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REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

JANUARY TERM, 1896.

VOLUME XLVIII.

D. A. CAMPBELL,
OFFICIAL REPORTER.

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In behalf of the people of Nebraska.

THE SUPREME COURT

OF

NEBRASKA.

1896.

CHIEF JUSTICE,

A. M. POST.

JUDGES,

T. O. C. HARRISON,
T. L. NORVAL.

COMMISSIONERS,

ROBERT RYAN,
JOHN M. RAGAN,
FRANK IRVINE.

OFFICERS.

ATTORNEY GENERAL,

A. S. CHURCHILL.

CLERK AND REPORTER,

D. A. CAMPBELL.

DEPUTY CLERK,

W. B. ROSE.

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J. S. STULL.....Auburn.

Second District—

B. S. RAMSEY.....Plattsmouth.

Third District—

A. J. CORNISH.....Lincoln.
CHARLES L. HALL.....Lincoln.
E. P. HOLMES.....Lincoln.

Fourth District—

B. S. BAKER.....Omaha.
CHARLES T. DICKINSON.....Tekamah.
JACOB FAWCETT.....Omaha.
W. W. KEYSOR.....Omaha.
CLINTON N. POWELL.....Omaha.
C. R. SCOTT.....Omaha.
W. W. SLABAUGH.....Omaha.

Fifth District—

EDWARD BATES.....York.
S. H. SEDGWICK.....York.

Sixth District—

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

Seventh District—

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

Eighth District—

R. E. EVANS.....Dakota City.

Ninth District—

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

Tenth District—

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

Eleventh District—

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J. R. THOMPSON.....Grand Island

Twelfth District—
W. L. GREENE.....Kearney.

Thirteenth District—
H. M. GRIMES.....North Platte.

Fourteenth District—
G. W. NORRIS.....Beaver City.

Fifteenth District—
M. P. KINKAID.....O'Neill.
W. H. WESTOVER.....Rushville.

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ADMITTED SINCE THE PUBLICATION OF VOL. XLVII.

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ODELL, FRANK G.
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THOMPSON, WILL H.
WILLIAMS, SYLVESTER G.

In Memoriam.

ANDREW J. POPPLETON.

At the session of the supreme court of the state of Nebraska, October 6, 1896, there being present Hon. A. M. Post, chief justice, Hon. T. O. C. Harrison and Hon. T. L. Norval, judges, Hon. Robert Ryan, Hon. John M. Ragan, and Hon. Frank Irvine, commissioners, and David A. Campbell, clerk and reporter, it was ordered that the following proceedings be spread at large upon the records of the court:

Hon. George W. Doane appeared before the court and said:

MAY IT PLEASE YOUR HONORS: As chairman of a committee appointed at a meeting of the Douglas county bar, I have been charged with the mournful duty of presenting to this court a tribute of respect adopted by the bar of Douglas county to the memory of ANDREW J. POPPLETON, a member of the bar of this court since its first organization, and to request this court to take such action in the premises as may seem appropriate.

The resolutions of the Douglas county bar are as follows:

ANDREW J. POPPLETON, one of the foremost leaders of this bar ever since the first organization of the courts in Nebraska, and holding a high place among the great lawyers throughout the whole land, a citizen who had rendered to this community and state services of the highest value, and a man of singular purity of life and character, having departed this life at his residence in this city on the 24th day of September instant, we, his friends, associates, and brethren assembled for the purpose of expressing our respect for his memory, have

Resolved, That the great powers of our deceased brother in advocacy, his wide and varied learning, his lofty principles, and his pure and elevated character secured for him when he was among us our highest respect and admiration. And now, when by an inscrutable Providence he has been removed from our midst, and we are deprived of his good example and the inspiration of his impressive personality, with unfeigned sorrow we bear witness to his virtues and the fame which he achieved through all the borders of the nation.

Resolved, That we tender to his widow and children our sincere sympathy, and direct that a copy of these resolutions be communicated to them.

Resolved, That the chair appoint suitable committees to present this expression of our respect for the memory of MR. POPPLETON to all of the district courts of this county, the supreme court of this state, and the circuit court of the United States for this district, and request that they be spread at large upon their records.

J. M. WOOLWORTH, *Chairman,*
C. A. BALDWIN,
B. E. B. KENNEDY,
CHARLES F. MANDERSON,
JOHN C. COWIN,
WM. D. BECKETT,
E. WAKELEY,
Committee.

In presenting these resolutions, it may not be amiss to accompany them with a few words in retrospect of MR. POPPLETON'S career and character.

Descended from sturdy New England stock, and born and nurtured under the influences and surroundings of pioneer life in Michigan, it is not difficult to account for the development in MR. POPPLETON of those characteristics which distinguished him in maturer years as a man of broad and liberal views. His earlier collegiate education was received at the University of Michigan, and completed at Union College, New York, under the tutelage of that most eminent and practical of America's educators, Dr. Nott. After graduation, MR. POPPLETON studied law with one of the leading firms in Detroit, and was admitted to the bar in 1852, after examination before the supreme court at Pontiac, Michigan. Soon after his admission to the bar he came to Nebraska, in the year 1854, immediately after the passage of the act organizing the territory. From his first entrance into the active life of this trans-Missouri country, MR. POPPLETON took a leading part in the direction and development of all enterprises which tended to the upbuilding and betterment of the community with which he had cast his lot. It is impossible to overestimate the value of his counsel and services in the critical crises which arose from time to time in the history of the territory and of the city with which his interests were indissolubly connected.

MR. POPPLETON was elected as one of the representatives from Douglas county and served as such in one of the earlier sessions of the legislative assembly of the territory, and took a leading part in shaping legislation for the broadening and strengthening of the foundations of the future state.

Upon the organization of the Union Pacific Railroad Company for active work in 1864, MR. POPPLETON was appointed its first general attorney, and so efficiently and satisfactorily did he perform the duties of the position that he was continued in it until he voluntarily re-

signed it in the year 1888, much to the regret of the board of directors, who, in accepting the resignation, acknowledged in most flattering terms their high appreciation of the value of his services to the corporation, and regret at the severing of his relations with the company.

In 1868 MR. POPPLETON was nominated by the democratic party as its candidate for congress from this state and made a vigorous canvass throughout the state, but, as has befallen many a worthy man before him, he was so fortunate as to have been defeated. I say fortunate, for who will venture to compare the successes of political life, with all its turmoils and jealousies and heart-burnings, with the satisfaction to be derived from an honorable professional career?

While MR. POPPLETON was not devoid of political ambition, he was entirely wanting in those peculiar characteristics which are combined in the successful politician. He had nothing of chicanery, demagogy, or double-dealing in his character, but was sincere in his convictions, courageous in his defense of them, and impatient of hypocrisy. If there was any trait of his character more prominent than another, it was that of having what has been called "the courage of his convictions." A notable exhibition of this was on an occasion when invited to deliver an address before, I believe, the Historical Society of this state, at the city of Lincoln, several years ago, and while still the attorney of the Union Pacific Railroad Company, one of the most powerful corporations of the country. In descanting upon the dangers which menaced the life of the republic, he placed at the head of them all, the increase of aggregated wealth and power in the rapidly multiplying corporations of the country, and uttered the prediction which seems even so soon to be on the verge of fulfillment.

In the early part of MR. POPPLETON'S professional life in Omaha, and at the very time when it carried the promise of the highest success and greatest usefulness, he was stricken with a form of paralysis, from the effects of which he never entirely recovered. This affliction, which for a time threatened fatal results, withdrew him for two or three years from active participation in the work of his profession, and his struggle against the disability with which he was threatened, and his return to the work which he loved and to the triumphs which he achieved thereby, was an additional evidence of his indomitable courage and unconquerable spirit. That he was able, in spite of the assault upon the citadel of life and strength, to re-enter the lists and in the battle of life to win some of its most valuable prizes, evidences the sturdiness of his will and the strength of his ambition. But there is a limit to all physical powers, how strong soever may be the will. In 1892 the premonitory warning of the final decadence of the physical system came in an attack upon the organs of sight, which continued, with gradual but sure advances, until total blindness deprived him of

all active participation in the duties of his profession for three or four years before his death, which occurred on the 24th day of September last.

To measure the usefulness of such a life as MR. POPPLETON'S, we must consider the times and circumstances under which he lived. The greater part of his life was spent as a pioneer, in laying the foundation, and upon it erecting the superstructure of civilization in a new country. When he first reached the shores of the Missouri River, with the exception of the mission at Bellevue, and the few whites which constituted its corps of teachers, and the employes connected with the Indian agencies, all the fixed population west of the river consisted of the Indian tribes, who still occupied the undefined ranges of their ancestors. The structure of society and of civil government was to be built from the foundation, and MR. POPPLETON was one of the chief architects. How well he and those associated with him planned, and how substantially they built, is attested by the marvelous growth of this commonwealth and the material wealth and prosperity we now enjoy.

As a lawyer, MR. POPPLETON was studious, conscientious, loyal to his client; as a counsellor, wise; as an advocate, eloquent and persuasive, and more successful in the final issue of his causes than most practitioners.

As a man, while reserved in his manner with strangers, he was genial and communicative with friends, and possessed a vein of humor which in his intercourse with friends made him extremely companionable.

His domestic ties were of the strongest, and home possessed for him attractions which nothing else could supply. A devoted wife and children survive him to mourn his loss, and the bar of the state and nation is bereaved of one of its brightest ornaments and most worthy members.

To the young practitioner, just entering upon professional life, MR. POPPLETON was a helpful adviser and sympathetic brother. Through an extended practice of many years at the bar, side by side with MR. POPPLETON, and seeing him engaged in many bitterly contested trials, where the desire for success would naturally lead to personal controversy, I never saw him so far forget himself as to indulge in abusive or unkind remarks towards opposing counsel. His shafts of invective, if any he used, were reserved for the client or his cause, and not for his counsel.

MR. POPPLETON'S professional career was brought to a sudden and untimely end by the loss of his eyesight, while in the full enjoyment of his mental faculties, and before any serious impairment of his physical strength. He was not at that time of an age when men of

such ambition as he possessed, are ready to surrender the labor and responsibility of active business, being then but sixty-two years of age. But a superior wisdom directed otherwise, and he was obliged to lay down his work, and who shall say that this was not for the best? MR. POPPLETON'S life had been a successful one in all ways by which success is measured in human estimation. He had acquired reputation, wealth, the respect and admiration of his brethren at the bar, the attachment of friends, commanding influence in the community, a position second to none at the bar of the state, as well as of the nation, and the love and affection of a true wife and devoted children, which are the best gifts of God to man.

What was left for him to strive for? The battle of life had been fought, the victory had been won.

"When you have lived your life,
When you have fought your last good fight and won,
And the hard day's work is finished, and the sun
Sets on the darkening world in all its strife
Ere the worn hands are tired with all they've done,
Ere the mind's strength begins to droop and wane,
Ere the first touch of sleep has dulled the brain,
Ere the heart's springs are slow and running dry—
When you have lived your life,
'Twere good to die."

SUPREME COURT COMMISSIONERS.

(Laws, 1893, chapter 16, page 150.)

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

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

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

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

Approved March 9, A. D. 1893.

See page li for table of Nebraska cases overruled.

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

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

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, A. D. 1896.

PRESENT:

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

DAVID R. BUSH ET AL. V. JOHNSON COUNTY.

FILED APRIL 10, 1896. No. 8254.

1. **Action on County Treasurer's Bond: PAYMENT TO SUCCESSOR: CERTIFICATES OF DEPOSIT.** An outgoing county treasurer turned over to his successor a certificate evidencing the deposit of county funds in a bank for safe-keeping, and the same was received by the incoming treasurer as a payment to him, to its amount, of such funds. The certificate of deposit was, by the new treasurer, delivered to the bank which had issued it, and was canceled and the treasurer received in lieu thereof a certificate of deposit for a like sum, payable to him as county treasurer. *Held*, That the incoming treasurer and his bondsmen were chargeable on his bond for the amount of such payment, and a subsequent failure of the bank during the time the deposit was continued, and his consequent inability to realize the money, did not relieve them of the liability.

2. ———: ———: LIABILITY OF OFFICER FOR LOST FUNDS. The duty

imposed on a county treasurer by law, and assumed by him, of safely keeping, accounting for and turning over the public funds which come into his hands by virtue of his office, is an absolute one; and where his bond is conditioned for the faithful performance of the duties of the office by him, the sureties on the bond are bound and liable in like manner and their responsibility is the same as that of their principal, and it will be no defense for either of the parties, in an action on the bond to recover public funds, predicated on an alleged failure of the treasurer to account for or pay them over, that the funds have been lost or stolen without the fault or negligence of the treasurer.

3. ———: ———: LIABILITY OF SURETIES. It is the duty of the bondsmen of a county treasurer to see that the duties of that officer are properly discharged; and if the county board shall be negligent or careless in the examination of the accounts or report of the treasurer, such examination and settlement will not be available as a defense to the sureties on his bond in an action for funds which the treasurer has failed to turn over.

4. **County Treasurer:** SETTLEMENT WITH COUNTY BOARD. The periodical settlements assigned by our statutes to be made between the county board and the treasurer of the county do not have in them the elements of a judicial determination of the subjects involved.

5. ———: ———. The case of *Ragoss v. Cuming County*, 36 Neb., 375, examined and distinguished.

6. ———: PAYMENT TO SUCCESSOR: WORTHLESS CERTIFICATES OF DEPOSIT: SETTLEMENT: ACTION ON BOND. A county treasurer, during his first term, had on deposit in a bank $6,000 of the public funds, such deposit being evidenced by a certificate of deposit. At the close of this term of office and the beginning of the second term, in his report to and settlement with the county board, he included and stated the amount of the certificate of deposit as so much cash, the board possessing no knowledge of the existence of the certificate, or of the deposit of the money. Before the close of the treasurer's first term, the bank failed. *Held*, That such settlement did not bind the county as an acceptance or approval of the certificate of deposit as so much cash accounted for, nor did its retention by the treasurer, or turning it over to himself as his own successor, constitute a paying over of the public funds, but was a failure to do so which rendered him, and the obligors on his bond for his first term, liable.

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

The opinion contains a statement of the case.

S. P. Davidson, T. Appelget, and *I. Reavis,* for plaintiffs in error:

The sureties are released because the evidence fails to bring their liability within the conditions of the bond. (2 Parsons, Contracts [5th ed.], 5; 1 Brandt, Suretyship & Guaranty, sec. 79; *Lang v. Pike,* 27 O. St., 498; *Reese v. United States,* 9 Wall. [U. S.], 13; *Dumont v. United States,* 8 Otto [U. S.], 142.)

The county board settled with the county treasurer and passed and approved all his accounts. This settlement was final and the county should not recover. (1 Herman, Estoppel & Res Judicata, sec. 435, and cases cited; *Richland County v. Miller,* 16 S. Car., 244; *Ragoss v. Cuming County,* 36 Neb., 376; *Supervisors of Richmond County v. Ellis,* 59 N. Y., 620; *Supervisors of Onondaga v. Briggs,* 2 Den. [N. Y.], 26; *Hobson v. Commonwealth,* 1 Duv. [Ky.], 172; *Yalabusha County v. Carbry,* 3 S. & M. [Miss.], 529; *Mobile County v. Huggins,* 8 Ala., 440; *Arthur v. Adam,* 49 Miss., 404; *United States v. Jones,* 8 Pet. [U. S.], 375; *Porter v. Directors,* 18 Pa. St., 144; *Township of Middletown v. Miles,* 61 Pa. St., 290; *Burnet v. Auditor of Portage County,* 12 O., 54; *Kendall v. United States,* 12 Pet. [U. S.], 524.)

Reference was also made to the following cases: *Cedar County v. Jenal,* 14 Neb., 254; *State v. Hill,* 47 Neb., 456.

J. Hall Hitchcock and *E. W. Thomas, contra.*

References: *First Nat. Bank of Wymore v. Miller,* 37 Neb., 500; *Van Sickel v. Buffalo County,* 13 Neb., 103; *Vivian v. Otis,* 24 Wis., 518; 19 Am. & Eng. Ency. Law, 544-556.

HARRISON, J.

David R. Bush was elected treasurer of Johnson county at an election held during the fall of 1889, and took possession of and commenced the performance of the duties of the office in January, 1890. He was re-elected

in the fall of 1891, and in January, 1892, closed his first and began his second term as treasurer. The other plaintiffs in error were his bondsmen for the first term. Bush's immediate predecessor in the office of county treasurer, when he turned over the office and funds in January, 1891, delivered to Bush some forty or fifty dollars in actual cash, or money in the strictest meaning of the term, and gave him certificates evidencing deposits which the retiring treasurer then had in banks, and also some checks. These were accepted by the incoming treasurer and received, as between him and the outgoing one, as payment of the amounts stated in them. One of these certificates, or checks, was for the sum of $6,000, payable by the bank of Russell & Holmes at Tecumseh. Bush presented this at the banking office of Russell & Holmes, and in lieu of it received a certificate of deposit for the sum named. This he retained through and beyond the entire time and close of his first term as treasurer. In his report to the county board, at or near the close of his first term, a certain balance was shown to be on hand. A portion of this balance was this sum evidenced by the certificate mentioned. The bank in which this money was deposited continued business in the regular manner until October, 1891, at which time it closed, a month or two before the expiration of Bush's first term. When the facts were discovered in regard to this and some other certificates of deposit,—we have here to deal particularly with this one,—action was instituted on the bond against plaintiffs in error to recover the amount as an alleged shortage. There were two principal questions raised by the pleadings: First, that Bush, the county treasurer, never received the money, the $6,000, to recover which was the object of this suit; second, that at the expiration of his term of office he made a settlement of his doings and accounts as county treasurer with the county commissioners, whereby the county became bound, and that, in consequence, it cannot, or should not be heard to assert any claim as against the treasurer

or his bondsmen. A jury was waived and a trial had. Judgment was rendered against the treasurer and bondsmen for the $6,000 and interest thereon. The case has been brought to this court by proceedings in error.

In regard to what transpired in January, 1889, between the outgoing treasurer and Mr. Bush, the incoming officer, in regard to the funds of the county and their transfer from one to the other of the officers, Mr. Zutavern, the retiring treasurer, testified as follows:

Q. Mr. Zutavern, what official position did you hold in this county in the years '88 and '89?

A. County treasurer.

Q. Who was your successor?

A. D. R. Bush.

Q. Do you know how much money you turned over to Mr. Bush at the time you went out of the office?

A. I do not know now.

Q. You may state to the court how you delivered the things in the treasurer's office to Mr. Bush, at the time your term of office expired, with reference to the money on hand.

A. I turned over all the money that belonged to the county to D. R. Bush.

Q. How did you turn it over?

A. Why, by checks, most of it. I guess I had a little cash on hand, maybe $40 or $50, in the drawer, and I turned that over. I turned him over a few certificates.

Q. State how it was you did not give him the money.

A. I had the certificates and asked Bush if he could use them, whether they would answer as well as money, and he said they would. There was nothing said about me getting the cash, I do not think.

Q. State the facts as to whether they were equivalent to cash at that time, and for how long.

A. They were.

Q. Did Mr. Bush ever give you any information, in any form or manner, after this, that he could not use these

certificates, or ask you to take them up, or any of the things you turned over as the amount of money on hand?

A. No, sir.

Q. Why didn't you turn the money over in cash at the expiration of your term of office to Mr. Bush?

A. I had these certificates and showed them to Bush and asked him if he could use them, and he said that he could. That was my reason. He said they would do him as well as money.

Q. You were acquainted with the financial condition of the different banks upon which you had the bank certificates?

A. I think I was.

Q. You were acquainted with their condition with reference to paying of their papers presented to them, for a year after that?

Q. From that time on for another year?

A. I think I was.

Q. Well, what was it?

A. They were good.

Q. They paid all of the demands made on them?

A. Yes, sir.

A portion of the testimony of Mr. Bush is as follows:

Q. Mr. Bush, you are the defendant, one of the defendants, in this case?

A. Yes, sir.

Q. You are the principal defendant, are you not, in this case?

A. Yes, sir.

Q. (Handing witness plaintiff's Exhibit "E.") What is that paper you now have?

A. It is a certificate of deposit on the bank of Russell & Holmes.

Q. You are the person who is named in that certificate as payee, are you?

A. Yes, sir.

Q. You were county treasurer at that time?

A. Yes, sir.

Q. It was paid to you as county treasurer?

A. Yes, sir.

Q. The consideration of that check was county money?

A. It was a check given me for county money.

Q. And you took the check to the bank and got that?

A. Yes, sir.

Q. At your own request?

A. At the request of Mr. Charles Holmes.

Q. Did you ask him for the cash?

A. No, sir.

Q. You did not want it?

A. No, sir.

Q. You could have got it?

A. I do not know whether I could or not.

Q. You had every reason to believe it? You had not known them to refuse any certificates, had you?

A. No, sir.

Q. You have got money out of there as county treasurer since that was deposited there, haven't you?

A. Yes, sir.

Q. That was a part of the funds you received from Zutavern, your predecessor?

A. Yes, sir.

Q. At the end of your first term you did not turn that over except in the form of a certificate as it appears there, to yourself?

A. There was no change.

Q. Just that certificate?

A. Yes, sir.

Q. When you settled with the county board at the end of your first term, January, 1892, you turned over that certificate in your report to the county commissioners as part of the funds on hand?

A. Why, I suppose you would call it that; simply in my own hands.

Q. You turned it over to yourself as successor?

A. I believe that is what it would be.

Q. You never turned any cash over to represent that?

A. No, sir.

In this connection it may be further said that all of the testimony introduced which had a bearing upon the question of whether or not the bank of Russell & Holmes was, at the time of the transaction between Zutavern and Bush, of date January, 1890, solvent and meeting all demands for payments of money made upon it, tended to establish that it was so, and so doing, and continued in such condition for more than a year subsequent thereto. It is clear from the evidence that Mr. Bush, on assuming the duties of the office of county treasurer, received from the retiring officer a check or certificate of deposit entitling him to demand from the bank of Russell & Holmes the sum of $6,000, and that it was so accepted by him in such form, in lieu of the cash, either coin or legal tender currency; that he did not demand any other or different payment, but waived it, and the check or certificate of deposit was by him delivered to the bank and canceled, and at the request of the banker he received a new certificate of deposit for the sum named, payable to himself as county treasurer. The title or right to the sum of money involved was, by the methods stated, transferred from Mr. Zutavern to Mr. Bush, the latter being the recipient of it by reason of his occupancy of the office of county treasurer. The reception of this money from his predecessor was one of the duties which devolved upon the incoming treasurer, his due and proper performance of which, together with all others pertaining to the office, his sureties, by signing the bond, had guarantied. Giving the bond was one of the essential prerequisites of his assuming the office, without which he could not legally do so, and the sureties, by their signatures, enabled him to meet this requirement and to acquire title or right to this money, and, having so acquired it, he and the bondsmen became liable to the county for it. The fact that he elected to take a certificate of deposit evidencing the indebtedness of a bank to his predecessor in office for the amount, instead of coin or currency, and to have the certificate canceled and a new one issued payable to him-

self as county treasurer, and to let the money remain in the bank and to carry the sum thus treated in his accounts as such treasurer, as moneys or funds on hand, could in no manner or degree affect his liability or that of his bondsmen. He became possessed of the right to $6,000 of the funds of the county, and liable for its safe-keeping and to account for it, and at the request of the banker left it in the bank. This was a sufficient reception by him of the money of the county to render him and his sureties liable for it under the conditions of this bond within the rule announced in *State v. Hill*, 47 Neb., 456.

What effect the transactions we have outlined between the two treasurers would have upon the rights of the county, if any, existing or arising therefrom, against Zutavern, the outgoing treasurer, and his bondsmen, is not involved in this case and will not be discussed or decided. It is evident that Bush, the incoming treasurer, acquired the right to act in relation to the $6,000 of the county funds, and by his action it was left in the bank. This was such an act of right, of control, and disposition of the money as rendered him liable to account for it. It is argued that the treasurer is only bound to use due and ordinary care for the safe-keeping and preservation of the money of the county, and if he deposited it in the bank after using reasonable and ordinary care and caution in ascertaining the standing and solvent condition of the bank, and was watchful in this particular so long as it remained there, if the bank failed and the money was thereby lost to the county, in whole or in part, without any fault or negligence attributable to the treasurer, he was not liable for such loss, nor were his sureties so liable. There exists an irreconcilable conflict in the decisions of the courts in regard to the liability of public officers and their bondsmen for funds lost without fault or negligence on the part of the officers, but the weight of authority in this country is to the effect that a public officer and his sureties are to be held responsible for public funds lost, regardless of the question of fault or negli-

gence on the part of the officer, where the law, in positive terms or from its general tenor and without any limitation upon the obligation, requires that the officer pay over public funds which have been received by him and held as such. Where the statutes impose the duty of payment it is sufficient, if the bond is conditioned for the faithful discharge of the duties of the officer, to render the sureties liable to the same extent as their principal. Our statutes on the subject, by their general tenor, if not in direct terms, require the retiring treasurer to account for or pay over the public moneys. The bond in this case was conditioned for the faithful discharge by the treasurer of the duties of the office, and for the faithful accounting for and paying over of all the moneys of the county which he received, and both he and his sureties became liable for any failure on his part to pay over any of the public money, notwithstanding it may have been lost without his fault or negligence. (*Board of Education of the Village of Pine Island v. Jewell*, 46 N. W. Rep. [Minn.], 914, and cases cited, as follows: *United States v. Prescott*, 3 How. [U. S.], 578; *United States v. Dashiel*, 4 Wall. [U. S.], 182; *Boyden v. United States*, 13 Wall. [U. S.], 17; *Inhabitants of Hancock v. Hazzard*, 12 Cush. [Mass.], 112; *Inhabitants of New Providence v. McEachron*, 33 N. J. Law, 339; *Commonwealth v. Comly*, 3 Pa. St., 372; *State v. Harper*, 6 O. St., 607; *District Township of Taylor v. Morton*, 37 Ia., 550; *Thompson v. Board of Trustees*, 30 Ill., 99; *Halbert v. State*, 22 Ind., 125; *Morbeck v. State*, 28 Ind., 86; *Ward v. School District*, 10 Neb., 293; *Wilson v. Wichita County*, 67 Tex., 647; *State v. Nevin*, 19 Nev., 162; *State v. Moore*, 74 Mo., 413; *State v. Powell*, 67 Mo., 395; *Commissioners of Jefferson County v. Lineberger*, 3 Mont., 231; *Redwood County v. Tower*, 28 Minn., 45.)

The case of *Ward v. School District*, 10 Neb., 293, cited in the opinion of the Minnesota court just alluded to, in support of the doctrine of strict accountability of treasurers and their bondsmen for public money entrusted to the care of the treasurers by virtue of their

being such officers, may be said to be not strictly in point, for the reason that the money lost by failure of the bank, and sought in the action to be recovered of the treasurer and his bondsmen, had been deposited by the treasurer in the bank, to his own individual credit. This court held: "The defendant, while treasurer of the plaintiff district, deposited the money in question with his banker to his own individual credit. The money was intended to meet certain bonds of the district, then about to fall due, and which were payable at that bank, and the defendant so informed the banker and directed him verbally to so apply it when the bonds were presented. While in this condition the bank failed and the money was lost. Held, that the banker was the agent of the treasurer, and not of the district, and that the money was recoverable by the district in an action on the treasurer's bond." And it was said in the text of the opinion: "It was Ward's duty, under the law, to keep the money securely until properly directed, as before shown, to pay it over to the holder of the district bonds. The money was within his control, placed there by force of the statute, and if he saw fit to entrust it to the care of another, he did so at his peril."

In the opinion in the case of *State v. Sheldon*, 10 Neb., 452, in stating the liability of a treasurer for public funds it was held: "The fact that the public funds have been stolen from the treasurer is no legal justification for the failure of the treasurer to account for them." This was not a case, however, wherein the recovery of the public funds was the object of the action, but was one in the nature of a *quo warranto* to oust the defendant from the office of county treasurer of Greeley county, and in reaching a conclusion as to whether the treasurer had been guilty of neglect of duty as an officer it was observed: "This being the case, the county treasurer having failed to account for the moneys in his hands, properly chargeable against him as treasurer, is guilty of willful neglect of duty and may be removed from office. And the fact

that the moneys were stolen is no legal justification for the failure to account for them."

While it may be said that these cases are not in point and cannot be said to support the rule which holds treasurers to a strict accountability in respect to public funds which come into their possession as officers, for the reason that, strictly speaking, it was not the main question involved in either case, but only incidentally, yet it was so necessarily connected with the matters under discussion and which were determined, that it became necessary to pass upon it, and the decisions show what the opinion of the court was in regard to the responsibility of the treasurers for public money which they handled as officers.

It is argued that if the delivery of the certificate of deposit or check by Zutavern to Bush when the latter assumed the duties of the office was a sufficient payment to render Bush and his bondsmen responsible to the county for the amount thus paid, inasmuch as at the expiration of the first term of his services as treasurer and assumption of the duties of the second term, January, 1892, he turned this $6,000 certificate of deposit over to himself as his own successor, this released the sureties herein sued, who signed his bond for the first term, and the action must fail as to them. Whatever might be said of this contention had the certificate of deposit in question, at the time of the termination of the first term which Bush occupied the office as treasurer, retained its full force and vigor as a demand against the bank for the sum evidenced by its face, we must now recall to mind the fact that during the month of October, 1891, the bank payor of the certificate failed, or quit business, had passed out of existence in the business world, and the certificate of deposit was no longer a demand against a living business being, but was merely evidence of a claim against what might at some time be realized of the assets of the bank which had failed, and was certainly not entitled to be considered as such a payment when retained

by Bush in making the change from his first to his second term, of the amount of funds on hand, to him as his own successor, as to render or raise a liability for the amount of the certificate against him and his bondsmen for the second term as a loss occurring during the second term, and certainly was not a paying over of the county funds which worked a release of the sureties who signed the bond for the first term. The failure to otherwise pay the sum expressed by the face of the certificate, at the expiration of the first term of office, was such a failure to faithfully discharge the duties of the office required by law, to faithfully account for and pay over all funds which had come into his hands or under his control by virtue of his office, as rendered him and the sureties for the first term liable therefor.

A further contention is made on behalf of plaintiffs in error, that the county board, or commissioners, had settled with Mr. Bush, comprehending in such settlement all his actions as county treasurer during his first term, and had examined his final account and approved it and made such approval a matter of record; that this constituted an adjudication of all these matters which was final and conclusive; hence this action will not lie. Our statutory law requires the county treasurer to make periodical reports, which must show, somewhat in detail, the main transactions, more particularly in relation to disbursements of the public moneys and balances remaining on hand in the various funds, and these must be scrutinized and passed upon by the county board, and they make what is denominated a settlement with the treasurer. But call it what you may, we are satisfied that it is nothing more than an examination of the accounts and report of the business acts of the treasurer during the period covered by it, a scanning of such acts, a "checking up," if the expression is allowable, by the county commissioners, the parties designated by law to attend to it, made in the interest of the public and the county and for the benefit of the public and the county. Its main object

and purpose is to maintain an espionage and supervision over the finances of the county and their management by the treasurer, and secure, by such means, as great promptitude and care and exactitude in their management as possible. It is not in any sense or degree on behalf of the sureties on the bonds of the officers. Their contract is that the officer will perform his duties faithfully and properly, and for any failure so to do they become liable. The law does not contemplate that the officer shall be watched by the county or its officers for the benefit of the sureties. It is no part of the contract with the sureties that it shall be done; and where reports and settlements are required by law it does not change the obligation of the sureties or enter into their contract. It is their duty to see to it that the duties of the officer are faithfully discharged, and, if the county board should be negligent, or careless, or irregular in an examination of an account or report of a treasurer, or in what is termed a settlement, it would be no available defense to sureties on his bond in an action to recover an amount of public funds which the treasurer had failed to pay over. These periodical settlements assigned by our statutes to be made with county treasurers do not have the elements in them of a judicial determination of the subjects involved. It would not be contended that if the county commissioners state, as a matter of record, as the result of one of these so-called settlements, that the treasurer was short in his accounts in a stated sum and consequently indebted to the county in such sum, that this would constitute an adjudication of the whole matter, and, unless appealed from, it would be final and binding on the parties, and not open to attack. No more can the result obtained by the examination be said to be binding and conclusive upon the county in regard to the amounts reported on hand by the treasurer being the exact, true amounts, or their payment by the treasurer preclude the institution and successful prosecution of an action for any further sums which he has failed to report or to pay

over. It can have no further or greater conclusiveness than any settlement made between private persons. We are cited on this point in the case to the decision in the case of *Rayoss v. Cuming County*, 36 Neb., 375, as sustaining the position of plaintiffs in error, but we do not so read it. It was held, "Where the county board has before it a matter which it may reject or allow, and its action thereon will be final unless appealed from, its order in the premises cannot be attacked collaterally, except for fraud," which is entirely correct; but in passing upon the report of a county treasurer the board do not reject or allow it in the sense in which these words were used in the case referred to. It is only approved or disapproved, and not conclusively. In the same decision it is observed: "An officer who has faithfully performed the duties of his office, and made a full settlement with the tribunal authorized to settle the same, should be permitted to rest on such settlement unless there is fraud, mistake, or imposition in making the same." The rule announced in the third paragraph of the syllabus to the case, which we have quoted, had reference to an order of the county board allowing the county clerk deputies and the application of the fees of the office to the payment of their salaries as fixed by the board, and was entirely applicable. What was said in the opinion in regard to the settlement was substantially the same as herein stated. Any settlement is all right and entitled to stand in favor of an officer who has faithfully performed the duties of his office, when in the settlement there is neither fraud nor mistake, or imposition. In support of what we have said in regard to these reports and their examination and approval and settlement, see *Crawn v. Commonwealth*, 4 S. E. Rep. [Va.], 721; *Rose v. Douglas Township*, 34 Pac. Rep. [Kan.], 1046; *Board of County Commissioners v. Sheehan*, 43 N. W. Rep. [Minn.], 690; *Britton v. City of Ft. Worth*, 14 S. W. Rep. [Tex.], 585.

In the case at bar it was shown by the testimony that at the close of his first term Mr. Bush made a report or

account which was examined by the county board. The statements of the commissioners' record in respect to the settlement had at that time were as follows: Under date January 29, 1892: "The county commissioners proceeded to settle with the county treasurer. The board adjourned to January 30, 1892." Under date of January 30, 1892: "The board then proceeded to settle with the county treasurer. Board adjourned to February 1, 1892." Under date of February 1, 1892: "The board proceeded to settle with the county treasurer. Pending settlement the board adjourned to February 2, 1892." Under date of February 2, 1892: "The board completed with the county treasurer." The account indicated the proper and true amount which had come into the possession of the county treasurer, or had been paid to him, as on hand, but it in fact included this certificate of deposit for $6,000 issued by the bank, which had, subsequently to such issuance, but prior to the time of settlement, failed. The fact that this was so included and counted by the treasurer as money on hand was not known by the county board. The funds were not asked for by the board, were not produced by the treasurer, and any approval of the account or report of the treasurer at that time was so made without any knowledge of the existence of the certificate of deposit, or that it figured or was claimed by the treasurer as a part of the moneys on hand. There was a mistake in the settlement, if any was made, to the amount evidenced by the certificate, and the paying over the funds shown by the report to be on hand, by Bush to himself, to the extent that it consisted of his retaining this certificate and counting it as so much money, was a failure to account and pay over the moneys of the county, —a failure to faithfully discharge the duties of his office as required by law, and for which he and his bondsmen became liable. It follows that the judgment of the district court must be

AFFIRMED.

NORVAL, J., not sitting.

FARMERS LOAN & TRUST COMPANY V. T. F. MEMMINGER ET AL.

FILED APRIL 10, 1896. No. 6414.

1. Taxes: LIEN. Taxes assessed on personal property are a lien from and after the delivery of the tax list to the county treasurer upon all the personal property owned by the person assessed. *Reynolds v. Fisher*, 43 Neb., 172, followed.
2. ———: ———: CHATTEL MORTGAGES. The lien of such taxes is paramount to the lien of a chattel mortgage executed after the delivery of the tax list to the county treasurer.
3. Trial to Jury: IMMATERIAL EVIDENCE: HARMLESS ERROR. The admission of immaterial evidence in a cause tried to a jury is no ground for reversal, where it had no effect on the result, and the verdict could not have been different had the objectionable evidence been excluded.

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

Wigton & Whitham, for plaintiff in error:

The warrants attached to the tax-books were not liens on the property in controversy when the mortgages were given. (*Hill v. Figley*, 23 Ill., 418; *Binkert v. Wabash R. Co.*, 98 Ill., 218; *Ream v. Stone*, 102 Ill., 364; *Hill v. Palmer*, 32 Neb., 632.)

Robinson & Reed, contra.

NORVAL, J.

On the 13th day of December, 1888, James McMahon executed a chattel mortgage on certain personal property to the plaintiff, the Farmers Loan & Trust Company, to secure the payment of $500, which was the next day duly filed in the county clerk's office of Madison county. To secure the said sum, on October 9, 1889, McMahon executed another mortgage to the plaintiff upon the same property described in the prior mortgage, and also

a pony and colt, and a copy of the instrument was duly filed the following day. Personal taxes were legally assessed and levied against said McMahon in Madison county for the years and amounts following: 1880, $10.31; 1881, $14.39; 1884, $13.50; 1885, $13.78; 1886, $10.14; 1887, $6.93; 1888, $4.81; 1889, $11.97. The tax lists covering these taxes, with the warrants required by law duly attached, were delivered to the county treasurer of Madison county for collection, and all of said taxes remaining unpaid, the defendant, T. F. Memminger, as such treasurer, seized, on January 27, 1890, the mortgaged chattels for the satisfaction of the above taxes due the county, while the property was in the possession of plaintiff under its mortgages, and sold the same, applying the proceeds to the payment of said taxes. Plaintiff thereupon brought this action on the treasurer's bond for the conversion of the property, and from a verdict and judgment for the defendants the plaintiff prosecutes error to this court.

The petition in error contains twenty-eight assignments, only three of which are argued in the brief of plaintiff, and the others must be regarded as waived and will not be considered.

Objection is made to the following instruction given by the court on its own motion: "Under the law of this state as it existed during the period covered by the transactions involved in this case the taxes assessed upon the personal property of a citizen were a lien upon the personal property of such person from and after the tax books were received by the tax collector, and this lien would continue against all personal property owned and in the possession of the delinquent in the county, so long as the tax remained upon the tax books and unpaid, and a person taking a chattel mortgage upon any of such property would by the record of such tax be charged with the notice of such tax lien." It is argued in the brief that this instruction is erroneous in stating that personal taxes are a lien on the personalty of the person assessed

from the date of the delivery of the tax list to the county treasurer. It is insisted that the lien of such taxes in this state does not attach until after the treasurer or tax collector receives the tax books or lists, a demand has been made upon the taxpayer for the payment of the taxes assessed, and a levy has actually been made by the officer. There is some support for this contention in the authorities cited from the state of Illinois, and the language used in the decision of this court in *Hill v. Palmer*, 32 Neb., 632. In *Hill v. Palmer* the property was purchased without actual notice of the lien for taxes, two days prior to the date of the tax warrant issued by the township collector and the levy thereunder. It did not appear when the tax books were delivered to the collector. The court held that the property sold was not subject to sale for the taxes assessed against the vendor. The case referred to was in effect overruled by the decision of *Reynolds v. Fisher*, 43 Neb., 173, where the precise question here involved was passed upon adversely to the contention of this plaintiff. In that case the tax debtor executed chattel mortgages upon the property after the delivery of the tax book to the county treasurer. The possession of the property was delivered to the mortgagees and the county treasurer brought replevin, claiming the right of possession as such officer, under and by virtue of the statutory lien for the personal taxes previously levied against the mortgagor. No levy for the taxes had been made by the treasurer, nor was any payment of the taxes demanded until after possession had been taken under the mortgages. This court reversed the judgment of the district court, holding that personal taxes are a lien from the delivery of the tax list to the treasurer, not only upon the personalty assessed, but on all such property subsequently acquired by the taxpayer, and the lien for such taxes is paramount and superior to the liens created by the chattel mortgages executed after the tax list has come into the hands of the county treasurer. Section

139, article 1, chapter 77, Compiled Statutes, which provides that "The taxes assessed upon personal property shall be a lien upon the personal property of the person assessed, from and after the time the tax books are received by the collector," was construed in that case and we are entirely content with the interpretation then given it. The statute is too plain to admit of any other construction. To hold that personal taxes are not a lien until the property has been seized by the treasurer would be the rankest kind of judicial legislation. The instruction quoted is in harmony with the decision in *Reynolds v. Fisher*, *supra*, and was applicable to the evidence.

It is claimed that there was a balance in the treasurer's hands arising from the sale of the property, of $16.73, after the payment of the taxes, and that plaintiff was entitled to a judgment for that sum. This contention is not tenable, since the action is for the conversion of the property, and not to recover any surplus that may be in the hands of the officer. There is no averment in the petition that there was such a surplus, nor is any demand for its payment alleged. The plaintiff brought its case upon the theory that the liens of the chattel mortgages were superior to the lien for taxes, and that was the issue tried.

Lastly, it is claimed that the court erred in permitting to go in evidence Exhibit N, the record of the proceedings of the county commissioners of Madison county, under date of July 11, 1889, instructing the county treasurer to collect all delinquent taxes prior to the year 1888. We agree with counsel that it was wholly immaterial, since the law makes it the duty of the county treasurer to collect delinquent taxes without any orders or directions from the county board. Plaintiff, however, was not prejudiced by the introduction of this record, for, had it been excluded, no other verdict could have been returned under the evidence properly admitted. (*Terry v. Beatrice Starch Co.*, 43 Neb., 866.)

The judgment is clearly right, and it will be

AFFIRMED.

J. H. SMITH V. WELCOME SMITH.

FILED APRIL 10, 1896. No. 6361.

1. **Review:** CONFLICTING EVIDENCE. When the verdict is warranted by the proof on conflicting evidence it will not be set aside.
2. ———: ———. Evidence considered, and *held* to have been sufficient to sustain the verdict.

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

E. J. Hainer, for plaintiff in error.

M. Randall, contra.

NORVAL, J.

This was an action by Welcome Smith against J. H. Smith to recover the sum of $50 and interest thereon alleged to be due from the latter to the former on account of a land deal. Upon a trial to a jury the plaintiff recovered a verdict, upon which judgment was subsequently rendered, and the defendant has brought the record here for review.

No legal proposition is presented for our consideration. The only question in the case is whether or not the verdict is sustained by the proofs. The uncontradicted evidence discloses the following facts: In 1886, John Viotle commenced an action in the district court of Hamilton county against N. B. Kizer, Welcome Smith, the plaintiff herein, and several others to foreclose a mortgage upon certain real estate situate in the said county near the town of Phillips. Subsequently, Rebecca B. Hitchcock, through her attorney, J. H. Smith, the defendant herein, intervened and filed an answer and cross-petition in the cause setting up a first mortgage upon the same premises, and praying a foreclosure thereof. On the 2d day of May, 1887, a decree was en-

tered foreclosing both mortgages, the mortgage of Hitchcock being declared the first lien upon the premises for the sum of $566.95, and Viotle was awarded a second lien for the sum of $194.54, both sums to draw ten per cent interest from the date of the decree. An order of sale was subsequently issued, and on the 17th day of September, 1887, the mortgaged real estate was sold thereunder by the sheriff to said Welcome Smith for the sum of $800. No portion of the bid was paid down. On October 5, 1887, the defendant herein wrote a letter to plaintiff's attorney, W. R. Bacon, Esq., of Grand Island, but now located at Los Angeles, California, urging the payment by plaintiff of the amount of his bid at once. The next day plaintiff went to Aurora and saw defendant in regard to the matter. Court was then in session, and the latter urged strongly the payment of the money so the sale might be confirmed. It was finally arranged that plaintiff should pay $400 to the defendant, as attorney for Hitchcock, and plaintiff would negotiate a loan to raise the remainder of the purchase money. The $400 was paid as agreed. At the same time some sort of an understanding was had between plaintiff and defendant to the effect that if the former could not raise the remainder of the purchase price, the latter would do so, and the bid was to be assigned to him. Plaintiff attempted to make a loan upon the premises, but did not succeed in his efforts. On October 11, 1887, plaintiff and his attorney, Mr. Bacon, went to Aurora to see the defendant for the purpose of making a settlement of the matter. They saw the defendant, an understanding between the parties was reached whereby the plaintiff transferred his bid to the defendant, and his interest in the premises, and the latter on said day returned to the former the $400 already mentioned. The defendant also agreed conditionally to pay plaintiff $50, as a bonus. The sheriff thereafter made return of the order of sale, naming therein the defendant as purchaser. On the 8th day of May, 1888, the sale was approved and confirmed

by the court. It is to recover the above sum of $50 that this action was brought, the plaintiff claiming that the condition or stipulation accompanying the agreement to pay said sum has been fulfilled, and therefore a cause of action has accrued in his favor for the money. There is no dispute but that the defendant agreed to pay plaintiff $50 on account of the transaction already mentioned. The controversy is one over the condition or conditions accompanying the promise to pay. The plaintiff insists that the sole condition imposed was that the sale should be confirmed by the court in the name of the defendant as purchaser. While the defendant contends that he was to pay the plaintiff $50, providing the sale was confirmed; that the defendant should make sale of the premises to one Alfred W. Mason, at the time a prospective purchaser, and that Mr. Bacon should obtain a loan for the latter on the land of $700 at eight per cent interest. No sale of the property to Mason was effected, nor was the loan to him made; so if the agreement was as defendant insists no recovery can be had in this case. There were but three persons present when the contract in question was made,—plaintiff, defendant, and Mr. Bacon,—and they gave testimony upon the trial.

The plaintiff testified positively that the sole condition attached to the agreement of the defendant to pay him $50 for his interest was that the sale should be confirmed in the name of the defendant.

Mr. Bacon testified, by deposition, to the agreement of the defendant to pay the plaintiff the sum stated, if certain contingencies should happen, the nature of which the witness did not remember.

The defendant's testimony sustains his own contention as to the terms of the agreement, and his is, to some extent, corroborated by the letters which passed between himself and Mr. Bacon subsequent to the date of the settlement, and which are found in the bill of exceptions. The defendant also gave testimony to the effect that, on May 7, 1888, prior to the confirmation of the sale, plaint-

iff came to see him about the payment of the $50, when defendant informed him that he did not intend to take the land, and urged plaintiff to raise the money, stating that if he did not do so defendant would have the sale set aside; that plaintiff replied: "If you don't have the sale confirmed, and let me go home, I think I can raise the money in two or three days. If I cannot raise the money I will send you word, and you can have the sale confirmed in your name and you take it at the bid." The witness further testified that they both went to Mr. Valentine, the then sheriff, and plaintiff stated to the officer that if he sent the money the sale was to be confirmed in his name, otherwise the defendant was to take the property at the bid and pay nothing more, and the sheriff was to change his return on the order of sale, to show that defendant was the purchaser; that on the next day the following letter was received from the plaintiff, which was introduced in evidence:

"GRAND ISLAND, May 8, 1888.

"*Mr. J. H. Smith.*—DEAR SIR: You can have the sale confirmed in your name, and I will see you when you come to Grand Island.

"Respectfully, WELCOME SMITH."

The defendant is corroborated by the testimony of F. E. Valentine, the officer who made the sale, as to the conversation mentioned above as having taken place May 8, while the plaintiff in his testimony denies that any such conversation occurred.

The testimony adduced is hopelessly irreconcilable, not only as to the terms of the contract entered into on October 11, but whether the same was subsequently modified or rescinded by the parties. The jury heard the witnesses, weighed their evidence, and decided all conflict therein in favor of the plaintiff, and the trial court approved the same by refusing a new trial. Their finding cannot be disturbed by us, unless shown to be clearly and manifestly wrong, or without sufficient evidence to support it. We have thrice read the testimony

and find that that introduced by the plaintiff is not only reasonable and consistent in all its parts, but if accepted as true, and disregarding the proofs on the other side, it makes out the cause of action alleged. Under the evidence the jury could have returned a verdict for the defendant, but as there is not a total want of evidence upon any essential point to sustain the verdict, it must stand. This is in accordance with the well established rule in this court. The judgment is

AFFIRMED.

EMMA L. VAN ETTEN V. DELL R. EDWARDS.

FILED APRIL 10, 1896. NO. 6345.

Directing Verdict: EVIDENCE: REVIEW. It is error to direct a verdict for the defendant, when the evidence is sufficient to warrant a finding and judgment for the plaintiff.

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

David Van Etten, for plaintiff in error.

McClanahan & Halligan, contra.

NORVAL, J.

This was an action by Emma L. Van Etten against Dell R. Edwards to recover the sum of $397.77, with eight per cent interest thereon from April 9, 1890. At the close of the plaintiff's testimony the court instructed the jury to return a verdict for the defendant, which was accordingly done, and judgment was entered upon the verdict. David Van Etten was the only person who gave evidence in the case. He testified that he offered to sell to the defendant, through her agent, John E. Edwards, three promissory notes, aggregating the sum of

$400, given by J. Buls, dated March 17, 1887, and secured by a chattel mortgage; that Mr. Edwards said that he would look at the property securing the notes; and subsequently, on December 1, 1887, he came to Mr. Van Etten and proposed to let him have $100 on the notes, saying that he would collect the mortgage and pay Van Etten all above $115. This proposition was accepted, the $100 was paid, and the following instrument was executed by the defendant:

"OMAHA, NEB., December 1, 1887.

"I have this day bought of David Van Etten three promissory notes for one hundred and thirty-three 33-100 dols.; one hundred and thirty-three 33-100 dols., one hundred and thirty-three 33-100 dols., respectively, signed by J. Buls, and payable to Mari Kochem or order, and dated March 19, 1887, and secured by a certain chattel mortgage upon goods and chattels of said J. Buls in Sarpy Co. I hereby agree with said David Van Etten to pay him all sums of money, notes, or securities realized upon a settlement with J. Buls, or a foreclosure of said mortgage, over and above the sum of one hundred and fifteen dollars and the expenses and costs of said settlement or foreclosure, provided said settlement or foreclosure is obtained on or before the expiration of sixty days from the date of this agreement, and I hereby agree to proceed under said mortgage within fifteen days from the aforesaid date hereof. DELL R. EDWARDS,

"By J. E. EDWARDS,

"*Her Atty. in Fact.*"

Before this action was brought the foregoing instrument was duly assigned for a valuable consideration to the plaintiff by Mr. Van Etten. Mr. Buls paid his note to the defendant without foreclosure of the mortgage, and the latter has failed and refused to account to the plaintiff for any portion thereof, although requested to do so. Mr. Van Etten further testified that the three notes signed by Buls were left with the defendant as collateral security for the loan of $100. It was at-

tempted to be shown on the witness' cross-examination that he gave a bill of sale of the notes to the defendant at the time the paper copied above was executed, but if such a bill of sale was given, it was neither established by the evidence nor introduced on the trial. It appears from the testimony that the defendant did not proceed to collect the money from Mr. Buls by foreclosure within the time specified in the contract, but on the contrary, that defendant's agent, Mr. Edwards, stated to Van Etten that he considered it better to collect the money without foreclosure, and the latter agreed to this. The answer sets up that Mr. Van Etten made certain false representations to the defendant whereby she was induced to sign the instrument already mentioned, but no proof was offered in support of such averment.

Under the evidence a verdict should have been returned for the plaintiff for the difference between the amount collected by the defendant on the three notes of Buls, with interest thereon, less $115. It follows that the court erred in directing a verdict for the defendant, and for which error the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

GOTTLIEB STORZ ET AL. V. LENA FINKLESTEIN, ADMINISTRATRIX, ET AL.

FILED APRIL 10, 1896. No. 6308.

1. **Reply**: PERMISSION TO FILE. The granting of permission to file a reply out of time, or during the trial, rests largely in the legal discretion of the trial court.

2. **Continuance**: REVIEW OF ORDER. An order denying a continuance of a cause will not be reversed except for an abuse of discretion.

3. **Intoxicating Liquors**: SALES: CONTRACT FOR UNLAWFUL RESALE. Where intoxicating liquors are sold in this state for the purpose of enabling the purchaser to resell them contrary to, or in viola-

tion of, the laws of this state, and the vendor has the knowledge of the illegal purpose of the buyer and participates with him in the illegal traffic, the sale is void, and no recovery can be had for the purchase price of the liquors thus sold.

4. **Wrongful Attachment:** DAMAGES: ACTION ON BOND: MALICE. In the absence of malice, an action for the wrongful suing out of an attachment can be maintained alone on the attachment bond. To maintain an action independently of the statute, and not on the bond, malice in suing out the writ and want of probable cause must be averred and shown. (*Jones v. Fruin*, 26 Neb., 76.)

5. ———: ———: ———: BURDEN OF PROOF. In an action on an attachment bond, where the answer denies each allegation in the petition, the burden is upon the plaintiff to establish the execution of the bond, and to show that the attachment was wrongfully issued,—that is, that the ground stated in the attachment affidavit did not exist.

6. ———: ———: ———: ———. It is not enough that it be shown that the attachment was merely dissolved. *Eaton v. Bartscherer*, 5 Neb., 469, followed.

7. **Bill of Exceptions:** OMISSION OF DEPOSITIONS: REVIEW. This court will not weigh the evidence to see if it sustains the verdict, when the bill of exceptions, on its face, reveals that a deposition introduced and read upon the trial has been omitted therefrom, even though the trial judge has certified that the bill contains all the evidence offered or given upon the trial.

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

The facts are stated in the opinion.

Lake, Hamilton & Maxwell, for plaintiffs in error:

Permitting a reply to be filed during a trial is a ground for continuance where new issues are raised. (*Taylor v. Heffner*, 4 Blackf. [Ind.], 387*.)

Mere knowledge of the seller that the buyer intends to put the goods to an unlawful use, where they may be lawfully used, will not make the sale illegal or prevent the recovery of the purchase price. (Tiedeman, Sales, sec. 294; *Thimes v. Stumpff*, 33 Kan., 62; *Bowman Distilling Co. v. Nutt*, 34 Kan., 724; Benjamin, Sales [4th Am. ed.], sec. 791; Newmark, Sales, sec. 364; *Webber v. Donnelly*, 33 Mich., 469; *Gambs v. Sutherland*, 59 N. W. Rep.

[Mich.], 652; *Tegler v. Shipman*, 33 Ia., 195; *McKinney v. Andrews*, 41 Tex., 363; *Dater v. Earl*, 3 Gray [Mass.], 482; *Curtis v. Leavitt*, 15 N. Y., 15, 235; *Tracy v. Talmage*, 14 N. Y., 162; *Kreiss v. Seligman*, 8 Barb. [N. Y.], 441.)

By wrongfully suing out attachment is meant, not the omissions, irregularities, or informalities in issuing the same, but that the party resorted to it without sufficient grounds. (*Eaton v. Bartscherer*, 5 Neb., 471; *Sharpe v. Hunter*, 16 Ala., 765; *Raver v. Webster*, 3 Ia., 502; *Pettit v. Mercer*, 8 B. Mon. [Ky.], 51.)

An action for wrongful attachment, in the absence of a statute, can be maintained only on the attachment bond. (*Tallant v. Burlington Gas-Light Co.*, 36 Ia., 262; *Palmer v. Foley*, 71 N. Y., 108; Drake, Attachments [7th ed.], sec. 726.)

References to question relating to measure of damage: *Goebel v. Hough*, 26 Minn., 257; *Clark v. Marsiglia*, 1 Den. [N. Y], 317; *Lord v. Thomas*, 64 N. Y., 109; *Nebraska City v. Nebraska City Hydraulic Gas-Light & Coke Co.*, 9 Neb., 343; Bishop, Contracts, sec. 842.

Estabrook & Davis, contra, cited: *Struthers v. McDowell*, 5 Neb., 493; *Rudolf v. McDonald*, 6 Neb., 165; *Shepherd v. Hills*, 11 Exch. [Eng.], 55; *Tilson v. Warwick*, 4 B. & C. [Eng.], 962; *Hart v. Barnes*, 24 Neb., 782; *Haverly v. Elliot*, 39 Neb., 201; *Storz v. Finklestein*, 46 Neb., 577.

Chas. E. Clapp, also for defendants in error.

NORVAL, J.

This action was brought upon an attachment bond by Louis M. Finklestein against Gottlieb Storz and Joseph D. Iler, as principals, and Theodore Olsen, as surety upon said bond, to recover damages for the alleged wrongful suing out of a writ of attachment and levying it upon certain personal property of the plaintiff. The petition contains the usual averments. Storz & Iler, in their answer, admit the bringing of the attachment suit,

the filing of an affidavit for attachment, the issuing of the writ of attachment, the levying thereof on plaintiff's property, and that the court discharged the attachment. All other allegations in the petition they deny. They also aver that the affidavit for attachment was made in good faith, and that they had probable cause to believe the allegations therein contained were true. The answer further pleads as a set-off that plaintiff is indebted to Storz & Iler in the sum of $388.43, with interest thereon, on an account for beer sold and delivered to plaintiff at his request, for which amount, with interest, they pray judgment. The defendant Olsen answered by a general denial of each allegation contained in the petition. After the jury had been impaneled a reply was filed by the plaintiff. The first and third paragraphs thereof were stricken out by the court, and the defendants filed a general demurrer to the second paragraph, which was overruled. There was a verdict in favor of the plaintiff for the sum of $999.92, and the defendants' separate motions for a new trial were overruled and judgment rendered upon the verdict. Afterwards, on the death of the plaintiff, the judgment was revived in the name of Lena Finklestein, his administratrix, and John O. Malcom, his administrator. The defendants jointly and severally prosecute error.

The first error assigned is based upon the ruling of the trial court permitting the plaintiff to file a reply to the answer of Storz & Iler after the jury had been sworn. The matter of granting or refusing permission to answer pleadings, or to file pleadings out of time, or during the trial, rests largely in the legal discretion of the trial court, and this court will not interfere with a ruling in that regard, unless there has been an abuse of discretion. This is the settled law of this state. (*Hale v. Wigton*, 20 Neb., 83; *Brown v. Rogers*, 20 Neb., 547; *Ward v. Parlin*, 30 Neb., 376; *Blair v. West Point Mfg. Co.*, 7 Neb., 147.) The discretion of the court below was not improperly exercised in allowing the reply to be filed. Immediately

upon the filing of the reply, the defendants asked the court to continue the cause, for the reason that they were unable to proceed to trial on account of the reply putting in issue the averments in their answer, which request was denied by the court. In this, it is claimed, there was error, and section 147 of the Code of Civil Procedure is cited to sustain the contention. This section provides: "When either party shall amend any pleading or proceeding, and the court shall be satisfied, by affidavit or otherwise, that the adverse party could not be ready for trial in consequence thereof, a continuance may be granted to some day in term, or to another term of court." This section contemplates that a cause may be continued where a party, in consequence of the amending of the pleading of his adversary, is unable to go to trial; but the party seeking the postponement must satisfy the court of the existence of grounds therefor by affidavit or other testimony. An application for continuance is addressed to the discretion of the trial court, and it must appear that there has been a clear abuse thereof in denying it, else the ruling will not be disturbed in the appellate court. (*Nebraska Loan & Trust Co. v. Hamer*, 40 Neb., 281; *Kansas City, W. & N. R. Co. v. Conlee*, 43 Neb., 121; *Stratton v. Dole*, 45 Neb., 472.) The reply pleaded affirmative defenses to the set-off set forth in the answer, it is true; but the record fails to disclose that any showing was made in the support of the motion for a continuance. The court below could not know without such showing that the defendants were unprepared to meet the issues tendered by the reply. If a postponement of the trial was desired to meet the evidence which it was expected the plaintiff would adduce in support of the averments in his reply, the defendants should have made that fact to appear by proper testimony, giving the names of their witnesses who were absent, the nature of their testimony, and that defendants expected to be able to procure the attendance of such witnesses or their testimony. In the absence of such showing there was no error in refus-

ing the continuance. (*Clark v. Carey*, 41 Neb., 780; *Home Fire Ins. Co. v. Johnson*, 43 Neb., 71; *Corbett v. National Bank of Commerce*, 44 Neb., 230; *Dixon v. State*, 46 Neb., 298.)

The next contention is that error was committed in overruling the demurrer to the second paragraph of the reply, which is as follows: "But said plaintiff avers that upon the dates from July 1 to July 9, inclusive; and in the meantime said plaintiff had no license for the sale of malt or spirituous liquors; that such fact was well and fully known to said defendants, and that it was further known and understood between said parties, plaintiff and defendants, that such beer was purchased from said defendants by said plaintiff for the purpose of being bottled and resold by plaintiff; and plaintiff avers by reason of such knowledge and such understanding and such fact such sale was illegal and void, and no recovery thereon may be had by said defendants against said plaintiff. And plaintiff further says defendants entered into a written agreement, a copy of which is hereto attached and made a part hereof, whereby said defendants were to participate and profit in said illegal traffic, and did so participate and profit therein." The answer discloses that the account therein pleaded as a set-off, except as to three items, is for beer sold and delivered to the plaintiff between June 30, 1889, and July 10 of the same year. The defendants insist that the facts set up in the reply are insufficient to defeat a recovery for the purchase price of the beer sold between said dates, and numerous authorities are cited in the brief to the effect that the mere knowledge of the vendor that the vendee intended to put the liquors to an unlawful use, or to resell them in violation of the law, is not sufficient to render the sale void or defeat an action brought by such vendor against the vendee to recover the purchase price of such liquors. We do not question the soundness of the adjudications to which the defendants have called our attention. Clearly they are not applicable to the facts before us.

The plaintiff does not rely upon the mere knowledge of the defendants that the beer was purchased for resale in violation of the laws of this state. Knowledge of the intended unlawful use is not only set up in the reply, but it is further averred that the beer was sold by Storz & Iler for the purpose that the law should be violated, and that they were to, and did, participate and profit in the unlawful traffic. The averments contained in the reply, if true, were sufficient to defeat a recovery of the purchase price of the beer sold between the dates above specified; hence the demurrer was properly overruled. (*Storz v. Finklestein*, 46 Neb., 577.)

It is contended that this action cannot be maintained against Storz & Iler, for the reason they did not sign or execute the attachment undertaking. It is a fact that their names are not attached to said instrument, nor did they in any manner execute the same. Storz & Iler having procured the undertaking to be given, they thereby became liable to their surety for any and all damages he might be compelled to pay by reason of the wrongful suing out of the attachment; but it does not follow that they are parties to the instrument in such a sense that they are directly liable to the attaching defendant in a suit upon the undertaking. The statute does not require the attaching creditor to sign the attachment bond. It is sufficient if it be signed by the surety alone. (Code, sec. 200; *Eckman v. Hammond*, 27 Neb., 611; *Howard v. Manderfield*, 31 Minn., 337; *Black Hills Mining Co. v. Gardiner*, 58 N.W.Rep. [S. Dak.], 557; *Pierce v. Miles*, 5 Mont., 549.) Should judgment be recovered on this bond against Olsen, the surety, and he should pay it, doubtless he could sue Storz & Iler and recover from them the amount thus paid; but that is no reason why the latter are directly liable to the plaintiff on the bond. They may be, and doubtless are, liable for any damages that the plaintiff may have sustained if they caused his property to be attached maliciously and without probable cause. But such remedy of the plaintiff is not upon the bond,

but independent of it, in the way of an action for a malicious attachment, in which case he would be compelled to allege and prove want of probable cause and malice. (*Jones v. Fruin*, 26 Neb., 76.) In an action upon the attachment undertaking, malice need not be either alleged or proven. We have no statute in this state which permits an attaching debtor to recover damages for the mere wrongful suing out of a writ of attachment, except upon the bond; and, in the absence of such a statutory provision, such an action cannot be maintained. (*Jones v. Fruin, supra;* Drake, Attachment [7th ed.], sec. 726; *Tallant v. Burlington Gas-Light Co.*, 36 Ia., 262; *Frantz v. Hanford*, 87 Ia., 469.) This suit is upon the bond or undertaking given by the surety, which Storz & Iler have not executed. There is no averment in the petition that they maliciously and without want of probable cause procured the attachment to be issued and levied. Therefore, a cause of action is not made on paper as to Storz & Iler, and the judgment as to them must be reversed. The authorities are conflicting upon the question just discussed, but this court is committed to the rule stated and it will be adhered to.

Error is assigned for the giving of the following instruction:

"1. In order that the plaintiff may recover in this action, he must satisfy you by a preponderance of all the evidence (1) that defendants Storz & Iler in a suit brought by them against him caused an attachment to be issued and levied on his bottling works; (2) that said attachment was dissolved in due course of law; (3) as to the amount of damages, if any, suffered by him as a direct result of the issuance and levy of said attachment; (4) that the attachment bond was duly executed by defendant Olsen."

Section 200 of the Code of Civil Procedure provides: "When the ground of attachment is, that the defendant is a foreign corporation, or a non-resident of the state, the order of attachment may be issued without an under-

taking. In all other cases the order of attachment shall not be issued by the clerk until there has been executed in his office, by one or more sufficient sureties of the plaintiff, to be approved by the clerk, an undertaking not exceeding double the amount of the plaintiff's claim, to the effect that the plaintiff shall pay the defendant all damages which he may sustain by reason of the attachment, if the order be wrongfully obtained." The bond in this case is conditioned in accordance with the terms of the above section. Therefore, both under the bond and the statute, the surety is liable only for the damages resulting from the wrongful issuance of the attachment writ. In an action on an attachment bond, where the averments of the petition are put in issue by the answer, the burden is upon the plaintiff to establish that the writ was wrongfully obtained; in other words, that the ground stated in the affidavit for attachment did not exist, or was untrue. In case there is a failure to prove such fact, the suit must fail. It is not enough that it be shown that the attachment was dissolved, since the writ may have been discharged for omission or irregularities merely. It must further appear that the attachment was wrongfully issued; that is, no valid grounds existed for granting the writ. This is the rule stated by LAKE, C. J., in *Eaton v. Bartscherer*, 5 Neb., 469. It follows that the instruction quoted was erroneous.

It is argued that the evidence is insufficient to sustain the verdict, in two particulars: First, it was not established that the defendant Olsen executed the bond, and second, the record fails to disclose that the attachment was wrongfully issued. The answer of Olsen having put in issue the execution of the bond, it devolved upon the plaintiff to establish such fact. (*Donovan v. Fowler*, 17 Neb., 247; *Hassett v. Curtis*, 20 Neb., 162.) The evidence incorporated in the bill of exceptions fails to show that Olsen signed the instrument. While it is true there is attached to the bond a certificate of approval of the county judge who issued the attachment, any presump-

tion that might rise therefrom is overthrown by the testimony of the witness Haubens, to the effect that but three persons were present when the bond was presented and approved, and that Olsen was not one of them. If there was no other evidence given on the trial on the matter of the execution of the bond, it would seem very evident that it would be insufficient to establish that the surety signed the bond in suit. An inspection of the bill of exceptions discloses that on page 146 thereof the deposition of one W. S. Crabb was introduced in evidence by the plaintiff and read to the jury, which deposition does not appear in, nor is it attached to, the bill of exceptions in the case. Notwithstanding the trial judge certified that the bill of exceptions allowed by him and ordered to be made part of the record of the case contains "all the evidence offered or given upon the trial of this case by either party," it is obvious that the deposition alluded to has been omitted from the bill; therefore, the certificate of the judge will not control. (*Missouri P. R. Co. v. Hays*, 15 Neb., 224; *Oberfelder v. Kavanaugh*, 29 Neb., 427; *Schneider v. Tomblin*, 34 Neb., 661; *Dawson v. Williams*, 37 Neb., 1; *Nelson v. Jenkins*, 42 Neb., 133.) Since the whole of the evidence is not before us, we must indulge the presumption that the execution of the bond was established on the trial by ample testimony.

Was the attachment resorted to without sufficient grounds? While the petition alleges that the attachment was wrongfully obtained, yet this averment was put in issue by the answer. The burden was therefore upon the plaintiff to establish that the writ was wrongfully issued. The transcript of the county judge's docket shows that the attachment was dissolved, but upon what ground or grounds is not disclosed. The motion to discharge was not introduced in evidence, hence we do not know the grounds upon which the dissolution of the attachment was asked. If the decision was predicated upon omissions or irregularities merely, in the granting of the writ, that would not justify an action on the bond. On the

other hand, had the attachment been dissolved upon the ground that the affidavit on which the writ was procured was false or untrue, and the record had so shown, the decision would have been conclusive in the action upon the bond that the attachment was sued out wrongfully. We know that affidavits were filed in support of the motion to dissolve, and counter-affidavits in resistance thereof; but the record is silent as to the scope of those affidavits, or whether they were read or not. Inasmuch as the bill of exceptions discloses on its face that it does not contain all the evidence adduced on the trial, we are unable to determine whether or not it was sufficient to show that the attachment was wrongfully issued.

For the errors indicated the judgment must be reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

IRVINE, C., not sitting.

IN RE LEWIS VOGLAND, SALEM T. CLARK, AND CHARLES H. JACKSON.

FILED APRIL 10, 1896. No. 8309.

Criminal Law: INFORMATIONS FILED IN VACATION: HABEAS CORPUS. Under the provisions of chapter 108 of the Laws of Nebraska passed in 1885, the requirement that "all informations shall be filed during term, in the court having jurisdiction of the offense specified therein," is mandatory, and an information, upon which the accused is to be tried for felony, is void if filed in vacation.

ORIGINAL application for writ of *habeas corpus*. *Petitioners discharged.*

J. H. Broady, for petitioners.

A. S. Churchill, Attorney General, and *George A. Day, Deputy Attorney General*, for the state.

RYAN, C.

An application was made to this court in this case for a writ of *habeas corpus* by Lewis Vogland, Salem T. Clark, and Charles H. Jackson, who alleged that they were unlawfully detained by George W. Leidigh, the warden of the penitentiary of this state. To the writ which thereupon issued the warden answered justifying his detention of the petitioners, under a warrant for their commitment by virtue of certain proceedings fully described in the exhibit attached to the petition of the applicants. To these averments of the answer there was filed a demurrer by which is raised the sufficiency of the facts in said answer pleaded to justify the imprisonment of the petitioners in the state penitentiary.

It would probably tend to obscure the facts if an attempt was made to describe by copying or even epitomizing the pleadings, and we shall therefore state these facts as clearly and concisely as possible in the form of a narrative. On the 18th day of July, 1895, an information was filed with the county judge of Keya Paha county whereby the petitioners for *habeas corpus* were charged with stealing cattle in said Keya Paha county on June 26, 1895. There was a plea of guilty to this charge on the same day the information was filed, and thereupon the county judge committed the persons accused to the county jail to await a hearing at the next succeeding term of the district court of Keya Paha county, to be held at the county court room in Springview, Nebraska. On the 20th day of July, 1895, the aforesaid Lewis Vogland, Salem T. Clark, and Charles H. Jackson, together with the county attorney of Keya Paha county, appeared at chambers in Bassett, in Rock county, Nebraska, before Honorable M. P. Kinkaid, district judge of the fifteenth judicial district of Nebraska, in which district are included the counties of Keya Paha and Rock, and requested that their plea of larceny in stealing cattle in Keya Paha county, June 26, 1895, might be received.

When the request was made the county attorney of Keya Paha county exhibited to Judge Kinkaid an information, which had been filed in the district court of Keya Paha county, July 18, 1895, by which the said Vogland, Clark, and Jackson were charged with larceny of cattle committed June 26, 1895, in said Keya Paha county. This, by direction of Judge Kinkaid, the said county attorney read to the parties therein accused, and thereto the defendants pleaded guilty and were sentenced to be imprisoned at hard labor in the state penitentiary,—Vogland for the term of five years, and Clark and Jackson, each, for the term of six years. Warden Leidigh received the parties sentenced as above, and their application for a writ of *habeas corpus* calls in question the sufficiency of the above proceedings to justify their detention in the penitentiary.

In argument several questions were discussed which we shall not attempt to consider, for there is one which in our view is decisive of this case. In 1885 there was passed and approved an act entitled "An act to provide for prosecuting offenses on information and to dispense with the calling of grand juries except by order of the district judges." (Session Laws, 1885, p. 397, ch. 108.) By section 2 of this act it is required that "All informations shall be filed during term in the court having jurisdiction of the offense specified therein," etc. It is conceded in this case that the district court of Keya Paha county was not in session when the information was filed, upon which Judge Kinkaid acted, two days afterward, in Rock county. This information was therefore void, and upon it no plea could be received or acted upon. The requirement of filing in term is mandatory, and a filing in vacation cannot be substituted. The prayer of the petitioners must therefore be granted and the applicants for a writ of *habeas corpus* are accordingly ordered discharged from custody.

PETITIONERS DISCHARGED.

JOHN F. COAD V. GUY R. C. READ.

FILED APRIL 10, 1896. No. 6432.

1. **Justice of the Peace:** JUDGMENT: SUFFICIENCY OF FINDINGS: APPEAL. In an error proceeding in the district court to set aside as an entirety a judgment for $125 and interest thereon from a fixed anterior date, rendered by a justice of the peace, it is *held* that there was sufficient certainty, at least as to the sum of $125, to justify the refusal of said district court to grant the relief prayed.
2. ———: ———: ———: ———. Upon the trial of questions of fact it is not necessary for the court to state its findings, except generally for the plaintiff or defendant, unless there is a request for a special finding under the conditions stated in section 297, Code of Civil Procedure. It is accordingly *held* that a general finding of a justice of the peace for plaintiff is sufficient to sustain a judgment as against an attempt to set it aside in the district court upon proceedings in error therein brought for that purpose.

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

Martin Langdon, for plaintiff in error.

Guy R. C. Read, contra.

RYAN, C.

This error proceeding, from the district court of Douglas county, is prosecuted to reverse a judgment by it rendered sustaining a judgment of a justice of the peace in favor of the defendant in error against the plaintiff in error, rendered December 14, 1892.

The first ground urged for the reversal of the judgment of the justice of the peace presented in the district court was that the justice of the peace had no jurisdiction of the defendant, for the reason that there was a defect in the copy of the summons, which copy was submitted with the petition in error in the district court. This question was not presented to the justice of the peace on a motion to vacate the judgment or otherwise. The alleged copy

of the summons was brought into the record only by a bill of exceptions purporting to have been allowed by the justice of the peace who rendered the judgment complained of, and from this alleged bill of exceptions we are unable to even surmise why there was an attempt to preserve as evidence the aforesaid copy of the summons. If it had been submitted in support of a motion to open the judgment, it is conceivable that it was competent, but it had no such relation to any question presented to the justice of the peace. As it was, this alleged copy of the summons amounted to nothing more than an independent offer of evidence to impeach the judgment rendered by the justice of the peace.

It is insisted that it was erroneous to render on December 14, 1892, a judgment for $125 with seven per cent interest thereon from June 6, 1892, for, it is urged, this was not for a present sum definite. This proceeding was to vacate the entire judgment, and not to review a failure upon motion to correct it. As to the sum of $125 there was sufficient certainty for every purpose. We need not, therefore, consider the question of interest urged as constituting an uncertain matter, for it cannot be suffered to impair the validity of what is certain. The language of the docket entry made by the justice of the peace, it is said, did not contain a finding which would sustain the judgment rendered. His finding was as follows: "This cause coming on for hearing upon the bill of particulars and the evidence was submitted to me, upon consideration whereof I find in favor of the plaintiff." It is provided by section 1000 of the Code of Civil Procedure: "If the defendant fail to appear at the return day of the summons * * * the cause may proceed at the request of the adverse party, and judgment must be given in conformity with the bill of particulars and proofs." This special provision as to proceedings before a justice of the peace seems from the record quoted to have been literally complied with. By section 1085 of the Code of Civil Procedure it is provided that "the provisions of

this Code, which are in their nature applicable, and in respect to which no special provision is made by statute, shall apply to proceedings before justices of the peace." Section 297 of the same Code is in this language: "Upon the trial of questions of fact by the court, it shall not be necessary for the court to state its finding, except generally for the plaintiff or defendant, unless one of the parties requests it," etc.

In *Crossley v. Steele*, 13 Neb., 219, this court held that the judgment then under consideration was voidable because it was without the support of any finding whatever, and the applicability of sections 297 and 1085 of the Code of Civil Procedure to proceedings before justices of the peace was unequivocally recognized. In the same opinion, however, occurred this language: "The necessity of a finding seems to be as great in cases tried before justices of the peace as in cases tried in courts of record. The finding takes the place of the verdict of a jury and shows upon what facts the justice bases his judgment. There must therefore be a finding of facts in all cases tried before a justice of the peace where a jury is waived." This, as will be readily seen, was entirely foreign to the facts involved in the case actually presented and decided. How much value attaches to it by reason of its intrinsic logic will readily appear when we consider separately each step by which was approached the inconsequential result reached by the language above quoted. First, the statute was quoted whereby it was enacted that upon the trials of questions of fact by the court it shall not be necessary for the court to state its findings, except generally for the plaintiff or defendant. This provision was next held applicable to justices of the peace, so that in respect to the necessity of a finding to sustain its judgment every court is bound by the same rule. The next step was to give reasons why any finding whatever was necessary, and these were said to be because a finding of the court takes the place of a verdict of a jury and shows upon what facts the court bases his judgment. The con-

clusion finally deduced from this course of reasoning was that the statute requires a special finding of facts to sustain a judgment, whether rendered by a justice of the peace or by the district court. In other words, if there was a mere finding for the defendant generally, this would be an insufficient basis for a judgment, because there was not set out as part of this finding a statement of the facts upon which the court based its judgment. To conform to this rule, the statute should have provided that in the trial of all questions of fact by the court it shall be necessary for the court to state its findings, and that a finding generally for plaintiff or defendant shall be insufficient, and the requirement of a request for a finding should have been omitted. It is not necessary to retrace the several steps by which the illogical result indicated was attained, merely for the purpose of discovering what particular deduction was erroneous, for the language criticised was at most mere *obiter*. Our concern in this matter is solely with a clearly expressed statutory provision whereby it is required only that there shall be a general finding for the plaintiff or for the defendant. As the language quoted from the above cited case exacts more than is required by statute, we have been at some pains to illustrate what might have been done in briefer terms, and that is that this court does not assume to modify unambiguous statutory provisions by judicial construction or rational interpretation. (*Stoppert v. Nierle*, 45 Neb., 105.) Counsel for the plaintiff in error have cited *Sprick v. Washington County*, 3 Neb., 255; *Smith v. Silvis*, 8 Neb., 164, and *Foster v. Devinney*, 28 Neb., 421, in support of the contention that notwithstanding the statute there must, to sustain a judgment, be found specially the facts upon which the judgment is predicated. In neither of these cases was there a finding of any kind; hence, tested by this express provision of the statute, there was lacking a general finding for the plaintiff or defendant. As pointed out by counsel for the defendant in error, the views which we have just expressed were

recognized as correct in *Haller v. Blaco*, 14 Neb., 195; *Degering v. Flick*, 14 Neb., 448, and *Dye v. Russell*, 24 Neb., 829.

There is a line of cases not relied upon by either party which has been understood to countenance the rule that a finding, to sustain a judgment, must be as specific as should be the verdict of a jury. Of these, the first in the series was *Ransdell v. Putnam*, 15 Neb., 642, in which the entry in the docket of the justice of the peace was as follows: "After hearing and duly weighing the testimony and authorities, it was found by this court that the plaintiff have and recover of the defendants Ransdell and Reed the sum of twenty-nine dollars and fifty cents as due him for services and labor done and performed and for costs of suit taxed as follows," etc. This language was held to imply the same finding as would have been implied by a verdict of a jury in the following form: "We, the jury, find for the plaintiff and assess his damages at twenty-nine dollars and fifty cents." It was therefore concluded that the finding was sufficient. In the case at bar the entry of the justice of the peace was as follows: "This cause coming on for hearing upon a bill of particulars and the evidence, was submitted to me, upon consideration whereof I find in favor of the plaintiff. It is therefore considered and adjudged by me that the plaintiff recover from the defendant the sum of $125, with seven per cent interest thereon from June 6, 1892, and costs of suit." If the final judgment is considered in connection with the general finding for the plaintiff, it will be seen that there is in the record under consideration at least as much of a finding of facts as in the case of *Ransdell v. Putnam*, *supra*, for in the latter case the language was: "It is found by this court that the plaintiff have and recover from the defendants Ransdell and Reed the sum of twenty-nine dollars and fifty cents," etc. The next of this series of cases was *McNamara v. Cahon*, 21 Neb., 589, in which it was held that a judgment in the following form was not void, to-wit: "After hearing the

proof it is the opinion of the court that the defendant Anton Cabon is indebted to the plaintiff in the sum of $100, * * * with interest from December 20, 1883, and costs of this suit taxed at $3.15." In this case it was said: "In *Ransdell v. Putnam*, 15 Neb., 642, it was held that the finding of facts by a court, where a jury is waived, need not be more specific than would be required of the verdict of a jury." This court made no application of the principle invoked, for it merely held that the language, "It is the opinion of the court that the defendant Anton Cabon is indebted to the plaintiff in the sum of $100," amounted to a sufficient finding. The incongruity of attempting to apply the analogies of a verdict to the requirement of a finding appears by stating the above finding in the form of a verdict as was done in *Ransdell v. Putnam*, which case it is sometimes supposed to follow. Such a form of the verdict would be: We, the jury, are of the opinion that the defendant Anton Cabon is indebted to the plaintiff in the sum of $100. It can scarcely be claimed, therefore, that this case is an authority for the proposition that upon the trial of questions of fact by the court it shall be necessary that the court state its findings with the same fullness required in the verdict of a jury. In *Rhodes v. Thomas*, 31 Neb., 848, COBB, C. J., in the syllabus stated the rule thus: "When an action at law is tried to a court without a jury, the finding of fact by such court is a substitute for, and stands in lieu of, a verdict of a jury, and need be no more specific than the verdict of a jury upon the same pleadings and evidence." It can scarcely be overlooked that this language does not require that the finding of fact shall be as specific as the verdict of a jury, but that it need not be more so. This is not a mere fanciful construction of the language of the syllabus, as will appear from the following facts involved in the case decided. Originally, the justice entered his judgment as follows: "October 17, 1888, 9 A. M. Court convenes and defense proceeds with examination of witnesses, after which case

is argued by attorneys and submitted to the court, with the following finding: October 17, 1888. After hearing the evidence, it is therefore considered by me that the plaintiff have and recover from defendant the sum of $69.15, together with costs taxed at $49.15." In the district court there was stricken out of the transcript, as having been improperly interlined, the words "of $69.15 due from defendant to plaintiff," which followed immediately after the word "finding." After the elimination of these interpolated words the record stood as above quoted, and the district court held the judgment good without any further finding and this judgment was affirmed in this court. In the course of the opinion it was said, however, as to the requirements of a finding, "that it should be as specific as, and stand in the place of, a verdict." This was the first positive enunciation of this requirement in the line of cases which we are following, and in view of the facts upon which the case was really decided this principle was entirely irrelevant. This will appear very clearly from two distinctive considerations, of which the first is that immediately following the requirement that a finding must be as specific as a verdict, this language is found in the opinion: "We consider that portion of the plaintiff in error's argument referring to certain words of the justice's transcript and findings ordered to be stricken out in the district court as not material to the consideration of the case." The other argument, as to the finding being as definite as a verdict, takes the entries of the justice of the peace after the elimination of the finding held immaterial, and, as was done by COBB, J., in *Ransdell v. Putnam*, states the substance of such finding in the form of a verdict thus: "It is therefore considered by us that the plaintiff have and recover from the defendant the sum of $69.15, together with costs taxed at $49.15." It would of course be objected that this is, in form, rather a judgment than, in any sense, a finding upon which to base a judgment. If this is true, and no one can gainsay the correctness of

this classification, there was in fact no finding by the justice of the peace, and yet his judgment was sustained by this court. Whatever other proposition this case may sustain, there is one thing certain, and that is, that it has no tendency toward sustaining the principle that a finding, to sustain a judgment, must be as specific as, and stand in the place of, a verdict. This closes the list of cases which seem to sustain this doctrine, and in none of them is it discoverable that this test of the sufficiency of a finding has ever been applied, much less enforced. It is noticeable that in none of the cases of this class was there a reference to the Code of Civil Procedure which recognizes the necessity of a finding of any kind. This review of cases would scarcely be complete without mention of *Kirkwood v. First Nat. Bank of Hastings*, 40 Neb., 484, in which was noted all the cases cited by counsel on this branch of the case, and, perhaps, some others on the same lines, but, as the questions therein determined were only that the district court had no power to require indemnity to be given as a condition on which the character of its judgment was dependent, in the absence of a finding which would sustain this requirement, it has but little bearing upon the question hereinbefore considered.

The extended examination of the cases bearing upon the subject under discussion has served to impress upon us very strongly the wisdom of accepting the provisions of the statute as we find them and of giving effect to them according to their terms, uninfluenced by mere fanciful analogies. The requirement of section 297 of the Code of Civil Procedure is that upon the trial of a question of fact by the court it shall not be necessary for the court to state its findings, except generally for the plaintiff or defendant, except upon request under certain conditions, and the judgment of the justice of the peace under consideration was in strict conformity with this requirement. The judgment of the district court is therefore

AFFIRMED.

ADOLPH GOLDSMITH ET AL., APPELLEES, V. C. L. ERICKSON, IMPLEADED WITH CHARLES E. FORD ET AL., APPELLANTS.

FILED APRIL 10, 1896. No. 6280.

1. **Fraudulent Conveyances:** EVIDENCE: CREDITORS' BILL. Where a purchase of an entire stock of goods, books of account, and fixtures of a merchant was made at a fair price, and with no knowledge that such merchant was at the time indebted to other parties, it should not be declared void though the purpose of the purchaser was in part to secure payment of a debt due the bank of which he was at the time cashier.
2. ———: ———. The case of *Bonns v. Carter*, 20 Neb., 566, having been overruled, there was, in this state, no presumption of law that a transaction was fraudulent merely because the property was in effect all that the vendor owned.
3. ———: ———: QUESTION OF FACT. Whether or not a transfer of property is fraudulent as against the creditors of the vendor is a question of fact determinable solely upon the evidence adduced in each case.

APPEAL from the district court of Douglas county. Tried below before IRVINE and WALTON, JJ.

James H. Macomber and *Wharton & Baird*, for Charles E. Ford and Union National Bank, appellants.

Cavanagh, Thomas & McGilton, Edgar H. Scott, Bartlett, Baldrige & De Bord, N. H. Tunnicliff, J. W. Roudebush, L. F. Crofoot, Frank Heller, J. W. West, L. D. Holmes, A. C. Wakeley, Montgomery, Charlton & Hall, for other parties.

RYAN, C.

On the 30th day of December, 1891, Adolph Goldsmith, Weis & Oppenheimer, Wolf & Co., Heyman & Sweet, and the Middleton Plate Company, as plaintiffs, brought an action in the district court of Douglas county against C. L. Erickson, Charles E. Ford, and the Union National Bank of Omaha. The averments in the petition were, in

substance, that on and prior to December 31, 1890, the defendant C. L. Erickson was indebted to the several plaintiffs in the amount described, and was the owner in possession of a large stock of jewelry, with the fixtures and other property connected therewith, and was carrying on a retail business in the city of Omaha; that said Erickson was indebted to the Union National Bank not to exceed $5,000; that on and prior to December 31, 1890, the various creditors of said Erickson were pressing him for payment, and that suits had been brought by some of the plaintiffs and were then pending. The fraudulent conduct of the defendants was alleged as follows: "On the said 31st day of December, 1890, said Erickson, for the purpose of defrauding, hindering, and delaying his creditors, sold and transferred his said stock to said Charles E. Ford, and that said Charles E. Ford well knew of the intention on the part of said Erickson to hinder and delay his creditors, and that it was agreed between said Charles E. Ford, individually, and as an agent of said defendant, the Union National Bank, that said Erickson should transfer the title to said property to said Ford to hold the same for the Union National Bank, and sell said property and satisfy the indebtedness due said bank from said Erickson, and it was agreed by and between Ford, as such cashier and individually, and said Erickson that said Ford would account to Erickson for the balance over and above the amount sufficient to satisfy said defendant, the Union National Bank; that there was no other or different consideration for such transfer paid by said Ford or the Union National Bank to said Erickson; that said Union National Bank and said Ford well knew of the fraudulent intention on the part of said Erickson and conspired with said Erickson to defraud his said creditors; that on said 31st of December, 1890, said Erickson executed a bill of sale to said Ford for his said property, and that said Ford and said Union National Bank took possession of said property and converted it to their own use; that said property was, as plaintiffs are

informed, of the value of twenty-five thousand ($25,000) dollars; that said property so converted by said defendants and belonging to said Erickson was all the property which said Erickson had in his own name and subject to execution, all of which said Ford and said Union National Bank well knew." Following this language there was a description in detail of the judgment or judgments held by each plaintiff against C. L. Erickson, and in respect to each it was alleged that an execution had been issued and returned unsatisfied, and, in general, it was alleged that said Erickson had no property in his own name on which an execution could be levied. The prayer of the petition was as follows: "Wherefore said plaintiff asks that said Union National Bank and said Charles E. Ford be required to account for the goods received by them from said Erickson, and that said plaintiffs have judgment against said Union National Bank and Charles E. Ford for the amounts of their claims against said Erickson." Between the date of the filing of the above petition and the trial there was filed in this case the petitions of fifteen intervenors, to whom, it was stipulated on the trial, there was due the aggregate sum of $4,602.82. These intervenors made allegations and claimed relief of the same nature as had been done in the original petition. The aggregate amount due the original plaintiffs, it was stipulated on the trial, was $2,192.50, so that at the time the decree was rendered, on January 27, 1893, the total amount of indebtedness of C. L. Erickson as to which Charles E. Ford and the Union National Bank were held liable as trustees to the original plaintiffs and the intervenors before the decree was $6,795.32. Subsequent to the entry of this decree there were other petitions of intervention filed, in which, in each case, it seems to have been assumed that there was to be a general distribution of the value of the stock of C. L. Erickson whenever C. E. Ford and the Union National Bank should pay the same. This was not warranted by the original decree, for, after having made pro-

vision for the appointment of a referee to find and report the value of the goods, etc., transferred to Ford and the bank, and also "the amount now due the various creditors of Erickson who are parties in this suit," this decree contained this immediately following language: "And upon the filing of the report of said referee and his findings in the case the court will make a distribution of the amount of the value of said stock, fixtures, and book accounts, in the manner provided by law and to the various creditors in this action entitled to said money." Notwithstanding this restrictive language, other alleged creditors of Erickson, as already stated, filed their petitions for the aggregate amount of $4,808.61, after the entry of the decree above referred to. Each individual of this class of intervenors was, by the decree made upon the coming in of the report of the referee, adjudged entitled to share the amount of the value of the goods, book accounts, and fixtures *pro rata* with the others, and the rights of this class were decreed inferior and subject to those of the original petitioners and those creditors of Mr. Erickson who had intervened before the first decree was rendered. This made the entire amount of the claims with reference to which the bank and Mr. Ford were held to sustain the relation of trustees, $11,603.93. The difference between this amount and the above mentioned sum of $6,795.32 represents the aggregate amount of the claims presented by petitions filed after the first decree was entered. There was allowed Ford and the bank the sum of $2,000 for services rendered and expenses incurred in disposing of the goods, book accounts, and fixtures which Erickson had turned over to Ford. From the first decree, and from that part of the last which enforced their liability as trustees, Ford and the bank appeal, and from the allowance of $2,000 in favor of Ford and the bank, and from their postponement as a class, the creditors of Erickson who filed their petitions after the entry of the first decree also appeal.

The theory upon which the original plaintiffs and those

who intervened before the first decree drew their petitions is much more intelligible if it is borne in mind that the very commencement of this action was almost exactly a year after the date of the sale made by Mr. Erickson to Charles E. Ford. Meanwhile many of the goods had been sold and it was probably impossible to reach those remaining. These petitions, while somewhat in the nature of creditors' bills, really had for their object the subjection to the debts of plaintiff and the intervenors of the value of the goods, book accounts, and fixtures, rather than those particular articles in kind. From this it resulted that while the good faith of the purchase was attacked, there was no attempt to set it aside. In a certain sense the purchase was approved and it was sought to hold the purchaser liable for the full value of the goods as though no payment had been made thereon. Under these circumstances we do not feel called upon to determine whether or not there were sufficient formalities observed to vest the title in Charles E. Ford. The question to be considered will not, therefore, be whether or not the title passed to Ford, but, it being conceded to have passed, whether or not the purchaser should be held liable for the value of the property as though he had made no payment — those having been made being deemed no payments because made in an alleged attempt to hinder, delay, and defraud the creditors of C. L. Erickson. Thus shorn of extraneous considerations the propositions to be considered are, first, whether the evidence disclosed the existence of the alleged fraud as a matter of fact; and second, whether from the facts proved the law raises a presumption of fraud.

The original petition, as well as those of the intervenors, charged that the fraudulent transaction consisted in a sale, by Erickson to Ford, with intent to hinder and delay the creditors of Erickson, shared by the vendor and vendee, and by an accompanying agreement that when sufficient goods have been sold to satisfy the debt of Erickson due the Union National Bank, the remainder

should be accounted for by Ford to Erickson. There was no attempt to make proof that in the purchase there was any condition requiring Ford or the bank to account for the value of anything whatever. The evidence has been very carefully examined since this case was submitted on oral arguments, and we have been able to discover no proof that Ford, who at the time was cashier of the Union National Bank, had any knowledge, when he purchased of Erickson, that the latter owed anything, except the sum of $4,400 to the aforesaid bank and the sum of $4,633.30 to the wife of C. L. Erickson. The note evidencing the indebtedness of C. L. Erickson to the bank fell due a few days before December 31, 1890, and between the maturity of said note and the date last given, Mr. Ford had tried to have it paid or secured. It had been suggested repeatedly to Mr. Erickson that he should give a chattel mortgage on his stock to secure this debt, but this was as often refused. On the 31st of December, 1890, Mr. Ford visited Mr. Erickson's place of business with the intention of having the matter settled in some way, and was told by Mr. Erickson that if the bank or Mr. Ford wanted the stock, it would be sold to either of them for the amount due the bank and the amount which Erickson owed his wife. Not being able to obtain security, Mr. Ford purchased the stock of goods, books of account, and fixtures on the terms proposed, and having received Mr. Erickson's key to the store, he left a Mr. Nelson in possession. On January 2, 1891, Mr. Ford gave Mrs. Erickson his check for the amount due her. Upon this, she thereupon received the money at one window over the counter of the bank and having carried it to another window, she in exchange for it received a certificate of deposit of the Union National Bank, payable to her own order, in the sum of $4,633.30. This certificate she left at the bank under an arrangement between her husband and Mr. Ford or the attorneys for the bank, by which this certificate was to be so left as an indemnity against any loss by reason of attachments, which, on

January 1, 1890, had been levied upon the stock of goods notwithstanding the sale. These attachments aggregated the sum of $4,641.75, and the suits in which they had been issued were not ended until November 4, 1891, when an arrangement was made between the attaching creditors and Mrs. Erickson by virtue of which their debts were paid by the use of her certificate of deposit, the amount of which thereupon Mr. Ford paid to said attaching creditors. There were other details attending this settlement which need not be described, for our present object is only to show in what manner Mr. Erickson sold his stock of goods and to consider whether or not the sale was *bona fide*. It may not be amiss to suggest that the plaintiffs and the intervenors in this action were probably influenced to delay these proceedings by the pendency of the attachment suits, and that the above described settlement, perhaps, at least in a remote degree, suggested that a favorable time had arrived for the commencement of this action. There was no evidence tending in the least to show that the full sum of $4,400 was not due the bank. Mrs. Erickson testified positively that the sum above named as due her had been by her loaned to her husband to enable him to extend his business, and in contradiction of this there was not a scintilla of evidence. It must therefore be accepted as an established fact that for the goods, fixtures, and book accounts Mr. Ford had actually paid the sum of $9,033.30 of the indebtedness of C. L. Erickson, in consideration of which the property purchased was delivered so as to vest in him the title. It is not deemed necessary to discuss the evidence as to the purchase and the turning over of possession on the night of December 31, 1890, or the execution of a bill of sale the following day, or the manner in which the payment was made of the amount owing by C. L. Erickson to his wife, with reference to whether or not the sale was good as against the aforesaid attaching creditors, for, as we have already stated, these creditors have been paid, and their claims that the purchase was incom-

plete have no bearing upon the issues in this action. The referee provided for in the first decree reported on April 14, 1893, that the value of the goods, book accounts, and fixtures, when taken possession of by Ford, was $10,700; that at the time of filing of said report Ford still had goods undisposed of to the amount of less in value than $1,000; that the accounts collected and the amounts realized by him from the goods and fixtures were $6,860. Between the value of the goods found to exist on January 1, 1890, $10,700, and the aggregate of the two amounts paid by Ford, $9,033.30, there was but a difference of $1,666.70. If, therefore, he expended $2,000 for caring for and selling the goods, there was to him a loss rather than a profit in the transaction. The propriety of the allowance of this $2,000 is questioned by no one, except such parties as came into this case after the first decree as intervenors, and they are in no position to object, for two reasons: First, the decree just spoken of provided for distribution among parties then in the action; and, second, these intervenors served no notice of the pendency of their petitions of intervention, and in respect to them neither Ford nor the Union National Bank made an appearance. (*Hapgood v. Ellis*, 11 Neb., 131; *Cockle Separator Co. v. Clark*, 23 Neb., 702; *Carlow v. Aultman*, 28 Neb., 672; *Arnold v. Badger Lumber Co.*, 36 Neb., 841; *Schultz v. Loomis*, 40 Neb., 152; *Patrick Land Co. v. Leavenworth*, 42 Neb., 715; *Woodward v. Pike*, 43 Neb., 777; *Patten v. Lane*, 45 Neb., 373; *Havemeyer v. Paul*, 45 Neb., 373.) If, however, we accept the referee's report of the value of the goods on hand and his finding of the amount of the proceeds of those sold as above given, and no plaintiff or intervenor questions this, the result shows a greater loss still; for, while Ford paid out for the goods $9,033.30, he has to show for them only $7,860. In any event it must be conceded that for the goods, book accounts, and fixtures their full value was actually paid by Ford. As he bought for a fair price without knowledge of the indebtedness of Erickson, and, therefore, with no intention of

defrauding or hindering Erickson's creditors, there is no sufficient ground for the contention that from the facts established by evidence this transaction should be held fraudulent, and that therefore Ford or the bank should be held liable for the value of the goods received from Erickson. What the intentions of Erickson in the transaction were could not be shown, for he had died before any proofs in this case were taken.

The next question is whether or not the purchase, as a question of law, must be deemed fraudulent as against the creditors of C. L. Erickson. This inference in the first decree was doubtless deemed unavoidable in view of *Bonns v. Carter*, 20 Neb., 566, then believed to embody the established rule of law in this state. In *Kilpatrick-Koch Dry Goods Co. v. Bremers*, 41 Neb., 863, it was pointed out that the majority opinion in the case of *Bonns v. Carter*, *supra*, was contrary in its logic to *Hershiser v. Higman*, 31 Neb., 531, and *Hamilton v. Isaacs*, 34 Neb., 709. In *Jones v. Loree*, 37 Neb., 816, and in *Smith v. Phelan*, 40 Neb., 765, it was unequivocally announced that *Bonns v. Carter* was overruled. It has been repeatedly held that the existence of fraud is a question of fact, and in this case the conveyance was improperly found by the court in its fifth finding to be in conflict with the general assignment law of Nebraska and therefore void. This disposes of all questions necessarily involved, and the judgment of the district court is reversed and this cause is remanded with directions to the district court to dismiss all the petitions filed in this case at the costs of plaintiffs and the intervenors.

REVERSED AND REMANDED.

IRVINE, C., not sitting.

G. R. SHEASLEY, APPELLEE, V. F. G. KEENS, APPELLANT.

FILED APRIL 10, 1896. No. 5985.

1. **Unrecorded Deeds:** SHERIFFS' DEEDS: SUPERIOR TITLE. A prior unrecorded deed, passing the legal title, made in good faith for a valuable consideration, will take precedence of a title based on a judicial sale, made under an attachment or execution, if such deed be recorded before the evidence of the title based on the judicial sale is recorded. *Harral v. Gray*, 10 Neb., 186, followed.

2. **Lis Pendens:** CONSTRUCTIVE NOTICE: VALIDITY OF STATUTE. The amendment of section 85 of the Code of Civil Procedure passed and approved March 31, 1887, considered, and *held* (1) that so much of said amendment as makes a *lis pendens* filed at the commencement of an action or cross-action affecting the title to real estate constructive notice of such action to all persons not parties thereto who thereafter deal with the subject-matter thereof, is valid; (2) that so much of such amendment as makes a *lis pendens* filed at the commencement of an action or cross-action affecting the title to real estate, or a *lis pendens* filed at any time after the commencement of such action or cross-action, constructive notice of such action to the holders of liens, incumbrances, or conveyances of said real estate, executed prior to the filing of such *lis pendens*, is unconstitutional and void.

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

R. A. Moore, for appellant.

References: *Mansfield v. Gregory*, 8 Neb., 432; *Wright v. Smith*, 11 Neb., 343; *Collingwood v. Brown*, 10 S. E. Rep. [N. Car.], 868; *Norton v. Birge*, 35 Conn., 250; *Hoyt v. Jones*, 31 Wis., 399; *Day v. Thompson*, 11 Neb., 123; *Sterns v. O'Connell*, 35 N. Y., 109; *Foorman v. Wallace*, 17 Pac. Rep. [Cal.], 681; *Gassen v. Hendrick*, 16 Pac. Rep. [Cal.], 242; *Frey v. Clifford*, 44 Cal., 335; *Schluter v. Harvey*, 65 Cal., 158; *Hannahs v. Felt*, 15 Ia., 143; *Carter v. Champion*, 8 Conn., 549; *Peck v. Webber*, 7 How. [Miss.], 658; *People v. Cameron*, 7 Ill., 468; *Lyon v. Sandford*, 5 Conn., 544; *Munroe v. Luke*, 19 Pick. [Mass.], 41; *Lincoln Rapid Transit Co. v. Rundle*, 34 Neb., 559.

Fred A. Nye, contra.

References: *Harral v. Gray*, 10 Neb., 186; *Galway v. Malchow*, 7 Neb., 285; *Mansfield v. Gregory*, 8 Neb., 432, 11 Neb., 297; *Hubbart v. Walker*, 19 Neb., 94; *Keeling v. Hoyt*, 31 Neb., 453.

RAGAN, C.

On the 31st day of March, 1890, D. A. McElheney owned certain real estate in the city of Kearney, Nebraska, and on that date, for a valuable consideration, sold and conveyed it by deed to G. R. Sheasley. Sheasley did not record his deed until the 1st day of November, 1890. On the 19th day of May, 1890, Keens sued McElheney at law in the district court of Buffalo county to recover a sum of money which he alleged was due him from McElheney on a contract in writing; and at the time of filing his petition in that case Keens caused an attachment to be issued auxiliary to his law action and levied upon the property which McElheney had conveyed to Sheasley. At the time of filing his petition and suing out his attachment, Keens, in accordance with the provisions of section 85 of the Code of Civil Procedure, filed in the office of the register of deeds of said Buffalo county a notice of the pendency of such action, reciting, among other things, that the real estate in controversy had been attached to satisfy whatever judgment might be rendered therein. Keens duly prosecuted his action, and judgment was rendered finding the amount due him from McElheney and sustaining the attachment and ordering the real estate sold to pay the amount found due. The sale of the real estate was duly made, Keens becoming the purchaser. This sale was confirmed and a deed ordered and issued to Keens for the property, which deed Keens put upon record after November 1, 1890. At the time Keens brought suit and filed notice under the statutes the property stood on the records of Buffalo county in the name of McElheney, and Keens had no knowledge

or notice that Sheasley owned or claimed the property until about the time the order of sale was issued for the sale of the property under the attachment. At that time, however, Keens was notified that Sheasley claimed the property by an unrecorded deed from McElheney dated the 31st of March, 1890. This action was brought by Sheasley in the district court of Buffalo county to cancel as a cloud upon his title the deed held by Keens based on the judicial sale above mentioned. Sheasley had a decree as prayed and Keens has appealed. The question presented by the record is this: Which has the better title to the real estate in controversy, Sheasley, who claims under the purchase and conveyance from McElheney, or Keens, who holds a conveyance for the property based on the judicial sale made thereof under the attachment proceedings had while Sheasley's deed was unrecorded and while Keens was entirely ignorant that Sheasley had any claim or title to the property?

1. Section 16, chapter 73, Compiled Statutes, provides: "All deeds, mortgages, and other instruments of writing which are required to be recorded shall take effect and be in force from and after the time of delivering the same to the register of deeds for record, and not before, as to all creditors and subsequent purchasers in good faith without notice; and all such deeds, mortgages, and other instruments shall be adjudged void as to all such creditors and subsequent purchasers without notice whose deeds, mortgages, and other instruments shall be first recorded; *Provided*, That such deeds, mortgages, or instruments shall be valid between the parties." This statute has been in force since 1857 and was re-enacted by the legislature of 1887. The statute just quoted was first construed by this court in *Bennet v. Fooks*, 1 Neb., 465. In that case Fooks made a mortgage on the 2d of October, 1857, upon certain real estate. This mortgage was not filed for record until April 6, 1858. One Moffit obtained a judgment against Fooks in December, 1857, on which an execution was issued and levied upon the mortgaged

real estate, and the same was sold to him on the 30th of January, 1858, and on that date the sheriff issued to him a certificate of the sale. Up to this time Moffit had no knowledge of the existence of the mortgage. At that time the law did not require judicial sales to be confirmed by the court; and the certificate of sale issued by the sheriff to the purchaser at the judicial sale entitled the latter to a deed for the premises unless the execution debtor redeemed them within a certain time. In a suit to foreclose the mortgage, brought subsequent to the date it was filed for record, the court held that the purchaser of the real estate at the execution sale had acquired a title divested of the lien of the mortgage. The construction of the section of the statute quoted above was again before the court in *Galway v. Malchow*, 7 Neb., 285, and in that case the court overruled *Bennet v. Fooks*, *supra*, and held, in effect, that a title or lien to real estate based on an unrecorded conveyance thereof would prevail over a title thereto based on a judicial sale of said real estate, provided the unrecorded conveyance should be filed for record before the conveyance based on the judicial sale was recorded. To the same effect are *Mansfield v. Gregory*, 8 Neb., 432; *Harral v. Gray*, 10 Neb., 186; *Mansfield v. Gregory*, 11 Neb., 297; *Hubbart v. Walker*, 19 Neb., 94. To state the effect of the cases quoted above by paraphrasing the language of COBB, J., in *Harral v. Gray*, *supra*, a prior unrecorded deed, passing the legal title, made in good faith for a valuable consideration, will take precedence of a title based on a judicial sale made under an attachment or execution if such deed be recorded before the evidence of the title based on the judicial sale is recorded. Applying the doctrine of these cases last cited to the facts of the case at bar, it is clear that if Keens' title depends upon the construction of the statute quoted above it must fail, for two reasons: (1) The deed which he obtained to the real estate in pursuance of the judicial sale made thereof was not filed for record in the office of the register of deeds until after the deed made by McEl-

heney to Sheasley was recorded; and (2) before the judicial sale was confirmed on which Keens' title was based he had actual knowledge that Sheasley claimed title to the real estate by virtue of the McElheney deed.

2. Section 85 of the Code of Civil Procedure, so far as the same is material here, is as follows: "When the summons has been served or publication made the action is pending so as to charge third persons with notice of pendency, and while pending, no interest can be acquired by third persons in the subject-matter thereof as against the plaintiff's title. *Provided, however*, That in all actions brought to effect the title to real property the plaintiff may, either at the time of filing his petition or afterwards, file, or in case any defendant sets up an affirmative cause of action and demands relief which shall affect the title to real estate, may at the time of filing such answer, or any time afterwards, file with the clerk or register of deeds of each county in which the said real estate thus to be affected, or any part thereof, may be situated, a notice of the pendency of such action, containing the names of the parties, the object of the action, and a description of the property in such county sought to be affected thereby. * * * From the time of filing such notice shall the pendency of such action be constructive notice to any purchaser or incumbrancer to be affected thereby, and every person whose conveyance or incumbrance is subsequently executed or subsequently recorded shall be deemed to be a subsequent purchaser or incumbrancer, and shall be bound by all proceedings taken in said action, after the filing of such notice, to the same extent as if he were made a party to the action." That part of section 85 of the Code of Civil Procedure quoted above preceding the words "provded, however," has existed in this state for many years as section 85 of the Code of Civil Procedure. In the year 1887 (see Session Laws, 1887, p. 643) the legislature amended said section 85 by adding to it the words "provided, however," and all the language which follows those words. Counsel for

the appellant now contends that his client's title to the real estate in controversy does not depend upon said section 16, chapter 73, Compiled Statutes, quoted above, and the construction placed on said section by the decisions of this court above cited, as said decisions were all rendered prior to the said amendment of said section 85. Counsel's contention is that by reason of the *lis pendens* filed by Keens at the time he brought his suit against McElheney, and caused the real estate in controversy to be attached, that Sheasley was in effect made a party to that action; that the *lis pendens* operated as constructive service upon Sheasley and bound him by the judgment rendered in the suit of Keens against McElheney in the same manner and to the same effect as he would have been bound had he been in fact a party defendant to that action and served with constructive service; and that as Sheasley made no defense to that suit, did not appear therein and set up his claim of title, that he cannot now in this, a collateral proceeding, question appellant's title. This is doubtless a correct construction of said section 85 of the Code of Civil Procedure as it now exists; and this brings us to a consideration of the provisions of the amendment to said section made by the legislature in 1887.

The section as it stood prior to the amendment was as follows: "When the summons has been served or publication made the action is pending so as to charge third persons with notice of pendency, and while pending no interest can be acquired by third persons in the subject-matter thereof as against the plaintiff's title." The Roman or civil law provided: "A thing concerning which there is a controversy is prohibited during the suit from being alienated." (Bennett, Lis Pendens, 63.) And one of the rules adopted by Lord Bacon when chancellor of England was in this language: "No decree bindeth any that cometh in *bona fide* by conveyance from the defendant before the bill exhibited and is made no party neither by bill nor order, but where he comes in *pendente lite*, and

while the suit is in full prosecution, and without any color or allowance or privity of the court, there regularly the decree bindeth." (Bennett, Lis Pendens, 57.) It will thus be seen that this section of the Code, as it existed prior to its amendment in 1887, was a legislative adoption of the equity rule of *lis pendens* that had existed from time immemorial. Doubtless the rule owed its origin to considerations of public policy and was designed to give force and effect to decrees affecting property and to inspire confidence in titles based on such decrees. By the provisions of said section 85, as it existed prior to this amendment, third persons acquiring an interest in property in litigation were only bound by the judgment rendered in such action if they acquired their interest in the property after such action was pending; and the action was declared to be pending after the summons had been served or publication made on the defendants to the action. An analysis of the amendment made by the legislature shows that two things were attempted: (1.) To make a *lis pendens*, filed at the time an action or cross-action was brought affecting the title to real estate, constructive notice to persons, not parties to the suit, acquiring any interest in the subject-matter thereof, from the time of the filing of such *lis pendens*, instead of from the time when the suit pended as to the defendants therein. We know of no provisions of the constitution which this part of the amendment violates. It is not amendatory of, nor does it conflict with, any other statute prescribing the time in which a suit shall be deemed pending as to persons not made parties thereto. It is not in conflict with section 19 of the Code of Civil Procedure, because that section prescribes the time in which an action shall be deemed pending as to the defendants thereto. (2.) But the amendment under consideration also attempts to make a *lis pendens* filed at the commencement of an action or cross-action affecting the title to real estate, or a *lis pendens* filed any time after the commencement of such action or cross-action, constructive notice

to the holders of unrecorded conveyances or incumbrances of such real estate, though executed prior to the time of the filing of such *lis pendens*. The holder of an unrecorded deed or mortgage affecting the real estate involved in the litigation in which the *lis pendens* is filed, though such mortgage or deed was executed long prior to the time of the filing of the *lis pendens*, is, by the amendment, in effect, made a party to the suit in which the *lis pendens* is filed, and declared to be bound by the judgment rendered in that action, in the same manner as if he was in fact made a party to the suit and served with notice by publication. Section 77 of the Code of Civil Procedure, in force when the amendment under consideration was enacted and in force long prior to that time, defines in what cases constructive service may be had and upon what persons; and by this section constructive service is limited to non-residents of the state and foreign corporations, except where the defendant, being a resident of the state, has departed therefrom or from the county of his residence with intent to delay or defraud his creditors or to avoid the service of summons or keeps himself concealed therein with a like intent. It will thus be seen that the legislature, by enacting the amendment to said section 85, has amended section 77 of the Code of Civil Procedure providing for constructive service. The title to the act by which the section was amended is as follows: "An act to amend section 85 of the Code of Civil Procedure in regard to *lis pendens*, and to repeal said original section." Nowhere in the title of this act is any reference whatever made to constructive service or to the statutes upon that subject. The title of the act does not purport to deal with the subject of constructive service, nor amend section 77 of the Code of Civil Procedure. In other words, the legislation embraced in the amendment is entirely foreign to the object of the act as expressed in its title. It therefore violates section 11, article 3, of the constitution, which declares: "No bill shall contain more than one subject, and the same shall be

clearly expressed in its title. And no law shall be amended unless the new act contain the said section or sections so amended, and the section or sections so amended shall be repealed." (See, also, *Smails v. White*, 4 Neb., 353; *City of Tecumseh v. Phillips*, 5 Neb., 305; *Sovereign v. State*, 7 Neb., 409; *State v. Board of County Commissioners*, 10 Neb., 476; *State v. Board of County Commissioners*, 17 Neb., 85; *State v. Corner*, 22 Neb., 265.) We reach the conclusion, therefore, (1) that so much of the amendment to section 85 of the Code of Civil Procedure, passed and approved March 31, 1887, as makes a *lis pendens*, filed at the commencement of an action or cross-action affecting the title to real estate, constructive notice of the suit to all persons not parties thereto and thereafter dealing with the subject-matter thereof is valid; and persons who acquire an interest in the subject-matter of a suit affecting the title to real estate will hold such interest subject to the disposition made of the real estate by the judgment finally pronounced in the action; (2) that so much of said amendment as makes a *lis pendens*, filed at the commencement of an action or cross-action, affecting the title to real estate, or a *lis pendens* filed at any time after the commencement of such action or cross-action, constructive notice of such action to the holders of liens, incumbrances, or conveyances of said real estate, executed prior to the filing of such *lis pendens*, is unconstitutional and void. The decree of the district court is right and is

AFFIRMED.

OMAHA STREET RAILWAY COMPANY V. WALTER I. MARTIN.

FILED APRIL 10, 1896. NO. 6374.

1. **Negligence: CONTRIBUTORY NEGLIGENCE: BURDEN OF PROOF.** In an action, the basis of which is negligence, if the plaintiff can prove his case without disclosing any negligence on his own part, his

negligence then becomes a matter of defense, the burden of proving it being on the defendant. *Union Stock Yards Co. v. Conoyer*, 41 Neb., 617, and cases there cited, followed.

2. ———: QUESTION FOR JURY. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury; but where the facts are such that all reasonable men must draw the same conclusion from them, the question of negligence is one of law for the court.

3. ———: ———: PERSONAL INJURIES. Whether the act of a party in attempting to board a moving street car is negligence or not is generally a fact to be determined by the jury, taking into consideration all the circumstances in evidence in the case.

4. ———: EVIDENCE: QUESTION OF LAW. It is for the court to say what act or omission is evidence of negligence, but generally it is for the jury to say whether the evidence establishes negligence.

5. ———: CAUTION. The law requires every reasonable man to exercise caution commensurate with the obvious peril with which he is confronted, but this means no more than that he is under all circumstances required to exercise ordinary care.

6. ———: DAMAGES. Although a party may have negligently exposed himself to an injury, yet, if the defendant after discovering his exposed situation negligently injures him, or is guilty of negligence in not discovering his dangerous position until too late, and the plaintiff is because thereof injured, he may nevertheless recover.

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

John L. Webster, for plaintiff in error.

George W. Cooper, contra.

RAGAN, C.

Walter I. Martin sued the Omaha Street Railway Company in the district court of Douglas county for damages which he alleged he had sustained by reason of the negligence of the employes of that company while attempting to board one of its cars. Martin had a verdict and judgment and the street railway company prosecutes to this court a petition in error.

1. Martin in his petition alleged that the servants of

the railway company negligently failed to stop its train of cars at the usual stopping place a reasonable and sufficient length of time to permit him to safely get on the cars; "and just as plaintiff was in the act of ascending the steps of the * * * back car of said train defendant's * * * servants * * * then in charge of * * * said cars * * * did so negligently and carelessly manage said train of cars * * * that said cars were suddenly and rapidly and without notice or warning to plaintiff started forward * * * thereby violently throwing plaintiff to and upon the surface of the street and under said moving car." The street railway company in its answer, among other things, alleged: "That said plaintiff negligently and carelessly endeavored to board said train while it was in motion, instead of waiting for the same to come to a stop; * * * that said plaintiff in so endeavoring to board said train while in motion slipped and fell and so was injured." On the trial Martin himself testified as follows: "I took up my grip when I went to signal the car—the motorman in charge of the car. I come over to the track, and when the front car got along it was going a little too fast to board and I stepped out, and when the rear car came—the front end of the rear car came along—the almost stopped, just about stopped; and I took hold of the hand-rail and put my foot on the step and was raising myself up to put my right foot up the next step and there was a sudden jerk and it threw me on the street." The conductor of the car which Martin in attempting to board was hurt testified as follows: "Well, sir, I noticed the motorman applying his brake and I looked over and saw a man standing there, so I applied my brake to let a man off the train. At that time it was going a little slow, because we were going down grade, anyway, and the first thing I saw was when he got to about the corner I saw Mr. Martin. I saw a man with a package. * * * As we slowed up to let him on, the train came nearly to a perfect stand-still. Mr. Martin—I didn't know what his name was at that

time—he caught hold of the front end of the trailer with his right hand and I saw then he couldn't get a good foot-hold with his left foot; got a foot-hold with his right foot; and I noticed that and made a grab for him and he slipped."

The first assignment of error argued in the brief is directed to the refusal of the district court to give certain instructions requested by the street railway company, and it is insisted that the court erred in refusing to give these instructions, as they embodied the law of the case applicable to the testimony given in support of its theory of the accident. The first of these instructions is as follows: "The jury are instructed that the plaintiff cannot recover in this action unless he satisfied you by a preponderance of evidence that the injuries received by him resulted from the negligence of the defendant company, and that the plaintiff was free from fault in the premises." The court did not err in refusing to give this instruction. It was not incumbent upon the plaintiff to prove by a preponderance of the evidence that his injury was not the result of negligence on his part. If Martin proved by a preponderance of the evidence that he was injured, and that his injury was the result of the negligence of the street railway company, and, in making these proofs, it was not disclosed that his injury was the result of his negligence, he made out his case. He was not required to prove by a preponderance of the evidence the negative proposition that his injury was not the result of his negligence. See *Union Stock Yards Co. v. Conoyer*, 41 Neb., 617, where the rule laid down in *Anderson v. Chicago, B. & Q. R. Co.*, 35 Neb., 95, is quoted with approval, the rule being as follows: "In an action for negligence, where the plaintiff can prove his case without disclosing any negligence on his part, contributory negligence is a matter of defense, the burden of proving it being on the defendant."

The second instruction is as follows: "The jury are instructed that if you find from all the evidence that the

accident to the plaintiff was caused or brought about by his attempt to get on board the train while the train was being brought to a stop, but before the train had come to a full stop, then he was guilty of contributory negligence and cannot recover and your verdict should be for the defendant." This instruction the court did not err in refusing to give. It was not for the court to say whether or not Martin was guilty of negligence in attempting to board this train while it was moving. The court might have properly told the jury that if Martin attempted to step on the train while it was in motion, that that was evidence tending to prove negligence, but it was for the jury to say what the effect of that evidence was. *Omaha Street R. Co. v. Craig*, 39 Neb., 602, was an action for damages brought by Miss Craig against the railway company for injury which she alleged she had sustained through the negligence of that company in not bringing the car to a stand-still when she was about to alight therefrom. The railway company's theory of the accident was—and its evidence tended to support it—that Miss Craig's injury was caused by her stepping from the car while it was in motion to the platform or foot-board thereof, and not holding to the uprights at the ends of the seats. The eminent counsel who makes the argument for the street railway company in the case at bar, in the Craig case pressed this court to decide as a matter of law that if Miss Craig stepped from the car while in motion and was thereby injured, that this act raised against her a conclusive presumption of negligence. Answering that argument the court said: "But we think that Miss Craig's stepping out on the platform of the car before it came to a full stop, at the time and under the circumstances, and her failure to avail herself of the hand-holds on the uprights of the seats, were, at most, facts to be submitted to the jury as evidence tending to show negligence on her part. Reasonable men might honestly draw different conclusions as to whether this act or omission of Miss Craig's was, under the circumstances, negli-

gence, and therefore it was for the jury to say whether the evidence of what she did and what she omitted to do warranted a conclusion of negligence on her part. It is for the court to say what act or omission is evidence of negligence, but it is for the jury to say whether the evidence establishes negligence."

The third instruction refused was as follows: "The jury are instructed that it was the duty of the plaintiff to wait until the train had come to a stop before attempting to get on board the car, and if you find from the evidence that the train was being brought to a stop, and before the train had come to a full stop, the plaintiff attempted to get on the car and in so doing slipped and fell, then the plaintiff cannot recover and your verdict should be for the defendant." What has just been said in reference to instruction No. 2 disposes of the assignment that the court erred in refusing to give this instruction.

The fourth instruction refused was as follows: "The jury are instructed that in determining whether the plaintiff attempted to get on board the train before the train had come to a full stop, you should take into account not only the evidence of the defendant's witnesses, but also such witnesses as were called by the plaintiff, if any, who testified that the train had not come to a full stop when the plaintiff attempted to get on board." This was in effect asking the court to say to the jury: One of the matters being litigated here is whether Martin attempted to board the train while it was in motion. The defendant's witnesses and some of Martin's witnesses have testified that he did. You should consider the evidence of all these witnesses. It was the duty of the jury to consider all the evidence of all the witnesses. The jury was sworn to try the case according to the evidence, and we will not presume they did not, but we do not think the district court was under any obligation—if, indeed, such a course would have been proper—to single out one point being litigated and say to the jury: All the

witnesses on one side of the case have testified that a certain thing was done, and part of the witnesses on the other side have testified that this thing was done, and you should consider the evidence of these witnesses. This would have been not only to give too much prominence to one point being litigated, but to tell the jury to consider only the evidence directed to one side of the matter in dispute.

The fifth instruction refused, of which complaint is made, was as follows: "The jury are further instructed that the fact that the plaintiff was carrying a package as described by himself and other witnesses, was a circumstance requiring upon his part a higher degree of care while attempting to get on board the train than if he had not been burdened or incumbered by such package." The plaintiff was required to exercise ordinary care and nothing more. The law requires every reasonable man to exercise caution commensurate with the obvious peril with which he is confronted, but this means no more than that he is under all circumstances required to exercise ordinary care, the danger and his knowledge thereof considered. (*City of Beatrice v. Reid*, 41 Neb., 214.)

2. It is next argued that the court erred in giving to the jury instruction No. 8, as follows: "You are further instructed that if you find that plaintiff attempted to board the train while carrying a bundle in one hand, and after it had passed over the street intersection and while the train was in motion, and at the point where it was the duty of defendant's employes to bring the train to a stop, as hereinbefore explained to you, and you further find that plaintiff received the injury complained of by reason of his attempting to board the train while in motion, such act on the part of plaintiff would constitute contributory negligence on his part, as it was his duty not to attempt to board the train while it was in motion, carrying in one of his hands a bundle, and he could not recover in this action unless you further find that an ordinarily cautious and prudent man, situated as plaintiff

was, would under like circumstances have attempted to board the car; or that defendant's employes, by the exercise of ordinary care, could have avoided the injury after discovering the danger, if you find they did or could have discovered the danger by the exercise of ordinary care. In determining whether defendant's employes exercised ordinary care to avoid the injury after discovering the danger, should you find that they did discover the danger, and should you find that plaintiff by his own negligence contributed to the accident which produced the injury complained of, you will take into account and give due consideration to the fact, if you find such fact has been proven, that the conductor and motorman used every effort and all the means within their power to stop the train and avoid the injury to plaintiff by applying the brakes, making an effort to catch the plaintiff to prevent his falling, if such facts have been proven, the position the train was in with reference to grade and speed, and all other facts you find disclosed by the testimony bearing upon that question." We think this instruction was erroneous, but the street railway company cannot complain of it. It was not prejudicial to it, but Martin. One criticism of counsel is directed to that part of the instruction quoted in which the court told the jury, in effect, that if they should find that Martin had negligently exposed himself to danger, yet he might recover if the railway company, after discovering his danger, inflicted the injury upon him because of its failure to exercise ordinary care. This instruction was correct. (See *Union P. R. Co. v. Mertes*, 35 Neb., 204; *Chicago, B. & Q. R. Co. v. Grablin*, 38 Neb., 90; Shearman & Redfield, Negligence, sec. 25.) But counsel says that the instruction was erroneous because not applicable to the facts in evidence in the case: (1) Because the evidence did not show that Martin had placed himself in a position of danger. The evidence introduced in behalf of the railway company all tended to show that Martin attempted to board this train while it was in motion, and we think it a matter of

common sense that a person when about to step on or off a moving train is in a situation of danger. The second argument is that the instruction was not applicable, because the evidence does not disclose that the railway company knew that the plaintiff Martin was in danger. We have already quoted the evidence of the conductor of the train to the effect that Martin attempted to step on the train while it was in motion, and that he, the conductor, saw that he was about to fall and that he attempted to catch him. Another criticism made to this instruction is that part of it by which the court told the jury that the railway company would be liable for Martin's injury if, after discovering his danger, they failed to exercise ordinary care, or if they did not discover his danger because of its failure to exercise ordinary care; in other words, the argument is that the railway company was only bound to exercise ordinary care after it discovered Martin's danger; and that its employes were under no obligation to observe Martin or his conduct until they found him in a dangerous situation. Under the circumstances in evidence in this case we do not think the court erred in telling the jury that the railway company would be liable for Martin's injury if it failed to exercise ordinary care after discovering his dangerous situation, or if, through its want of ordinary care, it failed to discover his dangerous situation until too late. The evidence is undisputed that Martin signalled the train to stop; that the conductor and the motorman saw him and slowed the train down, and that he had a grip in his hand, and that he was intending and attempting to board the train. Under these circumstances it was incumbent upon the employes of the railway company to know that Martin was on the train before they started it. *Chicago, B. & Q. R. Co. v. Grablin*, 38 Neb., 90, was an action by Grablin, as administrator, against the railway company for negligently, as he alleged, causing the death of his child while trespassing on the railway company's track. The railway company requested the trial court to instruct the

jury as follows: "You are instructed * * * if you find that the negligence of the boy in going upon the track caused or contributed to the injury, you must find a verdict for the defendant, unless you further find that the company or its servants were willfully or recklessly negligent after the boy was discovered, or that the engineer willfully avoided seeing the boy on the track sooner than he did see him." The refusal of the district court to give this instruction was assigned here as error, but the court sustained the action of the trial judge and held that if the engineer could, by exercising such vigilant and careful lookout as was consistent with his other duties as engineer, have seen the boy in time to save him, then his neglect to exercise such careful and vigilant lookout was negligence. These are the only assignments of error which we deem it necessary to notice. The judgment of the district court is in all things right and is

AFFIRMED.

CITY OF KEARNEY V. CAROLINE THEMANSON, ADMINISTRATRIX.

FILED APRIL 10, 1896. No. 7790.

1. **Surface Water:** DAMAGES. The doctrine of this court is the rule of the common law, that surface water is a common enemy, and an owner may defend his premises against it by dike or embankment, and if damages result to an adjoining proprietor by reason of such defense, he is not liable therefor.

2. ———: ———: NEGLIGENCE. But this rule is a general one and subject to another common law rule, that a proprietor must so use his own property as not to unnecessarily and negligently injure his neighbor.

3. ———: ———: ———. And therefore every proprietor may lawfully improve his property by doing what is reasonably necessary for that purpose, and unless guilty of some act of negligence in the manner of its execution, will not be answerable to an adjoining proprietor although he may thereby cause the surface

water to flow on the premises of the latter to his damage; but if in the execution of such enterprise he is guilty of negligence, which is the natural and proximate cause of injury to his neighbor, he is accountable therefor. *Anheuser-Busch Brewing Association v. Peterson*, 41 Neb., 897; *Lincoln Street R. Co. v. Adams*, 41 Neb., 737; *Lincoln & B. H. R. Co. v. Sutherland*, 44 Neb., 526; *City of Beatrice v. Leary*, 45 Neb., 149, and *Jacobson v. Van Boening*, 48 Neb., 80, followed and affirmed.

4. Witnesses: MEMORANDA. A memorandum which it appears was prepared at the time of the fact in question or soon afterwards, which the witness knew to be correct at the time it was made, may be used by the witness to refresh his memory. (*Atchison, T. & S. F. R. Co. v. Lawler*, 40 Neb., 356.)

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

F. E. Beeman and *E. C. Calkins*, for plaintiff in error.

B. O. Hostetler, contra.

RAGAN, C.

Caroline Themanson sued the city of Kearney in the district court of Buffalo county for damages. For cause of action she alleged that in 1883 the city built an embankment about three feet high in the street in front of the property occupied by her, without first having established the grade of the said street by ordinance; that prior to the building of said embankment the surface water from a large area of territory had been accustomed to flow eastward north of her building, and across the street the grade of which the city raised; that the city, when it built the embankment, negligently neglected to build a culvert or other opening in the embankment, and that in April, 1884, during a heavy rain, such surface waters were stopped by the embankment and flowed back into her cellar and injured a large amount of groceries stored therein. This case has been twice before in this court, and for a more extended statement of the facts and issues made by the pleadings the reader is referred to *City of Kearney v. Themanson*, 25 Neb., 147, and

Themanson v. City of Kearney, 35 Neb., 881. Mrs. Themanson had a judgment in the court below and the city of Kearney has brought the same here for review.

1. The first argument in the brief, in effect, is that if it be admitted that Mrs. Themanson's property was damaged by surface water flowing into her cellar, that this surface water was stopped in its course and turned back into the cellar by the embankment made by the city in the street, and that such damage and such turning back of the surface water were caused by the negligence of the city in not building a culvert or an opening in the embankment, yet, nevertheless, the city is not liable, because it is protected by the rule of the common law that surface water is a common enemy and that an owner may defend his premises against it, and if damages result to adjoining proprietors by reason of such defense he is not liable therefor. But the facts averred by the plaintiff as a cause of action against the city, if proved, exclude the plaintiff in error from the protection of this general common law rule. The case at bar falls within and is governed and controlled by the decisions of this court in *Lincoln Street R. Co. v. Adams*, 41 Neb., 737; *Anheuser-Busch Brewing Association v. Peterson*, 41 Neb., 897; *Lincoln & B. H. R. Co. v. Sutherland*, 44 Neb., 526; *City of Beatrice v. Leary*, 45 Neb., 149, and *Jacobson v. Van Boening*, 48 Neb., 80. This rule of the common law was invoked as a defense in each of those cases, but the conclusion reached by the court was that, while the common law rule as to surface water was in force in this state, that it was a general one and that it was subject to another common law rule, namely, that a proprietor must so use his own property as not to unnecessarily and negligently injure his neighbor's; and that, therefore, every proprietor might lawfully improve his property by doing what was reasonably necessary for that purpose, and, unless guilty of some act of negligence in the manner of its execution, would not be answerable to an adjoining proprietor although he might thereby cause the surface water

to flow on the premises of the latter to his damage; but if in the execution of such enterprise he was guilty of negligence which was the natural and proximate cause of injury to his neighbor, he would be accountable therefor. We do not feel called upon to re-examine these cases. We are satisfied that they correctly state the law and we accordingly adhere to them. The mere right of a proprietor to defend himself against surface water without being responsible for the consequences has never been denied by this court. But there may be a difference between the possession of a right and the manner of its exercise. In the case at bar it may be conceded that the city had a right to grade the street in question,—to build the embankment therein. This right we do not call in question. It is only the manner of the exercise of that right that is involved in this litigation.

2. The next assignment of error that we notice is the ruling of the district court in permitting the witnesses Orrin and Albert Themanson to testify from a memorandum as to the goods that were injured or destroyed. It appears from the record that the water flowed into this cellar in the night, and that very soon thereafter the memorandum of the goods injured and destroyed was made. To lay the foundation for permitting these witnesses to testify from this memorandum, Orrin was examined as follows:

Q. You may state to the jury whether or not you, in connection with others, made an inventory of the goods that were in the cellar. State what you did about that.

A. We took an inventory of the goods and Albert Themanson wrote it down—the amount that was in the cellar. * * *

Q. Did you assist?

A. Yes, sir.

Q. Do you think you would recognize the inventory if you should see it?

A. Yes, sir; I would recognize the articles.

Q. Look at that paper and see if that is the inventory you refer to.

A. Yes, sir, as near as my memory would serve me.

Q. Did you see the paper made?

A. Yes, sir. I was there at the time it was made. * *

Q. Did you at that time examine the paper and know that it contained an exact list of the articles damaged?

A. Yes, sir.

Albert Themanson was then called and testified as follows:

Q. Do you remember the fact of the cellar of your father being flooded on the 1st of April, 1884?

A. Yes, sir.

Q. State whether or not there was an inventory made of the goods that were in the cellar at the time of the flood.

A. Yes, sir. There was an inventory made shortly after.

Q. Examine that paper and state whether that is the inventory or not that was made at that time.

A. Yes, sir, it is the inventory.

Q. Did you make that yourself?

A. Yes, sir, I did.

Q. In whose handwriting is that part which is written in ink?

A. That is mine.

Q. Who was with you when you did it?

A. Mr. Orrin.

Q. Did someone call off and you set it down?

A. Sometimes they would and sometimes I would take the number down myself.

Q. In whose handwriting are the pencil marks at the right of the goods?

A. That is my handwriting.

Q. When did you make that?

A. That was made at the time.

Q. State whether or not you examined that paper at the time it was made.

A. Yes, sir.

Q. Do you know whether it was correct at that time?

A. Yes, sir, to the best of my knowledge.

We do not think the court erred in permitting these witnesses to use this memorandum. In *Atchison, T. & S. F. R. Co. v. Lawler*, 40 Neb., 356, this court said: "A memorandum which it appears was prepared at the time of the fact in question, or soon afterwards, which the witness knew to be correct at the time it was made, may be used by the witness to refresh his memory."

3. It is also insisted that the verdict of the jury is not supported by sufficient evidence. It is not disputed that Themanson's goods were damaged. It is not insisted that the amount of damages awarded her by the jury is excessive. It is not claimed that the city had ever established by ordinance the grade of the street in which it built the embankment; that when it built said embankment it put a culvert or other opening therein for the escape of surface waters that were accustomed to flow east across the street, nor that the property of Mrs. Themanson was not damaged by surface waters, but the argument that the verdict lacks sufficient evidence to support it is based on the contention that there were windows in Mrs. Themanson's cellar; that these windows extended below the level of the ground on which the building was erected, and that the windows were not protected by embankments or bulk-heads, and that the water which flowed into the cellar and damaged the goods did so because the windows were not thus protected. There are two answers to this argument: (1.) There is some evidence in the record that the windows were protected by embankments or bulk-heads. (2.) The evidence justifies a finding by the jury that the presence of the water in the cellar was due to the negligence of the city in failing to put a culvert in its embankment, and not to a want of bulk-heads around the windows in the cellar.

Counsel for the city complain of some instructions given by the trial court and some instructions which the court refused to give. It is not necessary to quote these

instructions and it must suffice to say that the action of the court was entirely proper. There is no error in the record, and its judgment is

AFFIRMED.

PETER JACOBSON, APPELLEE, V. JOHN VAN BOENING, APPELLANT.

FILED APRIL 10, 1896. No. 6441.

1. **Surface Water**: DAMAGES. In this state the common law rule prevails that a proprietor may, by barriers or otherwise, protect his land from surface water coming from or across adjacent lands, and for injuries occasioned to others from a proper exercise of that right, he is not responsible. *Morrissey v. Chicago, B. & Q. R. Co.*, 38 Neb., 406, followed.

2. ———: NEGLIGENCE: DAMAGES. If in the execution of such object such proprietor is guilty of negligence which is the natural and proximate cause of injury to the adjoining proprietor, he is accountable therefor. *Anheuser-Busch Brewing Association v. Peterson*, 41 Neb., 897, followed.

3. ———: ———: ———. One may not accumulate surface waters on his own land and by means of a ditch discharge them in a volume upon the land of another. *Fremont, E. & M. V. R. Co. v. Marley*, 25 Neb., 138, followed.

4. ———: ———: ———. The former decisions of this court reviewed, and *held* to be in harmony with the foregoing principles.

5. ———: ———: INJUNCTION. Against a continuing injury to land caused by an unlawful discharge of surface waters by an adjoining proprietor, equity will afford relief by injunction.

6. ———: ———: ———: DAMAGES: EVIDENCE. In such case it is not necessary for the plaintiff to prove that actual injury occurred before the suit was brought. The remedy is in such case preventive, and will be granted on proof that the acts complained of, unless restrained, will result in damage.

7. ———: ———: ———. To such an action it is no defense that the injury is in part threatened by the acts of another. The plaintiff has his remedy against each one contributing thereto.

8. **Actions**: MALICE. Where one has a valid cause of action against another, his motive in instituting it is immaterial, and the fact that it is inspired by malice is no defense.

APPEAL from the district court of Adams county. Heard below before BEALL, J.

A. H. Bowen and *J. B. Cessna*, for appellant.

Smith & McCreary, contra.

IRVINE, C.

This was an action by the appellee against the appellant for the purpose of obtaining an injunction restraining the appellant from maintaining a certain ditch whereby it was alleged that waters collected upon the lands of appellant were discharged upon the lands of plaintiff, to plaintiff's damage. The evidence is hopelessly conflicting, and in some parts very obscure. As there was a general finding for the plaintiff, we must take it in the light in which it most strongly tends to support the allegations of the petition. So considered, it appears that the parties are owners of adjoining farms, the plaintiff's lying west of defendant's. Along the north line of these farms there is a highway. On the defendant's farm, and near the northeast corner thereof, there lie what the witnesses style two "lagoons." A review of the evidence discloses, however, that this term is used according to a local signification, and means merely a slight depression in the land, wherein in wet seasons surface water accumulates. It is quite evident that these are not permanent ponds or lakes. At some time in the past a ditch was constructed near the middle of the highway, whereby the surface water from the vicinity was collected and flowed along the highway westward into a ravine, or, as we shall hereafter style it, using another local term more accurately descriptive than any word of general use, a "draw." This draw crosses the highway north of plaintiff's land, passes over his land, and across defendant's toward the east. Shortly before this action was commenced, in accordance with some action by the county authorities, this ditch was

filled up and another one, nearer the south side of the highway, was constructed for the same purpose and having the same outlet. The so-called lagoons, by means of smaller ditches, were connected with this ditch in the highway. The damage alleged is that whereas the natural drainage from the lagoons is southeast, these ditches divert it to the north and thence along the highway to the draw, discharging a large body of water thereby across plaintiff's lands, cutting trenches and covering the land with accretions. It also appears that by the construction of a ditch much shorter than the one now maintained, the defendant might discharge the water from the lagoons into this same draw upon his own land.

One point urged in support of the appeal is that there is no evidence that down to the time of the trial any large quantity of water had been discharged by reason of the ditches in question, or that plaintiff's lands had been in fact injured. It is true that there is very little evidence to the contrary; but we regard this as immaterial. The plaintiff was not obliged to wait until the injury had been inflicted. There is ample evidence tending to show that such an injury, in the event of a wet season, would be the result of maintaining the ditches, and the remedy sought is preventive and not compensatory. Another point urged is that the action should properly be against the county, because the damage, if any, is directly inflicted by the ditch in the highway. While the prayer of the petition seems to extend to all the ditches, the district court granted the injunction only so far as to restrain the defendant from maintaining the ditches connecting the lagoons with the ditch in the highway. Assuming for the moment that any wrong was committed by maintaining this system of ditches, the defendant was the responsible person to the extent of the water discharged by the ditch the maintenance of which was restrained. The fact that the plaintiff may have a remedy against the county or against other proprietors for similar acts contributing to the same injury does not deprive

him of his remedy against the defendant for his share therein. Another minor point may here be disposed of. The district court excluded testimony accompanied by an offer to show that the plaintiff and others had conspired together to institute criminal and civil actions against Van Boening, contributing to the expense thereof, and with the purpose of harassing him until he should leave the township. This would be no defense to this action. If as a matter of fact the plaintiff had a good cause of action against the defendant, his motives in prosecuting it are immaterial.

With these preliminary matters cleared away, the question remains whether the plaintiff was entitled to relief against the defendant for discharging surface water through a ditch, in a volume, upon plaintiff's land, contrary to the natural course of drainage; and the proof showing that as effective and as convenient a method of discharging water might have been availed of without discharging it on the highway or on plaintiff's land. That for a wrong of this kind injunction is an appropriate remedy was held in *Davis v. Londgreen*, 8 Neb., 43. That one's right to protect his land against surface water does not extend so far as to permit him to collect it in a volume and by means of a ditch to discharge it upon the land of another has been several times decided. (*Fremont, E. & M. V. R. Co. v. Marley*, 25 Neb., 138; *Lincoln Street R. Co. v. Adams*, 41 Neb., 737; *Bunderson v. Burlington & M. R. R. Co.*, 43 Neb., 545.) There are other cases applying the principle, but we do not cite them, for the reason that they seem rather to relate to the diversion of water-courses than of surface water. The announcement of the rule referred to is sufficient to dispose of this case; but, as it developed upon the argument that an impression prevails that the different decisions of the court have not been altogether harmonious upon the subject, it seems well to review these cases, which to our minds are in complete harmony, and to as clearly as possible state the principle which has governed all the de-

cisions. Prior to 1893 there was no case dealing with the general principles of law on the subject.

Davis v. Londgreen, supra, was much like the present, except that it would seem that the pond which had been drained was permanent in its character, and not a mere depression in which surface water occasionally collected. It was held that such water could not lawfully, by means of a ditch, be discharged upon the land of one's neighbor.

Pyle v. Richards, 17 Neb., 180, was a case of the diversion of a stream, and while it has been cited in several surface water cases, it was in fact governed by different principles.

Stewart v. Schneider, 22 Neb., 286, depended for its solution entirely upon the effect of a prior decree fixing the rights of the parties, the correctness of which was not and could not have been then questioned.

Morrissey v. Chicago, B. & Q. R. Co., 38 Neb., 406, is perhaps the leading case on the subject. It was there announced that the common law rule prevails, and that therefore one has the right to defend himself against surface water and that incidental damage inflicted upon another by such acts is *damnum absque injuria.* It is this case which is thought to be in conflict with some of the others. The opinion is entirely too long to abstract here, but an examination of the case discloses that the court had always in view the fact that there was neither allegation nor proof that the railroad embankment which had caused the injury had been unnecessarily or negligently constructed. The district court gave an instruction to the effect that one might upon his own land erect such barriers as he deemed necessary to keep off surface water falling upon it or coming from adjacent lands, and for any consequent injury to other lands he would not be responsible; but that such waters as fell upon his own lands or came thereon by surface drainage, he must keep within the boundaries or permit them to flow off without artificial interference, unless within the limits of his own lands he could turn them into a natural water-course.

Commenting upon this instruction, this court, through Commissioner RYAN, said: "In the latter part of this instruction it is barely possible that the court may have erred as against the defendant, in holding that it was the affirmative duty of the proprietor to keep within his boundary, or permit to flow off without interference, such waters as fall in rain or snow on his land or come there by surface drainage, unless within the limits of his own land he can turn them into a natural water-course. It is unnecessary to determine this question." In many of the cases cited in the opinion the distinction was clearly drawn between a proper defense against surface water and a negligent defense. This case, then, merely established the general rule, but there was kept constantly in view the fact that no negligence appeared; and that the existence of negligence might be a controlling feature.

In *Lincoln Street R. Co. v. Adams, supra*, while the rule was very briefly stated, in accordance with former opinions, that a proprietor may not collect surface waters on his own estate in a ditch and discharge them in a volume on the land of his neighbor, it is quite evident that the same principle was in view, and that this was deemed a negligent method of protecting one's self.

In *Anheuser-Busch Brewing Association v. Peterson*, 41 Neb., 897, a proprietor, in order to protect himself against surface water, filled in his lots, but in such a manner that water which otherwise would have passed off in another direction accumulated and entered the ice-house of plaintiff through a privy vault. The rule in *Morrissey v. Chicago, B. & Q. R. Co., supra*, was stated, and the court, through Judge POST, said: "Subject to that rule, every proprietor may lawfully improve his property by doing what is reasonably necessary for that purpose, and unless he is guilty of some act of negligence in the manner of its execution, he will not be answerable to his neighbor, although he may thereby cause the surface water to flow upon or from the premises of the latter to

his damage. The injury in such case is but a mere incident to the proper use of the owner's property; but if in the execution of the enterprise in hand he is guilty of negligence which is the natural and proximate cause of injury to the adjoining proprietor, the law holds him accountable therefor. Such is the essence of the authorities cited in *Morrissey v. Chicago, B. & Q. R. Co., supra*, and undoubtedly the law of this case."

In *Bunderson v. Burlington & M. R. R. Co., supra*, it was held that the construction of a railroad embankment whereby water had been backed up upon the lands of a superior proprietor, was no cause of action, and this for the reason that to have made an opening or culvert would have discharged the water in a volume upon the lands of an inferior proprietor, which would have been tortious.

In *Lincoln & B. H. R. Co. v. Sutherland*, 44 Neb., 526, the railroad company was held liable because of its negligence in the construction of an embankment, and the words above quoted from *Anheuser-Busch Brewing Association v. Peterson, supra*, were quoted with approval as controlling the case.

In *City of Beatrice v. Leary*, 45 Neb., 149, it was said: "The doctrine of this court is the rule of the common law, that surface water is a common enemy and that an owner may defend his premises against it by dike or embankment, and if damages result to adjoining proprietors by reason of such defense he is not liable therefor; but this rule is a general one and subject to another common law rule, that a proprietor must so use his own property as not to unnecessarily and negligently injure his neighbor; and, therefore, every proprietor may lawfully improve his property by doing what is reasonably necessary for that purpose, and, unless guilty of some act of negligence in the manner of its execution, will not be answerable to an adjoining proprietor, although he may thereby cause the surface water to flow on the premises of the latter to his damage; but if in the execution of

such enterprise he is guilty of negligence which is the natural and proximate cause of injury to his neighbor, he is accountable therefor."

We think that the foregoing review of the cases shows that instead of there existing any conflict in the decisions, it has been the settled and uniform rule, applied in every case, that while one may protect his land from surface water, he is responsible for any negligence in so doing occasioning damage to his neighbor. The case is not different from the exercise of any other undoubted right. I have as much right to drive along the highway as I have to defend my land from surface water; but if I drive negligently and injure someone, I am responsible. We think, in view of this principle, the evidence amply sustained the finding and decree of the district court.

JUDGMENT AFFIRMED.

THOMAS CHURCHILL, APPELLANT, V. CHARLES H. BEETHE ET AL., APPELLEES.

FILED APRIL 10, 1896. No. 6490.

1. **Surface Water:** DAMAGES: NEGLIGENCE. Under the common law rule prevailing in this state, the proprietor of lands may, by a proper use and improvement upon them, deflect surface water; and for consequent damage to his neighbor he is not liable in the absence of negligence. *Morrissey v. Chicago, B. & Q. R. Co.*, 38 Neb., 406, followed.

2. ———: ———: COUNTIES: CITIES. This rule applies to counties and municipalities exercising the right of eminent domain.

3. ———: ———: INJUNCTION: COUNTIES. For an unlawful diversion of surface water there is a remedy by an action for damages, or by injunction against a private individual; but a county or municipality, in the exercise of the right of eminent domain, may divert water in a manner which would be unlawful if done by an individual. In such case just compensation must be made for all damage inflicted.

4. ———: ———: EMINENT DOMAIN. All damages, immediate or prospective, which may flow from the proper construction and maintenance of an improvement carried on under the power of eminent domain, must be compensated in the original condemnation proceedings.

5. **Highways:** PROCEEDINGS TO OPEN: DAMAGES. The proceedings by which a highway is opened call for a settlement and payment of all damages which may arise from such proper construction and maintenance of the highway, taking into consideration such fills, cuts, ditches, and culverts as a proper construction and maintenance may require.

6. ———: CULVERTS: INJUNCTION. An action will not lie to enjoin a county from constructing a culvert across a highway, when such culvert is reasonably necessary to a proper maintenance of the road, damages consequent from such construction being presumed to have been satisfied when the highway was opened.

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

T. Appelget, for appellant.

J. Hall Hitchcock, contra.

IRVINE, C.

The appellant brought this action against the defendants, who are the county commissioners of Johnson county and the overseer of a road district therein, to restrain the defendants from building a certain culvert across a highway, and from otherwise changing the natural course of surface water. There was a general finding for the defendants, and a judgment of dismissal. The petition alleges that the plaintiff is the owner of certain described land, and that along the west border thereof lies a public highway; that the defendants raised an embankment along said highway in such a manner as to change the course of surface water accumulating on the land west of the highway, so as to cause it to flow upon the lands of the plaintiff; whereas, before the embankment was constructed, such water flowed over the lands north of plaintiff's. The petition further

alleges that the defendants are about to build a culvert across the highway in such a manner as to turn the accumulated surface water from the lands to the west in a body upon plaintiff's land.

It appears that the highway in question has long been a public road, and that several years before the action was brought a fill was made of two or three feet along the highway to the west of plaintiff's land, for the purpose of improving the road. This is the embankment complained of. Its effect in diverting surface water we cannot understand from the written record, for the reason that the witnesses refer continually to certain maps in evidence, evidently accompanying their words with indications and gestures referring to maps and points thereon, but not in such a manner that they can be followed without the aid of these indications and gestures. As to this feature of the case, however, this defect in the record is not important, because we are satisfied that the petition does not in this respect state a cause of action. It is not alleged that the embankment was not a necessary or a proper improvement of the highway. It is not alleged that there was any negligence in the design or manner of its construction. It is not even alleged that the effect of the embankment is to accumulate surface water upon other lands and discharge it in a body on the lands of the plaintiff. It is merely alleged that the embankment has diverted the natural flow of surface water so as to turn it over plaintiff's lands. On this state of facts the rule established in *Morrissey v. Chicago, B. & Q. R. Co.*, 38 Neb., 406, is directly applicable, and a reference to that case avoids the necessity of further discussion.

The latter part of the petition, charging the purpose to construct a culvert which will discharge accumulated surface waters in a body on plaintiff's lands, presents a somewhat different question. The evidence tends to show that a creek flows through the south part of plaintiff's land. The natural surface of the land rises from

the creek for about 200 feet and then gradually falls to a point near plaintiff's northwest corner, from which point it again rises toward the north. The embankment or fill in the highway crosses this depression or basin in the surface of the land. It operates as a sort of a dam, the water flowing both from the north and from the south to this low point, where it accumulates to the west of the highway. It also appears that the depression is such that if a ditch were constructed along the west side of the road to the creek, instead of draining this accumulated surface water into the creek, the grade is such that the ditch would empty the creek into the basin referred to. In this state of affairs the water rises so as to cover the highway at the lowest point; and it is the purpose of the commissioners to avoid this inconvenience by placing a culvert at the low point, which would permit the water to flow beneath the highway and upon plaintiff's lands. It is needless to say that such an act by a private proprietor would be unlawful, and that relief could be had against it (*Jacobson v. Van Boening*, 48 Neb., 80, and cases there cited); but this work is to be done by the county for the improvement of a highway, for the purpose of constructing and maintaining which it enjoys the power of eminent domain. It is not alleged that the culvert is not a proper or necessary work for the purpose of maintaining the highway in proper condition for travel. There can be no doubt that when the highway was first opened the culvert might have been put in, notwithstanding any injury it would cause the plaintiff, the only condition in inflicting such damage upon him being that just compensation should be paid him therefor. It is now the settled law of the state that for all injuries which may arise on account of the proper construction or future operation of an improvement, an adjoining proprietor must be compensated in the original condemnation proceedings. (*Omaha & R. V. R. Co. v. Moschel*, 38 Neb., 281; *Omaha S. R. Co. v. Todd*, 39 Neb., 818; *Fremont, E. & M. V. R. Co. v. Bates*, 40 Neb., 381; *Chi-*

cago, B. & Q. R. Co. v. O'Connor, 42 Neb., 90.) In *Omaha S. R. Co. v. Todd, supra*, it was said: "In an inquiry whether, and how much, the part of a farm not taken for railroad right of way is depreciated in value by the appropriation of a part, evidence as to the size of the farm; the purpose for which it is used; the improvements thereon, and how located; the direction of the road across the farm; the cuts and fills made or to be made in the construction of the road; the width of the right of way; the height of embankments; the depth of ditches; the inconvenience of crossing the track from one part of the farm to another; the liability of stock being killed; the danger from fire from passing trains, are all facts competent for the jury's consideration in determining the depreciation in value of the remainder of the farm." The cases are all those of railroads; but the same principles govern the exercise of the right of eminent domain by counties or municipalities, in the absence of qualifying statutes. The effect of the cases is that in assessing damages for the construction of a railroad, the jury has in view all facts affecting the value of the land which may arise from the proper construction and operation of the railroad,—not merely in the manner in which it may be first constructed, but for any proper and appropriate extensions or improvements, so long as the original use is not changed. So with a highway. The owner of adjoining lands is entitled to compensation not only for such injuries as might result from the use of the land appropriated in its natural state, but for all which would result from a proper construction, improvement, and maintenance of the highway, taking into consideration such embankments, cuts, bridges, culverts, and ditches as shall be required or warranted for the purpose of a proper construction and maintenance. Applying these principles to the present case, it would seem that the fill and culvert are not only a proper, but apparently a necessary improvement, for the purpose of properly maintaining the highway; and while, if plaintiff's lands will suf-

fer an injury thereby, he was entitled to compensation therefor, it must be presumed that he received such compensation, or at least had an opportunity to receive it, when the highway was originally constructed. He is not entitled to any further condemnation proceedings. Much less is he entitled to a perpetual injunction to restrain such highway improvement.

JUDGMENT AFFIRMED.

WILLIAM M. GILMORE, APPELLANT, V. WILSON M. ARMSTRONG, APPELLEE.

FILED APRIL 10, 1896. No. 6403.

1. **Easement:** PAROL GRANT: STATUTE OF FRAUDS. A court of equity will give effect to a parol grant of an easement where there has been a valid consideration, where the grant is certain in its terms, and where there has been such a performance on the part of the grantee as would, in the case of a contract for the sale of the fee, take the case out of the statute of frauds.

2. ———: ———: DRAINAGE: DAMS: INJUNCTION. A and B, proprietors of adjoining lands, agreed that a dam should be constructed across a draw, where the draw crossed the division line, and that a ditch should be constructed along the division line to carry off the water. The object was to better drain the lands of both proprietors. Both took part in locating the dam and the ditch, and both contributed to their construction, but by mistake as to the location of the division line, the ditch did not follow it but lay mostly on the land of A, but partly on that of B. The dam and ditch were so maintained for seven years. *Held*, That an injunction should not be granted to restrain B from further maintaining the dam and ditch.

APPEAL from the district court of Jefferson county. Heard below before BABCOCK, J.

The facts are stated by the commissioner.

Letton & Hinshaw, for appellant:

A right of drainage through the lands of another is an

easement requiring for its enjoyment an interest in lands which cannot be conferred by parol. (2 Washburn, Real Property [3d ed.], p. 279; *Snowden v. Wilas*, 19 Ind., 13; *Wiseman v. Lucksinger*, 84 N. Y., 31; *Cronkhite v. Cronkhite*, 94 N. Y., 323; *Croasdale v. Lanigan*, 129 N. Y., 604; *Polson v. Ingram*, 22 S. Car., 541; *Morse v. Copeland*, 2 Gray [Mass.], 302.)

No license was ever granted to defendant to perform the acts complained of; but conceding that a parol license was granted as asserted, such license was revocable and has been revoked. (*Johnson v. Skillman*, 29 Minn., 95; *Mumford v. Whitney*, 15 Wend. [N. Y.], 381; *Selden v. Delaware & Hudson Canal Co.*, 29 N. Y., 639; *Wilson v. St. Paul, M. & M. R. Co.*, 41 Minn., 56; *Houston v. Laffee*, 46 N. H., 505; *Dodge v. McClintock*, 47 N. H., 386.)

John Heasty and *S. N. Lindley, contra:*

The statute of frauds has no application to a contract which has been fully performed. (Chitty, Contracts [6th Am. ed.], 68; *Stone v. Dennison*, 13 Pick. [Mass.], 1; *Shaw v. Woodcock*, 7 Barn. & Cr. [Eng.], 73; *Hess v. Fox*, 10 Wend. [N. Y.], 436.)

Where a contract for the sale of land, which when made was within the statute of frauds and might have been avoided thereby, has been fully executed, the statute of frauds is no defense. (*Talmadge v. East River Bank*, 26 N. Y., 105; 3 Wait, Actions and Defenses, 202.)

The license is a completed contract, and irrevocable by one of the parties. (*Vannest v. Fleming*, 18 Am. St. Rep. [Ia.], 387; *Lacy v. Arnett*, 33 Pa. St., 169; *Stephens v. Benson*, 19 Ind., 367; *Beatty v. Gregory*, 17 Ia., 109; *Wynn v. Garland*, 19 Ark., 23; *Russell v. Hubbard*, 59 Ill., 335; *Rawson v. Bell*, 46 Ga., 19; *City of San Francisco v. Canvan*, 42 Cal., 543; *Livingston v. McDonald*, 21 Ia., 163.)

IRVINE, C.

The appellant brought this action against the appellee to restrain the latter from maintaining a certain dam

and ditch, which he alleged diverted a water-course which would otherwise drain plaintiff's land and pass across the land of the defendant, in such manner as to throw the water back upon plaintiff's land to its damage. The defendant, by answer, pleaded that the dam and ditch had been constructed under an agreement between the parties to that effect, and had been their joint work; that plaintiff had wrongfully obstructed the ditch, and defendant therefore prayed for an injunction restraining the plaintiff from further obstructing it. The district court found for the defendant, denied the plaintiff the relief he sought, and also denied relief to the defendant, on the ground that there was no evidence of an intention on the part of plaintiff to further obstruct the ditch. The plaintiff appeals, and the defendant also, in his brief, asks that the decree be modified so as to grant him the relief prayed in his answer.

While the evidence on some points is in conflict, there is sufficient competent evidence tending to show the following state of facts: The plaintiff is the owner of the northwest quarter of a certain section. The defendant is the owner of the west half of the northeast quarter, and the plaintiff is the owner of the northeast quarter of the northeast quarter. The defendant's land, therefore, lies between two tracts belonging to the plaintiff. A draw, which for the purposes of this case we assume to be a natural water-course, takes its rise some place near plaintiff's south line, and crosses to defendant's land about 900 feet north of the center of the section. The northern part of the section is bottom land adjoining the Little Blue river. The water collected in this draw formerly passed across defendant's land and poured out upon the bottom land in the northeast quarter of the northeast quarter belonging to the plaintiff; and was a serious inconvenience to both parties. By parol agreement between the parties a dam was constructed at the point where the draw crossed the line between the northeast and northwest quarters; and a ditch was constructed

from the western end of the dam almost north so as to discharge the water at a point near this line, instead of upon the northeast quarter of the northeast quarter of the section. It seems that this has the effect of overflowing in wet seasons a portion of Gilmore's land in the northeast part of the northwest quarter, while it relieves the northeast quarter of the northeast quarter and Armstrong's farm of an excess of water. It also appears that it was the intention of the parties to construct the ditch along the line between the two quarter sections; and that it was staked off by both parties; and the work, both upon the dam and the ditch, was contributed to by both parties, but was chiefly done by the defendant. A survey, however, disclosed that their intention of keeping the ditch upon the division line was not carried out, but that the greater part of its course was by mistake laid upon the land of Gilmore. Assuming these facts as established by the findings of the court, notwithstanding the conflicting evidence, the question presented is whether or not the construction of the dam and ditch under the parol agreement referred to is a defense to the action; because, in the absence of such agreement, it is clear that the plaintiff would be entitled to relief against such a diversion of the waters. (*Davis v. Londgreen*, 8 Neb., 43; *Fremont, E. & M. V. R. Co. v. Marley*, 25 Neb., 138; *Jacobson v. Van Boening*, 48 Neb., 80, and cases there cited.)

The appellant contends that the agreement referred to, if proved, would establish an easement, and therefore must be proved either by grant, which in this state means by written deed, or by prescription, neither of which is pleaded or proved; and further, that if it be treated as a license, which may be established by parol, it was one which was revocable at the will of the licensor, and had been revoked. There are certain cases which support this contention, but they lose sight of two principles. The first is that a license upon sufficient consideration, carried into execution by the incurring of expense by the

licensee, is usually not revocable. The other is that in a court of equity part performance is frequently sufficient to take the case out of the statute of frauds. These principles have been frequently recognized in similar cases; and we refer especially to the elaborate and carefully considered opinion of Justice Hanly in *Wynn v. Garland*, 19 Ark., 23. Other cases recognizing the principle are *Snowden v. Wilas*, 19 Ind., 10; *Stephens v. Benson*, 19 Ind., 367; *Wiseman v. Lucksinger*, 84 N. Y., 31; *Lacy v. Arnett*, 33 Pa. St., 169; *Cronkhite v. Cronkhite*, 94 N. Y., 323; *Johnson v. Skillman*, 29 Minn., 95. As said by Judge Dillon in a similar case (*Beatty v. Gregory*, 17 Ia., 109), in meeting a similar argument as to the power to revoke such license, "It would be a shame and reproach to the law if this could be done." The cases we have cited, while differing as to the requirements in the way of part performance, which are necessary to take the case out of the statute of frauds, all recognize the doctrine that a parol grant of an easement is, in equity, out of the statute, when the circumstances are such that a contract for the conveyance of the fee would be taken out of it. In this case the evidence tends to show that the dam and ditch were constructed principally at defendant's expense, along defined and ascertained lines fixed by the parties, chiefly on plaintiff's land, but partly on defendant's and with the purpose of benefiting both parties. They had been maintained for about seven years before this suit was brought, and we think, under the circumstances, the contract is clearly one which a court of equity will enforce. Much more will it refuse affirmative relief to the party who seeks to disregard it.

As to the cross-appeal, we think the action of the district court was justified by the evidence. The finding is such that the decree refusing defendant an injunction would be no bar to an action for a similar purpose if plaintiff should in the future threaten his rights. The decree is, therefore, in all things

AFFIRMED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY v. L. W. HAGUE, EXECUTOR.

FILED APRIL 10, 1896. No. 6382.

1. **Railroad Companies:** INJURY TO PASSENGERS: RIGHT OF RECOVERY: PRESUMPTION OF NEGLIGENCE. Under the provisions of section 3, article 1, chapter 72, Compiled Statutes, it is only necessary to a right of recovery against a railroad company to show that the person injured was, at the time, being transported as a passenger over the defendant's line of railroad, and that the injury resulted from the management or operation of said railroad. A presumption thereupon arises that such management or operation was negligent, and it can be met only by showing that the injury arose from the criminal negligence of the party injured or that it was the result of the violation of some express rule or regulation of said railroad company actually brought to the notice of the party injured. *Missouri P. R. Co. v. Baier*, 37 Neb., 253, followed.

2. **Criminal Negligence:** DEFINITION. Criminal negligence, as the term is used in the statute, means such negligence as amounts to a flagrant and reckless disregard of one's own safety, and the willful indifference to the injury liable to follow. *Omaha & R. V. R. Co. v. Chollette*, 33 Neb., 143, followed.

3. ———: EVIDENCE. Evidence examined, and *held* to so clearly disclose criminal negligence on the part of the person injured as to permit no reasonable inference to the contrary.

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

J. L. McPheely, T. M. Marquett, J. W. Deweese, and *W. S. Morlan,* for plaintiff in error.

Stewart & Munger and *L. W. Hague, contra.*

IRVINE, C.

This was an action under Compiled Statutes, chapter 21, by Hague, as executor of Robert P. Stein, deceased, against the Chicago, Burlington & Quincy Railroad Company, on account of injuries causing the death of decedent. The plaintiff had a verdict and judgment for $4,000.

The sufficiency of the evidence to sustain the verdict is presented for review by a direct assignment of error, and also by an assignment based on the refusal of the court to give an instruction directing a verdict for the defendant. In support of these assignments the railroad company contends, first, that the evidence does not in any manner tend to charge it with negligence; and secondly, that the uncontradicted evidence discloses that Stein was guilty of contributory negligence.

The first argument is completely answered by the uncontradicted proof that Stein was a passenger lawfully riding on a train of the railroad company when the injury was inflicted. Chapter 72, article 1, section 3, Compiled Statutes, provides: "Every railroad company, as aforesaid, shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the persons injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice." The railroad company contends that the phrase "damages inflicted upon the person of passengers" indicates that in order to charge the railroad it must appear that the injury was the result of some negligent omission or commission on the part of the railroad. This construction is not tenable. In *Missouri P. R. Co. v. Baier*, 37 Neb., 235, it was held that under this statute it is necessary to prove only that the injured person was a passenger being transported over the line of railroad of the defendant when damages were inflicted upon the person of such passenger; that proof of such facts raises a presumption of negligence on the part of the railroad company which can be rebutted only by proof of negligence on the part of the passenger, or the violation by him of some express rule or regulation of the railroad actually brought to his notice. This construction has been followed in *Union P. R. Co. v. Porter*, 38 Neb., 226, in *St. Joseph & G. I. R. Co. v. Hedge*, 44 Neb., 448, and in other

cases, and it is undoubtedly correct. It was, therefore, unnecessary for the plaintiff to prove that Stein's death was caused by any specific negligence on the part of the railroad.

We preface a consideration of the evidence with relation to the second argument with the remark that the case being within the statute, it was insufficient for the railroad company merely to establish such a degree of negligence on the part of Stein as would prevent a recovery in ordinary cases of personal injuries. The statute requires as a defense that the person injured should have been guilty of "criminal negligence." In *Omaha & R. V. R. Co. v. Chollette*, 33 Neb., 143, this court approved an instruction to the effect that criminal negligence, as the term is used in the statute, means gross negligence,—such negligence as would amount to a flagrant and reckless disregard of one's own safety, and a willful indifference to the injury liable to follow. In later cases the foregoing has been accepted as a correct interpretation of the statute. It must also be borne in mind that it is the settled law of this state that even where the facts are undisputed, the question of negligence is for the jury, where different minds may reasonably draw different inferences from those facts. This rule has been many times announced and was applied in *Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb., 642, 39 Neb., 803, where the court examined the evidence in a similar case and held that it permitted no reasonable inference except that of criminal negligence on the part of the person injured. Therefore, the question presented to us is not whether to our minds the evidence here discloses that Stein was guilty of criminal negligence as above defined, but rather whether under the facts disclosed any other inference is reasonable; if so, we cannot disturb the verdict. With these principles in view we pass to an examination of the evidence.

Stein lived at Minden. He boarded a west-bound freight train carrying passengers, at Hartwell, the first

station east of Minden, for the purpose of returning home. The passengers, including Stein, were in the caboose at the rear end of the train. The train arrived at Minden about 2 A. M. The night was misty and dark. About 1,300 feet east of the station at Minden there is a bridge some twenty feet high. Five hundred feet east of the station there is a switch leading to a side track. As the train approached Minden it stopped at such a point that the caboose stood upon the bridge. It seems that this stop was made for the purpose of taking the side track to permit a passenger train to pass; and that it was made at this point because the front end of the train was then at the switch. The passenger train not being due for about ten minutes, the interval was availed of for the purpose of uncoupling the engine and running it on to the station for water. This manœuvre left the caboose upon the bridge for several minutes; and during that period, while there is no direct evidence on the subject, it is quite clear from inference that Stein passed out the rear door of the caboose and fell to the ground beneath the bridge, probably in an attempt to alight from the train. The railroad company claims that the evidence shows that Stein had received and had understood an express warning that the caboose was on the bridge, and that he attempted to alight in spite of that warning. The plaintiff contends that on this point there was a conflict of the evidence, which must be resolved in his favor in accordance with the verdict of the jury. On the argument it was practically conceded that the question of contributory negligence turned on this point. The plaintiff frankly conceded that if Stein attempted to alight in spite of an express warning as to the situation of the caboose and the danger of the attempt, negligence on his part would be established. On the other hand, it was practically conceded that his attempt to alight, in the absence of knowledge on his part of the situation, would not present so clear a case as to justify the withdrawal of the issue from the jury. The conclusion we reach is

such that we may assume, for the purposes of this case, that the latter position is correct. There is no doubt that the conductor gave a general warning to the passengers not to get off, stating as a reason that the caboose was on a bridge; and our effort is therefore to ascertain whether or not there was a conflict in the evidence as to whether Stein understood this warning. If the evidence was conflicting, the finding of the jury for the plaintiff must on this branch of the case be taken as conclusive. There were in the caboose when the train stopped the conductor and five passengers. At the east, the rear end, was what is termed the "cupola." The conductor had been sitting in this. From this cupola west extended seats on either side, on which the passengers were sitting or reclining. Mr. Martin, one of the passengers, was not a witness. We have the testimony of the other passengers and of the conductor. The conductor was called by the defendant. He testified that when the train stopped he saw that he was on a bridge. He descended from the cupola and told the passengers that they were at Minden, but not to get out, as they were on a high bridge. Then he stepped to the east door and Stein stepped up beside him. Then he went to the west door. He then returned and reascended to the cupola, when he heard a groan and descending found that Stein was missing. Then comes this testimony:

Q. What, if anything, did you say to the passengers or to Mr. Stein before you went up in the cupola?

A. I told them not to get off; we was on a bridge.

Q. What, if anything, did Mr. Stein say to you?

A. He says, "Thank you, thank you." He thanked me two or three times. I do not remember just the words that he used.

This rather obscure testimony is much cleared up by the cross-examination:

Q. What did you say you did the first thing when the train stopped?

A. I was up in the cupola when the train stopped and I got down.

Q. At once?

A. Yes, sir.

Q. Then what did you do?

A. I told the people that we were at Minden, and not to get off; that we were on a bridge, and to wait until we got up to the depot.

Q. Then where did you go?

A. I walked to the east door.

Q. Did you stop there a while?

A. Yes, sir; probably half a minute.

Q. What part of the car were you in when you told the passengers not to get off?

A. Well, about the center of the car.

Q. You were not at the west door of the car when you said that?

A. No, sir.

Q. You did not go out the west door of the car after you said that?

A. Yes, sir.

Q. Not immediately?

A. No, sir.

Q. You went back to the east door?

A. First.

Q. And afterwards went out of the west door?

A. Yes, sir.

Q. How long did you say you staid at the east door?

A. Half a minute.

* * * * * * *

Q. Mr. Stein spoke to you on the rear platform and thanked you—he thanked you some place for telling him that he was on a high bridge?

A. I say the east door. He thanked me first when I got down and thanked me a second time.

* * * * * * *

Mr. Kelley, one of the passengers, says that his attention was first called to Stein when he noticed him standing in the middle of the car acting as if he was about to get out; that the conductor then told him that they were

not at Minden yet, but were on a bridge and would pull in on a side track to let an express go by; that Mr. Stein thanked him two or three times. The conductor then started for the front end of the car. Kelley does not know what then became of Stein.

The foregoing is the testimony on which the railroad company relies. Following is the testimony adduced by plaintiff and which he claims presents a conflict:

Mr. Smith says he was on the north side of the caboose, near the middle. When the train stopped, the conductor, preparing to go out over the train, said: "Don't get off; the caboose is standing on a high bridge." He was in the act of going out to the west when he said this. The witness was asleep and the words of the conductor awakened him. He thinks Stein also sat on the north side of the car and east of him. On cross-examination he says that when the conductor spoke he was just a few steps from the witness, and he thinks nearer the west end of the car than the center.

Mr. Johnson was on the south side of the car near the cupola. Mr. Martin, he says, was on the same side. Johnson also had been asleep. When he awoke the conductor was a short distance west of where he was lying. As Johnson awoke, the conductor made the remark which the other witnesses testify to. He then went out the west door. Another feature of the testimony of this witness is significant. When he awoke there were only two men on the north side. These were Smith and Kelley. Within a minute and a half of the time the conductor left the west door, Johnson saw someone go out the east door. This must have been Stein, although Johnson could not identify him.

The writer, after a somewhat careful examination of the evidence, was at first of the opinion that there was something of a conflict between the testimony of the conductor and Kelley on the one side, and that of Johnson and Smith on the other; and this because Johnson and Smith both seem to insist that the conductor's words

were spoken as he was in the act of passing out the west door, a fact inconsistent with the evidence as to the conversation with Stein, which, from the conductor's testimony, would seem to have occurred near the east door. Serious doubts having arisen, the evidence has been carefully re-examined, and we are now of the opinion that the testimony offered by the plaintiff in nowise conflicts with that offered by the defendant, to the effect that Stein heard the conductor's warning and thanked him for the information. While the language of Smith especially would indicate that the conductor gave the warning as he was passing out of the front end of the car, and immediately before he went out, on cross-examination he says, not that the conductor was at or near the west door, but that he was nearer the west door than the center of the car; but he also says that he was only a few steps from Smith. Kelley was between Smith and the west end of the car, so that his testimony in this respect is not materially different from that of the conductor and the other passengers who say that the conductor was about in the center of the car when he spoke. Now Smith says that Stein had been on the north side of the car and east of Smith, which would place three men on the north bench. Smith does not seem to have observed Stein at all after this stop was made. Johnson says that when he awoke there were only two men on the north bench and these were Smith and Kelley. Therefore Stein must have arisen from the north bench before Smith and Johnson awoke, and he must have been standing toward the east end of the car, or the other witnesses, who observed the conductor a little west of them, would have seen Stein also. Moreover, Johnson saw Stein go out the east door. The probabilities are that this movement would have been noticed by some of the other passengers if he had not been already near the east door and away from his seat when the others were awakened. Another fact is that Johnson and Smith both testify that they were asleep when the train stopped; and Smith's testimony

is positive that it was the conductor's voice, and not the stopping of the train, which awakened him. This would seem to be true also of Johnson, because as he awakened he saw the conductor west of him. The conductor had then descended from the cupola and passed westward before Johnson awoke. It is not unnatural that these two witnesses should not have observed or recalled such an incident as Stein's thanking the conductor for the warning, when it must have occurred as they were awakening from sleep. Finally, neither Smith nor Johnson was asked whether the incident with Stein did occur. If their testimony could be taken as denying its occurrence, it would be merely by inference from their relating what did occur, omitting this incident. They testified in chief before the conductor had testified or Kelley's deposition was read. Their attention was in nowise called to this conversation, and the case is, in that respect, far different from what it would have been if their attention had been directly called to it, and they had denied its occurrence. We think, therefore, that the testimony, without contradiction, shows, not only that the conductor gave the warning, but that it was understood by Stein; and if so, we think his act in attempting to leave the car in the face of such warning was so clearly and so grossly negligent as to permit no other reasonable inference to be drawn.

REVERSED AND REMANDED.

WILLIAM C. LE HANE V. STATE OF NEBRASKA.

FILED APRIL 10, 1896. No. 8122.

1. **Judges: PREJUDICE: APPLICATION FOR CHANGE.** It is the right of a party to an action and of his counsel to apply to the judge before whom the case would naturally come on for hearing, for the purpose of having another judge try the case because of prejudice on the part of the first judge which would prevent an impartial trial.

2. **Contempt: RECUSATION.** The presenting of such an application, in respectful language and in a respectful manner, is not of itself a contempt of court.

3. **Application for Trial Before Another Judge: EVIDENCE: CONTEMPT.** Such an application must be supported by evidence, and the tender of such evidence is not a contempt of court when made in good faith for the purpose of proving such prejudice and not for the purpose of reflecting upon the judge's honor, integrity, or character.

4. ———: ———: ———. When such proof is of a documentary character, the presenting of the application, if it is so made in good faith, is not a contempt of court merely because the documents offered in evidence do reflect upon the character of the judge, and even though their original publication may have been contemptuous or libelous.

5. ———: ———: ———. In a summary proceeding, a person making such an application cannot be punished for contempt because of the character of the original publication of such documents, or of improper motives in making the application. Such a proceeding must be based on information as for constructive contempt.

6. ———: ———: ———. An attorney at law applied to a district judge for an order transferring a cause to another judge for trial, because of prejudice on the part of the first. He supported the application by proof that he had published a libel of and concerning the judge to whom the application was made, and attached a copy of the libelous publication to his affidavit. The application was itself made in respectful language and it did not appear that it was not presented in a respectful manner. *Held*, That the attorney could not be summarily convicted of contempt without an information and trial, because of matter contained in the libelous publication.

ERROR to the district court for Gage county. Tried below before BUSH, J.

The facts appear in the opinion.

L. M. Pemberton, E. O. Kretsinger, R. W. Sabin, S. D. Killen, and *W. S. Summers*, for plaintiff in error:

In absence of an information and an opportunity to defend, the finding and judgment against plaintiff in error are erroneous. The court erred in finding plaintiff in error guilty of contempt for filing an affidavit which only set forth facts having a tendency to show prejudice

on part of the judge. The judgment imposing a fine and imprisonment is not based upon findings of fact, and is therefore erroneous. (Code of Civil Procedure, secs. 61, 670; *In re Peyton*, 12 Kan., 398; *Barnes v. McMullins*, 78 Mo., 266; *Turner v. Commonwealth*, 2 Met. [Ky.], 619; *Moses v. Julian*, 45 N. H., 52; *City of Emporia v. Volmer*, 12 Kan., 622; *State v. Foley*, 65 Ia., 51; *Thomas v. People*, 14 Colo., 254; *Mullin v. People*, 24 Pac. Rep. [Colo.], 880; *Gandy v. State*, 13 Neb., 445; *Ludden v. State*, 31 Neb., 429; *Hawes v. State*, 46 Neb., 149; *O'Chander v. State*, 46 Neb., 10; *Zimmerman v. State*, 46 Neb., 13; *State v. Galloway*, 5 Cold. [Tenn.], 326; *Batchelder v. Moore*, 42 Cal., 412; *Skiff v. State*, 2 Ia., 550; *State v. Utley*, 13 Ia., 593; *Ex parte Walker*, 25 Ala., 88; *People v. Turner*, 1 Cal., 153; *In re Deaton*, 105 N. Car., 59; *Bergin v. Deering*, 24 N. Y. Sup., 35.)

A. S. Churchill, Attorney General, and *George A. Day, Deputy Attorney General,* for the state:

The acts complained of constitute a contempt of court. (*In re Woolley*, 11 Bush [Ky.], 95; *Percival v. State*, 45 Neb., 741; *Ex parte Terry*, 128 U. S., 289; *Middlebrook v. State*, 43 Conn., 257; *Bronson's Case*, 12 Johns. [N. Y.], 460; *Commonwealth v. Dandridge*, 2 Va. Cas., 408; *People v. Wilson*, 64 Ill., 195; *State v. District Court*, 62 N. W. Rep. [Minn.], 831.)

The offense was a direct contempt, committed in presence of the court, and punishable without an information. (*People v. Wilson*, 64 Ill., 195; *Commonwealth v. Morgan*, 107 Mass., 199; *People v. Stapleton*, 33 Pac. Rep. [Colo.], 167; *Harrison v. State*, 35 Ark., 458; *In re Prior*, 18 Kan., 72; *Ex parte Terry*, 128 U. S., 290; *People v. Stapleton*, 18 Colo., 568; *State v. Morrill*, 16 Ark., 403; *Meyers v. State*, 22 N. E. Rep. [O.], 43.)

IRVINE, C.

The plaintiff in error was in the district court of Gage county, Judge Bush presiding, adjudged to be guilty of

contempt and sentenced to pay a fine of $100 and to be imprisoned in the county jail in the cell thereof for the period of ten days. The record discloses that the plaintiff in error is a member of the bar of Gage county, and represented plaintiffs in error in three cases brought on error to the district court from the county court. The plaintiff in error in each case was a corporation. Le Hane filed objections to the hearing of said cases at the time when they had been set for hearing, for certain reasons not necessary to here set forth. These objections were by the court stricken from the files, whereupon Le Hane filed a motion for a change of venue, which was stricken from the files for the reason that it was unsupported by any evidence or by statement of any reasons therefor. Le Hane then filed a formal motion, supported by his own affidavit, asking for an order transferring the cases in question to Judge Babcock, the other judge of the first district at that time, or to some other district judge, on account of prejudice alleged to exist on the part of Judge Bush against Le Hane and his clients. On the presenting of this application, Judge Bush caused these proceedings to be instituted, and, without information filed, trial, or hearing, made the finding and imposed the sentence complained of.

The nature of the motion has been stated. It merely alleged prejudice in general terms. The affidavit of Le Hane in support of the motion was to the following effect, omitting portions which clearly could not have been considered by the district court as contemptuous or connected with contemptuous conduct: That Le Hane had frequently heard Judge Bush express himself against corporations as being opposed to the interests of the general public and the average individual; and that he believed Judge Bush to be prejudiced in favor of individuals and against corporations; that Le Hane had had cases in which he had represented corporations or non-residents as opposed to residents of Gage county, and believed that Judge Bush in trying said cases was prejudiced against

Le Hane's clients because they were corporations or non-residents, and that such prejudice controlled his rulings to the detriment of Le Hane's clients. Further the affidavit set forth that Le Hane for several months past had been chairman of the Gage county republican central committee, and that Judge Bush was a candidate for re-election as district judge on a ticket opposed to the republican ticket; that as chairman of such committee it was Le Hane's duty to and he did assist in publishing a supplement to the Beatrice *Times*, a copy of which is attached to the affidavit; that Judge Bush had been much exasperated by the publication of said supplement; that the evening that said supplement appeared Mr. Charles E. Bush, a son of Judge Bush, had made an assault upon the editor of said Beatrice *Times;* that later in the evening, Le Hane being in the office of the *Times* assisting in publishing said supplement, Judge Bush and his son were in the office of the newspaper and had full knowledge of Le Hane's connection with the supplement, and that at that time Mr. Charles Bush asked Le Hane where he expected to practice law after the 1st of January,—indicating by what he said that Le Hane would be unable to practice before Judge Bush. Le Hane further averred in the affidavit that he had at no time "attempted to curry favor with said Judge J. E. Bush by indicating to him in any way that he was not in sympathy with the statements contained in the *Times;*" and that on the evening in question Le Hane had some controversy with Judge Bush in regard to that publication, in which Judge Bush said that the statements contained therein were untrue, and Le Hane insisted that they were true. It is unnecessary to set forth any of the matter contained in the so-called "supplement" attached to the affidavit. It is sufficient to say that the publication was, in general character, not unlike similar emanations from newspapers of various party affiliations, which have become, immediately preceding elections, so frequent that the toleration of their existence creates a serious doubt as to whether political

managers are properly inspired with respect for sound public sentiment or the law of libel.

The finding on which the judgment of conviction was based is "that the said affidavit, together with the supplement of the Beatrice *Times*, which is attached and made a part of said affidavit, * * * is of itself, by reason of the contents therein contained, a contempt of this court, and it is a direct and uncalled for and corrupt charge, without any reason, against the court, * * * and that said affidavit and supplement * * * tends to corrupt the administration of justice, and that it was and is a reflection upon the honesty and integrity of the court, * * * and that the filing and presenting to the court by the defendant is a contempt of this court." From this it appears that the court proceeded upon the theory that the filing and presenting of the affidavit, with the exhibit attached, was, because of the matter contained therein, in itself contemptuous, and warranted summary proceedings. For acts contemptuous in their character, committed in the presence of the court, the court may inflict a summary punishment upon the offender without information filed or trial; but when the acts constituting a contempt are not committed in the presence of the court, an information under oath must be filed and the defendant is entitled to a trial of the facts therein alleged. (*Gandy v. State*, 13 Neb., 445; *Ludden v. State*, 31 Neb., 429; *Hawthorne v. State*, 45 Neb., 871.) It is a necessary consequence of this rule that where the act committed in the presence of the court is not of itself contemptuous, but its character as such can only appear through its connection with facts not so within the direct personal cognizance of the court, an information is equally necessary as where the whole act is committed outside the court's presence. (*Thomas v. People*, 14 Colo., 254.) A recurrence to this principle is necessary to a proper consideration of the case before us.

The filing of a motion, supported by relevant proof, for the purpose of having another judge hear the cases in

which Le Hane was engaged was not in and of itself a contemptuous or even an improper proceeding. It is true that we have no express provision of law whereby a district judge is disqualified from sitting in a case because of bias or prejudice with regard to one of the parties. Section 37, chapter 19, Compiled Statutes, provides that a judge is disqualified from acting as such except by mutual consent of the parties in any case wherein he is a party or interested, or where he is related to either party by consanguinity or affinity within the fourth degree, or where he has been of counsel for either party in the action or proceeding. It will be observed that the basis of these grounds of disqualification is the presumption of prejudice arising from the facts. Perhaps the section is exclusive in so far as it makes the disqualification in such cases absolute, though this we do not decide. Section 61 of the Code provides that when it shall be made to appear to the court that the judge is interested or has been of counsel in the case or subject-matter thereof, or is related to either of the parties, or is otherwise disqualified to sit, the court may, on application of either party, change the place of trial to some adjoining county. We do not refer to these sections as controlling the proceedings in the case before us, but merely for the purpose of showing that there is nothing unwarranted by our law in applications for a purpose similar to that here made. Aside from these provisions, there are other provisions of the statute allowing judges of different districts to hold court for one another; and in the first district, where this action arose, there are two judges. Where for any reason a case is of such a character that there would be any impropriety in the judge before whom it would in its orderly course go for trial, presiding at the trial thereof, there is certainly nothing improper, by a respectful application for that purpose, in calling the facts to the attention of the judge and requesting that another judge of that district, or of some other district, be called in to try the case. Certainly if a prejudice of such a character as to prevent

an impartial hearing exist against either party to a case, that would be sufficient reason for such an application; and a statement made to the court in a respectful manner and in respectful language of the reasons for such a course, could not sustain a conviction for contempt. (*Hawes v. State*, 46 Neb., 149.) As in the case last cited, there is nothing in this record to show anything improper or disrespectful in the manner in which this application was made.

As to the matter of the application, whether or not it was contemptuous depended upon circumstances. The gist of it was that the plaintiff in error believed Judge Bush prejudiced generally against corporations to such an extent that his judicial conduct was influenced thereby; and further, that the plaintiff in error had published of and concerning Judge Bush matter which for the purposes of this case we may assume to have been grossly libelous in its character, and that Judge Bush had exhibited a very natural resentment on account thereof. Now the publication itself, as we have assumed, may have been a libel for which the plaintiff in error, under proper proceedings, should be punished. It may even have been a contempt of court. This we do not decide, because, if so, so far as the matter of the so-called supplement was concerned, the offense lay in its original publication; and if it was a contempt, it was constructive and could be punished only by trial on information. Having published it, to display it in support of the affidavit for a change of venue was not a contempt, at least if the application was made in good faith and the showing was made in an honest attempt to support the application with necessary proof. If objectionable matter was incorporated into the showing, not merely for its ostensible purpose of showing prejudice on the part of the judge, but also to reflect upon his honor, integrity, and character, the case might be different; but the presumption is that such proceedings were in good faith. Extrinsic evidence would have been necessary to establish

such an improper motive; and therefore an information and trial would be necessary to justify a conviction. These views are directly supported by *Thomas v. People*, 14 Colo., 254, and *Mullin v. People*, 15 Colo., 437.

To summarize the foregoing, a party to an action, or counsel, may in good faith apply to a judge before whom a case would naturally come on for hearing to have another judge try the case, because of prejudice on the part of the first judge which would prevent an impartial trial. Such an application, when presented in respectful language and in a respectful manner, is not in itself a contempt of court. Such an application must be supported by proof, and the tendering of proof in support thereof is not a contempt of court when offered in good faith for the purpose of establishing the judge's prejudice, and not for the purpose of reflecting upon his honor, integrity, or character. When such proof is of a documentary character, the proceeding is not rendered contemptuous, when it is so conducted in good faith, merely because documents introduced do reflect upon the character of the judge, and even though their original publication might have been contemptuous or criminal; and finally, in a summary proceeding for contempt the court cannot take notice of such original publication or of such improper motive in making the application. To reach these matters the proceeding must be on information as for constructive contempt.

REVERSED AND DISMISSED.

WILLIAM BARR, APPELLANT, V. MILTON F. LAMASTER, APPELLEE.

FILED APRIL 21, 1896. No. 6455.

1. **Partition.** The right of partition, whether in equity or under the provisions of the Code, is confined to joint tenants and tenants in common of an estate in land. (*Hurste v. Hotaling*, 20 Neb., 178.)
2. **Tenants: EASEMENTS: CONSIDERATION.** Adjoining lot owners in a city may, by grant, impose mutual and corresponding restrictions and conditions upon the land owned by each, the mutuality of the covenant in such case being a sufficient consideration for the respective grants.
3. ———: ———. Mutual covenants imposing such rights or restrictions will be construed as the grant of reciprocal easements which may, when the remedy at law is insufficient, be enforced and protected by a court of equity.
4. ———: ———: **PARTITION.** The plaintiff and defendant, owners in severalty of adjoining lots, pursuant to a mutual agreement, erected thereon buildings corresponding in size, having the stairs, hallways, skylight, and heating apparatus in common. *Held*, A grant to each of an easement in so much of the stairs, halls, and skylight as is situated upon the lot of the other; that the easement of each in the property of the other is owned in severalty, and the mere existence of such cross-easements does not authorize the partition of said lots at the suit of either party.

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

The opinion contains a statement of the case.

Roscoe Pound, for appellant:

There can be no partition of property owned in severalty. (*Anderson School Township v. Milroy Lodge*, 130 Ind., 108; *Johnson v. Moser*, 72 Ia., 523; *Hurste v. Hotaling*, 20 Neb., 178.)

Lamaster granted the easement in that part of the hallway and skylight situated on his lot, freely and voluntarily, and for a valuable consideration, namely, the

grant to him of a cross-easement in that part of the hallway and skylight situated on Barr's lot. That easement is Barr's property. It is real property, an incorporeal hereditament, and neither Lamaster nor the court can take it from him. The easement is as much Barr's property as is the building on his lot. Not only is it impossible for Lamaster to build a wall and destroy the easement of Barr in his building, but he could not pull down his building during the existence of Barr's easement, and if he suffered his building to decay, Barr could enter and repair it to preserve his easement, though he might not be able to charge Lamaster with repairs. (2 Wasburn, Real Property, 79; *Loring v. Bacon*, 4 Mass., 575; *Pierce v. Dyer*, 109 Mass., 374.)

Lamaster cannot compel Barr to remodel his building after the latter has built in reliance upon the written agreement. Even a tenant in common may, by contract, estop himself from claiming partition. (*Eberts v. Fisher*, 54 Mich., 294; *Latshaw's Appeal*, 122 Pa. St., 142; *Baldwin v. Humphrey*, 44 N. Y., 609; *Soniat v. Supple*, 19 So. Rep. [La.], 128.)

Pound & Burr, also for appellant.

R. D. Stearns, J. H. Broady, E. H. Wooley, Cobb & Harvey, and *E. J. Murfin, contra*, cited: *Taylor v. Hampton*, 17 Am. Dec. [S. Car.], 710; *Swift v. Dewey*, 20 Neb., 107; *Buchanan v. Griggs*, 20 Neb., 165.

POST, C. J.

In the month of May, 1887, the plaintiff and defendant, being the owners in severalty of adjoining inside lots in the city of Lincoln, and being desirous of improving the same, mutually agreed to so build thereon as to have the entrance, hallways, and skylight in common, thus saving valuable space to each. It was further agreed that the two buildings should be heated as one, and by means of a single furnace. Pursuant to such agreement, three-

story brick buildings were erected on the lots mentioned, separated by a partition wall one story in height, the upper halls, or courts, being reached by a common stairway and receiving light and ventilation from a common skylight and each party paying one-half of the cost of the heating plant subsequently owned and used by them in common. This controversy was instituted by the plaintiff Barr in the month of January, 1892, who alleged in the petition filed by him, in addition to the facts above stated, that the defendant, taking advantage of the common hallway, was destroying the value of his (plaintiff's) property by maintaining a nuisance therein and by encouraging and permitting his (defendant's) tenants to harbor therein lewd and disreputable characters, etc. The prayer of the petition was for the appointment of a receiver to take charge of and lease the premises and to manage the heating apparatus therein, also for a decree permitting the plaintiff to erect a partition wall upon his own premises from the cellar to the roof of his said building and to set aside and cancel the written agreements, three in number, under and by virtue of which the said buildings were constructed. An answer was in due time filed, in which, after setting out one of the several agreements relating to the buildings in controversy, it is alleged that said agreement remains in full force and effect, and expressly denying the plaintiff's right to erect a wall as prayed by him and denying the jurisdiction of the court to award the relief sought. Accompanying the answer is a cross-petition in the following language: "The defendant consents to the erection of a brick wall between the said lot of this defendant and the said lot of said plaintiff, and that the heating fixtures, including the smoke stack, furnace, boiler, pipes, and utensils owned jointly by and between plaintiff and defendant be sold. Defendant insists that the court shall sell said joint property above mentioned and erect said brick wall on the true line between the said lots, through the medium of a receiver or master commissioner or the proper

officer appointed by the court for that purpose, and that such officer, by the aid of the county surveyor or other proper person, locate the true line between the said two lots prior to putting the said partition wall thereon, and defendant asks that said partition wall be built through the entire length and height of said building. Defendant therefore prays for the sale of said joint heating fixtures and the erection of said partition wall as aforesaid, and for judgment for damages as aforesaid, and for costs." The agreement to which reference is made in the answer is as follows:

"This agreement, made and entered into this 7th day of November, 1890, by and between William Barr and Milton F. Lamaster, witnesseth:

"That whereas Milton F. Lamaster is owner of lot six (6), block fifty-eight (58), city of Lincoln, and William Barr is the owner of lot five (5), block fifty-eight (58), city of Lincoln; and whereas said parties have erected a three-story building upon each of said lots; and whereas the stairway and hall of the second and third floors are joined for the purpose of use and occupancy, it is therefore stipulated and agreed that the said hall and stairway shall always, during the existence of said buildings, be used and occupied by said parties jointly and severally; and it is further stipulated and agreed that the title to each party's lot shall not in any way or manner be affected by the use of said joint occupancy by the said parties hereto, and that said halls and stairways, being located equally upon said lots, are to be used jointly by the said parties for the convenience of both of them, to the end that they may get a wider and more commodious hallway and stairway in said buildings, it being stipulated and agreed that the occupancy by one party of a portion of the other's lot shall not in any way affect or becloud the title of the other party; and it is further stipulated and agreed that said buildings shall be heated jointly and each of the parties to this agreement to pay one-half of the expense for the same,

whether the buildings or any portion of them are occupied or vacated; also, that each party is to pay one-half of all expense for repairs to heating apparatus. It is further stipulated that all the heating apparatus in the halls of said building and boiler, and all heating apparatus in the boiler room, is owned jointly by the parties hereto. It is further stipulated that the halls and stairway of said building shall be lighted jointly and that each of the parties to this agreement pay one-half of the expense of lighting the same. Neither of said parties shall have the right to remove or appropriate to his own use any of the heating or lighting apparatus belonging to said building or any other property or thing to said building belonging or owned in common by the parties to this agreement.

"It is further stipulated that this agreement shall be and remain in force for the period of twenty years, unless sooner canceled by the mutual consent of the parties hereto.

"Witness our hands, this 7th day of November, A. D. 1890. WM. BARR.

"M. F. LAMASTER.

"Witness: A. D. BURR."

In an amended and supplemental reply to the defendant's answer and cross-bill it is alleged that to erect a wall on the line between said buildings is wholly impracticable, since it would necessitate the remodeling of the interior of said building at great expense; that it would destroy the hallway, reduce the size of the rooms, and otherwise irreparably injure the plaintiff's property, to his damage, etc. Subsequently the plaintiff, by leave of court, dismissed his petition and the cause proceeded to final decree upon the defendant's cross-bill and reply thereto. The decree mentioned, and from which the plaintiff has prosecuted an appeal to this court, is as follows:

"And now on this 1st day of July, 1893, the court, being well and fully advised in the premises, doth find

from the testimony that the plaintiff William Barr is the owner of lot five (5) and the defendant Milton F. Lamaster is the owner of lot six (6), in block fifty-eight (58), in the city of Lincoln; that upon said lots a three-story brick building is erected, and that said building contains a joint stairway and hallway on the second and third stories, said stairway and hallways being one-half upon each of said lots; that each of the said parties own the building upon their respective lots, but that in the construction of said building it was intended to be lighted and heated jointly and that the boiler, pipes, and chimney, etc., were paid for by the plaintiff and defendant, jointly, and that the boiler was placed upon the lot line between the said lots, and that the other portion of the joint property was placed upon lot five, except heating pipes and radiators, which the court finds were placed equally in each of the said buildings.

"The court further finds that it is impossible for the plaintiff and defendant to continue the joint use of said stairway and hallways, and that a partition wall should be erected between said buildings the entire length of said buildings, the center of said wall to be on the true lot line between said lots, and that the erection of said wall shall be commenced on the 15th day of August, 1893, or as soon thereafter as possible.

"The court further finds that a partition wall has been erected between the said buildings extending to the second story thereof, except where the stairways are in front and the boiler now stands.

"It is therefore ordered, adjudged, and decreed that a partition wall be built through said stairway and extend through the hallways on the second and third stories, and from the basement in front for the entire length of the building, including the space where the boiler now stands, to the skylight in said building on the lot line, and that each of said parties pay for one-half of the expense of the same, and that James Tyler, architect, be, and is hereby, appointed special commissioner to erect

said wall, said special commissioner to advertise for bids for having said wall built for at least ten days in a newspaper of general circulation in Lincoln, and said work to be let to the lowest responsible bidder, with power reserved to reject any and all bids and re-advertise.

"It is therefore ordered, adjudged, and decreed that said James Tyler shall appraise the property owned in common by said plaintiff and defendant, and may call to his assistance, at his option, any persons acquainted with the value thereof and notify each of said parties of said appraisement, and if either of said parties desire to take said property at said appraisement, to pay James Tyler the one-half of said appraised value and shall have the privilege so to do, each party having first choice of taking joint property at appraised value situate on his lot, otherwise said James Tyler shall advertise and sell said property as upon execution, except the chimney, which shall be taken down and used in the erection of said partition wall if neither of said parties will pay the appraised value thereof, and except also the sewer which was erected on lot five (5) at the joint expense of the plaintiff and the defendant, which shall be taken at the appraised value of the same by the owner of lot five (5), William Barr, at his option, and also other permanent water pipes and other fixtures that are the joint property of said Barr and Lamaster and located upon said lot five (5), and said Lamaster shall take, at its appraised value, any such property located on lot six (6), at his option. Either party to have the right to appeal from the appraisement of property on his lot solely situated to the district court on giving bond in double the amount to prosecute the appeal and to pay the appraisement determined at the end of the litigation.

"It is further ordered, adjudged, and decreed that the said plaintiff William Barr and the said defendant Milton F. Lamaster each pay one-half of the costs of this action, the costs of the plaintiff being taxed at $—— and

the costs of the defendant being taxed at $——, and for all of which execution is hereby awarded," etc.

The proceeding, as submitted to the district court, appears to have been regarded as an equitable partition between the parties to the decree, of the property thereby affected, and in that light it must be viewed for the purpose of this appeal.

It is first argued by the appellant that the cross-bill failed to state a cause of action since there can be no partition of property owned in severalty. It may be stated as a general proposition that where the parties are neither joint tenants nor tenants in common, or copartners, but each owning distinct and several parts of the property described, an action for partition thereof will not lie. (Freeman, Cotenancy & Partition, secs. 87, 431 *et seq.*; *Russell v. Beasley*, 72 Ala., 190; *M'Connel v. Kibbe*, 43 Ill., 12; *Johnson v. Moser*, 72 Ia., 523; *Anderson School Township v. Milroy Lodge*, 130 Ind., 108.) The foregoing general rule is in strict accord with the provisions of our Code for the partition of real property, viz.: "When the object of the action is to effect the partition of real property among several joint owners, the petition must describe the property and the respective interests, and the estates of the several owners thereof, if known. All tenants in common or joint tenants of any estate in land may be compelled to make or suffer partition of such estate or estates in the manner hereinafter prescribed." (Code Civil Procedure, sec. 802.) In *Hurste v. Hotaling*, 20 Neb., 178, the court, by MAXWELL, C. J., after quoting the foregoing section, say: "The controlling principle in partition, therefore, without regard to the extent or quantity of the interest, is that the parties shall be joint tenants in common of an estate in land. * * * Only joint tenants or tenants in common of an estate in land, however, can institute the proceeding." In *Johnson v. Moser*, *supra*, the plaintiff had, by purchase at sheriff's sale, acquired title to the first and fourth stories of a certain brick building, also the cellar thereunder except

that portion used by the execution defendant for the storage of vegetables and provisions for the use of his family. It was held that an action for the partition of the cellar by metes and bounds could not be maintained, the parties being neither joint tenants nor tenants in common, but owners in severalty of distinct and separate portions thereof. In *Anderson School Township v. Milroy Lodge, supra*, the parties had erected a building under an agreement whereby the plaintiff was to own and control the ground and first story subject to the defendant's right of entrance to the third story to be owned and occupied by it. Elliott, C. J., speaking for the court, after holding that partition should be denied on the ground that it would destroy the defendant's right of access to its lodge room, adds: "But this is not the only reason why appellant is not entitled to partition, for there is this additional reason, namely, each party owns its part of the building in severalty. As each party owns its part of the property in severalty, it is legally impossible that partition can be awarded, for there is no community of interest." By virtue of the agreements under which the buildings were erected each party to this controversy has an easement in so much of the halls and skylight as is situated upon the lot of the other; and, in the language of plaintiff's counsel, such easements "are in no way inconsistent with entire several ownership of the two buildings, and the mere existence of cross-easements does not authorize the court to make partition, because each party owns his easement in the property of the other in severalty."

The defendant, it is shown, granted to the plaintiff the easement in the hallways and skylight voluntarily, and for a valuable consideration, viz., the grant to him of a cross-easement therein. Such easement is real property—an incorporeal hereditament, and as much a part of the plaintiff's estate as the building itself. The defendant is not merely prohibited from interfering with the access of the plaintiff and his tenants to the building

of the latter by means of the common hallways and their free enjoyment of the common skylight, but equity would interfere to prevent the tearing down or destroying by him of his own building during the existence of such easement (2 Story, Equity Jurisprudence [12th ed.], sec. 927; *Trustees of Columbia College v. Lynch*, 70 N. Y., 440; *Henry v. Koch*, 80 Ky., 391); and should he suffer his building to decay, the plaintiff would have the right to enter for the purpose of repairing, in order to preserve his easement therein. (2 Washburn, Real Property, p. 79*; Washburn, Easements & Servitude, 654; *Prescott v. White*, 21 Pick. [Mass.], 341; *McMillan v. Cronin*, 75 N. Y., 474.) But the decree is defended upon the ground that the plaintiff, by the petition to which reference has been made, and by which he sought permission to erect a partition wall on his own premises, abandoned whatever easement he enjoyed in the defendant's property and that he is accordingly now estopped to call in question the power of the court to grant the relief awarded. But to that contention there are two sufficient answers: First, the allegations of the petition, in so far as they relate to the rights of the parties under the agreements mentioned, are in substantial accord with the statements of the answer, and the alleged estoppel is predicated not upon any statement of fact but upon the pleader's conclusion from the facts stated by him; second, the plaintiff, for reasons not disclosed, but presumably because he was not entitled to the relief prayed, dismissed his petition previous to the hearing of the cause in the district court. A party will not, it is true, be permitted to shift his position during the trial by pleading one cause of action or defense and recovering upon another; but that doctrine can have no application to the case before us where the alleged variance consists in the mere assertion of legal proposition in a proceeding previously dismissed on the plaintiff's own motion. The decree is reversed and the action dismissed.

REVERSED.

BUILDING & LOAN ASSOCIATION OF DAKOTA V. JAMES M. CAMERON.

FILED APRIL 21, 1896. No. 6275.

1. **Pleading:** PRACTICE. Where a petition contains several causes of action the trial court should, on the motion of the defendant, require them to be separately stated and numbered. (*Schuyler Nat. Bank v. Bollong*, 24 Neb., 821.)

2. **Contracts:** FRAUD: RESCISSION: RETURN OF PROPERTY. One who seeks to rescind a contract on the ground of fraud must, within a reasonable time, offer to return the property or consideration therefor received by him, provided it be of any value.

3. ———: ———: ———: ———. Property, the loss of which would in any way result in disadvantage or inconvenience to the adverse party, must, in such case, be returned although it possesses no intrinsic or market value.

4. **Building and Loan Associations:** SALE OF STOCK: FRAUD: RESCISSION. The plaintiff, a subscriber to the stock of a foreign building and loan association, sued to recover money paid for such stock, alleging a rescission of his contract of subscription on account of the false and fraudulent representations of the defendant's agent. *Held*, In the absence of evidence to the contrary, that said stock is presumed to be of some value and its surrender is a condition precedent to the right to rescind.

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

Leese & Starling and *Stewart & Munger*, for plaintiff in error.

Field & Holmes, contra.

POST, C. J.

This was an action by the defendant in error, who claims on his own account, and as assignee of L. R. Kinnan, Olaf Matteson, John P. Yates, James M. Hamilton, William T. Marsh, W. T. Stretch, and F. P. Storey, against the plaintiff in error, the Building & Loan Asso-

ciation of Dakota, hereafter called the "association." In the petition it is, in substance, alleged that in the month of July, 1889, one Misner, a representative of the defendant below, visited the village of Ceresco, the home of the plaintiff therein and his assignors, and represented to said parties that the said defendant was prepared to make loans upon real estate at six per cent interest, without the payment of any commission, provided the proposed borrowers would subscribe for the stock of the defendant association and organize what is known as a local board in said village, and that all amounts paid for such stock would be credited upon the notes given by subscribers for money so borrowed; that, relying upon said promises and representations, the plaintiff and his assignors advanced to the said association the sum of $224 in payment for stock by them severally subscribed for, and for the sole purpose of procuring loans in accordance with the terms and conditions mentioned in their agreements with the said Misner, but that the said association refused to make the said loans, or any of them, upon the stipulated terms; and, on the contrary, imposed other and different conditions so unreasonable in character that they could not be complied with by said subscribers, or any of them; that said representations were false and made by said Misner for the purpose of cheating and defrauding the parties named, and that upon the refusal of the association to make such loans in accordance with the agreement of its agent, and upon learning of the fraud practiced upon them, the several subscribers elected to rescind their contracts of subscription and demanded a return of the money paid and advanced by them. There is a second cause of action for the sum of $214, as compensation earned by the plaintiff in procuring applications for loans under an agreement with the said Misner, acting in behalf of the defendant. There was a trial before the district court for Lancaster county, resulting in a verdict and judgment for the plaintiff therein in the sum of $224, which has been removed into this court for

review by means of the petition in error of the defendant association.

The first proposition to which we will give attention is that the several causes of action should have been separately stated and numbered. Objection upon that ground was made at every stage of the proceedings before the district court, including the answer, to which reference will hereafter be made. That the wrong, if any, to each of the parties named is a separate cause of action, for which each might have recovered in his own name, cannot be doubted. The Code of Civil Procedure, section 93, provides that "where the petition contains more than one cause of action, each shall be separately stated and numbered," and this provision applies to all wrongs for which separate actions will lie. (Maxwell, Code Pleading, p. 342; Kinkead, Code Pleading, p. 18; *Schuyler Nat. Bank v. Bollong*, 24 Neb., 821.) It follows that the district court should have required the plaintiff to separately state and number his causes of action, and its ruling in that behalf is error calling for a reversal of the judgment.

Another fatal objection to the judgment complained of is that the plaintiff below has at no time tendered or offered to return the stock issued to the several subscribers therefor. The first cause of action is not the failure to make the promised loans, nor the difference between the actual worth of the stock and its value as represented by Misner, the defendant's agent, but to recover the money paid, on the theory of a rescission of the contract. It has been often held, and may be regarded as elementary law, that one who seeks to rescind a contract on the ground of fraud must offer to return the property or consideration received therefor by him, provided it be of any value, within a reasonable time. (*Clark v. Tennant*, 5 Neb., 549; *Brown v. Waters*, 7 Neb., 424; *Babcock v. Purcupile*, 36 Neb., 417; *Gould v. Cayuga County Nat. Bank*, 86 N. Y., 75; *Graham v. Meyer*, 99 N. Y., 615.) In *Snow v. Alley*, 144 Mass., 555, it is said: "The right to rescind or avoid a contract proceeds upon the ground that a party

has been fraudulently betrayed into making it, and, having thus been induced to part with his own property, may resume possession of it on returning that which he has himself received, and thus placing the other party in the same position that he was before the contract was made. * * * Where property is entirely worthless, it need not indeed be returned; but so strictly has this rule been held that articles which are of the slightest value, or the loss of which may be a disadvantage in any way, must be returned even if they have no intrinsic or market value, as casks containing worthless lime, or sacks which have been on bales of wool;" citing *Conner v. Henderson*, 15 Mass., 319; *Morse v. Brackett*, 98 Mass., 205; *Bassett v. Brown*, 105 Mass., 551; *Estabrook v. Swett*, 116 Mass., 203. The stock issued to the plaintiff and his fellow-subscribers is personal property (2 Beach, Private Corporations, sec. 612), presumably of some value, and the surrender thereof, or an offer to surrender it to the defendant association, is an essential condition to the right to rescind. The judgment is therefore reversed and the cause remanded for further proceedings in the district court.

REVERSED.

ROBERT HANNA V. L. S. BUCKLEY.

FILED APRIL 21, 1896. NO. 6493.

1. **Sales:** TITLE OF THIRD PERSON: SURRENDER OF PROPERTY: DAMAGES: EVIDENCE. The buyer of personal property may peaceably surrender possession to a third person claimant thereof, but if he does so, in an action between him and the seller, in order to sustain a claim on his part for damages for the loss of the property, he must prove that the third person had a title thereto, valid and paramount to that acquired by the buyer from the seller.

2. ———: ———: ———: ———. Evidence *held* insufficient to sustain the verdict.

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

G. W. Fox, for plaintiff in error.

C. W. McNamar, contra.

HARRISON, J.

The plaintiff commenced this action in the district court of Dawson county, on a promissory note, to recover the sum of $49.50 and interest. Defendant admitted the execution and delivery of the note in suit, but alleged that it was for the purchase price of a horse sold to him by plaintiff, and that plaintiff represented that he possessed a good title to the horse and that it was not mortgaged or incumbered in any manner; that this was untrue, there being at the time of the sale to defendant, to plaintiff's knowledge, an existing mortgage on the horse; that subsequent to defendant's purchase the animal was taken from him by or for the party owner and holder of the mortgage lien, of which fact he immediately notified the plaintiff, who did not and had not taken any action in the premises, all of which damaged the defendant in the amount of the note and $25 in excess thereof. The plaintiff, in reply to the answer of defendant, admitted that the note evidenced the agreed price of a horse sold by him to defendant, but denied each and every other allegation of the answer. The issues were tried before the judge and a jury, and the result was a verdict for the defendant, and, after motion for new trial heard and overruled, judgment was rendered on the verdict. The plaintiff presents the case here by error proceedings.

One assignment of error was that the verdict was not sustained by sufficient evidence, and under this assignment it is claimed that it was for the defendant to show, before he should have been allowed any damages, not only that the horse had been taken from him, but that it

was done by or for some person having a superior title or right to the property. The evidence discloses that the plaintiff had a lien by mortgage on the horse and took possession of it, foreclosed the mortgage, and sold the horse, which, at such sale, was purchased by the defendant herein, and at the time of the sale the defendant inquired of plaintiff whether there was any other lien on the property existing other than the one to enforce which it was being sold, and was assured by plaintiff that there was not, and that in making the purchase the defendant relied on such statement as being true. We will quote a portion of the defendant's testimony:

Q. State what the note in this action was given for.

A. It was given for a horse that I bought of Mr. Robert Hanna.

Q. State if there was anything said by Mr. Robert Hanna in regard to the title of the horse.

A. The horse was sold on a mortgage and I asked Mr. Robert Hanna at the time of the sale if the horse was free and clear of all incumbrance, and he said it was.

Q. State if the horse was ever taken away from you; if so, state the circumstances.

A. After I had the horse about a month or six weeks the deputy sheriff of Custer county came with a mortgage on the horse and took the horse away from me; at least he went into the corral where the horse was and got the horse and took him away.

Q. State if you said anything to Mr. Hanna about it.

A. I notified Mr. Robert Hanna just as quick as I possibly could go to where he was.

Q. How long did it take you to go there?

A. The same day; not over an hour.

In regard to the mortgage or lien under which it was claimed the horse was taken from the possession of defendant, it was further testified that plaintiff had knowledge that some person claimed to hold a mortgage on the property, but there was no evidence in respect to its validity or date, whether it had been filed, or whether it

covered the horse sold by plaintiff to defendant. The mortgage was not proved or offered in evidence. To give the evidence in regard to the defendant being deprived of the horse its full effect, it may be said to establish that some person claiming to be deputy sheriff from Custer county went to the place where defendant had the horse and took it away, asserting his right to do so was derived from a lien created by a mortgage then in his possession, and that the defendant offered no resistance, but allowed the horse to be taken and immediately notified the plaintiff of what had occurred. This was not sufficient. It further devolved upon defendant to prove that the lien under which the horse was taken from his possession was a valid one and superior to the title which had been conveyed to him by plaintiff. This he did not do. Where, as in this case, personal property is sold and there is a warranty of the title by the vendor, if some third person claims the property, either as an owner or by virtue of a mortgage or other lien thereon, the buyer may peaceably surrender possession to such third person, and in an action against the buyer for the unpaid purchase price, or any portion thereof, by the seller, the damages sustained by the buyer by reason of the failure of the title to the property is good matter of defense, but to maintain such defense the party alleging it, under the circumstances hereinbefore detailed, must establish that the title to which he yielded was valid, superior, and paramount to the title acquired from the seller. By a voluntary surrender of the property to a third party the buyer, in an action between him and the seller, in order to sustain a claim for damages arising from the loss of the property, assumes the *onus* of showing that the third person had a valid and paramount title or claim to the property. (*McGiffin v. Baird*, 62 N. Y., 329; *Bordwell v. Collie*, 45 N. Y., 494; Benjamin, Sales, sec. 830, note; *Hall v. Aitkin*, 25 Neb., 360; *Cheney v. Straube*, 35 Neb., 521.) In the case at bar the defendant did not prove the validity of the title of the party to whom, or to whose agent, he volun-

tarily surrendered the possession of the horse, and the superiority of such title to that of the party of whom he purchased and of whom he was seeking to recover damages for the failure of the title, consequently the evidence was insufficient to sustain the verdict and the judgment and verdict must be set aside.

There are some other alleged errors argued in the brief, but as there must be a new trial, we do not deem a discussion of them necessary. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

WARREN A. HOWLAND V. JULIUS C. SHARP, ADMINISTRATOR.

FILED APRIL 21, 1896. No. 6544.

Replevin: VERDICT FOR DEFENDANT: EVIDENCE. The evidence examined, and *held* insufficient to support the verdict of the jury.

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

E. C. Page, for plaintiff in error.

Joel W. West, contra.

HARRISON, J.

This, an action of replevin, was commenced to obtain possession of certain personal property held by John F. Boyd, as sheriff of Douglas county, under the levy of a writ of attachment issued in an action by Herman Deiss against the Western Dry House & Construction Company. The suit in which the attachment was issued was brought July 22, 1890, and the writ was levied on the same day. Judgment was rendered in the last mentioned

cause, of date November 26, 1890, and the property was ordered sold, the proceeds to be applied on the judgment. In the case at bar the plaintiff did not furnish the bond required in replevin actions and the property was not delivered to him, the cause proceeding as one for damages. During the pendency of the suit the sheriff died and it was revived in favor of his administrator, Julius C. Sharp. There was a trial of the issues and a verdict and judgment in favor of the defendant. The plaintiff presents the case here for review by error proceedings.

The argument in the brief filed for plaintiff in error is first directed to the question raised by the assignment of error that the verdict is not sustained by sufficient evidence. The controversy in the cause was over "all brick in and about the brick kilns contained in the brick yard situated on Douglas county poor farm, said brick yards being bounded on the east by the Belt Line railway, on the south by Park street, and on the west by Ryan & Walsh's brick yard, the city of Omaha." A careful consideration and investigation of all the testimony presented in the record convinces us that the view of counsel that the verdict is not supported by the evidence is a correct one. It was shown that one George Hinchliff was, and had been for several months, the owner and in possession of the property in the brick yard, including these bricks in the kilns; that he sold the bricks to one William Redgwick during the month of May, 1890, and about two months prior to the levy of the attachment in favor of Diess; that on October 26, 1890, Redgwick sold the bricks to the plaintiff, neither of them having any knowledge, at the time of the sale, of the existence of the attachment, its issuance, or levy. There was an effort on behalf of the defendant to show that the bricks belonged to the Western Dry House & Construction Company, and it was shown that Hinchliff and Redgwick had at one time been members of, or interested in, the company, but there was no evidence which would sustain the verdict returned by the jury.

There are some other assignments of error in reference to the trial judge giving certain instructions, and also in refusing to give an instruction requested by plaintiff, and a further assignment in regard to the action of the judge in overruling objections to and admitting testimony, but we do not deem it necessary to discuss them now, as a determination of them is not necessary to a decision of the main question in the case, nor would it materially assist in another trial, should there be one. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

JONAS FRY V. GUSTAVE KAESSNER.

FILED APRIL 21, 1896. NO. 6492.

1. **Intoxicating Liquors:** LICENSE FEES: PAYMENT. There exists no authority in this state to grant license to sell intoxicating liquors without payment in full of the fee prescribed by law, and a license issued without such payment of the fee is invalid.
2. **Malicious Prosecution.** A person may institute a criminal prosecution when the apparent facts are sufficient to induce a discreet and prudent person to believe that the party to be accused has committed the crime with which he is to be charged, and although the accused may be adjudged innocent, the complainant will not be liable in an action for malicious prosecution.
3. **Arrest Without Warrant.** "Every sheriff, deputy sheriff, constable, marshal, or deputy marshal, watchman, or police officer shall arrest and detain any person found violating any law of this state, or any legal ordinance of any city or incorporated village, until a legal warrant can be obtained." (See Criminal Code, sec. 283.)
4. **Action to Recover Damages for Malicious Prosecution:** VERDICT FOR PLAINTIFF. Evidence examined, and *held* insufficient to support the verdict.

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

William S. Poppleton, for plaintiff in error.

James W. Carr, contra.

HARRISON, J.

In this action Gustave Kaessner sought to recover damages in the sum of $20,000 alleged to have been suffered by him as the consequences of his malicious prosecution by Jonas Fry, the marshal of the village of Elkhorn, and a number of others, who were made defendants, but as to whom no more specific reference need be made, as, during the trial, a nonsuit of plaintiff's cause of action was entered as to all of them. A trial of the issues was had, and the plaintiff in the district court was accorded a verdict and judgment against Jonas Fry in the sum of $350. Error proceedings have been prosecuted to this court on behalf of Fry.

During a portion of the year 1890 one August C. Uhtof was running a saloon, or was engaged in the business of selling liquor, in a building or room which belonged to Gustave Kaessner, situated in the village of Elkhorn. As authority to engage in such business, Uhtof had obtained from the village board what was issued and purported to be a license for his conducting such business one year, commencing January 20, 1890, and terminating January 20, 1891, for which he was to pay quarterly in advance. He had paid on January 19, 1890, $125, April 19, 1890, $125, and no more. Differences and trouble arose between Uhtof and the village board, probably more especially in regard to an occupation tax, which the board demanded of him and he refused. The board took counsel and were advised by an attorney, after he had been fully informed upon and fully investigated the subject, that Uhtof's supposed license to sell liquors was void, and that he was liable to arrest or that his place could be closed; that the latter was the proper and the better course to pursue, and the one favored by counsel.

Of all this Fry, the marshal, was informed by the board, or some of its members, and furthermore, he had an interview with the attorney, in which he was told the same, in substance. The board, at one of its meetings, made an order by which it purported to revoke Uhtof's license, and in the endeavor to have him stop selling liquors there were some suits at law commenced and prosecuted. But to come to the occurrences with which we are more particularly concerned, because from them sprung the case at bar. On the 7th of September, 1890, in the evening, Uhtof was arrested, and we will say here that at the date just alluded to his license was of no force or effect, was void, if it ever had been of any validity, for the reason, if none other, that he had never paid the license fee in full. He had not even paid the installments. The license is void if the fee is not paid in full. (*Zielke v. State*, 42 Neb., 750.) It appears that after Uhtof's arrest he was taken to the village jail and kept there during the night. Kaessner, whose place of business was near Uhtof's saloon, when on his way to business on the morning of the 18th of September, 1890, noticed that Uhtof's saloon was not open and went into some other room or rooms of the same building, where it appears Uhtof and his family lived, and questioned some members of the family in regard to the whereabouts of Uhtof. While he was there Uhtof came in, and during a conversation they then had, Uhtof asked Kaessner to tend bar during the day, as he, Uhtof, could not be there to do so, but must attend his trial or hearing to be held then. To this Kaessner assented and was given the key to the saloon, and opened it and prepared for customers, and it was in the testimony that it was not long until customers came and he served them, selling them some beer, Jonas Fry testified on this point as follows:

Q. You may state what the facts were, as known to you, regarding the actual selling of liquor by Gustave Kaessner here on the morning of his arrest, September 18.

A. He was.

Q. How do you know he was selling liquor?

A. I saw him.

The marshal, between 10 and 11 o'clock of that morning, went to the saloon, without a warrant, and after some resistance from Kaessner and also from Uhtof, who was then in the saloon, and after calling in help, finally arrested Kaessner as he stood behind the bar and took him to the jail and put him in and left him there until he (the officer) went to the residence of a justice of the peace, about three-quarters of a mile distant, and with the justice returned to the village. A complaint was prepared and verified by the marshal, charging Kaessner with selling intoxicating liquors without first having obtained a license authorizing such selling by him, and a warrant was issued. At about 1 o'clock in the afternoon Kaessner was taken before the justice of the peace, David Smith, to have his hearing and applied for a change of venue, and the case was transferred to be heard before Ed A. Shaw, a justice of the peace in the city of Omaha. Fry took Kaessner to Omaha and kept him in a hotel over night, and the next morning took him to the county jail and left him there, where he was kept something more than a day, when he furnished bond and was released. On October 15, 1890, Kaessner had a hearing and was discharged.

One proposition raised by the assignments of error, and mainly depended upon by counsel for plaintiff in error, is that the verdict was not sustained by sufficient evidence. The testimony discloses that Uhtof was conducting the saloon business in the village of Elkhorn without any valid license or authority so to do; also, that Kaessner, on the morning of the 18th of September, 1890, was "tending bar or running the saloon for Uhtof, and sold intoxicating liquor at that time and place, and further, that Jonas Fry was the marshal of the village; that he knew all the facts in regard to Uhtof's carrying on the business without legal right to do so; that Fry saw Kaessner in the saloon selling liquors on the morn-

ing the arrest was made, and he was also informed by other persons of sales of intoxicants made there by Kaessner on that morning." It has been said "Probable cause [for a criminal prosecution] is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing that the accused was guilty" of the offense named. (*Chicago, B. & Q. R. Co. v. Kriski*, 30 Neb., 215; *Diers v. Mallon*, 46 Neb., 121.) The prosecution may act upon appearances. If the apparent facts are such that a discreet and prudent person would be led to the belief that the accused had committed a crime, he will not be liable in this action, although it may turn out that the accused was innocent. Such a case must be presented as would induce a sober, sensible, and discreet person to act upon it. (Cooley, Torts, note 2, p. 182.) Unquestionably, on the facts and circumstances as developed in the testimony in this case with reference to the illegal sales of intoxicating liquors by Kaessner the morning of his arrest for such acts, Fry, having knowledge of them, was warranted in making the complaint and instituting the prosecution. (*Chicago, B. & Q. R. Co. v. Kriski, supra.*) In this connection the question of the arrest of Kaessner without a warrant and his detention until one could be obtained arises. It is provided in section 283 of the Criminal Code: "Every sheriff, deputy sheriff, constable, marshal or deputy marshal, watchman, or police officer shall arrest and detain any person found violating any law of this state or any legal ordinance of any city or incorporated village, until a legal warrant can be obtained." The officer in this case had been informed that Kaessner was selling liquor in Uhtof's saloon, for the running of which the officer knew there was no valid license. He saw the accused sell liquor that morning and in that place, and when he went to make the arrest Kaessner was behind the bar, with the liquors at hand and ready for business, although the evidence did not show that he was, just at the immediate instant of his arrest, dealing out or passing liquor over the

bar. Doubtless the officer was justified in making the arrest as he did without a warrant, and detaining Kaessner until it could be obtained, but the better and the proper course would have been to have filed a complaint and obtained a warrant before making the arrest. Kaessner was a business man and citizen of the village, and it was reasonable to suppose that he would not flee to avoid the arrest before a warrant could be issued. There was no necessity for his immediate apprehension. It was not claimed that he was committing a breach of the peace or creating disorder. "But when the offense committed is a misdemeanor only, then even an officer should not ordinarily arrest without a warrant, unless the offender is found by the officer himself in the act. The reason is obvious. In cases of misdemeanor there is not that probability that the offender will abscond, * * * as in cases of felony." (Warren, Ohio Criminal Law, 48.) The verdict rendered was not supported by the evidence, hence the judgment of the district court must be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

FULLER, SMITH & FULLER, APPELLANTS, V. J. M. PAULEY ET AL., APPELLEES.

FILED APRIL 21, 1896. No. 6521.

1. **Vendors' Liens: MECHANICS' LIENS: PRIORITIES.** A person who furnishes materials for use in the erection of buildings on land to one in possession thereof under contract of sale may acquire a mechanic's lien on the premises for any unpaid amount of the price of the materials, but if there is no agreement between the vendor and vendee of the land that the improvements shall be made, the lien can only attach to the interest of the vendee and will be subsequent and inferior to the lien of the vendor for any balance of the purchase price for the land remaining unpaid.

2. **Conflicting Evidence:** REVIEW. A finding of a trial court on a point in respect to which the evidence is conflicting, but which there is sufficient evidence to sustain, will not be disturbed.

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

Phelps & Sabin and *Wigton & Whitham*, for appellants.

Allen, Robinson & Reed and *W. E. Reed, contra.*

HARRISON, J.

It appears from the pleadings and evidence in this case that W. T. Searles had contracted to purchase from the state a section of what is generally known as "school land," or a "school section," and had such written evidences or contracts as are issued in transactions of this character between the state and a purchaser of school lands. On October 1, 1887, he sold the land to one J. M. Pauley, the price agreed upon being $12.50 per acre, or $8,000 for the entire tract. Pauley was to pay the amount then unpaid to the state, $4,320, and to pay in cash to Searles $3,680. Of this last mentioned sum he paid but $80. In December of the same year, or the following January, pursuant to an agreement then entered into by the parties, Pauley gave his notes, payable six months after date, to Searles for the unpaid balance of the amount of what was to have been the cash payment of the purchase consideration. After this arrangement Pauley took possession of the land and remained in possession until about November 1, 1888, and during the time just indicated erected a house and barn and made some other improvements thereon, and for the lumber and other materials used in so doing became indebted to the appellants, and also to S. K. Painter for some material. These bills not being paid, a lien was prepared and filed by each party, in accordance with the provisions of our statute in relation to mechanics' liens, and in this, an

action by appellants to enforce their lien, and in which S. K. Painter, the other lien-holder, and W. T. Searles were made defendants, a decree was rendered foreclosing the lien of appellants, also that of Painter, but subordinating them to the rights or demand of Searles, Pauley's vendor, for the unpaid balance of the purchase price of the land.

The question of the priority as between the liens for material and the vendor's claim for unpaid purchase money is the main one presented by the appeal. Collateral to this, but quite important in a final determination of the case, is the inquiry of whether Pauley, as a part consideration for the sale of the land to him by Searles, agreed to build the dwelling and barn, the furnishing of materials for which by the lien-holders, respectively, is the basis of the lien of appellants and of S. K. Painter. The evidence on this point in the case is conflicting, and the judge before whom it was tried made a general finding on the issues involved in favor of Searles, which comprised and included a finding that it was no part of the consideration for the purchase of the land that Pauley should build the house and barn, and this conclusion was amply supported by the evidence and will not be disturbed. The evidence discloses that Searles did not assign to Pauley the contracts of purchase issued by the state, but retained them in his possession, and intended to do so until the whole sum which he would realize from the transaction should be paid to him. With these conditions shown to exist,—a contract of sale from vendor to vendee, a portion of the purchase money unpaid, no part of the consideration between the vendor and vendee being an agreement by the vendee to erect the improvements, there being in fact no such an agreement, while the right to a lien for materials furnished to make the improvements might arise and attach,—it could, in any event, be only to the interest of the vendee in the property and as a lien subject and inferior to the right of the vendor for any unpaid balance of purchase money.

(*Mentzer v. Peters*, 33 Pac. Rep. [Wash.], 1078; *Thomas v. Ellison*, 22 S. W. Rep. [Ark.], 95; *Wilkins v. Litchfield*, 29 N. W. Rep. [Ia.], 447; *Smith v. Huckaby*, 23 S. W. Rep. [Tex.], 397; Phillips, Mechanics' Liens, sec. 72.) The judgment of the district court is

AFFIRMED.

SUSAN A. MCCLELLAND v. BENJAMIN F. SCROGGIN.

FILED APRIL 21, 1896. NO. 6505.

1. **Continuance:** ABSENT WITNESSES: AFFIDAVIT. A motion and the affidavit filed in support thereof which did not show that if a continuance was granted the evidence of the absent witness or his personal attendance could or would be obtained, *held* insufficient.
2. **Negligence:** ORDINARY CARE. The care which may be termed ordinary is such a degree of care as a prudent and reasonable man would exercise under the existing circumstances and conditions. Where the known risks are enhanced the degree of care should correspondingly increase.
3. **Steam-Threshers:** FIRES: NEGLIGENCE: EVIDENCE. The facts and circumstances in evidence in this case with reference to the management and operation of the engine of a steam-thresher, more particularly in respect to the manner of dumping or throwing ashes and cinders and live coals therefrom in the stack-yard near to the straw and stacks of grain, and the condition in which such ashes, cinders, and coals were there left, *held* to present questions of negligence which should have been submitted to the jury.

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

Cole & Brown and *S. W. Christy*, for plaintiff in error.

Searle & Coleman, contra.

HARRISON, J.

During the fall of 1891 the defendant in error was operating what is generally designated a "steam-thresher," and with it threshed grain for the plaintiff

in error, in such quantity that the bill for services amounted to $103. This the plaintiff in error did not pay and this suit was instituted for its recovery. Plaintiff in error, in her pleading, admitted the account both as to its origin and amount, but alleged that while engaged in threshing for her the defendant in error and his employes carelessly and negligently dumped or deposited ashes, cinders, and live coals from the engine, a part of the thresher, on the ground, so that fire was communicated to the loose straw on the premises around the thresher and to the unthreshed wheat and stacks, and there was thereby destroyed wheat belonging to plaintiff in error, of the value of $182.60, all of which affirmative matter pleaded by plaintiff in error the defendant in error denied. When the case was called for trial it was agreed that, as the issues were joined, the plaintiff in error was charged with the burden and should first produce proof. At the close of the testimony introduced in her behalf the judge instructed the jury as follows: "Defendant admits the claim of plaintiff for $103 and interest from November 20, 1891, and seeks to avoid the same by a claim for damages for negligence on the part of plaintiff in the handling and care of plaintiff's traction engine, whereby defendant's wheat and straw is alleged to have been burned. In the view of the court the defendant has failed to produce any sufficient evidence to substantiate this claim. You will therefore find your verdict in this cause for plaintiff in the amount of his claim." The jury followed the directions contained in the instruction and returned a verdict in favor of defendant in error for $112, for which amount, after motion for new trial heard and overruled, judgment was rendered.

Prior to the trial, an application was made on behalf of the plaintiff in error for a continuance of the case. This was in the usual form of a motion supported by affidavit. The application was made on March 7, 1893, and it was stated in the affidavit accompanying the motion that one Frank Ribley was a material witness for the af-

fiant; that he was, in the fore part of February, 1893, at Maryville, Kansas, where affiant wrote with reference to his being present to testify in the cause on behalf of affiant, and on or about February 13, 1893, received a letter from Frank Ribley stating that he would be back to Oak, Nuckolls county, Nebraska, about March, 1893, and not later than March 5, 1893, and it was further stated that the witness had not returned according to his promise to the knowledge of affiant, nor had she heard anything more from him; that, placing reliance in the promise of the witness to be present and give testimony, affiant had taken no steps to procure his deposition. The affidavit filed in support of the motion for a continuance failed to show that the evidence of the absent witness or his personal attendance would probably be obtained if a continuance was allowed, hence it was insufficient and the judge did not err in overruling the motion. (*Polin v. State*, 14 Neb., 540; *Barton v. McKay*, 36 Neb., 632.)

The only further question is, did the trial court err in directing a verdict in favor of defendant in error, or in effect deciding and stating that the plaintiff in error had not produced any sufficient testimony to show that defendant in error or his employes had been guilty of any negligence in operating the engine and thresher, which had been the cause of the fire, or was there sufficient evidence on this point to require its submission to the jury as a question of fact for their determination? The evidence disclosed that the threshing was commenced either Wednesday or Thursday of the week, and that it was in progress on Friday until about 5 o'clock P. M., and again on Saturday. During all the time the work was done in one stack-yard, in which there were, in all, eight stacks of grain. The position of the engine was changed two or three times, and at each place in the stack-yard or field where it had stood there had been dumped or thrown out ashes and cinders, and in at least two of them live coals. On Saturday the wind was quite strong and carried with it loose straw, which it strewed around and over the

stack-yard, and the prevalence of the high wind and the consequent inconvenience caused in the threshing with the engine and separator in the positions they occupied when work was begun in the morning, necessitated that they be changed during the day. Work was stopped on Saturday evening and the machine left in position for further operation. Between 10 and 11 o'clock on Saturday night the straw and some of the grain stacks were discovered to be burning. The steam-thresher is but one of the advanced types of implements used by man in his labors, and has been, with others of a similar kind, supplied by inventive genius and ingenuity as his wants have become apparent in the progress, development, and advancement of the people in the various pursuits of life, and its use is proper and necessary, and any new conditions or relations arising from the use of this or any of the new devices or implements are to be adjusted as they present themselves. In the use of the steam-thresher the agency of fire must be employed, and in the near presence of straw and other combustible material, but we have no doubt that the established rule that such care should be exercised in its use as a prudent and reasonable man would take under the existing circumstances should apply and govern. Where the known risks are enhanced, the degrees of care and diligence should increase correspondingly. (*City of Beatrice v. Reid*, 41 Neb., 214.) Viewed in the light of this rule, the evidence in the case at bar presented subject-matter for the examination and determination of the jury, and the judge should have submitted it to them, and it was therefore error to direct a verdict. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

JOHN A. FULLER ET AL. V. BROWNELL & COMPANY.

FILED APRIL 21, 1896. No. 6488.

1. **Replevin:** TITLE OF THIRD PERSON. It is a good defense to an action in replevin to prove title and right of possession in a third person.
2. **Chattel Mortgages:** FAILURE TO REGISTER. A chattel mortgage is good between the parties thereto, and all others, except creditors of the mortgagor or subsequent purchasers and mortgagees in good faith, though not filed as required by statute.
3. ———: CONSIDERATION. Extension of time for the payment of a debt is a sufficient consideration for a chattel mortgage given by the debtor to secure such indebtedness.
4. **Res Judicata:** PARTIES. A judgment is binding upon the parties thereto and their privies, as to the issues adjudicated.
5. **Landlord and Tenant:** REMOVAL OF TRADE-FIXTURES. In the absence of an agreement or consent of the landlord, a tenant cannot remove trade-fixtures after the expiration of the tenancy, or after the tenant has surrendered possession. (*Friedlander v. Ryder*, 30 Neb., 783.)
6. **Chattel Mortgages:** REMOVAL OF FIXTURES. A chattel mortgagee has no greater rights than a tenant to remove mortgaged fixtures after the tenant has quit possession. *Free v. Stuart*, 39 Neb., 220, followed.

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

B. N. Robertson, for plaintiffs in error.

Lane & Murdock, contra.

NORVAL, J.

This was an action of replevin by Brownell & Co. against John A. Fuller and Daniel W. Smith to obtain possession of a portable engine and boiler and the appliances connected therewith. The jury, under the direction of the trial judge, returned a verdict finding that the plaintiff, at the commencement of the action, had the right of possession in the property and a special interest

therein for the sum of $899.47, and assessing the damages for the unlawful detention at fifty cents against each defendant. From a judgment rendered on the verdict a joint petition in error is prosecuted by the defendants.

One J. A. Silver and the defendant Smith, from November, 1889, until July 12 of the following year, were partners engaged in running a planing mill at South Omaha, under the name and style of Silver & Smith. The building in which the business was conducted was leased from the defendant Fuller, the owner thereof. During the existence of said partnership, plaintiff sold to the firm the property in controversy, and notes of Silver & Smith were taken for part of the purchase price. These notes not having been paid at maturity, on June 20, 1890, the firm executed to plaintiff two renewal notes aggregating $899.45, due in ninety days, and also verbally promised to give a lien on the property in dispute as security for the payment of the indebtedness. Accordingly, on the 8th day of July, 1890, to secure said notes, J. A. Silver, for and on behalf of the partnership, and in the name of the firm, executed and delivered a written mortgage to the plaintiff upon said chattels. Shortly thereafter the firm of Silver & Smith was dissolved, the latter retiring therefrom and the former taking the assets and agreeing to pay the partnership liabilities. After the maturity of the mortgage, plaintiff instituted this action to recover the property, claiming a special interest therein under and by virtue of said mortgage. It was established upon the trial that the mortgage debt remained wholly unpaid, and that the conditions of the mortgage were broken. Plaintiff, therefore, showed such an interest as entitled it to the immediate possession of the property, as against the defendants, unless they proved a superior title in themselves, or one of them, or in a third person. The verdict is not contrary to the evidence, since defendants did not establish any one of these things upon the trial, although they offered evidence along that line, which was excluded by the trial judge.

Complaint is made of the rulings upon the admission and exclusion of testimony. It is insisted by the plaintiff that they cannot be reviewed, since the defendants joined in the motion for a new trial and the petition in error, and the judgment being right as to one, must be affirmed as to both. It has been repeatedly decided that a joint assignment of errors by two or more parties to a suit in a petition in error, or a motion for a new trial, will be denied as to all unless it can properly be sustained as to all joining therein. (*Long v. Clapp*, 15 Neb., 417; *Real v. Hollister*, 17 Neb., 661; *Boldt v. Budwig*, 19 Neb., 739; *Scott v. Chope*, 33 Neb., 41; *Gordon v. Little*, 41 Neb., 250; *Small v. Sandall*, 45 Neb., 306.) The defendants do not question the soundness of the doctrine stated, but they deny the application to this case. The plaintiff claims that defendant Smith has no standing in this court, and the judgment as to him was proper, because he never made the slightest endeavor to establish a fact tending to show that he was entitled to the possession of said machinery, as owner or otherwise. While it is true no attempt was made to prove title or right of possession in Smith, yet he did tender testimony to show right of property and right of possession in the chattels in controversy in his co-defendant, Fuller, at the commencement of the suit. Proving title and right of possession in a third person is a good defense to an action of replevin. Plaintiff must recover on the strength of his own title. (Cobbey, Replevin, secs. 784, 785; *Sutro v. Hoile*, 2 Neb., 186.) Any testimony tending to establish a defense for Fuller was available to Smith. The rulings upon the trial, therefore, affected both alike, and both properly joined in the assignments of error in this court, as well as in the court below.

Over the objections of the defendants, plaintiff introduced in evidence the chattel mortgage through and by which it claims the property replevied, and this ruling is assigned for error. It is urged that it was inadmissible, as it was not proven that the instrument was ever filed in

the office of the county clerk, or that Fuller had notice of the mortgage when he took possession. While the mortgage was put in evidence, the certificate of the county clerk indorsed thereon showing the filing of the paper was neither received nor offered in evidence. Without such filing the mortgage was good between the parties and to all others, except creditors of the mortgagor, or subsequent good faith purchasers and mortgagees. (Compiled Statutes, ch. 32, sec. 14; *Ransom v. Schmela*, 13 Neb., 76; *Sanford v. Munford*, 31 Neb., 792.) It is not shown that either of these defendants was a creditor, mortgagor, or purchaser of the property, hence proof that the mortgage was duly filed was unnecessary to its validity.

It is urged that no consideration was shown for the execution of the mortgage. This objection is not well taken. It is undisputed that the notes secured by the mortgage were renewals of others given by the firm of Silver & Smith for the purchase price of the property mortgaged, which notes had matured; that at the time such renewals were taken, plaintiff demanded that they be secured upon the machinery in question; that such security was promised, and that subsequently, in pursuance of this arrangement, the mortgage was executed. There was an extension of the time for the payment of the debt, which was a sufficient consideration for the mortgage. (*Westheimer v. Phillips*, 11 Neb., 62.)

The judgment, pleadings, and files in a case tried in the district court of Douglas county, entitled J. A. Fuller v. John A. Silver, which was an action in replevin to obtain the property involved in this case, were introduced in evidence and treated by the court as constituting an estoppel. While the issues in the two actions were the same, the parties were different, with the exception that Fuller was a party to both suits. Moreover, the question of title to the property was not passed upon or adjudicated in the case wherein the judgment rendered was introduced. The verdict of the jury in Fuller v. Silver is

as follows: "We, the jury, duly impaneled and sworn to try the issue joined between the parties, do find for said defendant, and assess his damages at ten dollars." And the judgment rendered thereon is as follows: "It is therefore considered, ordered, and adjudged by the court that the defendant, J. A. Silver, go hence without day and have and recover of and from J. A. Fuller, plaintiff herein, the sum of ten dollars, his damages as by the verdict of the jury assessed, and costs herein expended at —— dollars, and execution is awarded therefor." Section 191 of the Code of Civil Procedure provides: "In all cases, when the property has been delivered to the plaintiff, where the jury shall find upon issue joined for the defendant, they shall also find whether the defendant had the right of property or the right of possession only, at the commencement of the suit; and if they find either in his favor, they shall assess such damages as they think right and proper for the defendant, for which, with costs of suit, the court shall render judgment for the defendant." It was disclosed that in the suit of Fuller v. Silver the property had been taken under the writ, and possession thereof delivered to the plaintiff. Therefore, the jury, under the section quoted, should have found whether the right of property or the right of possession only was in the defendant; but this the jury failed to do. The verdict and judgment are silent as to the ownership of the property, and that question not having been adjudicated in that court, it is not conclusive upon that issue here. We do not say that the judgment and pleadings were inadmissible as evidence, in view of the fact that it was shown that Fuller put in evidence on the trial of that action the mortgage in controversy here. What we do hold is that the judgment was not an adjudication against Fuller upon his claim of title to the property.

There was no error in allowing to go in evidence the contract entered into between Silver containing the terms of the dissolution of the partnership theretofore existing between Silver & Smith. By this agreement,

Smith turned over the assets of the firm, including the property in dispute, to Silver, who agreed to pay the indebtedness of the firm. This contract was therefore competent evidence, as tending to show that Smith had parted with all his right and title in and to the mortgaged chattels.

The following offer of testimony made by the defendants was excluded from the jury, as being irrelevant, immaterial, and incompetent: "That on or about the 15th day of March, 1890, the said firm of Silver & Smith placed on the premises described in Exhibit C [which was a lease from Fuller for his building] an engine and boiler, and that said engine and boiler were placed there and became what is known in law as 'trade-fixtures;' that shortly after the expiration of the lease—Exhibit C—the defendant Fuller took possession of the premises, with the trade-fixtures, under an agreement with the witness Smith, and said possession was taken on or about the 5th day of July, 1890; that possession of the premises was surrendered to the defendant Fuller by the witness Smith not later than said date, under an agreement between Fuller and Smith that Fuller should take the premises, with the trade-fixtures thereon, and get out of it what rent was coming to him for the use of the premises." This testimony should not have been excluded, as it tended to show that the chattels in controversy had been pledged prior to date of the plaintiff's mortgage, by one of the members of the firm of Silver & Smith, to Fuller as security for a partnership indebtedness, and further, it tended to establish that the lease had been surrendered to Fuller, the landlord, before the mortgage was executed. If the engine and boiler were trade-fixtures and were left in Fuller's building at the time the tenancy ceased, neither the tenants nor their mortgagee had the right afterwards to remove them, in the absence of an agreement or consent of the landlord to do so. (*Friedlander v. Ryder*, 30 Neb., 783; *Free v. Stuart*, 39 Neb., 220.) The excluded testimony was competent as tending to establish a defense in

this action. Whether the machinery was placed in Fuller's building, or in a public alley joining his premises, was a question of fact for the jury to determine from the evidence.

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

REVERSED AND REMANDED.

JACOB LOUIS V. UNION PACIFIC RAILWAY COMPANY.

FILED APRIL 21, 1896. No. 6387.

Conflicting Evidence: REVIEW. A question of fact determined on conflicting evidence will not be reviewed.

ERROR from the district court of Platte county. Tried below before SULLIVAN, J.

McAllister & Cornelius, for plaintiff in error.

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

NORVAL, J.

This action was brought to recover damages against the defendant for the negligent destruction by fire from one of its engines of about one hundred and twenty tons of hay owned by the plaintiff. At the trial there was a verdict for the railroad company, and from an order refusing a new trial plaintiff prosecutes error to this court.

The only contention here is that the verdict is contrary to the evidence. No witness testified to having seen the fire in question start. Several persons were called and examined by plaintiff, who testified that they saw the fire spring up shortly after defendant's locomotive and cars had passed on its track, from which it might be in-

ferred that the fire originated from sparks or cinders thrown or cast out by said engine into the dry grass and combustible material near defendant's right of way. Evidence was also introduced by the plaintiff tending to show that the reputation of this particular engine for setting out fires was bad. On the other hand, evidence was adduced to show that this locomotive was equipped with the latest and most approved appliances for the prevention of the escape of sparks and cinders, and at the time was in good condition and was operated properly and in a skillful manner; furthermore, that no fire escaped from said engine on said date. There is also testimony tending to show that the fire originated too far from defendant's right of way to have been started by sparks or coals from the engine, had any escaped therefrom. There is ample evidence in the record to sustain a finding for either party, the testimony being so conflicting. The verdict not being unsupported by the evidence, the judgment is

AFFIRMED.

EMMA L. VAN ETTEN ET AL. V. HENRY A. KOSTERS.

FILED APRIL 21, 1896. No. 6489.

1. **Judgment on Pleadings.** It is error to render a judgment for the plaintiff upon the pleadings, without evidence, for a larger sum than is by the answer admitted to be due him.

2. ———: ANSWER. When a cause is decided by the court on the petition and answer, without evidence, such matters of defense in the answer as are well pleaded, in the absence of a reply, are to be considered as established.

3. **Action on Supersedeas Bond: SET-OFF.** In an action upon a supersedeas bond against the principal and sureties thereon, a legal claim due from the plaintiff to such principal may be pleaded as a set-off.

4. ———: FORM OF JUDGMENT. In such an action a judgment for the

plaintiff should, under section 511 of the Code of Civil Procedure, state which defendant is the principal debtor and which are sureties.

5. ———: ———. *Flannagan v. Cleveland*, 44 Neb., 58, distinguished.

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

David Van Etten, for plaintiffs in error.

F. A. Brogan, contra.

NORVAL, J.

The court below rendered a judgment on the 24th day of September, 1892, against the defendants below, upon the pleadings, without any proofs or evidence, for the sum of $359.40. The only question for determination is whether the plaintiff was entitled upon the pleadings to judgment for the amount rendered. The action is upon a supersedeas bond executed by Emma L. Van Etten, as principal, and the other defendants, as sureties, to stay the execution of a judgment obtained in the district court of Douglas county by Henry A. Kosters against said Van Etten during the pendency of proceedings in error instituted by her in this court for the purpose of reviewing said judgment. The petition alleges the recovery of a judgment by Kosters against Van Etten, on February 11, 1889, in the sum of $286.30 and costs; the execution and delivery of the supersedeas bond attached to and made a part of the pleading; the prosecution of a petition in error by said Van Etten to this court; the affirmance of the judgment, and subsequently the modification thereof by requiring the plaintiff, as a condition of affirmance, that he file a remittitur for the sum of $28 as of the date of the original judgment, which he accordingly did; the issuing and filing of the mandate of this court directing the district court to proceed with the enforcement of the original judgment to the extent of $258.30, with interest thereon from February 11, 1889, and the costs in the dis-

trict court, amounting to $35.73; the issuing of an execution upon said judgment, and the return thereof by the sheriff unsatisfied, and that said judgment is wholly unpaid.

It will be observed that the recovery in the case at bar is for the precise amount claimed in the petition, including the item of $35.73 for costs, and we take it that the judgment was thus rendered on the theory that the answer of the defendants presented no defense to plaintiff's cause of action. In this we think the court below erred. The defendants in their answer deny the amount of costs which the petition alleges was recovered against Mrs. Van Etten by the judgment superseded, and they also expressly aver that such costs did not exceed the sum of $20.93. There was no reply filed, and this averment as to costs in the answer must be taken as true. Upon this defense alone the judgment was excessive in the sum of $14.80. The answer pleaded as a set-off the amount of costs Mrs. Van Etten recovered against the plaintiff in this court on the proceedings to review the original judgment. The answer alleges that such costs were taxed and specified in the mandate issued to the district court at the sum of $24, when in fact Mrs. Van Etten was entitled to recover a much larger sum as taxable costs, to-wit, $59.05. The items of cost making this sum are set out in the answer, and it is averred that plaintiff is liable to Mrs. Van Etten therefor, excepting the sum of $6, which belongs to the clerk of this court as his costs in the case. The unpaid costs which Mrs. Van Etten recovered against the plaintiff, she is entitled to set off in this action. (*Raymond v. Green*, 12 Neb., 215.) There are some other averments in the answer, which need not be referred to, as they were insufficient to constitute a defense.

It is finally insisted that this judgment should be reversed, because it was rendered against all the defendants as principals, instead of against Mrs. Van Etten as principal and the others as sureties, in accordance with section 511 of the Code of Civil Procedure, which pro-

vides: "In all cases where judgment is rendered in any court of record within the state, upon any other instrument of writing, in which two or more persons are jointly and severally bound, and it shall be made to appear to the court, by parol or other testimony, that one or more of said persons so bound signed the same as surety or bail for his or their co-defendant, it shall be the duty of the clerk of said court, in recording the judgment thereon, to certify which of the defendants is principal debtor, and which are sureties or bail. And the clerk of the court aforesaid shall issue execution on such judgment, commanding the sheriff or other officer to cause the money to be made of the goods and chattels, lands and tenements, of the principal debtor, but for want of sufficient property of the principal debtor to make the same, that he cause the same to be made of the goods and chattels, lands and tenements, of the surety or bail. In all cases the property, both personal and real, of the principal debtor, within the jurisdiction of the court, shall be exhausted before any of the property of the surety or bail shall be taken in execution." The petition alleges, and the answer admits, that Emma L. Van Etten was the principal obligor, and that the remaining defendants signed the bond as sureties merely. Under the section quoted, the judgment should have specified who was the principal debtor and who were the sureties. This was of importance to the sureties, inasmuch as they were entitled to have the property of their principal within the jurisdiction of the court exhausted for the satisfaction of the joint judgment before theirs was seized. The case of *Flannagan v. Cleveland*, 44 Neb., 58, is distinguishable. That was an action on an appeal undertaking given in a justice court, and it was ruled that said section 511 was not applicable to a judgment rendered against the signers of such an undertaking, since, by the provision of section 1014 of the Code of Civil Procedure, the liability of such signers, as between themselves and the judgment creditor, is that of principal debtors. It is not necessary

for the party appealing from a judgment rendered by a justice of the peace to sign the appeal undertaking, while the plaintiff in error is by section 588 of the Code required to execute the supersedeas bond, with one or more sufficient sureties, in order to stay the execution of the judgment sought to be reviewed. On such a bond the plaintiff in error is the principal debtor and the other signers are his sureties. The decision cited above was based upon said section 1014, the provisions of which apply alone to sureties on appeal undertakings and cannot be extended to a case like this.

For the errors indicated the judgment must be reversed and the cause remanded, with directions to the district court to render judgment for plaintiff below in accordance with this opinion.

REVERSED.

MARY HAY V. MARY E. MILLER ET AL.

FILED APRIL 21, 1896. No. 6472.

1. **Trial**: SUBMISSION OF ISSUE: EXCEPTION: REVIEW. Error as to the form in which an issue of fact in an equity cause is submitted to the jury for decision is not available in this court, where no exception was taken thereto in the trial court and the judgment is not assailed on that ground in the petition in error.

2. **Witnesses**: OPINION AS TO SANITY. A non-professional witness may give his opinion as to sanity, as the result of his personal observation of the person whose sanity or mental condition is questioned, after first stating the facts which he observed.

3. **Insanity**: CANCELLATION OF CONVEYANCE. While mere imbecility or weakness of mind in a grantor will not, in the absence of fraud, avoid his deed, insanity will do so if of such a character as to induce the conveyance, although such insanity may not amount to a complete dethronement of reason and understanding upon all subjects. *Dewey v. Allgire*, 37 Neb., 6, followed.

4. **Sufficiency of Evidence**: REVIEW. Where there was sufficient evidence properly admitted to sustain the findings, they will not be disturbed.

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

The opinion contains a statement of the case.

Kennedy, Gilbert & Anderson, for plaintiff in error:

There is no proof of mental weakness or loss of understanding at the time of making the deed, immediately before, nor at any time thereafter, sufficient to nullify the deed. (*Mulloy v. Ingalls*, 4 Neb., 115; *Dewey v. Allgire*, 37 Neb., 6.)

Testimony that the grantor at times prior to the execution of the deed possessed hallucinations and vagaries on some particular subjects; that he was an old man; that he was distrustful of persons respecting his property; that he was erratic at times; and that he asked persons to count his money, was incompetent to prove insanity. (*Prentis v. Bates*, 50 N. W. Rep. [Mich.], 637; *Cauffman v. Long*, 82 Pa. St., 72; Buswell, Insanity, 174.)

The question submitted to the jury was erroneous. It represented a question of law instead of fact from which the conclusions of law could be drawn by the court. (*Todd v. Fenton*, 66 Ind., 25; *Kempsey v. McGinniss*, 21 Mich., 123; *Walker v. Walker*, 34 Ala., 469; *Gardner v. Lamback*, 47 Ga., 133; *Young v. Stevens*, 48 N. H., 133.)

The opinion of a witness not an expert as to the mental condition of another is not competent, save in the case of a subscribing witness to a will, though based on what the witness himself saw and heard. (*Holcomb v. Holcomb*, 95 N. Y., 316; *State v. Geddis*, 42 Ia., 268; *Van Horn v. Keenan*, 28 Ill., 445; *Townsend v. Pepperell*, 99 Mass., 40.)

Non-expert witnesses may be permitted to state whether or not the acts of which they have testified are rational or irrational; but it is always for the court to determine from the facts proved whether the person is sane or insane. (*Real v. People*, 42 N. Y., 282; *O'Brien v. People*, 36 N. Y., 276; *Hewlett v. Wood*, 55 N. Y., 635; *People v. San-*

ford, 43 Cal., 29; *State v. Klinger*, 46 Mo., 224; *Baughman v. Baughman*, 32 Kan., 538.)

The sufficiency of the evidence must be passed upon before submission to the jury, and it was error to submit the question to the jury, there being no evidence that incapacity existed at the time of the execution of the deed. (*Thompson v. Kyner*, 65 Pa. St., 368; *Smith v. First Nat. Bank in Westfield*, 99 Mass., 611; *Kinne v. Kinne*, 9 Conn., 102; *Brown v. Torrey*, 24 Barb. [N. Y.], 583.)

Cowin & McHugh and *G. W. Ambrose, contra.*

NORVAL, J.

On the 25th day of October, 1890, Joseph Manning made, executed, and delivered to Mary Hay a warranty deed purporting to convey to the latter, his niece, all his real estate and personal property and effects. His property consisted of a large number of lots in the city of Florence, in the county of Douglas, and about $1,200 in money. The consideration for making the conveyance, as expressed in the deed, is "that the said Mary Hay has undertaken and agrees to furnish to the grantor a good and comfortable home in her family, and suitable support during the remainder of his natural life, and at his death a suitable burial, all at her own expense." On the 6th day of November, twelve days after the delivery of the deed, Manning died intestate at the home of Mrs. Hay, in the county of Douglas, and subsequently William Colburn was duly appointed administrator *de bonis non* of the estate of said Manning, and qualified as such officer. On the 18th day of January, 1891, Mary E. Miller, Lizzie Rogerson, John Morrisey, and Maggie Stangelan, the grandchildren and sole heirs at law of the said Joseph Manning, deceased, the said administrator joining with them, brought this action in the court below against the said Mary Hay, and William Hay, her husband, to annul and cancel said deed, on the ground that the grantor at the date of the execution of the instrument was of un-

sound mind and incapable of understanding the nature or effect of his acts, and further, that the grantee obtained the conveyance through fraud and undue influence. No testimony was offered on the trial in support of the allegations in the petition of fraud and undue influence. On application of the plaintiffs, the court made an order directing that there be tried by a jury the issue whether or not the said Joseph Manning at the time of the making and executing of the deed in question was of unsound mind. Upon the hearing, the jury returned a verdict finding the said issue in favor of the plaintiffs, and that said Manning, by reason of his mental condition, was incapable of making a disposition of his property, or to realize the purport and effect of his acts when he executed the deed. A motion to set aside the verdict and for a new trial was overruled, and thereupon the remaining issues in the case presented by the pleadings were tried to the court. Findings in favor of the plaintiffs were made, and a decree was entered setting aside and canceling the deed, and adjudging the said grandchildren of the deceased to be the owners of the property described in the conveyance. Mrs. Hay has prosecuted a petition in error.

Complaint is made in the brief of the form in which the issue was submitted to the jury, counsel claiming that the question propounded to the jury represented a question of law instead of one of fact from which the conclusions of law could be drawn by the court. No exception was taken by the defendants to the form in which the question was submitted at the time the order was entered, nor was any objection made upon that ground either in the motion for a new trial or in the petition in error; hence, if there was any error in the decision, it is not available in this court. Moreover, the question was not objectionable on the ground on which it is assailed. It submitted to the jury for their determination purely an issue of fact, namely, whether Joseph Manning, on the 25th day of October, 1890, and at the time he executed

the deed, was of "unsound mind and mentally incapable of understanding the nature and effect of said instrument."

It is urged that the court committed error in permitting non-expert witnesses for the plaintiffs to state their opinions as to the mental condition of said Joseph Manning. Counsel take the ground that the opinion of a witness not an expert is not competent to prove the sanity or insanity of another, save and except in the case of a subscribing witness to a will. Whatever may be the rule elsewhere, it is not the law in this state. As early as *Schlencker v. State*, 9 Neb., 241, it was held that the opinion of a non-professional witness is competent evidence upon the sanity or mental condition of the accused, where such opinion is based upon facts within his personal knowledge and which he has previously detailed before the jury. The doctrine announced in the above case has been followed with approval in *Polin v. State*, 14 Neb., 540; *Burgo v. State*, 26 Neb., 643; *Shults v. State*, 37 Neb., 481; *Dewey v. Allgire*, 37 Neb., 6; *Pflueger v. State*, 46 Neb., 493. In the case at bar it was disclosed that each of the non-expert witnesses called by the plaintiffs was well acquainted with Manning in his lifetime, and had sufficient opportunities of observing him, and that the witness did not give his opinion as to Manning's sanity or mental condition until after he had stated the facts to the jury upon which such opinion was based. We discover no error in the admission of the non-expert testimony prejudicial to the rights of the party now complaining.

It is finally insisted that there is no proof of mental weakness of said Joseph Manning at the time of making the deed to Mrs. Hay, sufficient to invalidate the conveyance. Numerous witnesses were examined upon this branch of the case,—about an equal number on either side,—their testimony making nearly 450 type-written pages. We have read it all, and without entering upon a detailed consideration of the evidence, it may be said that introduced upon behalf of the defendants tends to show

that Manning, when he made the deed, was perfectly sane and was capable to contract with reference to his property. The testimony on the other side is fully as convincing, and tends to establish that Manning when he executed the deed was more than ninety years old; that for some time prior thereto, by reason of sickness and advanced age, he had been greatly enfeebled in mind and body, and when the conveyance was executed his mind was so impaired that he was wholly incapable of understanding the nature and effect of his acts. The testimony adduced, although conflicting, when tested by the rule laid down in *Dewey v. Allgire*, 37 Neb., 6, was ample to warrant a finding that Manning was incompetent to execute the deed. It was in that case said—we quote from the syllabus: "While mere imbecility or weakness of mind in a grantor will not, in the absence of fraud, avoid his deed, insanity will do so if of such a character as to induce the conveyance, although such insanity may not amount to a complete dethronement of reason and understanding upon all subjects." The facts bring the case at bar within the above decision.

The finding upon the controverted issue in the case being supported by sufficient competent evidence, the decree setting aside the deed must be

AFFIRMED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY V. ELIZABETH HYATT.

FILED APRIL 21, 1896. No. 6462.

1. **Bill of Exceptions**: ALLOWANCE BY CLERK. The clerk of the district court is clothed with the power to sign and allow a bill of exceptions, when it is made to appear by affidavit that the trial judge is absent from his district.

2. **Judicial Districts**: BOUNDARIES: EVIDENCE. This court will take

judicial notice of the boundaries of a judicial district and of the counties included therein.

3. **Criminal Negligence.** It is the settled law of this state that the term "criminal negligence," as employed in section 3, article 1, chapter 72, Compiled Statutes, means gross negligence, such as amounts to a reckless disregard of one's own safety and a willful indifference to the consequences liable to follow.

4. **Railroad Companies:** INJURY TO PASSENGER: CONTRIBUTORY NEGLIGENCE. Where a passenger knowingly jumps from a moving train under such circumstances as to render the act obviously and necessarily perilous and to show a willful disregard of the danger incurred thereby, it will prevent a recovery for the injuries received therefrom. (*Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb., 642.)

5. ———: ———: DAMAGES: EVIDENCE. *Held*, Under the facts proven in the case, that plaintiff was not guilty of such negligence in alighting from a moving train as to defeat a recovery for injuries received therefrom. *Union P. R. Co. v. Porter*, 38 Neb., 226, followed.

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

T. M. Marquett, J. A. Kilroy, and *J. W. Deweese*, for plaintiff in error.

C. M. Parker and *M. B. Reese, contra.*

NORVAL, J.

This was an action by Elizabeth Hyatt against the Chicago, Burlington & Quincy Railroad Company to recover damages for personal injuries received in alighting from defendant's train, in the town of Tamora, in Seward county. The jury found a verdict in favor of the plaintiff for $500, and also made and returned therewith the following special findings:

"1st. How long did the train stop at the station at Tamora at the time complained of?

"Answer. One and a half minutes.

"2d. How fast was the train running at the time the plaintiff got off the same?

"Answer. About five miles an hour.

"3d. Did the conductor or any of the trainmen direct or request her to get off at the time she did, and after the train was in motion?

"Answer. No.

"4th. Did the plaintiff know that the train was in motion and running at the time that she came out onto the platform to get off, and about what part of the car was she in when she knew that the train had started to run again?

"Answer. Yes; near the center of the car.

"V. A. MARKLE,
"*Foreman.*"

Judgment was rendered for the plaintiff upon the general verdict, from which the railroad company prosecutes error to this court.

We will first give attention to the objection of the plaintiff to the consideration of the bill of exceptions, which was not signed and allowed by the trial judge, but by the clerk of the district court. The authority of the latter to sign the bill is now disputed. It has been frequently held that power is not conferred upon the clerk of the district court to settle a bill of exceptions, unless the trial judge is dead or is prevented from doing so by reason of sickness or absence from his district, or the parties to the suit or their counsel have agreed upon the bill and attached thereto their written stipulation to that effect. (*Scott v. Spencer*, 42 Neb., 632; *Glass v. Zutavern*, 43 Neb., 334; *Nelson v. Johnson*, 44 Neb., 7; *Yenney v. Central City Bank*, 44 Neb., 402; *School District v. Cooper*, 44 Neb., 714; *Martin v. Fillmore County*, 44 Neb., 719; *Griggs v. Harmon*, 45 Neb., 21; *Rice v. Winters*, 45 Neb., 517; *Mattis v. Connolly*, 45 Neb., 628.) The draft of the proposed bill was returned by counsel for plaintiff without any amendments being suggested, but neither the parties nor their attorneys agreed in writing to the bill. It was not, however, invalid for that reason alone. The clerk has the authority to allow and sign a bill of excep-

tions, even though it has not been agreed to by the parties to the litigation, where the judge is dead, or he is prevented by sickness, or absence from the district, from settling the bill. It is claimed that there is no showing that any one of these events has occurred. In this counsel for plaintiff are mistaken. There is attached to the bill the affidavit of J. W. Deweese, one of the defendant's attorneys, setting forth "that the Hon. A. S. Tibbets, judge of said court before whom the said cause was tried, is absent from the said county of Lancaster, and has been ever since the said bill of exceptions was returned by plaintiff's attorneys, and that said defendant is prevented by reason of such absence from having the bill settled and signed by the said judge," and praying that the clerk of the court may settle and sign the bill as provided by statute. The clerk in his certificate allowing the bill recites that the defendant had filed an affidavit setting forth the absence of the trial judge from the county of Lancaster. A lawful excuse was shown for not having the trial judge settle the bill, and such an excuse as justified the clerk in signing it. While it is true the statute specifies the absence of the trial judge from the district as a ground for the clerk allowing a bill, yet the showing in this record, that Judge Tibbets was absent from Lancaster county, the county in which the cause was tried, was sufficient to confer authority upon the clerk to act. This court will take judicial notice of the boundaries of the several judicial districts in this state, and in that way we know that during the entire pendency of this cause in the court below, and since, Lancaster county alone comprised the third judicial district. Judge Tibbets being absent from such county, he was likewise absent from said district, and therefore the clerk possessed the power to settle, allow, and sign this bill of exceptions.

On the 23d day of March, 1892, the plaintiff, then forty-six years of age and by occupation a dressmaker, after purchasing a ticket from Lincoln to Tamora, boarded a passenger train on defendant's road in Lincoln, taking a

seat near the center of the second day coach. After the train started her ticket was surrendered to the conductor and a check was given her, which was taken up between Seward and Tamora, when she was informed by the brakeman, upon her inquiry, that the next stop was at Tamora, her place of destination, and the station was soon thereafter called by the brakeman. The train arrived at Tamora about 1:45 in the afternoon, making its usual stop, and the plaintiff immediately went out upon the platform of the car in which she was riding for the purpose of getting off, but did not then do so, claiming that the coach had not reached the station platform, and that the ground in front of her was covered with running water, which, together with the height of the car step above the ground, prevented her from alighting. Plaintiff thereupon, at the suggestion of a passenger, passed rapidly through the first day coach, the car immediately in front of the one in which she rode, in order that she might alight on the station platform. By the time she reached the center of the car she ascertained that the train was moving slowly towards the next station, yet she hurried through the car, and on reaching the front platform thereof she leaped or jumped off, spraining and bruising her right ankle and foot. It is on account of this injury that she sues for damages. The acts of negligence alleged in the petition are as follows: "That upon the arrival of said defendant's train at said town of Tamora, which was her destination, and of which fact she had been informed by the conductor of the train, the said defendant stopped the said train before it arrived at the depot or platform, which was more especially the case of the car occupied by plaintiff; that immediately upon the arrival of said train the said plaintiff hurriedly went to the platform to alight from said train or car, when she found the steps of said car were so high from the ground that it was impossible for her to alight from said steps; that the ground was so muddy that it was an impossible and unfit place for her to alight; that she then

hurriedly ran through the next car in front for the purpose of alighting upon the platform prepared for that purpose; that before she arrived at the front end of the car referred to, which was the next immediately in front of the one in which she was seated, the train had been started and was in such rapid motion that in getting off she was, by the motion of said car, thrown down and seriously injured. Plaintiff further alleges that at the time she alighted from said train, which was done in the shortest time possible after the train was stopped, there was neither brakeman, nor fireman, conductor, or trainman there to assist her; that there was no trainman on said platform nor anywhere in sight. Plaintiff alleges that by the gross carelessness of said defendant, by its wanton and gross negligence in stopping said train before the car in which she was riding, and was compelled to ride, on account of the crowded condition of the train, before its arrival at the platform, and in not allowing her sufficient time to alight from said train, and the gross negligence of said defendant in not having some of its assistants at their proper place to assist said plaintiff in alighting from said train, and by reason of the fall as above described, so received through the gross carelessness and negligence of said defendant, the plaintiff had her right foot and ankle seriously sprained, bruised, and injured." The answer denies all negligence of the defendant, and alleges that the injury was caused by plaintiff's own carelessness and negligence, and without any fault or want of care on the part of the company. The reply put in issue the averments of the answer. The testimony discloses that the train on which plaintiff took passage stopped at Tamora the usual length of time, sufficient to have allowed the plaintiff to alight had the car reached the station platform. There is a conflict in the evidence as to the exact place at which the train stopped. That introduced by plaintiff tended to show that the car in which she rode did not come up to the station platform, and that the lower step of the car was about two feet

from the ground, which was entirely covered by water. The verdict being for the plaintiff, we must accept as true, although there is in the record evidence sufficient to sustain a different finding upon this point, that the company was guilty of negligence in not providing a suitable and convenient place for plaintiff to alight at the place she first made the attempt.

It is argued that plaintiff cannot recover because the injury inflicted was attributable to her own gross or criminal negligence. (Compiled Statutes, ch. 72, art. 1, sec. 3.) This section makes every railroad company the insurer of the passenger's safety, "except in cases where the injury done arises from the criminal negligence of the person injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice." The term "criminal negligence," as above employed, has been defined to mean "gross negligence, such as amounts to reckless disregard of one's own safety, and a willful indifference to the consequences liable to follow." (*Omaha & R. V. R. Co. v. Chollette*, 33 Neb., 143; *Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb., 642; *Missouri P. R. Co. v. Baier*, 37 Neb., 236; *Chicago, B. & Q. R. Co. v. Hague*, 48 Neb., 97.) In the case at bar the evidence shows that the plaintiff received her injury by jumping from a train while in motion. It is not *per se* gross negligence for a passenger to alight from a moving train. (*Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb., 643.) Whether to do so constitutes such negligence as will defeat a recovery for injuries received is for the jury to determine, under proper instructions, from a consideration of all the evidence in the case. A passenger might be fully justified in jumping from a moving train to escape a threatened collision (*St. Joseph & G. I. R. Co. v. Hedge*, 44 Neb., 448), and there are other instances or circumstances, doubtless, where a passenger would not be held guilty of gross or criminal negligence should he alight from a car while in motion in order to escape apparent imminent danger.

So, too, a passenger, under certain circumstances, may be warranted in getting off a train while slowly passing a station. (*Union P. R. Co. v. Porter*, 38 Neb., 226.) As said before, whether a plaintiff in any case is guilty of criminal negligence is purely a question of fact for the jury; but the finding upon that, like every other issue of fact submitted to a jury, must be based upon the testimony, otherwise it will be disregarded by the reviewing court. This brings us to consider whether this plaintiff was guilty of such negligence as will prevent a recovery.

It is the duty of a railroad company to provide a suitable and safe platform or place for the exit of passengers at each station, and to stop its cars in proper position and for a sufficient time for them to alight with safety, and if it fails to do so it is guilty of negligence. According to plaintiff's testimony, the car in which she rode, and from which she first made the attempt to get off, stopped before it reached the station platform, and the ground at that place was inundated with water, hence she was not required to alight there. Discovering the situation, she hurried through to the next car in front, in order that she might reach the depot platform, and succeeded in getting off before the platform had been passed. The train was not moving rapidly at the time, not faster than a person can walk. The undisputed evidence shows that it had not yet moved the length of two cars after starting, and, therefore, it is not probable that the train in that distance could have acquired the speed found by the jury. A careful reading and analysis of the testimony fails to disclose that plaintiff, in alighting under the circumstances, was guilty of gross negligence. She was fully justified in believing that she ran no risk of injury in stepping off the car. The case is analogous in its principal facts to *Union P. R. Co. v. Porter*, 38 Neb., 226, where a judgment for Porter was affirmed. The case at bar is distinguishable from *Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb., 643. There the plaintiff jumped from a rapidly moving train under such circumstances as to render the

act obviously and necessarily perilous, and such as showed a flagrant and reckless disregard of the passenger's own safety, and a willful indifference to the injury liable to follow.

Complaint is made of the refusal of the court to give the six instructions requested by the company, but they are not argued in the brief. These requests, so far as applicable, are fully covered by the charge of the court.

JUDGMENT IS AFFIRMED.

WILLIAM FRANK, APPELLEE, V. LIBBIE C. SCOVILLE, APPELLANT, ET AL.

FILED APRIL 21, 1896. No. 6547.

1. **Review**: REFUSAL TO MAKE FINDING. No ground of complaint is presented by the refusal of the court to make a finding in support of which there had been offered no sufficient evidence.
2. **Treasurer's Deeds.** A county treasurer's tax deed under the present condition of the statutes of this state is invalid either with or without a seal.
3. **Void Tax Deeds**: HOLDERS OF TAX LIENS: REIMBURSEMENT: SUBROGATION. Where a tax deed of the treasurer is invalid because no seal of the treasurer is attached thereto or because the statute authorizes no such seal, the holder thereof is entitled to reimbursement for the amount of such taxes as he has paid upon his purchase, and subsequent taxes properly paid, and in respect thereto to be subrogated to the rights of the public as to the liens of such taxes and interest.

APPEAL from the district court of Hall county. Heard below before THOMPSON, J.

Abbott & Caldwell, for appellant.

R. C. Glanville, contra.

RYAN, C.

In his petition filed in the district court of Hall county the plaintiff alleged that by purchase from two heirs of Leonard Burge, deceased, he had become and still continued to be the owner of an undivided two-thirds of certain lots which he described. Libbie C. Scoville, it was alleged, was the holder of a certain invalid tax deed, which created a cloud upon plaintiff's title, and it was prayed that the amount necessary to enable plaintiff to redeem should be ascertained by the court, that plaintiff might be adjudged entitled to redeem therefrom, and that, upon such redemption being made, plaintiff's title might be quieted. By her answer, Libbie C. Scoville admitted that there had been made to her, by the treasurer of Hall county, a tax deed which, as she alleged, was valid and gave her full title to the lots described in plaintiff's petition. This defendant in her answer also alleged that, as the widow of Leonard Burge, she was entitled to dower in the lots in controversy, which dower she prayed might be set apart for her. She furthermore answered that she had paid the taxes from the year 1874 to 1890, inclusive, which, with interest thereon, amounted to $225, and had on July 12, 1876, paid off a mortgage made on said lots by Leonard Burge and herself, for which purpose she had been required to pay, and had paid, on or about December 24, 1884, the sum of $144, which sum, with interest to January 1, 1892, amounting to $244.80, with the aforesaid taxes, this defendant prayed to be decreed a lien on the aforesaid lots paramount to every other claim. These averments were denied in the reply, and the statute of limitations was pleaded as to payment of the mortgage described. There was a decree which allowed Libbie C. Scoville $250.61 for and on account of taxes, and created this the first lien upon the lots in controversy.

In the brief submitted on behalf of the appellant, Mrs. Scoville, there was a complaint that the court allowed

nothing on account of the mortgage. There was no sufficient proof pointed out by the brief of appellant as to why such mortgage should have been reinstated in favor of Mrs. Scoville, and we have been unable to find any evidence that she paid it, for the release was silent as to who had paid, and upon this point there was no other evidence. So, too, as to the alleged dower interest of Mrs. Scoville, there was proof that at the time of the death of Leonard Burge she was his wife, while there was some testimony tending to show that he had obtained a divorce from her.

After this cause had been tried, and on April 15, 1893, contemporaneously with the entry of the decree, the attorneys for Mrs. Scoville notified the court and desired that she might have leave to file an amended and supplemental answer, thereafter to be prepared. This was filed June 19, 1893, although the record shows that the motion for leave to file the same was denied on that day, except for the correction of a mistake disclosed by the decree itself. The matter which the court refused to allow to be pleaded was the payment of an alleged sidewalk tax of $41.55, made during the pendency of the action. There had been introduced no evidence requiring this proposed amendment of the answer, and it was no abuse of discretion for the court to refuse this new cause of action to be stated more than two months after the judgment which settled all matters as to which issue had been joined, and which had not by the decree itself been expressly excepted from its operation.

In the discussion of the only question presented, to-wit, the rights of Mrs. Scoville with respect to the taxes paid by her, there was, between counsel, charges and countercharges of improper conduct with reference to the tax deed made to Mrs. Scoville. Whether or not there was on it a seal, originally, and whether or not there was sharp practice in obtaining an inspection of such deed to obtain evidence of the non-existence of such seal, and whether or not a seal was surreptitiously placed upon

the deed after this action was begun, are matters of no real importance in view of the holding of this court in *Thomsen v. Dickey*, 42 Neb., 314, and *Larson v. Dickey*, 39 Neb., 471, for, under the rule announced in those cases, a seal in any event could effect nothing. There is no claim that the court erred in the amount of the assessment on account of taxes paid, and it was proper to establish this as a lien upon the interest of plaintiff in the aforesaid lots, and Mrs. Scoville was entitled to nothing more than was by the decree awarded her. (See *Adams v. Osgood*, 42 Neb., 450.) The judgment of the district court is therefore

AFFIRMED.

HARRISON, J., not sitting.

JOHN LEDWICH, APPELLEE, V. WILLIAM J. CONNELL, APPELLANT.

FILED APRIL 21, 1896. No. 6516.

Tax Liens: FORECLOSURE: VALIDITY OF TAX SALE. While the holder of a certificate of purchase at a tax sale may foreclose his lien when the tax deed issued pursuant thereto is invalid by reason of an irregularity in the proceedings leading up to such sale, this rule cannot be invoked, when, in his petition, such purchaser alleges that the treasurer made the sale to him without authority of law and without any jurisdiction in the premises.

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

Connell & Ives, for appellant.

A. S. Churchill, contra.

RYAN, C.

On the 23d day of April, 1892, the appellee began this action in the district court of Douglas county for the

foreclosure of an alleged tax lien which he held, as he averred, upon certain real property owned by the appellant, and a decree was afterward entered as prayed. There was in the answer a denial of the averments of the petition that the real property above referred to was subject to taxation for the year 1887; that taxes were duly and regularly assessed for said year; that said taxes became due and payable from the defendant without demand therefor; that on May 1, 1888, the said taxes had not, and never since have been, paid, but are still delinquent, and that by reason of the aforesaid assessment and taxation the said taxes became and continued to be a lien upon said land. By the answer it was admitted that of the allegations of the petition the truth was stated in such as alleged that the taxes being delinquent and unpaid, the same were offered for sale on the 1st day of November, 1888, and not sold for want of bidders, and that on January 26, 1889, the same were sold at private sale for the delinquent taxes for the year 1887 to the appellee, who paid to the treasurer of Douglas county the sum of $446.84, which said sum was received by said county treasurer for said tax so assessed as aforesaid upon said land; that said treasurer has ever since retained said sum and passed the same to the various accounts of the state and county, and that upon receipt of said money said county treasurer, on January 26, 1889, issued to the appellee a certificate of sale therefor. It was alleged in the answer, and not denied, that upon this certificate of sale no notice had ever been served or attempted to be served of the purchase of the real property in the certificate described, or of any other matter required by section 123 of chapter 77, Compiled Statutes. The answer admitted the correctness of the following allegations of the petition:

"6. That in making said sale the said treasurer of Douglas county, Nebraska, made the same without authority of law and without jurisdiction in the premises; that by mistake and neglect of said Henry Bolln, who

was then treasurer of said county of Douglas, in said state of Nebraska, said land was not advertised for sale as required by law; that in fact no advertisement whatever was made of the sale of said land for delinquent taxes, and that the sale was void by reason thereof."

It was alleged in the petition that by reason of the mistake on the part of the county treasurer and his neglect to advertise the land for delinquent taxes, the certificate issued was at the time the petition was filed, and at all times had been, illegal and void; but this admission was coupled with a denial that such certificate was illegal and void solely by reason of the mistake of the treasurer or his neglect to properly advertise the land for sale for delinquent taxes, and in this connection it was by the answer asserted that the certificate was void for good and sufficient reasons other than those enumerated in the petition. By the petition there was asserted the right of the plaintiff to be subrogated to the rights of the county with reference to the taxes paid to its treasurer upon the purchase of the land bought by the plaintiff, and this right was denied by the defendant in his answer. From this analysis of the pleadings we find that the parties have left but few disputed questions, and to these we shall now direct our attention.

In that portion of the sixth paragraph of the petition above quoted there is the broad averment that "in making said sale the said treasurer made the same without authority of law and without any jurisdiction in the premises." While other similar averments in the petition are qualified by the statement of some reason why the sale was without authority of law and without jurisdiction, in this particular instance there was no qualification whatever. This general statement being admitted by the answer, we are bound to assume that the sale was without authority of law and without any jurisdiction. On the trial the certificate of purchase was introduced in evidence, notwithstanding the admitted fact that the sale was without authority of law and without any juris-

diction. This certificate was evidence proper for consideration with reference to a sale having been made if, under the issues, that question had been open for determination. But there was no such issue. The plaintiff had alleged, and the defendant had admitted, that the sale made by the treasurer was without authority of law and without any jurisdiction. For all purposes this was an established fact, and the certificate could not in the least unsettle it. For this reason the certificate cannot be considered for the purpose of determining whether or not, in fact, there was a sale to the appellee. If the certificate cannot be considered for the reason stated, it is manifest that evidence, *aliunde*, of the same fact is incompetent, and hence we are left without proof of any kind that plaintiff purchased the land with reference to which this controversy exists. The appellee, in the district court, predicated his right to a foreclosure of the lien of the county upon the principle that, by the sale, he had been subrogated to the rights of such county, and that, therefore, in equity, without the sanction of a statute, he was entitled to the relief prayed. The insuperable objection to this proposition is that by his own averments the appellee showed that the sale was without authority of law and without any jurisdiction. This being true, the sale was void, absolutely, and not merely invalid by reason of defective compliance with some requirements of the statute or a failure to perform some precedent condition as was the case in *Pettit v. Black*, 8 Neb., 52; *Wilhelm v. Russell*, 8 Neb., 120; *O'Donohue v. Hendrix*, 13 Neb., 257; *Merriam v. Hemple*, 17 Neb., 345; *Otoe County v. Matthews*, 18 Neb., 466; *Merriam v. Dovey*, 25 Neb., 618; *Stegeman v. Faulkner*, 42 Neb., 53; *Adams v. Osgood*, 42 Neb., 450. In each of these cases cited there was a mere irregularity in the exercise of the authority and in the jurisdiction to sell conferred by law; there was not, as in this case, an entire lack of both authority and jurisdiction. What might be the rights of appellee arising from subrogation cannot in this action be determined, for the

county treasurer having conducted the sale, upon which the rights of the appellee depend, "without authority of law and without any jurisdiction," there was no subrogation possible.

It has already been shown that the certificate of purchase, under the admitted averments of the petition, was inadmissible in evidence. It is, therefore, not necessary, indeed it would be improper, to express an opinion as to the necessity of compliance with the provisions of section 123 of chapter 77, Compiled Statutes, to entitle the holder of a certificate of purchase at a tax sale to maintain a foreclosure action thereon.

The judgment of the district court is reversed and this cause is remanded for further proceedings.

REVERSED AND REMANDED.

O. K. PADDOCK ET AL. V. SAM GOSNEY LIVE STOCK COMMISSION COMPANY.

FILED APRIL 21, 1896. No. 6515.

Questions of Fact: EVIDENCE: INSTRUCTIONS: REVIEW. When there is involved merely a question of fact, its determination rests with the jury, and the district court is therefore *held* properly to have admitted evidence to establish such fact and properly to have refused to instruct, upon request, that, from certain evidence stated, a certain presumption arose and that certain other evidence stated established other facts.

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

Gregory, Day & Day, for plaintiffs in error.

Mahoney, Minahan & Smyth and *Ben S. Adams, contra.*

RYAN, C.

The subject-matter of this replevin suit, as to which there was a verdict, upon which a judgment was rendered by the district court of Douglas county, was a car load of steers shipped by E. W. Banks from Thurman, Iowa, to South Omaha. As these cattle were shipped in the name of said Banks, it was assumed by Paddock & Co., a firm at South Omaha, that these cattle were owned by Banks and could be subjected to the payment of a debt by him owing to said firm, and accordingly an attachment was by said firm sued out, and, thereunder, the said cattle were attached as the property of Banks. The Sam Gosney Live Stock Commission Company, a corporation doing business at South Omaha, replevied the cattle from the sheriff, joining the members of the firm of Paddock & Co. as defendants, and from the judgment in favor of the plaintiff in the district court aforesaid the defendants have prosecuted error proceedings to this court.

As might be inferred from the above statement of facts, the chief contested question was one of fact, that is to say, whether the cattle were in reality those of the Gosney Live Stock Commission Company or were owned by, and therefore were subject to seizure for satisfaction of the debts of, Banks. There is no room for doubt that Mr. Gosney, acting for the Sam Gosney Live Stock Commission Company, visited Thurman, Iowa, July 6, 1891, saw the cattle afterwards shipped to South Omaha, and endeavored to buy them, but, finding the price asked was greater than he was willing to pay, he did not then purchase. He, however, told Paul Bros., bankers at Thurman aforesaid, that he wished to purchase these cattle if the market should become more to his liking within a short time, and in that event he would want to make arrangements through said bank. Mr. Gosney on July 8 telephoned Mr. Banks to buy the cattle at the price at which they had been offered, and also telephoned Paul Bros. to honor a draft on the Sam Gosney Live Stock

Commission Company, drawn by Banks, for the purchase price of the cattle. This was accordingly done and the cattle were purchased, but Banks, without the knowledge of the aforesaid commission firm, shipped the cattle to South Omaha in his own name. It is complained that there was admitted evidence of the transaction in Iowa, but we can see no good reason for excluding this testimony, for the question was whether, in reality, Banks was the owner of the cattle upon which the levy had been made. It was therefore necessary to show such facts as served to show whether or not Banks was the owner of the cattle, and certainly the arrangement previously made for furnishing the necessary money was material, as was also the proof that in pursuance of such arrangement the required money was actually supplied through Paul Bros.

It is urged that the court should have given instruction numbered 3 asked by the plaintiff in error. This instruction was to the effect that the purchase of the cattle by Banks in his own name, and payment by checks drawn on Paul Bros., raised a presumption that Banks was the owner of the cattle at the time they were purchased and shipped. The court upon its motion had instructed that the burden of the proof was upon the defendant in error to establish by the preponderance of the proof every material disputed allegation of its petition. This was as much as the court was bound to do, for what presumption was to be entertained from proof of certain facts was a question for the jury alone to determine. (*Dobson v. State*, 46 Neb., 250, and authorities cited; *Metz v. State*, 46 Neb., 547.)

The fifth instruction asked by plaintiff in error was properly refused, for it required the jury to pass upon the effect of a mere guaranty of the Gosney Live Stock Commission Company to Paul Bros. The evidence did not tend, even remotely, in any fair view of it, to establish such a relation between the parties concerned; hence this instruction was properly refused.

There was an attempt in the sixth instruction, by the plaintiff in error, to state what facts would be sufficient to constitute Banks the owner or not the owner of the cattle in dispute. This matter of ownership was a question of fact to be determined by the jury upon its own estimate of the weight of the evidence as a whole, and an instruction which sought to perform this duty for the jury was properly refused.

These are all the questions discussed and the judgment of the district court is

AFFIRMED.

WILLIAM BURRIS V. MYRTA COURT.

FILED APRIL 21, 1896. No. 6514.

1. **Continuance:** REVIEW. An application for a continuance is addressed to the sound discretion of the trial court, and unless it appears that there has been an abuse of such discretion, its ruling will not be disturbed.
2. **Affidavit for Continuance as Testimony of Absent Witnesses:** INSTRUCTIONS. An instruction by which the court only professed to describe, and in fact did accurately describe to the jury the admissions of fact of a party as the same appeared of record, cannot be assailed as erroneous on the alleged ground that the adverse party had a right, in the first place, to an admission of greater scope or conclusiveness than that described as a condition upon which a continuance would be denied such adverse party.
3. ———: ADMISSIONS. An admission of plaintiff that proposed witnesses of defendant, if time applied for should be allowed to procure their evidence, would give certain testimony, is not equivalent to an admission that such proposed testimony is absolutely true and indisputable.

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

Clements Bros. and *Coffin & Stone*, for plaintiff in error:

Where defendant is not guilty of negligence or laches and has filed a sufficient affidavit for a continuance on

the ground that his witnesses are absent, he should not be compelled to go to trial because the plaintiff admits that the absent witnesses, if present, would testify as alleged in the affidavit, and it is error to permit the plaintiff to introduce witnesses to contradict the facts thus admitted. (*Nave v. Horton*, 9 Ind., 563; *Murphy v. Murphy*, 31 Mo., 322; *People v. Brown*, 59 Cal., 353; *Baldwin v. Walden*, 30 Ga., 829; *Willis v. People*, 2 Ill., 399; *Supervisors of Fulton County v. Mississippi & W. R. Co.*, 21 Ill., 338; *Brill v. Lord*, 14 Johns. [N. Y.], 341; *People v. Diaz*, 6 Cal., 248; *People v. McCrory*, 41 Cal., 458; *De Warren v. State*, 29 Tex., 464; *Pool v. Devers*, 30 Ala., 672; *State v. Brette*, 6 La. Ann., 653; *People v. Vermilyea*, 7 Cow. [N. Y.], 387.)

A. M. Robbins, *A. S. Moon*, and *C. I. Bragg*, *contra.*

RYAN, C.

A former judgment in this case was reversed and the cause was remanded to the district court of Loup county for further proceedings. (*Burris v. Court*, 34 Neb., 187.) In the opinion reported, as above indicated, there was a statement of such facts as are essential to a fuller understanding of the questions hereinafter discussed. There was, on a second trial, a verdict of guilty, and the judgment was accordingly rendered which the plaintiff in error seeks to have reversed by these proceedings in error. An application for a continuance was made upon the affidavit of the plaintiff in error, in which were the statements that two material witnesses named were absent from this state, each of whom, if he testified by deposition, would swear that during the period of gestation preceding the birth of Myrta Court's child, he had had sexual intercourse with said Myrta Court. The proceedings with reference to this application are described in the record as follows: "Plaintiff in open court admits that the witnesses Elbridge Mitchell and Colonel Spencer would testify to the facts set forth in the affidavit for a

continuance that are alleged in said affidavit, *i. e.*, Elbridge Mitchell will swear that at several times between the 1st day of August and the 26th day of September, 1889, the period during which the bastard child of plaintiff alleged to have been begotten by this defendant might have been conceived, that he, the said Elbridge Mitchell, had sexual intercourse with said plaintiff. And said Colonel Spencer would swear that on or about the 1st day of September, 1889, he, the said Colonel Spencer, had sexual intercourse with plaintiff, and that said affidavit and the facts therein stated may be read in evidence to the jury. Motion for continuance overruled. Plaintiff excepts." In the draft of the bill of exceptions originally submitted to counsel for the plaintiff in the district court there was no mention whatever of the above affidavit of William Burris. Upon suggestion of such counsel, however, there were interlined in the certificate of allowance of said bill, following a description of other evidence, the words, "and also introduced in evidence the affidavit of William Burris for a continuance; a certified copy of which affidavit is hereto attached." The above quotations disclose all that is to be found in the record or bill of exceptions with reference to the affidavit of Mr. Burris up to the time of instructing the jury, and upon this showing we are urged to hold that the court should have granted a continuance.

In *Stoppert v. Nierle*, 45 Neb., 105, it was said that motions for continuance are addressed to the sound discretion of the trial court, and unless it appears that there has been an abuse of such discretion, its rulings thereon will not be disturbed. The same rule was stated and enforced in *Stratton v. Dole*, 45 Neb., 472, and in *Keens v. Robertson*, 46 Neb., 837. Upon the presentation of the affidavit of Mr. Burris, his adversary offered to admit that the proposed witnesses therein named would swear to the facts which by said affidavit it was alleged they would swear to if an opportunity was given to take their testimony. It is doubtless true that this substitute for

the oral testimony of these witnesses would probably lack the convincing force which an oral narrative would lend to the facts stated; but these witnesses were not in this state, and therefore their personal attendance at this trial could not be compelled. At most, their testimony could, by depositions, be reduced to writing, and, preserved in that manner, it could be read to the jury. It is probable that the statements made in the affidavit of Mr. Burris are as direct as would have been made by the witnesses themselves; at least we are bound to believe this would be the case, for there is no way of testing the probable testimony of these witnesses except as the same is disclosed by the affidavit of Mr. Burris. Without a possibility of this being impaired or destroyed by cross-examination, Mr. Burris stated just what he expected these witnesses would swear to, and his adversary formally admitted that their testimony would be as stated. Having the benefit of these statements as evidence, we cannot see that the court erred in refusing a continuance in order that, in a more formal manner, this same testimony might be obtained and read to the jury.

It is, however, insisted that in respect to this matter the court erred in giving this instruction: "You are instructed that the plaintiff, by admitting the statements contained in the affidavit for a continuance, which were read in evidence before you, simply admits that if said witnesses Elbridge Mitchell and Colonel Spencer were present as witnesses testifying in this case, they would testify as stated in said affidavit, but the plaintiff does not admit that such testimony would be the truth. She has the same right to contradict such admitted testimony as though the witnesses were present and had so testified to the same matter upon the witness stand." In the first part of this instruction the court did not attempt to state a rule of law, but rather to describe what, in fact, the defendant in the district court had offered to admit, and that was that the proposed witnesses, if present, would testify to certain facts, and that such facts might be read

in evidence to the jury. This was a correct statement of the scope of this admission, as shown by the record, and the court committed no error in so describing it. This being true, it is evident that there existed no reason for assuming that these statements were to be deemed more conclusive in their nature than if they had been stated by the witnesses. If the rule contended for by counsel for plaintiff in error is correct, that these statements in the affidavit of proposed evidence must be accepted as absolutely true, it would have been improper to have allowed the plaintiff in the district court to deny them. It is quite possible, and to the mind of the writer it appears very probable, that an intelligent jury would absolutely discredit the voluntary testimony of the nature of that alleged as likely to be given by Elbridge Mitchell and Colonel Spencer, if they had been given an opportunity to testify. Under the rule contended for by the plaintiff in error the instruction should have been that these statements of the affidavit must be accepted as absolutely true, notwithstanding any gross improbability in point of fact, and the depravity or self-stultification of each witness evidenced and illustrated by his own testimony. The jury was not bound to believe these statements merely because embodied in an affidavit; neither thereby did these statements imply absolute verity. They were mere evidence, to be accorded such weight by the jury as, under all the circumstances of the case, they deserved.

The court in an instruction briefly described to the jury the provisions of sections 6, 7, and 8 of chapter 37, Compiled Statutes, in which it is provided how the defendant may be dealt with by the court in case there is a verdict of guilty. This in no manner concerned the jury and the instruction should not have been given, yet we fail to see in what respect the plaintiff in error could have been prejudiced by it. Whether the story of Myrta Court, or its denial by William Burris, was entitled to credence was a question of fact for the jury, and in support of a finding either way there was sufficient evidence to justify the verdict.

No other question was argued in the brief of the plaintiff in error, and we conclude, upon the whole case presented, that the judgment of the district court must be

AFFIRMED.

HARRISON, J., not sitting.

CLAUDE H. HOOVER V. STATE OF NEBRASKA.

FILED APRIL 21, 1896. No. 8285.

1. **Homicide:** REFUSAL TO POSTPONE TRIAL: REVIEW. There must, to show prejudicial error, be made to appear something more than that within three weeks after a homicide has been committed there was a conviction of the accused in respect to such homicide of the crime of murder.

2. ———: ———: ———. There is necessarily vested in the district court a considerable discretion as to overruling an application for a continuance in a criminal case, and, to justify a reversal of the ruling in denial of such an application, such application must contain something more than the affidavits of the prisoner and his counsel, in general terms, that there exists in the county wherein the trial must take place a great deal of excitement.

3. **Information:** INTERLINEATIONS: PLEA IN ABATEMENT. From the mere fact that the word "purposely" was interlined with a pen in a type-written information, upon which a preliminary examination was had, it is not a necessary inference that the interlineation was made after or during the preliminary examination, and a plea in abatement sustained only by such assumption was properly overruled in the district court.

4. **Insanity:** OPINION OF NON-EXPERT WITNESS. Non-expert witnesses can be permitted to express opinion as to the sanity or insanity of a person, only when they have shown other sufficient qualifications, and have stated the facts and circumstances upon which their opinion of such mental condition is based.

5. **Trial:** ORDER REQUIRING WITNESS TO GO AWAY FROM ACCUSED: REVIEW. There is no presumption that the district judge, without sufficient justification, required witnesses, though relations of the prisoner, to leave the immediate vicinity of the accused during the progress of the trial; neither does the mere fact that this was done in an unusual manner justify the assumption that thereby prejudice resulted.

6. **Misconduct of County Attorney:** ARGUMENT: REVIEW. Where a prosecuting attorney referred to facts not in evidence, and upon objection that the statements were unwarranted by the evidence, the district court instructed the jury to disregard such statements, there was left no ground for complaint for the reason that the court, when appealed to, granted all the relief prayed for.

7. **Murder in the First Degree.** The verdict is sustained by ample evidence which was uncontradicted and the judgment of the district court thereon is affirmed.

ERROR to the district court for Douglas county. Tried below before SCOTT, J.

The facts are stated in the opinion.

James A. Powers and *M. C. Acheson*, for plaintiff in error:

The plea in abatement was based on the fact that in the original complaint, which was type-written and upon which Hoover was bound over to the district court, the word "purposely" was interlined in some person's handwriting. An evident alteration of an instrument is generally presumed to have been made after the execution thereof. (Parsons, Contracts [7th ed.], sec. 722.)

If the alteration is noted, or if it appears in the same handwriting and ink as the body of the instrument, it may suffice to relieve against suspicion. (2 Greenleaf, Evidence [14th ed.], 564; *Master v. Miller*, Smith's Leading Cases [Am. ed.], part 2, 1315; *Lewis v. State*, 15 Neb., 90.)

A magistrate has no right to alter an information without consent. The word "purposely" was not properly a part of the complaint. The complaint being the foundation of the information, the county attorney could not insert in the latter the word "purposely." Accused cannot be tried for a higher offense than that charged in the complaint, and on which he has had a preliminary hearing. (*Wright v. State*, 45 Neb., 45; *White v. State*, 28 Neb., 341; *Alderman v. State*, 24 Neb., 101.)

When the complaint differs from the information, a plea in abatement is proper instead of a motion to quash. (*Cowan v. State*, 22 Neb., 519; *Hill v. State*, 42 Neb., 511;

Coffield v. State, 44 Neb., 421; *Agnew v. Dubois*, 8 W. N. C. [Pa.], 406; *Gesser v. Braunfeld*, 13 W. N. C. [Pa.], 209; *Commissioners v. Desmartean*, 16 Gray [Mass.],16; *Commonwealth v. Fagan*, 15 Gray [Mass.], 194; Wharton, Criminal Pleading & Practice, 277.)

Upon the type-written complaint the accused could only be held for manslaughter. (*Simmerman v. State*, 14 Neb., 568.)

An essential word to raise the grade to murder is interlined, and the presumption is that the interlineation was unauthorized. (Lawson, Presumptive Evidence [ed. 1886], 390.)

The motion for a continuance should have been granted. It was based on affidavit that accused could not have a fair and impartial trial, owing to the recent date the crime was alleged to have been committed and on account of the exaggerated and sensational articles which appeared in the newspapers and inflamed the prejudices against accused. (*Poole v. State*, 18 Ga., 567; *Commonwealth v. Dunham*, Thach. Crim. Cas. [Mass.], 516; *John v. State*, 1 Head [Tenn.], 49; *Bishop v. State*, 9 Ga., 127; *Howell v. State*, 5 Ga., 53; *King v. Jolliffe*, 4 T. R. [Eng.], 285; *Williams v. State*, 6 Neb., 338; *Gandy v. State*, 27 Neb., 719; *Johnson v. Dinsmore*, 11 Neb., 393.)

Non-expert witnesses may give opinions as to sanity or insanity. (*Schlencker v. State*, 9 Neb., 251; *Clark v. State*, 12 O., 483; *Pflueger v. State*, 46 Neb., 493; *Polin v. State*, 14 Neb., 546; *Connecticut Mutual Ins. Co. v. Lathrop*, 111 U. S., 620; *Burgo v. State*, 26 Neb., 643; *State v. Klinger*, 46 Mo., 224.)

The action of the trial court in requiring witnesses—the sister and half-sister of the defendant—to remove from accused's side, by saying in a loud voice, in the presence of the jury, "Go right away from here. You cannot sit there," was misconduct of the court, and prejudicial to the rights of the accused. (*Bowman v. State*, 19 Neb., 526; *Carr v. State*, 23 Neb., 764; *Wheeler v. Wallace*, 53 Mich., 357; *Cronkhite v. Dickerson*, 51 Mich., 177; *Skelly*

v. Boland, 78 Ill., 438; *Hair v. Little*, 28 Ala., 249; *McDuff v. Detroit Evening Journal*, 47 N. W. Rep. [Mich.], 671.)

It was error to permit argument to be made while the judge was absent from the court room. (*Gravely v. State*, 38 Neb., 871.)

The want of an exception does not necessarily deprive the prisoner of his right to a new trial for errors prejudicial to him. (*Thompson v. People*, 4 Neb., 524; *Schlencker v. State*, 9 Neb., 302.)

It was prejudicial error for the county attorney to go outside the record in his argument to the jury.

A. S. Churchill, *Attorney General*, and *George A. Day*, *Deputy Attorney General*, for the state:

The crime of murder in the first degree can be charged without using the statutory language in the information. An act is done purposely when it is the direct result of the action of the will. If one, therefore, is charged intentionally, designedly, or willfully with the commission of some act, he is charged the same as though the act had been purposely done. For definition of the word "purposely," see Standard Dictionary; Anderson's Law Dictionary; *Fahnestock v. State*, 23 Ind., 262; *Whitman v. State*, 17 Neb., 224; *Hannstine v. State*, 31 Neb., 112.

The information, as well as the complaint, charged the crime of murder in the first degree without the use of the word "purposely." Section 309 of the Code of Criminal Procedure authorizes the magistrate to bind a prisoner to the district court for a higher offense than that charged where it appears to the magistrate that a higher offense has been committed.

The motion for a continuance was addressed to the sound discretion of the trial court, and there is no showing that such discretion was abused. (*Smith v. State*, 4 Neb., 286; *Burrell v. State*, 25 Neb., 581; *Williams v. State*, 6 Neb., 335; *State v. Thatch*, 5 Neb., 94; *Stoppert v. Nierle*, 45 Neb., 106; *Clark v. Carey*, 41 Neb., 780; *Home Fire Ins. Co. v. Murray*, 40 Neb., 601; *Nebraska Loan & Trust Co. v.*

Hamer, 40 Neb., 282; *McDonald v. McAllister*, 32 Neb., 514; *Ingalls v. Nobles*, 14 Neb., 272; *Singer Mfg. Co. v. McAllister*, 22 Neb., 359; *Billings v. McCoy*, 5 Neb., 187.)

Public excitement is usually deemed an insufficient ground for continuance where the statute authorizes a preliminary examination of and challenge to the jury, or where a change of venue is allowed by statute. (4 Encyclopedia, Pleading & Practice, 832; *Ballard v. State*, 31 Fla., 267.)

All facts necessary to show a clear abuse of discretion of the court to the injury of the accused must be presented, and where the record is silent or uncertain the presumptions are in favor of the correctness of the ruling. (*Barber v. State*, 13 Fla., 675; *McNealy v. State*, 17 Fla., 198; *Newberry v. State*, 26 Fla., 334; *Garner v. State*, 28 Fla., 113; *Joyce v. Commonwealth*, 78 Va., 287; *Baw v. State*, 24 S. W. Rep. [Tex.], 293; *State v. Hawkins*, 18 Ore., 476; *Poole v. State*, 18 Ga., 567; *Thompson v. State*, 24 Ga., 303; *Johnson v. State*, 48 Ga., 118; *Stevens v. State*, 93 Ga., 307; *John v. State*, 1 Head [Tenn.], 49; *Porter v. State*, 3 Lee [Tenn.], 496; *King v. State*, 91 Tenn., 617.)

Before a non-expert witness is permitted to give an opinion upon the question of sanity or insanity, he must first state the facts upon which such opinion is founded; otherwise it would be a mere substitution of non-expert opinion for facts. (*State v. Stickley*, 41 Ia., 232; *Pelamourges v. Clark*, 9 Ia., 1; *State v. Pennyman*, 68 Ia., 216; *State v. Klinger*, 46 Mo., 224; *American Bible Society v. Price*, 115 Ill., 623; *Wood v. State*, 58 Miss., 741; *Clark v. State*, 12 O., 483; *Grant v. Thompson*, 4 Conn., 208; *Shaver v. McCarthy*, 110 Pa. St., 339; *Holcomb v. State*, 41 Tex., 125; *Clapp v. Fullerton*, 34 N. Y., 190; *Goodwin v. State*, 96 Ind., 550; *Grubb v. State*, 117 Ind., 277; *Schlencker v. State*, 9 Neb., 248; *Polin v. State*, 14 Neb., 540; *Walker v. State*, 102 Ind., 502; *State v. Hayden*, 51 Vt., 296; *Morse v. Crawford*, 17 Vt., 499; *State v. Erb*, 74 Mo., 199; *Choice v. State*, 31 Ga., 424; *State v. Newlin*, 69 Ind., 108; *People v. Wreden*, 59 Cal., 392; *Hardy v. Merrill*, 56 N. H., 227; *Powell v.*

State, 25 Ala., 21; *Dove v. State*, 3 Heisk. [Tenn.], 349; *Woodcock v. Johnson*, 36 Minn., 217; *McRae v. Malloy*, 93 N. Car., 154; *Beller v. Jones*, 22 Ark., 92; *Connecticut Mutual Life Ins. Co. v. Lathrop*, 111 U. S., 612; *Commonwealth v. Sturtivant*, 117 Mass., 122.) Tested by this rule, the testimony offered was incompetent. We have gone into this subject at some length because this court has, as in the recent case of *Pflueger v. State*, 46 Neb., 493, cited with apparent approval the case of *State v. Lewis*, 22 Pac. Rep. [Nev.], 241, in which the doctrine is announced that "witnesses who are not experts may testify to their belief as to the sanity or insanity of the accused without giving the facts upon which their belief is based."

Where a question is propounded to a witness to which an objection is sustained, the party desiring the evidence must offer to prove the facts sought to be introduced and have it made a part of the record. (*Mordhorst v. Nebraska Telephone Co.*, 28 Neb., 610; *Mathews v. State*, 19 Neb., 330; *Fosbinder v. Svitak*, 16 Neb., 499; *Masters v. Marsh*, 19 Neb., 458; *Yates v. Kinney*, 25 Neb., 120; *Hamilton v. Ross*, 23 Neb., 630; *Sellars v. Foster*, 27 Neb., 119; *Burns v. City of Fairmont*, 28 Neb., 866; *German Ins. Co. v. Hyman*, 34 Neb., 704; *Roach v. Hawkinson*, 34 Neb., 658; *Berneker v. State*, 40 Neb., 810; *Omaha Fire Ins. Co. v. Berg*, 44 Neb., 522; *Alter v. Covey*, 45 Neb., 508.)

There is a presumption that jurors are men of sufficient intelligence to understand that their verdict must be based on the evidence adduced on the trial and the law as given in the instructions of the court. (*State v. Jackson*, 17 S. E. Rep. [N. Car.], 149; *State v. Dusenberry*, 20 S. W. Rep. [Mo.], 461.)

The alleged irregularity relating to the removal of witnesses was one of the incidents of the trial in preserving proper order in court. (*Debney v. State*, 45 Neb., 856; *McMahon v. State*, 46 Neb., 166; *Lindsay v. State*, 46 Neb., 177.)

The contention based on the absence of the judge during a portion of the argument cannot be examined. As-

signments of error, to be considered by the supreme court, must have been presented to and overruled by the trial court. (*Tecumseh Town Site Case*, 3 Neb., 267; *Thurman v. State*, 32 Neb., 224; *Coombs v. McDonald*, 43 Neb., 632; *Woodward v. Baird*, 43 Neb., 310; *Ecklund v. Willis*, 42 Neb., 737.)

RYAN, C.

Plaintiff in error was convicted of murder in the first degree in the district court of Douglas county. The information was filed December 24, 1895, and charged in appropriate language that the plaintiff in error, on December 13, 1895, had murdered Samuel Du Bois in said county. A plea in abatement was overruled December 26, 1895, and on the same day there was an arraignment and a plea of not guilty. On the day following the trial began, was continued on the 28th, and on the 29th there was a verdict as above indicated. A motion for a new trial was overruled on December 30, and on January 3, 1896, sentence was pronounced that Claude H. Hoover, on April 17, 1896, suffer death by hanging. Just before his death the business of Samuel Du Bois was repairing elevators. In his employ were Kate Brophy and Claude H. Hoover. In her testimony Miss Brophy described herself as a half-sister of Hoover and a half-sister of the widow of Samuel Du Bois. In the record the relationship of the parties is not stated with more fullness, and, indeed, no more definite information is necessary, for this enables us to understand why Hoover should feel authorized to talk as he did to Miss Brophy. Between the hours of 1 and 2 o'clock on the afternoon of December 13, 1895, Miss Brophy was in the office of Mr. Du Bois. Plaintiff in error came in and said to Miss Brophy, "I don't want you to go with that girl any more, because she ain't the kind of girl you ought to go with." In the discussion of this suggestion there seems to have arisen considerable feeling,—so much so that when, very soon afterward, Mr. Du Bois came into the office, he observed there was some-

thing wrong. When the nature of the trouble had been explained to him, Mr. Du Bois said he knew Miss Brophy would not go with any one who wasn't right, for she had always done right. To Mr. Hoover, Mr. Du Bois said that he should go out of the office, and at the same time he seems to have taken hold of Hoover and led him toward the door. While this was being done Hoover suggested that he would go out if Du Bois would pay him the wages due him. This was agreed to and very soon done, and Mr. Hoover, upon receiving his pay, said to Mr. Du Bois that he was obliged to him, and was told by Mr. Du Bois that he was welcome. The deceased and the accused seem not to have met again until just before the commission of the homicide hereinafter described. About fifteen minutes before 2 o'clock, Hoover, by telephone, arranged with Miss Brophy to meet him, and soon afterward, from across the street, beckoned her to come to him. Upon compliance he asked her the address of Mr. Colby at Kansas City, saying that he was that night going to that city. In this interview he spoke of Du Bois and said that Du Bois had no business striking him, and that if he, Hoover, would do right he would shoot Du Bois. He was probably considerably intoxicated at this time, shed tears, and sent his farewells to other members of the family. It is not clear from the evidence whether this interview was before or after the purchase of the pistol with which he afterwards killed Du Bois. It was, at any rate, about the same time in the afternoon, that is to say, about 2 or 3 o'clock. About half past five o'clock Mr. Hoover went to the shop of Mr. Saalfield, a shoemaker. There were then in the shop some other persons, and Mr. Hoover sat down and talked with them, and among other things he remarked that he would give a quarter if Sam Du Bois would show up. His companions did not notice that he was much intoxicated, if indeed he was at all, at this time. Within fifteen minutes after Hoover had become an inmate of the shop, Samuel Du Bois entered, saying,

"Good evening, gentlemen," and was instantly confronted by Hoover, who said, "I've got you where I want you. You son-of-a-bitch." The persons in the shop at the time were able to state in their testimony nothing that immediately followed this remark, except that they saw two flashes of a pistol in Hoover's hand and heard Du Bois say, "I'm shot!" It seems, however, that Du Bois must instantly have closed with his assailant, for the earliest resumption of the narrative of any eye-witness begins with the description of the manner in which Du Bois was holding Hoover powerless to do him further harm. Finally Du Bois, unassisted, wrenched the pistol from Hoover's grasp, and having turned from Hoover, said: "Somebody take this gun. He shot me, but I don't want to shoot him." Mr. Fenton took the pistol from Mr. Du Bois, who immediately took off his coat, and as soon as some garments could be spread upon the floor, lay down. Before Du Bois had lain down, Hoover said to him, "I always told you I would shoot you." Afterward, however, he seemed sorry for what he had done. Du Bois within fifteen hours died of the wounds inflicted by Hoover. We are able thus confidently to state the above facts, for there was, in respect to them, no conflict in the evidence. The matters upon which the plaintiff in error relies for a reversal of the judgment of the district court will now be considered in their order of presentation in the brief of his counsel.

It is first urged that the application for a continuance should have been sustained, in view of the showing thereby of the excited condition of the people of Douglas county, and that there was prejudicial error in hastening the trial as was done in this case. A considerable discretion is necessarily lodged with the district courts with reference to applications for continuance in criminal cases. If the rule was otherwise it would be almost impossible to bring to trial persons accused of grave crimes. The court in this case was certainly very expeditious, having performed the last of its duties January 3, 1896,—just

ten days after the filing of the information, and three weeks after the commission of the homicide. There is no showing that there was sacrificed any right of the accused; neither does it appear that if more time had been given him to prepare for trial, he would have been able to procure evidence of any kind to his advantage; and, so far as the existence of excitement was concerned, it was only shown by affidavits of the accused and his counsel couched in very general terms. While haste, if it was shown to have attended the various proceedings, might predispose a reviewing court to a favorable consideration of the proofs indicating that thereby the accused had actually suffered prejudice, this predisposition should not entirely excuse the absence of such proof. By the information upon preliminary examination it was charged that Claude H. Hoover "did, unlawfully, feloniously, purposely, and of his deliberate and premeditated malice, kill and murder," etc. This information was type-written, except that the word "purposely" was interlined with a pen. In the district court the information upon which the trial was had contained the word "purposely." It is not shown that the word "purposely" was not in the information before the preliminary examination was had, except by an affidavit submitted in this court to procure an order requiring that such original information should be certified to this court for inspection. Upon this unsatisfactory showing, in this court made for the first time, we would not be justified in assuming that at an improper time an amendment of the information before the examining magistrate had been made, and this was the sole question presented by the plea in abatement. Whether or not this information would have been sufficient without the word "purposely" we do not consider, much less decide.

The next criticism of the action of the court is because there was excluded evidence which, it is claimed, would have shown that the accused was insane when he killed Du Bois. Miss Brophy testified that Hoover had been

drinking, but was not drunk while he was in the office; that at the interview across the street from the office he was drunk, she thought. "At times," she said, "he didn't talk right," "he talked strange," she always thought. In her cross-examination, Miss Brophy said she was seventeen years old and had lived in the family with the accused for two years and had seen him every day during this time, and that on the 13th of December, 1895, he was acting very strangely. The following proceedings during the cross-examination of Miss Brophy are shown, by the bill of exceptions, to have taken place:

Q. You had seen him act queer on other occasions?

A. Yes, sir.

Motion by the state to strike the answer as incompetent, irrelevant, immaterial, and not proper cross-examination. Sustained. Defendant excepts.

Q. From all that you saw of Claude this day, and all that you know of him, and the manner in which he acted on that day,—what was said and done,—did you consider him at the time sane or insane?

Objection by the state as incompetent, immaterial, irrelevant, and not proper cross-examination. Sustained. Defendant excepts.

It must be conceded that the objection that this was not proper cross-examination was well taken, and yet aside from this there is left undetermined the competency, materiality, and relevancy of the evidence excluded and of that offered on this branch of the case. The interrogative sentence, "You have seen him act queer on other occasions?" called simply for a conclusion of the witness. The inquiry should have been with reference to the facts and circumstances themselves, and not merely, in effect, whether the witness regarded the conduct of the accused on other occasions as queer. There was, therefore, no error in excluding this evidence. The next question, as to whether the witness, from what she saw of the accused on the day of the homicide, and from what she knew of him, regarded

him as sane or insane, was premature. The rule is that before a non-expert can give his opinion as to the sanity or insanity of a person, he must state the facts and circumstances upon which he bases his conclusion. In *Schlencker v. State*, 9 Neb., 241, it was held that the opinion of a witness not an expert is competent evidence upon the question of the prisoner's sanity where such opinion is formed upon facts within the personal knowledge of the witness and sworn to by him before the jury. In the later cases in this court there has been no direct statement of the requirement that a non-expert witness, before giving his opinion as to the mental condition of a person at a certain time, must state the facts and circumstances upon which that opinion rests, yet the case above cited has been repeatedly approved in a general way. (*Polin v. State*, 14 Neb., 540; *Shults v. State*, 37 Neb., 481.) We are indebted to the brief of the attorney general for citations of the holdings of twenty-one different states in support of this rule, and the cases cited in behalf of the plaintiff in error are not in conflict with it. Since the argument in this case the principle has been enforced in *Hay v. Miller*, 48 Neb., 156. We cannot examine the errors alleged with reference to the exclusion of the evidence of Mrs. Du Bois as to the sanity of Hoover for a reason additional to that given above, which is that there was no statement as to what the proffered testimony would disclose, if admitted.

By affidavit it was shown, without contradiction, that while one of the attorneys for the prisoner was addressing the jury there were seated near the accused, Mrs. Du Bois and Miss Brophy; that the presiding judge, Hon. Cunningham R. Scott, came directly from his private room to them and, in the presence and the hearing of the jury, said: "Go right away from here. You cannot sit there." Counsel for the prisoner then said: "Your Honor: These are our witnesses;" to which the reply was simply, "Yes, sir." It is insisted that this was prejudicial to the rights of the accused and must have had an influence upon the jury. It is possible that too much display was

made in obtaining the removal of these ladies, and probably it would have been much better if the presiding judge had conveyed his wish to them through the medium of a bailiff, or some other person. It was a strange situation, however, and there may have been such misconduct that the presiding judge was justifiable in putting a stop to it in a very summary manner. The fact that the ladies were witnesses on behalf of the accused conferred upon them no right in a special manner to manifest to the jury their wish for his acquittal, and if anything of this kind was transpiring it was certainly the duty of the court to see that it ceased. It is true there is no evidence in the record of any misconduct, and yet this conduct of the judge, while not altogether dignified, cannot be assumed to have been without justification.

The fifth and last point urged in the brief is that there was misconduct on the part of the county attorney in making use of the following language in his argument to the jury, to-wit: "Samuel Du Bois was a man who rose by his own merit from humble walks of life, and was a man of large, generous heart. He was called upon to make the laws of this city, and these facts, with other circumstances, make this one of the most heinous crimes ever committed in this community." In the affidavit by which was shown the use of the above language it was disclosed that the county attorney further said to the jury: "For fourteen hours he suffered all the tortures of the damned." Following this quotation the affidavit contained these words: "That said Powers [an attorney for the prisoner] called the attention of the court to this language and insisted that it was unwarranted by the evidence, and thereupon the court instructed the jury not to consider it in arriving at their verdict, and further affiant saith not." It appears clearly from these quotations that the sole objection made to the language of the county attorney was that it was unwarranted by the evidence, and that, thereupon, the court by an instruction directed the jury not to consider it. This was all that counsel by his

objection seems to have required. Prosecuting attorneys cannot be too careful to confine themselves strictly within the evidence. It is not required of them that in asserting the majesty of the law they shall resort to questionable means. They are the representatives of the state and should never forget to maintain its authority by fair, open methods. In this case, whatever lapse occurred was instantly counteracted by the court as far as required by counsel for the prisoner, and, therefore, he has no ground for complaint. This record has been very carefully examined with a view to ascertaining whether or not any prejudicial error was committed, and we can find none. The statement of the facts, established by uncontradicted evidence which has hereinbefore been given, leaves no room for doubt that the defendant was properly convicted of the crime with which he was charged. The judgment of the district court is

AFFIRMED.

Sentence to be executed August 7, 1896.

IRVINE, C., dissenting.

I think this judgment should be reversed for the sole reason that the accused was put on trial over his objections within so brief a period after the offense with which he was charged was committed that he had no reasonable time to prepare his defense, and was not permitted the assistance of counsel within the proper meaning of the term. The offense was charged to have been committed December 13. The defendant was held to answer December 18. The information was filed December 24. He was arraigned December 26. He was put on trial December 27, less than two weeks after the offense was committed. It is true that there was no showing by evidence preserved in the record of public excitement or prejudice preventing a fair trial. It is also true that a motion for a continuance for the purpose of properly preparing for trial must be supported by proof of the occa-

sion therefor. But there is a difference between the continuance of a cause and its mere postponement to a future day. The same strictness is not required in order to procure a temporary postponement that is required for a continuance over the term; and especially in a criminal case, although the application be for a continuance, if the proof be insufficient, the court should postpone the trial if it would be unjust for any reason to proceed at once. This was a capital case. The life of the accused was at stake. We cannot shut our eyes to well-known truths. Counsel, no matter how learned, no matter how experienced, require in all cases some time for preparation. Where his client's life is at stake, any lawyer, with a proper sense of the responsibility resting upon him, requires a considerable time for the examination of the case, for reflection, and for preparation for trial. His client is in such a case usually much less able to assist him than in civil cases, or than in criminal cases of minor import. It is not always possible for counsel to even sufficiently inform himself of the facts of the case, and of available evidence, to at once present the formal proof requisite to procure a continuance; and when a man is charged with murder, especially where, as it in this case turned out, insanity is a feature of the defense, a reasonable opportunity should be given counsel, not only to procure the attendance of witnesses, but to examine into the facts of the case and deliberate upon his course of conduct. As said by the supreme court of Louisiana in *State v. Ferris*, 16 La. Ann., 425: "The law, in securing to them [persons accused of crime] the assistance of counsel, did not intend to extend a barren right; for of what avail would be the privilege of counsel * * * if, on the spur of the moment, without an opportunity of studying the case, the former should be compelled to enter into an investigation of the cause?" I am aware that convictions have been sustained where less time intervened between the commission of the offense and the commencement of the trial than in the case at bar; but, so far as I know,

there has not been any recent instance of a sentence of death sustained under such circumstances of expedition against the protest of the accused. But the case, to my mind, should not be controlled by precedent. A reasonably speedy enforcement of the criminal laws is necessary; but the court should not permit the clamor of newspapers, or of the public, to so far hasten prosecutions as to substantially deprive the accused of their constitutional privilege of a fair and impartial, as well as a speedy, trial, and to the real assistance of counsel,—that is, the assistance of counsel who have had a reasonable opportunity to investigate the case and prepare a defense. I think in this case there was an abuse of discretion in not granting the accused a postponement of the trial, and that the judgment should be for that reason reversed.

RAGAN, C., concurs in the foregoing dissenting opinion.

MAY BROTHERS, APPELLANTS, V. JOHN D. HOOVER, JR., ET AL., APPELLEES.

FILED APRIL 21, 1896. No. 6546.

Fraudulent Conveyances: EVIDENCE. Evidence examined, and *held* to sustain the conclusion of the district court that the conveyance assailed in this action as fraudulent was neither made nor accepted with the intent to defraud, hinder, or delay the creditors of the appellees.

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

Albert & Reeder, for appellants.

Campbell & Wallis, contra.

RAGAN, C.

May Bros. brought this suit in equity in the district court of Madison county against John D. Hoover, Jr., and wife and John D. Hoover, Sr., to have set aside a convey-

ance of real estate made in December, 1888, by Hoover, Jr., and wife to Hoover, Sr. May Bros. alleged that the conveyance was without consideration and made for the purpose of hindering, delaying, and defrauding them and other creditors of Hoover, Jr. The district court found the issues in favor of the defendants below and dismissed the case, and from this decree May Bros. have appealed.

It appears from the evidence in the bill of exceptions that for some years prior to 1881 Hoover, senior and junior, being father and son, were copartners owning and operating a store and a mill at Battle Creek, Nebraska. In January, 1881, the father and son dissolved their copartnership relations, the father selling out his interest in the copartnership property to the son. The price agreed to be paid by the son to the father was about $7,000, for which the son executed his promissory notes to his father. The son continued in business alone until December, 1888. At that time he and his wife conveyed to the father the real estate previously owned by the copartnership and some other property. This is the conveyance assailed as fraudulent in this action. The principal consideration for this conveyance was the debt and the interest thereon owing by the son to the father, contracted in 1881, as already stated, said debt being past due and wholly unpaid. These facts are practically undisputed. The district judge was of opinion, and we agree with him, that the appellees made it appear on the trial that the conveyance was made in good faith and for a valuable consideration, and not made with intent to defraud, hinder, or delay the creditors of Hoover, Jr.

It is insisted by appellants in their argument here that the evidence does not show that Hoover, Sr., paid a valuable consideration for the property. We think it does. What that consideration was has already been stated. There is also some evidence in the record which shows that Hoover, Sr., worked for the son in the mill or store after the father and son dissolved copartnership, and that when the conveyance assailed by this suit was made, the

value of Hoover, Sr.'s, services was taken into consideration in fixing the price to be paid for the property. There is a conflict in the evidence as to the value of the property conveyed by Hoover, Jr., to Hoover, Sr., in December, 1888, but the evidence would sustain a special finding, had one been made, that the property conveyed to Hoover, Sr., was not worth any more than he paid for it. It also appears from the record that after the son and wife sold and conveyed the real estate in controversy to the son's father, the latter conveyed a part of such real estate to the son's wife. It is insisted by the counsel for the appellants that this shows the transaction to be fraudulent. We think this was at most a circumstance to be considered with all the other facts and circumstances in the case in determining whether or not the transaction between the father and son was made in good faith, but we do not think it was conclusive evidence of a fraudulent intent on the part of any of the parties. If the conveyance made by the son to the father was made and accepted in good faith, for an honest purpose and without any intent on the part of either of them to defraud, delay, or hinder the creditors of Hoover, Jr.,—and the district judge has found that such conveyance was so made and accepted, and the evidence sustains his finding,—then Hoover, Sr., might do what he pleased with the property afterwards. He might keep it, sell it to Hoover, Jr.'s, wife or to any one else, or give it away; and, except as against his own creditors, no one would have a right to complain.

The appeal presents no disputed question of law, but simply the question whether the district court reached the proper conclusion under the evidence. If the district court had found that the conveyance was fraudulent, we seriously doubt if the evidence would have sustained such finding. Certainly we cannot say, under the evidence before us, that the finding of the district court lacks sufficient evidence to support it, and its decree is therefore

AFFIRMED.

JOHN H. UNLAND V. JOHN G. GARTON.

FILED APRIL 21, 1896. No. 6508.

1. **Warranty: SALES.** To constitute a warranty it is not necessary that the word "warranty" should be used. It is sufficient if the language used by the vendor amounts to an undertaking or assertion on his part that the thing sold is as represented.
2. **Sales: WARRANTY: QUESTION FOR JURY.** Whether statements made by a vendor as to the condition or quality of property offered for sale were intended by him to be warranties of the condition or quality of such property or whether by such statements the vendor intended merely to give his opinion as to the condition or quality of such property, are questions of fact for the jury. *Erskine v. Swanson*, 45 Neb., 767, followed.

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

J. H. Grimm and *E. W. Metcalfe*, for plaintiff in error.

Hastings & McGintie, contra.

RAGAN, C.

John H. Unland sued John G. Garton at law in the district court of Saline county on a promissory note. Garton had a verdict and judgment, and Unland brings the case here for review.

1. The first assignment of error argued is that the court erred in permitting Garton to introduce any evidence, as the facts stated in his answer constituted no defense to the action. The execution and delivery of the note was admitted, but Garton pleaded as a defense thereto that the only consideration for the note was a corn-sheller sold by a copartnership, of which Unland was a member, to him, Garton; that the corn-sheller was warranted and that the warranty had failed. The warranty pleaded was as follows: "That at the time of said purchase said Unland & Heller represented and war-

ranted to these defendants that said sheller was as good as new; that it would do as good work as any corn-sheller; and that it would do first-class work in every particular." Counsel for plaintiff in error now insist that this language did not amount to a warranty, and that it was merely a recommendation of the machine, or an expression of opinion by the seller as to its merits. In *Halliday v. Briggs*, 15 Neb., 219, the warranty relied on was in this language: "All right, sound, and free from disease." It was held that a court would not be justified in holding this language to be a warranty against the finding of a jury to the contrary. It was further held in that case that if the evidence left the matter in doubt as to whether or not the seller intended to make an affirmation or to express an opinion merely, the matter should be submitted to the jury. In *Erskine v. Swanson*, 45 Neb., 767, the warranty was in this language: " 'You needn't be afraid of that lameness. I guaranty that horse. In a few weeks you won't notice it.' 'Why, the horse will be all right. I guaranty to you it will be all right.' 'He is a good, sure horse.' " And it was there held: "To constitute a warranty it is not necessary that the word 'warranty' should be used. It is sufficient if the language used by the vendor amounts to an undertaking or an assertion on his part that the thing sold is as represented." It was further held: "Whether statements made by a vendor as to the condition or quality of property offered for sale were intended by him to be warranties of the condition or quality of such property, or whether by such statements the vendor intended merely to give his opinion as to the condition or quality of such property, are questions of fact for a jury." The allegation in the answer assailed is that the vendors "represented and warranted the sheller to be as good as new," etc. We think this allegation sufficient as against a demurrer, and that the answer stated a defense.

2. The second assignment of error is that the court erred in giving paragraphs 2 and 3 of instructions on its

own motion. No exception was taken by Unland to the giving of either of these instructions. The assignment of error cannot, therefore, be considered.

3. The third assignment of error argued is "that the court erred in refusing to give the instructions asked for by the plaintiff." The plaintiff in error requested the court to give six instructions. The assignment is that it erred in refusing to give all of them. We have examined the instructions so far as to ascertain that the court did not err in refusing to give some of them. This assignment will therefore be overruled.

4. The final assignment is "that the verdict is not sustained by sufficient evidence." We think it is. The judgment of the district court is

AFFIRMED.

NEBRASKA MOLINE PLOW COMPANY V. O. C. KLINGMAN ET AL.

FILED APRIL 21, 1896. No. 6543.

1. **Attachment:** RULING ON MOTION TO DISSOLVE: REVIEW. Where a motion to discharge an attachment on the ground that the facts stated in the affidavit are untrue is heard on conflicting evidence the decision of the trial court on the motion will not be disturbed unless it is clearly against the weight of the evidence. *Whipple v. Hill*, 36 Neb., 720, followed.

2. **Fraudulent Conveyances:** EVIDENCE: PARTNERSHIP. The fact that a copartnership largely indebted sells most of its property and its business to one of small means in consideration of a small amount of cash and the purchaser's promissory notes is a circumstance tending to show that the transaction was fraudulent, but not conclusive nor alone sufficient evidence that it was fraudulent.

ERROR from the district court of Webster county. Tried below before BEALL, J.

Switzler & McIntosh, for plaintiff in error:

Where an insolvent mercantile firm sells all its available property to one who is execution proof, and takes in

payment his unsecured, long-time notes, it is a fraud on other creditors. (*Pilling v. Otis*, 13 Wis., 533; *Knowlton v. Hawes*, 10 Neb., 534; *Beels v. Flynn*, 28 Neb., 575; *Seymour v. Wilson*, 19 N. Y., 417; *Smith v. Sands*, 17 Neb., 498.)

M. A. Hartigan, contra.

RAGAN, C.

In the district court of Webster county the Nebraska Moline Plow Company sued O. C. Klingman and A. D. McNear, a partnership doing business as Klingman & Co., at law to recover $1,918 which the plow company alleged was owing to it from Klingman & Co. At the time of bringing this suit the plow company caused an attachment to be issued and levied upon a stock of goods, consisting of buggies, wagons, and farming implements, which the plow company alleged was the property of Klingman & Co. At the time the attachment was issued and the property seized $275 only of the debt sued for, and for which the property was attached, was due. The district court, on motion of Klingman & Co., discharged this attachment, and to reverse that order the plow company prosecutes here a petition in error.

The plow company alleged in the affidavit made to procure the attachment that "said defendants have sold, conveyed, and otherwise disposed of their property, with a fraudulent intent to cheat and defraud their creditors and to hinder and delay them in the collection of their debts." The affidavit alleged that Klingman & Co. had done three things which amounted to a fraudulent disposition of their property with intent to defraud and delay their creditors: (1) That Klingman & Co. had executed a chattel mortgage for $900 on a portion of their stock of goods to a brother of one of the partners; (2) that Klingman & Co. had turned over to a bank in Webster county bills receivable belonging to them of the par value of $4,100. An examination of the evidence preserved in the bill of exceptions shows that these two averments of the

affidavit are entirely without foundation. Klingman & Co. at no time, so far as the record shows, ever mortgaged any of their property to a brother of one of the firm, and the disposition made of the bills receivable of Klingman & Co. to the bank in Webster county was made to secure debts owing by Klingman & Co. to the bank. The third act, and the one relied on in the argument here, done by Klingman & Co. which the affidavit alleges was done for the fraudulent purpose of defrauding and delaying their creditors, was that on the 24th day of July, 1893, they sold their stock of merchandise to one McClure. The sale of the stock of goods at that time to McClure is admitted, and we are thus brought to the consideration of the only question in the case, namely: Does the evidence sustain the finding of the district court that this sale to McClure was not fraudulent; neither made nor accepted by the parties thereto with intent to defraud or delay the creditors of Klingman & Co.?

Section 20, chapter 32, Compiled Statutes, provides: "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, and no conveyance or charge shall be adjudged fraudulent as against creditors or purchasers solely on the ground that it was not founded on a valuable consideration." This statute made the issue considered by the district court and the issue presented here only one of fact, namely: What was the motive, the intention, which actuated Klingman & Co. and McClure in making the sale?

The evidence on behalf of the plow company tends to show that at the time the sale was made by Klingman & Co. to McClure the former were insolvent; that a check of theirs given to the Moline Plow company had gone to protest and that some of their notes had been dishonored; that McClure had very little property subject to execution; that Klingman & Co. were doing business in Blue Hill, in Webster county; that on Sunday night prior to the sale, McClure, Klingman, and McNear met in the city

of Hastings; that the trade was there talked over; that a lawyer was consulted about the trade; that on Monday morning, at Blue Hill, McClure and Klingman made an invoice of the goods; that McClure then paid Klingman & Co. $200 in cash and executed his notes for the remainder of the purchase price of the stock, the total price agreed to be paid being about $4,000, the fair value of the goods; that no bill of sale of these goods was made by Klingman & Co. to McClure; that Klingman remained in the place of business of Klingman & Co. after the sale, the same as before it; that McClure expected and intended to pay Klingman & Co. the notes he had given them for the implement stock out of the proceeds of the sale of such implements, and that Klingman & Co. had turned over the notes received from McClure to a brother of one of the firm to put them beyond the reach of the firm's creditors.

The evidence on behalf of Klingman & Co. tended to show that McNear's interest in the business was about three times as much as that of Klingman; that McNear lived in the city of Blue Hill; that he was in the habit of spending his Sundays in the city of Hastings; that Klingman had the active management of the copartnership; that McNear was in the employment of a manufacturing company; that he was traveling for that company at a salary of $1,200 a year and expenses; that he had been so traveling for some years prior to the date of the sale to McClure; that in the spring of that year someone had reported to the manufacturing company that he, McNear, was neglecting its business and devoting too much of his attention to the copartnership affairs of Klingman & Co.; that the manufacturing company called McNear's attention to this; that McNear then talked to McClure about buying out Klingman & Co.; that on the Sunday preceding the sale McNear was stopping at Hastings as usual on Sundays; that McClure came to Hastings on that Sunday not knowing that either McNear or Klingman was there; that he was then and had been for some time in

the employment of a mowing or reaping-machine company, and traveling over the country setting up their machines; that the time of his employment with the machine company had about expired; that on this Sunday, after reaching Hastings, he met Klingman on the street; that afterwards he and Klingman and McNear met and the proposition to sell to McClure was again discussed; that they all went to a lawyer's office and counseled with him as to whether a bill of sale was necessary, and were advised that it was not; that on Monday morning McClure and Klingman returned to Blue Hill, invoiced the goods, McClure paid the $200 in cash, executed his notes for the remainder of the purchase money, and took possession of the stock; that Klingman & Co., at the time they made the sale, were not insolvent; that the check of $50 made to the plow company which had been protested was subsequently, before the bringing of the attachment suit, paid; that the assets of Klingman & Co., at a fair valuation, exceeded by several thousand dollars their total liabilities; that the real object and motive of the sale was that McNear might remain in the employ of the manufacturing company for whom he was working; that McClure was worth in the neighborhood of $3,000 at the time he purchased the stock; that he was well acquainted with the character of the business conducted by Klingman & Co., and that he possessed in the banks of Blue Hill an excellent credit; that the notes given by McClure to Klingman & Co. had never been indorsed or transferred; that they were produced on the taking of the evidence to discharge the attachment and were still owned by Klingman & Co. The evidence further shows, without contradiction, that only $275 of the debt for which the property was attached was due at the time of the attachment, and that this $275 was secured by bills receivable owned by Klingman & Co.; that Klingman after the sale remained in the old business house of Klingman & Co.; that he did so for the purpose of disposing of commission goods which the firm of Klingman

& Co. were carrying, and which were not included in the sale to McClure, and for the further purpose of collecting the book accounts and debts due to the firm of Klingman & Co.

Under this evidence we cannot say that the finding of the district court is not supported by sufficient evidence, nor that it is clearly against the weight of the evidence. In *Whipple v. Hill*, 36 Neb., 720, it was held that "where a motion to discharge an attachment on the ground that the facts stated in the affidavit are untrue is heard upon conflicting affidavits, the decision of the trial court on the motion will not be disturbed unless it is clearly against the weight of the evidence."

As already stated, the cardinal inquiry was: What was the motive, what was the intention, which actuated Klingman & Co. and McClure? If the court had found that their motive and their intentions were fraudulent, we think the evidence would have sustained the finding; but the district court, after looking at all the circumstances in evidence, has reached the conclusion that the motive and intentions of the parties were honest, and we cannot say that he is wrong. Counsel for the plow company insist, however, that, as the evidence shows the consideration for the sale was $200 in money, and the remainder of the purchase price was the notes of the purchaser, the court should therefore say the transaction was fraudulent; and counsel insist that *Beels v. Flynn*, 28 Neb., 575, supports their contention where a sale is made by a debtor of all his property for a part cash and the remainder in the promissory notes of the purchaser, that such transaction is conclusive evidence of a fraudulent intent. In the case cited a debtor had sold all his property to Beels in consideration of some cash and the promissory notes of Beels. Flynn, as sheriff, seized the property under attachment process and sold it, and Beels sued the sheriff for conversion. The sheriff justified the seizure by virtue of his attachment writs and defended on the ground that the sale to Beels

was fraudulently made by the debtor, with the intention on the part of the debtor and Beels to defraud the latter's creditors. The jury found on this issue for the sheriff and this court affirmed the judgment. The only issue presented to the jury was whether the sale made by the creditor to Beels was made in good faith. The jury found that it was not, and the only question presented to this court on proceedings in error was the sufficiency of the evidence to sustain the finding of the jury. It is said in the syllabus that Beels was not a *bona fide* purchaser and not entitled to protection. But this was no more than saying that the evidence sustained the finding of the jury that Beels was not a *bona fide* purchaser. Whether Beels was a *bona fide* purchaser or not was not a question of law, but of fact. The jury found that he was not a good faith purchaser and this court affirmed the judgment, and the opinion meant and means no more than that the evidence before the jury was sufficient to sustain its finding. It is doubtless true that the sale by one of all his property for some cash and the promissory notes of the purchaser, the seller at the time being in debt and the purchaser being a man of small means, is evidence of a fraudulent intent, but this court has never consciously held that such facts alone were conclusive evidence of fraud. To so hold would be to repeal the statute which has, wisely or unwisely, declared that intention to be a question for the determination of the jury or trial court, from all the facts and circumstances surrounding the transaction put in evidence in the particular case. The judgment of the district court is

AFFIRMED.

GRANT OYLER V. GEORGE H. ROSS.

FILED APRIL 21, 1896. No. 6507.

1. **Highways**: PETITION TO OPEN: COUNTY BOARD. A petition is not essential to confer jurisdiction upon a county board to open section line roads under section 46, chapter 78, Compiled Statutes. The only limitation upon the discretion of the board in that respect is the fundamental one of compensation for private property taken or damaged. *Rose v. Washington County*, 42 Neb., 1, followed.
2. ———: ORDER TO OPEN. An order of a board of supervisors instructing the county clerk to cause a section line road to be resurveyed and to enter such survey when made of record is not an order for the opening of such section line road within the meaning of said section 46.
3. ———: DEDICATION OF LAND: EVIDENCE. The evidence examined, and *held* to sustain the finding of the district court that the defendant in error had not dedicated certain real estate to the public for use as a highway.

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

J. H. Grimm and *E. W. Metcalfe*, for plaintiff in error.

Hastings & McGintie, contra.

RAGAN, C.

George H. Ross owned the southwest quarter of section 27, in township 6 north and range 4 east of the sixth principal meridian, in Saline county. He built a post and wire fence along the west side of said quarter section of land. The fence stood less than thirty-three feet east of the north and south section line dividing sections 27 and 28 in said township. Grant Oyler, without Ross' permission, tore down this fence and drove over the cultivated grounds and crops of Ross. For tearing down the fence and driving over his ground and crops Ross sued Oyler for damages in the district court of Saline county. Ross

had a verdict and judgment, to reverse which Oyler prosecutes to this court a petition in error. Oyler admitted the tearing down of the fence and driving over the lands of Ross, but pleaded as a defense to the action that the land on which the fence stood, and over which he drove, was at that time a part of "a public road duly laid out and established by continuous use by the public long prior" to the date he tore down the fence.

1. On the 25th day of August, 1884, a number of gentlemen petitioned the board of supervisors of Saline county to establish a road extending north and south on the section line between sections 27 and 28 above mentioned; thereupon the county clerk of said county appointed a commissioner to examine into the expediency of the proposed road and to report accordingly. The commissioner accepted the appointment, viewed the line of the proposed road, and made report to the supervisors that in his judgment it was expedient to establish the road petitioned for. Notice was duly given of all these proceedings and a day fixed for the filing of claims for damages by reason of the proposed establishment of said road. Prior to the date fixed for parties to file their claims for damages a large number of claims were filed with the county clerk of said county. A remonstrance was also filed against the establishment of the road prayed for in the petition. Appraisers were appointed to assess the damages sustained by adjoining proprietors in case the road should be established. These appraisers acted and filed their reports, and upon a hearing of the petition and remonstrance the board of supervisors made an order rejecting the petition. On the trial in the district court Oyler offered in evidence a certified copy of the records of the board of supervisors of Saline county showing the matters just above stated. This evidence the court excluded, and this action of the court is the first assignment of error argued here. The certified copy of the records offered shows that all the proceedings were in due form, but the court did not err in refusing to admit

this evidence, for two reasons: (1.) The evidence was not relevant under the pleadings. The averment of the answer is that the land on which Ross' fence stood was a part of the public road, which the public had acquired by user. The plea was not that a public road had been laid out over the land of Ross by the authorities of Saline county, in pursuance of a petition and other proceedings provided for by chapter 78, Compiled Statutes. (2.) If such had been the plea, the evidence offered did not tend to prove it, as that evidence showed that the authorities of Saline county rejected the petition, and, so far as the record shows, they never did anything further in the premises.

2. After the rejection by the authorities of Saline county of the petition aforementioned, the board of supervisors of said county made the following order: "The clerk is instructed to cause the following described road * * * running south on the section line between sections * * * 27 and 28 * * * to be resurveyed, enter such survey when made in the proper record, and plat the same on the road plat book of the county." Oyler on the trial of the case at bar offered in evidence a certified copy of this order. The court excluded the evidence offered, and this action of the court is the second assignment of error argued here. Section 46, chapter 78, Compiled Statutes, so far as material here, provides: "The section lines are hereby declared to be public roads in each county in this state, and county boards of such county may, whenever the public good requires it, open such roads without any preliminary survey and cause them to be worked in the same manner as other public roads." The contention of counsel for plaintiff in error seems to be that since the north and south section line between sections 27 and 28 was by statute made a public highway, the order of the board of supervisors offered in evidence amounted to an order on the part of the board to open and work the road along said section line. We do not agree with this contention. The language of the

statute is that "the county board of such county may, whenever the public good requires it, open such roads without any preliminary survey and cause them to be worked in the same manner as other public roads." But the order offered in evidence is not an order of the board to any one to open and work the road along the section line between sections 27 and 28. The order, then, was irrelevant under the pleadings, for the reason already stated and for the further reason that it did not tend to prove that a public road had been ordered opened and worked between sections 27 and 28. We are not discussing the authority of the county board to make an order opening roads on section lines. There is no doubt but that the county boards have the authority, whenever in their judgment the public good requires it, to open and lay out public highways along the various section lines, and a petition is not essential to confer jurisdiction upon them for that purpose. The only limitation upon their discretion in the matter is the fundamental one of compensation for private property taken or damaged. (*Rose v. Washington County*, 42 Neb., 1.) But the evidence offered by the plaintiff in error and excluded by the court did not show, or tend to show, that a public road had ever been established on the north and south line between sections 27 and 28, by the board of supervisors, in pursuance of a petition filed with them for that purpose; nor that the board of supervisors of that county had ever ordered the road, located along said section line by virtue of the statute, to be opened and worked.

3. The final assignment of error argued is that the judgment rendered is contrary to the evidence and the law of the case. This argument is based on the contention that the evidence shows that at the time Oyler tore down the fence of Ross the public had acquired by user a public road over the lands on which the fence stood. The evidence shows that for some fifteen or twenty years the public has traveled north and south along the section line between sections 27 and 28; that this travel-way is

from eight to twelve feet wide; that road overseers have sometimes done some work along this travel-way, but no part of the fence torn down by Oyler was on this travel-way; that Ross had been in possession of his land for some eight years; that he and his grantors had always cultivated the land up to the line where the fence stood; that at the time Oyler tore down the fence the land east of it was planted to crops. Now it may be that Ross and his grantors, by their conduct in permitting the public to pass and repass along the section line on this travel-way, of the width of eight or twelve feet, and by not exercising or attempting to exercise any control or dominion over such travel-way, may be estopped from claiming that such travel-way is not a public road; but there is no evidence whatever in the record before us which shows, or tends to show, that Ross had ever dedicated, or intended to dedicate, to the public any part of the land on which his fence stood, or the land east thereof; and had the jury found that he had dedicated such lands to the public for the purposes of a highway, the finding would have lacked support in the evidence. In *Rube v. Sullivan*, 23 Neb., 779, a party owning land in fencing the same left a strip along the section line a rod or more in width, apparently for the use of a public road, and it was traveled as such, but there was no proof of dedication or an intention to dedicate any of the land within the inclosure, and the court held that "without such proof the jury would not be justified in finding that any of the land within the inclosure had been dedicated to public use, and therefore a road overseer who removed the fence as an obstruction to the highway would be liable for the trespass." The judgment of the district court is

AFFIRMED.

FRANK RAWLINGS V. YOUNG MEN'S CHRISTIAN ASSOCIATION OF LINCOLN.

FILED APRIL 21, 1896. No. 6506.

1. **Contracts:** PLEADING: BURDEN OF PROOF. When suit is brought upon a contract, a general denial puts the making of the contract in issue, and the burden devolves upon the plaintiff of establishing it substantially as alleged.
2. **Subscriptions:** PLEADING: EVIDENCE: PRINCIPAL AND AGENT: INSTRUCTIONS. Suit was brought on a subscription contract, alleging an absolute subscription. The answer contained a general denial. The evidence tended to show that the defendant had authorized the plaintiff's solicitor to enter his name for a certain amount subject to certain conditions; and that the solicitor had subscribed defendant's name without embodying such conditions in the contract. *Held*, (*a*) That the issue presented was not whether there had been a breach of the conditions which would constitute a defense, but was whether the defendant had authorized the contract which the solicitor had undertaken to make for him; (*b*) that the defendant was not bound by the acts of plaintiff's solicitor beyond the actual authority conferred upon him; (*c*) that the defendant was entitled to have this theory of the case submitted to the jury.
3. **Evidence:** LOST BOOKS: SUBSCRIPTION. The book in which the subscription was entered was proved to have been lost. *Held*, That the plaintiff might prove its contents by parol evidence, although there were in existence similar books also used for subscription purposes, substantially like the one in question, and not offered in evidence.

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

Davis & Hibner, for plaintiff in error.

Ricketts & Wilson, contra.

IRVINE, C.

The Young Men's Christian Association of Lincoln brought this suit against Rawlings, alleging in its petition that it was a corporation, and that in the year 1888,

desiring to erect a building, it solicited subscriptions for that purpose; that Rawlings subscribed to the erection of the said building the sum of $500, to be paid on demand; and that the association, on the faith of that and other like subscriptions, proceeded to erect a building for the use of the association and contracted extensive liabilities which remain unpaid; that thereby Rawlings became indebted to the association in said sum of $500. Rawlings answered admitting that the plaintiff was a corporation and that in 1888, desiring to erect a building, it solicited subscriptions for that purpose. Further answering, Rawlings denied that he subscribed $500, or any sum whatever, for said purpose; denied that he was indebted to the association in the sum of $500, or in any sum whatever; and denied every allegation of the petition not specifically admitted. The trial resulted in a verdict and judgment for the association for the amount claimed, with interest. Rawlings brings the case here by petition in error.

The evidence discloses that one Ensign had been employed by the association to solicit subscriptions; that for this purpose there was placed in his hands a book containing a certain preliminary statement or caption in the nature of a subscription contract. This was followed by blank spaces for signatures and the entry of the amounts subscribed. There were several of these books, which were turned in by the solicitors to the officers of the association. In one of the books, turned in by Ensign, appeared the name of Rawlings, and opposite it, in figures, "$500." This book was not forthcoming on the trial, and after quite satisfactory proof that diligent search for it had proved unavailing, the plaintiff was permitted to prove its contents by parol evidence. None of the witnesses undertook to give the language of the so-called "caption." None of the other books was produced or offered in evidence. There was evidence tending to show that some of these captions were printed, some written, and some type-written; that they were not in all

respects alike, although substantially the same in terms. The parol evidence admitted tended to show that following Rawlings' name appeared the words, "to be used on building." Mr. Ensign testified that when he called on Rawlings, Rawlings authorized him to enter his name for $500 on this condition, and on the further condition that the building should cost $50,000. Mr. Rawlings' testimony was to the effect that he had positively refused to himself subscribe or to permit his name to be subscribed for any sum whatever; but that he had said that if he gave anything it would be on condition that the building should be commenced the following spring and completed during the year. Witnesses on behalf of the association testified to conversations with Rawlings after the time of his alleged subscription. One of these witnesses says that, when confronted with the book, Rawlings said that there was a condition to the subscription, that the association was to begin the building within a given time. Another witness said that Rawlings' statement to him was that the subscription was to be applied upon the building and not on the lots, and that the building was to be completed at once. The remaining witness for the plaintiff, testifying as to this last conversation, said that Rawlings said that the building was to be completed within a year. Reviewing this testimony, it will be observed that it is conceded that Rawlings did not himself subscribe; that according to his own testimony he never subscribed, but merely said that if he did it would be upon certain conditions. According to the other witnesses, he had authorized Ensign to subscribe for him, but according to each of them there was a condition to be attached to his subscription, although the witnesses differ as to what this condition was. In this state of the evidence, the court instructed the jury as follows:

"Plaintiff contends in its evidence that defendant authorized the witness Ensign to sign his name to its subscription list for $500, in the year 1888, to be used in the erection of its building. Whether or not such authority

was given is a question for you to determine from the evidence.

"If you find from the evidence that defendant, in the year 1888, authorized the witness Ensign to sign defendant's name to plaintiff's subscription list for $500, to be used by plaintiff in the erection of its building, then you are instructed that defendant's name, if so signed by his direction and authority, binds defendant, and is as legal as though signed by himself personally."

The following instructions requested by defendant were refused:

"If you find from the evidence that the defendant refused to sign the subscription contract described in the petition and testimony of plaintiff, but instead thereof authorized his name to be attached to another and different contract, then your verdict should be for the defendant.

"You are instructed that if you find that the defendant authorized the witness Ensign to sign his name to a subscription with certain conditions annexed, and the witness Ensign signed his name to such subscription without those conditions annexed, such act of signing would not be the act of the defendant and he would not be bound thereby.

"If you find from the evidence that the defendant authorized his name to be signed to a subscription for $500 upon condition that plaintiff would agree to complete its building within one year, then such condition was necessary and without it the defendant could not be bound, and if you find from the evidence that such condition was required by him at the time, your verdict should be for defendant."

The propriety of the giving and refusal of these instructions is presented for review.

The plaintiff contends that under the pleadings there was no question presented as to a condition attached to the subscription, or a breach thereof; that, therefore, the court properly submitted the case to the jury on the sole

question of the authority given by Rawlings generally to subscribe his name; and therefore properly refused instructions involving a consideration of the conditions attached to the subscription. We quite agree with the plaintiff that the special denial of a subscription put in issue only the question as to whether there had been any subscription, of whatever character. But the answer contained a general denial, and it therefore devolved upon the plaintiff to prove the contract as he alleged it. (*McEvoy v. Swayze*, 34 Neb., 315.) In that case the plaintiff sued on a contract which he set forth. The defendant by answer averred a different contract and denied the contract pleaded by plaintiff by a general denial of the petition. The court held that the burden devolved upon the plaintiff of establishing the contract he alleged, saying: "The answer, therefore, put in issue the making of the contract and the breach thereof as set up in the petition. The affirmative matter averred in the answer is nothing more than an argumentative denial. Such allegations were entirely unnecessary, as the facts could have been proven under the general denial." If the defendant in this case had pleaded specially, the answer would necessarily have been reducible to this form: "The defendant says that he did make a certain contract of subscription, as follows: etc. But denies that he made the contract alleged in the petition." To any one familiar with common law pleading, it is at once apparent that this would have been analogous to the special traverse of the common law, where the inducement was not itself traversable and the *absque hoc* was the gist of the plea. (Tyler, Stephen on Pleading, 199.) It would not be a plea in confession and avoidance, but a direct traverse putting in issue the declaration, with the affirmative matter merely pleaded as an inducement, but not itself tendering an issue. If the defendant were here relying upon a conditional subscription and a breach thereof, it might be questionable, under the Code, whether the common law rule would prevail, and whether it would not be necessary

for the defendant to plead the condition and the breach; and in such a case the plaintiff's further argument might be pertinent, that the conditions here proved were conditions subsequent and not precedent; and that, therefore, the subscription was collectible without proof of a prior compliance with the condition. But the question presented by the instructions is a different one. Rawlings did not himself subscribe. The utmost that the plaintiff's evidence discloses is a subscription for him by an agent. This agent was also the agent of the association, so that the association was charged with the agent's knowledge of any limitations placed upon his authority by the defendant. Therefore there is no question in the case of an implied authority, or authority by estoppel. If it is true that Rawlings did authorize Ensign to subscribe $500 for him, but required that certain conditions should be attached to this subscription, then the subscription by Ensign of Rawlings' name to a contract not embodying those conditions was without authority. It was not the act of Rawlings, and he is not bound thereby. The instructions given by the court may be in themselves correct; but under the evidence they should have been accompanied by specific instructions bearing on this question of the authority given to Ensign; and while perhaps those requested by the defendant were not so specific as might be desired, the first and second at least were free from legal objections, and the defendant was entitled to have them given.

The defendant contends that the court erred in admitting parol evidence of the contents of the subscription book, in view of the fact that the evidence disclosed that other books of like character were in existence. It is insisted that these other books were better evidence than parol testimony of the contents of the particular book, as to the nature of the contract, at least so far as the caption is concerned. This question should be disposed of, as there must be a new trial of the case. We do not think that in this respect the court erred. In the first place, it

was not shown that the other books in existence were copies of that particularly in question. The proof was merely that they were in substance alike, and that they differed in details. In the second place, we think it is the general rule that there are no degrees of secondary evidence. When the primary is not obtainable, a party may resort to any evidence otherwise competent; and his choice of one class of secondary evidence instead of another goes to the weight of the evidence and not to its admissibility. (*Goodrich v. Weston*, 102 Mass., 362; Greenleaf, Evidence [14th ed.], sec. 84, note.)

REVERSED AND REMANDED.

TECUMSEH NATIONAL BANK V. GEORGE W. HARMON.

FILED APRIL 21, 1896. No. 6499.

1. **Action on Bank Deposit: TRIAL: PLEADING: AMENDMENT BY AGREEMENT: PRACTICE.** H. sued the T. Bank on a deposit. The bank answered by a general denial. During the trial, it undertook to prove payment. Objection being made to the relevancy of the proof, an agreement was made in open court whereby the bank was allowed twenty days to amend its answer "in any manner," with the same effect as if presently filed, and the trial proceeded. The instructions given excluded from the jury the consideration of the issue of payment which was finally tendered by the amended answer, filed after trial, but within the stipulated time. *Held*, That the plaintiff was bound by the terms of his stipulation, and that the judgment must be reversed for failure to submit the issues finally framed, to the jury.
2. **Practice: TRIAL.** The practice of proceeding with a trial subject to a future amendment of the pleadings, criticised.

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

John H. Ames and *S. P. Davidson*, for plaintiff in error.

T. Appelget and *J. H. Broady, contra.*

IRVINE, C.

This case has been elaborately argued, orally and on briefs, with relation to questions of substantive law supposed to be involved therein. We think, however, that its decision must depend chiefly upon matters of practice, presented by a state of the record so anomalous that they must be determined principally upon general considerations, without the aid of authority. Harmon brought the suit against the Tecumseh National Bank, alleging that on the 6th day of March, 1891, he deposited with the bank $5,000, at the instance and request of the bank, and that the deposit was to draw interest at six per cent per annum; that $1,000 and all interest to March 9, 1892, had been paid, but the remaining $4,000, with interest from said March 9, remained due. To this petition there was originally filed an answer admitting the corporate capacity of the defendant, and denying all other allegations. On the issues so framed the case proceeded to trial, but immediately after the defendant began to introduce its evidence it was confronted by an objection on the ground of irrelevancy. What then occurred is thus recited in the record: "The defendant here asks leave of court to amend his answer, to which the plaintiff objects. On the intimation of the court that he would permit the defendant to withdraw a juror and consequently continue the case, rather than submit to that, the plaintiff consents that the defendant can go on and draw their answer in any manner and file it, and they will rely on the instructions of the court. It is agreed by the parties that the amended answer so filed will have the same effect as though filed now. Said answer to be filed within twenty days." Thereupon the case proceeded and the evidence took a wide range. There was a verdict for the plaintiff for $4,000, with interest. Judgment was entered on this, and the defendant prosecutes error.

On the one side it is contended that the verdict is not sustained by the evidence; on the other, that, without

regard to any error which may have occurred in the course of the trial, the verdict was the only one which could be properly rendered under the evidence, and that the judgment should for that reason be affirmed. As we think the cause must be remanded for a new trial, we forbear any comment upon the evidence beyond what is necessary to solve the questions now presented to us, and simply say that in our opinion it was of such a character as to require the submission of the contested issues to a jury. There had been for a long time in Tecumseh a firm of bankers known as Russell & Holmes. Latterly it seems that this concern, whether by incorporation or otherwise does not appear, was styled "The Bank of Russell & Holmes." Before the transaction here in controversy, the Tecumseh National Bank was organized and seems to have become a successor to Russell & Holmes, although the evidence tends to show that the former firm remained in existence for the purpose of closing out some incidental business. Mr. Holmes, of the old firm, was president of the national bank. March 6, 1891, there was a conversation between Harmon and Mr. Holmes in the banking house, looking to the withdrawal by Mr. Harmon of money he had on deposit in the Carson National Bank of Auburn, and the loan or deposit of this money on interest either with Russell & Holmes or the Tecumseh National Bank. Whether the party contracting to receive the deposit or loan was Russell & Holmes or the Tecumseh National Bank is the vital question of the case, coupled with another, which we do not pass upon, which is whether, under the circumstances, the bank may be held liable by estoppel on account of the acts of its president, although it did not in fact receive the benefit of the money. It was agreed between Holmes and Harmon that Harmon should withdraw $5,000 from the Carson bank and place it with Holmes. He drew his check upon the Carson bank for $5,000 to the order of the Tecumseh National Bank, and received what is called a deposit slip, headed "Tecumseh National Bank," signed by Holmes as

president, and indicating the deposit of the check for $5,000. This check was by the Tecumseh bank indorsed for collection, and it was collected. March 9, three days after this transaction, there was issued by Holmes, and accepted by Harmon, a pass-book, being one of the books which had formerly been used by the bank of Russell & Holmes. This was marked on the cover, "Bank of Russell & Holmes, Tecumseh, Nebraska, in account with George Harmon." Inside was the following:

"The Bank of Russell & Holmes, Dr.

1891.

Mch. 9. Deposit..... $5,000

"This deposit to draw interest at six per cent per an. if left six months. Interest paid to Mch. 9—91."

On another page were certain entries indicating the payment of certain sums as interest and principal. There was evidence *aliunde* tending to show that the transaction was a loan to Russell & Holmes at six per cent; that the deposit of March 6 was only preliminary to that transaction; and that on March 9 the transaction was consummated, as evidenced by the pass-book, the money in fact passing to Russell & Holmes. On the other hand, there was evidence tending to show that Harmon understood that the whole transaction was with the Tecumseh National Bank; that he was unable to read, and therefore was perhaps not bound by the form of the pass-book, which might at least have put another man on inquiry.

The court gave a number of instructions at the request of the plaintiff, several of which were to the effect that the jury should find for the plaintiff if, on March 6, or about that time, he left with the defendant the money sued for. By one of the instructions the jury was told that the plaintiff's check and the deposit slip of March 6 constituted a complete written contract, the terms of which could not be contradicted by oral evidence, and that the jury should disregard all oral evidence tending to so contradict these papers. By still another the jury was instructed that the pass-book of March 9 could not

be received for the purpose of changing the terms of the contract, as evidenced by the check and deposit slip of March 6. Here the question of practice is presented for consideration. As the issues stood at this time, the petition was on a deposit. The answer was a general denial, and under this answer the defendant could not prove discharge by payment or otherwise; but under the answer as finally filed, while it was perhaps not very artificially drawn, the issue of payment was presented; and the question was not merely whether a deposit had been made on March 6, but it was whether the bank had discharged the liability thereby incurred by collecting the check and paying its proceeds to Russell & Holmes, in pursuance of plaintiff's direction. It is at once apparent that the instructions given confined the jury to the sole question as to whether the deposit had been made, and directed them that the transaction of March 9 could not be received to avoid the effect of any evidence as to the transaction of March 6. They did not submit the issues presented by the amended answer. The real question is, therefore, whether the defendant can now avail itself of its amended answer. In *Grimison v. Russell*, 11 Neb., 469, the original pleadings were lost after trial and before judgment; copies were not substituted and the judgment was reversed, because the court had no authority to enter judgment without pleadings whereon to found it. The reason of that case is applicable to this, although perhaps the defendant, being the party originally at fault, could not avail itself of the error if the plaintiff had been free from fault. But the stipulation of record shows that the plaintiff consented that the defendant might have twenty days to file its answer "in any manner," with the same effect as if then filed. The proceeding was highly irregular, and the court should have insisted that the issues be framed before the trial proceeded. By consenting to this course, however, the plaintiff bound himself to submit to any answer which might be filed within the time stipulated and allowed by the court. This an-

swer presented issues which had not been submitted to the jury. We think the plaintiff must be held to his stipulation and the case must be considered as if the answer finally filed had been already filed when the instructions were given. It is always well to have issues framed before judgment. This case illustrates the danger of trying a case and proceeding to judgment, and pleading it thereafter.

It is argued that there was a special finding, which in effect determines the merits of the case, independent of the general verdict. The following is the question propounded to the jury, and its answer: "Was the money in controversy included in the fund of the Tecumseh National Bank, after the amount thereof was entered upon plaintiff's pass-book with Russell & Holmes; if so, at what time?" The answer was as follows: "Yes; March 9, 1891." We have been unable, after a careful examination of the evidence, to find any evidence sustaining this finding.

REVERSED AND REMANDED.

DORSEY B. HOUCK V. SYLVESTER LINN ET AL.

FILED APRIL 21, 1896. No. 6531.

1. **Sales:** OPTION TO RESCIND. An arrangement whereby chattels are conveyed at a price certain, with a provision that the vendee may, if he fails to resell them, return them to the vendor, is a contract of sale with an option to rescind, and not a contract of brokerage.

2. **Evidence:** EXECUTION OF INSTRUMENT. Where an instrument is received in evidence without sufficient proof of its execution, the error is cured if such proof be subsequently made during the trial.

3. **Trial:** ADMISSION OF EVIDENCE. Error, if any, in sustaining objections to questions as leading, is cured if the evidence sought to be elicited is afterwards adduced from the same witness in response to other questions.

4. **Replevin**: ATTACHMENT: INDEPENDENT LIENS. In an action of replevin against a constable who held the property under a writ of attachment, his rights depend upon the attachment, and he cannot justify on the ground that the attachment plaintiff had an independent lien upon the property prior to the attachment.

5. **Chattel Mortgages.** A chattel mortgage is not avoided by the fact that subsequent to its execution the mortgagee consented to a sale of the property by the mortgagor for the benefit of both parties, no other liens existing and the sale not having been consummated.

6. ———: FAILURE TO FORECLOSE. A chattel mortgage is not avoided by the failure of the mortgagee to foreclose immediately upon default.

7. ———: INDORSEMENT OF NOTES: COLLATERAL SECURITY. The indorsement of notes secured by chattel mortgage, as collateral security for a debt of the mortgagee, passes the mortgage security to the indorsee of the notes, and such indorsee is, as against both mortgagor and mortgagee, entitled, on breach of condition, to the possession of the mortgaged property.

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

John T. Cathers, for plaintiff in error.

Gregory, Day & Day, contra.

IRVINE, C.

This was an action of replevin for three stallions, by the defendants in error, Linn and Barrie, against Houck, a constable. At the close of the evidence the court directed a verdict in favor of both plaintiffs. The essential facts are undisputed. The stallions formerly belonged to one Watson, in Scotland. They were shipped to Iowa and there sold by Watson's agent, Barrie, to Linn. Linn seems to have bought, in all, fourteen horses, and the arrangement between him and Barrie was that on reselling the horses he should pay Barrie a certain price for each; but in case he made no sale he had the privilege of returning the horses. The defendant contends that this arrangement merely constituted Linn an agent or broker for the sale of the horses; but we think it did more. It

vested in him the title to the horses, and granted to him an option of rescinding the sale. Linn sold the three horses in controversy to one Jillson, who, to secure the purchase price, executed to Linn his three promissory notes, secured by chattel mortgage on the horses. Jillson brought the horses to Omaha and put them up at the livery stable of one Doherty. They were placed there May 14, 1891. Linn's mortgage was filed for record May 16. Jillson not paying for the care of the horses and apparently having left the country, Doherty, in December, 1891, brought an action in the county court to recover for their keeping, and caused them to be attached. Houck, as constable, levied the attachment. In the meantime, Linn and Barrie had had a settlement of their affairs, by virtue whereof Linn gave to Barrie two notes for the amount found due and indorsed to him the Jillson notes as collateral security. The attachment case proceeded to judgment and the constable was about to sell the horses when Linn and Barrie replevied them in this action.

Several assignments of error relate to rulings on the evidence. It is contended that the court erred in admitting the chattel mortgage, for the reason that it was not sufficiently proved. This objection, we think, was well taken when the mortgage was admitted, but immediately thereafter its execution and identity were amply proved, and the proof on that subject remained uncontradicted. The order in which evidence is introduced rests largely in the discretion of the trial court; and the subsequent proof cured any error in the original admission of the mortgage.

Objections were made to two questions put to Linn in regard to his assignment of the Jillson notes to Barrie. It is contended that this proof was irrelevant. We think not. The petition specially pleaded the facts in regard to the interests of the two plaintiffs, and this proof tended to establish the interest of Barrie.

Objection was made to certain other questions because

they were leading, and these objections were sustained. This is assigned as error; but if there was any error it was immediately cured by permitting the same evidence to be adduced in response to similar questions put in a different form.

There are certain other assignments relating to rulings on the evidence, but counsel in the briefs merely say that the rulings were erroneous, and state no reason therefor, and we are unable to see that any such reason exists.

The other assignments raise the question of the propriety of the court's peremptory instruction to find for the plaintiffs. On this question the greater part of defendant's argument is directed to the question of priority between the mortgagee and Doherty under his statutory lien for caring for the horses. We cannot regard this question as material; nor is it even material to this action whether Doherty waived his lien by instituting the attachment suit and causing the horses to be levied upon. Conceding that Doherty had a lien prior to the mortgage, under the statute, and that he did not waive it by the attachment, this does not affect the right of Houck. Houck was certainly not in possession as Doherty's agent, but was in possession as an officer of the law, justifying merely under the writ of attachment. The lien obtained by virtue of the attachment, which is the sole justification of Houck, does not relate back to the time when Doherty's agister's lien accrued. There are some states where by statute it is provided that certain liens may be enforced by attachment; and authorities which carry the lien back are under statutes of this character. Here an attachment is not a method of foreclosing an existing lien, but is the creation of a new lien, the validity of which, as well as its priority, depends upon the attachment proceedings themselves. The attachment was not levied until long after the Linn mortgage was filed, and the mortgage has, therefore, priority, unless it was void as to the creditors of the mortgagor. It was presumptively void, as the mortgagee was not in possession; but

the proof shows clearly, and without contradiction, that it was executed in good faith for the purpose of securing a *bona fide* debt. It is urged, however, that the mortgage was void because a power of sale remained in the mortgagor. The evidence establishes no such power. The mortgage does not contain it, and the parol evidence shows that the horses were sold to Jillson for breeding purposes, and not for resale. It is true that it appears that after Jillson got into difficulties, Linn undertook to assist in giving him an opportunity to sell the horses and thereby discharge both debts; but this did not render the mortgage fraudulent. The mortgages which have been held void, because containing a power of sale, have been those where, by the mortgage itself, or by contemporaneous understanding, the mortgagor was permitted to remain in possession and sell the goods in the ordinary course of trade. In *Gregory v. Whedon*, 8 Neb., 373, the reason of this rule was stated to be that the object of a mortgage is to create a specific lien on the mortgaged property, which cannot be had if the mortgagor is permitted to dispose of the goods for his own benefit. We can conceive of no principle of law whereby a mortgagor and mortgagee may not, by joint arrangement in good faith, dispose of the property for the benefit of both parties, where no other liens exist. It is also contended that the mortgage was avoided by the failure of the mortgagee to take possession for the purpose of foreclosure immediately upon default. Certain Illinois cases are cited in support of this argument; but they are based on a statute whereby a chattel mortgage is valid only until the maturity of the debt secured. (Statutes of Illinois, ch. 95, sec. 4.) Under our statute a chattel mortgage is valid against creditors for five years after it is filed for record. (Compiled Statutes, ch. 32, sec. 16.) We think, therefore, that the plaintiffs established the validity of the mortgage.

But was there evidence justifying the direction of a verdict in favor of both plaintiffs? By the indorsement

of Jillson's notes to Barrie, the mortgage security passed to him. The theory of the petition was that only a portion of the notes had been so transferred; but the evidence shows that they were all transferred, and when the action was commenced Barrie still retained them, Linn's debt to him not having been paid. Barrie was, therefore, at the commencement of the action, the owner of the mortgage, and the proper plaintiff. He could have sued upon the notes, and they being good as between the original parties, his recovery would have been for their whole amount, and not merely the amount of the debt for which they were pledged. (*Barmby v. Wolfe*, 44 Neb., 77; *Haas v. Bank of Commerce*, 41 Neb., 754.) So he had a right to foreclose the chattel mortgage for the whole debt secured thereby, and had a right both as against the mortgagor and the original mortgagee to the possession of the mortgaged property after condition broken. We think, therefore, no right of possession was established in Linn. The judgment in favor of Barrie is affirmed. That in favor of Linn is reversed and the cause as to him remanded.

JUDGMENT ACCORDINGLY.

MISSOURI PACIFIC RAILWAY COMPANY V. MAMIE HANSEN.

FILED APRIL 21, 1896. No. 6466.

Railroad Companies: SPEED OF TRAINS: NEGLIGENCE: PERSONAL INJURIES. That a passenger train was run at the rate of twenty-five miles per hour outside the limits of a city or town, even in a thickly settled neighborhood and at a point where some persons were accustomed to walk upon the tracks, is not in itself and alone sufficient evidence of negligence. In a case where it is sought to hold the railroad liable because of such rate of speed, the jury, on proper request, should be so instructed.

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

See opinion for statement of the case.

R. S. Hall, A. R. Talbot, J. W. Orr, and *B. P. Waggener,* for plaintiff in error:

Speed alone, uncoupled with any other fact or circumstance, is insufficient to show gross negligence on part of a railroad company. (*Burlington & M. R. R. Co. v. Wendt,* 12 Neb., 78; *Illinois C. R. Co. v. Hetherington,* 83 Ill., 510; *Powell v. Missouri P. R. Co.,* 76 Mo., 80; *Goodwin v. Chicago, R. I. & P. R. Co.,* 75 Mo., 73; *Louisville & N. R. Co. v. Howard,* 82 Ky., 212; *Shackleford v. Louisville & N. R. Co.,* 84 Ky., 43; *Warner v. New York C. R. Co.,* 44 N. Y., 465; *Connyers v. Sioux City & P. R. Co.,* 78 Ia., 410; *Woodruff v. Northern P. R. Co.,* 47 Fed. Rep., 689; *Houston v. Vicksburg, S. & P. R. Co.,* 2 So. Rep. [La.], 562; *Doggett v. Richmond & D. R. Co.,* 81 N. Car., 459; *Young v. Hannibal & St. J. R. Co.,* 79 Mo., 336; *McKonkey v. Chicago, B. & Q. R. Co.,* 40 Ia., 205; *Central O. R. Co. v. Lawrence,* 13 O. St., 66.)

George W. Cooper, contra:

The speed of a train at the time and place of an injury should be considered in connection with the rule that more care is to be exercised at a place where the track is habitually used by pedestrians, and in a populous neighborhood, than at points where the track is not so used. (*Thompson v. New York C. & H. R. R. Co.,* 17 N. E. Rep. [N. Y.], 690; *Brown v. Sioux City & P. R. Co.,* 62 N. W. Rep. [Ia.], 737.)

John W. Johnston and *Ricketts & Wilson,* also for defendant in error.

IRVINE, C.

Mamie Hansen, an infant, brought this action by her next friend against the Missouri Pacific Railway Company to recover for personal injuries. She had a judg-

ment for $11,000, which the railway company by these proceedings seeks to reverse.

The petition alleges that the plaintiff was, at the date of the injury complained of, twelve years of age; that the defendant was the owner of and operating a line of railroad from Omaha to Kansas City. Then comes the following: "That on the line of defendant's said railroad, and within a thickly settled neighborhood adjoining the corporate limits of the said city of Omaha, immediately northeast of a public crossing on the line of said railway aforesaid, called 'Ruser's crossing,' defendant, without objection, notice, or warning on its part, at said date, and a long time prior thereto, allowed its said railroad track at said point to be habitually and constantly used by men, women, and children going back and forth as a footpath and public thoroughfare, the distance of one-half mile northeast of said Ruser's crossing to a point on the line of said railroad where the same intersects with another public crossing, and said defendant had full knowledge that said track aforesaid was so used; that on said date, and while plaintiff was walking in the center of the track of said railroad, along that portion of the line of defendant's said railroad, used by pedestrians as aforesaid, going northeast from said Ruser's crossing, and at a point some 600 feet from said Ruser's crossing; that at said time, which was about the hour of 5 o'clock P. M. on said date aforesaid, defendant's agents, servants, and employes were running a locomotive and passenger train attached thereto over and upon said railroad at said time and place, which was coming from the southwest; that while plaintiff was so walking upon said track at said time and place, traveling northeast, with her back to said approaching train, she (plaintiff) could have been and was plainly seen and distinguished, as an infant, walking on said railroad track, by the said agents, servants, and employes of defendant, then running and managing said locomotive and train of cars at said time and place, for the distance of one-half mile, within which

distance said locomotive and cars could have been easily stopped; but said defendant's agents, servants, and employes, disregarding the life and safety of this (infant) plaintiff, ran said train, at said time and place, at the unlawful rate of speed of twenty-five miles per hour, without attempting to stop said train as the same approached plaintiff without her knowledge, and while said (child) plaintiff might have been and was seen by the said agents, servants, and employes of defendant, as aforesaid, then so negligently and carelessly running said locomotive and train of cars, at said time and place, carelessly and negligently ran said locomotive and train of cars over and upon said plaintiff, whereby and by reason thereof plaintiff's right foot and leg were so badly crushed and mangled the same had to be and was amputated just below the knee."

It will be observed that the only negligence alleged is in running the train at the rate of twenty-five miles per hour, and in failing to stop it in time to avoid the injury. It is very doubtful whether the petition pleads sufficient facts to impose upon the company the duty of stopping the train. Ordinarily an engineer has a right to presume that persons walking along the track are in possession of their senses and will appreciate the danger and act with discretion; and he is under no obligation to stop the train, or even lessen the speed thereof, before discovering that such person is heedless of warnings given of the approach of the train, or otherwise in imminent peril. (*Omaha & R. V. R. Co. v. Cook*, 42 Neb., 905.) A mere failure to stop a train when a trespasser is seen, or should be seen, upon the track can therefore create no presumption of negligence. There must be other facts to create the duty of stopping; and it is doubtful whether the facts that the trespasser is but twelve years old and the place one where pedestrians are permitted to walk upon the track, create such duty. In this case the evidence was such that some other facts might have been pleaded; but we need not now determine what is necessary in that

regard, because in the decision of the case the consideration of this feature is only necessary and has only been entered into for the purpose of indicating that under such general allegations the specific allegation that the train was running at an unlawful speed of twenty-five miles per hour became a salient feature of the pleading. It has been held that outside the limits of cities and towns no rate of speed is in itself unlawful or negligent. (*Burlington & M. R. R. Co. v. Wendt*, 12 Neb., 76; *Chicago, B. & Q. R. Co. v. Grablin*, 38 Neb., 90.) It does not appear that this portion of defendant's railroad was within a city or town. On the other hand, it is alleged that it is in a thickly settled neighborhood adjoining the city of Omaha. The evidence is conflicting as to the actual speed, one witness placing it at twenty-five miles per hour, others as low as twelve miles per hour. There is no evidence that the region was unusually thickly settled. There is evidence that a number of persons were accustomed to walk for a certain distance along the track —how many and how frequently does not appear. But there was no highway and no permission by the railway company to so use its tracks, unless a license might be inferred from its knowledge that they were so used without any measures being taken to prevent. We do not think that any jury should be permitted to find that a railway company was negligent from the mere fact that it ran its passenger trains twelve or even twenty-five miles per hour along a suburban route, outside of the city limits, even though it knew that trespassers might be on the right of way. Such knowledge would affect its duty in keeping a lookout and giving warnings, and in exercising other precautions to avoid injuring trespassers; but such a situation certainly would not require trains to be run at a less speed than twenty-five miles per hour.

Under this state of the evidence, the defendant requested the following instruction: "The jury are instructed that no rate of speed is of itself negligence,

except where the rate of speed is prescribed or specified by some law or ordinance, and you are further instructed that the defendant company, in the operation of its trains over its tracks outside of any city, or in the absence of any express law to the contrary, has the right to operate its trains at any rate of speed consistent for the safe and proper conduct of its business; and in this case, unless you find the defendant guilty of some negligence alleged in the petition other than the operation of its train at the rate of twenty-five miles per hour, your verdict must be for the defendant." The court refused to give this instruction, and in no place gave the jury any similar caution. We think that the railway company was, under the evidence, entitled to have the jury so directed, and that the refusal to so charge was prejudicial error.

Many other questions are raised, but most of them have been decided in other cases since the trial of this in the district court, and they will therefore not be considered.

REVERSED AND REMANDED.

ROSALIE FARLEY V. JOHN MCKEEGAN ET AL.

FILED MAY 6, 1896. No. 6298.

1. **Landlord and Tenant**: EVIDENCE OF CONTRACT. The relation of landlord and tenant, like other contract relations, does not necessarily depend upon an express agreement, but may be implied from the conduct of the parties.
2. **Tenant from Year to Year**: EVIDENCE. A general occupancy by one other than the owner of land will be treated as a tenancy from year to year, whenever the reservation of rent or other circumstances plainly indicate an agreement for an annual holding.
3. ——: TERMINATION OF TENANCY. The tenancy can, in such case, be terminated only by agreement, express or implied, or by notice for the time and in the manner prescribed by law.

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

C. C. McNish, *J. W. Huntsberger*, and *Chase & Sloan*, for plaintiff in error.

T. M. Franse and *P. M. Moodie*, *contra*.

POST, C. J.

This was an action by the plaintiff in error in the district court for Cuming county, who sued to recover $675, the value of 270 tons of hay, which, as therein alleged, was unlawfully converted by the defendants in the summer of 1891. Accompanying the answer, which is in effect a general denial, is a counter-claim for $100 on account of trespass by the plaintiff upon the premises described in the petition. On the trial of the issues thus joined there was a verdict and judgment against the plaintiff below as to her cause of action, and in favor of the defendants on their counter-claim in the sum of five cents, to reverse which this proceeding is prosecuted by the former.

The substantial controversy is the right of possession of the *locus in quo*, to-wit, the northeast quarter of section 26, township 24, range 7 east, in Cuming county. Both parties claimed through Richard Rush, an Omaha Indian, to whom said land was allotted under the provisions of the act of congress approved August 7, 1882. The basis of the plaintiff's claim is a lease under date of July 1, 1891, from Noah La Flesche, who claimed to hold by virtue of a lease executed by said Rush February 16, 1891, and acknowledged August 17 following. On the other hand, it was shown that Richard Rush had left the Omaha reservation some time previous to the allotment of the lands thereof, and that selection was made in his behalf by his brother, Joel Rush. On the third day of May, 1887, Mary Rush and John Webster, guardians of the minor children of the said Joel Rush, then deceased,

executed a lease of the land in dispute to John McKeegan and John Blenkiron for the period of five years. Richard Rush, it should be observed, was, at the date last named, supposed to be dead, and said lease was executed by the guardians named in good faith, believing that the title to the property therein described was in the children of his deceased brother. In the year 1889 or 1890 the said Richard returned to the reservation, and thereafter collected from the defendants McKeegan and McManus, who had succeeded to the rights of McKeegan and Blenkiron, the annual rental for the premises at the stipulated rate of $100 per annum, payable May 1 of each year. The lessees last named took possession upon the execution of the lease to them in 1887, which possession in them and their successors in interest, McKeegan and McManus, continued up to and subsequent to the date of the lease from La Flesche to the plaintiff. The argument of the plaintiff is directed mainly to the proposition that there was no competent proof of a ratification on the part of Richard Rush of the unauthorized lease executed in behalf of the children of his deceased brother. That proposition may be conceded without an examination of the evidence, although it does not necessarily follow therefrom that the judgment complained of is wrong. On the contrary, it is reasonably certain that the relation of the defendants toward Rush, the owner of the premises, resulting from the act of the latter in accepting the annual rental, as above stated, was that of tenants from year to year, which could be terminated only in the manner prescribed by law, and is a sufficient protection to them in this action. The relation of landlord and tenant does not necessarily depend upon an express agreement, but, like all other contract relations, may be implied from the conduct of the parties; and it may be asserted as a rule of universal application that a general occupancy of land will be treated as a tenancy from year to year, whenever the reservation of rent or other circumstances plainly indicate an agreement for an annual holding. (Wood,

Landlord & Tenant, p. 5, and cases cited; 4 Kent's Commentaries, 114; *Jackson v. Wilsey*, 9 Johns. [N. Y.], 267; *Critchfield v. Remaley*, 21 Neb., 178.) As a matter of course, the occupancy of the defendants might, upon the giving of proper notice, have been terminated on the 30th day of April, 1891. But instead of any steps being taken by Rush or others claiming under him toward a termination of the lease, the defendants were permitted to hold over without objections, so far as appears from this record, until the hay in controversy was ready for harvest. The law, from the facts stated, and as to which there is no dispute, implies an agreement for the continuance of the lease for the year ending April 30, 1892. The judgment is therefore

AFFIRMED.

JOHN BLOMGREN V. GUST. ANDERSON.

FILED MAY 6, 1896. No. 6600.

1. **Action for Wages:** VERDICT FOR PLAINTIFF. Evidence, although conflicting, *held* to sustain the verdict and judgment complained of.
2. **Evidence:** COLLATERAL FACTS. Evidence of collateral facts corroborative of the statements of parties with respect to the principal contention is confined to such transactions as shed some real light upon the question at issue. As a rule, the circumstances surrounding the parties, their relations toward each other and the subject of the controversy at the time of the transaction involved, are proper subjects of proof.
3. **Wages:** SPECIAL CONTRACT: EVIDENCE: COLLATERAL FACTS. In an action to recover for services rendered under a special contract the defense alleged was that such services were by agreement performed as an equivalent for the plaintiff's board and lodging during the period named. Evidence that on or about the date of the agreement alleged by the defendant a third person, in his (defendant's) presence and hearing, offered to employ the plaintiff at substantial wages for work of the same general character, was rightly admitted as bearing upon the reasonableness of the plaintiff's claim, and in some degree corroborative of the plaintiff's testimony.

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

Uriah Bruner, for plaintiff in error.

H. H. Bowes, contra.

POST, C. J.

The defendant in error was permitted to recover in the district court of Burt county for work and labor performed under an alleged special agreement. According to the allegations of his petition, he labored for the defendant therein (plaintiff in error) three months, to-wit, during the months of December, 1891, and January and February, 1892, at the agreed rate of $20 per month. The answer consists of a general denial and an allegation that the services claimed for were by agreement rendered as an equivalent for the plaintiff's board and lodging, during the months above named. Evidence was adduced by the parties in support of their respective contentions, that of the plaintiff below being sufficient, when tested by the rules applicable to proceedings in error, to sustain the verdict and judgment in his favor. The record, however, presents another question, the solution of which is attended with more difficulty. The plaintiff below was, over the objection of the defendant, permitted to prove as a part of his case in chief that one Johnson, a neighbor, about the time of the alleged agreement, to-wit, December 1, 1891, offered to employ him (plaintiff) to husk corn at $1.25 per day, saying that he then had ninety acres of corn to gather, which offer was made in the presence and hearing of the defendant. That proof, it is argued, should have been rejected as wholly collateral to the matter in dispute, and as tendering a false issue, the effect of which was necessarily to mislead and prejudice the minds of the jurors against the defendant. It is clear that some discretion should be accorded the trial court in the admission of collateral facts corroborative

of the statements of parties with respect to the principal contention, although the limit of such discretion has not been clearly defined. The rule, as said by one author, "excludes all evidence of collateral facts which are incapable of affording any reasonable presumption as to the principal matters in dispute; and the reason is that such evidence tends needlessly to consume the public time, to draw the minds of the jurors from the points in issue, and to excite prejudice and mislead; moreover, the adverse party, having had no notice of such evidence, is not prepared to rebut it. The due application of this rule will occasionally tax to the utmost the firmness and discrimination of the judge; so that while he shall reject, as too remote, every fact which merely furnishes a fanciful analogy or conjectural inference, he may admit as relevant the evidence of all those matters which shed a real, though perhaps indirect and feeble, light on the question in issue. And here it will generally be found that the circumstances of the parties to the suit, and the position in which they stood when the matter in controversy occurred, are proper subjects of evidence; and, indeed, the change in the law enabling parties to give testimony for themselves has rendered this proof of 'surrounding circumstances' still more important than it was in former times." (Taylor, Evidence, sec. 316; 1 Greenleaf, Evidence, sec. 52 *et seq.*) The fact that the plaintiff below might have earned satisfactory wages at the time he, as alleged, engaged to serve the defendant for his board and lodging, is not wholly irrelevant to the question at issue. It bears directly upon the reasonableness of the defendant's claim, and is accordingly in some degree corroborative of the plaintiff's evidence in his own behalf. In *Weidner v. Phillips*, 114 N. Y., 458, in which the question at issue was an agreement for the sale of property at a specified price, evidence of the value of the property was held admissible in corroboration of the defendant's denial of the alleged contract; and that case was followed and approved in *Rubino v. Scott*, 118 N. Y., 662. It must be re-

membered, too, that Johnson's offer to employ the plaintiff was made in the presence and hearing of the defendant and is, for that reason, not within the rule excluding *res inter alios acta*. The court did not, we think, err in receiving the evidence complained of, the question of the weight and sufficiency thereof being by appropriate instructions submitted to the jury.

What is here said applies to evidence of like character received over the objection of the defendant below, and of which complaint is made in the petition in error. An examination of the entire record discloses no error on the part of the trial court prejudicial to the defendant therein. The judgment is accordingly

AFFIRMED.

MARY RILEY, APPELLEE, V. CLARENCE E. STARR ET AL., APPELLANTS.

FILED MAY 6, 1896. No. 6528.

1. **Deeds as Mortgages.** The true test in determining whether a conveyance absolute in form should be treated as a sale or as a mortgage is whether the relation of the parties toward each other as debtor and creditor continues. If it does so continue, the transaction will be treated as a mortgage and the conveyance as a security only.
2. ———: EVIDENCE. Evidence examined, and *held* to sustain the finding that a conveyance absolute in form was intended as a security only.

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

Wharton & Baird, for appellants.

Mahoney & Smyth, contra.

POST, C. J.

This is an appeal from a decree of the district court for Douglas county, whereby a deed absolute in form, exe-

cuted by the appellee, Mary Riley, to Clarence E. Starr, agent and manager of the Central Loan & Trust Company, was declared to be in equity a mortgage merely, requiring a reconveyance upon a finding that the debt thereby secured had been paid and satisfied from the sale of a portion of the property conveyed, and awarding judgment in favor of the appellee for the proceeds of the property so sold, less the amount of the debt secured.

The questions presented for determination will be readily understood without a statement in detail of the issue made by the pleadings, or of the facts disclosed by the record. It should, in justice to counsel for appellant, be observed that they concede the power of courts of equity to award proper relief against conveyances absolute in form, when intended as security only; but they deny the application of that rule to the facts of the case at bar, on the ground, as claimed, that the deed in question was given, not as security, but in satisfaction of the indebtedness due from the appellee; that the agreement to reconvey was a mere condition subsequent operating upon an estate already vested, and in no sense a defeasance essential to characterize the transaction as a mortgage. There is no doubt that the law recognizes a distinction between a deed intended as security only and one with a covenant to reconvey upon condition; but the failure of the courts to always observe such distinction has led to some confusion and apparent conflict of decision upon the subject. A safe and perhaps the most satisfactory test, in all such cases, is whether the relation of the parties to each other as debtor and creditor continues. If it does, the transaction will be treated as a mortgage, otherwise not (*Robinson v. Cropsey*, 2 Edw. Ch. [N. Y.], 138; *Wilson v. Giddings*, 28 O. St., 554; Jones, Mortgages, sec. 258); and if intended as a mortgage when executed, its character as such will not be changed by the mere effluence of time. (*Tower v. Fetz*, 26 Neb., 706; *Nelson v. Atkinson*, 37 Neb., 577; *Morrow v. Jones*, 41 Neb., 867; *State Bank of O'Neill v.*

Mathews, 45 Neb., 659.) According to the testimony of Bernard Riley, who represented the plaintiff throughout the transaction, the deed in question was delivered to Mr. Starr about the 15th day of June, 1892, at which time, and as a condition thereto, it was by the latter promised and agreed that the witness should have until September 1 to "fix it up," or to "pay the debt." True, the foregoing statement is denied by the witnesses for the appellants, and the finding of the court upon that issue is vigorously assailed as unsupported by the evidence; but whatever view we might entertain of that subject as an original proposition, it cannot be said that the finding is so clearly unsupported by the evidence as to warrant interference on our part. The rule which governs in all such cases has been so often asserted by this court as to render further discussion unnecessary.

DECREE AFFIRMED.

RUMSEY SALING, APPELLANT, V. RICHARD SALING ET AL., APPELLEES.

FILED MAY 6, 1896. No. 6594.

Conflicting Evidence: REVIEW. Evidence, although conflicting, *held* sufficient to sustain the order appealed from.

APPEAL from the district court of Sarpy county. Heard below before KEYSOR, J.

Anthony E. Langdon, for appellant.

H. C. Lefler and *James Hassett*, *contra*.

POST, C. J.

The appellant, Rumsey Saling, as guardian of the person and property of Catherine Saling, an infirm person, upon the death of his said ward exhibited to the county

court of Sarpy county his final report, to which exceptions were taken by the appellees as heirs at law of the said Catherine, who died intestate. From the final order of that court an appeal was taken by the said guardian to the district court, where, upon a hearing of the issues made, he was allowed the sum of $1,041.99 in full of all demands against the said estate, and from which order he has prosecuted an appeal to this court. The district court found specially as to each of the many items in dispute, and has stated the account between the guardian and the estate with a precision which cannot be too highly commended. We have examined the evidence in the voluminous bill of exceptions so far as it relates to the contested charges, and which in our opinion fully sustains each of the findings assailed on this appeal. The order of the district court is accordingly

AFFIRMED.

WESTERN GRAVEL COMPANY, APPELLANT, V. CHRISTIAN GAUER, APPELLEE.

FILED MAY 6, 1896. No. 6580.

New Trial: NEWLY-DISCOVERED EVIDENCE: BILL OF EXCEPTIONS. In order to entitle the unsuccessful party to a petition for a new trial under section 318 of the Code to a review in this court the evidence on the former trial must, when material, be preserved in the bill of exceptions. (*Omaha, N. & B. H. R. Co. v. O'Donnell*, 24 Neb., 753.)

APPEAL from the district court of Cass county. Heard below before CHAPMAN, J.

Bradley & De Lamatre, for appellant.

Beeson & Root, contra.

POST, C. J.

The plaintiff, against which decree had been entered by the district court for Cass county, prosecuted a pro-

ceeding by petition for a new trial under the provisions of section 318 of the Code. Said petition, upon final hearing thereof, was dismissed and a new trial denied, to which order and judgment exception was taken and the cause by appropriate proceeding removed into this court for review.

The only proposition necessary to notice at this time is that the record does not present the merits of the controversy, since the evidence upon the former hearing is not included in the bill of exceptions herein. Where a new trial is sought by means of a petition filed after the term at which the judgment or decree was rendered, the petitioner is required to show the evidence at the former trial when material, as well as the newly-discovered evidence or other ground alleged therefor, and both must be preserved in the bill of exceptions in order to entitle the unsuccessful party to a review of such proceeding by this court. (*Omaha, N. & B. H. R. Co. v. O'Donnell*, 24 Neb., 753.) The sole question presented by the petition in this case was whether, in view of the issues as finally made, the decree was warranted by the evidence. It is, therefore, clearly within the rule stated, and the judgment complained of must be

AFFIRMED.

J. P. TWOHIG V. PERRY LEAMER.

FILED MAY 6, 1896. No. 6557.

1. **Witnesses: FORMER TRIAL: RECOLLECTION OF TESTIMONY OF DECEASED PERSON.** The evidence of a witness, given or used on the trial of a cause and who has since died, is competent on a subsequent trial of the same action, and where not in the form of deposition or preserved in any manner prescribed or contemplated by law, may be stated by any person who heard it given and who recollects and can state it substantially.

2. ———: ———: ———. Before a witness can be allowed to give his recollection of the evidence of a deceased witness, it must be

shown, as a foundation for the introduction of such evidence in such manner, that it was given or taken for use in a former action between the same litigants, that the party against whom it was given had, from the manner of its reception, an opportunity to cross-examine the deceased witness, that it involved the same subject-matter, and that the witness called to state it recollects and can repeat in substance the evidence of the deceasd witness.

3. ———: ———: ———. Where, in a trial before the judge of a district court without the intervention of a jury, a witness was allowed to state his recollection of the evidence of a witness given at a former trial of the case who had since died, no sufficient foundation having first been laid for the introduction of the evidence in such manner, and the witness making statements in giving his evidence, which would have completed the foundation for its introduction, it renders the evidence competent for consideration in the determination of the issues in the action and cures the error, if any, committed by its admission.

4. Ejectment: VOID TAX DEEDS. A void tax deed affords color of title in an action of ejectment in which adverse possession of real estate for the statutory period of ten years is relied upon as a defense.

5. ———: ADVERSE POSSESSION: STATUTE OF LIMITATIONS. To establish title to real property in this state by virtue of the operation of the statute of limitations there must have been maintained by the party asserting it an actual, continuous, notorious, and adverse possession of the premises under claim of ownership during the full period required by the statute. (*Gatling v. Lane*, 17 Neb., 77; *Lantry v. Parker*, 37 Neb., 353.)

6. ———: ———: ———. The evidence in this case examined, and *held* to show such acts in respect to a piece of land not suitable to general farming purposes, but fit for grazing, and a portion of which was what is termed "hay land," as constituted actual, continued, notorious, and adverse possession for the time required by statute.

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

W. E. Gantt, for plaintiff in error.

R. E. Evans, *contra*.

HARRISON, J.

This, an action of ejectment, was commenced by the plaintiff in the district court of Dakota county, to recover possession of the south half of the southeast quarter of

the northwest quarter of section 18, township 28 north, of range 9 east. The defenses stated in the answer were adverse possession in the defendant and his grantor for more than ten years prior to the commencement of the action, the possession of the grantor being, it was alleged, under a tax deed issued to him by the treasurer of Dakota county. There was also pleaded in the answer the payment by defendant and his grantor of all taxes assessed against the land in controversy for the years 1865 and each succeeding year up to and including 1890. There was a reply filed and a trial of the cause and judgment rendered, which, as is the practice, was set aside on motion of the defeated party. Subsequently amendments of the pleadings, or some of them, were allowed to be made, but we need not particularly notice them. A second trial of the issues to the presiding judge, a jury being waived, resulted in a judgment in favor of defendant, and seeking its reversal, the plaintiff presents the case to this court by error proceedings.

The first objection of plaintiff to which our attention has been directed by counsel in the arguments in the brief of questions presented for review is that the trial judge erred in admitting the testimony of M. C. Beck, who was called to state the evidence given in this case before him as referee, by a witness since deceased. It is contended that no sufficient foundation was laid for the introduction of the testimony to which we have referred. It must be borne in mind, in solving this question, that the trial in progress was before the judge, without the intervention of a jury, and that the trial judge, if such was the fact, admitted this evidence without the proper foundation having been laid for its introduction, would not be sufficient to call for a reversal of the judgment. The judge, where the trial is to him without the intervention of a jury, is presumed to sift the evidence and base his findings on that which is proper and competent, and that alone. It was of the record of this case that there had been a prior trial of it. It was shown that Mr. Beck,

the witness being interrogated, had at one time been appointed referee to take testimony in this case; that as such referee he took the testimony of one Thomas L. Griffey, who had died some time between the date of taking his evidence by the referee and the time of this the second trial of the cause, and it was further shown that the report of the referee containing the evidence of the deceased witness, Thomas L. Griffey, had been filed in the proper office and made of the papers in the case, but had been lost or mislaid. After the foregoing facts appeared in evidence, Mr. Beck was asked to state what testimony Thomas L. Griffey had given relative to his title or claim to the property in controversy in this action, and the counsel for plaintiff then objected to the proposed evidence, as "incompetent, irrelevant, and immaterial; further, the witness has not shown himself competent, for the reason that he does not show that he remembers what was said." This objection was overruled and the evidence admitted. The objection was well taken. It had not been shown that the witness then testifying recollected and could state the substance of the evidence given by the deceased witness. Unless Mr. Beck did recollect and could state the substance of the evidence by such witness, his evidence should not have been admitted, and that he could do so should have been made to appear before he was allowed to testify; but, as we have seen, the mere erroneous admission of this evidence in the trial of the cause before the judge without a jury does not call for the reversal of the judgment. The witness, as a preface to his testimony, said that his recollection was not very vivid as to Mr. Griffey's testimony, but that he remembered something of the substance of it, and in attempting to state it he at all times gave, as he said, what the deceased witness had testified, not the sense or meaning which he, Beck, had drawn from the testimony of Griffey, and was clothing in words, but in substance, the evidence he had heard as referee. This rendered the testimony of this witness competent to be

considered by the judge in a determination of the issues in the cause, if it was not open to the further criticism urged against it by counsel under this same objection, viz., that it should have been shown that at the time the evidence of the deceased witness was taken there was a cross-examination on behalf of plaintiff, or an opportunity afforded for it. It has been said that it must appear that there was a cross-examination of the deceased witness at the time the testimony was taken which it is purported to have detailed, by another witness, as evidence in a trial of the issues, in the action which takes place subsequent to the death of the witness, or that it was taken in such manner that an opportunity was offered for cross-examination by the opposing party to the one who called the witness and caused his testimony to be taken (1 Greenleaf, Evidence, note 2, sec.165); but in this case Griffey was the party to whom the tax deed was issued, and who was the grantor of defendant in the action, and it was as a portion of defendant's case that his evidence formerly taken was sought to be introduced, and in the cross-examination of Mr. Beck, who was called for the purpose of stating it, counsel for plaintiff, referring to the taking of the evidence of the deceased witness before the referee, asked this question: "Didn't he testify, in answer to my question if his possession was continuous, that he could not say that it was?" From which the reasonable inference is that counsel was there representing plaintiff and participating in the taking of the testimony by cross-examining the witness, and it follows that this branch of the objection must be overruled.

The main and real controverted issue in the case was whether there had been such an adverse possession by defendant and his grantor as gave title to the land, and in regard to this it is strenuously urged that the findings and judgment of the court were not sustained by sufficient evidence; also that they were contrary to law. These two assignments we will consider together. The general rule is well established in this state that in order

to successfully claim title to real estate by virtue of the operation of the statute of limitations there must have been maintained by the party asserting it an actual, continued, notorious, and adverse possession of the premises, under claim of ownership, during the full period stated in the statute. (*Gatling v. Lane*, 17 Neb., 77; *Lantry v. Parker*, 37 Neb., 353.) It was admitted that the United States conveyed the title to the land in controversy to William F. Lockwood and James Virtue, by patent, and that they conveyed it to the plaintiff by a quitclaim deed in October, 1888. Just when the patent was issued to plaintiff's grantors does not appear, but it was probably some twenty years or more prior to the time they conveyed to him. Of date January 27, 1869, Thomas L. Griffey received from the treasurer of the county in which the land is situated a tax deed for it, which was duly recorded on the same day, and on April 24, 1885, Griffey conveyed by quitclaim deed whatever interest or title he had acquired in or to the land to the defendant in this action. It is conceded by counsel for defendant that the tax deed issued to defendant was void, and at most gave no more than color of title, but it constituted color of title, and any rights acquired by its holder by adverse possession of the land described in it would be in or to the whole of such land. A void tax deed affords color of title. (*Lantry v. Parker, supra.*) The land in dispute was shown to be of such nature as not to be fit for use for general farming purposes, but only for pasturage, or was what is commonly called in this state "hay land." It was said in the opinion in the case of *Lantry v. Parker, supra*, a case in which a piece of land was in controversy which was "best adapted to the purposes of grazing and growing hay," in regard to the necessary character of adverse possession of land of the kind described: "This evidence is, we think, sufficient to justify the trial court in finding that defendant had the notorious, continuous, and adverse possession of the land for the statutory period. The law does not require that possession shall be evi-

denced by a complete inclosure, nor by persons remaining continuously upon the land and constantly, from day to day, performing acts of ownership thereon. It is sufficient if the land is used continuously for the purposes to which it may be, in its nature, adapted. In the case of arable land it is not necessary, in order to hold possession, that one should continuously have a crop in the ground. It is sufficient if, during the seasons of the year when crops are grown, the land be used for that purpose; and from harvest to seedtime one's possession is not interrupted, although during that period no acts of ownership may be exercised. So here we think that the protection of the grass during the growing season, the cutting, curing, and disposal of the hay at the proper periods, constitute actual possession in the defendant." The evidence in the case at bar was in some particulars conflicting, but it was admitted that Griffey and the defendant had paid the taxes assessed against the land, commencing with those of 1865, and for each succeeding year up to and including 1890. This was a strong circumstance tending to establish the adverse holding and abandonment of the land by the holders of the legal title. (*Omaha & Florence Loan & Trust Co. v. Barrett*, 31 Neb., 804.) The evidence on behalf of defendant tended to show that Griffey, when he received the tax deed in January,1869, took possession of the land and did some work on it, a part of which consisted in digging out and removing from among the growing grass the small willows, and thus improving it in quality as hay land; also cutting the grass and making hay on the land, or allowing it to be done by other persons for him, or by his permission as owner of the land; that some twelve or fourteen years prior to the commencement of this suit, this land, with other lands adjoining, was inclosed or fenced. This, it appears, was not done by Griffey, and he did not cause it to be done, but it was by his permission, given at request of the party who inclosed it; that the possession and use of it had been such that it was known in its vicinity as

"Griffey's land," and when any person desired to make use of it, application for the privilege was made to Griffey as owner, and that from the time in 1885, when the land was purchased by defendant, his use of it had been continuous. Viewed in the light of the rule announced in the case of *Lantry v. Parker*, *supra*, the evidence was sufficient to sustain the finding of the trial judge that there had been an adverse holding for the statutory period, and his judgment rendered in accordance with the finding was right. There are no other assignments of error discussed in the brief of counsel for plaintiff, and it follows from the foregoing conclusions that the judgment must be

AFFIRMED.

SARAH J. FAIRFIELD V. ANDREAS KERN ET AL.

FILED MAY 6, 1896. No. 6347.

1. **Instructions**: ASSIGNMENTS OF ERROR. Errors in respect to giving instructions must be assigned separately, and if assigned in groups will be considered no further than to ascertain that one of the instructions complained of was properly given.
2. **Review**: SUFFICIENCY OF EVIDENCE. Where there is sufficient evidence to sustain a verdict it will not be set aside, notwithstanding the court might have found differently from the jury upon the testimony.

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

C. S. Polk and *Beeson & Root*, for plaintiff in error.

Matthew Gering, contra.

HARRISON, J.

In the petition in this action it was alleged, in substance, that on or about the 1st day of May, 1886, the plaintiff leased to defendants certain property situated

in an addition to the city of Plattsmouth, for the term of one year, at a rental of $20 per month, payable monthly in advance, and on the 14th of the month mentioned the defendants took possession of the premises and continued in possession until May 14, 1887, at which time the property was again leased to them for a year at an agreed monthly consideration of $15, payable for each month of the term in advance; that their possession under the agreement last stated continued until April 14, 1888; that payments were made of rent moneys in the sum of $320.20; that there was a balance due plaintiff of $84.80; that by reason of the negligence and carelessness of defendants while living in said house and on the premises, they became dirty and out of repair and the plaintiff was obliged to spend the sum of $15 for cleansing and repairing them after defendants had left them. The plaintiff prayed judgment for the sum of $99.80 and interest. Defendants, for answer, denied each and every allegation of the petition, except such as were specifically admitted. The defendant, Mary Kern denied an indebtedness to plaintiff and pleaded that at the time of the making of the contract of lease she was the wife of Andrew Kern and the contract had no reference to her separate property, trade, or business. It was further pleaded in the answer as follows: "That the defendant, further answering, states that he has paid the plaintiff all sums of money due her, and that he specifically denies that he agreed to pay the plaintiff the sum of $20 per month for the rent of the premises, or that he agreed to pay $15 per month therefor except a portion of the time, and that he has paid said plaintiff all sums due her under and by virtue of said contract. Defendant admits that he occupied said premises during the time stated in said petition, and that he paid her the sum of $320; denies that said premises were injured by the negligence of defendant, but that he necessarily expended the sum of $25 for the repair of said premises. Defendant, for a counter-claim, alleges and avers that at her special instance and request

he boarded said plaintiff for a period of about thirteen weeks, and that said board was reasonably worth the sum of $39, no portion of which sum has ever been paid, although requested; that there is now due defendant Andreas Kern from the plaintiff the sum of $25 for repairs upon said premises, and $39 for board, wherefore defendant demands judgment against the plaintiff for the sum of $64, with interest from May 14, 1887, besides costs of suit." The reply was a general denial of all new matter contained in the answer. There was a trial of the issues before the judge and a jury, which resulted in a verdict and judgment in favor of defendant in the sum of $2.20, to reverse which the plaintiff has prosecuted error proceedings to this court.

Some objections are urged, in the argument, to certain of the instructions to the jury. The assignment of error in respect to the action of the judge in giving the instructions was in the following language: "The court erred in giving paragraphs 1, 2, 3, 4, 5, 6, 7, 8, and 9 of the instructions given by the court on its own motion." Instruction numbered 8 was unobjectionable, and this being determined, according to the well established rule of this court, this assignment of error will not be further examined or considered. Errors as to giving instructions should be separately assigned, and if assigned in a group will be examined no further than is necessary to ascertain that the action as to any one of such instructions was proper. (*Kaufmann v. Cooper*, 46 Neb., 644; *Grossman v. State*, 46 Neb., 22.)

The evidence on the part of the plaintiff was mainly directed toward establishing that the amount of rent to be paid by the defendants during the first year was the sum of $20 per month, and for the second $15 per month, while, on the other hand, the defendants sought to show that it was $15 per month during the first and $12 per month during the second year. We might possibly not agree with the jury upon the evidence presented to us in the record, but it was conflicting, and there was sufficient

evidence to sustain the verdict rendered, and it will not be set aside. (*Converse v. Meyer*, 14 Neb., 190; *Hough v. Stover*, 46 Neb., 588.) From an investigation of all the evidence we conclude that the jury must have rejected the evidence as to all of the controverted questions except the ones we have before indicated as being the ones mainly litigated, and not allowed the plaintiff anything on the claim for repairs, etc., or the defendants on the claims for boarding plaintiff and repairing the premises, and the amount for which they returned a verdict in favor of defendants would necessarily be a sum of overpayment of the real amount due of the rent for the whole time the defendants occupied the premises belonging to plaintiff, and if this be true, as we conclude, then it must be further said that to the extent any such recovery was granted, it was erroneous, as there was no allegation or claim in the defendants' answer of or for any amount of money as overpaid on the rent. The defendants may, within thirty days, file a remittitur of the sum of $2.20, and if they do so the judgment in their favor may be affirmed, and if not, the judgment will be reversed and cause remanded to the district court for further proceedings.

JUDGMENT ACCORDINGLY.

WILLIAM COBURN ET AL. V. JOHN L. WATSON.

FILED MAY 6, 1896. No. 6511.

1. **Conversion: RETURN OF GOODS: MITIGATION OF DAMAGES.** An owner or party entitled to goods which have been converted who subsequently has them, or a portion thereof, returned to him or receives a portion of the proceeds of a sale of the goods or some of them, is not thereby barred of his rights of action for the original wrongful taking but proof of such facts, or either of them, will be available in mitigation of damages.

2. ———: **DEFENSES.** The fact that property has been taken from a

party who converted it, under or by virtue of legal process, or in any manner, presents no defense to an action against him by the owner or person entitled to it, for its conversion, unless it further be shown that such owner or person entitled to the property has received it or the proceeds of any sale which may have been made of it.

3. ———: MEASURE OF DAMAGES. The measure of damages in an action of conversion, by the mortgagee of personal property, against the sheriff or other officer who has levied and taken the property by virtue of the process issued in favor of creditors of the mortgagor, is the actual market value of the property when converted, with interest thereon from such time, deducting therefrom the market value of any of the property afterwards returned to the mortgagee or which he has received, or the proceeds of any of the property of which he has received the advantage, and not in any event to exceed the amount due on the mortgage debt.

4. ———. As to the conclusions stated in the three foregoing paragraphs, the decision on the former hearing of this case reported in 35 Neb., 492, approved and followed.

5. **Law of the Case:** INFERIOR COURTS: REVIEW. The determinations of questions presented to this court in its review of the proceedings of an inferior tribunal become the law of the case, and, ordinarily, will not be re-examined in a subsequent review of the proceedings of the inferior tribunal on a second trial or hearing of the cause.

6. **Review:** ASSIGNMENTS OF ERROR. In order to present for review the rulings of a trial judge in excluding testimony the particular rulings complained of must be referred to in the petition in error.

7. **Conversion:** SALE OF GOODS: PROCEEDS: EVIDENCE. *Held*, That there was no evidence from which it can be determined whether the mortgagee had received the benefit or should be charged with the proceeds of certain property sold by a receiver and for the conversion of which the mortgagee was in this action asking a recovery.

8. **Constitutional Law:** RIGHT OF APPEAL: AFFIRMANCE: PENALTY. "Under the constitution of 1875, a party may, as a right, have a cause reviewed either by appeal or on error, in the court of last resort, and the legislature has no authority to impose a penalty of five per cent upon the affirmance of the judgment." *Moore v. Herron*, 17 Neb., 703, followed.

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

B. G. Burbank, for plaintiffs in error.

E. R. Duffie, contra.

HARRISON, J.

This action was commenced in the district court of Douglas county by John L. Watson on the bond of William Coburn, as sheriff of Douglas county, against William Coburn as principal and the other defendants as his sureties. The alleged cause of action was the conversion of a stock of furniture and musical instruments. A trial of the issues resulted in a verdict and judgment in favor of Watson, from which both parties prosecuted error proceedings to this court. The former judgment was by this court reversed and the cause remanded to the district court. (For the former decision see 35 Neb., 492.) In the district court, in a second trial, Watson was successful and received a verdict and judgment, and the case is presented here by the other parties for review of the proceedings during the second trial.

It appears that a corporation named the New York Storage & Loan Company was, or had previous to February 28, 1888, been engaged, in business in the city of Omaha, and was the owner of the property the alleged conversion of which was the basis of this action, and on the day just stated the corporation, being indebted to John L. Watson for money borrowed by it of him, executed and delivered to him a chattel mortgage covering its stock of furniture and musical instruments, etc., to secure the payment of the debt. Watson then took possession of the goods and conducted the business, and was, under and by virtue of his lien, in possession of the stock on April 24 of the same year. During the afternoon of the last mentioned date, Coburn, as sheriff, levied an execution in favor of W. L. Hall, and against the New York Storage & Loan Company, on the stock and took possession of it, and subsequently levied a writ of attachment in an action wherein Dell R. Edwards was plaintiff and the corporation defendant. George C. Wheeler, who was president of the New York Storage & Loan Company, it appears also did business under the style of New

York Music Company, New York Storage Company, New York Piano Company, G. C. Wheeler, and G. C. Wheeler, manager. After the levy of the writ of attachment in favor of Dell R. Edwards, she brought suit against W. L. Hall and the New York Storage & Loan Company, the object being to enjoin the collection of the judgment in favor of Hall and to have it declared void. Afterwards she instituted another action, against John L. Watson, W. L. Hall, the New York Piano Company, the New York Music Company, the New York Storage & Loan Company, G. C. Wheeler, manager, and others, in which she pleaded that the mortgage to Watson was fraudulent and void, and prayed that it be so declared by the court, and further prayed for an accounting by all the defendants and the appointment of a receiver to take charge of the property of the New York Storage & Loan Company and sell or dispose of it. A consolidation of these suits was had. Watson filed an answer in the action after the consolidation of the several suits, declaring on his mortgage and asserting his lien upon the stock of goods by virtue thereof, and stating his possession at the date of the levies of execution and attachment by the sheriff. The court appointed a receiver and ordered the sheriff to deliver to the receiver such of the goods as then remained in his possession and had not been taken from him under process, which the sheriff did, and the goods were sold by the receiver and the sale was confirmed. After issues were joined in the consolidation, the cause was referred to A. S. Churchill, Esq., who was to take the testimony and report to the court his findings both of fact and law. It was determined and reported by the referee that the mortgage to Watson was valid and made in good faith and for a sufficient consideration; that Watson had taken possession of the stock of goods under it and was in possession when the sheriff took possession under the writs; that such mortgage was the prior and superior lien and Watson entitled to its enforcement, and to subject to its payment the entire stock of goods seized under

the writs; that the sum due on the mortgage was $4,493.62. The referee further determined the W. L. Hall judgment to be fraudulent and void, from which he further concluded that neither Hall nor the sheriff derived any right or title to the property seized under the writ issued on such judgment, and that Dell R. Edwards did not have any cause of action against the New York Storage & Loan Company and hence no right to the attachment, and the levy thereof was set aside and held of none effect. The report of the referee was, on motion on behalf of Watson, confirmed. The present case was brought by Watson two days previous to the appointment of the receiver in the consolidation of actions.

One of the contentions of plaintiffs in error herein, both in pleading and in argument, was and is that by the proceedings and determination in the case in which the receiver was appointed, all matters in issue in the present case were fully adjudicated and determined, and such adjudication constitutes a bar to this action. Counsel for plaintiffs in error outlines the questions which he desires to urge in his brief as follows:

"When an officer levies on a stock of goods in the possession of the mortgagee, at the instance of a creditor of the mortgagor, and, shortly thereafter, a receiver of the property of the mortgagor is appointed on the application of certain of the creditors of the mortgagor, in which action the mortgagee is a party, and the sheriff is ordered by the court to surrender the goods to the receiver, which he does, and said receiver sells those goods, which sale is confirmed by the court, and the mortgagee's lien is held to be a first lien on said goods and he is entitled to the money received from said sale. *Quære:* Under such circumstances, is the officer liable as and for a conversion of said stock of goods?

"2. When certain of the goods contained in the mortgage and levy are held by the mortgagor on commission, and after the levy the mortgagee releases said goods from his mortgage, and the officer from his levy. *Quære:* Is

it error of the court to refuse to allow evidence to show that fact for the purpose of showing that those goods were not converted?

"3. Did the mortgagee, having a judgment for certain costs, and permitting those costs to be paid out of the sale by the receiver, estop himself from claiming from the officer and his sureties on his bond the money so paid out?

"4. Was the judgment according to the weight of the evidence?"

The first of these questions, in all its bearings on the issues in the present case, was considered on the former hearing in this court, and it was said in reference thereto by NORVAL, J., who wrote the opinion: "The first question we will consider is as to the sufficiency of this defense. It is a rule, sustained by judicial decisions in this country, that where one's goods are converted by another, the owner may sue for their value, or recover the property, but he cannot pursue both remedies. It is equally well settled that the subsequent recovery or return of the property does not extinguish the owner's right of action against the wrong-doer for the conversion, but only goes in mitigation of damages. (*Gibbs v. Chase*, 10 Mass., 125; *Brady v. Whitney*, 24 Mich., 154; *Western Land & Cattle Co. v. Hall*, 33 Fed. Rep., 236.) Where goods that have been converted are returned to and accepted by the owner, the measure of damages is the market value at the time of the original wrongful taking, less the market value at the time the same are returned. (*Irish v. Cloyes*, 8 Vt., 30; *Lucas v. Trumbull*, 15 Gray [Mass.], 306.) Testing the effect of the adjudication in the receiver case by these principles, Watson is not estopped from prosecuting his action for the conversion of the property. It is true Watson, in the case in which the receiver was appointed, in his answer and cross-petition filed therein, claimed a lien upon the property by virtue of his mortgage and asked that the mortgage be foreclosed. The property had already been sold by the receiver appointed at the request of Edwards. Watson could not recover the prop-

erty, so he sought to recover the money arising from the sale. The adjudication was in his favor. He is entitled to * * * the net proceeds of the sale of the goods which had been turned over to the clerk of the court by the receiver. To that amount only his claim against the officer for the conversion was satisfied. Any other rule would not make him whole. Where property is converted, just compensation to the owner is the rule. We are unable to perceive how the receipt of the proceeds differs from a return of the property, or the proceeds thereof, to the owner. Such payment is proper to be given in evidence only in mitigation of damages. Prior to the appointment of the receiver, Watson elected to treat the levies as a conversion of the property by bringing this action to recover the value of the goods. In our views the adjudication of his rights in the suit referred to does not preclude him from maintaining this action. * * * It requires no argument or citation of authorities to show that in an action for conversion of personal property the defendant cannot defeat the action by showing that the property, or a part thereof, has been taken from him by third parties, by legal process or otherwise, unless the original owner has received the goods or had the benefit of the proceeds thereof. If all or a portion of the goods converted are returned to the owner, or he receives the proceeds of the same, the wrong-doer may prove such facts, not as a complete defense, but in mitigation of damages. The fact that a portion of the goods covered by plaintiff's mortgage was replevied from the sheriff, and others were turned over to the receiver, would not alone be a defense to the suit, but would be so to the extent that it was shown that Watson has had, or could have, the benefit of such property." We have been furnished with no sufficient reasons for changing what was then expressed on this branch of the cause. As then stated, it became the law of the case, to which we will now adhere.

In regard to the alleged error of the court raised in the

second question, in refusing to admit certain testimony, the only assignment of error which can be said to refer in any manner to this question is as follows: "The court erred in excluding certain evidence offered by the plaintiffs in error, to the excluding of which the plaintiffs in error then and there excepted." This assignment does not challenge attention to any particular ruling of the court, does not specifically assign any particular ruling for error, and, as has been frequently held, is not sufficiently definite for consideration. (*Edney v. Baum*, 44 Neb., 294; *Smith v. Mason*, 44 Neb., 610.)

It is argued that the stock of goods was sold by the receiver for the total sum of $1,950, and that it was adjudged in the action in which the receiver was appointed that Watson should recover only three-fourths "of the costs by him expended in this action, and to recover from Edwards one-fourth and from Hall one-half;" that the evidence disclosed but $277 in the hands of the clerk of the court remaining of the amount realized by the receiver from the sale of the goods; that Watson should have been paid the whole sum, but suffered it to be paid out for costs, and it should be deducted in this case from the amount to be otherwise allowed him, or at least the one-fourth, as he was charged or was to pay one-fourth of his costs. In this connection it is argued that the trial judge erred in excluding from the testimony the receiver's report of a sale or offers to purchase the stock of goods and an order of the court confirming the sale. As we have hereinbefore said, the only assignment of error in respect to the exclusion of evidence was general, and not specific enough to present the question of the exclusion of any particular portion of testimony offered and refused; hence the error, if any, in excluding the report and order alluded to is not presented here in such manner as to be entitled to be considered. There is no evidence in the record before us of the amount for which the receiver sold the stock of goods, and if the report offered had been admitted, it would only have shown the amount for which

the stock was sold, and as there was no evidence of the amount of costs, for what they were taxed, in what branch of the case, or against whom, or what amount of money derived from the sale was paid out as costs, or how applied, we cannot say whether or not counsel for plaintiffs in error is supported in his argument in relation to the amount received from the sale of the goods and how it was applied, and how it should have been. This being true, the argument must fail. This also disposes of the objections urged to certain of the instructions given by the court on this same branch of the case, as such objections were predicated upon the reasoning in regard to the amount realized from the sale of the goods and its application, which we have just determined to be without force herein.

The only remaining assignment of error argued in the brief of counsel for plaintiff in error is that the verdict was not sustained by the evidence. Under this it is contended that the value of the stock of goods fixed by the jury, $3,000, was not supported by the evidence. The testimony on the subject of the value of the stock of goods was conflicting, but it would have sustained a finding of a much larger value than the one adopted by the jury, and would also have warranted a smaller; but, in view of all the facts and circumstances in evidence in regard to the stock of goods and its value, we conclude that the verdict of the jury in this particular is sustained thereby and will not be disturbed.

It is provided in section 596 of the Code of Civil Procedure: "When a judgment or final order shall be affirmed in the supreme court, the said court shall also render judgment against the plaintiff in error for five per cent upon the amount due from him to the defendant in error, unless the court shall enter upon its minutes that there was reasonable grounds for the proceedings in error." It is urged on behalf of defendant in error that this case is one which calls for the application and enforcement of the provision of the statute just quoted.

This section of the Code has been held unconstitutional (*Moore v. Herron*, 17 Neb., 703; *Garneau v. Omaha Printing Co.*, 42 Neb., 847), and we do not deem it best now to re-examine the question. The judgment of the district court is

AFFIRMED.

JULIA THOMAS, ADMINISTRATRIX, V. A. S. CHURCHILL, ADMINISTRATOR.

FILED MAY 6, 1896. No. 6270.

1. **Petition in Error:** WAIVER OF APPEAL. Where a party presenting a case to this court for review files a petition in error therein, he will be presumed to have elected to proceed by error and not by appeal.
2. **Statute of Frauds:** PAROL AGREEMENT TO CONVEY LAND. A parol agreement by a grantee, to reconvey real estate to his grantor, is within the statute of frauds and does not create an express trust in such real estate in favor of the grantor.
3. ———: ———: PLEADING. It is not necessary that the existence of a parol contract be denied in pleading, in order to render the defense of the statute of frauds available, but the pleader may admit the contract and yet plead and insist upon the statute and its application thereto.
4. ———: ———: EVIDENCE: OBJECTION. The failure to object, on a trial, to the introduction of evidence of a parol agreement to reconvey real estate will not amount, under the practice of this state, to a waiver of the right to invoke the statute of frauds as to such agreement where the statute has been properly pleaded as a defense.

ERROR from the district court of Washington county. Tried below before SCOTT, J.

Charles Ogden, for plaintiff in error.

A. S. Churchill, contra.

HARRISON, J.

The original plaintiff in this cause, John D. Thomas, and one of the defendants, John P. Thomas, have died

during its pendency, and the action has been revived in the name of Julia Thomas, administratrix of the estate of the deceased plaintiff, and against the administrator of the deceased defendant. A petition was filed March 7, 1891, and an amended petition May 25, 1891, in which it was stated, in substance, that the plaintiff was, and for many years had been, the owner of 200 acres of land in Washington county, Nebraska, giving a specific description of the land, which we omit; that he had been a resident of this state during the year 1856, and of Washington county until about 1872, when he removed to Omaha; that about the year 1875 the plaintiff was induced by fraud, misrepresentation, and deception to marry with one Sylvia Preston, and soon after such marriage became convinced that the woman had formed such marriage relation with him for the purpose of assisting her in a fraudulent purpose to obtain as much of his money and property as possible; that in the course of numerous litigations with her, or her relations, friends, and accomplices as opponents, he had lost much money and a large and valuable piece of land, and that he had been unsuccessful in a number of other lawsuits in which he had been a participant, and had become imbued with the idea that he could not obtain justice, and that he would lose or have all the remainder of the property which he owned taken from him, "and said nephew, John P. Thomas, having personal knowledge of many of the plaintiff's said annoyances and experiences in the courts of Douglas county and citizens above referred to of Douglas county, and being a young unmarried man, poor but honest, as the plaintiff then believed, professed great sympathy for the plaintiff in his above mentioned troubles, and proffered his assistance as a trusted relative in helping the plaintiff to place his property, then remaining, in such shape as that no more of it would be lost to the plaintiff, and so that plaintiff, at any time he designed, might have it returned to him; and the plaintiff, believing in the honesty and integrity of his said nephew, the defendant

John P. Thomas, and believing that such offer was made in good faith and for the benefit of this plaintiff, and to enable the plaintiff to save to himself said property, the plaintiff was induced to and did accept the proffered assistance of his said nephew in that behalf, which proffered assistance, as plaintiff afterward learned, was in bad faith, and his statements of sympathy for the plaintiff and of his desire to assist said plaintiff to save said property for his own use and benefit were false and made with the fraudulent design of inducing plaintiff to entrust to the defendant John P. Thomas the title to said property, that he, John P. Thomas, might thus be enabled to defraud plaintiff out of the same, and without any intention on the part of him, the said John P. Thomas, to reconvey the same to plaintiff; that on the 5th day of February, 1884, the plaintiff, confiding in the said John P. Thomas, and believing that he was sincere in proffered assistance as above stated, and with the verbal understanding and promise of the said John P. Thomas that he would at any time thereafter, at the request of the plaintiff, reconvey to the plaintiff any and all of the said above described real estate, and the plaintiff, believing it was a matter of prudence for him, plaintiff, so to do, by deed of the date last aforesaid conveyed to said defendant John P. Thomas all of the said above described real estate, to be held, as above stated, in trust, for the sole benefit and use of this plaintiff; that although said deed recited a consideration, yet, in truth and in fact, there was no consideration therefor, and no money was paid, or intended to be paid, in consideration for said deed, and no consideration has since been paid by said John P. Thomas, or any one for him, for said deed; and plaintiff avers that the promise by which the plaintiff was induced to make the said deed to the defendant John P. Thomas, as above stated, was in bad faith and false, and made with the intent on his part to deceive and defraud this plaintiff thereby; that at the date of said conveyance by plaintiff to said defendant John P. Thomas

the said defendant was a poor man and without any means with which to pay any consideration for such transfer; that such deed was not made as a gift nor as an advancement to said John P. Thomas, but was made and accepted for the sole benefit of plaintiff, as above stated; that said deed was recorded in the county clerk's office of Washington county, Nebraska, on the 16th day of February, 1884, at page 345 of book 19 of deeds; that plaintiff, ever since the making of said deed, has been in possession of all of said real estate, has paid all taxes and assessments thereon, has collected the rents thereof, and all done with full knowledge of the said defendant John P. Thomas, and without any protest on his part against the same or any claim on his part as to any personal interest therein, until about the 21st day of February, 1891, upon which date the said defendant John P. Thomas undertook to assert his title to said property and interfered with the tenants placed on said land by the plaintiff by notifying said tenants not to pay rent to this plaintiff; that John P. Thomas, in further pursuance of his fraudulent design, on the 21st day of February, 1891, conveyed, by deed of quitclaim, the lands described to one Henry Webber, for an alleged consideration of $6,000; that there was in fact no consideration passed from Webber to John P. Thomas, and that, as a part of the scheme, Webber, of date February 24, 1891, executed and delivered to John P. Thomas a mortgage on the lands in question, purporting to secure the payment of $5,200, which was duly recorded, and that the same was in truth entirely without consideration and a sham. The prayer of the petition was for the declaration of a trust in favor of plaintiff in the premises described therein, and the annullment and cancellation of all and singular the various instruments of conveyance referred to in the petition; "that the plaintiff be reinvested of his former title in and to all of the hereinbefore described real estate." It was also asked that Webber be enjoined from transferring the property; that John P. Thomas be enjoined from dispos-

ing of the mortgage executed by Webber or the notes, the payment of which it purported to secure, and that both defendants be enjoined from in any manner interfering with the tenants of plaintiff then occupying the land, and for such other, further, and different relief as justice and equity would entitle him to receive. John P. Thomas, defendant, answered and admitted that he was the plaintiff's nephew, and that on the 5th of February, 1884, the plaintiff conveyed to him the real estate mentioned in the petition, and stated that the conveyance was effected by warranty deed; denied that the transfer was without consideration and averred that it was for a good and valuable consideration, and not in trust, but for the use of defendant, his heirs and assigns, and as to the verbal promise to reconvey the land to plaintiff, as alleged in the petition, pleaded that it was void and of no effect under the statute of frauds; and further, that the plaintiff was estopped by the covenants and recitals in the warranty deed, by which he conveyed the real estate to defendant, from averring or proving any trust relation as arising from the transaction, in contradiction of the terms of the instrument, and estopped from claiming any right or interest in the premises. It was admitted that plaintiff had paid the taxes assessed against the land, but denied that the plaintiff had been in possession of the premises, either himself, personally, or by tenants; and further answering the fifth paragraph, it was pleaded that on or about the date the land was conveyed by plaintiff to the answering defendant, the defendant executed and delivered to plaintiff a power of attorney, by which the plaintiff was authorized to lease the premises and collect the rents thereof, and that, acting under and by virtue of the authority thus granted, the plaintiff leased the land, collected the rent moneys, and with it, or a portion of it, paid the taxes. It was further answered by this defendant: "The defendant admits that on the 21st day of February, 1891, he conveyed the premises to Henry Webber for a consideration of $6,000, and

that Webber executed and delivered to the answering defendant a mortgage to secure the payment of the sum of $5,200, a part of the purchase price of the land." There were some other matters pleaded in this answer, but we need not notice them here. The answer of Webber was very similar in the main to that of his co-defendant, which we have just outlined, and admitted the conveyance of the land by John P. Thomas and the execution of the mortgage for the unpaid portion of the purchase price, and that Webber had notified the tenants who were occupying and using the land not to pay rent to the plaintiff, and averred that the purchase of the land by this defendant was for a good and valuable consideration, and without any knowledge on his part of any right, or claim of right, of the plaintiff in or to the premises. The issues were tried to a judge, who resolved them in favor of the defendants, and after hearing and overruling a motion for new trial in behalf of plaintiff, rendered a judgment or decree for defendants. A petition in error has been filed in this court on behalf of the unsuccessful party in the trial court for the purpose of having the proceedings in that court reviewed.

The parties have entitled the case as here an appeal, and have treated it as such in the briefs filed. It has been held that where the party bringing a case to this court files a petition in error, he will be presumed to have elected to proceed by error and not by appeal (*Beatrice Paper Co. v. Beloit Iron Works*, 46 Neb., 900; *Monroe v. Reid*, 46 Neb., 316; *Woodard v. Baird*, 43 Neb., 310); but it will make no difference in this case, as the points discussed all come under the questions of the sufficiency of the evidence to sustain the findings and the judgment, and what are the rules of law applicable to the facts as developed by the testimony during the trial and governing the disposition of the cause, and did the trial judge rightly select and apply them.

It will be remembered that the plaintiff pleaded that it was because he feared a loss of his property, and, in an

effort to avoid such loss, that he conveyed the property to his nephew. In his testimony he gave an entirely different reason for making the transfer. We will give it as it appears in the record:

Q. Now you may tell the court what the circumstances were attending the execution of the deeds spoken of in the petition and the answer herein of this land, to which your attention has been called, to John P. Thomas, about the year 1884.

A. In the latter part of December, 1883, or else in January, 1884, I had a little interest out at Fremont and I went out there and in the evening I took a train and went to Blair. It was a winter evening and pretty dark. I had supper, and after supper I stepped out on the sidewalk, and, as I usually go, I had both hands in my pockets. I took six or seven steps from the door when I stepped on the sidewalk, and I stepped in a hole with the left foot and didn't reach no ground, and I fell against the edge of the planks with the fourth and fifth ribs, and it pretty nearly laid me out. I came down to Omaha here the second day after and I treated with three different doctors, and finally I went to the hospital and staid there some two weeks and I was spitting considerable blood, and for a long time when I went up steps I had to drag my left foot behind and when I went down steps I had to swing it forward. When I was in bed I had a hard time to turn over one way or the other, and at the time I didn't know what would become of me. I had no friends and no relatives here except this nephew.

Q. You mean John P. Thomas?

A. Yes, and I called him and told him the conditions, and he said he would take care of anything I would put over in his name and would return it any time I would make a demand, and afterwards these papers were made out to that effect.

Whatever may have been the reasons of the plaintiff for so doing, on the 5th day of February, 1884, he conveyed by warranty deed to his nephew, not only the land

in dispute, but some other property. The plaintiff couldn't recollect whether the nephew was present when the deed was executed or not, but thought he was. The nephew was positive that he was not, and that he came from St. Louis to Omaha, probably in response to a letter from plaintiff, arriving in the latter city on the evening of the 5th of February, and during the next day, the 6th, he executed and delivered to his uncle a power of attorney authorizing him to take entire charge of and control all the property belonging to the nephew in Douglas county and Washington county. To refer again to the deed from the uncle to the nephew, no person could or did tell just exactly how or when it was, if ever, given into the hands of the nephew, but it was, according to the indorsement made on it by the county clerk of Washington county, filed with him, presumably for record, February 11, 1884. It was disclosed by the evidence that at the time this and the other land in Washington county was conveyed by the plaintiff, he also conveyed to his nephew some property he owned situate in Douglas county, some of it in Omaha. In the year 1887 the plaintiff requested the defendant to reconvey the land, and in regard to how this was done, or, more particularly, who furnished the description of the property to be included in the deed then prepared and afterwards executed, the plaintiff testified as follows:

Q. Is it not a fact that you went into the office of Mr. Breen and told him to prepare a deed from John P. Thomas to yourself, and you gave him a description of the land that you wished to be included in the deed, including the "old homestead place," as you call it, in Washington county, the lots on Cuming street and Eighteenth and Webster, and didn't he prepare a deed for you at that time?

A. Is that all he prepared? Didn't he put in ten acres up at the fort, too?

Q. And Mr. Breen put into the deed a description of all the property that you gave him to include in the deed?

A. Yes, and he put it nearly all in his deed, too.

Q. And after the deed was prepared you had the defendant go with you up into Mr. Breen's office and execute that deed, didn't you?

A. I don't know. I can't tell you.

Q. And he did sign and execute the deed before Mr. Breen, conveying all the property back except what is in controversy in this case?

A. The deed seems to be signed by him, yes. * * *

Q. And that transfer back to you was made in pursuance of what you have stated here, the arrangement for all the property?

A. Yes.

Q. At that time he was still on good terms with you, was he not?

A. The best of terms.

Q. The relations between you and him were the same as before?

A. Yes, as good as ever.

Q. And he made no objection to transferring that property back?

A. Just as good as ever.

Q. At the time that deed was made, could you have included all this other land without any objection from him at that time, if you had seen proper to do so?

A. Yes, I think I could.

Q. Was he making any objection at that time about transferring back any of this property?

A. Not any that I know of.

The nephew testified on this subject as follows:

A. He came to me in 1887 and asked me if I would deed the property back to him, and I said, "Yes, go ahead and have your papers made out."

Q. After that did he inform you that the papers were made out and where they were?

A. Yes, sir. A day or two after that I met him on the street and he said, "I got them deeds made now." I said, "All right." He said they were up in Breen's office. Says

I, "What have you got in that deed?" and he said "Webster street, Cuming street, and the homestead."

Q. What did he mean by "homestead"?

A. That was the 160; he told me the 120 and 80. He said, "What I showed you in 1887." He said, "You been pretty square with me and I don't know what I do without you," and I could keep that. We went to Mr. Breen's office and I looked the deed over and signed it.

Q. Has he ever asked you for a deed of it since?

A. No, sir.

The plaintiff testified that there was a direct promise on the part of his nephew to reconvey the property whenever requested so to do; that there was nothing paid for the property. The nephew stated in his testimony that he did not pay anything for it. In the cross-examination of the plaintiff it appears:

Q. You say, then, that the only purpose you had in deeding to him this land, making him a warranty deed to it, was so he would have it in case you didn't recover?

A. Yes, sir.

In the testimony of the young man he was asked and answered as follows:

Q. You may state if you had any conversation at the time of making the deed, and prior thereto, in relation to the making of it.

A. No, sir.

Q. You say that he just gave it to you?

A. I didn't know that the deed was made to me until after it was done. I knew nothing about it until after I came up here. [Referring, evidently, to his coming from St. Louis to Omaha at or about the time of the making of the deeds.]

It was shown that the plaintiff, in another action between him and his nephew, had testified in regard to the transfer of the land as follows:

Q. You may state to the court whether you discussed these litigations you had or was having with him.

A. Yes, when I lost the land and had trouble with the

woman and they took everything, he said I should sign things over to his name; that I could hold nothing then. It was done at that time, I think in 1884. I signed everything over to him, everything I had, but while that was done I asked him, I says, "John you go on the road and so on; something may happen to you and then I would have some trouble." There was some papers drawn up so good as he could do them in his handwriting, that I should receive $500 a month if anybody would trouble me, in his own handwriting. Of course I signed that. It was pretty hard. We agreed that I should sign it over to him and he would hold it for me.

We have thought best to set forth this much of the testimony in order that its general drift and import might be understood. It is claimed by counsel for plaintiff that "there was no delivery of the deed made in 1884 by plaintiff to his nephew. It was a trust deed, if anything." The question of a delivery of a deed was not of the litigated points in the case. The transaction of 1884 was in all respects, both in the pleading and in the evidence of plaintiff, treated and considered as a full and completed transfer and conveyance of the property to his nephew. It was at all times recognized as such by the plaintiff. Whether the deed of 1884 had ever been delivered by the plaintiff to his nephew or not, or whether it had in one way or another, was not questioned. The deed was filed for record by someone and duly recorded, and the plaintiff avers and proves a full and complete transfer of the title and transfer of the property to his nephew, and no question was made of the delivery of the deed or any other act necessary as an element or part of such completed conveyance. The petition in this case alleged a conveyance of the property in controversy in trust for the grantor, arising out of a promise by the grantee to reconvey to grantor, the promise being verbal, and sought to have a trust resting entirely in parol declared and enforced. It was within the statute of frauds as enacted by this state, and hence without the province of the court

to entertain or enforce. A parol agreement by a grantee to reconvey real estate to his grantor does not create an express trust in favor of the grantor in such real estate. (*Dailey v. Kinsler*, 31 Neb., 340; *Hansen v. Berthelsen*, 19 Neb., 433; *Moore v. Horsley*, 40 N. E. Rep. [Ill.], 323; *Pillsbury-Washburn Flour Mills Co. v. Kistler*, 54 N. W. Rep. [Minn.], 1063.)

But it is insisted that the grantee, in this case the nephew, had recognized or admitted the trust by reconveying a portion of the property, and that it is a fair deduction to be drawn from his testimony that a promise to reconvey existed or had been made. We cannot give the fact of the reconveyance of a portion of the property such force as is claimed for it by counsel. It may be said that it was probably a strong circumstance tending to establish the existence of a promise to reconvey, but not so conclusive as to be construed or held to be an admission of it, nor do we think his testimony can be construed as an admission. The point which counsel urged in this connection is that if the defendant admitted the agreement, that no reason then exists for not enforcing it, and the courts will give it force notwithstanding the statute; but the preponderance of authority is to the effect that the party may admit the contract and yet plead and insist on the statute and its application. (22 Am. & Eng. Ency. of Law, 979, and cases cited; 2 Story, Equity Jurisprudence [13th ed.], secs. 757, 758.)

It is further urged that the plaintiff was allowed to testify to the terms of the verbal agreement without any objection on the part of defendant, and that by this the right to invoke the statute was waived, and we are cited to the decision of the case of *Nunez v. Morgan*, 77 Cal., 427, in support of the argument. The opinion cited was rendered, so far as we can ascertain by its reading, in a case in which the defendant in pleading contented himself with the denial of the existence of the agreement and did not plead the statute of frauds, and did not object to the introduction of evidence of a parol agreement, and it was

held that he had waived the defense of the statute of frauds. In the case at bar the defendant had pleaded the statute as a defense, and evidence of a parol agreement that he had agreed to reconvey the property, introduced for the purpose of raising a trust and demanding its enforcement, was incompetent; and in our state the admission of incompetent evidence during the course of a trial before a judge without a jury is not ordinarily an error which can be relied upon, as it is the theory that the judge will not consider it in weighing the evidence and determining the cause, and the practice has arisen and prevails, for the purpose of expediting business and trials, of allowing evidence to be introduced to which, otherwise, objection would be interposed and urged. Where, in this state, a party has pleaded the statute of frauds as a defense to an action to have an alleged parol agreement to reconvey real estate to his grantor upheld, he will not be held to have waived the right to invoke the statute because of a failure to object, on the trial, to introduction of evidence of a parol agreement to the effect stated. In this state a defendant may avail himself of the defense that an agreement, such as was the one in the case at bar, is invalid under the statute of frauds under a general denial of the allegations of the petition. (*Powder River Live Stock Co. v. Lamb*, 38 Neb., 339.)

It is claimed that the nephew, in reconveying a part of the property to the plaintiff, purposely omitted to include the land in dispute herein. The testimony in the record before us relative to this point all tends to establish that the deed by which the reconveyance was effected was prepared by the request of the plaintiff and included such property as he described; that he furnished the description at a time when the nephew was not present, and that the plaintiff knew that the land in controversy was omitted from such instrument. In the opinion in the case of *Dailey v. Kinsler*, *supra*, where the question of the allowance of the establishment of a trust resting in a parol promise to reconvey real estate to a grantor was under

consideration, it was said—we quote it here with approval and as applicable herein: "This has been the rule in this state for nearly twenty years, and if changed it should be by statute. No doubt there are cases where the justice of the matter creates a strong desire to allow parol testimony to be given to establish the trust. The law, however, gives security to titles, prevents fraud and perjury in the assertion of alleged trusts, and conduces to the general welfare. It is not to be supposed that a party will make an absolute conveyance of real estate where he still retains an interest therein without that interest being stated in writing. The law, at least, requires it to be so stated, and it is the duty of the court so to declare." The judgment of the district court must be

AFFIRMED.

SAMUEL A. STONER ET AL. V. KEITH COUNTY.

FILED MAY 6, 1896. No. 6501.

1. **Officers: FEES: EXTRA COMPENSATION.** A public officer must discharge all the duties pertaining to his office for the compensation allowed by law, and will not be allowed compensation for extra work unless it is authorized by statute. (*State v. Silver*, 9 Neb., 88; *Bayha v. County of Webster*, 18 Neb., 131.)

2. **County Treasurers: "MONEYS COLLECTED."** The words, "on all moneys collected by him"—the county treasurer—in section 20, chapter 28, Compiled Statutes, in relation to fees, refer solely to such taxes as he has collected from the taxpayers. (*Taylor v. Kearney County*, 35 Neb., 381.)

3. ———: **FEES.** A county treasurer is not entitled to a commission or collection fee on funds, the proceeds of sales of bonds paid or delivered to him as such officer.

4. ———: **SALE OF BONDS: FAILURE TO TURN OVER PROCEEDS: PLEADING AND PROOF.** In an action on the bonds of a county treasurer, the county pleaded the reception by him of the proceeds of the sales of certain bonds, the disbursement of a part of the funds, and the failure to turn over to his successor in office an amount of such money. The treasurer and his bondsmen admitted receiving the

money, but as to his failure to turn any portion thereof over to his successor in office the answer was a general denial. The county introduced proof showing that the treasurer charged a per cent of the amount of the proceeds of the bonds as collection fees, which sum he retained and did not pay to his successor. *Held*, Under the issues joined by the pleadings, to be sufficient to show a failure to comply with the obligations of his bonds and that it did not devolve upon the county to further show that the treasurer had received all the fees to which he was by law entitled for his services; that if there was any sum or sums due the treasurer from the county, the legitimate subject of set-off or counter-claim in his favor, or which he had allowed to remain in the county treasury in payment of the amount claimed by the county as before indicated, they were matters constituting a defense and should have been pleaded as such and proved.

5. **Principal and Surety**: ALTERATION OF BOND. Sureties on a bond are released by a material alteration of the instrument evidencing their obligation, made without their knowledge and consent.

6. ———: ———: LIABILITY OF SURETIES. The signing of a bond of a county treasurer after its approval by the county board, by additional sureties, the same being done without the knowledge and consent of the sureties who had attached their signatures thereto prior to the time it was approved, avoided the obligations of the bond as to such prior sureties and released them from any liability thereunder for any subsequent failure or default of the principal in the fulfillment of the conditions of the bond.

7. ———: ———: ———. *Held further*, That the parties who signed the bond subsequent to its approval, as additional sureties, must be presumed to have known what would be the effect of such signing, including the discharge of the prior sureties, and they became bound and liable for any subsequent failure or default of the principal in the bond to perform its obligations.

8. **Official Bonds**: LIABILITY OF SURETIES. A bond of an officer, which is presented to a county board and approved by it, binds all parties who signed it as sureties notwithstanding that they may have signed the instrument conditionally, if the bond is perfect on its face and the board possessed no notice of the conditional signing and there was nothing to raise the duty of inquiry as to the manner of the execution of the bond.

9. ———: APPROVAL. Under the provision of section 7, chapter 10, Compiled Statutes, that "The official bonds of all county, precinct, and township officers shall be approved by the county board," in approving bonds the board acts as a body. The approval is not the act of a member or individual members thereof as persons. It is the act of the board as a body.

10. ———: ———. A county treasurer's bond is to be approved by the county board.

11. ———: ———: CONDITIONAL LIABILITY OF SURETY: NOTICE. The

knowledge of one member of a county board, at the time of its approval by them, of the conditional signing of a county treasurer's bond by the sureties, not shown to have been imparted to the board, is not knowledge of or notice to the board of such fact.

12. ———: ADDITIONAL BOND: CONSIDERATION. An additional, or second bond, was executed, delivered, and approved during the term of office of a county treasurer. *Held*, That there was sufficient consideration therefor.

13. **Evidence.** It is not competent to change or vary the terms of a written contract by parol evidence.

14. **County Treasurers:** TURNING OVER FUNDS: TIME. A county treasurer, at the close of his term of office, must pay over to his successor all moneys in his hands belonging to the county, or for which he is liable to account. If there has been no proof of any particular date at which it is claimed that the money was misappropriated by a county treasurer, or other proof than that he failed to account for and pay over to his successor at the close of the term of office all funds for which he was liable to account, it will be presumed to have occurred at the close of the term and the liability accrues as of such time.

15. **Action on Treasurer's Bonds:** PARTIES. Where the bond of a county treasurer was presented and approved at or prior to the commencement of his term of office, which bond was signed by additional sureties during the term and also an additional bond given and approved, and the default or failure, if any, of the principal in the discharge of the duties of the office occurred at the close of his term, it was proper to join all the sureties as defendants in one action on the bonds.

16. ———: DIRECTING VERDICT. The evidence *held* to warrant the trial judge in instructing the jury to return a verdict in favor of the county against certain of the defendants named in the instruction.

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

The facts and issues are stated in the opinion.

Grimes & Wilcox, for plaintiffs in error:

The evidence should have been passed upon by the jury, and it was error to direct a verdict for plaintiff. (*Grant v. Cropsey*, 8 Neb., 205; *Eaton v. Carruth*, 11 Neb., 231; *Johnson v. Missouri P. R. Co.*, 18 Neb., 690; *Houck v. Gue*, 30 Neb., 113.)

A material change in a contract without the consent of the surety will release him, though the change may be

a benefit to him. (Brandt, Suretyship & Guaranty, secs. 332, 335, 338; 2 Parsons, Notes & Bills [2d ed.], 557; *Weir Plow Co. v. Walmsley*, 11 N. E. Rep. [Ind.], 232; *Berryman v. Manker*, 9 N. W. Rep. [Ia.], 103; *Sullivan v. Rudisill*, 18 N. W. Rep. [Ia.], 856; *Bowers v. Cobb*, 31 Fed. Rep., 678; *Hagler v. State*, 31 Neb., 145; *State v. Craig*, 58 Ia., 238; *Dair v. United States*, 16 Wall. [U. S.], 1; *Barnes v. Van Keuren*, 31 Neb., 168; *Henry & Coatsworth Co. v. Fisherdick*, 37 Neb., 207.)

Any unauthorized variation in any agreement which a surety has signed, that may prejudice him, or may substitute an agreement different from that which he came into, discharges him. (*Smith v. United States*, 2 Wall. [U. S.], 219; *State v. Craig*, 58 Ia., 238; *Hagler v. State*, 31 Neb., 148.)

The substituted surety having signed the bond without the knowledge of its alteration, and under the supposition that the other signers were his co-sureties, the bond is void as to him, as he never undertook to become the sole surety. (*State v. McGonigle*, 13 S. W. Rep. [Mo.], 758.)

If the condition, known to the creditor, upon which the surety agrees to become bound, is not complied with, the surety is discharged. (Brandt, Suretyship & Guaranty, secs. 341, 350; *State v. Allen*, 10 So. Rep. [Miss.], 473; *Hessell v. Johnson*, 30 N. W. Rep. [Mich.], 209.)

Evidence of non-compliance with the conditions of a bond may be given in defending an action on the bond. (*Hall v. Parker*, 37 Mich., 590.)

There was no consideration for the second bond and it is not binding. (*Owens v. Tague*, 29 N. E. Rep. [Ind. App.], 784; *Kansas Mfg. Co. v. Gandy*, 11 Neb., 448; *Barnes v. Van Keuren*, 31 Neb., 165.)

Unless the bond is retrospective, the sureties are only bound for moneys in the hands of the officer when the bond was executed and for that which subsequently goes into his hands. (*Mahaska County v. Ingalls*, 16 Ia., 81; *Bessinger v. Dickerson*, 20 Ia., 261; *Warren County v. Ward*, 21 Ia., 84; *Farrar v. United States*, 5 Pet. [U. S.], 373.)

J. R. Brotherton, contra:

A public officer must discharge all the duties of his office for the compensation allowed by law, and is only entitled to such fees as are authorized by statute. (*State v. Silver*, 9 Neb., 88; *Bayha v. Webster County*, 18 Neb., 132; *Taylor v. Kearney County*, 35 Neb., 384.)

A county treasurer is not entitled to commission upon the proceeds of bonds. (*Territory v. Cavanaugh*, 3 Dak., 325; *Sandager v. Walsh County*, 6 Dak., 31.)

The law presumes that Beyerle and Meyer knew that the effect of their signatures would be to bind them and discharge Goold and the other sureties. (*Dickerman v. Miner*, 43 Ia., 508; *Hamilton v. Hooper*, 46 Ia., 515; *United States v. O'Neill*, 19 Fed. Rep., 567; *Shipp v. Suggett*, 9 B. Mon. [Ky.], 5.)

The sureties should be held liable unless the conditional signing was known to the approving authority. (*Dair v. United States*, 16 Wall. [U. S.], 2; *Brown v. Perkins*, 4 N. W. Rep. [Mich.], 195; *Carroll County v. Ruggles*, 69 Ia., 275; *McCormick v. Bay City*, 23 Mich., 457; *Lyttle v. Cozad*, 21 W. Va., 183; *Smith v. Moberly*, 10 B. Mon. [Ky.], 266; *Deardorff v. Foresman*, 24 Ind., 481.)

Notice to a member of the county board of a conditional signing was not notice to the board. (*Paola v. Anderson County*, 16 Kan., 302; *Miller v. Supervisors*, 25 Cal., 93; *Missoula County v. McCormick*, 5 Pac. Rep. [Mont.], 287; *Freichler v. Berks County*, 2 Grant's Cas. [Pa.], 445; *Merrill v. Berkshire*, 11 Pick. [Mass.], 269; *Bouton v. Supervisors McDonough County*, 84 Ill., 384; *County Commissioners v. Hamlin*, 31 Kan., 105.)

There was a sufficient consideration for the second bond. (*Gilbert v. Board of Education*, 45 Kan., 31.)

If the defalcation took place prior to the giving of the second bond, it was incumbent upon the sureties to show that the default actually occurred before they became sureties. (*Heppe v. Johnson*, 73 Cal., 265; *Bruce v. United States*, 17 How. [U. S.], 437; *United States v. Earhart*, 4 Saw. [U. S. C. C.], 245.)

The books of the treasurer introduced in evidence show that on the day his term of office expired he was charged with the amount he should have turned over to his successor. Under this state of facts the burden of proving the contrary is upon the sureties. (*Bruce v. United States*, 58 U. S., 437; *United States v. Stone*, 106 U. S., 525; *United States v. Eckford*, 42 U. S., 250.)

The liability of the sureties dates from the time the treasurer surrendered his office to his successor. (*Commissioners v. McCormick*, 4 Mont., 115.)

The sureties on both bonds were properly joined in one action and jointly held. (*Holeran v. School District*, 10 Neb., 406; *Powell v. Powell*, 48 Cal., 234; *Gilbert v. Board of Education*, 45 Kan., 31.)

HARRISON, J.

At the general election held in Keith county, November 8, 1887, Samuel A. Stoner was elected to the office of treasurer for the term commencing January, 1888, and terminating January, 1890. He presented to the county commissioners his official bond, signed by himself as principal and by H. L. McWilliams, H. L. Goold, J. M. Houghton, W. H. Wood, and O. T. Carlson as sureties, which was duly approved, and the officer elected took possession of and assumed the duties of the office. On this bond there appears the following:

"Signed as additional surety, Sept. 11, 1888.
"GEORGE BEYERLE.
"T. A. MEYERS."

On November 8, 1889, there was executed and approved another bond, which, in addition to the usual recitations and conditions, contained the following statement: "It is understood that this bond is given as additional security." This instrument was signed by Samuel A. Stoner as principal and H. L. Goold, J. M. Houghton, and H. Carnahan as sureties. During Stoner's term of office as county treasurer he received from the sales of

certain bonds moneys belonging to three distinct funds, and from pages of "Ledger A of Keith county, Neb.," as introduced in evidence, such pages showing the receptions and disbursements of the aforementioned moneys by Stoner as treasurer, it appeared that of them he had charged as collection fees in the aggregate the sum of $1,180 and retained it when he turned the office and moneys and other articles over to his successor. The recovery of this sum of $1,180 was the object of this action, instituted against the ex-treasurer and all parties who at any time had signed either of the bonds to which we have hereinbefore referred. A trial of the issues formed by the pleadings filed on behalf of the various parties to the suit was had, and at the close of the introduction of the testimony the presiding judge instructed the jury which had been impaneled to try the cause to return a verdict in favor of the county and against Samuel A. Stoner, H. L. Goold, J. M. Houghton, George Beyerle, T. A. Meyers, and H. Carnahan, of defendants, for the full amount claimed in the petition, which the jury accordingly did, and, after motions for a new trial were heard and overruled, judgment was rendered on the verdict, to reverse which the parties whose interests were adversely affected have prosecuted an error proceeding to this court.

The first question discussed by counsel for plaintiffs in error is, Does the evidence disclose any amount due from Stoner to the county? In his answer Stoner admitted the reception of the money as alleged in the petition, the county introduced the pages of the ledger which it was testified was the only book in which any entries were made in regard to these funds, and there was sufficient other testimony to establish that the entries were the accounts of the receipts of the funds by Stoner and their disbursements, and on each page there was an entry showing a sum charged as collection fee. This entry one witness, who stated he was acquainted with the handwriting of Stoner, testified was, in his opinion, made

by Stoner. This particular entry on one of two of the pages of the ledger was under date January 9, 1890, and on the other page January 8, 1890, and each page also shows a balance of the fund of which it contains the account, paid to Stoner's successor in office. January 9, 1890, it appears, was the date that Stoner's term of office expired. Suffice it to say that sufficient facts were proved to show that Stoner received these funds, disbursed a portion of each, and retained from each a sum stated in the account as a collection fee. Was the treasurer entitled to any collection fees from the proceeds of the bonds? It is not claimed that he had anything to do with the sales of the bonds. It is said, however, in the argument, although it does not appear from the evidence, that Stoner expended this money during and in forwarding the issuance and registration of the bonds from the sale of which the funds were derived. There was no testimony that he had expended any sums for such purposes, and, as we have said, the testimony did disclose that the charges were for collection fees, and not for expenses of any nature or description.

Section 20, chapter 28, Compiled Statutes, 1889, in relation to fees, provides as follows: "Each county treasurer shall receive for his services the following fees: On all moneys collected by him for each fiscal year, under three thousand dollars, ten per cent. For all sums over three thousand dollars and under five thousand dollars, four per cent. On all sums over five thousand dollars, two per cent. On all sums collected, percentage shall be allowed but once; and in computing the amount collected, for the purpose of charging percentage, all sums, from whatever fund derived, shall be included together, except the school fund. For going to the seat of government to settle with the state treasurer, and returning therefrom, a traveling fee of ten cents per mile, to be paid out of the state treasury. For advertising and selling lands for delinquent tax, an additional fee of five per cent, to be collected only in case such lands are actually

sold, and then in cash of the person buying the same; but for all other cases and services the treasurer shall be paid in the same *pro rata* from the respective funds collected by him, whether the same be in money, state, or county warrants. On school moneys by him collected he shall receive a commission of but one per cent. And in all cases where persons outside of the state apply to the treasurer by letter to pay taxes, the treasurer is authorized to charge a fee of one dollar for each tax receipt by him sent to such person." In determining the meaning to be given to certain of the controlling words of the foregoing section of the statutes it was said, in the syllabus of the opinion in the case of *Taylor v. Kearney County*, 35 Neb., 381: "The words 'on all moneys collected by him' [the county treasurer] refer solely to such taxes as he has collected from the taxpayers;" and it has been stated by this court that "a public officer must discharge all the duties pertaining to his office for the compensation allowed by law, and will not be allowed compensation for extra work unless it is authorized by statute." (*State v. Silver*, 9 Neb., 88; *Bayha v. County of Webster*, 18 Neb., 131.) The money for which it was shown collection fees were charged by the treasurer were not of taxes collected of the taxpayers, nor do we find any existing statutory authority for such charges. The county treasurer, in this particular instance Stoner, was not entitled to commissions or collection fees on the proceeds of the bonds delivered to him as such officer. (*Territory v. Cavanaugh*, 3 Dak., 325; *Sandager v. Walsh County*, 6 Dak., 31.)

Counsel for plaintiffs in error further urge in this connection that the county did not show or introduce any evidence to the effect that Stoner had received all the fees to which he was entitled by law and his services rendered as county treasurer; that before it could recover it must have shown that there was nothing remaining his due as fees. This position is not tenable. The funds in question were for specific purposes, and—as to two portions of the funds at least—could not be diverted by the

treasurer from such purposes, or appropriated by him to make payments on amounts of indebtedness due to parties from the county from others of its funds, or in payment of his fees for collecting the ordinary revenues of the county; and further, Stoner's answer, to the extent it applied to retaining the amount which the county sought to recover, was a general denial. As we have said before, there was an admission that the moneys were received. Then the county introduced as to each of the particular funds an account of the disbursements of the money belonging to it, which showed that the treasurer had retained two per cent of the amount of proceeds of bonds paid to him, charging the same in the account as "collection fees," and that, on demand, he refused to pay the sums indicated to his successor. Under the issues this was sufficient without the county producing the further proof that the treasurer had received all his fees for collecting taxes. If there was any sum due him from the county which could in any manner be available in his behalf as a set-off or counter-claim against the demand of the county, or if he had allowed such a sum of his regular fees to which the law entitled him to remain in and of the funds of the county, paid by him to his successor in office as a payment of the amount which by the accounts in the ledger was due the county, either constituted matter of defense and should have been pleaded and proved, neither of which was done or attempted.

The bond which was furnished by Stoner at the time he took possession of the office, and which we will hereinafter refer to as the first bond, had been signed, at the time of its approval, by H. L. McWilliams, H. L. Goold, J. M. Houghton, W. H. Wood, and O. T. Carlson as sureties, long after its approval by the county board had written upon it as of the date stated in the writing, "Signed as additional security," and immediately under this appeared the signatures, then attached, of George Beyerle and T. A. Meyers. This, it is claimed, was a material alteration of the instrument, that it was made

without the consent or knowledge of the sureties, and rendered it void as to the sureties who signed it at its inception, and a number of authorities are cited in support of the doctrine that a material change in a contract, without the consent of a surety thereon, will discharge the surety. This is conceded by the counsel for the county, and that the alteration of the first bond in the manner we have set forth avoided it as to the sureties who signed it before its approval; hence we need not dwell further upon this point.

It is contended that Beyerle and Meyers, who signed the first bond on September 11,1888,as additional surety, were not bound, for the reason they each signed with the understanding, or at least they had been informed, that the original signers of the instrument as sureties had consented to its being signed by Beyerle and Meyers, at the time, in the manner, and for the purpose they did sign. That they signed with the intention and expectation of becoming co-sureties of the prior signers of the bond in such capacity; that inasmuch as the prior signers did not consent to the signing and alteration, and such act avoided the instrument as to them, it ceased to be the contract which Beyerle and Meyers had agreed to sign and join in, and hence they were not bound by their signatures. There was no evidence to show that the prior sureties on the bond had any knowledge of the acts of the subsequent signers or their intentions, or that any consent was given; nor was it shown that either of the signers of date September 11, 1888, was informed that the original sureties had any knowledge of the intended subsequent additional signatures to be placed on the bond, or gave any consent thereto. The county did no act which resulted or could result to the injury of Beyerle and Meyers. There was no erasure of a name or names from the bond, no one was in any manner released before the bond was signed by them on September 11, 1888. It was their act of signing which effected the release of the prior sureties. Under the circumstances shown in evi-

dence, these after-signers of the instrument must be presumed to have understood and known what effect their signing would have, including the discharge of the other sureties, and it must be held that no good reasons have been given why they should not be bound to the fulfillment of the obligations of the bond.

We will now turn our attention to the second bond given by Stoner, of date November 8, 1889. It is claimed for plaintiffs in error that this second bond was given under an agreement between the sureties whose names appear thereon and one of the county commissioners, that one McWilliams, who was then away from home, should sign it as soon as he returned, and that it was not to be delivered or presented for approval until he had signed it; in other words, that their signing was conditional, and the condition was not performed; that at the time of the approval of the bond one of the board had knowledge of the condition and its non-fulfillment, and that his knowledge was notice to the board of the facts. There could be no agreement or contract between one of the board of commissioners and other persons which would bind the county, unless the commissioner acted for, and under authority of, the board. (*Treichler v. Berks County*, 2 Grant's Cas. [Pa.], 445; *Merrill v. Berkshire*, 11 Pick. [Mass.], 269.) It appears from the testimony that this second bond, when it was presented to the board, was not in any manner irregular, or in such condition as to put the board upon inquiry. The names of the sureties who had signed it appeared in the body of the bond, and none others. Unless the board had notice of the condition, if any existed, modifying or affecting its signing, if presented to and approved by the board the sureties would be bound and liable for any default of the principal in its obligations.

Was the knowledge of one of the commissioners the knowledge of the board, or notice to it? In approving bonds the board acts as a body. The approval is not the act of a member or individual members, or as persons,

but is the act of the board as a body. "The official bonds of all county, precinct, and township officers shall be approved by the county board." (Compiled Statutes, ch. 10, sec. 7.) There are some exceptions made in a further portion of the section, but the treasurer's bond comes under the part above quoted. Approval of bonds is a duty of the board and must be performed as a board when in session. (*County of Missoula v. McCormick*, 5 Pac. Rep. [Mont.], 287.) The powers of a county are vested in a board of commissioners as a corporate entity, and not in the commissioners separately and as individual officers. (*Paola & F. R. Co. v. Commissioners of Anderson County*, 16 Kan., 302.) The knowledge of the chairman of the board was not the knowledge of the board, and did not bind it. (*Commissioners of Leavenworth County v. Hamlin*, 31 Kan., 105.) The knowledge, if any—for it was a disputed fact—of one member of a county board of a conditional signing by the sureties of the second bond, not shown to have been imparted to the board, was not the knowledge of the board, nor was it notice of the fact to the board as a body, nor did it bind the county and operate the release of the sureties if the condition was not performed.

It is urged that there was no consideration for giving this second bond. In section 21, chapter 10, Compiled Statutes, provision is made for requiring and receiving additional bond of a county treasurer. The evidence shows that the conditions contemplated in the foregoing section existed in the affairs of the county of Keith, and that the treasurer furnished the additional bond. There was no more lack of consideration for the execution of the second bond than the first. The consideration was sufficient.

It is complained that the trial judge erred in not allowing the plaintiffs in error to show that it was agreed and understood, at least between the signers of the second bond as sureties and one member of the board, that the second bond was given for the one purpose of securing

the treasurer's faithful performance of his duties in regard to but one fund, known as the "Ogallala Precinct Fund," the proceeds of the sale of some bonds, $35,000, which the treasurer, according to the charge in the ledger, received on November 7, 1889,—the day previous to that on which the bond in question was signed and approved. The bond, in its terms, as printed and written, was not ambiguous, and needed no evidence to explain it; hence none was receivable, and the trial judge did not err in rejecting it. The bond contained the contract of the parties and it could not be varied or changed by evidence of a different parol agreement.

It is further claimed that the shortages, if any were shown, existed prior to the time the second bond was given, and the parties who signed it cannot be held to their payment. The testimony shows that the treasurer received the proceeds of these bonds and of the moneys he failed and refused to turn over, in the aggregate, the sum of $1,180 thereof. The page of the book introduced in evidence showed that at the date which closed his term of office the amounts which made the above stated sum were charges against the treasurer of moneys which should have been turned over to his successor. So much being shown, it devolved upon the opposite parties to prove the contrary. It was the duty of the treasurer to turn over to his successor all moneys in his hands belonging to the county, or for which he was liable to account. In the absence of proof as to when it was misappropriated, the presumption must be that it was at the end of the term and the liability would accrue at such time. (*Heppe v. Johnson*, 73 Cal., 265; *United States v. Stone*, 106 U. S., 525.)

It is further claimed that there was misjoinder of parties; that the sureties on the first bond should not have been joined in an action with those who signed the second. Under the view that the default of the treasurer occurred after the execution of the second bond, the sureties on both bonds were properly joined as parties

defendants. They were each and all liable for the failure of the principal to faithfully perform the duties of his office. (*Holeran v. School District*, 10 Neb., 406; *Powell v. Powell*, 48 Cal., 234; *Gilbert v. Board of Education*, 45 Kan., 31.)

The uncontroverted testimony in the case warranted the presiding judge in instructing the jury to return a verdict for the county and against the parties stated in the instruction. The judgment of the district court was right and is

AFFIRMED.

BLUE VALLEY LUMBER COMPANY ET AL. V. A. D. SMITH.

FILED MAY 6, 1896. No. 6448.

1. **Instructions**: EXCEPTIONS. Exceptions should be taken separately to instructions, and not *en masse*.
2. ———: ———: REVIEW. An exception to instructions numbered 1, 2, 3, 4, 5, 6, 7, 8, and 9, given by the court to the jury on its own motion, is in substance and effect a general exception to the whole charge, consisting of nine paragraphs, and such exception is not available on review, if any one of the instructions was correct and free from criticism.
3. ———: ASSUMPTION OF FACT. It is not reversible error to refuse an instruction based on an assumption of fact in issue in the case.
4. **Negotiable Instruments**: CONSIDERATION. A lack of consideration is no defense to negotiable paper in the hands of an innocent purchaser for value in the usual course of business before maturity.

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

Brome, Burnett & Jones, for plaintiffs in error.

John P. Breen, contra.

NORVAL, J.

This was an action upon two bills of exchange drawn by Abner Conro & Son upon, and accepted by, the Blue

Valley Lumber Company, and indorsed by F. N. Jaynes. The suit was brought by A. D. Smith, the owner of said bills of exchange, against both the acceptor and indorser thereof. A verdict was returned in favor of the plaintiff for the full amount claimed in the petition, and from a judgment rendered on the verdict the defendants have prosecuted error to this court.

The Blue Valley Lumber Company, a corporation organized under the laws of this state, and doing business at the city of Omaha, on the 9th day of January, 1892, entered into a written contract with Abner Conro & Son, a firm engaged in the lumber business at Rhinelander, Wisconsin, for the purchase from the latter of 6,000,000 feet of pine lumber, then piled in the yards of said Conro & Son, at Rhinelander. By the terms of the contract the lumber was to be delivered on board of cars to such persons as the Blue Valley Lumber Company might direct, and that each party should furnish a scaler to scale the lumber and tally the shingles and lath. The bills of exchange in question were executed on account of the purchase price of said lumber. The Blue Valley Lumber Company, for answer to the petition, pleads the contract for the purchase of the lumber; alleges that the quantity, quality, or amount of the different grades of lumber could not be ascertained from an ordinary inspection thereof; that in order to induce it to enter into said contract said Conro & Son falsely represented to defendant that there were 214,415 feet of lumber of grade "C" and better, and there were 492,716 feet of No. 1 boards and fencing; that, relying upon said representations and believing them to be true, defendant was induced to and did enter into said contract of purchase; that afterwards, without any knowledge that said representations respecting the quantity, quality, and grades of said lumber were untrue, defendant did from time to time cause to be shipped to various parties and places in Nebraska and Kansas said lumber, and executed said drafts or bills of exchange; that afterwards defendant discovered that

said representations of said Conro & Son were false and untrue, in this, that there were not to exceed 165,000 feet of grade "C" and better, and not to exceed 232,000 of No. 1 boards and fencing; that if the lumber had been of the quantity, quality, and grades represented it would have been worth $80,000, while it was not actually worth to exceed $55,000; that Conro & Son, when said representations were made, knew that they were false and untrue, and were made for the purpose and with the design of cheating and defrauding defendant. It is further averred that plaintiff is not an innocent purchaser of the bills of exchange; that defendant had overpaid Conro & Son for the lumber actually obtained from them at the time said bills of exchange were executed, and that said Conro & Son released, in writing, defendant from any and all liability on account of the contract for the purchase of said lumber. The reply denies the allegations of the answer. Evidence bearing upon the question of false representations set up in the answer was conflicting. That introduced by the defendant tended to sustain its contention. Upon this branch of the case the court instructed the jury as follows:

"7. If you find from the evidence that Conro & Son and the plaintiff fraudulently and, with the intent to cheat and defraud defendant, falsely represented that the lumber was of a certain quality and grade, or if said Conro & Son fraudulently and, with intent to cheat and defraud defendant, falsely represented that the lumber was of a certain quality and grade, and you further find that plaintiff knew, or had reason to know, or had such information thereon as would have put a reasonable, cautious, and prudent man upon inquiry, and which inquiry would have led to a discovery of the fraudulent representations respecting the quality and grade of the lumber, if any were made, at the time he obtained the ninety-day draft, then the assignment of the contract by defendant to Jaynes would not prevent defendant from recovering upon its counter-claim for such damages as it has proven

that it has sustained by reason of such fraudulent representations as to the lumber received by it prior to the assignment to Jaynes by defendant, under the directions herein given you; but if you find for defendant upon its counter-claim, defendant must have satisfied you that the representations, if any, as to the quality of the lumber were in fact made; that they were false; that they were known to be false at the time that they were made; that they were made for the purpose of cheating and defrauding defendant; that defendant believed such representations and upon the strength of which it purchased the lumber; that defendant was damaged thereby and the amount of its damage.

"You are further instructed that if you find that false and fraudulent representations as to the quality of the lumber were made, but the defendant did not rely upon such representations in making the purchase, but had an agent acting for it as a scaler of the lumber, and you find that such scaler did examine and determine the quality of the lumber while so acting for defendant, then defendant could not recover upon its counter-claim. Nor could defendant recover upon its counter-claim if you find that at the time of the purchase of the lumber, defendant's agent, Jaynes, knew, or had reason to know, that the lumber was not as represented by Conro & Son, even though you find Conro & Son did falsely and fraudulently represent the quality of the lumber for the purpose of cheating and defrauding the defendant."

The giving of this instruction is assigned for error. Counsel for plaintiff below insist that no proper exception was taken to the instruction when given, therefore no foundation has been laid for its review by this court. The record shows that nine instructions were given by the trial judge on his own motion, and the following is the only exception taken at the time by the defendant:

"The Blue Valley Lumber Company, at the time the instructions were given, and in the presence of the court and jury, excepted to instructions numbered 1, 2, 3, 4, 5,

6, 7, 8, and 9, given by the court to the jury on its own motion.

"Correct. SCOTT, J."

The above is not a separate exception to each instruction given, but a general exception to the entire charge to the jury. It does not single out a particular instruction as erroneous, but the defendant has excepted to the charge *en masse*, which is only sufficient to bring up for review the propriety of the instructions as a whole. If they were all bad, doubtless a sufficient foundation is laid for their review. Several separate and distinct propositions are embodied in the charge of the court, some of them are manifestly correct, and but one is assailed by defendant here. It is the settled law of this state that exceptions must be taken separately to instructions which are deemed objectionable, and that a general exception to the whole charge, involving more than one proposition, will be of no avail if any one of the paragraphs therein contained be correct or faultless. (*McReady v. Rogers*, 1 Neb., 124; *Strader v. White*, 2 Neb., 348; *First Nat. Bank of Denver v. Lowrey*, 36 Neb., 290; *Omaha Fire Ins. Co. v. Dierks*, 43 Neb., 473; *Redman v. Voss*, 46 Neb., 512; *City of Omaha v. McGavock*, 47 Neb., 313.) The exception preserved in the case at bar is to the whole charge, as much so as if the exception read "the defendant excepts to the giving of the instructions by the court on its own motion," or had this language been employed in noting the exception: "Comes now the defendant and excepts to the instructions numbered from 1 to 9, inclusive, given to the jury by the court on the trial of said cause." An exception in substantially the same language as that just quoted was held insufficient in *Omaha Fire Ins. Co. v. Dierks*, 43 Neb., 473. It has been repeatedly held, and this is but an application of the principle for which the plaintiff in this case contends, that an assignment in a petition in error, or a motion for a new trial, that the court erred in giving instructions 1, 2, 3, 4, etc., is too general to call for review each instruction in-

cluded in the group, and will be examined no further than to ascertain that any one of them was correct. (*Hiatt v. Kinkaid*, 40 Neb., 178; *McDonald v. Bowman*, 40 Neb., 269; *Jenkins v. Mitchell*, 40 Neb., 664; *Murphy v. Gould*, 40 Neb., 728; *Armann v. Buel*, 40 Neb., 803; *Houston v. City of Omaha*, 44 Neb., 65; *Schelly v. Schwank*, 44 Neb., 504; *Stoppert v. Nierle*, 45 Neb., 105; *Smith v. First Nat. Bank of Chadron*, 45 Neb., 448.) Since exceptions were taken in this case to the instructions *en masse*, and one or more of the paragraphs not being erroneous, upon principle, as well as authority, we are constrained to hold that no sufficient foundation has been laid for a review by us of the instruction above quoted.

Complaint is made because the court refused the defendant's third, fourth, and fifth requests to charge, which are as follows:

"3. If you find from the evidence that the drafts in suit were given without consideration, or, in other words, at the time they were executed and delivered there was no balance due said Conro & Son from said Blue Valley Lumber Company on account of, and for the purchase price of, said lumber, then your verdict will be for the defendant.

"4. If you find from the evidence in this case that after the maturity of one of the drafts in suit, the same was paid to the holder and owner thereof by Conro & Son, the makers thereof, then plaintiff cannot recover in this action as to such draft.

"5. If you find from the evidence that defendant herein, at the time of the commencement of this action, was not indebted to Abner Conro & Son on account of purchase price of said lumber, or in any manner whatever, then your verdict will be for defendant and against plaintiff as to both causes of action set up and stated in plaintiff's petition."

The third and fifth requests to charge are each based on an assumption of fact in issue in the case, and for that reason were properly refused. If plaintiff was an inno-

cent purchaser of either of the bills of exchange or drafts for value before maturity, he was entitled to recover, even though they were given without consideration, and defendant was not indebted to Conro & Son anything on account of the lumber purchased. These drafts were negotiable in form, and as to one of them there was evidence adduced tending to show the plaintiff was a good-faith purchaser for value before maturity, without notice of any defense existing against it, and if so, as to such paper, plaintiff was protected and the defense interposed against it is unavailing. It is conceded that plaintiff became the owner of one of the drafts after its maturity. The instructions requested were framed upon the theory that plaintiff was not an innocent purchaser of either draft, and for that reason they were faulty. The fourth request did not contain a correct statement of the law. Conro & Son had indorsed one of the drafts, and after its maturity they made their indorsement good by taking the same up, and then retransferred the draft to plaintiff. The fact that Conro & Son had lifted the draft would not alone defeat a recovery in the hands of plaintiff, the undisputed owner. To have that effect it must be shown that there was nothing due thereon, and that was a controverted issue in the case. The instruction assumed, upon conflicting evidence, that the defense against such draft was established, and therefore was properly refused. The judgment is

AFFIRMED.

EMERY M. STENBERG ET AL. V. STATE OF NEBRASKA, EX REL. CHARLES B. KELLER ET AL.

FILED MAY 6, 1896. No. 8281.

1. **County Boards: JURISDICTION: DISTRICT COURTS.** A county board has exclusive original jurisdiction to examine and pass upon claims or demands against the county properly cognizable for audit and allowance, and the jurisdiction of the district court, as to such, is appellate merely.

2. **Appellate Courts:** JURISDICTION. An appellate court acquires no jurisdiction of the subject-matter where the tribunal or body from which the appeal was taken possessed none.

3. **County Boards:** AUTHORITY TO REVIEW. In the absence of statutory authority one county board cannot review or reverse the act of a prior board performed within the scope of authority conferred by law.

4. ———: JURISDICTION: VOID SALE OF LAND: CLAIM FOR PURCHASE MONEY. *Held*, That the respondents had jurisdiction to examine and allow relators' claim.

5. ———: COURTS. While boards of county commissioners exercise functions judicial in their nature in the allowance and rejection of claims against the county, such boards are not courts in a constitutional sense, or within the general recognized acceptation of that term.

6. **Counties:** VOID SALE OF LAND. *Douglas County v. Keller*, 43 Neb., 635, adhered to.

7. **Res Judicata:** COLLATERAL ATTACK. A judgment by a court having jurisdiction of the parties and subject-matter is conclusive upon the parties thereto and their privies, unless reversed in appellate proceedings. It settles all matters litigated, and cannot be assailed collaterally.

8. **Set-Off and Counter-Claim.** The Code of Civil Procedure relating to set-offs authorizes such defenses to be interposed before, but not after judgment. A court of equity, where proper grounds exist therefor, may allow a set-off in cases not provided for by statute.

9. **Negotiable Instruments:** CONSIDERATION. A promissory note without consideration is invalid as between the original parties, and cannot be enforced against the maker in the hands of the payee.

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

The opinion contains a statement of the case.

William D. Beckett and *Read & Beckett*, for plaintiffs in error:

1. The county board as an executive or administrative body had no power to comply with the demand of Keller and Doane for the return of the money paid by them on account of the purchase of the lots in Douglas Addition. (*Davey v. Dakota County*, 19 Neb., 722; *State v. Alexander*,

14 Neb., 282; *United States v. Stone*, 2 Wall. [U. S.], 525; *Moore v. Robbins*, 96 U. S., 530; *Steel v. Smelting Co.*, 106 U. S., 447; *United States v. Schurz*, 102 U. S., 378; *Union River Logging R. Co. v. Noble*, 147 U. S., 165; *Hilliard v. Connelly*, 7 Ga., 172; *Sumner v. Colfax County*, 14 Neb., 524; *Sioux City & P. R. Co. v. Washington County*, 3 Neb., 40; *State v. Buffalo County*, 6 Neb., 454; *Kemerer v. State*, 7 Neb., 132.)

2. The county board, as a judicial tribunal, had no jurisdiction to consider the petition of Keller and Doane, or to adjudicate upon the validity of their deed from the county. (*Stewart v. Otoe County*, 2 Neb., 181; *Brown v. Otoe County*, 6 Neb., 115; *Gaston v. Commissioners*, 3 Ind., 497; *Board of Commissioners v. Cutler*, 7 Ind., 6; *Rhode v. Davis*, 2 Carter [Ind.], 53; *State v. Conner*, 5 Black. [Ind.], 325; *Furnas v. Nemaha County*, 5 Neb., 367; *Howard v. Dakota County*, 25 Neb., 233; *State v. Buffalo County*, 6 Neb., 454; *Dixon County v. Barnes*, 13 Neb., 294; *State v. Merrell*, 43 Neb., 575; *State v. Churchill*, 37 Neb., 702; *Sioux County v. Jameson*, 43 Neb., 265; *Heald v. Polk County*, 46 Neb., 28; *Dodge County v. Gregg*, 14 Neb., 305; *Streeter v. Rolph*, 13 Neb., 388; *Chicago, B. & Q. R. Co. v. Skupa*, 16 Neb., 346; *Republican V. R. Co. v. Fink*, 28 Neb., 397; *Huddleston v. Johnson*, 71 Wis., 336; *Fordsen v. Gummer*, 37 Minn., 211; *Brooks v. Delrymple*, 1 Mich., 145.)

3. The board of county commissioners having no jurisdiction to consider the petition of Keller and Doane, the district court acquired none by the appeal. (*Brondberg v. Babbott*, 14 Neb., 517; *Union P. R. Co. v. Ogilvy*, 18 Neb., 638; *Stringham v. Board of Supervisors*, 24 Wis., 594; *Keeshan v. State*, 46 Neb., 155; *Latham v. Edgerton*, 9 Cow. [N. Y.], 227; *Plunkett v. Evans*, 50 N. W. Rep. [So. Dak.], 961; *Fidelity Trust Co. v. Gill Car Co.*, 25 Fed. Rep., 737; *Plano Mfg. Co. v. Rasey*, 69 Wis., 246; *Moise v. Powell*, 40 Neb., 674; *Foster v. Pierce County*, 15 Neb., 48; *Town of Wayne v. Caldwell*, 1 So. Dak., 483; *Fitzgerald v. Beebe*, 7 Ark., 305; *Johnson v. Parrotte*, 46 Neb., 51.)

4. The note and mortgage of Keller and Doane to the

county constituted a good off-set against the judgment to that extent, so that it is not the duty of the plaintiff in error to pay said judgment in full.

5. Keller and Doane bought no public grounds of Douglas county. They bought vacant lots, and the deed of the county for such lots vested in them a perfect title. (Dillon, Municipal Corporations, sec. 575; *Roberts v. Northern P. R. Co.*, 158 U. S., 1; *Platten v. Board of County Commissioners*, 103 Ind., 360.)

Charles B. Keller and *George W. Doane, contra.*

In reply to the first proposition of plaintiffs in error the following cases were cited: *Douglas County v. Keller*, 43 Neb., 635; *State v. Anderson*, 26 Neb., 521; *State v. Lancaster County*, 6 Neb., 481; *State v. Babcock*, 17 Neb., 188; *State v. Bechel*, 22 Neb., 158; *State v. Benton*, 29 Neb., 460; *Zottman v. City of San Francisco*, 20 Cal., 102; *Mayor of Baltimore v. Porter*, 18 Md., 301; *Smith v. Stevens*, 10 Wall. [U. S.], 326; *Still v. Lansingburgh*, 16 Barb. [N. Y.], 107; *Dill v. Wareham*, 7 Met. [Mass.], 438; *Hurford v. City of Omaha*, 4 Neb., 350; *McCracken v. City of San Francisco*, 16 Cal., 628; *Paul v. City of Kenosha*, 22 Wis., 266.

The question of jurisdiction is no longer an open one. (*Douglas County v. Keller*, 43 Neb., 635; *Washington Bridge Co. v. Stewart*, 3 How. [U. S.], 413; *Skillern v. May*, 6 Cranch [U. S.], 267*; *Himely v. Rose*, 5 Cranch [U. S.], 316*; *State v. Waupaca Bank*, 20 Wis., 672; *Martin v. Hunter*, 1 Wheat. [U. S.], 364; *Gaines v. Rugg*, 148 U. S., 242; *Younkin v. Younkin*, 44 Neb., 729; *Clary v. Hoagland*, 6 Cal., 685.)

The claims were properly presented to the board of county commissioners in the first instance, and an appeal from their order of disallowance taken to the district court. (*Dixon v. Barnes*, 13 Neb., 294; *Richardson County v. Hull*, 24 Neb., 536; *State v. Churchill*, 37 Neb., 704; *Heald v. Polk County*, 46 Neb., 28; *Maddox v. Randolph County*, 65 Ga., 216; *McCann v. Sierra County*, 7 Cal., 121; *McLendon v. Anson County*, 71 N. Car., 38; *Marshall v. Baltimore*

& O. R. Co., 16 How. [U. S.], 325; *Clark v. Saline County*, 9 Neb., 516.)

Boards of county commissioners are not courts within the purview or within the meaning of that term as used in the constitution, nor is their action judicial within the meaning of that term as therein used. (*Eureka Sandstone Co. v. Pierce County*, 8 Wash., 237; *Kemerer v. State*, 7 Neb., 130; *State v. Roderick*, 25 Neb., 629; *State v. Harmon*, 31 O. St., 257; *Gurnee v. Brunswick County*, 1 Hugh [U. S. C. C.], 270; *Sewing Machine Cases*, 18 Wall. [U. S.], 585; *Dogge v. State*, 21 Neb., 279; *People v. Board of Supervisors*, 65 N. Y., 225; *National Bank of Chemung v. City of Elmira*, 53 N. Y., 49; *People v. Supervisors of Schenectady*, 35 Barb. [N. Y.], 408; *Mathews v. Otsego Supervisors*, 48 Mich., 589; *Rowe v. Bowen*, 28 Ill., 117; *Betts v. New Hartford*, 25 Conn., 185; *Black v. Saunders County*, 8 Neb., 440; *Shurbun v. Hooper*, 40 Mich., 503; *Commissioners v. Keller*, 6 Kan., 510; *Flat Swamp Canal Co. v. McAllister*, 74 N. Car., 162; *Ferry v. King County*, 26 Pac. Rep. [Wash.], 537; *Granger v. Pulaski County*, 26 Ark., 39; *Hunsacker v. Borden*, 5 Cal., 288; *State v. Ormsby County*, 7 Nev., 392; *Shanklin v. Madison County*, 21 O. St., 583; *People v. Supervisors*, 8 Cal., 58; *State v. Stout*, 7 Neb., 107; *Lyell v. St. Clair County*, 3 Macl. [U. S. C. C.], 580; *Rock Island County v. Steele*, 31 Ill., 543; *Schuyler County v. Mercer County*, 4 Gil. [Ill.], 20; *Granger v. Pulaski County*, 26 Ark., 40; *Ward v. Hartford County*, 12 Conn., 404; *Anderson v. State*, 23 Miss., 459; *Maddox v. Randolph County*, 65 Ga., 216; *McCann v. Sierra County*, 7 Cal., 121; *McLendon v. Anson County*, 71 N. Car., 38; *Ex parte Harker*, 49 Cal., 465; *Aldrich v. Hawkins*, 6 Black. [Ind.], 126; *State v. Vincent*, 46 Neb., 408.)

The title to real estate was not sought to be recovered, and was not drawn in question in the sense referred to in the constitution. (*Smith v. Kaiser*, 17 Neb., 184; *Radley v. O'Leary*, 36 Minn., 173; *Readle v. Sutton*, 43 Md., 64; *Nicholson v. Walker*, 4 Ill. App., 404; *Potts v. Magnes*, 17 Colo., 364; *Fulton v. Hanlow*, 20 Cal., 487; *King v. Chase*, 15 N. H., 10; *Gilbert v. Thompson*, 9 Cush. [Mass.], 348; *Mush-*

rush v. Devereaux, 20 Neb., 49; *Jakenay v. Barrett*, 38 Vt., 316; *Campbell v. McClure*, 45 Neb., 608; *Hart v. Hart*, 48 Mich., 175; *Hungerford v. Redford*, 29 Wis., 345; *Bridges v. Branam*, 33 N. E. Rep. [Ind.], 271; *Conaway v. Gore*, 27 Kan., 126; *Benton v. Marshall*, 1 S. W. Rep. [Ark.], 201; *Lehnen v. Dickson*, 148 U. S., 71; *Quetermous v. Hatfield*, 14 S. W. Rep. [Ark.], 1096.)

In an argument against the third contention of plaintiffs in error reference was made to the following cases: *Groves v. Richmond*, 56 Ia., 69; *Hughes v. Hardesty*, 13 Bush [Ky.], 364; *Real v. Hollister*, 20 Neb., 112; *Davidson v. Cox*, 10 Neb., 150; *Dale v. Shively*, 8 Kan., 276; *Richardson v. Dorr*, 5 Vt., 9; *Thayer v. Clemence*, 22 Pick. [Mass.], 493; *Pollard v. Dwight*, 8 U. S., 429; *Randolph County v. Ralls*, 18 Ill., 29; *Leigh v. Mason*, 1 Scam. [Ill.], 249; *Vermillion County v. Knight*, 1 Scam. [Ill.], 97; *Williams v. Blankenship*, 12 Ill., 122; *Ginn v. Rogers*, 4 Gil. [Ill.], 131; *Gillenwater v. Mississippi & A. R. Co.*, 13 Ill., 1; *Allen v. Belcher*, 3 Gil. [Ill.], 594; *Montgomery v. Heilman*, 96 Pa. St., 44; *Lee v. Parrett*, 25 Minn., 128; *Birks v. Houston*, 63 Ill., 77.

Citation as to right of set-off: *Thrall v. Omaha Hotel Co.*, 5 Neb., 301.

References in reply to the fifth contention of plaintiffs in error: *Chapman v. Douglas County*, 107 U. S., 348; *Eureka Sandstone Co. v. Pierce County*, 8 Wash., 237; *Barker v. Davies*, 47 Neb., 78.

NORVAL, J.

This was an application to the district court of Douglas county by the relators for a peremptory *mandamus* to compel the respondents, the board of county commissioners of said county, to take the necessary steps to cause a warrant to be issued upon the county treasurer in favor of relators, in payment of a judgment recovered in said district court by Charles B. Keller and George W. Doane against Douglas county for the sum of $4,832.62, and costs taxed at $99.73, which judgment was affirmed by this court. (*Douglas County v. Keller*, 43 Neb., 635.) A

peremptory writ of *mandamus* was ordered as prayed, and the respondents have brought the record here for review.

There is no controversy as to the facts. The respondents insist that the judgment sought to be enforced by this proceeding was rendered without jurisdiction, and, therefore, is void. Before entering upon the discussion of the questions involved, it will not be inappropriate to briefly state the facts. The county of Douglas, being the owner of 160 acres of land, which had been purchased and was used as a poor farm, its board of county commissioners adopted a resolution submitting to the voters of the county, for their adoption or rejection, the proposition to sell a part of the poor farm and with the proceeds build a county hospital. This question was voted upon at the general election held in said county November 2, 1886, and much less than one-half, and but a little over one-third, of the total vote polled in said county at said election was cast in favor of said proposition, although it received more than two-thirds of all the votes cast on the question. In February, 1887, the east fifty acres of the poor farm tract was subdivided into lots and blocks, and platted as an addition to the city of Omaha. In the following April, Charles B. Keller and George W. Doane purchased from the county at public auction three of the lots for $4,950. One-third of the purchase money was paid in cash, and for the balance they gave to the county their three promissory notes, aggregating $3,300, and secured the same by mortgage upon the lots. At the same time the county commissioners executed to the purchasers a warranty deed for said lots. Subsequently Keller and Doane paid two of the notes, and likewise paid the taxes upon the lots purchased by them, including taxes levied by the city of Omaha for street improvements. The other note remains wholly unpaid. In April, 1892, Keller and Doane filed with the county commissioners a verified itemized account or claim for the sums paid by them for said lots and for taxes, and demanded a

return of the money thus paid, on the ground that the deed was void for lack of authority on the part of the commissioners to execute the same. The demand was refused. The claim was rejected and disallowed, and an appeal was prosecuted to the district court, where, in May, 1893, the judgment in question was entered in favor of Keller and Doane. The latter has assigned his interest therein to the relator, the Merchants National Bank of Omaha. It is also shown by the record that there are available funds in the treasury of Douglas county sufficient to pay off and discharge said judgment.

The theory of the relators was, and is, that the county commissioners in executing the deed acted without authority of law, and the conveyance is a nullity, since they could not sell any part of the public grounds of the county without having first been empowered to do so by the electors of the county; and further, that the sale being void, relators were entitled to have the moneys paid by them refunded by the county. This contention was sustained by the decision in *Douglas County v. Keller*, 43 Neb., 635. It was there held that a sale by a county board of the public grounds of the county, without having first submitted the question to the electors thereof, and without receiving the consent of the majority of the electors voting at an election authorized by law, is void and passes no title to the purchaser. On the other hand, it is strenuously insisted by respondents that the county board was without power to pass upon and audit relator's claim, and, therefore, the appeal conferred no jurisdiction upon the district court to adjudicate. We have been favored with able and exhaustive arguments at the bar, and in printed briefs by counsel for the respective parties, which have been invaluable aids in our investigation.

We will first notice the main question in the case, namely: Is the judgment void for want of jurisdiction of the subject-matter? There is no room for doubt that the district court, by the appeal, acquired no greater power

or authority to hear and determine the matter than was possessed by the county board. True, the county appeared in the appellate court and contested the claim, but that is wholly immaterial. Jurisdiction of the person may be waived, but consent cannot confer jurisdiction of the subject-matter. If the county board had no power or authority to act in the premises, it is very evident the district court obtained none, and so say the authorities. (*Brondberg v. Babbott*, 14 Neb., 517; *Union P. R. Co. v. Ogilvy*, 18 Neb., 638; *Moise v. Powell*, 40 Neb., 671; *Johnson v. Parrotte*, 46 Neb., 51; *Keeshan v. State*, 46 Neb., 155.) This rule obtains in other states. (See authorities cited in brief of respondent.) It is equally well settled that a county board has exclusive original jurisdiction in the examination and allowance of most claims against the county. No original action can be maintained against a county upon a claim or demand properly cognizable for audit and allowance before the county board. As to all such the jurisdiction of the district court is appellate merely. (*Brown v. Otoe County*, 6 Neb., 111; *Clark v. Dayton*, 6 Neb., 192; *Dixon County v. Barnes*, 13 Neb., 294; *Richardson County v. Hull*, 24 Neb., 536, 28 Neb., 810; *Fuller v. Colfax County*, 33 Neb., 716; *State v. Merrill*, 43 Neb., 575.)

It is contended by respondents that the claim upon which the judgment in question was rendered was improperly presented to the county board, as it is one which that body was not authorized to act upon, for two reasons: First, the county board, as an executive or administrative body, could not return to Keller and Doane the money which they paid on the lots without undoing the acts of its predecessors, and one executive body or official is powerless to review or overturn the acts of former officers or bodies; second, the county board, in the matter of the allowance of claims, is a court or judicial tribunal, and as such it was without jurisdiction to consider or pass upon the claim, because the title to real estate is involved. We will notice these objections in the

order above stated. We do not question the soundness of the doctrine urged by respondents, that one executive officer cannot review and reverse the acts of a predecessor performed in the scope of his authority, for such is undoubtedly the law when no statutory authority to do so is given, and it was so held and applied in *State v. Alexander*, 14 Neb., 280. That was an application for *mandamus* against the auditor and secretary of state to compel the registration of certain bonds of Dakota county executed in pursuance of statute to replace other bonds of the county previously issued and registered. The respondents insisted that the original bonds were illegal, because they were in excess of the amount the county was authorized to vote. LAKE, C. J., in delivering the opinion of the court, said: "It is only by reviewing the action of former officers, by which the bonds are shown to have been properly issued, that they can now say that they were unauthorized. This, we think, they have no right to do. As to them, the questions confided to the judgment of and decided by their predecessors are *res judicata*, and not to be opened. * * * There is no principle that we are aware of which will permit the respondents to overturn the action of their predecessors in registering and certifying to the legality of bonds, and a peremptory writ is awarded." The same principle of law is announced in *United States v. Stone*, 2 Wall. [U. S.], 525; *Moore v. Robbins*, 96 U. S., 530; *United States v. Schurz*, 152 U. S., 378; *Noble v. Union River L. R. R. Co.*, 147 U. S., 165; *Hillard v. Connelly*, 7 Ga., 172. The rule deducible from the authorities is that in order for an act by one executive or administrative officer or board to be binding upon a successor, such officer must in performing the same have acted within the scope of the authority imposed by law. If the act was outside of, or exceeded, the power conferred, it is a nullity and binding upon no one.

It is argued that the county board was acting within the scope of its authority when it executed the deed.

This court held the reverse of this to be true in *Douglas County v. Keller*, *supra*, where the identical judgment here in question was before us for review. As already stated, it was there decided that the sale was void and the purchasers acquired no title, inasmuch as the board had not been previously empowered by the requisite vote of the electors of the county to execute the conveyance of the property, the real estate being a part of the public grounds. It is insisted, however, that no public grounds were bought by Keller and Doane, but vacant lots, and that it required no vote of the electors of the county to authorize the sale of such real estate; hence the deed vested in the purchasers a complete and perfect title. This argument is based upon the provisions of section 22, chapter 18, article 1, Compiled Statutes, which section reads: "Each county shall have power: First—To purchase and hold the real and personal estate necessary for the use of the county, and to purchase and hold, for the benefit of the county, real estate sold by virtue of judicial proceedings in which the county is plaintiff or is interested, and all real estate conveyed by general warranty deed to trustees, in which the county is the beneficiary, whether such real estate is situated in the county so interested or in some other county or counties of the state. Second—To sell and convey, or lease, any real or personal estate owned by the county. Third—To make all contracts and to do all other acts in relation to the property and concerns of the county necessary to the exercise of its corporate powers." The foregoing was not referred to or considered in the opinion in the case of *Douglas County v. Keller*, but the decision therein was based upon sections 23 and 24 and other provisions of said chapter, which section 24 declares: "The county board shall not sell the public grounds, as provided in the third subdivision of the preceding section, without having first submitted the question of selling such public grounds to a vote of the electors of the county." It may be that real estate acquired by the county through a tax

sale, or by virtue of a sale under an execution upon a judgment rendered in its favor upon an official bond, or other real estate, the title to which was acquired by the county through some other channel, but which was not purchased and used for county purposes, may be sold and conveyed under the provisions of said section 22 without the previous affirmative consent of the voters of the county; but whether so or not we do not decide, as it does not arise in this case. Said section has no application here, so far as we have been able to discover. The lots sold to Keller and Doane were parts of a tract which the county had purchased for, and used as, a poor farm,—a purpose wholly public in its character,—and therefore said lots were parts of the public grounds of the county, which the county board could not dispose of until authorized so to do in the mode pointed out in section 24. True, these lots were parts of the fifty acres of the poor farm which had been platted as an addition to Omaha, but that was done without the sanction of the voters of the county, and such platting did not make the real estate included therein any the less public grounds of the county. An officer cannot do indirectly what he is forbidden or unauthorized directly to do. If this sale is valid and receives judicial sanction, then it will be an easy matter to evade the safeguards of the statute relating to the sale of real estate purchased and used for county purposes; and there would be nothing to prevent the present, or some future, county board of Douglas county from selling part of the tract upon which the court house is erected, without having previously submitted the proposition to do so to the voters, if the board, by merely platting a part of the tract or abandoning the same for county purposes, thereby makes such real estate no longer public grounds within the purview of the statute. The construction contended for by respondents is neither a natural nor reasonable one, but is manifestly against the intention of the law-makers, and we decline to adopt it. The mere segregating by the

county board of the fifty acres from the poor-farm tract, and the platting thereof into blocks and lots, did not confer power upon the county commissioners to sell such lots until first empowered to make such sale in the mode indicated by section 24, article 1, chapter 18, Compiled Statutes. We therefore hold that the provisions of said section 22 of said article and chapter are not applicable here, and that in making the sale of said lots to Keller and Doane the county board failed not only to keep within the scope of its powers, but acted without any authority whatever. The statute has prescribed the manner in which the public grounds of a county may be disposed of, and such mode must be pursued. If not, there is an entire lack of power. The legislature has required that the affirmative consent of the voters of the county shall be first given to sell such grounds, and a conveyance without such previous consent is not voidable merely, but is absolutely void, and confers no title upon the purchaser. No authority to sell these lots was ever conferred by a vote of the electors of the county as the statute required, therefore the deed was without any validity.

The commissioners, in passing upon the claim of Keller and Doane, even had they allowed it, would have in nowise overruled or reversed any act of their predecessors, since there had been no prior decision or ruling by the county board upon the question of refunding this money by the county. It has often been held in this state that a county board, in examining and passing upon claims against the county, acts judicially, and the allowance or rejection by it of a claim has the force and effect of a judgment, unless reversed or set aside by appellate proceedings. (*State v. Buffalo County*, 6 Neb., 454; *Brown v. Otoe County*, 6 Neb., 111; *State v. Churchill*, 37 Neb., 702; *State v. Morrill*, 43 Neb., 575; *Sioux County v. Jamison*, 43 Neb., 265; *Heald v. Polk County*, 46 Neb., 28; *State v. Vincent*, 46 Neb., 408.) But we are unable to agree with counsel for respondents that county boards are courts

in a constitutional sense, or within the general acceptation of that term. They are not created courts by the constitution, nor does the present law establishing county boards and defining their duties and powers constitute them courts. They are merely legislative and administrative bodies, with limited powers, created for the transaction of county business, exercising in some matters, it is true, functions judicial in their nature, and appeals lie from their decisions in certain matters provided for; but that does not make them courts. So, too, officers not judicial sometimes are clothed with judicial powers. A county superintendent of schools exercises *quasi*-judicial functions in the changing of the boundaries of school districts, and an appeal may be taken from his decision, yet there is no superintendent's court. The state auditor in the audit and allowance of claims acts judicially, and the right to appeal is given, but that does not constitute an auditor's court. Many other instances might be mentioned where judicial power, to a limited extent, is lodged in the hands of different officers for specific purposes. "A court is a body in the government organized for the public administration of justice at the time and place prescribed by law." (4 Am. & Eng. Ency. of Law, 447.) County boards do not fall within this definition. They cannot issue subpœnas for witnesses. The rules of law governing the admission of testimony in the courts are not usually followed before county boards in passing upon claims. Such boards often act without testimony and receive, and consider sufficient, evidence inadmissible in courts of justice. County boards do not render judgments. The allowance or rejection of a claim from which no appeal has been prosecuted has merely the effect of a judgment. The statute in no place refers to such boards as courts. Nor does the fact that the law requires each county board to procure a seal constitute it a court. Such seal is expressly made by the legislature the seal of the county, and not that of the board as a court or judicial tribunal. That it

is obligatory upon county commissioners to hold their sessions at the court house for the transaction of the business of the county is not significant. The county treasurer and other county officers are required to hold their offices in the same building.

Section 1, article 6, of the present constitution declares that "the judicial powers of this state shall be vested in the supreme court, district courts, county courts, justices of the peace, police magistrates, and such other courts inferior to the district courts as may be created by law for cities and incorporated towns." It will be observed that county boards are not classed or referred to above as courts. Certainly they are not created as such by the language quoted, nor does it, as counsel concede, confer power upon the legislature to establish commissioners' or supervisors' courts. It merely empowers the legislature to create courts inferior to the district courts for cities and incorporated towns. Neither the constitution nor the statute has constituted county boards courts, although, without consideration, this court in some of its opinions has, in speaking of such boards, inaccurately called them "inferior courts," or "inferior tribunals."

It is argued that such boards were created courts by the legislature prior to the adoption of the constitution of 1866, and that they were continued in existence by the provision found in the first section of the last article of that constitution, which declares that "all laws now in force shall remain in force until altered, amended, or repealed by the legislature," and also by section 4, article 16, of the constitution of 1875, which reads: "All existing courts which are not in this constitution specifically enumerated, and concerning which no other provision is herein made, shall continue in existence and exercise their present jurisdiction until otherwise provided by law." The first law creating county boards was enacted at the second session of the territorial legislature of Nebraska. (Laws, 1856, ch. 20, p. 70.) The next general act relating to the

powers and duties of such boards was passed in 1861 (Laws, p. 146); and both acts, without material changes, were carried into the Revised Statutes of 1866 as chapter 9. Conceding, as contended, that the territorial legislatures intended by said laws to create county boards to be courts, yet it is evident that under section 9 of the organic act they had no power to do so. This section provides that "the judicial power of said territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace." Thus it will be seen that congress vested the entire judicial power of the territory in the certain specified courts, and the legislature was powerless to create any other courts or judicial tribunals. The provision in the constitution of 1866 quoted above only continued in existence laws then in force, and gave no new life or vitality to statutes which were invalid. In 1873 "an act concerning county and county officers" (Gen. Stats., p. 232) was passed, which, it is claimed, preserved the provisions of prior acts relating to county boards, and created such to be courts. This act was passed under the constitution of 1866, section 1, article 4, of which provided that the judicial power of the state should be vested in certain enumerated courts, "and such inferior courts as the legislature may from time to time establish." Section 4 of the same article reads as follows: "The jurisdiction of the several courts herein provided for, both appellate and original, shall be as fixed by law; *Provided*, That probate courts, justices of the peace, or any inferior court that may be established by the legislature shall not have jurisdiction in any matter wherein the title or boundaries of land may be in dispute. Nor shall either of the courts mentioned in this provision have the power to order or decree the sale or partition of real estate; and *Provided further*, that justices of the peace, and such inferior courts that may be established by the legislature shall not have jurisdiction when the debt or sum claimed shall exceed one hundred dollars," etc.

Counsel for respondents argue that the said act of 1873 created, as it might do under said section 1, article 4, above set out, county boards inferior courts, and that such courts under section 4 of the same article were ousted of jurisdiction in any matter involving the title or boundaries of real estate; further, that by virtue of section 4, article 16, of the present constitution, county boards continued to exist as courts, with the same limitation as to jurisdiction. We have carefully read and considered said act of 1873, and we find nothing therein contained to warrant the conclusion contended for by counsel. If such boards were by said act constituted inferior courts, then they could not examine, audit, and allow claims against the county where the amount thereof exceeded one hundred dollars. Manifestly such was not the intention of the legislature, and no such construction has, within our knowledge, ever been placed upon the powers of the county boards. They have universally acted upon claims without regard to the amount involved. True, this statute, as well as the prior one upon the same subject, authorized county boards to preserve order and punish contempts by fine and imprisonment, yet that did not have the effect to create such boards judicial tribunals. Each house of the legislature possesses powers to punish for contempts in certain cases, but this falls far short of constituting it a court. The authority to punish for contempt is not conferred alone upon a judge or court. A notary public may commit a witness for contempt who refuses to give his deposition. (*Dogge v. State*, 21 Neb., 272.) If the act of 1873 constituted county boards inferior courts, we now have no such courts, for the legislature in 1879 enacted a law relating to county officers, establishing thereby county boards, not as courts, but as administrative bodies for the transaction of county business, and at the same time in express terms repealed the said act of 1873, as well as all acts or parts of acts in conflict with the said act of 1879. (Session Laws, 1879, p.

353.) This latter act, with some changes or modifications not important on this question, is still in force and effect. In this state we have no commissioners' or supervisors' courts. The conclusion reached upon this branch of the case makes it unnecessary to consider the contention that the title to real estate was involved in the auditing of the claim of Keller and Doane.

It is insisted that the judgment improperly included the amount of taxes on these lots paid by the purchasers to the city of Omaha. The point raised goes to the merits of the original controversy, and is not a proper matter for consideration now. For us to do so would be to investigate anew, in a collateral proceeding, a question which was finally adjudicated by the judgment sought to be enforced. It is a rule firmly established by the decisions that a judgment rendered by a court having jurisdiction over the parties and the subject-matter is conclusive upon the parties and their privies, and cannot be assailed collaterally, even though it may have been erroneously entered. (*State v. Buffalo County*, 6 Neb., 454; *Bryant v. Estabrook*, 16 Neb., 217; *Hilton v. Bachman*, 24 Neb., 490; *Yeatman v. Yeatman*, 35 Neb., 422; *Taylor v. Coots*, 32 Neb., 30; *Smithson v. Smithson*, 37 Neb., 535; *Ripley v. Larsen*, 43 Neb., 687.)

It is also urged that Douglas county is entitled to set off against the judgment the amount of the unpaid note given by Keller and Doane as a part of the purchase price of the lots. The provisions of the Code of Civil Procedure relating to set-offs authorizes such defenses to be interposed before, and not after, judgment. While a demand in the nature of a set-off cannot be allowed under the statute after judgment, yet a court of equity, in a proper case, may grant relief, as when it is shown that the party against whom the set-off is claimed is insolvent. (*Thrall v. Omaha Hotel Co.*, 5 Neb., 295; *Richardson v. Doty*, 44 Neb., 73.) This is not a suit in equity, but strictly a law action. Besides, the insolvency of the relators is neither alleged nor proved, nor is any other

ground for equitable cognizance disclosed by the record. Moreover, if the county is liable for a return of the money paid by Keller and Doane, as we have already decided, it follows that the note asked to be set off is without consideration, and the county is not entitled to recover thereon, since said note is one of three executed as a part of the same transaction, and the judgment includes the money paid on the other two notes. The judgment is

AFFIRMED.

DOUGLAS COUNTY V. CHARLES B. KELLER ET AL.

FILED MAY 6, 1896. NO. 8280.

Counties: VOID SALE OF LAND: PURCHASE MONEY. This case is controlled by the decision in *Stenberg v. State*, 48 Neb., 299, decided herewith.

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

William D. Beckett and *Read & Beckett*, for plaintiff in error.

Charles B. Keller and *George W. Doane, contra.*

NORVAL, J.

This is the second appearance of this case in this court, the opinion affirming the judgment of the court below being reported in 43 Neb., 635. After the issuance of the mandate and the filing thereof in the district court, the county filed a motion to set aside and vacate the judgment upon various grounds, among others, that the court had no jurisdiction of the subject-matter of the action, which motion was subsequently overruled, and the county prosecutes error therefrom.

Precisely the same questions argued and presented herein were involved in the case of *Stenberg v. State*, 48 Neb., 299, decided herewith, and following the decision therein, the judgment is

AFFIRMED.

MARY A. SMALL ET AL. V. C. M. SANDALL.

FILED MAY 6, 1896. No. 5887.

1. **Names:** ACCOUNT. In an action upon an account the plaintiff should sue in his Christian name, instead of his initial letters.
2. ———: OBJECTIONS: APPEAL. Objection that a plaintiff has not sued in his full Christian name may be made at any time before judgment, even in the district court on appeal.
3. **Husband and Wife:** NECESSARIES: WIFE'S SEPARATE ESTATE. Under section 1, chapter 53, Compiled Statutes, the wife is surety for her husband for the payment of debts contracted for necessaries for the family, but her separate estate is not chargeable until after a judgment has been obtained against the husband for such indebtedness, and an execution issued thereon returned unsatisfied.
4. ———: ———: ———. *Held*, That the verdict is without evidence to support it.

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

G. W. Bemis, for plaintiffs in error.

Harlan & Harlan, contra.

NORVAL, J.

This was a rehearing of the case reported in 45 Neb., 306. The action originated in a justice court, and from a judgment against Mary A. Small she appealed to the district court, where a joint judgment was rendered against her and J. M. Bell, the surety on the appeal bond. Both prosecuted a petition in error, joining in the assign-

ments. Upon the former hearing the judgment was affirmed on a question of practice, namely, that a joint assignment of error in a petition in error by several parties, which is not well taken as to all who joined therein, will be overruled as to all. Having entertained a doubt whether the rule was correctly applied to the case at bar, a rehearing was allowed. Since which time, on motion of Bell, the proceedings were dismissed as to him; therefore, the question upon which the former decision turned has been eliminated.

Complaint is made that the plaintiff did not sue in his full Christian name, but by the initial letters alone. The action being upon an account, plaintiff's full Christian name should have been set forth. It was a misnomer not to do so. It is a defect or irregularity which may be waived, and will be so treated unless raised before judgment. (*Scarborough v. Myrick*, 47 Neb., 794, and cases there cited.) In the case at bar the question was raised before trial, by setting it up in the answer, which averment was, on motion of the plaintiff, stricken out. Plaintiff insists that this ruling was right for two reasons: First, the proper remedy is by motion to require the petition to be corrected in that regard; second, that the answer setting up the matter alluded to presented a new and different issue from the one tried in the justice court, where the action originated, which is not permissible. Undoubtedly the appropriate remedy is by motion, and it is the better practice to call the attention of the court to the defect in that mode, yet it may be raised by plea as well. (*Burlington & M. R. R. Co. v. Dick*, 7 Neb., 242.) Objection that a party plaintiff is designated by the initials of his Christian name may be made at any time before judgment, and the fact that it was not presented in the justice court constitutes no waiver. Permitting the question to be raised for the first time in the district court does not violate the rule which requires a defendant to try his cause upon the same defenses in the appellate court as in the court of original jurisdiction. The rule

has its exceptions; besides, it has reference to defenses interposed to the merits of the controversy. If a nonresident should bring his action in a justice court without giving security for costs, can there be any doubt that the defendant might for the first time demand that such security should be given while the cause was pending on appeal in the district court? Clearly not. So, too, we think, the defendant had the right to insist in the district court that the plaintiff amend his petition by setting forth therein his full Christian name, and the court erred in not requiring it to be done.

The judgment is erroneous for the further reason that it is not supported by the evidence. The action is on an account in favor of Oscar Froid, plaintiff's assignor, for two pairs of shoes, $4.50, for the children of Mr. and Mrs. Small, and 50 cents for repairing children's shoes. Froid charged the items to Mrs. Small, yet he testified that he did not know who got one pair, or who procured the repairing to be done, but does state that the other pair was obtained by the daughter of Mrs. Small. J. W. Small, the defendant's husband, testified, which is uncontradicted, that he went with his daughters to Froid's place of business and purchased the shoes and ordered the repairing on witness' own account, and that subsequently the bill was presented to him for payment. It is undisputed that Froid made out and gave to C. F. Rawalt for collection a bill against Mrs. Small for the items sued for, which Rawalt presented to Mr. Small for payment. Mrs. Small's testimony shows she never authorized either her husband or their daughters to purchase the articles in question. There is not a line of testimony to prove that the defendant either bought or ordered the goods, or procured the repairing to be done, or authorized any one else to do so on her account; hence she is not liable. There is evidence tending to show that the account was presented to the defendant and she agreed to pay it; but that does not make her liable, if in fact, as the evidence shows, the debt was her husband's, since the agreement

not being in writing was void, under the statute of frauds. The statute provides: "All property of a married woman not exempt by law from sale on execution or attachment shall be liable for the payment of all debts contracted for necessaries furnished the family of said married woman after execution against the husband for such indebtedness has been returned unsatisfied for want of goods and chattels, lands and tenements, whereon to levy and make the same." (Compiled Statutes, ch. 53, sec. 1.) While the items in this account, doubtless, were for necessaries furnished the family, that is no ground for a recovery in this case under the section quoted. The petition was not framed under the statute. There is no allegation therein that the account is for necessaries furnished the defendant's family, nor does it appear, by averment or otherwise, that a judgment has been recovered against Mr. Small upon which an execution has been issued and returned unsatisfied. Nor is Mr. Small a party to this suit. The statute makes the wife surety for the husband for necessaries furnished for the family, and her estate is not bound until a judgment has been obtained against the husband and an execution has been returned unsatisfied. (*George v. Edney*, 36 Neb., 604.) In no view of the case does the evidence sustain the verdict. The judgment will be reversed and the cause remanded, with instructions to permit the plaintiff, if he so desires, to amend his petition by setting forth his Christian name.

REVERSED AND REMANDED.

FRED DREXEL ET AL., APPELLANTS, V. JAMES RICHARDS ET AL., APPELLEES.

FILED MAY 6, 1896. No. 6498.

1. **Mechanics' Liens:** CONTRACTS. The right to a lien secured by the provisions of section 2, article 1, chapter 54, Compiled Statutes, does not depend upon the terms of the contract between the owner of the building and the original contractor, but upon the ground that the subcontractor furnished materials or performed labor in the erection of the building, and that he has complied with the requirements of said section.
2. ———: SUBCONTRACTORS. To entitle a subcontractor to a lien, he must file in the office of the county clerk, within sixty days from the date of the last item of material furnished or labor performed, the sworn statement required by said section 2.
3. ———: DECREE FOR DEFENDANTS. Evidence examined, and *held* to sustain the decree of the district court refusing plaintiffs a lien.

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

B. G. Burbank, for appellants.

Calkins & Pratt and *Kennedy, Gilbert & Anderson, contra.*

NORVAL, J.

This was a suit in equity by plaintiffs, as subcontractors, to foreclose a mechanic's lien. From a decree refusing a lien plaintiffs appeal.

The defendants, R. L. Downing and J. J. Bartlett, in August, 1890, entered into a contract with the firm of Richards & Co. whereby the latter agreed to furnish all the material and perform all the labor and erect for Downing & Bartlett a brick and stone business block in the city of Kearney, for the agreed sum of $22,000. Richards & Co. thereupon sublet the cut stone and the stone work to plaintiffs, Drexel & Foll, for the stipulated price of $5,049. Their contract called for the carving of a certain granite column furnished and set by the sub-

contractors in the building. Plaintiffs completed their work according to plans and specifications, excepting said carving, which was never done, and on April 30, 1891, more than sixty days after the furnishing of the last item of materials and the performing of the last labor, plaintiffs filed an itemized account of said work and labor, duly verified, with the county clerk of Buffalo county, claiming a mechanic's lien upon the premises and building thereon erected for the full contract price. The court found upon the issues presented by the pleadings as follows:

"1. That the plaintiffs, Drexel & Foll, did not furnish the stone in the rough for the building in question, that being furnished by the Kearney Stone Works to Richards & Co., Drexel & Foll only cutting the same.

"2. That cutting the holes for putting up the shields and other iron work was no part of plaintiffs' contract, and that they did not in fact do or perform the same.

"3. That the plaintiffs did offer to carve the granite column on the 23d day of April, 1891, but that it had been agreed between the owners and principal contractors in the month of February, 1891, that this carving was to be dispensed with. The plaintiffs had completed their work in November or December, 1890, and had abandoned any further execution of the same, and that the offer to carve the column made in April was made after the building was turned over to the owners and was occupied by their tenants, and that said offer was not made in good faith as a continuation of the original contract, or as a part of it, but was made after abandoning their work, for the sole and only purpose of reviving their right to a lien.

"4. That said lien was not filed in the time required by law, and was and is void, and the defendants Downing & Bartlett are entitled to a decree cancelling the same."

It is argued that the first of the above findings is against the weight of the evidence. Whether this contention is well founded or not we shall not stop to con-

sider, inasmuch, if said finding is wrong, still the decree must be affirmed for the reasons hereafter stated.

The second finding is not assailed by the plaintiffs, so far as we have been able to discover. Evidence was adduced upon the trial tending to prove that within sixty days prior to the filing of the plaintiffs' claim for a mechanic's lien some holes were drilled in the stones for putting up the shields and other portions of the iron work of the building in question. The purpose of this was to show that the lien was perfected and filed in time. The finding is, however, supported by ample testimony. There is in the bill of exceptions evidence tending to prove that the drilling of those holes was no part of plaintiffs' contract, but that it was the duty of the iron contractor to do this work. Moreover, that plaintiffs did not drill, or cause to be drilled, said holes, but even if it was for them to perform the work, the testimony shows that it was done, and the shields put up in February, 1891, more than sixty days before the filing of the claim for a lien.

A careful perusal and consideration of the testimony convinces us that it is ample to support the third and fourth findings, except as to the time stated when plaintiffs completed their work. Instead of the last work being done by them in November or December, 1890, it was on January 23, 1891, but this error is not material, since ninety days elapsed thereafter before the filing of the lien.

It is strenuously insisted that Bartlett & Downing are estopped by their conduct from now insisting that plaintiffs did not file their claim for lien within the statutory period of sixty days. This is based upon the fact that they forbade and refused to permit plaintiffs to carve the column on April 23, 1891, when they went to Kearney for the purpose of doing that work. On the other hand, the defendants insist, and the trial court so found, that plaintiffs had previously abandoned the further execution of their contract, and this last contention, in our

judgment, is not without evidence to sustain it. By the contract entered into between defendants and Richards & Co. the building was to have been completed by December 31, 1890, and the corner room thereof by November 1 of the same year. The time of the completion of the building was waived by the defendants by permitting work to be performed thereon after the period fixed in the contract, but that did not leave the time for finishing the building wholly optional to either the contractors or subcontractors. It was shown that on January 18, 1891, five days before plaintiffs ceased work upon the building, defendants applied to Richards & Co., the original contractors, to have the column carved, and, by their directions, Mr. Downing, one of the defendants herein, sent to the plaintiffs the following letter, on the day it bears date:

"KEARNEY, NEBRASKA, January 18, 1891.

"*To Drexel & Foll, Omaha*—GENTLEMEN: Can't you send men at once to finish carving my column. I intend getting in the front room by the first of February, and wish that column finished before that time. Please attend to it at once, and oblige

"Yours truly, R. L. DOWNING."

While this letter was received by Drexel & Foll, they never in any manner answered or paid any attention to it, or complied with the request. This letter had the effect to extend the time of performance of the contract to February 1, 1891, but not to a later date. The evidence also discloses that Mr. Drexel went to Kearney on March 2, 1891, for the purpose of getting some money on his contract, and that Mr. Downing refused to pay any money. Had plaintiffs then filed their claim for lien it would have been in time, but they did not do so, nor did Drexel inform Mr. Downing that it was his purpose to carve the column. We think that an abandonment of the contract by plaintiffs was established. The column which was to be carved supports the corner of the building and stands in front of the entrance to one of the

rooms. When plaintiffs offered to do the carving in April, this room was occupied for business purposes, and had the defendants permitted the carving to be then done, the necessary staging would have so blocked the entrance as to require the closing of this room until the work was finished. Under the circumstances the defendants were justified in not allowing the column to be then carved. Had plaintiffs attempted to perform the work within the period specified in the contract for the completion of the building, and had been prevented from so doing by Downing & Bartlett, the case might be more favorable to plaintiffs.

It is urged that during the winter time it is too cold to do this carving, owing to the frost. If granite cannot be carved in cold weather, plaintiffs should have done this part of their work before winter began, and no explanation is given for their not having done so. Again, no excuse on account of the weather was made until this controversy arose. Moreover, there is in the record testimony tending to show that granite can be carved successfully during any season of the year.

Complaint is also made that by an arrangement entered into between Downing & Bartlett and Richards & Co., the principal contractors, the carving of the column was dispensed with, and that Drexel & Foll were not notified thereof. We do not regard this feature of the case important. The defendants had the right to change, alter, or modify the original contract as they and their contractors might agree, and we know of no law which required Downing & Bartlett to notify the subcontractors of such changes. We do not say that the rights of a subcontractor, without his consent, can be impaired or affected by subsequent agreements of the parties to the original contract. The decision in this case does not hinge upon the fact that the original contract for the construction of the building was modified, but rather upon the fact that plaintiffs abandoned the work, and failed to file their lien in the period fixed by law. The

right to a lien given to a subcontractor by the provisions of section 2 of the mechanics' lien law does not depend upon the terms of the contract between the owner of the building and the original contractor, but upon the ground the subcontractor furnished the materials or performed labor in the erection of the building (*Colpetzer v. Trinity Church*, 24 Neb., 113); but such lien does not exist until the statute has been complied with. To entitle a subcontractor to a lien, he must file in the office of the county clerk, within sixty days from the date of the last item of material furnished or labor performed, a sworn statement in compliance with section 2, article 1, chapter 54, Compiled Statutes. (*Wells v. David City Improvement Co.*, 43 Neb., 366; *Buchanan v. Selden*, 43 Neb., 559.) The plaintiffs having failed to comply with the requirements of said section 2, they are not entitled to a lien. The decree is

AFFIRMED.

STATE OF NEBRASKA, EX REL. GEORGE H. DOWNING, V. WILLIAM L. GREENE, DISTRICT JUDGE.

FILED MAY 6, 1896. No. 8415.

1. **Restraining Order:** SUPERSEDEAS. The provisions of section 677 *et seq.* of the Code of Civil Procedure, providing for the execution of a supersedeas bond upon the dissolution of a temporary injunction, have no application to a mere restraining order granted to prevent the commission of an act until a hearing can be had upon an application for a temporary injunction.

2. ———: COUNTY JUDGE. A county judge possesses the power to allow a restraining order pending a hearing of an application for a temporary injunctional order.

3. ———: TIME. A restraining order ceases to be operative on the expiration of the date fixed by its terms.

4. ———: UNDERTAKING. An order granting a temporary injunction does not become effective until an undertaking is executed by the party applying for the writ.

5. ———: ———. A bond given to secure a restraining order will not give effect to a temporary injunction subsequently allowed in the same case. A new bond must be executed on the granting of the latter order.

6. ———: ———. Where a temporary injunction has never been operative, owing to the failure to give the undertaking required by statute, the giving of a supersedeas bond, upon the dismissal of the suit by the court, would not give the order of injunction any validity.

ORIGINAL application for *mandamus* to compel respondent to fix the amount of a supersedeas bond. *Writ denied.*

Marston & Marston, for relator.

W. D. Oldham and *E. C. Calkins*, *contra.*

NORVAL, J.

This is an original application for a writ of *mandamus* to compel the respondent, as judge of the twelfth judicial district, to fix the amount of a supersedeas bond to be given by the relator in a cause lately determined in the district court of Buffalo county, wherein the relator was plaintiff and A. F. Lewis and Mary J. Lewis were defendants. The Lewises, on and prior to the 6th day of August, were engaged in the laundry business in the city of Kearney, and on said day they sold said business to the relator, and in the contract covenanted and agreed not to engage therein in said city for and during the ensuing five years. Subsequently the Lewises, in violation of the terms and stipulations of said contract, conducted a laundry business in the city of Kearney, and thereupon relator brought this action in the district court to enjoin them from further prosecuting the same. Application was made to the county judge of Buffalo county for a temporary injunction, who "ordered that said petition stand for hearing before the district court in and for said county October 21, 1895, at 9 o'clock A. M., and that, in the meantime, the said defendants, and each of their employes, agents, or attorneys, be restrained from en-

gaging in and carrying on a laundry business in Kearney, Nebraska, upon the plaintiff's executing an undertaking to the defendants in the sum of $500, conditioned as required by law, said undertaking to be approved by the clerk of the district court of said county." Plaintiff on the same day filed with the clerk of the district court his undertaking, in accordance with said order of the county judge, which bond was duly approved by said clerk. No hearing was had before the district court at the time set by the county judge, owing to the absence from the county of Judge Sinclair, the then judge of the twelfth district. On October 25, 1895, an amended petition was filed in said cause, which was presented to Judge Sinclair, who indorsed thereon the following order:

"Upon reading the foregoing amended petition of the plaintiff, duly verified, it is hereby ordered that an order of this court be issued by the clerk thereof, enjoining and restraining the defendants, and each of them, their agents, employes, and attorneys, as prayed in said amended petition; and it is further ordered that the bond of the plaintiff heretofore filed in said cause, and approved by the clerk of this court, stand in all respects as the bond securing the defendants from all damages which may occur to them by reason of the wrongful issuing of the order herein directed.

"HECTOR M. SINCLAIR,
"Judge of Twelfth Judicial District, Nebraska."

On March 21, 1896, application was made to the respondent, the present judge of the district court of Buffalo county, for a temporary injunction, which application was denied, and the action was dismissed on the ground that the respondent was of the opinion that the contract set out in the petition was in violation of section 1, chapter 91*a*, of the Compiled Statutes, relating to trusts. Respondent having refused to fix the amount of a supersedeas bond, this proceeding was brought to compel him to do so.

The sole question presented by the record for consideration is whether, under the provisions of section 677 *et seq.* of the Code of Civil Procedure, the relator is entitled to give a supersedeas bond to stay the commission of the acts sought to be restrained by the said suit dismissed by the respondent, pending a review of said cause in this court. The fourth subdivision of said section 677 provides that "when the judgment, decree, or final order dissolves or modifies any order of injunction * * * the supersedeas bond shall be in such reasonable sum as the court, or judge thereof in vacation, shall prescribe, conditioned, * * * and such supersedeas bond shall stay the doing of the act or acts sought to be restrained by the suit, and continue such injunction in force, until the case is heard and finally determined in the supreme court," etc. By this section authority is conferred for the giving of a supersedeas bond when an injunction is dissolved by a final order or decree, or is modified. Section 679 of the Code provides "that in case of the dissolution or modification by any court, or any judge at chambers, of any temporary order of injunction which has been or may hereafter be granted, the court or judge so dissolving or modifying said order of injunction shall at the same time fix a reasonable sum as the amount of a supersedeas bond, which the person or persons applying for said injunction may give, and prevent the doing of the act or acts the commission of which was, or may be sought to be, restrained by the injunction so dissolved or modified." Section 680 designates the time within which such supersedeas bond shall be given, the number of sureties, the officer who shall approve the same, and the conditions of the bond; and the next section provides that the giving of such bond continues the injunction in force until the cause is heard and finally determined. It will be observed that section 679 has provided for a supersedeas bond only in case a temporary order of injunction is dissolved or modified. There is no authority for the giving of such a bond where no

temporary injunction has been allowed. In other words, that the statute does not apply to mere restraining orders. This was expressly decided in *State v. Wakeley*, 28 Neb., 431. In the opinion in that case it was said: "It is very clear that the legislature never intended to give the force and effect to a restraining order which attaches to an injunction when regularly allowed. It simply suspends proceedings until an opportunity can be given for the parties to be heard, and upon that hearing having been had, and a decision rendered upon the application, the whole force of the restraining order ceases by its own limitation. Any other conclusion would do violence to the intention of the legislature."

It remains to be determined whether a temporary injunctional order, or one that was valid, was ever allowed in the case of Downing v. Lewis. Clearly no temporary injunction was granted by the county judge. He merely issued an order restraining the defendants from conducting the laundry business until the application for a temporary injunction could be heard by the district court, or the judge thereof, and fixed a time for such hearing. No such hearing was had at the time designated, and, therefore, the restraining order by its own limitation ceased to have any binding force and effect, and could not be revived and continued in force by the giving of a supersedeas bond.

It is argued that a county judge has no power to grant a restraining order. If this were true, we do not see how it could benefit the relator, since the order granted by the county judge does not by its terms purport to be a temporary order of injunction. If the contention of the relator is well founded, then the order granted by the county judge was void for want of authority to make it. But we are convinced, from a reading of the statute, that a county judge in a proper case may issue a restraining order pending a hearing of an application for a temporary injunction. By section 252 of the Code a temporary injunction may be granted before judgment by the

district court, or any judge thereof, or, in the absence from the county of said judges, by the county judge. Section 253 declares: "If the court or judge deem it proper that the defendant, or any party to the suit, should be heard before granting the injunction, it may direct a reasonable notice to be given to such party to attend for such purpose at a specified time and place, and may in the meantime, restrain such party." Section 254 reads as follows: "An injunction shall not be granted against a party who has answered, unless upon notice; but such party may be restrained until the decision of the application for an injunction." The power conferred upon county judges by section 252 to grant temporary orders of injunction clearly includes the authority to allow restraining orders. The greater embraces the less. If there was any doubt of the existence of such power under said section, it is entirely removed by the provisions of said sections 253 and 254, which authorize the allowance of restraining orders, and it is obvious that said sections apply to county judges as well as to district courts and the judges thereof. To hold otherwise would, indeed, be a narrow construction of the statute, and manifestly opposed to the intention of the lawmakers. The order granted by Judge Sinclair, although purporting to be a temporary injunction, required no bond to be given by the relator, nor was one in fact thereafter executed. This order, therefore, never went into effect, and had no validity whatever. Such is the meaning of sections 255 and 258 of the Code, the latter of which declares that "an injunction binds the party from the time he has notice thereof and the undertaking required by the applicant therefor is executed." Said section 255, in clear and unequivocal language, states that no injunction, unless provided by special statute, shall operate until the bond required by said section has been filed and approved. It is no contempt to disregard a temporary injunction where no bond has been given to carry the order into effect. (*Baker v. Meisch*, 29 Neb.,

227.) Although by the order allowed by Judge Sinclair the bond given under the restraining order was ordered to stand in the place of a new one, such bond did not and could not have the effect to give any validity to his order. Not only is there no statute which authorizes a court or judge to make an order dispensing with the giving of a bond in granting a temporary injunction in such a case, or to require that a former bond shall stand, but if the requirements of the legislature mean anything, or are to be observed and enforced, a new bond should have been required of and given by the relator to make the injunction effectual. The temporary injunction allowed by Judge Sinclair having never become operative by reason of the failure to give the undertaking required by statute, nothing could be plainer than that a supersedeas bond, if one were given, could not give the order any validity. The purpose of such a bond is to continue in force a temporary injunction which has been dissolved or modified, until a final determination of the case in the trial court, and pending a review in the appellate court, and not to give life and vitality to an injunctional order which never became effective. The respondent properly declined to fix the amount of a supersedeas bond, and the writ is denied.

WRIT DENIED.

LEROY S. WINTERS, APPELLEE, V. JOHN L. MEANS, APPELLANT.

FILED MAY 6, 1896. No. 6411.

Review: SUFFICIENCY OF EVIDENCE: BILL OF EXCEPTIONS. Where there is presented by appeal only the sufficiency of the evidence to sustain the judgment of the district court, such judgment will be affirmed when there is to be found in the record no bill of exceptions.

APPEAL from the district court of Adams county. Heard below before BEALL, J.

O. A. Abbott, for appellant.

B. F. Smith, contra.

RYAN, C.

This case first made its appearance in the official reports of the decisions of this court in 25 Neb., 241, and on that occasion it was held that there existed a valid judgment against the firm of W. L. Smith & Co., and that to entitle Leroy S. Winters, the appellee, to relief, he should have pleaded his defense, and to justify his declaimer of the authority of an attorney to appear for him individually, the evidence adduced by him should have been clear and convincing. The judgment which had been rendered in the district court of Adams county in favor of Winters was therefore reversed and this cause was remanded, with leave to plaintiff Winters to file an amended petition in thirty days stating in full the defenses on which he relied. Purposely, an extended mention of the issues considered in the error proceedings just referred to has been omitted, that matters connected with subsequent proceedings might not give rise to confusion. With reference to subsequent transactions it is necessary, however, to state that the prayer of the original petition of Mr. Winters was that a judgment which had been rendered in favor of Means against himself, as a member of the firm of W. L. Smith & Co., might be vacated and set aside, and that Means might be restrained from collecting and enforcing said judgment. The grounds for this relief were that Winters, as he alleged, had never appeared, by attorney or otherwise; had never been notified of the pendency of said suit against the members of the firm of W. L. Smith & Co.; and that at the commencement of the action said Win-

ters was not a member of the firm of W. L. Smith & Co., never was indebted to Means, and had never been interested or concerned in the transaction out of which the said judgment had its origin. After the cause was remanded to the district court, Winters dismissed his petition and sought by a reply to the answer of Means, which was in the nature of a cross-petition, to plead certain matters of defense. This right was denied him, and on another error proceeding there was a reversal of the action of the district court, at this time to the advantage of Winters. (See 33 Neb., 635.) The affirmative allegations of the answer and cross-petition of John L. Means were to the effect that he, as plaintiff, on June 22, 1880, had recovered a judgment in the district court of Adams county for $22,691 against the defendants W. L. Smith & Co., consisting of W. L. Smith, Leroy S. Winters, John J. Worswick, Henry P. Handy, Charles Wells, and George Wells. It was in effect alleged by Means that Winters was a member of the firm of W. L. Smith & Co. at the time the obligation in said action sued upon had been incurred and when said suit had been brought, of the pendency of which suit Winters had notice, as alleged, and had employed attorneys, who had appeared for Smith & Co. and himself, and it was denied that Winters had any defense in reality to the cause of action upon which the aforesaid judgment had been rendered. It was averred by Means that the judgment in his favor, which Winters sought to have vacated, was at the time of filing the answer and cross-petition of Means in full force, wholly unpaid, unsatisfied, and unreversed. There was a prayer that execution might issue against Winters and for general equitable relief. The answer and cross-petition of Means above described was met by the following reply:

"And now come Leroy S. Winters and * * * first, denies that on the 22d day of June, 1880, or at any other time, said Means recovered judgment against W. L. Smith & Co., for the reason that no service had been

made upon the said W. L. Smith & Co., and the said W. L. Smith & Co. never appeared in said case, and the court never had any jurisdiction of the person of said W. L. Smith & Co.

"Second—And the said Leroy S. Winters, for further reply, * * * alleges that he was not a member of the firm of W. L. Smith & Co. at the time the cause of action accrued upon which suit was brought by said John L. Means against said W. L. Smith & Co., but had severed his connection with said W. L. Smith & Co. long before said time and before said Means had done anything, with the consent and knowledge of the said John L. Means, and one John J. Worswick had purchased the interest of the said Leroy S. Winters and assumed all responsibility, with the consent and knowledge of said John L. Means.

"Third—And for further reply the said Leroy S. Winters alleges that there was never any service of summons upon him in said suit, and he never appeared in said suit and never authorized any one to appear for him in any manner whatever, and he never had any notice or knowledge of the pendency of said suit until July, 1886.

"Fourth—And for further reply to said answer and cross-petition the said Leroy S. Winters alleges that the claims of the said John L. Means upon which he brought suit had been outlawed, long before judgment was rendered upon said suit, more than four years had elapsed from the time the cause of action mentioned in his petition had accrued before any suit was commenced, and more than five years had elapsed before any one of the members of W. L. Smith & Co. ever appeared in the suit, by attorney or otherwise, and more than five years had elapsed after such action accrued on which suit was brought before any steps or action was taken against the said Leroy S. Winters or before any one appeared in said suit."

The prayer of Winters, with which his reply closed, was that the judgment, in so far as it in any way related

to himself, might be declared void and of no effect, and for proper general equitable relief.

It was claimed by Means that the pleading first described as having been filed by Winters was an answer, and therefore Means replied thereto alleging first, that the matters raised had been determined and judicially settled in *Winters v. Means*, 25 Neb., 241, and second, by way of a general denial. There was no substantial ground for the claim that any matters involved in this case had been settled by any judgment of this court, as must appear from the description heretofore given of the matters which were brought to this court for review and its judgments thereon. Upon trial duly had upon November 30, 1892, there was, on March 17, 1893, a judgment rendered by the district court of Adams county in favor of Leroy S. Winters, upon the issues presented by the answer and cross-petition of John L. Means and the reply and answer of Leroy S. Winters. It is sought to review this judgment by an appeal, and accordingly no motion for a new trial was filed or passed upon; neither has there been filed in this court a petition in error.

There was stated by Winters in his pleading, designated by him a reply, sufficient facts, if established by proofs, to entitle him to the relief which he prayed; of this there can be no doubt. It is equally free from doubt that these matters pleaded by Winters had never been determined by this or any other court, so far as we have any means of knowledge. There was filed in this case notice that a motion would be presented in this court September 19, 1893, for an allowance of additional time to complete the record, by procuring and filing in this court the original bill of exceptions, or a copy thereof. No such order has ever been obtained, neither is there to be found any purported bill of exceptions. There is in the record, but not marked filed, what probably may have been regarded by the appellant as a bill of exceptions, but this has never been authenticated as such. We

cannot, therefore, consider it. It must under these circumstances be assumed that there was sufficient evidence to sustain the findings of the district court, and that it was sufficiently shown by the proofs adduced that Mr. Winters was never represented by an attorney nor served with notice of the pendency of the action wherein judgment was rendered against him, and that before the firm of W. L. Smith & Co. incurred any liability to John L. Means, Leroy S. Winters had withdrawn from said firm, with the consent and knowledge of said Means. The judgment of the district court must be, and it accordingly is,

AFFIRMED.

RAGAN, C., having been of counsel, took no part in the determination of this appeal.

HENRY OLIVER, APPELLANT, V. JAMES F. LANSING, APPELLEE.

FILED MAY 6, 1896. No. 6428.

1. **Principal and Agent:** CONFLICT OF INTEREST: SALE OF LAND: RATIFICATION: DAMAGES: LIMITATION OF ACTIONS. An agent who sells his own property to his principal under general instructions which require him to do the best he can for his principal, and which evidence a special trust reposed in him, may be held to account by the principal for the difference between the real value of the property and the price at which it was sold, and the fact that the principal before bringing suit has mortgaged such property does not impair his right to maintain an action for the amount of such difference; neither does the lapse of time, short of the period of limitation fixed by the statute.

2. ———: ———: ABUSE OF TRUST: LIABILITY OF AGENT. An agent who has taken advantage of confidence reposed in him by his principal to profit himself at the expense of such principal can only be relieved of liability to the extent to which a clear preponderance of all the evidence shows that he ought to be relieved in view of his dishonest conduct.

3. **Retraxit**: DISMISSAL: FRAUD: SUBSEQUENT ACTION. The mere dismissal of an action and publication by plaintiff of a notice that he believed he had done wrong in commencing such suit cannot be successfully shown in bar of another suit commenced upon the same causes of action.

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

The facts and issues appear in the statement of the commissioner.

Halleck F. Rose and *Webster, Rose & Fisherdick*, for appellant:

It is essential to the validity of a judgment that the court find, either specially or generally, upon the facts in controversy. (Code, sec. 297; *Sprick v. Washington*, 3 Neb., 255; *Howard v. Lamaster*, 13 Neb., 221; *Smith v. Silvis*, 8 Neb., 164; *Mason v. Embree*, 5 O., 278; *Headley v. Roby*, 6 O., 524.)

Under the general prayer a court of equity may grant any specific relief to which the claimant may appear entitled. (1 Daniels, Chancery Pleading & Practice [6th Am. ed.], 378, 379, note 3; *Beaumont v. Boultbee*, 5 Ves. [Eng.], 485; *Bullock v. Adams*, 20 N. J. Eq., 367; *McGlothlin v. Henery*, 44 Mo., 350; *Kirksey v. Means*, 42 Ala., 426; *Moore v. Mitchell*, 2 Woods [U. S. C. C.], 483; *M'Nairy v. Eastland*, 10 Yerg. [Tenn.], 310.)

Loyalty to his trust is the first duty of the agent. (*People v. Overysset*, 11 Mich., 225; *Tisdale v. Tisdale*, 2 Sneed [Tenn.], 596; *Switzer v. Skiles*, 3 Gil. [Ill.], 529; *Bunker v. Miles*, 30 Me., 431; *Keighler v. Savage Mfg. Co.*, 12 Md., 383; *European & N. A. R. Co. v. Poor*, 59 Me., 277; *Rochester v. Levering*, 104 Ind., 562; *Tate v. Williamson*, L. R., 2 Ch. App. [Eng.], 55.)

Proofs of express disaffirmance will override any implication of affirmance or ratification by conduct or acquiescence. The law does not imply a ratification where an express disaffirmance has been made. (Mechem,

Agency, sec. 152; *McClure v. Evartson*, 14 Lea [Tenn.], 495.)

The action accrued on discovery of the fraud, and plaintiff had four years thereafter in which to commence suit. (Code, sec. 12; *Foley v. Holtry*, 41 Neb., 564, 43 Neb., 133; *Richards v. Hatfield*, 40 Neb., 879; *Nash v. Baker*, 40 Neb., 294.)

Where the vendor makes material representations as to the character, quality, or location of his real estate, and the vendee believes, relies, and acts upon the representations, and they prove to be false, the vendor cannot shield himself from the consequences of his fraudulent conduct by interposing the plea of laches on part of the vendee. (*Hoock v. Bowman*, 42 Neb., 80, 87.)

The mortgages executed by vendee did not operate as a confirmation of the fraudulent sale. (*Montgomery v. Pickering*, 116 Mass., 227; *McClure v. Evartson*, 14 Lea [Tenn.], 495; *Doughaday v. Crowell*, 11 N. J. Eq., 201; *McKnight v. Thompson*, 39 Neb., 752.)

Mere submission to an injury for any time short of the period limited by statute does not take away the right of action. (*De Bussche v. Alt*, L. R., 8 Ch. Div. [Eng.], 286, 314; *Foley v. Holtry*, 41 Neb., 564, 43 Neb., 133; Code, sec. 12.)

The ratification or affirmance of a fraudulent transaction is, in effect, a new contract to forgive the fraud practiced and condone the wrong done, made consciously with such intent and purpose; and in case fraud is actually established, this defense must stand upon the clearest evidence, because the act is so inconsistent with justice and so likely to be connected with the fraud. (*Montgomery v. Pickering*, 116 Mass., 227; *Tarkington v. Purvis*, 128 Ind., 187; *Moxon v. Payne*, L. R., 8 Ch. App. [Eng.], 881; *Morse v. Royal*, 12 Ves. [Eng.], 355; *Crowe v. Ballard*, 1 Ves., Jr. [Eng.], 215; *Staley v. Housel*, 35 Neb., 172.)

The knowledge of the existence of a right of defense and the intention to relinquish it must concur in order to estop a party by waiver. (*Henry & Coatsworth Co. v. Fish-*

erdick, 37 Neb., 207; *Livesey v. Hotel Co.*, 5 Neb., 50; *Cutler v. Roberts*, 7 Neb., 14.)

That there should be any waiver, ratification, or intentional relinquishment is utterly inconsistent and irreconcilable with continued and acrimonious controversy between the parties over the subject of the sale, shown clearly by the evidence to have existed. (*Tarkington v. Purvis*, 128 Ind., 182; *Montgomery v. Pickering*, 116 Mass., 227; *Moxon v. Payne*, L. R., 8 Ch. App. [Eng.], 881.)

It was not necessary for plaintiff, in order to maintain his suit in equity for a rescission, to make formal delivery or tender of a deed. (*Smith v. Gibson*, 25 Neb., 518; *Harrington v. Birdsall*, 38 Neb., 176; *Homan v. Laboo*, 1 Neb., 205; *Aultman v. Steinan*, 8 Neb.,114; *Knappen v. Freeman*, 50 N. W. Rep. [Minn.], 533.)

Equity raises a presumption against the validity of all transactions wherein the agent unites his personal and his representative characters; and in such case the onus of proving affirmatively the fairness of the contract and of overcoming this presumption of invalidity is on the agent who claims a right under it. (2 Pomeroy, Equity Jurisprudence, secs. 956, 959; *Noble v. Moses*, 81 Ala., 540.)

Rescission is not the only relief grantable in equity, and though the court, for some reason, may refuse to grant rescission, it must still give plaintiff some adequate relief for the wrong done him. (*Herrin v. Libbey*, 36 Me., 357; *Gould v. Cayuga Nat. Bank*, 86 N. Y., 83; *Baker v. Ziegler*, 56 Hun [N. Y.], 405; *Van Rensselaer v. Van Rensselaer*, 113 N. Y., 214; *Holland v. Anderson*, 38 Mo., 55; *Swift v. Dewey*, 20 Neb., 107; *Buchanan v. Griggs*, 20 Neb., 165.)

Charles O. Whedon, also for appellant:

An agent should not, when acting for his principal, at the same time act for himself; and all profits made and advantage gained by the agent in the execution of his

agency belong to the principal. It matters not how the profit or advantage arises, either by the performance or violation of duty, or by the suppression of material facts. If the duty of the agent is strictly performed, the resulting profit or advantage belongs to the principal, as the consequence of the relation. If the profit or advantage arises from violation of duty on the part of the agent, then it belongs to the principal, because the agent shall not profit by his own wrong. It is only by a rigid adherence to this rule that all temptation can be removed from one acting in a fiduciary capacity, to abuse his trust or seek his own advantage. (*Jansen v. Williams*, 36 Neb., 869; Mechem, Agency, secs. 129, 455, 469, 470; 1 Story, Equity Jurisprudence, secs. 321, 322, 465, note 2.)

Marquett, Dewcese & Hall, contra:

The failure of plaintiff to promptly repudiate the sale and to demand repayment of the purchase money, and his conduct in persuading defendant to enter a joint business enterprise, in offering to sell back the block, in accepting benefits under his deed, in exercising rights of ownership, and in mortgaging the property constitute a ratification of the alleged fraudulent transaction and preclude rescission. (*Leaming v. Wise*, 73 Pa. St., 173; *Whitcomb v. Denio*, 52 Vt., 382; *Baker v. Lever*, 67 N. Y., 304; *Dayton v. Monroe*, 47 Mich., 193; *Cobb v. Hatfield*, 46 N. Y., 533; *Masson v. Bovet*, 1 Den. [N. Y.], 69; *Sinclair v. Neill*, 1 Hun [N. Y.], 80; *Lewis v. McMillen*, 41 Barb. [N. Y.], 420.)

Plaintiff having framed his bill on the theory that he rescinded the contract, and having tried the case upon that theory, cannot afterward resort to the action for damages for fraud and deceit. (*Corry v. Gaynor*, 21 O. St., 277; *Bank of Beloit v. Beale*, 34 N. Y., 473; *Bowen v. Mandeville*, 95 N. Y., 240; *Mercier v. Lewis*, 39 Cal., 533; *Jaeger v. Kelley*, 52 N. Y., 274; *Stevens v. Mayor of New York*, 84 N. Y., 296.)

Pound & Burr and *Roscoe Pound*, also for appellee:

A finding of fact will be given full effect as such though included by the court in a finding or conclusion of law. (*Cushing v. Cable*, 54 Minn., 6; *Sherman v. Hudson R. R. Co.*, 64 N. Y., 254; *In re Clark*, 119 N. Y., 427; *Burton v. Burton*, 79 Cal., 490; *In re Bullard*, 31 Pac. Rep. [Cal.], 1119; *Wells v. Yarbrough*, 84 Tex., 660; *Canadian-American Mortgage & Trust Co. v. McCarty*, 34 S. W. Rep. [Tex.], 306.)

A party defrauded must be diligent in making inquiry. Means of knowledge is equivalent to knowledge. A clue to the facts, which, if followed up diligently, would lead to a discovery, is equivalent to knowledge. (*Gillespie v. Cooper*, 36 Neb., 775; *Parker v. Kuhn*, 21 Neb., 413.)

If, after discovering the untruth of representations, a party conducts himself with reference to the transaction as though it were still subsisting and binding, he thereby waives all benefit of relief from the misrepresentations. (2 Pomeroy, Equity Jurisprudence, secs. 817, 897, 916; *Schiffer v. Dietz*, 83 N. Y., 300; *Bassett v. Brown*, 105 Mass., 551; *Merrill v. Wilson*, 66 Mich., 232; *Weeks v. Robie*, 42 N. H., 316.)

After a party has obtained knowledge of fraud, or has been informed of facts and circumstances from which such knowledge would be imputed to him, delay in bringing suit, though for a less period than that prescribed by statute, will be regarded as acquiescence and will bar equitable relief. (2 Pomeroy, Equity Jurisprudence, sec. 917; *Wilbur v. Flood*, 16 Mich., 40; *Ackerly v. Vilas*, 21 Wis., 88; *Strong v. Strong*, 102 N. Y., 69; *Haldane v. Sweet*, 55 Mich., 196; *Bailey v. Fox*, 78 Cal., 389; *Burkle v. Levy*, 70 Cal., 250; *Cummins v. Lods*, 2 Fed. Rep., 661; *Hoyt v. Latham*, 143 U. S., 553; *Disbrow v. Secor*, 58 Conn., 35.)

There is no allegation in the petition that plaintiff relied upon the pretended representations. Such an allegation is necessary. (*Stetson v. Riggs*, 37 Neb., 797; *Upton v. Levy*, 39 Neb., 331.)

The remedies by rescission and by way of damages are entirely inconsistent, and the adoption of one excludes the other. Where a party has made an election he must abide by it. (*Schiffer v. Dietz*, 83 N. Y., 300.)

Plaintiff cannot abandon specific relief prayed for and seek relief of another character under a prayer for general relief. (*Hiern v. Mill*, 13 Ves., Jr. [Eng.], 113; *Allen v. Pullman Palace Car Co.*, 139 U. S., 658; *Kent v. Lake Superior Co.*, 144 U. S., 75; *Pickens v. Knisely*, 29 W. Va., 1; *Welch v. Bayand*, 21 N. J. Eq., 186; *Chalmers v. Chalmers*, 6 Harr. & J. [Md.], 29; *Cloud v. Whiteman*, 2 Del. Ch., 23; *Walker v. Hill*, 21 N. J. Eq., 191.)

Where the facts are fully disclosed, and the agent acts in good faith, a sale to the principal must stand the same as a purchase from a third person. (Mechem, Agency, sec. 466; *Fisher's Appeal*, 34 Pa. St., 29.)

RYAN, C.

On the 22d day of September, 1892, Henry Oliver filed in the office of the clerk of the district court of Lancaster county his petition, in which he averred that in 1872 plaintiff was an infant; that in said year 1872 the defendant married the plaintiff's sister; that since said marriage until the disagreements in the petition described plaintiff had trusted defendant as though he had been plaintiff's older brother; that since the year 1883 the defendant had resided in the city of Lincoln, while the plaintiff was residing in New York, Georgia, and North Carolina, until the month of March, 1891, during which time the plaintiff had large property interests in Lincoln, the management of which, by reason of his confidence in defendant, plaintiff intrusted to said defendant; that by reason of sales and rents collected the defendant had during this time received large sums of money, and had paid out money for taxes, repairs, and other purposes; that in the month of March, 1891, plaintiff became, and has since continued to be, a resident of the city of Lincoln. It will avoid the necessity

of again reciting the above facts to note, at this otherwise inappropriate place, that the evidence clearly substantiated each of the above allegations. As a reason for not bringing this action earlier than September 22, 1892, plaintiff averred in his petition that, after March, 1891, plaintiff, owing to his faith in the integrity of defendant and in defendant's repeated promises to account for all moneys of plaintiff received and disbursed by defendant between 1883 and March, 1891, was induced to expect that an amicable adjustment might be made as to matters unsettled between plaintiff and defendant. As often happens in matters of accounting, the dispute between these parties litigant at the trial narrowed down to the consideration of but few of the disputed items, in this particular case three in number, as to which, as briefly as possible, the issues joined shall now be described.

In October, 1885, plaintiff, then a resident of Charlotte, North Carolina, was the owner of lot 9, in block 220, of the city of Lincoln, which lot was then under the management of the defendant; that at defendant's request plaintiff signed in blank a deed, which was left with defendant for immediate use in case a sale of such lot could be made; that on October 8, 1885, the defendant sold said lot to J. B. Trickey for the actual consideration of $450, and, by the use of aforesaid blank deed, effected a conveyance thereof to Trickey without informing plaintiff of the terms of such sale. It was further charged by plaintiff that the defendant fraudulently concealed the real consideration for the sale of lot 9, block 220, aforesaid, and of the real amount, $450, only accounted for $125, which sum the defendant represented was the entire consideration paid him for said lot. In his answer the defendant admitted the sale of the aforesaid lot, but alleged that the consideration was a diamond ring of the value of no more than $125, which sum defendant averred he had paid to plaintiff, and that said sum was the fair and reasonable value of said lot.

The defendant, further answering in this connection, alleged that he had informed the plaintiff of the true consideration of said sale, and had offered to turn said ring over to said plaintiff, if plaintiff so desired, but that plaintiff had refused to receive said ring and had expressed himself perfectly satisfied with the aforesaid amount received.

Of the three specially disputed items, the second was of the following nature, as described in the petition: Plaintiff for about two years before July 1, 1889, was a resident of Atlanta, Georgia, and just preceding the date just named sent to defendant a draft for the sum of $22,435.70 for investment in Lincoln real property, productive of a revenue and centrally located, at judicious prices according to the best judgment of the defendant, and that though such property could have then been easily purchased, the defendant did not follow plaintiff's instructions, but about July 10, 1889, falsely advised plaintiff that he was unable to buy property of the kind indicated, but had made to plaintiff a conveyance of block 9, containing sixteen lots, in East Lincoln, for $16,000, which was, as he represented, a less price than equally valuable property could have been purchased from any one else, and that at said price block 9 aforesaid would be a safe and profitable investment. The defendant in his answer denied that he had been directed to purchase improved, productive, and centrally located Lincoln property, but alleged that about July 1, 1889, plaintiff "transmitted said sum of $22,435.70 to the defendant, with the directions to invest the same in such real estate in the city of Lincoln as should by the defendant be selected and by him considered a safe and profitable investment," etc. The defendant in this connection made other averments of a ratification of the above transaction, with full knowledge of its nature, to which reference may be made later, but which need not now be further referred to in describing the issues specially contested.

Another of the three transactions above referred to was one in respect to which plaintiff was granted relief, and which, in the petition, was described in effect as follows: During the month of August, 1889, the defendant, having in his hands the aforesaid $22,435.70, wrote to plaintiff at Atlanta, Georgia, pretending to have found an opportunity to purchase a piece of ground of fifty feet frontage on O street, near Twentieth, in the city of Lincoln, for $4,700, which was a low price, and advised plaintiff to purchase the same as a safe and desirable investment, and that plaintiff having answered authorizing the defendant to exercise his own judgment as to this proposed purchase, the defendant replied that he had purchased said property for plaintiff for $4,700, whereas in truth and in fact the defendant had purchased but twenty-five feet frontage for $1,700, and for the other twenty-five feet had turned in property which he himself owned, of no greater value than the twenty-five feet which he had bought, but for the twenty-five feet which he turned in the defendant charged the plaintiff $3,000. In this connection plaintiff alleged that he did not discover until May of 1892 that the defendant had conveyed to him the twenty-five feet aforesaid and that he had charged him therefor $1,300 in excess of what defendant had paid for the same area of just as valuable property lying contiguous thereto. This petition closed with the following prayer:

"Plaintiff therefore prays:

"1. That the title to said block 9, in East Lincoln, held by plaintiff under said deed of conveyance of date February 10, 1888, from defendant, be decreed to be merely in trust for defendant, and that upon delivery to defendant, or to the clerk of the court for defendant's use, of a deed of conveyance thereof free and clear of any liens or incumbrances placed thereon by plaintiff, the plaintiff be discharged and released from said trust.

"2. For an accounting by defendant to plaintiff covering all moneys and credits and properties received and

controlled, rents and profits, receipts and disbursements thereof, or therefrom, in the said business of handling plaintiff's money and property from the year 1883.

"3. That in such accounting the defendant be charged specially, first, with the fraudulent conversion of $325 received October 1, 1885, from the sale of said lot 9, block 220, and interest be allowed to plaintiff from said date thereon, together with moneys paid for taxes and payment of interest from payment of each item; third, with the fraudulent conversion of $1,300, August 1, 1889, as an excess charge so wrongfully taken and withheld on account of the conveyance of said O street property, and that plaintiff be allowed interest thereon from said date.

"4. That plaintiff have judgment for the amount found due him on such accounting, and for such further, other, or different relief as to the court may seem just and equitable, and for costs of suit."

The defendant, by answer, joined issue as to the fraud charged by plaintiff in each of the above transactions, and alleged that plaintiff, with full konwledge of all the facts therewith connected, had approved each of them. As a further reason why plaintiff should not be entitled to maintain his action, the defendant in his answer made the following averments:

"And the defendant further answering alleges that on or about the 28th day of June, 1892, the plaintiff commenced an action in the said court against the defendant, and in his petition filed therein stated and set forth the same cause and causes of action and the same subject-matter, and made the same allegations that are stated and set forth and made in the petition in this action, and that summons in said action so begun on June 28, 1892, was duly issued out of said court and served on this defendant, and that said last named action was settled and by the defendant dismissed at his own cost; that said court had jurisdiction of the subject-matter and causes of action in said last named action

and of the parties thereto, and that by settlement and dismissal of the same as aforesaid the cause and causes of action, if any, and the subject-matter stated and set forth in the petition in this action have been settled, and that at the time of the settlement and dismissal of said action as aforesaid the plaintiff signed and delivered to the defendant a paper in writing in the words and figures following, to-wit:

"'Takes it all back, was mistaken, and retracts everything.—I, Henry Oliver, do hereby acknowledge that I made a mistake in beginning suit for $50,000 against my brother-in-law, J. F. Lansing, it having been done in the heat of passion, and I never realized the great injustice done Mr. and Mrs. Lansing by so doing, as they have always been perfectly honest in all real estate and other dealings I have ever had with them.

"'HENRY OLIVER.'".

There was also contained in the answer a statement of a cause of action against the plaintiff for the purchase price of an undivided one-half of certain lots bought by plaintiff from defendant in the sum of $10,000, and of another cause of action in the sum of $2,500, for services rendered by defendant for plaintiff. There was in the answer a prayer for judgment for $12,500 in favor of the defendant against plaintiff, together with interest and costs. The district court found due the defendant the sum of $10,000 and interest as prayed, but disallowed the claim of $2,500 on account of alleged services. As against the amount thus found for the defendant there was allowed in favor of plaintiff the sum of $1,300, with interest from August 31, 1889, at seven per cent per annum on account of the overcharge for the twenty-five-foot lot on O street. There was also allowed in favor of the plaintiff the sum of $106, with seven per cent interest thereon from August 11, 1890, because of an overcharge of a plumber's bill paid by Lansing. Having credited these two amounts, there was found due defendant from plaintiff, on June 26, 1893, the date of the decree, the

sum of $9,673.66. It was also adjudged that this sum draw interest at the rate of seven per cent per annum from the date of the decree, and that plaintiff pay $166.35 and the defendant pay $279, the proportion of costs made by the respective parties. As the debt of $10,000 was contracted by Mr. Oliver after March 1, 1891, and not through the agency of Mr. Lansing, and as in respect to it the evidence is conflicting, the finding as to this item must remain undisturbed. Since there was amply sufficient evidence to sustain the findings of the amounts credited Mr. Oliver upon the above $10,000 and interest, these, too, must stand. This leaves for our consideration but two items,—one of which is on account of the difference between $450, the real value, and $125, the alleged value, of a diamond ring exchanged by Mr. Trickey for lot 9, block 220; and the other the $16,000 charged for the block 9 in East Lincoln. In respect to the first of these two items the district court concluded that plaintiff was entitled to no relief other than to take the ring upon repayment of $125 to defendant, and that as Mr. Oliver had not tendered this amount he was not entitled to even this relief. In this view we cannot concur. The evidence shows that a blank deed was signed by Mr. Oliver, then an unmarried man, and left with Mr. Lansing, who filled out this deed and delivered it to Mr. Trickey in exchange for the ring in question. Mr. Oliver was always told that this ring was of the value of no more than $125, and, indeed, in the defendant's answer this is the value stated. In the conversation between Mr. Oliver and his sister, Mrs. Lansing, she said to him, "Here is the $125 diamond ring received for this lot; now that you are married, you will probably want it." To this Mr. Oliver answered that Mrs. Lansing might keep the ring, for he was under obligations for what had been done for him to that or perhaps a greater amount. In his petition Mr. Oliver admitted the receipt of $125; hence this much must be assumed to have been actually paid to Oliver. The un-

contradicted evidence of Mr. Trickey, however, was that the retail cash value of the ring was $450. The false statement of Mr. Lansing as to the value of the ring was a violation of his duty toward his principal, and upon the mere fact that Mr. Oliver believed and acted upon this misstatement, Mr. Lansing can predicate no rights adverse to the interests of Mr. Oliver. It was Mr. Lansing's duty to inform his principal of the value of the ring received by him, and then only could Mr. Oliver be bound to accept such ring as full payment, if he received it at all. If this agent, however, represented the value as $125, and on that basis of value Mr. Oliver was induced to receive it, the payment thereby as between the principal and the agent was but $125, and it was of no avail for Mr. Lansing to testify that someone else, not called as a witness, had told him that the stone was worth only $125. Mr. Oliver's right to the full value of this ring in no way depended upon his refunding the sum of $125, for, as we have already said, his agent was legally bound to pay that sum, and much more in addition. Having credited Mr. Lansing with this payment, there still remains due from him to plaintiff the sum of $325, with interest at seven per cent thereon from October 8, 1885, on account of the sale of lot 9, block 220, in the city of Lincoln.

It was not very fully shown why block 9, in East Lincoln, was conveyed to Henry Oliver in February, 1888. It seems, however, that at that time Mr. Lansing was having serious litigation with a Mr. Bookwalter, and that he wrote to Mr. Oliver to make him an offer of $10,000 for said block, of which $1,000 should be cash, and that for the balance a note drawing eight per cent interest should be given. The correspondence was not put in evidence, but it seems to have resulted that a deed was made by Mr. and Mrs. Lansing to Henry Oliver for the recited consideration of $10,000. This deed Mr. Lansing caused to be recorded. Contemporaneously with the execution of the above deed, Mr. Oliver, then an un-

married man, made a deed back to Mr. Lansing whereby the said block was reconveyed, but Mr. Lansing did not file this deed for record. The suit of Bookwalter against Lansing was afterwards disposed of to Mr. Lansing's satisfaction, judging from a letter of his dated October 28, 1888, wherein he said, "Everything is settled and as clean as a pin." There was, however, no change in the status of the title of the aforesaid block 9. On July 4, 1889, Mr. Oliver sent to Mr. Lansing the sum of $22,435.70 for investment in real property in Lincoln. Whether or not there were instructions to invest this in inside, revenue-producing property was a very seriously contested question in the district court. It does not seem to us that it possessed the importance attributed to it, for, as we have already noted, Mr. Lansing in his answer admitted that the directions accompanying this remittance to him were to invest in such real estate in the city of Lincoln as Mr. Lansing should consider a safe and profitable investment. The testimony shows that Mr. Oliver paid Mr. Lansing for his services $8.33 per month, according to agreement, during all the time the latter acted as agent for the former. The above admission of the answer is to the effect that his money was entrusted to Mr. Lansing to be invested in such real property as in the judgment of Mr. Lansing would be likely to be safe and profitable. In answer to this letter of Mr. Oliver, Mr. Lansing testified that he wrote about July 30, 1889, that he had looked over the property in the city and had found nothing which would pay twelve per cent, as Mr. Oliver wanted, and that if Mr. Oliver desired to buy block 9, East Lincoln, he, Oliver, knew all about it, had seen it, and that the writer would like to pay some mortgages he owed and would sell block 9 aforesaid to Mr. Oliver for $16,000. To this proposition Mr. Lansing requested an answer on receipt of his letter, for, as he wrote, he had to do something about his own note in the Hartford bank. In answer to this letter Mr. Lansing received a telegram instructing him to use his

own judgment. In the telegram, however, were the words "see letter," and for this letter Mr. Lansing waited before acting further. This letter was as follows, in so far as it refers to the present subject:

"ATLANTA, GA., 7-31-1889.

"*J. F. Lansing, Esq., Lincoln, Nebr.*—DEAR BRO.: Your telegram received yesterday late in the day and answered this A. M. It would seem that the sixteen lots are bringing a rather steep price, but I suppose you know what they are worth. If I could get a piece of property that would bring me in say ten or twelve per cent it would be quite as well for me, but I expect such investments are scarce in Lincoln from now on. The money you have of mine I leave for you to invest for me, and I am not going to say anything if the purchase is made from your own property, as I know you would not take advantage of me. If I should buy the sixteen lots of you and put up a good house, say to cost $4,000, for myself to live in, it ought to help to sell the other lots and in that way make them pay out well. Do the best you can for me, and that is all any man can do, and I will be satisfied. Am pressed to get my mill finished by fall, as it is one of those big jobs that a man never sees the end of when once he gets in it.

"Your brother, HENRY OLIVER."

In response Mr. Lansing sent Mr. Oliver the following letter:

"Aug. 6th, 1889.

"*Henry Oliver, Esq., Atlanta, Ga.*—DEAR BROTHER: Your letter of July 30, '89, at hand and noted. I have sold you my block 9, East Lincoln, for $16,000 cash and have charged your account with the same. As you have had title to it for about two years, as I never recorded the deed to me, I herewith return it to you canceled, and also the note you kindly made for my use one year ago, also canceled. I consider the block at this time worth $20,000 and would have sold to no one else for less,

and as you sent your money for to invest, and as I wanted to pay my $10,000, rather than pay interest, I have helped myself, and you have a bargain. I know if you build a residence to cost $4,000 you will get parties to buy and build, and you will get not less than $1,500 to $2,000 per lot. I have an eye on a couple of other pieces of property for you and may take them in. The taxes on the block assessed for 1889, payable 1890, will be for you to pay. We have been on our mountain trip and returned, had a very beautiful scenery trip and enjoyed the cool mountain air. Wish you and family had been with us. The boys go back on the 11th of September to school. Good-bye.

"From your brother J. F. LANSING."

In this transaction, giving it the most favorable construction possible in favor of Mr. Lansing, he was the agent of plaintiff, in whom plaintiff reposed special confidence, and although doubtful whether the price fixed was not too great, the principal left it with Mr. Lansing to exercise his own judgment, limited only by the requirement that he should do the best he could for Mr. Oliver's interest. Whether or not Mr. Lansing followed these instructions must determine whether or not this sale of his own property through himself as agent to Mr. Oliver was binding upon the latter. In *Rockford Watch Co. v. Manifold*, 36 Neb., 801, it was held that an agent, for the purpose of selling goods, would not be permitted to sell to himself, even though the sale was public and no actual fraud appeared. In *Jansen v. Williams*, 36 Neb., 869, it was held that an agent's relation to his principal forbade his becoming a purchaser of his principal's property entrusted to him to sell, in any way, without the full knowledge by the principal of this fact and the principal's acquiescence with such knowledge, and that the burden of proving such knowledge and acquiescence was upon the agent. The principle of these cases is applicable to the case at bar to the extent that the law so far disapproves of an agent's right to sell his own property to

his principal that, if permitted at all, it must be under such circumstances that the principal must clearly appear to have acted upon his own judgment, independently of that of his agent, and the burden of showing facts necessary to validate such a sale devolves upon the agent. To narrow the application of this principle, the requirement made of Mr. Lansing is that having retained $16,000 already in his hands in payment to himself for block 9, in East Lincoln, the burden of proof rests upon him to show either that his principal, with full knowledge of all the facts, approved the sale, or that Mr. Lansing acted exactly according to instructions; that is, that he has done the best he could for Mr. Oliver. We do not assume to say that the latter alternative is correct as an abstract proposition of law, applicable in all cases, but that under his instructions Mr. Lansing can claim nothing more favorable to himself. On behalf of Mr. Oliver there were examined twenty-four witnesses as to the value of block 9, in East Lincoln, at the date Mr. Oliver was charged $16,000 for it. These, with one of the witnesses sworn on behalf of the defendant, fixed the value at and about $8,000. The average of the valuations placed upon this block by the qualified witnesses for the defendant,—and there were thirty-two of these witnesses,—was $15,370. The district court having assumed that there was such acquiescence as barred plaintiff's right to recover in any event, made no finding as to what was the real value of this block in July or August of the year 1889. From the testimony of Mr. Lansing's own witnesses it is very clear that when he wrote to Mr. Oliver on August 6, 1889, that this block was worth $20,000, he stated what he must have known was false, so that we cannot, if we would, assume that Mr. Lansing acted in good faith. Another very significant fact is that, though Mr. Oliver afterwards offered to sell lots in this block singly, there has never been found any one willing to buy even one lot. This block adjoined a street or highway on the south, just across which there was an

unplatted field. On the east from this block, across a half-block and an adjoining highway, there was another field. It was on the extreme eastern line of the city of Lincoln, and near it there was neither water, a street car line, nor gas or other public light. It was unimproved and consequently had little value except for purposes of speculation, and this was not the kind of property desired by Mr. Oliver, as Mr. Lansing well knew. While Mr. Lansing's first letter on this subject assumed that Mr. Oliver knew the location and something about this block, the evidence shows that this assumption was unwarranted, and that the only knowledge Mr. Oliver had of these matters was from what Mr. Lansing wrote him in the above quoted letter. Under these circumstances we conclude that there has been no satisfactory proof made that the value of block 9, in East Lincoln, at the time $16,000 was charged for it was worth that sum. As there was no finding on this question of value, this must be determined upon another trial in the district court.

It was, however, insisted most strenuously in the argument in this court that as Mr. Oliver had mortgaged a portion of these lots, he was in no condition to insist upon a rescission of the sale. From the fact that there seems to have been a decline in the value of real property in the vicinity of this block since August, 1889, we are inclined to give some weight to this consideration. Mr. Oliver had a right not only to insist upon a rescission, but he had the alternative right to retain the property and to compel Mr. Lansing to pay him the difference between the real value of this block and the amount collected from him, as this was, as its actual value. (*Building & Loan Association of Dakota v. Cameron*, 48 Neb., 124.) In respect to the effect of acquiescense in the purchase as affecting this right the language of POST, J., in *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 44 Neb., 463, is very apposite. He said: "Acquiescence in a fraudulent transaction is in effect a new agreement made

consciously with an intent to condone the wrong done, and will not be inferred from doubtful evidence, but should be established, like any other material fact, by the party asserting it. We are referred to no positive act indicating acquiescence in this instance, the only claim being that it should be inferred from the time intervening between the date of the action complained of and the institution of the suit, to-wit, one year, ten months, and seventeen days. Time alone, unaffected by other circumstances, will not bar the right to rescind a voidable transaction, since it is not for a wrong-doer to impose extreme vigilance and promptitude as conditions to the exercise of the rights of the injured party. (Pollock, Contracts, 548*; *Pence v. Langdon*, 99 U. S., 581; *Montgomery v. Pickering*, 116 Mass., 227; *Tarkington v. Purvis*, 128 Ind., 187; *Moxon v. Payne*, L. R., 8 Ch. App. [Eng.], 881; *Foley v. Holtry*, 41 Neb., 563.)" There was no proof of acquiescence other than that Mr. Oliver mortgaged the property as his own. This was entirely consistent with his election to retain the property and in no way affected his right to recover such damages as he had sustained, and from the quotation just made it is evident that mere lapse of time within the statutory period of limitation has not inured to the benefit of the defendant. We therefore conclude that Mr. Oliver is entitled to recover from Mr. Lansing on account of this transaction in relation to block 9, in East Lincoln, the sum of the difference between the charged and real value, with seven per cent interest thereon from the 6th day of August, 1889.

There was pleaded by the defendant as sufficient to bar this action the commencement of a suit by filing the same petition as has been filed in this case, the issue and return of summons thereon, and the subsequent dismissal of said suit a short time before the commencement of this one, and nearly contemporaneously with such dismissal the signing of a libel, as I suppose it would be called in vulgar parlance. These acts were procured to

be done by means of the false representations of an agent of Lansing that Lansing would sue for $50,000 if this was not done, and by the further false representation that a certain named attorney at law, held in high esteem by everybody who knew him, had said that he was commencing such a suit, and that as Mr. Oliver had never had a cause of action, he would be compelled to answer in a great amount of damages for commencing said first suit. This agent by these misrepresentations procured a dismissal of the said first suit, and the signing of a confession that Mr. Oliver had unjustifiably begun that action. We are at a loss to conjecture why it should be imagined that these acts of plaintiff's should be deemed sufficient to bar plaintiff of any rights he really has pleaded and proved in this action. The course taken to frighten Mr. Oliver was disgraceful alike to his agent and to Mr. Lansing himself. There was no final judgment in that case; neither was there a settlement. As to whether or not, in reality, Mr. Oliver had a right of action against Mr. Lansing on account of his duplicity, the final decision of this cause may determine, at least to some extent. The judgment of the district court is reversed and this case is remanded to the district court, with directions to enter a decree in conformity herewith, taxing all costs to the defendant.

REVERSED AND REMANDED.

GEORGE SEBERING ET AL. V. GEORGE T. BASTEDO ET AL.

FILED MAY 6, 1896. No. 6654.

Elections: CONTEST: JURISDICTION: DISMISSAL. The dismissal of an attempted contest of a county seat election, because the district court had no jurisdiction, *held* proper, upon the authority of *Thomas v. Franklin*, 42 Neb., 310.

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

R. R. Dickson and *M. F. Harrington*, for plaintiffs in error.

H. M. Uttley, *A. L. Tingle*, and *John H. Mosier*, *contra*.

RYAN, C.

In this case the only question presented is the right of plaintiffs in error, as residents and citizens of the town of Spencer, to contest the validity of the county seat election in Boyd county, whereby Butte City, upon the face of the returns as against Spencer, was declared by the canvassing board to have been successful. The district court of Boyd county dismissed this action as having been brought too late, whereby it was held the said court had never had jurisdiction. Whether it was without jurisdiction upon the ground alleged need not be discussed, for certainly the disposition made of the case was proper, under the ruling of this court in *Thomas v. Franklin*, 42 Neb., 310. The judgment of the district court is therefore

AFFIRMED.

ORLANDO HUDSON, APPELLEE, V. H. W. PENNOCK, APPELLANT, ET AL., APPELLEES.

FILED MAY 6, 1896. No. 658

Review: DEFECTIVE RECORD. This court cannot determine that the ruling of the district court upon a motion was without justification, when there is presented for review neither the motion nor the proofs submitted in support of it.

APPEAL from the district court of Adams county. Heard below before BEALL, J.

Batty & Dungan and *Henry W. Pennock*, for appellant.

C. E. Higinbotham, Darnall & Kirkpatrick, and *Tibbets, Morey & Ferris, contra.*

RYAN, C.

This was a foreclosure proceeding brought in the district court of Adams county by Orlando Hudson to obtain satisfaction of three notes made by H. W. Pennock, secured by his mortgage. There were made defendants H. W. Pennock and his wife, and others, among whom was James L. Britton. To the usual averments for the foreclosure of a mortgage, H. W. Pennock answered admitting the making of the notes and mortgage, the credits of payments stated in the petition, the alleged recording of the mortgage, and that no proceeding at law had been had for the recovery of the debt secured. There was a denial that there was due upon the notes on October 24, 1892, the sum of $5,158.62, and a denial that said sum was due when the petition was filed. These alleged denials closed with this language: "And this defendant requires strict proof of the plaintiff as to the amount due upon said notes according to law." This answer finally closed with a general denial of all matters not admitted as above stated. Upon the trial there were introduced in evidence only the notes and mortgage, and therefrom the court found there was due and subject to foreclosure on the date of the judgment, May 14, 1893, the sum of $5,287.23, and entered a decree accordingly. The appellant, Mr. Pennock, makes no complaint that this sum was incorrect, neither does he complain of any injustice in the decree, except as will now be described.

James L. Britton, a defendant, by his answer to the original petition having alleged that he was the holder of certain tax deeds on the mortgaged premises, described at length the several amounts of taxes which he had paid at various times after the issue to him of said

tax deeds, and that he had served proper preliminary notices and had obtained the aforesaid tax deeds to be made by the treasurer of Adams county. The prayer of Mr. Britton was, to say the least, unique, as will be seen by the following copy of it: "Wherefore this defendant prays that this suit be dismissed at plaintiff's cost, and for such other and further relief as justice and equity may require." H. W. Pennock answered the pleading of Mr. Britton, alleging various irregularities and omissions of substantive matters precedent to the making of the tax deeds, which, as he averred, rendered them invalid, and, having offered to pay in court $30 for the use and benefit of Mr. Britton, or any party thereto entitled, as the full amount of taxes really due, he prayed for a cancellation of the said tax deeds, and that upon payment of the amount tendered in full for the taxes and assessments he might go hence without day. The sole complaint of Mr. Pennock upon this appeal is that the court, upon the motion of Mr. Britton, "dismissed Mr. Britton out of the case." There is to be found in the record no such motion. In his brief Mr. Pennock says this motion of Mr. Britton was made orally, but we cannot act upon this suggestion, especially in view of the only record recitations to be found, which are in the following language: "And now on this 18th day of May, 1893, this cause comes on for hearing upon the application and motion of the defendant James L. Britton to be dismissed out of this case. Upon consideration whereof the court, being satisfied that the showing made by the said defendant James L. Britton in support of his said application and motion is sufficient, the court sustains said motion and the said defendant James L. Britton is accordingly dismissed out of this case. To which ruling and action of the court the defendant H. W. Pennock excepts, and his exceptions are by the court allowed." It would seem from the above recitation of a showing made that there was introduced some sort of evidence in support of Mr. Britton's motion, but no bill of exceptions evidences the nature of such

proofs. We cannot presume, in the absence of the motion itself and of the evidence upon which it was sustained, that there was prejudicial error in the ruling of the district court thereon, and this is just what we are required to do if we should sustain this appeal. The judgment of the district court is therefore

AFFIRMED.

HENRY NEWMAN V. LEWIS RYNE ET AL.

FILED MAY 6, 1896. NO. 6549.

1. Instructions: ASSIGNMENTS OF ERROR: REVIEW. An assignment of errors in a group as to giving or refusing to give instructions will be examined no further when it is found that one of the first indicated group was properly given, or of the last indicated group one was properly refused.

2. ———. It is no sufficient ground for the reversal of a judgment that an immaterial instruction asked by the plaintiff in error was refused.

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

Hainer & Smith, for plaintiff in error.

Whitmore & Carr, contra.

RYAN, C.

This action was one of replevin brought originally by Henry Newman against Lewis Ryne and A. L. Preston in the district court of Hamilton county. Subsequently A. P. Adams appeared and filed a petition of intervention, claiming the replevied property under a bill of sale. Thenceforward the controversy was between the original plaintiff and the intervenor, the latter of whom obtained the verdict, upon which judgment was rendered.

The first assignment in the petition in error is that the court erred in giving instructions numbered 1, 2, 3, 4, 5, 6, 7, and 8 on its own motion. Of these the fifth was that under the issues the controversy was narrowed down between Newman and Adams, and this, by his brief, the plaintiff in error concedes is entirely accurate. We cannot, therefore, consider the other instructions of which the correctness is called in question. The assignment as to the refusal to give instructions grouped numbers 4, 5, and 6, asked by plaintiff. Of these the fourth was as follows: "The mere fact that the defendant Ryne may have given the key or keys for the building situated upon the premises described in said lease, to the plaintiff, would not constitute a surrender of said premises to plaintiff." The plaintiff founded his right of possession of the property replevied upon a lease containing provisions in the nature of a chattel mortgage, with reference to the personal property of the lessee contained in the building. After these goods had been taken under plaintiff's writ of replevin, Mr. Ryne, the lessee, refused to give up possession of the premises which had been leased to him. A few days after this refusal he met the plaintiff and asked him if he did not want the keys; if he did not want to go in there, and upon plaintiff's answering in the affirmative, Ryne handed him the keys. The object of the above instruction was to have the jury instructed as to such facts as would indicate that Mr. Ryne had not surrendered his possession of the premises, and that he had not by surrender of the keys ceased to be liable to plaintiff. As we have already indicated, the controversy was between the plaintiff and the intervenor. The grounds of this dispute were that plaintiff claimed the goods by virtue of a lien created by the lease for rent. The term expired May 1, 1892, by the terms of the lease itself, but plaintiff was desirous of holding the lessee for rent for another year by reason of his holding over his term. This instruction we do not deem at all material, for one reason, because the lease was not re-

corded until after the intervenor had purchased the personal property in dispute and given his note and check for the amount of the purchase price. There was no attempt to show that this purchase was with the actual knowledge of the terms of the unrecorded lease, or in bad faith, hence it was immaterial whether or not Mr. Ryne held over his term. Again, the instruction requested, though abstractly correct enough, was refused without prejudice to plaintiff because, before the alleged holding over, plaintiff had replevied and removed the property from the building, and the lease by its provisions was only operative as to such personal property as was kept on the premises. This, we understand, refers to property kept on the premises while the delinquent rent accrued. As plaintiff had caused the removal of this very property, he could not insist that his lease was still operative as against it for rent accruing after such removal had been made by himself.

There is but one other proposition urged, and that is that there was error in instructing the jury that if the intervenor, before the lease was recorded and without knowledge of its provisions, purchased the property in good faith and made payment thereon, he was entitled to the possession thereof as against the plaintiff, who replevied after such purchase and payment. As to this there is perceived no just ground of complaint under the proofs or the law applicable thereto. The judgment of the district court is

AFFIRMED.

E. B. BACON ET AL., APPELLEES, V. P. BROCKMAN COMMISSION COMPANY, APPELLANT ET AL., APPELLEES.

FILED MAY 6, 1896. No. 6537.

Fraudulent Conveyances: CHATTEL MORTGAGES. A chattel mortgage which covered all the property of an insolvent debtor, executed under an agreement between the parties thereto that the mortgage should not be filed for record, that the mortgagee should take formal possession of the mortgaged property and hold possession thereof for the benefit and subject to the direction of the mortgagor until by sale or lease of the mortgaged property to the advantage of the mortgagor the debt secured should be paid, and then account to the mortgagor for the balance, *held* fraudulent as to other creditors of the mortgagor who are plaintiffs in this action.

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

Hall & McCulloch, for appellant.

John D. Howe, E. R. Duffie, and *James McNeny, contra.*

RYAN, C.

This action was begun April 28, 1892, in the district court of Gage county by the partnership firm of E. P. Bacon & Co. Subsequently, by intervention, the Citizens State Bank of Council Bluffs, Iowa, became a party plaintiff. The Brown Bros. Grain Company, a corporation organized under the laws of the state of Nebraska, was made a defendant because it was largely indebted to each of the plaintiffs. Between the parties already named there was in this case no controversy. Between the original plaintiff and the intervenor, on the one hand, and the P. Brockman Commission Company, a Missouri corporation doing business at St. Louis, on the other hand, there was a real closely contested dispute. Each petition was in the nature of a creditor's bill containing averments necessary to show the existence of an indebt-

edness due from the Brown Bros. Grain Company, evidenced by a judgment in favor of the plaintiff and the intervenor respectively, the issue and return of execution "no property found," and the subsequent levy upon the property sought to be subjected to the payment of said judgments. In addition to the averments indicated, these petitions, in apt language, sufficiently described the transactions of which complaint was made, charged that they were fraudulent, and prayed appropriate relief. The subsequently filed pleadings fully presented the issues under which the evidence was introduced, so that it is not necessary to describe at greater length these pleadings. There was a decree in favor of the plaintiff and the intervenor, and therefrom the P. Brockman Commission Company has prosecuted this appeal.

The Brown Bros. Grain Company was incorporated in the year 1890 and continued in the business of buying, selling, and shipping grain until the latter part of the year 1891. This firm owned eleven elevators in Nebraska and two in Kansas, and had a five years' lease of the Union Elevator at Council Bluffs, Iowa. The elevators in Nebraska and Kansas were built and stood on the right of way of the Union Pacific railway, or of its branches. About July 20, 1891, the Brown Bros. Grain Company made a shipment of grain to the P. Brockman Commission Company at St. Louis, and against said shipment drew a draft of $300. This was paid and thereafter there were other consignments and other drafts, until in September, 1891, the Brown Bros. Grain Company was indebted to the P. Brockman Commission Company in the sum of $67,580.85, and, after having been increased to over $84,000 in the meantime, this indebtedness, in November of the same year, was reduced to $68,479.11. On the 14th day of the month last named P. Brockman, the president of the P. Brockman Commission Company, made an arrangement with the Brown Bros. Grain Company whereby was procured to be executed a chattel mortgage. Mr. Brockman in making this ar-

rangement had, it seems, full authority to represent the company of which he was president. The chattel mortgage above referred to was not easily procured, and finally was given only on condition that certain memoranda of agreements should be contemporaneously executed by the mortgagee. Practically, this mortgage covered all the property of the mortgagor, including its accounts, notes, and demands of every kind. The conditions contained in the mortgage were as follows: "Now if the said Brown Bros. Grain Company shall well and truly pay, or cause to be paid, all of said notes, checks, bills of exchange, open accounts, and other indebtedness above described, to the said P. Brockman Commission Company, when the same shall become due and payable, then this obligation shall be void, but in case the said Brown Bros. Grain Company shall not pay the same when they become due and payable, or any part thereof, then the said P. Brockman Commission Company shall have the right to take immediate possession of the same, and to sell the same either at public or private sale, as it, said corporation, shall elect, notice of said sale and publication thereof being hereby expressly waived, and, after paying the expenses of the said sale, and any amount which may be due the said P. Brockman Commission Company, the said P. Brockman Commission Company shall render the surplus, if any, to the said Brown Bros. Grain Company." Contemporaneously with the making of the above mortgage, there were executed three memoranda, which, under their respective headings, "A," "B," and "C," were as follows:

"A."

"This memoranda witnesseth, that whereas, Brown Bros. Elevator Company have this day turned over to P. Brockman Commission Company, of St. Louis, by mortgage indenture of this date, their lease of elevator in Council Bluffs, and all their elevators on the line of the Union Pacific and its branches in Nebraska and Kansas, being elevators at Raymond, Lincoln, Beatrice, Prince-

ton, Hamlin, Jamaica, Blue Springs, Pickerell, Cortland, Holmesville, Barneston, in Nebraska, and Oketo and Hull, in Kansas:

"Now, therefore, it is understood and agreed by the P. Brockman Commission Company, of St. Louis, Missouri, that they will continue to operate all of such elevators now operated until the same can be disposed of, by lease or sale, to the advantage of said grain company, accounting to said Brown Bros. Grain Company for whatever profits there may be over and above all costs and expenses, interest, and indebtedness for running the same.

"Dated this 14th day of November, 1891.

"BROCKMAN COMMISSION COMPANY,
"Per P. BROCKMAN."

"B."

"Whereas, Brown Bros. Grain Company has heretofore caused certain grain to be shipped on the line of the Union Pacific Railway Company, on its bills of lading duly issued therefor, consigned to the care of the Union Elevator of Council Bluffs, Iowa, which said Union Elevator has been in the possession of and operated by the said Brown Bros. Grain Company; and

"Whereas, the said Brown Bros. Grain Company has secured the delivery of large shipments of said grain to said elevator so operated by it, without producing or surrendering to the said Union Pacific Railway Company the bills of lading therefor, by reason of which fact there are now outstanding a large number of bills of lading as against the said railway company, for grain which has actually been delivered to said elevator company; and

"Whereas, the undersigned is a large creditor of the Brown Bros. Grain Company, and it is important that the undersigned should secure possession of the said Union Elevator at Council Bluffs, Iowa, and should secure a transfer, assignment of sale of the grain, and other properties now in possession of Brown Bros. Grain Company at the said elevator, and in certain other elevators now operated by it in the state of Nebraska; and,

"Whereas, the said Union Pacific Railway Company has assisted the undersigned in securing possession of the said elevator and in negotiating a proper transfer of the properties of said Brown Bros. Grain Company, for the purpose of securing the undersigned:

"Now, therefore, in consideration of the premises, the undersigned hereby promises and agrees to and with the said Union Pacific Railway Company, that all of the grain received from the said Brown Bros. Grain Company and now stored in the Union Elevator at Council Bluffs, Iowa, so far as the same can lawfully be applied for such purpose, shall be applied to the cancellation and satisfaction of all outstanding bills of lading of the Union Pacific Railway Company for grain delivered at such elevator in Council Bluffs, it being expressly understood that those bills of lading now in the hands of the undersigned shall be first satisfied, and that thereafter other bills of lading so outstanding shall be satisfied in the order of their presentation, it being the purpose of this agreement to guaranty and protect the said railway company from all loss arising from any outstanding bills of lading therefor, so far as the said grain now in said elevator will suffice for that purpose.

"P. BROCKMAN COMMISSION COMPANY,
"Per P. BROCKMAN, *Pt.*"
"C."

"It is agreed by P. Brockman Commission Company that it will protect all drafts against grain en route for the elevator now drawn, not exceeding $16,800.

"P. BROCKMAN COMMISSION COMPANY,
"Per P. BROCKMAN, *Prest.*"

Appellant insists that the above described mortgage, and the written contracts made contemporaneously therewith, constitute the sole admissible evidence of the transactions therein referred to. As between the parties to these written instruments this doubtless would have been the general rule, but this action was not one predicated upon the memoranda nor between the parties. It was

rather a proceeding in which this whole transaction was assailed as fraudulent and void as against the rights of the complaining parties, and its purpose was to obtain the judgment of the court to that effect. Whatever evidence was competent and relevant for the purpose indicated was admissible, and from an attack of this character the written memoranda could claim no special immunity.

On Sunday, the 8th day of November, 1891, P. Brockman, representing the P. Brockman Commission Company, made an examination of the books of the Brown Bros. Grain Company, and with expressions of approval of the showing thereby made, offered to furnish whatever money was necessary for carrying on the business, provided security was given for what was already owing, and for further advances. During the remainder of the week preceding Saturday there were renewed efforts to reach an agreement as to how matters should be arranged between the commission company and the grain company. As indicated by memorandum "B," above copied, the Union Pacific Railway Company had previously delivered from its cars large amounts of grain to the grain company at the Union Elevator at Council Bluffs, without requiring the production or surrender of the bills of lading. There were outstanding on November 14, 1891, 129 bills of lading of this character. The grain represented by these bills of lading had either been shipped to some eastern market and sold, or was still in the possession of the Brown Bros. Grain Company. It was to hold harmless the railroad company with reference to this grain that the provisions in the memorandum "B" were made.

Memorandum "C" was made necessary by the following condition of affairs: There had been purchased in the regular course of business, by the agents of the Brown Bros. Grain Company running the elevators of that company in Kansas and Nebraska, a large amount of grain. It was the custom of these agents, as they purchased

grain, to draw on the grain company aforesaid through local banks for the amount of such purchases. The credits were extended to these agents by the local banks, largely, if not altogether, on the faith of the drafts, drawn against actual purchases. On the date of the mortgage and memorandum "C" there were outstanding unpaid drafts of this character to the aggregate amount of $16,841.26. It cannot be determined from the evidence what proportion of the grain drawn against in this manner was in the elevators, and what proportion was on board cars. It was to make certain the payment of these outstanding drafts that the memorandum designated "C" was made.

It was in relation to the provisions of memorandum "A" that very much of the conflicting oral testimony was introduced. Briefly summarized, these conditions were that the P. Brockman Commission Company undertook to operate all the elevators which theretofore had been operated by the grain company, until such elevators should be disposed of by lease or sale to the advantage of the grain company, accounting meanwhile to said grain company for all profits "over and above all costs and expenses, interest, and all indebtedness for running the same." How from one standpoint this should be construed and supplemented was illustrated by the testimony of C. T. Brown, George K. Brown, and W. E. Kirker. Of these, C. T. Brown was the president of the Brown Bros. Grain Company. He testified that on the date of the mortgage he, with others, met Mr. Hall, the attorney for the P. Brockman Commission Company, and P. Brockman himself, at Mr. Hall's office in Omaha. As to what transpired at this office before the mortgage was executed this witness testified as follows: "The question of filing the mortgage was talked over and I said if the mortgage was filed it would probably ruin our business and our credit, and we did not want anything of that kind done, and Hall said, 'Either place the mortgage on file or take possession in order to make the mortgage good;' and I said that taking

possession and placing a notice on the buildings would be as bad as filing the mortgage, and Hall said, 'You can give possession with these elevators and formally turn them over to him, and he can turn them back to you and arrange with someone to take charge of them and no one know anything about it;' and I said that I wanted a written agreement as to how it should be run and who was to have charge of it, and we talked the matter over and the attorneys suggested that that could be done later on, as we had not much time. * * * It was finally agreed that the mortgage should not be recorded. It was agreed that the mere claim of formal possession should be given to Brockman, instead of filing the mortgage, and the business was to be run as it had been, without any change. He agreed there should be no change and I should be the general manager of the business, but he should pay the men, and possession was to be given him and the business was to run as it had been. * * * Mr. Carstons was to represent Mr. Brockman in carrying on the business." C. T. Brown further testified that the memorandum designated above as "A" was "a part of the result of the whole business and the only part of that understanding that was decided was necessary to put in writing; the rest of it was claimed to be matters that could be arranged later on. We insisted upon having some agreement in writing, and this was made and the rest was to be drawn afterwards; the details of running the business were not yet to be put in writing, but drawn in the contract there." Mr. Brown testified that the mortgage and memoranda, above designated as "A," "B," and "C," were contemporaneously executed about 6 o'clock of Saturday evening. It seems from the testimony of all parties that on Sunday morning trouble began between the contracting parties by the posting of a notice of possession under the mortgage, and that on Monday it increased and has since still further increased, so that it resulted that the business was practically never continued. We have not, therefore, the aid

of subsequent events to enable us to ascertain from the actual manner of running the business whether or not the above testimony was true. We can look alone to parol testimony in connection with the writings executed, and to the writings themselves, for information as to the scope and object of the transaction. The testimony of George K. Brown was as direct as was that of his brother, C. T. Brown, and to the same matters, and in addition thereto George K. Brown, who was secretary of the grain company, testified that on Sunday morning following the making of the mortgage he called on Mr. Brockman at the Paxton Hotel in Omaha to practically give him the formal possession; that witness asked Brockman if he had not better wait till Monday, as there was no time set, and was answered, "We had better take it to-day and we will be ready for business Monday," to which the witness replied that he was only one of the company, but would go and practically turn it over. This witness testified that practically turning over the office consisted in walking into the office and telling the bookkeeper and foreman of the elevator "that we practically turned the business over to Brockman, to operate the business as before, which I did." When those parties reached the office they found nailed to the door a notice, in the language of Mr. Brown, stating "that this property had been taken by Brockman, of St. Louis, under a chattel mortgage." Mr. Brockman denied that he had been instrumental in having this notice posted, and promised to see that it came down. George K. Brown, further testifying, said: "I think that Mr. Brockman was the man who spoke up and said things are going on as before, and I have a little interest here, and we want to keep everything quiet and not to say anything about the chattel mortgage on the property, as it was understood and agreed Brown is to manage the business as before, and that he would probably have a man there to represent him, which would be J. D. Carstons of Omaha, and I spoke to Brockman, as he went out, to have the notice

removed from the door, and he said, 'I'll see this is done.'"

Mr. Kirker, the treasurer of the Brown Bros. Grain Company, testified that he was present just before the mortgage was signed and asked Mr. Brockman about filing it, and was answered that it was not to be filed; that Brockman was to take formal possession, and, as Mr. Kirker said, "we were to run the business the same as it had been." This witness also testified that Mr. Brockman said he would furnish all the money necessary to run the business, and upon being asked to put that in writing he said, "Do you think I am a damned rascal?" and refused to comply.

In regard to the matters above referred to Mr. Brockman testified that after he came to Omaha in November, 1891, he investigated the matter, and as the Brown Bros. Grain Company owed him a great deal, he asked for security, either in the nature of a bill of sale or of a mortgage. In answer to an inquiry as to whether he made an agreement with the grain company for continuing its business when the mortgage was made, Mr. Brockman said in his testimony, "I think I agreed for them to carry on the business; that was before I knew how their financial standing was. They made all kinds of statements to me, which I found afterwards to be false; that they misrepresented everything to me, as I found out when I came to the various elevators." In answer to an interrogatory as to what understanding outside the written agreements he had with the Brown brothers, Mr. Brockman said: "I don't know that I had any particular agreement." Having admitted that he did not carry out his agreement with the grain company, Mr. Brockman responded to the question why this was, as follows: "After I took possession of the property of the various elevators, including the Council Bluffs elevator, and ascertained how much grain there was, I found that there was hardly any, perhaps a few car loads in the Council Bluffs elevator. I held at that time forty-three bills of lading for which there was

no grain. After ascertaining how I had been victimized and swindled by the Browns, who had obtained my money under false pretenses, I shut down on them only too quick, in order not to get in them any deeper, which would have been the case if I had continued business with them. For this reason I did not carry out this agreement, as, from their statements, the elevators were full. If I had found them so I would have carried out my agreement to the letter, but after I learned and found that they had swindled me in the matter, as I have stated before, I simply considered it my duty as a business man not to give them any chance to get into me any deeper. The bills of lading, which are in my possession yet, besides lots of other bills of lading, show where the grain has been diverted to, either Chicago or Milwaukee; all told there was over 100 car loads for which the Brown Bros. got paid twice, and in a good many instances they never even paid for the grain to the country shippers. They took out another bill of lading at Council Bluffs without surrendering the original ones, which were in possession of the various parties, some in banks, some in Chicago, some in Milwaukee, and those I held myself. By this *modus operandi* they not only swindled the various shippers, but the railroad company besides. For this reason I do not suppose that any sane man can blame me for not continuing the business in their name any longer, because it could not be done unless I had furnished them the money, and I even paid drafts for them, with bills of lading attached, to the amount of over $20,000." Upon this same subject-matter Mr. Brockman testified as follows:

Q. At the time you took possession of those elevators and other property, was there any understanding between you and the Brown Bros. Grain Company that they would still be the property of the Brown Bros. Grain Company?

A. No, sir.

Q. Or was there also any understanding that they should keep possession also with you?

A. I think there was somewhat of an agreement, the same as you read before, and for that reason I made this explanation giving the reason why I did not carry out this agreement.

On cross-examination, being asked if he meant to say that he had carried out his agreement (memorandum marked "A") to continue operating the elevators until they were disposed of, and as to continuing business with the Brown Bros. Grain Company, Mr. Brockman said: "I did intend to carry out that agreement at the time I signed it, and would have carried it out if I had found matters the way they were represented to me by the Browns."

Mr. Hall, who, as attorney, conducted the operations for Mr. Brockman at the time the mortgage was given, testified as follows:

"At the time the mortgage was given, at that interview or at the one leading up to it, the Brown Bros. Grain Company did not desire us to put our mortgage on record, and I think in the first interview, or one of the first, I told them, or it was said on our side, that it would not be necessary to put these mortgages on record at once; they were desirous of that afterward. At the time the mortgage was given I spoke of taking possession and they, the Brown Bros., whoever it was that conducted the conversation, I think it was Charley Brown, but it may have been one of the others, asked if we were going to take possession. I said, 'Yes, if we didn't record the mortgage, we would have to take possession;' and they then said that if we had to take possession, it didn't make much difference whether we recorded the mortgage or not; that was about the size of the talk, the substance of it."

Q. What, if anything, Mr. Hall, was said or done in these negotiations with regard to the control or running of the property?

A. Well, there was nothing in regard to control, except that he went into possession.

Q. Well, what was there, if anything, with reference to the preservation of it and disposition of it?

A. Well, they were, the Brown Bros. Grain Company, very much afraid, and so expressed themselves; said they were afraid that when we got this mortgage for the P. Brockman Commission Company, that we would immediately go to work and sell the elevator out and destroy the business. They said that they had an immense amount of grain coming in, and, to do that, would ruin the business. We said to them that if they had the grain coming in they said they had, it would not be to Brockman's advantage to destroy the business, nor to destroy or sell the elevators out at a sacrifice. They said, "Yes, but after you get this mortgage you may forget about that." Substantially the talk, and they wanted a writing that we would not sell it out at a sacrifice immediately, and, in fact, after that talk there was a writing given that told them that we did not propose unnecessarily to sacrifice the property. It was to our advantage to get as much for it as we could, and we intended to do that.

From the above quotations it is not left open to doubt that there was sufficient evidence from which it could properly be found that at the time the mortgage was made there was an understanding between the mortgagor and the mortgagee that the latter should take formal possession of the mortgaged property, and that it should, under the name of the latter, be run for the benefit of, and practically under the direction of, the mortgagor. By the terms of the mortgage itself it was provided that the mortgagee's right to take possession should be exercised upon the failure of the mortgagor to make payments of all or some portion of the amounts secured when it fell due. The property mortgaged was all the property of the mortgagor, and at the time the mortgage was given the mortgagor was insolvent. It is, however, insisted by the appellant that by the terms of memoranda "B" and "C" the mortgagee assumed, and has in fact assumed, certain obligations in consideration

of said mortgage, and in fact has performed some of these obligations at considerable cost, and that all these undertakings would have been carried out if the Brown Bros. Grain Company had not been guilty of such fraudulent conduct that the commission company ought not to be held to such performance. These were matters which concerned only the mortgagor and the mortgagee. In memorandum "B" the mortgagee recited, as one of the reasons for signing the memorandum, that the Union Pacific Railway Company had assisted the mortgagee in securing possession of the Union Elevator and in negotiating a proper transfer of the properties of the said Brown Bros. Grain Company for the purpose of securing the P. Brockman Commission Company, a consummation which, in this memorandum it was recited, was important to bring about, for the commission company, as was said in the memorandum, was a large creditor of the Brown Bros. Grain Company. As this memorandum was entered into solely for the benefit of the mortgagee and the Union Pacific Railway Company, and to the necessary disadvantage of all the other creditors of the Brown Bros. Grain Company, it is difficult to understand why any hardship sustained by the mortgagee should be chargeable to such other creditors. The agreement to protect certain drafts, to the amount of $16,800, was one intended solely for the benefit of the parties to it, and of the parties liable on the drafts. It was not for the benefit of the appellees in the remotest degree, and therefore it should not prejudice their rights. It is no concern of appellees whether or not the mortgagor or mortgagee aimed solely to secure an unjust advantage of each other in these dealings, and it is of as little consequence that, quarreling afterward, each still further sought to wrong the other, as is now freely charged by both parties. The question with which appellees are concerned is whether or not the transaction between the mortgagor and mortgagee on November 14, 1891, was of such a nature that thereby a secret trust was created in favor of the mort-

gagor to the prejudice of the rights of the appellees as creditors of the Brown Bros. Grain Company. Section 7, chapter 32, Compiled Statutes, provides: "All deeds of gift, all conveyances, and all transfers and assignments, verbal or written, of goods, chattels, or things in action, made in trust for the use of the person making the same, shall be void as against the creditors, existing or subsequent, of such person." By section 20 of the same chapter it is provided: "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. It has been repeatedly held by this court that the question of fraudulent intent is one to be determined by the jury, in a case where there is a jury, and by the court as a question of fact where there is no jury. (*Kilpatrick-Koch Dry Goods Co. v. McPheely*, 37 Neb., 800; *Hewitt v. Commercial Banking Co.*, 40 Neb., 820; *Meyer v. Union Bag & Paper Co.*, 41 Neb., 67; *Connelly v. Edgerton*, 22 Neb., 82; *Davis v. Scott*, 22 Neb., 154; *Riley v. Melquist*, 23 Neb., 474; *Fitzgerald v. Meyer*, 25 Neb., 77; *Feder v. Solomon*, 26 Neb., 266.) The district court, upon conflicting proofs evidently, found that there was a fraudulent intent entertained by both parties to the mortgage at the time it was made, and this it could very properly do, in view of evidence in relation to the existence of a secret trust relation between them under the circumstances disclosed by the proofs. There were also justified findings that the mortgagor was insolvent, that the appellees were existing creditors of the mortgagor, and that if such mortgage was sustained the appellees would be wholly prevented from collecting their claims as against the mortgagor. In terms, these findings were not expressed at length in the decree, but they were the necessary inferences from findings that the averments of the petitions which alleged these facts were true. It requires no citations in support of the proposition that the findings of the district court upon conflicting evidence will not be

disturbed on appeal. It therefore results that the judgment of the district court is

AFFIRMED.

H. C. BASCOM, APPELLEE, V. J. F. ZEDIKER, APPELLANT, ET AL.

FILED MAY 6, 1896. No. 6526.

Conflict of Laws: CONTRACTS: FORUM OF JURISDICTION. Suit on a promissory note. Defense: Consideration for the note, a loan of money made by appellee to appellants at a usurious rate of interest, and that the contract was made in the state of New York and void under the laws thereof. Evidence set out at length in the opinion and *held* to sustain the finding of the district court that the contract between the parties was made in, and governed by the laws of, the state of Nebraska.

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

The facts are stated by the commissioner.

C. C. Flansburg and *Abbott & Caldwell*, for appellant:

The contract is governed by the laws of New York. (*Andrews v. Pond*, 13 Pet. [U. S.], 65; *Gay v. Rainey*, 89 Ill., 221; *Freese v. Brawnwell*, 35 N. J. Law, 286; *Campbell v. Nichols*, 33 N. J. Law, 81; *Akers v. Demond*, 103 Mass., 318; *Little v. Rogers*, 1 Met. [Mass.], 108; *Clark v. Sisson*, 22 N. Y., 312; *Buchanan v. Drovers Nat. Bank*, 55 Fed. Rep., 223; *Milliken v. Pratt*, 125 Mass., 374; *Cook v. Moffatt*, 5 How. [U. S.], 295; *Bell v. Packard*, 69 Me., 106; *Hyde v. Goodnow*, 3 Comst. [N. Y.], 270.)

John M. Stewart, contra.

RAGAN, C.

H. Clay Bascom sued James F. Zediker and others in equity in the district court of Lancaster county to recover

a sum of money which he alleged was due to him on a promissory note executed and delivered to him by Zediker and others, and in that action sought to have the amount found due him on the note declared a lien upon certain bank stock pledged as security for the payment of the note. Zediker admitted the execution and delivery of the note, but defended on two grounds: (1) That the consideration for the note was a loan of money made to him by Bascom; that the contract was made in the state of New York, governed and controlled by the laws of that state, and was usurious and void; and (2) that if the contract was governed by the laws of the state of Nebraska it was usurious. The district court found and decreed that the contract was made in and governed by the laws of Nebraska and that the note was usurious, and rendered a decree accordingly, from which Zediker has appealed.

1. It is conceded by all parties that the note in suit is usurious under the laws of the state of Nebraska, and that if the contract between Zediker and Bascom was made in, and is to be governed by the laws of, the state of Nebraska, the decree of the district court must be affirmed. It is also conceded that if the contract between Zediker and Bascom was made in the state of New York and is to be governed by the laws of that state, the note in suit is void, and that the decree appealed from must be reversed.

2. On the trial Zediker testified that in the summer of 1888 he was a resident and citizen of the state of Nebraska, and that Bascom was a resident and citizen of the state of New York; that during this summer he was in Troy, New York, saw Mr. Bascom and entered into an agreement with him in and by which Bascom agreed to lend him $10,000, for which Zediker was to execute his promissory note drawing interest at the rate of ten per cent per annum, and to pay Bascom a bonus of $100 for making this loan. On the 11th day of August, 1888, Zediker being in Grand Island, Nebraska, wrote to Bas-

com at Troy, New York, a letter as follows: "I have struck a chance to buy $10,000 of our stock in First National Bank at prices to suit me, and I want to borrow $10,000 for a year at the best rate I can get, likely nine per cent, but I want the money. I can give my own and wife's name and two or three others and then put up the $10,000 stock of said bank as additional security. Can you make me the loan or negotiate such a loan? Will give you $100 for trouble of negotiating it. I want the matter in shape so I can pay for stock by the 30th inst. sure. Money can be remitted to our bank or its cashier, with instructions, or you could have a bank there authorize First National of Franklin, Nebraska, to draw for $———, with note and collateral attached as described, etc. Write me here at Grand Island. I will be here until the last of the month." On the 25th day of August, 1888, Bascom's secretary at Troy, New York, wrote to Zediker in answer a letter as follows: "Mr. Bascom is out of the city just now, but he has instructed me to say that if you will give your and wife's name and two good indorsers, and put up the stock and pay a rate of ten per cent per annum and $100 bonus, he will get the money for you. He will be at home when your answer arrives if it is on receipt of this." At Franklin, Nebraska, on the 3d day of September, 1888, Zediker replied to Bascom's letter as follows: "Yours of August 25th came to me at Grand Island, and I came home immediately to arrange for the stock I expected to buy. One man has raised on his price, but we have finally come to terms. Others I expected to arrange with this week. Think I will be ready to send you the note by the end of this week. Want to make best deals I can, and so will take a few days to complete the work. I am depending on the money. Your rate is strong, but I shall not lose even at that. Bank is in fine condition and I propose to control it. So I depend on you for the money at rates offered and will give you two good indorsers and $10,000 national bank stock for collateral for the $10,000 loan at

ten per cent and pay you $100 bonus for your trouble." On the same day, from the same place, Zediker wrote to Bascom another letter as follows: "Herein find promissory note for $10,000 at ten per cent interest, on one year's time, signed by myself and ———. * * * The stock will have to be turned over to us and rewritten and then indorsed in blank and sent to you, so won't you please send the money to the cashier of this bank—First National—instructing him to turn over money to me as fast as I hand over to him stock in his said bank $1,000 for $1,000 par value, you to have the full $10,000 of stock for the $9,900 cash, to be held by you as collateral. * * Date the note the day you send me the money." Bascom in due course of mail received the note sent to him by Zediker on the 3d of September, and on the 13th of September filled in that date in the note and transmitted to the cashier of the First National Bank of Franklin $9,900 to be paid to Zediker on his delivering to said cashier for Bascom $10,000 of the capital stock of the First National Bank of Franklin, Nebraska. The stock was so delivered by Zediker to the cashier and the money paid over. The note sent was payable to Bascom in Troy, New York.

In *Sheldon v. Haxtun*, 91 N. Y., 124, Haxtun resided in the state of Illinois and Sheldon in the state of New York. Haxtun collected certain moneys in Illinois which belonged to Sheldon, and by an agreement between them, instead of remitting the money, he sent his own notes to Sheldon for the amount of money which he had collected belonging to him. These notes were dated at his place of residence in Illinois and drew ten per cent interest. This at the time was a lawful rate in the state of Illinois, but was unlawful in the state of New York. In an action upon these notes it was held that their validity was to be determined by the law of Illinois; that as they were valid there they were valid in New York. Andrews, C. J., said: "The transaction was in substance a loan by * * * a resident of New York, * * * to a resident of Illinois, in the latter state, of funds there

held by and belonging to the former, at a rate of interest lawful in Illinois. If the plaintiff's intestate had gone in person to Illinois and collected the notes and then lent the money to the defendant [Sheldon] at ten per cent interest, there could, we apprehend, be no question as to the lawfulness of the transaction, although the notes were payable in this state. * * * Nor could it, we conceive, alter the case if the negotiation for the loan was made in this state and afterward consummated and the transaction completed in Illinois, the transaction being *bona fide* and there being no intent thereby to evade the laws of this state. The dealing, for the purpose of determining the question of usury, would be assigned to the place where the funds were and where the loan was consummated. What occurred between the parties was equivalent to the plaintiff's intestate [Sheldon] going to Illinois and there making the several loans to the defendant. The funds were there in possession of the defendant as agent. He was permitted to retain them and became a debtor for the amount. Upon depositing the notes in the mail the transaction was complete. The money became the defendant's and the notes the property of the intestate. The defendant became the borrower of the proceeds of the note collected by him."

In *Akers v. Demond*, 103 Mass., 318, two bills of exchange were drawn in New York by one Reed upon Demond, a resident of Boston. The bills were payable in Boston and indorsed by a third party in New York and then transmitted by Reed to Boston, where they were accepted by Demond, who returned them to Reed in New York, where they were sold at a rate of interest usurious both in New York and in Massachusetts. In a suit on these bills of exchange Demond interposed the defense that they were made in and governed by the laws of the state of New York and were usurious and void. The court sustained this defense, saying: "The fact that the bills now in suit were accepted in Boston and were payable there does not exempt them from this

operation of the laws of New York. They were mere 'nude pacts,' with no legal validity or force as contracts until a consideration was paid. The only consideration ever paid was the usurious loan made by these plaintiffs in New York. That, then, was the legal inception of the alleged contracts."

In *Milliken v. Pratt*, 125 Mass., 374, it was held: "A contract of guaranty signed in this commonwealth and sent by mail to another state, and assented to and acted on there, for the price of goods sold there, is made in the latter state."

In *McIntyre v. Parks*, 3 Met. [Mass.], 207, it was held: "Where a proposal to purchase goods is made by letter sent to another state and is there assented to, the contract of sale is made in that state."

In *Gay v. Rainey*, 89 Ill., 221, a note was executed by parties in Illinois and sent to the payee in Louisiana, where he indorsed the same and returned it by mail to the makers to be negotiated by them for their accommodation. The makers negotiated and delivered the note in Illinois. It was held that the contract of indorsement, though written in Louisiana, was made in Illinois and made at the time of the delivery of the note when negotiated by the makers. In this case it was further held that the place where a contract is made depends not upon the place where it is actually written, signed, or dated, but upon the place where it is delivered as consummating the bargain. To the same effect see *Buchanan v. Drovers Nat. Bank of Chicago*, 55 Fed. Rep., 223; *Western Transportation & Coal Co. v. Kilderhouse*, 87 N. Y., 430; *Merchant v. Chapman*, 4 Allen [Mass.], 362; *Sands v. Smith*, 1 Neb., 108; *Hosford v. Nichols*, 1 Paige Ch. [N. Y.], 220.

Applying these authorities to the facts of the case at bar, we reach the conclusion that the contract existing between Zediker and Bascom, out of which the suit in controversy grew, was made in, and is to be governed by the laws of, the state of Nebraska, and not the state of New York. A contract is made when it is finished, com-

pleted, consummated. In the case at bar the loan of Bascom to Zediker was not completed until the money was paid over to him by the cashier of the First National Bank at Franklin. By agreement between the parties Bascom was to remit, and did remit, the money to the cashier of the First National Bank of Franklin. He was to pay over the money to Zediker on the latter's delivering to him for Bascom certain of the capital stock of the bank. The contract, then, between Bascom and Zediker was consummated in Franklin, Nebraska, when the $10,000 of stock was delivered to the cashier and the $9,900 money paid over by him to Zediker. The decree of the district court is right and is

AFFIRMED.

MARY FITZGERALD, ADMINISTRATRIX, APPELLANT, V. FITZGERALD & MALLORY CONSTRUCTION COMPANY, APPELLEE.

FILED MAY 6, 1896. No. 5309.

1. **Reference.** Evidence examined, and *held* to sustain the findings of the referee, and his report confirmed.
2. **Probate Courts: JUDGMENTS: REVIEW.** The supreme court has no original probate jurisdiction, and where a county court makes an order in reference to the disposition of the assets of a decedent's estate, having at the time jurisdiction of the subject-matter and the parties, this court will not pass upon the validity of such order unless presented for review by a direct proceeding.

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

Heard on motion to confirm report of referee and on objections to confirmation. *Report confirmed.*

William S. Poppleton, for the objections.

J. W. Deweese, *F. M. Hall*, and *John H. Ames*, *contra*.

RAGAN, C.

In the district court of Lancaster county John Fitzgerald, in behalf of himself and all other stockholders of the Fitzgerald & Mallory Construction Company, sued the Missouri Pacific Railway Company in equity for an accounting. The decree of the district court was brought here on appeal, and this court rendered a decree in favor of the construction company and against the railway company for a large sum of money. (See *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 44 Neb., 463.) A receiver was then appointed by this court for the construction company to collect the judgment and pay it out in accordance with the further orders of the court. Subsequently the railway company paid this judgment in full to the receiver, and the latter, under the directions of the court, paid out all of said judgment except the sum of $70,000. A number of persons filed in this court, in this case, claims against the construction company, and sought to have said claims paid out of said sum remaining in the hands of the receiver. The court appointed a referee to take the evidence and to report his conclusions of law and fact as to the disposition to be made of said sum. The referee has taken the evidence and filed his report, and the matter now before us is on the motion to confirm this report and certain objections made thereto by certain claimants of a part of said fund. It appears from the evidence in the record that prior to the rendition of the decree in favor of the construction company against the railway company, John Fitzgerald in his own behalf had obtained a judgment for a large sum of money against the construction company; that he had caused the Missouri Pacific Railway Company to be garnished as a debtor of the construction company; that no part of the judgment recovered against the construction company by Fitzgerald has ever been paid; that Fitzgerald died intestate before the rendition of the decree of this court in favor of the construction company and

against the railway company, and that his widow, Mary, was by the county court of Lancaster county duly appointed his administratrix; that the county court of Lancaster county, on the petition of the administratrix therefor, made an order licensing and authorizing her to sell and dispose of, at private sale and at the best market price obtainable, such personal property of the John Fitzgerald estate as might be necessary for the protection of said estate; that the administratrix thereupon sold the judgment obtained by John Fitzgerald against the construction company to the First National Bank of Lincoln, and as such administratrix duly assigned to said bank all the right, title, and interest of the Fitzgerald estate in and to said judgment. The administratrix reported this sale to the probate court and the probate court confirmed it. It further appears that the members of the late firm of Marquett, Deweese & Hall were the counsel and attorneys of John Fitzgerald in the litigation between him and the construction company; that they performed all the legal services for Fitzgerald in that litigation and obtained that judgment; that Mr. Marquett, of that firm, subsequently died, and that Deweese & Hall, the firm's successors, filed a claim or lien for attorneys' fees against the judgment. The referee found and reported, in effect, that the fund in controversy should be applied to the payment of the judgment obtained by John Fitzgerald against the construction company; that the First National Bank of Lincoln was the owner of that judgment and therefore entitled to the fund, subject only to the attorneys' lien of Deweese & Hall thereon for the sum of $10,000. The referee found adversely to all other claimants of said fund. Two parties only have filed objections to this report. These are Messrs. J. M. Woolworth and S. H. Mallory. Mr. Woolworth claimed that he had performed certain professional legal services for Mrs. Fitzgerald, administratrix, at her request, and that he had performed certain legal services for Messrs. Deweese & Hall at their request, all

said professional services having been rendered in the litigation between the construction company and the railway company. Mr. Mallory's claim is based upon certain promissory notes executed and delivered to him by John Fitzgerald. Mallory alleges that the consideration of these notes was certain claims which he held against the construction company and which he assigned to Fitzgerald, the latter agreeing that he would pay the notes out of whatever judgment he might finally obtain against the construction company.

As already stated, the referee found adversely to the claims of both Mr. Woolworth and Mr. Mallory, and no objection is made here by them, or either of them, that the findings of the referee are not supported by the evidence. Their sole contention is that the order of the county court of Lancaster county authorizing the administratrix to sell at private sale the personal property of her intestate, and the order of the county court confirming the sale by the administratrix of the judgment owned by Fitzgerald against the construction company were all without jurisdiction and absolutely void, and that therefore the judgment of Fitzgerald against the construction company still belongs to the Fitzgerald estate, is an asset thereof, and this court has no jurisdiction except to direct the receiver to pay the fund in controversy to the administratrix. We do not determine whether the orders made by the county court were interlocutory or final, nor whether such orders were erroneous, but they certainly were not void, as the county court is by the constitution and laws of the state given exclusive original jurisdiction of all matters relating to settlement of the estates of decedents; and the county court had jurisdiction of the subject-matter and of the parties to the proceeding in which the orders complained of were made; and we answer the objection of counsel by simply saying that these orders made by the probate court are not before us for review.

Messrs. Woolworth and Mallory both claim in their

petitions here to be creditors of John Fitzgerald, deceased. This estate is being settled up by and under the direction of the probate court of Lancaster county, and to that tribunal, and not to this court, the creditors of the estate of John Fitzgerald must first address their complaints as to the action of that court and the administratrix as to the disposition of the assets of that estate.

M. S. Carter & Co. have also made application for leave to file a claim which they hold against the construction company and have the same paid out of the fund in the receiver's hands. The application discloses that on the 9th of July, 1888, the construction company, by its auditor, drew a draft on the construction company for $1,407.40, payable four months after date, and this draft was on the same day accepted by the construction company. To the filing of this application of Carter & Co. the receiver objects on the ground that the claim is barred by the statute of limitations. The objection is well taken. It was said in oral argument at the bar that certain payments had been made upon this draft or acceptance which took it out of the statute of limitations, but this, if true, does not appear from the record before us. A copy of the acceptance is set out in the application and in the petition made a part of the application, and it is recited that there remains due on the acceptance from the construction company $900, but there is no statement in the application or petition accompanying it as to when, if ever, any payments were made upon this acceptance. The application for leave to file the claim against the construction company is therefore denied.

All objections made to the report of the referee are overruled and the report is in all things confirmed, and a decree will be entered accordingly.

JUDGMENT ACCORDINGLY.

J. E. COBBEY V. ELMER BUCHANAN.

FILED MAY 6, 1896. No. 6603.

1. **Review**: ISSUES IN APPELLATE COURT. It is the settled law of this state that a cause is to be tried in the appellate court upon the same issues that were presented in the court from which the appeal was taken, with the exception of new matter arising after the first trial. *Darner v. Daggett*, 35 Neb., 695, followed.

2. **Infants**: ESTOPPEL. Generally, the doctrine of estoppel *in pais* is not applicable to infants.

3. ———: ———: PLEADING. For a representation made by an infant as to his being of age to estop him from asserting infancy as a defense the representation must have been fraudulently made by the infant and believed in, relied on, and acted upon by the other party, and the facts claimed to constitute such an estoppel must be pleaded.

4. ———: NECESSARIES. Necessaries for which an infant is liable are such things as are necessary to his support, use, and comfort comporting with his condition and circumstances in life. *Price v. Sanders*, 60 Ind., 310, followed.

5. ———: ———. The meaning of the term "necessaries" cannot be defined by a general rule applicable to all cases; the question is a mixed one of law and fact to be determined in each case from the particular facts and circumstances of such case. *Englebert v. Troxell*, 40 Neb., 195, followed.

6. ———: ———: ATTORNEY'S FEES. At the request of an infant an attorney examined the public records and advised the infant as to his rights to certain property inherited from his deceased father. *Held*, That the services rendered by the attorney were not necessaries.

7. ———: ———: ———. An infant was by a judgment of court duly committed to the reform school. Before his term expired he was released on parole during good behavior. He violated his parole and was taken into custody by the sheriff for the purpose of being returned to the reform school. He then employed an attorney, who sued out a writ of *habeas corpus* and tested the sheriff's authority to return him to the reform school. *Held*, In a suit by the attorney against the infant for services rendered him in the *habeas corpus* case, that the court did not err in submitting to the jury the question as to whether the services rendered by the attorney were necessaries.

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

The facts are stated by the commissioner.

Rickards & Prout and *J. E. Cobbey*, for plaintiff in error:

A defendant must plead his infancy. (*Schermerhorn v. Jenkins*, 7 Johns. [N. Y.], 373; *Roe v. Angevine*, 7 Hun [N. Y.], 679; *Bryant v. Pottinger*, 6 Bush [Ky.], 473; *Clemson v. Bush*, 3 Binn. [Pa.], 413; *Campbell v. Wilson*, 23 Tex., 252; *Sliver v. Shelback*, 1 Dall. [U. S.], 165.)

The burden of proof is upon the person under disability to make out the defense. (*Roberts v. Bethell*, 12 C. B. [Eng.], 778; *State v. Arnold*, 13 Ired. Law [N. Car.], 184.)

References relating to question as to "necessaries:" *Price v. Sanders*, 60 Ind., 310; *Breed v. Judd*, 1 Gray [Mass.], 458; *Thrall v. Wright*, 38 Vt., 494; *Munson v. Washband*, 31 Conn., 303; *Warden v. Heiden*, 28 Wis., 517; *Morris v. Palmer*, 39 N. H., 123; *Shepherd v. Mackoul*, 3 Camp. [Eng.], 326; *Clarke v. Leslie*, 5 Esp. [Eng.], 28; *McCrillis v. Bartlett*, 8 N. H., 569; *Askey v. Williams*, 11 S. W. Rep. [Tex.], 1101; *Barker v. Hibbard*, 54 N. H., 539; *Epperson v. Nugent*, 57 Miss., 45; *Decell v. Lewenthal*, 57 Miss., 331; *Stanton v. Willson*, 3 Day [Conn.], 37; *Peters v. Fleming*, 6 M. & W. [Eng.], 42; *Ryder v. Wombwell*, L. R., 4 Exch. [Eng.], 32.

L. M. Pemberton, contra:

Professional services of an attorney are not necessaries for which the infant is liable. (*Tupper v. Cadwell*, 12 Met. [Mass.], 559; *Mathes v. Dobschuetz*, 72 Ill., 438; *West v. Gregg*, 1 Grant [Pa.], 53; *Wallis v. Bardwell*, 126 Mass., 366; *Freeman v. Bridger*, 4 Jones Law [N. Car.], 1; *Phelps v. Worcester*, 11 N. H., 51; *New Hampshire Mutual Fire Ins. Co. v. Noyes*, 32 N. H., 345; *Buchanan v. Mallalieu*, 25 Neb., 201.)

RAGAN, C.

Before the county judge of Gage county, sitting as a justice of the peace, J. E. Cobbey sued Elmer Buchanan to recover for certain professional legal services which he alleged he had rendered Buchanan at his request, of the reasonable value of $50. An appeal was taken to the district court from the judgment of the county judge, where the case was again tried, resulting in a judgment of dismissal of Cobbey's action, to reverse which he prosecutes to this court a petition in error.

1. The answer filed by Buchanan in the district court, so far as material here, interposed two defenses: (1) A general denial, and (2) a plea of infancy. Cobbey filed a motion in the district court to strike from the answer of Buchanan the defense of infancy, and the overruling of this motion is the first assignment of error argued here. It is insisted that the defense of infancy was not interposed before the county judge and could not, therefore, be interposed in the district court. It is the settled law of this state that a cause is to be tried in the appellate court upon the same issues that were presented in the court from which the appeal was taken, with the exception of new matter arising after the first trial. (*Darner v. Daggett*, 35 Neb., 695, and cases there cited.) But in the case at bar Buchanan filed no answer or "bill of particulars," as it is called in section 951 of the Code of Civil Procedure, before the county judge; and, so far as the record shows, Cobbey did not require that he should file one. Buchanan, then, before the county judge, was at liberty to interpose any defense he saw fit, and for anything we know, did interpose before the county judge the defense of infancy. There was nothing in the record transmitted from the county judge to the district court to advise the latter as to what issues were tried before the county judge, and therefore the district court did not err in overruling the motion of Cobbey to strike out the defense of infancy set up by Buchanan in his answer filed in the district court.

2. The second assignment of error argued is that the district court erred in refusing to give to the jury the following instruction: "The jury are instructed that if you believe from the evidence that the defendant employed the plaintiff to perform the services for which this action is brought, and at the same time represented to the plaintiff that he had arrived at the age of twenty-one years, then you are instructed that you may consider such statements, and such declaration may be considered by you in determining his age at the time such employment was made." The court did not err in refusing to give this instruction. (1.) The instruction was asked upon the ground that if Buchanan had represented himself to be of age, such representation on his part estopped him from asserting the defense of infancy. This is not the law. As a general rule, the doctrine of estoppel *in pais* is not applicable to infants. (*Wieland v. Kobick*, 110 Ill., 16; *Schnell v. City of Chicago*, 38 Ill., 383.) In *Sims v. Everhardt*, 102 U. S., 300, the supreme court said: "The question is whether acts and declarations of an infant during infancy can estop him from asserting the invalidity of his deed after he has attained his majority. In regard to this there can be no doubt founded either upon reason or authority. Without spending time to look at the reason, the authorities are all one way. An estoppel *in pais* is not applicable to infants, and a fraudulent representation of capacity cannot be an equivalent for actual capacity. * * * An assertion of an estoppel against him is but a claim that he has assented or contracted. But he can no more do that effectively than he can make the contract alleged to be confirmed." In *Brown v. McCune*, 5 Sandf. [N. Y.], 224, it was said: "We are not aware that any case has gone the length of holding a party estopped by anything he has said or done while he is under age; and we think it would be repugnant to the principle upon which the law protects infants from civil liabilities in general. * * * We are clear that the doctrine of estoppel is inapplicable to infants."

We are aware that there are cases holding a party estopped from asserting the defense of infancy when he had procured some advantage, benefit, or property by fraudulently representing himself to be of age, and where the other party had believed in, relied on, and acted upon such false representations. Such are, among others, *Campbell v. Ridgley*, 13 Vict., L. R. [Aus.], 701; *Overton v. Banister*, 3 Hare [Eng.], 503; *Hayes v. Parker*, 41 N. J. Eq., 630; *Schmitheimer v. Eiseman*, 7 Bush [Ky.], 298. But in all those cases the representation made by the infant as to his age was fraudulently made, believed in, relied on, and acted upon by the other party. And in order for the representation made by an infant as to his being of age to estop him from asserting infancy as a defense, the representation must have been fraudulently made by the infant, believed in, relied on, and acted upon by the other party. (*Baker v. Stone*, 136 Mass., 405.) And furthermore, such an estoppel must be pleaded. In the case at bar the reply of Cobbey to Buchanan's answer was a general denial, and there is no evidence whatever in the record that when Buchanan represented to Cobbey that he was of age, that Cobbey believed such representation, or relied on or acted upon it; in fact all the evidence shows that Cobbey was fully aware of the fact that Buchanan was a minor. (2.) If the object of the instruction was to have the jury take into consideration Buchanan's representation that he was a minor, and consider that statement for the purpose of determining whether or not he was a minor at the time of his alleged employment of Cobbey, then the instruction was inapplicable, as there was no attempt made by any one on the trial to show that Buchanan was in fact of age at the time of his alleged employment of Cobbey, or that Cobbey did not know he was a minor.

3. The plaintiff in error requested the district court to instruct the jury as follows: "The jury are instructed that even if they find from the evidence that Elmer Buchanan, at the time of his contracting the debt sued

on, was under guardianship, still this is no defense to this action." The court added the following: "Provided, if you further find such services necessaries," and as thus changed gave the instruction. The third assignment of error argued relates to the modification made to the instruction by the district court. It appears that Buchanan's father had died intestate, leaving a large amount of property. Cobbey alleged that Buchanan had requested him to examine the records and advise him as to what property he was heir to, and his rights with reference to the property inherited from his deceased father, and that he did so. The performance of these services for Buchanan is a part of Cobbey's claim in this suit. The court would have erred had he given the instruction without the modification complained of. For if Buchanan was a minor under guardianship, he was not liable to Cobbey for anything done or furnished by him except such things were necessaries; and necessaries for which an infant is liable are such things as are necessary to his support, use, and comfort, comporting with his condition and circumstances in life. (*Price v. Sanders*, 60 Ind., 310.) The court should have told the jury that if Cobbey investigated the title and interest which Buchanan had in the property of his deceased father, such services were not necessaries. It also appears that Buchanan had, by a court of competent jurisdiction, been duly committed to the reform school, there to remain until he attained his majority (see *Buchanan v. Mallalieu*, 25 Neb., 201); that before his term expired he was released on parole during his good behavior; that he violated his parole, and the authorities of the reform school ordered him returned thereto, and while in the custody of the sheriff for that purpose Cobbey sued out on behalf of Buchanan a writ of *habeas corpus*, and the remainder of the claim of Cobbey against Buchanan in this suit is for services rendered him in this *habeas corpus* proceeding. By the modification complained of the district court submitted to the jury the question whether or

not the services rendered by Cobbey to Buchanan in the *habeas corpus* proceeding were necessaries. The argument here is that whether these services were necessaries was a question of law and not of fact. In *Englebert v. Troxell*, 40 Neb., 195, this court said: "The meaning of the term 'necessaries' cannot be defined by a general rule applicable to all cases; the question is a mixed one of law and fact, to be determined in each case from the particular facts and circumstances in such case." We cannot say that the court erred in submitting to the jury the question as to whether the services rendered by Cobbey in the *habeas corpus* proceeding were necessaries. The judgment of the district court is right and is

AFFIRMED.

ELIZABETH MACK ET AL. V. DRUMMOND TOBACCO COMPANY.

FILED MAY 6, 1896. No. 6530.

Sales: CONSTRUCTION OF CONTRACT: AGENCY. An agreement between a manufacturing company and a merchant provided: (*a.*) That the merchant was thereby appointed agent of the manufacturing company to sell its tobacco at such prices as it might direct. (*b.*) The merchant was to be paid a certain commission on all sales made if he sold the tobacco furnished at the price fixed by the manufacturer. If he sold it for less he was to have no commission. (*c.*) The merchant guarantied the payment of all tobacco shipped him by the manufacturer. (*d.*) The merchant was to execute and deliver his promissory notes, due in sixty days, for all tobacco furnished him by the manufacturer. *Held*, (1) Not a contract of agency for the sale of the manufacturer's goods by the merchant on commission, but a contract of sale; (2) that tobacco furnished the merchant under this contract, upon his giving his notes therefor, became his property.

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

Thomas D. Crane and *Duffie, Crane & Van Dusen*, for plaintiffs in error.

G. W. Shields and *Curtis & Shields, contra.*

RAGAN, C.

In August, 1889, G. H. Mack & Co. were tobacco dealers in the city of Omaha, Nebraska, and the Drummond Tobacco Company were tobacco dealers in the city of St. Louis, Missouri. On said date said parties entered into an agreement, in words and figures as follows:

"*G. H. Mack & Co., Omaha, Nebraska:* We hereby appoint you our agent to sell our tobacco at such prices as we may require and direct by our price cards as issued from time to time. Your compensation, until changed by us, inclusive of insurance and all other expenses, will be six cents per pound on sales of Natural Leaf and Five A, and three cents per pound on sales of Horseshoe, J. T., and all other of our brands, provided you have not sold or otherwise parted with our tobacco at less than our prices; but your compensation may be increased at any time by us, and will always be uniform to our agents. In consideration of the above compensation you must warrant that every shipment made to you will be paid for. To make good your above warranty, we require you to send us your sixty-day note or acceptance for the amount of each invoice shipped to you, but if you are willing to make us advances in cash of the amount of any shipment, we will allow you, if remitted within ten days after shipment, two per cent for such cash as additional compensation, the advances to be entirely at the risk of your reimbursing yourselves out of the goods so shipped —you to insure all goods shipped in order to protect your above warranty or any cash advances made. We will settle with you every sixty days, but we will not pay you any compensation if you sell our goods at less

than our prices. We reserve the right to terminate this agency at any time at our option.

"DRUMMOND TOBACCO CO.,
"Per JOHN N. DRUMMOND, *Vice Pres.*

"The above terms for the sale of Drummond Tobacco Company's goods are accepted.

"G. H. MACK & CO.

"Omaha, August 9, '89."

In accordance with the provisions of this contract the Drummond Tobacco Company shipped a quantity of tobacco to Mack & Co., and the latter executed and delivered their promissory notes, due in sixty days, to the tobacco company for the amount of the goods shipped. Mack & Co. pledged their tobacco stock, including certain tobacco which they had received under the contract above mentioned from the Drummond Tobacco Company, to certain of their creditors by chattel mortgages. The creditors took possession of the property pledged, and the Drummond Tobacco Company brought this, an action in replevin, against the mortgagees to recover the tobacco which it had shipped to Mack & Co. under the contract quoted above. The tobacco company had a verdict and judgment, and the mortgagees have prosecuted to this court a petition in error.

That the mortgages executed by Mack & Co. were made in good faith to secure debts owing by them to the several mortgagees is not a disputed question in this case. There are several assignments of error argued in the brief of counsel for the plaintiffs in error, but as we have reached the conclusion that the judgment under review is not supported by any evidence and is contrary to the law of the case, these errors will not be specifically considered. The sole question in the case is whether Mack & Co. were the owners of the tobacco received from the Drummond Tobacco Company under the contract quoted above and mortgaged to the plaintiffs in error, or whether such tobacco was the property of the Drummond Tobacco Company and was held by Mack & Co. as agents.

In *Fish v. Benedict*, 74 N. Y., 613, one Norton had given a written order to Fish Bros. for certain farm wagons at a certain price per wagon. The order further provided that Norton should pay for all wagons shipped him by Fish Bros. as soon as sold, and if sold on time he would indorse and forward the notes, with interest, and keep the wagons received under cover and insured, and that if any wagons remained unsold for twelve months after their receipt he would pay for the same. It was insisted that this order made Norton agent of Fish Bros. for the sale of the wagons shipped to him under such order, but the court of appeals held: "That the paper was an order for a purchase by the Nortons, and a sale by the plaintiffs, and was not a creation of an agency to sell on commission; that the title to the wagons was transferred to the Nortons and plaintiffs [Fish Bros.] had no title or right of possession; and that the question as to the interpretation of the instrument was one of law only."

In *Kellam v. Brown*, 17 S. E. Rep. [N. Car.], 416, the contract provided: (1.) That Kellam would not sell his goods to another merchant in the town where Brown was in business. (2.) In consideration of this agreement on Kellam's part Brown agreed not to sell any spectacles or eye-glasses except the "Perfected Crystal Lenses" and other goods manufactured by Kellam. (3.) Brown agreed to keep on hand $100 worth of such spectacles and eye-glasses. (4.) Brown agreed not to sell the spectacles at less than a price established by Kellam. (5.) By the contract first signed Brown ordered $100 worth of Kellam's goods. One-fifth of this amount was to be paid August 1, 1891, and a like sum on the first day of each month thereafter until full payment of the $100. (6.) All future goods ordered by Brown under the contract were to be paid for in sixty days from date of their receipt. It was insisted that this contract or agreement between Kellam and Brown was one of agency; that Brown was the agent of Kellam and that the goods shipped to Brown under the contract by Kellam remained the property of

Kellam, but the supreme court of North Carolina held: "The agreement between the parties is not such, as is contended by defendant, that it would constitute the defendant a factor or commission merchant,—the agent of the plaintiffs for the sale of the goods mentioned,—but clearly contemplates a sale."

In *Aspinwall Mfg. Co. v. Johnson*, 56 N. W. Rep. [Mich.], 932, the agreement recited: (1.) That the manufacturing company had appointed Johnson agent for the sale of a potato planter in certain territory. (2.) Johnson hereby orders of the manufacturing company one Aspinwall Potato Planter, $65, to be paid for in four months after May 1, 1891. (3.) Johnson agreed to give his notes for all goods shipped to him under the contract by the manufacturing company when requested by it. The supreme court of Michigan, in construing this contract, said: "The order of the goods payable in four months after May 1, 1891, with the promise to give a note whenever requested, makes this a contract of purchase. The fact that the contract contains other undertakings does not change the character of this. The defendant secured to himself the right to sell these goods and to purchase at certain prices. In consideration he agreed to make an effort to sell the plaintiff's machines, but it requires the defendant to become the purchaser of such goods as he orders."

In *Peoria Mfg. Co. v. Lyons*, 38 N. E. Rep. [Ill.], 661, the contract between the manufacturing company and Lyons recited: (1.) The manufacturing company agreed to deliver to Lyons such farm wagons, plows, and buggies as he might order on commission for the manufacturing company. (2.) Lyons agreed to sell the goods received at retail prices, the difference between which and the manufacturer's price was to constitute his compensation or commission for making the sale. (3.) In case Lyons sold the wagons on credit and took notes for them, he must guaranty the notes and turn them over to the manufacturing company, and if said notes were not paid at

maturity Lyons was to pay them. (4.) If Lyons sold the goods for cash he was to remit the cash to the manufacturing company. (5.) Lyons was to give the manufacturing company his notes for the invoice price of all the goods shipped to him when the goods were received, and any cash or notes remitted by Lyons to the manufacturing company as the proceeds of the sale of wagons were to be applied upon the notes which Lyons had given to the manufacturing company for the goods shipped him. The supreme court of Illinois, in construing this contract, held that goods shipped by the manufacturing company to Lyons in pursuance of this contract were sold to Lyons; that he did not hold such goods as the agent of the manufacturing company. To the same effect see *Braunn v. Keally*, 146 Pa. St., 519.

Construing the contract between the Drummond Tobacco Company and Mack & Co. in the light of these authorities, we reach the conclusion that Mack & Co. were not the agents of the Drummond Tobacco Company, and that the tobacco shipped by the Drummond Tobacco Company to Mack & Co. in pursuance of the terms of this contract was sold by the tobacco company to Mack & Co., and became, on its acceptance and the giving of the notes for its price, the latter's property. It is true the contract under consideration recites that the Drummond Tobacco Company does hereby appoint Mack & Co. its agent to sell its tobacco, but this language is not controlling. Not only were Mack & Co. required by the agreement to guaranty the payment of the price of all tobacco shipped them by the tobacco company, but in addition to that, on the receipt of a bill of goods they were required to execute to the tobacco company their notes for the amount of the goods shipped, due in sixty days. If this did not constitute a sale, it is difficult to understand what would constitute one. We have not overlooked the case of the *National Cordage Co. v. Sims*, 44 Neb., 148, but the contract construed in that case was very different from the one under consideration here,

and the conclusion reached here does not in any manner conflict with the decision in the case last referred to. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

IRENE MOFFITT V. JAMES W. CARR.

FILED MAY 6, 1896. NO. 6599.

1. **Payment.** Part payment, within the meaning of section 22 of the Code of Civil Procedure, is a voluntary payment made by the debtor himself or by someone authorized by him to make such payment.
2. **Statute of Limitations: PAYMENT.** A payment made on a debtor's note by the sale of his property on execution, or other legal process, is not such part payment by the debtor as is declared by said section 22 of the Code to have the effect of arresting the running of the statute of limitations.
3. ———: ———. If the trustee, in a deed of trust containing a power of sale, sells the mortgaged premises and pays the proceeds to the holder of the note secured by the trust deed, and the latter indorses such proceeds on the note, this is not such part payment on the note as will take it out of the operation of the statute of limitations as to the mortgagor. *Campbell v. Baldwin*, 130 Mass., 199, followed.

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

The opinion contains a statement of the case.

Tiffany & Vinsonhaler, for plaintiff in error:

The trustee's indorsement of a payment did not take the note out of the operation of the statute of limitations. (*Clarke v. Chambers*, 17 Neb., 90; *Marienthal v. Mosler*, 16 O. St., 566; *Sornberger v. Lee*, 14 Neb., 193; *Letson v. Kenyon*, 31 Kan., 301; *Barger v. Durvin*, 22 Barb. [N. Y.], 68; *National State Bank v. Rowland*, 29 Pac. Rep. [Colo.],

465; *Whipple v. Blackington*, 97 Mass., 476; *Bender v. Markle*, 37 Mo. App., 234; *Porter v. Blood*, 5 Pick. [Mass.], 53; *Taylor v. Foster*, 132 Mass., 30; *Haven v. Hathaway*, 20 Me., 345.)

Otis H. Ballou and *James W. Carr*, *contra*.

References: *Stoddard v. Doane*, 7 Gray [Mass.], 387; *Pickett v. King*, 34 Barb. [N. Y.], 193; *Roosevelt v. Mark*, 6 Johns. Ch. [N. Y.], 266; *Winchell v. Hicks*, 18 N. Y., 567; *Mayberry v. Willoughby*, 5 Neb., 370; *Nelson v. Becker*, 32 Neb., 99; *Leach v. Asher*, 20 Mo. App., 656; *Goodfellow v. Stillwell*, 73 Mo., 17; *Marx v. Kilpatrick*, 25 Neb., 107; *Hower v. Aultman*, 27 Neb., 251; *Helper v. Davis*, 32 Neb., 556.

RAGAN, C.

In the state of Missouri, on the 26th of February, 1883, James W. Carr executed and delivered his certain promissory note to one Irene Moffitt, and to secure the payment of said note he executed a trust deed on certain real estate in Missouri to one George S. Baker as trustee. The trust deed provided that in case Carr should fail to pay his note according to its tenor, that upon the request of the holder of said note the trustee, or, in case of his absence, death, refusal to act, or disability in anywise, the then sheriff of Worth county, Missouri, should proceed to advertise the property for thirty days and sell it at public vendue and apply the proceeds of the sale towards the payment of the note. The note made by Carr matured on the 26th of February, 1886, and no part of the principal or interest of the note was ever paid by him afterwards. On the 16th day of October, 1886, the sheriff of Worth county, after having duly advertised the real estate conveyed by the trust deed, sold it at public vendue and paid the proceeds of the sale to the holder of the note, who indorsed the amount of the said proceeds thereon. Irene Moffitt brought this suit in the district court of Douglas county against Carr to recover

the amount of money remaining due on said note. Carr pleaded that he was, and had been for more than five years prior to the bringing of the suit, a resident and citizen of the state of Nebraska; that the cause of action on the note accrued more than five years before suit brought, and interposed and invoked the statute of limitations as a defense to the action. Moffitt replied that Carr had made a payment on the note within five years before suit brought. The payment referred to in the reply was the indorsement on the note of the proceeds of the sale of the real estate conveyed by the trust deed, which was sold on the 16th of October, 1886, as already stated. The jury, in obedience to an instruction of the district court, returned a verdict in favor of Carr, on which a judgment dismissing Moffitt's action was rendered, and she prosecutes here a petition in error.

Section 10 of the Code of Civil Procedure provides that an action on a contract or promise in writing must be brought within five years, and section 22 of the Code provides: "In any cause founded on contract, when any part of the principal or interest shall have been paid, * * * an action may be brought in such case within the period prescribed for the same after such payment," etc. The present suit was brought on the 15th of October, 1891, or more than five years after the maturity of the note, and the defense of the statute of limitations is good, unless the credit of the proceeds of the sale of the lands conveyed by the trust deed, made on the note by the holder thereof on the 16th of October, 1886, was a payment on the note within the meaning of said section 22 of the Code of Civil Procedure. The sole question presented, then, is, Did the sale of the lands conveyed by the trust deed, the payment of proceeds of said sale to the holder of the note, and her crediting said note with said proceeds of the sale on the date thereof, amount to a payment on the note within the meaning of said section 22 of the Code of Civil Procedure?

In *Sornberger v. Lee*, 14 Neb., 193, this court held: "The

receipt and indorsement on a promissory note by the holder of money realized from a collateral left with him by the maker for that purpose will remove the bar of the statute." We have not the slightest doubt of the correctness of that holding; but the decision rests upon the correct principle that the debtor, by delivering to his creditor collateral notes, authorizing him to collect them and indorse the amount of the proceeds on the original note, thereby constituted the holder of the note his agent, and everything that the holder did in the premises was, in effect, the act of the maker of the note. In other words, the transaction amounted to a voluntary payment on the note by the maker. To the same effect is *National State Bank of Boulder v. Rowland*, 29 Pac. Rep. [Colo.], 465.

In *Whitney v. Chambers*, 17 Neb., 90, this court held: "The payment of a dividend by the assignee of an insolvent debtor is not such a part payment as will, under section 22 of the Code, take the residue of the debt out of the statutory limitation as against such debtor." This case is sustained by the great weight of authority, and it was decided and rests upon the principle that the sale of the property of the maker of the note by his assignee, and his application of the proceeds of such sale towards the payment of the note, was not a voluntary payment made on the note by the maker, but was a payment *in invitum*. True, the assignee was in a sense the agent of the maker of the note, but the assignee was nevertheless an agent of the law, one of the instrumentalities provided by the law for disposing of the assets of the insolvent debtor and applying the proceeds thereof towards the payment of his debts. To the same effect are *Roscoe v. Hale*, 7 Gray [Mass.], 274, *Stoddard v. Doane*, 7 Gray [Mass.], 387, *Richardson v. Thomas*, 13 Gray [Mass.], 381, and *Battle v. Battle*, 21 S. E. Rep. [N. Car.], 177.

In *Kallenbach v. Dickinson*, 100 Ill., 427, the supreme court of Illinois held that a payment made by one joint

maker of a promissory note would not arrest the running of the statute of limitations as against the other joint maker. The court said: "In order that Dickinson [one of the joint makers] shall be concluded by the payments of Wenzel [the other joint maker], it must be determined that Wenzel was Dickinson's agent, not only for the purpose of liquidating the note by payment, but also for the purpose of doing what in legal estimation is necessary to make a new promise that will remove the bar of the statute."

In *Hughes v. Boone*, 19 S. E. Rep., 63, the supreme court of North Carolina held: "A partial payment of a judgment made on execution does not interrupt the running of the statute of limitations." To the same effect see *In re Raeder*, 31 Atl. Rep. [Pa.], 929.

The principle upon which the cases last cited rests is that the payments were not voluntary payments made by the debtor, but if they were payments at all they were payments made involuntarily.

In *Harper v. Fairley*, 53 N. Y., 442, the court, in discussing the question under consideration, said: "A part payment, whether made before or after the debt is barred by the statute, does not revive the contract unless made by the debtor himself or by someone having authority to make a new promise on his behalf for the residue."

It is to be observed that section 22 of the Code of Civil Procedure does not say by whom nor under what circumstances a payment must have been made upon a note in order to arrest the running of the statute of limitations, but we think, both upon reason and authority, that part payment, within the meaning of said section of the Code, is a voluntary payment made by the debtor himself or by someone authorized by him to make the payment; and that a payment made on a debtor's note by the sale of his property on execution, or under any legal process whatever, is not such part payment by the debtor as is declared by said section 22 of the Code to have the effect of arresting the running of the statute of limitations.

Had the mortgage made by Carr conveyed lands in the state of Nebraska, had the mortgage been foreclosed, a judicial sale made of the premises, and proceeds of such sale indorsed upon the note in suit, it is quite clear that such indorsement would not have been a part payment on the note within the meaning of the Code, and would not have arrested the running of the statute of limitations; but the trust deed made by Carr conveyed lands in the state of Missouri, and it was competent, under the laws of that state, for a trustee named in the deed of trust, on the request of the holder of the note to secure which the trust deed was given, to advertise the lands for thirty days and sell them to discharge the debt. The trustee, then, in making this sale of these lands in Missouri was as much an instrumentality of the law as would have been the sheriff of this state had the mortgage been made here and the lands sold here at a judicial sale. In other words, Carr has been divested of the title to his property by operation of law, and the indorsement upon the note in suit is not there because of any voluntary payment made by Carr, but there by operation of law.

In *Leach v. Asher*, 20 Mo. App., 656, one division of the court of appeals of the state of Missouri held that part payment by a trustee from the proceeds of a trustee sale of part of a debt secured by the deed of trust did not have the effect of arresting the running of the statute of limitations, while in *Bender v. Markle*, 37 Mo. App., 234, another branch of the court of appeals of Missouri held exactly the reverse. We have not been referred to or been able to find any decision by the supreme court of Missouri upon the question under consideration; but *Campbell v. Baldwin*, 130 Mass., 199, is a case exactly in point, and there the court held: "If the assignee of a mortgage on real estate containing a power of sale sells the mortgaged premises, and after paying the expenses of the sale applies the balance to the mortgage debt, this does not operate as a part payment on the note so as to

take it out of the operation of the statute of limitations as to the mortgagor." In that case, as in the case at bar, the mortgagor had, after mortgaging his real estate, sold and conveyed it to another party, who had assumed and agreed to pay the mortgage. We reach the conclusion, therefore, that crediting the note in suit with the proceeds of the sale of the land conveyed by the trust deed was not a part payment on the note by Carr within the meaning of the statute; that such payment was not a voluntary one on the part of Carr, but one made *in invitum* and by operation of law, and that it did not arrest the running of the statute of limitations. The judgment of the district court is right and is

AFFIRMED.

S. S. BROWN, APPELLANT, V. VALENTINE ULRICH ET AL., APPELLEES.

FILED MAY 6, 1896. No. 6548.

1. **Specific Performance:** CONTRACTS: TIME. Parties to a contract for the sale of land may make time of its essence by a distinct provision to that effect in the contract; and where they have done so, a court of equity will refuse to enforce specific performance in favor of a party who has been in default, unless strict performance has been waived. *Morgan v. Bergen*, 3 Neb., 209, followed.

2. **Vendor and Vendee:** CONTRACTS: SPECIFIC PERFORMANCE. A contract for the sale of land provided that payment should be made by a certain time and that time was of the essence of the contract. Subsequently a further contract was made recognizing the first as abrogated, and providing that a conveyance would be made upon payment of the purchase money, together with certain independent indebtedness by the vendee to the vendor, on or before a certain other date. Time was also made of the essence of this contract. The purchase money not having been tendered by the time fixed, *held*, that equity would not require a conveyance.

3. ———: ———: WAIVER OF STRICT PERFORMANCE. The fact that the vendor had instituted an action to recover the other indebtedness

referred to in the second contract did not constitute a waiver of strict performance; the action not being for any portion of the purchase money of the land.

APPEAL from the district court of Hamilton county. Heard below before BATES, J.

Hainer & Smith, for appellant.

W. H. Thompson and *A. W. Agee, contra.*

IRVINE, C.

This was an action by S. S. Brown, as the vendee under a contract for the sale of land, to enforce the specific performance of that contract. The defendants are Valentine Ulrich and wife, Charles E. Ulrich, and H. S. Brown. The petition alleges that Charles E. Ulrich, April 2, 1886, was the owner of the land in controversy, and on that day he entered into a contract in writing with the plaintiff and H. S. Brown, in the name of H. S. Brown alone, whereby he sold and agreed to convey the land to the plaintiff and H. S. Brown for the sum of $4,800, with interest at eight per cent, payable annually, and the principal to be paid six years from the date of the contract; that H. S. Brown took possession and reduced the land to a good state of cultivation, thereby greatly improving it; that on October 15, 1887, Charles Ulrich and wife, by deed of quitclaim, conveyed to Valentine Ulrich, the latter having full notice of plaintiff's rights; that the plaintiff had paid on the contract $1,100, and that H. S. Brown had transferred by parol to the plaintiff all his right to the land; that Valentine Ulrich had forcibly taken possession of the land, and had been in receipt of the rents and profits thereof; that the plaintiff had tendered the remainder of the purchase money to Valentine Ulrich, who had refused to accept it and to make a conveyance. H. S. Brown disclaimed. The Ulriches, by a joint answer, admitted having made a contract of sale to H. S. Brown, but denied that there

was any contract with the plaintiff; and denied that Valentine Ulrich had any knowledge that plaintiff claimed any interest in the land, and denied the alleged payment. They further averred that on the 23d of September, 1891, there was a full settlement between Valentine Ulrich and H. S. Brown of this and other matters, wherein the contract of sale was recognized as having terminated, but a new contract made, providing that if H. S. Brown should pay the purchase money originally agreed upon, with interest, together with certain other indebtedness, by November 1, 1892, then Ulrich would convey the land to him, or to such person as he might designate, and that Brown had failed to so pay. For reply the plaintiff denied the affirmative allegations of the answer, and alleged that Valentine Ulrich had begun an action against the plaintiff to recover the other indebtedness referred to in the second contract. The court found generally for the defendants and dismissed the case. The plaintiff appeals.

By the express terms of the contract sued on, time was made of its essence. The language is: "It is expressly understood and agreed by and between the parties hereto that time is of the essence of this contract, and that in the event of the non-payment of said sum of money, or any part thereof, or the interest thereon, at the time or times herein named for its payment, that then the said Charles E. Ulrich is absolutely discharged at law and in equity from any and all liabilities to make and execute such deed." By the terms of the contract the whole purchase money was due April 2, 1892. No tender was made until December, 1892. In *Morgan v. Bergen*, 3 Neb., 209, the question being directly involved, the court said: "The parties may make time the essence of the contract; so that if there be a default at the day, without any just excuse and without any waiver afterwards, the court will not interfere to help the party in default." In *Langan v. Thummel*, 24 Neb., 265, the court said that time is of the essence of the contract where the nature of the

contract itself, the property and rights on which it is intended to operate, the length of time which it has to run by its own terms, or the circumstances connected therewith, require that in order to be just and equitable between the parties it must be fulfilled promptly on its terms, and also "where from the terms of the contract itself the parties agree that time shall be of the essence of the contract, either in expressed words or language equivalent, clearly indicating that it was so intended by the party to be charged therewith;" and in that case *Missouri River, F. S. & G. R. Co. v. Brickley*, 21 Kan., 275, was cited with approval, where it was said that "in equity as well as at law, wherever it clearly appears to be the intention of the parties that time should be of the essence of the contract, that essential feature will be upheld." It is true that in *Langan v. Thummel* the court held that the particular words in the contract under consideration did not make time of its essence; but the rule that a distinct provision to that effect controlled the court was distinctly reaffirmed. In *Patterson v. Murphy*, 41 Neb., 818, it was held that a party whose cause of action is founded upon a written contract is limited as to his rights by the terms of such contract, and a recovery contrary thereto cannot be sustained. In that case there was a contract for the sale of land which provided that time should be of its essence, and that in case the vendee failed to make any payment punctually the contract might be declared void without any compensation for money paid or improvements made. The vendee failed to complete the payments, and the contract having been rescinded for that reason, it was held that he could not recover back the money he had already paid.

We are aware that in *Merriam v. Goodlett*, 36 Neb., 384, specific performance was decreed where there had been a default of payment, although the contract expressly provided that time should be of its essence, and it was intimated that notwithstanding that provision time would not be considered essential where the circum-

stances of the transaction did not make it material. We think, in using this language, Chief Justice MAXWELL must have overlooked the case of *Langan v. Thummel*, in which he concurred, as well as that of *Morgan v. Bergen*, in which he wrote the opinion. The question was really not necessary to the decision in *Merriam v. Goodlett*, because there had been a waiver of the condition and the court so held. At any rate, we think that it is established, and rightly established, that the parties are bound by the terms of their contract. The court cannot make and enforce for them another contract in conflict with that which they have made for themselves; and where they distinctly and clearly stipulate that time is essential, the court cannot disregard that provision and enforce the rest of the contract. So far as *Merriam v. Goodlett* is in conflict with these views it is overruled. The original contract was therefore forfeited, or at least the vendee's right to enforce it was lost by his failure to pay or tender the purchase money within the time stipulated. We cannot find that there was any waiver of this requirement. It is true that by the contract of September 23, 1891, it was provided that a deed would be executed on the payment of the money, together with certain other indebtedness to Ulrich from the two Browns, on or before November 1, 1892; but this contract also provided that time should be of its essence, and its language was even more specific and direct in this respect than the original contract. The plaintiff cannot treat this second contract as a waiver of the terms of the first without accepting it in its entirety, and if it be so accepted the right to enforce it was also lost by failure to comply with the terms of payment. Nor did the institution of the action pleaded in the reply operate as a waiver. The money sued for in that action was not the purchase price of the land, but certain other and independent indebtedness, the payment of which by November 1, 1892, had been made one of the conditions of the second contract to convey. It was an existing debt, and Ulrich had a right

to proceed to its collection after default in payment. He was not required to relinquish that debt in order to avoid the contract to convey.

The record presents several other interesting questions; but the decision of those already mentioned requires an affirmance of the decree of the district court and it is unnecessary to consider the others.

JUDGMENT AFFIRMED.

EVA M. PRUGH, APPELLANT, V. PORTSMOUTH SAVINGS BANK ET AL., APPELLEES.

FILED MAY 6, 1896. No. 6550.

1. **Homestead:** PROCEEDS OF SALE. Proceeds of the sale of a homestead are for six months after said sale entitled to the same protection against legal process as the homestead itself; and if during that period such proceeds are invested in a city lot, such lot may be selected as a homestead, although not yet occupied as such.

2. ———: INCUMBRANCES. The amount of an incumbrance is not to be deducted from the $2,000 homestead exemption, but the claimant is entitled to that exemption in excess of such incumbrance. *Hoy v. Anderson*, 39 Neb., 386, followed.

3. **Courts:** JURISDICTION: INJUNCTION. After a federal court has acquired jurisdiction of the parties and subject-matter of a controversy, a state court may not by injunction or otherwise interfere with the exercise of such jurisdiction.

4. ———: ———: ———. Accordingly, as a general rule, a state court will not enjoin parties to an action already in progress in a federal court from further proceeding therein.

5. ———: ———: ———. The exceptions to this rule are based upon the doctrine that in courts of concurrent jurisdiction that which first has obtained jurisdiction of the parties and subject-matter retains it for all purposes, and by all necessary process will protect itself in the exercise of that jurisdiction.

6. ———: ———. The jurisdiction of a court does not cease by the rendition of judgment, but continues for the purpose of enforcing the judgment.

7. Executions: LEVIES. Land levied upon by virtue of a writ of execution is subjected to the process of the court as much as chattels so levied upon.

8. ———: ———: INJUNCTION. A state court having no prior jurisdiction of the subject-matter will not, by injunction, restrain a plaintiff in whose favor judgment has been rendered in a federal court from proceeding to the execution of such judgment. *A fortiori*, it will not restrain a United States marshal from selling property levied upon to satisfy such judgment.

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

Andrew Bevins, for appellant.

John W. Lytle, contra.

IRVINE, C.

This was an action by Eva M. Prugh against the Portsmouth Savings Bank and Brad D. Slaughter, United States marshal for the district of Nebraska, to restrain the defendants from selling certain land under an execution issued from the United States circuit court. The plaintiff is a married woman, and prior to the 23d day of June, 1892, was the owner of a certain lot in the city of Omaha, which was occupied by herself and family as a homestead. On that day she sold this land for $2,500, $1,450 of which was applied to discharge a mortgage on the premises. August 13, 1892, she purchased the lot here in controversy, paying therefor $500 out of the proceeds of the former homestead. August 23, 1892, an execution issued from the United States circuit court on a judgment of the Portsmouth Savings Bank against Mrs. Prugh was, by the defendant Slaughter, the United States marshal, levied on this lot. It was then vacant, but the plaintiff thereafter erected a cottage thereon of the value of about $800, which was occupied by the family as a home. The marshal being about to sell this lot under the execution, this action was brought in the district court of Douglas county to enjoin the plaintiff in

the federal case and the marshal from so proceeding. The district court refused the injunction and dismissed the case, and the plaintiff appeals.

The case was tried under a stipulation of facts substantially as above set forth. Under these facts there can be no doubt that the land in question was exempt as a homestead, from execution and sale in satisfaction of the judgment. Section 16, chapter 36, Compiled Statutes, provides that if the homestead be conveyed the proceeds of the sale, not exceeding the amount of the homestead exemption, shall be entitled for the period of six months thereafter to the same protection against legal process which the law gives to the homestead, and that the sale and disposition of one homestead shall not be held to prevent the selection or purchase of another. It has also been settled that where a homestead has been incumbered, the amount of the incumbrance is not to be deducted from the $2,000 homestead exemption, but that the claimant is entitled to this exemption over and above the incumbrance. (*Hoy v. Anderson*, 39 Neb., 386.) It follows, therefore, that the proceeds of the sale of the former homestead, having been within six months from the sale invested in the premises in controversy, after discharging the mortgage indebtedness, the homestead exemption continued in the present land. An injunction should therefore have been allowed restraining the present sale of the land levied upon, unless the court was without authority to interfere with the proceedings being taken to enforce the judgment of the federal court. (*Quigley v. McEvony*, 41 Neb., 73; *Corey v. Schuster*, 44 Neb., 269.)

We think there can be no doubt that the court was without authority to enjoin the marshal from proceeding. Where goods have been seized by a federal court under a writ of attachment, a claimant of the property may not replevy them from the marshal in the state court. (*Freeman v. Howe*, 24 How. [U. S.], 450; *Covell v. Heyman*, 111 U. S., 176; *Summers v. White*, 71 Fed. Rep.,

106.) It is true that it was held in *Buck v. Colbath*, 3 Wall. [U. S.], 334, that under such circumstances a claimant of the property may maintain trover in a state court against the marshal therefor; but Mr. Justice Miller in the latter case very clearly and satisfactorily distinguishes the two cases as follows: "Whenever property has been seized by an officer of the court, by virtue of its process, the property is to be considered as in the custody of the court, and under its control for the time being; and that no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises. * * * Whenever the litigation is ended, or the possession of the officer or court is discharged, other courts are at liberty to deal with it according to the rights of the parties before them, whether those rights require them to take possession of the property or not. * * * It is obvious that the action of trespass against the marshal in the case before us does not interfere with the principle thus laid down and limited. The federal court could proceed to render its judgment in the attachment suit, could sell and deliver the property attached, and have its execution satisfied without any disturbance of its proceedings, or any contempt of its process, while, at the same time the state court could proceed to determine the questions before it involved in the suit against the marshal without interfering with the possession of the property in dispute." The line is thus very clearly drawn. A state court may not, after a federal court has acquired jurisdiction of property, interfere with the exercise of that jurisdiction; but it may entertain independent actions among the same parties, or other parties, provided they do not interfere with the jurisdiction, custody, or process of the federal court. When land has been levied upon, it is as much in the custody of the court, and under the control of its process, as when personal prop-

erty has been seized on execution or in attachment; and the state court was, therefore, without any authority, by injunction or otherwise, to interfere with the marshal in the execution of the writ. We think a kindred principle forbade enjoining the judgment plaintiff in the federal court from proceeding to enforce his judgment. No general principle is better settled than that a state court may not by injunction restrain proceedings in a federal court. In *Riggs v. Johnson County*, 6 Wall. [U. S.], 166, judgment had been rendered by a federal court against a county upon certain bonds. A state court had perpetually enjoined the officers of the county from levying a tax to pay the same. The supreme court, nevertheless, held that a *mandamus* should issue to compel the officers to levy the tax. (See, also, *United States v. Council of Keokuk*, 6 Wall. [U. S.], 514; *Mayor of City of Davenport v. Lord*, 9 Wall. [U. S.], 409; *Supervisors of Washington County v. Durant*, 9 Wall. [U. S.], 415; *Amy v. Supervisors of Des Moines County*, 11 Wall. [U. S.], 136; *Schuyler v. Pelissier*, 3 Edw. Ch. [N. Y.], 191*; *Coster v. Griswold*, 4 Edw. Ch. [N. Y.], 364; *Chapin v. James*, 11 R. I., 86; *Phelan v. Smith*, 8 Cal., 520.) A reciprocal doctrine applies to the allowance of injunctions by the federal courts, interfering with the process of state courts; and while there is a federal statute applying to this situation, the federal decisions seem to regard this statute as declaratory and simply expressive of a general principle which would be applicable independently thereof. (*Domestic & Foreign Missionary Society v. Hinman*, 13 Fed. Rep., 161.) To the rule as above stated there are limitations and exceptions, but these only emphasize the rule. They rest upon the general doctrine that as between courts of concurrent jurisdiction, that court which first obtains jurisdiction of the subject-matter and parties retains it to the exclusion of other courts. Therefore, a state court, in a proper case, before action begun in a federal court, might undoubtedly prevent the commencement of such an action, and so, too, if a state court has

obtained jurisdiction of the parties and subject-matter and thereafter proceedings are begun in a federal court, the state court, in protection of its own jurisdiction, may enjoin the parties from further proceeding in the federal court (*Akerly v. Vilas*, 15 Wis., 401*; *Home Ins. Co. v. Howell*, 24 N. J. Eq., 238); and *vice versa* (*Garner v. Second Nat. Bank of Providence*, 67 Fed. Rep., 833). There is nothing in the present case, however, to bring it within any of the exceptions. The parties undoubtedly have their remedy in the federal court (*Gumbel v. Pitkin*, 124 U. S., 131), and the state court rightfully refused to interfere with the proceedings there.

It is urged that the sale contemplated was not a judicial sale, that the case had proceeded to judgment, and that the marshal was acting beyond the authority of his writ in levying upon the homestead. To this argument, however, *Riggs v. Johnson County*, *supra*, affords a complete answer. In that case Mr. Justice Clifford said: "Express determination of this court is that the jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until that judgment shall be satisfied. * * * Process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the constitution." It was accordingly held that the jurisdiction obtained by the federal court in the original action continued for the purpose not merely of an execution to enforce the judgment, but for the purpose of an independent action for a *mandamus* to compel the levy of a tax to pay the judgment; and that this jurisdiction was, by virtue of the original action, prior to that of the state court in an injunction case to restrain the enforcement of the judgment, begun before the *mandamus* suit.

JUDGMENT AFFIRMED.

ORRIN A. COOPER ET AL. V. DAVIS MILL COMPANY.

FILED MAY 6, 1896. No. 6572.

1. **Attachment: REDELIVERY BOND: THIRD PERSONS: ESTOPPEL.** Section 206 of the Code of Civil Procedure provides that an officer who has levied a writ of attachment shall deliver the attached property to the person in whose possession it was found, upon his execution, with sureties, of an undertaking that the parties to the same are bound in double the appraised value thereof, that the property or its appraised value in money shall be forthcoming to answer the judgment of the court in the action. A stranger to the attachment suit in whose possession the attached property is found, and who has given such an undertaking, cannot, after judgment and order of sale in the attachment case, be heard to assert, in an action upon the undertaking, that he himself and not the attachment defendant was the owner of the property.

2. ———: ———: ———. In such case a person executing such undertaking is bound by its distinct terms to deliver the property or its appraised value in money to answer the judgment in the attachment case.

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

See opinion for references to authorities.

S. P. Davidson, for plaintiff in error.

Pound & Burr, contra.

IRVINE, C.

The Davis Mill Company began an action in the district court of Lancaster county against Fredericks, Bailey & Co., and in said action caused an attachment to be issued and levied upon certain property, as the property of Fredericks, Bailey & Co., which was in the possession of Cooper at the time of the levy. Thereafter, Cooper, as principal, and John B. Wright, as surety, executed, under section 206 of the Code of Civil Procedure, the following undertaking:

"Whereas, Sam McClay, sheriff of Lancaster county, has, on this 21st day of September, 1891, attached certain goods and chattels in the hands of Orrin Cooper on an attachment issued out of the district court of Lancaster county, in an action pending therein, wherein R. T. Davis Mill Company is plaintiff and Fredericks, Bailey & Co. are defendants, which property is appraised at the sum of $675.65, and which property is now delivered to Orrin Cooper at his request:

"Now we, Orrin Cooper as principal and John B. Wright as surety, do hereby undertake to the plaintiff in the sum of $1,351.20 that said property, to-wit, two hundred sacks of flour, five show cases, and wrapping papers and paper bags, or its appraised value in money, shall be forthcoming to answer the judgment of the district court in the action and perform the judgment of said court, then this obligation to be void, otherwise to remain in full force and effect as provided by statute.

"ORRIN COOPER.
"JOHN B. WRIGHT."

The property was thereupon delivered by the sheriff to Cooper. Judgment having been rendered against Fredericks, Bailey & Co. and an order made for the sale of the attached property, suit was brought upon this bond. Cooper and Wright answered, alleging property in Cooper by virtue of a chattel mortgage antecedent to the attachment, and, a jury having been waived, the court found in favor of the plaintiff for the appraised value of the property. The defendants seek to have the judgment in pursuance of this finding reversed by these proceedings.

The record on its face presents two questions: First—Was the mortgage to Cooper valid as against the creditors of the mortgagor? Second—Can the defendants in this case be heard to set up property in themselves, or in one of them, as against an action upon their bond? The first question we do not find it necessary to consider. It is perhaps somewhat remarkable that the second ques-

tion has never before been presented in such a form as to call forth a distinct decision. In *Hilton v. Ross*, 9 Neb., 406, it was held that the giving of a redelivery bond under section 206 does not preclude the defendant in the attachment case from afterwards moving for a dissolution of the attachment; and this decision was followed in *Wilson v. Shepherd*, 15 Neb., 15. These decisions we have no disposition to question. On the contrary, we think they are entirely right. The undertaking of the defendants was merely that the property or its appraised value in money should be forthcoming to answer the judgment of the court in the attachment case. The defendant did not stipulate that the judgment should be for the plaintiff, or that it should sustain the attachment. He was left at liberty in the attachment case to resist the main action and to resist the attachment itself, and his only obligation was that the property or its value should be forthcoming to answer any judgment which might be rendered. If the attachment should be dissolved on his motion, no judgment could be rendered which the property would be required to answer. In the case now before us the bond was given by a third person, in whose possession the property was found, and the attachment case proceeded to judgment in favor of the plaintiff therein, without dissolving the attachment, but on the contrary, with an order subjecting the attached property to sale in payment of the judgment. In *Cortelyou v. Maben*, 40 Neb., 512, a bond given under the section in question was held not obligatory because the officer had refused to accept it, and it had therefore never become operative; but in the opinion, after referring to cases holding that after such a bond has become operative the obligors cannot urge that the property did not belong to defendant, the court said: "We do not controvert the propositions which the cited cases lay down, but these decisions are not applicable to the facts made by this record." The question before us has never, then, been decided by this court, although the judgment of the

lower court receives some implied support from the *dictum* above quoted, which, however, was carefully guarded to avoid its being considered as an authoritative announcement of the law. Looking elsewhere for light, we are met by a wealth of adjudications; but the cases are so conflicting in their character that from authority alone it would be difficult to reach a conclusion. We shall not attempt a complete review of these cases; nor shall we even attempt a classification which would embrace the whole number, or which pretends to scientific exactness of analysis. A general classification may, however, be made, which we think will aid somewhat, by pursuit of the inductive method, to a solution of the question before us.

The earlier cases, especially in New England, relate not to bonds or to statutory undertakings, but to receipts. In these the receiptor is treated merely as the bailee of the officer holding the writ; and while this principle may not appear very prominently in the opinions as controlling the decision of the court, it is very obvious that in many cases it was the controlling feature. We shall not undertake to separate the cases of receipts from those of bonds or statutory undertakings; but the distinction between these two classes of instruments should be borne in mind in comparing the cases.

There is a class of cases in which it is held that the liability of a receiptor depends upon that of the officer holding the writ; that, therefore, if the goods were not in fact subject to the attachment and passed into the hands of their rightful owner, the officer not being liable to the plaintiff in attachment, the receiptor was not so liable to the officer. (*Jones v. Gilbert*, 13 Conn., 506; *Dayton v. Merritt*, 33 Conn., 184; *Morse v. Hurd*, 17 N. H., 246; *Adams v. Fox*, 17 Vt., 361; *Learned v. Bryant*, 13 Mass., 224; *Lathrop v. Cook*, 14 Me., 414; *Perry v. Williams*, 39 Wis., 339; *Williams v. Morgan*, 50 Wis., 548; *Billingsley v. Harris*, 79 Wis., 103.) A modification of this doctrine is observable in *Bursley v. Hamilton*, 15 Pick. [Mass.], 40,

which holds that in such case the fact that the defendant in attachment was not the owner is no defense to an action on the receipt, but goes in mitigation of damages. Akin to these cases is another class where it is held that the receiptor may show in defense that he has surrendered the property to a stranger under a paramount title. (*Learned v. Bryant*, 13 Mass., 224; *Fisher v. Bartlett*, 8 Me., 122; *Sawyer v. Mason*, 19 Me., 49; *Wood v. Goodwin*, 49 Me., 266; *Quine v. Mayes*, 2 Rob. [La.], 510; *Bauer v. Antoine*, 22 La. Ann., 145; *Koeniger v. Creed*, 58 Ind., 554.) Several of these cases very sharply draw the distinction between the receiptor's setting up property in himself and his setting up property in a third person, holding either distinctly that he is estopped from setting up property in himself or else that not only property in the third person must be alleged, but an actual surrender to him under a title paramount (*Learned v. Bryant, supra; Sawyer v. Mason, supra; Wood v. Goodwin, supra; Koeniger v. Creed, supra; Gray v. MacLean*, 17 Ill., 404); but this distinction is denied in *Perry v. Williams, supra.*

Still another class of cases is to the effect that a receiptor or obligor is bound by his contract to surrender the property according to its terms; but having done so, and thus discharged his bond, he may then institute an appropriate action setting up title in himself. (*Johns v. Church*, 12 Pick. [Mass.], 557; *Robinson v. Mansfield*, 13 Pick. [Mass.], 139; *Bleven v. Freer*, 10 Cal., 172; *Gaff v. Harding*, 66 Ill., 61.)

In a few of these cases there lurks a hint of a very interesting distinction which the facts of this case do not render it necessary for us to closely examine. These are cases of foreign attachment where it seems that one executing a redelivery bond may show that the facts justifying the issuing of the attachment did not exist, for the reason that the jurisdiction of the court depended upon those facts. The attachment cases were proceedings *in rem;* and if jurisdiction did not exist the officer was without any right to hold the property, and there-

fore the bond was without consideration. (See *Billingsley v. Harris*, 79 Wis., 107; *Murphy v. Montandon*, 2 Ida., 1048, and also certain early Louisiana cases.) In a few cases the bond, by express terms, admitted that the property was that of the defendant in attachment; and the cases were resolved on the ground that this admission was conclusive upon the parties. Analogous to this class of cases is *Smith v. Jewell*, 14 Gray [Mass.], 222, where it was held that a surety on a redelivery bond could set up a mortgage from the principal, who was also the defendant in the attachment suit, in defense of the action, because the bond expressly, by its recitals, reserved to him the right to do so.

In *Easton v. Goodwin*, 22 Minn., 426, it was held that where the defendant himself executed the receipt, he would not be permitted to set up title in a stranger. This case went largely, however, upon the doctrine of estoppel *in pais*.

The following cases hold, some of them in regard to receipts and some in regard to bonds, that the receiptor or obligor is bound by the terms of his undertaking to deliver the property, and that he cannot be heard to set up title adversely to the claims of the plaintiff: *Staples v. Fillmore*, 43 Conn., 510; *Birdsall v. Wheeler*, 58 Conn., 429; *Morrison v. Blodgett*, 8 N. H., 238; *Pierce v. Whiting*, 63 Cal., 538; *Dezell v. Odell*, 3 Hill [N. Y.], 215; *People v. Reeder*, 25 N. Y., 302; *Cornell v. Dakin*, 38 N. Y., 253; *Haxtun v. Sizer*, 23 Kan., 310; *Wolf v. Hahn*, 28 Kan., 588; *Bishop v. Steele*, 34 Kan., 90; *Peterson v. Woollen*, 48 Kan., 770; *Dorr v. Clark*, 7 Mich., 310. We call particular attention to the Kansas cases cited, because they are under statutes like our own. Other cases, not so closely in point, but the reasoning in which fully sustains the judgment of the lower court in this case, are the following: *Spencer v. Williams*, 2 Vt., 209; *Jewett v. Torrey*, 11 Mass., 219; *Bacon v. Daniels*, 116 Mass., 474; *Foltz v. Stevens*, 54 Ill., 180; *Hopping v. Burnam*, 2 G. Greene [Ia.], 39; *Burk v. Webb*, 32 Mich., 173; *Stowell's Administrator v. Drake*, 23 N. J. Law, 310.

Examining the foregoing cases with a view to ascertaining the true principles of law which should govern the question, there is, first, a general disposition observable to work out the liability of the obligors or receiptors through that of the officer holding the writ. This may be well enough when the obligation runs to the officer, and not, as in this case, to the plaintiff himself. But the rule observed tends too much in the direction of satisfying the demands of a general equitable adjustment, rather than the enforcement of contracts as made, to commend it greatly to the consideration of courts which regard it as their province to adjust controversies according to the rights of the parties as fixed by law, rather than to assume a general guardianship and supervisory power over the contracts of suitors. Second, some of the courts, in cases of receipts, as will be observed from an examination of the cases cited, have regarded these instruments as technical receipts and therefore open generally to contradiction by parol evidence. Such cases are clearly not applicable to the one before us. Third, a large number of cases are resolved solely on the doctrine of estoppel; and these, in jurisdictions where the distinction is retained between deeds and simple contracts, have naturally sought for the estoppel, not as an estoppel of record or by deed, but as an estoppel *in pais*. This has led to a distinction some places observed between cases where the receiptor has informed the officer at the time of receiving the property that he claimed an interest in it, and those where he has concealed such an interest and thereby placed the officer or the plaintiff at a disadvantage. Fourth, the cases where a receiptor is allowed to set up title in a third person are not in point. They are resolved under the general rule that a bailee may surrender to the true owner, and if he do so he is not liable to his bailor. Fifth, the cases which turn upon the court's jurisdiction over the property are not here in point. In this case the attachment was not based on the non-residence of the defendant; nor was it claimed that

the writ was illegally issued; so that it cannot be claimed that the bond was without consideration. The delivery of the property to the obligor is a sufficient consideration, if one is required for a statutory bond. All the cases where the attachment was not illegally issued so hold. We think, therefore, that the cases which seem to favor the contention of the defendants herein are either not in point or were decided on grounds which are not tenable as applied to the facts of the present case. We do not regard the question as one of estoppel, except in so far as every man may be said to be estopped from setting up claims contrary to his express, deliberate, and lawful contract obligations. The true line, the consistent line, of authorities is that which holds the defendant to the terms of his contract and requires him to perform it as he has obligated himself to do. If he has made a foolish contract the courts cannot relieve him; provided he is competent to contract, the contract is legal and was not accomplished by fraud, mistake, or duress. In this case the defendants have unconditionally, clearly, lawfully, deliberately, and freely obligated themselves that the property or its appraised value in money should be forthcoming to answer the judgment in the attachment case. The judgment has been rendered in that case and it requires a resort to the property. Whether they might have been heard in the attachment case, after giving the undertaking, to assert their rights, or whether, as indicated by some of the cases we have cited, they might have delivered the property in pursuance of their undertaking, and thus having discharged it, afterwards asserted a claim thereto, we cannot and do not now decide. What we hold is that their bond absolutely required them to deliver the property or its value to answer the judgment, and that they cannot be now heard to assert title in themselves as against the terms of their bond.

JUDGMENT AFFIRMED.

COLUMBIA NATIONAL BANK OF LINCOLN V. H. M. RICE & COMPANY.

FILED MAY 6, 1896. No. 6509.

1. **Partnership Property**: INDIVIDUAL TRANSFERS. One member of a partnership has no implied authority to dispose of property of the partnership in satisfaction of his individual debt, or for his individual benefit.
2. ———: ———: NOTICE. One in such case dealing with a partner, knowing that he is receiving partnership property, and that its proceeds are passing to the individual use of the partner, is charged with notice of such partner's want of authority in the transaction.
3. ———: ———: EVIDENCE OF AUTHORITY: ESTOPPEL. The declarations of the partner conducting the transaction, that he has authority so to do, are insufficient to establish such authority or create an estoppel against the other partners in favor of one relying on such declarations.
4. ———: ———: RATIFICATION. In order to constitute a ratification of an unauthorized act the act relied on as such ratification must be performed with knowledge of the material facts, in the absence of circumstances creating an equitable estoppel.
5. **Evidence**: ADMISSIONS. The testimony on another trial of an officer of a corporation with relation to previous corporate acts cannot be proved as an admission binding upon the corporation.
6. **Rulings on Evidence.** Certain rulings on the admission of evidence presenting no new question of law examined and sustained.

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

Atkinson & Doty, for plaintiff in error.

Deweese & Hall, contra.

IRVINE, C.

The Columbia National Bank brought this suit against H. M. Rice & Co., a copartnership composed of H. M. Rice and the State Journal Company, a corporation, to re-

cover on a promissory note for $150 and upon an overdraft of $67.42. The defendants denied the allegations of the petition and pleaded a counter-claim of $500 as a balance due on account of the sale and delivery by Rice & Co. to the bank of a safe. The reply admitted the counter-claim, but alleged payment. A jury was waived and the case tried to the court, which found for the plaintiff on its petition and for the defendants on their counter-claim, and rendered judgment in favor of the defendants for the excess of the counter-claim over the amount claimed in the petition. There was no dispute on the trial as to the validity of plaintiff's claim; the whole controversy concerns the counter-claim. The evidence discloses that at the time the Columbia National Bank was organized, Rice, acting for Rice & Co., sold the safe in question to the bank for $1,200. Rice individually subscribed for $500 of stock in the bank. The bank paid Rice & Co. $700 in cash or its equivalent, and credited the remaining $500 due upon the safe to Rice in payment of his subscription to stock in the bank. It is by this credit that the bank claims to have discharged the balance due upon the safe.

The plaintiff invokes the rule that a partnership is bound by the acts of one of its partners within the scope of the partnership business; but counsel, in argument, overlook the qualification indicated by the latter part of the rule, which is a feature of all the cases they cite in support of their position. It was not within the scope, or the apparent scope, of the business of the partnership to dispose of its property for the individual benefit of Rice. In *Norton v. Thatcher*, 8 Neb., 186, it was held that a partner binds the firm necessarily only when he uses the name of the firm and acts within the scope of his authority. In *Howell v. Wilcox & Gibbs Sewing Machine Co.*, 12 Neb., 177, it was held that one partner has no power to bind the firm by promissory notes given in renewal of such partner's individual notes. In *Levi v. Latham*, 15 Neb., 509, it was held that a partner in a non-

trading partnership cannot bind his copartner by a promissory note in the firm name unless he has express authority therefor, or the giving of such note was necessary to the carrying on of the business, or was usual in similar partnerships, and in such case the burden is upon the party suing on the note to prove authority; and especially was the firm not bound when the note was executed for the individual benefit of the partner making it. In *Tolerton v. McLain*, 35 Neb., 725, it was held that a partner has no right to pledge notes owned by the partnership for the payment of his individual debt. In *Cady v. South Omaha Nat. Bank*, 46 Neb., 756, the rule was announced *arguendo*, but with abundant citation of authorities, that a partner cannot, without the consent of his copartners, apply the firm property in satisfaction of his individual liabilities; and that the burden is cast upon the person receiving the property to prove either consent of the other partners or facts creating an equitable estoppel. The case is so plain on principle that we do not deem it necessary to cite any foreign cases. Those from our own state already cited are sufficient to establish the principle. The evidence in this case was somewhat conflicting, but certainly sufficient to sustain the finding that Rice either disposed of the safe in settlement of his private subscription to stock in the bank, or else that, having sold the safe to the bank, he undertook to have the debt owing therefor applied in satisfaction of his subscription to the stock; that this was done without the consent or knowledge of the other partners, and that the bank was aware that the subscription to the stock was that of Rice individually and not of the firm. Under these circumstances it was charged with notice of his want of authority. There was evidence tending to show that Rice had represented to the bank that he had authority to so use the firm property; but the authority of a partner to act on behalf of the firm is based upon the general principles regulating the authority of agents; and it is a primary principle that the authority of an

agent cannot be proved by the declarations of the agent himself. So that Rice's declarations on this behalf did not bind the firm. The bank dealt with him at its peril. (*Stoll v. Sheldon*, 13 Neb., 207; *Nostrum v. Halliday*, 39 Neb., 828; *Burke v. Frye*, 44 Neb., 223; *Richardson & Boynton Co. v. School District*, 45 Neb., 777.) Nor does the rule that where one of two innocent parties must suffer, that one who has placed the wrongdoer in position to work the injury must sustain the loss, apply to this case. That rule applies where the act was within the apparent authority of the agent. (*City Nat. Bank of Hastings v. Thomas*, 46 Neb., 861.) Here the act was not within the agent's apparent authority.

It is contended that the evidence shows that the State Journal Company ratified the act of Rice by making a claim to the stock; but the evidence in that respect tends to show that this was merely by serving a notice upon the bank that the State Journal Company claimed an interest in the stock. This notice was served after Rice had absconded, greatly in debt to the partnership, and its object was merely to keep such property of Rice as could be ascertained within reach. It was served before the State Journal Company had any notice that the stock had been issued in part payment for the safe. A ratification, to be effectual, must be made with knowledge of the facts, and therefore the evidence sustains the finding in favor of the defendants in that respect.

Several assignments relate to rulings on the evidence. A witness was asked, referring to Mr. Hathaway, the treasurer and general manager of the State Journal Company: "I will ask you if you heard him testify in regard to this stock, and if so, what he said in regard to it as to whether the State Journal Company had any interest in the stock or not?" An objection to this question was sustained. The question referred to testimony given by Hathaway on the trial of this case in the county court. The ruling of the district court excluding the testimony was right. The State Journal Company was a corpora-

tion, and was not bound by the admissions of its officers, unless they had been authorized to make such admissions, or unless the admission was competent as a part of the *res gestæ*, or unless the fact of the admission was in issue between the parties. (1 Morawetz, Private Corporations, sec. 540*a*.) Hathaway's testimony in the county court was not a part of the *res gestæ*, nor did it fall within the other classes of admissible statements. Nor was it admissible for the purpose of impeaching Hathaway, because no foundation had been laid for such proof on his cross-examination. An objection to a question put to Hathaway was sustained as not being proper cross-examination; but during the further progress of the case the plaintiff was permitted to ask substantially the same question of the same witness, and it was answered. If, therefore, the sustaining of this objection was erroneous, the error was cured. When Rice was on the stand as a witness for the plaintiff, he was asked whether or not at the time he gave the receipt to the bank for the balance due on the account he had any authority to sign the name of Rice & Co. thereto. An objection to this question was sustained. Perhaps it would not have been error to have overruled the objection; but Rice's authority was to be proved by facts, and not by his conclusion as to what his authority was. Therefore the court did not err in sustaining the objection to the question in the form in which it was put. The following question was asked Rice: "Do you know whether or not, on the books of H. M. Rice & Co., in account with the Columbia National Bank, it showed an item of stock of $500? If so, state what you know about it." An objection to this question was properly sustained. It is perhaps true, as plaintiff contends, that, as preliminary to the offer of the books, it might be shown in a general way whether they contained an item with reference to the transaction; but the latter part of the question plainly called for the contents of the books on that subject, and it was, therefore, not the best evidence. An

answer to a question the court refused to strike out as not responsive. This was not error in a case tried without the intervention of a jury.

JUDGMENT AFFIRMED.

WILLIAM MCKENNA V. CHRISTIAN DIETRICH ET AL.

FILED MAY 6, 1896. No. 6533.

Review: BILL OF EXCEPTIONS. The petition in error in this case presenting only questions requiring an examination of the evidence, and there being no bill of exceptions allowed either by the judge or clerk, the judgment is affirmed.

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

Mahoney, Minahan & Smyth, for plaintiff in error.

Herdman & Herdman, contra.

IRVINE, C.

This was an action of replevin by the plaintiff in error against the defendants in error for a horse, a harness, and a buggy. The plaintiff claimed under chattel mortgage. The defendants claimed an agister's lien on the horse and made no claim for the other property. The court directed the jury to return a verdict in favor of the defendants for the horse. The plaintiff prosecutes error. The only questions presented are the sufficiency of the evidence and the propriety of the peremptory instruction given by the court. Each of these questions requires for its solution an examination of the evidence. What purports to be a bill of exceptions in the case has not been settled or allowed either by the judge or the clerk, and it therefore cannot be considered for any purpose.

JUDGMENT AFFIRMED.

AMERICAN BUILDING & LOAN ASSOCIATION V. NAPOLEON A. RAINBOLT.

FILED MAY 19, 1896. No. 6476.

1. **Contracts**: TIME TO RESCIND. The right to rescind a contract on the ground of fraud must be promptly exercised upon the discovery of the ground therefor. The continued use or employment of property will, in such case, be construed as an election to affirm the contract under which it was received.

2. **Building and Loan Associations**: STOCK: FRAUD: WITHDRAWAL OF STOCKHOLDERS. A stockholder who has for three years acted as a director of a corporation, taking an active part in its management, with notice of its business methods and financial condition, cannot thereafter, in an action against such corporation, recover the money originally paid for his stock on the ground that his subscription therefor was procured by means of the fraudulent representation of the defendant's agents.

3. **Principal and Agent**: NOTICE: RECOVERY FOR MONEY PAID FOR STOCK. Nor can he in such case recover as assignee of like claims of other stockholders represented by him as agent, and whose interest as such he was bound to protect, since, by reason of their relations towards him, such stockholders are chargeable with the knowledge possessed by him respecting the affairs of the corporation.

4. **Pleading**. Facts which merely disprove the allegations of the adverse party do not necessarily constitute new matter within the meaning of the Code, and are, as a rule, admissible in evidence under a general denial.

5. **Contracts**: EVIDENCE OF BREACH: BUILDING AND LOAN ASSOCIATIONS. Evidence examined, and *held* not to prove the breach by the defendant, a foreign building and loan association, of an alleged agreement to maintain at the plaintiff's home a local board of directors.

6. ———: BREACH: RESCISSION. Not every breach of a contract by one party thereto will authorize the other to treat it as rescinded. The failure to perform an independent stipulation collateral to the main consideration, not amounting to a condition precedent, and not such as to prevent the performance by the party so in default, of the principal undertaking, although attended by some loss or inconvenience to the other party, does not absolve the latter from liability, or authorize him to treat the contract as abandoned.

7. **Corporations:** MISMANAGEMENT: WITHDRAWAL OF STOCKHOLDERS. The mere mismanagement of the affairs of a corporation by its officers or agents does not warrant the withdrawal therefrom of stockholders or the repudiation of the obligations assumed by them as such.

8. **Constitutional Law:** VIOLATION OF CONTRACTS. The act of 1891 relating to building and loan associations (Compiled Statutes, secs. 148*a*-148*r*, ch. 16) provides that it shall not be lawful for any foreign building and loan association to transact business in this state without first having filed with the auditor of public accounts a copy of the act under which it was organized, together with its charter or articles of incorporation, a statement under oath showing its resources and liabilities, also the number and cash value of its shares, and appoint an attorney in each county in which it may transact or solicit business, on whom service of process can be made, and with authority to acknowledge service in its behalf; and that any person or corporation doing business in this state as agent for any such association, which shall not have complied with the provisions of said act, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, be fined, etc. *Held*, (1) That the primary object of said statute is to bring a designated class of foreign corporations within the jurisdiction of the courts of this state in order to protect persons dealing with them from fraud and imposition; (2) assuming that the purpose of said act was to declare illegal contracts of non-complying building and loan associations, it is, as to agreements existing at the time of its enactment, a clear invasion of constitutional rights, as impairing contract obligations.

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

Barnes & Tyler and *C. M. Cooley*, for plaintiff in error.

John S. Robinson and *Powers & Hays, contra.*

POST, C. J.

This was an action in the district court for Madison county by the defendant in error, Rainbolt, to recover money paid by himself and his assignors, Mary R. Rainbolt, James H. Brown, John F. Newhall, and S. H. Overholser, as subscribers for the capital stock of the plaintiff in error, the American Building & Loan Association of Minneapolis, in the state of Minnesota, hereafter called

the "association." The theory upon which the cause was prosecuted to judgment in the district court is that the contracts of subscription had been rescinded by the several subscribers named, on account of the fraud of the defendant therein, and on account of the violation by the latter of the terms and conditions of the agreement under and by virtue of which the money sued for was paid. The allegations of the petition, which is exceedingly voluminous, are, by counsel for the association, properly grouped under three heads: (1.) Fraudulent representations as inducements to the subscription for said capital stock. (2.) The violation of an agreement by said association to the effect that all money paid by subscribers in the city of Norfolk and certain contiguous territory, after the payment of necessary expenses, should be credited to a fund to be known as the "loan fund," the proceeds of which were to be applied in payment of the stock of such subscribers. (3.) The failure of the defendant below to comply with the provisions of the act relating to building and loan associations, which took effect April 4, 1891. (Laws, 1891, ch. 14.) The stock to which reference is made was, according to the petition, subscribed for in the months of July, October, and November, 1888, and payments thereon made at the rate of sixty cents per month for each share, of the par value of $100, up to and including the month of April, 1891. The charge of fraud sufficiently appears from the following quotation from the petition:

"That at the time of said subscription for stock by said parties the defendant proposed to use said moneys so paid in by said parties in payment for said stock in making loans to holders of stock in the defendant, secured by mortgage upon real estate held by them, upon applications to be made and to be submitted to a local board of the defendant, to be constituted of stockholders in the defendant residing in the city of Norfolk and said county of Madison, and to use all the money so paid for said stock except sufficient to carry on the expenses, for the

creation of a loan fund to be used in making loans, upon real estate, to the stockholders of the defendant, at the rate of interest of six per cent per annum, which loans made to any of the said stockholders in said counties of Madison and Pierce were to be approved by the local board of the defendant, consisting of stockholders residing in the city of Norfolk, Nebraska, and agreed to create such local board at Norfolk, Nebraska, which should have a treasurer, to whom subscribers for stock could pay their assessments thereon, and subsequently and soon after said subscriptions of stock had been made, did create such local board at Norfolk, aforesaid, and a local treasurer or collector, to whom the assessments or payments upon said stock could be made by said subscribers thereto and to whom said payments were made, which agreement was published in a circular by the defendant, which it distributed to said parties, as well as many others, and which said circulars contain the statement as an inducement, and which was an inducement to said parties to subscribe for said stock, that the affairs and management of the defendant were and should be supervised by an advisory board, consisting of a large number of well-known and eminent citizens of the states of Minnesota and Iowa, among which was the name of an ex-governor of the state of Iowa and the lieutenant governor of the state of Minnesota, and others of equal prominence in the country; that said representations so made by the defendant were false and fraudulent and known by it so to be at the time the same were made, and the said parties so subscribed for said stock as aforesaid believing the same to be true, and were induced thereby to make said subscriptions for said stock; that the defendant agreed as part of said contract of subscription that all of said money paid upon said stock, except enough to pay the expenses of the defendant, should be placed in a fund to be called the loan fund, and that the proceeds thereof should be applied in payment of said stock. It was also agreed by the defendant in said contracts of

subscription with said parties that any moneys remaining in the expense fund after paying the salaries of the officers, as fixed by the board of directors, and the other expenses of the association, the surplus so remaining shall be turned into the loan funds as profits.

"The plaintiff further says that said representations in regard to the advisory board were false, fraudulent, and untrue, and known by defendant so to be at the time the same were made and when said subscriptions to said stock were made; that for some time after said subscriptions of stock were made, and until August, 1891, the defendant had a local board in the city of Norfolk, with its treasurer, to whom said payments or assessments upon its stock were made by said parties, and in the month of August, 1891, the defendant abrogated the same and withdrew the power or authority from said local board and its treasurer, and demanded that said parties should make future payments upon their stock at the office of the defendant in the city of Minneapolis and state of Minnesota."

It will be observed from a careful reading of the foregoing excerpt that the only false assertions charged with respect to existing matters are those which relate to the so-called advisory board, and which are expressly controverted by the answer. There is, apparently, much force in the argument that the law raises no presumption of damage on account of the non-existence of such a board, and that the allegations of the petition, so far as they relate to that subject, are wholly immaterial. The question does not, however, call for discussion in this connection, since there is upon the issue presented an entire failure of proof. A copy of the document mentioned in the petition is attached to the bill of exceptions and referred to by witnesses and counsel as the "blue circular," in which, after a statement of the authorized capital and names of officers and directors of the defendant association, appears the following:

"ADVISORY BOARD.

"Hon. John H. Gear, Ex-Governor, Iowa; Hon. A. E. Ricehient, Governor, Minn.; Hon. John De Laittre, Minneapolis, Minn.; Hon. E. W. Trask, Minneapolis, Minn."

Said circular contains a statement in detail of the purpose of the defendant association, a summary of its business methods, and the advantages claimed for it as a means of investment, but containing no reference to an advisory board, except as shown above. Its articles of incorporation provide for a president, secretary, treasurer, and board of six directors, and declare that the government of the association and management of its affairs shall be vested in said officers and directors. In the by-laws of the association, which were introduced in evidence by the plaintiff below, we find this provision: "Advisory boards may be appointed by the board of directors to such an extent and at such times as it may deem best. They shall advise with the board of directors upon important topics whenever called upon to do so, and shall furnish said directors with information relating to the matters of the association in their particular localities as they may from time to time require."

The plaintiff below, according to the testimony given by him in his own behalf, visited Minneapolis about July 30, 1888, for the purpose of attending the stockholders' annual meeting, at which time he was chosen as a director of the association, and in which capacity he continued to serve until the month of July, 1891, at the same time acting as agent for the other stockholders in Norfolk and vicinity in their relations to the association. He testified further that he learned from the president, Mr. Rundell, the day succeeding the day of his election as a director, that there was in fact no advisory board, although it was customary to print in the advertising literature, as members of such board, the names of influential persons, in order to assist agents in securing business for the association. The record, however, fails to dis-

close any substantial change in the management of the affairs of the association during the defendant in error's term of office as a director. There was, according to his express admission, during said period, no action taken by the directors for the appointment of an advisory board; and it is certain that no steps were taken by him, either in his own behalf or for those whom he represented, toward a rescission of the contracts under which the stock in question was issued until after the annual meeting in July, 1891, with which, for reasons not disclosed, his official relation to the association terminated. It will thus be seen that there is not a mere failure of proof upon the issue, of rescission within a reasonable time, but that the plaintiff by his conduct deliberately waived whatever right, if any existed in his favor and in favor of the stockholders represented by him, to rescind their contracts of subscription on account of representations respecting the existence of an advisory board. There is no rule more firmly established, or resting upon more just and equitable principles, than that the right of rescission on account of fraud must be promptly exercised on discovery of the ground therefor, and that the continued use or employment of property will, in such case, be construed as an election to affirm the contract under which it is received. The party defrauded has his election of remedies, viz., compensation in damage, or to be restored to the position in which he stood before the consummation of the contract. Such remedies are, however, not concurrent, but inconsistent, and one who has, with a knowledge of the facts, made his election, must abide it. (1 Addison, Contracts, sec. 312; Pollock, Contracts, p. 537; Bishop, Contracts, sec. 204 *et seq.*; *Brown v. Waters*, 7 Neb., 424; *Building & Loan Association v. Cameron*, 48 Neb., 124; *Schiffer v. Dietz*, 83 N. Y., 300; *Strong v. Strong*, 102 N. Y., 69; *Grymes v. Sanders*, 93 U. S., 55.) It has been said: "A subscriber to stock in a corporation may waive any defense he may have to the subscription. The waiver may be expressed, or it may arise

by implication from the acts and declarations of the subscriber. Thus, the payment of a call with the full knowledge of the defense is held to be a waiver; and any act indicating a clear intent to abide by, or accept, or pass over an objection which the subscriber might make will be held to be a waiver. (1 Cook, Stock & Stockholders [2d ed.], sec. 198.) Certainly a more fitting application of the rule there stated cannot be conceived than to the facts of this case, since the plaintiff, while holding an office of trust to which he was eligible solely by reason of his relation to the association as a stockholder, received from the treasury thereof for his services as director and attorney $3,500 or more; and the other stockholders, through whom he claims, were, on account of his relation toward them, also charged with the knowledge possessed by him respecting the business methods of the association, so that each, in legal effect, paid assessments on his stock for more than three years after notice of the fraud now alleged for the purpose of avoiding such contracts.

It is argued that the facts constituting a waiver should have been specially pleaded, and are not available under the issues presented. It is true the answer, so far as it relates to that branch of the case, consists of a general denial, but the claim of counsel in that behalf is, nevertheless, without merit. It was necessary for the plaintiff to allege and prove a rescission within season, and the denial of that allegation presents a material issue which is fully met by the evidence above alluded to. A defense which merely disproves the allegations of the adverse party is not new matter within the meaning of the Code, and is therefore admissible in evidence under a general denial. (Kinkead, Code Pleading, p. 82; Bliss, Code Pleading, sec. 327.)

The next proposition discussed involves the alleged agreement of the association to maintain a local board in the city of Norfolk. The only evidence adduced in support of that contention is the following statement

found in the so-called "blue circular": "A local board of directors may be elected in towns where sufficient business is done to warrant it. Such board may elect a local treasurer or collector, who may receive monthly payments on giving a bond. Such local treasurer will be deemed the agent of the members and not of the association. The officers of the local board should consist of a president, secretary, and treasurer, and a board of not less than three, and not more than nine, directors. No loans will be made in any town unless a local board is organized. All applications for loans will be submitted to the local board for approval. The plan of establishing local boards in a large number of towns enables the association to do a more satisfactory business than if the membership were confined to one locality. Some towns want no loans; others want a good many. The money therefore goes where it is wanted." Waiving, for the present, the materiality of this evidence, and assuming with counsel for defendant in error that the printed statement relating to the local board was a controlling inducement to each contract of subscription, thus entering into and becoming an essential part thereof, is the association answerable in this action by reason of the alleged breach of such condition? We think not, for two reasons: First, because there is a failure of proof upon that issue; and second, the alleged refusal of the association to maintain a local board in the city of Norfolk from and after the month of August, 1891, of itself presents no sufficient ground for rescinding the contracts of subscription. An examination of the question suggested by this contention necessitates a reference to the evidence preserved in the bill of exceptions. It appears that a local board was established at Norfolk in the month of July, 1888, and there is no claim that it has been abolished by any act of the association, except as hereafter shown. The plaintiff below during all of said period acted in the capacity of collector for the association, under written authority, of which the following is a copy:

"NORFOLK, NEB., July 3, 1888.

"The American Building & Loan Association hereby appoints N. A. Rainbolt local depository or collector for the town of Norfolk, in the state of Nebraska. A commission of one per cent will be allowed for collection. The said N. A. Rainbolt agrees to make collections for said association at the rate of commission above mentioned, and to send a statement to said association with remittances on the first day of each month, or at such other time as said association may request.

"N. A. RAINBOLT,
"*Agent.*

"The above appointment is approved by the American Building & Loan Association. F. P. RUNDELL,
"*President.*"

It is contended by Mr. Rainbolt that he was also acting in the capacity of treasurer of the local board, but that claim has, we think, no sufficient foundation in the record. Referring to the subject, he testified as follows:

Q. Now, Mr. Rainbolt, you refer to the fact that there was some talk of your being appointed collector for the company at Norfolk?

A. Yes, sir.

Q. Were you so appointed?

A. Yes, sir.

Q. You may state when your appointment was made.

A. Well, this is my appointment, dated July 3 [referring to Exhibit "L," the instrument above set out]. This appointment I received in consequence of the agreement made with Mr. Chilstrom [plaintiff in error's agent].

Q. Do I understand you had another appointment, or was otherwise appointed then?

A. No.

Q. Exhibit "L" is a notification of your appointment as such collector, is it?

A. Yes, sir; it was the contract of appointment.

On August 10, 1891, Mr. Bishop, secretary of the asso-

ciation, addressed to the bank of which the defendant in error was president the following communication:

"MINNEAPOLIS, August 10, '91.

"*Norfolk National Bank, Norfolk, Neb.:* You will please take notice that at a special meeting of the directors of the American Building & Loan Association, held at the home office at Minneapolis, on August 7, 1891, the following resolutions were unanimously passed:

" 'First. *Resolved,* That from and after this date the appointment of collectors in the state of Nebraska be, and the same are hereby, revoked and canceled; that no further appointment of collectors be made in that state, and that the secretary of the association be instructed to notify all persons in said state who may be interested.

" 'Second. *Resolved,* That from and after this date all members of this association in the state of Nebraska shall be required to remit all payments direct to the home office, in accordance with the terms and conditions named in the second clause of their certificates of stock. Any payments made in any other manner than as above indicated will not be credited on our books.'

"Yours truly, T. E. BISHOP,
"*Secretary.*"

No direct acknowledgment of the foregoing appears to have been made, but on August 24, 1891, the following letter was, by the defendant in error, addressed to the association:

"NORFOLK, NEB., August 24, 1891.

"DEAR SIRS: At the request of the stockholders of your association in Norfolk, Pierce, and Tilden, I write you as follows:

"That each of said stockholders have received notice that your board of directors within the past month passed a resolution depriving them of rights and privileges which entered into and formed part of the contract whereby they subscribed to stock in your association, and whereby payments thereon have continued to the present time.

"That you have thereby and in other matters violated the contract of their subscription to said stock, and it is now impossible for you to comply with, or perform in all its details, your part of said contract, the same must be considered as rescinded. They therefore, and each of them, hereby demand a return to them of all the money which they have paid to you on said stock, with proper interest thereon.

"That if said money is not returned to them within a reasonable time after you have received this notice, such steps will be taken to recover the same as may appear advisable.

"Respectfully yours, N. A. RAINBOLT."

To that communication Mr. Bishop, in behalf of the association, responded as follows:

"MINNEAPOLIS, MINN., 8-26-91.

"*N. A. Rainbolt, Esq., Norfolk, Neb.*—DEAR SIR: Your favor of the 24th inst., relating to the matter of a certain resolution recently passed by the board of directors, and containing a demand for the return of the money paid by the shareholders in Pierce, Tilden, and Norfolk, is at hand.

"For reply I have to say that it was not the intention of board of directors in passing this resolution to forbid the shareholders to appoint their own agent for receiving of and transmitting their payments, but only to revoke the authority of any collector who had been appointed by the association, or who may have been considered by the shareholders as the agent of the association. It was far from the intention of the board to deprive any shareholder of the privilege of appointing their own collectors. In fact, we would be very glad, indeed, to have them do so.

"We would most assuredly contest the attempt of any shareholder to nullify his contract with the association by reason of the refusal to maintain its own agents for the collection of dues. There is no provision contained

in any of our literature or certificates of stock binding the association to maintain its own agents for such purpose. You have been a director of the association for three years, and, being an attorney by profession, ought to be able to recognize the utter futility of the claim you make.

"Yours truly,

"AMERICAN BUILDING & LOAN ASS'N,

"By JAS. H. BISHOP, *Pres't.*"

The utmost that can be said for this proof is that it shows a revocation of the defendant in error's authority as an agent of the association, leaving him free to represent the local board in any capacity not inconsistent with the rules and by-laws prescribed for its government. There is no imputation of fraud or misrepresentation respecting the local board as an inducement to the contracts of subscription, and the fact that such a board was organized and maintained without objection for more than three years is the most satisfactory evidence of good faith on the part of the association.

That a contract may be rescinded for causes arising subsequent to its execution, such as the non-performance of a condition precedent, is not denied, although every breach of contract by one party will not authorize the other to treat it as abandoned. There is not, as said by Judge Marcy in *Dubois v. Delaware & Hudson Canal Co.*, 4 Wend. [N. Y.], 285, "Any precise rule which, when applied to the breach of a contract, certainly settles the question whether it is thereby abandoned or not, but if the act of one party be such as necessarily to prevent the other from performing on his part, * * * the contract may, I think, be treated as rescinded." And it was held by Lord Coleridge in *Freeth v. Burr*, L. R., 9 C. P. [Eng.], 213, that the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract. (See, also, 2 Parsons, Contracts, 278; *School District v. Hayne*, 46 Wis., 511; *Blackburn v. Reilly*, 47 N. J. Law, 290.) In *Hoffman v. King*, 70

Wis., 372, the court, in a carefully prepared opinion, by Cassoday, J., approve, without qualification, of the rule as stated by Chief Justice Shaw in *Proprietors of Mill Dam Foundery v. Hovey*, 21 Pick. [Mass.], 417, who there said: "It seems to be well settled that where there is a stipulation amounting to a condition precedent, the failure of one party to perform such condition will excuse the other party from all further performance of stipulations depending upon such prior performance. But a failure to perform an independent stipulation not amounting to a condition precedent, though it subject the party failing to damages, does not excuse the party on the other side from the performance of all stipulations on his part. * * * In order to construe a stipulation on one side to be a condition precedent to an obligation to perform on the other side, it must in general appear either: (1.) That the undertaking on one side is in terms a condition to the stipulation on the other. * * (2.) It must result from the nature of the acts to be done, and the order in which they must necessarily precede and follow each other in the progress of performance, * * * as where one stipulates to manufacture an article from materials to be furnished by the other, and the other stipulates to furnish the materials, the act of furnishing the materials necessarily precedes the act of manufacturing, and will constitute a condition precedent without express words. But when the act of the one is not necessary to the act of the other, though it would be convenient, useful, or beneficial, yet, as the want of it does not prevent performance, and the loss and inconvenience can be compensated in damages, the performance of the one is not a condition to the obligation to perform by the other. (3.) The non-performance on one side must go to the entire substance of the contract, and to the whole consideration, so that it may be safely inferred as the intent and just construction of the contract that if the act to be performed on the one side is not done, there is no consideration for the stipulations on the other

side, * * * yet, if it does not go to the whole consideration and the loss can be compensated in damages, the stipulation must be construed to be independent, for breach of which the party sustaining such loss has his remedy by action, but it is not a condition precedent, upon the non-performance of which the other party is absolved from the performance of the stipulations on his part." The doctrine there stated is not only reasonable and just, but is, it is believed, sanctioned by the decided weight of authority in this country and England. Granting, therefore, for the purpose of the argument, that the statement contained in the plaintiff's circular should be construed as a special covenant to maintain a local board, it is, at most, an independent provision collateral to the real consideration for the contract of subscription, and the breach thereof in no measure affects the ability of the association to discharge the obligation assumed by it towards its members or stockholders. It is not charged or claimed that the association refused to make loans to its members in accordance with its rules and by-laws, or that it neglected or refused to submit applications for loans to the local board. Consequently the only damage resulting from the abolition of such board is the inconvenience of being required to remit to the association at Minneapolis instead of making payments through the agency of a local treasurer, and for which the remedy by action is in all respects adequate.

Another fatal objection to the right of rescission in this case is that the abolition of the local board, like the alleged failure to transfer surplus money to the loan fund, amounts to no more than a mismanagement of the affairs of the association. It is the duty of the members to select competent officers to conduct the corporate affairs, and failing to do so, they will not be heard to complain if those chosen for that purpose prove incompetent or inattentive to the trust reposed in them. (Beach, Private Corporations, sec. 110; 1 Cook, Stock & Stockholders [2d ed.], sec. 188.)

The remaining questions relate to the failure of the association to comply with the provisions of the act of 1891. The allegations of the petition are, in substance, that the association has not filed with the auditor of public accounts a certified copy of the statute under which it was organized, or its articles of incorporation and by-laws; that it has not appointed an attorney in any of the counties of the state on whom service of process can be made; and that it has not obtained from the auditor, attorney general, and state treasurer a certificate authorizing it to transact business within the state. It is by section 17 of the act in question provided: "It shall not be lawful for any foreign building and loan association, directly or indirectly, to transact any business in this state without first procuring a certificate of approval and authorization from the auditor of public accounts, state treasurer, and attorney general, or any two of them. Before obtaining such certificate, such foreign building and loan association shall furnish the auditor with a statement, sworn to by its president or secretary of the association, which statement shall show," etc. (Session Laws, 1891, p. 212, ch. 14, sec. 17.) Among other facts required to be shown by such statement are the resources and liabilities of the association, its articles of incorporation and by-laws, the number and estimated cash value of its stock per share. It is also required to appoint an attorney in each county in which it may transact business, with authority to accept service or waive process in its behalf. By section 19 it is provided: "Any person, agent, or company doing business, or attempting to do business, in this state for any foreign building and loan association, which shall not at the time be the holder of a valid certificate of approval and authorization as provided for in section 17 of this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding one thousand dollars, or imprisoned in the county jail not more than thirty days, or both, at the discretion

of the court." (Session Laws, 1891, p. 214, ch. 14, sec. 19.) We are unable, notwithstanding the exhaustive and scholarly argument of counsel for defendant in error, to perceive any possible application of the foregoing provisions to the case at bar. Had the act of 1891 in express terms declared nugatory and void all contracts of building and loan associations failing to conform to the conditions thereby imposed, it would, as to existing agreements, have been a clear invasion of constitutional rights as impairing contract obligations. So numerous are the decisions in point since the foundation of the law upon the subject was laid by Chief Justice Marshall in *Fletcher v. Peck*, 6 Cranch [U. S.], 87, that a review of the cases in this connection would be useless, if not, indeed, presumptuous. It is sufficient that the obligation of a contract is impaired within the prohibition of the constitution whenever the remedy is taken away or abolished, or the legal obligation diminished, suspended, or destroyed by repealing or abolishing the remedy therefor, or when the proceedings for enforcement are burdened with new or unreasonable conditions or restrictions. (*Bronson v. Kinzie*, 1 How. [U. S.], 311; *Von Hoffman v. City of Quincy*, 71 U. S., 535; *Gunn v. Barry*, 82 U. S., 610; *Louisiana v. New Orleans*, 102 U. S., 203.) But such, in the opinion of the writer, is neither the express nor implied purpose of the act. The primary object of the statute cited is not to render void the transactions of associations failing to comply with its demands, but to bring a designated class of foreign corporations within the jurisdiction of the courts of this state, in order to protect parties with whom they may transact business from fraud and imposition. In 2 Morawetz, Private Corporations [2d ed.], sec. 665, we find the rule thus stated: "The object of the various statutes providing that foreign corporations, before transacting business, shall comply with specified conditions, such as filing copies of their charters, making statements of their financial condition, appointing agents upon whom process shall be served,

etc., is to protect parties dealing with them from imposition and to secure convenient means of obtaining jurisdiction in the local courts. These statutes place foreign corporations in the same position as domestic corporations in the particulars provided for. It is clearly not the primary purpose of the legislature in passing these statutes to render the contracts and dealings of corporations which have not complied with the statutes void and unenforceable. Hence, when the legislature has not expressly declared that this result shall follow from a failure to comply with the statute, the courts ought not to imply such a result unless this be necessary in order to attain the primary object for which the statute was passed." We observe numerous reported cases in which that doctrine is expressly approved. For instance, *Dearborn Foundry Co. v. Augustine*, 5 Wash., 67, involved a statute which authorized corporations to transact business upon terms substantially like those above enumerated, and providing that agents transacting business for corporations which had not complied with the conditions imposed by statute should be guilty of a misdemeanor. It was held that such contracts are not void in the absence of a statute so declaring. In *La France Fire Engine Co. v. Davis*, 9 Wash., 600, that case was cited and followed. By statute of the territory of Dakota it was provided that "No foreign corporation * * shall transact any business within this state [territory], or acquire, hold, or dispose of property * * * until such corporation shall have filed in the office of the secretary of state [territory] a duly authenticated copy of its charter or articles of incorporation, and shall have complied with the provisions of this chapter." (Revised Code, N. Dak., ch. 22, sec. 3261.) The next section, among other things, required the appointment of an agent, to reside at some accessible point in the territory, on whom service could be made, and for the filing of written notice of such appointment with the register of deeds of the proper county. That act has recently been examined and construed by

the courts of both North Dakota and South Dakota with the thoroughness and ability which characterizes the decisions of those tribunals, and resulting in the conclusion that the statute was not intended as a prohibition upon the powers of foreign corporations to make valid contracts, but to bring them and their property within the jurisdiction of the courts of the territory. (See *Wright v. Lee*, 2 S. Dak., 596, same case on rehearing, 4 S. Dak., 237; *Washburn Mill Co. v. Bartlett*, 3 N. Dak., 138; also *Edison General Electric Co. v. Canadian Pacific Navigation Co.*, 8 Wash., 370; *Fisk v. Patton*, 7 Utah, 399; *Kindel v. Beck & Pauli Lithographing Co.*, 35 Pac. Rep. [Colo.], 538; *State Mutual Fire Ins. Association v. Brinkley Stave & Heading Co.*, 31 S. W. Rep. [Ark.], 157; *Connecticut River Mutual Fire Ins. Co. v. Whipple*, 61 N. H., 61; *Connecticut River Mutual Fire Ins. Co. v. Way*, 62 N. H., 622; *Union Mutual Life Ins. Co. v. McMillen*, 24 O. St., 67; *Hartford Live Stock Ins. Co. v. Matthews*, 102 Mass., 221; *Powder River Cattle Co. v. Commissioners, Custer County*, 9 Mon., 145; *Toledo Tie & Lumber Co. v. Thomas*, 33 W. Va., 566; *Chattanooga, R. & C. R. Co. v. Evans*, 14 C. C. A., 116; *Fritts v. Palmer*, 132 U. S., 232; *Seymour v. Slide & Spur Gold Mines*, 153 U. S., 523.)

We have not overlooked the case of *Barbor v. Boehm*, 21 Neb., 450, holding that notes given for insurance to a company which had failed to comply with the provisions of the statute with respect to the filing of a statement and procuring a certificate authorizing it to transact business, were by reason of that fact invalid as to the original parties. It is sufficient, without quoting at length from the statute therein involved, that its provisions, so far as they relate to the subject under discussion, are not essentially different from those of the act of 1891 above referred to. Hence that case, if accepted as an authoritative statement of the law, must be regarded as decisive of the question now at issue. But the doctrine there asserted cannot be reconciled with the later decisions of this court, nor, indeed, with the earlier case

of *Missouri Valley Land Co. v. Bushnell*, 11 Neb., 192, holding that the grantee of land by a deed from a corporation, by its charter prohibited from acquiring or conveying real estate, would not, in an action for the price of land so conveyed, be heard to allege the want of capacity on the part of his grantor, and that such conveyance is not void absolutely, but valid and enforceable unless assailed in a direct proceeding by the state. In *Carlow v. Aultman*, 28 Neb., 672, following the case last cited, it was held that foreign corporations might acquire, hold, and convey land in this state, notwithstanding section 1, chapter 65, Laws, 1887, then in force, by which they were prohibited from acquiring or disposing of real estate except for certain designated purposes. *Myers v. McGavock*, 39 Neb., 843, presented the question of the power of a corporation organized under the laws of congress to acquire and hold real estate in violation of the restrictions imposed by section 8, article 11, Constitution of 1875, viz.: "No railroad corporation organized under the laws of any other state, or of the United States, and doing business in this state, shall be entitled to exercise the right of eminent domain or have power to acquire the right of way, or real estate for depot or other uses, until it shall have become a body corporate pursuant to and in accordance with the laws of this state." It was held on the authority of *Missouri Valley Land Co. v. Bushnell* and *Carlow v. Aultman* that the title of the railroad company to real estate acquired in violation of the foregoing constitutional prohibition could not be questioned except in a proceeding for that purpose by the state; and in *Hanlon v. Union P. R. Co.*, 40 Neb., 52, the question was again examined and the doctrine of the previous cases expressly approved.

No more radical application of the rule here asserted has been made than in the foregoing decisions by this court, since the act involved in each is a violation of the corporation's charter by the usurpation of powers plainly prohibited, and not, as in the case at bar, the disregard of a mere condition obviously imposed in the interest of

persons dealing with the class of associations to which it applies. That *Missouri Valley Land Co. v. Bushnell* should have been overlooked in *Barbor v. Boehm* is to be deplored, since to that fact must be attributed the conflicting and irreconcilable utterances upon the subject by this court. That the last mentioned case is opposed to the weight of authority is manifest from the foregoing citations, and that it is unsound in principle is equally apparent. The defendant therein had received from the insurance company named a policy which was valid and enforceable (1 Beach, Insurance, sec. 64, and cases cited; 1 Biddle, Insurance, sec. 96), and, therefore, a sufficient consideration for the notes which were the subject of the controversy. But the force of that case is weakened by another fact, which is that the cases therein cited, to-wit, *Ætna Ins. Co. v. Harvey*, 11 Wis., 412, and *Cincinnati Mutual Health Assurance Co. v. Rosenthal*, 55 Ill., 85, appear to have been materially modified by more recent decisions in the states named. (*Vide Charter Oak Life Ins. Co. v. Sawyer*, 44 Wis., 387; *Stevens v. Pratt*, 101 Ill., 217; *Alexander v. Tolleston Club of Chicago*, 110 Ill., 65; *Barnes v. Suddard*, 117 Ill., 237; *Pennsylvania Co. for Insurance on Lives v. Burle*, 143 Ill., 459.) However reluctant courts may be to overrule cases which for years have had the apparent sanction of the bench and bar, there can be no excuse for hesitation when, as in this instance, a prior decision is both indefensible on principle and opposed to later utterances of the same tribunal. It should, in conclusion, be remarked that the writer is alone responsible for the criticism here indulged respecting the case of *Barbor v. Boehm*, the majority of the court preferring to base the judgment of reversal upon the proposition that the act of 1891, whatever may have been the purpose of the legislature, cannot be construed as affecting contracts existing at the time it took effect.

REVERSED AND REMANDED.

HARRISON and NORVAL, JJ.

We concur in the judgment just rendered, but do not concur in all the arguments of the chief justice in the foregoing opinion, especially those in conflict with the decision in *Barbor v. Boehm*, 21 Neb., 450.

AMERICAN BUILDING & LOAN ASSOCIATION V. ALEXANDER BEAR.

FILED MAY 19, 1896. No. 6481.

1. **False representations** as the basis of an action, whether for damages or for rescission of a contract, are such only as in some manner actually mislead the complaining party to his damage.
2. **Actionable fraud** must relate to matters material to the transaction involved. Mere collateral inducement, although fraudulently made, of itself affords no ground for the rescission of a contract, or for the recovery of damage against the offending party.
3. **Corporations: WITHDRAWAL OF STOCKHOLDER: RECOVERY OF PAYMENTS.** *American Building & Loan Ass'n v. Rainbolt*, 48 Neb., 434, followed.

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

Barnes & Tyler and *C. M. Cooley*, for plaintiff in error.

George E. Pritchett, *John S. Robinson*, and *Powers & Hays*, *contra.*

POST, C. J.

This was an action in the district court for Madison county by the defendant in error, Alexander Bear, to recover money paid by himself and by his wife, Amelia Bear, to whose rights he has succeeded by assignment, for twenty-five shares of the capital stock of the plaintiff in error, the American Building & Loan Association, a

Minnesota corporation. The theory upon which the action is prosecuted, and upon which a recovery was allowed by the district court, is that the contracts of subscription had been rescinded on account of the fraudulent representations by the association named, and on account of the breach by it of certain express covenants as inducements thereto. The issues raised by the pleadings are substantially those presented in *American Building & Loan Association v. Rainbolt*, 48 Neb., 434, and supported by practically the same evidence on the part of the plaintiff below. It is not disputed that the plaintiff, Dr. Bear, in the month of July, 1888, subscribed for and caused to be issued in his own name fifteen shares of the stock of the said association, and at the same time subscribed for ten shares in the name of his wife. It is further shown, and not disputed, that assessments upon said stock were regularly paid by him until the month of August, 1891, during which period he acted as the agent of his wife in all matters pertaining to the shares issued in her name. As in *American Building & Loan Association v. Rainbolt*, the only representation alleged with respect to existing matters is that contained in the printed circular regarding the existence of an advisory board. But that statement, it is argued, affords no ground for the rescission of the contracts of subscription, in view of the fact that there is neither allegation nor proof that the rights of stockholders have been even remotely prejudiced by the non-existence of such board. Nor are we warranted in presuming that the affairs of the association would have been more wisely or successfully conducted with the assistance of such a body, whose functions are undefined by charter or by-law, and which would in a legal sense be answerable to nobody for its actions. There is, indeed, no charge of misrepresentation as respects the actual condition of the association, or the management of its business prior to the alleged abrogation of the local board in the month of August, 1891.

False representations as the basis of an action, whether for damages or for the rescission of a contract, are such only as in some manner actually mislead the complaining party to his damage. "A statement made with intent to defraud a subscriber, but without that effect, is immaterial; mere intent without damage is insufficient." (1 Cook, Stock & Stockholders [3d ed.], 149. See, also, *Keller v. Johnson*, 11 Ind., 337; *Robertson v. Parks*, 76 Md., 118; *Wainwright v. Weske*, 23 Pac. Rep. [Cal.], 12.) True, it is alleged that the association, in order to induce the plaintiff below and others to subscribe for its stock, represented that its affairs "were and should be supervised by an advisory board consisting of a large number of well-known and eminent citizens of the states of Minnesota and Iowa; that such representations were false and fraudulent and known by it [the association] so to be at the time they were made, and the said parties so subscribed for said stock as aforesaid believing the same to be true, and were induced thereby to make said subscriptions." But, as above intimated, a reference to the circular mentioned in the petition fails to disclose any representation whatever respecting the powers or duties of the advisory board, or to indicate that it was to be in any manner charged with the responsibility of supervising the affairs of the association. It is elementary law that actionable fraud must in some manner pertain to matters material to the transaction involved. The representations relied upon at most relate to matters of collateral inducement only, and which of themselves afford no ground for the rescission of the contracts of subscription. (*First Nat. Bank of Barnesville, O., v. Yocum*, 11 Neb., 328; *Noel v. Horton*, 50 Ia., 687; *Hall v. Johnson*, 41 Mich., 286; Pomeroy, Equity Jurisprudence, sec. 598.) There is on principle a wide difference between the representations proved and false statements respecting the personnel of managing directors, and possibly of a local board such as contemplated in this instance, since the powers of governing

boards of corporations are clearly defined by law, and the character of the persons comprising such bodies is presumably one of the inducements for the relation assumed toward them by stockholders, with its attendant responsibilities.

The other questions discussed by counsel were considered in *American Building & Loan Association v. Rainbolt*, 48 Neb., 434, and will not be here examined.

The judgment will be reversed and the cause remanded.

REVERSED.

HOMER A. MILLER V. FRANK STRIVENS.

FILED MAY 19, 1896. No. 6578.

1. **Negligence: QUESTION FOR JURY.** Where from a given state of facts reasonable men may draw different conclusions respecting the subject of negligence, the question is one of fact for the jury.
2. **———: EVIDENCE.** It is for the judge to determine what acts of omission or commission are evidence of negligence, but it is the province of the jury to say what conclusion such evidence warrants.
3. **Runaway Team: COLLISION: ACTION FOR DAMAGES: VERDICT FOR DEFENDANT.** Evidence examined, and *held* to sustain the verdict and judgment complained of.

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

Wilbur F. Bryant, for plaintiff in error.

J. C. Engelman, contra.

POST, C. J.

This was an action by Miller, the plaintiff in error, in the district court for Cedar county, to recover for the negligence of the defendants therein, Frank Strivens and

Knight Strivens, in suffering to escape from their custody and control a vicious and unmanageable team of horses. That the horses mentioned escaped from custody at the time alleged and in their flight collided with the plaintiff's carriage, to his damage, is a proposition not controverted either by the pleadings or proofs; but the jury, guided by proper instructions, found upon the issue of negligence in favor of the defendant, Frank Strivens,—the cause having been dismissed during the trial as to the other defendant,—and to secure a review of the judgment based upon the verdict thus rendered this proceeding is prosecuted.

From the evidence adduced by the defendant in error it appears that he purchased said team a week or ten days previous to the occurrence which is the basis of this action; that he had on the day in question driven from his home to the village of Coleridge, about five miles distant, for the purpose, among others, of exchanging some wheat for flour at the village mill. On arriving at the mill he left his team and spring wagon in charge of his brother, a lad eighteen years of age, while transacting his business thereat, and was engaged in carrying flour to his wagon when the team took fright, with the result stated. It is further shown, and not disputed, that Charles Strivens, the boy above mentioned, was, when said horses became unmanageable, holding them by the bits, and that the defendant on observing their fright hastily caught hold of the lines, but was unable to prevent their escape. The latter, according to his own testimony, was unaware of any vicious propensities of the said horses, or either of them; and Mr. Snow, from whom they were purchased by him, testified that he, the witness, had never known them to run away, although they had been driven by his wife and boy. It is, however, alleged, as bearing upon the question of negligence, that the defendant's brother, Charles Strivens, is a cripple and not a safe or proper person to leave in charge of an unhitched team of horses. On the other hand, the said

Charles, according to the testimony of the defendant's witnesses, although crippled in one arm, is accustomed to the use and management of horses for all purposes incident to farm work. The question of negligence was, in view of the evidence upon which the cause was submitted, purely one of fact, and with the verdict and judgment based thereon we can perceive no ground for interference. The facts, even upon the plaintiff's own theory, are such as to warrant different conclusions respecting the question at issue, and would have been quite sufficient to sustain a finding that the defendant was not guilty of actionable negligence in leaving the team in charge of his brother during the time required for the transaction of his business at the mill. (*City of Lincoln v. Gillilan*, 18 Neb., 114; *Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb., 643.)

Exception was taken to the refusal of the following request to instruct: "You are instructed that if a horse is left unhitched, this of itself is negligence which will render the owner or party in charge thereof liable for all injuries resulting therefrom." The court certainly did not err in refusing the foregoing request. The facts proved were, according to instructions given, to be considered as evidence of negligence, but the conclusion to be drawn from such evidence was, according to the recognized practice in this state, a question for the jury. (*American Water-Works Co. v. Dougherty*, 37 Neb., 373; *Missouri P. R. Co. v. Baier*, 37 Neb., 235; *Omaha Street R. Co. v. Craig*, 39 Neb., 601; *Chicago, B. & Q. R. Co. v. Oleson*, 40 Neb., 889.)

Complaint is also made of the refusal of instruction No. 6, relating to the measure of damage, but, in view of the verdict for the defendant, the ruling assigned is at most error without prejudice.

JUDGMENT AFFIRMED.