the defendants.

This record presents no question for review, for two reasons:

1. No motion for a new trial was made in the lower court.

2. There is no bill of exceptions in the case preserving the testimony taken on the trial.

The rule is firmly established in this state that a motion for a new trial is necessary to obtain a review of the findings of the trial court in an equity cause, by proceedings in error. (*Dunham v. Courtnay*, 24 Neb., 627; *Carlow v. Aultman*, 28 Neb., 672; *Gaughran v. Crosby*, 33 Neb., 33.) It is equally well settled that the supreme court will not consider an assignment in a petition in error that the verdict of the jury or the finding of the court is not sustained by sufficient evidence, unless the evidence is before the court by a proper bill of exceptions. (*Schroeder v. Rinehard*, 25 Neb., 75; *Leech v. Philpott*, 12 Neb., 577; *Robberts v. Hershiser*, 20 Neb., 594.) The judgment is

AFFIRMED.

W. H. JEWELL V. CHARLES M. CHAMBERLAIN.

FILED JUNE 26, 1894. No. 5253.

1. **Evidence:** SUBSCRIBING WITNESSES: SIGNATURES. In case a subscribing witness is absent from the county in which the suit is pending, or if he denies or does not recall the execution of the instrument to which his name is subscribed as such witness, its execution may be established by other competent evidence.

2. **Sufficiency of Evidence:** INSTRUCTIONS. *Held*, That the evidence sustains the verdict, and that there is no error in the charge of the court.

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

J. Hall Hitchcock, for plaintiff in error.

Chamberlain Bros. & Rood, contra.

NORVAL, C. J.

This is an action by Charles M. Chamberlain upon a promissory note calling for the sum of $30.83, purporting to have been signed by W. H. Jewell. The petition alleges the execution and delivery of the note and the indorsement thereof by the payee to the plaintiff below, before maturity for a valuable consideration. The answer is a general denial. From a verdict and judgment in favor of the plaintiff, the defendant prosecutes error to this court.

The note in question purports to have been signed by the payee, George H. Dennett, as a witness. Upon the trial the plaintiff, in making out his case in chief, introduced evidence tending to show that plaintiff had made efforts to find said Dennett, but did not succeed in locating him, as he was not in the state at the time of the trial. Testimony was likewise adduced tending to prove the genuineness of Dennett's signature, both as a subscribing witness and as indorsee of the paper. Plaintiff then called as a witness one C. L. Rothell, who testified that he was acquainted with the defendant's handwriting; that he had seen him write his name frequently, and that the signature to the note as maker was the defendant's. It is insisted that no proper foundation was laid for the introduction of the above testimony of the witness Rothell, and section 343 of the Code is cited in support of the contention, which reads as follows:

"Sec. 343. When a subscribing witness is absent from the county in which the action is pending, denies, or does

not recollect, the execution of the instrument to which his name is subscribed as such witness, its execution may be proved by other evidence."

This statute authorizes a party to prove the execution of an instrument by evidence other than that of the subscribing witness thereto, in case such witness is absent from the county where the suit is pending, or where such witness, being present at the trial, denies, or does not recollect, the execution of the instrument. It was proven, as already stated, that Dennett, the person who signed the note as a subscribing witness, was not only out of the county where the trial was had, but was not in the state; hence the proper foundation was laid for the introduction of the evidence objected to.

It is claimed that the verdict is not sustained by sufficient evidence. Although the defendant, while upon the witness stand, testified that he did not sign the note in controversy, there was ample proof before the jury, introduced by the plaintiff in chief and upon rebuttal, to justify them in finding that he executed the note. (*Huff v. Nims*, 11 Neb., 363.)

Complaint is finally made of the following instruction: "The question of fact for you to determine is whether the defendant Jewell signed the note offered in evidence. If you find from the evidence that he did, you will find for the plaintiff the full amount of the note. If you fail to find from the evidence that defendant Jewell signed the note, you will find for the defendant." There is no room for doubt that the above charge is sound as an abstract proposition of law; indeed, defendant below does not urge that it is not, but maintains that there was no competent evidence before the jury upon which to base the instruction. This objection is fully met by our remarks upon the other assignments of error.

There being no reversible error in the record, the judgment is

AFFIRMED.

STATE OF NEBRASKA, EX REL. BOARD OF SUPERVISORS OF HOLT COUNTY, V. G. C. HAZELET, COUNTY CLERK.

FILED JUNE 26, 1894. No. 4993.

1. **Dismissal.** A plaintiff cannot, as a matter of right, dismiss his action after the final submission of the case to the court or jury. (*State v. Scott*, 22 Neb., 628.)
2. **Counties: FEES OF CLERK: DUTY TO COLLECT AND REPORT: MANDAMUS.** Where lands are seized on execution or order of sale, it is the duty of the county clerk of the county wherein such real estate is situated, on application of the sheriff in writing, to certify to the sheriff, under his seal of office the amount and character of all liens existing of record against said lands which are prior to the lien of the levy, and for which certificate and the necessary search therefor, said county clerk is authorized and required to collect and enter upon his fee book, and report to the county board, the sum of $2, even though the labor of examining the records and preparing the certificate was performed out of office hours by an employe of the office, or some person other than the county clerk or his authorized deputy.
3. ———: ———: ———. A county clerk has no authority to charge for official services less than the fees prescribed by statute.

ORIGINAL application for *mandamus*.

E. W. Adams, for relator.

H. M. Uttley, contra.

NORVAL, C. J.

This is an application for a peremptory writ of *mandamus* to require the respondent, as county clerk of Holt county, to enter upon his fee book, and report to the county board of said county, the sum of $2 for each and every certificate of liens furnished by the respondent to the sheriff of the county for the purpose of appraising lands

under executions and orders of sale. The cause was submitted to this court upon the petition and answer at the September term, 1892. Subsequently, the relator filed a motion to dismiss without prejudice to a future action. The first question therefore presented is whether the relator has the right, over the objection of the respondent, to dismiss the cause after the same had been finally submitted to the court upon the merits. Section 430 of the Code gives the plaintiff the right to dismiss his action without prejudice at any time "before the final submission of the case to the jury, or to the court, where the trial is by the court." There is no statutory provision conferring authority upon a plaintiff to withdraw his suit after the cause has been submitted to the court or jury. On the contrary, the right of a plaintiff to dismiss is limited by statute to the final submission of the case. (*State v. Scott*, 22 Neb., 628.) The motion to dismiss is therefore overruled.

The facts, briefly stated, are these: Respondent at the time of the commencement of the proceeding was the duly elected, qualified, and acting county clerk of the county of Holt, and during his term of office the sheriff of said county presented to the respondent numerous written applications, requesting him to certify under his hand and seal of office the amount and character of all liens and incumbrances disclosed by the records of his office upon lands about to be appraised and sold by the sheriff under executions and orders of sale; that pursuant to said applications numerous certificates, the exact number the record fails to disclose, were made out and certified to in the following manner: The examination of the records and preparing the certificates were performed by some clerk or employe in the county clerk's office, other than the respondent's deputy, after office hours; that after said examinations had been made and the certificates prepared, the respondent, or his regular constituted deputy, signed the same and attached thereto the seal of office, and the re-

spondent charged and received the sum of twenty-five cents, and no more, for each certificate, and he entered said sum upon the fee book kept in said office; that whatever sum has been paid by the sheriff for such certificates, in excess of the twenty-five cents, was paid to the person who performed the labor connected with the examination of the records and preparing said certificates, and not to the respondent, or his deputy. A single question is presented upon this relation, and that is whether the respondent is bound to enter upon his fee book and report to the county board the sum of $2 for each certificate of liens furnished by him to the sheriff, instead of the sum of twenty-five cents, the actual amount of fees collected by him for such service. Section 42 of chapter 28, Compiled Statutes, provides, among other things, that every county clerk, whose fees shall exceed the sum of $1,500, shall pay such excess into the county treasury of the proper county. By section 43 of said chapter it is made the duty of certain county officers, including the county clerk, to make a report to the county board quarterly, under oath, of the different items of fees received, from whom, at what time, and for what service, as well as the total amount of fees received by such officer since his last report, and also the amount received for the current year. Section 44 requires each officer named in the act to enter each item of fees collected upon a fee book furnished by the county. There is no room for doubt, under the sections above referred to, that it is the duty of each county clerk to keep a fee book, and to enter therein every item of fees received or earned by him for official services, and to make an accurate report of the same to the county board. The statute in that respect is mandatory. It does not exempt any officer governed by its provisions from reporting all the legal fees by him collected, and the courts are powerless to relieve him from performing that duty.

Section 491c of the Code of Civil Procedure declares:

"It shall be the duty of the county clerk, the clerk of the district court, and the county treasurer of the county * * * wherein such levy is made, for the purpose of ascertaining the amount of the liens and incumbrances upon the lands and tenements so levied upon, on application of the sheriff in writing, holding such execution, to certify to said sheriff, under their respective hands and official seals, the amount and character of all liens existing against the lands and tenements levied on, which are prior to the lien of such levy, as the said liens appear of record in their respective offices. For which certificate, and the necessary search therefor, said officer shall receive a fee of two dollars ($2) each, to be paid by the plaintiff in the execution, and taxed as increased costs in the action in which the judgment on which execution was issued was rendered." It will be observed that we have a plain statutory enactment, not only requiring the county clerk, on application made to him by the sheriff of his county, to issue a certificate showing the liens and incumbrances which appear of record in his office against the real estate described in the application, but fixing the exact compensation which the clerk shall receive for such service. It is conceded that under and in pursuance of the requirements of said section 491c of the Code, the respondent issued numerous certificates of incumbrance under the seal of his office, for which he collected and entered upon his fee book, the sum of twenty-five cents for each certificate, instead of the statutory fee of $2 for each search and certificate.

It is insisted that since a portion of the services rendered, namely, the examination of the records and the preparing of the certificates of liens for the signature of the respondent or his deputy, were performed by an employe in the clerk's office outside of the usual office hours, the respondent was not required to collect the full statutory fee. We cannot conceive that it makes any difference when the services in question were actually performed, or whether

rendered by the respondent himself, or his authorized deputy, or a clerk in the office. In each case the services are official, and the principal is responsible for the accuracy of the work, and the statutory fees therefor, whether collected or not. Fees in excess of the statutory compensation allowed a county clerk do not go to the officer, but belong to the county. If such officer fails or neglects to collect the full fees authorized for services performed it is his loss, and he must duly account for the same to the county. In *State v. Kelly*, 30 Neb., 574, it was held that where a county clerk, who is also a notary public, takes acknowledgments of conveyances of real estate, as well as depositions and affidavits as a notary public, he must enter upon his fee book, as county clerk, and report to the county board, the fees paid him for such services. The case under consideration is not distinguishable in principle from the decision alluded to. To our mind it is clear that a county clerk cannot evade liability to his county for fees belonging to such office, even though the services are performed out of office hours, and that, too, by some one connected with the office other than the principal or his deputy. The respondent was authorized by law to make certificates of incumbrances, and the fees for such official duty is likewise fixed by statute.

But it is said the plaintiff in execution may waive the provisions of the statute relating to certificates of liens and incumbrances, and from which it argued that the plaintiff in execution, or sheriff, under his direction, may procure any person other than the county clerk to make the required search of the records in said office, and prepare the certificate of liens. The conclusion which counsel has drawn from the premises stated is unsound. The certificates of liens required by section 491c of the Code must be made by the officers therein named, or under their direction. The sheriff has no authority to apply to any person other than the officers designated by statute to search

the records or furnish the certificates of liens. The statute fixes the compensation as follows: "For which certificate, and the necessary search therefor, said officer shall receive a fee of $2." This provision makes it mandatory upon the officer to charge and collect $2 for each and every certificate of liens furnished by him, and the charging by the respondent of twenty-five cents for such services was without sanction of law. The argument that parties have the right to contract with officers for the charging of fees for the performance of official duties at a sum less than fixed by statute is unsound, as regards county officers, who are by statute required to turn into the treasury all fees earned by them in excess of a stipulated sum. The excess does not belong to the officer earning the same, but to the county, and such officer must charge the full statutory fees. This construction is manifest from a reading of section 45 of chapter 28 of the Compiled Statutes, which declares that: "Any of the officers named in section one of this act who shall omit to comply with the provisions of this act, or shall fail or neglect to keep a correct account of the fees by him received, or shall fail and neglect to make a report to the board of county commissioners as herein provided, or shall willfully or intentionally omit to charge the fees provided by law, with intent to evade the provisions of this act, shall be deemed guilty of a misdemeanor," etc. We are constrained to hold that it was the duty of the respondent to charge and collect the full amount of fees authorized by statute for searching the records of his office and making certificates of liens, to enter the same upon his fee book, and make report thereof to the county board. It follows that a peremptory writ of *mandamus* should be granted as prayed.

WRIT ALLOWED.

STATE OF NEBRASKA, EX REL. BOARD OF SUPERVISORS OF HOLT COUNTY, V. BARRETT SCOTT, COUNTY TREASURER.

FILED JUNE 26, 1894. No. 4992.

Dismissal: FEES OF COUNTY OFFICERS: MANDAMUS. This cause is governed by the opinion filed herewith in *State, ex rel. Board of Supervisors of Holt County, v. Hazelet*, 41 Neb., 257.

ORIGINAL application for *mandamus*.

C. W. Adams, for relator.

H. M. Uttley, contra.

NORVAL, C. J.

This is a companion case to that of *State, ex rel. Board of Supervisors of Holt County, v. Hazelet*, 41 Neb., 257, decided herewith. The questions presented in both cases are in all respects the same. The opinion in that case is adopted in this, and, upon the authority of said opinion, a peremptory writ of *mandamus* is granted as prayed.

WRIT ALLOWED.

JAMES AIKEN V. STATE OF NEBRASKA.

FILED JUNE 26, 1894. No. 6723.

1. **Indictment and Information:** OBJECTIONS: WAIVER. Objection to an indictment or information on the ground of duplicity must be made before verdict, or it will be held to have been waived.

2. ———. DIFFERENT CRIMINAL ACTS which constitute parts of the same transaction, such as burglary with intent to steal particular property, and larceny of the property described, may be charged in the same indictment or count thereof.

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

G. A. Rutherford and *D. F. Osgood*, for plaintiff in error.

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

POST, J.

The plaintiff in error was convicted of the crime of burglary by the judgment of the district court of Douglas county, and which he now seeks to reverse by means of a petition in error addressed to this court.

The first proposition argued is that the indictment is bad for duplicity. The charge of burglary, which is in the usual form, is followed by the further allegation that "the said James Aikin and * * * then and there being in said storehouse nineteen pieces of English worsted of the value of $275, and * * * the personal property of said Soren Larsen, then and there being found in said storehouse, feloniously and burglariously did steal, take, and carry away." To that contention a sufficient answer is that no objection was made to the indictment until after verdict. Where two or more distinct felonies, arising out of different transactions, are charged in the same indictment, the prosecutor will, on motion of the accused, be required to elect upon which charge he will proceed; but such objection must be made before trial and verdict, otherwise it will be waived. (*Thompson v. People*, 4 Neb., 524.)

2. The indictment is, however, free from the vice imputed to it. Where different criminal acts constitute parts of the same transaction, they may be charged in the same count. There are many illustrations of this rule, among

which are burglary and larceny. It is permissible to charge a burglary only, as that the accused broke and entered with intent to steal property, and also a larceny, as that he then and there stole the property described; and such an indictment will sustain a conviction for either of the crimes charged. (1 Bishop, Criminal Procedure, 423, 439; *Breese v. State*, 12 O. St., 146; *State v. Brandon*, 7 Kan., 106; *State v. Hayden*, 45 Ia., 12; *State v. Brady*, 14 Vt., 353; *Commonwealth v. Tuck*, 20 Pick. [Mass.], 356; *Josslyn v. Commonwealth*, 6 Met. [Mass.], 236.)

3. It is contended, also, that the evidence is insufficient to sustain the conviction; but that contention is based upon the proposition that the jury should have accepted the testimony of the witnesses for the accused rather than of those for the state. It was for the jury to say which set of witnesses should be credited. There is no error in the record and the judgment is

AFFIRMED.

ESTERLY HARVESTING MACHINE COMPANY V. WESLEY PRINGLE ET AL.

FILED JUNE 26, 1894. No. 5596.

Contracts: CONSIDERATION. Neither the promise to do nor the actual doing of that which the promisor is by law or subsisting contract bound to do is a sufficient consideration to support a promise in his favor.

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

Grimes & Wilcox, for plaintiff in error.

Parsons & Logan, *contra*.

POST, J.

This was an action of replevin in the district court of Perkins county, by the plaintiff in error against the defendants in error, to recover possession of five Esterly harvesters and binders, seven Esterly mowers, and a miscellaneous lot of repairs and fixtures. The plaintiff's general ownership of said property was conceded, but defendants claimed possession by virtue of a lien thereon for freight and storage, as will hereafter appear. A trial was had in the district court, which resulted in a verdict and judgment for the defendants therein, and the cause was removed into this court for review upon allegations of error by the plaintiff. The material facts are as follows:

On the 20th day of February, 1890, the parties entered into an agreement in writing whereby the defendants undertook, as agents, to sell on commission the machinery of the plaintiff at Grant, in Perkins county. The provisions of said agreement, so far as material to the present controversy, are as follows:

"The party of the second part [defendants], for and in consideration of the appointment of such agency, which is hereby accepted, and for the further consideration of the commissions herein provided for, agree as follows:

"That said commissions shall be in full for all charges for handling, exhibiting, selling, setting up, starting, storing, and securing payments, also for all other business and expenses connected with the agency.

* * * * * * *

"That said agent is to receive and pay transportation from the factory on all machines, twine, and extras shipped him, and provide, immediately on their arrival, proper storage and careful protection of the same from sun, rain, and wind, and to keep them clean and bright until sold and delivered.

* * * * * * *

"Or he will deliver the machines remaining on hand, complete and in good order at his depot, free from all freight and charges, as said first party may elect and demand. The said agent agrees that if any machines, twine, or extras remain unsold at or near the close of this season's sales, if either are ordered away, he will promptly deliver the same in good order at his depot free from all freight and charges; and the said agent is to keep the party of the first part harmless from all charges for storage, reshipping, cartage, and taxes, and to hold all unsold machines, and parts of machines, on hand for such time after the expiration of this contract (not to exceed one year) as may be desired by said party of the first part.

* * * * * * *

"The party of the second part hereby guaranties the sale in accordance with the terms of this contract, and the instructions herein contained, of all the machines herein ordered, and by him ordered, during the continuance of this contract, and promises and agrees that if any machines remain unsold on the 1st day of September, 1890, he will, at the option and upon the demand of the party of the first part, either execute and deliver to the party of the first part his two promissory notes, payable November 1, 1891, and November 1, 1892, with interest from August 1, 1891, each in a sum of principal equal to one-half the amount of said machines so remaining unsold at the prices named herein under head of 'List Prices and Commissions 1st,' less the 'commission' thereon, such notes to be indorsed by some responsible party or otherwise secured if required; or he will deliver the machines remaining on hand, complete and in good order, at his railroad depot free from all freight and charges, as said first party may elect and demand. The said agent agrees that if any machine twine or extras remain unsold at or near the close of this season's sales, if either are ordered away, he will promptly deliver same in good order at his railroad depot free from all

freight and charges. And the said agent is to keep for storage, reshipping, cartage, and taxes, and to hold all unsold machines, and parts of machines, on hand for such time after the expiration of this contract (not to exceed one year) as may be desired by said party of the first part.
* * * * * * *

"Nothing herein contained shall be construed as allowing the party of the second part a lien on any part of the machines, twine, or extras, or proceeds thereof; it being expressly understood and agreed that the same is the property of the party of the first part, to be delivered it on demand."

The property in controversy was shipped to the defendants and received by them pursuant to the above agreement and remained unsold at the close of the season of 1890. During the month of October, 1890, there was a settlement between the parties of the business of that year and receipts given. In the month of June, 1891, the agreement not having been renewed, the plaintiff demanded the said property, which demand was refused, hence this action.

It is claimed that at the settlement mentioned Mr. Christensen, the plaintiff's agent, employed defendants to care for and store said machines and fixtures until the following April, and agreed that they should have a lien thereon for their storage charges, as well as the sum of $116 for freight paid, less the sum of $65 on account of a note executed by them in favor of the plaintiff. The agreement thus stated is denied by the plaintiff. It is further contended by the plaintiff that such promise, if made by Christensen, was in excess of his authority. To sustain their contention the defendants rely upon the testimony of Wesley Pringle, which, so far as it relates to the question under consideration, is as follows:

Q. You may state what, if anything, in the way of an agreement or contract you had with Christensen some time in October, when he was here and when you took the re-

ceipt in full, with reference to the machines that were left on hand.

A. The contract was this: There was a note in our settlement of $65.90 that was made payable on or before the 1st of April. That note was to be liquidated when the company settled. They were to take the machinery away from us, or we were to become their agents, and we were to pay that note, and if they moved the machinery we were to get our freights out of it, as we had paid Sayers & Walker, and that was to offset the note, and we were to have what was coming to us in the settlement. That is the reason that I had this receipt in full on this contract.

Q. State whether or not any computation was made by you and Christensen at that time with reference to the amount of freight that you had paid.

A. No, sir; there was not a word said. We did not figure out exactly the amount of freight, but we were to take these goods and store them and keep them until they wanted them, until they were called for by their agent and our freight paid to us, and we were to settle up and turn over the repairs and machinery to our successors, as they were turned over to us by Sayers & Walker when we took the goods.

Q. State what was said about storage.

A. The storage was to be paid to us when our freight was paid to us and the goods turned over to somebody else, provided we were not their agents, and we sent and told him that we never would be their agent as long as Christenson was the general agent for the company.

In our consideration of the question at issue we have assumed the agreement for a lien to have been made by Christensen as alleged, and that such agreement is within the scope of the latter's authority as the plaintiff's agent; but does it follow that the defendants acquired a lien thereby upon the property which they can assert in this action as against the plaintiff's right of possession? We

think not, for the reason that such agreement is not supported by any sufficient consideration. The rule is elementary that neither the promise to do nor the actual doing of that which the promisor is by law or subsisting contract bound to do is a sufficient consideration to support a promise in his favor. (Pollock, Contracts, 177; 2 Parsons, Contracts, 437; Bishop, Contracts, 420; *Deacon v. Gridley*, 15 C. B. [Eng.], 295; *Bartlett v. Wyman*, 14 Johns. [N. Y.], 260; *Reynolds v. Nugent*, 25 Ind., 328; *Ayres v. Chicago, R. I. & P. R. Co.*, 52 Ia., 478; *Conover v. Stillwell*, 34 N. J. Law, 54; *Hennessey v. Hill*, 52 Ill., 281; *Withers v. Ewing*, 40 O. St., 400.) It is apparent from the agreement set out above that the defendants had in the most explicit terms obligated themselves to store and care for the property in controversy for one year from the expiration thereof. They had also, in no uncertain language, stipulated that they should not have a lien upon said property, but would deliver it to the plaintiff on demand. Being bound by the terms of their own valid undertaking to render the services contemplated by the agreement with Christensen, it follows that the promise of the latter is *nudum pactum*. The agreement upon which defendants rely to support their alleged lien being void for want of consideration, the court should have directed a verdict for the plaintiff. The judgment is accordingly reversed and the cause remanded for further proceedings in the district court.

REVERSED AND REMANDED.

JAMES R. FOREE, APPELLEE, V. JOHN J. STUBBS ET AL., APPELLANTS.

FILED JUNE 26, 1894. NO. 5358.

1. **Quieting Title:** PURPOSE OF STATUTE: MULTIPLICITY OF SUITS. The purpose of the act of 1873, entitled "An act to quiet title to real estate" (secs. 57, 58, 59, ch. 73, Comp. Stats.), was to abolish the fiction of constructive possession and prevent a multiplicity of suits, by a determination in one action of the rights of all persons asserting title to real estate.
2. ———: RIGHT TO MAINTAIN ACTION. Any person claiming title to real property in this state, whether in or out of possession, may maintain an action against any person or persons claiming adversely, for the purpose of determining such estate and quieting title. (*Holland v. Challen*, 110 U. S., 15.)
3. ———: ———. The fourth proposition in the syllabus of the case of *State v. Sioux City & P. R. Co.*, 7 Neb., 357, overruled.
4. **Taxes:** LIEN ON REAL ESTATE: DESIGN OF STATUTE. The provision of the revenue law by which taxes are declared to be a perpetual lien is designed for the benefit of the state and the different municipalities which are authorized to provide revenue by taxation.
5. **Purchasers of property at tax sales,** whether for investment or for the purpose of securing title thereto, must look to the remedy prescribed by statute.
6. **Foreclosure of Tax Liens:** LIMITATION OF ACTIONS. The limitation of the revenue law with respect to the period within which an action must be brought to enforce a tax lien does not relate to the remedy merely, but to the cause of action. (*Alexander v. Shaffer*, 38 Neb., 812.)

APPEAL from the district court of Burt county. Heard below before IRVINE, J.

W. A. Redick and *N. J. Sheckell*, for appellants:

The plaintiff cannot maintain this suit to quiet title because he has neither the legal title nor the actual possession

of the land. (*State v. Sioux City & P. R. Co.*, 7 Neb., 357; *Snowden v. Tyler*, 21 Neb., 199.)

Conceding, for the purpose of argument, that plaintiff's title is sufficient to maintain the action, the court ought to have required him to pay the tax liens and interest, as a condition of equitable relief, notwithstanding the liens are barred by statute. (1 Pomeroy, Equity Jurisprudence, secs. 385, 388; *Sturgis v. Champneys*, 5 M. & C. [Eng.], 97; *Crawford v. Galloway*, 29 Neb., 261; *Loney v. Courtnay*, 24 Neb., 580; *Hunt v. Easterday*, 10 Neb., 165; *Wygant v. Dahl*, 26 Neb., 562; *Comstock v. Johnson*, 46 N. Y., 615; *Tripp v. Cook*, 26 Wend. [N. Y.], 143; *McDonald v. Neilson*, 2 Cow. [N. Y.], 139; *Casler v. Shipman*, 35 N. Y., 533; *Finch v. Finch*, 10 O. St., 501; *Hanson v. Keating*, 4 Hare [Eng.], 1; *Whitaker v. Hall*, 1 Glyn & Jam. [Eng.], 213; *Colvin v. Hartwell*, 5 C. & F. [Eng.], 484*; *Wood v. Helmer*, 10 Neb., 65; *Harrison v. Haas*, 25 Ind., 281.)

Montgomery, Charlton & Hall, contra:

The statute requires neither actual possession nor legal title to be in plaintiff. (Comp. Stats., sec. 57, ch. 73.)

A lien upon land for taxes is unknown unless provided by express legislative authority. The method of enforcement and the duration of the lien are dependent upon statutes. (Cooley, Taxation [1st ed.], 305; Burroughs, Taxation [1st ed.], 271, 272; *Heine v. Levee Commissioners*, 19 Wall. [U. S.], 655; *Kirkwood v. Magill*, 6 Kan., 540.)

A statute giving a lien and a remedy for its enforcement must be strictly construed. (*Creighton v. Manson*, 27 Cal., 614.)

Equity cannot give assistance where the statute has provided another remedy. (*People v. Biggins*, 96 Ill., 481.)

Equity cannot give a remedy to one who has failed to avail himself of the remedy provided by law. (*Methodist Protestant Church v. Mayor and City Council of Baltimore*, 6 Gill [Md.], 391.)

The right to foreclose the tax liens expired after five years and the certificates are of no force. (*Parker v. Matheson*, 21 Neb., 546; *D'Gette v. Sheldon*, 27 Neb., 829; *Alexander v. Wilcox*, 30 Neb., 793; *Warren v. Demary*, 33 Neb., 327.)

A court of equity has no arbitrary power to grant relief independent of the settled rules of law and equity. (*Hanson v. Keating*, 4 Hare [Eng.], 1; *Whitaker v. Hall*, 1 Glyn & Jam. [Eng.], 213.)

POST, J.

Two questions are presented by the record of this case, viz.: First—Will an action lie by a party out of possession of real estate, but claiming an interest therein, to quiet his title as against one in possession? Second—Will the plaintiff, in an action to quiet title as against one in possession, be required, as a condition to the relief sought, to discharge tax liens held by the defendant but which are barred by statute?

We are embarrassed somewhat in the consideration of the question first stated by the decision of this court in *State v. Sioux City & P. R. Co.*, 7 Neb., 357. In that case it was held that in order to maintain an action to quiet title by one out of possession the legal title is indispensable; and such is conceded to be the rule, particularly in those jurisdictions where the distinction between legal and equitable remedies is still recognized, although it is rejected by courts of high standing as applied to our system, where the relief depends upon the facts proved rather than the form of action. The question is, therefore, to what extent the rule, as stated, has been modified by statute in this state? By the first three sections of the act of 1873, entitled "An act to quiet title to real estate" (secs. 57, 58, 59, ch. 73, Comp. Stats.), it is provided:

"Section 1. That an action may be brought and prosecuted to final decree, judgment, or order, by any person or

persons, whether in actual possession or not, claiming title to real estate, against any person or persons, who claim an adverse estate or interest therein, for the purpose of determining such estate or interest, and quieting the title to said real estate.

"Sec. 2. All such pleadings and proofs and subsequent proceedings shall be had in such action now pending or hereafter brought, as may be necessary to fully settle and determine the question of title between the parties to said real estate, and to decree the title to the same, or any part thereof, to the party entitled thereto; and the court may issue the appropriate order to carry such decree, judgment, or order into effect.

"Sec. 3. Any person or persons having an interest in remainders or reversion in real estate shall be entitled to all the rights and benefits of this act."

It is argued that the construction given that act in *State v. Sioux City & P. R. Co.*, *supra*, is too narrow, notwithstanding the term "actual possession," as used in the first section. The evident purpose thereof, it is contended, was to abolish the fiction of constructive possession and prevent a multiplicity of suits by a determination in one action of the rights of all persons asserting title, whether in or out of possession. That contention finds support in the case of *McDonald v. Early*, 15 Neb., 63, in which it was held that an action to quiet title would lie for the purpose of determining the rights of parties, neither of whom claimed to hold the legal title; and in the opinion of the court it is declared that the object of the statute "was to extend the benefit of the common law in actions of this character to persons claiming title to real property, although not in possession thereof."

The same statute was before the supreme court of the United States for construction in the case of *Holland v. Challen*, 110 U. S., 15, where, after a careful consideration of the subject, the doctrine of *State v. Sioux City & P. R.*

Co. was rejected. The law of this state is there declared to be that "any person claiming title to real estate, whether in or out of possession, may maintain a suit against one who claims an adverse estate or interest in it, for the purpose of determining such estate and quieting the title." The question was subsequently presented in *Arndt v. Griggs*, 134 U. S., 316, where *Holland v. Challen* was cited and followed. Referring to our statute in the last named case the court says: "It is certainly for the interest of the state that this jurisdiction of the court should be maintained and that causes of apprehended litigation respecting real property necessarily affecting its use and enjoyment should be removed, for so long as they remain they will prevent improvement and consequent benefit to the public. It is a matter of every-day observation that many lots of land in our cities remain unimproved because of conflicting claims to them. The rightful owner of a parcel in this condition hesitates to place valuable improvements upon it, and others are unwilling to purchase it, much less to erect buildings upon it, with the certainty of litigation and possible loss of the whole. * * * To meet cases of this character statutes like the one of Nebraska have been passed by several states, and they accomplish a most useful purpose;" and the provision there referred to was held by the same court in *Reynolds v. Crawfordsville First Nat. Bank*, 112 U. S., 405, to mean the same as an Indiana statute authorizing an action to determine and quiet title to real estate by one having an interest therein, whether in or out of possession.

Under a statute of Arkansas, which, like ours, provides that "an action may be brought and prosecuted to final decree, judgment, or order by any person or persons, whether in actual possession or not, claiming title," etc., it was held in *Love v. Bryson*, 57 Ark., 589, that an action to quiet title would lie by the real owner, although out of possession, *Holland v. Challen, supra*, being cited with ap-

proval; and to the same effect are *Wofford v. Bailey*, 57 Miss., 239; *Paxton v. Valley Land Co.*, 67 Miss., 96; *Mason v. Black*, 87 Mo., 329; *Connecticut Mutual Life Ins. Co. v. Smith*, 22 S. W. Rep. [Mo.], 623.

It is suggested, too, that the Ohio cases cited in *State v. Sioux City & P. R. Co.* are not authority for the conclusion therein, since they rest upon a statute materially different from ours. There is force in that argument, as the Ohio statute then in force limited the right of action to "any person in possession by himself or tenant." In no other state, we believe, has a statute like that under consideration been held to exclude from its operation a party who in good faith seeks to assert an equity in lands as against a defendant in possession. We could not consent to the reversal of a rule of this court, particularly one that has become a rule of property, simply because it is rejected by the United States courts for this jurisdiction, however much a conflict with those courts is to be deplored; but where we entertain a settled conviction of the soundness of the rule which prevails in the courts of the United States, uniformity of construction is a strong inducement for the abandonment of a conflicting rule by this court. It follows that the plaintiff, although out of possession, was entitled to maintain the action to quiet his title, and that the case of *State v. Sioux City & P. R. Co.*, so far as it is in conflict with the rule herein stated, is overruled.

2. Should the plaintiff have been required, as a condition to relief, to discharge the tax liens against which the limitations of the statute had run? That question we regard as fully settled by the following decisions of this court: *Helphrey v. Redick*, 21 Neb., 80; *D'Gette v. Sheldon*, 27 Neb., 829; *Warren v. Demary*, 33 Neb., 327; *Alexander v. Shaffer*, 38 Neb., 812. The doctrine of those cases is that the provision of the revenue law by which taxes are declared to be a perpetual lien is for the exclusive benefit of the state and the different agencies thereof which are

authorized to raise revenue by taxation for public purposes. It follows that purchasers of property at tax sales, whether for investment or with the view of securing title, must look to the remedy prescribed by statute. As said in *Alexander v. Shaffer*, "the limitation fixed in the revenue law is not merely a limitation as to the right of action, but it is a limitation upon the duration of the lien itself, and that upon the expiration of the period it is not merely the remedy to enforce the lien which expired, but the lien itself is extinguished absolutely." As the defendant had no lien, the district court was right in holding that he had no equities which could be enforced in this action. The maxim, "He who seeks equity must do equity," should never be so applied as to require performance by the plaintiff of acts not imposed upon him by established principles of law or equity. (*Alexander v. Shaffer, supra.*) It follows that the judgment of the district court is right and is

AFFIRMED.

STATE OF NEBRASKA, EX REL. STULL BROTHERS, V. JOSEPH S. BARTLEY, STATE TREASURER.

FILED JUNE 26, 1894. No. 6953.

1. **Statutes:** CONSTITUTIONAL LAW. Courts will not hesitate to declare invalid acts of the legislature when found to be in substantial conflict with the fundamental law of the state.
2. ———: ———. The fact that a statute is within the letter of the constitution is not sufficient. It must also be in substantial compliance with the spirit and purpose thereof.
3. ———: ———. An act which violates the true meaning and intent of the constitution and is an evasion of its general express or plainly implied purpose is as clearly void as if in express terms prohibited.

4. **Constitutional Law:** PERMANENT SCHOOL FUND: TRANSFER TO OTHER FUND. The prohibition of section 9 of article 8 of the constitution, against the transfer of the permanent school fund to any other fund, is an express limitation upon the powers of the legislature; and the restraint thus imposed cannot be disregarded upon the pretense of a supposed necessity resulting from a change of conditions, or in deference to the judgment of the legislature.

5. ———: TRANSFER OF FUNDS: STATE TREASURER. By the act of 1891, amendatory of section 25, article 1, chapter 80, Compiled Statutes, it was provided that the state treasurer should pay warrants drawn against other funds out of the permanent school fund, and hold them as an investment of the permanent school fund. *Held*, To contemplate a transfer of that fund to other funds, and, therefore, in conflict with section 9, article 8, of the constitution.

6. **Permanent School Fund.** By the provision of the constitution above cited the state is made the trustee of the permanent school fund.

7. ———: INVESTMENT IN STATE WARRANTS. If, as trustee for said fund, the state desires to invest the same in state warrants, it must do so on terms of equality with other investors, and cannot enforce the sale to it by holders of such securities.

8. **State Treasurer:** LIABILITY FOR TRANSFER OF FUNDS. An act of the legislature for the transfer of the permanent school fund to the general fund of the state is no protection to the treasurer, and the latter is liable to the school fund for all money disbursed in pursuance of such an act.

9. ———: DUTY TO REGISTER WARRANTS. It is the duty of the treasurer, on demand of the holder, to register state warrants in the order presented, when not paid for want of funds.

10. ———: WARRANTS ON GENERAL FUND: RIGHTS OF HOLDERS. The holder of general fund warrants is not required to receive in payment thereof money known to belong to the permanent school fund, where such payment would amount to a misappropriation of such fund by the treasurer.

ORIGINAL application for *mandamus*.

C. C. Flansburg, for relators.

George H. Hastings, Attorney General, for respondent.

POST, J.

This is an original application for a writ of *mandamus* to require the respondent, as state treasurer, to register certain general fund warrants, and is submitted upon the following stipulation:

"It is hereby stipulated and agreed by and between the parties hereto, for the purpose of this case, and as the facts upon which the same is to be determined, that William Stull and Louis Stull are partners doing business under the firm name of Stull Bros., in the city of Lincoln, Nebraska; that the respondent is the duly elected, qualified, and acting treasurer of the state of Nebraska, and has been such ever since about the 14th day of January, 1893; that by the proper officers, and under the authority of law, there was duly and regularly issued the state warrants in the plaintiff's petition set forth, payable out of the general fund of the state of Nebraska, delivered to the persons in whose favor they were drawn, as in said petition set forth, and that said persons duly indorsed their names upon the back of said warrants and sold and delivered them to the said Stull Bros. for the amount of the face of the warrants and a premium of one per cent over and above their face value; that the said Stull Bros., prior to the 14th day of May, 1894, purchased all of the said warrants in the said petition set forth, as hereinbefore stipulated, and the same were made payable to the order of said Stull Bros., by indorsement, and thereupon the said Stull Bros., on the said 14th day of May, became and were the legal holders and owners of the said warrants, and still hold and own the same; that on the 14th day of May, aforesaid, the said Stull Bros. duly presented the warrants, in their petition described, to the respondent Joseph S. Bartley at the state treasury in the city of Lincoln; that at said time the said Stull Bros. inquired of the said Joseph S. Bartley if there was any money in the general fund upon which said warrants were drawn for

the payment of the same, and the said Joseph S. Bartley replied that there was no money in the said general fund for their payment, but at the same time offered to pay to said Stull Bros. the face of said warrants out of the moneys belonging to the permanent school fund of the state of Nebraska, under and by virtue of the authority of a resolution passed by the 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; that thereupon the said Stull Bros. declined to accept the face of said warrants, and upon learning that there was no money in the general fund of said state for the payment of said warrants, demanded that the same be registered for payment; that the said state treasurer (respondent herein, Joseph S. Bartley) refused to register the same, but offered to pay the face of said warrants to the said Stull Bros. and hold the same as an investment for the permanent school fund, under the instructions of the said resolution heretofore referred to; that there was in fact no money in the general fund for the payment of the said warrants, and is not at the present time, and upon the refusal of the said Stull Bros. to accept the amount of the face of said warrants and deliver them over to the treasurer as an investment of the school fund aforesaid, the said Joseph S. Bartley, treasurer as aforesaid, refused to register the same; that on the 10th day of May, 1894, at the regular meeting, the board of educational lands and funds duly passed and adopted a resolution authorizing the investment of the sum of $250,000 in current unregistered warrants of the state, a copy of which said resolution is hereto attached, marked 'A'; that said warrants, and all of them, were duly issued in pursuance of an appropriation duly made and secured by the levy of tax for their payment."

The resolution above referred to is in the following language:

"*Resolved*, That the sum of two hundred thousand dollars of the permanent school fund of the state of Nebraska, or as much thereof as may be necessary, be, and hereby is, set apart from which to pay outstanding warrants drawn upon the general fund, which warrants are registered and bearing numbers from Nos. 13292 to 16000, inclusive, together with accrued interest, it being determined by this board that said warrants are drawn in pursuance of an appropriation made by the legislature and secured by the levy of a tax for their payment, and therefore are state securities; and the state treasurer is instructed to at once notify the several parties in whose names said warrants are registered of his readiness and purpose to pay said warrants, so that interest on the same shall cease, as provided in chapter 93 of the Compiled Statutes of Nebraska, and when so paid the warrants shall be held by the treasurer as an investment of the permanent school fund, and shall be stamped and signed as provided by law.

"*Resolved, also*, That the further sum of two hundred and fifty thousand dollars of the permanent school fund of the state, or as much thereof as may be necessary, be, and is hereby, set apart from which to pay current unregistered warrants already drawn, as well as those which may hereafter be drawn, against the general fund under appropriations made at the last legislature, it being determined by this board that such appropriations are secured by a levy of tax for their payment; and the state treasurer is hereby directed to pay such warrants as they may be presented at the state treasury, and stamp, sign, and hold the same as an investment of the permanent school fund, as provided by statute.

"*Resolved, further*, That the state treasurer, a member of this board, be, and hereby is, empowered to act in its behalf in determining any questions as to the genuineness and ownership of any and all warrants presented under the foregoing two resolutions, and when in doubt he will

refer the matter to the chairman, to be submitted to the board for its decision."

Two questions are presented by the facts stated, viz.: First—Does the foregoing resolution contemplate a transfer of a part of the permanent school fund to the general fund of the state within the prohibition of section 9, article 8, of the constitution? Second—Conceding the action of the state board to be in effect a transfer *pro tanto* of the permanent school fund, and, therefore, violative of the constitution, will the relators be heard in this action to complain, inasmuch as the respondent offers to pay their warrants in full? The section of the constitution above referred to reads as follows: "All funds belonging to the state for educational purposes, the interest and income whereof only are to be used, shall be deemed trust funds held by the state, and the state shall supply all losses thereof that may in any manner accrue, so that the same shall remain forever inviolate and undiminished; and shall not be invested or loaned except on United States or state securities, or registered county bonds of this state; and such funds, with the interest and income thereof, are hereby solemnly pledged for the purposes for which they are granted and set apart, and shall not be transferred to any other fund for other uses." By section 25, article 1, of chapter 80, Compiled Statutes, as amended in 1891, it is provided that the board of educational lands and funds shall, at their regular meetings, make the necessary orders for the investment of the principal of the fund derived from the school lands of the state in United States or state securities and registered county bonds; "*Provided*, That when any state warrant 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 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," etc.

It is clear that by the foregoing resolution the state board intended to give effect to this statute. The real controversy therefore is with respect to the validity of the act of 1891, having for its object the investment of the permanent school fund. In *State v. Bartley*, 40 Neb., 298, that act was before us, where it was held that in so far as it was sought thereby to confer upon the treasurer alone authority to invest the permanent school fund, it is in conflict with the provisions of section 1, article 8, of the constitution. We are constrained to hold, after a careful consideration of the subject, that said act provides in substance for a transfer to the general fund of the permanent school fund of the state, and is, therefore, in conflict also with the section of the constitution above set out. It is a well settled and salutary rule that nothing but a clear and manifest violation of the constitution will justify the judicial annulment of the legislative will. It is, however, quite as well established that courts will not hesitate to condemn acts when found to be in substantial conflict with the fundamental law of the land. An elementary rule of construction is that an act which violates the true meaning and intent of the constitution is so much within its prohibition as if it were a violation of the strict letter thereof; and an act in evasion of the constitution, as properly interpreted and understood, and frustrating its general, express, or plainly implied purpose, is as clearly void as if in express terms forbidden. (*People v. Allen*, 42 N. Y., 404; *People v. Albertson*, 55 N. Y., 50; *Wenzler v. People*, 58 N. Y., 516; *District Court Case*, 34 O. St., 440; *People v. Parks*, 58 Cal., 635.)

That no adequate provision is made for the profitable investment of our rapidly increasing permanent school fund is a fact greatly to be deplored; but the provision against the transfer of that fund is an express limitation

upon the power of the legislature; and a disregard of the restraint thus imposed cannot be sanctioned upon any pretense of a supposed necessity resulting from a change of conditions or in deference to the judgment of the legislature. We shall not argue to prove that an act which provides for the defraying of current expenses of the state, and the enforced payment of outstanding general fund warrants from the permanent school fund, is a transfer of that fund. The fact that such a transaction is by the legislature denominated an investment is wholly immaterial. Suppose the declared purpose of the act had been to use the fund in question for payment of salaries of the executive and judicial officers of the state and members of the legislature. Who can doubt that it would have been a flagrant violation of the constitution? Yet by no process of reasoning can it be proved that the character of the transaction is altered by calling it an investment instead of transfer. We must not, however, be understood as holding that warrants against the general fund are not state securities within the meaning of the constitution. Although that question is not presented by this record, following *In re State Warrants*, 25 Neb., 659, and *State v. Bartley, supra*, we assume them to be legitimate investments for the permanent school fund; but if the state, as trustee for said fund, desires to invest in that class of securities, it is required to do so on terms of equality with other investors. We are aware of no precise legal definition of the term "investment" as applied to money. In common speech it means the loaning or putting out of money at interest so as to produce an income. (*People v. Utica Ins. Co.*, 15 Johns. [N. Y.], 358; *Scott v. Depeyster*, 1 Edw. Ch. [N. Y.], 513; *Shoemaker v. Smith*, 37 Ind., 122.) It implies the contractual relation of purchaser and seller or borrower and lender, and in that sense it is employed in the constitution. It follows that the state, in its relation as trustee, can no more require the holder of state warrants to part with them than

it can enforce the sale by a citizen of any other species of property.

It remains to be determined whether these relators have any standing in court in view of the respondent's offer to pay their warrants. We have seen that the money which it was proposed to use for that purpose is declared to be a trust fund and that such an application thereof is not only a breach of the trust imposed upon the state, but a palpable violation of the constitution. For such a misappropriation of that fund neither the act of the legislature nor the resolution would afford protection to the state board, the treasurer, or the relators. A more radical but quite as fair a statement of the respondent's position is that the state can discharge its obligations to creditors by requiring them to receive in payment money held by it as trustee and for which they could be called upon at any time to account, a proposition as unsound in law as it is in morals, and not deserving of further consideration in this connection. It is proper to observe, in conclusion, that relief on the line of the act here considered cannot, in view of the restrictions upon the power of the legislature, be attained by statutory enactments, but must be sought through a change in the fundamental law of the state. The peremptory writ of *mandamus* is allowed as prayed.

WRIT ALLOWED.

KIRKENDALL, JONES & CO. V. E. F. DAVIS, SHERIFF.

FILED JUNE 26, 1894. No. 5334.

1. **An assignment of error,** as to the admission of incompetent, irrelevant, and immaterial evidence at the trial of a cause, will not be considered in this court unless the particular rulings so claimed to be erroneous are specifically pointed out in an assignment of error in the petition in error.

2. **The verdict of the jury on the trial of a cause, based upon conflicting testimony, will not be disturbed by this court unless manifestly wrong.**

3. **Estoppel:** SALES: ATTACHMENT: REPLEVIN. **Where a stock of boots and shoes were ordered shipped to a firm, unknown to them, by one claiming to act as their agent, but who was in no way authorized so to act, and such firm received and paid the freight on said stock, and, after holding them for about thirty days, allowed the party so ordering the goods to remove them from their store and to another town, and a creditor of a firm, of which such party was formerly a member, attached the goods, and upon inquiring of the firm making the original shipment was told by a member of the firm that they claimed no title to the goods, and they would make no interference in the attachment proceedings and further advised the prosecution of the attachment proceedings to judgment and sale, *held*, that such statements made to the representative of the attaching creditors, where he, on the strength of said statements, incurred in their behalf additional expenses in prosecuting the proceedings in attachment, worked an estoppel of the shipper of said goods, and concluded the firm from setting up a title to them in a subsequent action of replevin to recover the possession of the goods from the officer holding them by virtue of the levy of writs issued in said attachment proceedings.**

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

Griggs, Rinaker & Bibb, for plaintiffs in error, cited: *School District v. Randall*, 5 Neb., 411; *Hoitt v. Holcomb*, 3 Foster [N. H.], 554; *Hardman v. Booth*, 1 H. & C. [Eng.], 893; *Dean v. Yates*, 22 O. St., 389; *De Nayer v. State Nat. Bank*, 8 Neb., 104; *Strauss v. Minzesheimer*, 78 Ill., 493; *Behrens v. Germania Fire Ins. Co.*, 19 N. W. Rep. [Ia.], 839; *Powell v. Rogers*, 105 Ill., 318; *Reed v. Bagley*, 24 Neb., 336.

R. W. Sabin, contra, cited: *Heyn v. O'Hagen*, 26 N. W. Rep. [Mich.], 861; *Sandwich Mfg. Co. v. Shiley*, 15 Neb., 109; *Meister v. Birney*, 24 Mich., 435; *Goodman v. Kennedy*, 10 Neb., 273; *Bardwell v. Stubbert*, 17 Neb., 485.

HARRISON, J.

This is an action of replevin commenced in the county court of Gage county, and, from a judgment there rendered, appealed to the district court. The relief sought was to obtain possession of eleven boxes of boots and shoes and slippers, of the alleged value of $379.54, which had been seized by the defendant, the sheriff of Gage county, by virtue of a writ or writs of attachment. The petition filed was in the usual form. Defendant, for answer, filed a general denial as to all the allegations of the petition, excepting the one as to the value of the property. There was a trial to the court and a jury, a verdict for defendant. Plaintiffs filed a motion for a new trial, which was overruled, and judgment rendered for defendant, to reverse which the plaintiff has prosecuted petition in error to this court.

One assignment of error, which is argued by counsel for plaintiffs in error in brief filed, is that the court erred in overruling the objection of plaintiffs to incompetent, irrelevant, immaterial evidence offered by the defendant. It has been held that it is sufficient, in a motion for a new trial, to assign an alleged error in the admission or exclusion of testimony in this general manner. (See *Labaree v. Klosterman*, 33 Neb., 156, and *Davis v. Getchell*, 32 Neb., 808.) But in both of these cases it is further held that such an assignment of error is not proper or permissible in a petition in error; that in the latter the particular rulings which are claimed to be erroneous must be pointed out specifically. The above assignment of error is too general and does not entitle the plaintiffs in error to have the errors in admitting the testimony, if any, reviewed.

The only other assignment of error which is argued and insisted upon is, that the verdict is contrary to the evidence and the law. The evidence disclosed that one J. W. Wright was negotiating with the firm of Le Gros, Bigelow & Co., of Lincoln, Nebraska, with a view to becoming a member

of the firm; that during the time that the negotiations were in progress he went to Omaha and ordered the goods in controversy of the plaintiffs, stating that he was buying for Le Gros, Bigelow & Co., and ordered them forwarded to the firm, which was done. The goods were received by Le Gros, Bigelow & Co. at their place of business in Lincoln, and the freight paid by the firm, although the testimony further shows that they did not understand why the goods should have been shipped to them, and that in a conversation between members of the firm, in reference to the goods while they were on the sidewalk, where they had been deposited by the drayman when brought from the depot, one of them remarked that they probably were goods which had been ordered by Wright. The boxes containing the goods were taken into the store-room of the firm and there placed with some other boxes of similar goods belonging to Wright, which he had been allowed to store there and were not opened. Soon afterwards the negotiations between the firm and Wright were broken off and Wright took his departure for Horton, Kansas, to which point he shipped the goods which had been stored in the room of the firm, including the cases of boots, etc., in controversy in this suit. In the meantime the Lincoln firm had notified plaintiffs of the receipt of the goods, and the further fact that they had not ordered them; but they allowed Wright to remove them, interposing no objections to such action on his part. We think, unquestionably, that the manner in which the goods were obtained by Wright from plaintiffs constituted a fraud as against them, for he very clearly had no authority to order them as he did, in the name of or for Le Gros, Bigelow & Co.; and further, that it is fair to conclude that the order was so given on his part with the purpose and intent of thus obtaining possession of the goods, and without paying for them; and the title to the goods did not pass but remained in plaintiffs, and they could pursue the goods and take them by replevin, if found

in specie, from Wright or from the attaching creditors; and if they had not, by their words or actions, destroyed this right, it existed at the commencement of this suit. A Mr. White, who represented one of the attaching creditors of Wright & Flanagan, at whose instance the writ levied upon the goods, and upon which the sheriff's right to hold them was predicated, gives the following evidence:

Q. After you had caused the goods to be attached, did you go to Omaha and see Kirkendall, Jones & Co.?

A. Yes, I did. I made two trips. I did not see them the first time. I went to ascertain from them whether he was going to lay any claim for the goods or whether they would fight me on an attachment suit. Mr. Coe said: "We have nothing to do with this case. We shipped those goods to Le Gros, Bigelow & Co., and they are their goods, and we shall collect from them when it is due;" and he said: "My advice is to go right on and sell them. We have nothing to do with that. They have held the goods there for thirty days, and we shall collect from them when it is due."

Q. What was said about Le Gros receiving and paying the freight on them?

A. He said: "He has received the goods and paid the freight and we have nothing to do with them. The title has passed from us."

Q. What did you do?

A. I came right back and commenced proceedings here.

Q. Did you go to any expense after that towards going ahead with the proceedings?

A. I paid out quite a lot of money.

Plaintiffs object to that and ask to have that answer stricken out. Objection overruled. Exception taken.

Q. About what expense did you cause to be done and were you put to by reason of their telling you to go ahead?

Objected to, as immaterial, incompetent, and irrelevant. Objection overruled. Exception taken, for the reason stated.

A. I think—my recollection of it is that I paid out in the neighborhood of $30 after that.

Q. Did you make a trip back to Beatrice and give instructions in relation to it at that time?

A. Yes; I made two trips.

Q. I mean after you had seen Mr. Coe and had this conversation. Did you then go back to Beatrice?

A. Yes; I did go back to Beatrice.

Plaintiffs move to have that stricken out. Motion overruled. Exception taken.

Q. Do you know whether the goods had been advertised for sale when you got back?

A. Yes; they were advertised before I got back. I came on to attend the sale. It was some time in June then.

Q. You went on to see Kirkendall & Jones, to see if it was safe to go ahead?

A. Yes; I went to see what grounds I stood on before I incurred any expenses.

Q. Did you tell them what you had found?

A. Yes; that I had found eleven cases of goods, and he said we sold those goods to Le Gros, Bigelow & Co. and shall look to them for the pay.

The member of the firm of plaintiffs with whom this conversation is testified to have occurred states that he saw and talked with Mr. White, but denies the substance of the conversation as related by him. In other words, there was a direct conflict of the testimony upon this point. The jury were instructed on this branch of the case: "The court instructs the jury that if they believe from the evidence that the plaintiffs Kirkendall, Jones & Co. informed Geo. H. White, the agent for the attaching creditors of Wright & Flanagan, after the goods were attached, that they, the said plaintiffs, had no claim on the goods in controversy, and that they had sold the goods to Le Gros, Bigelow & Co. and looked to them only for payment, and advised the said White, as the agent for the attaching creditors, to go

ahead and sell the goods to satisfy the claim of the attaching creditors, and upon the strength of what the said plaintiffs told the said agent, White, the attaching creditors did go ahead and get judgment and caused an order of sale to be issued by the county court of Gage county, and caused the said goods to be advertised for sale, and by reason of said advice to said plaintiffs went to an additional expense in the way of costs, expenses, and attorney's fees, then, in that case, the court instructs you that plaintiffs are estopped from claiming said goods from defendant and the jury should find for the defendant." The jury solved the question, or made a finding on the conflicting evidence on this point in favor of defendants, and in accordance with a well settled rule of this court, it will not be disturbed or reversed.

The further query then arises, whether the statements made were sufficient in law to conclude the plaintiffs from claiming a different condition to have existed at the time of the conversation? The rule announced in *Grant v. Cropsey*, 8 Neb., 205, and again in *Newman v. Mueller*, 16 Neb., 523, is as follows: "It is a firmly established rule that when one, by his words or conduct, willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." (See, also, *Betts v. Simms*, 25 Neb., 166; *St. Louis Wrought Iron Range Co. v. Meyer*, 31 Neb., 543; *Blodgett v. McMurtry*, 34 Neb., 782.) In *Meister v. Birney*, 24 Mich., 440, it is stated: "Expenditures in litigation may as reasonably constitute the basis of an estoppel as any other expenditures." It being established that the statement of the plaintiffs that they had no claim to the goods, and advising the defendant to proceed with the attachments, induced them to so proceed and to incur further expenses in so doing, it was, we think, sufficient to estop them from being heard to allege and assert

title to the goods, recover them in this action, and thus not only lose to the defendant their lien on the goods acquired by the attachment as a fund or means of payment of their claims, but also cause the loss of the costs and expenses of litigation incurred after such statements. The judgment of the district court is

AFFIRMED.

NATIONAL LUMBER COMPANY v. W. H. ASHBY ET AL.

FILED JUNE 26, 1894. No. 5419.

1. **Review**: MOTION FOR NEW TRIAL: AFFIDAVITS: BILL OF EXCEPTIONS. Affidavits used as evidence on the hearing of a motion in the district court will not be considered in this court in reviewing the action of the lower court in passing upon the motion unless they are presented in the form of a bill of exceptions.

2. ———: ———: ———: ———. Where a motion for a new trial, on the ground of newly discovered evidence, is overruled, the party who presented the motion is not entitled to a review of the decision of the trial court as to this ground of the motion unless all the testimony (in this case in the form of affidavits) used on the hearing of the motion is preserved and set out in the bill of exceptions.

3. **Pleading.** All material allegations of new matter contained in an answer are admitted and must be taken as true if no reply is made to them.

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

G. M. Humphrey, for plaintiff in error.

Griggs, Rinaker & Bibb, contra.

HARRISON, J.

October 11, 1887, the plaintiff herein filed a petition in the district court of Gage county, in a case brought to that court by an appeal from the judgment of the county court, demanding judgment against the defendants in the sum of $131.50 and interest at ten per cent per annum from May 31, 1884, upon a promissory note signed by defendants, of date May 31, 1884, in the sum of $131.50, and providing for interest at ten per cent per annum. The defendant Zilla Ashby answered separately, and for herself alone alleges as a defense "that she was, at the time of her signing the note mentioned in plaintiff's petition, the wife of defendant W. H. Ashby, and signed said note at the request of said defendant W. H. Ashby, as surety for him merely, and that she received no consideration whatever therefor, and the same was and is void and created no liability as against her." W. H. Ashby filed a separate answer, admitting the execution of the note in suit, and further alleged in defense as follows:

"That the note sued upon was given in settlement and not in payment of an account for lumber purchased by this defendant from the Jones & McGee Lumber Company and from the plaintiff; and that the defendant Zilla Ashby signed said note at the request of this defendant, without any consideration and as security merely, and this defendant admits the execution of said note.

"2. That the plaintiff is indebted to this defendant in the sum of $375, for services as attorney for plaintiff in the following cases in the district court of Gage county, Nebraska, to-wit: The Jones & McGee Lumber Company v. Newman & Winter; Jones & McGee Lumber Company v. Miller; Jones & McGee v. Yates and others; Jones & McGee v. Bush; Jones & McGee v. Casey; and for costs in case of Lumber Co. v. Greenslate and others, assigned to plaintiff, but not paid for by plaintiff. That all of said

services were rendered for plaintiff and its assignor, the Jones & McGee Lumber Company, at the request of plaintiff in the case of the Jones & McGee Lumber Company v. Newman & Winter, and that the payment of the defendant's claim in the other cases was assumed by plaintiff as successor, by purchase, of the Jones & McGee Lumber Company, and the plaintiff is now indebted to defendant for all of said services, and that said services were and are of the value of $375."

To this there seems to have been no reply, or if any, it is not contained in the record; nor does the record anywhere recite that a reply was filed. One assignment of error reads as follows: "The court erred in not permitting the plaintiff to recall Mr. A. D. McCandless as a witness in its behalf, after the discovery of the evidence mentioned in the affidavits of G. M. Humphrey and A. D. McCandless and before the jury had retired to consider its verdict;" and paragraph No. 6 of the motion for a new trial states as a reason for allowing a new trial: "Newly discovered evidence material for the plaintiff, as shown by the affidavits of Geo. M. Humphrey and A. D. McCandless submitted herewith, which evidence the plaintiff was unable with reasonable diligence, as shown by the affidavit of his attorney, G. M. Humphrey, to discover and produce on the trial." The only portion of the bill of exceptions to which reference is made by assignment of error No. 6 is contained on pages 14 and 15 thereof, where we find the following:

"WEDNESDAY, November 11, 1891.

"Court being open, plaintiff filed a motion to reopen this case on account of newly discovered evidence, and asks leave to recall Mr. McCandless. To which the defendants object.

"By the Court: The court rules on that question, that, as Mr. McCandless is not present, the case will not be reopened. We will not hold the jury for his presence. To the jury: You may retire with your bailiff."

There is nothing in this which gives us any light or information in the least as to whether the newly discovered evidence was material or not, or from which we can form any opinion regarding the exercise of the discretion of the court in overruling the motion, or whether there was any abuse of such discretion or not.

There are several affidavits in the record, which, from their nature and import, presumably were heard or read when the motion was presented, and also on the hearing of the motion for a new trial; but this court has repeatedly held that affidavits used as testimony in the district courts will not be considered in this court unless they are embodied in a bill of exceptions; and also affidavits used on the hearing of a motion for a new trial must be preserved in a bill of exceptions. In *Wohlenberg v. Melchert*, 35 Neb., 803, it was held: "Affidavits used at the hearing of a motion in the district court, to be available in this court, must be brought into the record by a bill of exceptions. * * * A party is not entitled to review, on appeal or error, the decision of a trial court in denying a new trial upon the ground of newly discovered evidence unless all the testimony given on the hearing of the motion is set out in a bill of exceptions." The affidavits in this case, in support of these motions, are not recognized in any manner, or otherwise authenticated, than that we discover them attached to the record, and probably one of them referred to in one or two sentences in the record. It is nowhere shown whether they were used for any purpose, and they cannot be considered here.

It is claimed that the verdict was contrary to an instruction asked by plaintiff and given, and also that the defense of set-off was not supported by sufficient evidence. As there was no reply, all the material allegations of the answer were admitted, and no further proof of the set-off necessary. According to the condition of the case when submitted to the jury, the defendant was entitled to have

the set-off allowed, and neither of the above objections could be or are of any avail or force. The same may be said and is true of the further assignment, that "the court erred in giving the instruction asked for by the defendants, to which plaintiff objected at the time." If there was any error in giving the instruction indicated in this assignment, it was not prejudicial, as the defendant W. H. Ashby was, under the pleadings, regardless of this instruction on the matter to which the attention of the jury was by it directed, to have the set-off allowed. The judgment of the district court is

AFFIRMED.

ALDEN K. RILEY ET AL. V. WALLACE M. BURROUGHS.

FILED JUNE 26, 1894. No. 4601.

Conflict of Laws: BREACH OF COVENANT: LEX LOCI. Where land situate in the state of Iowa was sold and the conveyance therefor was executed in the state of Nebraska, and there had been several prior conveyances, each of which contained a covenant of warranty against incumbrance, and of each of which there was the same existing breach, *held*, that the law of Iowa, or the law of the place in which the land is situate, will govern the rights of the parties in the enforcement of the covenant, in so far as it relates to the question of the covenant running with the land.

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

Hall, McCulloch & English, for plaintiffs in error, cited: *Chapman v. Kimball*, 7 Neb., 399; *Davidson v. Cox*, 10 Neb., 150; *Knadler v. Sharp*, 36 Ia., 236; *Devore v. Sunderland*, 11 O., 60; 2 Parsons, Contracts, 571*; *Bethell v. Bethell*, 54 Ind., 428; *Craig v. Donovan*, 63 Ind., 513.

Arthur C. Wakeley, contra:

Real property, as to its tenure, mode of enjoyment, transfer, and descent, is to be regulated by the *lex loci rei sitæ*. (*Fisher v. Parry*, 68 Ind., 465; *Kling v. Sejour*, 4 La. Ann., 130; *Succession of Cassidy*, 40 La. Ann., 837; *Succession of Larendon*, 39 La. Ann., 952; *United States v. Crosby*, 7 Cranch [U. S.], 115; 3 Am. & Eng. Ency. of Law, p. 567, note 1; *Chapman v. Robertson*, 6 Paige Ch. [N. Y.], 627; *McCormick v. Sullivant*, 10 Wheat. [U. S.], 192; *Brine v. Hartford Fire Ins. Co.*, 96 U. S., 627; *Kerr v. Moon*, 9 Wheat. [U. S.], 565; *McGoon v. Scales*, 9 Wall. [U. S.], 27.)

HARRISON, J.

This action was instituted in the district court of Douglas county by defendant in error to recover the sum of certain imposed taxes on the southwest quarter of section 36, township 81, range 39, in Shelby county, Iowa, remaining unpaid at the time the land was conveyed to him. A jury was waived in the district court, and on a trial to the judge thereof judgment was rendered for defendant in error, and plaintiffs in error have prosecuted a writ of error to this court. The case is submitted here on the following agreed statement of facts:

"Upon this —— day of ——, 1890, at the February, 1890, term of said court, this cause coming on to be tried was heard before his honor George W. Doane, one of the judges of this court,—a jury being waived by the parties hereto,—and afterwards, to-wit, on the 6th day of March, 1890, judgment was rendered herein in favor of the plaintiff; and whereas the said defendants are about to prosecute a writ of error from the decision of the said district court to the supreme court of the state of Nebraska, it is agreed between the parties hereto that this cause may be submitted for decision to the supreme court upon the following agreed statement of facts:

"1. The real estate, for breach of covenants against incumbrances upon which this suit is brought, is the southwest quarter section 36, township 81, range 39, in Shelby county, in the state of Iowa.

"2. On the 16th day of June, 1886, William J. Chausse and Mercy Chausse, of Shelby county, Iowa, conveyed said premises by warranty deed to the defendant Alden K. Riley; that on July 21, 1887, the defendant Alden K. Riley conveyed said premises to the defendant Annie R. Kinkead; that on October 19, 1887, Annie R. Kinkead conveyed the said premises to Thomas B. McCulloch; that on the 7th day of November, 1887, Thomas B. McCulloch conveyed the said premises to William F. Woods and Charles W. Sanborn; that on April 11, 1888, the said Woods and Sanborn conveyed the said premises to the plaintiff herein, Wallace M. Burroughs, who is the owner thereof.

"3. That the said real estate was conveyed by the said several grantors to the said several grantees by deeds of general warranty, and that all the said several deeds made by the defendants herein contained, among other things, the following covenants against incumbrance, to-wit: 'And I, the said [grantor], for myself, my heirs, executors and administrators, do covenant with the said [grantee], and with his heirs and assigns, that I am lawfully seized of said premises; that they are free from incumbrance,' etc.

"4. That at all the times of said several conveyances there existed upon said premises incumbrances other than those mentioned and excepted in any of said deeds, to-wit, valid and subsisting tax liens, to the amount as ascertained and adjudged by the district court.

"5. That on June 25, 1888, the plaintiff herein was compelled to pay, and did pay, to one Elsie Goldschmidt, who had redeemed said property from tax sale, the amount of said taxes, to-wit, one hundred and fifty-six and $\frac{5}{100}$ ($156.05) dollars.

"6. That all of said deeds, with the exception of the deed from the said Chausse and wife to Alden K. Riley, were made in the state of Nebraska, and the parties thereto were residents of the state of Nebraska; and that the said Chausse deed was made in the county of Shelby and state of Iowa.

"7. That, as shown by the petition herein, the plaintiff brings suit against the prior grantors of said land and not against his immediate grantors, William F. Woods and Charles W. Sanborn.

"8. That under the law of the state of Iowa a covenant against incumbrance, such as the one in question herein, runs with the land, and can be sued upon by any grantee, however remote.

"9. That all of said deeds were introduced in evidence under the objection of the defendants.

"10. That this agreed statement of facts shall constitute the bill of exceptions herein and be made a part of the record in said case."

It will be noticed that the suit was not brought against the immediate grantors of defendant (plaintiff in court below), William F. Woods and wife and Chas. W. Sanborn and wife, but against former grantors in the chain of title who had executed and delivered warranty deeds to the property, and it is claimed that the taxes which defendant in error paid were existing liens at the time of the conveyance by these former grantors. The plaintiffs in error deny that they are liable for the taxes in favor of defendant in error, on the ground that any taxes which were unpaid at the time of the conveyance by each would be a claim against each in favor only of his immediate grantee and not in favor of subsequent and remote grantees in the title with whom they were not immediately connected in the transaction and had no dealing. It is conceded that by the law of Nebraska, where the deed to defendant in error was executed, the covenant against incumbrances is a personal one

and does not run with the land, but is broken as soon as made, if there is an existing incumbrance; hence, in Nebraska, action can be maintained only by or between the immediate parties to the covenant. It further follows that if the law of this state—the law of the place of contract and forum of the suit—is to be applied to the facts in this action, and prevail, the judgment of the district court was wrong and must be reversed. It is further agreed that in Iowa a covenant against incumbrances, such as the one in this case, runs with the land, and may be taken advantage of by any grantee against his immediate grantor, or any grantor, however remote, in the chain of title, who conveyed with the incumbrance existing, by deed containing the covenants. If, therefore, the law of Iowa—the law of the place where the land which is the subject of the conveyance is situate—is to govern the rights and remedies of the parties, then the judgment of the district court was right and should not be disturbed.

Counsel for plaintiff in error cite the case of *Bethell v. Bethell*, 54 Ind., 428, as sustaining their position, also *Craig v. Donovan*, 63 Ind., 513. The case of *Bethell v. Bethell*, *supra*, held: "Where a deed is executed in this state between citizens thereof conveying lands situated in another state, without any covenants, the law of the latter state cannot be made to extend beyond her borders, so as to make such deed contain a covenant of seizin." In the text of the opinion it was stated: "The supposed covenant in this case, then, was one that did not run with the land. It was purely personal and broken as soon as entered into. It was not so connected with the land that any subsequent grantee thereof could take advantage of it. The question is therefore narrowed down to this: Can a deed executed in Indiana between citizens thereof, containing no covenants whatever according to the law of Indiana, be held, by virtue of the law of Missouri, where the land lies, to contain a covenant not running with the land, but broken as

soon as entered into? We think this question must be answered in the negative. A covenant of seizin, not running with the land, is purely a personal covenant, broken as soon as made, and has nothing whatever to do with the transmission of the title to the land. As a general rule, the *lex loci contractus* determines the construction and effect of contracts; and we think that where a deed is made, as above stated, the question whether it contains such a covenant is to be determined by the law of the place where it is made." It will be noticed that this case does not decide the exact point in dispute in the case at bar, but is confined to holding that the law of the state where the land is situated cannot be invoked to read into the deed a covenant which is not there expressed in terms, and which the law of the state where the deed was executed will not imply, but the latter law—the law of the state where the conveyance was executed—will prevail. The case in 63 Ind., *supra*, follows the doctrine announced in *Bethell v. Bethell*. In the case of *Fisher v. Parry*, 68 Ind., 465, the court said: "In 1862, F. conveyed certain land situated in Minnesota to K. by deed in the form prescribed by the statute of Indiana. Afterward K. conveyed the land to P. by a deed in the old form, with all the usual covenants. Both deeds were executed and delivered in Indiana, where all the parties resided. H. had owned the land and mortgaged it to D. in 1857, the latter subsequently foreclosing his mortgage and becoming the purchaser of the land, of which he took possession. *Held*, That as P. can maintain an action against F. only upon some covenant running with the land, and as, in determining whether a deed contains such a covenant, the '*lex rei sitæ*' governs, said P. had no right of action against F." Also, "in determining whether a conveyance of real estate contains a covenant that runs with the land, the *lex rei sitæ* governs." In the case of *Worley v. Hineman*, 33 N. E. Rep., 261, a later Indiana case, it was held: "Where the owner of land situate in Illinois,

on which there was a mortgage, executed a deed therefor in Indiana, with general covenant of warranty, such covenant was not personal to the immediate grantee, but ran with the land, even though the grantor, being a resident of Indiana, did not have possession of the land, but was in a position to give possession to his immediate grantee. Where such mortgage was subsequently foreclosed against a remote grantee, and the land redeemed by the immediate grantee, who thereafter brought suit in Indiana against his grantor's estate on the covenant of warranty, the question whether there was a covenant or not that ran with the land is determinable under the laws of Indiana, and hence, if the complaint discloses a breach of covenant under such laws, it states a good cause of action;" and it is stated in the opinion: "The case of *Fisher v. Parry, supra*, seems not to have been followed in any later decision; and if we should feel constrained, under ordinary circumstances, to follow it, we believe we are justified in saying that it is repugnant in principle to the entire line of Indiana cases on the subject."

It will be seen that the Indiana court has not at all times adhered to the same doctrine on the subject here involved, but in *Worley v. Hineman, supra*, which is the latest decision of that court on the point herein under discussion, it may be said to support the contention of plaintiff in error. On the other hand, we find in *Kling v. Sejour*, 4 La. Ann., 128, it was held: "What constitutes title and what seizin—or, in the language of our law, the possession, as owner, of immovable property,—must be determined by the law of the place where it is situated, and that is the only law which can determine whether a covenant of title and seizin has been broken or not." In *Succession of Larendon*, 39 La. Ann., 952, it was held: "The rights and obligations arising under acts passed in one state to be executed in another, respecting the transfer of real estate in the latter, are regulated, in point of form, substance, and

validity, by the laws of the state in which such acts are to have effect." In *Succession of Cassidy*, 40 La. Ann., 827, 5 So. Rep., 292,—a case which arose out of the following facts, as therein stated: "The present controversy arises in the testate and apparently solvent succession of Henry Cassidy, a citizen and resident of this state, and which was opened in October, 1884. It is raised by way of an opposition to a final account. The opponents are Arthur E. Spohn and Catherine Hamilton, administratrix of the estate of Alexander Hamilton, citizens of the state of Texas. The following are the grounds of their opposition, substantially, viz.: That on the 9th of December, 1875, the deceased, in consideration of the price of $2,000, sold to Horace Wright Cassidy a tract of land situated in Nueces county, Texas, with full warranty of title to said purchaser, his heirs and assigns, and on the 11th day of July, 1878, said vendee, for and in consideration of the price of $1,822.50, sold said tract of land to Arthur E. Spohn and Dr. Alexander Hamilton, opponents herein, with like warranty of title; that by a decision of the supreme court of the state of Texas rendered in March, 1884 (*Schaeffer v. Berry*, 62 Tex., 705), opponents' title to said land was declared null, and state patents have been issued to other parties and they have been compelled to abandon it. They aver that they were in fact subrogated by their vendor, Horace Wright Cassidy, to the warranty of Henry Cassidy, 'whose covenant of warranty runs with the land, under the law of the state of Texas, and should protect petitioners,' and that the succession of Henry Cassidy is liable to them under the law of the state of Texas, against which opponents are entitled to recover on said obligation of warranty,"—the rule was stated in these words: "The rights and obligations of the parties to a sale executed in one state of real estate situated in another must be determined under the laws of the state in which the property is situated;" and in the opinion it was said: "This brings us to the discussion of the con-

tested right of the opponents to sue as a warrantor, a remote vendor in the chain of titles, without first exercising their recourse against their immediate vendor. The sale by Henry Cassidy to Horace Wright Cassidy was executed in this state, and the deed of the latter to Spohn and Hamilton was executed in the state of Texas, and, as already stated, the lands which were the subject-matter of both contracts are situated in Texas. Hence it follows that the rights and obligations of the parties under both contracts are to be governed by the laws of Texas. This question was discussed and maturely considered in the case of the *Succession of Larendon*, 39 La. Ann., 952, 3 So. Rep., 219, in which the rule was formulated in the following language: 'The rights and obligations arising under acts passed in one state, to be executed in another, respecting the transfer of real estate in the latter, are regulated, in point of form, substance, and validity, by the laws of the state in which such acts are to have effect.'"

In *Tillotson v. Prichard*, 14 Atl. Rep. [Vt.], 302, the following rule is announced: "In an action of breach of covenant of warranty, where the grantor resided in Vermont, the grantee in New Hampshire, and the land was situated in Minnesota, the construction of the contract, including the rule as to damages, is governed by the law of Minnesota,"—and the further statement in the body of the opinion: "The covenant sought to be enforced was contained in a deed executed in Vermont; the grantor domiciled there, the grantees in New Hampshire. The land described in the deed was located in Minnesota. The question arises, by what law is the contract to be governed? The defendant insists (see brief, point 1) that the question 'must be decided according to Minnesota law,' and the plaintiff's counsel invoke the aid of that law upon the questions of the execution of the deed and the transitory character of the action. The contract, being one which could only be performed in Minnesota, the parties evidently

had in view the law of that state in reference to its execution. We think its construction and force, including the rule as to damages, must be governed by the law of that state. (2 Kent, Com., 459.) 'The law of the place where performance is to occur governs in respect to the validity and performance of contracts made in one state, but to be performed in another.' (Rorer, Interstate Law, 50.) 'Matters connected with * * * performance are regulated by the law prevailing at the place of performance.' (*Scudder v. Union Nat. Bank*, 91 U. S., 406, 413.)"

We are satisfied that the rule which allows the law of the state wherein the land is situated to prevail, and the covenant to be construed, in reference to whether it runs with the land, to be determined by such law, is consonant to or with the soundest and best reasoning, and hence we will adopt it. There is a further thought which moves us to this conclusion: If the other doctrine were held superior, if a tract of land was sold, and deed executed in Texas, then by the grantee conveyed by deed executed in New York, and thus through any number of conveyances, each in a different state from any other, there would arise many complications, and much confusion and uncertainty in the relief afforded the litigants under the covenants of the deeds, construed by the differing laws of the states on the subject,—in some running with the land and in others not; some parties being confined in the right of action to immediate grantors, others allowed to make a selection,—while, on the other hand, the rule which we are convinced will be productive of the best results, and more certainty of justice to litigants, will adjust the rights and administer relief to each and every one and all concerned, according to the same construction, the law of the state or place where the real estate is situate.

AFFIRMED.

MOSES ROBERTS V. CHARLES H. DREHMER ET AL.

FILED JUNE 26, 1894. No. 5648.

1. **Instructions**: HARMLESS ERROR: REVIEW. A new trial will not be granted because of the action of the trial court in giving an instruction, if erroneous, where it appears from the verdict rendered by the jury that the party complaining of the giving of the instruction has not been prejudiced thereby.
2. **Costs**: PROCEDURE TO REVIEW JUDGMENT FOR. The general rule is that in order to obtain a review of a judgment for costs, it is necessary that a motion to retax the costs be made and presented to the lower court, and its ruling had thereon.
3. **Instructions**: REVIEW. It is error to give an instruction which is not predicated upon and pertinent to the issues in the case as joined by the pleadings and applicable to the testimony adduced.
4. **Damages**: SERVICES: PART PERFORMANCE OF CONTRACT: INSTRUCTIONS. An instruction given by the court on its own motion examined, and *held* not based upon and applicable to the pleadings and testimony, and further erroneous, in that it stated an incorrect rule or measure of damages, and to be calculated to mislead the jury, and prejudicial to the rights of plaintiff in error.

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

E. W. Thomas and *E. C. Hall*, for plaintiff in error.

J. S. Stull and *S. P. Davidson, contra.*

HARRISON, J.

This is an action by Drehmer Bros., partners, to recover of Moses Roberts, plaintiff in error, compensation for certain services, which they allege were performed by them for him. The material allegations of the petition filed in the district court are as follows:

"The plaintiffs, for their cause of action, allege that on

or about the 10th day of June, A. D. 1890, the plaintiff and the defendant entered into a verbal contract, whereby the plaintiff agreed to drill a well on the premises of the defendant to a depth sufficient to furnish plenty of water, and to put a good pump therein, and as compensation therefor the defendant promised and agreed to pay the said plaintiffs the sum of $1.25 for each and every foot of said well, the measurement to be from the top of the pump to the bottom of the well, to be payable when the well was completed. Said defendant further agreed to pay said plaintiffs the sum of ten cents for each and every foot of casing used in said well, if the same should be needed. That in pursuance of said contract the said plaintiffs at once entered upon the performance of their part of the said contract and faithfully completed the same according to the terms thereof on or about the 20th day of August, A. D. 1890, drilling a well and furnishing a good pump therefor, the measurement of which was 319 feet, and that it was necessary to, and the plaintiffs did, furnish and put into said well tubing to the amount of 300 feet; that said plaintiffs, after completing the said contract, and on or about the 15th day of January, 1891, made repairs on the pump in said well, at the defendant's instance and request, which said repairs were reasonably worth the sum of $10; that the said plaintiffs moved their well drill out to the premises of the defendant on or about the 27th day of October, 1890, for the purpose of drilling another well on his premises and were ordered not to proceed with the said work by the defendant, and that said defendant then and there agreed to pay the said plaintiffs the sum of $25 for the trouble and expense of moving and setting up said well drill; that all of said work, material furnished, and repairs done is as follows, to-wit:

To drilling and putting in pump, 319 feet, at $1.25	$398 75
To 300 feet of casing, at 10 cents per foot	30 00

To work, fixing pump	$10 00
To setting up well drill	25 00
Total	$463 75
Oct. 28, 1890, paid by cash	175 00
Balance due	$288 75

"That on the 28th day of October, 1890, the defendant paid to these plaintiffs the sum of $175, leaving a balance still due and unpaid from the defendant to these plaintiffs the sum of $288.75, for which, with costs of suit, plaintiffs demand judgment."

The answer contained a denial of each and every allegation of the petition not expressly admitted, and the further statement of matters of defense as follows:

"This defendant admits that on or about the 10th day of June, 1890, he entered into the contract with plaintiffs, as in the first paragraph of said petition described and alleged, but this defendant avers that said plaintiffs failed to fulfill the terms and the requirements of said contract, and utterly failed to procure, in the drilling and construction of the well mentioned in said petition, a plentiful flow and supply of water, according to the terms of said contract, and plaintiffs wholly failed and neglected to complete their contract aforesaid, according to the terms thereof; and this defendant further avers that, according to said contract, the defendant was to pay plaintiffs the sum of $1 per foot for drilling said well, and not $1.25, as in said petition alleged; that by reason of the failure of said plaintiffs to contract and make said well according to said contract and procure, according to the terms thereof, for the use of defendant, a plentiful supply of water for one hundred head of cattle, two hundred head of hogs, twenty head of horses, and sufficient for household use, which, according to said contract, plaintiffs were bound to do, the defendant has been greatly damaged in the sum of $500.

"For further answer to said petition defendant further avers that for all the matters and things charged and alleged against this defendant therein the defendant long since settled and paid in full, and procured therefor from plaintiffs due receipt and acquittance."

The prayer of the answer was that the plaintiffs should not have and recover anything, and for judgment in favor of defendant Roberts in the sum of $500 damages. To this answer plaintiff filed, in reply, a general denial. A trial of the issues, before the court and a jury, resulted in a verdict in favor of Drehmer Bros., plaintiffs below, in the sum of $——, for which sum, after motion for a new trial on behalf of defendant Roberts was submitted and overruled, judgment was rendered for the plaintiffs, and to reverse which the case is brought here by plaintiff in error on his petition.

The first alleged error to which our attention is challenged in the brief filed on behalf of plaintiff in error is that the court erred in instructing the jury that the answer admitted the terms of the contract to be as alleged by plaintiffs, and that the allegation of the petition in regard to the contract and its obligations were to be taken as true. The court did so instruct, and under the pleadings it is questionable whether it was proper or erroneous; but however this may have been, viewed in the light of the issues joined by the pleadings, and the evidence adduced at the trial, the jury, having found generally for the plaintiffs, could not, if they figured their compensation at the sum of $1 per foot, for which Roberts alleged in his answer the Drehmer Bros. agreed to sink the well, have made their verdict for a less sum, or indeed for a smaller sum than they did make it, $112.50, and the plaintiff in error was not prejudiced by the instruction of which complaint is made; and having determined this agreeably to a settled rule of the court, the verdict and judgment will not, for this reason, be reversed.

Another assignment of error is that the court erred in

rendering judgment against plaintiff in error for the costs incurred by plaintiffs in that court. In order to obtain a review of this action of the lower court in this court it was necessary to file a motion to retax the costs; and if the ruling of the trial court on the motion was adverse to the party making it, the ruling could then be reviewed in this court when properly removed and presented here. No motion to retax the costs was made in the lower court, hence the judgment for costs cannot be reviewed. (*Bates v. Diamond Crystal Salt Co.*, 36 Neb., 900.)

Instruction numbered 5, of the instructions given by the court on its own motion, was as follows: "But if, on the other hand, you find from a preponderance of the evidence that the $175 paid by defendant to plaintiffs was made and received as a part payment of the contract price, and such settlement was only a conditional agreement, and they were to be paid the balance of the contract price, on the performance of the condition, * * * then plaintiffs would be entitled to recover the balance of the contract price on the performance of the condition on the part of plaintiffs, or their offer to perform, and prohibited by the defendant, if you should so find." This instruction, it is claimed by counsel for plaintiff in error, was erroneous, in that it stated an incorrect rule for the measure of damages, wherein by it the jury was informed that "then plaintiffs would be entitled to recover the balance of the contract price on the performance of the condition on the part of plaintiffs, or their offer to perform, and prohibited by the defendant, if you should so find." In considering the objection to this instruction it must be borne in mind that the petition in this case set forth a contract, alleged the full performance of it, acknowledged a part payment of it, and prayed for a recovery of the balance of the consideration in full; that the answer admitted the making of the contract, probably alleged a lesser consideration than the petition, pleaded affirmatively a breach of the contract on the part of the

Drehmer Bros., and damages accruing from such breach, to the defendant Roberts, and contained the further allegation of a settlement and payment in full by Roberts to Drehmer Bros. for their services in sinking the well. Clearly, no such issue was raised by the pleadings in the case as is outlined in the above quoted instruction, although there was quite a large amount of evidence introduced during the trial on the question, to which the attention of the jury was directed by this instruction; but even if the instruction had been proper and admissible, or warranted by the issues joined by the pleadings, it was erroneous, in that it misstated the measure of damages. We understand the rule of damages where there has been a part performance and an offer to complete, which the employer rejected, that it raises a liability in favor of the other party, where the action is upon the contract, for not to exceed compensation for the work already performed, and profits to be made under the contract. (*Hale v. Hess*, 30 Neb., 42, and citations; Field, Damages, sec. 339, and cases cited; *M'Elwee v. Bridgeport Land & Improvement Co.*, 54 Fed. Rep., 629.) By the testimony introduced it was sought to bring before the court and jury, as an issue to be considered by them, that the parties at some date (the exact time is not material), after the well had been driven and pronounced complete by Drehmer Bros. but not so by Roberts, modified the contract in such a manner that if the well did not prove satisfactory by a named date, the Drehmer Bros. were to drive another, or make a well which would fulfill, in all respects, the terms of the original contract. There was no evidence introduced tending in any manner or degree to prove what plaintiffs should have received as compensation and damages, except the proof of the whole amount of the consideration, provided for by the contract originally. The instruction complained of was unquestionably erroneous, in that it was based upon an issue not raised by the pleadings, and did not inform the jury as to the true measure of damages, and

was calculated to mislead the jury to the prejudice of plaintiff in error.

REVERSED AND REMANDED.

DANIEL F. LA BONTY V. CARL P. LUNDGREN.

FILED JUNE 26, 1894. No. 5974.

Trial: EJECTMENT: GENUINENESS OF SIGNATURES TO DEEDS: CONSIDERATION BY JURY IN JURY ROOM OF NOTE NOT IN EVIDENCE. In a case in ejectment, where the signatures to certain deeds purporting to convey the land in controversy are in dispute, and a note obviously signed by the alleged forger of the said deeds, and not admitted and read in evidence, is allowed, accidentally or otherwise, to be taken into the jury room, remaining in the hands of the jury during their consideration of the verdict, it is fair to assume, unless definitely demonstrated to the contrary, that such note with its signature were considered and examined by the jury; and its admission to the jury room was prejudicial to the party against whom the verdict was rendered, and calls for a reversal of the verdict and a new trial of the cause.

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

Griggs, Rinaker & Bibb, J. C. Crawford, and *J. A. Smith,* for plaintiff in error:

When the jury retired they took with them into the jury room without plaintiff's consent, a note which had not been introduced in evidence. This was shown by affidavit to be prejudicial to plaintiff. The court erred in refusing a new trial for misconduct of the jury. (*State v. Hartmann,* 46 Wis., 248; Proffatt, Jury Trials, secs. 392, 405; *Town of Peacham v. Carter,* 21 Vt., 515; *Kruidenier v. Shields,* 77 Ia., 504.)

Munger & Courtright, T. M. Franse, and *M. McLaughlin, contra.*

HARRISON, J.

This is an action of ejectment commenced by Daniel F. La Bonty to recover the possession of 160 acres of land, the northeast quarter of section 26, in township 21 north, of range 7 east, and in Cuming county, Nebraska. The petition is in the usual form. The answer is a denial of the allegations of the plaintiff's petition, and further pleads as a defense that defendant purchased the lands in controversy from one John Kerkow during the year 1881, and received a warranty deed therefor, paying the sum of $1,000 as the consideration for said sale; that he made the purchase in good faith, and without any knowledge or notice of any claim or interest of the plaintiff to or in the land; and further recites the valuable improvements which he has placed upon and attached to the land. The plaintiff, in reply, denied the affirmative statements and allegations of new matter in the answer. A trial of the issues was had before the court and a jury, the outcome of which was a verdict in favor of the defendant. The plaintiff filed a motion for a new trial, which the court overruled, and judgment was rendered for defendant upon and in accordance with the verdict. A reversal of this judgment is sought by the plaintiff in these proceedings in error to this court.

The paper claim of title introduced in evidence by the plaintiff to sustain his contention was a certificate of location issued by the United States through one of its land offices October 10, 1867, to Charles Bartholomew, which was assigned to Daniel F. La Bonty; a patent issued November 2, 1868. Defendant on his part introduced a deed of date December 2, 1880, purporting to have been signed by D. F. La Bounte or "D. F. Lq Bounte," the grantee named therein being John Kerkow. He also introduced a tax deed by the treasurer of Cuming county, in favor of L. B. Baker, as grantee,

also a quitclaim deed from Baker to D. F. La Bonte, this last of date December 11, 1880, and a quitclaim deed of date January 27, 1881, to John Kerkow, purporting to to have been signed by D. F. La Bonte, also a deed from John Kerkow and wife to defendant December 15, 1880. It will be noticed, in mentioning the deeds from La Bonte to John Kerkow, it has been stated that they purported to have been signed by D. F. La Bonte. They are thus alluded to for the reason that on the question of whether the signatures to them were written by Daniel F. La Bonty, or were forgeries, hinged or turned the decision of the case by the jury, the fact of the genuineness, or lack of it, of the signatures being the main point in the case to which the evidence was directed and with reference to which there was a sharp and well defined conflict in the testimony, and upon which there was a hot contest throughout the whole trial. A number of the witnesses for the plaintiff, among whom was the notary before whom the two deeds referred to were acknowledged, and the attesting witnesses to one of them, testified that the signatures to the deeds were written by one Amos Labonte, or as he was otherwise known and familiarly called, "Frenchy." Six copies of pension vouchers and two chattel mortgages which had been signed by this man Amos Labounte were introduced by the defendant to prove, by comparison with the signatures upon the two deeds, that he did not write the signatures last mentioned, and among other things attention was particularly drawn to the fact that Amos Labonte, or "Labuntey," as he says it should be spelled, never separated the name into two parts nor spelled the Bonte part of it commencing with a capital "B," as was done in both instances in the signatures to the deeds, which are the subject of plaintiff's attack as forgeries, but that he invariably wrote it in one word, "Labuntey," and used a small "b." In his testimony he states:

Q. That kind of a "D" you don't know how to make?

A. No, or any kind of a "D."

Q. Or a "B."

A. No, I never tried to make a "B." I simply sign my name the way I sign it here. (Here the witness marks with his hand on the desk.)

Q. How do you write your name, as far as the "B" is concerned?

A. I write just a small "b."

Q. Nothing like the "B" that is on those deeds?

A. No, sir.

And one William H. Stanley, a witness for the plaintiff, in his testimony says:

Q. Will you state whether he signed the name with a small "b" or a large "B" in the word "bountey."

A. I think it was with a large "B," that is my recollection of it.

Q. Will you be positive of that?

A. No, I will not be positive.

Q. Can you produce a signature of Amos Labountey, wherein he wrote the name with a capital "B" in the word "Bountey."

A. I think so. I know I can produce his signature, if I have little time to look it up, but I am not positive as to the capital "B."

The defense seem to have made quite an effort to convince the jury that no signature could be produced, made by Amos Labuntey, where the separation in the word was made and the capital "B" used; that he could write nothing but his name, and this only in the one manner indicated, stated in his testimony, and as shown by the exhibits introduced. In the brief of counsel for the intervenor, W. H. Atwood, who is now defendant in error, we find the following on this same subject: "The 'B' in every case is a capital 'B' and not unlike those made by plaintiff, whereas the signatures, as shown by the photograph, are in no particular like the signatures of Amos Labounte. * * * Plaintiff

has been challenged to show a signature of Amos Labounty, signed with a capital 'B,' or a word written by him, other than his signature. * * * Amos Labunty cannot write and never does write anything except his own name, and never writes that in any other manner than with a small 'b'." From all this it will be gathered that the signature of Amos Labunty, and the manner in which it was framed, and whether a capital "B" or a small "b" was used and appeared in it wherever and whenever it was seen, was one of the important facts to be determined by the jury from the evidence adduced.

One of the errors assigned and argued by plaintiff is thus stated in the motion for a new trial: "The jury obtained and took with them into the jury room, by some means unknown to the plaintiff and without his knowledge or consent, a certain promissory note, which had not been introduced in evidence by either party, purporting to have been executed by Amos Labounty to Van Devort & Co. for the sum of $45, dated February 13, 1890, which said note, and especially the signature thereto, was considered and discussed by the jury, as will more fully appear by the affidavit of Emil Heller and J. A. Smith, with the said note thereto attached, marked Exhibit 'A' and made a part hereof." The affidavits referred to are as follows:

"Emil Heller, being first duly sworn, says that he is clerk of the district court of Cuming county; that the above cause was submitted to the jury February 6, 1892; that among the papers returned with the verdict of said jury was the note signed by Amos Labounty, which said note is attached to this affidavit and made a part hereof and marked Exhibit 'A'."

"J. A. Smith, being first duly sworn, says that he is of counsel of plaintiff; that the above cause was submitted to the jury February 6, 1892; that the note referred to in the affidavit of Emil Heller, and made a part of his affidavit, was not introduced in evidence and was not, with the con-

sent of plaintiff or his counsel, given them. The said jury being called for an explanation of the occurrence upon February 8, 1892, in open court, each and every one said they knew nothing as to the manner of how the said note came into their deliberations; that during the time said jury was out and deliberating upon the verdict, said jury instructed the bailiff to ask the court for the depositions of D. F. La Bonty and Amos Labounty, also the two deeds introduced in evidence; that the court, upon the refusal of attorneys for defendant to consent to the request of the jury, refused the same; that this affidavit and also that of the clerk of the district court of Cuming county is made by each of them for the sole reason that many of the jurors in said cause, having been asked to make the same, expressed a reluctance and decided disinclination to make the same."

The plaintiff very strenuously contends that for this the case should be reversed and remanded for a new trial. The note attached to one of the above affidavits was not introduced or offered as evidence in the case, so far as the record discloses. It had not been identified in any manner as a note signed by Amos Labuntey, or made competent as evidence. In truth its first appearance in the case, according to the record, was when it was handed to the clerk by the jury, along with the verdict; and no blame, it seems, can attach to any one for the jury having it in their possession; but from the facts that the controversy over the manner in which this name was written, and the comparison with the two deeds in question, was so strong, and the evidence so conflicting, and to be determined by the jury from a view and consideration of all the evidence bearing upon it; that there were but few papers sent out at the time they retired to consider of their verdict; that after being out a short time they sent for all the other papers upon which the disputed signature appeared, and also those introduced, by which it was sought to help them in reaching a conclu-

sion as to whether the two deeds had been signed by the plaintiff, or some one else who was not authorized by him to do so; that when the jurors were interrogated afterward in open court, in regard to the note and the manner of their obtaining possession of it, they all showed a knowledge of it, but could give no account of how they became possessed of it,—it is fair to conclude that it was used by them and entered into their deliberations as a part of the evidence, from which the conclusion was reached, which became their verdict, determining the rights of the parties to the action. The only further question is, does this call for a reversal of the case?

In 2 Thompson, Trials, p. 1943, sec. 2580, it is said: "The general rule is that if depositions or other papers which have not been admitted in evidence are taken out by the jury when they retire to consider of their verdict, a new trial will be granted; since it would be idle to rule out incompetent documentary evidence, if the jury were allowed to take it to their room and consider it while making up their verdict."

In *Neil v. Abel*, 24 Wend. [N. Y.], 185, it is said: "Where a cause was tried in a justice's court, and the justice, at the request of the jury, after they had retired to consider of their verdict, gave them, without the consent of the parties, his minutes of the trial, the common pleas, on *certiorari*, reversed the judgment rendered on the verdict of the jury, and this court, on writ of error, affirmed the judgment of the common pleas."

In Thompson & Merriam on Juries, p. 481, sec. 386, it is said: "The general rule is, that if depositions or other papers which have not been admitted in evidence are taken out by the jury when they retire to consider of their verdict, a new trial will be granted. This rule rests upon the same reason which makes it error to admit hearsay or other incompetent evidence at the trial. It would be idle to rule out incompetent documentary evidence if the jury

were allowed to take it to their room and consider it while making up their verdict."

In *Munde v. Lambie*, 125 Mass., 367, it was held: "If a bill of exceptions, allowed by the judge at the first trial of a case, and containing statements material to the issue, is at the second trial taken to the jury room and read by the jury, or any of them, it is sufficient ground for a new trial; and misconduct by the party in whose favor the verdict is rendered need not be shown;" and Gray, C. J., in the text of the opinion says: "The bill of exceptions tendered by the plaintiff and allowed by the judge at the first trial, was not competent evidence to be laid before the jury at the second trial. As the statements therein were material to the issue and may have prejudiced the defendants, it was not necessary to show misconduct on the part of the plaintiff in bringing the paper before the jury."

So in *Hix v. Drury*, 5 Pick. [Mass.], 296, it was said: "Where a paper, which is capable of influencing the jury on the side of the prevailing party, goes to the jury by accident, and is read by them, the verdict will be set aside, although the jury may think that they were not influenced by such paper, for it is impossible for them to say what effect it may have had on their minds."

In *Whitney v. Whitman*, 5 Mass., 405, we find that "where, upon a trial, a material paper, not read in evidence, had been given to the jury by mistake, a new trial was granted without costs," and in the body of the opinion it is stated: "The court refused to examine any of the jurors, and observed that the court must be governed by the tendency of the paper apparent from the face of it; that it was not pretended that the jury had not read it, and it would be difficult for jurors, where, as in this case, there was much evidence of different kinds, clearly to decide in what manner their minds were influenced in forming their verdict. As it was received by the jury among other written evidence and read by them, it must be presumed

that they considered it as evidence, and gave due weight to it."

In *Woodbury v. City of Anoka*, 54 N. W. Rep. [Minn.], 187, it was held: "Where there is misconduct of jurors that may have had an influence on the verdict unfavorable to the defeated party, the verdict must be set aside, unless it appear, beyond doubt, that in fact it had no such effect;" and we quote from the text as follows: "Misconduct of jurors as a reason for setting aside the verdict was fully considered in *Koehler v. Cleary*, 23 Minn., 325, and the rule stated that 'if it does not appear that the misconduct was occasioned by the prevailing party, or any one in his behalf, and if it does not indicate any improper bias in the jurors' minds, and the court cannot see that it either had or might have had an effect unfavorable to the party moving for a new trial, the verdict ought not to be set aside,' and that all the moving party can be called on to show is 'that the misconduct may have had an effect unfavorable to him.' The party need not show that he was in fact prejudiced. That case concedes that where the misconduct may have had an effect unfavorable to the defeated party, the other party may be permitted to show that in fact it did not have such effect. But that would have to appear very clearly,—so clearly as to leave no doubt as to the fact. When it may have had an unfavorable effect, it would be unsafe to allow any speculation, whether in fact it did or not." (See, also, *Durfee v. Eveland*, 8 Barb. [N. Y.], 46; *Thrall v. Smiley*, 9 Cal., 529; *McLeod v. Humeston & S. R. Co.*, 32 N. W. Rep. [Ia.], 246; *Bulen v. Granger*, 29 N. W. Rep. [Mich.], 718.)

The signature upon the note which the jury had with them in their room was as follows:



and if not the genuine signature of the witness, Amos

Labuntey, was a very clever imitation of it; but however this may be it seems highly probable, if not entirely certain, that it must have exerted an influence on the minds of the jurors very unfavorable to the plaintiff's contention in the case, on the branch of the inquiry of the case on trial, in reference to the signatures, and as this was largely a governing one, it seems more than probable that it must have been prejudicial to his rights. It is the policy of the law to guard very jealously and carefully the deliberations of juries, and keep them free from any influence from sources other than the court, and through the channels provided by its rules and laws.

There are several errors assigned and argued, but as their discussion would involve and necessitate more or less comment upon the evidence in the case, and its weight and sufficiency, and as there must be another trial, we think it best to stop here, and to refrain from any further consideration of the case.

REVERSED AND REMANDED.

FOUNTAIN L. BEATTY V. JAMES D. RUSSELL.

FILED JUNE 26, 1894. No. 4773.

1. **Real Estate Brokers:** ACTION FOR COMMISSION: CONTRACTS. Where real estate is listed with an agent or broker for sale, the agreement being that it is to be sold for $4,800 net to the owner of the land, the broker to have and receive as compensation for making the sale any sum in excess of the $4,800 for which he can effect a sale, and he meets a party who desires to purchase the land, and informs him that it can be purchased for $4,800, and then introduces him to the owner, who completes the sale at the price above named, in an action by the broker to recover a reasonable commission, *held*, that he is not entitled to recover.

2. **Instructions.** Objections to the modification by the court of an

instruction requested by the plaintiff examined, and *held* that the modification was proper.

3. ———. The action of the court in giving an instruction requested by the defendant *held* not erroneous.

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

Daniel F. Osgood, for plaintiff in error.

S. P. Davidson, contra.

HARRISON, J.

This case was originally instituted in the county court of Johnson county, by plaintiff, to recover a commission which he claimed due him from defendant, for effecting the sale of a piece of real estate for defendant, as his agent, and from a judgment there rendered was by appeal removed to the district court. The statement of the cause of action, in the petition filed in the district court, is as follows: "That there is due and owing to the plaintiff from the defendant the sum of $145 commission for selling land by the plaintiff for the defendant, at the defendant's request, about December 27, 1889. Said services were reasonably worth the sum of $145." To this the defendant answered as follows:

"1. Comes said defendant and, for answer to the plaintiff's petition, denies each and every allegation contained therein.

"2. As a second and further defense herein this defendant denies that he employed said plaintiff to sell the land referred to in said petition, but avers the fact to be that a firm, Greer & Beatty, composed of Geo. H. Greer and this plaintiff as partners, was employed to sell said farm upon the terms that this defendant was to receive $4,800, clear of all commission, for the land, and said Greer & Beatty were to have all over said $4,800 as their commission, and

if they sold the land for only $4,800 they were to have no commission from this defendant. This defendant avers that said land was sold for $4,800, and no more, and therefore no commission whatever is due this plaintiff.

"3. As a third defense herein defendant alleges that while not recognizing the validity of the claim of either said Greer & Beatty, or this plaintiff, for any commission for the sale of said land, but by way of compromising a disputed claim, this defendant settled said claim with said Greer & Beatty long prior to the commencement of this suit, and paid them, in pursuance of said settlement, the sum of $56, in full of said claim, said firm being represented in said settlement by said Greer, a member of said firm."

To this answer the plaintiff filed a general denial. The issues thus presented were submitted to a jury and a verdict returned for defendant, and after motion for a new trial was argued and overruled, judgment was rendered in accordance with the verdict, and plaintiff brings the case to this court by petition in error.

The manner in which the claim of plaintiff is pleaded in his petition, a perusal of his evidence in chief as given on the trial, and an examination of the law cited by his counsel in the brief filed, leads to the conclusion that he predicates his claim on the proposition that defendant, having authorized him to sell his land for him, the fact that he procured a purchaser, whom he introduced to defendant and to whom defendant, almost immediately afterwards, effected a sale of the real estate, entitled him to compensation, or a reasonable commission, and the determination of whether or not the evidence adduced in the case supports the above proposition will dispose of all the material questions presented in the case. The solution, or answer to the above query, depends mainly, if not entirely, upon the character of the contract which was entered into at the time when Mr. Russell authorized the plaintiff or the firm of

Greer & Beatty (if such a firm existed) to sell the real estate. On this subject the defendant testified as follows:

Q. Now, some time prior to the time of this sale, state whether you went to their office and in the presence of both of them gave them this land in controversy for sale; and if so, state what terms, if any, you prescribed by which they should make the sale.

Plaintiff objects; immaterial and irrelevant. Objection overruled and exception taken.

A. I went into their office some time previous to the sale of the land, and told them I had a half section in Pawnee county that was for sale, described it as well as I could as to what was there, and gave them the price and terms upon which they might sell it.

Q. Now, state what terms and price you gave them.

Plaintiff makes same objection. Same ruling and exception taken.

A. I addressed my conversation more particularly to Mr. Greer, told him that they might sell it for $4,800 to me, net; that the price was $5,000, but they might sell it for $4,800, or so it would realize me that much, after their commission was paid; and if they wanted to sell it for $4,850, I was to have the $4,800, with eight per cent interest on the deferred payments.

Q. Was Mr. Beatty present at that time?

A. Yes, sir; he sat at my left and Mr. Greer at my right.

Q. Did you ever after that, and prior to the sale, inform them that they could sell it on any other terms than you have just stated?

A. I never did.

And the testimony of Mr. Greer on this point is as follows:

Q. Well, now, Mr. Greer, tell the jury what terms, if any, Mr. Russell gave your firm upon which you could sell this farm in Pawnee county.

A. The only terms that I ever heard Mr. Russell offer

this property for were five thousand dollars, but must net him forty-eight hundred anyway. To me at least,—I am not positive what he told Mr. Beatty, but I swear positively that this was the terms that this piece of land was placed with me for sale.

Q. Do you remember of Mr. Russell coming into the office of Greer & Beatty and stating the terms on which you could sell this land to you in the presence of Mr. Beatty?

Plaintiff objects, as leading. Objection overruled and exception taken.

A. I will have to explain that a little. I cannot swear positively to any particular occasion of his coming in, but remember of his coming in often, at least a half dozen times, and saying he wanted to sell the land; expressing himself as not wanting to hold it, as it was too far away. He said we could sell it for forty-eight hundred to him and make a good commission, but it must net him forty-eight hundred.

Q. Now, was Mr. Beatty present in the office at one of the conversations?

A. Well, I am satisfied he must have been; I can't say positively; we would all talk about it, and I think he must have been present, as we often talked about it.

Q. Tell the jury whether you and Mr. Beatty have talked particularly about this piece of land and the terms at which it was offered for sale?

A. Well, I don't know whether we talked particularly about this piece any more than the whole list, but I think I spoke to Mr. Beatty about Mr. Russell being anxious to get rid of this piece of land.

Q. In that conversation state whether you spoke of the terms upon which you could sell it.

Plaintiff objects, as immaterial and irrelevant, and leading. Objection overruled and exception noted.

A. We talked of the land and what commission we would

get on different pieces, ranging from twenty-five to one hundred and fifty dollars, and this one piece of land was considered by Mr. Beatty to be worth $5,000, and that would give us a strong commission on that piece of land.

Q. What commission did you talk about?

A. Why, we talked about getting $5,000 and paying Mr. Russell $4,800.

The plaintiff does not, in his testimony, state what the contract between him or between the firm and Mr. Russell was, but he states as follows:

Q. I will ask you what you did, if anything, in regard to selling some land for Mr. Russell about December, 1889?

A. Well, I will have to go back to the beginning to get the full meaning, won't I? (Mr. Osgood: Yes.) About that time Mr. John Palmer came to me and requested me to go with him to look at an eighty acres of land near Cook. I advised Mr. Palmer not to buy an eighty; that Mr. Russell had three hundred and twenty acres near Burchard that he could buy for forty-eight hundred dollars, on any reasonable time, without paying much, if any, down. He said if he could see Mr. Russell and have a talk with him perhaps he could make a trade. We then went round to the foot of the stairs where Russell lived, over Parker's store. He stopped at the foot of the stairs and I went up and brought Mr. Russell down. I introduced Mr. Palmer to Mr. Russell and told him his business there; that he wanted to buy a farm. I then turned round and went to the post-office. * * *

Q. How long had you had this land on sale?

A. I had it about, between three and four years; three years any way.

And on cross-examination states:

Q. At that time you stated to Mr. Palmer what the land could be bought for, did you?

A. I think I did, sir.

Q. What did you tell him it could be bought for?

A. Forty-eight hundred dollars.

Q. That was before Mr. Russell had seen Mr. Palmer about it at all?

A. Yes, sir.

Q. What rate of interest did you state to him that he would have to pay Mr. Russell on the deferred payments?

A. If I stated any at all, it was eight per cent. I would not be positive that I stated any.

Mr. Palmer, the party to whom the land was sold, states in his testimony that Mr. Beatty, before they met Russell, had told him that the price for the land was $4,800, and the interest on deferred payments eight per cent.

We think this testimony establishes that the contract made at the time when Russell gave authority to sell the land was that it was to net him $4,800 and the agents were to have any sum in excess of $4,800 as a commission. This view of the case destroys any claim of the agent to a commission, for the price which Beatty named as the consideration, when talking to the purchaser, Palmer, was the exact sum which the sale of the land was to net to Russell; the contract being that the commission or compensation for effecting the sale, or finding a purchaser, was to be measured by the sum received in consideration for the land in excess of $4,800, and Beatty having named to the purchaser this sum as the amount required to buy the farm, there could be and was no excess, and hence no commission. Having reached the above conclusion, it becomes unnecessary to discuss the question of whether a partnership ever existed between Beatty and Greer, which, if considered by the jury, must have been solved in favor of defendant, to arrive at the verdict which they did, and being based upon conflicting testimony and not clearly wrong, would not be disturbed; nor is it essential to determine what effect the compromise and settlement, or payment to Mr. Greer, had upon the rights of the parties to this suit.

The counsel for plaintiff in error also raises some ob-

jections to a modification which was made by the court to an instruction asked by plaintiff. We cannot agree with counsel in this contention, but on the contrary think that, in view of the issues and evidence introduced in the case, the modification was entirely pertinent and proper; and so of the exceptions to the second instruction given at request of defendant, when considered in connection with and to be applied to the testimony before the jury, and construed with all the other instructions given, we fail to discover wherein its giving was erroneous. We are satisfied that the case was fairly submitted to the jury, and the judgment of the district court was right.

AFFIRMED.

JOSEPHINE KOFKA, APPELLANT, V. JOHN ROSICKY ET AL., APPELLEES.

FILED JUNE 26, 1894. NO. 4927.

1. **Specific performance of a parol contract** will be enforced by a court of equity, where one party has wholly and the other partly performed it, and its non-fulfillment on the one hand would amount to a fraud on the party who has fully performed it.
2. **Specific performance is a matter of discretion** in a court which withholds or grants relief according to the circumstances of each particular case, where the general rules and principles governing the court do not furnish any exact measure of justice between the parties.
3. **Specific Performance.** *Held*, That the oral contract in this case possessed the elements of certainty, and the proof establishing it was sufficiently clear and satisfactory.
4. **Wills:** PAROL CONTRACTS: ACTION BY ADOPTED CHILD FOR SPECIFIC PERFORMANCE: STATUTE OF FRAUDS. A girl about seventeen months old was given by her parents to her uncle and aunt under an agreement that they would adopt her and rear, nurture, and educate her, and that she was to be as their own

child, and at their death to receive, or be left, all the property which they might own. She lived with them until they died, some ten years afterward, took their name, did not recognize or know her own father and mother in the true relation, but knew them as and called them uncle and aunt, and knew and recognized her uncle and aunt as father and mother. The uncle and aunt died possessed of real estate in the city of Omaha, the title to which they did not, either by deed or will, transfer to the child. *Held*, That there was such a part performance of the contract by the parties thereto as entitled her to a decree giving her the title to the property, by way of specific performance of the contract.

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

The opinion contains a statement of the case.

Switzler & McIntosh, for appellant:

The agreement, although not in writing, is such as a court of equity will enforce. (*Briton v. Van Cott*, 33 Pac. Rep. [Utah], 218; *Korminsky v. Korminsky*, 21 N. Y. Supp., 611; *Godine v. Kidd*, 64 Hun [N. Y.], 585; *Van Dyne v. Vreeland*, 11 N. J. Eq., 370; *Sharkey v. McDermott*, 91 Mo., 655; *Wright v. Tinsley*, 30 Mo., 389; *Gupton v. Gupton*, 47 Mo., 37; *Sutton v. Hayden*, 62 Mo., 101; *Hill v. Gomme*, 1 Beav. [Eng. Ch.], 555; *Wall's Appeal*, 111 Pa. St., 460; *Thompson v. Stevens*, 71 Pa. St., 161; *Pollock v. Ray*, 85 Pa. St., 428; *Taft v. Taft*, 41 N. W. Rep. [Mich.], 481; *Slingerland v. Slingerland*, 39 N. W. Rep. [Minn.], 146; *Welch v. Whelpley*, 28 N. W. Rep. [Mich.], 744; *Twiss v. George*, 33 Mich., 253; *Shamp v. Meyer*, 20 Neb., 223; *Dawson v. McFaddin*, 22 Neb., 131; *Franklin v. Tuckerman*, 27 N. W. Rep. [Ia.], 759; *Carmichael v. Carmichael*, 40 N. W. Rep. [Mich.], 176; *Faxton v. Faxon*, 28 Mich., 159; *Sword v. Keith*, 31 Mich., 247; *De Moss v. Robinson*, 46 Mich., 62; *Mundy v. Foster*, 31 Mich., 313; *Johnson v. Hubbell*, 10 N. J. Eq., 332; *Sample v. Collins*, 46 N. W. Rep. [Ia.], 742; *Brown v. Houg*, 29 N. W. Rep.

[Minn.], 135; *Ford v. Steele*, 31 Neb., 521; *Winans v. Luppie*, 47 N. J. Eq., 302.)

The contract of adoption is not within the statute of frauds. (*McCormick v. Drummett*, 9 Neb., 388; *Taylor v. Deseve*, 16 S. W. Rep. [Tex.], 1008; Comp. Stats., secs. 4, 6, ch. 32; *Wallace v. Rappleye*, 103 Ill., 231.)

Mahoney, Minahan & Smyth, contra:

Under the alleged agreement it was the duty of the Spilineks to legally adopt, educate, and treat plaintiff as their own child, and leave her all their property at their death. If the court cannot decree the performance of the whole contract, it will not enforce any part of it. (*Thayer v. Rock*, 13 Wend. [N. Y.], 53; *Pond v. Sheean*, 23 N. E. Rep. [Ill.], 1018; *Meyers v. Shemp*, 67 Ill., 471; *Prante v. Schutte*, 18 Brad. [Ill.], 62; *Hall v. Loomis*, 30 N. W. Rep. [Mich.], 374; Waterman, Specific Performance of Contracts, sec. 389; *Nickels v. Hancock*, 7 De G., M. & G. [Eng.], 300; *South Wales R. Co. v. Wythes*, 1 K. & J. [Eng.], 186.)

The plaintiff was not adopted by the Spilineks according to statute. Neither was there any attempt to follow the provisions of our Code. The law of adoption was not and is not a part of the common law. It is purely statutory. Where the statute points out the way in which a thing shall be done, that is the only way in which it may be done. The plaintiff was not legally adopted. (Code of Civil Procedure, secs. 796–800; *Tecumseh Town Site Case*, 3 Neb., 284; *Keith v. Tilford*, 12 Neb., 273; *Shearer v. Weaver*, 56 Ia., 578; *Houx v. Bates County*, 61 Mo., 391.)

A court of equity cannot specifically enforce that part of the contract which imposes upon the Spilineks the duty of legally adopting the plaintiff. (*Shearer v. Weaver*, 56 Ia., 578; Story, Equity Jurisprudence, secs. 96, 177; *Long v. Hewitt*, 44 Ia., 363; *Houx v. Bates County*, 61 Mo., 391; Schouler, Domestic Relations, 232.)

The court will not specifically enforce any contract, whether it be oral or written, until the following elements appear therein: Valuable consideration, certainty as to its subject-matter, its stipulations, its fairness, its parties, and the circumstances under which it was made. It must be mutual. It must be perfectly fair, equal, and just in its terms and in its circumstances. (*Minturn v. Seymour*, 4 Johns. Ch. [N. Y.], 497; *Butman v. Porter*, 100 Mass., 337; *Nichols v. Williams*, 22 N. J. Eq., 63; *Rogers v. Saunders*, 16 Me., 92; *Benedict v. Lynch*, 1 Johns. Ch. [N. Y.], 370; *Willard v. Taylor*, 8 Wall. [U. S.], 557; *Woods v. Farmare*, 10 Watts [Pa.], 203.)

The alleged contract is not certain either in its subject-matter, its purposes, or the circumstances under which it was made. (*Hennessy v. Woolworth*, 128 U. S., 438; *Purcell v. Miner*, 4 Wall. [U. S.], 517; *Nickerson v. Nickerson*, 127 U. S., 668; Browne, Statute of Frauds, secs. 487, 491; *Walepole v. Oxford*, 3 Ves. [Eng.], 419; *Askew v. Carr*, 8 S. E. Rep. [Ga.], 74; *Gallagher v. Gallagher*, 5 S. E. Rep. [W.Va.], 297; Story, Equity Jurisprudence, sec. 764; *Gorham v. Dodge*, 14 N. E. Rep. [Ill.], 44; *Brix v. Ott*, 101 Ill., 70; *Hamilton v. Harvey*, 121 Ill., 469; *Magee v. McManus*, 12 Pac. Rep. [Cal.], 451; *Lanz v. McLaughlin*, 14 Minn., 72; *Miller v. Zufall*, 6 Atl. Rep. [Pa.], 350; *Brown v. Brown*, 47 Mich., 384; *Recknagle v. Schmalz*, 33 N. W. Rep. [Ia.], 365.)

The alleged contract is not mutual. (Waterman, Specific Performance of Contracts, sec. 196; *Iron Age Publishing Co. v. Western Union Telegraph Co.*, 3 So. Rep. [Ala.], 449; *Cooper v. Pena*, 21 Cal., 404; *Webb v. Alton Marine & Fire Ins. Co.*, 5 Gil. [Ill.], 225; *Wallace v. Rappleye*, 103 Ill., 229.)

The contract is not fair, equal, and just. (*Jackson v. Ashton*, 11 Pet. [U. S.], 229; *Osgood v. Franklin*, 2 Johns. Ch. [N. Y.], 1; *Walpole v. Oxford*, 3 Ves. [Eng.], 419.)

The contract has not been taken out of the statute of frauds. (*Morgan v. Bergen*, 3 Neb., 209; *Baker v. Wiswell*, 17 Neb., 58; *Poland v. O'Connor*, 1 Neb., 53; *Dawson v. McFaddin*, 22 Neb., 131; *Neale v. Neales*, 9 Wall. [U. S.], 1.)

Plaintiff has not paid anything in pursuance of the contract. Assume that her affection, obedience, and services, if there were any, would take the place of payment; still that would not hold, because by the terms of the contract she was not required to do those things. (*Horn v. Ludington*, 32 Wis., 73; *Morgan v. Bergen*, 3 Neb., 209.)

Possession must be obtained under the agreement and in part performance of it to take the case out of the statute of frauds. (*Moore v. Small*, 7 Harris [Pa.], 468; *Cronk v. Trumble*, 66 Ill., 428; *Wood v. Thornly*, 58 Ill., 464; *Padfield v. Padfield*, 92 Ill., 198; *Hart v. Carroll*, 85 Pa. St., 508; *Ballard v. Ward*, 89 Pa. St., 358; *Miller v. Zufall*, 6 Atl. Rep. [Pa.], 350; *Ferbrache v. Ferbrache*, 110 Ill., 210; *Kaufman v. Cook*, 114 Ill., 11; *Clark v. Clark*, 122 Ill., 388; *Wallace v. Long*, 5 N. E. Rep. [Ind.], 666; *Pond v. Sheean*, 23 N. E. Rep. [Ill.], 1018.)

The plaintiff is not entitled to performance on the ground of equitable fraud. (3 Pomeroy, Equity Jurisprudence, sec. 1409, note 2; *Morgan v. Bergen*, 3 Neb., 209; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. [N. Y.], 273; *Pierce v. Catron*, 23 Gratt. [Va.], 588; *Pond v. Sheean*, 23 N. E. Rep. [Ill.], 1018; *Gallagher v. Gallagher*, 5 S. E. Rep. [W. Va.], 297; Waterman, Specific Performance of Contracts, secs. 263, 268; *Wheeler v. Reynolds*, 66 N. Y., 227.)

Lamb, Ricketts & Wilson, amici curiæ, contending that the contract under consideration is in nowise affected by the operation of the statute of frauds, cited: *Powder River Live Stock Co. v. Lamb*, 38 Neb., 339; *McCormick v. Drummett*, 9 Neb., 388; *Connolly v. Giddings*, 24 Neb., 131; *Kiene v. Shaeffing*, 33 Neb., 21; *Stowers v. Hollis*, 83 Ky.,

544; *Wooldridge v. Stern*, 42 Fed. Rep., 311; *Hall v. Solomon*, 23 Atl. Rep. [Conn.], 876; *Taylor v. Deseve*, 16 S. W. Rep. [Tex.], 1008; *Thomas v. Armstrong*, 10 S. E. Rep. [Va.], 6; *Aiken v. Nogle*, 27 Pac. Rep. [Kan.], 825; Browne, Statute of Frauds [4th ed.], 275–285, and authorities cited; *Stadleman v. Fitzgerald*, 14 Neb., 292.

HARRISON, J.

December 8, 1888, the following petition was filed in the district court of Douglas county.

"The plaintiff, Josephine Kofka, appears by her next friend, James Kofka, and for her cause of action alleges the fact to be that this plaintiff was born in Omaha, Nebraska, on the 16th day of March, 1877; that her father's name is James Kofka, who appears here as her next friend, and her mother's name is Mary Kofka, both of whom were then residing in Omaha, and have ever since here resided; that the parties to this suit are all of Bohemian nationality; that soon after her birth, to-wit, in the month of August, 1878, there were living in Omaha, John Spilinek, deceased, and his wife, Anna Spilinek, the latter being a sister of the plaintiff's mother. During said month the said John Spilinek and Anna Spilinek, who never had any children of their own, requested of plaintiff's parents the privilege of taking this plaintiff with them to live with them as their child. The parents of plaintiff having several children, one of whom at that time was only a few weeks old, fully considered the matter, and having full confidence that plaintiff would receive at the hands of John and Anna Spilinek the care and affection which is due from parents to child, consented to said request, but only upon the expressed and well understood conditions, to be hereinafter named; that is to say, James Kofka and Mary Kofka, the parents of the plaintiff, gave up the care, custody, and control of said child, in the said month of August, 1878, on the consideration and agreement, then and there assented

to by the said John and Anna Spilinek, that they would legally adopt and receive the said child as their own, would care for her, rear and educate her, and that she should have their fullest and best affection, and at their death she, the plaintiff, should inherit and be left all the property with which they died possessed.

"Plaintiff further says that she went to live with the said John and Anna Spilinek at the time above mentioned, on the terms aforesaid; that she continued to live uninterruptedly with them until their death, which came to John Spilinek on September 16, 1888, and to Anna Spilinek on September 19, 1888. The plaintiff says that during all of said time she conducted herself toward the said Spilineks as an affectionate and obedient child and received at their hands all the devotion and love a child should receive from parents; that she had, for several years previous to their death, assisted her aunt, Anna Spilinek, in the work about the house, in the way of washing, making up the beds, house cleaning, going on errands, and generally doing at their request anything within her power; that she has of late years been going to the public schools of the city of Omaha, where she was always enrolled and known as Josephine Spilinek, and, in fact, she has always gone by that name, and never knew any other until the death of the said John and Anna Spilinek. Plaintiff says the said John and Anna Spilinek always called her their own child, and so treated her, and she was told and given to understand by them that her own father was her uncle and her own mother her aunt, and she knew not the contrary until after September 19, 1888, and she always believed, and in her own mind cannot but believe yet, that the said John and Anna Spilinek were her real father and mother.

"The plaintiff further says that the said deceased, John Spilinek and Anna Spilinek, often, during the last ten years, expressed and made known to friends and acquaintances, and to the plaintiff's parents, their intention to leave

this plaintiff all their property at their death, and these promises and declarations on the part of both were made up to and within a few days of and on the very day of their death, and plaintiff says that up to the very time of their death they intended to leave their property to this plaintiff; that the said deceased always intended to fulfill their agreement of adoption by legal proceedings according to the statutes, but all parties concerned were on intimate and friendly terms, and the matter was allowed to go by, all feeling secure, and that for all intents and purposes plaintiff was as fully their child as if the formalities had been gone through, until it was finally prevented by his sudden death as hereinafter mentioned.

"Plaintiff further says that on the 16th day of September, 1888, the deceased John Spilinek was suddenly overtaken by a loss of control of his mental faculties and while thus afflicted shot himself dead, and inflicted mortal wounds at the same time upon his said wife; that John Spilinek died within a short time on the same day, but his said wife Anna lingered until September 19, 1888, when she died from the effects of said wounds. Plaintiff says there was no marital or family difficulty whatever to induce this conduct on the part of said John Spilinek, but it was wholly caused by despondency brought on by fancied business embarrassments.

"Plaintiff says that the deceased John Spilinek died intestate, but had it not been for his sudden act of suicide, he would have made provision by will for his property to go to his wife during her life, and at her death, to this plaintiff, as was his oft-expressed desire and intention up to the very time of his death.

"Plaintiff alleges that Anna Spilinek, deceased, while in the full and complete control of her mental faculties, and recalling her deceased husband's desire in the premises as well as their agreement, did on September 17, 1888, make and execute a will in writing, which said will was duly

probated and allowed on the 20th day of November, A. D. 1888, by the terms of which all the real and other property of which she died possessed, subject to two or three small debts, was left to this plaintiff, whom she calls therein, 'our adopted child, Josepha Kofka.' The following is a copy of said will:

"'LAST WILL OF

"'I, Anna Spilinek, of Douglas county and state of Nebraska, being aware of the uncertainty of life, but of sound mind and memory, do make and declare this to be my last will and testament in manner following, to-wit: I give, devise, and bequeath unto our adopted child, Josepha Kofka, all of mine real estate, money, personal property, and other effects that I may be possessed of or entitled to after my decease, subject, however, to all my legal debts; that is to say, I and my husband owe to Karel Spilinek $150, and to John Barta $50, and to Barbara Spilinek $9. I also further declare that out of the above real estate and money $100 be set and given to my father, Frank Radil. Signed this 17th day of September, 1888, at Omaha, Nebraska. ANNA SPILINEK.

"'Signed in the presence of

"'JAMES ENGELTHALE.

"'FRANK MRKWICKA.

"'VACLAV BENAK.'

"The plaintiff says that the defendant John Rosicky is the duly appointed, qualified, and acting administrator of the estate of the said John Spilinek; that the other defendants named, to-wit, Anton Spilinek, Frank Spilinek, Vincent Spilinek and Albert Spilinek, being of ages respectively fifty-three, fifty-one, forty-nine, and forty-two years, are brothers of said John Spilinek, deceased; that they are all non-resident aliens living at Skuhrov, Bohemia, except Anton, and he is a resident and citizen of Nebraska.

"Plaintiff alleges that the defendant Anton Spilinek claims to be the sole heir at law of the estate of John

Spilinek, his brothers being non-resident aliens, and disputes the right of this plaintiff to inherit any property whatever from the estate of the said John Spilinek, and he claims to be the sole heir to the real estate mentioned herein, and maintains that this plaintiff has no rights in the premises. The other brothers are made defendants in this case and brought into court out of caution, in view of our present law with respect to non-resident aliens.

"The plaintiff says that at the time of his death the deceased John Spilinek was possessed of the following real estate, situated in the city of Omaha, of the value of about $6,500; that is to say: The east half of lot 4, in block 11, and the east half of the west half of lot 4, in said block 11, S. E. Rogers' addition to Omaha, Nebraska. The defendant Herman Tombrinck claims a mortgage on the property described herein for $600, bearing date May 4, 1887, which appears of record in Douglas county as a lien on said property, but whether the same is genuine or unpaid this plaintiff has no information, and in order to put said Herman Tombrinck to his proof in the premises, she denies said mortgage is *bona fide* and valid lien on said property.

"The plaintiff says that since she and her parents have fully performed the agreement herein mentioned on their part, whereby they yielded the possession of and control over this plaintiff to said deceased parties, and she yielded to them the obedience, services, and devotion of a child for over ten years, and would have continued so to do but for their death, and that by their own acts during their lives she knew no other mother or father save them, and that whereas these decedents fully expected and intended she should inherit their property at their death, plaintiff says it would be a fraud on her and on them to have their agreements in that particular violated. The plaintiff therefore brings her cause before this honorable court on its equity side and prays that she may be decreed a specific perform-

ance of the contract mentioned herein and that she be declared to be the lawfully adopted child of the deceased John and Anna Spilinek; that she may be declared the legal heir to the property described herein, and all other property of said deceased, and to hold the same free from any claim or right the other defendants may have or claim in or to the same, and for such further relief in the premises as the facts in the case may entitle her."

We copy the allegations of the petition entire, for the reason that it is probably as short and complete a statement of the plaintiff's cause of action as can be made and fully set forth the same. A demurrer to the petition was filed, argued, and overruled, and the answer, filed by defendant March 7, 1890, which joined the issues upon which the case was tried and determined, contained two counts, the first of which was as follows:

"Now comes the said defendants, John Rosicky, administrator, Anton Spilinek, Frank Spilinek, Albert Spilinek, Vincent Spilinek, and answering for themselves only, deny each and every allegation in the petition filed in said cause except those expressly admitted herein.

"Defendants admit that plaintiff was born in Omaha, Nebraska; that her father's name was James Kofka and her mother's name Mary Kofka, and that both of them were residing in Omaha when the said plaintiff was born; that the parties to this suit are of Bohemian nationality; that the said plaintiff lived with the said John Spilinek, deceased, for some years; that in 1878 John Spilinek and his wife, Anna Spilinek, a sister of plaintiff's mother, resided in Omaha; that said John Spilinek and Anna Spilinek never had any children of their own; that plaintiff resided with the said John Spilinek and Anna Spilinek at the time of their death, and that John Spilinek died on September 16, 1888, and Anna Spilinek on the 19th day of September, 1888; that the said plaintiff has of late years attended the public schools of the city of

Omaha; that on the 16th day of September, 1888, the deceased, John Spilinek, was afflicted by a loss of control of his mental faculties, and while thus afflicted, shot himself dead, and inflicted a mortal wound at the same time upon his said wife; that the said Spilinek in a short time died and his said wife lingered until September 19, when she died from the effects of said wound; that there was no marital or domestic difficulty whatever to induce this conduct on the part of the said James Spilinek, but was wholly brought on by fancied business embarrassments; the deceased died intestate; that the will, a copy of which is set out in the petition, was signed by Anna Spilinek; that the defendant John Rosicky is the administrator of the estate of said John Spilinek, as alleged in the petition; that the other defendants, Anton Spilinek, Frank Spilinek, Albert Spilinek, and Vincent Spilinek, are brothers of the deceased, as set out in the petition; said brothers are all nonresidents, except Anton Spilinek, and that he is a resident of the state of Nebraska; that said Anton Spilinek claims to be the sole heir at law of the estate of John Spilinek, and denies the right of the plaintiff to inherit any property whatever from the estate of the said John Spilinek, and he claims to be the sole heir to the real estate mentioned herein, and maintains that said plaintiff has no right to the premises; that the deceased, John Spilinek, was possessed of the real estate described in the petition at the time of his death, and that the defendant claims a mortgage upon said premises, as alleged in said petition.

"Further answering defendants say that they have no knowledge or belief concerning the date of plaintiff's birth, nor concerning the allegation that she continued to live on uninterruptedly with the said deceased until their death; nor that she conducted herself toward the said deceased as an affectionate and obedient child and received from the hands of the deceased all the love and devotion that she should receive from her parents; nor that she had, for sev-

eral years previous to the death of the deceased, assisted in the work about the house as alleged in said petition; nor that she was enrolled in the public schools as Josephine Spilinek, and that she was always known by that name and never knew any other until the death of the deceased; nor that said deceased called her their child."

The second count of the answer pleads the statute of frauds. The trial of the case, as regards the rights of the plaintiff, was had July 17, 1891, and the issues were determined in favor of defendants and the action of plaintiff dismissed, and the case brought to this court on appeal by plaintiff.

The evidence in this case discloses that the mother of the plaintiff, Mary Kofka, was the sister of Mrs. Spilinek; that they were living near each other in the city of Omaha, with their husbands, John Kofka and John Spilinek. The Kofkas were the happy possessors, at the time (August, 1878) when it is alleged the transaction occurred between them out of which this suit springs or to which we may refer as its source, of four children, among them the plaintiff, then about seventeen months old. The Spilineks had no children, and it was agreed between the parties that the plaintiff should be taken by the Spilineks, to be reared, educated, and cared for as if she was their own daughter,—they stating that any property they might have or own during life should be given to her, or be hers, at their death, and that they would adopt her and make her their heir. Pursuant to this agreement the plaintiff was taken to the house of the Spilineks, who, at the time of these occurrences, were poor, and, as appears from the testimony, living in a shanty in the street. The plaintiff, from this time until the death of the Spilineks,—of whom John Spilinek died September 16, 1888, having on that day shot first his wife and then himself, he dying immediately and she two or three days later,—lived with the Spilineks and was taught to and did call them father and mother and

treated them as such, and did not know her own father and mother, although she saw them almost, and possibly, every day, but accepted them as, and considered and called them, aunt and uncle, knowing no better, yet she went to the premises where they resided and played with their other children, thinking they were her cousins and treating them as such; that she did not know but what the Spilineks were her parents until after their death, when she was so informed by her mother and other parties. The plaintiff was known at school as "Josie," or "Josephine Spilinek," and so wrote her name at all times after she learned to write. In fact there seems to have been a complete loss of her identity, personality, or individuality as a Kofka, and an assumption of the Spilinek, as much so, apparently, as if her whole being, both mental and physical, had been changed. The evidence further shows that she was a good, obedient, and dutiful child to the Spilineks, and also that they treated her well and affectionately. At all times, in all places, and under all circumstances, Spilinek and his wife treated, looked upon, claimed, and acknowledged the plaintiff as their "child" or "girl." The Kofkas, on their part, never made any claim to her or her services, or attempted to take her from the Spilineks, or by word or deed to inform her that they bore any other relation to her than that of uncle and aunt; and through all this was interwoven, as a part of the life and vitality of the agreement, the proposition that the plaintiff was to have the property. It was always spoken of when the matter was mentioned between them, which was very frequently, and the Spilineks made it a subject of conversation with a number of persons, friends, and acquaintances, some of whom were called and so testified; and in a letter written by Spilinek, September 12, we find reference made to "my girl," which must be taken to mean the plaintiff, and in the will of Mrs. Spilinek, made just prior to her death, she fully recognized the position and rights of the plaintiff.

We are satisfied, after a careful examination, comparison, and analysis of all the testimony in the record, that the contract was one clear and definite in its terms and obligations, and was both made and performed as such with reference to the property rights to accrue or inure to or in favor of plaintiff as much as with reference to any other portion of it.

The Spilineks had acquired some property, a piece of real estate, the title to which is now in controversy in this case, for which, according to the evidence, Spilinek was at one time offered $4,000. There was also an agreement to adopt the plaintiff, or at least so the parties testify, and the parents and Spilineks often conversed about "assigning" her, but it does not seem to have been considered by them as one of the essentials of the compact, and which must necessarily be accomplished, but as something more of a formal nature, or character; nor do we think it was so inseparably connected with the other part of the contract as to carry it along with it and render it incapable of enforcement, if so capable in any event, provided the agreement to adopt cannot be decreed to be performed, which we think unquestionably it cannot be, as in this state the matter of adoption is statutory, and the manner of procedure and terms are all specifically prescribed and must be followed, and involve a written consent by the parties, a relinquishment by those possessing the rights to and over the child, and an acceptance by the person or persons desiring to acquire such rights and a decree by the judge of the county court, which introduces an element barring the jurisdiction of a court to decree specific performance in the first instance.

Having reached the conclusion that a contract was entered into, the query now arises, was it one of which a court of equity can and will decree a specific performance? The property which the plaintiff seeks to recover is real estate, and it is contended that the contract, resting entirely

in parol, is within the statute of frauds and hence cannot be enforced. Courts in the past (whether such action was wise or unwise we will not now stop to discuss) have removed or exempted from the operation of the statute of frauds certain cases in which they have concluded that the hardship forced to be endured by the parties was greater than was warranted by the benefit to be derived from enforcing the rule, and there has gradually arisen classes of cases known as "exemptions from the rule of the statute," and one class embraces what is called "cases of specific performance of parol contracts for the transfer or conveyance of real estate." The agreement in this case did not contain anything by which it can be known whether the transfer of the property to plaintiff was to be effected by will or by deed, and our inquiry in reference to the power of the court to decree performance cannot be confined to either, but must include both. There is a line of authorities emanating from some of our able courts of last resort, most notably those of Indiana, Illinois, and Iowa, which denies the right to specific performance of a contract similar to the one under which the claim in this case arises, mainly upon the ground that the statute was enacted to cover just such cases; that it will work no hardship to require parties to put all such agreements in writing and that the testimony of witnesses should not be received, probably several years after the happening of the event, to establish a contract by parol, by which the course of the descent of lands will be changed. These are strong and cogent reasons, and it is not our province to attack or attempt to refute them. As we understand it, they are the underlying, principal reasons for the rule as embodied in the statute; but we do not think the rule should be so rigidly adhered to as to accomplish a fraud as against one of the persons affected by the contract to which it is to be applied. It is a matter of discretion in the court which withholds or grants relief, according to the circumstances of

each particular case, when the general rules and principles which govern the court will not furnish any exact measure of justice between the parties. (2 Story, Equity Jurisprudence, sec. 742; *Clarke v. Koenig*, 36 Neb., 572.)

Van Dyne v. Vreeland, first reported in 11 N. J. Eq. 370, and on a second hearing, was a case in which "The father of an infant child made an agreement with an uncle of the infant, at the uncle's request, to this effect, that the uncle should take the infant and adopt him as his own child, and that he would treat him as his own son, and that the property he should have should be given to the child, so that it should belong to him at the death of the uncle and his wife. The uncle took the child and had him baptized, and the child assumed his surname, and lived with him twenty-five years. Held, that the child might maintain his bill upon the agreement after such performance." Also, "Where a father makes an agreement in reference to his infant child, from which benefits are to accrue to the child upon his performance of the agreement, after performance, the child, in his own name, may file his bill to enforce the agreement. The party for whose benefit the agreement is to be performed, and especially if any valuable portion of the consideration has been rendered by him, has a legal right to enforce it. It is of no consequence that the promise to fulfill it was not made directly to the person who is entitled to remuneration. It is enough if it was made by some one who had authority to make it on his behalf." In the text of the opinion it was stated: "In this case, if the agreement, which is the ground of the bill, is of such a character as could be enforced by either party if it were in writing, then, I think, there can be no doubt but that there has been such a part performance in this case by the complainant as will take the agreement out of the operation of the statute. The bill alleges that the agreement has been fully performed by the father of the complainant, one of the parties by whom it was made, and by the complainant,

upon whom it imposed certain duties and obligations. The facts stated show that the complainant and his father have performed their part of the agreement as fully as such an agreement could be performed. There is nothing more for them to do. The complainant cannot be denied his redress by the mere interposition of the statute. The question is, is it an agreement of a character which can be enforced in equity?" In the report of the case in volume 12 it was held: "The principles of equity will be applied to new cases as they are presented, and relief will not be withheld merely on the ground that no precedent can be found." In the opinion the court says: "The agreement was this: Vreeland and his wife were to adopt the boy. He was to be given up to them and to be under their management and control, and when they died he was to have their property. It is true the agreement does not state whether the property should be secured to the complainant by deed, so that he might enjoy it when they died, or whether it should be left him by will. * * * In this case part performance is set up in avoidance of the statute. I think the answer admits, and the evidence shows, a substantial performance of the agreement on the complainant's part, as well as such part performance on the part of the defendant himself, as will take the case out of the operation of the statute. There has been such a performance on both sides as puts the complainant in a situation which is a fraud upon him unless the agreement is fully performed." This was a case very similar in its facts and incidents to the one at bar and directly in point.

The case of *Van Tine v. Van Tine*, 15 Atl. Rep., 249, is another case decided by the New Jersey court. The case is stated and the rule announced in the first section of the syllabus as follows: "A father gave his child, then only a few months old, to S., his sister, with a mutual understanding that she was to provide for the child and bring her up as her own. She thereupon took charge of the child, re-

fused to give her up to her father, and had her baptized in her own name, by which the child was always known. The child always lived with S., assisted her in her household duties, called her 'mother,' and was not informed of her parentage until she was eighteen years old. S. often stated that the child was to have all her property, and about fourteen years before her death made a will, bequeathing to the child all her personal property, at which time she owned none but personal estate. But a few months before her death she purchased the land in question. Her death was sudden and there was nothing to show that she bought the land to prevent that much of the estate going to the child. Held, that the child was entitled to the land, as the agreement of S. to receive her as her own was valid and binding, though not in writing, and had been partially performed." In the opinion the court said: "The obligations of parties to each other are ascertained as well by what they say as by what they do; admissions often giving the best and truest interpretation to contracts previously entered into; or doings showing what has previously been agreed to be or promised should be done. When Mrs. Stryker, being childless, said to her brother Peter, the father of Jessie, that she would take Jessie and would treat her as her own child, she meant just what she said, both in law and in conscience. She meant that Jessie should have all the benefit of the relation of parent and child. If individuals are ever to be taken at their word and held to it by the courts, surely they should be so taken under such circumstances as are here presented. How can the court say that Mrs. Stryker did not mean just what she said? and how can it say that she did not, by what she said, most fully and distinctly bind herself to perform all the obligations of a parent towards a child towards Jessie? And were not those obligations so made of the same force as she would have been under to a child of her own loins? I cannot see how obligations, so vol-

untarily assumed by a citizen, so affecting the highest welfare of an infant of the tenderest years, can be regarded as otherwise than the most sacred and binding. There was part performance of the obligation." (See, also, *Johnson v. Hubbell*, 66 Am. Dec. [N. J.], 773, and authorities cited in note on page 784, under the head of "Agreements to make particular disposition of property by will. (1) Validity of such agreements, and (3) mode of enforcement in equity.") "It seems to be settled that the payment of the consideration will not in general be deemed such a part performance as to relieve a parol contract from the operation of the statute; but the reason for this, viz., that in such a case the repayment of the consideration will place the parties in the same situation in which they were before, shows that the rule applies to a moneyed consideration. If the consideration for the contract be labor and services, those may sometimes be estimated and their value liquidated in money, so as measurably to make the promisee whole on the promisor's rescission of the contract; but in a case where the services rendered were of such a peculiar character that it is impossible to estimate their value to the promisor by any pecuniary standard, * * * it is out of the power of any court, after the performance of the services, to restore the promisee to the situation in which he was before the contract was made, or to compensate him in damages. Such a case is clearly within the rule which governs courts of equity in carrying parol agreements into effect, where possession has been taken of landed property or moneys laid out in improvements upon land which the testator agreed to devise in consideration of care and maintenance during his life. (*Rhodes v. Rhodes*, 3 Sandf. Ch. [N. Y.], 279.)"

In *Wright v. Wright*, 58 N. W. Rep., 54, a Michigan case, the court held: "Defendant in his second year was indentured to deceased until his majority. When he was eight, deceased and his wife, being childless, adopted him under the law then in force and his name was changed.

He gave them his entire services without pay till he was over twenty-two, when deceased died. The widow testified that they intended that he should be their heir; that her husband believed that this was effected by the adoption; that defendant thought he was their child till after her husband's death, and that they never talked about paying him for his services. The adoption law was held unconstitutional. Held, that defendant's performance entitled him to the inheritance, by way of specific performance of the oral contract," and states in the opinion: "In *Shahan v. Swan*, reported in 26 N. E. Rep., 222, the supreme court of Ohio expressly recognize the doctrine of these cases. It there said: 'Notwithstanding that it is the established rule in Ohio that the payment of the consideration, even in the personal service of the party seeking relief, does not ordinarily constitute such part performance as will take the case out of the operation of the statute, we do not wish to be understood to hold that cases may not arise where specific performance of a contract in parol may be had on the ground that the consideration had been paid in personal services not intended to be and not susceptible of being measured by a pecuniary standard.'"

Sutton v. Hayden, 62 Mo., 101, was a case in which one Mrs. Green made an agreement by which she took, in its infancy, the child of her brother, upon the understanding that at her death all the property owned by her should go to the child. The child was to come and live with her, be as a daughter to her, and take care of her for the remainder of her life. The child entered upon the performance of her part of the agreement, and throughout the course of Mrs. Green's life rendered the services, and, so far as lay in her power, performed her part of the agreement. Mrs. Green died without having in any way secured the property to the child. Say the court: "There are things which money cannot buy; a thousand nameless and delicate services and attentions, incapable of being the subject of explicit

contract, which money, with all its peculiar potency, is powerless to purchase. The law furnishes no standard whereby the value of such services can be estimated, and equity can only make an approximation in that direction by decreeing the specific execution of the contract." See, also, *Sharkey v. McDermott*, 91 Mo., 655, 60 Am. Rep., 270, where it was held that an agreement by a man and his wife to adopt a child, provide and care well for her, and leave her their property at their death, performed on the part of the child, is enforceable as to the property on their death.

In *Brinton v. Van Cott*, 33 Pac. Rep. [Utah], 218, it was held as follows: "A verbal contract, whereby plaintiff agrees to live with and take care of an old woman until her death in consideration of her promise to leave all her property to plaintiff, is taken out of the statute of frauds by the rendition of the services during the lifetime of the woman; and after her death, equity will specifically enforce the contract, on the theory of part performance, since the services rendered are of a peculiar character, not intended by the parties to be measured by a pecuniary standard. * * * A contract by which an old woman, in apparent good health and having the expectancy of many years of life, agrees to leave all her property, worth about $5,000, to a sixteen-year-old girl, in consideration of the latter's promise to live with and take care of her as long as she lives, is not void for want of mutuality and fairness; and after her death the contract will be specifically enforced in favor of the girl, who performed her part of the agreement though the woman died within three or four months after the execution of the contract." Also, "In this territory the statute of frauds is in full force. (2 Comp. Laws, sec. 2831.) It is therefore incumbent upon the appellant to show by her complaint that she has partly or wholly performed her contract, so as to take it out of the statute of frauds. 'When the consideration of the agreement consists in work, labor, and services personally done and ren-

dered by the plaintiff, if the value of the same can be ascertained with reasonable accuracy in an action at law, and adequately compensated by the recovery of damages, then neither the services themselves nor the payment for them will avail as a part performance of the verbal agreement; but if the services are of such a peculiar character that it is impossible to estimate their value by any pecuniary standard, and it is evident that the parties did not intend to measure them by any such standard, then the plaintiff, after the performance of these services, could not be restored to the situation in which he was before, or be compensated by any recovery of legal damages.' Under these circumstances the rendition of the services is a part performance of a verbal agreement. The act of part performance of a verbal agreement for services must be such that it would be a fraud upon the party performing for the other party to refuse to perform his part as agreed between them. (Pomeroy, Contracts, sec. 114.)" See, also, *Korminsky v. Korminsky*, 21 N. Y. Supp., 611; *Godine v. Kidd*, 64 Hun [N. Y.], 585; *Jaffee v. Jacobson*, 1 C. C. A., 24; *McKinnon v. McKinnon*, 5 C. C. A., 530; *Haines v. Haines*, 6 Md., 435.

We will not further quote or cite authorities. We are fully convinced that the weight of authority and reason preponderates in favor of the position that the contract in the case at bar was such a one as a part performance will relieve from the operation of the statute of frauds; that there was a full performance of the contract on the part of the plaintiff and such a part performance by the Spilineks as did so take it out of the operation of the statute. We are further satisfied that the child had a right to bring the action to enforce the contract made for it by the parents, and that the proof of the contract was sufficiently clear, definite, satisfactory, and unequivocal to call for its enforcement by a court of equity, in the exercise of its discretion. The judgment of the district court is reversed, so

far as it affected the rights of the plaintiff herein, and a decree is ordered in this court in favor of appellant, that the title to the property, described in the petition, is in appellant, and that it be quieted in her, except as against the mortgage liens thereon prior to the death of the Spilineks.

DECREE ACCORDINGLY.

H. A. MERRILL, APPELLEE, V. JOANNA C. WRIGHT ET AL., APPELLANTS.

FILED JUNE 26, 1894. No. 5471.

Tax Liens: PRESUMPTION OF ASSESSMENT OF TAXES: FORECLOSURE: EVIDENCE: PLEADING. To uphold the validity of a tax lien sought to be foreclosed, neither a levy nor assessment of taxes will be presumed from the mere introduction in evidence of a treasurer's receipt for taxes, or such treasurer's certificate of a purchase at tax sale, when the existence of such levy and assessment have been put in issue by the answer.

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

Andrew Bevins, for appellants, cited: *Ruth v. Lowrey*, 10 Neb., 272; *Miller v. Hurford*, 13 Neb., 13; *Towle v. Holt*, 14 Neb., 227; *Wright v. People*, 4 Neb., 410; *Hassett v. Curtis*, 20 Neb., 164; *Garrison v. Aultman*, 20 Neb., 314; *Aultman v. Leahey*, 24 Neb., 289; *Plummer v. Shellhorn*, 24 Neb., 535; *Olds Wagon Co. v. Benedict*, 25 Neb., 375; *White v. Woodruff*, 25 Neb., 804; *Otoe County v. Mathews*, 18 Neb., 470.

Henry W. Pennock, contra:

There is a presumption of law in favor of the due performance of official duty by public officers where such duty is enjoined upon them by law. (*Taylor v. Wilson*, 17 Neb., 88.)

RYAN, C.

Plaintiff in her petition alleged that at public tax sale on November 9, 1887, she bought, for the then due and delinquent taxes of the year 1886 thereon, the west one-half of lot 7, block 24, of the city of Omaha, and paid the county treasurer therefor the sum of $76.46, which was the amount of the county and city taxes of the year 1886, together with interest, penalty, and costs allowed by law, and accordingly received the certificate of such treasurer; that as a part of said tax sale plaintiff was required to pay, and did pay, to said county treasurer other items of taxes on said premises which were due and delinquent at the time of said sale to the amount of $340. An itemized statement of the several items which made up the above aggregate sum of $340 was set out in the petition, from which it appeared that there were thus paid Omaha city taxes of the years from 1879 to 1884, inclusive, the sum of $193.96; special Omaha taxes (sidewalk) for 1876, 1880, 1882, 1883, and 1887 the sum of $65.80. The balance, of $80.24, was for curbing and guttering. Plaintiff further alleged that after said purchase, and as holder of the tax title, she paid city taxes for 1887, 1888, and 1889, amounting, principal and interest, to the sum of $143.05, and in the year 1889, instalments of special paving tax, amounting, principal, interest, and costs, to $92.67. In the petition were these averments:

"6. A tax deed, if taken out on said real estate under and by virtue of said treasurer's certificate of tax sale, would be invalid and ineffectual to convey title to said property, and the plaintiff elects to consider said tax certificate and accompanying receipts a lien on said premises in the nature of a mortgage and to foreclose the same as by law provided."

No reason is given for the assumption that the tax deed, if issued, would be invalid and ineffectual to convey title.

We shall therefore accept this conclusion as fully warranted by the facts. The petition contained the averments that Joanna C. Wright was, at the time of the filing of the petition, and prior thereto had been, the owner of the real property against which relief was sought; that no proceedings at law had been had for the recovery of the amount of said taxes, and closed with a prayer for a foreclosure of the lien for the payment of the taxes paid, interest, and costs. By the answer it was admitted that Joanna C. Wright was, at the time of the pretended tax sale, and still continued to the date of filing said answer, the owner of the premises against which the foreclosure of a lien was sought, and that no proceedings at law had been had to recover the moneys alleged to have been paid by plaintiff. Following these admissions was a denial of each and every allegation not admitted in the answer. There was a decree of foreclosure as prayed in plaintiff's petition, from which the defendants appeal to this court.

We shall not enter into a detailed review of the discussion in the brief as to the sufficiency of other averments of the answer, for this general denial was sufficient, whatever may have afterward been inartistically traversed. In the reply there was an admission that the taxes described in the petition were assessed and levied against said lot, and that the tax receipts described in the petition were issued to plaintiff upon payment thereof. These admissions were responsive to no averments of the answer, and cannot be treated as part of the petition in stating a cause of action. (*Savage v. Aiken*, 21 Neb., 605; *Hastings School District v. Caldwell*, 16 Neb., 68; *Holmes v. Hutchins*, 38 Neb., 601.)

In *Merriam v. Hemple*, 17 Neb., 345, it was held that "where the purchaser, at a void sale of real estate for taxes, pays the taxes legally levied upon the real estate for subsequent years, upon a failure of his title he will be subrogated to the rights of the county to the extent of the legal taxes so paid by him, with legal interest, even though the

taxes upon which the sale was had were void by reason of the default of the assessor in not filing the proper oath with the assessment roll." This principle, we presume, is that upon which plaintiff bases her right to a foreclosure, but, as will be observed, this goes no farther than to hold that an irregularity in the assessment will not render void the tax lien.

As a sufficient answer to several points made by appellants in this court the appellee quotes the following language of this court found in *Otoe County v. Mathews*, 18 Neb., 470: "Whatever may have been the holding of this court in cases where it has been sought in a purely legal action to enforce a tax title, or whatever might be the ruling in a direct proceeding against the officers charged with the duty of assessing, levying, or collecting taxes while such proceedings are *in elimini* based upon the failure of the assessor to take, subscribe, or return the oath prescribed by the statute or upon other illegality in the proceedings, it is clear and well settled that in a proceeding in the nature of equity to enforce a tax lien the court will look to the statute and not to the assessment as a foundation of such lien, and will regard the amount of the taxes against the property in question as borne upon the books of the county as unalterably established." The language quoted refers to irregularities in the assessment, though these are styled "illegalities in the proceedings." There is no language, however, either in this or any other opinion of this court which holds taxes paid a lien irrespective of whether such taxes were founded upon any levy or assessment whatever.

In the case under consideration the taxes paid were for the most part city taxes, a large part of which was in discharge of special assessments. There was in the petition no averment of either a levy or of an assessment of taxes. The appellee expressly averred that if she took a tax deed on the sale of the real estate to her, such deed would be invalid and ineffectual to convey title to her. Why this

result would follow is not stated, and for aught that appears in the petition it might have been because of the entire absence of either a levy or assessment. It would be requiring at our hands too much to ask us to assume that the deed would vest no title on account of mere irregularities. The appellee voluntarily placed herself in the same position as would have been the county had it attempted to collect taxes by a foreclosure proceeding. In such a case the county would have been obliged to allege and prove that there had been a levy and assessment—mere irregularities would not invalidate either, but both must be shown to have existed.

In her foreclosure proceedings the appellee had no right to rely upon the county treasurer's certificate of purchase as being sufficient to evidence anything more than the regularity of the sale proceedings conducted by him. This certificate formed the basis of a part of the right of recovery urged in the district court. Another part depended upon mere receipts which recited the payment of money for specified taxes. In *Ellison v. Albright*, 41 Neb., 93, filed at this term, it was held by this court that "as against strangers thereto a receipt is incompetent evidence of the payment thereby acknowledged, for, as against such strangers, such receipt is but the hearsay declaration of the party who signed it, made without opportunity for his cross-examination and independently of the sanction of his oath." To hold that such a receipt would be evidence against third parties of the binding force of the obligation which impelled payment would be absolutely unwarranted, and yet we must go to this extent if we hold that tax receipts are proof of the existence of a levy and assessment of the taxes in evidence of the payment of which the receipt was given. As there was neither plea nor proof of a levy or assessment the judgment rendered by the district court is

REVERSED.

MICHAEL LAMB V. STATE OF NEBRASKA.

FILED JUNE 26, 1894. No. 5706.

1. **Larceny**: SUFFICIENCY OF PROOF: REVIEW. On the trial of this case the only questions which arose worthy of consideration were as to the sufficiency of the proof to justify a conviction, upon full consideration of which it is found that the verdict of conviction was fully justified.
2. **Criminal Law**: NEW TRIAL: JUROR'S KNOWLEDGE OF CHARACTER OF ACCUSED. Ordinarily, the discretion of the trial judge in overruling a motion for a new trial will not be disturbed when the sole grounds for said motion are admissions of a juror as to his knowledge of the character of the accused, when such admissions have no reference to the facts tried, especially when upon his *voir dire* examination such juror had answered that he had no bias or prejudice which would prevent impartial action on his part.

ERROR to the district court for Platte county. Tried below before SULLIVAN, J.

W. F. Critchfield, Higgins & Garlow, and *M. B. Gearon*, for plaintiff in error.

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

RYAN, C.

This case originated in Boone county. After a change of venue, the defendant was convicted in Platte county. The charge upon which he was found guilty was that he had aided, abetted, procured, incited, and hired Robert Nickerson and Lafayette Bolingbroke to steal certain cattle, the property of Simons & Co., of the value of $345. These cattle were, after the alleged larceny, found among cattle owned by the defendant, whose connection with and responsibility for the said larceny were established by the direct evidence of both Nickerson and Bolingbroke. In

addition to this, George Schoolcraft, a disinterested witness, testified to some very damaging expressions which he had heard uttered by the defendant to Nickerson concerning the proposed theft of the cattle before they were stolen. The evidence of the defendant himself was in contradiction of that of the three witnesses named, and was explanatory of the fact that the stolen cattle were found with his own. There were several witnesses sworn, the testimony of whom tended to show that the cattle were not removed to Garfield county on the exact date which the witnesses for the prosecution fixed as that upon which they were driven into said county. These were questions of fact which were submitted to the jury for consideration in the determination of the guilt of the accused. The evidence was amply sufficient to sustain the conviction which followed, notwithstanding these trifling discrepancies.

Criticism of instructions has been freely indulged in, but no error of any prejudicial tendency has been pointed out. No instructions were asked on behalf of the accused, so that no question arises on account of modifications or refusal of requests in that respect.

Affidavits were filed to show the existence of prejudice entertained against the defendant by Mr. Hale, a juror. This showing, however, was not of prejudice, correctly speaking. The affiants, as to this matter, said that the statement of Mr. Hale was that he knew that Lamb was a dangerous man whom it would not do to let get away; that he had known said Lamb for five years to have been at the head of a gang of cattle thieves, who stole cattle and ran them up into the reservation and sold them, and that such men should not be allowed to run at large. The record does not show what questions were propounded to this juror upon his *voir dire* examination. In the affidavits of counsel for the accused it appears, however, that Mr. Hale on such examination answered that he had no bias or prejudice against the defendant, and had formed no

opinion as to his guilt, and that he knew of no reason why he could not render a fair and impartial verdict. In ruling upon the motion for a new trial the court evidently assumed that these answers were more to be relied on than the affidavits filed to discredit the competency of Mr. Hale as a juror. Affidavits as to language used by jurors, after their duties as such have ceased, as to their reasons for their verdict, as a general rule, are entitled to no great consideration, for the very reason that the juror himself would not ordinarily be heard to impeach the verdict to which he had assented, by alleging the existence of bias or prejudice upon his own part influencing him improperly. This is especially true where upon consideration of all the evidence there is found no room for doubt of the guilt of the accused. The judgment of the district court is

AFFIRMED.

CITY OF BEATRICE ET AL. V. BRETHREN CHURCH OF BEATRICE.

FILED JUNE 26, 1894. No. 6896.

1. **Municipal Corporations: SPECIAL ASSESSMENTS: CHURCH PROPERTY: EXEMPTIONS.** The exemptions provided by section 2, article 9, of the constitution of Nebraska are solely with reference to taxes assessed by valuation for general purposes, and have no applicability to special assessments or special taxation of property benefited for local improvements under authority of section 6 of the same article.

2. ———: ———: ———. Chapter 14 of the Session Laws of 1887, in so far as it relates to the above subject, is construed in harmony with the construction given the sections just referred to.

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

The facts are stated by the commissioner.

E. O. Kretsinger, for plaintiff in error;

Church property which is used exclusively for religious purposes is not exempt under section 2, article 9, of the constitution, supplemented by section 2, article 1, chapter 77, Compiled Statutes, from special assessments for local improvements in cities of the second class having more than five thousand and less than twenty-five thousand population. (*City of Big Rapids v. Board of Supervisors of Mecosta County*, 58 N. W. Rep. [Mich.], 358; Dillon, Municipal Corporations, secs. 761, 773, 777; *Worcester County v. City of Worcester*, 116 Mass., 193; *City of Hartford v. West Middle District*, 45 Conn., 462; *Board of Improvement v. School District of Little Rock*, 19 S. W. Rep. [Ark.], 969; *Matter of the Mayor*, 11 Johns. [N. Y.], 77; *Mayor and City Council of Baltimore v. Proprietors of Green Mount Cemetery*, 7 Md., 517; *State v. City of Newark*, 27 N. J. Law, 187; *Trustees of Illinois-Michigan Canal v. City of Chicago*, 12 Ill., 406; Cooley, Taxation, 147, 606; 2 Desty, Taxation, p. 1235; *Northern Liberties v. St. John's Church*, 13 Pa. St., 104; *Emery v. San Francisco Gas Co.*, 28 Cal., 346; *City of Chicago v. Baptist Theological Union*, 2 N. E. Rep. [Ill.], 254; Elliott, Roads & Streets, pp. 370, 376; *Municipality No. Two v. Dunn*, 10 La. Ann., 57; *New Jersey M. R. Co. v. Jersey City*, 42 N. J. Law, 97; *Bleecker v. Ballou*, 3 Wend. [N. Y.], 263; *New Jersey Railroad & Transportation Co. v. City of Elizabeth*, 37 N. J. Law, 330; *Brewster v. City of Syracuse*, 19 N. Y., 116; *Protestant Foster Home Society v. Mayor of Newark*, 36 N. J. Law, 478; *Buffalo City Cemetery v. City of Buffalo*, 46 N. Y., 506; *Roosevelt Hospital v. Mayor of New York*, 84 N. Y., 108; *Illinois Central R. Co. v. City of Decatur*, 126 Ill., 92; *Sheehan v. Good Samaritan Hospital*, 50 Mo., 155; *City of Lafayette v. Male Orphan Asylum*, 4 La. Ann., 1; *Zabel v. Louisville Baptist Orphans' Home*, 17 S. W. Rep. [Ky.], 212; *City of Atlanta v. First Presbyterian Church*, 86 Ga.,

730; *Boston Seamen's Friend Society v. Mayor and Aldermen of Boston*, 116 Mass., 181; *City of Philadelphia v. Contributors to Pennsylvania Hospital*, 22 Atl. Rep. [Pa.], 744; *In the Matter of College Street*, 8 R. I., 474; *Lockwood v. City of St. Louis*, 24 Mo., 20; *City of Raleigh v. Peace*, 110 N. Car., 34; 2 Lawson, Rights, Remedies & Practice, sec. 633; Boone, Law of Corporations, sec. 90, note 11; 2 Beach, Public Corporations, secs. 1172, 1173; *Winona & St. P. R. Co. v. City of Watertown*, 44 N. W. Rep. [S. Dak.], 1072; *City of Sioux City v. Independent School District of Sioux City*, 55 Ia., 150; *Kemper v. King*, 11 Mo. App., 116; *Flint v. Webb*, 25 Minn., 93; *White v. City of Bloomington*, 94 Ill., 604; *Sigler v. Fuller*, 34 N. J. Law, 227; *Sloan v. Beebe*, 24 Kan., 343; *Lufkin v. City of Galveston*, 58 Tex., 545; *Adams County v. City of Quincy*, 22 N. E. Rep. [Ill.], 624.)

Murphy & Le Hane, contra, cited: *Von Steen v. City of Beatrice*, 36 Neb., 421.

RYAN, C.

This proceeding was brought in this court to review the ruling of the district court of Gage county upon a general demurrer to the petition of the defendant in error. In this petition it was alleged that the plaintiff therein named was a corporation existing and owning property on which was its house of worship in the city of Beatrice; that the city of Beatrice, the defendant named in the petition, was a public corporation duly organized and existing under and by virtue of the laws of the state of Nebraska providing for the incorporation of cities of the first-class having less than twenty-five thousand and more than ten thousand inhabitants. Omitting the general averments which would naturally be expected in such a petition, it is sufficient to say that the special matters as to which relief was sought were, that, on August 27, 1889, the city of Beatrice by

ordinance created paving district No. 4, which included within its prescribed boundaries the real property of the plaintiff on which was situate its church, which was used exclusively for religious purposes; that on October 22, 1890, the said city passed an ordinance levying and assessing an assessment and tax on said district and all the real estate situated within its limits, the amount levied and assessed against the real property of plaintiff being $206.61, payable in instalments, one-tenth in each year after its assessment, except that the first one-tenth fell due in fifty days from the passage, approval, and publication of the last above named ordinance. It was alleged in the petition that for some of these instalments the real property of the plaintiff had been sold at tax sale, and purchased by Alexander Q. Smith, who, unless prevented, in due time would apply for and procure a deed to plaintiff's aforesaid real property. There were like averments made as to curbing ordered and sidewalks constructed along plaintiff's property, the cost of which was specially assessed against said property, and it was averred that if not prevented, the title to said property would be clouded by a tax deed issued in pursuance of sale for the satisfaction of the above special assessments. The sole ground upon which the right to relief was based was, that the property sold at tax sale was church property, used exclusively for religious purposes. Upon the overruling of the demurrer to the petition a decree was entered in accordance with its prayer, and the cause was brought to this court for review of the ruling of the district court on the aforesaid demurrer. Incidentally several questions might be considered,—for instance, the rights of Smith as a purchaser,—but as the most vital question presented involves the right of exemption of church property from liability for assessments for the cost of paving and curbing and of constructing sidewalks on adjacent streets, that question alone will be considered.

The case of *Von Steen v. City of Beatrice*, 36 Neb., 421,

was considered solely with reference to chapter 14, Session Laws of 1887, and it was held that the chapter named operated to repeal all former acts on the same subject. In the course of the opinion delivered by POST, J., he referred to the statutory provision for special assessments for public improvements, as in the case of paving of streets adjacent thereto, and remarked that this question had never been presented to the courts in this state, and that this court found upon the subject an irreconcilable conflict of opinion. Following these observations, this was his language: "It is provided by section 2 of our revenue law (ch. 77, Comp. Stats.) that 'the following property shall be exempt from taxation in this state: First, the property of the state, counties, and municipal corporations, both real and personal; second, such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery, and charitable purposes.' Similar provisions have been construed as exempting the property mentioned therein from all contributions in the nature of taxation, whether imposed for public purposes under general revenue laws or for local improvements such as are denominated special assessments. Opposing this view is the doctrine, quite as well sustained by authority, that the immunity from taxation relates only to general, state, county, or other municipal taxes, and not to assessments for improvements made under special laws or ordinances and local in their nature. It is not deemed necessary to review the cases cited in support of the different views by their respective advocates, since the solution of the question here presented depends upon a construction of the charter of the defendant city." The remainder of this opinion was devoted to the facts presented as governed solely by the provisions of the act of 1887 heretofore referred to.

For the reason that afterward, in *State v. Birkhauser*, 37 Neb., 521, NORVAL, J., questioned one of the conclusions reached in *Von Steen v. City of Beatrice, supra*, doubts as

to the thoroughness with which the last named case was presented have received considerable confirmation. In the opinion in the Von Steen case no reference was made to the provisions of our constitution, and as the brief filed by plaintiff in error in the case at bar ignores the constitutional bounds which must in such cases limit legislation, it is easy to believe that the Von Steen case was presented, and perhaps considered, without special reference to the constitution. If the statute of 1887 can be fairly construed so that its provisions harmonize with those of the constitution, such a construction should undoubtedly prevail rather than one which creates an irreconcilable conflict between them. With a view to showing how harmony can exist I quote from article 9 of our constitution section 6 and that portion of section 2 pertaining to our purpose, which are as follows:

"Sec. 2. [*Exemption from Taxation.*]—The property of the state, counties, and municipal corporations, both real and personal, shall be exempt from taxation, and such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery, and charitable purposes, may be exempted from taxation, but such exemptions shall be only by general law," etc.

"Sec. 6. [*Municipal Taxes.*]—The legislature may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessment, or by special taxation of property benefited. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

It is clear that section 2 prescribes the rule which must govern in the assessment of taxes properly so designated. Protected by the provisions of a statute sanctioned by this section, the property of churches used for religious purposes is exempted from the general burden of taxation. It does

not necessarily result from this, however, that such property can by statute be exempted from special assessments on account of special benefits conferred by public improvements of the streets and sidewalks adjacent thereto. In *State v. Dodge County*, 8 Neb., 124, this court had under consideration section 6, above quoted. In the opinion of MAXWELL, C. J., there were reviewed kindred constitutional provisions of other states. For instance, he said that the constitution of Arkansas provides that "all property shall be taxed according to its value. * * * The general assembly shall have power to tax merchants, bankers, peddlers, and privileges in such manner as may be prescribed by law. * * * It was held that this provision did not prohibit the legislature from authorizing counties and incorporated towns to impose a tax upon billiard tables, ten pin alleys, taverns, groceries, and the like for municipal purposes and as a police regulation for the preservation of good order. (*Washington v. State*, 13 Ark., 752; Dillon, Municipal Corporations, sec. 592.)" In the above opinion was quoted a provision of the constitution of Ohio, that "laws shall be passed taxing by a uniform rule all moneys, etc., and also all real and personal property according to its true value in money." Another section quoted required the legislature to "provide for the organization of cities and incorporated villages by general laws and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit so as to prevent the abuse of such power." Referring to these provisions, MAXWELL, C. J., remarked that it was held that "legislation authorizing cities and villages to levy special assessments for the purpose of improving streets upon real estate peculiarly and specially benefited and in proportion to such benefit was not repugnant to any provision of the constitution. (See, also, *City of Zanesville v. Richards*, 5 O. St., 589; *Baker v. City of Cincinnati*, 11 O. St., 534; *Exchange Bank of Columbus v. Hines*, 3 O. St., 1.)" Similar constitutional

provisions of the states of California, Indiana, Massachusetts, Mississippi, Missouri, Oregon, and Wisconsin were likewise reviewed in detail in this opinion, each sustaining the result above announced with reference to similar constitutional provisions. The consensus of these authorities is that an assessment to reimburse a municipal corporation for such benefit as it has conferred upon an adjacent lot by reason of pavements or sidewalks laid along side it is not an exercise of the power to tax in the generally accepted meaning of that term.

Section 6, article 9, of our constitution was again considered by this court in *Hanscom v. City of Omaha*, 11 Neb., 37. The opinion was delivered by MAXWELL, C. J., who said: "The words 'by special assessment or by special taxation of the property benefited' [which occurred in the statute conferring powers upon cities of the class of Omaha] refer to and mean the same thing, viz., that special assessments may be made upon property to the extent of the benefits received by it. Taxation by special assessment differs from general taxation in this, that they can be imposed only to the extent of the special benefits received, while the benefits which the taxpayer receives in return for general taxation are the enforcement of the laws, protection to life and property, and such other benefits as are shared by the public at large. The principle which underlies special assessments is that the value of the property is enhanced to an amount at least equal to the assessment. This principle cannot be departed from without taking private property for public use."

In *Kittle v. Shervin*, 11 Neb., on pages 80 and 81, is reported the following language of COBB, J., by whom the opinion of the court was written. He said: "In an important case lately argued in this court, involving a construction of the section above referred to [section 6, article 9, constitution], the court was undivided in the opinion that the provisions of said section applied to pre-

vious legislation, and that under them the corporate authorities of cities, towns, or villages could be vested with power to levy and collect but two kinds of taxes, first, by special assessment or by special taxation (two ways of expressing the same thing) of property benefited—this only for purposes of local improvements; second, for all other corporate purposes to assess and collect taxes, but such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same. (*Hanscom v. City of Omaha, ante*, p. 37.)"

This court has, therefore, recognized a distinction between taxation for general purposes and assessments on account of special benefits conferred to adjacent property. If no such difference in fact existed, the provisions of section 1, article 9, of our constitution would absolutely prohibit the assessment of lots on account of benefits conferred by public improvements adjacent thereto, for, except as his property is specially benefited, the adjacent lot owner has no more concern with such improvements than has any one else of the general public. He can only use the improved highway in the same way and for the same purposes as may any other individual. On him would be inflicted the same punishment for obstructions placed thereon as would be visited upon an utter stranger in the city for the same offense, notwithstanding the fact that with his own private means alone this portion of the highway had been rendered fit for the use of the general public. If the special benefit to his adjacent property presents no ground for its special assessment, it is difficult to see how the legislature has provided for necessary revenue by levying a tax by valuation so that (as required by section 1, article 9, of the constitution) each person shall pay a tax in proportion to the value of his property. The exemptions provided by section 2, article 9, of our constitution have reference solely to the general tax by valuation provided in the immediately preceding section, and have no application whatever to the

special assessment or special taxation of property benefited by local improvements as contemplated by section 6 of the same article. The closing sentence of section 6, just referred to, is significant, for, following the provision that the legislature may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessment or by special taxation of property benefited, said sentence provides that "for all other corporate purposes all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same." The last sentence quoted clearly excludes from the provision requiring uniformity with respect to persons and property the special assessment or special taxation contemplated in the first sentence of the same section. These considerations strongly countenance the assumption that the framers of our constitution had in mind the distinction afterwards recognized by this court between the power of general taxation and the power to make payment for local improvements by special assessments, and that, by sections 1 and 2 of article 9 of the constitution, one general rule, with its exception, was provided, while by section 6 of the same article, another general rule, with its exceptions, was laid down,—each of these clauses, with its attendant exception, being independent of the other. Any other construction than this creates a confusion between the two clauses just distinguished and gives but little other than confusing force to the last clause of section 6, for thereby, except in so far as section 1 and section 6 are in hopeless conflict, the latter is but the useless reiteration of the former. This construction should therefore be avoided, if, consistently with the language of these sections, a more reasonable one can be found which gives a harmonizing effect to all provisions of both. This result is attained by excluding from section 6 the exemptions declared in section 2 of article 9 of the constitution, and this is be-

lieved to be the true construction of these sections. The construction of chapter 14, Session Laws of 1887, should have been conformably to that given the sections of article 9 of our constitution above discussed. It follows that the contention of the defendant in error, that its property used for religious purposes was exempt from special assessments or special taxation on account of special benefits conferred upon said property by the construction of sidewalks and curbing and the laying of pavements on an adjacent street, was without sanction of either the statutes or the constitution of this state. The judgment of the district court is therefore

REVERSED.

STERLING LUMBER COMPANY V. FRED D. STINSON.

FILED JUNE 26, 1894. NO. 5799.

Account Stated: SUFFICIENCY OF EVIDENCE. Where plaintiff sued on an account stated, and defendant denied that an account had been stated, but admitted that there was due to plaintiff a less amount than claimed, the finding of the jury sustaining the defendant's averments will not be disturbed when, as in this case, they are sustained by competent evidence, no error of law having occurred on the trial.

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

J. Hall Hitchcock, for plaintiff in error.

D. P. Storer and *E. Ross Hitchcock, contra.*

RYAN, C.

Plaintiff, by its petition filed in the district court of Johnson county, alleged that between it and the defendant

there was stated an account whereby it was agreed that there was due from defendant to plaintiff the sum of $151.05, which sum the defendant accordingly agreed to pay; that he had failed so to do; and there was a prayer for the amount named, with interest and costs. These averments were denied by the defendant, who admitted in his answer that there was due from defendant to plaintiff the sum of $75, for which sum he tendered judgment. Judgment was rendered in favor of plaintiff for but $75, conformably to the verdict of a jury on a trial of these issues, and from this judgment the plaintiff prosecutes error to this court. There was sufficient evidence to sustain the verdict rendered, for there was disputed evidence as to whether an account was stated or not. As an original question, it is probable the weight of the evidence preponderated in favor of the verdict as returned. Certainly there is no such lack of support as would justify interference by this court. The instructions of the court fairly presented to the jury the law which should be applied in determining whether or not there was an account stated. The verdict, therefore, cannot be disturbed either because of lack of evidence to sustain it, or on account of error of law in giving or refusing instructions applicable to the issues presented.

It is urged that there was error in admitting in evidence Exhibits A, B, and C. These were statements of account claimed by the defendant to have been made out by the agent of plaintiff, and were properly admissible upon that theory, to sustain the defense pleaded in the answer. As plaintiff's cause of action was on an account stated, he could recover only by showing both the account and unqualified assent of defendant to its correctness. The court, therefore, very properly excluded from the jury's consideration the showing made by the books of account of plaintiff, independently of the alleged account stated.

Errors are urged as to the admission of testimony, but

as this matter was presented on the petition in error only as "errors of law occurring at the trial, duly excepted to," they cannot be considered. The judgment of the district court is

AFFIRMED.

JOHN CLARKE V. STATE OF NEBRASKA.

FILED JUNE 26, 1894. No. 6815.

Larceny: SUFFICIENCY OF EVIDENCE. The evidence in this case *held* not to have justified a conviction of plaintiff in error of the crime of larceny, as charged in the information against him.

ERROR to the district court for Webster county. Tried below before BEALL, J.

John M. Chaffin and *James McNeny*, for plaintiff in error.

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

RYAN, C.

The plaintiff in error was convicted in the district court of Webster county upon the charge of unlawfully and feloniously stealing, taking, and leading away a gelding. The evidence showed that the horse led away from the livery stable of F. M. Reed was the property of the accused. There was evidence that it had previously been levied upon by a constable under and by virtue of a writ of attachment in his hands, issued in an action pending before a justice of the peace in said county, the accused being the defendant named in said action. The horse was, after the levy, placed in the livery stable of F. M. Reed for safe keeping, from whence it was removed by the plaintiff in error. The conviction was upon an information which

alleged that the horse was owned by F. M. Reed. It is quite possible that the accused should have been punished for his misconduct. We are unable, however, to find any justification in the statutes of this state for convicting him of larceny, under the proofs as made. The judgment of the district court is

REVERSED.

JAMES STEPHENSON ET AL. V. EVERETT S. FLAGG, ADMINISTRATOR.

FILED JUNE 26, 1894. No. 4699.

1. **Negligence:** COLLISION ON STREET: PERSONAL INJURIES: EVIDENCE. The verdict in this case was sustained by ample evidence as to all points in issue. A review of it is therefore unnecessary.
2. **Instructions:** REVIEW: ASSIGNMENTS OF ERROR. Where the assignments in the petition in error challenge the correctness in group of any of the trial court's rulings either as to the giving or refusing to give instructions, no consideration of such assignment can be had in this court further than to ascertain that the challenge is not well founded as to any instruction in the group in respect to which such assignment is made.

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

Edward W. Simeral and *J. C. Cowin*, for plaintiffs in error.

Howard B. Smith and *Clinton N. Powell*, *contra*.

RYAN, C.

On March 6, 1889, there was filed in the district court of Douglas county the petition of Ada E. Flagg against James Stephenson and Cornelius F. Williams, partners doing business under the firm name of the Omaha Cab Com-

pany. The damages claimed were alleged in the petition to have been sustained by plaintiff having been struck and injured while driving on Douglas street in Omaha, and that the collision was caused by the negligence of defendants, through the fault of the driver of one of the defendants' Hansom cabs. The petition at length described the nature of the injuries sustained by plaintiff, and closed with a prayer for judgment in the sum of $5,241 and costs. The answer was an admission of the existence of the partnership alleged as existing between defendants, their ownership of a Hansom cab, and a denial of every other allegation of the petition, closing with an averment that whatever injury had been sustained by plaintiff was entirely owing to her own carelessness. There were returned two verdicts, upon the first of which no judgment was rendered. On the trial which followed the setting aside of the first verdict there was a second verdict for plaintiff. Judgment was rendered on this last verdict for $2,000, for the reversal of which the defendants filed their petition in error in this court, accompanied by a proper transcript and bill of exceptions.

The first contention of plaintiffs in error is that there was no sufficient evidence to sustain the verdict. The evidence urged as wanting is that which would show that the injuries described on the trial had in February of 1891 were traceable to the accident which occurred April 7, 1887. If there had been no evidence save that of the expert physicians produced by the plaintiffs in error, this argument would be entitled to consideration. After all, this very evidence was not positive as to the relation of cause and effect. It was full as to present ailments and the manifestations attending them, but when the cause was inquired into it was with the result that the injury sustained might have been the original inception of Mrs. Flagg's present suffering, or they might have arisen from other causes. It is not difficult to believe that the uncertainty

developed by the examination of these expert witnesses was caused by the lapse of almost three years after the occurrence of the accident, before their examination of the defendant in error. These witnesses admitted that the ailments described on the trial by Mrs. Flagg might have resulted from the accident of which she made complaint in her petition. On the other hand, there was abundant evidence to sustain the verdict of the jury: First, as to the good health of Mrs. Flagg before April 7, 1887; and, second, as to the change in her health following upon the injury, and that it was of such nature as to be reasonably imputed to it. There was detailed in evidence the history of her case, showing the gradual development of new and unfavorable symptoms, until were reached the results described on the trial. This class of testimony was given, not only by herself, her mother, and her husband, but by her attendant physicians as well. It may be pertinently observed in this connection that from the time of her injury until the trial in February of 1891, Mrs. Flagg seemed almost constantly to have been under medical treatment. The evidence was amply sufficient to justify the verdict in not only this, but in every other respect.

No other errors alleged in the petition in error are argued, except criticisms are made of the instruction given, and of those refused. Of those given of the court's own volition there is argued error only as to the use of the word "carelessness" in the fourth paragraph. As this assignment of error was as to Nos. 5 and 6, as to which no criticism is even attempted coupled with No. 4, we cannot consider the error urged as inhering in No. 4 alone. The petition in error alleged that the court erred in giving paragraphs Nos. 1, 2, 3, 4, 5, 10, 11, 12, and 13 at the request of the defendant in error. As might well be supposed, there would be no error found in each one of these several paragraphs, and this assignment requires us to prosecute inquiry no farther than this point.

There is assigned error in the petition in error, in that the court refused to give paragraphs numbered 5 and 6 of the instructions asked by plaintiffs in error. Of these paragraphs, that numbered 5 required the jury to find against the defendant in error, if, at the time of the accident, she was on the north or left-hand side of Douglas street, provided that if she had been on the other side of said street the accident would not have happened. We know of no reason for such a radical statement of the law as this would require, and no attempt has been made in argument to show one. The fifth and sixth paragraphs of the instructions asked by the plaintiff in error were, therefore, properly refused. The judgment of the district court is

AFFIRMED.

JOHN FITZGERALD, FOR HIMSELF AND ON BEHALF OF ALL OTHER STOCKHOLDERS OF THE FITZGERALD & MALLORY CONSTRUCTION COMPANY, APPELLANT, V. FITZGERALD & MALLORY CONSTRUCTION COMPANY AND THE MISSOURI PACIFIC RAILWAY COMPANY, APPELLEES.

FILED JUNE 26, 1894. No. 5309.

1. **Corporations:** ABUSE OF TRUST BY OFFICERS INTERESTED IN RIVAL COMPANY: ACTION BY STOCKHOLDERS FOR BENEFIT OF CORPORATION. Where the officers of a corporation responsible for its management are shown to have abused their trust to the great damage of such corporation in the interest of another corporation of which they were then and still remain managing officers, any stockholder of the corporation wronged may bring an action in his own name for the benefit of the wronged corporation against the other corporation above referred to, for the redress of such grievance and for an accounting between said corporations, and for these purposes may properly join both corporations as defendants.

2. ———: ———: ———: PARTIES: FOREIGN RECEIVER. A receiver appointed by a court in another state than Nebraska is not a necessary party in this state to a suit on behalf of or against the corporation for which such receiver was so appointed.

3. ———: LIABILITY FOR TORTS OF OFFICERS. A corporation is liable civilly for all damages occasioned by the torts of its officers or agents committed within the scope of their employment as such.

4. ———: ACQUIESCENCE OF STOCKHOLDERS IN FRAUD OF OFFICERS. The acquiescence of a stockholder will not preclude a recovery in an action brought by him in a proper case for the benefit of such corporation in respect of wrongs committed by the managing officers of said corporation against it for the benefit of another corporation in which they are also officers. In such case, while the stockholder is nominally the plaintiff, he is only nominally so; the action is in reality between the corporations joined as defendants,—the one as the party wronged, the other as the party which profited by the wrong.

5. ———: CONSTRUCTION CONTRACT: COMMUTATION OF CONTRACT RATE: CONSIDERATION. The agreement of a construction company to commute its contract rate of compensation for finished work to a lower rate because of the work not being completed as agreed, in consideration of which commutation the other contracting party consented to presently accept the work in its unfinished condition, afforded a sufficient consideration to sustain the stipulated reduction as a compromise between the parties.

6. ———: ———: ———: ———. Where a construction company had contracted to build a certain railroad line, and had completed the work according to contract, an agreement by its president, without authority, to accept payment at less than the contract price was without consideration and did not release the other contracting party from liability for payment at the full rate fixed by the original contract.

7. ———: PURCHASE OF BONDS AT DISCOUNT BY OFFICERS INTERESTED IN RIVAL COMPANY. In an action on behalf of a corporation to recover the discount at which certain bonds held by said corporation had been by its board of directors ostensibly authorized to be sold to the stockholders of said corporation, resulting, however, in such sale only to the individual directors who voted to authorize it, and to parties in privity with them in wrongfully making such sale, *held*, that the burden of proof strongly devolved upon the purchasers of said bonds at the dis-

count authorized to show affirmatively that the price paid was the fair value of such bonds; and the proofs, as well as the finding of the trial court, having been adverse to such showing, *held further*, that the discount was properly recoverable.

8. ———: CONSTRUCTION CONTRACT: SURVEYS MADE TO INDUCE MUNICIPAL DONATIONS. Where the contract of a construction company contemplated only the building of a specified line of railroad, the expenses incidental to preliminary surveys made by the construction company with a view to the location of other lines where municipal donations could readily and freely be secured, in large part, for the benefit of the said construction company, are not properly recoverable by said construction company as against the railroad company for which the work of construction was being done, even though some of the officers of the said railroad company, by their conversation, in a measure, countenanced the making of said surveys for the purposes above stated.

9. **Contracts in Writing:** PAROL EVIDENCE OF SUBSEQUENT MODIFICATION. A written contract for the construction of a line of railroad alone does not render incompetent oral evidence of a subsequent contract for supplying the cattle yards, a telegraph line, turn-tables, etc., necessary or proper for the equipment or operation of such line of railroad when completed. The same rule applies as to furnishing nut fasteners and extra ties not within the terms of the original written contract.

10. **Breach of Contract to Procure Right of Way:** EVIDENCE: DAMAGES. Proof of a defective compliance with the laws of congress as to acquiring a railroad right of way across the public domain, without more, cannot be made a ground for the recovery of damages as against the party whose duty it was to properly secure such right of way.

11. **Interstate Commerce Act.** The act of congress entitled "An act to regulate commerce," when it took effect, abrogated all existing contracts with common carriers for special interstate commercial rates, and especially vested in the federal tribunals described in that act exclusive jurisdiction to inquire into and adjust such interstate rates as are alleged to be unfair or discriminative.

12. **Foreign Laws:** PRESUMPTIONS. In the entire absence of proof upon the subject, it is presumed that the rate of interest in another state is the same as that fixed by the statutes of Nebraska.

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

The case is stated in the opinion of Commissioner Ryan.

Marquett, Deweese & Hall, for appellant:

The Construction Company should be allowed for the full amount agreed upon in bonds for building the first one hundred and fifty miles of road. The findings touching these two items are, in substance, that after the road was completed according to contract, they then modified it and threw off a thousand dollars a mile. There is no consideration for this pretended modification. The rule is well established that where the facts show clearly a certain sum to be due from one person to another, a release of the entire sum on a payment of a part is without consideration, and the creditor may still sue and recover the residue. (*Fire Insurance Association v. Wickham*, 141 U. S., 577; *United States v. Bostwick*, 94 U. S., 53-67; *Lingenfelder v. Wainwright Brewery Co.*, 15 S. W. Rep. [Mo.], 848; *Ayres v. Chicago, R. I. & P. R. Co.*, 52 Ia., 478; *Sherwin v. Brigham*, 39 O. St., 137; *Laidlow v. Hatch*, 75 Ill., 11; *Wimer v. Overseers of the Poor*, 104 Pa. St., 307; *Vanderbilt v. Schreyer*, 91 N. Y., 392; *Tulane v. Clifton*, 20 Atl. Rep. [N. J.], 1086.)

The court below found: "On the 15th day of June, 1886, the said Construction Company had ten miles of said road completed and ready for delivery to the Missouri Pacific Company; that on the 15th of July, 1886, the Construction Company had thirty miles of said road completed and ready for such delivery." The contract was that the bonds were to be delivered as each ten-mile section was built. There were no bonds issued for nine and one-half months after the first ten miles were built, and for eight and one-half months after the first thirty miles were built. For the non-delivery of the bonds the Construction Company should be allowed damages. The measure of damages is interest from the time they were

due until they were delivered. (2 Sutherland, Damages, sec. 534; *Hinckley v. Pittsburgh Bessemer Steel Co.*, 121 U. S., 264; *McMahon v. New York & E. R. Co.*, 20 N. Y., 463; *Skagit Railway & Lumber Co. v. Cole*, 26 Pac. Rep. [Wash.], 535; *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y., 487; *Richardson v. Chynoweth*, 26 Wis., 656.)

The sale by the directors, and purchase by the stockholders, of the Missouri Pacific bonds at a discount was a fraud. Neither directors of a company nor its stockholders can buy its property for less than its value, or sell it for less than its value, without making themselves and all those concerned in it liable for the true value of the property. (*Farmers Loan & Trust Co. v. San Diego Street Car Co.*, 45 Fed. Rep., 527; *Koehler v. Black River Falls Iron Co.*, 2 Black [U. S.], 721; *Goodin v. Cincinnati & Whitewater Canal Co.*, 18 O. St., 169; *Woodroof v. Howes*, 26 Pac. Rep. [Cal.], 111.)

Without the aid of the Missouri Pacific this fraud in the sale of bonds could not have been committed. At a time when the Construction Company borrowed of Gould for sale $2,500,000 of bonds, there was due from the Missouri Pacific $3,170,000 of bonds. Gould had to act for the Missouri Pacific in withholding the $3,170,000 in order to loan his $2,500,000. The perpetration was the joint act of Gould and the Missouri Pacific. The Missouri Pacific acted with its directors and the stockholders of the Construction Company. The resolution by which the bonds were sold was passed for its benefit as well as theirs. It got part of the fruits of the sale, and cannot make defense by claiming that the acts by which the wrongs have been committed are not within the corporate powers conferred upon them. A corporation can be guilty of a conspiracy to defraud. (Cook, Stockholders, 698; *Denver & R. G. R. Co. v. Harris*, 122 U. S., 608; *Hussey v. King*, 3 S. E. Rep. [N. Car.], 923; *Jackson v. Ludeling*, 21 Wall. [U. S.], 628; *Wayne Pike Co. v. Hammons*, 27 N. E. Rep. [Ind.],

487; *Barr v. New York, L. E. & W. R. Co.*, 96 N. Y., 444; *Ervin v. Oregon Railway & Navigation Co.*, 27 Fed. Rep., 627; *Peck v. Ellis*, 2 Johns. Ch. [N. Y.], 131; *Miller v. Fenton*, 11 Paige Ch. [N. Y.], 18; *Heath v. Erie R. Co.*, 8 Blatch. [U. S.], 347; *Wilkinson v. Parry*, 4 Russ. [Eng.], 271.)

The conspiracy and wrong must be viewed as a whole. If the Missouri Pacific did anything to aid the conspirators in this sale of bonds, it is responsible for the whole damages, or, after it has received the fruits, the money realized wrongfully, it is liable. A corporation may be a party to a conspiracy. (Cooley, Torts, 127, 133; *Magill v. Kauffman*, 4 Serg. & R. [Pa.], 318; *Grand Rapids Safety Deposit Co. v. Cincinnati Safe Lock Co.*, 45 Fed. Rep., 671; *Russell v. Post*, 138 U. S., 425; *Buffalo Lubricating Oil Co. v. Standard Oil Co. of New York*, 42 Hun [N. Y.], 153; *Morton v. Metropolitan Life Ins. Co.*, 34 Hun [N. Y.], 367; *Reed v. Home Savings Bank*, 130 Mass., 443; *Krulevitz v. Eastern R. Co.*, 140 Mass., 573; *Craigie v. Hadley*, 1 N. E. Rep. [N. Y.], 537; *McCartney v. Berlin*, 31 Neb., 411.)

By the act of conspiring together for the purposes alleged, the conspirators assumed to themselves the attributes of individuality, so far as regards the prosecution of the common design, thus rendering what was said or done by any one in furtherance of the design the acts of all. (*Walls v. State*, 125 Ind., 400; *Fogg v. Blair*, 139 U. S., 126.)

Fitzgerald never received any benefits and never acquiesced in the settlement. In order to constitute one a wrong doer by ratification the original act must have been done in his interest, or intended to further some purpose of his own. No majority of a corporation, however large, can misapply the funds of a corporation. A single dissenting voice can frustrate the objects of the majority. (Cooley, Torts, 187*; 1 Morawetz, Private Corporations, sec., 249; *Woodroof v. Howes*, 26 Pac. Rep. [Cal.], 111.)

The court found that the majority of the directors and stockholders, in all matters where the interests of the Missouri Pacific and the interests of the Construction Company conflicted, acted for the benefit and interest of the Missouri Pacific. In other words, during all these transactions the Construction Company was in the hands of those hostile to it. In cases of this kind laches and acquiescence do not apply. (1 Morawetz, Private Corporations, sec. 531; *Pacific R. Co. v. Missouri P. R. Co.*, 111 U. S., 521.)

On the issue of overcharges for materials hauled by the railway company for the Construction Company there was an agreement for a rate of three-quarters of a cent per ton per mile. The railway company claims exemption for itself from this agreement by published schedules of rates which it says it charged. It will thus be seen that what they claim to be their scheduled rates were in writing, and the only proof would be the printed schedule of what that rate was. It is necessary that the printed schedule should be produced. (*Myers v. Bealer*, 30 Neb., 281; *Wiseman v. Northern P. R. Co.*, 26 Pac. Rep. [Ore.], 272; *American Life Insurance & Trust Co v. Rosenagle*, 77 Pa. St., 514; *Houser v. Austin*, 10 Pac. Rep. [Idaho], 37.)

The verbal agreement is good, and is unaffected by the rate established in the printed schedule. (*Holly v. Blackman*, 10 S. E. Rep. [S. Car.], 774; *Snow v. Alley*, 23 N. E. Rep. [Mass.], 576.)

The court erred in allowing interest at only six per cent. The regular rate in Kansas and Nebraska was seven per cent. The contract was to be performed in Kansas. If a contract is made with reference to the laws of another state the interest is to be calculated according to the place where the work is to be performed. (1 Sutherland, Damages, sec. 357; *Boyce v. Edwards*, 4 Pet. [U. S.], 111; *Lefler v. Dermotte*, 18 Ind., 246; *Von Hemert v. Porter*, 11 Met. [Mass.], 210; *Healy v. Gorman*, 15 N. J. Law, 328.)

There is no proof of what the interest rate is in Kansas

or in New York. It is therefore presumed to be the same as it is in Nebraska. (*Wenger v. Taylor*, 39 Kan., 757.)

As to the right of a stockholder to commence a suit of this kind: The corporation is under the control of the wrong-doers, George Gould, Russell Sage, Sidney Dillon, and Jay Gould, who own a controlling interest in both corporations, and virtually hold the purse-strings of both of them. A demand would be ordinarily nugatory under the circumstances, and it would be wholly contrary to established principles of justice to permit the authors of a wrong to conduct a litigation against themselves as agents of the injured complainants. (1 Morawetz, Private Corporations, sec. 252; *Peabody v. Flint*, 6 Allen [Mass.], 54; *Brewer v. Proprietors of Boston Theatre*, 104 Mass., 378; *Wilcox v. Bickel*, 11 Neb., 154; *Ryan v. Leavenworth, A. & N. R. Co.*, 21 Kan., 365; *Barr v. New York, L. E. & W. R. Co.*, 96 N. Y., 454.)

The majority of stockholders cannot combine against the minority. If they do, they are responsible for every wrong committed by that combination to the minority stockholders. (*Ervin v. Oregon Railway & Navigation Co.*, 27 Fed. Rep., 625.)

B. P. Waggener and *A. R. Talbot*, for appellees:

No sufficient showing has been made to entitle the plaintiff as a stockholder to maintain this action. The cause of action set forth in his petition is not a cause of action in favor of Fitzgerald, but in favor of the Construction Company. The refusal of the board of directors to act is essential to give a stockholder any standing in court. (*Hawes v. Oakland*, 104 U. S., 450–460; *Detroit v. Dean*, 106 U. S., 541; *Quincy v. Steel*, 120 U. S., 246; *Dimpfell v. Ohio & M. R. Co.*, 110 U. S., 210; *Ivinson v. Hutton*, 98 U. S., 79; *Memphis City v. Dean*, 8 Wall. [U. S.], 64; *Cogswell v. Bull*, 39 Cal., 320; *Talbot v. Scripps*, 31 Mich., 268; *Ware v. Bazemore*, 58 Ga., 318; *Doud v. Wisconsin P. & S. R. Co.*, 65 Wis., 108.)

The Construction Company was formed for the express purpose of giving to the directors of the Missouri Pacific Company a controlling interest in the stock, to secure their influence to make an advantageous contract with the Missouri Pacific Company to sell to it the stock and bonds which the Construction Company might receive from the Denver Company. The officers and directors of the Missouri Pacific Railway Company being so largely interested in the Construction Company, a court of equity will not permit the contract of May 4, 1886, to be made the basis of any action. (*Wardell v. Union P. R. Co.*, 103 U. S., 651–659; *Thomas v. Brownville, Ft. K. & P. R. Co.*, 109 U. S., 524, s. c. 2 Fed. Rep., 878; *Wardell v. Union P. R. Co.*, 4 Dill. [U. S.], 337, 338; *Ryan v. Leavenworth, A. & N. R. Co.*, 21 Kan., 366; *Gilman C. & S. R. Co. v. Kelly*, 77 Ill., 426; *Thomas v. Brownville, Ft. K. & P. R. Co.*, 1 McCrary [U. S.], 392; *Stewart v. Lehigh Valley R. Co.*, 38 N. J. Law, 505; *Paine v. Lake Erie & L. R. Co.*, 31 Ind., 283; *Port v. Russell*, 36 Ind., 60; *European & N. A. R. Co. v. Poor*, 59 Me., 277; *Koehler v. Black River Falls Iron Co.*, 2 Black [U. S.], 715; *Jones v. Morrison*, 31 Minn., 140; *Hoyle v. Plattsburgh & M. R. Co.*, 54 N. Y., 315; *Pickett v. School District No. 1 of Town of Wiota*, 25 Wis., 551–559; *Memphis & C. R. Co. v. Woods*, 88 Ala., 630; *Langan v. Sankey*, 55 Ia., 54; *Blake v. Buffalo Creek R. Co.*, 56 N. Y., 485; *Bestor v. Wathen*, 60 Ill., 138, 139; *Berryman v. Trustees of Cincinnati S. R. Co.*, 14 Ky., 755; *Pearson v. Concord Railroad Corporation*, 13 Am. & Eng. R. Cases [N. H.], 102; *Guild v. Parker*, 43 N. J. Law, 430; *Davis v. Rock Creek Lumber, Flume & Mining Co.*, 55 Cal., 359; *Ward v. Davidson*, 89 Mo., 445; *Parker v. Nickerson*, 112 Mass., 195; *Munson v. Syracuse, G. & C. R. Co.*, 103 N. Y., 58; *Duncomb v. New York, H. & N. R. Co.*, 84 N. Y., 190; *People v. Township Board of Overyssel*, 11 Mich., 222; *Flint & P. M. R. Co. v. Dewey*, 14 Mich., 477; *Blair Town Lot & Land Co. v. Walker*, 50 Ia.,

376; *Boyd v. Blankman*, 29 Cal., 19; *Bent v. Priest*, 10 Mo. App., 544; *Cook v. Sherman*, 20 Fed. Rep., 167; *Coleman v. Second Avenue R. Co.*, 38 N. Y., 202; *Butts v. Wood*, 37 N. Y., 317–319; *Ogden v. Murray*, 39 N. Y., 202; *Bliss v. Matteson*, 45 N. Y., 22; *Covington & L. R. Co. v. Bowler*, 9 Bush [Ky.], 468; *Cook v. Berlin Woolen Mill Co.*, 43 Wis., 433; *Abbot v. American Hard Rubber Co.*, 33 Barb. [N. Y.], 578; *Jewett v. Miller*, 10 N. Y., 402; *Samuels v. Oliver*, 130 Ill., 73; *Clarke v. Omaha & S. W. R. Co.*, 5 Neb., 314.)

The item of $150,000 claimed arises out of a compromise, whereby the railway accepted one hundred and fifty miles of road in an incomplete condition at the rate of $10,000 per mile, instead of requiring it to be completed and then paying $11,000 per mile. It was a contract that both companies had a right to make—a fair compromise and settlement of a controversy. The plaintiff, with knowledge of the facts, acquiesced in the settlement and accepted the benefits thereof, and is now estopped to object to the corporate acts or claim the right to rescind that contract. (*Ashhurst's Appeal*, 60 Pa. St., 290; *Taylor v. South & N. A. R. Co.*, 4 Woods [U. S.], 575; *Twin-Lick Oil Co. v. Marbury*, 91 U. S., 592; *Union Gold Mining Co v. Rocky Mountain National Bank*, 96 U. S., 640; *Indianapolis Rolling Mill v. St. Louis, Ft. S. & W. R. Co.*, 120 U. S., 256; *Pneumatic Gas Co. v. Berry*, 113 U. S., 322–327; *Shelton Hat Blocking Co. v. Eickemeyer Hat Blocking Machine Co.*, 90 N. Y., 607; *Parks v. Evansville, I. & C. S. L. R. Co.* 23 Ind., 567; *Graham v. Birkenhead L. & C. J. R. Co.*, 2 M. & Gord. [Eng.], 156; *Kitchen v. St. Louis, K. C. & N. R. Co.*, 69 Mo., 226; *Weed v. Little Falls & D. R. Co.*, 31 Minn., 154; *Bell v. Keepers*, 39 Kan., 105; *Gregory v. Patchett*, 33 Beav. [Eng.], 595; *Banks v. Judah*, 8 Conn., 145; *Boston & P. R. Co. v. New York & N. E. R. Co.*, 13 R. I., 260; *Aurora Agricultural & Horticultural Society of Aurora v. Paddock*, 80 Ill., 263; *Stewart v. Erie &*

Western Transportation Co., 17 Minn., 372; *Goodin v. Evans*, 18 O. St., 150; *McLaughlin v. Detroit & M. R. Co.*, 8 Mich., 100; *Peabody v. Flint*, 88 Mass., 54; *Royal Bank of Liverpool v. Grand Junction Railroad & Depot Co.*, 125 Mass., 490; *Thompson v. Lambert*, 44 Ia., 239; *Terry v. Eagle Lock Co.*, 47 Conn., 141; *Craig v. Bradley*, 26 Mich., 354; *Tyrell v. Cairo & St. L. R. Co.*, 7 Mo. App., 294–299; *Chouteau v. Allen*, 70 Mo. 290; *Perkins v. Portland S. &. P. R. Co.*, 47 Me., 591; *Dunks v. Fuller*, 32 Mich., 245; 1 Morawetz, Private Corporations, secs. 262, 264; 2 Morawetz, Private Corporations, secs. 630, 631; *Clarke v. Omaha & S. W. R. Co.*, 4 Neb., 467; *Thomas v. Brownville, Ft. K. &. P. R. Co.*, 109 U. S., 524.)

The Construction Company could not maintain an action to rescind the contract of settlement without offering to put the defendant *in statu quo* by returning the bonds received as the consideration of that settlement. (*Estes v. Reynolds*, 75 Mo., 563; *Allegheny City v. McClurkan*, 14 Pa. St., 83; *Rich v. State Nat. Bank of Lincoln*, 7 Neb., 209; *Melton v. Smith*, 65 Mo., 315; *Harvey v. Morris*, 63 Mo., 475.)

The constructive fraud, and the vice with which this settlement is alleged to be tainted, is the same vice which condemns the contracts of May 4, 1886; and the petition and evidence as to the making of the original contracts disclose facts which preclude a court of equity from affording plaintiff any relief. (*Gilman C. & S. R. Co. v. Kelly*, 77 Ill., 426–437; *Flint & P. M. R. Co. v. Dewey*, 14 Mich., 479.)

It was an executed contract of compromise, as a result of controversy over disputed facts. The work to be done was not completed. It was subject to the approval of the chief engineer of the Missouri Pacific, who had not approved it. This provision was binding, and the settlement was made before any sum was due, and is a valid, executed contract. (*De Graff v. St. Paul & P. R. Co.*, 23 Minn., 146; *Delaware Hudson Canal Co. v. Pennsylvania Coal*

Co., 50 N. Y., 258; *Jackson v. Cleveland*, 19 Wis., 400*; *Hudson v. McCartney*, 33 Wis., 341; *United States v. Robeson*, 9 Pet. [U. S.], 327; *Reynolds v. Caldwell*, 51 Pa. St., 305; *Snell v. Brown*, 71 Ill., 142; *Humaston v. Telegraph Co.*, 20 Wall. [U. S.], 27; *Denver, S. P. & P. R. Co. v. Riley*, 7 Col., 494; *Denver & New Orleans Construction Co. v. Stout*, 8 Col., 65; *Mercer v. Harris*, 4 Neb., 77; *Howard v. Allegheny V. R. Co.*, 69 Pa. St., 489; *Vanderwerker v. Vermont C. R. Co.*, 27 Vt., 126; *School District No. 27, Sarpy County, v. Randall*, 5 Neb., 408; *Kidwell v. Baltimore & O. R. Co.*, 11 Gratt. [Va.], 676.)

The item of $36,000, claimed on account of Larned Branch, was improperly allowed by the court below. The work had not been done. The building of that line had been abandoned. A proposition to permit the Construction Company to build it at $10,000 per mile was accepted, the road built, and settlement made on this basis. The acquiescence of the Construction Company and all its stockholders in this settlement precludes them from any right to relief on this item. (*Indianapolis Rolling Mill v. St. Louis, Ft. S. & W. R. Co.*, 120 U. S., 256.)

The road having been abandoned, the Missouri Pacific had the right to pay all damages occasioned by the breach of its contract, if valid, rather than build thirty-six miles of road at $11,000. The consideration for renewing operations was the proposal of the Construction Company to build the road for $10,000 per mile. This was a valid agreement based on a sufficient consideration. (*Hale v. Hess*, 30 Neb., 42; *Cleveland & P. R. Co. v. Kelley*, 5 O. St., 180; *Crowley v. Genesee Mining Co.*, 55 Cal., 273.)

The contract provided for payment in bonds. In any event the measure of damages would be the market value of the bonds at date of demand, and in no case could the action be maintained without first making demand for delivery of the bonds. (*Wyatt v. Bailey*, 1 Mor. [Ia.], 396*; *Bradley v. Farrington*, 4 Ark., 533; *Martin v. Chauvin*, 7

Mo., 277; *State v. Mooney*, 65 Mo., 494; *Widner v. Walsh*, 3 Col., 548.)

The agreement for special rates, made between Mallory, as president of the Construction Company, and Gould, as president of the railway company, under which the court below allowed to the Construction Company the sum of $318,763.56 claimed as rebates on account of overcharges on interstate shipments, was made prior to May 4, the date of the written contract. The written contract covered the question of transportation. The contract of May 4, 1886, merged all antecedent agreements and stipulations, whether oral or written, and oral evidence was inadmissible to vary or modify its terms. (*Mills v. Miller*, 4 Neb., 443; *Hamilton v. Thrall*, 7 Neb., 219; *Delaney v. Linder*, 22 Neb., 280; *McNish v. Reynolds*, 95 Pa. St., 483; *Dodge v. Kiene*, 28 Neb., 221; *Cornell v. St Louis, K. & A. R. Co.*, 25 Kan., 615; *Hopkins v. St. Louis & S. F. R. Co.*, 16 Am. & Eng. R. Cases [Kan.], 131; *Frost v. Blanchard*, 97 Mass., 155; *Pilmer v. Branch of State Bank, Des Moines*, 16 Ia., 321; *Emery v. Mohler*, 69 Ill., 221; *Davis v. Symonds*, 1 Cox's Ch. [Eng.], 402; *Savercool v. Farwell*, 17 Mich., 308; *Long v. New York C. R. Co.*, 50 N. Y., 76; *Baker v. Higgins*, 21 N. Y., 397; *Merchants Mutual Ins. Co. v. Lyman*, 15 Wall. [U. S.], 664; *Riley v. City of Brooklyn*, 46 N. Y., 444; *Purinton v. Northern I. R. Co.*, 46 Ill., 297; *Thurston v. Ludwig*, 6 O. St., 1-4; *Hills v. Rix*, 43 Minn., 543; *Gilbert v. Stockman*, 76 Wis., 62; *Harrison v. McCormick*, 89 Cal., 327; *State v. Hoshaw*, 98 Mo., 358.)

In the absence of a showing that Mr. Gould, as president of the Missouri Pacific, had authority to make a contract for a special rate, the law does not imply authority in him, from the position he held, to enter into such a contract. (*Blen v. Bear River & Auburn Water Mining Co.*, 20 Cal., 602; *Templin v. Chicago, B. & P. R. Co.*, 73 Ia., 548; Taylor, Corporations, sec. 236; *Adriance v. Roome*, 52

Barb. [N. Y.], 399; *Griffith v. Chicago, B. & P. R. Co.*, 74 Ia., 85; *Getty v. Barnes Milling Co.*, 40 Kan., 281; *Farmers Bank of Bucks County v. McKee*, 2 Pa. St., 318.)

After April 1, 1887, the bills of lading stated on their face the amount of freight that was charged, and parol evidence was incompetent to contradict or change the terms and conditions of the bill of lading or shipping receipt. (*Louisville & N. R. Co. v. Fulgham*, 8 So. Rep. [Ala.], 803; *Long v. New York C. R. Co.*, 50 N. Y., 76; *Merchants Mutual Ins. Co. v. Lyman*, 15 Wall. [U. S.], 664; *Hopkins v. St. Louis & S. F. R. Co.*, 16 Am. & Eng. R. Cases [Kan.], 131; *Clyde v. Graver*, 54 Pa. St., 251.)

Mallory and Fitzgerald had notice of payment of the freight charges. A resolution of the board of directors of the Construction Company recognized the indebtedness. There was no disapproval of the act of the treasurer in making the payment. The payment will now be presumed to have been ratified. (*Indianapolis Rolling Mill v. St. Louis, Ft. S. & W. R. Co.*, 120 U. S. 256; *Twin-Lick Oil Co. v. Marbury*, 91 U. S., 592; *Badger v. Badger*, 2 Wall. [U. S.], 87; *Harwood v. Air-Line R. Co.*, 17 Wall. [U. S.], 78; *Marsh v. Whitmore*, 21 Wall. [U. S.], 178; *Union Gold-Mining Co. v. Rocky Mountain Nat. Bank*, 96 U. S., 640.)

Whether the right to a special or reduced rate was based on custom or contract, the interstate commerce act, which took effect April 4, 1887, ended the custom and annulled the contract, and recovery on this item can only be had on the basis of a violation of a positive act of congress. (*Kentucky & Indiana Bridge Co. v. Louisville & N. R. Co.*, 2 Inter. Com. Rep. [Ky.], 162; *Knox v. Lee*, 12 Wall. [U. S.], 457; *Southern Wire Co. v. St. Louis B. & T. R. Co.*, 38 Mo. App., 191; *Atkinson v. Ritchie*, 10 East [Eng.], 530; *Kentucky & Indiana Bridge Co. v. Louisville & N. R. Co.*, 34 Am. & Eng. R. Cases [Ky.], 630; *Scofield v. Lake Shore & M. S. R. Co.*, 43 O. St., 571; *Dillon*

v. Allen, 46 Ia., 299; *Bishop v. Palmer*, 146 Mass., 474; *Riley v. Jordan*, 122 Mass., 233; *Hanauer v. Doane*, 12 Wall. [U. S], 342; *Valentine v. Stewart*, 15 Cal., 388; *Widoe v. Webb*, 20 O. St., 431; *Ludlow v. Hardy*, 38 Mich., 690; *Everingham v. Meighan*, 55 Wis., 354; *Melchoir v. McCarty*, 31 Wis., 252; *Hutchins v. Weldin*, 114 Ind., 80; *Caldwell v. Bridal*, 48 Ia., 15; *United States Bank v. Owens*, 2 Pet. [U. S.], 527; *Suit v. Woodhall*, 113 Mass., 391; *Hobbie v. Zaepffel*, 17 Neb., 536; *Gould v. Kendall*, 15 Neb., 549.)

By the express provisions of the interstate commerce act all special rates and agreements for rebates were annulled. On and after April 4, 1887, in the absence of any notice, the presumption is that the Construction Company delivered the goods to be shipped in accordance with the provisions of that law. (*Kirkland v. Dinsmore*, 62 N. Y., 171; *United States Bank v. Dandridge*, 12 Wheat. [U. S.], 70; *Hartwell v. Root*, 19 Johns. [N. Y.], 346; *Fitzgerald v. Grand Trunk R. Co.*, 22 Atl. Rep. [Vt.], 76; *Messenger v. Pennsylvania R. Co.*, 36 N. J. Law, 407; *Audenried v. Philadelphia & R. R. Co.*, 68 Pa. St., 370; *McDuffee v. Portland & R. R. Co.*, 52 N. H., 430; *New England Express Co. v. Maine C. R. Co.*, 57 Me., 188.)

The payment by the Construction Company of the sum claimed by the railway company for freight charges was a voluntary payment, made under claim of right, and as such cannot be recovered back. (*Kenneth v. South Carolina R. Co.*, 15 Rich. [S. C.], 284; *Claflin v. McDonough*, 33 Mo., 412; *Bucknall v. Story*, 46 Cal., 599; *Brumagim v. Tillinghast*, 18 Cal., 265; *Beecher v. Buckingham*, 18 Conn., 110; *Stevens v. Head*, 9 Vt., 174; *Morris v. Tarin*, 1 Dallas [U. S.], 148; *Hall v. Shultz*, 4 Johns. [N. Y.], 240; *Lathrope v. McBride*, 31 Neb., 289; *City of Muscatine v. Keokuk Northern Line Packet Co.*, 45 Ia., 185; *Town of Sullivan v. McCammon*, 51 Ind., 264; *Dawson v. Mann*, 49 Ia., 596; *Regan v. Baldwin*, 126 Mass., 485; *Ferguson v.*

Hirsch, 54 Ind., 338; *Lamborn v. County Commissioners*, 97 U. S. 185; *Gerecke v. Campbell*, 24 Neb., 306.)

The Missouri Pacific is not liable for telegraph line, turntables, fences, and extra work done on the line of the Denver, Memphis & Atlantic by the Construction Company. The contract for the construction of the road was with the Denver Company, in which the Missouri Pacific, by its purchase of stock and bonds under its contract with the Construction Company, became merely a controlling stockholder. As stockholder of the Denver Company, the Missouri Pacific did not become liable primarily for its debts. (*Pullman Palace Car Co. v. Missouri P. R. Co.*, 115 U. S., 596; *Fitzgerald v. Missouri P. R. Co.*, 45 Fed. Rep., 818; *Atchison, T. & S. F. R. Co. v. Cochran*, 23 Pac. Rep. [Kan.], 155; *Atchison, T. & S. F. R. Co. v. Davis*, 34 Kan., 209; *Ohio & M. R. Co. v. Indianapolis & C. R. Co.*, 5 Am. Law Reg. n. s., [O.], 733; *State v. Atchison & N. R. Co.*, 24 Neb., 143; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S., 290–309; 1 Cook, Stockholders, sec. 241; *Myers v. Irwin*, 2 Serg. & R. [Pa.], 371; *Ferry v. Little*, 101 U. S., 216; *Spense v. Iowa Valley Construction Co.*, 36 Ia., 407; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. [U. S.], 566; *New England Commercial Bank v. Stockholders of Newport Steam Factory*, 6 R. I., 188; *Walker v. Lewis*, 49 Tex., 123; *Green v. Beckman*, 59 Cal., 545; *Jones v. Jarman*, 34 Ark., 323; *Windham Provident Institution for Savings v. Sprague*, 43 Vt., 502; *Woods v. Wicks*, 7 Lea [Tenn.], 40; *Great Falls & C. R. Co. v. Copp*, 38 N. H., 124; *Chase v. Lord*, 77 N. Y., 1; *Harper v. Union Mfg. Co.*, 100 Ill., 225; *First Nat. Bank of Garrettsville v. Green*, 64 Ia., 445; *Wright v. McCormack*, 17 O. St., 86; *Stewart v. Lay*, 45 Ia., 604; *Means' Appeal*, 85 Pa. St., 75; *Bayliss v. Swift*, 40 Ia., 648; *McClaren v. Franciscus*, 43 Mo., 452; *Terry v. Anderson*, 95 U. S., 636; *Baldwin v. Canfield*, 26 Minn., 43; *Button v. Hoffman*, 61 Wis., 20; *Murphy v. Hanrahan*, 50 Wis., 485;

Bundy v. Ophir Iron Co., 38 O. St., 300; *Frank v. Drenkhahn*, 76 Mo., 508; *Alexander v. Cauldwell*, 83 N. Y., 480.)

The Missouri Pacific had no authority under its charter to build or acquire such a line, and is not liable for extras. Persons dealing with the managers of a corporation must take notice of the limitations imposed upon their authority by the act of association. (*Central Transportation Co. v. Pullman Palace Car Co.*, 139 U. S., 41; Morawetz, Corporations, sec. 591; *Ohio & M. R. Co. v. Indianapolis & C. R. Co.*, 5 Am. Law Reg., n. s., 733; *Chicago City R. Co. v. Allerton*, 18 Wall. [U. S.], 233; *Davis v. Old Colony R. Co.*, 131 Mass., 258; *Colman v. Eastern Counties R. Co.*, 10 Beav. [Eng.], 1; *Bagshaw v. Eastern Union R. Co.*, 7 Hare [Eng.], 114; *Commonwealth v. Erie C. N. E. R. Co.*, 27 Pa. St., 339; *Pacific R. Co. v. Seely*, 45 Mo., 212; *Pearce v. Madison & I. R. Co.*, 21 How. [U. S.], 442.)

The $62,500 interest for loan of bonds paid Jay Gould, September, 1887, was paid by the treasurer on a voucher approved by the president of the Construction Company. It was a voluntary payment, and a transaction in which the railway company had no interest. The finding of the lower court that the loan of bonds should be treated as a payment by the railway company to the Construction Company is unsupported by the evidence. There were then no bonds due. The bonds of the Denver Company were required to be first certified by the trustee and delivered to the Missouri Pacific before the delivery of the Missouri Pacific bonds to the Construction Company. This was a condition precedent which had not been complied with. A condition precedent must be strictly performed to entitle a party to recover. (*Oakley v. Morton*, 11 N. Y., 25; *Livesey v. Omaha Hotel Co.*, 5 Neb., 50; *Estabrook v. Omaha Hotel Co.*, 5 Neb., 76; *Boehme v. Omaha Hotel Co.*, 5 Neb., 80; *Snell v. Cheney*, 88 Ill., 258-260; *Toombs v. Consolidated Poe Mining Co.*, 15 Nev., 444; *Webb v. Smith*, 6 Col., 366;

Bishop, Contracts, sec. 1422; *Dermott v. Jones*, 2 Wall. [U. S.], 1; *Larimore v. Tyler*, 88 Mo., 667; *Moore v. Campbell*, 111 Ind., 328; *Barney v. Giles*, 120 Ill., 155; *People v. Glann*, 70 Ill., 232; *Denver, S. P. & P. R. Co. v. Riley*, 7 Col., 495; *Robinson v. Harbour*, 42 Miss., 795; *Nashville & N. W. R. Co v. Jones*, 2 Cold. [Tenn.], 574; *Cullum v. Wagstaff*, 48 Pa. St., 300.)

The item of $500,000 claimed as discount on bonds sold was properly disallowed. If there was any fraud on the part of the members of the board, they, and not the railway company, should account to the Construction Company. (*Ambler v. Choteau*, 107 U. S., 586; *United States v. Union P. R. Co.*, 98 U. S., 569.)

The court below found that plaintiff acquiesced in the sale of bonds of July 28 and September 22, 1887, and the declaration of said dividend to stockholders. By such acquiescence plaintiff is estopped to claim any relief on this item. (*Kitchen v. St. Louis, K. C. & N. R. Co.*, 69 Mo., 224; *Clark v. Saline County*, 9 Neb., 516; *Brown v. City of Atchison*, 39 Kan., 37; *Sheldon v. Eickmeyer*, 90 N. Y., 616; *Taylor v. South & N. A. R. Co.*, 4 Woods [U. S. C. C.], 575; *Twin-Lick Oil Co. v. Marbury*, 91 U. S., 592; *Allen v. Wilson*, 28 Fed. Rep., 677; *Craig v. Bradley*, 26 Mich., 354; *Dunks v. Fuller*, 32 Mich., 245; *Wood v. Carpenter*, 101 U. S., 141.)

The Construction Company was a party to the transaction and cannot complain while retaining the benefits. (*Mississippi & M. R. Co. v. Howard*, 7 Wall. [U. S.], 413; *Taylor v. South & N. A. R. Co.* 4 Woods [U. S.], 575; *Twin-Lick Oil Co. v. Marbury*, 91 U. S., 592; *Union Gold Mining Co. v. Rocky Mountain Nat. Bank*, 96 U. S., 644; *Indianapolis Rolling Mill Co. v. St. Louis, F. S. & W. R. Co.*, 120 U. S., 256; *Pneumatic Gas Co. v. Berry*, 113 U. S., 322; *Parks v. Evansville, I. & C. R. Co.* 23 Ind., 567; *Weed v. Little Falls & D. R. Co.*, 31 Minn., 154; *Bell v. Keepers*, 39 Kan., 105; *Banks v. Judah*, 8

Conn., 145; *Boston & P. R. Co. v. New York & N. E. R. Co.*, 13 R. I., 260; *Aurora Agricultural & Horticultural Society of Aurora v. Paddock*, 80 Ill., 263; *Goodin v. Evans*, 18 O. St., 150; *Terry v. Eagle Lock Co.*, 47 Conn., 141; *Craig v. Bradley*, 26 Mich., 354; *Tyrell v. Cairo & St. L. R. Co.*, 7 Mo. App., 294; *Chouteau v. Allen*, 70 Mo., 290; *Perkins v. Portland, S. & P. R. Co.* 47 Me., 591; *Wood v. Carpenter*, 101 U. S., 141.)

The Missouri Pacific Railroad Company is not bound by the acts of its own officers while they are acting as officers and members of the Construction Company. There was no competent evidence of the existence of any conspiracy. All the statements of Sage, Dillon, Hopkins, and Cross, while acting as directors of the Construction Company, were incompetent and should have been excluded. Declarations of an officer, to be binding on the corporation, must be shown to have been made while in performance of his duties as such officer. (*Moore v. Towers Hardware Co.*, 87 Ala., 206; *Union Mutual Life Ins. Co. v. Mowry*, 96 U. S., 547; *Whits v. Ashton*, 51 N. Y., 280; Bigelow, Estoppel, 437, 441; *White v. Walker*, 31 Ill., 422; *Faxton v. Faxon*, 28 Mich., 159; *Merchants Bank v. Rudolph*, 5 Neb., 536; *Kalamazoo Novelty Mfg. Co. v. McAlister*, 36 Mich., 327; *East River Bank v. Hoyt*, 41 Barb. [N. Y.], 441; *Chicago & N. W. R. Co v. James*, 22 Wis., 191; *Tripp v. Metallic Packing Co.*, 137 Mass., 502; *Alexander v. Cauldwell*, 83 N. Y., 485; Angell & Ames, Corporations, 288–391; *Ricketts v. Birmingham Street R. Co.*, 5 So. Rep. [Ala.], 353; *Danner Land & Loan Co. v. Stonewall Ins. Co.*, 77 Ala., 184; *Peek v. Detroit Novelty Works*, 29 Mich., 313; *Grayville & M. R. Co. v. Burns*, 92 Ill., 302; *Florida M. & G. R. Co. v. Varnedoe*, 7 S. E. Rep. [Ga.], 129; *Farmers Bank v. McKee*, 2 Pa. St., 318; *Hackney v. Allegheny Mutual Ins. Co.*, 4 Barr [Pa.], 185; *Custar v. Titusville Gas & Water Co.*, 63 Pa. St., 386; *First Nat. Bank of Allentown v. Hock*, 89 Pa. St., 324; *Ladd v. Couzins*,

35 Mo., 516; *McDermott v. Hanibal & St. J. R. Co.*, 73 Mo., 516; *National Bank v. Norton*, 1 Hill [N. Y.], 579; *Adriance v. Roome*, 52 Barb. [N. Y.], 399; *Hoyt v. Thompson*, 5 N. Y., 334; *Crump v. United States Mining Co.*, 7 Gratt. [Va.], 353; *Polleys v. Ocean Ins. Co.*, 14 Me., 141; *Ruby v. Abyssinian Society*, 15 Me., 306; *Winchester v. Baltimore & S. R. R. Co.*, 4 Md., 232; *Leggett v. New Jersey Mfg. & Bank Co.*, 1 N. J. Eq., 553; *Barnes v. Trenton Gas Light Co.*, 27 N. J. Eq., 33; *Titus v. Cairo & F. R. Co.*, 37 N. J. Law, 102; *First Nat. Bank of Davenport v. Gifford*, 47 Ia., 575; *Langan v. Iowa & Minnesota Construction Co.*, 49 Ia., 317; *Allemony v. Simmons*, 23 N. E. Rep. [Ind.], 768; *Manhattan Brass Co. v. Webster Glass & Queensware Co.*, 37 Mo. App., 145; *Blen v. Bear River Mining Co.*, 20 Cal., 602; *Soper v. Buffalo & R. R. Co.*, 19 Barb. [N. Y.], 310; *Columbus Co. v. Hurford*, 1 Neb., 161; *Clarke v. Omaha & S. W. R. Co.*, 5 Neb., 320; *Gregory v. Lamb*, 16 Neb., 205; *Ward v. Davidson*, 89 Mo., 445; *Spyker v. Spence*, 8 Ala., 339; *Henry v. Northern Bank of Alabama*, 63 Ala., 527; *Baldwin v. Canfield*, 26 Minn., 54; *Davis Improved Wrought Iron Wagon Wheel Co. v. Davis Wrought Iron Wagon Co.*, 20 Fed. Rep., 699; 1 Morawetz, Corporations, sec. 517; *Wardell v. Union P. R. Co.*, 4 Dill. [U. S.], 330; *Blair Town Lot & Land Co. v. Walker*, 50 Ia., 376.)

The Missouri Pacific received no consideration for the seventeen miles of road constructed over the government land. The Denver Company acquired no title to its right of way for this portion of its road, and its stock and bonds issued thereon were invalid and worthless because of its failure to comply with the act of congress of March 3, 1875, granting railroads right of way through public lands. (*Savannah, F. & W. R. Co. v. Davis*, 7 So. Rep. [Fla.], 29; *Van Wyck v. Knevals*, 106 U. S., 360; *Kansas P. R. Co. v. Dunmeyer*, 113 U. S., 629, 634; *Grinnell v. Chicago, R. I. & P. R. Co.*, 103 U. S., 739; *Easley v. Kellom*, 14 Wall.

[U. S.], 279; *United States v. Fitzgerald*, 15 Pet. [U. S.], 407.)

John L. Webster, also for appellees:

Before a stockholder in a corporation can be permitted to maintain a suit in equity in his own name for the benefit of other stockholders it must be made to appear that the plaintiff has made an earnest effort to obtain redress at the hands of the directors and shareholders of the corporation, and that such effort has been without avail. (*Hawes v. Oakland*, 104 U. S., 450; *Quincy v. Steel*, 120 U. S., 241; *Dimpfell v. Ohio & M. R. Co.*, 110 U. S., 211; *Allan v. Wilson*, 28 Fed. Rep., 677; *Dunphy v. Travelers Newspaper Association*, 146 Mass., 495; *Brewer v. Boston Theatre Co.*, 104 Mass., 378; *Boyd v. Sims*, 87 Tenn., 771.)

The petition is multifarious, in that it contains several causes of action which cannot properly be prosecuted together, and some of which cannot properly lie against the Missouri Pacific Railway Company. (*Pullman Palace Car Co. v. Missouri P. R. Co.*, 115 U. S., 596; *Atchison, T. & S. F. R. Co. v. Cochran*, 43 Kan., 225; *Button v. Hoffman*, 61 Wis., 20.)

The plaintiffs have no standing in a court of equity to seek any relief under the contract with the Fitzgerald & Mallory Construction Company, for the reason that said contract is tainted with such vice as forbids a court of equity lending its aid to the enforcement of any of its provisions, between the contracting parties, in this: that the same persons held a controlling interest in the stock of the two companies, and controlled the boards of directors of the two respective companies. (*Wardell v. Union P. R. Co.*, 103 U. S., 651; *Thomas v. Brownville, Ft. K. & P. R. Co.*, 109 U. S., 522; *Gilman, C. & S. R. Co. v. Kelly*, 77 Ill., 426; *People v. Township Board of Overyssel*, 11 Mich., 222; *Pickett v. School District*, 25 Wis., 551; *Cook v. Sherman*, 20 Fed. Rep., 167; *Ryan v. Leavenworth, A. & N.*

R. Co., 21 Kan., 365; *Pearson v. Concord R. Co.*, 13 Am. & Eng. R. Cases [N. H.], 102; *Michoud v. Girod*, 4 How. [U. S.], 503.)

The agreement by which the Fitzgerald & Mallory Construction Company agreed to accept payment for one hundred and fifty miles of the Denver, Memphis & Atlantic railway at the rate of $10,000 per mile was a compromised settlement acquiesced in by all the parties and cannot be disturbed. Courts of equity are slow to set aside compromise settlements, and will never do so unless the parties can be put *in statu quo*. (*Estes v. Reynolds*, 75 Mo., 567; *McMichael v. Kilmer*, 76 N. Y., 46; *Hammond v. Pennock*, 61 N. Y., 145; *Houghton v. Nash*, 64 Me., 477; *Van Trott v. Wiese*, 36 Wis., 439; *Jarrett v. Morton*, 44 Mo., 275.)

The doctrine of acquiescence forbids the plaintiff to recover from the Missouri Pacific Company the amount of the ten per cent discount at which the bonds were sold. (*Twin-Lick Oil Co. v. Marbury*, 91 U. S., 592; *Badger v. Badger*, 2 Wall. [U. S.], 87; *Harwood v. Air-Line R. Co.*, 17 Wall. [U. S.], 78; *Marsh v. Whitmore*, 21 Wall. [U. S.], 178; *Vigers v. Pike*, 8 C. & F. [Eng.], 650; *Wentworth v. Lloyd*, 32 Beav. [Eng.], 467; *Follansbe v. Kilbreth*, 17 Ill., 522; Beach, Corporations, sec. 887; *Sheldon Hat Blocking Co. v. Eickemeyer Hat Blocking Machine Co.*, 90 N. Y., 616; *Pneumatic Gas Co. v. Berry*, 113 U. S., 327; *Allen v. Wilson*, 28 Fed. Rep., 677; *Union Gold Mining Co. v. Rocky Mountain Nat. Bank*, 96 U. S., 644; *Kitchen v. St. Louis, K. C. & N. R. Co.*, 69 Mo., 226; *Terry v. Eagle Lock Co.*, 47 Conn., 141.)

The claim of plaintiff to recover $318,000 freight charges cannot be maintained. The previous parol understanding of the parties cannot be considered or allowed to prevail against the provisions in the written contract. (*Mills v. Miller*, 4 Neb., 441; *Hamilton v. Thrall*, 7 Neb., 219; *Delaney v. Linder*, 22 Neb., 274; *McNish v. Reynolds*, 95 Pa. St., 483; *Dodge v. Kiene*, 28 Neb., 221; *Cor-*

nell v. St. Louis, K. & A. R. Co., 25 Kan., 615; *Hopkins v. St. Louis & S. F. R. Co.*, 16 Am. & Eng. R. Cases [Kan.], 126; *Emery v. Mohler*, 69 Ill., 221; *Davis v. Symonds*, 1 Cox's Ch. [Eng.], 402; *Savercool v. Farwell*, 17 Mich., 308; *Long v. New York C. R. Co.*, 50 N. Y., 76.)

The plaintiffs, in so far as they seek to recover for items that went into the construction of the Denver, Memphis & Atlantic Railway Company, cannot recover in this action for the reason that the Denver, Memphis & Atlantic Company is not made a party defendant. (*Pullman Palace Car Co. v. Missouri P. R. Co.*, 115 U. S., 596; *Atchison, T. & S. F. R. Co. v. Davis*, 34 Kan., 209.)

RYAN, C.

1. In the district court of Lancaster county, Nebraska, John Fitzgerald, on behalf of himself and all other stockholders of the Fitzgerald & Mallory Construction Company, filed his petition against said Construction Company and the Missouri Pacific Railway Company as defendants. This petition stated that the capital stock of the aforesaid Construction Company amounted to $1,500,000, divided into shares of $100 each; that of these, at the time of bringing suit, John Fitzgerald was the owner of 1,500 shares, Jay Gould of 4,000 shares, Sidney Dillon of 1,000 shares, Morton, Bliss & Co. of 2,000 shares, Russell Sage of 2,700 shares, George J. Gould of 500 shares, and S. H. Mallory of 1,500 shares. The matters complained of in the petition, for the most part, arose out of a written contract made between the said Construction Company and the Denver, Memphis & Atlantic Railroad Company, whereby was undertaken by the Construction Company the building of the line of road of the railroad company. Following this contract there was entered into another between the aforesaid Construction Company and the Missouri Pacific Railway Company, whereby the last named company be-

came entitled to the stock and bonds of the Denver, Memphis & Atlantic Railroad Company to be issued to the Construction Company in consideration of its construction of the railroad aforesaid. The other matters which gave rise to this controversy had their origin in the construction by said Construction Company of the line of railroad of the Pueblo & State Line railroad, and the subsequent ownership of the stock and bonds of said Pueblo & State Line Railroad Company issued to the Construction Company, and by said Construction Company turned over to the Missouri Pacific Railway Company. For the stock and bonds of both railroads to be constructed as aforesaid the Missouri Pacific Railway Company agreed to give to the Construction Company first mortgage bonds of the said Missouri Pacific Railway Company equal to $11,000 per mile of the railroads completely constructed by the said Construction Company as aforesaid. The petition averred that payment in bonds was in fact only made at the rate of $10,000 per mile, though the roads had been fully constructed; that the Missouri Pacific bonds received at that rate were purchased by certain named officers of the Missouri Pacific Railway Company at a discount of ten per cent, though said bonds were worth par; that though the agreed rate at which the Missouri Pacific Railway Company was to transport material necessary for the construction of the work aforesaid was at the rate of three-fourths of a cent per ton per mile, in fact for a large amount of said material there was charged and collected from the Construction Company payment at the rate of three cents per ton per mile, which excess, the said petition alleged, was still due the said Construction Company; that said Missouri Pacific Railway Company's officers, by collecting interest which was not in fact due, and upon other unfounded pretenses, had exacted and withheld from the Construction Company large sums of money, for which said Missouri Pacific Railway Company ought to be held to account. There were other mat-

ters complained of in the petition, but for our present purpose the above described causes of action are amply sufficient.

That it might appear that the suit was brought by Mr. Fitzgerald as a stockholder of the Construction Company, he made the following averments in reference to certain of the matters above described:

"Complainant says that shortly after said contracts were made, those owning a controlling share of the stock of the Missouri Pacific Railway Company procured a controlling share of the stock of the Construction Company, notably Jay Gould, Russell Sage, George J. Gould, and Sidney Dillon; that at the date of said contracts the directors of the Construction Company were as follows: John Fitzgerald, S. H. Mallory, S. S. King, T. M. Stewart, and Edward A. Temple, who were the directors at the time the said contracts were made and entered into; that after they had obtained control of this stock they demanded the resignation of all the directors except Fitzgerald and S. H. Mallory, and on November 3, 1886, the said board of directors was changed, and in place of Messrs. King, Stewart, and Temple were elected George J. Gould, Russell Sage, and Richard Cross; that two of said directors, complainant afterward found out, were directors in the Missouri Pacific Railway Company, and that said Richard Cross was a member of a firm which were bankers for the Missouri Pacific Railway Company, and that the directors were absolutely under the control of the Missouri Pacific management; that this board of directors has not been changed, except that George J. Gould has gone out and Sidney Dillon, another Missouri Pacific director, and one of its largest stockholders, has been elected in his stead, and that now the said three directors have assumed and had the management in all important matters of said Construction Company, and have managed its affairs in the interest of the Missouri Pacific Railway Company, and have

been, as will hereinafter more clearly appear, under the control of Jay Gould, the president of the Missouri Pacific Railway Company, the largest owner of its stock, and who controls it. * * * That the payment of only $10,000 per mile in five per cent bonds for the first one hundred and fifty miles was brought about by the fraudulent acts of the Missouri Pacific, as follows: That by the contract with the Denver, Memphis & Atlantic Railroad Company the Construction Company was to build a railroad from the east line of Kansas to the west line thereof and equip the same as to be thereafter located, and properly grade the line according to the engineer's survey of the same."

Plaintiff alleged that the first one hundred and fifty miles of the line of the Denver, Memphis & Atlantic Railroad was constructed according to contract and fully completed, but that by reason of the refusal of the Missouri Pacific Railway Company to allow its engineer to accept the said one hundred and fifty miles with a view to its acceptance in accordance with the terms of the contract, the Construction Company was unable to secure its acceptance by the Missouri Pacific Railway Company, and that to secure payment for the said one hundred and fifty miles the Construction Company was compelled to accede to the proposition of Jay Gould, the president of the Missouri Pacific, and to accept $10,000 per mile, which, as plaintiff alleged, had already been fully earned. The petition alleged that the pretense upon which the president of the Missouri Pacific Railway Company founded the claim of that company to a reduction of payment per mile was, that the road was not completed, and, as plaintiff alleged, this was untrue in fact, and that the road was then fully completed according to the terms of the contract, as would have been found had the civil engineer of the Missouri Pacific inspected the road as was contemplated by the contract between the Construction Company and the Missouri Pacific Railway Company, and

that for these reasons the reduction of $1,000 per mile exacted and compelled was wholly without consideration, for which reason, as the plaintiff alleged, the Missouri Pacific Railway Company was still indebted to the Construction Company to the amount of the discount aforesaid with interest thereon.

Plaintiff further alleged that on or about the middle of February, and just before the first bonds of the Missouri Pacific Railway Company for $1,500,000 were issued and delivered to the Construction Company, the Missouri Pacific Railway Company issued $4,666,000 par value of its bonds and sold them to its president, Jay Gould, at par, so that afterwards, when the $1,500,000 were delivered to the Construction Company, the president of the Missouri Pacific Railway Company held the amount already stated and had entire control and could manipulate as he pleased the price and issue of bonds of the said Missouri Pacific Railway Company.

The petitioner further alleged that the Missouri Pacific directors, Sidney Dillon and Russell Sage, together with R. J. Cross, who acted with them, had control of the Construction Company, and that the management of the Missouri Pacific Railway Company controlled the Construction Company the same as it controlled the Missouri Pacific Company, hence it placed the bonds at once in the hands of Jay Gould and others in the management of and stockholders in the Missouri Pacific Railway Company; that on the 29th day of July, 1887, there were earned and due by the completion of the road under contract to the Construction Company, from the Missouri Pacific Railway Company, nearly $4,171,000 worth of the five per cent bonds which were undelivered (except $1,500,000 of the same); that on that date, or the day before, the Missouri Pacific management, in order to injure and violate the contract it had made with the Construction Company, and in order to bankrupt and make said Construction Com-

pany worthless, took the action shown by the record of the Construction Company, hereinafter fully set out, with reference to the discount of ten per cent on $5,000,000 par value of bonds of the Missouri Pacific Railway Company owned by the Construction Company. In reference to the meeting at which the action was had as described in the record referred to, the plaintiff alleged that he and S. H. Mallory, two of the directors and stockholders of the Construction Company, had no notice. That in accordance with said resolution the said three directors, combining with Jay Gould, proceeded to sell or dispose of said bonds, or of all said bonds that had been issued to the Construction Company, and the $2,500,000 borrowed of Jay Gould. The petition then in detail stated the manner in which the bonds of the Missouri Pacific Railway Company were disposed of on the basis of ninety cents on the dollar, the recipients being Morton, Bliss & Co., and certain named holders of stock of the Missouri Pacific Railway Company. The amount of bonds distributed is shown by this detailed statement to have reached in the aggregate the sum of $8,200,000. In the petition the plaintiff used the following language:

"Complainant further alleges that the withholding of the delivery of the bonds by the Missouri Pacific Railway Company; that the pressing of spurious accounts that did not exist; that the loaning of $2,500,000 by Gould when there was more than that due from the Missouri Pacific Railway Company, was a conspiracy in which the Missouri Pacific was the principal actor, and done for the purposes and benefit of the Missouri Pacific, and particularly for the benefit of its management, and to the great damage of the Construction Company in the sum of at least $700,000, and that this does not include $62,500 of interest that the Construction Company was forced to pay on account of the failure of the Missouri Pacific to deliver bonds due, and the unlawful acts of the directors in borrowing. Com-

plainant submits that the act of July 28, 1887, when the meeting was called and action taken without notice to either Mr. Mallory or your complainant, was null and void, and was not binding upon complainant.

"Complainant further says that without their knowledge the Missouri Pacific management, in taking stock in the Construction Company, that is, the persons who governed both companies, to-wit, Jay Gould, George J. Gould, Russell Sage, and Sidney Dillon, who owned a majority of the stock of the Missouri Pacific, and likewise a majority of the stock of the Construction Company, so arranged that they owned such stock proportionately to the amount of the stock in each company, so that any act which would injure or damage the Construction Company, and which would benefit the Missouri Pacific Company, would not in any way affect them, and that their acts were done for the purpose of bankrupting and injuring the Construction Company to its great injury. * * *

"Complainant further says that the Construction Company was the owner of three town sites and a great body of real estate along the entire line of the Denver, Memphis & Atlantic railroad and the Pueblo & State Line railroad, which it is of great interest to the Missouri Pacific to get control of, and that the acts of oppression and wrong and of fraud, and of violation of the contract, have been for the sole purpose of getting control of the same and of freezing out all stockholders except the management of the Missouri Pacific; and as a part of the scheme by which this was to be done, about the time the work was finished and the contracts completed, that it had to do for the Missouri Pacific Railway Company, the Missouri Pacific Railway directors who had control of the Construction Company had in fact peremptorily refused to raise money to pay off the contractors, laborers, and persons who had done the work, but allowed the debts of some $70,000 or $80,000 for that purpose to accumulate, know-

ing at the time that Mr. Mallory and Mr. Fitzgerald had personally obligated themselves to pay said debts, and as soon as they found out that they were personally obligated to pay the same they refused to take any steps toward paying the debts which had been contracted, and they were forced to pay the same, and that your complainant was forced to sue the Construction Company individually, and that the Missouri Pacific tried every means to defeat these just claims and put your petitioner to large expense, but that he now holds a judgment against the said Construction Company in round numbers of $52,000, with interest, amounting to $55,000; that there are other debts and other judgments against the Construction Company which the said directory in New York refuses to make any provision for, and has refused to allow any settlement to be made, and that on the last of May, 1888, they refused to allow any salaries to any officers to settle up the business of the Construction Company out of the salaries of the officers. This was done for the purpose that the heavy burden placed upon your complainant should be borne by him, with the hope of crushing and bankrupting the concern and making him pay the same and freezing him out of the Construction Company; that there are other debts, amounting in all to probably $100,000, which are unpaid and which the directory of the Construction Company, under the control of the Missouri Pacific, have refused to take any steps to pay, but that the directory, in order to bankrupt the Construction Company, have commenced spurious cases in Kansas, alleging that the company was about bankrupt, and assuming the right, and with an attorney employed by Sidney Dillon and Russell Sage, to go into court and make an accounting with the Missouri Pacific; that since the commencement of this suit the said stockholders of the Construction Company, namely, Jay Gould, George J. Gould, Sidney Dillon, and Russell Sage, who hold a majority of the stock, have sent their proxies to the attorney of the

Missouri Pacific Railway Company with instructions for him to elect another director of the Missouri Pacific, A. L. Hopkins, who is and has been an employe of the Missouri Pacific, and who has always acted with them, and is a director and large stockholder of the Missouri Pacific Company. The stockholders, by this action, and by the election of the directors of the Missouri Pacific Railway Company, making a majority of the board and controlling all the directors of it but one, have incapacitated themselves to act in any matters where the Missouri Pacific is concerned, and makes it an absolute necessity that a receiver be appointed for the purpose of paying the debts and winding up the affairs of the corporation."

The petition closed with a prayer for such a judgment in favor of the Construction Company against the Missouri Pacific Railway Company as upon an accounting it should be found entitled to, and for other equitable relief. This lengthy and perhaps tedious quotation from the petition of the plaintiff has been rendered necessary, in order that it might appear what averments have been made, with a view to accounting for the failure of the directory of the Construction Company to seek the relief demanded for said Construction Company against the Missouri Pacific Railway Company in this action; and furthermore, to show in what manner the plaintiff excuses the commencement of this suit by himself as a stockholder, for the enforcement of the aforesaid rights of the Construction Company, since neither the findings of the court nor the evidence adduced showed a demand to have been made prior to suit brought as alleged in the petition for the commencement of an action for the relief herein prayed.

2. In argument it was insisted, with great tenacity, that it was necessary in every case to show that a demand had actually been made by the stockholder upon the directors that they move for the protection of the corporation, and that their refusal be shown before an action might be com-

menced on the relation of a stockholder to enforce the rights of such corporation. Ordinarily, perhaps, this contention is correct. In the case at bar, however, it was sufficiently shown and found that the directors of the Construction Company were so immediately under the control of the management of the Missouri Pacific Railway Company, against whom suit must be brought, and had in connection with that management shown such a disposition to betray the interest of the company in favor of which they owed their best endeavors, that an application to them as directors to act was altogether unnecessary.

In section 886 of Beach on Private Corporations the following language occurs: "Where a request that the corporation itself bring the desired suit is apparently useless, it is excused, and need not be made. Accordingly, where the directors of a corporation having the authority to direct its litigation are themselves guilty of the wrong complained of, a court of equity will interfere at the instance of the stockholders without a demand and refusal upon the part of the directors to bring the suit, for it would be against the plainest principles of justice to permit the perpetrators of the wrong to conduct a litigation against themselves."

In *Barr v. New York, L. E. & W. R. Co.*, 96 N. Y., 444, Miller, J., delivering the opinion of the court, said: "We are referred by the learned counsel for the appellants to the case of *Hawes v. Oakland* (14 Otto [U. S.], 450) as authority for the doctrine that no action can be maintained by a stockholder of a corporation under the allegations contained in the complaint in the action at bar. We do not think the case cited sustains the position contended for. It is there laid down that where the board of directors of a corporation is acting in a manner destructive of the rights of the other shareholders, or where the majority of the shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation which is in violation of the rights of the other shareholders, and which can

only be restrained by the aid of a court of equity, an action to obtain relief may be maintained by a stockholder."

In Cook on Stock and Stockholders and Corporation Law, section 741, we find this statement of the rule: "There are occasions when the allegation that the stockholder has requested the directors to bring suit, and they have refused, may be omitted, since the request itself is not required. This occurs when the corporate management is under the control of the guilty parties. No request need then be made or alleged, since the guilty parties would not comply with the request, and even if they did the court would not allow them to conduct the suit against themselves." This is believed to be a correct statement of the rule. At least, in no case cited has it transpired that under allegations like those in the petition under consideration, relief has been denied. The action was, therefore, properly commenced and prosecuted by John Fitzgerald as a stockholder of the Construction Company, for the enforcement of its rights against its co-defendant, the Missouri Pacific Railway Company. The prayer of the petition was for judgment in favor of said Construction Company against its co-defendant, the Missouri Pacific Railway Company. The findings of the court and its judgment were in accordance with that prayer.

In the further consideration of this case it must be borne in mind that while John Fitzgerald, as a stockholder, has a standing to allege the grounds of indebtedness as between the Construction Company and its co-defendant, and to pray for proper relief, such relief is in no way prayed on his own behalf individually, but on behalf of the Construction Company as a corporation; as much so as if the action had been begun by authority of its directors and in its own name.

3. Incidentally it was stated in the petition that a receiver had been appointed for the Construction Company in a court of general jurisdiction in Kansas; and it also

appears from the record that another receiver was appointed for the same company in a court of general jurisdiction in Iowa. The appellees insist that, it having appeared that a receiver had been appointed, such receiver is an indispensable party in this case.

In Beach on Receivers, section 680, the following language occurs: "The general rule as to the right of a receiver to bring suits in the courts of other states than that in which he is appointed is well settled. It has been stated by Mr. Justice Wayne in a leading case to be, 'that he has no extra-territorial power of official action; none which the court appointing him can confer with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property; none which can give him, upon the principle of comity, a privilege to sue in a foreign court or another jurisdiction, as the judgment creditor himself might have done where his debtor may be amenable to the tribunal which the creditor may seek;' [citing *Booth v. Clark*, 17 How. [U. S.], 322–338]. The rule thus laid down by the supreme court of the United States has been followed by other courts with essential unanimity, and can hardly be said to be seriously questioned. [In support of this proposition there are cited many authorities.] Applying this rule, it was held that a receiver of the effects of a debtor, appointed by a court in New York, had no right to file a bill in the District of Columbia for the purpose of obtaining possession of funds due to the debtor, the appellate court affirming the action of the court below in dismissing the bill."

This rule is thus discussed in section 47 of High on Receivers: "Questions of much nicety have sometimes arisen in this country as to the extent to which the courts of one state will recognize the functions and powers of a receiver appointed in another state, and as to the right of such receivers to act beyond the territorial jurisdiction of the court appointing them. The better doctrine upon this

subject undoubtedly is, that the legal authority of a receiver is co-extensive only with the jurisdiction of the court appointing him, and that as a matter of strict right, the courts of one state are not bound to recognize a receiver appointed in a foreign state. The rule is founded upon the recognized principle that the laws of one state have no force *proprio vigore* beyond the territorial limits of such state, although, upon considerations of courtesy or comity, they may be permitted to operate in another state for the promotion of justice, when neither the latter state nor its citizens will suffer any inconvenience from the application of the foreign law."

This rule, which is laid down with so much confidence by the two text-writers from which quotations have been made, is doubtless correct.

4. The relations, rights, and duties between the Denver, Memphis & Atlantic Railroad Company and the defendants in this action are created and defined by written contracts which are in the words and figures following:

"This agreement, made this 28th day of April, 1886, by and between the Fitzgerald & Mallory Construction Company, of the state of Iowa, party of the first part, and the Denver, Memphis & Atlantic Railway Company, a corporation duly organized under the laws of the state of Kansas, party of the second part, witnesseth: Now, therefore, it is agreed between the parties hereto as follows: The party of the first part agrees to furnish all materials and money and to construct as rapidly as may be determined, from time to time, between the parties hereto a line of railroad from the east line of Kansas to the west line thereof, and equip the same as the same may be hereafter located; to properly grade the line according to the engineer's survey of the same; to furnish oak ties on curves not less than thirty-six hundred to the mile, and steel of not less than fifty-six pounds to the yard; to build such depots and stations as may be determined upon by the party of the

second part; to build all necessary sidings and turn-outs, and generally to construct the same equal to the railroads now being built in southern Kansas; and upon the completion thereof, to equip the same with, at least, one thousand dollars ($1,000) of rolling stock per mile. In consideration thereof, and in payment therefor, the party of the second part agrees to pay to the party of the first part sixteen thousand dollars ($16,000) per mile of its full paid capital stock for every mile of completed road to be constructed, and sixteen thousand dollars ($16,000) per mile in its first mortgage bonds per mile of single track of road, and said bonds to be of the denomination of one thousand dollars ($1,000) each, or of such denomination as may be agreed upon by the parties hereto, and bearing interest at the rate of —— per cent per annum, payable in the city of New York and state of New York, where the principal is also payable. Said bonds to be issued for the construction of said road under this contract shall be dated January 1, 1886, and run thirty years from date, and to be secured by first deed of even date herewith, duly executed by the party of the second part to the —— Company, therein named, of the aforesaid line and branches thereof. The said Denver, Memphis & Atlantic Railway Company hereby agrees to issue and deliver to said party of the first part the said stock and bonds at the rate hereinbefore set forth, at such times and in such settlements as the said Fitzgerald & Mallory Construction Company require in order to obtain the money necessary to perform this contract; and also to deliver to said first party all municipal and county bonds voted and to be voted in aid of said railroad, and all donations thereto, as soon as earned and delivered to said second party; and said Fitzgerald & Mallory Construction Company covenants and agrees to proceed forthwith in the execution of this agreement and to construct said line as rapidly as possible according to the surveys now made or to be hereafter determined upon; and the said party of the second part

agrees to procure, or cause to be procured, the right of way of said line of railroads at the proper time in advance of the work so as not to impede or delay construction, which right of way shall be paid for by said Construction Company.

"In witness whereof, the said Fitzgerald & Mallory Construction Company, by their president, has hereto set their hand and seal, and said party of the second part has caused its corporate name to be signed by its president and its corporate seal to be attached by its secretary the day and year first above named.

"FITZGERALD & MALLORY CONSTRUCTION COMPANY,
"By its President, S. H. MALLORY.
"THE DENVER, MEMPHIS & ATLANTIC RAILWAY,
"By J. J. BURNS, *Its President.*
"Attest:
"CHAS. C. BLACK, *Secretary.*

"Memorandum of an agreement, made on this 4th day of May, 1886, between the Missouri Pacific Railway Company, party of the first part, and the Fitzgerald and Mallory Construction Company, party of the second part, witnesseth: Whereas, the party of the second part has made a contract with the Denver, Memphis & Atlantic Railway Company to construct its road from Chetopa across the state of Kansas, on a line heretofore agreed upon (a copy of which is hereto attached and made a part of this agreement); and, whereas, the Missouri Pacific Railway Company is desirous of obtaining control of the said line of road, it is agreed as follows:

"First—The party of the second part will sell to the party of the first part all of the securities which the said party of the second part is to receive under the terms of the contract dated April 28, 1886, between the said Fitzgerald & Mallory Construction Company and the Denver, Memphis & Atlantic Railway Company, for the construction of its road, and said securities amounting to sixteen

thousand dollars ($16,000) per mile of stock, and sixteen thousand dollars ($16,000) per mile of first mortgage bonds, less the amount of stock that has to be given for municipal and county aid (estimated at about thirty-five hundred dollars ($3500) per mile), and receive in full payment for the same twelve thousand dollars ($12,000) per mile of Missouri Pacific Railway five per cent bonds, to be secured by a deposit of the securities above referred to with a trustee.

"Second—The party of the second part further agrees that the said railroad to be constructed, and heretofore described, shall be of standard gauge, of not less than fifty-six pounds (56) steel rails, twenty-six hundred (2,600) ties to the mile, with stations not more than eight (8) miles apart, * * * and shall be equal in its general character to the roads now being constructed by the Missouri Pacific Railway Company in the state of Kansas, all to be subject to the approval of the chief engineer of the party of the first part.

"In witness whereof, the Missouri Pacific Railway Company and the said Fitzgerald & Mallory Construction Company, parties hereto, have executed this agreement the day and year first above written.

"THE MISSOURI PACIFIC RAILWAY COMPANY,
"[SEAL.] By JAY GOULD, *President.*
"Attest:
"GUY PHILLIPS, *Second Ass't Secretary.*
"THE FITZGERALD & MALLORY CONSTRUCTION COMPANY,
"By S. H. MALLORY, *President.*"

"ADDENDA TO CONTRACT.

"It is further agreed that the party of the first part shall make payments for the sixteen thousand (16,000) dollars per mile of first mortgage bonds and sixteen thousand (16,000) dollars per mile of stock, referred to in the first clause of this contract, as follows: On the completion

of each ten miles of road according to the contract from not more than two points connecting with the road of the party of the first part, and on receipt of the sixteen thousand (16,000) dollars per mile of first mortgage bonds and sixteen thousand (16,000) dollars per mile of stock appertaining thereto (less the amount paid out for aid), the party of the first part will deliver to the party of the second part twelve thousand (12,000) dollars per mile of its five per cent bonds according to the above agreement.

"The party of the first part also agrees that all men and materials used by the party of the second part in the construction of the said railroad shall be transported at actual cost over such portions of the road as may be turned over to the party of the first part during the construction of the same.

"THE MISSOURI PACIFIC RAILWAY CO.,
"By JAY GOULD, *Pres't.*
"FITZGERALD & MALLORY CONSTRUCTION CO.,
"By S. H. MALLORY, *Pres't.*"

The Denver, Memphis & Atlantic Railway Company was originally incorporated for the purpose of constructing a railroad from Denver to Memphis, through the state of Kansas. Its authoritized capital stock was $10,000,000, but by its articles of incorporation the value of its property was estimated at only $10,000. This railroad company was distinguished not so much for its possessions as for its capacity, as readily appears from the figures just given, as well as from the additional consideration that in the future it could exercise the right of eminent domain, and in exchange for its stock receive municipal aid along its proposed line through the state of Kansas. It is possibly true that the laws of the state last named should not have permitted this exchange, and yet it is not within the province of this court to pass upon the wisdom of the statutes of another state. The municipalities whose bonds were voted to aid this enterprise were fully apprised by

the articles of incorporation of the proposed donee that its authorized capital was $10,000,000, while it was patent that its property was of the value of but $10,000. Under these circumstances, if the Kansas municipalities coveted an interest in this authorized capital stock, and the laws of that state sanctioned the acquisition of a part of such stock by an exchange therefor of municipal bonds, this court cannot interpose a veto to such transactions, no matter upon what scale they may have been carried on. We have neither jurisdiction to question the law, nor do the municipalities concerned ask us so to do. With more courage than judgment, perhaps, Messrs. Fitzgerald & Mallory attempted to secure control of the leverage offered by the railroad company to obtain bonds of the municipalities of the state of Kansas lying along the route of the railroad, but later they found their means inadequate to this undertaking. Under stress of financial difficulties, Messrs. Fitzgerald & Mallory applied to the managing officers of the Missouri Pacific Railway Company for assistance. As a condition precedent to the Missouri Pacific Railway Company's compliance, its officers required that a construction company should take the place of Messrs. Fitzgerald & Mallory as contractors. The memorandum of agreement of May 4, 1886, was thereupon entered into between the substituted construction company and the Missouri Pacific Railway Company. A significant part of the preambles with which this contract began was the recitation of the desire of the Missouri Pacific Railway Company to obtain control of the line of railroad to be constructed. As the construction of the railroad line progressed, stock of the Denver, Memphis & Atlantic Railway Company at the rate of $16,000 per mile, less $3,500 per mile intended to be exchanged for municipal aid bonds, and $16,000 per mile of its bonds secured by first mortgage on its line, were issued and delivered to the Construction Company in payment for such construction. Exclusive of $1,000 per mile for

the purchase of rolling stock equipment (which provision was afterwards abandoned), the above contract between the Fitzgerald & Mallory Construction Company and the Missouri Pacific Railway Company provided that full payment should be made to the Construction Company in the Missouri Pacific Railway Company's bonds, bearing five per cent annual interest, issued at the rate of $11,000 per mile of constructed railroad. It is possible that at one time the municipalities which issued their bonds might have been relieved in a proper forum as against the inadequacy between the stock issued to them and the aid bonds given in exchange for them. These dealings, at most, authorized the election to treat the bonds as voidable, not necessarily void, provided the right of election was exercised in due time and before other rights had accrued. In so far as our action should be governed by considerations of public policy, it seems quite clear that the inadequacy referred to should not be given great prominence, not only on account of what has already been said, but because of the fact that on the 1st day of January, 1887, the Missouri Pacific Railway Company executed a trust mortgage to secure its negotiable five per cent bonds to be issued in the aggregate not in excess of fifteen million dollars, and as part of "the underlying securities" for the payment of these bonds, there were deposited with the trustee named in the mortgage, the bonds of the Denver, Memphis & Atlantic Railway Company, and other companies whose lines of railroad were constructed under much the same contracts as those above set out, made between the same parties. After the lapse of several years, it is fair to assume that these negotiable bonds have passed into the hands of innocent purchasers for value, whose rights should not unnecessarily be ignored. It seems to the writer hereof that an inquiry into the original motives and conduct of the parties not involved in this litigation is unnecessary, and in view of the rights of the holders of the bonds of

the Missouri Pacific Railway Company such an inquiry might be very mischievous. There are no pleadings in the record upon which questions of public policy, as affecting the status of the parties to this controversy, are presented. The building of railroad lines were legitimate enterprises—possibly there may have been too great a margin for the work undertaken with its incidental risks. The roads have been built and no one questions that this is so. To us are presented simply questions as to the rights of the parties to the proceeds earned under contracts which in their inception at most were not void, but voidable only. No one concerned elects to treat them as void; we should hesitate long before becoming the moving party in that direction.

Due issues were made up as to all claims asserted by each party, upon the trial of which the district court made special findings as to each subject of controversy, and rendered a judgment, from which both parties appeal—the Construction Company by John Fitzgerald, however, having first completed its appeal, has hereinbefore been styled the appellant. The pleadings in this case are very voluminous, and as the gist of the controversy is for all practicable purposes sufficiently set out in the findings of the district court, they, rather than the averments of the pleadings, will be hereinafter resorted to for a statement of the matters of difference between the parties litigant.

5. In a review of the issues joined it is evident that the liability of the Missouri Pacific Railway Company for such acts as were charged against its officers in the discharge of their duties, as such, should first receive attention, since it is insisted by defendants that these acts cannot be imputable to the railway company itself.

The following apt language is employed by Harlan, J., in the opinion of the supreme court of the United States, in *Denver & R. G. R. Co. v. Harris*, 122 U. S., on page 607: "In *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. [U. S.], 202, this court held that a railroad corporation was

responsible for the publication by them of a libel in which the capacity and skill of a mechanic and builder of depots, bridges, station houses, and other structures for railroad companies were falsely and maliciously disparaged and undervalued. The publication in that case consisted in the preservation in the permanent form of a book for distribution among the persons belonging to the corporation, of a report made by a committee of the company's board of directors, in relation to the administration and dealings of the plaintiff as a superintendent of the road. The court, upon a full review of the authorities, held it to be the result of the cases 'that for acts done by the agents of a corporation, either *in contractu* or *in delicto*, in the course of its business and of their employment, the corporation is responsible as an individual is responsible under similar circumstances.' In *State v. Morris & E. R. Co.*, 23 N. J. Law, 369, it was well said that if the corporation has itself no hands with which to strike, it may employ the hands of others; and it is now perfectly well settled, contrary to the ancient authorities, that a corporation is liable *civiliter* for all torts committed by its servants or agents by authority of the corporation, express or implied. * * * The result of the modern cases is that a corporation is liable *civiliter* for torts committed by its servants or agents precisely as a natural person, and that it is liable as a natural person for the acts of its agents done by its authority, express or implied, though there be neither a written appointment under seal nor a vote of the corporation constituting the agency or authorizing the act. (See, also, *Salt Lake City v. Hollister*, 118 U. S., 256-260; *New Jersey Steamboat Co. v. Brockett*, 121 U. S., 637; *First Nat. Bank of Carlisle, Pennsylvania, v. Graham*, 100 U. S., 699-702.)"

In *Booth v. Farmers & Merchants Bank*, 50 N. Y., on page 400 *et seq.*, is found the following language: "When an officer does an act which is within the general scope of his powers, although circumstances may exist which render

the particular act a violation of his duty, the corporation is nevertheless bound by his act as to persons dealing in ignorance of those circumstances, and is responsible to innocent third parties who have sustained damages occasioned by such act. And the liability of the corporation for the consequences of acts of its officers done within the scope of their general powers is not affected by the fact that the act which the officer has assumed to do is one which the corporation itself could not rightfully do. A corporation may do wrong through its agents as well as a private individual. (*New York & N. H. R. Co. v. Schuyler*, 34 N. Y., 30; *Farmers & Mechanics Bank of Kent County, Maryland, v. Butchers & Drovers Bank*, 16 N. Y., 125; *Bissell v. Michigan S. & N. I. R. Co.'s*, 22 N. Y., 258; *Bank of Genesee v. Patchin Bank*, 13 N. Y., 309.)"

In *Hussey v. King*, 3 S. E. Rep. [N. Car.], on page 926, Davis, J., delivering the opinion of the court, said: "It was long thought that as the corporation had no mouth with which to utter slander, or hand with which to write libels or commit batteries, or mind to suggest malicious prosecutions or other wrongs; as it was an artificial person and could speak and act only through and by the agency of others, it was therefore not liable for any torts except such as resulted from some act of commission or omission of its agents or servants while acting within the scope of granted powers, or wrongfully omitting or neglecting some duty imposed by its charter or by law; and, consequently, it was necessary to allege that the act committed was while acting within the scope and power of the company; or that the act omitted was required to be performed. Whether it was wise to depart from this rule that exempted corporations from liability for the acts of agents in cases where the character of the act depended upon motive or intent, seems no longer an open question. The old idea that because a corporation had no 'soul' it could not commit torts or be the subject of punishment for tortious acts, may now be

regarded as obsolete. The rights, the powers, and the duties of corporate bodies have been so enlarged in modern times, and these 'artificial persons' have become so numerous and enter so largely into the every-day transactions of life, that it has become the policy of the law to subject them, as far as practicable, to the same civil liability for wrongful acts as attach to natural persons, and this liability is not restricted to acts committed within the scope of granted powers, but a corporation may be liable to an action 'for false imprisonment, malicious prosecution, and libel.' (Pierce, Railroads, 273.)"

In *Miller v. Burlington & M. R. R. Co.*, 8 Neb., 219, it was said that a corporation is liable the same as a natural person for the tortious acts of its servants and agents in the course of their employment, but to make a corporation liable for such acts, they must be connected with the transaction of the business for which the company was incorporated, for the officers themselves are the mere agents of the corporation, and their powers are necessarily limited within the scope of the purposes of the corporation. The stockholders, however, by electing officers, assume the risk of the faithful or unfaithful management of the corporation, and cases may arise when if one of two innocent persons has to suffer, the one who has created the power and selected the persons to enforce it must sustain the loss.

The citation of other authorities upon a point which may now be considered settled would be a work of supererogation, in no way rendering more clear the principles established by the consensus of the above adjudicated cases. A fuller and more elaborate consideration of the subject could easily be had by mere quotation from the language of section 698 of Cook on Stock and Stockholders and Corporation Law, but the space thereby occupied would be needlessly so taken up, for the result reached in each instance is the same as that enunciated in the opinions from which quotations have already been made.

6. In *Worthington v. Worthington*, 32 Neb., 338, 339, NORVAL, J., said: "It is well settled in this state that the finding of the district court on conflicting evidence is conclusive on appeal to the supreme court, unless there is a clear preponderance of evidence against the finding. (*Brown v. Hurst*, 3 Neb., 353; *Helling v. New England Mortgage Security Co.*, 10 Neb., 611; *Courtnay v. Price*, 12 Neb., 188; *Jennings v. Simpson*, 12 Neb., 558; *Aultman v. Patterson*, 14 Neb., 57; *McLaughlin v. Sandusky*, 17 Neb., 110.)"

A patient and careful examination of all the testimony adduced upon the trial before Judge Tibbets serves to justify the confidence in the trial judge which this rule implies, as well as to place us under great obligations for his thorough analysis of the evidence adduced, and his comprehensive findings of the facts thereby established. No other apology or explanation is deemed necessary to account for the free use which shall be made of the findings of fact thus made by the trial court. Referring to the contracts, which have already been copied, the twelfth finding of fact was as follows:

"(12.) That said agreements were, by all the parties thereto, subsequently modified and changed to the effect that the furnishing of the equipment for the road to be constructed was waived by the railroad company, and the amount to be received by the Fitzgerald & Mallory Construction Company from the Missouri Pacific Railway Company was reduced to eleven thousand ($11,000) dollars per mile, to be paid in Missouri Pacific five per cent bonds."

Immediately succeeding this are the following findings of fact:

"(13.) That under the said contract the said Fitzgerald & Mallory Construction Company constructed in the state of Kansas four hundred and ten and forty-eight hundredths miles of railroad, extending from Chetopa, in eastern Kansas, west to Larned, a distance of two hundred and seventy-two and two-hundredths miles, and from McCracken west

to the state line, a distance of one hundred and thirty-eight and forty-six hundredths miles; that the said road was constructed by the said Construction Company in every respect in compliance with the terms of said contracts.

"(14.) On the 15th day of June, 1886, the said Construction Company had ten miles of said road completed and ready for delivery to the Missouri Pacific Railway Company; that on the 15th day of July, 1886, the Construction Company had thirty miles of said road completed and ready for such delivery; that on the 14th day of February, 1887, the Construction Company had one hundred and fifty miles of said railroad completed and ready for delivery, with the exception of some finishing work upon the road-bed, bridges, and cattle guards; that on August 1, 1887, said road was entirely completed.

"(15.) That said railroad was turned over and delivered to the defendant, the Missouri Pacific Railway Company, by the defendant, the Fitzgerald & Mallory Construction [Company], as follows: One hundred and fifty miles on the 14th day of February, 1887; twenty-nine and eighty-three hundredths miles on the 11th day of August, 1887; ninety-three and fifty-seven hundredths miles on the 11th day of August, 1887; one hundred and twenty-four and forty-two hundredths miles on the 1st day of October, 1887; twelve and eighty-two hundredths miles on the 15th day of December, 1887.

"(16.) That for the purpose of extending the line of railroad heretofore recited in these findings to be built from the western line of the state of Kansas to the city of Pueblo in the state of Colorado, the said Fitzgerald & Mallory Construction Company and the said the Missouri Pacific Railway Company on the —— day of ——, 1887, caused to be incorporated, under the laws of the state of Colorado, the Pueblo and State Line Railroad Company, with power to construct and operate a line of railway from the western line of Kansas to said city of Pueblo.

"(17.) That on the 16th day of August, 1887, the Fitzgerald & Mallory Construction Company entered into a contract with the Pueblo & State Line Railroad Company, wherein the said Construction Company agreed to furnish all material and construct a railway commencing at or near the city of Pueblo, state of Colorado, thence running eastward to the state line of Kansas, and to furnish and pay for the right of way for the said railway, the work and construction of said railway to be done in accordance with the terms of said contract, and to the satisfaction of the resident engineer of the Missouri Pacific Railway Company, and subject to his approval; buildings and yard tracks to be according to plan to be furnished by the Missouri Pacific Railway Company. In consideration whereof the Pueblo & State Line Railroad Company agreed to turn over and pay to the said Construction Company fifteen thousand ($15,000) dollars of first mortgage bonds and ten thousand ($10,000) dollars stock for each mile of road so constructed, the same being all the bonds and all of the stock of said railroad.

"(18.) That on the 16th day of August, 1887, the Fitzgerald & Mallory Construction Company and the Missouri Pacific Railway Company entered into a written contract, wherein it was recited that the said Construction Company had, on the 16th day of August, 1887, entered into a contract with the Pueblo & State Line Railroad Company for the construction of a line of railroad from Pueblo to the state line of Kansas, and wherein it was recited that the contract with the Pueblo & State Line Railroad Company was annexed and made a part thereof. That therein it was agreed that the Fitzgerald & Mallory Construction Company should sell to the Missouri Pacific Railway Company all of the stock and bonds of the said Pueblo & State Line Railroad Company that should be received from the construction of the road, to-wit, fifteen thousand ($15,000) dollars in bonds, and ten thousand ($10,000)

dollars of stock for each mile of completed road, and therein it was agreed that the said the Missouri Pacific Railway company should pay to the said Fitzgerald & Mallory Construction Company for said bonds and stock the sum of twelve thousand ($12,000) dollars per mile of completed road, payable in the bonds of the Missouri Pacific Railway Company, drawing interest at the rate of five per cent per annum. And in said contract it was further agreed that the Missouri Pacific Railway Company should furnish and deliver to the said Construction Company at the west line of the state of Kansas all the ties, rails, and fastenings to be used by the Construction Company in the construction of the said road, at a certain price, in said contract specified, and if delivered at any other place than above named the additional amount of three-fourths of a cent as freight per ton per mile to be charged. It was further provided in said contract that the said Missouri Pacific Railway Company should transport over its system of railway such material and men as should be required by the Construction Company in the construction of the said road at the rate of three-quarters of a cent per ton per mile for materials, and one cent per mile for men. And to transport over any portion of the said State Line & Pueblo railroad that may be operated by the Missouri Pacific Railway Company materials and men used and required as aforesaid at the actual cost of train service.

"(19.) That under the said contracts so made for the construction of the Pueblo & State Line railroad the Fitzgerald & Mallory Construction Company constructed and completed a line of railway commencing at the terminus of the Denver, Memphis & Atlantic railway on the state line between Kansas & Colorado, running thence in a westerly direction to the city of Pueblo, in the state of Colorado, a distance of one hundred and fifty-one and thirty-four hundredth miles, and on the 15th day of December, 1887, delivered said road and the possession and

control of the same to the defendant the Missouri Pacific Railway Company. That said road was constructed in every respect in accordance with the terms and conditions of the said contracts.

"(20.) That prior to the 3d day of May, 1887, the Fitzgerald & Mallory Construction Company, under contracts in all respects similar to the contracts in connection with the construction of the said Denver, Memphis & Atlantic railway, constructed a line of railway known as the Kansas & Southwestern railway, extending from Iuka in the state of Kansas, in a northeasterly direction, to a junction with the Denver, Memphis & Atlantic railway, a distance of twenty-four and eighty-four hundredths miles, and on the 3d day of May, 1887, the said Construction Company delivered said road so constructed, together with the possession and the control of the same, to the defendant the Missouri Pacific Railway Company; that the said road was constructed in all respects in accordance with the terms and conditions of the said contracts.

"(21.) That prior to the 11th day of August, 1887, the Fitzgerald & Mallory Construction Company, under a contract similar to that named in finding number 20, constructed a line of road known as the Winfield, Texas & Gulf, running from Winfield, in the state of Kansas, south a distance of two miles, and on the 11th day of August, 1887, the said Construction Company delivered the said road so constructed and the possession and control of the same to the defendant the Missouri Pacific Railway Company; that said road was constructed in all respects in accordance with the contract.

"(22.) That each and all of the several railroads, and the parts of the same constructed by the Fitzgerald & Mallory Construction Company and delivered to the Missouri Pacific Railway Company, as heretofore recited in these findings, have, at all times, since the said several deliveries,

been in the possession and under the control of the defendant the Missouri Pacific Railway Company, and have been operated by the said railway company.

"(23.) That by virtue of and through the above named arrangements and contracts the Fitzgerald & Mallory Construction Company assumed the relation of contractor with the Missouri Pacific Railway Company to build the several lines of railroad so named above in the findings, and a direct contract relation in reference to the building of said railroads was established between the two companies.

"(24.) The court finds that each and all of the above named contracts for the construction of the several roads named were in nowise unconscionable contracts, but were fair and reasonable contracts in which the interest of all the parties to the several contracts were properly protected, and at the time of the execution of the said contracts the officers of the Fitzgerald & Mallory Construction Company who executed said contracts on behalf of the Construction Company acted in good faith in the interests of the Construction Company, and the officers of the Missouri Pacific Railway Company who executed said contracts on behalf of said railway company acted in good faith in the interest of the said railway company.

"(25.) The court finds that from the 28th day of April, 1886, to the 6th day of April, 1887, the officers and directors of the Denver, Memphis & Atlantic Railway Company were the friends and favorable to the interest of the Fitzgerald & Mallory Construction Company, and of the plaintiff herein, and were under the pay of said Construction Company; that since said 6th day of April, 1887, the organization of the said Denver, Memphis & Atlantic Railway Company has been under the control of the Missouri Pacific Railway Company, and its officers and directors have acted in the interests and under the direction of the said Missouri Pacific Railway Company.

"(26.) The court further finds that the defendant the

Missouri Pacific Railway Company, in connection with the several contracts above referred to, assumed the right to prepare the bonds of the Denver, Memphis & Atlantic Railway Company, and the Pueblo & State Line Railroad Company, and to prepare the mortgages that were to secure the said bonds, and to retain the said bonds, both before and after execution, in its possession, and under its control; that said bonds were never in the possession or under the control of the Denver, Memphis & Atlantic Railway Company, or the Fitzgerald & Mallory Construction Company; that on the 22d to the 28th days of October, 1886, the president and secretary of the Denver, Memphis & Atlantic Railway Company executed three million two hundred thousand ($3,200,000) dollars of said bonds in the office of the defendant railway company in New York city.

"(27.) On the 22d day of February, 1887, the board of directors of the Denver, Memphis & Atlantic Railway Company authorized the trustee to certify to bonds covering one hundred and fifty miles of completed road; on the 23d day of May, 1887, the board of directors authorized the certification of bonds covering thirty additional miles of road; that on the 18th day of July, 1887, the said board further authorized the certification of bonds covering two hundred miles of additional road; that on the 1st day of October, 1887, the said board authorized the further certification of bonds covering thirty and seven-tenths miles of additional road.

"(28.) The court further finds that at all times from the date of the organization of the Fitzgerald & Mallory Construction Company up to April 17, 1889, the plaintiff herein, John Fitzgerald, was a director of said Construction Company; that the directors of said company were five in number; that prior to November 3, 1886, a majority of said directors were friendly to the interest of the plaintiff; that since said 3d day of November, 1886, three of said five directors, together with the treasurer, have been

directly or indirectly interested in the defendant railway company; have acted in the interest of said railway company in all matters concerning the management of said Construction Company, where the interest of the railway company and the Construction Company have come in conflict.

"(29.) The Missouri Pacific Railway Company failed to act in the authorization of the issuance of its bonds to pay over as provided in its contracts with the Construction Company until December 10, 1886, when, by its board of directors, it authorized the issuance of five million ($5,000,000) dollars of Missouri Pacific five per cent trust bonds, and said bonds were issued in pursuance of said authorization under date of January 1, 1887.

"(30.) The court finds that under the contract for the construction of the Denver, Memphis & Atlantic railway, the Kansas Southwestern railway, and the Pueblo & State Line railroad, the defendant the Missouri Pacific Railway Company delivered to the Fitzgerald & Mallory Construction Company, Missouri Pacific trust bonds as follows:

"February 14, 1887	$1,500,000
"July 28, 1887, (through Jay Gould)	2,500,000
"September 22, 1887	2,500,000
"Making a total of	$6,500,000

"That the said bonds so delivered had never been bought and sold upon the market and had not acquired a fixed market value, but were reasonably worth par at the several times of said several deliveries; that the said bonds were secured by the deposit with the trustee of the first mortgage bond of said different railway companies, including the Denver, Memphis & Atlantic and the Kansas and Southwestern Railway Companies, and were not secured by the deposit of the stock of any companies whatever.

"(31). That under said contracts there would be due and payable from the Missouri Pacific Railway Company to

the Fitzgerald & Mallory Construction Company, in Missouri Pacific five per cent bonds, for the construction of the Denver, Memphis & Atlantic railway, the Pueblo & State Line railroad, and the Kansas & Southwestern railroad, the sum of six million six hundred and four thousand six hundred ($6,604,600) dollars.

"(32.) That on the 7th day of February, 1887, the Missouri Pacific Railway Company and the Fitzgerald & Mallory Construction Company modified and changed the contract for the construction of the Denver, Memphis & Atlantic railway to the effect that one hundred and fifty (150) miles of the road then completed should be paid for by the said railway company at the rate of ten thousand ($10,000) dollars per mile, instead of at the rate of eleven thousand ($11,000) per mile, the same to be paid in Missouri Pacific five per cent bonds, as above provided."

The fortieth, forty-first, forty-second, forty-third, and forty-fourth findings were as follows:

"(40.) The court further finds that on the 28th day of July, 1887, at a meeting of the board of directors of the Fitzgerald & Mallory Construction Company held at New York city, where were present Russell Sage, R. I. Cross, and Sidney Dillon, and absent S. H. Mallory and the plaintiff herein, it was resolved to sell four million ($4,000,000) dollars Missouri Pacific railway five per cent bonds to the stockholders of the said Construction Company at ninety per cent of face value, and Jay Gould, the president of the Missouri Pacific Railway Company, furnished two million five hundred thousand ($2,500,000) dollars in bonds to add to one million five hundred thousand dollars ($1,500,000) bonds then possessed by the Construction Company, for the purpose of completing the required amount to make the sale; that under said resolution all the stockholders, with the exception of John Fitzgerald and S. H. Mallory, took their *pro rata* share of said bonds and in the amount of three million two hundred

thousand ($3,200,000) dollars; that when informed of said transaction the said Fitzgerald and Mallory protested against the same.

"(41.) That on said July 28, 1887, the full amount of said two million five hundred thousand ($2,500,000) dollars, additional bonds furnished by Jay Gould, was due the Construction Company from the defendant the Missouri Pacific Railway Company, and the same should be treated as a payment by the said railway company to the Construction Company and the said railway company should pay all charges made by the said Gould on account of said advancement.

"(42.) That on the 23d day of September, 1887, R. I. Cross, the treasurer of the Construction Company, paid from the funds of the said company the sum of sixty-two thousand five hundred ($62,500) dollars to Jay Gould on account of interest on the two million five hundred thousand ($2,500,000) dollars bonds delivered to the Construction Company July 28, 1887; that the said sixty-two thousand five hundred ($62,500) dollars, so paid, is a proper charge against the Missouri Pacific Railway Company and in favor of the Fitzgerald & Mallory Construction Company in this action, and the same is allowed.

"(43.) That on the 22d day of September, 1887, at a meeting of the directors of the Fitzgerald & Mallory Construction Company, held in New York city, where all of the directors were present, a sale of bonds in the amount of one million eight hundred thousand ($1,800,000) dollars (not) already sold (was) ordered made to the New York stockholders of the Fitzgerald & Mallory Construction Company *pro rata*, said sale being made at ninety per cent of par value; that it was further ordered at said meeting of directors that one million five hundred thousand ($1,500,000) dollars of Missouri Pacific bonds be distributed among the stockholders of the Construction Company as a declared dividend upon stock.

"(44.) That the plaintiff herein acquiesced in the sale of bonds of July 28 and September 22, and the declaration of said dividend to stockholders, and acquiesced in the reduction of one thousand dollars ($1,000) per mile on one hundred and fifty (150) miles of road made by the meeting of the board of directors February 7, 1887."

7. Before consideration in detail of the several items involved, the effect of the acquiescence by stockholders of the Construction Company in acts detrimental to that company as creating an estoppel should receive consideration. The last quoted finding of fact (forty-fourth) led the trial judge to the conclusion that as to neither item therein referred to could relief be granted. Whether or not this result followed is the question now to be considered. It will be borne in mind that S. H. Mallory and John Fitzgerald owned one-fifth of the capital stock of the Fitzgerald & Mallory Construction Company, and the findings of the court are, therefore, that by the acquiescence by one-fifth in amount of the stockholders in wrongs which were found to have been perpetrated upon the Construction Company, the Construction Company was barred of its right to relief. The plaintiff alleged that there was due from the Construction Company something like $100,000 of indebtedness, for which there was available nothing but the amounts due said Construction Company from its co-defendant, the Missouri Pacific Railway Company. The fourteenth paragraph of the answer of the defendant specifically alleged the existence of one debt due from the Construction Company of the sum of $2,500; of another of $52,000 in amount, and of a third of $5,148.48, the last two of which were in judgment, besides in general terms asserting that there were other debts equaling in the aggregate the sum of about $50,000, in respect of which the Missouri Pacific Railway Company had been duly garnished as a supposed debtor of said Construction Company. It is difficult to conceive why the acquiescence of

stockholders in the wrong found by the court, whereby its ability to pay its debts was greatly impaired, should preclude the right of the Construction Company to relief as against such wrong. The trial court found that aside from the acquiescence of Fitzgerald and Mallory there had been the active commission of the wrong by the holders of the other four-fifths of the Construction Company's stock. Of what greater avail should be the mere acquiescence of the other fifth?

In *Quincy v. Steel*, 120 U. S., 244, it was said that a suit brought by a stockholder for the benefit of the corporation was in fact a suit for the corporation itself. That the acquiescence of stockholders, merely as such, could be held to imply more than by an affirmative act such stockholder, as such, could perform, can scarcely be seriously argued.

In the brief of the defendants is found the following quotation from the language of Field, J., in *Humphreys v. McKissock*, 140 U. S., 311, 312: "The property of a corporation is not subject to the control of individual members, whether acting separately or jointly. They can neither incumber nor transfer that property, nor authorize others to do so. The corporation—the artificial being created—holds the property, and alone can mortgage or transfer it; and the corporation acts only through its officers, subject to the conditions prescribed by law." In this brief it is also stated that Justice Field, in the case cited, approved the language of Chief Justice Shaw in *Smith v. Hurd*, 12 Met. [Mass.], 385, where he says: "The individual members of the corporation, whether they should all join or each act severally, have no right or power to intermeddle with the property or concerns of the bank, or call any officer, agent, or servant to account, or discharge them from any liability. Should all the stockholders join in a power of attorney to any one, he could not take possession of any real or personal estate, any security or chose

in action: could not collect a debt or discharge a claim, or release damage arising from any default, simply because they are not the legal owners of the property, and damage done to such property is not an injury to them. Their rights and their powers are limited and well defined." If all the stockholders, by joining in a power of attorney for that purpose, could not release damage arising from any default, upon what principle could such release be inferred from the mere acquiescence in such release by one-fifth in amount of the stockholders? Most manifestly such an anomaly cannot be tolerated, much less enforced by judicial tribunals. In argument it is tenaciously contended, however, that the long acquiescence of the Construction Company effected the same result. There was no finding of such acquiescence by the court. Indeed, there could not be, consistently with the finding that the Construction Company was dominated in all things by the officers of the Missouri Pacific Railway Company.

8. Having divested the inquiry of this matter of acquiescence, let us consider the history of these transactions; and first,—of the reduction in compensation from $11,000 per mile to $10,000. In the thirty-second finding, above quoted, the trial court found established as a fact, by the evidence, that on February 7, 1887, the Missouri Pacific Railway Company and the Fitzgerald & Mallory Construction Company modified and changed the contract for the construction of the Denver, Memphis & Atlantic railway so that 150 miles of the road, when completed, should be paid for by the said railway company at the rate of $10,000 instead of at the rate of $11,000 per mile, the same to be paid in Missouri Pacific five per cent bonds. This finding of the completed condition of 150 miles of the line of railroad of the Denver, Memphis & Atlantic Railway Company on February 7, 1887, is somewhat modified by the concluding part of the fourteenth finding, which was: "That on the 14th day of February, 1887, the Construction Company had

one hundred and fifty miles of said railroad completed and ready for delivery, with the exception of some finishing work upon the road-bed, bridges, and cattle-guards; that on August 1, 1887, said road was entirely completed." The fifteenth finding establishes the fact that the 150 miles of railroad under consideration was accepted by the Missouri Pacific Railway Company on February 14, 1887, although the road was not then completed according to contract. The minutes of the meeting of the directors of the Construction Company, held on February 7, 1887, read as follows:

"195 BROADWAY, NEW YORK CITY,
"Feb. 7, 1887.

"An adjourned meeting of the directors of the Fitzgerald & Mallory Construction Company was held this day, at which there were present Messrs. S. H. Mallory, George J. Gould, R. J. Cross, and R. Sage and also Jay Gould.

"The minutes of the previous meeting were read, and on motion of Mr. Sage, were approved.

"Mr. Jay Gould, on behalf of the Missouri Pacific Railway Company, stated that certain portions of the Denver, Memphis & Atlantic railway were unsatisfactorily constructed, and for that reason the Missouri Pacific Company would decline to pay more than $10,000 per mile for the 150 miles already built, and that the Missouri Pacific Company was ready to take the 150 miles named at that price, that is the line from Chetopa to Cedarville, and enough line from Belle Plaine to make out the 150 miles.

"On motion of Mr. Cross, duly seconded, it was voted that the proposition of the Missouri Pacific Railway Company to receive the 150 miles of the road and give Missouri Pacific Railway Company trust five per cent bonds for the same at the rate of $10,000 per mile in full settlement be accepted.

"On motion, the meeting adjourned.

We concur with the court in its conclusion that the reduction from $11,000 per mile to $10,000 should be sustained. As already indicated, however, the fact that all the stockholders of the Construction Company acquiesced in this reduction is not a sufficient ground upon which alone the settlement at the rate of discount named can be sustained. The court found that the 150 miles was not, when accepted, completed according to the terms of the contract under which its construction was undertaken. The resolution quoted shows on what grounds the reduction was based and assented to. While the evidence is very conflicting as to the degree of non-compliance with the terms of said contract which existed when this reduction was made, neither party introduced evidence of full compliance. A settlement was made by way of compromise of these differences, and we do not find warrant in the record for disturbing the concessions made.

From a consideration of the thirty-third finding of fact of the trial court, there arises a necessity for criticism by reason of the difference between the thirteenth and fifteenth findings as to the mileage constructed. If there is allowed $10,000 a mile for the first 150 miles of the Denver, Memphis & Atlantic railroad constructed, $11,000 a mile for the remainder of that road and the Kansas & Southwestern, and $12,000 a mile for the Pueblo, we find that the Construction Company earned upon its contract $6,456,360, payable in Missouri Pacific five per cent bonds at par. The trial court found $6,454,600. The difference between these findings, amounting to $1,760, is due to the circumstances to which we have referred. Between the thirteenth and fifteenth findings there is a conflict to the extent of sixteen one-hundredths of a mile, and we have accepted the detailed statement of the fifteenth finding rather than the general statement of the thirteenth, there being support in the evidence for either finding. Instead, therefore, of the Missouri Pacific Railway Company

being entitled to a credit on account of overpayment in bonds to the amount of $45,400, the credit should in fact be but $43,640.

In the closing part of the thirty-third finding of facts it seems that there was a confusion of items to the disadvantage of the Missouri Pacific Railway Company, for the court having found due the above discussed item to the Missouri Pacific Railway Company, established the same as in "full settlement of the item of $82,000, assigned by Jay Gould to the said railway company under date of September 1, 1888." This item of $82,000, assigned by Jay Gould, has received mention in no other finding by the trial court. This item was assigned by Jay Gould to the Missouri Pacific Railway Company, and by that company is urged as a set-off to the claims made on behalf of the Construction Company. The treasurer of the Construction Company, R. J. Cross, in his evidence, explained that this item arose out of the loan to the Construction Company of $2,500,000 Missouri Pacific bonds; that on January 31, 1888, he, as treasurer, returned to Jay Gould $1,800,000 bonds issued by the Missouri Pacific Railway Company, which lacked $156,000 of repaying Mr. Gould his said loan of bonds. Mr. Cross further testified that of the $156,000 there was returned to Mr. Gould by the Construction Company on April 6, 1888, the sum of $74,000 in bonds. The difference between the sum of $156,000 and $74,000 equals the $82,000 claimed by the Missouri Pacific Railway Company by virtue of an assignment thereof from Jay Gould. It required no assignment to make the Missouri Pacific Railway Company a party to this transaction, for the trial court found that the alleged loan of $2,500,000 of bonds of the Missouri Pacific Railway Company was not in fact a loan by Jay Gould, but was, and should be treated as, a payment upon a still larger amount already due from the Missouri Pacific Railway Company to the Construction Company. While the

trial court made no special finding as to this remnant of $82,000, its status was fixed by the general finding as to the alleged loan of $2,500,000 Missouri Pacific bonds out of which it grew, and it cannot, therefore, be allowed as a credit in favor of the Missouri Pacific Railway Company, claiming as assignee of Jay Gould. It was but a part payment of a large amount due the Construction Company from, and wrongfully withheld by, the Missouri Pacific Railway Company, and no assignment or manipulation can entitle it to a different status or more consideration than in its true character it was entitled to receive.

The thirty-fourth finding of fact was as follows: "The court further finds that on or about the 22d day of March, 1887, S. H. Mallory, the then president of the Fitzgerald & Mallory Construction Company, consented to a further reduction in the contract price for the construction of the Denver, Memphis & Atlantic railway of one thousand ($1,000) dollars per mile for thirty-six miles of the said road; that the said consent of said Mallory was beyond the power of the president of said company; that the same was never at any time consented to or ratified by the said Construction Company or the plaintiff herein, and cannot be allowed as a credit to the defendant railway company." The facts recited were fully sustained by the evidence. The reasons assigned were amply sufficient to justify the conclusion reached as to this item. In addition to these, however, another occurs to us, and that is that the contract for the discount of $36,000 was without consideration. (*Fire Insurance Association v. Wickham*, 141 U. S., 577; *United States v. Bostwick*, 94 U. S., 53; *Lingenfelder v. Wainwright Brewery Co.*, 15 S. W. Rep. [Mo.], 847; *Ayres v. Chicago, R. I. & P. R. Co.*, 52 Ia., 478; *Sherwin v. Brigham*, 39 O. St., 137; *Laidlou v. Hatch*, 75 Ill., 11; *Wilmer v. Overseers of Poor of Worth Township*, 104 Pa. St., 307; *Vanderbilt v. Schreyer*, 91 N. Y., 392; *Boyce v. Berger*, 11 Neb., 399.)

9. Let us now consider the history of the transactions of July 28 and September 22, referred to in the forty-fourth finding of facts. The fortieth finding established as facts that on July 28, 1887, at a meeting of the board of directors of the Construction Company, at which were present Russell Sage, R. J. Cross, and Sidney Dillon (S. H. Mallory and John Fitzgerald being absent), it was resolved that $1,500,000 of Missouri Pacific bonds, then in the Construction Company's possession, and $2,500,000 of said bonds to be borrowed of Jay Gould by said Construction Company, should be sold to the stockholders of the Construction Company at the rate of ninety per cent of their face value, and that under said resolution $3,200,000 of said bonds, reckoned at their par value, were taken by the stockholders of the Construction Company other than Mallory and Fitzgerald, and that the last named parties, when informed of this transaction, protested against it. It is worthy of note that by the forty-first finding the Missouri Pacific Railway Company is found to owe this $2,500,000 to the Construction Company, by which company, nevertheless, bonds to the amount of $2,500,000 were borrowed of Jay Gould. The above finding of protest is reconcilable with the acquiescence stated in the forty-fourth finding upon the assumption that, notwithstanding their protest upon being informed of the transaction, Fitzgerald and Mallory afterward, on September 22, acquiesced in it. The action of the board of directors of the Construction Company appears in the records of the Construction Company in the following language:

"NEW YORK CITY, July 28, 1887.

"Mr. Cross stated that the company is indebted to its stockholders to the extent of $1,500,000, being money borrowed, and that it is indebted to the Missouri Pacific Railway Company for $772,856.27, and to Messrs. Morton, Bliss & Co. to the extent of $600,000. Mr. Cross also stated that at least $500,000 would be required to complete

the company's contract with the Missouri Pacific Railway Company. In view of these facts, the following resolution was offered by Mr. Cross and unanimously adopted:

"*Resolved,* That the treasurer is hereby instructed to sell a sufficient amount of the Missouri Pacific Railway Company's five per cent bonds at not less than ninety, to provide funds to pay off the amount borrowed, amounting to, say, $1,500,000 and interest. The treasurer is authorized to sell other amounts of the same bonds at the same price, to the extent of, say, $4,000,000 in all, to the shareholders, with the understanding that the *pro rata* share of these bonds of any stockholder who is not prepared to take his share within ten days from this date shall be first offered to the other stockholders *pro rata.*

"On motion of Mr. Cross, it was voted that the treasurer is hereby authorized to borrow from Mr. Jay Gould about $2,500,000 of the Missouri Pacific Railway Company's five per cent bonds, to be returned to him when the Construction Company receives the bonds due under its contract with the Missouri Pacific Railway Company.

"On motion of Mr. Sage, the meeting adjourned."

The first notice Mr. Fitzgerald had of this meeting was given him by the following letter:

"JULY 28, 1887.

"*John Fitzgerald, Esq., Winfield, Kansas*—DEAR SIR: I hand you herewith a copy of minutes of a meeting of the stockholders of the Fitzgerald & Mallory Construction Company held here today. From it you will see that it was resolved to distribute $4,000,000 of Missouri Pacific five per cent first bonds among the shareholders of the company at ninety, in order to raise necessary funds. Your interest on this distribution amounts to $400,000 bonds, and it will be necessary for you to arrange for this amount to be taken up within ten days from date, otherwise I am instructed to distribute the bonds *pro rata* among the other shareholders. Yours truly, R. J. CROSS,

"*Treasurer Fitzgerald & Mallory Construction Co.*"

At a meeting of the board of directors of the Construction Company at which were present S. H. Mallory, Russell Sage, John Fitzgerald, and R. J. Cross, on September 20, 1887, it was voted that the treasurer of said company be, and he was thereby, authorized to sell $2,000,000 of the Missouri Pacific Company's five per cent bonds at ninety per cent to provide funds for the completion of the work of the Construction Company, and to give the stockholders *pro rata* the first option of buying the same. On September 22, 1887, there were present the same directors as were present on the 20th, and, in addition, there was present Sidney Dillon, another director, upon whose motion it was unanimously voted that the resolution passed on the 20th of September, providing for the sale of $2,000,000 of bonds, should be amended so as to read as follows:

"*Resolved*, That the treasurer of this company be, and he is hereby, authorized to sell $1,800,000 of the Missouri Pacific Railway Company's five per cent bonds at ninety per cent, to provide funds for the completion of the work of the Construction Company, and that the said bonds be sold to the following stockholders of the company (who were ready to buy the same) as follows:

"Russell Sage	$375,000
"Morton, Bliss & Co	300,000
"Jay Gould	675,000
"H. G. Marquand	150,000
"Sidney Dillon	150,000
"George J. Gould	75,000
"J. & S. Warmser	75,000
	"$1,800,000"

Referring back to the transaction as to sale of bonds of July 28, 1887, there is presented the fact that $4,000,000 in bonds of the Construction Company were by its board of directors ordered sold at ninety per cent of their face

value, and that at that time there was taken by the stockholders of the Construction Company (other than Fitzgerald and Mallory), $3,200,000 of these bonds, the proportion of Fitzgerald and Mallory ($800,000) not being taken. On September 20th and 22d the sale was authorized by the said board of directors when S. H. Mallory and John Fitzgerald were present, it therefore was peremptorily ordered to the associates of Fitzgerald and Mallory so as to include such portion as Messrs. Fitzgerald and Mallory had been entitled to take under the sale of July 28. These two sales of $4,000,000 and of $1,800,000, aggregating $5,800,000, twice includes the sale of $800,000 in bonds. The amounts actually taken were $3,200,000 of the sale of July 28th, and $1,800,000 on September 22, a total of $5,000,000; $1,800,000 of the last sale including the $800,000 Fitzgerald and Mallory allotment ordered sold on July 28.

The minutes of said meeting of September 22 continued in this language: "On motion of Mr. Dillon, voted that a dividend of one hundred per cent on outstanding stock of the company, payable in Missouri Pacific Railway Company five per cent bonds, be, and is hereby, declared, and that said dividend be paid by the treasurer of the company on and after the 23d day of September, 1887, at his office, No. 28 Nassau street, New York city." This action of the board is merely recited in the trial court's forty-third finding of facts. It deserves more extended notice as part of the *res gestæ* and as indicative of the motives and methods of the parties who were directly responsible for these proceedings. Reverting again to the action of the board of directors of the Construction Company at its meeting of date July 28, 1887, it will be remembered that the bonds ordered sold were $2,500,000, borrowed of Jay Gould, and $1,500,000 held by the Construction Company. In the interim between July 28, 1887, and the above declared dividend there is not shown in the record the payment of a single cent on account of the purchase of $1,500,000

Missouri Pacific bonds held by the Construction Company. By virtue of the dividend above declared there was placed to the credit of the stockholders of the Construction Company, with its treasurer, the amount necessary to pay at par for the $1,500,000 of the bonds purchased. In the letter of R. J. Cross, treasurer of the Construction Company, addressed to George J. Gould, and written just after the action of the board referred to, Mr. Cross said: "I am instructed to inform you that on to-morrow, July 29, I will deliver to you your share of said bonds, say $133,000, and receive from you in settlement therefor, as per the written statement, after crediting with interest the $50,000 advanced by you on the 9th of March last, $68,533.33, it being understood that the said bonds are to be held subject to my order with a view to making a satisfactory sale of the whole amount of the block." From the context of the letter it is not open to question that the block referred to was the $4,000,000 in bonds previously mentioned in the said letter. On the same day the above named treasurer of the Construction Company wrote to Jay Gould a statement as to the mutual items of account between said Gould and the Construction Company, ending with the same significant language which closed the letter to George J. Gould, to-wit, "it being understood that the said bonds are to be held subject to my order with a view to making a satisfactory sale of the whole amount in one block." In the accounts given in evidence as between the Construction Company and each of the Goulds, of date July 29, 1887, the bonds are charged at the rate of ninety cents on the dollar. On the 22d day of September, 1887, John Fitzgerald and S. H. Mallory gave an order on R. J. Cross, treasurer of the Construction Company, requiring him to deliver to Jay Gould 213 Missouri Pacific bonds due them on account of their 3,000 shares of the Construction Company stock. On September 23, 1887, S. H. Mallory and John Fitzgerald gave an order on the treasurer of the Con-

struction Company directing him to deliver twenty Missouri Pacific bonds to C. C. Black, who on the same day indorsed said order to Sidney Dillon. On September 23, 1887, S. H. Mallory and John Fitzgerald receipted to the treasurer of the Construction Company for sixty-seven Missouri Pacific bonds, which closed out their share of the so-called dividend of one hundred per cent upon 3,000 shares of Construction Company stock held by them. In the evidence of R. J. Cross, treasurer of the Construction Company, there is given the following account of the disposition of the Missouri Pacific bonds:

Q. Did the Missouri Pacific Railway Company subsequent to that [February 7, 1887] deliver to you, as treasurer of the Construction Company, $1,500,000 of the trust five per cent bonds provided for in the contract?

A. It did.

Q. So far as you know, did each, John Fitzgerald and S. H. Mallory and the other stockholders of the Construction Company, have notice of this settlement, and this delivery of these bonds?

A. They did.

Q. What was done with the $1,500,000 in bonds thus delivered to you?

A. My recollection is that at first money was borrowed on the bonds from the different stockholders, or from some of them, and that later on the bonds were divided as a dividend on the stock.

Q. Why was the money borrowed from the stockholders at that time?

A. Because it was required to carry on the construction. The Construction Company required money and that was considered the best way of getting the money at that time.

Q. And these bonds were held as collateral security for the advance made by the stockholders?

A. They were.

Q. How was the money thus obtained from the stockholders repaid to them?

A. It was repaid to them by selling the bonds held as collateral.

Q. Was that sale made in pursuance of the authority of the board of directors of the Construction Company?

A. It was.

Q. Was the sale made upon a discount?

A. It was made at ninety cents on the dollar.

The purpose of this dividend has now been made clear. Ordinarily, the term "dividend" is applied to profits apportioned among shareholders. (*Vide* Webster's Dictionary.) In this case, there were no profits; nothing but such a dearth of funds that these bonds had been of necessity pledged as collateral for advances necessary to continue the operations of the Construction Company. In this condition of affairs, these bonds were sold to its favored stockholders by the Construction Company at the rate of ninety cents on the dollar. A fictitious dividend of one hundred per cent on the stock was declared in favor of each purchaser of bonds, which dividend was credited to him at par on the books of the treasurer of the Construction Company. This enabled the purchaser of the bonds to obtain several substantial advantages in addition to the discount of ten per cent under the resolution of July 28. By means of the first discount the favored stockholders were enabled to insure the payment by the Construction Company to themselves of the advances which had previously been made by them,—a very prudent measure in view of what followed, —for on September 22 a fictitious dividend was declared on Construction Company stock of one hundred per cent, which was ratably placed to the credit of each stockholder with the treasurer of the Construction Company, thereby enabling each purchaser to take and therewith pay for the greater portion of the $1,800,000 Missouri Pacific bonds on that day ordered sold privately to the stockholders of the Construction Company. Incidentally, the sale and distribution of the bonds placed to the credit of Mr. Fitz-

gerald and of Mr. Mallory, respectively, a sufficient amount to enable Jay Gould to obtain therefrom payment of the amount due him from these two gentlemen, leaving to each a small sum as a residue. Neither Mr. Fitzgerald nor Mr. Mallory is a party to this action, in such a sense that any relief can be afforded them individually, even though, notwithstanding his acquiescence, each could claim relief,—a proposition upon which no opinion is herein ventured. As has already been said, this action is, for all practical purposes, to be treated as though the Construction Company was plaintiff and the Missouri Pacific Railway Company was defendant. The thirtieth finding of the trial court, upon conflicting evidence it is true, but still with sufficient proof to sustain it, was that the bonds, at the time of the several deliveries of them, were worth par. This must, therefore, be accepted as conclusive upon that point. The evidence of Mr. Black, president of the Denver, Memphis & Atlantic Railroad Company, was, that the bonds of that railroad company were all signed at the office of Mr. Gould, by himself (Mr. Black) and the secretary of said railroad company, and turned over to Mr. Phillips (Jay Gould's private secretary, and assistant secretary of the Missouri Pacific Railway Company), by whom receipts were given for the safe keeping of said bonds during the time they were there, and that after that time that he (Mr. Black) saw them no more and had no knowledge what became of them. Mr. Burns testified that, as secretary, he signed the bonds above referred to, and that receipts were given as above stated for the bonds which remained in the possession of Mr. Phillips. The receipts referred to were signed "Guy Phillips, Assistant Secretary." The first of these receipts, dated October 22, 1886, was for 100 bonds, Nos. 1–100; the second was of date October 23, 1886, and was for 400 bonds, Nos. 101–500; the third was of date October 25, 1886, and was for 750 bonds, Nos. 501–1250; the fourth was of date October 26, 1886, and was for 1,000 bonds,

Nos. 1251–2250; the fifth was of date October 27, 1887, and was for 750 bonds, Nos. 2251–3000; the sixth was of date October 28, 1886, and was for 200 bonds, Nos. 3001–3200. These bonds were for the sum of $1,000 each. Each recited that all coupons were attached to such bonds as were described in said receipt, and that the certificate of the trustee was not signed. These receipts cover bonds of the par value of $3,200,000 in the aggregate, and, at the rate of $16,000 per mile, were issued upon 200 miles of railroad. There is no proof as to the time and manner of the subsequent issue of bonds of the Denver, Memphis & Atlantic Railroad Company—an omission probably accounted for by the subsequent change of officials of that road,—neither is there any evidence as to what became of the coupons above referred to, and as to the shares of stock in exchange for a part of which counties and cities in Kansas voted subsidies to the amount of about $1,200,000 in the aggregate, the record is just as silent.

The trial court found in the thirtieth finding that "under the contract for construction of the Denver, Memphis & Atlantic railway, the Kansas Southwestern railway, and the Pueblo & State Line railroad, the Missouri Pacific Railway Company delivered to the Fitzgerald & Mallory Construction Company, Missouri Pacific trust bonds as follows:

"February 14, 1887	$1,500,000
"July 28, 1887 (J. Gould)	2,500,000
"September 22, 1887	2,500,000
"Making a total of	$6,500,000"

As to these, this finding also was that, while they had no fixed market value, they were reasonably worth par at the time of said several deliveries. In this finding is mentioned three railroads as to which there were contracts of construction. In respect to this it is only necessary to state that they were constructed under substantially the same

contract, and that in relation to each the parties to this controversy sustained a like relation as to every other of said railroads. The rule which must be enforced, as applied to the officers of the Construction Company, is aptly stated in *Gorder v. Plattsmouth Canning Co.*, 36 Neb., 548, by POST, J., in the following language: "There is no doubt that the relation of directors to the corporation of which they are officers is of a fiduciary character, and their contracts and dealings with respect to the corporate property will be carefully scrutinized by the courts. There are to be found cases in which it is asserted that such contracts are absolutely void, * * * but the decided weight of authority, as well as the more satisfactory reasoning, sustains the view that they are voidable only. It is frequently said in the reports and text-books that contracts between corporations and their directors will be set aside by courts of equity at the election of the stockholders, but such statement is not strictly accurate. Not every purchase of corporate property by the directors of the corporation will be adjudged void in an action by the stockholders, even by courts of equity. On the contrary, the relation of directors to the stockholders of a corporation is not essentially different from that ordinarily existing between trustee and *cestui que trust.* Courts of equity will set aside such contracts on the ground of fraud, and generally upon slight showing of fraud or bad faith by the trustee."

The liability of a corporation for the acts of its officers and agents within the scope of their employment has already been discussed. It was insisted on the trial, and is still urged, that the Missouri Pacific Railway Company was in no respect a participant in the proceedings which resulted in the discount of ten per cent on its bonds, and, therefore, that it cannot be held answerable to the Construction Company for this discount. It will be seen, by a reference to the addenda to the contract between the Missouri Pacific Railway Company and the Construction Com-

pany, that payments were to be made in time and manner following, to-wit: "On the completion of each ten miles of road according to the contract from not more than two miles connected with the road of the party of the first part, and on the receipt of the sixteen thousand ($16,000) dollars per mile of the first mortgage bonds and sixteen thousand ($16,000) dollars per mile of stock appertaining thereto (less the amount paid out for aid), the party of the first part will deliver to the party of the second part twelve thousand ($12,000) dollars per mile of its five per cent bonds according to the above agreement." The evidence of Mr. Black and Mr. Burns, one the president and the other the secretary of the Denver, Memphis & Atlantic Railway Company, hereinbefore referred to, shows that as such officers they signed 3,200 bonds of the company last named, as shown by contemporaneously given receipts of dates between October 21 and October 28, 1886, and that these bonds were turned over to Guy Phillips, who was at that time the private secretary of Jay Gould, president of the Missouri Pacific Railway Company, as well as assistant secretary of the railway company last named. The receipts for these bonds were signed by Guy Phillips as such assistant secretary. Mr. Calef, the secretary of the Missouri Pacific Railway Company, suggested that assistant secretary Phillips would give these receipts for the safe keeping of the bonds, and it was accordingly so arranged. The officers of the Denver, Memphis & Atlantic Railway Company were given no alternative, the bonds must be retained in the office of the secretary of the Missouri Pacific Railway Company.

The trial court found that "since April 6, 1887, the organization of the said Denver, Memphis & Atlantic Railway Company has been under the control of the Missouri Pacific Railway Company, and its officers and directors have acted in the interests and under the direction of the said Missouri Pacific Railway Company. It is very im-

portant, in view of this domination of the Denver, Memphis & Atlantic Railway Company by the Missouri Pacific Railway Company, to note that the trial court found that the board of directors of the Denver, Memphis & Atlantic Railway Company, on February 22, 1887, authorized the trustee to certify to bonds of the Denver, Memphis & Atlantic Railway Company covering 150 miles of completed road, and that on May 23, 1887, the said board of directors authorized the certification of bonds covering 30 additional miles of road, and that on the 18th day of July, 1887, the said board further authorized the certification of bonds covering 200 miles of additional road. Omitting the first 150 miles as having been settled for by a compromise arrangement, we find that there were authorized to be certified by the trustee 260 miles of railroad as completed before July 18, 1887, a date very important to be kept in mind. No reference need be made in this connection to the 150 miles completed in February of 1887; for our purposes it is sufficient to note the finding of the trial court, that on May 3, 1887, there were turned over and delivered to the Missouri Pacific Railway Company 24.84 miles; on the 11th day of August, 1887, 123.40 miles; on October 1, 1887, 124.42 miles, and on December 15, 1887, 12.82 miles. The settlement in February, 1887, gave to the Construction Company $1,500,000 in bonds of the Missouri Pacific Railway Company, which were disposed of as has just been stated. Notwithstanding the certificate to the trustee that on July 18, 1887, there were completed 260 miles of road, there had been before that date turned over and delivered to the Missouri Pacific Railway Company but 24.84 miles of railroad, and the Missouri Pacific Railway Company accepted as completed no more miles of railroad until August 11, following, when it received 123.40 miles. There was no more road turned over to the Missouri Pacific Railway Company until October 1, at which time the transactions

under comment had been fully consummated. If the Missouri Pacific Railway Company had paid according to the terms of its contract (modified to $11,000 per mile as it was), there would have been paid to the Construction Company, on and before July 18, 1887, for 260 miles of railroad, the sum of $2,860,000 in bonds, exclusive of the $1,500,000 settled for in February preceding. These payments, however, were held back, and on the 28th day of July, ten days afterward, Jay Gould, the president of the railroad company in default, offered to, and as a matter of accommodation as it is claimed, did, loan to the Construction Company $2,500,000 Missouri Pacific bonds. It will readily be seen that this amount, treated as a payment, which the trial court very properly declared it to be, still left due from the Missouri Pacific Railway Company to the Construction Company a balance of $360,000 fully earned. When it is remembered that not only the $2,500,000 of bonds which Jay Gould pretended to loan, but the $1,500,000 earned for the first 150 miles constructed, were discounted at the rate of ten per cent when worth par, the enormity of this transgression against the rights of the Construction Company is fully apparent. Of these bonds the associates of John Fitzgerald and S. H. Mallory took $3,200,000. It has already been demonstrated how, by the use of a fictitious dividend of one hundred per cent upon the stock of the Construction Company, the $800,000 in bonds which Fitzgerald and Mallory had been unable to take, and $1,000,000 more in bonds, were wrested from the Construction Company. The trial court found, as we have seen, that since the 6th of April, 1887, the organization of the Denver, Memphis & Atlantic Railroad Company had been under the control of the Missouri Pacific Railway Company, and that its officers and directors had acted in the interests and under the direction of the said Missouri Pacific Railway Company To complete the responsibility of the Missouri Pacific Rail-

way Company for the unwarranted discount of $500,000 enforced against the Construction Company, it is necessary to note but another finding of the court, which was, that since November 3, 1886, three of the directors of the Construction Company, together with its treasurer (R. J. Cross), "have been directly or indirectly interested in the defendant railroad company; have acted in the interests of said railroad company in all matters concerning the management of the said Construction Company where the interests of the railroad company and the Construction Company came in conflict." This finding is of course upon conflicting evidence, but it has ample support. It would subserve no useful purpose to fortify these facts as to the domination of the Missouri Pacific Railway Company over the Denver, Memphis & Atlantic Railway Company by an extended analysis of the testimony, which would be indispensable for that purpose, but which, while scattered through an immense volume, when gathered and considered, fully sustains the findings made. Under the pleadings, proofs, and findings, the Missouri Pacific Railway Company must be held liable to the Fitzgerald & Mallory Construction Company for this discount of ten per cent exacted upon the purchase of $5,000,000 of Missouri Pacific bonds with interest, after deducting the overpayment of $43,640 found in the corrected thirty-third finding of fact to have been made in bonds by the Missouri Pacific Railway Company to the said Construction Company as hereinbefore stated. The forty-second finding of fact is that $62,500 interest, which fell due on the $2,500,000 bonds delivered by Jay Gould to the Construction Company July 28, 1887, was paid to said Gould by the treasurer of the Construction Company on September 23, 1887. That for this amount, with interest from the date last named, the Missouri Pacific Railway Company is liable to the said Construction Company as a necessary corollary results from the propositions heretofore discussed.

10. Between the Missouri Pacific Railway Company and the aforesaid Construction Company there was a protracted introduction of evidence as to liability for certain material. The ultimate facts properly deducible from that evidence were settled to our satisfaction in the forty-fifth finding, which was in the following language: "(45.) The court further finds that in September, 1888, it was agreed between the Fitzgerald & Mallory Construction Company and the Missouri Pacific Railway Company that certain track material, the property of the Construction Company, should be sold and delivered to the said railway company as the same should be needed for use; that in accordance with said agreement an invoice of the said material was taken by the said construction and the said railway companies, and in the month of October, 1888, there was delivered to the said railway company of the agreed value of sixteen thousand two hundred and forty-one dollars and sixteen cents ($16,241.16); that subsequently there was delivered further material of the agreed value of nineteen thousand six hundred and eighty dollars ($19,680); that before any further delivery was made the remaining track material, of the value of sixteen thousand nine hundred and ten dollars and fifty cents ($16,910.50), was sold for taxes duly and regularly levied against the Construction Company, and the railway company purchased the same at tax sale, and the material came into the possession of the said railway company; that said railway company paid at such tax sale the sum of three thousand and fifty dollars and forty cents ($3,050.40), and is entitled to the same." It is perhaps true that technically there is ground for the argument made that title had not passed because delivery could not justly be made, nevertheless the relations of the parties were such that the Missouri Pacific Railway Company should not by purchase at a tax sale be permitted to acquire title as against the Construction Company.

11. The forty-sixth finding of fact is satisfactory to us.

It is as follows: "(46.) The court finds that at the several times of the delivery of the roads constructed, certain items of right of way remained unsettled, and that prior to the commencement of this action the defendant railway company paid out, to secure the said right of way, the sum of fifty-eight thousand seven hundred and fifty-eight dollars and thirty-nine cents ($58,758.39); that since the commencement of this action the said railway company has paid out the further sum of six thousand six hundred and one dollars and ninety-one cents, and that the said sums are true and correct charges against the said Construction Company, and in favor of the defendant the Missouri Pacific Railway Company."

12. The forty-seventh finding of fact is in the following language: "(47.) "That about fifteen miles of railroad were laid out over government land; that no maps were filed with the secretary of the interior, showing the lines of way over said government land in the state of Kansas, but maps were filed with local land officers of the United States at Wakeeney, Kansas, duly certified to, showing said right of way." In the case of *Real v. Hollister*, 20 Neb., 112, it was held that, "in an action on a warranty deed for a breach of the covenant for quiet enjoyment, the plaintiff must allege and prove that he has been turned out of the possession of the granted premises or of some part thereof, or has yielded possession thereof to the paramount title." (See, also, *Anderson v. Buchanan*, 20 Neb., 272.) The finding quoted fully and fairly states all that was pleaded and proved; hence, no allowance of a counterclaim can be made as to the alleged failure to comply with such requirements as were necessary to acquire a railroad right of way across government lands.

13. The forty-eighth finding of fact was as follows: "(48.) The court further finds that under the said contracts for the construction of roads, and under the direction and request of the defendant the Missouri Pacific Railway Com-

pany, the Fitzgerald & Mallory Construction Company made surveys for lines not built, and expended for the same the sum of four thousand nine hundred and twenty-three dollars and six cents ($4,923.06), and the same is allowed as a correct charge against the said defendant railway company." We cannot concur in this conclusion reached by the trial court, for the reason that there was not sufficient evidence to sustain it. There was evidence of other railroad schemes and of conversations between some of the officers of the Missouri Pacific Railway Company and some of the officers of the Construction Company in respect to the schemes proposed, which all seem to have had reference to obtaining subsidies rather than promoting legitimate railroad enterprise. As no more worthy object than this was in view in the preliminary surveys, a court of equity should hardly be called upon to help foster such a questionable spirit of enterprise. These surveys have been paid for by the Construction Company, and courts might as well be called upon to compel contribution among the promoters of any other scheme to rob the taxpayers as to enable the Construction Company to reimburse itself as to these surveys. From the record in this case, it appears that in Kansas it is required that for the bonds voted in aid of railroad enterprises there shall be issued stock of the railroad company at its par value, by virtue of which stock it is of course assumed that the donors are insured a representation on the board of directors of the railroad company to which the bonds are voted. The Denver, Memphis & Atlantic Railroad Company's articles of incorporation provided for fifteen directors elected by holders of stock issued at the rate of $16,000 per mile, of which it was assumed by parties to the contracts above referred to that $3,500 would be used in exchange for aid bonds. The articles of incorporation also provided for the issue of the bonds of the Denver, Memphis & Atlantic Railroad Company, secured by a first mortgage on the railroad line,

at the rate of $16,000 per mile. Its stock was issued on a like liberal scale, so that plenty of margin should exist for the acquisition of aid bonds in exchange for a comparatively small portion of the stock. For the first mortgage five per cent bonds of the Missouri Pacific Railway Company, at the rate of $11,000 per mile, both the $16,000 per mile of bonds and whatever of the $16,000 per mile of stock which had not been exchanged for aid bonds (estimated at $3,500 per mile) were gladly exchanged by the Construction Company. Even this was claimed to be more than an equivalent for the line carrying $16,000 per mile in stock and $16,000 per mile in bonds, so that $1,000 per mile of Missouri Pacific bonds were thrown off, and then for cash this $10,000 per mile of Missouri Pacific bonds was shrunk ten per cent more. If the aid bonds, estimated at $3,500 per mile, were worth par, the net cost of this railroad, without considering profits of construction, was $5,500 per mile. The cost of these preliminary surveys not being contemplated in the original contracts for the construction of the railroads enumerated, and these surveys not being necessary concomitants to the operation thereof, present no equitable reasons for the reimbursement of the Construction Company's expenditures in that behalf. This claim of $4,923.06 must, therefore, be disallowed, and if there existed the same absence of the rights of creditors of the Construction Company as to other items involved in this case, we should be decidedly inclined to let such items take a like course on the same grounds.

14. In reference to the construction of the telegraph line along the Denver, Memphis & Atlantic railroad there was the forty-ninth finding of the court, which was sufficiently sustained by the evidence. This finding was as follows: "(49.) The court finds that on the 18th day of August, 1886, under the direction of the defendant the Missouri Pacific Railway Company, the officers of the Denver,

Memphis & Atlantic railroad entered into a contract with the Western Union Telegraph Company for the construction of a telegraph line along the line of the Denver, Memphis & Atlantic; that in pursuance of the said contract the Fitzgerald & Mallory Construction Company furnished labor and material for the construction of said telegraph line, in the amount and value of twenty-five thousand seven hundred and three dollars and three cents ($25,703.03); that said contract was made with said telegraph company for the use and benefit of the defendant the Missouri Pacific Railway Company, and said labor and material furnished were furnished at the request of said defendant railway company, and is a proper charge against said railway company." Its allowance as above is, therefore, confirmed.

The finding of the court that the Construction Company was entitled to payment for extra ties put in on the line of the Denver, Memphis & Atlantic railroad west of McCracken, for stock yards and pens, for fencing Chetopa & Conway Springs Division, for turn-tables on Conway Springs Division, and for extra nut-locks on the Denver, Memphis & Atlantic line as extras, was not without the support of sufficient evidence. The amount in each case of these extras is as near exact correctness as the condition of the proofs will admit of, and hence will be accepted as the true amount due. Against these items counsel for the Missouri Pacific Railway Company makes the contention that they were not within the contemplation of the written contracts to which reference has heretofore so frequently been made; in fact, that the allowance of these items must be upon evidence incompetent, because not found therein. The liability of the Missouri Pacific Railway Company is not, as to these matters, predicated upon said written contract; it is owing to the duty of making compensation for such erections made and material furnished and put into and along the line of railroad contemplated by said agreements,

as in the nature of things were necessary to its completion and equipment whether ordered in advance or after construction and used by the Missouri Pacific Railway Company. As to these, the testimony was that they were furnished in compliance with the request of the officers of the Missouri Pacific Railway Company. The question of the admissibility of evidence under such circumstances is very aptly discussed in the following language of COBB, J., in *Delaney v. Linder*, 22 Neb., on page 280: "Upon the point arising upon the refusal of the court to let in evidence to vary the terms of the contract, it is deemed sufficient to say that the contract is sued on, and set out in the petition without any allegation of mistake or failure therein to truly express the terms of the contract, or prayer for its reformation, and it is deemed to be too well settled to call for the citation of authorities that such allegation and prayer are indispensably necessary as a foundation for the admission of such evidence. The following from the opinion of Denman, C. J., in the case of *Goss v. Lord Nugent*, 5 B. & Ad. [Eng.], 64*, cited in the opinion in *McNish v. Reynolds*, 95 Pa. St., 483, is believed to possess the rare merit of being applicable to, if not conclusive of, both the above points: 'By the general rules of the common law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made or during the time it was in a state of preparation, so as to add or subtract from, or in any manner to vary or qualify the written contract; but after the agreement has been reduced into writing it is competent for the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or vary or qualify the terms of it, and thus to make a new contract; which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms en-

grafted upon what will be thus left of the written agreement."

15. The thirty-fifth, thirty-sixth, thirty-seventh, thirty-eighth, and thirty-ninth findings of fact were in reference to alleged overcharges, and were as follows:

"(35.) The court further finds that prior to May 4, 1886, the Fitzgerald & Mallory Construction Company and the Missouri Pacific Railway Company, in contemplation of the contract of May 4, 1886, entered into an oral agreement wherein it was agreed that the defendant railway company should transport over its line all men and material to be used in the construction of the roads contemplated at the regular construction rates of the said railway company, the same being the rate charged the several constituent companies of the said Missouri Pacific Railway Company, intermediate in the transportation of company material and men used in construction; that subsequent to May 4, 1886, the said agreement was confirmed and ratified by the parties thereto; that the said construction rate was at a rate of three-fourths of one cent per mile for all distances more than two hundred miles, and specified rates for distances less than two hundred miles, and one cent per mile for the transportation of men. That said freight and passenger rates were intended by the said parties to be about the actual cost of transportation.

"(36.) That said construction rate continued to be the established construction rate of the Missouri Pacific Railway Company up to and including December 15, 1887, and during the entire period of shipment by the said Construction Company over the lines of the said railway company.

"(37.) That prior to April 5, 1887, the Missouri Pacific Railway Company overcharged the Fitzgerald & Mallory Construction Company on freight the sum of seventeen thousand seven hundred and sixty-nine dollars and forty-five cents ($17,769.45); that subsequent to April 5, 1887,

and prior to August 1, 1887, it overcharged the said Construction Company on freight the sum of seventeen thousand seven hundred and sixty-nine dollars and forty-five cents ($17,769.45); that subsequent to April 5, 1887, and prior to August 1, 1887, it overcharged the said Construction Company on freight the sum of two hundred and ninety-two thousand nine hundred and ninety-four dollars and sixty-two cents ($292,994.62); that prior to December 15, 1887, the said railway company overcharged the Construction Company the further sum of seven thousand nine hundred and ninety-nine dollars and forty-nine cents ($7,999.49) on material for the construction of the Pueblo & State Line railroad. The total amount for overcharge of freights being three hundred and eighteen thousand seven hundred and sixty-three dollars and fifty-six cents ($318,763.56), the same being upon interstate shipments.

"(38.) That upon demand of the defendant the Missouri Pacific Railway Company, the treasurer of the Fitzgerald & Mallory Construction Company paid over to the said railway company the full amount of said overcharge for freights from the funds of the Construction Company; that said payments were made by the treasurer without authority, and the acts of the said treasurer in making said payments have never been ratified by the Construction Company, and the said Construction Company is entitled to recover the same from said railway company.

"(39.) That the said overcharges were based, for the most part, upon a commercial tariff rate of three cents per ton per mile; that said rate was unreasonable and unfair."

The finding that there was given by the Missouri Pacific Railway Company to the Construction Company a rate of three-fourths of a cent per ton per mile on material for all distances where the transportation was for more than 200 miles was supported by sufficient evidence. It might admit of doubt whether the conversation between Jay Gould and Mr. Mallory was of sufficient definiteness, and of

itself competent to establish the existence of such a rate. This rate, however, as sufficient evidence shows, was acted upon by the parties from the first until April 5, 1887. Under these circumstances, the trial court was justified in acting upon the understanding of the parties to these transactions. (*School District v. Estes*, 13 Neb., 52; *Harbach v. Miller*, 14 Neb., 9; *Rathbun v. McConnell*, 27 Neb., 239; *District of Columbia v. Gallagher*, 124 U. S., 510.) The Construction Company is, therefore, entitled to repayment, with interest, of the sum of $17,769.45 on account of overcharges for transportation of material previous to April 5, 1887.

On the last date named the act of congress entitled "An act to regulate commerce," approved February 4, 1887, took effect. For overcharges on account of exacting payment for transportation of material at the rate of three cents per ton per mile after April 5, 1887, instead of at the rate of three-fourths of a cent per ton per mile, the trial court found the Missouri Pacific Railway Company liable to the Construction Company in the sum of $300,-994.11, notwithstanding the provisions of the above mentioned act of congress. There was a finding of the trial court that the last named overcharges were based for the most part upon a commercial tariff rate of three cents per ton per mile, and that said rate was unreasonable and unfair. Assuming that these conclusions were justified by the evidence, we are confronted with the proposition that these overcharges cannot be recovered because of the existence of the act of congress above referred to. Section 1 of the act in question defined what corporations, etc., were subject to its terms, within which definition is clearly included the Missouri Pacific Railway Company, and the class of transportation now under consideration. Section 2 is in the following language: "That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge,

demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful." There was published and sufficiently promulgated the following notice on March 14, 1887:

"THE MISSOURI PACIFIC RAILWAY COMPANY.—LEASED AND OPERATED LINES.

"Circular No. A 1.

"ST. LOUIS, March 14, 1887.

"*To Agents, Shippers, and Connections:* Notice is hereby given that all special rates or contracts providing for the transportation of any character of freight over any portion of this company's road, or its owned, controlled, leased, or operated lines, unless sooner terminating, will be void on and after April 1, 1887. All existing junction tariffs, division sheets, and special rates applying on interstate freight interchanged with connecting lines will be discontinued on that date. New tariffs will be issued on April 1, 1887, to apply on shipments between interstate points located on these roads, and arrangements with connecting lines for the continuance of interchange of shipments upon agreed through rates and divisions will be taken up and adjusted at the earliest practicable date. After April 1, 1887, agents will not, under any circumstances, issue through bills of lading for freight destined to interstate points located upon connecting lines, unless they have joint through rates, effective on and after the date above named. Station masters will post a copy of this notice in a con-

spicuous place at their stations, and also furnish a copy to all parties interested. OSCAR G. MURRAY,
"Frt. Traffic Mgr.
"Approved: W. H. NEWMAN,
"General Traffic Mgr."

After the interstate commerce act went into effect there was charged for the transportation of the Construction Company's material a freight rate of three cents per ton per mile, and the Construction Company was requested and required to pay this rate in the same manner as payments had before April 5, 1887, been customary with respect to the rate prevailing between these parties. In all the evidence introduced upon this subject the rate of three-fourths of a cent per ton per mile is spoken of as a special rate applicable to material to be used in the construction referred to. This rate of three-fourths of a cent per ton per mile was, therefore, within the terms of the notice above set out, and of which it cannot be claimed there was not full notice. By section 6 of the act of congress under consideration (as said section stood until 1889, in which interim it is alleged were collected the overcharges complained of) it was provided: "That every common carrier subject to the provisions of this act shall print, and keep for public inspection, schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its railroad, as defined by the first section of this act. The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried, and shall contain the classification of freight in force upon such railroad, and shall also state separately the terminal charges and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges. Such schedule shall be plainly printed in large type, of at least the size

of ordinary pica, and copies for the use of the public shall be kept in every depot or station upon any such railroad, in such places and in such form that they can be conveniently inspected." It is further provided in said section 6: "And when any such common carrier shall have established and published its rates, fares, and charges, in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force. Every common carrier, subject to the provisions of this act, shall file with the commission, hereinafter provided for, copies of its schedules of rates, fares, and charges which have been established and published in compliance with the requirements of this section, and shall promptly notify said commission of all changes made in the same." The complaint of plaintiff seems to be that the tariff schedules were not brought to the notice of the officers of the Construction Company. It is not claimed that there was any lack of knowledge of the notice abrogating all special rates, which, as before remarked, covered the rate contended for. This special rate having been canceled by this order, it was clearly the duty of the officers of the Construction Company to apply at some place designated by section 6 of said act as a repository for the schedules therein provided if such officers desired information as to the rates embodied in the schedules. There is no showing, and there can be entertained no presumption, that inquiry at the proper place would not have secured an examination of schedules of rates kept for public inspection as required by law. A claim for equitable relief can hardly be predicated upon a technicality so narrow or a presumption so violent as this. That the act to regulate commerce was, in this respect, sufficiently complied with,

seems clearly established upon the undisputed evidence in this case; and accepting that the conclusion as fixed, attention will be devoted to another question which incidentally arises. This question is, whether or not the act to regulate commerce abrogated existing special rates based upon that contract.

In *Southern Wire Co. v. St. Louis Bridge & Tunnel R. Co.*, 38 Mo. App., on page 191, the language of Thompson, J., delivering the opinion of the court, is as follows: "But it is argued that the statute, not being retroactive in its terms, is to be construed as prospective only, and as not having the effect of abrogating existing contracts in conflict with its prohibitions. We do not, of course, question the general principle that courts uniformly refuse to give to statutes a retrospective operation whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room for doubt that such was the intention of the legislature. This principle has been affirmed so often by the supreme court of the United States that it must be conceded to be a well settled principle to be applied in the interpretation of federal statutes. (*Chew Heong v. United States*, 112 U. S., 536, 559; *United States v. Heth*, 3 Cranch [U. S.], 398, 413; *Murray v. Gibson*, 15 How. [U. S.], 421, 423; *McEwen v. Den*, 24 How. [U. S.], 242, 244; *Harvey v. Tyler*, 2 Wall. [U. S.], 328, 347; *Sohn v. Waterson*, 17 Wall. [U. S.], 596, 599; *Twenty Per Cent Cases*, 20 Wall. [U. S.], 179, 187.) It is possibly of more peculiar application in the interpretation of federal than of state statutes, since no prohibition rests upon congress from passing laws impairing the obligation of contracts, such as the federal constitution imposes upon the legislatures of the states. But notwithstanding this, we are clear of all doubt that it was the purpose of congress, in enacting this statute, to put an end to all existing contracts and arrangements, producing unjust discrimination among shippers upon interstate rail-

ways. It is a most important general police regulation, designed to prohibit and suppress great abuses which had sprung up among interstate public carriers, whereby preferences were given to wealthy and favored shippers, which had the effect of driving out of business and destroying those who were not thus favored. It would greatly impair its effect to hold that it does not operate to abrogate existing contracts which are opposed to its prohibitions. Such a holding would open the door to fraudulent evasions of it by the making of contracts creating unjust discriminations and antedating them so as to place them seemingly beyond its reach."

The supreme court of Montana in *Bullard v. Northern P. R. Co.*, reported in 45 Am. & Eng. R. Cas., made use of the following language, which will be found on pages 244, 245 of the volume just named: "If the contract mentioned in the complaint has been fulfilled, it is plain that, after the act of congress became effective, and during the period specified in the pleadings, there would have been a discrimination in favor of the respondent by the appellant in the sum of $590.95 on account of the transportation of his goods. In other words, the patrons of the Northern Pacific Railroad Company, who had no special agreement, would pay this amount for the same service in excess of what would be demanded of the respondent. It has been adjudged in many cases that when these circumstances arise, the contract, which was entered into by the parties in this action, is contrary to public policy, and cannot be enforced. (*Messenger v. Pennsylvania R. Co.*, 36 N. J. Law, 407, affirmed 37 N. J. Law, 531; *Schofield v. Lake Shore & M. C. R. Co.*, 43 O. St., 571, 23 Am. & Eng. R. Cas., 612; *Christie v. Missouri P. R. Co.*, 94 Mo., 453, 32 Am. & Eng. R. Cas., 413; *Chicago & A. R. Co. v. People*, 67 Ill., 11; *Indianapolis, D. & S. R. Co. v. Ervin*, 118 Ill., 250, 27 Am. & Eng. R. Cas., 8.)"

In *Fitzgerald v. Grand Trunk R. Co.*, 22 Atl. Rep.,

on page 77 *et seq.*, is found the following language of Powers, J., delivering the opinion of the supreme court of Vermont: "In this case it is to be noted that the contract called for a transportation of the lumber through three states; such carriage, therefore, is commerce between the states within the meaning of article 1, section 8, of the federal constitution. Such commerce is solely regulated by congress, and when parties make contracts to engage in interstate commerce, they are held to do so on the basis and with the understanding that changes in the law applicable to their contracts may be made. There can, in the nature of things, be no vested right in an existing law which precludes its change or appeal, nor vested right in the omission to legislate upon a particular subject which exempts a contract from the effect of subsequent legislation upon its subject-matter by competent legislative authority. (Cooley, Const. Lim., 284, 574; *Thorpe v. Rutland & B. R. Co.*, 27 Vt., 140; *Ogden v. Saunders*, 12 Wheat. [U. S.], 214; *State v. Holmes*, 38 N. H., 225.) The power to regulate commerce between the states is one given expressly in the constitution to congress. The interstate act was called into being by reason of the making of contracts like the one at bar. Unjust discrimination was one of the chief evils in transportation which congress attempted to end by this act, and we see no reason why the act could not as properly put an end to a contract already working the mischief as to prohibit the making of one in the future. The case then comes to this: The plaintiffs seek to enforce a contract which is prohibited by law. The doctrine is elementary that whenever the plaintiff is compelled, in order to make out his case, to show the illegal contract, he cannot recover."

The following language of Judge Cooley is reported in *Kentucky & Indiana Bridge Co. v. Louisville & N. R. Co.*, 34 Am. & Eng. R. Cas., on page 653: "The slightest examination of the act to regulate commerce will make it

evident that congress has not undertaken thereby to meddle with contracts or to affect them in any way except as they may incidentally be affected by the rules it lays down and the regulations it prescribes. Those rules and regulations are in the nature of police laws. They are prescribed that facilities created for the public benefit may not be abused, that right may be done and public conveniences of a certain class made as useful as possible. It is not one of the purposes of congress that contracts shall be abrogated, much less that the obligation of this particular contract now brought to our attention, and which the act in no way refers to, shall in any particular be impaired or interfered with. But the act to regulate commerce is a general law, and contracts are always liable to be more or less affected by general laws, even when in no way referred to. This is the case with state laws as well as with federal. There probably was never an act passed in restraint of the sale of intoxicating drinks which did not affect some contracts and render their literal enforcement impossible. The same may be said of the federal revenue laws. Nothing is more likely than that a considerable change in customs, regulations, or custom duties, or in the provisions made for enforcement of excise laws will deprive some party of a right he supposed he had secured by contract. But this incidental effect of the general law is not understood to make it a law impairing the obligation of contracts. It is a necessary effect of any considerable change in the public laws. If the legislature had no power to alter its police laws when contracts would be affected, then the most important and valuable reforms might be precluded by the simple device of entering into contracts for the purpose. No doctrine to that effect would be even plausible, much less sound and tenable."

We have been cited to no case in conflict with the views expressed in the opinions from which liberal quotations have just been made. The conclusions arrived at and the

reasons given are indorsed by all the authorities of which we have any knowledge or of which any citation has been made; and of the latter class, there are a great number which it has been deemed inexpedient to embrace within the limits of this discussion. It follows, therefore, both upon authority and principle, that the contract for the special rate of three-fourths of a cent per ton per mile cannot be held to obtain unimpaired by the act of congress entitled "An act to regulate commerce," much less can it be tolerated that the enforcement of that rate should be made the basis of recovery of amounts paid in excess thereof, but which were charged and collected upon the tariff rate of the Missouri Pacific Railway Company.

Some stress seems to have been laid upon the finding that the rate of three cents per ton per mile was unreasonable and unfair. Section 9 of the act to regulate commerce is as follows: "That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the commission, as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but

such evidence or testimony shall not be used against such person on the trial of any criminal proceeding." It will be observed that this section provides that application may be made for the redress of grievances either to the interstate commission provided for in the act, or to any district or circuit court of the United States of competent jurisdiction. There is no provision in the act which authorizes suit to be commenced in the state courts, as was provided in the act for the recovery of the penalty for the exaction of usury by national banks. Even under this act last referred to, which provided specially that such jurisdiction might be exercised by state courts, it was strenuously insisted, and by some courts even held in the teeth of the language of the act itself, that the jurisdiction to enforce the provisions of that act was, from the nature of the case, limited to the federal courts alone. It would seem, from an examination of the "Act to regulate commerce," that as to the particular form of grievance alleged in this action congress has provided a commission, to which application should have been made, after April 5, 1887, for the adjustment of rates, if, as found by the courts, those exacted from the Construction Company were unreasonable and unfair; or the aggrieved party might sue, in a district court of the United States having jurisdiction, for damages occasioned by such unfair exaction.

The view which we take as to the federal jurisdiction, being exclusive in regard to the matter now under consideration, is not without the support of very respectable authorities.

In *Copp v. Louisville & N. R. Co.*, the supreme court of the state of Louisiana, in 46 Am. & Eng. R. Cas., employed the following language, which is found on page 634: "In the instant case the right asserted by the plaintiff is claimed under an act of congress, which specifies the remedy for its enforcement. This circumstance suffices to evidence that congress saw fit to give the federal courts ex-

clusive jurisdiction. The motive which induced such legislation may have been, and no doubt is, to create one entire and complete system and provide for the necessary uniform machinery to make it effective on an important and vital subject of national interest. (See further, Sutherland, Stat. Const., sec. 399; *Dudley v. Mayhew*, 3 N. Y., 9; *The Moses Taylor*, 4 Wall. [U. S.], 429; *Martin v. Hunter*, 1 Wheat. [U. S], 334; *Ex parte McNiel*, 13 Wall. [U. S.], 236.)"

In *Coxe Brothers v. Lehigh Valley R. Co.*, 4 Interstate Commerce Commission Reports, on page 578, is found the following language: "The act to regulate commerce, which declares every unjust and unreasonable charge to be unlawful, and requires its provisions to be enforced by the commission, confers the power to determine, and imposes on the commission the duty of determining, what are the reasonable rates which the charges may not exceed, as well as what are unreasonable."

In *Swift v. Philadelphia & R. R. Co.*, 58 Fed. Rep., 858, and in three other cases of the same nature submitted at the same time in the circuit court of the United States for the northern district of Illinois, in an opinion filed November 28, 1893, Grosscup, J., said: "The courts of the United States have had many occasions to enforce the common law, but in every instance it has been as the municipal law of the state by which the subject-matter was affected. Outside of the interstate commerce act there is no enactment of congress and no self-operating provision of the federal constitution which expressly or by implication evidences a command or purpose to interfere with the freedom of interstate commerce or lay any restraint upon the rights of carriers or shippers engaged therein. (*Welton v. State of Missouri*, 91 U. S., 282; *Brown v. Huston*, 114 U. S., 822.) The question then arises, is the municipal law of the state applicable to the transaction set forth in the declaration? Is the act or contract of the carrier who ac-

cepts goods for carriage from one state into another subject to that particular provision of the municipal law of the several states where the goods are taken, or through which they are conveyed, which prohibits the exaction of unreasonable rates? There can be no doubt that to congress is given, by the constitution, the absolute power to regulate commerce between the states. This power, independently of legislation, is not necessarily exclusive of the right of the states to reasonably regulate such incidents of interstate commerce lying within their respective jurisdictions, as wharves, pilots, harbors, roads, bridges, etc. A wharf, harbor, or bridge lying within a state is a tangible entity over which the laws of the state extend. The cost of their creation and the expenses of their maintenance make the imposition of tolls and charges not only reasonable but necessary. These must be enforced by, and subject to, some law, and in the absence of congressional legislation there is no law except that of the state. The application of the state law in such cases is not inconsistent with the general power conferred upon congress, and does not introduce into commerce between the states either confusion or restraint. Such regulations may exist harmoniously with regulations imposed by other states upon wharves, harbors, and bridges within their territorial limits. But the fixing of a rate for the carriage of goods from one state to another is not simply an incident of, or appurtenance to, commerce, but is the very core and essence of interstate commerce. It is not a physical entity within the limits of a state, and it cannot be subject to regulation in one state without coming into interference with the equally rightful regulations of other states, and thus producing hopeless contradiction and confusion. How can Illinois determine what is a reasonable charge for carriage across Indiana, Ohio, or Pennsylvania? The reasonableness of such rate depends, among other things, upon the cost of construction and wages paid beyond her

jurisdiction; the amount of capitalization allowed, and taxes and assessments exacted by other jurisdictions; the terms of contracts for the interchange of freight between carriers made and allowed under the laws of other states, and the amount of traffic carried which may, in turn, be affected by the laws of the other states governing the acquisition of or consolidation with other lines. These and many others are the elements of the cost of carriage, and before the reasonableness of a rate can be determined, the cost must be ascertained. The reasonableness of rates for such long distances and over different methods of conveyance can only be approximately ascertained at best by men of special learning and equipment in such matters. Is it possible that the constitution contemplates that such learning can be found in the courts and juries of every county traversed by a line one thousand miles long? I am of the opinion that a rate for the carriage of interstate commerce, dependent, as it is, for its reasonableness upon so many different considerations of expenditure, business, and interpretations of the laws of different states, is essentially a national affair, and its regulation is, therefore, exclusively national. The rate of carriage is the heart pulse of commerce, and can be subject safely to a single source of restraint only; many restraints themselves, entirely different and inconsistent with each other, would destroy the very possibility of uniformity or fixedness of rates. It follows, therefore, that, in my opinion, the local municipal law of the several states is not applicable to the reasonableness of these rates, and cannot be appealed to as a basis for suits such as these." In the latter part of this opinion, Grosscup, J., said: "The right to question the reasonableness of an interstate commerce rate is a matter of primary as well as of exclusive jurisdiction in the federal courts. It does not reside in the jurisdiction of the state courts, or of the federal courts acquired by the fact of diverse citizenship." This decision was upon the question of the right of

removal from a state to a federal court, it is true, as indicated in the sentence last quoted, but the principles enunciated are fairly applicable to the question which we have under consideration. Upon the general principle which we have been discussing, the language of COBB, J., as found in *Keith v. Tilford*, 12 Neb., on page 273, is as follows: "There can be no doubt of the correctness of the proposition to which plaintiffs in error cite numerous authorities, that where the statute confers a right and prescribes adequate means of protecting it, the proprietor of the right is confined to the statutory remedy." (See, also, *Tecumseh Town Site Case*, 3 Neb., 284, and *Richards v. Commissioners, Clay County*, 40 Neb., 45, and cases therein cited.) It necessarily follows that the interstate commerce act required the abrogation of all special rates by railroads affected by its provisions, and that though the uniform rate put in operation by the railroad company under stress of the act to regulate commerce may be unreasonable and unfair, yet that the federal authorities named in the act itself have exclusive jurisdiction to inquire into and redress grievances on that score. We are, therefore, constrained to disallow the item of overcharges, for the repayment of which subsequent to April 5, 1887, the trial court found the Missouri Pacific Railway Company liable.

16. The trial court found that the Missouri Pacific Railway Company had paid out for right of way necessary for the construction of the railroads contemplated by the contracts hereinbefore referred to, the sum of $58,758.39 before this suit was begun, and $6,601.91 since, and that the defendant was entitled to recover that sum from the Construction Company. As between the Construction Company and the Denver, Memphis & Atlantic Railroad Company, as well as between the Construction Company and the other roads of which the building was undertaken by the Construction Company, the contract required in each case that the Construction Company should pay for

the necessary right of way. There exists neither in the evidence nor in the pleadings any grounds proved or alleged for shifting this payment for the right of way so that the Missouri Pacific Railway Company should be liable for it, and as the last named railway company has been compelled to pay the above amounts, it is entitled to a reimbursement thereof with interest.

The last item allowed by the trial court was of interest at the rate of six per centum per annum on the sums found due respectively. Section 2, chapter 44, Compiled Statutes, provides: "Interest upon the loan or forbearance of money, goods, or things in action shall be at the rate of seven dollars per year upon one hundred dollars, unless a greater rate, not exceeding ten per cent per annum, be contracted for by the parties." Clearly in this state the rate upon such items as we have considered should be reckoned at the rate of seven per cent per annum from the date that each cause of action arose. There might be such controlling facts that resort would be had to the laws of another state to determine what rate of interest should be allowed between the parties. No showing has been made, however, as to such facts; neither has there been submitted any evidence of a different rate of interest from that of Nebraska prevailing elsewhere. We must, therefore, presume that the laws of other states are the same as our own. (*Ruth v. Lowrey*, 10 Neb., 260; *Lord v. State*, 17 Neb., 526.) Interest upon the several items found due will, therefore, be reckoned from the commencement of this action, for want of a more satisfactory basis, at the rate of seven per cent per annum.

It is unnecessary to note in detail the several items as to which there is no controversy between the parties; these will, therefore, be accepted as fully established. There is due on account of these items, and based upon the several matters which have been discussed at length, as between the Fitzgerald & Mallory Construction Company and the

Missouri Pacific Railway Company, the amounts hereinafter set forth.

From the Missouri Pacific Railway Company to the Construction Company aforesaid there is found due the following items:

For refund of passenger fares	$4,538 51
For labor	93 50
For material furnished	11,396 75
For water furnished	3 00
For coal furnished	11 00
For rails and ties furnished	7,098 17
Engine supplies	536 69
Labor and material (account bridges)	1,194 57
Taxes	1 00
Mail service	1,055 41
Construction Verdigris Valley R. R	36,869 01
Construction Winfield, Texas & Gulf R. R.	18,028 84
Overcharges on merchandise	1 66
Equipment purchased (cars and engines)	132,735 03
Overcharges on material (Horace)	163 72
Miscellaneous items	12,988 87
Overcharges on freight prior to April 1, 1887	17,769 45
Interest paid Jay Gould, Cr. September 1, 1887	62,500 00
Additional stall roundhouse, Chivington	1,000 00
Extra grading at Chivington	6,000 00
Material at Chivington, October, 1888	16,241 16
Material at Chivington since November, 1888	19,680 00
Material at Chivington, tax sale	16,910 59
Ten per cent discount on $5,000,000	500,000 00
Reduction of $1,000 per mile on 36 miles	36,000 00
Miscellaneous material at Chivington	5,000 00
Telegraph line	25,703 03
Extra ties on D., M. & A.	23,192 07

Stock yards and pens	$11,800 00
Fencing, Chetopa & Conway Springs division	1,522 98
Turn-tables, Conway Springs division	4,522 01
Extra nut-locks, D., M. & A	2,223 92
Interest to December 24, 1893, 7 per cent	341,873 33
Total	$1,318,654 27

There is due the Missouri Pacific Railway Company from the Fitzgerald & Mallory Construction Company:

For freight charges	$28,766 17
Tickets furnished	881 54
Water furnished	45 50
Taxes paid	1,021 38
Coal furnished	3,197 38
Cars destroyed	334 63
Cars repaired	1,117 49
Rent of cars	20 00
Cross-ties furnished	110,776 49
Overcharges on freight transported	413 07
Labor and material furnished	1,921 76
Recording deeds	13 80
Judgment and cost of right of way prior to suit	58,758 39
Paid T. J. Prosser & Co	26,766 39
Loss and damage on shipments	47 13
Stoves, etc	113 59
Bridge materials furnished	186 00
Labor and material (account bridges)	23,673 00
Drawbacks (overcharge and shortage)	839 59
Expenses paid on right of way	5,521 05
Paid M. S. Carter & Co	513 90
Paid J. B. Colt & Son	18,830 31
Paid T. J. Hillard	13,106 44
Cash, Russell Sage, December 28, 1887	10,000 00
Cash, Jay Gould, December 28, 1887	20,000 00

Cash, George Gould, January 23, 1888.....	$10,000 00
Cash, A. H. Calef, January 25, 1888.....	20,000 00
Paid taxes at Chivington tax sale.....	3,050 40
For right of way since suit.....	6,601 91
September 22, 1887, overpayment on bonds,	43,640 00
Interest to December 24, 1893, at 7 per cent,	143,554 88
Total	$553,712 19

On the 24th day of December, 1893, there was due upon an accounting between the parties named a balance of seven hundred and sixty-four thousand nine hundred and forty-two dollars and eight cents ($764,942.08), the difference between the above totals, from the Missouri Pacific Railway Company to the Fitzgerald & Mallory Construction Company, on which sum, from the date last mentioned, interest is to be computed at the rate of seven per cent per annum, and judgment in this court shall accordingly be rendered as of the date of the filing of this opinion, such judgment, when rendered, to draw interest at the same rate.

It is further ordered, that upon the rendition of judgment, as aforesaid, this cause be remanded to the district court of Lancaster county, Nebraska, with instructions to that court to enforce the collection of such judgment; and that upon its collection a receiver be appointed by said district court, who shall be authorized to collect, receipt for, and pay out the proceeds of the judgment above provided for (also, such other assets of said Construction Company as may be within the jurisdiction of said court), under such regulations, rules, and proceedings as by said district court shall be judged equitable and proper.

The judgment of the district court is reversed and a judgment in favor of the Fitzgerald & Mallory Construction Company against the Missouri Pacific Railway Company is directed.

JUDGMENT ACCORDINGLY.

RAGAN and IRVINE, CC., dissenting.

We cannot concur in the conclusion adopted by the court. In our opinion the judgment should be very different, and for reasons which we shall proceed to state.

The Denver, Memphis & Atlantic Railroad Company (hereinafter referred to as the "Denver Company") was incorporated in Kansas for the purpose of constructing a railroad from Denver to Memphis, extending through the state of Kansas. This company made a contract with the plaintiff and S. H. Mallory for the construction of a portion of its road. The terms of the contract are not material to this case. Fitzgerald & Mallory proceeded under the contract to the extent of grading about sixty miles of the road-bed, when funds seem to have been exhausted, and it became necessary to adopt some new plan of construction. Mr. Mallory and an officer of the Denver Company proceeded to New York for the purpose of interesting some large railroad company in the enterprise. Negotiations were begun with the officers of the Missouri Pacific Railway Company, chiefly with Mr. Jay Gould, its president; Mr. Fitzgerald also being in New York and taking part in the negotiations in some of their stages. As a result of these negotiations it was agreed between certain officers of the Missouri Pacific and Messrs. Fitzgerald & Mallory that a construction company should be incorporated, the stock of which should be taken by Messrs. Fitzgerald & Mallory, and certain other persons, most of whom were interested in the Missouri Pacific. Accordingly the Fitzgerald & Mallory Construction Company (hereinafter referred to as the "Construction Company") was incorporated under the laws of the state of Iowa, the expressed object of the corporation being the construction of railroads by contract, and the operation thereof, mining for coal or other minerals, quarrying stone and other materials. It does not seem to have ever been contemplated that the

Construction Company should do a general business, but merely that it should construct the Denver road and other roads in connection therewith. This Construction Company had a board of five directors, composed of Mr. Fitzgerald, Mr. Mallory, and three other gentlemen closely associated in business with the two named, and presumably friendly to their interests. The capital stock of this company was at first one million dollars, but was afterwards increased to one million and a half. Of this Mr. Fitzgerald and Mr. Mallory never owned more than one-fifth; almost all of the remainder being taken by persons who were directors of the Missouri Pacific. Upon April 26, 1886, soon after the Construction Company was incorporated, a contract was entered into between the Denver Company and the Construction Company whereby the Construction Company agreed to furnish materials and money and to construct the Denver Company's road. In consideration thereof the Denver Company agreed to pay the Construction Company its stock and all its bonds, being $16,000 per mile of each, at such times and in such settlements as the Construction Company might require. The Denver Company also agreed to deliver to the Construction Company all municipal and county bonds and all donations that might be voted to the Denver Company and to procure the right of way, but the Construction Company was to pay therefor. Upon the completion of the road the Construction Company was to equip it with at least $1,000 per mile of rolling stock. The road was to be built as it might be thereafter located, properly graded according to the engineer's survey, furnished with oak ties, on curves not less than 2,600 to the mile, and steel rails not less than fifty-six pounds to the yard. There were also to be such depots and stations as the Denver Company might determine, all necessary siding and turn-outs, and the road generally was to be constructed "equal to the roads now being built in southern Kansas." The foregoing states the substance of the whole contract.

Upon May 4, 1886, a contract was entered into between the Construction Company and the Missouri Pacific referring to that between the Construction Company and the Denver Company and making it a part of the new agreement, and reciting further that the Missouri Pacific "is desirous of obtaining control of the said line of road." The agreement then follows that the Construction Company shall sell to the Missouri Pacific all of the securities to be received from the Denver Company, less the amount of stock given for municipal and county aid, estimated at $3,500 per mile, and receive in payment for the same $12,000 per mile of Missouri Pacific five per cent bonds, to be secured by a deposit of the Denver securities with a trustee. The Construction Company also agreed that the railroad should be of standard gauge, of not less than fifty-six pound steel rails, 2,600 ties to the mile, stations not more than eight miles apart, water stations not more than twenty miles apart, and that the road should be equal in its general character "to the roads now being constructed by the Missouri Pacific Railway Company in the state of Kansas, all to be subject to the approval of the chief engineer" of the Missouri Pacific. An addendum to the contract provides for the payment of these securities upon both sides upon the completion of the road in ten-mile sections, and for the transportation of men and materials by the Missouri Pacific, at the actual cost, over such portions of the road as might be turned over to the Missouri Pacific during the period of construction. Afterwards, the provision for settlements as ten-mile sections were completed was waived by the parties, as was also the requirement that the Construction Company should equip the road. This last waiver was through an arrangement between the Construction Company and the Missouri Pacific whereby the Construction Company was to omit the equipment and receive $11,000 instead of $12,000 per mile of Missouri Pacific bonds. The Denver Company was

not a party to this last transaction and there was no rebate made in payments by the Denver Company to the Construction Company on that account. Upon May 11 the board of directors of the Construction Company approved both these contracts and one of its directors resigned and Mr. Russell Sage, a director of the Missouri Pacific, was elected to take his place. Upon November 3 two other directors resigned and Mr. George Gould and Mr. Richard Cross were elected in their stead. Mr. George Gould was then assistant to the president of the Missouri Pacific, and the following year became acting president thereof. Mr. Cross was a member of the banking house of Morton, Bliss & Co. The trial court found that he was directly or indirectly interested in the Missouri Pacific, but we find no evidence in the record to sustain that finding. It does not appear that either he or his firm was so interested, but it does very clearly appear from the evidence that upon every occasion when there was a difference of opinion among the directors Mr. Cross acted with Mr. Gould and Mr. Sage and against Mr. Fitzgerald and Mr. Mallory. It may be well to state here that the directory of the Denver Company was at first composed of men whose business and personal relations, and whose conduct as directors indicate that they were friendly to the interests of Mr. Fitzgerald and Mr. Mallory, but as soon as the Missouri Pacific had, by virtue of the contracts referred to, obtained an instalment of stock in the Denver Company, a meeting of that company was held and a board of directors elected, a majority of whom were closely connected with the Missouri Pacific. Under these contracts there was eventually constructed a line of railroad from Chetopa, near the southeastern corner of Kansas, in a generally northwesterly course to Larned, on the Arkansas river, and another line from McCracken, a short distance west of the center of the state, in an almost westerly course to the Colorado line. There was also constructed, under contracts substantially similar to those already set

forth, a line of railroad known as the Kansas & Southwestern, about twenty-five miles in length, and under still another contract about two miles of road known as the Winfield, Texas & Gulf. No controversy arises out of the construction of the last named road and the Construction Company's compensation therefor appears in the account below as an admitted item. During the progress of the work in Kansas a company known as the Pueblo & State Line Company was incorporated under the laws of the state of Colorado. This company will be hereinafter referred to as the "Pueblo Company." It seems to have been incorporated in the interest of the Missouri Pacific and by officers of that company. Upon August 16, 1887, the Pueblo Company entered into a contract with the Construction Company for the construction of a line of road from Pueblo easterly to a connection with the Denver road, and upon the same day the Missouri Pacific contracted with the Construction Company for the purchase of the stock and bonds of the Pueblo road and payment therefor in Missouri Pacific bonds. These contracts were very similar to those relating to the Denver road. They were somewhat more specific in their provisions, contained no requirement for equipping the road, and provided for bonds upon the Pueblo road at $15,000 per mile and stock at $10,000 per mile, for which stock and bonds the Missouri Pacific agreed to give $12,000 per mile of its five per cent bonds. This line of road was built by the Construction Company. Controversies having arisen out of various transactions under the foregoing contracts, or connected therewith, this action was brought by Fitzgerald, for himself and all the other stockholders of the Construction Company, for an accounting between the Construction Company and the Missouri Pacific.

The fundamental principle to be observed should be the discovery of the real nature, purposes, and results of these transactions and proceedings. Upon their face the con-

tracts appear to be grouped as follows: One class between railroad companies and the Construction Company, contemplating the construction of lines of railroad and the payment therefor in stock and bonds, a transaction reasonable and legitimate in its nature when unaccompanied by elements of fraud. Second, another series of contracts between the Construction Company and the Missouri Pacific, whereby the Construction Company sells the stock and bonds so obtained and receives in exchange bonds of the Missouri Pacific. This also seems upon its face to be a legitimate and reasonable transaction. It is the duty of a court, especially in the exercise of its equitable powers, to look behind the form of contracts and transactions and reach their substance. When an effort is made to do so in this case, an entirely new light is thrown upon the whole enterprise, and facts are disclosed which, in our opinion, call upon the court to apply to the case a fundamental and familiar maxim of the law which should dispose of the whole controversy, at least so far as the interposition of courts is concerned.

Examining the contracts and proceedings thereunder in this light, the following observations are made: (1.) The originally contracting railroad companies were scarcely more than paper concerns, without property, without *bona fide* stock, without financial responsibility, without any responsibility except to the sovereign power of the states creating them. (2.) The Construction Company, out of its board of five directors, at all times had at least two members of the directory of the Missouri Pacific, and for a third member a man who at all times voted with the Missouri Pacific interests. The large majority of the stock of the Construction Company was owned by Missouri Pacific directors and stockholders. (3.) It never seems to have been contemplated that the Construction Company should do a general business, but its organization and operation was a device to assist in the construction of these

particular lines of railroad. (4.) The plain, and indeed the express, object of the Missouri Pacific in contracting with the Construction Company was to obtain control of the railroads so to be constructed by the acquisition of all their stock and all their bonds. (5.) It is just as plainly inferable that the accomplishment of this object was one motive which led the Missouri Pacific stockholders and directors to subscribe to the stock of the Construction Company. (6.) The control so obtained of the original corporations enabled the Missouri Pacific in some manner to arrange with those companies to obtain not only a directing control of the corporations themselves, but actual possession and right to operate their tangible property as rapidly as it was brought into existence. (7.) Each one of these original companies issued capital stock and bonds vastly in excess of the cost of creating, and presumably of the value of its property. To illustrate: The stock of the Denver Company was $16,000 a mile, and its bonds $16,000 a mile. The stock of the Pueblo Company was $10,000 a mile, and its bonds $15,000 a mile. The other companies show similar figures. The evidence is not altogether harmonious as to the cost of construction, but it may safely be said that a figure between $10,000 and $12,000 a mile would amply cover the whole cost of construction, including the procurement of the right of way and the purchase of material, the erection of telegraph lines, the construction of stations, side tracks, stock pens, and all other things possessed by the companies. (8.) The bonds of the Missouri Pacific with which these securities were bought were not worth at the outside estimate much more than par; in fact, they were sold by the Construction Company at ninety cents. (9.) The Missouri Pacific was careful to contract in all cases that the stock and bonds which it should receive should be issued by the original companies, except that in regard to the Kansas roads an exception was made of so much of the stock as

might be issued in payment for local aid bonds. This feature will be hereinafter referred to. (10.) The stock of these companies being delivered to the Missouri Pacific, and there being no evidence as to any future disposition thereof, it is to be presumed that the Missouri Pacific still holds it for the purpose of maintaining its "control" of the original companies. (11.) The bonds were deposited with a trustee to secure the Missouri Pacific bonds with which they and the stock were purchased, but the Missouri Pacific receives the interest thereon from time to time. (12.) While the arrangements between the Missouri Pacific and the companies so passed under its "control" do not appear from the evidence, in view of the fact that the bonds of these companies amount in their aggregate to more than the cost of the roads and that they bear six per cent interest, it is fair to presume that any sums paid to the original companies by way of rentals or otherwise in payment for the privilege of holding and operating these roads is absorbed in the payment of interest on the bonds and so pass directly back to the Missouri Pacific. If any surplus remains, it is, of course, disposed of by way of dividends to the stockholders, —that is, the Missouri Pacific,—except to the extent of stock in the Kansas roads held by the municipalities which saw fit to impose the burden of taxation upon their citizens for the purpose of aiding this enterprise. (13.) So far as the evidence shows what became of the Missouri Pacific bonds after they reached the Construction Company, it appears that nearly all of them were sold at a discount to directors of the Missouri Pacific, who were also stockholders in the Construction Company. It therefore follows that all the sources of income created by these complex arrangements have been so manipulated that the income passes either directly to the Missouri Pacific or to such of its directors as seem to control its operations and also those of the Construction Company.

From these observations and from facts upon which they

are based the following conclusions seem inevitable: The whole scheme amounted to a device of the Missouri Pacific, or those having its control, to construct certain railroads in Kansas and Colorado, issue stocks and bonds vastly in excess of the value of the property, so manipulate them that whatever earnings might accrue would pass to the Missouri Pacific or to favored stockholders therein, so that the Missouri Pacific and those stockholders should receive all possible benefits from the transaction, and at the same time assume no burdens, leaving all the financial responsibility upon the Construction Company and all the legal responsibility devolving upon a railroad company in favor of the state upon those local corporations which have been heretofore styled the original companies, and which it is perfectly fair to characterize as purely paper and fictitious concerns and irresponsible devices for the purpose of exercising the rights granted by the states and assuming the obligations imposed upon such corporations by the states, and so relieve the real projector and promoter of the scheme from all actual responsibility. The overissue of stock and bonds is in itself a serious and probably sufficient reason for characterizing the transaction as fraudulent.

The courts, wherever the subject has arisen, as well as the text-writers, have announced the general doctrine that stock certificates purporting to be paid up should be actually so, and that the issuing of stock gratuitously at a discount, or in exchange for property taken at a known and intentional overvaluation, is a fraud. The fraud has been variously characterized as one against *bona fide* stockholders, against creditors, against the corporation itself, against the public and upon the law. It is not often that a remedy exists for such a fraud, and in many of the cases the courts, while insisting that the issue of fictitious stock is a fraud, have been compelled to deny relief against it, either because the parties seeking relief were estopped, or because they were not the sufferers. This result does not, however,

render the language of the courts regarding the nature of such transactions less significant.

In *Re Ambrose Lake Tin & Copper Mining Co.*, L. R. 14, Ch. Div. [Eng.], 390, it was said in regard to such a transaction: "Whether a fraud upon which any action can be taken has been committed in this case, I am not at present prepared to say, but that a fraud was intended I have not the least doubt. The transaction has all the badges of fraud."

In *Barnes v. Brown*, 80 N. Y., 527, the court said: "The directors assuming to issue stock in that way (without consideration) would perpetrate a wrong upon the corporation and its stockholders and a fraud upon every person who took such stock as full paid stock, relying upon the appearance, and deceived thereby."

In *Lorillard v. Clyde*, 86 N. Y., 384, the court sustained the formation of a corporation whose stock was issued in payment for steamers purchased from the stockholders at an agreed valuation which was not shown to be excessive, but it was said: "If it had appeared that the organization of the corporation in this way was a device to defraud the public by putting valueless stock on the market having an apparent basis only, a different question would be presented."

Gilman, C. & S. R. Co. v. Kelly, 77 Ill., 426, was a case presenting many features like the one now before us. The court said: "In this case certificates of stock to the amount of $1,400,000, being a majority of all the stock, have been issued without any real consideration, with the evident purpose to deprive the other stockholders of any influence in the election of directors or in the management of the affairs of the company. * * * Whatever may have been the motive, the disposition of the stock was such the directors could not rightfully make."

In *Tobey v. Robinson*, 99 Ill., 222, the court said in regard to stock issued without consideration: "Its issue was

in violation of law and in fraud of the rights of the stockholders of the Erie Company."

In *Osgood v. King*, 42 Ia., 478, it was said: "It is a gross fraud for the officers of such a corporation to issue to stockholders paid up certificates of stock in consideration of real estate conveyed at a price known and understood to be many times its real value, but such a fraud is greatly intensified when the officers of a corporation deal with themselves as stockholders and accept such a conveyance in payment of their own stock." This language is peculiarly applicable to the facts of the case under consideration.

As early as 1858 the issuance of fictitious stock was denounced by Mr. Justice McLean in *Sturges v. Stetson*, 1 Biss. [U. S.], 246, and in *Fosdick v. Sturges*, 1 Biss. [U. S.], 255, as "fraud upon law and upon the stockholders." The manner in which relief can be obtained from such a fraud is not material in this case. The only important principle is that the willful and intentional issuing of fictitious stock is unlawful. We can only surmise some of the motives which led to it in this case. One purpose on the part of the Missouri Pacific is plain enough. The trust indenture under which the Missouri Pacific bonds were issued restricted the issuance of such bonds to the amount of $10,000 per mile of roads whose underlying bonds were pledged to secure the same, with one exception in favor of the St. Louis, Fort Scott & Wichita road, which was $15,000 per mile. So far as the railroad companies in this controversy are concerned, $12,000 per mile much more than covered the average cost of construction; but these Missouri Pacific bonds were given a fictitious value by the pledge of bonds having a nominal value of $15,000 or $16,000 per mile to secure them. The advantages from an overissue of stock and bonds are manifest to any one who has been called upon to investigate contracts of corporations, and those familiar with questions lately arising in regard to the reasonableness of rates fixed by the legisla-

ture, or by commissioners, for the carriage of freight and passengers. Such overissues are pernicious in effect and indefensible upon principle. No honest motive can be ascribed to such acts when knowingly committed. Such instruments partake of the nature of false tokens. They are the instruments of deception and fraud. They are intended to, and do usually, find their way into the hands of innocent purchasers, who ultimately find that they have parted with their money in exchange for depreciated securities whose actual value, owing to the gigantic nature of the enterprises upon which they are based and usually the remoteness of the field of operations, these purchasers were unable to investigate. They lead to corporate bankruptcy and often to the bankruptcy and distress of investors. They form at once the urgent motive and plausible excuse for excessive and unreasonable charges upon the patrons of the road in order to secure sufficient earnings to pay interest and dividends upon securities in excess of the productive capital invested. They afford a motive and an opportunity for directors—whose interests should be, as their legal and moral duty is, to conduct the operations of the road for the benefit of all its creditors and stockholders—to deviate from this duty and so act as to receive for themselves a profit, coming first from unfortunate and misguided investors and ultimately from the stockholders whose interests it was their duty to protect.

In the gradual advancement of the law of corporations the courts have been slow in appreciating the enormity of the fraudulent issue of stock and bonds. The devices first resorted to for this purpose were simple and transparent and were easily corrected. The ingenuity of promoters has since devised more subtle schemes, until we have, in this case, a fraud of this kind shielded under such a complexity of corporate creations, contracts, and transactions that it has been necessary to review the whole history of the enterprise and to brush aside the forms of contracts in

order to discover its real nature. It is said that such schemes are common, that certain states are grid-ironed with railroads constructed in pursuance thereof, and so charged with indebtedness that no earnings could be expected to meet their obligations as they accrue, without regard to the payment to stockholders of the profits which they have a right to expect from their investment. At the same time a cry goes up from certain classes of patrons that the passenger and freight charges of these railroads are exorbitant and ruinous, and a demand, which some states have seen fit to meet, has gone out for legislative action to control and reduce such charges. While investors in railroad securities declare that they receive no income, that depreciation has occurred, and that failure threatens, other classes declare, with equal vehemence, that exorbitant charges by railroads render their business unproductive. This state of affairs is largely caused by just such operations as have given rise to this lawsuit, and it is high time for the courts to enforce the same rules in regard to fraudulent practices carried on upon this gigantic scale and followed by these enormous results as they enforce with regard to the same transactions where the magnitude of the scheme and the intricacies of its details tend less to obscure the vision. The foregoing remarks apply to both the Kansas and Colorado roads, but with regard to those in Kansas there are other more direct and probably clearer reasons why this transaction should be deemed fraudulent. The law of Kansas was not directly put in evidence by production of the statutes or other usual methods of proof. It appears, however, that counties and municipalities of that state are permitted, upon vote of the electors, to issue their bonds to aid in the construction of railroads, and that they receive in exchange for such bonds capital stock of the railroad companies at par valuation. About $1,000,000 of bonds were received by the railroad companies to aid in the construction of these roads. These bonds went

to the Construction Company. Obviously it was contemplated by the law that the stock which these bonds went to purchase should be genuine stock, but we find the property of these companies incumbered by mortgages to secure bonds in themselves greatly in excess of the cost of the roads. Then there is issued, on top of this mortgage indebtedness, stock in itself greatly in excess of such cost. The result is that these confiding municipalities have incurred obligations which have for their security the full force of the taxing power, and have received in exchange certificates of stock which are utterly worthless, so weighed down with other stock as not even to give the municipalities any effective voice in the control of the corporations, and the whole matter so manipulated in this case that the property of the corporation is turned over at once upon its creation to a different organization, in which the municipalities have no voice at all, and under such arrangements that whatever earnings might otherwise accrue to the original corporations are immediately absorbed by the other. A review of the evidence, indeed, must convince any candid reader that a chief, if not the principal, object in this enterprise, so far as the construction in Kansas was concerned, was to obtain the greatest amount possible of this local aid, with the further purpose always in view of so manipulating affairs that nothing should be given in return therefor. (See on this feature, *Gilman, C. & S. R. Co. v. Kelly*, 77 Ill., 426.) Enough has been said to demonstrate that the whole enterprise was of an unlawful character, at least so far as the Missouri Pacific and those officers who took an active part are concerned.

The question will now be asked, how does that fact affect the rights of the Construction Company? The answer is that the Construction Company was an essential part of the unlawful scheme. It was organized for the purpose of rendering the scheme feasible, and was as necessary to it as the original paper corporations themselves.

Had the contracts been directly between these two companies and the Missouri Pacific, it is probable that they would have been *ultra vires* of the Missouri Pacific. It had the right to build railroads for itself and to purchase and lease roads, but probably not to construct roads for other companies. Then it must be kept in view that the Missouri Pacific stockholders, who were also stockholders in the Construction Company, so manipulated affairs as to reap an individual profit to themselves. They undoubtedly had this object in view from the beginning. Then in a direct transaction the Missouri Pacific would have incurred a direct financial responsibility which it was more convenient to form the Construction Company to assume. In short, the Construction Company was a mere device to assist in the unlawful enterprise. Its two stockholders who were not interested in the Missouri Pacific had full knowledge of the relations of the other stockholders to that company. They knew all the details of the scheme. They are chargeable with the knowledge of its legal result. It is not a case where a third person has innocently assisted in the accomplishment of an illegal design, but one where the party seeking relief was a party to that design. By way of illustration: If A and B concoct a scheme whereby they contract with C to do a certain work, and by virtue of that contract defraud C, or a third person, the working of that fraud being their object in making the contract, and to carry out the fraud employ men to do the work, these workmen should undoubtedly recover from A and B for their services, if they were not aware of the unlawful character of the enterprise. Possibly they might recover even if they had notice of its illegality. But if A should pay these workmen, no court would hold that he could compel B to contribute or account. Such is the situation here. The Missouri Pacific and the Construction Company were practically partners for the purpose of carrying out an unlawful scheme. The court will not enforce such

a contract when executory, and when executed the court will leave the parties where they have placed themselves and refuse all relief. The general principles upon which this conclusion has been reached are founded upon public policy and are as old as the common law itself and require no argument for their establishment. There are, indeed, many cases holding that the mere knowledge of one party that the other proposes to illegally use the fruits of the contract will not prevent a recovery. This doctrine seems to have taken its rise from the opinion of Lord Mansfield in the case of *Holman v. Johnson*, 1 Cowp. [Eng.], 341, where it was held that there could be a recovery for goods sold at Dunkirk, the vendor knowing that the vendee intended to smuggle them into England; but in *Lightfoot v. Tenant*, 1 B. & P. [Eng.], 551, it was held that there could be no recovery upon a sale of goods to be disposed of by the vendee contrary to an act of parliament, where the vendor participated in the unlawful design, the court saying: "The plaintiffs do not merely assist another, they must be taken to be principals in the illicit transaction." The following forcible illustration is used: "The man who sold arsenic to one he knew intended to poison his wife with it, would not be allowed to maintain an action upon his contract." In *Hobbs v. Henning*, 17 C. B., n. s. [Eng.], 819, the court distinguishes the two cases last cited and attempts to reconcile them, overlooking the fact that in *Lightfoot v. Tenant* the inference of participation was drawn chiefly from the fact of the vendor's knowledge, and overlooking the further fact that in *Langton v. Hughes*, 1 Man. & Sel. [Eng.], 593, and in *Cannan v. Bryce*, 3 Barn. & Ald. [Eng.], 179, the doctrine of *Holman v. Johnson* had been overruled and no recovery permitted. We think that we have shown that the Construction Company was a principal and a participant in the illegal transaction, so that, measured by either rule, there can be no recovery. The language of Lord Mansfield in *Holman v. Johnson*, in

which he states the general rule, has been frequently approved and followed, while the conclusion reached in that case has been overruled. His language is as follows: "The objection, that a contract is immoral or illegal as between plaintiff and the defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded on general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this: *Ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis.*"

That the manipulation of the roads in Kansas was a gross and deliberate fraud upon the municipalities is clear, and that the organization of the Construction Company put it within the power of the common stockholders, in the first place, to earn for themselves and their coadjutors in the Construction Company a profit out of the Missouri Pacific, towards which they occupied fiduciary relations, and then in turn to take these profits from the Construction Company and put them into their own pockets, is equally clear. If the case is not parallel upon the facts, it is fairly within the principle of *Wardell v. Railroad Company*, 103 U. S., 651; *Anderson v. Carkins*, 135 U. S., 483; *Gould v. Ken-*

dall, 15 Neb., 549, and many other cases of a similar nature. In both *Wardell v. Railroad Company* and *Anderson v. Carkins* there is a dictum that in an appropriate action there might probably be a recovery upon a *quantum meruit*, but if that be so, it must be upon grounds independent of the contract and not in an action founded thereon. Relief was altogether refused in the cases cited, and should be refused here.

It may be said that the Construction Company is indebted and that its creditors should not suffer. Some indebtedness does appear in the record, most of it, however, to individuals who were parties to the scheme; but no creditors are here to enforce their rights, and this suit does not affect their rights. Their remedies against either or both of these companies are not before the court for consideration; and if in a direct proceeding between the parties to an unlawful contract the creditors of either must be protected, the courts could probably never apply the maxim, "*ex dolo malo non oritur actio*," and illegal contracts would always have to be enforced. There is no pleading of the illegality of the contract, at least upon the ground herein discussed; but where upon the trial it is apparent, from evidence material to the issues, that the cause of action rests upon an agreement against public policy, the court will of its own motion refuse to enforce such agreement or grant any relief where the parties are *in pari delicto*. But conceding that the subject-matter of this suit is one which the courts should entertain, we can see neither reason nor consistency in accepting some portions of the transaction as it appears on its face and rejecting other portions as subterfuges—measuring some liabilities by the terms of the contracts and others by a rule obtained by disregarding those terms. If the case is to be entertained at all we think it should be resolved as follows:

First—Fitzgerald's right to maintain the action. The Missouri Pacific contends that the plaintiff has not es-

tablished a sufficient foundation for maintaining a stockholder's bill. The allegations of the petition upon this point are, briefly, that the persons interested in the Missouri Pacific have a controlling interest in the stock of the Construction Company; that a majority of the board of directors of the Construction Company are interested in the Missouri Pacific and have manipulated the affairs of the Construction Company to its own disadvantage and to the advantage of the Missouri Pacific. These matters are set out at length and in detail. The evidence shows that prior to the commencement of the suit the plaintiff requested Mr. Mallory, the president of the Construction Company, to institute the action, and that Mr. Mallory refused to do so. No demand was made upon the board of directors. It is claimed in defense that in every case such a demand must be made as a condition precedent to the institution of a suit by a stockholder, or if there be an exception, it is confined to cases where the action is against the directors individually. The findings of the trial court and the overwhelming weight of evidence show that a majority of the board of directors in all of the transactions where there was a conflict of interests have acted in accordance with the interests of the Missouri Pacific or expressed wishes of Mr. Jay Gould, its president; that in all the matters complained of the Construction Company has been placed in the position it now occupies by acts of that same majority, and it is perfectly clear that a demand upon the board of directors to institute the suit would have been fruitless, or if it had been complied with, that the action would have been conducted as all the past affairs of the Construction Company had been,—not adversely to the Missouri Pacific, but in accordance with its wishes. We do not think that in any case presenting a similar state of facts has relief been denied to a stockholder. While the cases holding that a demand is unnecessary are generally actions against the persons upon whom if demand were necessary

it must be made, the principle established in those cases is that the demand is not necessary where it would be useless. (*Barr v. New York, L. E. & W. R. Co.*, 96 N. Y., 444; Beach, Private Corporations, 886; Cook, Stockholders, 741.)

Second—Is there a defect of parties? It appears incidentally in the pleadings and distinctly by the evidence that Fitzgerald brought an action in Iowa against the Construction Company for the purpose of winding up its affairs, and that in that action a receiver was appointed of the effects of the Construction Company. It is urged that Fitzgerald cannot now maintain this action, at least without joining the receiver as a party defendant. We think it is clear that the receiver could not himself have maintained the action in this state. The point was considered and discussed with great care by Mr. Justice Wayne in *Booth v. Clark*, 17 How. [U. S.], 321, and it is there said: "Our industry has been tasked unsuccessfully to find a case in which a receiver has been permitted to sue in a foreign jurisdiction for the property of the debtor. So far as we can find, it has not been allowed in an English tribunal; orders have been given in the English chancery for receivers to proceed to execute their functions in another jurisdiction, but we are not aware of its ever having been permitted by the tribunals of the last. We think that a receiver has never been recognized by a foreign tribunal as an actor in a suit. He is not within that comity which nations have permitted, after the manner of such nations as practice it, in respect to the judgments and decrees of foreign tribunals." Inasmuch as the receiver could not be recognized in this state and could not have been permitted to maintain the action, it would seem to follow that the courts of this state must proceed independently of the receivership. As a foreign receiver he would have no interest in the controversy, and is neither a necessary or proper party thereto. The case relied upon by the defendants

upon this point is that of *Porter v. Sabin*, 149 U. S., 473. It was there held that after a state court had appointed a receiver of property of a corporation, stockholders could not bring suit against the officers in a court of the United States of the same territorial jurisdiction without making the receiver a defendant. The decision was based upon the ground that when a court of competent jurisdiction appoints such a receiver it assumes the administration of the estate, and it is for that court to determine whether it will adjudicate claims for or against the receiver, or allow them to be litigated elsewhere, and in that case the court appointing the receiver and the court in which the stockholders' bill was filed having the same territorial jurisdiction, the state court had already obtained jurisdiction over all the property and rights of action which would otherwise be within reach of the federal court. The facts which influenced the decision in *Porter v. Sabin* do not exist in this case and the general doctrine applies.

Third—The accounting. Both parties have appealed from the decree of the district court, and we are now brought to a review of the findings of that court in the accounting between the parties defendant.

1. The trial court finds, in accordance with the evidence, that the railroads were constructed and turned over to the Missouri Pacific as follows: Denver, Memphis & Atlantic—February 14, 1887, 150 miles; August 11, 1887, 29.83 miles; August 11, 1887, 93.57 miles; October 1, 1887, 124.42 miles; December 15, 1887, 12.82 miles; total, 410.64 miles. Kansas & Southwestern—May 3, 1887, 24.84 miles. Pueblo & State Line—December 15, 1887, 151.34 miles. Total, 586.82 miles.

2. Upon the completion of the first 150 miles a controversy arose as to whether the road had been constructed in accordance with the contract, and the Missouri Pacific at first refused to accept the road. A proposition was then made by Mr. Jay Gould, as president of the Missouri Pa-

cific, to the directors of the Construction Company, that the Missouri Pacific would accept the road at $10,000 per mile. This proposition was accepted by a resolution of the directors and settlement made accordingly. The plaintiff seeks to recover the $150,000 thus withheld. The evidence as to the manner in which this 150 miles had been constructed is very conflicting, but the trial court found upon ample evidence that the road was constructed in accordance with the contract, except as to some details of the work which were afterwards performed. The binding force of the compromise depends not, however, upon what the rights of the parties actually were at the time it was entered into, but upon the question as to whether or not there was, at the time of the compromise, a *bona fide* controversy upon the subject. It is very clear from the evidence that Mr. Gould was dissatisfied with the work of the Construction Company; that he made many objections thereto; that he insisted earnestly that the work did not satisfy the requirements of the contract; and there is so much evidence to support the contention of Mr. Gould and the Missouri Pacific in this regard that a finding by the trial court based upon that evidence would not have been disturbed. We think the evidence shows that an actual controversy existed, that the Missouri Pacific urged it in good faith, and that the resolution was adopted in good faith for the purpose of settling it. A settlement was actually made upon the basis of a compromise, acquiesced in by both parties thereto, throughout all subsequent transactions, and it cannot now be disturbed. The trial court was right in disallowing this item. It is said that the Missouri Pacific paid Gould and others $11,000 per mile for the whole of the Denver road, making these persons its agents to pay the Construction Company. We cannot find any support for this in the evidence. The only thing from which such an inference could possibly be drawn is a report of the directors of the Missouri Pacific to its stockholders, in which the cost of the Denver road is

estimated at a little less than $12,000 per mile; but when the admitted items of extras in this account are considered, this statement is easily explained. But did the facts appear as the plaintiff claims, it would not affect the compromise. If A give B $100 to pay C, and a controversy existing as to whether C has earned the money, B settle for $500, his liability for the remainder is to his principal and not to C.

3. A portion of the road, 36.6 miles long, the Missouri Pacific at one time determined should not be constructed. Mr. Mallory urged its construction, and finally agreed to construct it at the rate of $10,000 per mile, if the Missouri Pacific would permit. Mr. Mallory had no authority to so modify the contract, and the directors of the Construction Company never ratified his action. For this section of the road the Construction Company is entitled to $11,000 per mile, and the trial court rightly so held.

4. Allowing, then, $10,000 a mile for the first 150 miles of the Denver road, $11,000 a mile for the remainder and for the Kansas & Southwestern, and $12,000 per mile for the Pueblo road, we find that the Construction Company earned upon its contracts $6,456,360, payable in Missouri Pacific five per cent bonds. The trial court found $6,454,600. The difference, amounting to $1,760, is due to a difference in the findings in regard to the length of the Denver road. The thirteenth and fifteenth findings conflict to the extent of .16 of a mile, and we have accepted the detailed statement of the fifteenth finding, rather than the general statement of the thirteenth, there being support in the evidence for either finding.

5. The trial court found that there had been payments of bonds as follows: February 14, 1887, $1,500,000; July 28, 1887, $2,500,000; September 22, 1887, $2,500,000; total, $6,500,000; and so credited the Missouri Pacific in the account with an overpayment of $45,400. The finding, however, of a payment upon July 28, of $2,500,000,

was a conclusion of the trial court based upon certain other findings. Upon the date named the Construction Company borrowed of Jay Gould $2,500,000 of these bonds. The trial court found that at that time the Construction Company had earned and that the Missouri Pacific was obliged to pay to it the sum of $2,500,000, and the court concluded that the loan of the bonds made by Gould should be treated as a payment of that date by the Missouri Pacific, and that the Missouri Pacific should be charged against this payment with an item of $62,500, being six months' interest upon the bonds lent by Gould, which Gould afterwards received. In this we think the trial court erred. It should not have treated the loan by Gould as a payment by the railroad company; but if the Missouri Pacific had unreasonably delayed or withheld payments due the Construction Company, the measure of damage would be the interest which the bonds would draw from the time they ought to have been delivered until they actually were delivered. The transactions between Gould and the Construction Company on the one side and the railroad company and the Construction Company on the other must be kept separate. The delivery of July 28 must be treated as a loan by Gould, which in fact it was, and the railroad company should only be credited with the bonds actually delivered to the Construction Company, or upon its order. The amount of these, as we find it from the evidence, is $6,418,000.

6. It was claimed by the Construction Company that a contract existed between that company and the Missouri Pacific by which the Missouri Pacific was obligated to transport materials to be used by the Construction Company over the Missouri Pacific lines at a rate of three-fourths of a cent per ton per mile. The Missouri Pacific, however, undertook to charge a rate of three cents per ton per mile, and the treasurer of the Construction Company, Mr. Cross, paid the Missouri Pacific, upon that basis, its

claim without authority. The by-laws of the Construction Company required vouchers to be approved by the president and this payment was made without such vouchers. The Construction Company claims that there should be refunded to it upon this account $318,763.56, and this item was allowed by the district court, the trial court finding the facts substantially as the plaintiff claimed them to exist, and finding that the rate of three cents per ton per mile was unreasonable. All the shipments out of which this account arose were interstate shipments, and the trial court finds specifically that of the whole amount claimed, $17,768.45 arose out of shipments made prior to April 5, 1887, when the interstate commerce act took effect; the remainder arose subsequently. The evidence as to this contract was conflicting, but the findings of the trial court received substantial support and we think that the item of $17,769.45 was properly allowed. Section 2 of the interstate commerce act is as follows: "That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property subject to the provisions of this act than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful." The plaintiff claims that the rate of three-fourths of a cent per ton per mile was the regular rate charged by the company to others for similar material, and that it was never changed. Section 9 of the act referred to is as follows: "That any person or persons claiming to be damaged by any common

carrier subject to the provisions of this act may either make complaint to the commission as hereinafter provided for, or may bring suit, in his or their own behalf, for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction. But such person or persons shall not have the right to pursue both of said remedies, and must, in each case, elect which one of the two methods of procedure herein provided for he or they will adopt." There is no provision in the act which authorizes suit to be commenced in the state courts. In this respect the act differs from that in regard to usury exacted by national banks, construing which it has been held that a state court has jurisdiction of a suit to recover the penalty. (*Schuyler Nat. Bank v. Bollong*, 37 Neb., 620.) As to the particular kind of grievance alleged in this case, congress has provided a commission to which application may be made for redress, or the aggrieved party may at his election bring suit for redress in the federal courts. The subject being one upon which the power to legislate is delegated to congress, and congress having enacted laws upon the subject and provided for certain procedure in certain tribunals to obtain redress for a violation of such laws, we think the tribunals so created have exclusive jurisdiction. (*Copp v. Louisville & N. R. Co.*, 46 Am. & Eng. R. Cas., 634; *Coxe Brothers v. Lehigh Valley R. Co.*, 4 Interstate C. C. Rep., 578; *Swift v. Philadelphia & R. R. Co.*, 58 Fed. Rep., 858, in circuit court for northern district of Illinois; *Keith v. Tilford*, 12 Neb., 273.) The matter of overcharges for freight since April 5, 1887, is, therefore, not within the jurisdiction of the court and must be for that reason dismissed from the case without determination.

7. The following items of charges against the Missouri Pacific were allowed by the trial court: Additional stall roundhouse, Chivington, $1,000; extra grading at Chiv-

ington, $6,000; extra ties on D., M. & A., $23,192.17; stock yards and pens, $11,800; fencing, $1,522.98; turntables, $4,522.01; extra nut-locks, D., M. & A., $2,223.92. These were all items which the Construction Company claims were not included in the contracts with the original railroad companies, but were performed and furnished at the instance and request of the Missouri Pacific, and for which the Construction Company should be allowed their reasonable value. The evidence is ample to support the findings of the trial court, which are upon these items affirmed.

8. The Construction Company also seeks to recover upon a *quantum meruit* for a telegraph line constructed along the Denver road. This line was constructed by virtue of a written contract between the Denver Company and the Western Union Telegraph Company, the Denver Company to do the work and the Telegraph Company to furnish the material. But there is much evidence to show that a telegraph line is not a portion of a railroad such as the Construction Company had contracted to build for the Denver Company. The negotiations in regard to this line were conducted between the Construction Company and officers of the Missouri Pacific. The contract was not entered into until after examination and approval by the Missouri Pacific officers, and the Construction Company proceeded with the work at the direction of these officers. Under these circumstances the Missouri Pacific rendered itself liable to the Construction Company and the trial court properly allowed this charge, which amounts to $25,703.03. (*Baltimore & Ohio Telegraph Co. v. Interstate Telegraph Co.*, 4 C. C. A. [U. S.], 184.)

9. Upon the completion of the Pueblo road a large quantity of track material remained unused at Chivington. It was claimed by the Construction Company that the Missouri Pacific agreed to take all of this property as inventoried by representatives of the two companies and at

prices agreed upon. Upon the other hand the Missouri Pacific claims that it agreed absolutely to take a portion of the material, to be delivered as it should be needed, and to take the rest provided it should find use therefor. Two items of this material are not disputed. The trial court seems to have found substantially in accordance with the claim of the Missouri Pacific as to the terms of this arrangement, and allows, in addition to the two items, an item of $16,910.59. This is the remainder of the track material which the Missouri Pacific agreed to take absolutely as it should need it; but before it was taken it was seized for taxes and the Missouri Pacific undertook to buy it at tax sale, paying therefor $3,050.40. The trial court, while charging the Missouri Pacific with this third item, credits it with the amount paid for taxes. Upon the basis of the finding of fact, which is sustained by the evidence, we think this is correct. The Missouri Pacific was obligated to take the material, but at the time of the tax sale the Construction Company was liable for the taxes, so while the Missouri Pacific could not, as against the Construction Company, obtain title through the tax sale, it was entitled to credit for the amount of taxes paid.

10. There is a further charge allowed by the trial court of $5,000, under the head of miscellaneous material at Chivington. This would be more correctly described as freight on material from Chivington to the Verdigris Valley railroad, for the construction of which it was ultimately used. The charge presents no question of law, and the evidence sustains the finding of the trial court.

11. The trial court also allowed, under the head of miscellaneous items, the sum of $12,988.87. Besides the items set forth in detail in the statement of account there was evidence in the record relating to a large number of transactions between the companies, resulting in what the Construction Company claimed to be just charges against the railroad company. The aggregate of those items which

receive support from the evidence is greater than that allowed by the court. The record does not show the constituent parts of the charge allowed, and error in this record not affirmatively appearing, the finding of the trial court is affirmed as to that item.

12. The following items of charges against the Construction Company allowed by the trial court present no question of law, and receiving support from the evidence are here allowed:

Taxes paid	$1,021 38
Recording deeds	13 80
Loss and damage on shipments	47 13
Overcharges and shortage on way bills	839 50
Expenses paid on right of way	5,521 05
Paid M. S. Carter & Co	513 90
Cash, Russell Sage	10,000 00
Cash, Jay Gould	20,000 00
Cash, George Gould	10,000 00
For right of way since suit	6,601 91

13. Each party admits a number of items as correct charges against it by the other, and in the following statement of account all items appearing, which have not already been discussed, are items which are so admitted.

14. There is due from the Missouri Pacific to the Construction Company the following:

Refund of passenger fares	$4,538 51
Labor	93 50
Material furnished	11,396 75
Water furnished	3 00
Coal furnished	11 00
Rails and ties	7,098 17
Engine supplies	536 69
Labor and material (bridges)	1,194 57
Taxes	1 00
Mail service	1,055 41
Construction Verdigris Valley R. R.	36,869 01

Winfield, Texas & Gulf R. R.	$18,028 84
Overcharge on merchandise	1 66
Equipment purchase	132,735 03
Overcharge on materials	163 72
Material at Chivington, October, 1888	16,241 16
Material at Chivington since November	19,680 00
Material at Chivington sold for taxes	16,910 59
Miscellaneous items	12,988 87
Overcharge on freight prior to April 1, 1888,	17,769 45
Additional stall roundhouse, Chivington	1,000 00
Extra grading at Chivington	6,000 00
Freight on material from Chivington	5,000 00
Telegraph line	25,703 03
Extra ties, D., M. & A.	23,192 17
Stock yards and pens	11,800 00
Fencing	1,522 98
Turn-tables	4,522 01
Extra nut-locks, D., M. & A.	2,223 92
Bonds earned under contracts by Construction Company	6,456,360 00
Interest on bonds not paid	9,590 00
Interest on other items	132,398 36
Total	$6,976,629 40

15. The Missouri Pacific should receive the following credits:

Freight charges	$28,766 17
Tickets	881 54
Water furnished	45 50
Coal furnished	3,197 38
Cars destroyed	334 63
Cars repaired	1,117 49
Rent of cars	20 00
Cross-ties furnished	110,776 62
Overcharges on freight	413 07
Labor and material	1,921 76

For right of way prior to suit	$58,758 39
Paid to T. J. Prosser & Co	26,776 39
Stoves, etc	113 59
Bridge material	186 00
Labor and material (bridges)	23,673 00
Paid Colt & Son	18,830 61
Paid T. J. Hilliard	13,106 44
Cash A. H. Calef, January 25, 1888	20,000 00
Taxes paid	1,021 38
Recording deeds	13 80
Loss and damage on shipments	47 13
Overcharge and shortage on way bills	839 59
Expenses paid on right of way	5,521 05
Paid M. S. Carter & Co	513 90
Cash, Russell Sage	10,000 00
Cash, Jay Gould	20,000 00
Cash, George J. Gould	10,000 00
Taxes paid at Chivington	3,050 40
Paid for right of way since suit	6,601 91
Bonds delivered	6,418,000 00
Interest	128,284 71
Total	$6,912,812 45
Missouri Pacific, Dr. to balance	63,816 95
	$6,976,629 40

16. The dates when these different items accrued are in most cases not ascertainable from the evidence. Moreover, the transactions form a running account between the parties, and in calculating interest we do not think any foundation has been laid for the allowance of interest to either party before the commencement of suit. We have, therefore, calculated it from December 1, 1888, to December 1, 1893, at seven per cent, there being no proof of the interest laws of either of the states where the transactions arose, and their law being presumed to be like our own. This does

not apply, however, to the difference between the amount of the bonds earned and the amount delivered. These bonds draw but five per cent interest, and interest upon that difference has been calculated at five per cent.

17. A large amount is claimed on behalf of the Construction Company in the nature of consequential damages arising out of the disposition of the bonds made by the directors of the Construction Company. Most of the bonds were sold by the Construction Company at ninety cents on the dollar, and it is claimed that the Missouri Pacific should be charged with the discount. The evidence relating to this is voluminous, but the contention of the plaintiff may be thus briefly summarized: That the Missouri Pacific unreasonably and wrongfully withheld its acceptance of the roads after they were completed, compelling the Construction Company to resort to devices in the nature of borrowing money and bonds, and that owing to the exigencies arising from the necessity of meeting these debts, the majority of the board of directors was enabled to carry through a scheme by which the bonds were sold by the Construction Company to themselves and to Jay Gould at a discount. We do not think that the evidence shows any such unreasonable or unlawful withholding of the bonds, and the trial court did not find that there had been such. In order to obtain the bonds the Construction Company was required not only to build the road, but to deliver the stock and bonds of the original railroad companies. The provision in the first contracts by which settlements were to be made by ten-mile sections was waived by the Construction Company, and for this provision no definite times were substituted for settlements. The original companies were, until construction had advanced to a considerable extent, under the control of the Construction Company. Their bonds could not be delivered until they directed the trustee to certify them. The first certification was not ordered until a few days before the first instalment of the

Missouri Pacific bonds was delivered, and this at a time before the Construction Company lost control of the railroad company. There is evidence that a number of bonds of the Denver road were executed by its officers and retained in the possession of the Missouri Pacific, but they were not certified, and could not be certified until the directory of the Denver road so ordered. They were no better until certification than blank paper, and had the Missouri Pacific obstructed a settlement, there was nothing to prevent the Construction Company, while it had control of the Denver Company, from causing to be executed other bonds, having them certified, and tendering them to the Missouri Pacific. No such thing was done. In the subsequent operations we cannot find anything in the evidence justifying us in holding that the district court erred in not finding that there had been a wrongful withholding by the Missouri Pacific of its bonds. But aside from this, the bonds were sold at a discount by order of the directors of the Construction Company. The first order gave the stockholders of the Construction Company a preference in proportion to their stock. Fitzgerald and Mallory did not take advantage of this and their proportion was taken by other stockholders. These acts may have been a fraud upon the Construction Company by a majority of its directors who happened to be interested in the Missouri Pacific, but as the Missouri Pacific, as a corporation, was not a party to the proceeding, the directors were acting as directors of the Construction Company and not as directors of the Missouri Pacific. The Missouri Pacific can no more be charged with the consequences of their wrongful acts in this regard than it could be charged for damages sustained by a passer-by in consequence of the unsafe condition of a sidewalk in front of the residence of such a director. The fact that it was Missouri Pacific bonds which were sold was, in this regard, a purely fortuitous circumstance, and the Missouri Pacific can no more be

charged with this than with the loss sustained by a sale of any other property of the Construction Company which had never been in the possession of the Missouri Pacific. The contract of the Missouri Pacific was to pay the Construction Company in Missouri Pacific bonds at specified sums per mile. The undisputed evidence shows that these payments were made as agreed and the Missouri Pacific's outstanding bonded indebtedness was thereby increased to that full amount. Upon what principle of law or equity can an additional sum of $500,000 be charged to that company? The trial court found no evidence whereon to base such a charge. We can find none, and the opinion adopted by the court does not, so far as we can discern, point out any such evidence or any tangible reason for allowing this item.

18. The same conclusions of fact on the question of the withholding of the bonds dispose of plaintiff's contention that the Construction Company should be charged with the item of $62,500 interest received by Jay Gould upon the $2,500,000 of bonds loaned by him to the Construction Company.

19. Interest is claimed upon a payment of $380,000, which it is alleged the treasurer of the Construction Company made to the Missouri Pacific for rails purchased from that company before the rails were delivered. A contract had been made for the purchase of these rails and a voucher approved by the president of the Construction Company. He claims that the approval was made simply to enable payments to be made as the rails were delivered, but the treasurer was authorized upon this voucher to disburse the money upon presentation, and he did so. This bound the Construction Company, and there can be no recovery on account of the prepayment.

20. The Denver contract provided that the Denver Company should procure the right of way, but the Construction Company pay therefor. The Construction Company claims that it was thereby obligated to pay only the pur-

chase price or condemnation money and that the costs of the proceedings and other expenses were chargeable against the Denver Company, and upon the theory that the operation was for the benefit of the Missouri Pacific should be charged against that company. The object of this provision in the contract is plain enough. All proceedings were necessarily in the name of the Denver Company and the title taken to that company. The proceedings had to be conducted through the officers of that company, and a stipulation to that effect was accordingly inserted in the contract. But it is equally clear that the Construction Company was to bear the whole expense of constructing the road, inasmuch as it received all the stock and bonds of the Denver Company for doing so, and the cost of condemnation proceedings and all other items of expense in procuring the right of way were as much chargeable against the Construction Company as the condemnation money itself.

21. The Missouri Pacific claims that there was a failure of consideration to the extent of some seventeen miles of railroad built over government land to which it was claimed no title was obtained. For several reasons nothing can be allowed on this account. The Missouri Pacific contends throughout the rest of its argument that it did not buy the Denver road, but only its stock and bonds, and we cannot say that any portion of the stock or bonds was without consideration on this account. Their amount was fixed according to the mileage of the road, but the security was upon the road as a whole. In the next place the Missouri Pacific obtained possession of the whole road, remained in possession, and has not been evicted. Even had there been a conveyance of the road to the Missouri Pacific with covenants of warranty and for quiet enjoyment, there would as yet be no cause of action upon these covenants. That case would be much stronger than this.

22. The Construction Company claims large amounts

caused by the failure of the Missouri Pacific to make Chivington a division station. A part of this claim is because there was a large amount of construction at Chivington based upon the intention of making it a division station. It was the duty of the Construction Company to build the railroad according to the plans. The plans provided for this construction, and it was entirely immaterial whether the railroad company afterwards used these structures or not. The remainder of the claim is for losses sustained by the Construction Company on account of speculations in land at Chivington and the erection of a hotel, out of which the Construction Company contemplated making large profits through the division station's being there located. Such an enterprise was wholly beyond the scope of the Construction Company's powers and objects, and the damages claimed are at once too uncertain, too speculative, and too remote for consideration.

23. There are a few other items claimed on either side and disallowed by the trial court. They depend for the most part upon questions of fact which were determined by the trial court upon conflicting evidence, and both upon the law and the facts we think they were correctly determined and they will not here be noticed in detail.

It follows from the foregoing considerations that the decree of the district court should be modified and the judgment entered here in favor of the Construction Company against the Missouri Pacific, if for any sum, should be $63,816.95, with interest from December 1, 1893.